4-1-1997

No One is above the Law When It Comes to the ADA and the Rehabilitation Act—Not Even Federal, State, or Local Law Enforcement Agencies

Keith Alan Byers

Recommended Citation
Keith A. Byers, No One is above the Law When It Comes to the ADA and the Rehabilitation Act—Not Even Federal, State, or Local Law Enforcement Agencies, 30 Loy. L.A. L. Rev. 977 (1997).
Available at: http://digitalcommons.lmu.edu/llr/vol30/iss3/12
NO ONE IS ABOVE THE LAW WHEN IT COMES TO THE ADA AND THE REHABILITATION ACT—NOT EVEN FEDERAL, STATE, OR LOCAL LAW ENFORCEMENT AGENCIES

Keith Alan Byers*

I. Introduction
II. General Application of the ADA and the Rehabilitation Act to Law Enforcement Agencies
   A. Statutory Protections
   B. Covered Entities
III. Disabilities Under the ADA and the Rehabilitation Act
   A. Statutorily Defining What Is a Covered Disability
   B. Judicially Interpreting What Is a Covered Disability
   C. Judicially Interpreting What Is Not a Covered Disability
IV. Understanding “Otherwise Qualified,” “Essential Functions,” and “Reasonable Accommodation” in Relation to Law Enforcement Employment
   A. The “Otherwise Qualified” Requirement
   B. The “Essential Functions” of Police Officers, Sheriffs’ Deputies, and Federal Agents
   C. Who Is Not “Otherwise Qualified”
   D. “Reasonable Accommodation” and When It Is No Longer Reasonable
V. The Hiring Process
   A. Preemployment Disability Inquiries
      1. General Prohibitions

* Keith Alan Byers, B.A., with high distinction, 1990, University of Kentucky; J.D., 1993, University of Kentucky College of Law; LL.M. (Health Law), 1996, University of Houston Law Center; Lieutenant, Judge Advocate General’s Corps, United States Naval Reserve, active duty 1993-1995.
2. The Justification for Prohibiting Pre-Offer Disability Inquiries ................................................... 1030
3. Illegal Pre-Offer Inquiries ............................................. 1032
5. Legal Pre-Offer Inquiries ........................................ 1035

B. Medical Examinations ............................................. 1038
   1. Pre-Offer and Post-Offer Medical Examinations 1038
   2. Psychological Tests .............................................. 1040
   3. Physical Agility and Physical Fitness Tests .......... 1045
   4. Drug Tests ............................................................. 1046
   5. Polygraph Examinations ....................................... 1047

VI. Conclusion ........................................................................ 1050
I. INTRODUCTION

The passage of both the Rehabilitation Act of 1973 (Rehabilitation Act) and the Americans with Disabilities Act of 1990 (ADA) implemented broad measures designed to protect individuals with disabilities. Specifically, two of the primary goals of these federal statutes were to prevent discrimination against disabled individuals seeking employment as well as to protect employees who became disabled. Because of the protections arising under these antidiscrimination laws, covered employers may no longer automatically dismiss an employee or applicant merely based upon a physical or mental disability. Although many people might be surprised to discover that these statutes do not exempt certain professions or categories of jobs from their statutory protections, both the Rehabilitation Act and the ADA apply with equal force to all fields of employment. As a result of the common misconception that law enforcement agencies virtually have free reign regarding employment decisions, this Article addresses the impact of the Rehabilitation Act and the ADA on the employment practices of law enforcement agencies. Quite simply, no one is above the law when it comes to complying with the ADA and the Rehabilitation Act—not even federal, state, or local law enforcement agencies.4

2. 42 U.S.C. §§ 12101-12213 (1994). Title I of the ADA prohibits discrimination against a qualified individual with a disability in regard to employment. See id. §§ 12111-12117. Title II of the ADA prohibits disability discrimination in regard to state and local government services, see id. §§ 12131-12165, while Title III of the ADA prohibits private parties who are providing public accommodation from discriminating on the basis of disability. See id. §§ 12181-12189.
3. See, e.g., id. § 12101(a)(8) ("[T]he Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency.").
4. In 1992 there were 12,502 local police departments, 3,086 sheriffs' departments, 49 primary state police departments, and 1,721 special police agencies funded by state and local governments in the United States. See BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 1992, at 1 (1993) [hereinafter REAVES, CENSUS]. These agencies collectively employed "604,000 full-time sworn officers with general arrest powers and 237,000 non-sworn civilian personnel." Id. As of June 30, 1993, local police departments employed approximately 373,554 sworn officers. See BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 1993, at 1 (1996) [hereinafter REAVES, LOCAL POLICE DEPARTMENTS]. Also, as of June 30, 1993, sheriffs' departments collectively employed 224,236 full-time employees of which almost 156,000 were sworn
II. GENERAL APPLICATION OF THE ADA AND THE REHABILITATION ACT TO LAW ENFORCEMENT AGENCIES

A. Statutory Protections

In order to address the employment practices of law enforcement agencies as they pertain to disabled individuals, it is important to understand exactly what protections flow from the ADA and the Rehabilitation Act. Title I of the ADA states in pertinent part: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such an 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." Furthermore, Title II of the ADA states: "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Likewise, the Rehabilitation Act states in pertinent part:

No otherwise qualified individual with a disability in the


As of December 1993 federal agencies employed approximately "69,000 full-time personnel authorized to make arrests and carry firearms." BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, FEDERAL LAW ENFORCEMENT OFFICERS, 1993, at 1 (1994) [hereinafter REAVES, FEDERAL LAW ENFORCEMENT OFFICERS]. Various federal agencies employed the following personnel: 10,120 U.S. Customs Service inspectors and criminal investigators; 10,075 Federal Bureau of Investigation (FBI) agents; 9,984 Federal Bureau of Prison correctional officers; 9,466 Immigration and Naturalization Service (INS) criminal investigators, inspectors, and Border Patrol agents; 3,621 Internal Revenue Service (IRS) agents; 3,587 postal inspectors and officers with the U.S. Postal Inspection Service; 2,813 Drug Enforcement Agency (DEA) agents; 2,186 U.S. Secret Service agents; 2,153 deputies with the U.S. Marshals Service; and 1,959 Alcohol, Tobacco and Firearms (ATF) agents. See id. at 1-3.

5. 42 U.S.C. § 12112(a).

6. Id. § 12132. The implementing regulations for Title II further declare, "No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity." 28 C.F.R. § 35.140(a) (1996).
United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . .

In effect, these statutory protections outlaw the intentional discrimination or the disparate treatment of qualified individuals solely because of their disability. 7

Not only do the ADA and Rehabilitation Act prohibit overt forms of discrimination, they also address more subtle forms of disability discrimination. For example, facially neutral employment standards, which either impact or burden individuals with disabilities more heavily than nondisabled individuals, are now subject to scrutiny. As a means to deter employers from relying on standards that have an unjustified disparate impact on individuals with disabilities, the following provisions were incorporated into Title I of the ADA:

[T]he term “discriminate” includes . . . utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability; or . . . using qualifications standards, employment tests or other selection criteria that screen out or tend to screen out an

---


Each department, agency, and instrumentality . . . in the executive branch shall . . . submit . . . an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, or instrumentality. Such plan shall . . . provide . . . sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.

Id. § 501(b), as amended by 29 U.S.C. § 791(b).

Although there is disagreement as to whether both § 501 and § 504 offer remedies for federal employees alleging disability discrimination, there is support for a plaintiff's reliance on both statutes. See, e.g., Hogarth v. Thornburgh, 833 F. Supp. 1077, 1083 (S.D.N.Y. 1993) (citing cases holding that “section 501 provides the exclusive remedy,” while also citing cases holding that § 501 and § 504 “provide overlapping protections” (citations omitted)); LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW § 8.05 n.47 (1992).

8. Considering the similar language used in the ADA and the Rehabilitation Act, it is not unusual for a court to rely on relevant case law developed under either statute when interpreting a provision common to both laws. See, e.g., Allison v. Department of Corrections, 94 F.3d 494, 497 (8th Cir. 1996); White v. York Int'l Corp., 45 F.3d 357, 360 n.5 (10th Cir. 1995); Bolton v. Scrivner, Inc., 36 F.3d 939, 943 (10th Cir. 1994).
individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity . . . .

Although the Rehabilitation Act does not directly mention disparate impact discrimination, it declares that the same standards applied under Title I of the ADA shall be used to determine whether § 501 or § 504 have been violated. Consequently, all employment policies and hiring criteria having a disparate impact on individuals with disabilities must be job-related and consistent with business necessity; otherwise, the employer might find itself unable to defend against allegations of disparate impact discrimination. Even if the employer is able to show that the standard is


10. See 29 U.S.C. §§ 791(g), 794(d). The administrative regulations for 29 U.S.C. §§ 501 and 504 of the Rehabilitation Act contain fairly similar disparate impact provisions as those found in Title I and its accompanying regulations. See 28 C.F.R. § 42.512; 45 C.F.R. § 84.13(a).

11. See Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 621-22 (9th Cir. 1982) ("[T]he courts must be wary that business necessity is not confused with mere expediency. If a job qualification is to be permitted to exclude handicapped individuals, it must be directly connected with, and must substantially promote, 'business necessity and safe performance.'"); Equal Employment Opportunity Commission, Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. § 1630.10 app. [hereinafter EEOC Interpretive Guidance] (explaining that "[t]he concept of 'business necessity' [as used in Title I of the ADA] has the same meaning as the concept of 'business necessity' under section 504 of the Rehabilitation Act of 1973"). See generally Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (explaining that the EEOC interpretive guidelines "‘while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" (citations omitted)); Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 16 (1st Cir. 1994) (following the reasoning in Meritor Savings Bank and relying on the EEOC's Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. §§ 1630 app., 1630.10);

12. See 42 U.S.C. § 12113(a); see also 29 C.F.R. § 1630.15 (describing the available defenses to an allegation of disparate treatment or impact). It is important to note that a finding of illegal, disparate impact discrimination can occur even in the absence of any discriminatory intent on the part of the employer. See Mark A. Schuman, The Wheelchair Ramp To Serfdom: The Americans With Disabilities Act, Liberty, and Markets, 10 ST. JOHN'S J. LEGAL COMMENT 495, 504 (1995); cf International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Proof of discriminatory motive, we have held, is not required under a disparate impact theory." (citation omitted)); Griggs v. Duke Power Co., 401 U.S. 424, 432
both job-related and consistent with business necessity, the employer still must be prepared to demonstrate that the individual could not have met the standard with reasonable accommodation.\(^\text{13}\)

In some cases, failure to make reasonable accommodations for the physical or mental limitations of an otherwise qualified individual with a disability also can fall within the definition of illegal discrimination.\(^\text{14}\) In particular, employers are prohibited from discriminating against a qualified individual with a disability by refusing to make a reasonable accommodation, unless the employer can demonstrate that the accommodation would result in undue hardship by requiring significant difficulty or expense.\(^\text{15}\) Examples of reasonable accommodation may include all of the following: “making existing facilities . . . readily accessible . . . and usable, . . . job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of . . . examinations, training materials or policies . . . and other similar accommodations.”\(^\text{16}\) Moreover, prohibited discrimination includes denying employment opportunities in an attempt to avoid the need to engage in reasonable accommodation.\(^\text{17}\)

**B. Covered Entities**

After reviewing the basic antidiscrimination mandates of the ADA and the Rehabilitation Act, the next step is to consider ex-


\(^{14}\) See 42 U.S.C. § 12112(b)(5)(A); see also infra note 199 and accompanying text (explaining that employers have an affirmative obligation to offer reasonable accommodation).


\(^{16}\) 42 U.S.C. § 12111(9); see also 28 C.F.R. § 42.511(b); 29 C.F.R. §§ 1613.704(b)(1)-(2), 1630.2(o) (describing reasonable accommodations).

\(^{17}\) See 42 U.S.C. § 12112(b)(5)(B).
actly what entities are covered by these statutes. Essentially, a law enforcement agency cannot be subject to the provisions of the ADA or the Rehabilitation Act unless it falls within the statutory scope of one of the two statutes.

According to Title I of the ADA, "[t]he term 'covered entity' means an employer, employment agency, labor organization, or joint labor-management committee." Additionally, the term "employer" generally means "a person engaged in an industry who has 15 or more employees for each working day in each of the 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." Due to these broad definitions, it is very likely that most police and sheriffs' departments will fall within the scope of Title I of the ADA. All state law enforcement agencies will be covered because every state, with the exception of Hawaii, employs in excess of fifteen state troopers, department of public safety officers, highway patrol officers, or state police officers.

Somewhat ironically, the very first Title I discrimination lawsuit filed by the United States Department of Justice directly involved the law enforcement community. In United States v. Illinois the Justice Department challenged two Illinois state laws impacting the receipt of pension benefits by police officers and firefighters. In particular, one of the challenged statutes enabled local pension boards to exclude police officers with disabilities from qualifying for any pension benefits, even in cases where employing municipalities already had determined that the same individuals were physically and mentally qualified for employment.

---

18. Id. § 12111(2).
19. Id. § 12111(5)(A).
20. It should be noted that because the ADA does not apply to federal employers, federal law enforcement agencies are not subject to the ADA. See id. § 12111(5)(B)(i).
24. See id.
25. See id. at *1 (citing 40 ILL. COMP. STAT. 5/3-106(2) (1985)).
As a result, it was possible for an individual to serve as a law enforcement officer and yet be ineligible for the receipt of any retirement, disability, or survivor’s benefits.  

Although neither the State of Illinois nor the pension fund board of trustees directly employed the affected officers, the court refused to dismiss any of the plaintiff’s Title I claims against these two defendants. The court made this decision after concluding that the state and the pension fund board of trustees each fell within the Title I definition of a “covered entity.” For instance, the state satisfied the literal definition of a covered entity based on the fact it had more than fifteen of its own employees. Furthermore, the pension fund board of trustees also qualified as a covered entity because it had acted as an agent on behalf of the employing municipality. Even if Title I had not been applicable, the Justice Department could have sought relief under Title II of the ADA. Ultimately, Illinois amended the relevant statute and the lawsuit settled with a consent decree.

an Aurora police officer, was denied participation in the pension fund because he was an insulin-dependent diabetic. See id. at *2.

26. See id. at *1. This situation meant that an officer, who was denied participation in the pension fund because of a preexisting disability, would receive no benefits whatsoever following a life-altering injury incurred in the line of duty. See William J. Eaton, U.S. Files First Suit Under Disabilities Act in Illinois, L.A. TIMES, Dec. 29, 1993, at A8.


28. See id. at *3-*4.

29. See id. at *3. The court explained, “There is no express requirement that the covered entity be an employer of the qualified individual. . . . The ADA is silent as to requiring a direct employment relationship for liability.” Id. at *2-*3.

30. See id. at *3-*4.


While prohibiting a public entity from engaging in disability discrimination, Title II defines the term public entity as meaning, “(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentalities of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority. . . .” Americans with Disabilities Act of 1990, 42 U.S.C. § 12131(1)(A)-(C). Because of the broad scope of this definition, Title II should apply to virtually every state and local police and sheriffs’ department within the United States.


33. See United States v. Illinois, No.93 C 7741 (N.D. Ill. Aug. 9, 1995) (consent decree entered) (on file with Loyola of Los Angeles Law Review); see also William Grady, Cops and Firefighters Breathe Sigh of Relief, CHI. TRIB., Aug. 13, 1995, Metro (Du Page ed.), at 1 (explaining the plight of Kevin Holmes and his suit); Lynn Sweet,
Unlike the ADA, the Rehabilitation Act potentially impacts both federal and state law enforcement agencies. For example, while the Rehabilitation Act applies directly to all federal agencies,\(^4\) it also affects recipients of federal financial assistance.\(^3\)\(^5\) As a result of § 501 and § 504, all federal law enforcement agencies—for example, the Federal Bureau of Investigation (FBI); the Drug Enforcement Administration (DEA); the Bureau of Alcohol, Tobacco, and Firearms (ATF); the United States Customs Service; the United States Secret Service; the United States Marshals Service; the Naval Criminal Investigative Service (NCIS); the fifty-seven offices of the Inspector General (OIG)—must comply with the antidiscrimination provisions of the Rehabilitation Act.\(^3\)\(^6\) Similarly, any state or local law enforcement agency receiving federal financial assistance also is required to comply with the Rehabilitation Act.\(^3\)\(^7\)

### III. DISABILITIES UNDER THE ADA AND THE REHABILITATION ACT

#### A. Statutorily Defining What Is a Covered Disability

Considering the fact that the ADA and Rehabilitation Act offer broad protections for disabled individuals,\(^3\)\(^8\) it is extremely important to understand exactly what categories of individuals are covered. The starting point is to turn to the statutes themselves for guidance.

---


37. *See, e.g., Delmonte v. Department of Bus. & Prof'l Regulation, 877 F. Supp. 1563, 1565 (S.D. Fla. 1995) (explaining that a state law enforcement agency's receipt of training provided by the FBI, DEA, IRS, ATF, and the Secret Service was enough to trigger § 504 coverage); Tanberg v. Weld County Sheriff, 787 F. Supp. 970, 974 (D. Colo. 1992) (ruling that a county sheriff's department was subject to the Rehabilitation Act because it qualified as a program receiving federal financial assistance).*

38. *Although the term “disabled” is considered to be more preferable than the term “handicapped,” many cases and statutes still rely on the term “handicapped.”*
Before a law enforcement officer or applicant can rely on the ADA, the individual first must be able to prove that he or she actually is disabled within the meaning of the law. One federal court has explained, "Establishing that one is disabled is the cornerstone to an ADA plaintiff's prima facie case." As a result, it is crucial that a plaintiff fall within the statutory definition of the term "disability" as contained in the ADA. According to the ADA, "The term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." Unless one of the three stated conditions exists, an individual will not be considered as being disabled; therefore, the protections of the ADA will not apply.

Likewise, anyone seeking to rely on the Rehabilitation Act must establish the existence of a disability as defined by that statute. In reference to this requirement, one court has declared, "As the first element of a prima facie case of discrimination under the Rehabilitation Act, Plaintiff must establish she is an 'individual with a disability' under the terms of the Act."

Almost identical to the ADA definition of the term disability, the Rehabilitation Act states that an "individual with a disability means . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." In the event an individual is unable to demonstrate that the physical or mental condition in question falls within the above-mentioned definition, the Rehabilitation Act will offer no protection.

In addition to the two stated definitions of what constitutes a disability, it is necessary to understand what legally amounts to a physical or mental impairment *substantially limiting* one or more major life activities. This is a key issue considering the fact that "[d]isability determinations often turn on whether the impairment

substantially limits a 'major life activity.'”

To explain what amounts to a substantial limitation of a major life activity, one should look for assistance to the administrative agencies that have confronted this issue. When the ADA was passed, Congress directed the Equal Employment Opportunity Commission (EEOC) to issue whatever administrative regulations were necessary to implement Title I of the ADA. As a result, the EEOC has articulated specific factors to consider when attempting to determine whether an impairment substantially limits a major life activity: “(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.” Moreover, the implementing regulations for Title I also state, “Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” Not too surprisingly, regulations implementing § 504 of the Rehabilitation Act rely on the same criteria when defining what amounts to a major life activity.

43. Fussell, 906 F. Supp. at 1568.
44. See Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 (5th Cir. 1995) (“The ADA defines neither 'substantially limits' nor 'major life activities,' but the regulations promulgated by the EEOC under the ADA provide significant guidance. These regulations adopt the same definition of major life activities as used in the Rehabilitation Act.” (citing Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994)).
47. Id. § 1630.2(h)(2)(i). The implementing regulations for Title II, as promulgated by the Department of Justice, offer a similar definition. See 28 C.F.R. § 35.104(4)(1)(i)-(ii) (1996).
Additionally, the EEOC defines “substantially limits” as meaning the following:
(i) Unable to perform a major life activity that the average person in the general population can perform; or . . . (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.
29 C.F.R. § 1630.2(j)(1)(i)-(ii).
B. Judicially Interpreting What Is a Covered Disability

Although both the ADA and Rehabilitation Act offer basic definitions of what constitutes a covered disability, judicial decisions offer additional guidance. There currently are only a limited, but steadily increasing, number of cases in which courts specifically have determined that a particular physical condition of a law enforcement officer or applicant qualifies him or her as an individual with a disability.\textsuperscript{49}

Despite the small number of judicial opinions addressing whether a particular impairment of a law enforcement officer or applicant amounts to a covered disability, the existing cases do offer valuable insight into what conditions are viewed as substantially limiting a major life activity.\textsuperscript{50} For instance, one court acknowledged that an applicant for the position of special agent with the FBI was disabled because he was an insulin-dependent diabetic.\textsuperscript{51} Likewise, a former criminal investigator with the Naval In-

\textsuperscript{49} Although numerous cases engage in general analysis of the Rehabilitation Act and the ADA in regards to law enforcement employment, only a handful involve specific judicial determinations that an individual is disabled.

Because the disability status of the plaintiff commonly is not at issue and because courts frequently focus upon whether an individual is “otherwise qualified,” there often is little discussion as to whether the individual is actually disabled. See, e.g., Lassiter v. Reno, No. 95-2058, 1996 WL 281933 (4th Cir. May 29, 1996) (explaining that because a deputy marshal suffered from a delusional paranoid disorder, the Attorney General did not dispute that the United States Marshals Service regarded him as being disabled), cert. denied, 117 S. Ct. 766 (1997); Champ v. Baltimore County, 884 F. Supp. 991, 994 (D. Md. 1995) (noting that parties did not dispute that former police officer, who suffered from a “100% loss in the use of his left upper arm,” was disabled), aff’d, 91 F.3d 129 (4th Cir. 1996); Ryan v. City of Highland Heights, 4 A.D. Cases 1389 (N.D. Ohio 1995) (defendants did not dispute the disability status of a reserve police officer, who had a metal rod and pins placed in his leg after he was injured while directing traffic); Dorris v. City of Kentwood, No. CIV.1:94-249, 1994 WL 762219 (W.D. Mich. Oct. 4, 1994) (City of Kentwood did not dispute that an officer with degenerative joint disease in both knees was disabled).

\textsuperscript{50} See, e.g., Woodson v. Cook County Sheriff, No. CIV.96-3864, 1996 WL 604051, at *3 (N.D. Ill. Oct. 18, 1996) (concluding that a deputy sheriff’s ADA claim that she suffers from the alleged disability of chronic fatigue syndrome is sufficient to survive a motion to dismiss); Silk v. City of Chicago, No. CIV.95-0143, 1996 WL 312074, at *16 (N.D. Ill. June 7, 1996) (ruling that a Chicago police officer’s allegation that his sleep apnea substantially limits his breathing is sufficient to survive a motion to dismiss); Madden v. Runyon, 899 F. Supp. 217 (E.D. Pa. 1995) (denying a defense motion for summary judgment after concluding that there was a material issue as to whether a postal inspector’s back spasms limited a major life activity).


In another case involving the FBI, a court determined that a former clerk
vestigative Service was classified as disabled under the Rehabilitation Act because he had epilepsy, which had caused him to experience at least four seizures. While reviewing the demotion of an alcoholic detective with the New York City Police Department, a federal court acknowledged that "it is clear that alcoholism is a disability under the Rehabilitation Act." In another case a federal court found that a security guard applicant, who had only one hand, had a disability according to the court's interpretation of the ADA. Additionally, a police officer applicant, who had experienced as many as five dislocations of his right shoulder over the course of his life, was held to be disabled. A correctional officer, who practically became blind in both eyes due to injuries sustained from an automobile accident, was "obviously . . . substantially limited in the major life activity of seeing . . . [so as to be considered] disabled for purposes of the ADA." Although there is not an abundance of law-enforcement-related cases holding that a particular physical or mental condition constitutes a covered disability, there are many cases outside of the realm of law enforcement that offer further guidance on this issue.

---

with a bipolar disorder was a "handicapped individual" as defined by the Rehabilitation Act. See Hogarth v. Thornburgh, 833 F. Supp. 1077, 1084 (S.D.N.Y. 1993). At different times, this individual developed "bizarre ideas." Id. For example, he thought the CIA wanted him to be an operative in Africa; he submitted false medical excuses; he believed he was a doctor; he "believed that he was receiving coded messages from the CIA over the radio"; and "he called the Strategic Air Command in Omaha to issue a warning" that a nuclear attack was about to occur. Id. at 1080.

52. See Salmon Piñeiro v. Lehman, 653 F. Supp. 483, 490 (D.P.R. 1987); see also Vazquez v. Bedsole, 888 F. Supp. 727, 731 (E.D.N.C. 1995) (finding that a sheriff's deputy suffering from periodic epileptic seizures was disabled under the ADA).


56. Miller v. Department of Corrections, 916 F. Supp. 863, 866 (C.D. Ill. 1996). While people are legally blind if they have 20/200 vision, the plaintiff in this case had 20/800 vision. See id. at 866 n.2. In another case involving a correctional officer, an allegation that asthma is a covered disability was enough to survive a defense motion to dismiss. See Muller v. Costello, No. CIV.94-842, 1996 WL 191977, at *5 (N.D.N.Y. Apr. 16, 1996).

57. See, e.g., School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 (1987) ("[A] person suffering from the contagious disease of tuberculosis can be a handi-
C. Judicially Interpreting What Is Not a Covered Disability

Unlike the comparatively limited number of cases holding that a specific physical condition of a law enforcement officer or applicant constitutes a disability, there are numerous judicial decisions explaining what types of conditions experienced by such individuals do not amount to covered disabilities.58

The United States Court of Appeals for the Second Circuit is one of many courts holding that a law enforcement applicant failed to possess a disability covered by one of the federal antidiscrimination disability laws. The Second Circuit confronted this issue after an applicant with the New York City Police Department was rejected because of "poor judgment, irresponsible behavior and poor impulse control."59 Rejecting the plaintiff's argument that he was entitled to protection under the Rehabilitation Act, the court held as follows:

"[P]oor judgment, irresponsible behavior and poor impulse control" do not amount to a mental condition that Congress intended to be considered an impairment which substantially limits a major life activity and therefore a person having those traits or perceived as having those traits cannot be considered a handicapped person within the meaning of § 504 of the Rehabilitation Act of 1973."); Klein v. Manor Healthcare Corp., 19 F.3d 1433 (6th Cir. 1994) (explaining that cancer is a disability).

58. See, e.g., Andrews v. Ohio, 104 F. 3d 2520 (6th Cir. 1997) (holding that 76 law enforcement officers with the Ohio State Highway Patrol were not disabled under either the ADA or the Rehabilitation Act merely because they were somewhat overweight); Hughes v. Bedsole, 48 F.3d 1376, 1388-89 (4th Cir. 1995) (holding a sheriff's department sergeant, who suffered from "tennis elbow" following a car accident while on patrol, was not a person with a disability), cert. denied, 116 S. Ct. 190 (1995); DeWitt v. Carsten, 941 F. Supp. 1232, 1236-37 (N.D. Ga. 1996) (concluding that a sheriff's deputy was not disabled under the ADA, despite claims of extreme stress caused by dealing with jail inmates and her boss, the sheriff); Williams v. City of Charlotte, 899 F. Supp. 1484, 1487-88 (W.D.N.C. 1995) (holding that a police officer with a sleep disorder had no disability under the ADA); Thompson v. City of Arlington, 838 F. Supp. 1137, 1151-52 (N.D. Tex. 1993) (ruling that a police officer suffering from depression was not disabled under the ADA); Capitano v. State, 875 P.2d 832 (Ariz. Ct. App. 1993) (concluding that a correctional officer applicant with mild to moderate high frequency hearing loss was not substantially impaired in any major life activity for purposes of the Rehabilitation Act).

59. Daley v. Koch, 892 F.2d 212, 214 (2d Cir. 1989) (quoting Dr. Ernest Adams). Dr. Adams' conclusion was based in part upon the applicant having indicated that he had held more than three jobs in the preceding two years. See id. at 213. See generally Kimberli R. Black, Personality Screening in Employment, 32 AM. BUS. L. J. 69, 116 (1994) (discussing Daley v. Koch).
the meaning of the [Rehabilitation] Act. Consequently, the court affirmed the dismissal of the applicant's claim under the Rehabilitation Act.

In Paegle v. Department of the Interior a federal police officer with the United States Park Police sought relief under § 504 of the Rehabilitation Act. The officer brought suit after his promotion to patrol sergeant was delayed approximately nine months while he served in a "limited duty" status. The officer was unable to perform his ordinary duties because of a back injury that had been reaggravated while he was making an arrest. After pointing out that "[i]t is well established that the [Rehabilitation] Act was never intended to extend to persons suffering from temporary conditions or injuries," the court concluded that the officer was not disabled so as to be covered by the protections of the Rehabilitation Act. Basically, the officer had failed to show that he suffered from anything more than a temporary injury.

Likewise, summary judgment was granted in another case involving a temporary disability. In Layser v. Morrison the plain-
tiff was a university security officer who was believed to be suffering from temporary work-related stress and depression. Initially the officer had been removed from patrol duty and placed on leave for approximately three months. Following his initial three month reassignment, the officer was reassigned to an unarmed dispatcher position for six more months before he was allowed to resume patrol duty. Because of his temporary removal from patrol duty, he alleged that his employer had discriminated against him on the basis of his having a perceived disability. The court, however, rejected the officer's argument with the following explanation: "Even if [the officer] could argue he suffered from a disability, it was too temporary to warrant relief under the ADA because [his employer] only removed him from active duty for approximately three months."

Furthermore, in numerous disability cases related to law enforcement employment, plaintiffs have attempted to allege that various physical or mental conditions were covered disabilities due to interference with their ability to work. A plaintiff often is forced to resort to this argument because the physical or mental condition at issue does not clearly affect (substantially limit) another major life activity such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, [or] learning." One such case, for example, involved a police officer alleging that a federal agency has engaged in disability discrimination must file an administrative complaint with the offending agency. See, e.g., Lovell v. United States, 794 F. Supp. 584 (W.D. Va. 1992) (granting a motion to dismiss because an FBI applicant had failed to file a timely discrimination complaint with the FBI), aff'd 995 F.2d 1063 (4th Cir. 1993). Federal employees and applicants must bring a disability complaint to the attention of one of the EEO counselors within 45 days of the date of the matter alleged to be discriminatory. See 29 C.F.R. § 1614.105(a)(1) (1996). See generally Mark D. Laponsky, Procedural Problems and Considerations in Representing Federal Employees in Equal Employment Opportunity Disputes, 29 How. L.J. 503 (1986) (offering helpful guidance for attorneys representing plaintiffs in disability discrimination disputes against federal agencies).

92. See id. at 565. The officer was placed on leave after his doctor promptly revealed that the officer had described a dream in which "he walked into [his supervisor's] office, pulled his revolver out of the holster, and pointed the gun at [the supervisor's] forehead." Id.
93. See id.
94. See id.
95. See id. at 565.
96. Id. at 569.
97. 29 C.F.R. § 1630.2(h)(2)(i).
applicant with uncorrected visual acuity of 20/200. Although the applicant’s general ability to see was not substantially limited, his eyesight still disqualified him from every law enforcement position in the state of New York, including that of a corrections officer. Despite this broad disqualification, the court held that the plaintiff was not disabled. Seemingly, such plaintiffs appear to be fighting an uphill battle.

In order to determine whether a physical or mental condition substantially interferes with working, many courts focus on the applicable implementing regulations of either the ADA or the Rehabilitation Act:

---

74. See Joyce v. Suffolk County, 911 F. Supp. 92 (E.D.N.Y. 1996); see also Daniel Wise, Handicapped Claim for Police Job Fails: Condition Not Covered by Federal Laws, N.Y.L.J., Jan. 25, 1996, at 1 (describing Joyce). Although the plaintiff’s visual acuity without corrective lenses was 20/200, his vision in each eye was correctable to 20/20. See Joyce, 911 F. Supp. at 93. Regardless, the Suffolk County Police Department required that “uncorrected visual acuity for police officer candidates be no worse than 20/40 in each eye.” Id.

75. See Joyce, 911 F. Supp. at 95. But see Sicard v. City of Sioux City, 950 F. Supp. 1420 (N.D. Iowa 1996) (concluding that there is a genuine issue of material fact that a firefighter applicant’s 20/200 uncorrected vision substantially limits major life activities).

76. See Joyce, 911 F. Supp. at 98. Shortly after the dismissal of this case, New York “issued a new set of guidelines . . . [wherein] uncorrected vision can be as impaired as 20/100 uncorrected and 20/30 corrected.” Robin Topping, Disability Act Doesn’t Hit the Hiring of Cops—Yet, NEWSDAY, Feb. 6, 1996, at A44; see also Barbara Carmen, Council Moves to Close Problem Liquor Sellers, THE COLUMBUS DISPATCH, Dec. 19, 1995, at 3C (reporting that the city of Columbus decided to change its vision requirements after it “[a]greed to pay $31,619 to settle a lawsuit” filed by a police officer applicant who alleged “the city’s 20/40 eyesight requirement violated the Americans with Disabilities Act”).

In another case a Torrington, Connecticut, police officer applied for a position as a Connecticut state police trooper trainee. See Venclauskas v. Connecticut Dep’t of Pub. Safety, 921 F. Supp. 78, 80 (D. Conn. 1995). The officer’s application was rejected because he could not meet the minimum standard of 20/30 unaided visual acuity in each eye. See id. The officer’s unaided visual acuity was 20/120 in his right eye and 20/80 in his left eye. See id. The court rejected the officer’s claims that he was substantially limited in his abilities to see, drive, and work. See id. at 81-82.

77. A plaintiff would be well-advised to avoid basing a disability claim on the single argument that the disputed condition substantially interferes with working. In the ideal case this argument only should be used to supplement allegations that other major life activities are also affected by the condition. Regardless, a plaintiff must almost always emphasize how the condition affects another major life activity besides working. See, e.g., Bumstead v. Jasper County, 931 F. Supp. 1323, 1336-38 (E.D. Tex. 1996) (concluding that a deputy sheriff with prostate cancer was not disabled under the Rehabilitation Act, after the plaintiff apparently based his disability argument on the allegation “that defendants viewed plaintiff as possessing a handicap which significantly affected his ability to engage in a major life activity, work”).
With respect to the major life activity of working... [t]he term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The *inability to perform a single, particular job does not constitute a substantial limitation* in the major life activity of working.\(^7\)

Subsequently, several courts have refused to hold that preclusion from one particular job amounts to a substantial limitation on one's ability to work.\(^8\) Moreover, a handful of courts even have

\(^7\) See Wooten v. Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995) ("'[W]orking' does not mean working at a particular job of that person's choice. 'An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one.'" (quoting Heilweil v. Mount Sinai Hosp., 32 F.3d 718, 723 (2d Cir. 1994), cert. denied, 115 S. Ct. 1095 (1995))); Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 727 (5th Cir. 1995) (holding that because a welder's "injured arm adversely affects only the functioning in a welding position requiring substantial climbing," the plaintiff failed to offer adequate "evidence that her impairment substantially limited a major life activity"); Bolton v. Scrivner, Inc., 36 F.3d 939, 944 (10th Cir. 1994) (ruling that a discharged order selector in a grocery warehouse, who suffered an on-the-job injury, "failed to produce evidence showing a significant restriction in his 'ability to perform either a class of jobs or a broad range of jobs in various classes'" (quoting 29 C.F.R. § 1630.2(j)(3)(ii))); Heilweil, 32 F.3d at 723-24 (holding that a terminated blood bank employee, whose asthma was made worse by specific chemicals used at the blood banking facility, was medically restricted only from working in this one place; therefore, her ability to work was not substantially limited); Gupton v. Virginia, 14 F.3d 203, 204-05 (4th Cir. 1994) (a highway utility specialist, whose allergy to smoke rendered her unable to work in an office that permitted smoking, failed to present "evidence that her allergy foreclosed her generally from obtaining jobs in her field"); Byrne v. Board of Educ., 979 F.2d 560, 565 (7th Cir. 1992) ("It is well established that an inability to perform a particular job for a particular employer is not sufficient to establish a handicap; the impairment must substantially limit employment generally." (citing E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1099-100 (D. Haw. 1980)); Welsh v. City of Tulsa, 977 F.2d 1415, 1419 (10th Cir. 1992) (stating that "an impairment that an employer perceives as limiting
held that a physical or mental condition that is deemed to prevent someone from serving in any capacity as a police officer, sheriff’s deputy, or federal agent does not necessarily mean that the person is disabled.\textsuperscript{30} While taking an extremely liberal view of what constitutes working in law enforcement, one court went so far as to state that a dismissed, overweight Virginia State Trooper was not “substantially limited as required by both the Rehabilitation Act and the ADA” because she was retained as a dispatcher in her occupational “field of law enforcement as a whole.”\textsuperscript{31}

Despite the breadth of case law refusing to accept the argument that preclusion from one particular job amounts to a substantial limitation on one’s ability to work, courts must remember that this is not the only standard for determining whether an individual has a covered disability.\textsuperscript{32} Simply because a condition does not substantially limit the major life activity of working, a court cannot automatically conclude that the individual does not have a

\begin{itemize}
  \item an individual’s ability to perform only one job is not a handicap under the [Rehabilitation] Act’’; Forrisi v. Bowen, 794 F.2d 931, 932 (4th Cir. 1986) (holding that a utility systems repair person with acrophobia failed to establish that he was handicapped as he was only disqualified from one particular position that required him to climb ladders); Jasany v. United States Postal Serv., 755 F.2d 1244, 1247-50 (6th Cir. 1985) (holding that a plaintiff with a mild case of crossed eyes was not “a handicapped person within the meaning of 29 U.S.C. § 706(7)” because the condition previously had not interfered with “his past work history and ability to carry out other duties at the post office apart from operation of [one particular machine]”).
  \item Layser, 935 F. Supp. at 568-69 (although an officer with depression was removed from patrol duty, he was retained as a dispatch officer; therefore, his inability to perform one particular job did not render him substantially limited in the activity of working); Joyce, 911 F. Supp. at 96-98 (stating that “[t]he need for corrective eyewear in no way substantially limits the plaintiff’s employment generally”; as a result, this plaintiff with poor eyesight could not demonstrate that he was regarded as “impaired in a way that substantially limits a major life activity”); Fussell v. Georgia Ports Auth., 906 F. Supp. 1561, 1573 (S.D. Ga. 1995) (a dismissed Georgia Ports Authority police officer suffering from hand tremors was not disabled as he was among those “only unable to perform either a particular specialized job or a narrow range of jobs”); Sanford v. Steam, No. CIV.5:91-0650, 1992 WL 436327, at *2 (N.D. Ohio Jan. 10, 1992) (holding that the Rehabilitation Act claim of a plaintiff, who injured his knee during a sheriff’s department training program, failed because he did not “allege that his injury prevented him from participating in activities other than the sheriff’s rigorous self-defense course.”), aff’d, 980 F.2d 731 (6th Cir. 1992).
  \item See Daley, 892 F.2d at 215 (“Being declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity.”); Smaw v. Virginia Dep’t of State Police, 862 F. Supp. 1469, 1475 (E.D. Va. 1994). But cf. Morrow v. City of Jacksonville, 941 F. Supp. 816, 819, 823 (E.D. Ark. 1996) (concluding that it is a question of fact for a jury to decide whether a “‘markedly obese’ juvenile officer was substantially limited in the activity of working”)
\end{itemize}
covered disability; working is just one of the many major life activities that could be affected by the individual’s condition. For instance, a condition still qualifies as a covered disability if it substantially limits any one of the other various major life activities; in other words, it is not necessary for a condition to substantially limit more than one major life activity in order to qualify as a covered disability.

In *Burke v. Virginia*, however, the court completely abandoned the statutory and regulatory language of the ADA when it considered the disability discrimination claim of a terminated corrections officer. In this case the Virginia Department of Corrections (Virginia DOC) hired the plaintiff as a correctional officer. Afterwards, the Virginia DOC required the plaintiff to receive training and obtain certification as a correctional officer. The plaintiff was unable to obtain certification because he could not pass the required tests. Evidently, the plaintiff’s inability to perform at an acceptable level was related to his suffering from “Attention Deficit Disorder and Hyperactivity Disorder and Developmental Expressive and Receptive Language Disorder.” After learning of the plaintiff’s condition, the Virginia DOC concluded that the plaintiff was not qualified to serve as a correctional officer. Meanwhile, the Virginia DOC offered the plaintiff alternative employment.

Despite the plaintiff’s condition, the defendant’s summary judgment motion was granted as the trial court decided that the plaintiff was not disabled under the ADA. The court apparently misconstrued the legal argument that preclusion from one law enforcement position is not a substantial limitation on the major life activity of working. Specifically, the court seemed to believe that case law holds “that the inability to perform a single, particular job
does not constitute substantial limitation of major life activity." This belief possibly resulted from the fact that the court confused the phrase "life activity" with the more appropriate term of "major life activity of working." Consequently, the court inaccurately summarized case law and concluded, "The case at bar requires the same result because the DOC provided Burke [the plaintiff] with comparable, alternative positions, defeating any claim of impaired life activity. Therefore, the Court finds that Burke does not have a disability within the meaning of the ADA." Due to the court's misinterpretation of existing case law, the court failed to even consider whether "Attention Deficit Disorder and Hyperactivity Disorder and Developmental Expressive and Receptive Language Disorder" substantially limit the major life activity of learning.

In contrast to Burke v. Virginia, the court in Lawrence v. Metro-Dade Police Department demonstrated how to properly reach the conclusion that an individual does not have a covered disability. In the Lawrence case a police sergeant suffering from "hammer toes," as well as lower back irritation caused by wearing a gun belt, brought suit under the Rehabilitation Act. After considering the plaintiff's argument that she was disabled because "her feet and spine substantially limited her ability to work," the

93. Id.
94. Id. at 323. For example, the court summarized one case by stating, "The Fourth Circuit found that [the plaintiff's] life activity was not substantially limited as she was not barred from law enforcement generally." Id. (citing Hughes v. Bedsole, 48 F.3d 1376 (4th Cir. 1995)) (emphasis added). The court summarized a second case in a similar manner: "[T]he Court found that her life activity was not substantially impaired because the plaintiff was still able to perform duties in the field of law enforcement." Id. (citing Smaw v. Virginia Dep't of State Police, 862 F. Supp. 1469) (E.D. Va. 1994)) (emphasis added).
95. Id.
96. Id. This case is offered only for the purpose of demonstrating how not to determine whether an individual has a covered disability. Of course, an individual with a disability would still be required to demonstrate that he or she is otherwise qualified. In Burke the court went on to conclude that the plaintiff was not otherwise qualified because he could not "adequately perform one of the essential functions of the correctional officer position—being able to read and comprehend written and oral instructions in potentially life threatening situations." Id.; see also DeLeo v. City of Stamford, 919 F. Supp. 70, 71 n.1 (D. Conn. 1995) (invoking a terminated police officer's claims "that his dyslexia substantially limits his ability to read and write, and that this limitation renders him 'disabled' under 29 U.S.C. 706(8)").
98. See id.
99. See id. at 952.
100. Id. at 954.
court explained that in order “[t]o determine whether a physical impairment substantially limits an individual’s ability to work so as to constitute a disability under the Rehabilitation Act, the Courts must evaluate the impairment with respect to the actual employee.”\textsuperscript{101} After considering evidence that the plaintiff’s physical conditions neither substantially interfered with her ability to work as a police officer nor substantially limited any other aspects of her life, the court concluded that there was “absolutely no evidence in the record to indicate Plaintiff’s physical impairments substantially limited any major life activities.”\textsuperscript{102} As a result, the court determined that the plaintiff was not disabled within the meaning of the Rehabilitation Act; therefore, the Act could provide no relief against the Metro-Dade Police Department’s requirement that plaintiff “wear the standard gun belt.”\textsuperscript{103}

Before blindly following existing case law or too narrowly applying the ADA and Rehabilitation Act in law enforcement cases, courts must begin to take a deeper look at these two federal laws. For example, courts must determine whether the position of police officer is truly its own job classification in and of itself, or whether it is merely one of the many possible jobs in the field of law enforcement.\textsuperscript{104} Unquestionably, many people would argue that being a police officer, sheriff’s deputy, or federal agent is a far cry from being a radio dispatcher, file clerk, or secretary in a law enforcement agency. If each of these positions is interpreted as being nothing more than one single job in the broad field of law enforcement, law enforcement agencies seemingly would be free to turn away numerous disabled individuals by claiming that (1) each person is being rejected only for one particular job in the broad field of law enforcement, and (2) he or she generally is capable of obtaining employment elsewhere.\textsuperscript{105} Additionally, law en-

\textsuperscript{101} Id. at 955.
\textsuperscript{102} Id. at 956. In the plaintiff’s deposition she admitted “that her back condition did not interfere with ‘standing, walking, running, exercising, driving, doing house work, [or] yard work.’” Id.
\textsuperscript{103} Id.
\textsuperscript{104} See E.E. Black, Ltd., 497 F. Supp. at 1101-02 (D. Haw. 1980) (“Certainly, if an applicant were disqualified from an entire field, there would be a substantial handicap to employment. But, questions as to subfields and the like must be answered on a case-by-case basis, after examining all the factors . . . .” Such factors include the number and types of jobs from which the impaired individual is disqualified; the geographical area to which the applicant has access; and the individual’s training and personal expectations.).
\textsuperscript{105} Such claims are contingent on the individual not possessing a disability sub-
forcement agencies would have less accountability and greater freedom to erroneously regard anyone with only limited impairment as being incapable of serving as a law enforcement officer—arguably because other employers would not take the same erroneous position; thereby, foreclosing a plaintiff’s claim that he or she was substantially limited in his or her ability to work.

Based on current case law, law enforcement officers and applicants need to realize that courts are rather narrowly interpreting what constitutes a protected disability in cases involving law enforcement positions. Considering the consequences of such a judicial approach, it seems somewhat more appropriate for courts to adopt an open-minded attitude towards defining what is a covered disability, while taking a more conservative posture towards defining who is an otherwise qualified individual. Maybe this approach would amount to doing nothing more than “giving with one hand and taking away with the other”; but it at least would afford those individuals, who are regarded as being medically disqualified, the opportunity to demonstrate that they are actually capable of performing the essential functions of the job.

If courts begin to somewhat more broadly interpret who qualifies as having a covered disability, law enforcement agencies will have less freedom to routinely turn away those applicants failing to meet existing standards which are of questionable value; for instance, rejecting all individuals whose uncorrected vision is worse than 20/40.\textsuperscript{106} Short of demonstrating that the questioned

---

\textsuperscript{106} See Richard N. Holden, \textit{Vision Standards for Law Enforcement: A Descriptive Study}, 12 J. POLICE SCI. & ADMIN. 125, 126 (1984) (stating that “[a]gencies with more applications than they can handle are often tempted to raise vision standards just to reduce qualified applicants”); see also Richard N. Holden, \textit{Eyesight Standards: Correcting Myths}, FBI L. ENFORCEMENT BULL., June 1993, at 1 (explaining that there is no consensus either within law enforcement or the academic community regarding uncorrected vision standards). \textit{Compare} Federal Bureau of Investigation, U.S. Dep’t of Justice, There’s A Place For You In Today’s F.B.I.: Special Agent Qualifications (1994) (on file with \textit{Loyola of Los Angeles Law Review}) (explaining that FBI special agent candidates must have uncorrected vision not worse than 20/200) with Bureau of Alcohol, Tobacco and Firearms, Dep’t of the Treasury, Special Agent Recruitment Information 3 (1996) (on file with the \textit{Loyola of Los Angeles Law Review}) (stating that ATF special agent candidates must have distant vision without correction of at least 20/100 (Snellen) in each eye, correctable to 20/30 (Snellen) in one eye and 20/20 (Snellen) in the other).

Of course, no court should tolerate the efforts of a plaintiff to rely on purely frivolous allegations in an attempt to qualify as having a covered disability. See Torres v. Bolger, 781 F.2d 1134 (5th Cir. 1986) (rejecting the argument that left-
standard or policy actually is a valid predictor of who is capable of performing the essential functions of the job, law enforcement agencies would be forced to adopt more accurate and appropriate employment standards. Absent being classified as disabled, applicants with borderline physical impediments would only have limited recourse for attacking hiring standards alleged to be unduly inflated. Specifically, these individuals would be reduced to arguing that the questioned standard has no rational basis or relation to the physical requirements actually needed to serve as a law enforcement officer. Predictably, few plaintiffs would receive any relief as almost all hiring standards could withstand a rational basis attack, even those standards which are unduly high or restrictive.

Future litigation will reveal whether the majority of courts will continue to narrowly define who qualifies as having a covered disability in disputes involving the law enforcement community. In the meantime, courts appear reluctant to accept claims that a physical or mental condition substantially limits the major life activity of working, especially when the individual is primarily only precluded from seeking employment as a law enforcement officer. While the ADA and Rehabilitation Act potentially offer broad prohibitions against law enforcement agencies engaging in disability discrimination, such measures are of little consequence if courts too narrowly interpret who qualifies as having a covered disability.

IV. UNDERSTANDING "OTHERWISE QUALIFIED," "ESSENTIAL FUNCTIONS," AND "REASONABLE ACCOMMODATION" IN RELATION TO LAW ENFORCEMENT EMPLOYMENT

A. The "Otherwise Qualified" Requirement

Once it is determined that a law enforcement officer or applicant is disabled under either the ADA or the Rehabilitation Act, the next key question is whether the individual is otherwise quali-
fied for the position at issue. Federal law recognizes that regardless of the fact an individual is disabled, he or she still might be qualified to serve as a police officer or federal agent, with or without some form of reasonable accommodation. In essence, the issue of whether an individual is otherwise qualified often determines if illegal discrimination has occurred or is about to occur. Because of the consequences accompanying a finding that an individual is otherwise qualified, it is crucial to understand just what it means to be otherwise qualified.

*Southeastern Community College v. Davis* is one of the most commonly cited cases dealing with the issue of whether a disabled individual is otherwise qualified. In *Southeastern Community College* the United States Supreme Court explained, “An otherwise qualified person is one who is able to meet all of a program’s requirements in spite of his [or her] handicap.” The Court also

109. See School Bd. of Nassau County v. Arline, 480 U.S. 273, 285 (1987) (stating that “the definition of ‘handicapped individual’ is broad, but only those individuals who are both handicapped and otherwise qualified are eligible for relief [under the Rehabilitation Act]”); Lisa J. Stansky, *Opening Doors: Five Years After Its Passage, the Americans With Disabilities Act Has Not Fulfilled the Greatest Fears of Its Critics—or the Greatest Hopes of Its Supporters*, A.B.A. J., Mar. 1996, at 66, 67 (The author quotes Stamford, Connecticut, attorney Carla Walworth describing the catch-22 situation facing employees and applicants: “You have to fit within this window where you’re seriously enough affected so you’re disabled but not so seriously so you can’t work.”).


111. See id.

112. Id. at 406. Although this case focused on participation in a federally funded program, its holding is analogous to employment cases. Implementing regulations for the Rehabilitation Act also define the term “qualified handicapped person” as meaning “[w]ith respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question.” 45 C.F.R. § 84.3(k); see also 28 C.F.R. § 41.32(a) (using the same definition of qualified handicapped person as 45 C.F.R. § 84.3(k)).

The implementing regulations for Title I of the ADA offer a similar, but somewhat more thorough definition:

*Qualified individual with a disability* means an individual with a disability who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or
took note of the fact "that legitimate physical qualifications may be essential to participation in particular programs." In light of the position of the Supreme Court, a plaintiff is precluded from arguing that he or she is otherwise qualified but for a disability.

In subsequent cases focusing on alleged disability discrimination, the term "otherwise qualified" has been further defined. For instance, the Supreme Court later declared, "In the employment context, an otherwise qualified person is one who can perform 'the essential functions' of the job in question." Furthermore, the Court pointed out that it must be determined "whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions." Likewise, the Fourth Circuit Court of Appeals has stated that it is necessary to desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

29 C.F.R. § 1630.2(m) (1996).

113. Southeastern Community College, 442 U.S. at 407; see also Simon v. Saint Louis County, 735 F.2d 1082, 1084 (8th Cir. 1984) ("A handicapped person may be required to meet legitimate physical qualifications essential to the job."); cf. Treadwell v. Alexander, 707 F.2d 473, 475 (11th Cir. 1983) ("Once a plaintiff shows an employer denied him employment because of physical condition, the burden of persuasion shifts to the . . . employer to show that the criteria used are job related and that plaintiff could not safely and efficiently perform the essentials of the job.").

114. See Southeastern Community College, 442 U.S. at 407 n.7 (explaining that "[u]nder such a literal reading of the term 'otherwise qualified', a blind person possessing all the qualifications for driving a bus except sight could be said to be 'otherwise qualified' for the job of driving. Clearly such a result was not intended by Congress.") (quoting 45 C.F.R. pt. 84, app. A (1978)).

115. Arline, 480 U.S. at 287 n.17 (1985) (citing 45 C.F.R. § 84.3(k)); see also Santos v. Port Auth., No. CIV.94-8427-JSM, 1995 WL 431336, at *2 (S.D.N.Y. July 20, 1995) ("A job function may be considered essential if, inter alia, (1) the reason the position exists is to perform the function; (2) there are a limited number of employees available among whom the performance of the job function can be distributed; or (3) the function is highly specialized so that the incumbent in the position is hired for his ability to perform the particular function.") (citing 29 C.F.R. § 1630.2 (n)(2))); Serapica v. City of New York, 708 F. Supp. 64, 73 (S.D.N.Y.) ("An employer is allowed to consider potential safety risks to applicants, co-workers, and others in making a decision about employment criteria.")], aff'd, 888 F.2d 126 (2d Cir. 1989). See generally Gary E. Phelan, Essential Functions of a Job Under The ADA: Determining If a Disabled Individual Is "Qualified", 39 FED. B. NEWS & J., Jan. 1992, at 46 (examining the meaning of the term "essential functions").

116. Arline, 480 U.S. at 287. When making this determination an employer is free to consider the fact that "an individual is not otherwise qualified if he poses a significant risk to the health or safety of others by virtue of the disability that cannot be eliminated by reasonable accommodation." Doe v. University of Md. Med. Sys., 50 F.3d 1261, 1265 (4th Cir. 1995) (a neurosurgery resident with HIV posed a significant risk to patients that could not be eliminated with reasonable accommodation; therefore, he was not otherwise qualified) (citing 29 U.S.C.A. §§ 706(8)(D) (West Supp. 1994) & 42 U.S.C.A. §§ 12111(3), 12113(a)-(b) (West Supp. 1994)).
answer two questions: (1) "whether . . . [the disabled individual] could 'perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue,' and (2) if not, whether 'any reasonable accommodation by the employer would enable [the disabled individual] to perform those functions.'"

Moreover, "an individualized inquiry" is required in order to determine whether a person is otherwise qualified for the position in question. When conducting an individualized inquiry, consideration should be given to the following factors: (1) the nature of the risk posed by the disability; (2) the duration of the risk; (3) the severity of the risk; and (4) the probability of the risk or injury actually occurring. Because an individualized inquiry is required, "blanket exclusions" automatically barring the employment or retention of individuals with certain physical or mental conditions are frequently subject to attack.


118. See Arline, 480 U.S. at 287. See also William U. McCormack, Grooming and Weight Standards for Law Enforcement, FBI L. ENFORCEMENT BULL., July 1994, at 27, 30 (explaining the physical requirements needed to be a law enforcement officer). See generally Chris Graves, Officer Down, STAR-TRIB., Mar. 19, 1997, at A1 (reporting that a Desert Storm veteran with a prosthetic leg graduated from the Arizona police academy and now serves as an active member of the police department in Mesa, Arizona).

119. See Arline, 480 U.S. at 288. See generally Chiari v. City of League City, 920 F.2d 311, 317 (5th Cir. 1991) (explaining that a significant risk of personal injury can disqualify a handicapped individual from a job if the employer cannot eliminate the risk . . . [and] under section 504, an individual is not qualified for a job if there is a genuine substantial risk that he or she could be injured or could injure others’); Hogarth v. Thornburgh, 833 F. Supp. 1077, 1086 (S.D.N.Y. 1993) (“In order to evaluate the qualification of a handicapped individual under the [Rehabilitation] Act, it is . . . necessary to analyze two factors: the consequences of a failure to perform and the likelihood of such a failure being caused by the handicapping condition.”).

120. See, e.g., Stillwell v. Kansas City, Mo. Bd. of Police Comm’rs, 872 F. Supp. 682, 687 (W.D. Mo. 1995) (declaring that a “blanket exclusion of all one-handed license applicants who are seeking authority to carry firearms as security guards, because of an unfounded fear that they are dangerous and more likely to use deadly force clearly runs afoul of the individualized assessment required by the ADA”); Bombrs v. City of Toledo, 849 F. Supp. 1210, 1219-21 (N.D. Ohio 1993) (holding “the City of Toledo’s blanket disqualification of individuals with insulin-dependent diabetes as candidates for police officer violates the Rehabilitation Act of 1973 . . . [and] the Americans with Disabilities Act,” while also speculating that Davis v. Meese might no longer be good law); Davis v. Meese, 692 F. Supp. 505, 520 (E.D. Pa. 1988) (considering the unique nature of employment as a FBI agent, the court held that “the preclusion of insulin-dependent diabetics from employment as special
Clearly, all law enforcement agencies should be very cautious before dismissing any applicant or employee with a disability. To be exact, a law enforcement agency should not even consider dismissing or removing an individual from consideration until after having seriously considered whether reasonable accommodation would be possible and determining whether the individual's disability actually would pose a "direct threat" or interfere with performance of the essential functions of the position. Prior to conducting this sort of individualized assessment, any adverse employment decision would be premature and in violation of federal law.

B. The "Essential Functions" of Police Officers, Sheriffs' Deputies, and Federal Agents

When determining whether someone is otherwise qualified to serve as a law enforcement officer, the employing agency must evaluate the person's abilities, or lack thereof, compared to the essential functions of the position. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

1. The duration of the risk;
2. The nature and severity of the potential harm;
3. The likelihood that the potential harm will occur; and
4. The imminence of the potential harm.

29 C.F.R. § 1630.2(r); see EEOC v. AIC Security Investigations, Ltd., 55 F.3d 1276, 1283 (7th Cir. 1995) ("It would seem that a requirement that employees not pose a significant safety threat in the workplace would obviously be consistent with business necessity."); James G. Frierson, An Analysis of ADA Provisions on Denying Employment Because of a Risk of Future Injury, 17 EMPLOYEE REL. L.J. 603 (1992) (discussing risk of future injury in regards to the ADA and Rehabilitation Act).
sential functions he or she will be called upon to perform. In order to make this comparison, therefore, it is vital to identify what truly are the essential functions of a police officer, sheriff’s deputy, or federal agent. According to the ADA, “consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.” As a result, it would be both logical and prudent for law enforcement agencies to take a proactive approach towards expressly defining the duties and responsibilities of its personnel, before a dispute ever arises.

Several courts have tackled the issue of trying to define the essential functions of a police officer. For example, one such court has explained,

122. See generally Martin Schiff, The Age Discrimination in Employment Act: Whither the Bona Fide Occupational Qualification and Law Enforcement Exemptions, 67 St. John’s L. Rev. 13, 16 (1993) (“[T]here is not even a legal consensus as to what constitutes the precise tasks that a police officer must perform. . . .”); Flynn McRoberts, Park Ridge Police May Fire Partly Deaf Officer, Chi. Trib., Oct. 6, 1993, at NW1 (quoting Georgetown University Law Professor Chai Feldblum: “Law enforcement will be an important testing ground under the ADA because they have such strict standards that may not be reflective of the actual requirements of the job.”).

In March 1993, representatives from the Major City Chiefs Association, the National Executive Institute Associates, and the FBI identified what they believed to be the essential functions of the position of police officer:

1. Make Custodial Arrests;
2. Drive, Operate, and Maintain Departmental Vehicles;
3. Provide Care and Treatment to Citizens and Prisoners;
4. Communicate Orally or in Writing;
5. Conduct Investigations;
6. Use Force;
7. Perform Patrol Functions;
8. Perform Rescue Operations and Render Citizen Assistance;
9. Conduct Searches and Seizures;


Police officers must be able to take action to uphold their sworn duty to preserve the peace, protect life and property, and prevent crime. The infrequency with which a particular officer fires a gun or makes an arrest in furtherance of her duty does not eliminate the need to be capable of performing that duty. Thus, ... the ability to fire a weapon and to make a forceful arrest is an essential job function.\footnote{124}

There is little question that many courts believe an officer must possess the ability to make a forceful arrest, as well as the capability to effectively use a firearm.\footnote{125} Because of the need for both firearm proficiency and safety, even the ability to shoot in the Weaver stance (a two-handed shooting position) has been held to be "an essential function for police officers" in one state.\footnote{126} Besides being able to make arrests and use a firearm, one court has noted that the abilities to "patrol by foot or automobile; apprehend violators; direct traffic; operate tractors, towing equipment, and emergency equipment; enforce traffic regulations; and maintain records ... clearly strike at the heart of a police officer's job."\footnote{127} Just as important as any of the essential functions already mentioned, police officers also should be both honest and law abiding.\footnote{128}

\footnote{124. Coski v. City of Denver, 795 P.2d 1364, 1367 (Colo. Ct. App. 1990); see also Blissitt v. City of Chicago, No. CIV.86-9584, 1990 WL 71315, at *8 (N.D. Ill. May 1, 1990) ("The core duties of a sworn officer on the Chicago Police Department are to preserve order, peace, and quiet and enforce the laws and ordinances throughout the City. ... For that reason police officers are trained in defense tactics, effecting arrests, and using deadly force and are authorized to carry weapons.").}

\footnote{125. See, e.g., Fussell v. Georgia Ports Auth., 906 F. Supp. 1561, 1572 (S.D. Ga. 1995) (concluding "that being able to shoot straight is a bona fide essential function of ... employment as a port authority police officer"); Dawn V. Martin, The Americans with Disabilities Act—Introductory Comments, 8 J.L. & HEALTH 1, 11 n.53 (1993-94) (stating that an "ability to affect forceful arrests is a national standard for police officers").}


\footnote{128. See generally Hartman v. City of Petaluma, 841 F. Supp. 946 (N.D. Cal. 1994) (holding that refusing to hire an officer due to his lack of honesty did not violate the ADA or public policy); Vance McLaughlin & Robert L. Bing, III, Law Enforcement Personnel Selection: A Commentary, 15 J. POLICE SCI. & ADMIN. 271, 271 (1987) ("Individuals becoming police officers must have high ethical standards . . . ."); Daniel J. Schofield, Employment Information Release Agreements, FBI L. ENFORCEMENT BULL., Dec. 1996, at 19, 19 ("Law enforcement organizations need to hire employees who possess the highest degree of integrity, character, and profes-
Compared to police officers, sheriffs' deputies are much more likely to work for a department that is responsible for maintaining a jail.\textsuperscript{129} Additionally, sheriffs’ deputies are more likely to provide law-enforcement-related services to the courts such as providing security and serving civil summonses.\textsuperscript{130} In most cases, however, a sheriff’s department fulfills or supplements the functions of a traditional police department.\textsuperscript{131} For instance, approximately 88\% of all sheriffs’ departments provide routine patrol services in their jurisdiction, while an estimated 77\% also enforce traffic laws.\textsuperscript{132} Furthermore, it is not atypical for sheriffs’ departments to have primary responsibility in their jurisdictions for investigating violent crimes, 90\%; offenses against property, 92\%; arson, 88\%; and drug related crimes, 78\%.\textsuperscript{133} For these reasons, the essential functions of a police officer and sheriff’s deputy will be relatively comparable.

Some disagreement has arisen over the issue of whether all police officer or deputy sheriff positions within a department consist of the same essential functions. This issue commonly occurs when an officer or deputy is not fully capable of performing the more rigorous duties associated with patrol duty, while he or she is capable of performing the less physically demanding duties of either clerical, administrative, or supervisory work. Nationwide 63\% of uniformed local police officers and 39\% of sheriffs’ department sworn personnel regularly handle calls for service.\textsuperscript{134} Evi-
dently, a significant percentage of police officers and sheriffs' deputies are not assigned to traditional patrol duty. Nevertheless, some courts have taken the position that all sworn personnel must be equally capable of serving in any position within a police or sheriff's department, while other courts have been reluctant to adopt this position.

The essential functions of a federal agent generally are considered to be somewhat more expansive than the essential functions of the average police officer or sheriff's deputy. At the same time, both the ability to make a forceful arrest and use a firearm, as well the expectation of honesty, are going to apply equally to the position of a federal agent. Compared to most police officers or sheriffs' deputies, federal agents typically have a higher probability of dealing with the most sensitive forms of information (for

---

135. See Simon v. Saint Louis County, 735 F.2d 1082 (8th Cir. 1984) (affirming district court's judgment that the ability to make forceful arrests and transfer among all positions was necessary to the job of a police officer); Champ v. Baltimore County, 884 F. Supp. 991, 998 (D. Md. 1995) (giving deference to the employer's position, the court recognized that "the ability to make a forcible arrest, drive a vehicle under emergency conditions and qualify with a weapon are essential functions that all Baltimore County police officers must be able to perform"), aff'd, 91 F.3d 129 (4th Cir. 1996).

136. See, e.g., Vazquez v. Bedsole, 888 F. Supp. 727, 731 (E.D.N.C. 1995) (denying a defense motion for summary judgment after considering a disabled deputy sheriff's argument that she was qualified for various deputy sheriff positions that did not require her to carry a weapon, apprehend fugitives, or drive a vehicle); Dorris v. City of Kentwood, No. CIV.1:94-249, 1994 WL 762219, at *4 (W.D. Mich. Oct. 4, 1994) (denying a motion for summary judgment because a genuine issue of fact existed as to what were the essential functions of a police officer teaching Drug Abuse Resistance Education (D.A.R.E)); Kuntz v. City of New Haven, No. CIV.N-90-480-JGM, 1993 WL 276945, at *12 (D. Conn. Mar. 3, 1993) (finding that the essential functions of a police lieutenant are "overwhelmingly, if not exclusively, supervisory in nature"), aff'd, 29 F.3d 622 (2d Cir.), cert. denied, 115 S. Ct. 667 (1994). See generally Sally Gross-Farina, Fit for Duty? Cops, Chiropractice, and Another Chance for Healing, 47 U. MIAMI L. REV. 1079, 1129 (1993) (stating that "all but the very smallest police departments have senior officers who have not seen the inside of a patrol car for years"); Jaret Seiberg, Failure to Promote Officer Violates Discrimination Acts, CONN. L. TRIB., July 18, 1994, at 5 (describing controversy over the essential functions of a police lieutenant and the New Haven Police Department's unwillingness to promote a disabled police sergeant); Disability Discrimination—Definition of Disability, MICH. LAW WKLY, July 17, 1995, at 9 (discussing how a D.A.R.E. officer was fired because he could not perform the duties of patrol officer); Handicapped Discrimination—Essential Job Qualifications, MICH. LAW WKLY, Oct. 24, 1994, at 5 (explaining that a summary judgment motion was denied due to a dispute over essential functions of position officer was actually performing).
example, information vital to national defense and security). As a result, federal agents are almost expected to be above reproach. Because of such an expectation, federal agents also need to be highly stable individuals who are capable of adhering to the highest standards of personal and professional conduct. Moreover, all federal agents and special agent candidates must have a "personal and professional history [which] affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion." The cumulative presence of these qualities is directly related to eligibility for access to classified information, which is a prerequisite for service as a federal agent.

The United States District Court for the Eastern District of Pennsylvania has provided one of the most thorough, if not the most thorough, judicial written accounts of the hiring process and employment criteria used by the FBI. Most importantly, the court summarized the unique duties of an FBI special agent:

The special agent is the principal investigative official of the FBI. The work of the special agent involves investigating violations of federal criminal law, including reacting to crimes, making arrests, collecting evidence of crimes, conducting surveillances, serving warrants, sub-

---

137. See RONALD KESSLER, THE FBI 92 (1993) (explaining that the FBI has approximately 20% of its agents—some 2600—assigned to foreign counterintelligence).

138. See Hogarth v. Thornburgh, 833 F. Supp. 1077, 1082 (1993) ("In determining the qualification of an applicant for [a top secret security] clearance, the FBI considers such characteristics as reliability, dependability, and stability.").


140. See id. Eligibility for access to classified information is synonymous with holding a security clearance.


poenas and investigative demands, and testifying in federal judicial proceedings. Special agents also have primary responsibility for conducting counterintelligence activities within the United States and its territories. . . . Many of the tasks required of the special agent involve periods of strenuous physical exertion and physical and mental stress. . . . Special agents may be called upon, either singlehandedly, or in the company of others, to apprehend suspects, many of whom are armed and dangerous and have records of violent criminal activity.143

The court also added:

Frequently, . . . a special agent may be given an assignment in a “reactive situation,” where preplanning is not possible either as to the probable length of time of the assignment or as to the physical requirements and potential hazards of the assignment. . . . Special agents are trained and required to be able to perform all tasks of the job at all times. . . . Assignments do include occasions when regular meals are substantially delayed or omitted.144

Although the primary duties and responsibilities of an FBI agent vary somewhat from those of other federal law enforcement agents, the essential functions of an FBI agent are relatively comparable to the essential functions of agents employed by the DEA, the Department of Treasury, or any other federal law enforcement agency.145

Only after considering the essential functions of the law enforcement position in dispute can a valid determination be made as to whether an individual with a disability is otherwise qualified for the position. While it is true that the essential functions of a

143. Id. at 510; see also Butler v. Thornburgh, 900 F.2d 871, 872 (5th Cir. 1990) (explaining that a special agent is “required to conduct surveillances, undertake investigations, testify in federal court, make arrests, collect evidence, conduct counterintelligence activities, carry and use a firearm, use physical force and drive an automobile”). See generally FEDERAL BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, FACE UNIQUE CHALLENGES WITH THE FBI, 9 (1994) (“Service with the FBI is not a ‘nine-to-five’ career.”).
144. Davis, 692 F. Supp. at 512.
position can vary from agency to agency, department to department, and city to city, it is reasonable to predict that many trial courts will be deferential to those courts that already have confronted this issue.\textsuperscript{146}

C. Who Is Not “Otherwise Qualified”

Frequently the most basic issue in cases involving a disabled law enforcement officer or applicant is whether he or she is otherwise qualified for the position. It is appropriate to conclude that a person is not qualified only after considering the essential functions of the position, making an individualized assessment, and considering whether reasonable accommodation is possible. While reviewing the employment decisions of law enforcement agencies for possible violations of the ADA or Rehabilitation Act, several courts have confronted the issue of whether a disabled individual was otherwise qualified to serve as a law enforcement officer.

A court commonly will hold that an individual is not otherwise qualified if the court believes the person would pose a danger to him or herself, other officers, or the community. For example, one court noted, “A municipality must protect its citizens from persons ‘suffering from bi-polar depression, alcoholism, and post-traumatic stress syndrome’; it does not send them out to protect other citizens.”\textsuperscript{147} Likewise, concern for public safety motivated the United States Marshals Service to terminate a deputy marshal who suffered from a delusional paranoid personality disorder.\textsuperscript{148}

\textsuperscript{146} See Elizabeth Burbeck & Adrian Furnham, \textit{Police Officer Selection: A Critical Review of the Literature}, 13 J. POLICE SCI. & ADMIN. 58, 63 (1985) (“In a country the size of the United States, with a plethora of police forces ranging from rural sheriffs’ offices of one or two men to huge urban forces like New York and Los Angeles, law enforcers in different forces can hardly be said to be doing the same job . . .”); McLaughlin & Bing, supra note 128, at 272 (“Every jurisdiction employing law enforcement officers has different tasks, rules, and client needs.”).

\textsuperscript{147} Graehling v. Village of Lombard, 58 F.3d 295, 298 (7th Cir. 1995). Regardless of whether the officer’s alleged forced-resignation occurred before or after the ADA was effective, the court still felt that “he had no business wearing a police uniform.” Id. “An officer who has beaten a prisoner, destroyed gas stations during walking blackouts, and believes himself mentally incompetent to make important decisions is not a fit police officer.” Id.

\textsuperscript{148} See Lassiter, 1996 WL 281933, at *1. Before his termination, the plaintiff had served as a deputy marshal for 22 years. See id. In 1990 the plaintiff began to believe that his neighbors conspired to burglarize his home. See id. He eventually implemented a plan whereby he hid in his home, armed himself with automatic weapons, and refused to flush his toilets out of fear of alerting the conspirators to his presence. See id. Ultimately, he was removed from his home after neighbors alleged
court held that “a police officer who cannot fire a weapon or make a forceful arrest is a danger to herself, other officers, and the public.”

While public safety is more than a legitimate concern, it needs to be stressed that the disabled individual must pose a significant risk of substantial harm before he or she is deemed not otherwise qualified. According to the Judiciary Committee of the United States House of Representatives, “A plaintiff is not required to prove that he or she poses no risk.” This same congressional

that he was threatening to kill people. See id. at *2. Because of the plaintiff’s condition, a doctor recommended that the deputy no longer be permitted to carry a firearm. See id.


150. See supra notes 116, 119, 121; see also Robert B. Fitzpatrick, Employers’ Screening Procedures Under the Americans with Disabilities Act: What’s Legal? What’s Illegal? What’s Debatable?, WL C780 ALI-ABA 291, 318 (1993) (explaining that before rejecting an individual as a “direct threat,” an employer “must be prepared to show a significant current risk of substantial harm (not a speculative or remote risk)’’); Jeffrey Higginbotham, The Americans with Disabilities Act, FBI L. ENFORCEMENT BULL., Aug. 1991, at 25, 30 (stating that “generalized fears, remote possibilities, or only slightly enhanced threats to safety or health are insufficient reasons for denying employment’’); Frank C. Morris, Jr., Americans with Disabilities Act: Medical Examinations and Inquiries, WL Q217 ALI-ABA 283, 291 (1992) (explaining that an employer may exclude an individual with a disability if the individual poses “a significant, current risk of substantial harm to health or safety’’); Ellen M. Saideman, The ADA As a Tool for Advocacy: A Strategy for Fighting Employment Discrimination Against People with Disabilities, 8 J. L. & HEALTH 47, 64-69 (1993-94) (discussing the issues of threat to self and threat to others); Mary Anne Sedey, The Threat to Safety Defense Under the Americans with Disabilities Act, 39 FED. B. NEWS & J. 96, 97 (1992) (“Employment can be denied on the basis of possible future injury only where there is a showing of a reasonable probability of substantial harm.”); Robert John Maselek, Jr., Note, Employee Medical Screening Under the Americans with Disabilities Act of 1990, 26 SUFFOLK U. L. REV. 653, 684-85 (1992) (addressing safety concerns and direct threat).

Despite the weight of authority to the contrary, the DEA apparently relies upon a significantly more exclusionary standard when asking its contract physicians to medically clear applicants for the DEA training program. The current post-medical examination, medical certification form provided to DEA contract physicians states the following: “If there are any abnormalities . . . or other medical conditions that would pose an unusual risk to the individual or others in performing such training, please note these findings . . . so that training can be rescheduled when the medical condition resolves or stabilizes.” Letter from Carolyn Cerini, Chief of Health Services Unit, Drug Enforcement Administration, U.S. Dep’t of Justice, to DEA Medical Providers (a copy of this letter was supplied on Nov. 18, 1996, in response to a Freedom of Information Act (FOIA) request made by Robert S. Morgan) (on file with Loyola of Los Angeles Law Review).

committee also explained, “As stated in Chalk v. United States District Court, ‘[l]ittle in science can be proved with complete certainty, and section 504 does not require such a test. As authoritatively construed by the Supreme Court, section 504 allows the exclusion of an employee only if there is a significant risk . . . to others.’” At the very least, a legitimate probability of the risk materializing must be found to exist prior to declaring an officer or applicant not otherwise qualified.

Partially based on public safety concerns, numerous courts have held that particular individuals suffering from alcoholism are not otherwise qualified to serve as law enforcement officers. It is

445, 469.

152. Id. at 46 (quoting Chalk v. United States District Court, 840 F.2d 701, 707 (9th Cir. 1988) (citing School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n.16 (1987))). The Judiciary Committee also declared, “The decision to exclude cannot be based on merely ‘an elevated risk of injury.’” Id. (quoting Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985)).

153. See supra notes 121 and 150. One court has relied upon a significantly lower standard. See Mahoney v. Ortiz, 645 F. Supp. 22 (S.D.N.Y. 1986). When upholding the New York Police Department’s policy of automatically disqualifying any applicant who had ever suffered two or more dislocations of the same shoulder, the court stated, “since there is a chance of a new dislocation, and its consequences could be unacceptably costly, the regulation is reasonable in excluding the apparently few who statistically have this risk from such employment.” Id. at 24 (emphasis added). Expert testimony indicated that the plaintiff had a 10% to 15% chance of dislocating his shoulder again. See id.

154. See, e.g., Labrucherie v. Regents of Univ. of Cal., No. CIV.94-1533-SC, 1995 WL 523905, at *5 (N.D. Cal. Aug. 30, 1995) (holding that an alcoholic officer, who was sentenced to 120 days in jail following his third D.U.I. arrest, was not fired because of his disability but because of his criminal conduct and his inability to report for work while incarcerated); Rodgers v. County of Yolo-Sheriff’s Dep’t, 889 F. Supp. 1284, 1291 (E.D. Cal. 1995) (explaining that an animal control employee of a sheriff’s department was not protected under the Rehabilitation Act because her consumption of alcohol impaired her ability to safely carry a weapon and drive a vehicle); Huff v. Israel, 573 F. Supp. 107, 110 (M.D. Ga. 1983) (accepting defendant’s argument that “plaintiff would be unable to function effectively in his position as Compliance Officer . . . when he, himself, could not comply with the law, as evidenced by his three convictions for D.U.I.”), vacated, 732 F.2d 943 (11th Cir. 1984). But cf. Dimonda v. New York City Police Dep’t, No. CIV.94-0840-JGK, 1996 WL 194325 (S.D.N.Y. Apr. 22, 1996) (denying defendant’s summary judgment motion because there were unresolved factual issues regarding whether a demoted alcoholic detective, who got drunk during surveillance at a bar and discharged his firearm into a police station wall, was otherwise qualified to remain a detective).

At the time the ADA was adopted, Congress included specific provisions pertaining to alcoholics and illegal drug users:

[1]The term “qualified individual with a disability” shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use . . . [and the employer] may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or
very important to note, however, that no court has based its ruling simply on an individual’s status of being an alcoholic. Instead, each court has focused on the fact that the respective individual was engaging in illegal, irresponsible, or unsafe behavior. For instance, Butler v. Thornburgh155 involved the termination of an alcoholic FBI agent after he had engaged in several separate acts of misconduct while intoxicated: picking a fight with “a crippled gas station attendant”; provoking a fight and physically injuring a security guard; driving an FBI vehicle into a wall; and forgetting where he left his Bureau vehicle.156 Without much surprise, the United States Fifth Circuit Court of Appeals concluded that the agent had shown himself to be incapable of safely performing his duties.157 In Little v. Federal Bureau of Investigation158 a district court reviewed the termination of an FBI special agent who had been involved in five separate alcohol-related incidents, including one occasion where he had been drunk on duty.159 While acknowledging that an intoxicated special agent would not be otherwise qualified to fulfill his duties, the court added, “[I]t is clear that an employer subject to the Rehabilitation Act must be permitted to terminate its employee on account of egregious misconduct, irrespective of whether the employee is handicapped.”160

In a third case an alcoholic police officer was terminated after seven alcohol-related incidents—which included fighting at a bar, fighting at a hotel, and committing a hit-and-run accident.161 Tak-

---

155. 900 F.2d 871 (5th Cir. 1990).
156. Id. at 872.
157. See id. at 876. At the district court level, the trial judge wrote, “The [Rehabilitation] Act does not create a duty to accommodate an alcoholic [FBI special agent] who is not ‘otherwise qualified,’ i.e. commits an act which standing alone disqualifies him from service and is not entirely a manifestation of alcohol abuse.” Butler v. Meese, No. CIV.88-2924, 1989 WL 38723, at *1 (E.D. La. Apr. 19, 1989), aff’d sub nom. Butler v. Thornburgh, 900 F.2d 871 (5th Cir. 1990), and cert. denied, 498 U.S. 998 (1990).
158. 1 F.3d 255 (4th Cir. 1993)
160. Little, 1 F.3d at 259.
ing note of the employing police department’s position that
"Plaintiff’s off-duty conduct reflected poorly upon the Plaintiff as
a citizen and as a police officer, and poorly upon the Gwinnett
County Police Department," the court held:

Requiring a police officer to abide by the law, both on
and off-duty, is not discrimination solely on the basis of a
handicap and there is no cause of action, under the Re-
habilitation Act, for the Plaintiff to pursue. . . . Under the
ADA the employer is allowed to terminate and not ac-
commodate an alcoholic employee, if the employee does
not perform to the same standard as all other employees,
even if the behavior is related to the employee’s alcohol-
ism.163

Accordingly, no violation of federal law occurs when a law en-
forcement agency either terminates or refuses to hire an alcoholic
who engages in illegal or otherwise bad conduct. 164

Similarly, any individual who engages in the illegal use of
drugs is not otherwise qualified to serve as a law enforcement of-

162. Id. at 1569.
163. Id. at 1571-72.
164. See generally Maddox v. University of Tenn., 62 F.3d 843, 848 (6th Cir. 1995)
(“Employers subject to the Rehabilitation Act and ADA must be permitted to take
appropriate action with respect to an employee on account of egregious or criminal
conduct, regardless of whether the employee is disabled.”); Adamczyk v. Chief, Balt-
29, 1997) (“A police department like the Baltimore County Police Department
(BCPD) must be allowed to legally demote even police officers suffering from alco-
holism who egregiously offend female officers and disregard rules and standards
which Baltimore County has established to regulate the conduct of its police force.”);
was not terminated because he might have been an alcoholic; instead, he was termi-
nated because he drove the wrong direction down an interstate highway in a gov-
ernment vehicle, he killed a two-year-old girl, and he had a 0.207% blood-alcohol
content at the time); Shields v. Shreveport, 579 So. 2d 961 (La. 1991) (noting that the
Rehabilitation Act does not preclude the termination of two police officers for
drinking in uniform and engaging in misconduct); Antoine v. Department of Pub.
Safety & Corrections, 681 So. 2d 1282, 1286 (La. Ct. App. 1996) (explaining that the
ADA does not prohibit the termination of a state police sergeant who was found to
have a 0.191% blood-alcohol concentration while on traffic enforcement duty, in uni-
form, and operating a state police vehicle); Lavery v. Department of Highway
Safety and Motor Vehicles, 523 So. 2d 696 (Fla. Dist. Ct. App. 1988) (holding that
the termination of a Florida highway patrol trooper for alcohol and cocaine abuse,
along with poor performance did not violate the Rehabilitation Act).
165. See statutes cited supra note 154; see, e.g., Baustian v. Louisiana, 910 F. Supp.
274 (E.D. La. 1996) (concluding that a Department of Public Safety and Corrections
officer, whose stress and depression were so severe that they led him to the use of drugs, is not otherwise qualified under the [Rehabilitation] Act.\textsuperscript{166} The United States Court of Appeals for the Third Circuit also confronted this issue in a case involving a Philadelphia police officer who both tested positive for illegal drug use and "had been found to be off his beat in the company of a fellow officer, who was alleged to be selling drugs."\textsuperscript{167} After considering the argument "that the very nature of the job requires that a police officer not engage in unlawful behavior because it is a police officer's duty to enforce the laws,"\textsuperscript{168} the court held as follows:

We conclude that accommodating a drug user within the ranks of the police department would constitute a "substantial modification" of the essential functions of the police department and would cast doubt upon the integrity of the police force. No rehabilitation program can alter the fact that a police officer violates the laws he is sworn to enforce by the very act of using illegal drugs. Because a police department is justified in concluding that it cannot properly accommodate a user of illegal drugs within its ranks, we conclude that . . . [plaintiff] is not otherwise qualified for the position.\textsuperscript{169}

Unlike the antidiscrimination protection afforded to those alcoholics who are both qualified and able to conform to the employer's standards of conduct, an illegal drug user is entitled to no such protection because he or she is neither "a handicapped individual," nor "otherwise qualified."\textsuperscript{170}

At the same time, it seems more than reasonable to speculate that a law enforcement agency could refuse to employ a former drug addict.\textsuperscript{171} Although a rehabilitated drug addict might demon-

\textsuperscript{167.} Copeland v. Philadelphia Police Dep't, 840 F.2d 1139, 1142 (3d Cir. 1988).\textit{See generally} Paul Reidinger, Trends in the Law; Take a Toke, Take a Hike, A.B.A. J., June 1, 1988, at 96, 98 (reporting on the Copeland decision).
\textsuperscript{168.} \textit{Copeland}, 840 F.2d at 1149.
\textsuperscript{169.} \textit{Id.}
\textsuperscript{170.} \textit{See} Heron v. McGuire, 803 F.2d 67, 69 (2d Cir. 1986) (citing Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979), and holding that because a terminated police officer addicted to heroin does not even qualify as a "handicapped individual," there is no need to consider whether he is "otherwise qualified").
\textsuperscript{171.} \textit{See} Brent LaLonde & Robert Ruth, Are Police Rules Substandard?, COLUMBUS DISPATCH, Dec. 4, 1994, at 1A (describing how "[l]aw enforcement offi-
strate that he or she is entitled to the protections of the ADA and Rehabilitation Act, law enforcement agencies seemingly would have little trouble justifying the exclusion of this sort of individual from a law enforcement career. Arguably, the very nature of this type of disability would render the individual incapable of performing the essential functions of a police officer or federal agent. Specifically, a law enforcement agency could argue that a past record of drug addiction should be disqualifying because of any of the following reasons: the individual's previous record of repeated illegal behavior directly conflicts with the very nature of law enforcement, various risks and temptations could result from permitting the individual to investigate drug offenses, and the credibility and impeachment problems that would arise whenever the individual might testify in a criminal proceeding. In most cases it seems very unlikely that a court would disagree with the refusal of a law enforcement agency to employ or accommodate a rehabilitated drug addict.


174. See Higginbotham, supra note 150, at 25, 27.

175. See David K. Fram, ADA Rules for Drug and Alcohol Abuse, PRAC. LAW., Oct. 1993, at 35, 39; see also EEOC TECHNICAL ASSISTANCE MANUAL, supra note 13, § 8.7, VIII-5 (speculating that a history of illegal drug use would undermine the credibility of the officer as a prosecution witness).

176. But see EEOC TECHNICAL ASSISTANCE MANUAL, supra note 13, § 8.7, VIII-6 (stating that the automatic exclusion of a person with a history of illegal drug use might not be justified if the individual had “an extensive period of successful performance as a police officer since the time of the drug use”); id. (explaining possible reasonable accommodations for an individual with a history of illegal drug use might include requiring periodic drug tests).

Courts also have ruled that dishonest individuals may be precluded from law enforcement employment regardless of disability status. In *Hartman v. City of Petaluma*\(^{177}\) a plaintiff filed suit alleging that he was not hired as a police officer because he was a rehabilitated drug addict.\(^{178}\) Although the court noted that there was little evidence that plaintiff was ever a drug addict, the court otherwise gave little attention to the issue of whether the plaintiff was actually disabled.\(^{179}\) Instead, the court concluded that the plaintiff was not hired for being less than honest during the hiring process.\(^{180}\) In particular, the court pointed out how the plaintiff admitted that he had used drugs "plus or minus 100 times" only after a polygraph test indicated that his original answer of approximately ten times was false.\(^{181}\) In a somewhat similar case, a dismissed agent with the Naval Investigative Service had "intentionally misrepresented his employment application by denying in his pre-employment physical that he suffered from epilepsy and seizures."\(^{182}\) Recognizing the fact that the agent could have been terminated for his dishonesty alone, the court ultimately determined that "the government is not obligated to provide a reasonable accommodation by reason of the plaintiff's misrepresentation."\(^{183}\) Considering the holdings of these two cases, courts appear less than eager to address a claim of disability discrimination in cases where the officer or applicant was legitimately rejected on

had used marijuana almost daily from 1969 to 1977, ... speed 50 to 70 times, LSD 10 times, hash 50 to 100 times, downers 5 times, and alcohol frequently." *Id.* Since 1977, however, he allegedly had been drug free for six years. *See id.* at *2. In response to a defense motion for summary judgment, the trial court concluded that the defendant failed to show that the applicant was unqualified for the position. *See id.* Additionally, the court held that the issue of whether the applicant's disability would "prevent him from performing the job... must be resolved at trial." *Id.*

177. 841 F. Supp. 946 (N.D. Cal. 1994).
178. *See id.* at 947. Incidentally, the plaintiff was John Hartman, a former member of the Doobie Brothers rock band. *See Rock Drummer Loses His Bid to Become a Police Officer, S.F. EXAMINER, Jan. 12, 1994, at A-6* (describing Hartman's failed lawsuit); *Jim Doyle, Ex-Musician’s Bid to Become Cop Is Rejected, S.F. CHRON., Jan. 12, 1994, at A15* (incorrectly stating that plaintiff's "hopes were dashed this week—not because he had used too many drugs—but because he apparently had not used enough").
180. *See id.* at 950.
181. *See id* at 950 n.1.
other grounds.\textsuperscript{184}

Also, any federal law enforcement applicant unable to obtain a security clearance almost certainly will be classified as not otherwise qualified for employment as a federal agent.\textsuperscript{185} Likewise, any current federal agent, who is unable to maintain a security clearance, most likely should anticipate the end of his or her career as a federal agent.\textsuperscript{186} Considering the vital importance of holding a security clearance, the ability to access classified information and the underlying eligibility determination arguably are two of the most significant issues in terms of securing and maintaining federal law enforcement employment.

Currently, Executive Order No. 12,968 clearly specifies that "[t]he United States Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified information."\textsuperscript{187} Despite this executive policy, any individual with a disability who is denied a security clearance will be in a highly undesirable position, especially if the person hopes to challenge the resulting determination that he or she no longer is otherwise qualified for employment as a federal agent.

In the context of federal law enforcement, a unique predicament has been created in terms of the antidiscrimination mandates of the Rehabilitation Act, Executive Order No. 12,968, and the requirement that federal agents hold a security clearance. This predicament results in part from the fact that Executive Order No. 12,968 expressly declined to "create any right to administrative or

\textsuperscript{184} But cf. Kraft v. Police Comm'r, 571 N.E.2d 380 (Mass. 1991) (relying on state law and holding that a Boston police commissioner could not terminate an officer for falsely answering two improper questions about his past medical history).

\textsuperscript{185} See supra note 141; cf. McCoy v. Pennsylvania Power & Light Co., 933 F. Supp. 438, 443-44 (M.D. Pa. 1996) (holding that an alcoholic plaintiff is not a qualified individual with a disability under the ADA because his disability precludes him from retaining the Department of Energy security clearance required to serve as a nuclear plant operator); McDaniel v. AlliedSignal, Inc., 896 F. Supp. 1482, 1491 (W.D. Mo. 1995) (determining that the plaintiff was not a qualified individual within the meaning of the ADA because his alcoholism and depression precluded him from holding the security clearance needed to work for a government contractor producing components for nuclear weapons).

\textsuperscript{186} See supra note 141.

\textsuperscript{187} Exec. Order No. 12,968, supra note 139, at pt. 3, § 3.1(c). Additionally, "[n]o negative inference concerning the standards in this section [for access to classified information] may be raised solely on the basis of mental health counseling ... [but] mental health may be considered where it directly relates to those standards." \textit{Id.} § 3.1(e).
judicial review” for individuals denied a security clearance. This predicament also results from the clearly evident unwillingness of the federal judiciary to review either the denial or revocation of a federal security clearance.

Following the United States Supreme Court case of Department of Navy v. Egan, federal courts consistently have held that security clearance determinations are not subject to review. In Egan, the Supreme Court stated, “It should be obvious that no one has a ‘right’ to a security clearance.” Additionally, the Court explained:

The grant of a clearance requires an affirmative act of discretion on the part of the granting official. The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of the national security.’... A clearance does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for

---

188. Id. at pt. 7, § 7.2(e). Whenever there is a denial or revocation of a security clearance, both applicants and employees must have the opportunity to receive a written explanation, a reasonable opportunity to reply, and an opportunity to “appeal” the decision to an internal agency panel. See id. at pt. 5, § 5.2(a)(1)-(7). Comparatively, it probably is more important to note the absence of any enforcement mechanisms to ensure that these opportunities actually occur, as well as any safeguards to guarantee a good faith, intra-agency, appellate review. See id.

189. See, e.g., Department of Navy v. Egan, 484 U.S. 518 (1988) (holding that the Merit Systems Protection Board had no authority to review an executive decision to revoke a security clearance); Becerra v. Dalton, 94 F.3d 145, 148 (4th Cir. 1996) (agreeing that a district court lacked subject matter jurisdiction to review the merits of the Navy's decision to revoke the plaintiff's security clearance); Brazil v. United States Dep't of Navy, 66 F.3d 193, 195 (9th Cir. 1995) (concluding that a federal court lacks jurisdiction to conduct a review of the Executive's decision to revoke a security clearance), cert. denied, 116 S. Ct. 1317 (1996).


191. See supra note 189. Although the Egan opinion only involved the authority of the Merit Systems Protection Board to substantively review the underlying decision to deny or revoke a security clearance, the same reasoning has been extended to the federal courts. See, e.g., Stehney v. Perry, 101 F. 3d 925, 932 (3d Cir. 1996) (noting that “federal courts may not 'second guess' the lawful decision of an agency . . . to terminate a person's access to classified information”); Dorfmont v. Brown, 913 F.2d 1399, 1401 (9th Cir. 1990) (holding that the logic of the Egan decision also precludes judicial review).

192. Egan, 484 U.S. at 528.
other reasons, he might compromise sensitive information. . . . Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information. . . . Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.\textsuperscript{193}

Subsequently, the Court refused to authorize a substantive review of the United States Navy's decision to deny the respondent a security clearance.\textsuperscript{194}

Based upon the rationale of the \textit{Egan} opinion and its ensuing effect on the federal judiciary, the Rehabilitation Act is potentially incapable of addressing disability discrimination in the security clearance process.\textsuperscript{195} For instance, one federal appellate court al-

\begin{itemize}
\item \textsuperscript{193} \textit{Id.} at 528-30 (citations omitted). \textit{But cf.} \textit{HOUSE COMM. ON GOVERNMENT OPERATIONS, INVESTIGATING THE INVESTIGATORS: JUSTICE DEP'T BACKGROUND REVIEWS BREAK DOWN, H.R. REP. NO. 102-854, at 14-15 (1992)} ("An unfavorable [security clearance] determination may have serious and long-lasting repercussions on the employee or applicant . . . such a determination can adversely affect an individual's career . . . result in the loss of employment . . . . Furthermore . . . individuals who have experienced an adverse determination may be stigmatized." (quoting \textit{Procedural Requirements for Personal Security Clearance Appeals Programs: Characteristics and Rationales for Uniform Minimum Requirements}, Memorandum by Frederick M. Kaiser, Specialist in American National Government, Government Division, Congressional Research Service, the Library of Congress, Washington, D.C., at 5 (Apr. 15, 1992)).

\item Based on current federal law, "no employee in the executive branch of Government may be given access to classified information . . . unless . . . such access is determined to be clearly consistent with the national security interests of the United States." 50 U.S.C. § 435(a)(1) (1995); \textit{see also} Exec. Order No. 12,968, \textit{supra} note 139, at pt. 3, § 3.1(b) (explaining the eligibility requirements for access to classified information). The term national security has been explained as follows: 'National Security' is not a term of art, with a precise, analytic meaning. At its core the phrase refers to the government's capacity to defend itself from violent overthrow by domestic subversion or external aggression. But it also encompasses simply the ability of the government to function effectively so as to serve our interests at home and abroad.


\item \textsuperscript{194} \textit{See Egan}, 484 U.S. at 527-33. The Navy based its decision on the following information: "respondent's convictions for assault and for being a felon in possession of a gun . . . his failure to disclose . . . two earlier convictions for carrying a loaded firearm[,] . . . [and] respondent's own statements that he had had drinking problems in the past." \textit{Id.} at 521.

\item \textsuperscript{195} \textit{See Guillot v. Garrett}, 970 F.2d 1320, 1321 (4th Cir. 1992) (affirming the district court's award of summary judgment on the grounds that the court lacked jurisdiction to decide whether the Navy's denial of a security clearance violated the Rehabilitation Act); \textit{see also} Peterson v. Department of Navy, 687 F. Supp. 713, 715
NO ONE IS ABOVE THE LAW

ready has taken the position that the Rehabilitation Act does not contain the requisite congressional intent to permit judicial review of a security clearance decision. Theoretically, such case law potentially provides federal law enforcement agencies with an effective and powerful means to eliminate any applicant or employee, even if unjustifiably motivated by the individual's disability status. Aside from political pressure and public scrutiny, there appears to be no clearly accepted or effective method for challenging a security clearance denial or revocation—even one premised upon an arbitrary blanket exclusion, an unjustified stereotype, or what otherwise would constitute illegal disability discrimination.

(D.N.H. 1988) (determining that “[i]f the statutory constraints imposed by Egan could be bypassed simply by alleging illegal discrimination, Egan would be viti- ated”).

In another case a deaf plaintiff was denied a security clearance after undergoing psychological testing. See Lovelace v. Stone, 814 F. Supp. 558 (E.D. Ky. 1992). The plaintiff alleged that the tests were discriminatory in violation of the Rehabilitation Act because the testing procedures were “not designed for a person with [a] hearing impairment[,] . . . the examiners did not know sign language, and . . . [he] was not permitted to bring an interpreter.” Id. at 559. Relying on Egan, the court concluded that it lacked subject matter jurisdiction to review the security clearance denial. See id.

196. See Guillot, 970 F.2d at 1325; cf. Becerra, 94 F.3d at 149 (concluding that “there is no unmistakable expression of purpose by Congress in Title VII to subject the decision of the Navy to revoke [the plaintiff's] security clearance to judicial scrutiny”).

197. See Perez v. FBI, 71 F.3d 513, 514 n.6 (5th Cir. 1995) (acknowledging “the concerns of federal agents, whose employment is conditioned on security clearances, that the lack of judicial review creates the potential for abuse by the agencies and bureaus employing them”).

198. Courts have also rejected security clearance challenges based on alleged due process constitutional violations. See, e.g., Molerio v. FBI, 749 F.2d 815, 823-24 (D.C. Cir. 1984). Considering the Supreme Court's position in Egan, courts have been unwilling to embrace most due process arguments. See, e.g., Jones v. Department of Navy, 978 F.2d 1223, 1225-26 (D.C. Cir. 1992); Dorfmont, 913 F.2d at 1403-04. There is a possibility, however, that judicial review could be triggered under an equal protection challenge. See, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Dubbs v. CIA, 866 F.2d 1114 (9th Cir. 1989); Buttino v. FBI, 801 F. Supp. 298, 312 (N.D. Cal. 1992) (stating that the court has “the authority and obligation under the United States Constitution to consider colorable claims under the Equal Protection Clause”). But see, e.g., Hill v. Department of Air Force, 844 F.2d 1407, 1411 (10th Cir. 1988) (observing that “if the statutory constraints in Egan can be bypassed simply by invoking alleged constitutional rights, it makes the authority of Egan hardly worth the effort”).

Also, it is unclear whether Congress could even remedy this situation by amending the Rehabilitation Act so as to specifically provide for substantive judicial or administrative review. Such congressional action possibly could be challenged as encroaching upon the authority of the executive branch. See Webster v. Doe, 486 U.S. 592, 614 (1988) (Scalia, J., dissenting). Regardless, one federal court judge has
After reviewing this broad sampling of cases, it should be rather apparent that there is a significant amount of case law supporting the principle that law enforcement agencies cannot be compelled to hire or retain individuals who are not otherwise qualified for law enforcement employment. If anything, the existing case law should reassure the law enforcement community that the courts are equally concerned about protecting public safety. At the same time, most courts have been very deferential to the hiring and termination decisions of law enforcement employers. In cases involving federal agencies and security clearance determinations, the federal judiciary has been willing to go so far as to refuse to even consider allegations of discrimination. Federal law enforcement agencies could hardly ask for any more deference.

D. "Reasonable Accommodation" and When It Is No Longer Reasonable

Although individuals with disabilities who engage in illegal or otherwise objectionable behavior deserve virtually no accommodation, it is not possible to conclude so quickly that other disabled individuals are not entitled to reasonable accommodation. According to the United States Supreme Court, "Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee."¹⁹⁹ But regardless of the disability, "an employer [is not] obligated to fundamentally alter its employment scheme by rewriting job descriptions."²⁰⁰

There are numerous examples of courts determining that a particular accommodation is not reasonable. For example, it is not reasonable to accommodate an FBI employee's depression and delusions by preventing his access to classified information, considering that the handling of such documents is one of his job re-

---

¹⁹⁹. School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n.19 (1987); see also Buckingham v. United States, 998 F.2d 735, 739 (9th Cir. 1993) (explaining that the Rehabilitation Act creates an affirmative obligation to accommodate).

²⁰⁰. Hogarth v. Thornburgh, 833 F. Supp. 1077, 1088 (S.D.N.Y. 1993); see also Fussell v. Georgia Ports Auth., 906 F. Supp. 1561, 1573 (S.D. Ga. 1995) (ruling that the "GPA simply was not required to create a special, 'unarmed police officer' position" for an officer whose hand tremors interfered with his ability to use a firearm); Serrapica v. City of New York, 708 F. Supp. 64, 73 (S.D.N.Y. 1989) (noting that "[a]n employer is not obligated to materially rewrite its job description, to lower or to effect substantial modifications of standards, or to overlook the handicap when the impairment relates to reasonable criteria for employability in a particular position.").
sponsibilities. Another court felt "a waiver of the weapon firing and forceful arrest requirement is not a reasonable accommodation" after reviewing evidence that the number of able-bodied officers would be reduced by allowing those officers unable to perform these duties to remain on the force. Furthermore, it is not a reasonable accommodation for a law enforcement agency to give a diabetic officer "a second chance" when he fails to control a controllable disability.

In Stewart v. County of Brown the Seventh Circuit Court of Appeals concluded that there are definite limits on an employer's obligation to provide reasonable accommodation. In Stewart the court reviewed a deputy's allegations that the local sheriff's department refused to accommodate his physical disabilities. The deputy, who had been assigned to monitor courthouse security from a video equipped security room, complained that the "ergonomics of the security room" caused him to experience "cervicodorsal spinal symptoms (i.e., neck and back pains) and headaches." In response, the court considered the accommodations made by the sheriff's department and the county: they built a platform in the security room in order to change the angle of the security monitors; “[t]hey installed mini-blinds on six courthouse windows and placed film on the doors . . . to minimize glare”; they “purchased an ergonomic chair” for the plaintiff; they lowered the monitors; and they significantly modified the plaintiff's work schedule.

After acknowledging the extensive efforts to ensure reasonable accommodation, the court explained that the deputy erroneously assumed that “‘accommodation’ means the same thing as ‘a

204. 86 F.3d 107 (7th Cir. 1996).
205. See id. at 112.
206. See id. at 110.
207. Id. at 109. Previously, the deputy had been removed from patrol duty after he had used excessive force during an arrest. See id.
208. See id. at 110.
perfect cure for the problem.” The court also concluded that it would be difficult “to imagine how much more [the county] could have done with the security room and the conditions of his employment to make life more comfortable, short of giving [the deputy] a blank check and full authority to order a complete rehab of the building.” Basically, “[r]easonable accommodation . . . does not require an employer to provide literally everything the disabled employee requests.”

While it would be difficult for a law enforcement agency to justify a refusal to allow an accommodation which is not excessive, or likely to create undue hardship or significant risk, reasonable accommodation disputes regularly force both law enforcement agencies and the courts to make difficult decisions. Controversy often arises in cases where an accommodation might facially appear to be unreasonable, yet possibly not so unreasonable after closer investigation. A good example of such a situation involved a thirteen-year veteran police officer who allegedly was fired by the Jersey Village (Texas) Police Department for refusing to wear a bulletproof vest while on duty. Suffering from an alleged acid reflux disability, i.e., acute heartburn, the officer claimed that the vest aggravated his condition.

Granted, the officer’s refusal to wear a bulletproof vest does appear questionable considering the increased risk accompanying such a decision. Regardless, this situation presents a difficult case in light of the fact that approximately 40% to 50% of the po-

209. Id. at 112.
210. Id.
211. Id. at 110.
212. See, e.g., Todd R. Wallack, Beaver Creek Officer Sues Department, DAYTON DAILY NEWS, Sept. 14, 1994, at Z61 (describing how a patrol officer with a spinal disease filed suit after his department refused to accommodate him by allowing him to wear a lightweight nylon equipment belt used by other nearby departments).

It has been estimated that “since 1974, approximately 1,800 officers were spared death by wearing body armor.” Jim Stingl, Body Armor Offers Some Protection, MILWAUKEE J. & SENTINEL, Sept. 10, 1996, at News 9.
lice officers in the United States do not even have bullet resistant vests.\textsuperscript{216} Moreover, 209, or 32\%, of the 653 officers killed in the line of duty by a firearm between 1985 and 1994 were wearing body armor.\textsuperscript{217} Although the Jersey Village officer’s refusal to wear a bulletproof vest does contribute to an increased risk of injury and danger, statistical evidence indicates that it is more difficult to say whether permitting him to forego wearing the vest would amount to an unreasonable accommodation or create a direct threat.\textsuperscript{218} Similarly, it would be debatable whether business necessity truly could justify a mandatory bulletproof vest policy.\textsuperscript{219}

The greatest debate regarding reasonable accommodation and law enforcement involves the issue of officers who become disabled during the course of their employment. Although it is typically true that there is no requirement that a law enforcement agency create a “light-duty” position for officers who become disabled,\textsuperscript{220} more than one disabled officer has alleged that his disabil-


\textsuperscript{217} See LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 1994, supra note 215, at 17 tbl. 7.

\textsuperscript{218} Currently there are more than 673,000 federal, state, and local law enforcement officers in the United States. See REAVES, CENSUS, supra note 4, at 1; REAVES, FEDERAL LAW ENFORCEMENT OFFICERS, supra note 4, at 1. In comparison, 708 federal, state, and local law enforcement officers were killed between 1985 and 1994. See LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 1994, supra note 215, at 15. Specifically, firearms were involved in 653, or 92\%, of those deaths; 209, or 32\%, of the firearm fatality victims were wearing body armor; 306, or 47\%, of the firearm fatalities resulted from head wounds; 307, or 47\%, firearm deaths were caused by upper torso wounds; and 40, or 6\%, of the fatalities resulted from gun shot wounds below the waist. See id. at 17 tbl. 7. During the same ten-year period, a total of 33,166 state and local officers were assaulted with a firearm, while roughly 8,758, or 26\%, of those officers were injured. See id. at 73. Incidentally, it should be pointed out that body armor also has been known to provide protection against injuries from knife attacks and automobile accidents.

\textsuperscript{219} See generally LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS, supra note 21, at 15-16 (describing the body armor policies of individual state and local law enforcement agencies); REAVES, LOCAL POLICE DEPARTMENTS, supra note 4, at 15 (explaining that 37\% of local police departments in 1993 required some or all regular field officers to wear body armor); REAVES, SHERIFFS' DEPARTMENTS, supra note 4, at 16 (stating that 35\% of sheriffs' departments in 1993 required some deputies or officers to wear body armor while on duty).

\textsuperscript{220} See Hardy v. Village of Piermont, 923 F. Supp. 604, 610 (S.D.N.Y. 1996) (holding that it would go beyond “reasonable assistance” for the Village of Piermont, New York, to create a “light duty” position for a police officer who was unable to run or walk long distances (citations omitted)); see also Rucker v. City of Philadelphia, No. CIV.94-0364, 1995 WL 464312 (E.D. Pa. July 31, 1995) (granting defen-
ity could be accommodated merely by permitting him to work in an administrative, clerical, or supervisory position within the department.\textsuperscript{21} It is reasonable to speculate, however, that a plaintiff arguing for this type of accommodation will be more likely to succeed when he or she is employed by a large organization.\textsuperscript{22} Logically, a large metropolitan police or sheriff's department will be better equipped to accommodate and reassign an officer to a less physically demanding position, especially compared to a small rural department which relies on all of its officers to perform patrol
dant's summary judgment motion because the city had no duty to place a youth detention counselor on "limited duty," despite his suffering three back injuries that prevented him from performing strenuous activity); Howell v. Michelin Tire Corp., 860 F. Supp. 1488, 1492 (M.D. Ala. 1994) ("Reasonable accommodation . . . does not require that an employer create a light-duty position or a new permanent position."). See generally Village Needn't Create Light Duty Police Position, NAT'L L.J., June 3, 1996, at B18 (reporting on the Hardy decision).

Since October 31, 1992, federal agencies must offer to reassign disabled employees to funded, vacant positions located in the same commuting area as long as the reassignment does not impose undue hardship. See 29 C.F.R. § 1614.203(g) (1996).

221. See supra notes 135-136 and accompanying text. See generally Gregory J. Kramer & Barbara Dillon, The Light Duty Dilemma, 12 LABOR LAW. 247, 252 (1996) (discussing the types of light duty positions to which an employer could assign an injured employee); Recruitment, Hiring and Promotion Practices for Minorities, Women and Persons with Disabilities: Report Before the House Permanent Select Comm. on Intelligence, 105th Cong. (Sept. 19, 1996), available in Westlaw, 1996 WL 538976 (testimony of Robert M. Bryant, Assistant Director, National Security Division, FBI) (testifying that as of June 30, 1996, 97 veteran special agents with disabilities were employed by the FBI, including one agent who uses a wheelchair and whose "work is limited to training, analysis and coordination of various operations in the field office in which he works"); Paul De La Garza, Injured Officer Faces Job Loss, ST. PETERSBURG TIMES, Nov. 29, 1993, at CT1 (reporting that the Tampa Police Department cannot continue to assign injured officers to light-duty assignments indefinitely because it is facing a hiring freeze and it must make room for able-bodied officers); Marty Rosen, Injured Officers File EEOC Complaints Over Firing Policy, ST. PETERSBURG TIMES, Aug. 21, 1992, at B3 (describing how three injured Tampa police officers filed federal discrimination complaints because of the Tampa Police Department's unwillingness to assign them desk jobs held by able-bodied officers).

222. See, e.g., United States v. City of Denver, 943 F. Supp. 1304 (D. Colo. 1996) (concluding that because the ADA's reasonable accommodation requirement includes reassignment, the City of Denver violated the ADA by refusing to reassign disabled police officers to either available positions for which they are qualified within the police department, or available nonpolice positions for which they are qualified within the City of Denver); Holbrook v. City of Alpharetta, 911 F. Supp. 1524 (N.D. Ga. 1995) (holding that it was not unreasonable for a police department with only three detectives to no longer permit a visually impaired detective to conduct field investigations when the detective could not drive or conduct an investigation by himself).
duty. Because of the unique nature of each law enforcement agency, requests for reasonable accommodation will have to be decided on a case by case basis.

V. THE HIRING PROCESS

A. Preemployment Disability Inquiries

1. General prohibitions

Following the passage of the ADA and the Rehabilitation Act, the hiring process now presents a greater challenge for law enforcement agencies. This challenge results from the fact that law enforcement agencies are being forced to abandon the historic practice of requesting applicants to reveal medical or disability-related information at the pre-offer stage of the hiring process. Specifically, the pre-offer stage is any point in the hiring process occurring before the applicant is given a bona fide job offer; however, an offer can be conditioned upon the applicant passing a medical exam and submitting to disability inquiries conducted in the post-offer phase of the hiring process (meaning after the offer has been made, but before the individual actually starts to work).

223. See generally Reaves, Local Police Departments, supra note 4, at 3 (providing the following information: 75% of police officers were assigned to respond to calls in jurisdictions with 10,000 to 24,999 residents; 85% in jurisdictions with 2500 to 9999 residents; and 95% in jurisdictions with under 2500 residents).

224. See, e.g., Kemp v. Monge, 919 F. Supp. 404 (M.D. Fla. 1996) (explaining that a judgment in the amount of $295,000 plus interest and costs was entered in favor of a sheriff's detective following the refusal of the Sarasota Sheriff's Office to accommodate his hearing impairment); Robert E. Kessler, Injured Suffolk Cops Win $200,000 Court Settlement, NEWSDAY, Mar. 19, 1997, at A38 (describing how a federal jury awarded three police officers a total of $200,000 because of the Suffolk County Police Department's violations of the ADA).


226. See generally U.S. Equal Employment Opportunity Commission Compliance Manual § 902 (1995) [hereinafter Compliance Manual] ("In order for a job offer to be considered bona fide, an employer should have evaluated all relevant non-medical information which, from a practical and legal perspective, could reasonably have been analyzed prior to extending the offer."). EEOC investigators receive guidance from the Compliance Manual when investigating disability discrimination claims. See Kevin G. Martin, Employment Law, 46 Syracuse L. Rev. 499, 518 (1995).

At the pre-offer phase of the hiring process, the ADA specifies that a covered entity "shall not . . . 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." 228 Similarly, the Rehabilitation Act prohibits most pre-employment disability-related inquiries. 229 According to the EEOC, these prohibitions mean that an employer may not ask "disability-related questions" at the pre-offer phase of the hiring process. 230 It is acceptable, however, to "make pre-employment inquiries into the ability of an applicant to perform job-related functions." 231 In order to avoid violating the restrictions of the ADA and Rehabilitation Act, many law enforcement agencies need to scrutinize and possibly revise their current hiring procedures, application forms, testing methods, and interview questions.

2. The justification for prohibiting pre-offer disability inquiries

Although some might criticize the restriction on pre-offer disability inquiries, the ADA and Rehabilitation Act otherwise would offer only limited protection against disability discrimination. When adopting the ADA Congress recognized that many Americans have "hidden disabilities" that are not readily apparent to employers such as "epilepsy, diabetes, emotional illness, heart


231. 42 U.S.C. § 12112(d)(2)(B); see 28 C.F.R. § 42.513(a) (Rehabilitation Act); 29 C.F.R. § 1630.14(a) (ADA Title I); 45 C.F.R. § 84.14(a) (Rehabilitation Act); see also Schuman, supra note 12, at 502.
NO ONE IS ABOVE THE LAW

April 1997

1031

disease, and cancer.”

Congress also realized that information about the existence of a disability was “often used to exclude applicants with disabilities—particularly those with so-called hidden disabilities . . . before their ability to perform the job was even evaluated.” In order to discourage employers from stereotyping applicants and prematurely rejecting potentially qualified individuals with disabilities, the ADA and the Rehabilitation Act now require employers first to consider whether an applicant actually is qualified prior to deciding whether to hire or reject the applicant.

Without a prohibition on pre-offer disability inquiries, most individuals with disabilities would never know the true reason behind a negative employment determination. In the past an applicant “did not necessarily know whether he or she was rejected because of disability, or because of insufficient skills or experience or a bad report from a reference.” For instance, an employer could simply say that the applicant did not interview very well, as opposed to admitting that the person was really rejected after having revealed disability-related information. By restricting the ability of an employer to make disability inquiries in the pre-offer phase of the hiring process, there will be little question that a post-offer revelation of the person’s disability status must have influenced the employer’s subsequent withdrawal of the employment offer. As a result, employers must be prepared to legally justify the withdrawal of an employment offer as they will no longer be able to so easily deny the fact that the applicant’s disability was a motivating factor.


234. See generally Doe, 508 F. Supp. at 336-37 (stating that by limiting “the scope of preemployment inquiries relating to a potential employee's handicap . . . an employer is required to base the hiring decision on a person's actual job qualifications, rather than on any perceived limitations”); Sondra M. Lopez-Aguado, The Americans with Disabilities Act: The Undue Hardship Defense and Insurance Costs, 12 REV. LITIG. 249, 263 (1992) (explaining that the prohibition against preemployment disability inquiries “is to assure that the employment selection process does not become biased by misconceptions regarding the applicant’s ability to perform”).

235. EEOC, ADA ENFORCEMENT GUIDANCE, supra note 230, at 1.

236. The employer should be prepared to demonstrate that the justification for the rejection is “job-related and consistent with business necessity.” 42 U.S.C. § 12112(d)(4)(A); see supra notes 9-13 and accompanying text.
3. Illegal pre-offer inquiries

Despite the general prohibitions against most pre-offer disability inquiries, many employers continue to make them. One possible explanation is traditional resistance to change, as well as a general unwillingness of employers to abandon and revise existing hiring practices. Another explanation is the possibility that employers still do not really understand what types of questions are permissible and what types are prohibited.

According to the EEOC, a disability-related question "means a question that is likely to elicit information about a disability." Therefore, any pre-offer inquiry directly asking an applicant to reveal a medical condition or disability status clearly is prohibited. For example, an employer may not ask questions such as, "Do you have a heart condition?" or "Have you ever been addicted to drugs?" Similarly, an employer should not ask whether an applicant has ever experienced or been treated for "any 'migraine, neuralgia, nervous breakdown, or psychiatric treatment.'" Instead of focusing on the disabilities of an applicant, an employer's questions should focus on the abilities of the applicant.

Because "[p]re-employment inquiries are only allowed when they relate to job-related functions," employers must avoid asking questions merely for the purpose of satisfying their own curiosity. At the pre-offer stage, therefore, a conscientious employer must resist the temptation to make follow-up inquiries in situations where an applicant voluntarily reveals disability information. For instance, if an applicant were to voluntarily reveal that he or

---

238. In the past it was not uncommon for a law enforcement agency to ask a question that is now considered illegal: "'Do you have any physical, mental or medical impairment or disability that would limit your job performance for the position for which you are applying?'" Palmer v. City of Monticello, 31 F.3d 1499, 1507 n.10 (10th Cir. 1994) (quoting a question a police officer was asked before he was hired by the police department in Monticello, Utah).
239. Doe, 508 F. Supp. at 335 (quoting an illegal question asked on an employment application).
241. See Black, supra note 59, at 118.
242. But see infra notes 261, 267 and accompanying text (explaining that in some situations an employer may ask about the need for reasonable accommodation). Even in cases where an applicant voluntarily reveals medical information, the employer is obligated to keep the information confidential. See EEOC, ADA Enforcement Guidance, supra note 230, at 22; cf. 42 U.S.C. § 12112 (d)(3)(B) (requiring the confidential treatment of medical information obtained during an employment entrance examination).
she had once experienced a stroke, the employer should not respond by asking any of the following types of questions: "What was it like to have a stroke?"; "What exactly were the effects of your stroke?"; or "What are the chances of you having another one?" Likewise, the employer must avoid asking irrelevant questions which could embarrass or humiliate the disabled applicant.243

Additionally, the EEOC has interpreted the ADA and Rehabilitation Act as prohibiting questions that are closely related to a disability inquiry.244 For example, an employer may not make indirect disability inquiries by asking applicants about their workers' compensation history.245 Likewise, an employer should not ask an applicant, who is a veteran of the armed forces, whether he or she received a medical discharge from the military.246 An employer also should not ask the applicant whether he or she receives disability compensation from the Department of Veterans Affairs.247 Although an employer may ask an applicant whether he or she drinks alcohol, an applicant should not be asked to specify exactly how much alcohol he or she consumes each week.248 Un-

243. See, e.g., Jeff Barge, Job Interview Can Bring ADA Liability, 82 A.B.A. J. 34 (quoting Jim Passamano, an EEOC senior trial attorney: "The moral to the story is that if you ask offensive questions that humiliate and embarrass [people], they can be compensated for that.").

244. See EEOC, ADA ENFORCEMENT GUIDANCE, supra note 230, at 4. Currently, the Houston Police Department asks applicants to list any restrictions on their drivers licenses. See Houston Police Dep't, Applicant Screening Checklist 3 (on file with the Loyola of Los Angeles Law Review). Considering the fact that almost all restrictions are disability related, this sort of pre-offer question seems to violate the ADA and Rehabilitation Act.

245. See EEOC, TECHNICAL ASSISTANCE MANUAL, supra note 13, § 5.5, at V-8.

246. The State of Florida asks veterans, who are applicants for the Florida Highway Patrol, to indicate whether they received a medical discharge from the military. See State of Florida, Dep't of Highway Safety & Motor Vehicles, Supplemental Application for Highway Patrol Officers 6 (on file with the Loyola of Los Angeles Law Review). Clearly this question is illegal because the receipt of a medical discharge indicates that the former soldier, sailor, Marine, or airman was classified as "unfit to perform the duties of his [military] office, grade, rank, or rating because of physical disability." 10 U.S.C. §§ 1201-1206 (1994). Essentially, this question is no different than asking an applicant to indicate whether he or she is a disabled veteran.

247. As of 1995, 2.2 million of the United States' 26.1 million veterans received disability compensation from the Department of Veterans Affairs for service-connected disabilities. See Tamar A. Mehuran, Veterans, AIR FORCE MAG., Mar. 1996, at 44. See generally Anne E. Beaumont, Note, This Estoppel Has Got To Stop: Judicial Estoppel and The Americans with Disabilities Act, 71 N.Y.U. L. Rev. 1529 (1996) (arguing that individuals receiving government disability entitlements should be neither precluded from arguing that they are protected by the ADA, nor estopped from arguing that they are in fact otherwise qualified).

248. See generally Thompson, 1996 WL 162990, at *7 (stating that an "employer
avoidably, these types of requests are likely to elicit information about whether the applicant has a disability.

Another prohibited pre-offer inquiry would involve asking a law enforcement applicant about lawful drug use. Commonly, the disclosure of a particular medication would be indicative of the underlying medical condition. "For example, if the applicant responds that he or she is taking AZT, insulin or tamoxafin, the employer has, in effect, been informed that the applicant has been diagnosed as being HIV-positive, or having diabetes or breast cancer, respectively."249 In other situations the disclosure of a medication used to treat multiple medical conditions might lead the employer to draw an incorrect conclusion about the applicant's particular medical diagnosis. For instance, if an applicant were to state, "I regularly take the drug Nortriptyline (Pamelor) pursuant to my doctor's orders," the employer might incorrectly assume that the individual suffers from depression. Although Nortriptyline most commonly is used to treat depression, it sometimes is prescribed for individuals with a history of migraine headaches.250

One court has addressed the legality of questioning current employees about legal drug use and determined that "a policy that requires employees to disclose the prescription medication they use would force the employees to reveal their disabilities (or perceived disabilities) to their employer."251 Likewise, this sort of inquiry also would force applicants to reveal their disabilities.

Furthermore, an employer may not ask a third party any questions that it could not directly ask the applicant.252 Law en-

---

250. See generally Mark A. Rothstein, Workplace Drug Testing: A Case Study in the Misapplication of Technology, 5 HARV. J.L. & TECH. 65, 78 (1991) (explaining that "an employee testing positive for barbiturates may be taking phenobarbital pursuant to a physician's prescription to help control epilepsy").
251. Roe, 920 F. Supp. at 1154. A policy of asking employees about prescription medications "would be permissible if [the employer] could demonstrate that its prescription medication inquiry is 'job-related and consistent with business necessity.'" Id. at 1155. See generally Julie Gannon Shoop, Employers Can't Ask About Prescription Drug Use, Court Holds, TRIAL, Apr. 1996, at 15-16 (discussing the holding of Roe).
252. See Grenier, 70 F.3d at 676 (citing EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ADA ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-
forcement agencies which elect to conduct background investigations or reference checks prior to making employment offers must be mindful of this prohibition. For example, a law enforcement agency should not ask an applicant's previous employer about how many days the applicant was sick. It is illegal to ask a third party this type of question because the inquiry is related directly to the severity of the individual's potential impairments, and it is likely to elicit information about a disability.

4. Affirmative action and self-identification

There is one primary exception to the rule that employers are prohibited from making pre-offer disability inquiries. In accordance with an affirmative action program mandated by federal, state, or local law, an employer is permitted to ask an applicant to voluntarily "self-identify" him or herself as an individual with a disability. Whenever an employer requests individuals to self-identify, the employer incurs specific obligations: the information can only be used to benefit the individual with a disability; the employer must clearly state that the disclosure is completely voluntary and that it will only be used for affirmative action purposes; the disclosed information must be kept confidential; and the disability information must be maintained separate from the applicant's main application. An employer fundamentally should not ask applicants to voluntarily self-identify unless the employer truly intends to use the information to benefit the applicants.

5. Legal pre-offer inquiries

Although law enforcement agencies are restricted in their ability to make disability-related pre-offer inquiries, they are still free to "make preemployment inquiries into the ability of an ap-

253. But see generally Thomas H. Wright, Pre-Employment Background Investigations, FBI L. ENFORCEMENT BULL., Nov. 1991, at 16, 19 (explaining that in order to conduct a thorough background investigation, the investigating officer should ask an applicant's previous employers about the applicant's use of sick leave).

254. See EEOC, ADA ENFORCEMENT GUIDANCE, supra note 230, at 12; see, e.g., 38 U.S.C. § 4214 (1994) (requiring federal agencies to grant hiring preference to disabled veterans). Employers also may engage in voluntary affirmative action. See 45 C.F.R. § 84.6(b).

255. See 28 C.F.R. § 42.513(b)(1)-(2); 45 C.F.R. § 84.14(b)(1)-(2); EEOC, ADA ENFORCEMENT GUIDANCE, supra note 230, at 12-13.
applicant to perform job-related functions." While one court has recognized that there is a fine line between the types of inquiries which are legal and those that are illegal, cautious employers can effectively avoid this potential predicament by merely choosing to limit their pre-offer inquiries. Once a bona fide offer has been made, the employer can then make the necessary inquiries.

Despite the restrictions of the ADA and Rehabilitation Act, there still is a rather wide range of questions that can be posed to applicants. As an illustration, it would be permissible for an employer to describe the essential functions of the relevant position and then ask the applicant whether he or she could perform those functions with or without reasonable accommodation. Because the preceding question asks whether the job could be performed with or without reasonable accommodation, it is not the same as asking the applicant if he or she would in fact require reasonable accommodation. Although an employer may ask applicants whether they will need reasonable accommodation for the hiring process, the employer generally should not yet ask applicants whether they also will need reasonable accommodation for the actual job.

Employers also "may ask an applicant to describe or demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions." Typically, however, the employer should not make this request unless all

---

256. 42 U.S.C. § 12112(d)(2)(B); see 28 C.F.R. § 42.513(a) (Rehabilitation Act); 45 C.F.R. § 84.14(a) (Rehabilitation Act); Schuman, supra note 12, at 502.

257. See Thompson, 1996 WL 162990, at *8.

258. See generally John J. Coleman, III & Marcel L. Debruge, A Practitioner's Introduction To ADA Title II, 45 ALA. L. REV. 55, 82 n.172 (1993) (stating that "an employer should be cautious in deciding whether to ask an applicant anything").

259. Even though the employer can make post-offer disability inquiries, any acquired disability information can only be used in a manner which is not contrary to the antidiscrimination requirements of the ADA and Rehabilitation Act. See infra notes 278-281 and accompanying text.

260. See EEOC, ADA ENFORCEMENT GUIDANCE, supra note 230, at 4; Chai Feldblum, Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View From the Inside, 64 TEMP. L. REV. 521, 537 n.98 (1991). The employer, however, should not ask the applicant whether he or she has a disability which would interfere with the performance of the described essential functions. See id. Asking such a question would be a "sugar-coat[ed]" way of asking the applicant if he or she has a disability. See id.

261. See EEOC, ADA ENFORCEMENT GUIDANCE, supra note 230, at 5.

262. See Grenier, 70 F.3d at 674; EEOC, ADA ENFORCEMENT GUIDANCE, supra note 230, at 6; infra note 264 and accompanying text.

263. 29 C.F.R. § 1630.14(a).
applicants in the same job category are also asked to do this.\textsuperscript{264} In cases where an applicant’s disability is either obvious or known,\textsuperscript{265} the employer may ask the particular applicant to describe or demonstrate how he or she would perform the job, regardless of whether other applicants are asked this same question.\textsuperscript{266} At the same time, “the ADA does not preclude an employer from asking an applicant with a \textit{known} disability who seeks a reasonable accommodation to specify the type of accommodation he seeks.”\textsuperscript{267}

Moreover, employers can ask applicants about their arrest or conviction records.\textsuperscript{268} For instance, an employer could ask such questions as, “Have you ever been convicted of a DUI/DWI?”, or “Have you ever been arrested for possession of illegal drugs?”

An employer also may ask an applicant about prior illegal drug use as long as the questions are “not likely to elicit information about a disability.”\textsuperscript{269} For example, questions like “Have you ever used illegal drugs?”, or “When was the last time you used illegal drugs?” would be permissible inquiries because they are not likely to reveal whether the applicant was or is a drug addict.\textsuperscript{270} On the other hand, a question like, “How many times have you ever used illegal drugs?” would be impermissible due to the likelihood of the answer revealing whether the applicant has ever been addicted to illegal drugs.\textsuperscript{271}

Regardless of the fact that it is entirely legal for an employer to make select job-related inquiries at the pre-offer stage, an employer cannot completely eliminate the risk that one of its current employees might ask an inappropriate or illegal question. Short of making no pre-offer inquiries, the most effective way for an employer to reduce this risk would be to thoroughly educate its personnel about the ADA and Rehabilitation Act. Another possible

\textsuperscript{264} See EEOC, ADA ENFORCEMENT GUIDANCE, \textit{supra} note 230, at 5.

\textsuperscript{265} For example, the applicant might have voluntarily disclosed his or her hidden disability.

\textsuperscript{266} See EEOC, ADA ENFORCEMENT GUIDANCE, \textit{supra} note 230, at 5.

\textsuperscript{267} Grenier, 70 F.3d at 677. The employer should realize that pre-offer questions about reasonable accommodation can be used “as evidence that the employer knew about the need for reasonable accommodation” and the EEOC will carefully scrutinize cases where the applicant later claims that the refusal to hire was based on the need for reasonable accommodation. See EEOC, ADA ENFORCEMENT GUIDANCE, \textit{supra} note 230, at 7.

\textsuperscript{268} See EEOC, ADA ENFORCEMENT GUIDANCE, \textit{supra} note 230, at 9.

\textsuperscript{269} Id. at 11.

\textsuperscript{270} Id.

\textsuperscript{271} See id.
approach would be for the employer to supply its interviewing personnel with preapproved questions and strictly prohibit them from making stray remarks—and then hope for the best.

B. Medical Examinations

1. Pre-offer and post-offer medical examinations

Similar to the prohibition against pre-offer disability inquiries, covered employers also are not permitted to conduct medical examinations prior to making a conditional job offer. Because of the significance of whether a test or procedure is a prohibited medical exam, the EEOC has provided factors that should be considered when making this determination:

[1.] Is it administered by a health care professional or someone trained by a health care professional?
[2.] Are the results interpreted by a health care professional or someone trained by a health care professional?
[3.] Is it designed to reveal an impairment of physical or mental health?
[4.] Is the employer trying to determine the applicant’s physical or mental health impairments?
[5.] Is it invasive (for example, does it require the drawing of blood, urine or breath)?
[6.] Does it measure an applicant’s performance of a task, or does it measure the applicant’s physiological responses to performing the task?
[7.] Is it normally given in a medical setting (for example, a health care professional’s office)?
[8.] Is medical equipment used?

Essentially, a case-by-case analysis will be required when attempting to determine whether a test or procedure truly is a medical

---


Once a conditional job offer is made, the employer may conduct medical examinations and make disability inquiries subject to a few basic limitations. First, all applicants in the same job category should be subjected to the examination or inquiry. Second, the newly acquired medical and disability information must be "collected and maintained on separate forms and in separate medical files" (or, in other words, in files separate from the applicant's primary applicant file). Third, the collected information must be protected and treated as confidential. Fourth, the results of the medical examination and inquiry may only be used in a manner consistent with the ADA and the Rehabilitation Act.

Despite these four basic restrictions, employers are not limited in terms of the scope of the medical exam that can be administered to applicants. For instance, not every medical test or procedure has to be job-related and consistent with business necessity. Nevertheless, an employer can only withdraw an offer based on information which indicates that the applicant is not otherwise qualified for the position. If the employer wants to use the test results or other medical criteria to screen out an applicant with disabilities, the employer must be prepared to show that the rele-

274. In some cases the presence of a single factor might even establish that a test or procedure is a medical exam. See id.

275. See 42 U.S.C. § 12112(d)(3)(A); 28 C.F.R. § 42.513(c)(1) (Rehabilitation Act); 29 C.F.R. § 1630.14(b) (ADA Title I); 45 C.F.R. § 84.14(c)(1) (Rehabilitation Act); EEOC, ADA ENFORCEMENT GUIDANCE, supra note 230, at 18. It is acceptable to conduct more in-depth or follow-up exams on select applicants whenever their initial exams reveal relevant information. See id.

276. Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(d)(3)(B); see 28 C.F.R. § 42.513(d) (Rehabilitation Act); 29 C.F.R. § 1630.14(b)(1) (ADA Title I); 45 C.F.R. § 84.14(d) (Rehabilitation Act).

277. See 42 U.S.C. § 12112(d)(3)(B); 28 C.F.R. § 42.513(d) (Rehabilitation Act); 29 C.F.R. § 1630.14(b)(1) (ADA Title I); 45 C.F.R. § 84.14(d) (Rehabilitation Act). In limited circumstances the information can be disclosed to select individuals. See 42 U.S.C. § 12112(d)(3)(B)(i)-(iii); see also EEOC, ADA ENFORCEMENT GUIDANCE, supra note 230, at 21 (describing the limited exceptions in which medical information may be disclosed).

278. See 42 U.S.C. § 12112(d)(3)(C); 28 C.F.R. § 42.513(c)(2) (Rehabilitation Act); 29 C.F.R. § 1630.14(b)(2) (ADA Title I); 45 C.F.R. § 84.14(c)(2) (Rehabilitation Act). See generally Feldblum, supra note 260, at 532-33, 537-38 (discussing the impact of the Rehabilitation Act and ADA upon post-offer medical exams); Matthew J. Mitten, AIDS and Athletics, 3 SETON HALL J. SPORT L. 5, 22 (1993) (discussing post-offer medical exams).

279. See 29 C.F.R. § 1630.14(b)(3).

280. See id.
vant test or criteria is "job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation."\textsuperscript{281}

In light of the mentioned restrictions, an employer receives no real benefit from administering tests or making inquiries that are not job-related and consistent with business necessity. Additionally, an employer would be well advised to voluntarily limit the scope of the exam. By taking such action, the employer avoids learning about irrelevant and unusable information. Furthermore, the employer reduces the amount of information that it must safeguard, which thereby decreases its risk of illegally disclosing confidential information.\textsuperscript{282}

At the same time, law enforcement agencies would be wise to treat medical information much the same way the United States military treats classified information. In the military even individuals holding a top-secret security clearance are only given access to classified information on a need-to-know basis. Similarly, employers should adopt specific measures designed to ensure that medical information is only revealed to those individuals having a legitimate need to know about the applicant's medical history or disability status. The bottom line is that employers should go to considerable lengths to ensure that medical information is never treated in a casual way or protected in a loose manner. When implementing a need-to-know policy, the most important and fundamental principle to remember is that most people will not have a need to know the confidential disability-related information. By adopting such a policy, an employer could substantially reduce the likelihood of violating its statutorily imposed duty to safeguard medical information.

2. Psychological tests

Law enforcement agencies are increasingly using psychological tests in the hiring process.\textsuperscript{283} For example, sixty-four percent of state police departments and seventy-three percent of municipal

\textsuperscript{281} Id.; see also supra notes 9-13 and accompanying text (discussing the prohibitions against disparate impact discrimination).

\textsuperscript{282} See Feldblum, supra note 260, at 538 (explaining that unnecessary and irrelevant questions "simply increase the amount of information the employer must ensure is not inadvertently disclosed").

\textsuperscript{283} See George E. Hargrave et al., F+4+9+Cn: An MMPI Measure of Aggression in Law Enforcement Officers and Applicants, 16 J. POLICE SCI. & ADMIN. 268 (1988) [hereinafter Hargrave, F+4+9+Cn].
police departments required applicants to undergo psychological testing in 1990. Moreover, some states even statutorily mandate that psychological testing occur before an individual can receive a law enforcement position or participate in law enforcement training.

The term "psychological test" often means any one of a number of tests used for such various purposes as attempts to assess personality, honesty, integrity, mental health, or emotional well-being. In most cases law enforcement agencies view psychological testing as a valuable means of reducing incidents of future police brutality, increase public confidence in the individuals selected for law enforcement employment, and avoid or reduce their liability exposure in brutality lawsuits. At the same time, agencies seemingly administer psychological tests in a more general attempt to predict which applicants will turn out to be "rotten apples."

Every law enforcement agency needs to realize that the administration of psychological tests must comply with the requirements of the ADA and the Rehabilitation Act. A law enforcement agency, therefore, should consider whether it can even administer the desired psychological test at the pre-offer stage of the hiring process. According to one congressional committee, "[t]he prohibition against pre-offer medical examinations also
applies to psychological examinations. The EEOC has taken a slightly different position, however, by announcing that an employer may administer a psychological test at the pre-offer stage as long as the particular examination is not medical.

In order to predict whether a pre-offer examination is medical, and thereby illegal, the EEOC has provided specific factors that should be considered when making this determination. As an illustration, one of the factors involves asking, "Is it [i.e., the test] designed to reveal an impairment of physical or mental health?" Similarly, the EEOC believes that a psychological examination is medical in nature if the test provides "evidence that would lead to identifying a mental disorder or impairment." Basically, only a case-by-case analysis will determine whether a particular psychological test is medical or nonmedical; but even in cases where a pre-offer psychological test is not classified as medical, it cannot involve disability-related inquiries.

The issue of psychological testing is just beginning to be addressed by the judicial system in connection with the ADA and the Rehabilitation Act. For instance, in Thompson v. Borg-Warner Protective Services Corporation, a security guard applicant was required to take a multiple choice test designed to predict those
individuals presenting “a high risk for problematic behaviors.” In response to the applicant’s claim that the pre-offer test violated the ADA, the court stated, “The ADA protects disabilities, not any characteristic which an employer may consider to be a personal flaw or undesirable aspect of an applicant’s personality.” Additionally, the court concluded, “[T]he ADA ought not prohibit an employer from inquiring into such personal characteristics as organization and time-management skills . . . which are not ordinarily indicative of a mental impairment.” After weighing the EEOC factors, the court ruled that no reasonable jury could find that the test in question was an unlawful pre-offer medical exam.

In *Barnes v. Cochran* an applicant for the position of corrections deputy also was required to undergo pre-offer psychological testing. In this case the pre-offer psychological examination was conducted by a licensed psychologist. The examination also involved the applicant and the psychologist discussing the applicant’s combat experiences in Vietnam as well as his history of flashbacks and blackouts. Although the court agreed that the applicant failed to prove that he had been rejected due to discriminatory reasons, the court permanently enjoined the Sheriff of Broward County, Florida, from “conducting any further preemployment psychological or physical medical examinations, as described and

---

297. *See id.* While taking the PASS-III D.A.T.A. Survey test, the applicant became angry and marked the “?” box for all questions that he believed asked for information that was none of the employer’s “business.” *See id.* at *2. All these responses were then marked as incorrect. *See id.*

298. *Id.* at *6.

299. *Id.*

300. *See id.* at *8.


302. *See id.* The testing consisted of the following: the Minnesota Multiphasic Personality Inventory, the Inwald Personality Inventory, the Otis Lennon School Ability Test, the Hilson Profile/Success Quotient Test, and the California Psychological Inventory. *Id.* at 905.

303. *See id.* at 901. *See generally* George E. Hargrave & Deirdre Hiatt, *Law Enforcement Selection with the Interview, MMPI, and CPI: A Study of Reliability and Validity*, 15 J. POLICE SCI. & ADMIN. 110 (1987) (explaining that a typical psychological assessment involves a psychological test battery and a diagnostic interview); Deirdre Hiatt & George E. Hargrave, *Predicting Job Performance Problems with Psychological Screening*, 16 J. POLICE SCI. & ADMIN. 122 (1988) (“A major component of most psychological screening programs is a clinical interview in which the psychologist assesses the applicant’s background and behavior, integrating information with psychological tests.”).

304. *See Barnes*, 944 F. Supp. at 901. Besides making disability related inquiries, the psychologist also reviewed the applicant’s medical records. *See id.* at 905.
defined in the Americans with Disabilities Act, the EEOC's regulations, and the guidance materials published by the EEOC. 305

Subject to the post-offer requirements for medical exams, 306 an employer is free to conduct post-offer psychological tests aimed at detecting psychological disabilities. 307 If an employer intends to withdraw the offer of employment based upon the psychological test results, however, the underlying test must be job-related and consistent with business necessity. 308 In some cases this requirement could present a potential problem for law enforcement agencies because there is considerable debate regarding the reliability and validity of using psychological tests in connection with selecting law enforcement officers. 309

305. Id. at 906. The court determined the pre-offer psychological examination was medical in nature and a violation of the ADA. See id. at 905.

306. See supra notes 275-78 and accompanying text.

307. See Barnes, 944 F. Supp. at 903; see supra note 227 and accompanying text.

308. See supra notes 9-13 and accompanying text. In Daley v. Koch and Gardiner v. Mercyhurst College, both plaintiffs were rejected or dismissed because of unfavorable results received during a post-offer psychological assessment, which consisted of an administration of the MMPI and a clinical interview. See Daley v. Koch, 892 F.2d 212, 213-14 (1989); Gardiner v. Mercyhurst College, 942 F. Supp. 1050, 1051-52 (W.D. Pa. 1995). Neither plaintiff could challenge the basis for the decision because neither one was an individual with a covered disability. See supra notes 59-61 and accompanying text. In Greenburg v. New York the plaintiff was given an unidentified psychological test. See Greenburg v. New York, 919 F. Supp. 637, 639 (E.D.N.Y. 1996). It also was unclear whether the test was administered in the pre-offer or post-offer phase. The plaintiff did not challenge the timing of the test as he merely challenged the findings; however, the challenge was unsuccessful because he was not an individual with a covered disability. See id. at 643.

309. See Aylward, supra note 293, at 201 ("Researchers have found . . . that neither psychological tests nor standard psychiatric interviews have demonstrated much in the way of reliable predictability for police work."); Burbeck & Furnham, supra note 146, at 64 ("[N]o test has been found that discriminates consistently and clearly between people who will make good police officers and those who will not."); Dwyer et al., supra note 288, at 176 ("[S]erious questions must be raised as to the value and even the ethics of [psychological testing] as it is typically performed in police departments across the nation."); Hargrave, F+4+9+Ch, supra note 283, at 268 ("Although the MMPI has been widely used for screening peace officer applicants, little research has been reported on its effectiveness in predicting aggression in this population."); George Hargrave et al., A Comparison of MMPI and CPI Test Profiles for Traffic Officers and Deputy Sheriffs, 14 J. POLICE SCI. & ADMIN. 250 (1986) (explaining that both writers and researchers have come to contradictory conclusions as to whether there is a police personality). See generally Katrin U. Byford, Comment, The Quest For The Honest Worker: A Proposal For Regulation of Integrity Testing, 49 SMU L. Rev. 329 (1996) (discussing the validity of honesty and integrity testing). But see Joyce I. McQuilkin et al., Psychological Test Validity for Selecting Law Enforcement Officers, 17 J. POLICE SCI. & ADMIN. 289, 293 (1990) ("The data suggest that psychological personality tests are valid selection devices for law enforcement officers."); Shusman et al., supra note 293, at 169 ("Although no preem-
3. Physical agility and physical fitness tests

A physical agility test requires an individual to demonstrate his or her ability to perform actual or simulated job tasks, while a physical fitness test requires an individual to perform basic physical tasks. Neither test is considered to be a medical exam as long as there is no attempt to measure "an applicant's physiological or biological responses." Therefore, a law enforcement agency is free to incorporate physical agility and physical fitness testing into its pre-offer selection process. For example, "a police department may conduct an agility test to measure a candidate's ability to walk, run, jump, or lift in relation to specific job duties." Likewise, a law enforcement agency is permitted to conduct physical fitness tests designed to measure how well or poorly an applicant performs general physical tasks.

Before conducting either a physical agility or fitness test, the employer may require the applicant to provide medical documentation simply indicating that he or she can safely participate in the testing process. Beyond requiring submission of a basic physician's statement that the applicant can safely participate, the employer is strictly prohibited from making further medical inquiries. The employer also may ask the applicant to assume liability for any injuries incurred during the administration of the tests.

---

310. EEOC, ADA ENFORCEMENT GUIDANCE, supra note 230, at 15.
311. EEOC Interpretive Guidance, supra note 11, at § 1630.14(a) app.; Maselek, supra note 150, at 687 (explaining that physical agility tests may be administered at any point in the hiring process); see also Barge, supra note 243, at 34 (quoting Peggy Mastroianni, director of ADA policy at the EEOC, "The employer can ask about performance... and if the job requires it, it can give a physical agility test.").
312. EEOC, TECHNICAL ASSISTANCE MANUAL, supra note 13, § 4.4, IV-8.
313. EEOC, ADA ENFORCEMENT GUIDANCE, supra note 230, at 15. The DEA, for instance, tests the ability of each applicant to perform a minimum number of trigger pulls, pull-ups, sit-ups, and push-ups in a limited amount of time. Drug Enforcement Administration, U.S. Dep't of Justice, Basic Agent Training (BAT) Pre-Training Packet 1, attachments I-VII (1995) (on file with the Loyola of Los Angeles Law Review). The DEA also conducts tests to determine how long it takes each applicant to complete a 120-yard shuttle run and 2.0 mile run. See id.
314. See EEOC, ADA ENFORCEMENT GUIDANCE, supra note 230, at 16. Considering the fact that the employer is prohibited from making general disability inquiries at the pre-offer stage, it seems only reasonable to allow the employer to require such basic documentation before administering the test.
315. See id.
Any employer conducting pre-offer physical agility or fitness tests, however, needs to be mindful of a few basic caveats. First, the employer must be able to show that each test is job related and consistent with business necessity whenever the tests are used to screen out individuals with disabilities. Second, the employer must also be prepared to show that neither the tests nor the job itself could be successfully performed by the disabled individual if reasonable accommodations were made. Third, the tests must be given to all applicants in the same job category, regardless of disability status.

4. Drug tests

Regarding the issue of drug testing, i.e., drug testing for illegal drugs, the ADA takes a neutral position. For instance, Title I of the ADA states that it does not "encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees." Regardless, Title I does declare that "a test to determine the illegal use of drugs shall not be considered a medical examination." Due to the fact that this sort of drug

316. See Ash et al., supra note 284, at 264 (reporting that physical strength and agility tests were used by 86.1% and 66.7% of the responding state police agencies and police departments in the 50 largest cities, respectively).

317. See EEOC TECHNICAL ASSISTANCE MANUAL, supra note 13, § 4.4, IV-5; EEOC Interpretive Guidance, supra note 11, at § 1630.14 (a) app.; supra notes 9-13 and accompanying text; see also Ryan v. City of Highland Heights, 4 A.D. Cases 1389 (N.D. Ohio 1995) ("If employers wish to terminate disabled individuals because they have failed required tests, the employers should be made to justify their tests according to the standards of § 12113(a)."). See generally REPORT ON PHYSICAL FITNESS TESTING IN LAW ENFORCEMENT, supra note 122, at 23-42 (describing a recommended physical agility test designed to test the physical abilities related to the essential functions of police officers).

318. See EEOC Interpretive Guidance, supra note 11, at § 1630.14 (a) app.; supra notes 9-13 and accompanying text; cf. EEOC TECHNICAL ASSISTANCE MANUAL, supra note 13, § 4.4, IV-5 (explaining that employers must demonstrate that an individual could not have met the standard with reasonable accommodation).


320. 42 U.S.C. §§ 12114(d)(2). See generally id. § 12114(d)(2) (defining the term "illegal use of drugs").

321. Id. § 12114(d)(1); see 29 C.F.R. § 1630.16(c); Roe v. Cheyenne Mountain Conference Resort, 920 F. Supp. 1153, 1154-55 (D. Colo. 1996); EEOC, TECHNICAL ASSISTANCE MANUAL, supra note 13, §§ 6.1, 8.9. But cf. EEOC, ADA ENFORCEMENT GUIDANCE, supra note 230, at 17 (stating that an employer may not conduct a pre-offer alcohol test because it would be a medical test).
test is not a medical exam, employers may administer drug tests at any stage of the hiring process.

Although employers are free to require applicants to submit to pre-offer drug tests, employers should not yet ask applicants to reveal information pertaining to lawful drug use. While the drug tests should be aimed at detecting illegal drug use, it is understandable that the tests also might inadvertently reveal information about lawful drug use. In the event the tests detect lawful drug use or an underlying disability, the employer is obligated to keep such information confidential.

In cases where an applicant tests positive for apparent illegal drug use, the employer will need to validate the results. In particular, the results can only be validated by requesting that the applicant reveal information about his or her lawful use of drugs and then determining whether the newly disclosed medications were responsible for the positive test results. This situation, however, presents somewhat of a predicament in light of the prohibition against disability and disability-related pre-offer inquiries. Even though the EEOC inconsistently has taken the position that an employer may request information about lawful drug use at the pre-offer stage in order to validate a positive drug test result, this position directly contradicts the prohibition against making pre-offer disability and disability-related inquiries. The best approach would be for the employer simply to avoid the uncertainty of this issue by electing to delay conducting any drug testing until the post-offer stage.

5. Polygraph examinations

Currently, polygraph examinations are widely used by law enforcement agencies. The federal government has been especially

322. See supra notes 249-51 and accompanying text.
323. See 29 C.F.R. § 1630.16(c)(3); supra note 277 and accompanying text.
324. If an employer elected not to validate the test, a disabled applicant who failed the test because of his or her use of a particular prescription medication could allege disability discrimination.
325. See supra notes 237-48 and accompanying text.
326. See EEOC, ADA ENFORCEMENT GUIDANCE, supra note 230, at 11. But see EEOC, TECHNICAL ASSISTANCE MANUAL, supra note 13, § 8.9, VIII-7 (suggesting that employers conduct drug tests after making an offer so as to avoid making pre-offer disability inquiries).
327. Charles R. Honts et al., Mental and Physical Countermeasures Reduce the Accuracy of Polygraph Tests, 79 J. APPLIED PSYCHOL. 252 (1994); see Anderson v. Philadelphia, 845 F. 2d 1216, 1223 (3d Cir. 1988) (noting that “approximately 50% of
known to incorporate polygraph testing into its hiring process as "[v]ital decisions concerning who should have access to cryptology, government secrets, and nuclear command and control have largely been based on polygraph test results."\(^{328}\)

Although administering a polygraph examination is not equivalent to conducting a traditional medical examination, most law enforcement agencies should consider foregoing the administration of a polygraph examination until the post-offer stage.\(^{329}\) Law enforcement agencies should consider such action in light of the fact that the applicant legally cannot be asked whether he or she is taking any prescription medications that might influence the accuracy of the polygraph examination.\(^{330}\) This restriction results from the general prohibition against both disability and disability-related inquiries at the pre-offer stage.\(^{331}\) In the event an agency elects to go ahead and conduct the examination without knowing whether the examinee is taking prescription medications, it might be forced to re-administer the test at the post-offer stage (that is, if it wants to confirm the accuracy of the test after learning that the examinee was in fact taking medication at the time of the original exam).\(^{332}\)

Prior to administering a pre-offer polygraph examination, a polygraph examiner also may not ask the applicant whether he or she has a medical condition that could influence the examination or endanger the health of the applicant.\(^{333}\) The testing agency,

police departments throughout the nation" rely upon pre-employment polygraph screening); Ash, supra note 284, at 265 (reporting that 56.5% of the responding law enforcement agencies use the polygraph in the hiring process); Billy Dickson, Pre-Employment Polygraph Screening of Police Applicants, FBI L. ENFORCEMENT BULL., Apr. 1986, at 7 ("Polygraph examinations have become a very important part of the police applicant screening process and are used by law enforcement agencies throughout the United States.").

328. Honts et al., supra note 327, at 252. See generally Stehney v. Perry, 101 F. 3d 925, 937 (3d Cir. 1996) ("The government contends that polygraph examinations are a useful investigatory tool not only because they assist in distinguishing between truthful and deceptive persons, but because they induce examinees to make more comprehensive disclosures that are useful in an investigation.").

329. See EEOC, ADA ENFORCEMENT GUIDANCE, supra note 230, at 17.

330. See id.

331. See supra notes 237-48 and accompanying text.

332. But cf. Charles R. Honts, Interpreting Research on Polygraph Countermeasures, 15 J. POLICE Sci. & ADMIN. 204 (1987) ("Several studies have explored the effects of drugs on detection of deception, and have generally found them to be ineffective countermeasures.").

333. See Sharp, supra note 230, at 911 (describing prohibited questions during a pre-offer polygraph).
however, could require the examinee agree to waive any liability against the agency for any adverse medical consequences resulting from the administration of the test. The testing agency also could provide the applicant with a description of the polygraph examination and require the applicant to produce medical documentation indicating clearance to take the exam. Besides being unable to ask about legal drug use and health issues affecting the test itself, the law enforcement agency would be restricted in terms of the pre-offer questions that could be asked during the actual exam. For example, the employer could not ask the applicant about how many times he or she has ever used illegal drugs. Likewise, it would be illegal to ask how often the applicant becomes intoxicated. The restriction against asking specific questions about drug and alcohol use is very significant because law enforcement agencies are often particularly concerned about an applicant's drug and alcohol problems. Just as important, the employer would be unable to use the pre-offer polygraph as a means to ensure the applicant had disclosed all relevant medical information and records due to the basic fact that the applicant should not yet have been required to reveal such information.

For the most part, these issues can be avoided by simply waiting until the post-offer stage to administer the polygraph examination. Employers should realize, however, that they will be subject to greater scrutiny whenever a disabled applicant is rejected following a post-offer polygraph. This increased scrutiny results from the fact that the revocation of the offer of employment will coincide with the employer's newly acquired knowledge about the applicant's disability.

As much as possible, employers would be prudent to take rea-

335. Cf. supra note 314 and accompanying text.
336. See generally Dickson, supra note 327, at 8-9 (during the pre-test interview, the Florida Highway Patrol questions applicants about such issues as "medical and mental health," "drinking habits," and "use and sale of illegal drugs").
337. See generally William Nardini, The Polygraph Technique: An Overview, 15 J. POLICE SCI. & ADMIN. 239, 240 (1987) (explaining that pre-employment polygraph examinations often are used "to verify information contained in a job application, and to learn if some negative relevant information has been omitted").
338. See id.
339. See generally EEOC, ADA ENFORCEMENT GUIDANCE, supra note 230, at 18-19 (explaining that in cases where a withdrawal follows both a post-offer security clearance and medical exam, close scrutiny is required in order to determine whether the medical exam was the actual reason for the withdrawal).
sonable steps to ensure that any information disclosed in the post-
offer medical examination is not passed on to those individuals re-
ponsible for administering the polygraph examination. For in-
stance, the polygraph examiner could simply ask the applicant if he
or she truthfully and fully provided all the previously requested
medical information and records. Furthermore, the polygraph ex-
aminer would not need to be informed that the applicant revealed
that he or she has been diagnosed with a particular disease or ail-
ment. Arguably, all the examiner would need to know is whether
the applicant has been medically cleared to take the exam and
whether he or she is taking any medications that could influence
the test.

By taking these sorts of basic precautions, an employer will be
in a better position to claim that the employment offer was re-
voked solely because of the applicant’s failure to pass the poly-
graph exam. The employer will also be in a better position to de-
fend the integrity of the exam as well as show that the polygraph
examiner was not biased against the disabled applicant.

VI. CONCLUSION

While it is true that law enforcement agencies are given a
great deal of leeway in making employment decisions, they no
longer have authority to discriminate against individuals with dis-
abilities. Despite initial fears by critics of the ADA and Rehabili-
tation Act, law enforcement agencies have not been forced to em-
ploy individuals who are not qualified or capable of doing the
job. Moreover, law enforcement agencies have been neither re-
quired to tolerate dishonest or illegal behavior nor compelled to
accommodate individuals posing a direct threat to themselves or
the public they are expected to protect. Only with the passage of

340. See John A. Leonard, The Americans with Disabilities Act, FBI L. EN-
FORCEMENT BULL., June 1993, at 22, 23 (stating that “the employment provisions
of the ADA do not reduce or eliminate selection criteria—the law simply attempts to
offer equal employment opportunities to qualified individuals with certain disabili-
ties”); Daniel L. Schofield, Hiring Standards: Ensuring Fitness for Duty, FBI L. EN-
FORCEMENT BULL., Nov. 1993, at 27, 28 (explaining that law enforcement agen-
cies are not required to hire or retain persons who are physically unable to perform
the job); Robin Topping, Around the Island Crime & Courts, NEWSDAY, Feb. 6,
1996, at A44 (quoting Karl Kampe, executive director of the Nassau County, New
York Civil Service Commission, regarding the initial attitudes of law enforcement
agencies after the passage of the ADA, “There was a lot of fear—a fear that both the
prospective applicant and the public would be exposed to more danger . . . [but] I
don’t think the fears have proven to be the fact.”).
time will more litigation further clarify the effects of the ADA and
the Rehabilitation Act upon law enforcement agencies. In the
meantime, employing law enforcement agencies should look to the
statutes themselves, the applicable implementing regulations, and
existing case law for guidance, while also being ever mindful of the
intent behind these federal antidiscrimination laws. At the same
time, law enforcement agencies must remain vigilant to the prem-
ise that they themselves are not above the law.341

341. Although many law enforcement officers and administrators might view the
ADA and the Rehabilitation Act as nothing more than bureaucratic meddling in the
affairs of law enforcement, those same individuals need to be reminded of the fact
that no one can predict when he or she might be either injured on or off duty or in-
flicted with a life-altering medical condition. Most cynics probably would view the
ADA and the Rehabilitation Act somewhat differently if they were a highly deco-
rated, 15-year veteran officer or agent facing an unexpected and unjustified termina-
tion following an injury incurred in the line of duty.