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FINAL REPORT

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Context for the Project

When the Americans with Disabilities Act (ADA) was signed into law in 1990, criminal justice agencies could only speculate as to how it would impact on their operations. Often called the most sweeping civil rights legislation since the Civil Rights Act of 1964, the ADA required the criminal justice community to take stock of its hiring and employment policies as well as how it delivered services, programs, and activities.

The ADA and the Criminal Justice Community

Title II of the ADA, the section that specifically applies to state and local governments as well as criminal justice agencies, went into effect on January 26, 1992. During 1992, the ADA Watch, a project the National Council on Disability created to monitor the implementation of the ADA, held hearings across the country to evaluate the progress in the law's implementation. At that time,

the realization that the proponents of the law had failed to contemplate the peculiar problems the ADA would present for criminal justice agencies was brought to light and some of the concerns raised by criminal justice agencies were validated.

Indeed, the hearings held by the ADA Watch proved to be prophetic. In the first nine months after Title II became effective, 272 complaints were filed with the U. S. Department of Justice (DOJ) against state and local governments.[1] Of these complaints, the single largest category was employment-related, with prisons and law enforcement comprising the largest number.[2] The second largest number of complaints involved inaccessible facilities or programs in prisons and courthouses.[3]

These statistics were not surprising when viewed in the context of how this civil rights law impacted on criminal justice. Its effect on the recruitment, screening, and selection process was significant. For example, since the ADA prohibits any medical examinations or inquiry of job applicants prior to extending a conditional offer of employment, most criminal justice agencies must now restructure their hiring process. Polygraph exams, psychological screening, medical exams and background checks which

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[1] National Council on Disability, "ADA Watch - Year One: A Report to the President and the Congress on Progress Implementing the Americans with Disabilities Act," April 5, 1993, p.38.

[2] Ibid.

[3] Ibid.

contain medical inquiries must be postponed until after a conditional offer of employment is made.

Other problems for criminal justice agencies also emerged. For instance, did the fact that there may be incumbents on staff who cannot pass the agility test administered to applicants necessarily create a new hiring standard? Likewise, corrections felt the effects of the ADA. What programs, services, and activities must facilities offer to inmates with disabilities? How should these programs be delivered under Title II of the ADA without compromising security?

With so many changes, unanswered questions, and criminal justice specific issues, it is understandable that these agencies comprised the area most ripe for challenge from persons with disabilities under Title II of the ADA. However, these statistics were not necessarily a reflection of a lack of information about the ADA or a desire by criminal justice agencies to avoid compliance with this law.

DOJ's Civil Rights Division and the Equal Employment Opportunity Commission (EEOC) published and distributed thousands of copies of documents designed to help explain the ADA including "Technical Assistance Manuals," "ADA Handbooks," "Regulations," and "Fact Sheets." These publications have been shown to be instrumental in raising awareness about the ADA. However, as the ADA Watch stated

in its April 5, 1993 Report, "as organizations and individuals advance their knowledge of the ADA, their questions are becoming increasingly sophisticated and technical, often requiring complex responses."[4]

What was needed, according to the ADA Watch, was industry/profession specific information and training. Perhaps no area was more illustrative of this need for profession specific information than that of criminal justice. The ADA raised interesting concerns for public safety. For instance:

* May a criminal justice agency, part of whose responsibility include the enforcement of anti-drug laws and the confiscation of illicit drugs, refuse to hire job applicants who are former drug addicts with criminal records for possession or sale of drugs even if they have nevertheless successfully completed a rehabilitation program?

* May criminal justice agencies develop a pool of qualified candidates from which to pick employees for sworn and unsworn positions? If so, must the existing pool of qualified candidates be hired before new candidates are put into or hired from the pool?

* What may criminal justice agencies do if a post-offer conditional examination reveals a non-medical character or personality trait which renders an applicant unsuitable for a public safety position?

* Must corrections facilities conducting bootcamps and early release programs predicated on strenuous physical labor offer some comparable way for inmates with physical disabilities to earn an early release?

* May corrections officials exclude HIV positive inmates from working in prison food services without violating the ADA?

* May a criminal justice agency exclude insulin-dependent diabetics from consideration for employment because they

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[4] Ibid, pp. 4-5.

> could pose a direct threat to the health and safety of themselves or others? What if the agency already has incumbents on the job who are insulin-dependent?

Initial efforts to bring industry specific information and training to criminal justice agencies was sporadic, at best. Some professional groups offered workshops on the ADA. Additionally, there had been, on an ad hoc basis, articles in criminal justice periodicals discussing, in a general way, the ADA.[5] However, not until the National Institute of Justice (NIJ) launched its ADA initiative, through this Fellowship, did a government agency dedicate itself, its efforts, and its funding to providing research, training, and technical assistance which is profession specific and designed, developed, and delivered primarily for criminal justice agencies.

It must be noted that NIJ's ADA initiative was established nearly a year before ADA Watch's report recommending this kind of assistance was released.

Since there has been a change in administrations since the inception of this Fellowship, there was also a shift in policy and, as such, guidance was slow in forthcoming from EEOC. The Commission has finally issued enforcement guidance statements on pre-employment medical inquiries and the definition of

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[5] See, for example, Flanagan, C. "The ADA and Police Psychology," The Police Chief, December 1991.; Litchford, J. "The Americans with Disabilities Act," The Police Chief, January 1991.

disability. To ensure that the criminal justice community received this information in a meaningful manner and with profession specific relevance highlighted, NIJ's ADA initiative, through this Fellowship has disseminated information and explanations of EEOC's position on these critical issues though its three tiered approach.

Another emerging area for which training and technical assistance was sought was that of other civil rights laws, especially as they relate to employment issues. It is not surprising that there was a growing need for information and training on civil rights laws dealing with race, gender, and sexual orientation. There has been enormous media attention given to these issues occasioned by the Los Angeles riots, the Tailhook incident, the Clarence Thomas - Anita Hill hearings and the controversy over whether to lift the ban prohibiting homosexuals from serving in the military. These events, coupled with an increasingly diverse work force, have naturally required criminal justice agencies to begin to address these issues.

Similarly, the Clinton administration expressed a keen desire to advance the cause of civil rights. Attorney General Janet Reno, during her remarks following President Clinton's nomination of her for the position of Attorney General, specifically stated her commitment to the enforcement of civil rights laws. To be in a position to enforce these laws, criminal justice agencies must

first, themselves, be in compliance with the laws and must also have access to information, training and technical assistance on emerging issues in this area.

Methodology

The goal of this Fellowship was to provide research, training, and technical assistance to the criminal justice system on the ADA and other civil rights issues. In order to achieve this goal the Fellowship had three components:

1. Conduct research and develop reports for NIJ's Research in Action (RIA) Series.
2. Develop and deliver NIJ-sponsored regional training on the ADA and other civil rights issues.
3. Provide technical assistance and deliver training at various workshops and conferences other agencies requesting NIJ's participation, and provide short-term technical assistance to entities contacting NIJ and in partnership with NIJ's other initiatives.

Conduct Research And Develop Reports

Research for the various publications for the RIA Series on the ADA and other civil rights issues was conducted by performing literature reviews and conducting interviews with key experts in the field. Given the evolving nature of the issues involved, it went beyond the traditional literature review and also included relevant periodicals and newsletters. Close communication and coordination with other federal agencies was maintained to ensure that the information or guidance were accurately reflected and that the relevance to

criminal justice was fully explored.

In addition, criminal justice publications were surveyed for information on the ADA and other civil rights laws, the issues they raised for criminal justice, and the responses proposed, debated, or implemented. Relevant publications on the ADA, in general, and in the context of criminal justice, in particular, were reviewed and synthesized as well.

A legal analysis of the emerging issues on the ADA and other civil rights laws was also conducted. This analysis included maintaining current on the following:

* Guidance letters and policy statements issued by EEOC or DOJ
* The Americans with Disabilities Act, the Civil Rights Act of 1964, the Civil Rights Act of 1991, and other civil rights laws
* The regulations issued by EEOC on these statutes
* The ADA Technical Assistance Manuals developed by EEOC and the DOJ
* The ADA Handbook published by EEOC and DOJ
* Any relevant legal treatise on the ADA and other civil rights laws
* Relevant case law decided under the ADA as well as the Rehabilitation Act of 1973 and other civil rights laws
* Law review articles on the ADA and other civil rights laws of specific relevance to criminal justice.

From this analysis, trends on how the courts are responding to the policies and procedures developed by criminal justice agencies in dealing with disabled individuals and employees

were explored.

Prior to refining, updating and expanding training materials, lesson plans and course notebooks, research was completed and members of the Fellowship Advisory Board consulted. In addition, through participation at various professional interest groups' annual conferences, NIJ sponsored conferences, and the health and justice initiative as well as site visits in connection with requests from the field for technical assistance, issues, and topics of interest and value to criminal justice professionals were identified, researched, and publications were prepared for the RIA Series.

In addition, efforts were made to publish pieces through the RIA Series in collaboration with criminal justice professionals and other government agencies serving the criminal justice community. These collaborations were invaluable in identifying issues of great importance to criminal justice as well as establishing and fostering partnerships with other agencies and NIJ.

The results of evaluations at conferences and workshops, site visits to provide technical assistance, literature reviews, and the legal analyses formed the basis for reports on the implications of the ADA and other civil rights laws for criminal justice, and the policy options and responses emerging in the field.

The product of this phase of the project was the RIAs on the ADA and other civil rights issues, their implications for criminal justice, and the emerging responses of operating agencies.

NIJ-Sponsored Regional Training

Experts were identified and agreed to serve as members of the Fellowship's Advisory Board. These experts were invited to participate in meetings of the Advisory Board designed to develop a working framework for the ADA and Civil Rights Initiative. They also assisted in reviewing existing training materials and provided suggestions and recommendations for modification.

Lesson plans for training programs and workshops were developed and included substantive materials as well as tools and techniques for "train the trainer" sessions. Course notebooks and workshop handouts were developed for use in workshops sponsored by NIJ and for dissemination to agencies wishing to sponsor their own workshops with the participation and/or assistance of NIJ were revised and up-dated as new information and guidance from EEOC, DOJ, and the courts were made public.

The product from this phase of the project was refined, up-dated, and expanded training materials, lesson plans and course materials.

Delivery of Training and Technical Assistance

Trainers, presenters and instructors were located to form a distinguished pool of resources from which the Fellowship drew in the delivery of workshops sponsored by NIJ as well as those sponsored by agencies seeking NIJ's participation and/or assistance.

The Fellowship also considered the delivery of additional comprehensive ADA and Civil Rights workshops in regional areas with logistical support provided through other NIJ contracts.

Finally, throughout this Fellowship, NIJ provided technical assistance to criminal justice agencies on the ADA and other civil rights laws and to include such a component in other NIJ initiatives, such as its health and justice initiative.

The products resulting from this phase of the project were the conferences and workshops that NIJ sponsored, as well as those in which it participated by providing speakers, experts or other technical assistance.

ADA Fellowship: Major Findings

This Fellowship was established with two goals in mind: (1) to communicate the legal requirements of the ADA and their implications for criminal justice; and (2) to provide technical

assistance and training to criminal justice professionals in dealing with the ADA.

The Fellowship sought to meet its goals (as outlined above), yet maintain sufficient flexibility to respond to requests for help from the field. One component of the Fellowship was to develop reports for NIJ's Research in Action series (RIA). This series provides concise descriptions of ADA issues of particular interest to the criminal justice community. In all, eight RIAs were written: seven were already published and the last is in the editorial process. They are:

* "ADA and Criminal Justice: An Overview."
* "ADA and Criminal Justice: Hiring New Employees."
* "ADA and Criminal Justice: Providing Inmate Services."
* "ADA and Criminal Justice: 911 and Emergency Response Systems."
* "ADA and Criminal Justice: Mental Illness and Corrections."
* "Civil Rights and Criminal Justice: Employment Discrimination Overview."
* "Civil Rights and Criminal Justice: Sexual Harassment."
* "ADA and Criminal Justice: Litigation Report."

In addition to the research and report component of the Fellowship, the second goal (as identified above) was met by: (1) providing regional training on the ADA to criminal justice professionals; and (2) responding to requests for training and technical assistance from the field and from within NIJ itself.

The regional training was a series of seven "needs oriented" regional training programs that include practical guidance on compliance with the ADA and information about how other criminal justice agencies comply with this civil rights law. Advisory Board members were involved in all aspects of training and development and representatives from EEOC and DOJ served as training faculty.

These regional training programs, now complete, provided significant assistance in responding to the need for training that exists in this area. The regions covered were:

* Austin, Texas (southwest)
* Seattle, Washington (pacific northwest)
* Washington, D.C. (mid-Atlantic)
* Chicago, Illinois (midwest)
* Springfield, Massachusetts (northeast)
* Orlando, Florida (southeast)
* San Francisco (west)

The third component of the Fellowship was the technical assistance provided both in response to requests from the field and to those coming from NIJ's other initiatives as well. In this regard, the Fellowship answered countless telephone inquiries on the ADA and other civil rights laws; provided on-site training in partnership with local agencies. These included:

* the Bay Area in California
* Maricopa County in Phoenix, Arizona

* the Maryland Department of Corrections
* the Iowa Department of Corrections
* the South Carolina Department of Corrections
* the Erie county Sheriffs office, the Buffalo Police Department

Various professional interest groups have also requested Fellowship participation in their ADA efforts. NIJ sponsored workshops at the following conferences:

* IACP Annual Conference 1992 - Detroit
* IACP Annual Conference 1993 - St. Louis
* ACA Mid-Winter Conference 1993 - Miami
* ACA Annual Conference 1993 - Nashville
* ACA Mid-Winter Conference 1994 - Orlando
* ACA Mid-Winter Conference 1995 - Dallas
* AJA Annual Conference 1993 - Portland
* International Correctional Education Association Conference 1993 - Chicago
* Department of Education's 1994 Correctional Leadership Forum
* AJA Annual Conference 1994 - Indianapolis
* AJA Annual Conference 1995 - Charlotte
* NACO Annual Conference 1993 - Minneapolis
* Correctional Educators Association Conference 1994 - Chicago
* National Association of Attorneys General - Corrections Conference 1995 - Little Rock
* National Association of ADA Coordinators 1995 Conference - San Diego
* U.S. Attorneys' Office, Western District of Tennessee - 1996 COP Training Conference

Other associations and federal agencies requested technical assistance as well. At the request of NIC, I wrote the scripts for two training videos it produced on the ADA. In addition, I assisted with the development and implementation of a teleconference on the ADA and was a participant in a second teleconference on ADA issues as they impact on corrections.

I also reviewed a video script for the ACA on the ADA; as well as wrote an article on the ADA and corrections for its April 1995 issue of Corrections Today.

The National League of Cities also sought technical assistance on the ADA and published three articles on ADA issues in its Nation's Cities Weekly.

In addition, the Fellowship provided a technical assistance capacity to NIJ in its other initiatives. ADA workshops were included in NIJ's 1993 Evaluation Conference and Community Policing Conference. Training to NIJ's Project Managers has also been provided. Answering ADA questions from NIJ staff has become routine practice.

Policy Implications

To meet the goals of the Fellowship, an Advisory Board was established to lend guidance, assistance and advice to the Fellowship. The assembly of this very distinguished Board proved

to be an invaluable asset to the Fellowship. Among the Board's members were: Chai Feldblum, one of the authors of the ADA; Peggy Mastroianni, Former Director of ADA Policy and now Associate Legal Counsel for the EEOC; Stewart Oneglia, Former Chief of the Coordination and Review Section of the Civil Rights Division at the DOJ, and Dianne Carter, President of the NIC Academy for the National Institute of Corrections (NIC). Through this Board, the Fellowship and NIJ was able to build excellent working relationships with EEOC, DOJ, and NIC, and have been working together to assist criminal justice agencies with the ADA.

As a result of discussions held by the Board, a need was identified for a dialogue between the criminal justice community and disability rights advocacy groups about issues the ADA raises for criminal justice. NIJ, through this Fellowship, responded to this need by hosting a meeting of these groups to identify and discuss these problems and develop at possible solutions. Both Advisory Board representatives from EEOC and DOJ indicated their full support for this endeavor and a willingness to consider all solutions reached when drafting future ADA policy and guidance. The meeting of this working group took place during the winter of 1994. After the meeting, EEOC issued Enforcement Guidance on the issue of medical exams and disability-related inquiries. The influence of the working group meeting and the Advisory Board was present in this guidance in the numerous criminal justice specific examples.

Conclusion

This Fellowship was supplemented and when all is said and done, NIJ's ADA Initiative will have lasted four years. This extension was not necessitated because more time was needed to complete the tasks committed to be undertaken during its original tenure. Indeed, these commitments were met early in the Fellowship and exceeded. Rather, continuing the effort enabled NIJ to perpetuate its ADA and Civil Rights Initiative and to respond to the overwhelming need for assistance in this area.

Since NIJ began this initiative, it has established itself as the leader on the ADA and its implications for criminal justice. The initiative continued until the end of July in 1996, however, the effects of these efforts will continue long after.

U.S. Department of Justice
Office of Justice Programs
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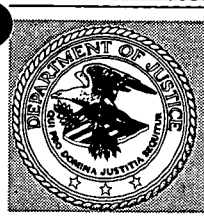

National Institute of Justice
Research in Action

Michael J. Russell, Acting Director

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The Americans with Disabilities Act and Criminal Justice: An Overview

by Paula N. Rubin

When the Americans With Disabilities Act (ADA) was enacted on July 26, 1990, a new era began in the quest to integrate persons with disabilities into the mainstream of society. The ADA is perhaps the most sweeping civil rights legislation passed since the enactment of the Civil Rights Act of 1964 nearly 30 years before.

This law is predicated on the belief that persons with disabilities have traditionally been isolated and segregated and that this discrimination took many forms, including architectural, transportation, and communication barriers; overprotective rules; exclusionary standards; lesser services, programs, activities, benefits, jobs, or other opportunities; and outright exclusion from certain places and privileges.[1]

One purpose of the ADA is simple: "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] The goal is to provide the estimated 43 million persons with disabilities[3] access to employment, to governmental programs, services and activities, and to public accommodations such as restaurants, hotels, theaters, and shopping centers. To achieve this goal, the ADA contains five sections designed to eliminate barriers in employment, public services, transportation, public accommodations, and telecommunication.

The ADA was intended to pick up where the Rehabilitation Act of 1973 left off by expanding coverage to include employers neither receiving Federal funds nor working pursuant to a Federal contract. The ADA also covers access to government facilities and the delivery of services and programs by government agencies.

While the ADA has significant implications for the criminal justice system, law enforcement is mentioned only once in the legislative history of the ADA, and even that is only in reference to persons with a history of illegal drug use.[4] Yet experts believe the impact on criminal justice is major:

> *The ADA may very well be the most significant piece of legislation affecting law enforcement since the Civil Rights Act. It will cause police agencies throughout the United States, as well as other employers, to adjust and, in some cases, completely overhaul their recruitment and selection procedures. Furthermore, if departments do not immediately develop changes in their personnel policies by the time the Act becomes applicable, they will expose themselves to substantial liability.*[5]

Attempts to create an exemption for law enforcement were unsuccessful. Thus, the way the criminal justice community selects and treats its employees and delivers services to the public must be brought into compliance with the ADA. This includes limitations on blanket exclusions and requires a selection process that deals with individuals on a case-by-case basis.

The requirements of the ADA present unique challenges for the criminal justice system. Director, Office of National Drug Control Policy, Lee Brown, in his role as former president of the International Association of Chiefs of Police, pointed this out in a letter to the Equal Employment Opportunity Commission (EEOC), "[W]e do . . . think that the extremely 'physical' nature of law enforcement work, coupled with the 'security/integrity' needs inherent to the job, impart a special perspective to our analysis of the Act."[6]

The need to have a working understanding of the law itself is critical to beginning to develop strategies for the recruitment, screening, selection, and treatment of police and corrections officers as well as for the delivery of services by criminal justice agencies. This Research in Action report provides a framework to begin to assess ADA's impact on the criminal justice system. Future issues will focus on the delivery by criminal justice agencies of their services to the public as well as on their hiring, promotion, and firing practices.

Understanding the basics

A person has a disability under the law if she or he has a mental or physical impairment that substantially limits a major life activity, such as walking, talking, breathing, sitting, standing, or learning. A person will also be considered to have a disability for purposes of this law if he or she has a

The National Institute of Justice launched an initiative on the Americans With Disabilities Act (ADA) to examine the implications of the Act for criminal justice agencies at the State and local levels. The ADA affects hiring and employment policies and practices as well as delivery of services. It poses unique challenges for criminal justice agencies, especially where the traditional physical requirements of law enforcement and corrections duties are involved.

The NIJ initiative has two goals: to provide information on the requirements of the ADA and to offer technical assistance and training to criminal justice professionals in dealing with this law.

This Research in Action report is the first in a series designed to explain how the ADA will affect the criminal justice system. It presents an overview of the law and a brief legal analysis of its provisions. Future titles in the series will examine such topics as hiring practices, delivery of inmate services, emergency response systems and telecommunications devices for the deaf (TDD's), and writing job descriptions for positions in the corrections profession.

Through its new initiative, the Institute is responding to the need for understanding of the Act in the criminal justice field, and the new opportunities it offers persons with disabilities for access to the mainstream of society.

Michael J. Russell
Acting Director
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record of such an impairment or is perceived or regarded as having an impairment. Those associated with the disabled person are also entitled to certain protections. Family members who need special consideration in caring for someone with a disability may be entitled to some protections under the law. However, the ADA does not require employers to provide reasonable accommodation in these cases.

Equal employment opportunities. Title I of the ADA addresses employment aspects of the law. The law makes it illegal to discriminate against persons with disabilities. These individuals are entitled to equal access to employment, including recruitment, hiring, promotion, and any other benefits and privileges of employment. To be "protected" (that is, covered by Title I of the ADA), the individual must have a disability and be qualified for the job.

To be qualified, the individual must satisfy the job requirements such as education, experience, and skills, and must be able to perform the essential functions of the job, with or without a reasonable accommodation.

Provision of reasonable accommodation. A reasonable accommodation can include modifying existing facilities to make them accessible, job restructuring, part-time or modified work schedules, acquiring or modifying equipment, and changing policies. However, reasonable accommodations will not be required when providing them causes an undue hardship for the agency.

Undue hardship means significant expense or difficulty. More than just money may be involved; it can also mean disruption or fundamental alteration of the nature or operation of the business or agency. Direct threat of serious harm is defined by the law as "a significant risk of substantial harm to the health and safety of others that cannot be eliminated by reasonable accommodation." Direct threat is not a defense to an employer's obligation to provide a reasonable accommodation. A reasonable accommodation is required if it will eliminate the direct threat.

If a police officer were recovering from a communicable disease but was fit for duty apart from the fact he or she would remain contagious for 2 weeks, a reasonable accommodation would be to award him or her 2 weeks of leave. After that, there would be no significant risk in returning to duty.[7] Speculative or remote threats will not satisfy this requirement. Such a determination must be predicated on objective evidence.

Accessibility to facilities and in delivery of government services. In addition, Title II of the ADA requires government entities to achieve accessibility to their facilities as well as in the delivery of services and programs. Accessibility encompasses new construction and the alteration of existing facilities. It can mean anything from adding curb ramps to creating parking spaces reserved for persons with disabilities.

Defining disability

A person with a disability is someone who:

- Has a physical or mental impairment that substantially limits one or more major life activities.
- Has a record of such an impairment.
- Is regarded as having an impairment.[8]

There are several key phrases in this definition: "impairment," "substantially limits," "major life activity," "record," and "regarded as." Understanding these concepts is essential to making an evaluation of whether someone is disabled for purposes of the ADA.

"Impairment." A threshold criterion that must be met under this definition is that there be an impairment—"some sort of physiological disorder or mental disorder."[9] This definition applies regardless of whether an individual can compensate for the impairment by use of an auxiliary aid or medication. For instance, someone who uses a hearing aid nevertheless has a disability under the ADA even if the device restores the person's hearing to normal levels. Likewise, an insulin-dependent diabetic whose diabetes is fully controlled by the insulin has a disability under the law.

On the other hand, physical characteristics such as hair or eye color or left-handedness do not constitute impairments. Certain personality characteristics such as poor judgment, a bad temper, or lack of dependability are not considered disabilities.

Not all cases are clear cut:

> *A person who cannot read due to dyslexia is an individual with a disability because dyslexia, which is a learning disability, is an impairment. But a person who cannot read because he or she dropped out of school is not an individual with a disability, because lack of education is not a disability.*[10]

"Substantially limits." Having a disability, in and of itself, is not enough; it must be a disability that substantially limits a major life activity. These types of activities

include: walking, speaking, breathing, performing manual tasks, seeing, hearing, learning, caring for oneself, and working.[11] Also considered major life activities are the ability to have intimate sexual relations and procreation. For this reason, those with AIDS or HIV infection will fall within the definition.

There are three criteria to consider when determining whether a major life activity is substantially limited by any given condition:

- Its nature and severity.
- How long it will last or is expected to last.
- Its permanent or long-term impact, or expected impact.[12]

A good rule of thumb is to look at the effect of the condition and not its name.[13] So, for example, "an individual with mild cerebral palsy that only slightly interferes with his or her ability to speak and has no significant impact on other major life activities is not an individual with a disability under this part of the definition."[14]

"Record of impairment." Even if an individual does not currently have a physiological or mental disorder, she or he may still be considered disabled under the three-part definition, inasmuch as those who have a record of an impairment are also protected from discrimination. The law also covers persons who have been erroneously classified as having an impairment. Remember, however, that the impairment must have substantially limited a major life activity. Having a record of an impairment, alone, will not satisfy the definition.

"Regarded as having an impairment." A more subtle aspect of the definition of disability is that part that protects those who are perceived to have a disability. How does this occur? Here are some examples:[15]

(1) A person has high blood pressure controlled by medication. Nevertheless, his employer places him on permanent light duty for fear of a possibility of a future heart attack. In this case, the person has a disability that does not substantially limit a major life activity, but his employer treats him as though it does.

(2) Refusal to hire someone who has severe scars from burns. Here there is no disability nor a limitation of a major life activity. Instead, the fears, stereotypes, and attitudes of others toward these scars are disabling.

(3) Firing someone rumored to have HIV infection, who in fact does not, may violate the law. Even though the individual does not have a disability, she or he is regarded as having a substantially limiting impairment.

There are very subtle differences between these examples. Indeed, they have been described as "all different sides of the same coin."[16] The bottom line is that the ADA prohibits discriminating against people who are being treated as if they have a disability.[17]

Defining ADA exclusions

What conditions are not covered by the ADA? The law explicitly states that certain conditions, including homosexuality, transvestism, bisexuality, transsexualism, voyeurism, exhibitionism, pedophilia, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and gender-identity disorders are not caused by a physical impairment. Therefore, they are not disabilities.

Persons with temporary conditions are also not usually found to have a disability under the definition. The question is whether the impairment substantially limits one or more major life activities. An example offered by the Equal Employment Opportunities Commission (EEOC) is that of a broken leg. If it heals normally within a few months, there would be no disability. But if the leg heals improperly, causing a permanent limp, or if the leg takes an abnormally long time to heal, during which time the person cannot walk, she or he might be considered to have a disability.[18] Pregnancy, for purposes of the ADA, is not an impairment. Moreover pregnancy is addressed in the Pregnancy Discrimination Act, which requires employers to treat pregnancy no less favorably than any other temporary disability.

What's in a Name?

In 1973 when the Rehabilitation Act was signed into law, it used the term "handicapped" to describe persons with disabilities. Since that time, individuals with disabilities have indicated their preference for the term "disability."

Many terms used to describe certain disabilities invoke stereotypes and can be dehumanizing. Here are some terms to avoid with suggested substitutes:

Avoid . . .	Instead say . . .
Handicapped, invalid, disabled	Person(s) with disabilities
Victim of epilepsy, arthritis	Officer Smith has epilepsy, Lt. Jones has arthritis
Deaf-mute, deaf and dumb	Deaf, hearing impaired, speech impaired
Confined to wheelchair, wheelchair bound	Wheelchair user, users of wheelchairs, mobility impaired
Cripple, crippled	Physically disabled, mobility impaired, Use name of the disability (e.g. polio)
Deformed	Physically disabled
Retarded, slow, stupid	People with mental disabilities
Slow, stupid, illiterate	People with learning disabilities, Officer Day has dyslexia
Spastic, fits	Seizures, Captain Collins has epilepsy

Also specifically excluded from protection under the ADA are those who currently use illegal drugs. Prior drug addicts, including those who are in the process of, or who have successfully completed, a rehabilitation program, are protected by the law. This protection applies to those with an addiction to drugs or alcohol. It does not apply to the casual or recreational user of drugs or alcohol.

The issue of current drug use or prior drug history has significant implications for criminal justice agencies. Issues as to what constitutes current drug use and whether and under what conditions individuals with a history of drug use may lawfully be denied sworn criminal justice positions will form the basis of a future Research in Action.

Otherwise qualified individuals with disabilities

Having a disability does not automatically entitle someone to protection under the ADA. The ADA is not a guaranteed-jobs law requiring criminal justice agencies to hire persons with disabilities. Nor is it an affirmative action law requiring that preference be given to persons with disabilities over those who are not disabled. Under the ADA, employers are still entitled to hire the most qualified candidate for the job.

The ADA does not safeguard a person with a disability unless the person is also otherwise qualified for the position. In evaluating whether a person with a disability is qualified for a job, two questions should be answered:

(1) Does this person meet the initial job requirements, such as work experience, education, skills, certificates, or licenses?

(2) If so, can the person perform the essential functions of the job, with or without reasonable accommodation?

Defining initial job requirements. In answering the first question, care must be taken to make sure that the specifications for the position are job-related and consistent with business necessity. For example, law enforcement agencies would most likely be permitted to require applicants and employees to have a driver's license, inasmuch as operating a patrol car is an essential part of police work in most jurisdictions. On the other hand, driving a car may not be an essential part of the job of a corrections officer or administrative or clerical employees, and therefore might not be appropriately included as a requirement for these positions.[19]

Note that the purpose of the law is to integrate persons with disabilities into the work force. It is impermissible to attempt to subvert the intent of the ADA by imposing qualifications and job requirements that are not job-related or only relate to marginal functions of the job.

Persons with disabilities who meet the specified job requirements are not considered qualified unless they can also perform the essential functions of the job with or without a reasonable accommodation. Making this determination also requires answering two questions:

(1) Are the functions truly essential or are they marginal?

(2) Can these essential functions be performed with or without a reasonable accommodation?

Identifying essential job functions. This involves determining whether employees in the position actually are required to perform the function and, if so, whether or not removing the function would fundamentally alter the job.

"Legal Ease"

The ADA uses numerous terms to describe its requirements and the obligations of those covered by the law. Here is a brief index and short explanation of some of the key words and phrases commonly used in the ADA.

Disability	(1) A mental or physical impairment that substantially limits a major life activity; (2) a record of having such an impairment; (3) being regarded as having such an impairment.
Impairment	A physiological or mental disorder.
Substantial limitation	When compared to the average person: (1) an inability to perform a major life activity; (2) a significant restriction on how or how long the activity can be performed; or (3) a significant restriction on the ability to perform a class or broad range of jobs.
Major life activity	Basic functions that the average person in the general population can do with little or no difficulty such as walking, seeing, hearing, breathing, speaking, procreating, learning, sitting, standing, performing manual tasks, working, or having intimate sexual relations.
Otherwise qualified	A person with a disability who satisfies all of the requirements of the job such as education, experience, or skill and who can perform the essential functions of the job with or without reasonable accommodation.
Essential functions	The fundamental, not marginal, duties of a job.
Reasonable accommodation	A change in the application process, work environment, or job descriptions involving marginal functions of the job, or the use of modified or auxiliary devices that enable a person with a disability to perform the essential functions of the job without causing an undue hardship or direct threat to the health and safety of herself or himself or of others.
Undue hardship	Significant difficulty or expense relative to the size and overall financial resources of the employer.
Direct threat	A significant risk of substantial harm based on valid, objective evidence and not mere speculation.

If the employer rarely requires a specific task, then it may not be appropriate to list the task as an essential job function. In that case, the employer would need to demonstrate that, although the function is rarely performed, to eliminate it would be to fundamentally alter the nature of the job. For example, even if 99 percent of police officers rarely make forcible arrests, departments may establish this as an essential function of the job by showing that the consequences would be significant if a police officer were not able to do so.

Answers will vary not only from job to job, but from department to department as well. The size and location of the agency may play a role in this assessment. Here are reasons offered by the EEOC as to why a job function may be essential:

- The position exists to perform the function.
- There are a limited number of other employees available to perform the function, or among whom the function can be distributed.
- A function is highly specialized, and the person in the position is hired for special expertise or abilities to perform it.[20]

What factors may be used in determining essential functions of a particular job?[21]

- The employer's judgment (while the employer may not be second guessed, other factors will also be regarded).
- A written job description prepared before advertising or interviewing for a job (this is not required under the ADA, but it is a good idea to have one that accurately reflects the true nature of the job and is created in advance of the screening and selection process).
- The amount of time spent performing the function (the example of the forcible arrest, used above, might apply to this factor).
- The consequences of not requiring the person to perform this function (the above example of the police officer might apply here).
- The terms of a collective bargaining agreement.
- The work experience of people who have performed the job in the past and work experience of people who currently perform similar jobs. (It is a good idea to talk with employees who have performed the job in the past as well as those who are doing the job now. Do not presume to know what a job involves; ask the people who are doing it.)
- Other relevant factors (this can include the kind of services provided by the employer or the organizational structure of the agency).

The principle is that job requirements should not have the practical effect of imposing a blanket exclusion of a particular disability or class of persons.

Reasonable accommodation, undue hardship, and direct threat

If an otherwise qualified individual with a disability cannot perform the essential functions of the job, the employer may be obligated to provide a reasonable accommodation. However, an "employer has no duty to accommodate an employee with a disability unless the accommodation will enable the employee to perform the essential functions of the position."[22] "Reasonable accommodation is any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy an equal employment opportunity."[23]

Defining reasonable accommodation. An employer's duty to reasonably accommodate individuals with disabilities applies to all aspects of employment. This includes the application and selection process, an employee's ability to perform the essential functions of the position currently held as well as those desired and the benefits and privileges other employees without disabilities enjoy.

This duty, however, only applies to known physical or mental disabilities. It is usually the responsibility of the person needing an accommodation to request one. An employer's applications, test announcements, or advertisements may request persons with disabilities requiring an accommodation to participate in the application process to inform the employer within a reasonable time prior to applying or interviewing for a position or taking an examination.[24]

Here are five additional explanations of reasonable accommodation:[25]

- A reasonable accommodation must be an effective accommodation.
- The reasonable accommodation obligation applies only to accommodations that reduce barriers to employment related to a person's disability; it does not apply to accommodations that a disabled person may request for some other reason.
- A reasonable accommodation need not be the best accommodation, as long as it is effective for that purpose.
- An employer is not required to provide an accommodation that is primarily for the employee's/applicant's personal use.
- An individual is not required to accept an accommodation if the individual has not requested an accommodation and does not believe that one is needed.

An employer, for example, might offer to raise a worktable so that a disabled employee's wheelchair would fit under it. The employee would be entitled to decline accepting the higher table as an accommodation; the individual might prefer the lower table to permit easier use of a computer keyboard in her or his lap.

When is an accommodation effective? When it enables the person to perform the essential functions of the job. The accommodation should avoid limiting, segregating, or classifying the individual.

What happens if an applicant or employee refuses an accommodation? Remember, employers are not required to provide the accommodation the person requests, although where possible it is advisable to do so. The employer does not even have to provide the best accommodation. The accommodation must be effective in helping the individual perform the essential functions of the job. If the individual chooses not to accept this accommodation, there is a risk that doing so will render her or him unable to carry out the essential functions of the job. When that happens, the individual is no longer "otherwise qualified" for the position.

Examples of reasonable accommodations. Because the same disability can manifest itself very differently in two different people, accommodations require a case-by-case determination, as noted above. The following list of possibilities is not meant to be exhaustive.[26]

Making facilities accessible and usable. *For instance, providing designated parking spaces for those with disabilities if parking is provided to others.*

Job restructuring. *This does not include reassigning essential functions of the job. It can include exchanging or reassigning marginal functions, or changing how and when essential functions are performed.*

Modified work schedules. *This might include part-time work.*

Flexible leave policies. *Accommodations do not include paid leave, but could include leave without pay.*

Reassignment to a vacant position. *This is new to the ADA and applies to incumbents only and not to applicants.*

Acquisition or modification of equipment and devices. *Examples include TDD's (telecommunications for the deaf) and apply to job-related equipment only. Employers are not required to provide devices for the personal use of the individual.*

Adjusting and modifying examinations, training materials, and policies. *This includes using training sites that are accessible.*

Providing qualified readers. *This does not mean two people must be hired to do one person's job.*[27]

Providing qualified interpreters. *This can be done on an as-needed basis.*

There may be times when providing an accommodation will not be required. Obviously, no accommodation is required when it would not enable the individual to perform the essential functions of the job.

Likewise, no reasonable accommodation will be required if it would impose an undue hardship on the employer or a direct threat to the health and safety of the employee or others is created, which cannot be eliminated by a reasonable accommodation.

Defining undue hardship. The ADA defines this term as "significant difficulty or expense." What may be an undue hardship for one criminal justice agency may not be a hardship for a different agency in different circumstances. Accommodations may constitute undue hardship if they are unduly costly, extensive, substantial, disruptive, or would fundamentally alter the nature or operation of the agency.[28]

"An undue hardship may be something less than a cost that would drive the employer to the verge of going out of business, but at the same time it must impose more than a negligible cost."[29]

Defining direct threat. This involves a significant risk of substantial harm based on objective evidence and not mere speculation. It cannot be predicated on some remote possibility in the future but must be a present risk. Employers are required to reduce or eliminate the risk with an accommodation. When this is not possible, then a refusal to hire due to direct threat may be appropriate.

Deciding what accommodation to provide. The best place to start is with the person requiring the accommodation. Often she or he will know what accommodation will work and how to obtain that accommodation as cost-efficiently as possible. It may also be a good idea to consult with other employers and local vocational rehabilitation agencies. The Job Accommodations Network (JAN), offered by the President's Committee on Disabilities, is an information and reference service that suggests accommodations. JAN may be reached at 1–800–ADA–WORK.

Accessibility to programs and services

The ADA not only addresses how criminal justice agencies are to treat their own employees under Title II but also governs how they are to treat members of the general public who may have a disability. Although Title II went into effect on January 26, 1992, many of its requirements have been in effect for federally assisted programs for nearly 20 years under the Rehabilitation Act of 1973. The ADA merely expands coverage to all government programs, services, or activities. However, a significant consequence of the ADA was to bring to the attention of the public at large the rights of those with disabilities to enjoy both equal employment opportunity and equal access to programs and services.

Title II applies to any governmental agency regardless of its size and requires the agency to make sure that its programs, services, and activities are accessible to persons with disabilities. This affects two areas: (1) the services and programs delivered by the agency, and (2) physical access to the facilities where these programs, services, and activities are offered.

Determining accessibility of programs and services. To ascertain if the agency is meeting the requirements of the ADA, the offered programs, services, and activities in their entirety need to be examined and the following questions asked:

- Are any modifications to the agency's policies, practices, or procedures necessary to ensure accessibility?
- Do any eligibility criteria eliminate or tend to screen out a qualified individual with a disability from enjoying the benefits of these programs, services, or activities?
- Do any policies or practices segregate persons with disabilities from others participating in these programs, services, or activities?
- Are any of these programs, services, or activities delivered at a location or facility that has the effect of denying persons with disabilities the right to enjoy the benefits of these programs, services, or activities?
- If alternative services are offered to persons with disabilities, are these benefits unequal to those offered to the public at large?

If the answer to any of these questions is "yes," the agency may need to revise the way it offers its programs, services, and activities. Modification will not be necessary, however, if doing so fundamentally alters the nature of the program, service, or activity or causes an undue burden. Undue burden under Title II is analogous to undue

hardship under Title I, and means "significant difficulty or expense . . . taking into account such factors as the nature and cost of the action, the financial resources of the site or a parent organization, the relationship of the site to the parent organization, and the type of the parent organization."[30]

Is it always illegal to have discriminatory practices or policies? Obviously not. An agency is allowed to take into account the safety of the public. So, for example, prohibiting persons with heart disease from riding on a roller coaster at a county fair might be a permissible rule with a discriminatory effect.

Determining physical access to facilities. Are criminal justice agencies expected to rebuild or renovate their facilities? The answer is a qualified "no." Criminal justice agencies are not expected to "retrofit" their existing buildings. Nor are they expected to alter historical landmarks. A rule of thumb is to look at the program, not the building. Is it possible to change the way the program is delivered rather than the building? Examples include moving the program or service to an accessible part of the building, such as the first floor, providing home delivery of the service, or telephoning the person with a mobility impairment. If so, then remodeling the delivery of the service rather than the building in which it is delivered may suffice. A little creativity can go a long way in complying with this part of the ADA.

New construction or alterations to existing buildings, however, must comply with the ADA. The Architectural and Transportation Compliance Board (the "Access Board") has issued proposed accessibility guidelines for State and local governments. These guidelines are expected to have special considerations not originally contemplated for courthouses and correctional facilities. Until the final guidelines are issued, however, agencies may choose between two different sets of architectural standards: the Uniform Federal Accessibility Standard (UFAS) or the ADA Accessibility Guidelines (ADAAG).

What must be done at the administrative level to comply with Title II of the ADA? Several things. Some of these administrative requirements will only apply to entities with 50 or more employees. A word of caution on calculating the number of employees. The size of a particular entity will be computed based on the number of employees not only in the department, but also on the number of employees in the city or county in which the specific department operates. Therefore, only the smallest of jurisdictions will be exempt from most administrative requirements.

What are these requirements?

- Self-evaluations of programs, services, and activities delivered should be conducted and a study made of whether the policies and practices prevent persons with disabilities from enjoying the benefits and privileges of them. For entities with 50 or more employees, the self-evaluation must have been completed by January 26, 1993, and be made available to the public for 3 years.

ADA Issues in the Criminal Justice Community

Future Research in Action issues will discuss such questions about the ADA's impact as the following:

Conditional Offer of Employment

- How should a conditional offer be developed in order to be legally sound?
- Under what circumstances may a conditional offer be withdrawn?
- Can agencies develop a pool of qualified candidates from which to pick employees, both sworn and unsworn?

Medical Exams and Medical Inquiries

- What constitutes a medical exam or inquiry?
- What impact does this have on administering polygraph exams?
- How can agencies effectively screen applicants while still making good-faith conditional offers of employment?

Psychological Exams

- When may a psychological exam be given?
- When does a psychological exam test medical issues as opposed to common personality traits such as poor judgment or quick temper?

Agility Tests

- What impact is there on applicants if incumbents cannot pass the same agility test? Does this create a new hiring standard?
- What is the ADA's position on fitness for duty tests for incumbents?
- If administered prior to extending a conditional offer of employment, what precautions can be taken to ensure that an applicant is fit enough to take the agility test?

Visual Acuity

- Will stringent eye standards withstand the scrutiny of the ADA?
- What impact will vision impairments or learning disabilities such as dyslexia have on the selection and training process?

Light Duty

- If permanent light-duty positions exist, what obligations exist to make the same or similar positions available to other employees? To applicants? Does this create new hiring standards?
- If a light-duty position is vacated, must it be made available to another person with a disability?

Drugs and Alcohol

- What does the ADA mean by "current use" and what constitutes the successful completion of a rehabilitation program?
- What questions can be asked of an applicant preoffer regarding drug and alcohol consumption?
- What about the impact of a former drug user with or without a criminal record on the security and integrity of the agency?

- Transition plans for entities with 50 or more employees are required if structural changes are necessary in order to make programs accessible.
- Public notice must be given to all interested parties of their rights and protections under the ADA. This notice can include signs, posters, and pamphlets and should be made in accessible formats.
- ADA compliance officers must be designated for entities with 50 or more employees to provide a contact point for individuals who need information on the ADA and to assist in the employees' education in the law.
- A grievance procedure must be created and implemented for entities with 50 or more employees to handle the receipt and processing of complaints as well as their resolution.

More questions remaining

Since enactment of the ADA, criminal justice agencies have begun to apply the ADA requirements. But at this juncture, there often seem to be more questions than answers about how to implement the ADA.

The law affects virtually every facet of the application, screening, and selection process for corrections and law enforcement personnel. Careful consideration of actions is required as there are, as yet, no certainties about how the courts will interpret the ADA. As aptly put in the October 1991 issue of *Fire & Police Personnel Reporter*, "Professionals can act only as weathervanes, and not forecasters."

Notes

1. Americans With Disabilities Act (ADA), 42 USC, Section 12101(a)(5).
2. ADA § 12101(b)(1).
3. ADA § 12101(a)(1).
4. *Appro Exchange*, "Get Ready for the Disabilities Act," July 1991, p. 7, reprinted from *Law Enforcement News*, a publication of John Jay College of Criminal Justice, New York.
5. T. Schneid and L. Gaines, "The Americans With Disabilities Act: Implications for Police Administrators," *Police Liability Review*, Winter 1991: 4.
6. Lee Brown, "Model Response to EEOC's Regulations Governing the Americans With Disabilities Act (ADA)," unpublished memorandum by the International Association of Chiefs of Police to its membership, April 3, 1991.
7. Equal Employment Opportunity Commission, *Technical Assistance Manual* (TAM), Section 4.5.
8. *TAM*, § 2.2.(a)(i).
9. C. Feldblum, "The Americans With Disabilities Act: The Definition of Disability," *The Labor Lawyer* 7, 11 (1991).
10. *TAM*, § 2.2(a)(i).
11. *TAM*, § 2.2(a)(ii).
12. *TAM*, § 2.2(a)(iii).
13. *TAM*, § 2.2(a)(iii).
14. *TAM*, § 2.2(a)(ii).
15. Examples from *TAM*, § 2.2(c).
16. Feldblum, p. 16.
17. Ibid.
18. *TAM*, § 2.2(a).
19. D. Snyder, *The Americans With Disabilities Act, Labor Relations Information System*, 1991: 82.
20. *TAM*, § 2.3(a).
21. Suggestions from *TAM*, § 2.3(a).
22. *TAM*, Section 3.1.
23. R. Fitzpatrick, "Reasonable Accommodation and Undue Hardship Under the ADA," *Federal Bar News & Journal*, January 1992.
24. Snyder, p. 177.
25. Suggestions from *TAM*, § 3.4.
26. From *TAM*, § 3.5.
27. See also Snyder, p. 167.
28. *TAM*, § 3.9.
29. Fitzpatrick, p. 73.
30. Bureau of National Affairs, *Americans With Disabilities Manual (ADAM)*, Washington, D.C., monthly, Section 40:0006.

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The Americans With Disabilities Act and Criminal Justice: Hiring New Employees

by Paula N. Rubin

The Americans with Disabilities Act (ADA) was created to eliminate barriers to equal employment opportunity and provide equal access to public accommodations and the programs, services, and activities delivered by government entities. Under the ADA, employers must reevaluate their personnel application and selection processes to ensure that they do not adversely affect persons with disabilities, either intentionally or unintentionally. The requirements of the ADA have significant consequences for the criminal justice system. Many of the tests and screening devices commonly used to hire public safety personnel, as well as the order in which these tests may be administered, must be scrutinized in light of the law.

The ADA and hiring: Some general principles

Appreciating the impact of the ADA on hiring requires an understanding of the law itself. Simply put, the ADA prohibits discrimination against *qualified* individuals with a disability. Having a disability, in and of itself, does not entitle a person to protection under the law. A job applicant also must be qualified, i.e., must meet established prerequisites of the position such as education, experience, and skills, and must be able to perform the essential functions of the job.

Whether an applicant with a disability is otherwise qualified for the job is a central issue in making legal hiring decisions under the ADA. Some questions to be considered are: How are these determinations made? What constitutes an essential function of the job? Are performance standards permitted?

Thus, hiring decisions should be made on a case-by-case basis and not based on generalized assumptions, stereotypes, or myths. Limiting, segregating, or classifying applicants so that persons with disabilities are adversely affected should be avoided.

Under the ADA, blanket exclusions of individuals with a particular disability are, in most cases, not permissible.[1] For example, to exclude "all applicants with diabetes ignores the varying degrees of severity of this disease and the ability to control its symptoms"[2] and would be forbidden. On the other hand, the "ADA does not require quotas, it...requires that employers not reject applicants with disabilities because of their disabilities."[3] In addition, the ADA requires employers to provide applicants with reasonable accommodations so that they can apply for jobs.

Qualifications and standards

Under the ADA, standards and qualifications that screen out, or tend to screen out, individuals or groups of individuals on the basis of disability must be related to the job to be performed.

An analysis of job qualifications begins with three questions:

- Do qualifications or standards that screen out persons with disabilities relate to essential functions of the job?
- Are qualifications and standards that screen out persons with disabilities job-related and consistent with business necessity?
- Is a reasonable accommodation available that enables an applicant, who would not be qualified because of a disability, to meet the qualification standards?

Fundamental, not marginal, job functions are considered essential for purposes of the ADA. Functions are essential: a) when employees are required to perform them and b) when their elimination would fundamentally alter the job. Even when a function is rarely performed, it may nevertheless be essential. For example, most police officers rarely make forcible arrests, but departments that can demonstrate serious consequences of an officer's inability to do so may establish this ability as an essential function.

There is nothing to prevent employers in criminal justice agencies from using qualifying standards. Indeed, it is permissible to

Highlights

NIJ's initiative to examine the implications of the Americans with Disabilities Act (ADA) for criminal justice agencies at the State and local levels was created to respond to the need for understanding of the Act in the criminal justice field and the new opportunities it offers persons with disabilities. This Research in Action, the second in a series designed to explain how the Americans with Disabilities Act (ADA) will affect the criminal justice system, focuses on the ADA's effect on criminal justice hiring practices. Key highlights include:

- Hiring decisions must be made on whether an applicant meets the established prerequisites of the position (e.g. education, experience) and whether the applicant is able to perform the essential functions of the job.
- A job function is considered essential when an employee is required to perform it and when its elimination would fundamentally alter the job.
- The ADA requires employers to provide applicants with reasonable accommodations so they can apply for jobs.
- A job applicant must be given a conditional offer of employment before being required to provide medical information or take a medical exam; the ADA expressly prohibits preemployment medical examinations and disability related inquiries.
- Agility tests may be given at any point in the hiring process if they are job-related, but the ADA forbids disability-related inquiries or medical exams to establish a person's fitness to take agility tests.
- Tests for illegal use of drugs are not considered a medical exam under the ADA; employers may make hiring decisions based on these test results.
- Since some preliminary questions asked in conjunction with polygraph tests are medical in nature, these exams can only be administered prior to making a job offer without making such inquiries. One option is to administer a second polygraph test, which includes medical inquiries, after the job offer is made.

These issues and their implications are detailed in this Research in Action.

"establish physical or mental qualifications that are necessary to perform specific jobs (for example, jobs in the transportation and construction industries; police and fire fighters jobs; security guard jobs) or to protect health and safety."[4]

What happens, however, if the qualifying standards eliminate someone on the basis of disability or a group of individuals with disabilities? Under the ADA, standards must be shown to be job-related and consistent with business necessity.[5] This requirement "underscores the need to examine all selection criteria to ensure that they not only provide an accurate measure of an applicant's actual ability to perform the essential functions of the job, but that even if they do provide such measure, a disabled applicant is offered a 'reasonable accommodation' to meet the criteria that relate to the functions of the job at issue."[6]

A qualification standard is *job-related* when it is "a legitimate measure or qualification for the specific job it is being used for."[7] Section 4.3 of the Equal Employment Opportunity Commission's (EEOC) *Technical Assistance Manual* explains:

> A qualification standard for a secretarial job of 'ability to take shorthand dictation' is not job-related if the person in the particular secretarial job actually transcribes taped dictation.

Business necessity means that the selection relates to an essential function of the job. Thus, "if a test or other selection criterion excludes an individual with a disability and does not relate to the essential function of the job, it is not consistent with business necessity."[8]

However, even if a standard is job-related it may nevertheless be inappropriate if it does not relate to an *essential* job function. For example, requiring a driver's license may be job-related for both patrol officers and corrections officers. However, the requirement relates to an essential function of the job of a patrol officer. Typically, a corrections officer is not required to drive in the course of business. Therefore, if requiring a driver's license screens out a person with a disability it may be justified for the job of patrol officer but not for that of corrections officer if driving is not an essential function of the job.

Reasonable accommodations during the hiring process

Employers have a duty to reasonably accommodate persons with disabilities during the application process to give otherwise qualified applicants an equal opportunity to be considered for the job.[9] However, an employer is permitted to ask applicants whether they need reasonable accommodation in order to participate in the application process or take a screening test.[10]

Reasonable accommodations during the hiring process can include providing qualified interpreters or readers. It can also mean revising or modifying exams or tests. Section 3.3 of EEOC's *Technical Assistance Manual* offers these examples:

> A person who uses a wheelchair may need an accommodation if an employment office or interview site is not accessible. A person with a visual disability or a person who lacks manual dexterity may need assistance in filling out an application form. Without such accommodations, these individuals may have no opportunity to be considered for a job.

On the other hand, unlike the kinds of reasonable accommodations afforded *employees* with disabilities — such as job restructuring or changing work schedules — employers do not have to find a job for an applicant with a disability who is not otherwise qualified, or consider an applicant for a job for which he or she did not apply. Likewise, while reassignment to another position might be a reasonable accommodation for an employer to make for an *employee*, this would not apply to *applicants* for a position. In addition, there is no requirement that employers lower performance standards.

Medical examinations and disability-related inquiries

Under the ADA, job applicants must be given a conditional offer of employment before being required to provide medical information or take a medical exam[11] even though law enforcement and corrections agencies routinely administer medical and psychological exams to applicants prior to making a job offer. "As a result, this provision of the ADA will significantly change hiring practices in the country."[12] This requirement is designed to prevent medical information from being considered before nonmedical qualifications.

The EEOC's Enforcement Guidelines define medical examinations as "...procedures or tests that seek information about the existence, nature, or severity of an individual's physical or mental impairment, or that seek information regarding an individual's physical or psychological health."[13] Sometimes it is easier to say what *"medical"* is *not* rather than what it is. For instance, "tests for illegal use of drugs are not medical examinations under the ADA and are not subject to the restrictions on such examinations."[14] Similarly, "physical agility tests are not medical examinations and so may be given at any point in the employment application process."[15]

A good rule of thumb is that questions that would disclose information regarding a disability, whether asked on an application or during an interview, may be construed as a medical exam or disability-related inquiry. This holds true for any test, procedure, or performance exam that would disclose information regarding a disability. Therefore, criminal justice agencies that customarily use psychological exams, polygraph tests, background checks, and medical exams will need to evaluate their hiring process in light of the ADA.

Application procedures and requirements

The ADA expressly prohibits preemployment medical examinations and disability-related inquiries.[16] "...[A]n employer may not ask or require a job applicant to take a medical examination before making a job offer."[17] Inquiry into the existence, nature, or severity of a disability is also forbidden at this stage in the hiring process.

However, employers may ask applicants questions regarding their ability to perform specific job functions "and may, with certain limitations, ask an individual with a disability to describe or demonstrate how he or she would perform these functions."[18] On the other hand, hiring practices that focus on disabilities rather than abilities will, in most instances, be considered discriminatory. Section 6.3 of EEOC's *Technical Assistance Manual* provides an example relevant to criminal justice agencies:

> A policy that prohibits employment of *any* individual who has epilepsy, diabetes, or a heart condition from a certain type of job, and which does not consider the ability of a *particular* individual, in most cases would violate the ADA.

The ADA does take into consideration an employer's need to ensure that job applicants can perform the job effectively and safely, and specifies how this can be done. Section 6.1 of EEOC's *Technical Assistance Manual* provides guidance:

> An employer may condition a job offer on the satisfactory result of a post-offer medical examination or inquiry if this is required of all entering employees in the same job category. A post-offer examination or inquiry does not have to be 'job-related' or 'consistent with business necessity.' Questions also may be asked about previous injuries and workers' compensation claims.

Questions that are prohibited before a conditional offer may be posed in the post-offer phase of the hiring process. Such post-offer medical examinations are legal only if the following requirements are met:

- All entering employees in a particular category are required to submit to the same examination regardless of disability.
- Information concerning the offeree's medical condition must be maintained on separate forms.
- The information must be maintained in separate medical files.
- The information must be treated as a confidential medical record.[19]

If a post-offer medical exam or disability-related inquiry reveals a disability, the reason for withdrawing a conditional offer of employment must be job-related and consistent with business necessity. The withdrawal of the offer may be permissible where the medical inquiry discloses facts pertinent to the applicant's qualifications. That is to say, the employer must show that the applicant cannot perform the essential functions of the job, with or without a reasonable accommodation, and must demonstrate that there is no reasonable accommodation available to enable the applicant to perform the essential functions of the job.

In addition, "a post-offer medical examination may disqualify an individual if the employer can demonstrate that the individual would pose a 'direct threat' in the workplace (i.e., a significant risk of substantial harm to the individual or others) that cannot be eliminated or reduced below the 'direct threat' level through reasonable accommodation."[20] However, a "direct threat" cannot be speculative or remote and must be based on current medical knowledge.

Section 6.4 of EEOC's *Technical Assistance Manual* offers this example:

> If a medical examination reveals that an individual has epilepsy and is seizure-free or has adequate warning of a seizure, it would be unlawful to disqualify this person from a job operating a machine because of fear or speculation that he might pose a risk to himself or others. But if the examination and other medical inquiries reveal that an individual with epilepsy has sei-

zures resulting in loss of consciousness, there could be evidence of significant risk in employing this person as a machine operator. However, even where the person might endanger himself by operating a machine, an accommodation such as placing a shield over the machine to protect him, should be considered.

Quick Quiz

Now, under the ADA, it is unlawful to make medical inquiries prior to extending a conditional offer of employment to a job applicant. Yet, the law does not define terms such as "medical examinations" or "medical inquiry."

What kind of questions, then, are off-limits before extending a job offer? Here are some common questions asked on applications and during interviews. Which questions should be asked only after making a conditional offer of employment?

Place an "X" by those questions which could be construed as a medical inquiry.

_____1. Have you ever filed a claim for workers' compensation?

_____2. How did you become disabled?

_____3. How often were you absent from your last job?

_____4. Have you ever been injured on-the-job?

_____5. Are you taking any medication at this time?

_____6. Please describe how you would perform the following functions of the job...

_____7. Are you willing to submit to a drug test at this time?

_____8. How many sick days did you use on your last job?

_____9. How much time off will you need because of your disability?

_____10. Do you need any reasonable accommodation to participate in our agility test?

[Answers appear on page 7.]

Implications for criminal justice

The ADA unquestionably has had an enormous impact on the hiring process in criminal justice. "The development of selection procedures which are in compliance with the ADA appear to be somewhat reversed to current arrangements."[21]

Prior to the enactment of the ADA, most departments required applicants to pass written exams, agility tests, a polygraph exam, a background investigation, a medical exam, and a psychological exam before being offered a position of employment. However, with the ADA prohibition against disability-related inquiry prior to making a conditional offer of employment, many of these testing and screening devices must be postponed until after an offer is made.

Thus, a "department cannot even remotely investigate an applicant's disability or potential disability until the applicant's other qualifications have been evaluated and a contingent offer of employment has been made to the candidate."[22] "Under the ADA, *bona fide* job offers do not always need to be limited to currently available vacancies but also may, under certain circumstances, be given to fill reasonably anticipated openings."[23]

For example:

> A police department may be able to demonstrate that it needs to make offers to 50 applicants for 25 available positions because: (1) for public safety reasons it needs to have police officers who are ready and able to begin work when a vacancy occurs on the force; and (2) it is likely that approximately half the offers will be revoked based on post-offer medical tests and/or the results of security checks, and be cause some applicants may withdraw from consideration.[24]

However, if more offers are made than positions exist, individuals must be hired from the pool based on pre-established objective standards. An example of such a standard includes using the date of application. Moreover, if applicants are re-ranked based on post-offer inquiry or procedures, the agency must inform persons in the pool of their overall rankings *before* the post-offer re-ranking and must notify all persons in the pool of any changes made as a result of such post-offer re-rankings. The Enforcement Guidance offers this example:

> A police department gives a post-offer psychological examination, which is designed to analyze an individual's mental stability and is, therefore, a medical examination. The department re-ranks the individuals in its pool based on scores on this examination, placing those individuals who score most favorably at the top of the hiring priority list. In this case, the department must inform individuals in the hiring pool of their initially-determined hiring rank order; after the post-offer medical examination, the department must inform the individuals in the hiring pool whether their rank was changed based (in whole or in part) on the post-offer medical examination.[25]

Can agencies have a qualified pool of candidates? While some jurisdictions have used this method, EEOC has not specifically addressed this issue yet. Agencies planning this should consider exhausting the number of candidates in the pool before adding to it. In addition, agencies employing such a method should ensure that *all* candidates advance equally through the pool as hirings are made.

Screening devices

Agility tests. These may be "given at any point in the application or employment process so long as employers can demonstrate that they are job-related and consistent with business necessity."[26] However, departments may not measure an applicant's physiological/biological responses to performance because that would be considered medical.[27]

The ADA also forbids disability-related inquiries or medical exams to establish a person's fitness to take the agility test.

"Agencies will not be permitted to screen applicants for medical conditions, such as heart disease, prior to giving them a physical agility test."[28] One solution to this problem is to provide applicants with a detailed written description of the test and require that they get a note or certification from their doctor that they are able to take the agility test.

Drug tests. Since a test for the illegal use of drugs is not considered a medical examination under the ADA, employers may conduct such testing of applicants or employees and make employment decisions based on the results. On the other hand, if an applicant tests positive for illegal drug use, the test may be validated by asking the applicant about any lawful drug use that may have resulted in the positive result.

However, certain drug tests may reveal the use of *prescription* drugs. This could lead to problems for employers. For example, what if the results of a drug test reveal that the applicant is taking AZT, a drug used in conjunction with treatment for HIV infection and AIDS? Persons with HIV infection or AIDS are protected under the ADA. Therefore, this information, in and of itself, could not be used to eliminate the applicant.

In the event secondary medical information is obtained, agencies should treat it in accordance with ADA requirements relating to all medical information. It should be treated as a confidential medical record, maintained separately from the individual's personnel file, and steps should be taken to guarantee the security of the information.

Polygraph tests. Polygraph tests are not addressed specifically by the ADA. However, preliminary questions asked in conjunction with a polygraph exam are often medical in nature. For instance, asking a person "Are you currently on any medication?" would be impermissible prior to extending a conditional offer.

What does this mean for criminal justice agencies? "Pre-offer, there will be no medical questions on the polygraph examination allowed."[29] Such inquiries include:

- Whether the individual has sought or is currently seeking mental health services.
- Inquiries about the extent of prior illegal drug use.
- Most inquiries about prior or current lawful drug use.
- Inquiries reflecting the extent of prior or current alcohol use.[30]

In addition, the EEOC Enforcement Guidance offers this example:

> "R., a police department, may not ask as part of a pre-offer polygraph examination such questions as: 'Do you have any mental disorders which would hamper your performance as a police officer?' or 'Have you ever been treated for drug addiction?' "[31]

Thus, employers are faced with delaying the polygraph exam until after an offer is made; conducting the polygraph without the initial medical inquiries often asked to ensure the validity of the exam; or conducting one polygraph test pre-offer, without the preliminary medical questions, and a second exam, post-offer, which includes medical exams.

Background checks. To the extent that background checks involve medical inquiry, they must be delayed until after an offer is made. FBI checks, national credit checks, and high school or college transcripts can be procured at the pre-offer stage. However, agencies cannot ask prior employers or others any questions that the employer cannot ask the applicant directly.

Medical exams. The ADA permits medical exams once a conditional offer of employment is made, and it would be useful to give a list of essential job functions to the doctor who will conduct the exam.[32]

What if the employer gets unsolicited medical information before extending a conditional offer? Can this information be used to exclude the applicant? This depends on whether the information is relevant to the applicant's qualifications. If an applicant is otherwise qualified, the information cannot be so used. If an applicant *volunteers* information about a disability that renders him or her unqualified for the job, then no offer need be made.

No decision should be made on the basis of speculation or assumptions. For example, if an applicant discloses that he or she has epilepsy, such information, in and of itself, would not disqualify the applicant. Blanket exclusions of a particular disability should be avoided. But should an applicant reveal that he or she has epilepsy that cannot be controlled by medication and continues to have seizures on a regular basis, it may be permissible to eliminate the candidate if the reasons are job-related and consistent with business necessity.

Psychological exams. Whether a psychological exam is also a medical exam depends on the type of exam administered. Criminal justice agencies will need to make this determination on a case-by-case basis. "To the extent that a test is designed and used to measure only such factors as an applicant's honesty, tastes, and habits, it would not normally be considered a medical examination."[33] However, exams or tests which provide evidence that a candidate has a mental disorder or impairment would be considered a medical examination.

In addition, for example, many departments have historically used tests such as the Minnesota Multiphasic Personality Inventory (MMPI), which includes questions that might be considered disability-related. For example:

- I am bothered by an upset stomach several times a week.
- I have a cough most of the time.
- During the past few years I have been well most of the time.
- I have never had a fit or convulsion.
- I have had attacks in which I could not control my movements or speech but in which I knew what was going on around me.[34]

Not all psychological tests include questions that are disability-related. With careful screening they might be utilized prior to extending a conditional offer of employment.

Prior to making a conditional offer, employers may assess personality traits, knowledge, skills, and abilities as they apply to job qualifications. Once an offer has been made, employers are free to administer psychological exams which include medical questions.

Notes

1. EEOC's *Technical Assistance Manual* ("TAM"), Section 4.4.

2. Snyder, D., *The American With Disabilities Act*, Labor Relations Information System (1991), p. 212.

3. Id. at 210.

4. "ADA Questions and Answers," Bureau of National Affairs, *Americans with Disabilities Manual* (ADAM), (Washington, D.C., monthly), Section 90:0233. TAM, Section 4.4.

5. TAM, Section 4.4.

6. House Labor and Education Report to the ADA, p. 72.

7. TAM, Section 4.3(1).

8. TAM, Section 4.3(2).

9. TAM, Section 3.3.

10. Snyder, p. 218.

11. Americans With Disabilities Act, Section 12112 (d).

12. Snyder, p. 228.

13. "Enforcement Guidelines: Pre-employment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act of 1990," the Equal Employment Opportunity Commission, May 1994, *Volume II, Compliance Manual No. 915.002.*

14. TAM, Section 6.1.

15. EEOC Regulations Interpretive Guidance, Section 1630.14.

16. Americans with Disabilities Act, Section 12112.

17. "ADA Questions and Answers," Bureau of National Affairs.

18. Id.

19. Snyder, p. 232-233.

20. "ADA Questions and Answers," Bureau of National Affairs.

21. Schneid, T., and L. Gaines, "The Americans with Disabilities Act: Implications for Police Administrators," *Police Liability Review*, Winter 1991. p.4.

22. Id. at 4.

23. "Enforcement Guidance: Pre-employment Disability-related Inquiries and Medical Examinations Under the Americans with Disabilities Act of 1990," the Equal Employment Opportunity Commission. p. 38.

24. Id.

25. Id. at 40.

26. Vaughn, C. Roland III. "IACP's Response to the Americans with Disabilities Act," *The Police Chief*, December 16, 1991.

27. "Enforcement Guidance: Pre-employment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act of 1990," the Equal Employment Opportunity Commission. p. 30.

28. *Crime Control Digest*, Vol 25. No. 50. December 16, 1991.

29. Id. at 7.

30. "Enforcement Guidance: Pre-employment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act of 1990," the Equal Employment Opportunity Commission. p.34.

31. Id. at 35.

32. *Crime Control Digest*, December 23, 1991. p.7.

33. "Enforcement Guidance: Pre-employment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act of 1990," the Equal Employment Opportunity Commission. p. 32.

34. "Minnesota Multiphasic Personality Inventory - 2," The University of Minnesota Press, 1989, #28, #36, #141, #143, and #182.

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Answers to Quiz

X 1. Questions about workers compensation history are not permitted prior to making a conditional offer of employment because it could require an applicant to disclose a disability or a record of a disability.

X 2. The ADA prohibits questions about the nature, origin, or severity of a disability at this stage in the hiring process.

___ 3. Questions about attendance, in general, are permitted so long as they do not relate to absences due to illness. [See question 8.]

X 4. Questions regarding on-the-job injuries are another way of asking about workers compensation claims and therefore are not permitted.

X 5. This question is often asked prior to administration of a polygraph and is considered a medical inquiry. Since this question cannot be asked prior to extending a conditional offer of employment, polygraph exams should either be pushed back until the post-offer phase or, alternatively, conducted without these "pre-polygraph" inquiries.

___ 6. Questions about how a particular applicant would perform specific job functions, and with what accommodation(s), are allowed. Employers are permitted to determine whether the applicant can perform the essential functions of the job and questions like this one focus on the applicant's *abilities, not* his or her *disabilities*.

___ 7. Drug tests are not considered medical exams under the ADA. Therefore, a drug test may be administered at any time.

X 8. Questions about absences due to illness would be considered a medical inquiry. Likewise, questions regarding conditions or illnesses for which treatment was sought, or regarding treatment by a psychiatrist or psychologist or for a mental condition would also not be permitted at the pre-offer stage of the hiring process.

X 9. Even if an applicant voluntarily discloses a disability which is not manifestly obvious, employers may not then use this information to inquire into otherwise impermissible areas. Remember, exploration into what accommodation to provide should focus on the applicant's abilities, not disabilities.

___ 10. Employers have a duty to reasonably accommodate participants in the application, the interview and any performance exams to be administered.

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Research in Action

July 1994

The Americans With Disabilities Act and Criminal Justice: Providing Inmate Services

by Paula N. Rubin and Susan W. McCampbell

Title II of the Americans With Disabilities Act (ADA) requires that State and local governmental entities, regardless of size, provide equal access for persons with disabilities to programs, services, and activities of the entity, as well as to employment opportunities. The ADA covers criminal justice agencies, including corrections facilities, operated by or on behalf of State and local governmental entities.

The ADA affects how employees for sworn and unsworn positions are hired in the corrections field. The law also affects the delivery of programs, services, and activities offered to inmates and their visitors—family members, attorneys, clergy, or any other person having a legitimate reason to visit an inmate. Moreover, the ADA applies not only to the mandatory programs that agencies are required to offer inmates, but also to any voluntary programs the facility may provide.

This Research in Action report, the third in a series on the Americans With Disabilities Act published by NIJ, explores the implications of Title II of the ADA for inmate programs and services. The Department of Justice (DOJ), one of eight Federal agencies responsible for enforcing the ADA, is designated to investigate, among other things, complaints involving law enforcement, public safety, and correctional institutions. During the first 9 months the ADA was in effect, 272 complaints were retained by DOJ for alleged violations of this new law.[1] The single largest number of complaints retained for investigation by the Department were employment-related, with prisons and law enforcement the main focus.[2] The second largest number of those complaints involved inaccessible facilities or programs in prisons and courthouses.[3]

Title II: legal overview

Title II makes it illegal to discriminate against qualified individuals with disabilities.[4] Under the law, a person has a disability if he or she suffers from a physical or mental impairment that substantially limits a major life activity, such as seeing, hearing, walking, talking, breathing, sitting, standing, or learning. A person will also be considered disabled, for purposes of this law, if there is a record of such an impairment or if he or she is perceived or regarded as having such an impairment. Those associated with a person with a disability are also entitled to certain protections.

To be covered by Title II of the ADA, a person must meet the definition of a "qualified individual with a disability." Such a person is defined as "...an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

Essential eligibility requirements. The essential eligibility requirements for receiving many of the services delivered in a correctional facility and for participating in many prison program activities may be minimal. For example, if certain types of offenders are entitled or required to attend counseling sessions, then having committed the offense in question may be the only eligibility requirement for attending the counseling sessions.

On the other hand, if a prison offers advanced educational opportunities, the requirement that a prisoner have completed the educational prerequisites to advanced classes is a legitimate eligibility requirement that does not discriminate on the basis of disability.

Highlights

NIJ's initiative to examine the implications of the Americans With Disabilities Act (ADA) for criminal justice agencies at the State and local levels was created to respond to the need for understanding of the Act in the criminal justice field and the new opportunities it offers persons with disabilities. This Research in Action, the third in a series designed to explain how the Americans With Disabilities Act (ADA) will affect the criminal justice system, focuses on providing services to inmates.

Compliance with the ADA affects the delivery of programs, services, and activities offered to inmates and their visitors, including family members, attorneys, clergy, counselors, and probation/parole officers. Inmates and visitors must be provided access to any program, service, or activity to which inmates and visitors without disabilities have access. Key highlights include:

- It is critical for administrators to develop written policies and procedures consistent with the ADA and have them in place before a problem arises.
- Reasonable modification of policies, practices, and procedures is necessary to avoid screening out inmates with disabilities from participating in programs and receiving services.
- Correctional facilities must provide "program access," i.e., ensuring that each service, program, or activity is readily accessible to and usable by individuals with disabilities. This standard must be applied to architectural features and all new construction and alterations to existing structures.
- Effective auxiliary aids (e.g., assistive listening systems, TTD's, qualified sign language interpreter, recorded books, and books in braille) must be provided to inmates where necessary to give them equal access to the facility's programs, services, or activities.
- Classification decisions (e.g., determining least restrictive custody) should be based solely upon risk factors relevant to the facility where the inmate is incarcerated.
- In general, ADA requirements do not apply when their exercise would fundamentally alter the nature of the program, service, or activity *or* create an undue financial or administrative burden. Undue burden can mean a significant expense or difficulty or a disruption or fundamental alteration of the nature of the agency.
- Eligibility requirements for such activities as educational programs, drugs and alcohol counseling, work programs, and boot camps that eliminate or tend to eliminate inmates with disabilities may not be imposed unless it can be shown that such requirements are necessary for the provision of the service.

These issues and their implications are detailed in this Research in Action.

However, as indicated in the definition of "qualified individual with disability," whether or not an inmate meets essential eligibility requirements for a particular program or activity is a decision that requires corrections administrators to evaluate that facility's rules, policies, and practices; architectural, communication, and transportation barriers; and policies for providing auxiliary aids and services. Administrators also must assess the impact of each on the ability of a prisoner to participate in programs, services, and activities conducted by the facility.

General guidance. The basic requirements of the ADA, as applied to providing inmate services, are discussed below. In applying these requirements, administrators should keep in mind some general guidance.

First, providing equal access to the facility's programs, services, or activities will never require the corrections agency to create a direct threat to the safety of others. The law defines direct threat of serious harm as a "significant risk to the health and safety of others that cannot be eliminated by reasonable accommodation." Such a determination must be predicated on objective evidence; speculative or remote threats will not suffice.

Second, because integration into the mainstream of society is a cornerstone of the ADA, services, programs, or activities that segregate persons with disabilities should be avoided.[5] A government agency such as a jail, detention center, or prison may, however, offer a separate or special program "when necessary to provide individuals with disabilities an equal opportunity to benefit from the programs."[6] So, for example, it may be permissible for a prison to sponsor a separate basketball league for inmates who use wheelchairs.

Policies and procedures. In evaluating services, administrators should ask: Are there policies, practices, or procedures that screen out inmates with disabilities from participating in programs? If the answer is "yes," reasonable modification to those policies or procedures may be necessary to avoid discrimination. Modifying a policy, practice, or procedure will not be required, however, if doing so would fundamentally alter the nature of the service, program, or activity.

Fundamental alteration of a program may occur when the modification is such that it changes the very nature of the program so that the facility would, in effect, be offering a different kind of program. For example, if a prison offers courses for college credit that require certain prerequisite courses not offered on the premises, the facility would not be required to offer them to inmates with disabilities who had not taken these prerequisite courses. To require the facility to offer such prerequisites would, in effect, require it to offer a completely different course.

Architectural barriers and "program access." The second aspect for evaluation under Title II involves access. A public

entity may not deny the benefits of its programs, activities, and services to individuals with disabilities because its facilities are inaccessible. Contrary to common belief, however, the ADA does *not* require that correctional institutions retrofit all their existing facilities to a new ADA standard. What the ADA *does* require is that a facility operate each service, program, or activity it offers so that, when viewed in its entirety, the service, program, or activity is readily accessible to and usable by individuals with disabilities. This standard, known as "program access," applies to all new construction and alterations to existing structures.

As a practical matter, corrections administrators will need to evaluate each service, program, and activity conducted at or offered by their institutions. If, when viewed in their entirety, these services, programs, or activities are not physically accessible to inmates with disabilities, then alternative methods of providing access should be considered.

Achieving program accessibility may mean relocating services and activities from an inaccessible site to one that is accessible, redesigning equipment, providing auxiliary aids for disabled beneficiaries of city correctional programs, and altering an existing structure.[7] The ADA recognizes that total structural access may not be possible and allows for use of "alternative methods of ensuring opportunities to participate in the program."[8]

Providing program access is not required if it would fundamentally alter the nature of the program, service, or activity, or if it would cause undue financial and administrative burdens on the governmental entity. Undue burden means significant expense or difficulty, and is not limited to money. Undue burden can also mean disruption or fundamental alteration of the nature or operation of the agency. For purposes of determining whether an undue burden would be created, the resources of the entire governmental entity under which the facility operates is considered and not just the resources of the facility itself.

Communications. The third area in evaluating program access is that of communication. Effective auxiliary aids must be provided to inmates where necessary to give them equal access to the facility's programs, services, or activities. This requirement does not apply, however, when doing so would fundamentally alter the nature of the program, service, or activity, or cause an undue financial and administrative burden.

A correctional facility must ensure that its communications with individuals with disabilities are as effective as its communications with others. When necessary to provide an individual with a disability an equal opportunity to participate in, and enjoy the benefits of programs, auxiliary aids and services should be provided at the facility's expense. This provision of the ADA applies only to individuals with hearing, vision, or speech impairments.

For persons who are deaf or hard of hearing, examples of auxiliary aids include assistive listening systems and telecommunication devices for the deaf (TDD's). Qualified readers and taped texts are examples of auxiliary aids for individuals with vision impairment, and for those with speech impairments, TDD's and communication boards qualify as auxiliary aids.

The type of auxiliary aid or service necessary to ensure effective communication will vary depending on the length and complexity of the communication involved. In routine matters, for example, the exchange of written notes with a deaf prisoner may be sufficient. However, where communication is more complex, extensive, or significant—for example, during classes, counseling sessions, or disciplinary proceedings—a qualified sign language interpreter may be required.

It is critical for administrators to develop written policies and procedures consistent with the ADA and have them in place before a problem or special need of an inmate or an arrestee arises. Examples might include having a list of certified sign language interpreters who can be called on short notice, having the necessary number of TDD's and personnel trained to use them, and making information available to staff on ways to locate books in braille or on tape.

Assessing inmates during intake

Intake is the process during which inmates or arrestees entering the correctional facility are evaluated. In particular, several issues are addressed:

- Risk assessment. Does the arrestee or inmate pose an imminent danger to himself or herself or others?
- Pretrial release. Is the arrestee eligible for pretrial release?
- Medical screening. Does the arrestee or inmate have any infectious diseases or medical conditions requiring immediate attention?
- Classification. What is the appropriate housing assignment for this individual?
- Needs assessment. What is the individual's interest, ability, and eligibility status regarding participation in the facility's various programs, services, and activities?

When addressing these issues problems sometimes occur. Evaluations may take place at various times during the intake process and may be conducted by different staff members in separate parts of the jail, prison, or detention center. In addition, not all ADA-defined disabilities are manifest, that is, obvious to the evaluator. Many, including diabetes, cancer, epilepsy, or HIV disease, are hidden or may not have visible symptoms.

How does the ADA affect this vital and necessary part of corrections operations? Here are some suggestions:

- Corrections administrators should keep in mind that information aimed at identifying inmates with disabilities should have a

legitimate purpose in the context of institutional settings. Administrators should obtain information that is genuinely necessary for the safe operation of the facility.

- Avoid using information obtained during intake as a basis for segregating prisoners with disabilities *solely* on the basis of the disability. *Mistakes* in classifying an inmate will not protect the facility from a claim of disability discrimination.

- Disability-related inquiries should include advising inmates of the facility's commitment to compliance with the ADA. Inmates with disabilities should be involved in the process of determining what accommodation to make so as to enable the inmate to participate in the facility's programs, services, or activities.

- Sound prison practices require that all medical information obtained from the prisoner be kept confidential, separate from other prisoner information, and disseminated only on a *need-to-know* basis.

- The facility should have written policies and procedures governing the intake process, and these should be distributed to all intake personnel.

Classification decisions

The classification process determines "the needs and requirements of those for whom confinement has been ordered and for assigning them to housing units and programs according to their needs and existing resources."[9] Classification decisions about an inmate include determining the least restrictive custody for an inmate. This process should be based solely upon risk factors shown to be relevant to the particular facility where the inmate is incarcerated. Some factors that might be considered include current criminal charge(s), past criminal charges, incidents of escape or attempted escape, and past institutional behavior.

Facilities that have further analysis or documented information on the inmate's behavior might also add such items as prior drug or alcohol use, age, and level of education. It should be noted that drug or alcohol addicts who have successfully completed a rehabilitation program or are currently in a rehabilitation program are considered persons with disabilities under

Questions Most Frequently Asked...

1. Does the ADA apply to corrections facilities?

Yes. Title II of the ADA applies to all public entities including State and local governments and the agencies that operate under their auspices. This includes jails, detention centers, and prisons. This section of the law covers all programs, services, and activities provided by the State or local government through its agencies.

2. Do short-term holding facilities (i.e., less than 1 year) have fewer obligations under the ADA than long-term facilities?

The ADA applies regardless of how long an inmate with a disability remains in custody. However, the length of an inmate's incarceration would certainly be a consideration in evaluating whether or not a modification to a facility's policies, practices, or procedures would fundamentally alter the nature of the service, program, or activity. Remember also that while public entities are not generally required to provide personal devices (for example, wheelchairs or hearing aids) or personal services (for example, attendants), this is not true for correctional facilities and other custodial entities.

3. During an intake evaluation, can an inmate be asked if he or she is HIV positive or has AIDS?

Public entities may not make unnecessary inquiries into the existence of a disability. If it is necessary to know whether an inmate who uses a wheelchair can perform manual work to determine eligibility for inmate work programs, then it might be permissible to ask. However, if asking about this disability is done as a general matter and not in connection with providing services, it could be challenged under the ADA as irrelevant. As a good practice, the agency should also be sure that medical information about inmates, such as their HIV or AIDS status, remains separate and confidential.

4. Is the correctional facility required to provide a sign language interpreter for a hearing-impaired inmate who wishes to attend Alcoholic Anonymous (AA) or Narcotics Anonymous meetings? What if the inmate's attendance at these meetings is court-ordered?

Generally, the corrections facility will be required to provide effective communication through auxiliary aids and services that enable the inmate to participate in such meetings in a meaningful way. This is true regardless of whether attendance is mandatory (court-ordered) or voluntary. An inmate cannot be required to pay the costs of auxiliary aids required by the ADA.

Remember, auxiliary aids that are *effective* are required. When interacting with deaf or hard-of-hearing inmates, writing notes for short exchanges may be effective, but for interactions such as an AA meeting, disciplinary hearings in which the inmate may lose privileges, participation in the facility's GED programs, or visits with an attorney, interpreters will most likely be more appropriate. Primary consideration must be given to the request of the person with the disability.[11]

5. Does the ADA require that a law library contain duplicate volumes in braille to accommodate inmates with vision impairments?

Correctional facilities are only required to provide auxiliary aids and services where necessary to enable an inmate with a disability to participate in programs, services, and activities. Doing so will not be required if it fundamentally alters the nature of the program, service, or activity, or if it causes undue financial and administrative burdens on the agency. An undue burden is significant difficulty or expense based on all of the resources available for use in the program. While duplicating an entire library might constitute an undue burden, printing relevant cases or portions of books might be in order. Similarly, it

the law. On the other hand, mere use of drugs or alcohol and related criminal convictions, including possession and sale will not invoke the ADA.

Most classification systems, especially objective systems, include an opportunity for staff to override a classification decision made even when based on objective information. Reasons for overriding an objective classification decision may be information such as mental health concerns, acute medical problems, suicide risk, and detoxification status. Any one of these conditions may make the housing placement decision indicated by objective classification procedures unadvisable. The override process allows for extenuating circumstances and permits case-by-case determination of an inmate's housing assignment.

Before invoking an override, the ADA should be considered. For example, policies relegating all inmates using wheelchairs to a particular part of the facility may violate the law. Because the ADA seeks to integrate persons with disabilities into the mainstream of society, it may be inappropriate to place all wheelchair users together. While it may be appropriate to place inmates using wheelchairs in first floor locations so they can be evacuated safely in the event of fire, these locations should be scattered among the various first floor housing units to the extent possible.

If an inmate's disability is a factor in making a housing decision, this situation should be handled during the override phase of the classification process because inmates with disabilities are not routinely housed separately; rather, they are considered on a case-by-case basis. In other words, the same classification process should apply to inmates with disabilities and inmates without disabilities. An override may be used if there is a valid reason for not placing an inmate with a disability in the same housing unit as inmates without disabilities—even when the disabled individual is in the same classification status, i.e., dangerous or suicidal. Valid reasons for segregating inmates with disabilities include the determination that a particular inmate poses a direct threat to the safety of others or has requested to be segregated. It is important that the

might be possible to provide persons to read to visually impaired inmates, or recorded books. Auxiliary aids need only provide equal opportunity to participate in a program, service, or activity. They do not have to be the most expensive accommodation.

6. Would a program that gives credit toward early release based on hard manual labor violate the ADA because it screens out inmates whose disability prevents them from participating in this program?

Probably. This is also a matter for consideration for the "boot camp" programs that are gaining popularity in many States and localities. Remember, this may be a denial of equal opportunity for inmates with disabilities to benefit from participation in this type of program, service, or activity.

One solution is to find another way for inmates who cannot participate in "hard labor" to get good time credit by performing other tasks. For example, inmates with mobility impairments might be able to work as readers for inmates with vision impairments; inmates with vision impairments might be able to earn credit by working in the laundry.

7. Can all inmates with disabilities be put in the same cell block? In other words, can I dedicate a corrections facility to persons with disabilities?

Generally, no. Remember, one of the goals of the ADA is to integrate persons with disabilities into the mainstream of society. This includes a community within a society, even a prison community. Inmates with disabilities should be classified and housed the same as inmates without disabilities with the same classification status *unless* housing the inmate in that location would pose a direct threat to the safety of staff or other inmates. Of course, the ADA does not require the integration of vulnerable prisoners who prefer to be segregated.

Inmate classification systems may consider an inmate's disability as an override to change housing location if a threat exists, but disability should not be a primary factor in determining the inmate's classification.

8. May inmates with mobility impairments be put together on the first floor for easy evacuation in case of fire?

Safety issues will permit some flexibility in segregating inmates with disabilities. Although it is possible to keep inmates with mobility impairments in ground floor accommodations for safer evacuation purposes, it is a good idea to integrate these inmates among other inmates on the ground level.

9. Does the ADA give inmates working in correctional facilities rights as employees under Title I?

Probably not. Two Federal courts recently held that inmates working for prison industries were not entitled to minimum wage under the Fair Labor Standards Act. The courts reasoned that there is no employee-employer relationship between an inmate and the correctional facility for which he or she performs hard labor. It would seem that, by analogy, the same could apply to the ADA. However, no court has yet addressed this issue specifically.

10. How does the ADA affect the providing of special education services to inmates over the age of 22?

The ADA does not preempt other Federal or State laws to the extent that those laws meet the ADA requirements or expand upon them. While the ADA was probably never meant to encompass special education, it does require reasonable modifications to be made regardless of the individual's age.

Remember, any classes offered, whether special education or otherwise, need to be accessible to inmates with disabilities who wish to participate. Access includes physical accessibility; the ability to participate in the program, service, or activity; and effective communication.

justification for an override be based on objective information, not mere speculation. It is a good idea to document all classification decisions as well as any reasons for exercising an override.

Inmate programs

Inmate assessment and classification are not the only areas in which corrections administrators need to be knowledgeable. The ADA has a significant effect on how the facility delivers its programs, services, and activities to inmates with disabilities.

Programs offering high school or college classes, drug or alcohol counseling, art therapy, inmate work programs, work release programs, boot camps, or religious programs must be accessible to inmates with disabilities so that they may participate meaningfully. Eligibility requirements may not be imposed that eliminate or tend to eliminate inmates with disabilities unless it can be shown that such requirements are necessary for the provision of the service.[10]

Educational programs. Corrections facilities may establish whatever eligibility requirements are necessary for the provision of the service, program, or activity being offered. For example, a program offering inmates the opportunity to participate in college classes for credit might require the inmate to have a high school diploma or a General Equivalency Diploma (GED). An inmate with a disability who has not completed high school or a GED program might be excluded from this program without violating the ADA.

On the other hand, a facility offering high school equivalency programs may need to modify its policies and procedures to enable inmates with learning disabilities to obtain the GED if they cannot finish high school or get a GED due to the disability.

But what if the facility did not have any high school equivalency programs? Would the ADA require the facility to create such a program to accommodate an inmate with a disability who wants to participate in its college credit program but did not have a high school equivalency degree? Probably not. This might constitute a fundamental alteration of the program since it would require the facility to offer a different program than college-level classes, i.e., a GED. In most cases, prisons and jails are not required to institute programs for inmates with disabilities, but should focus on making the programs they do offer accessible to inmates with disabilities.

Likewise, a requirement that inmates be able to attend classes in a place that is not architecturally accessible might violate the ADA if an affected inmate wishes to participate. In that case, the facility must relocate the class to an accessible place unless it can show that relocation would result in undue financial and administrative burdens or a fundamental alteration in the nature of the program.

Drug and alcohol treatment. Facilities that offer drug and alcohol rehabilitation through programs such as Alcoholics Anonymous or Narcotics Anonymous should ensure that they are accessible to any inmate wishing to participate. In the case of inmates who are deaf or hard of hearing, this might include making a sign language interpreter available.

Library services. Inmates who are blind or visually impaired should have access to use of the facility's library. This could be achieved by providing books on tape, qualified readers, or books in braille. Creativity can go a long way in accommodating inmates with disabilities. For example, asking other inmates to be readers for a blind inmate might be one way to make the library accessible.

Inmate work programs. Many correctional facilities offer programs in which inmates can earn early release in exchange for work. Often the work involves strenuous physical labor. Obviously, there are inmates with disabilities who cannot perform hard labor. What implications would the ADA have in such a case?

While a corrections facility is free to establish eligibility requirements for a program that has the potential to result in early release, release from prison or jail constitutes such an important benefit that it may be improper to exclude inmates with disabilities from participating. This may constitute a denial of an equal opportunity to benefit from the program. This example might be one in which corrections administrators would be required to create a program where none currently exists. This is another instance where creativity might go a long way in developing accommodations for including inmates with disabilities. For example, inmates who use wheelchairs may perform work by serving as readers for inmates who are blind or who have a reading disability.

Similarly, facilities should consider the ADA when evaluating "boot camps," or shock incarceration programs. Typically, boot camps offer the opportunity for early release to youthful offenders convicted of certain offenses, in exchange for hard labor and participation in strenuous physical exercise. As in the case of early release programs for adult inmates, these programs for youths should consider ways to allow youthful offenders with disabilities the opportunity to earn early release and reap the other benefits of the boot camp approach.

Visitors to correctional facilities

Compliance with the ADA is not limited to an agency's treatment of inmates or corrections employees. Prison and jail administrators should be aware that visitors and others who come into the facility for a legitimate purpose must be provided access. Attorneys, clergy, counselors, probation and parole officers, and family members who may have a disability should be provided access to any program, service, or activity to which visitors without disabilities have access. For example, even if the facility does not have an inmate who is deaf or hard of hearing, an inmate may have a family member who is deaf or hard of hearing. In that case, the facility may need to make a TDD available to that inmate so he or she can communicate with family members.

Notes

1. National Council on Disability, "ADA Watch–Year One: A Report to the President and Congress on progress in Implementing the Americans With Disabilities Act," April 5, 1993, p. 38.

2. Id.

3. Id.

4. Department of Justice's Title II Technical Assistance Manual (DOJ/TAM), Section II–2.1000.

5. DOJ/TAM, Section II–3.4000.

6. DOJ/TAM, Section II–3.4100.

7. Goldman, Charles B., "Complying with the ADA," *Nation's Cities Weekly*, April 27, 1992.

8. Id.

9. American Correctional Association, *Standards for Adult Local Detention Facilities*, Third Edition, p. 131.

10. 28 C.F.R. Section 35.130(b)(8); DOJ/TAM, Section II–3.5100.

11. 28 C.F.R. Section 35.160(b)(2); DOJ/TAM, Section II–7.1100.

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The Americans With Disabilities Act: Emergency Response Systems and Telecommunication Devices for the Deaf

by Paula N. Rubin and Toni Dunne

In 1991 a newspaper headline in a large city reported a tragedy in the following way: "Deaf man: 911 glitch cost wife her life." "911 telecommunicator hangs up on deaf man; wife dead." and "Wife dies after police hang up on 911 call." The article told the story: "...police 911 operator hung up on a deaf man who used a special communicator to report that his wife was having difficulty breathing, and the woman died before paramedics arrived more than 15 minutes later...."

The January 3, 1992, Newtown Bee reported: "TDD saves life." The caller "sensed her husband was having a heart attack, went to her TDD (telecommunications device for the deaf), and called 911. She notified police; the police notified the dispatcher; and the dispatcher sent an ambulance."

The Americans With Disabilities Act (ADA) and its requirements may help to diminish the likelihood of the first incident while increasing the chances of the second. Title II of the ADA makes it illegal for government entities to discriminate against qualified individuals with disabilities in the delivery of programs, activities, and services.

Among the services provided by many public safety agencies is the 911 telephone emergency response service. The law requires that "telephone emergency response services, including 911 services, provide direct access to people who use TDD's and computer modems."[1] Likewise, maintenance of TDD equipment is mandated by the ADA.[2]

The significance of the ADA's requirements cannot be overemphasized. A complaint filed by a deaf arrestee against the Clearwater, Florida, Police Department resulted in a settlement with the U.S. Department of Justice. The complaint was filed after the deaf individual was arrested and jailed overnight without being given the opportunity to communicate effectively through an interpreter.

The resulting agreement requires the Clearwater Police Department to create and implement a policy that prohibits discrimination against persons with disabilities, including failing to provide an interpreter in police situations involving deaf or hard of hearing individuals. The department is also required to provide auxiliary aids whenever necessary to ensure effective communication with individuals who are deaf or hard of hearing. The settlement provides guidance as to what constitutes auxiliary aids. Included are "qualified interpreters, computer-aided note taking, written materials, and notepad and pen."[3]

Additional requirements under the settlement include:

- A written policy that guarantees an interpreter when needed.
- Publication of the policy in the Clearwater community.
- Employee training on how to comply with the settlement.

Criminal justice agencies are required to accommodate persons who are deaf or hard of hearing in arrest and detainment situations. Likewise, it is critical that agencies charged with the responsibility of administering a community's emergency response service accommodate citizens with disabilities. The following questions need to be answered:

- How do telephone emergency service providers interact with individuals who use TDD's for telephone communication?
- What issues do agencies confront in providing these services?
- What are some ways that agencies can resolve these issues?

To answer these questions and others related to making 911 telephone emergency systems barrier-free for persons who are deaf or hard of hearing, a case study was conducted of the city of

Highlights

NIJ's initiative to examine the implications of the Americans With Disabilities Act (ADA) for criminal justice agencies at the State and local levels was created to respond to the need for understanding the Act in the criminal justice field and the new opportunities it offers persons with disabilities. This Research in Action, one of a series designed to explain how the ADA will affect the criminal justice system, focuses on first steps public safety agencies should take to accommodate the 911 telephone emergency response system to handle telecommunication devices for the deaf (TDD's).

ADA requires that "telephone emergency services, including 911 services, provide direct access to people who use TDD's." Based on a case study of the Denver emergency response system, key requirements for accommodating TDD's include:

- Having a TDD at every telecommunicator position where possible. If financial constraints make this impossible, TDD's should be centrally located so operators can get to them quickly.
- Establishing standard operating procedures for responding and transferring TDD calls.
- Testing equipment and telecommunicators regularly.
- Developing or updating a TDD training program for staff, involving retraining sessions (ideally every 6 months).
- Calling members of the deaf community—including national and local organizations—for advice in creating TDD emergency operating procedures and telecommunications staff training programs.
- Developing a public awareness program to notify citizens of the emergency response system and its TDD accessibility, which should include announcements in the telephone directory and on the ACD recorded announcement. (See glossary at the end of this Research in Action.)

These issues are discussed in more detail in this Research in Action.

Denver's telephone emergency response services.[4] The system used in Denver encompasses universal situations that telephone emergency response services in other communities may encounter. The findings and suggestions from the Denver study may have applications in other criminal justice or public safety agencies across the country.

In order to have a broader relevance, however, some findings are discussed here in generalities. Some specifics have been omitted for the sake of brevity or because they would not be universally applicable. This Research in Action is intended to assist public safety agencies and is best used as a *first* step in identifying and addressing issues in this area. It is not a definitive protocol, nor should it be substituted for independent legal advice.

Denver: A case study

The first step in evaluating Denver's telephone emergency response services and its TDD capabilities in answering 911 calls consisted of analyzing existing operations. The city of Denver staff answered more than 50 questions covering a range of areas, including an overview of Denver's operations, equipment, procedures, and training.

Every agency operating a telephone emergency response service is required to conduct a self-evaluation to assess its TDD capabilities and emergency response proficiency. (See Box: TDD's and Telephone Emergency response services: A Self-Analysis.)

Denver's telephone emergency response service. There are approximately 500,000 citizens within the city of Denver. Because the city is landlocked, it is unlikely that the population will grow by any significant amount. There are no statistics on how many Denver residents are deaf or hard of hearing.

Denver's 911 Communications Center is a consolidated operation funded by the 911 Trust Fund, which places an assessment on the 344,000 access telephone lines. The center is operated by the city's Department of Public Safety and the agencies within its purview. The police, fire, and sheriff's departments are part of Denver's Department of Public Safety.

To handle calls efficiently, Denver's 911 system uses an automated call distributor. There are 16 consoles—or positions—arranged into 4 pods of 4 consoles each. The call takers (telecommunicators) use a telephone system that interfaces with a computer-aided dispatch (CAD). The 115 trunks (see glossary) terminate into the public safety answering point (PSAP). Of these 115 trunks, 48 are dedicated 911 lines.

On average the center receives 2,400 calls a day. When a voice call comes in, it is answered by 1 of the 10 telecommunicators that the center has during each of its 3 shifts. If all telecommunicators are busy, the call is placed into a queue until a telecommunicator becomes available. While the call is in the queue, the caller hears a recorded message advising of the queue status and asking the caller to stay on the line.

The telecommunicator's job is to put the necessary information into the CAD and to determine the nature of the call and the appropriate emergency response (i.e., whether it is a police, fire, or medical emergency). In Denver, medical emergencies are immediately directed to the emergency medical service (EMS) dispatcher, who screens the call to determine the nature of the emergency. The 911 telecommunicators screen police and fire emergencies prior to forwarding them to the police or fire dispatcher.

There are approximately 11 dispatchers working at the center each shift: 5 police dispatchers, 2 police clearance channel operators, 3 fire department dispatchers,

and 3 EMS dispatchers. When the call reaches a dispatcher, he or she initiates the appropriate action to be taken by the agency called.

When a TDD call comes in. The center has two devices capable of responding to a 911 call from someone using a TDD: (1) a traditional TDD device; and (2) a computer keyboard that transmits TDD conversations.

The center has standard operating procedures for responding to TDD calls. When the call is audibly recognized as a TDD call, the telecommunicator forwards it to a nearby position equipped with a TDD. In this process, the automatic number identification (ANI) and automatic location identification (ALI) is also forwarded in order to efficiently complete the call handling procedure. Silent calls are treated as possible TDD calls, and the same procedure is followed.

There are three ways that TDD calls are commonly recognized. First, the telecommunicator may hear tones advising that a TDD call is forthcoming. Second, and just as often, no tones are heard and instead there is silence. This can lead to the mistaken belief that the caller has either hung up the phone or is injured to the degree that he or she is unable to communicate. The third, least common way for the telecommunicator to recognize a TDD call is to hear a prerecorded message advising him or her that a TDD call will follow.

Results of the analysis

The center has standard operating procedures regarding TDD calls as well as for handling silent calls. The center's employees are trained to use the TDD equipment and are familiar with the ADA and its requirements. In addition, test calls are occasionally made to telecommunicators to gauge whether they are responding to these calls in conformance with standard operating procedures.

Room for improvement. The following areas were identified for improvement that would enhance the center's responsiveness to TDD calls.

- Although the present TDD equipment is centrally located to the 10 telecommunicators, the current system requires the telecommunicator to leave his or her console and relocate to another part of the room. This causes a delay in response time and can confuse the caller who may think that the call has been disconnected instead of transferred.

- No system is in place for regularly testing the TDD equipment. Equipment malfunction caused by a maintenance failure could lead to problems.

- Further training of staff would be helpful. In addition, refresher and practice sessions would be useful to speed up the response time in transferring calls.

Suggestions for direct access. In today's economy, budgets are shrinking while obligations to provide services are increasing. Nevertheless, solutions are available. Some of those obligations may have a cost while many may be provided at a minimal cost or even at no cost at all.

In Denver more equipment would be helpful. Saving telecommunicators a trip from their customary positions to the TDD position would help cut delays and possible misunderstanding by the caller using a TDD. In emergency situations, when even seconds count, this can be important. For Denver, as in any emergency response center, having a TDD at every telecommunicator position would be ideal. If financial constraints make that impossible, centrally locating an increased number of TDD's would help. For example, in Denver adding a TDD for each pod of four operators would eliminate the need to move to another part of the center to respond to a TDD call.

- Denver should establish regular testing of the equipment and the telecommunicators. This testing involves minimal, if any, money and helps to avoid crises in the long run. It is a good idea to maintain records of testing efforts made by a department as well as all maintenance history on equipment.

The city should develop or update TDD training programs for staff. Training helps reduce awkwardness and confusion when handling TDD, nonvoice emergency calls. When possible, retraining every 6 months is optimum. Training should include topics such as:

- Language variables and impact when trying to provide access to telephone emergency response services.

- Call handling tips.

- Processing calls using telecommunication relay services.

- Regular proficiency training.

- Identification of equipment problems.

- In addition, Denver should ensure that its TDD capabilities are well known. All pages of the phone book where 911 is listed should prominently state that the telephone emergency system is TDD accessible. A TDD message should be included on the ACD recorded announcement. This allows the caller to know the status of his or her call, thereby decreasing the chances that the caller will hang up, assuming no one is responding.

Bringing home the lessons learned in Denver

The challenges faced by Denver are not unique. Indeed, many public safety agencies are addressing these issues. There are many themes observed and suggestions made in Denver that may help other departments.

Because current TDD technology only allows for one person to type at a time, this process is going to take longer than voiced communications. Telephone emergency response centers must strive to find ways to speed up the process. Here are some tips that may help to decrease confusion and mistakes or to avoid potential tragedies.

Equipment

- Conduct a self-evaluation of TDD capabilities and proficiency. Include an assessment of the equipment.

- Install devices that can detect when a TDD tone is initiated by the caller.

TDD's and Telephone Emergency Services: A Self-Analysis

The ADA, under Title II, requires public entities to conduct a self-evaluation of policies and practices to ensure that services for individuals with disabilities are accessible and as effective as those provided to others.

These questions allow a quick appraisal of a telephone emergency response center and can provide an opportunity to identify and resolve or correct problems that may exist in the way the telephone emergency service operates.

Communication center overview

1. What geographical and jurisdictional areas are served by each public safety answering point (PSAP)?
2. How many access lines does the 911 center serve?
3. What is the average daily call volume?
4. Is there a diagram of the 911 system configuration?
5. How many consoles are established for call taking?
6. In addition to call taking, what other functions do telecommunicators handle?
7. What is the average number of telecommunicators working at a given time?
8. Is there a grievance procedure for citizens not satisfied with services?

Equipment

9. Does the telephone emergency response system provide the same level of service [i.e., automatic number identification (ANI) and automatic location identification (ALI)] to all citizens?
10. In the event of individual line or system failure, is an alternative method accessible to TDD callers?
11. How many trunks connect to the PSAP? How many are dedicated for emergency calls?
12. How many consoles are available for receiving emergency calls, and how many are TDD accessible?
13. Describe the equipment and methods used to transfer emergency calls or information to each public safety answering point served by this PSAP.
14. Is redundancy in the 911 equipment provided for?
15. If the answer to the previous question is "yes," are TDD communications included in the redundancy plan?
16. Are TDD's included in the plan for overflow or power outage?
17. Does the system include automatic call distributor? If so, does it include an automatic recording to the citizen who may be put into a queue until there is an available telecommunicator? Does the recording include a TDD recording for a TDD user?
18. Does the system configuration have expansion capabilities (for adding a detector and dedicated/direct connect TDD)?
19. Does the system use a computer-aided dispatch?
20. Is there voice recording equipment that monitors all incoming emergency lines, including the point of answer for the TDD?
21. What type of TDD accessible equipment (i.e., standalone TDD, keyboard, computer TDD software, etc.) is currently being used?
22. How many TDD units are in use?
23. If the TDD equipment has preprogrammed messages, have persons with hearing disabilities been consulted regarding the language appropriate for TDD users?
24. Does the center have TDD detection equipment?
25. Does the communications system have the capability to provide TDD access to alternative nonemergency numbers?

Operations

26. Does the center have standard operating procedures (SOP's) for TDD call handling?
27. If SOP requires calls to be transferred to the fire department or emergency medical service, does the secondary public safety answering point response have TDD capability?
28. Is the standard time for answering voice calls comparable to that for TDD users?
29. Do the call-back procedures include contingencies for call-back for TDD calls?
30. Does the center keep entries or statistics of TDD calls?
31. Is there a method for handling foreign language speaking callers?
32. When there is no vocal response, is there an SOP handling for the open-line or silent call?
33. Are there procedures for handling telecommunication relay service calls?
34. Are there minimum training requirements for telecommunicators?
35. Is there specialized training regarding TDD calls?
36. Does the department have a public education program for the TDD user on accessing telephone emergency services?
37. Does the local telephone directory indicate direct access to telephone emergency services for TDD users?

These are the kinds of questions that should be asked in a self-analysis. The more questions that are answered "yes," the more likely the department will provide meaningful telephone emergency response service to those using TDD's. Established operating procedures and a comprehensive training program are key to a successful emergency response system. It also reflects the agency's commitment to the protection of lives and properties in the communities it serves.

- Where financially feasible, add more TDD equipment.
- Ensure the trunking used with the TDD devices are included on any recording or logging equipment.
- Prepare a plan and procedures for power failure contingencies.

Operations

- Develop and implement standard operating procedures for responding to TDD calls.
- Develop and incorporate effective transfer methods for transferring calls to the fire department or EMS.
- Initiate call-back procedures to include a mechanism for reaching a TDD caller.
- Develop and implement standard operating procedures for processing silent calls or open lines and how to query lines for a TDD caller.
- Test the system. Conduct test calls using various call processing scenarios. Involve members of the deaf community in this effort.

Training

- Develop and deliver a comprehensive TDD training program for incumbents as well as new hires.
- In communities with low TDD call volume, provide refresher training on a regular basis.
- Follow technological development through the various emergency response services associations and add these innovations into the training regiment.

Other

- Consult with the disability community in the self-evaluation process, the creation of standard operating procedures, and the development of training.
- Develop and deliver a public awareness program to notify citizens using TDD's of the department's accessibility and services.

Anatomy of a 911 Call

Typically, calling 911 means something is wrong or someone may be in trouble. When the caller can speak or hear, the telecommunicator immediately processes the call, asking appropriate questions. When the same scenario occurs, but the caller is using a TDD, the telecommunicator should rely on standard operating procedures for handling TDD calls. Voice calls are very different from calls coming in on a TDD. Compare how an emergency might sound by a voice caller with that of the same communication as relayed on a TDD.

A voice call. A 911 line rings.

911 Telecommunicator: "911, What is your emergency?"

Caller: "I need an ambulance. Bob's friend came in and started a fight. He's really bleeding bad. I'm hurt too."

Telecommunicator: "Okay, sir, calm down, what's your address."

Caller: "105 Evergreen. But Bob's at HIS house . . . I ran up here to get help."

Telecommunicator: "What's Bob's location?"

Caller: "112 I think . . . I don't know."

Telecommunicator: "Are there any weapons involved?"

Caller: "No. No. I don't know, man! Hurry, please."

Telecommunicator: "Sir! Are there any weapons?"

The telecommunicator continues to process the call, getting all the pertinent information to dispatch police and medical services.

Consider the same scenario with the caller using a TDD.

Here are abbreviations commonly used by TDD callers:

- GA = Go ahead ("it is your turn").
- SK = Stop keying ("ready to hang up").
- GASK = Go ahead/hang up.
- SKSK = Stop keying/hang up now.
- XXX = Erasing the error. The backspace key is rarely used. Instead, typing XXX indicates to disregard the previously typed word. Then the word is retyped.
- Q = Question mark. Punctuation marks are not used. Therefore, this letter is used to indicate a question.

A TDD call. A 911 line rings.

The 911 telecommunicator responds, "911 What's your emergency? . . . Hello? . . . Do you have an emergency?"

The caller may or may *not* press some keys on the TDD. If the caller does, the tones are heard by the telecommunicator and procedures begin to establish communications via TDD. If the caller does not press any keys, the telecommunicator begins to try to determine the problem. Procedures for silent—or open line—calls should be set in action.

The following conversation might occur when TDD communication has been established.

911 Telecommunicator: "That sounds like a TDD . . . . " The telecommunicator proceeds to establish communication on the TDD by typing: "911 here what ur emergency q ga."

Caller types: "BOB FRIEND MAD AND COME IN HOUSE HIT BOB I FIGHT FRIEND AND RUN AWAY BOB ON FLOOR BLOOD MUCH I BLOODY TO AN BOB IN HOUSE 105 EVERG GA."

911: "Okay what address for ambulance q ga."

Caller: "112 EVERG GA."

911: "spell everg ga."

Caller: "EVERGREEN."

911: "where are u now q ga."

Caller: "MY HOUSE 105 EVERG PLS HURRY GA."

At this point, the telecommunicator will begin asking clarifying questions, one at a time, to determine what services are needed and where, information on the assailant, weapons involved, etc.

Equipment for TDD Users

Various types of equipment are manufactured for persons who must use TDD's. The method that the public safety answering point uses to provide accessibility may vary according to the equipment and environment. Current products include:

- Telephones with built-in TDD's.
- TDD software and modems for personal computers.
- Built-in TDD communications in the 911 system equipment.
- Detecting devices to identify TDD calls.

All TDD's have some basic features in common, such as a keyboard similar to that on a typewriter or personal computer. The character display is where the conversation is electronically shown. An optional feature is a built-in or attachable printer. The acoustic coupler is the mechanism in which the telephone handset is placed to convert the TDD tones. Some optional features include auto answer/direct connect, rechargeable battery pack and AC adapters, and memory capabilities. TDD's with memory capability can store short messages for quick response.

Most TDD's have the standard 45.5 baud rate in Baudot code. The maximum rate of transmission is about 60 words a minute. Some units now are equipped with 110/300 baud capability. This allows for more characters to be transmitted per second (300 baud).

Detecting devices monitor phone lines, detect TDD (Baudot and ASCII, i.e., American Standard Code of Information Interchanges) calls, and alert the telecommunicator by visual and/or audible message of the incoming call. (It should be noted that at the time of publication of this guide, the U.S. Department of Justice did not require direct access to callers using TDD's or computer modems that use ASCII transmission.) Some units, upon detection, automatically send a preprogrammed message to the caller to inform him or her that the call has been received.

TDD call detecting can be handled several ways. Installation of a separate standalone unit can be connected to the trunking system. An alternative method would be to install equipment that has the built-in TDD detection feature. Another system offers not only TDD detection, but also diverts the call to a dedicated position equipped with a TDD.

The information provided here is limited to the availability of information at the time of compilation. With continuously advancing technologies, new and improved products will enhance communications for TDD users.

One of the most difficult aspects of being a telecommunicator is taking a TDD call when the caller does not use standard English. Variations in language usage will vary. The telecommunicator will need to rely on training received for TDD call handling. TDD communication sometimes requires a variety of strategies to enhance the call-taking process.

Tips

Current TDD technology allows for only one person to type at a given time, which is more time consuming than voiced communication. When an emergency occurs, every second is critical. The telecommunicator must achieve ways to speed up the call-handling process. The following tips are provided to eliminate confusion, thus avoiding having to explain or repeat when processing the TDD emergency call.

- Ask clarifying questions, one at a time. The caller may not have a TDD with a printer or be in a state of mind to recall numerous questions before being given the opportunity to respond.
- Use vocabulary that is easy to understand. Do not use words like "en route" or "intoxicated." Instead try "on the way" or "drunk." Try making a list of common words used in the course of handling various calls. Then list alternative words that can be substituted.
- Keep sentence structure simple. For many TDD users, English may be a second language. By keeping the structure simple, wasted seconds can be eliminated in situations such as when the caller does not understand and asks for the sentence to be repeated.
- Avoid using English idioms. Some phrases standard to the public safety profession can be considered an idiom, such as stand by. A person never having heard that phrase may believe he or she is being directed to actually stand by something. This could cause a great deal of confusion that could be avoided if basic English is used.
- Process the call just as calls are processed for hearing callers. Remember to type phrases like "stay calm" and inform him or her that "help is on the way" as soon as possible. Continue to periodically reassure the caller.

Finally, there are a few other differences to be aware of between handling a call from an individual who can hear and one who is using a TDD. Telecommunicators need an ability to listen to callers to know when to help them calm down in order to get the information needed to process the call. When communicating via a TDD, voice inflection is lost. Likewise, the TDD caller will not hear the professionalism and control in the telecommunicator's voice or that, perhaps, units have been dispatched.

How to identify a TDD call

- Audible electronic tones.
- Silence, "open line."

Glossary

ACD: Equipment used to distribute large volumes of incoming calls in approximate order of arrival to a call-taker or to store calls until call-taker becomes available.

ALI: Automatic location identification. A system that automatically displays the calling party's name, address, and other information.

ANI: Automatic number identification. A system that automatically displays the seven-digit number of the telephone used to place the 911 call.

Baud rate: The number of bits of information that are transmitted electronically per second.

Baudot: A five-bit code designed to transmit alphanumeric characters to a telecommunication device (i.e., TDD).

CAD: Computer-aided dispatch. A computerized system used to assist in dispatching emergency services. Special software programs allow the telecommunicator to retrieve caller ANI/ALI information pertaining to the incident.

Dedicated trunk: A telephone line dedicated to a specific purpose.

PPSAP: Primary PSAP.

PSAP: Public safety answering point. A location that answers 911 calls.

Redundancy: The installation and/or availability of multiple pieces of 911 equipment and system components as backup to support the original system to ensure reliable and consistent 911 service.

Selective routing: A telephone system feature that enables all 911 calls from a defined geographical area to be answered at a predesignated public safety answering point.

SOP: Standard operating procedures. Policies and practices developed by an agency.

SPSAP: Secondary public safety answering point.

TDD: Telecommunications device for the deaf, sometimes referred to as TTY (teletypewriter) or TT (text telephone). A device that allows for nonvoice communications via transmission/translation of electronic tones into typed format.

TDD detector: A device that identifies incoming TDD tones and alerts the telecommunicator of the TDD call by audio and visual indicators and notifies the caller that the call has been received.

TRS: Telecommunication relay service. A service that allows a TDD user and a traditional telephone user to communicate through the telephone network via a communication assistant who serves as a conduit to relay information between the parties.

Voice call: A normal telephone call.

- Synthesized voice announcement (a built-in feature on specific TDD's) such as, "TDD caller," "Use TDD," or "Hearing Impaired Caller: Use TDD."
- A TRS (see glossary) communication agent announcement (DO NOT CONNECT TO A TDD).

Troubleshooting tip. Garbled typed conversations are not uncommon. If this happens, telecommunicators should tap the space bar two or three times and check connections; if the telephone handset is using acoustical couplers, be sure it is placed on the couplers appropriately.

When the caller stops typing, the telecommunicator should type, "CANT READ U PLS REPEAT GA." Although the telecommunicator may not be receiving a clear message, the caller may be able to read the telecommunicator. Therefore, it is important to inform the caller, as soon as possible, if help is on the way.

Resources

There are numerous organizations with expertise in TDD's, emergency response systems, and issues facing those who are deaf or hard of hearing. Criminal justice professionals responsible for implementing and administering 911 telephone emergency response centers should consider contacting such organizations for guidance. Listed below are some groups who might be of assistance.

National organizations

National Emergency Number Association (NENA)
P.O. Box 1190
110 South Sixth Street
Coshocton, OH 43812–6190

Associated Public-Safety Communications Officers, Inc. (APCO)
2040 South Ridgewood Avenue
South Daytona, FL 32119–2257

Telecommunications for the Deaf, Inc. (TDI)
8719 Colesville Road, #300
Silver Spring, MD 20910

U.S. Department of Justice
Civil Rights Division
Coordination and Review Section
P.O. Box 66118
Washington, DC 20350–6118
202–514–0301 voice;
202–514–0381 TDD

Local resources

Community organizations; advocacy agencies

Social organizations (i.e., deaf clubs)

State agencies having programs for special populations (i.e., Commissions for the Deaf/Hearing Impaired, Blind Commission, Rehabilitation, etc.)

State organizations (affiliate chapters to the National Association of the Deaf)

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Public or social services (i.e., independent living centers, community services)

Other: individual State telecommunication relay services

Notes

1. 28 CFR Section 35.162.

2. 28 CFR Section 35.133.

3. *ADA Compliance Guide*, Thompson Publishing Group, Washington, D.C., Vol. 4, No. 9, September 1993, p. 3.

4. The National Institute of Justice gratefully acknowledges the contribution and invaluable assistance of the city of Denver, the Denver Police Department, the Denver Fire Department, and the Denver Emergency Medical Service. In particular, this publication would not have been possible without the efforts of Beth McCann, manager of safety for the city of Denver; Assistant Chief Miriam Reed of the Denver Police Department, and Captain Joe Hart of the Denver Fire Department.

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Research in Action

Jeremy Travis, Director

June 1995

Highlights

NIJ's initiative to examine the implications of the Americans with Disabilities Act (ADA) and other civil rights laws for State and local criminal justice agencies was created to foster understanding of these laws, their effects on the criminal justice field, and the opportunities they offer. This Research in Action, fifth in a series, is designed to explain the effects of various employment discrimination laws on the criminal justice system. It focuses on those Federal statutes that directly impact the rights of criminal justice employees.

Highlights include:

- Federal laws relating to equal employment opportunity prohibit discrimination on the basis of race, color, religion, sex, age, national origin, or disability. However, they allow exclusion of members of a protected class if there is a "bona fide occupational qualification" (BFOQ), i.e., a valid job-related requirement that is necessary to normal business operation.

- At least three Federal laws—Title VII of the 1964 Civil Rights Act, the Equal Pay Act of 1967, and the Pregnancy Discrimination Act—prohibit sex discrimination. Except in rare instances, employers are required to ignore gender when hiring or promoting; provide equal pay to all employees (absent certain circumstances), regardless of gender; and

continued . . .

Civil Rights and Criminal Justice: Employment Discrimination Overview

by Paula N. Rubin

Every day criminal justice professionals are confronted with civil rights issues both in their internal operations and in their dealings with the general public. You may have seen these stories:

- A police chief in a medium-sized city promised to "deal quickly with five white officers suspected of beating a black plainclothes officer stopped for having an expired license on his police-issue undercover truck."[1]

- Two women police officers who were sexually harassed by male coworkers were awarded more than $3 million.[2]

- "A Federal appeals court in San Francisco ruled that random, clothed-body searches of women prisoners–including of their breast and genital areas–by male guards at a . . . prison violated the Constitution's prohibition against cruel and unusual punishment."[3]

Knowledge of the laws affecting civil rights issues is an essential first step toward managing an increasingly diverse workforce. This Research in Action report, the fifth in a series published by NIJ, expands the discussion to include not only the Americans With Disabilities Act (ADA), but also other Federal statutes that have a direct impact on the civil rights of criminal justice employees.

The laws: a quick overview

Federal laws relating to equal employment opportunity make it illegal to discriminate on the basis of race, color, religion, sex, age, national origin, or disability. Under these laws (see "The Relevant Statutes"), criminal justice agencies may not deny members of these protected classes equal access to or enjoyment of the privileges and benefits of employment. "Equal access" applies to recruiting, screening, interviewing, and hiring employees, as well as promoting employees and providing employee benefits.

A member of a protected class is not automatically protected, however. It is not always illegal to deny members of these groups equal employment opportunity. In the context of hiring and referrals, the laws allow exclusion of members of a protected class if there is a "bona fide occupational

Americans With Disabilities Act

Highlights

continued . . .

treat pregnancy the same as any other temporary disability.

• The Family Medical Leave Act requires employers to provide 12 weeks of unpaid leave for employees to care for a newborn, adopted, or foster child or a spouse, child, or parent with a serious health condition.

• Courts have found that certain exceptions may exist that permit religious "discrimination," e.g., a religious institution may require an employee to have a particular religious affiliation if the job is clearly related to the affiliation—a church administrator, for example.

• To comply with laws that prohibit discrimination on the basis of national origin, criminal justice agencies should avoid height and weight requirements that are not related to job performance; ensure that employees who speak with an accent are given equal access to promotions and benefits; and prohibit ethnic slurs or verbal or physical abuse of employees based on their national origin or citizenship status.

• To qualify under Title I of the Americans With Disabilities Act (ADA), a job applicant or employee must be able to perform the essential functions of the job, with or without a reasonable accommodation.

• Although Federal law prohibits age discrimination against persons 40 years or older, it does not restrict criminal justice agencies from imposing minimum age requirements for officers.

These issues and their implications are detailed in this Research in Action.

qualification" (BFOQ), that is, a valid job-related requirement "reasonably necessary to the normal operation of that particular business."[4] In other words, valid job requirements that tend to eliminate members of a protected class may still be permissible if the requirements are BFOQ's. However, the laws allow no BFOQ's based on race, and those BFOQ's predicated on sex are very rare. So, for example, it may be a legitimate BFOQ that restroom attendants in women's rooms be female and attendants in men's rooms be male.

Sex discrimination: the basics

Title VII of the Civil Rights Act of 1964 prohibits employers with 15 or more employees from discriminating on the basis of sex. This prohibition relates to issues of gender and not sexuality issues such as homosexuality or transsexualism. BFOQ's for sex are very rare. Examples include actors, models, and restroom attendants, each of whom is usually required to be a specific gender to qualify for a specific job.

Criminal justice agencies should consider taking the following actions, if they have not already done so:

• Eliminate separate tracks for promotion and advancement.

• Eliminate separate advertising based on gender, unless a BFOQ is applicable.

• Eliminate salary and advancement criteria based on "head of household."

• Eliminate stereotypical limitations on job requirements, such as ability to lift a minimum amount of weight, unless a BFOQ is applicable.

• Eliminate policies designed to be paternalistic or protective of women.

An example of a paternalistic or protective policy is illustrated in the case of *United Auto Workers* v. *Johnson Controls, Inc.*[5] In that case, the United States Supreme Court unanimously held that employers may not bar women from jobs that might be hazardous to unborn children. The company policy that excluded women of child-bearing age from jobs that entailed exposure to lead was found to violate Title VII of the Civil Rights Act of 1964. The Supreme Court reasoned that the employer was unable to establish a valid BFOQ. The Court further found that employers could protect themselves from claims of tort liability by informing women interested in such positions of the medical risks.

Gender and wages

In addition to Title VII of the Civil Rights Act, the Equal Pay Act of 1967 also prohibits gender-based discrimination. This statute makes it illegal to pay wages to one sex or the other solely on the basis of gender. The law does not end all forms of salary discrimination, only those predicated on sex, including those in which males are earning less than females for equal work. In other words, people must receive equal pay for equal work.

This law allows for certain exceptions to the equal pay rule. Pay differentials are allowed if they are based on:

• Seniority.

• Quality of production.

• Quantity of production.

• Merit.

• Factors other than sex.

Care should be taken to ensure that the reasons for pay differentials are job-related and objective.

Pregnancy and maternity

Title VII was amended in 1978 to add the Pregnancy Discrimination Act, which outlaws discrimination on the basis of pregnancy, childbirth, or any medical condition that might be caused by pregnancy or childbirth. Employers are required to treat pregnancy as they would any other temporary disability.[6]

Without a BFOQ, employers may not refuse to hire an applicant solely because she is pregnant. This prohibition applies whether the woman is married or single. On the other hand, it is not unlawful to require employees to be able to perform the essential functions of the job or to complete a reasonable training period at the beginning of the employment relationship. Employers may be permitted to refuse to hire applicants who cannot complete the initial training period because of pregnancy.

Criminal justice agencies may not fire, refuse to promote, or fail to provide equal access to benefits to a pregnant employee simply because she is pregnant. Nor can they force pregnant employees to take maternity leave if the employees are able and willing to work. Employment opportunities involving pregnant employees should be based on the employee's ability to perform the essential functions of the job.

There is no Federal law that requires employers to provide paid maternity leave to their employees. However, those criminal justice agencies that have a paid leave policy for temporarily disabled employees must afford pregnant employees the same leave.

On the other hand, leave policies that favor pregnant women may not be discriminatory. The United States Supreme Court, in *California Savings & Loan* v. *Guerra*,[7] upheld a California law requiring employers to provide a pregnant employee with up to 4 months maternity leave and to permit her to return to her original job unless it had been eliminated due to business necessity. The Court reasoned that although the law appeared to favor women, there was nothing in the law to prevent employers from giving comparable benefits to employees with nonpregnancy-related disabilities.

For pregnancy and maternity leave issues, employers should keep in mind:

- Employees on maternity leave are entitled to accrue seniority or vacation benefits in the same manner as other temporarily disabled employees.

- If nonpregnant, temporarily disabled employees do not have to use up their vacation benefits prior to using their sick leave, neither do pregnant employees.

- Employers who limit the amount of maternity leave permitted must be willing to modify these time limits depending on the circumstances.

The Family Medical Leave Act of 1993 (FMLA) now requires employers with 50 or more employees to provide 12 weeks *unpaid* leave for employees to care for a newborn child, adopted child, or foster child. This requirement applies equally to men and women.

Employees are eligible if they have worked for an agency for at least 12 months prior to the request for leave, even if the 12 months of employment were not consecutive, and have worked for at least 1,250 hours with the employer during the prior 12-month period. Criminal justice agencies are allowed to require employees to use paid vacation and sick leave as part of the 12 weeks of leave.

The FMLA does not affect any other Federal or State law against discrimination. In addition, any State laws that provide greater family or medical leave rights cannot be preempted by this law.

Criminal justice agencies are required to offer employees taking leave under this law the same or an equivalent job when they return from leave. Executive management employees are exempt from such reinstatement. Similarly, like Title VII, the FMLA prohibits employers from taking away an employee's previously accrued seniority or benefits. However, employers do not have to allow employees to *accrue* seniority or benefits while on family leave.

Sexual harassment

Sexual harassment is defined as unwelcome advances, requests for sexual favors or physical conduct, or exposure to verbal communication that is sexual in nature. A critical issue in sexual harassment cases is whether the actions complained of are unwelcome. Sexual harassment does not happen only to women. Recently, a California man was awarded more than $1 million in damages and lost wages based on a claim of sexual harassment.[8]

Typically, sexual harassment occurs in one of two ways:

- *Quid pro quo harassment.* When a sexual act is a condition for a person to be hired, promoted, or receive a job benefit.

- *Hostile environment harassment.* When conduct has the purpose or effect of unreasonably interfering with a person's work performance or creating an intimidating, hostile, or offensive working environment.

A criminal justice agency is liable for the acts of its employees if the agency knew

or should have known that the acts were taking place. In addition, agencies may be liable for the acts of nonemployees. To avoid liability for a claim of harassment, the agency must prove that immediate steps were taken to remedy the offensive conduct.

Quid pro quo harassment. In defining quid pro quo harassment, EEOC Guidelines state:

> Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individuals. . . .[13]

This form of harassment forces the employee to choose between the job and the demands. When access to equal employment opportunities are blocked for refusing to capitulate to such demands, Title VII has been violated.

The sexual advances must be "unwelcome," which means undesired, uninvited, and unappreciated. The advances should also be *offensive*, although offensive behavior is harder to establish because of its subjective nature.

Hostile work environment. *EEOC Guidelines* state that harassment in a hostile work environment occurs when:

> . . .such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[16]

The Relevant Statutes

The ADA is just one of many Federal laws governing employment discrimination. The key Federal provisions are:

- *The Equal Pay Act of 1963*,[9] which extends the prohibition against sex discrimination and requires equal pay for equal work by forbidding pay differentials predicated on gender.

- *The Civil Rights Act of 1964*[10] (Title VII), which prohibits employment discrimination on the basis of race, color, religion, sex, age, or national origin by employers who employ 15 or more persons and are engaged in an industry affecting commerce.

- *The Age Discrimination in Employment Act of 1967*,[11] which prohibits employment discrimination against persons over the age of 40.

- *Rehabilitation Act of 1973*,[12] which prohibits discrimination on the basis of disability by programs receiving Federal funds or by Federal agencies. This law, the precursor to the ADA, was created to help persons with disabilities receive rehabilitation, obtain access to public buildings, and enjoy equal employment opportunity.

- *The Americans with Disabilities Act of 1990 (ADA)*,[14] which makes it illegal to discriminate against qualified individuals with disabilities. The purpose of the law is to provide the estimated 43 million persons with disabilities equal access to employment opportunities; the programs, services, and activities provided by government entities; and public accommodations, such as restaurants, hotels, shopping centers, and businesses, open to the general public.

- *The Civil Rights Act of 1991*,[15] which reverses a series of cases decided by the United States Supreme Court in 1989 that had revised long-standing interpretations (previously favorable to employees) of several Federal employment discrimination laws. The Act reinstates the earlier interpretations. In large part, the Act changes technical court rules that affect employment discrimination litigation. Highlights of the Act include permitting full-jury trials and, in certain cases, allowing for recovery of emotional suffering and punitive damages.

- *The Family and Medical Leave Act of 1993*,[17] which requires employers with 50 or more employees to provide eligible employees with up to 12 weeks of unpaid, job-protected leave for family and medical reasons such as birth, adoption, or foster care of a child or care of a spouse, child, or parent with a serious health condition.

- *The Pregnancy Discrimination Act*,[18] which extends the prohibition against sex discrimination and amends the Civil Rights Act of 1964 to add pregnancy, childbirth, and pregnancy-related medical conditions as protected against employment discrimination.

- *Vietnam Era Veterans Readjustment Assistance Act*,[19] which requires Federal contractors with contracts of $10,000 or more to actively endeavor to hire qualified veterans of any war who have disabilities and, specifically, qualified Vietnam War veterans who may or may not have disabilities.

This form of sexual harassment was recognized by the United States Supreme Court in the case of *Meritor Savings Bank* v. *Vinson*,[20] which held that sexual harassment does not have to result in economic damages to the victim. As noted about quid pro quo harassment, the Court also made clear that the hallmark of sexual harassment in a hostile work environment is that the conduct is *unwelcome*.

A hostile work environment exists when the condition of the victim's employment is changed. Unlike quid quo pro harassment, which typically occurs as an isolated incident or single offending act, the hostile work environment often entails repeated incidents or a series of events. A single, extreme act may create liability, however. Courts will look to the totality of the circumstances in making such a finding.

Employer liability. Because a criminal justice agency may be liable when one employee sexually harasses another, it is important to have a policy that defines and prohibits sexual harassment. Failure to have such a policy may be construed as deliberate indifference by the agency, thus exposing it to liability.[21] Those claiming sexual harassment will not have to prove economic injury, nor will they need to show severe psychological injury, in order to prevail.[22]

Even when such a policy exists, the agency may nevertheless be held liable. It may also make no difference if the employer did not know of the offending conduct or events that took place. In some instances, employers may be responsible if a court determines that they *should have known* of the harassment. In most cases, employers will be liable for the acts of their supervisory employees.

Thus, complaints of sexual harassment should be taken seriously and acted upon immediately. Every complaint should be followed up, no matter how trivial or unlikely it may seem. It is a good idea to interview witnesses in private, maintain confidentiality, and document every step of the investigation.

It is not uncommon for victims of sexual harassment to minimize the incident or fail to report it at all because of the embarrassing and personal nature of the complaint. Moreover, many victims are afraid of retaliation, reprisals, or even termination if they report the problem. For these reasons, discretion, sensitivity, and tact must be used when investigating and trying to remedy such claims.

Remedial action may include warnings, reprimands, suspension, and dismissal. While the harshest penalty is not always required, aggressive remedial action is recommended whenever harassment is found.[23]

Discrimination based on religion

While Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of religion, the Act itself does not provide a definition of "religion." However, religious practices can include traditional moral beliefs, ethical beliefs, and beliefs that individuals hold with the strength of traditional religious views. Moreover, atheists are protected from discrimination for not having religious beliefs.

The notion of what constitutes "religion" can include nontraditional practices as well. Even unusual cults may enjoy protection. Less traditional practices and beliefs might include, for example, "new age" training programs such as yoga, meditation, or biofeedback. Using these practices as part of a motivational training may conflict with an employee's religious beliefs and therefore violate Title VII.

Employees who notify their employer of a conflict between employment practices and their individual religious beliefs are entitled to "a reasonable accommodation," which may include flexible scheduling, voluntary substitutions, reassignment, or lateral transfers.

Employers are not required to provide such an accommodation, however, if doing so would create an undue hardship. As indicated in the seminal case of *Trans World Airlines* v. *Hardison*,[24] an undue hardship entails something more than administrative costs. In that case, the United States Supreme Court held that TWA did not need to alter its seniority system in order to accommodate more junior employees whose religious beliefs prohibited working on Saturday. A California court recently elaborated by holding that Title VII requires providing a *reasonable* accommodation, not meeting the employee's every desire.[25]

Courts have found that certain BFOQ's exist that permit "discrimination" on the basis of religion. For example, religious institutions and organizations may require an employee to be affiliated with a particular religion, provided there is a reasonable relationship between the job and the need for the employee to have the religious affiliation. Thus, while it may be permissible to require the executive director of a church to be a member of the church's faith, the same may not hold true for one who holds a nonadministrative position, such as the church's janitor.

To qualify for this type of BFOQ, the institution or organization must be owned, in whole or in significant part, by a specified religion or religious corporation. In addition, the purpose of the institution or organization must be the continuation and propagation of that religion.

Finally, criminal justice agencies may legitimately require on-duty officers to wear a particular uniform and prohibit officers from adorning or altering their uniforms in the name of religion. This right is based on court rulings that dress codes are justified when they are job related and consistent with business necessity. Courts have held that there is a rational basis for appearance uniformity, finding a substantial degree of deference to police determination on appropriate dress.[26]

Discrimination based on national origin

Covered by the Civil Rights Act of 1964, employers with 15 or more employees may not discriminate on the basis of national origin. "National origin" includes a person's place of origin and his or her ancestor's place of origin.

The Immigration Reform and Control Act (IRCA) requires an employer to verify a new employee's authorization to work in the United States. To comply with the law, employers must sometimes review documents that reveal an applicant's national origin. Nevertheless, this law also prohibits discrimination on the basis of an applicant's citizenship or intended citizenship.

IRCA does not prohibit employers from giving preference to applicants who are United States citizens over equally qualified aliens who are authorized to work in this country. However, such preference may violate Title VII of the Civil Rights Act if applicants of a particular national origin are disproportionately eliminated.

Discrimination based on national origin can include elimination of applicants on the basis of physical appearance. To comply with the law, criminal justice agencies should avoid height and weight requirements that are not legitimately related to job performance.

For the same reasons, criminal justice agencies should not refuse to hire or promote applicants and employees who speak with an accent.[27] The guiding standard should be an ability to effectively communicate.

Harassment of coworkers or employees is not confined to sexual harassment. Harassment can also occur among employees of differing national origin. Criminal justice agencies should not tolerate ethnic slurs, or verbal or physical abuse of employees based on their national origin or citizenship status. Like sexual harassment, if the conduct causes or attempts to cause a hostile or offensive work environment or has the effect of impairing an employee's ability to effectively perform his or her job, discrimination may exist.

Finally, while BFOQ's may permit exclusion on the basis of national origin, such cases are very rare. Criminal justice agencies should take care to apply all rules equally to applicants and employees. Any requirements, including "English-only" rules, should be job related.

Discrimination based on disability

The ADA makes it illegal to discriminate against qualified individuals with disabilities.[28] Title I of the law governs employment issues, while Title II addresses how government entities deliver their programs, services, and activities.

Under the law, a person is deemed to have a disability if he or she suffers from a physical or mental impairment that substantially limits a major life activity such as seeing, hearing, walking, talking, breathing, sitting, standing, or learning. For the purposes of this law, a person is also considered to have a disability if there is a record of the impairment or if he or she is perceived or regarded as having an impairment. Those associated with a person with a disability are also entitled to certain protections.

To be "qualified" under Title I of the ADA, the job applicant or employee must be able to perform the essential functions of the job. "Essential functions" are those that are fundamental and not marginal to the job.

Under Title I, if a person with a disability cannot perform the essential functions of the job, then an analysis must be made to determine whether a reasonable accommodation is possible to enable the individual to perform the job. A reasonable accommodation is defined as "a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy equal employment opportunity."[29]

A reasonable accommodation need not be provided when doing so causes an undue hardship or poses a direct

threat of serious harm. Undue hardship means significant expense or difficulty, but not just in monetary terms. Undue hardship can also mean disruption or fundamental alteration of the nature or operation of the employing entity. Direct threat of serious harm is defined by the law as a "significant risk to the health and safety of others that cannot be eliminated by reasonable accommodation." Speculative (based on likelihood) or remote (based on future time) threats will not satisfy this requirement. A determination of whether a threat is real must be predicated on objective evidence.

Finally, under Title II of the ADA, nondiscriminatory delivery of an agency's programs, services, and activities is required. Criminal justice administrators should ensure that individuals with disabilities are not treated differently than those without disabilities *solely* because of their disability. It is important that written policies and procedures consistent with the ADA be developed, and that these policies be in place before there is a problem or special need required by an inmate or an arrestee.

Discrimination based on age

The Age Discrimination in Employment Act (ADEA) makes it illegal to discriminate against persons 40 years or older on the basis of their age. This law applies not only to employers with 20 or more employees, but to local and State governments as well.

Certain law enforcement agencies were temporarily exempt from the ADEA. Those departments that had mandatory retirement policies in place on March 3, 1983, were exempt until December 31, 1993. The exemption also covered maximum age requirements for hiring. This exemption has not applied since January 1, 1994.

On the other hand, there is no Federal law that prohibits agencies from imposing minimum age requirements for officers. Agencies should, however, check State and local law to ensure that such minimum standards do not violate those States' statutes.

Criminal justice agencies should be aware of age issues in their recruiting and hiring practices. For example, advertising that tends to discourage persons over the age of 40 from applying might be deemed discriminatory. Without a BFOQ, terms such as "recent grad" or "young" should be avoided.

Words such as "trainee" or "apprentice" would be permissible in advertising, however, because they describe the position and not the person. A good rule of thumb is to look at the adjectives used in the advertisement to ensure they describe the position's requirements.

Finally, the law does not prevent criminal justice agencies from asking an applicant's age on an application. However, doing so invites extra scrutiny because such questions tend to discourage persons over the age of 40 from applying. One recommendation is to include a statement on the application that the agency complies with the ADEA as well as other relevant civil rights laws.

A final word about discrimination

The Civil Rights Act of 1964 makes it illegal to discriminate on the basis of race or color. There is *never* a BFOQ for race.

Discrimination against the protected class may include racial, ethnic, or sexual slurs, segregation, or harassment. Criminal justice agencies should take every precaution to ensure that such practices do not occur and, if they do, that they will not be tolerated. This includes having written policies and procedures that address issues of discrimination. The policies should be distributed to all employees.

Notes

1. The Washington Post, Wednesday, December 16, 1992, p. A–9.

2. *Fire & Police Reporter*, Nov. 1991, p. 170.

3. *The Washington Post*, February 27, 1993, p. A–10.

4. 42 U.S.C. §§2000e to e–17.

5. U.S. Sup. Ct. 499 U.S. ___; 111 S.Ct. 1196 (1991).

6. §708(k), 42 U.S.C. §2000e(k).

7. 479 U.S. 272 (1987).

8. *Gutierrez* v. *California Acrylic Industries d/b/a Cal-Spas*, Cal. Sup. Ct., BC 055641, 5/17/93.

9. §6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. §206(d).

10. 42 U.S.C. §§2000e *et seq.*

11. 29 U.S.C. §§621–34.

12. §§501, 503, and 504, 29 U.S.C. §§791, 793, 794.

13. Sec. 1604. 11(a)(1) and (2).

14. 42 U.S.C. Section 12101.

15. 42 U.S.C. §1981 *et. seq.*

16. Sec. 1604. 11(a)(3).

17. 29 U.S.C. §2601 *et. seq.*

18. 42 U.S.C. §2000e(k).

19. 38 U.S.C. §2012.

20. 477 U.S. 57, 40 FEP Cases 1505, 106 S. Ct. 2399 (1986).

21. *City of Canton* v. *Harris*, 489 U.S. 378 (1989).

22. *Harris* v. *Forklift*, U.S. Supreme Court, No. 92–1168, 11/9/93.

23. *Intlekofer* v. *Turnage*, 973 F.2d 773 (9th Cir. 1992).

24. 432 U.S. 63 (1977).

25. *Wright* v. *Runyon*, CA 7, No. 92–3490, 8/10/93.

26. 42 U.S.C. Section 12101.

27. *Estrada* v. *American Mutual Protective Bureau*, EEOC sr, No. 370–92–0434; 0515, 4/7/93; *Xieng* v. *Peoples National Bank of Washington*, Sup. Ct. Wash., No. 59064–8, 1/21/93.

28. Department of Justice's Title II Technical Assistance Manual (DOJ/TAM), Section II–2.1000.

29. The Equal Employment Opportunity Commission's Technical Assistance Manual (TAM), Section 3.3.

Paula N. Rubin, a lawyer, is a visiting fellow at the National Institute of Justice, coordinating NIJ's initiative to research, develop, and deliver publications and training for the criminal justice system on the Americans With Disabilities Act as well as other civil rights and human-resources management issues.

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Research in Action

Jeremy Travis, Director

September 1995

Highlights

The National Institute of Justice launched an initiative to examine the implications of the Americans With Disabilities Act (ADA) for criminal justice agencies at the State and local levels. This Research in Action report, the sixth in a series on the ADA, examines how correctional facilities must deliver programs, services, and activities to inmates, job applicants, and employees with mental disabilities.

Under the ADA, corrections facilities must do more than just identify mentally disabled inmates and employees. Now they must also provide mental health screening, evaluation, and treatment. Key points include the following:

- The ADA raises significant issues for correctional facilities because of the prevalence of mental disabilities among inmates. Jails across the United States are handling 640,000 to 800,000 detainees with such disabilities each year.

- According to the ADA, a mental disability is any developmental or psychological disorder, such as retardation, organic brain syndrome, emotional illness, or specific learning disability.

- Title II of the ADA governs how correctional facilities are to make their programs accessible. Program access is not required when it poses a direct threat to the health or safety of others.

continued . . .

The Americans With Disabilities Act and Criminal Justice: Mental Disabilities and Corrections

by Paula N. Rubin and Susan W. McCampbell

The enactment of the Americans With Disabilities Act (ADA) was part of a new effort in the civil rights movement to integrate into all segments of society individuals with disabilities. The ADA affects not only mainstream society but also prisons and jails. The manner in which a correctional facility works with inmates, job applicants, and employees with disabilities is now regulated by the ADA.

The ADA affects how correctional facilities deliver their programs and services to inmates with disabilities as well as others who have a legitimate right to be in the facility or are employed to work there.

Significant issues arise because of the prevalence of mental disabilities among inmates. Approximately 10 million individuals are detained in jails in the United States each year. An estimated 6.4 percent of these detainees have a severe mental disability.[1] Some experts believe this percentage is even higher, around 8 percent, and that the percentage of female detainees with a severe mental disability may be as high as 13 percent. This means that jails across the United States are dealing with 640,000 to 800,000 detainees with mental disabilities each year.

This Research in Action report, the sixth in a series on the ADA published by the National Institute of Justice, examines how correctional facilities must deliver programs, services, and activities to inmates, job applicants, and employees with mental disabilities.

Defining mental disability

According to the ADA, a mental disability is any "mental or psychological disorder, such as retardation, organic brain syndrome, emotional or mental illness, or specific learning disability."[2] The ADA distinguishes between mental illness and developmental disability (retardation). Mental illness is defined as "...a group of disorders causing severe disturbances in

Highlights

continued . . .

- Inappropriate policies and procedures that eliminate inmates from programs and services on the basis of a disability can be avoided by clearly defining the eligibility for program participation, by tying eligibility criteria to actual program needs, and by ensuring that the screening process is objectively applied.

- Under Title I of the ADA, it is illegal to deny equal employment opportunities to qualified individuals with disabilities on the basis of the disability. If job applicants are screened out because they are unable to perform an essential job function, the agency must be prepared to show that the standard is job-related and cannot be met even with reasonable accommodation.

- The liability of not referring for evaluation employees who are suspected of being mentally disabled is tremendous. Agencies that suspect an employee is thus unfit to perform duties and whose actions, or inactions, cause harm to an arrestee or inmate, may be liable.

- Many approaches to accommodating the needs of inmates with mental disabilities are valid. These include specialized housing units to hold inmates who pose a direct threat to the health and safety of others, treatment for inmates housed in regular housing units, and diversion of inmates to other institutions and services. Each approach, however, must not exclude eligible inmates with mental disabilities from programs and services available to the rest of the inmate population.

These issues and their implications are detailed in this Research in Action.

thinking, feeling, and relating. They result in substantially diminished capacity for coping with ordinary demands of life....A mental illness can have varying levels of seriousness. Identical illnesses can cause different reactions in different people, or different reactions at different times in the same person."[3] Personality traits such as poor judgment or a hot temper are not considered disabling under the ADA. Stress and depression may be considered disabling when they are diagnosed as an identifiable stress disorder and an impairment that substantially limits a major life activity.[4]

It should be noted that mental illness is not a crime. Prosecution and incarceration are inappropriate responses to symptoms of mental illness. Law enforcement agencies have a responsibility to distinguish criminal behavior from conduct that is the product of mental illness but has no criminal intent. Thus, failure to work with mental health authorities to ensure the appropriate response to "nuisance" offenders by determining whether the "offense" is simply a manifestation of a disability may violate the ADA, in addition to burdening correctional institutions with individuals who have needs that the institution is not equipped to meet.

A developmental disability means that "normal development fails to occur....A developmental disability is diagnosed by significant subaverage general intellectual functioning (as measured by IQ tests) resulting in, or associated with, defects or impairments in adaptive behavior, such as personal independence and social responsibility, with onset by age 18."[5] "...[R]etardation is estimated as...the Nation's fourth ranking disabling condition."[6]

Delivering programs, services, and activities

Title II of the ADA governs how correctional facilities are to make their programs, services, and activities accessible to inmates with mental disabilities. This law requires the facility to evaluate each program, service, and activity in such a way so that, when viewed in its entirety, the program, service, or activity is readily accessible to and usable by *eligible* inmates with disabilities.

Eligibility requirements. Under the ADA, not all inmates with disabilities may be "qualified." A "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services of the participation in programs provided by a public entity.[7]

Local jail officials deal with numerous severely mentally disabled arrestees each day, many of whom must handle the additional trauma of being arrested. Program access is not required when it poses a direct threat to the health or safety of others.

An inmate whose participation in a particular activity poses a "direct threat" to the health or safety of others will not be "qualified," but the determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and se-

verity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. Thus, across the board classification of an individual as a "direct threat" because of a mental disability would be inappropriate without consideration of the requirements of the particular program or activity in question.

Determination of whether an inmate with a mental illness or developmental disability is "qualified" for a particular program, service, or activity provided by a correctional institution requires analysis of the particular activity to identify the "essential eligibility requirements" and analysis of the particular inmate to determine the effect of the disability on his or her ability to meet those requirements and, if necessary, the feasibility of accommodation (see box).

Eligibility may also be based upon individual behavior. For those inmates with mental illness who can be safely housed in a general population setting, eligibility should not be an issue. Inmates whose disability requires maintenance on psychotropic medications, but who are stable enough for general population settings, may be eligible to participate in the facility's programs, services, or activities based on individual behavior. For example, an eligibility requirement that excludes all inmates on psychotropic medication from inmate worker status may violate the ADA. However, requiring the inmate's behavior to be stable while on such medication may be an acceptable eligibility requirement.

Corrections agencies, especially prisons, are faced with the long-term incarceration of inmates whose mental illness is acute and perhaps will never improve. In the long-term custodial setting of prison, inmates who are mentally ill may arrive in that condition, or they may develop illnesses over the term of their confinement. In circumstances in which the inmate's behavior is a direct threat to staff or other inmates, there is no requirement that they be permitted to participate in programs, services, or activities offered to other inmates. Those inmates who, because of a mental disability, cannot meet the essential eligibility requirements will not be "qualified" persons with a disability and therefore may not be entitled to participate in the program, service, or activity.

Essential Eligibility Requirements

If an inmate is "qualified" for participation in a program or activity, excluding the inmate or limiting his or her participation would violate one or more of the general prohibitions of discrimination in 28 C.F.R. § 35.130...

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability:

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(b)(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(b)(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(b)(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

To ensure compliance with ADA mandates, corrections administrators should look at three distinct areas when evaluating the accessibility of their facility's programs, services, and activities: (1) policies and procedures, (2) architectural barriers, and (3) communications.

Policies and procedures. The courts now consider a facility's deliberate indifference to an inmate's mental disability as the same as that facility's indifference to an inmate's medical condition. A correctional facility should avoid policies and procedures that screen out or eliminate eligible inmates from programs and services on the basis of a mental (as well as physical) disability. If such policies and procedures exist, it may be necessary to reasonably modify the policy or procedure to allow eligible inmates to participate in a meaningful way. Reasonable modification is not necessary if it fundamentally alters the nature of the program, service, or activity. Inappropriate policies and procedures can be avoided by clearly defining the eligibility for program participation, by tying these criteria to actual program needs, and by ensuring that the screening process is objectively applied.

Correctional facilities, including local jails, should screen all inmates to identify those with developmental disabilities. Those with mental disabilities should be evaluated by qualified mental health professionals, and they should have access to crisis intervention, treatment, and discharge planning services.[8] This approach requires a collaborative effort among corrections, mental health, and medical staff. One obvious way to address detainees with developmental disabilities is to divert these individuals before they get to the local jail. Community diversion works well in many jurisdictions and requires a collaborative effort among criminal justice, social service, and public health agencies to work with individuals who are often nuisance offenders—trespassers, petty thieves, public inebriants, the chronic homeless, and those who are dually diagnosed, i.e., those who have mental illness and are also substance abusers.

To avoid having police officers handle this special needs population, teams of specially trained community mental health workers can be on call for the local police. Mental health workers can come to arrest sites, provide alternative sites to which individuals who are candidates for diversion can be brought, or be present at local jails to initiate diversion activities. This collaborative approach requires training police officers to recognize signs and symptoms of mental disability so that they can respond appropriately. Inmates with mental disabilities, particularly those in local jails, are the responsibility of the community. The integration of jail services and community mental health services is critical to the success of an inmate's treatment and reintegration into the community.[9]

Policies for housing those with severe mental illness must be based on ADA criteria. Acceptable approaches may include maintaining specialized housing units to hold those who pose a direct threat to the health and safety of others or placing them in other institutions where more care is available to meet their needs. Not included, however, are individuals who are court-ordered to undergo evaluation and/or treatment or individuals for whom insanity and/or competency to stand trial is an issue. These legal activities are usually outside the scope of a correction facility's responsibilities.

Architectural barriers. Although the ADA does not automatically require correctional institutions to be architecturally retrofitted, it does mandate that the facility provide physical access for its inmates, visitors, staff, and volunteers with disabilities. This requirement can be accomplished without construction. It may be achieved by relocating services and activities to a different part of the facility, redesigning equipment, providing auxiliary aids, or, as a last resort, altering an existing structure. An agency need not experience an undue burden, however, in providing program access. An undue burden is defined as a significant expense or a fundamental alteration of the nature of the operations of the agency.

Architectural barriers may not be as significant an issue for mentally disabled inmates as other inmates with disabilities. If the local jail or prison has separate housing for individuals with mental disabilities, the inmates confined to that housing must have access to jail or prison programs for which they are eligible and for which their participation does not pose a direct threat. It is not enough to provide separate services to those with mental disabilities since mainstreaming is a hallmark of the ADA.

To ensure that those with disabilities are not summarily excluded, a review of all eligibility requirements for inmate and family programs should be made. The goal of this review should be to tie eligibility requirements to the program's actual requirements and provide a means to ensure that individuals with mental disabilities are not

excluded from mainstream activities. For example, if family group therapy is part of the inmate's treatment plan, but a disabled family member is not able to participate either because of architectural barriers or the absence of a sign language interpreter, the inmate should not be excluded.

Communications. Inmates, inmate families, and inmate visitors are also entitled to an effective means of communicating under the ADA. Meeting this condition may require auxiliary aids. Although this portion of the ADA applies only to hearing, speech, and vision impairments, to the extent an inmate with a mental disability has one of these disabilities, the ADA requirements would also apply.

Examples of auxiliary aids include assisted listening devices, telecommunication devices for the deaf, taped texts, and qualified readers. These aids should take into account, where practical, the mental disability of the inmate. Effectively communicating with visitors for an inmate who is developmentally disabled or retarded may mean alternatives to traditional visiting procedures.

A word about personal devices and services

Section 35.135 of the Department of Justice's Regulations provides that:

> ...this part does not require a public entity to provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature including assistance in eating, toileting, or dressing.

The regulation does, however, require that whatever services the entity provides must be provided without discrimination against qualified individuals with disabilities. Because of the custodial relationship between the institution and its inmates, the obligation of the institution is likely to include provision of personal devices or services that would not be required of public entities. For example, a correctional institution is responsible for providing medical care for inmates, including appropriate treatment for inmates with mental illnesses. Where an inmate's mental illness would require residential treatment in a mental hospital, housing that individual in a specialized facility, rather than among the general population, would be appropriate.

Applicants and employees with mental disabilities

Title I of the ADA deals with employment issues. Under this part of the law, it is illegal to deny equal employment opportunities to qualified individuals with disabilities on the basis of the disability. Equal employment opportunity includes the application and hiring process as well as how employees are treated with respect to transfers, promotions, and benefits.

Applicants with mental disabilities. To be covered by Title I of the ADA, the applicant must be qualified for the job. That means the applicant meets the requirements for the position, such as education and experience, and can perform the essential functions of the job with or without an accommodation.

Essential functions are those that are fundamental to the job. If the applicant cannot perform the essential functions of the job because of a disability, the correctional agency must determine whether there is a reasonable accommodation that will enable the individual to perform the essential functions of the job. Reasonable accommodations can include modifying existing facilities to make them accessible, job restructuring, part-time or modified work schedules, acquiring or modifying equipment, and changing policies or procedures. Providing a reasonable accommodation will not be necessary if doing so causes an undue hardship, that is, a significant expense or difficulty.

An additional condition for coverage by Title I of the ADA is that the applicant must not pose a direct threat to the safety of self or others that cannot be eliminated or reduced by reasonable accommodation. Under Title I, direct threat means "significant risk of substantial harm." This is interpreted to mean a high probability of substantial harm.

Ensuring that persons have equal access to employment opportunities means that applicants are allowed to participate in the application process in a meaningful way. For example, someone with a learning or reading disability might be accommodated by providing extra time to take a written exam.

Agencies need to develop and validate job-related entry level fitness standards—both physical and psychological. Candidates for positions who are significantly limited by mental disabilities need to be assessed to determine if they are eligible for the position and are able to perform the essential job functions. If a candidate is screened out by a particular job standard, the agency must be prepared to show that the standard, as applied,

is job-related and consistent with business necessity and cannot be met even with reasonable accommodation.

Blanket exclusions based on mental illnesses, controlled or not by psychotropic medications, may violate the ADA. Agencies should address this issue on a case-by-case basis. Persons experiencing a short-term mental illness, such as situational stress or mild depression, may not be covered by the ADA.

Employees with mental disabilities. In stressful corrections work environments, the effective evaluation of conditions such as post-traumatic stress disorder become as important as the ability to evaluate a back injury. In the event an employee acquires a mental disability, an evaluation as to whether a reasonable accommodation can be provided will need to be made. Accommodations may include time off to participate in therapy or temporary reassignment. It is essential to remember that mental illness may be temporary in nature, just as are some physical ailments. A disorder that is truly temporary would not be covered by the ADA.

Whether the condition is related to the job or not is often a matter that the worker's compensation statutes of the State will decide. The State's decision may ultimately affect the manner in which the individual receives help.

The liability of not referring employees who are suspected of being mentally disabled for evaluation is tremendous. Agencies who suspect an employee is physically or mentally unfit to perform duties and whose actions, or inactions, cause harm to an arrestee or inmate, may be liable.

The same evaluation and validation process for determining what mental health conditions exclude candidates for initial hiring might also provide a guideline for dealing with individuals who develop a mental disability during their employment. Moreover, a system that places as much emphasis on mental health as physical health for continued employment might provide an objective measure to ensure that a reasonable accommodation for the employee's needs is provided. For example, when developing light duty policies, the same issues will exist for both physical and mental health conditions: What is the probable time until return to full duty is possible? What will be the measure? What is the next step if return to full duty is not possible?

Developing and implementing mental health services for inmates

Because of the large number of severely mentally ill in local jails and the likelihood that developmentally disabled arrestees will be returned within a short period of time to their community, a better and more effective approach to addressing the needs of mentally disabled inmates needs to be found.

The first step is problem solving at the local level between corrections and mental health agencies. Other local agencies need to be involved as well, including police, prosecutors, public defenders, the defense bar, and judges. All agencies who deal with mentally disabled people share the burden in addressing this issue. Memorandums of agreement, contracts, and other shared objectives may form the basis for a working relationship that will, in the end, ensure that the best interests of the community, the mentally disabled person, and the jail staff are taken into consideration.

How correctional facilities accommodate the needs of inmates with mental disabilities will differ depending upon the setting—jail or prison. Various approaches include specialized housing units to hold inmates who pose a direct threat to the health and safety of others, treatment for inmates housed in regular housing units, and diversion of inmates to other institutions or services that are better able to meet their needs. Each approach is valid as long as it does not exclude eligible mentally disabled inmates from participating in programs and services available to the rest of the inmate population.

Notes

[1] Teplin, Linda, "The Prevalence of Severe Mental Disorder Among Male Urban Jail Detainees," *American Journal of Mental Health*, 80 (1990), p. 663-669.

[2] See Equal Employment Opportunity Commission's (EEOC) Technical Assistance Manual (TAM), Section 2.2(a)(i).

[3] Murphy, Gerard R., *Managing Persons with Disabilities: A Curriculum Guide for Police Trainers*, Police Executive Research Forum, Washington, D.C., 1989, p. 2–5.

[4] TAM, Section 2.2(a)(i).

[5] Murphy, Gerard R., *Managing Persons with Disabilities: A Curriculum Guide for Police Trainers*, Police Executive Research Forum, Washington, D.C., 1989, p. 2–5.

[6] Ibid, p. 2–13.

[7] See *Department of Justice Technical Assistance Manual,* Section II–2.800.

[8] American Psychiatric Association, "Psychiatric Services in Jails and Prisons," Washington, D. C., March 1989.

[9] Steadman, Henry J., McCarty, Dennis W., and Morrissey, Joseph P., *The Mentally Ill in Jail: Planning for Essential Services*, New York, The Guilford Press, 1989.

Paula N. Rubin, a lawyer, is a visiting fellow at the National Institute of Justice, coordinating NIJ's initiative to research, develop, and deliver publications and training for the criminal justice system on the Americans With Disabilities Act as well as other civil rights and human-resources management issues. Susan W. McCampbell is Director of the Department of Corrections and Rehabilitation Services, Broward County, Florida Sheriff's Office.
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Related NIJ Publications

Listed below are selected NIJ publications related to issues of mental illness and the ADA. These publications can be obtained free from the National Criminal Justice Reference Service (NCJRS): telephone 800–851–3420, e-mail askncjrs@ncjrs.aspensys.com, or write to NCJRS, Box 6000, Rockville, MD 20849–6000.

Please note that when free publications are out of stock, they are available in photocopies for a minimal fee or through interlibrary loan. They are also usually available on the NCJRS Bulletin Board System or on the Department of Justice Internet gopher site for downloading. Call NCJRS for more information.

McDonald, Douglas, C., Ph.D and Michele Teitelbaum, Ph.D., *Managing Mentally Ill Offenders in the Community: Milwaukee's Community Support Program*, NIJ Program Focus, March 1994, NCJ 145330.

Rubin, Paula N., *Civil Rights and Criminal Justice: Employment Discrimination Overview*, Research in Action, June 1995, NCJ 154278.

Rubin, Paula N. and Toni Dunne, *The Americans With Disabilities Act: Emergency Response Systems and Telecommunications Devices for the Deaf*, Research in Action, February 1995, NCJ 151177.

Rubin, Paula N., *The Americans With Disabilities Act and Criminal Justice: Hiring New Employees*, Research in Action, August 1994, NCJ 147479.

Rubin, Paula N., *The Americans With Disabilities Act and Criminal Justice: An Overview*, NIJ Research in Action, September 1993, NCJ 142960.

Rubin, Paula N. and Susan W. McCampbell, *The Americans With Disabilities Act and Criminal Justice: Providing Inmate Services*, Research in Action, July 1994, NCJ 148139.

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Research in Action

Jeremy Travis, Director

October 1995

Highlights

This *Research in Action*, the seventh in a series that examines civil rights laws as they affect the criminal justice community, takes a close look at sexual harassment—a form of sexual discrimination that is in the forefront of the American consciousness. Although the issue of sexual harassment is one that touches all employers, its relevance to law enforcement agencies extends beyond the concerns associated with more traditional settings.

Of note:

- Criminal justice agencies are vulnerable to employee claims of sexual harassment by supervisors or coworkers, and may also be held responsible for the actions of nonemployees and for harassment directed at nonemployees.
- Acquiescence to requests for sexual favors—or even voluntary participation in sexual activity—does not necessarily mean that the favors or activity were welcomed by a sexual harassment claimant.
- Workplace display of sexually explicit material—photos, magazines, or posters—may constitute hostile work environment harassment, even though the private possession, reading, and consensual sharing of such materials is protected under the Constitution.

continued . . .

Civil Rights and Criminal Justice: Primer on Sexual Harassment

by Paula N. Rubin

Sexual harassment is not new, nor are legal remedies against it. It has been recognized for nearly 20 years as a form of sex discrimination under the Civil Rights Act of 1964. However, allegations of improper behavior in the business world and in all branches of government, at Federal, State, and local levels, have become commonplace in today's society. Inevitably, these have resulted in a heightened public awareness about sexual harassment. And, as the Nation's consciousness has risen so has the number of complaints alleging sexual harassment.

How is criminal justice affected by this issue? Obviously, allegations of sexual harassment in the workplace are not confined to the private sector. Police and corrections have their share of claims. Exposure to liability exists not only for the conduct of employees, but in the treatment of inmates, persons in custody or under supervision, and others having reason to interact with criminal justice professionals as well.

The intersection between sexual harassment and criminal justice can best be seen within a legal context. What is sexual harassment? How does this form of discrimination happen in the workplace? Finally, what can agencies do to limit their exposure to liability for claims of sexual harassment and to prevent it from happening within their ranks?

Legal overview

The Civil Rights Act of 1964 (the Act) makes it illegal to discriminate on the basis of race, color, religion, age, national origin, and sex.[1] Title VII of the Act prohibits employers from, among other things, discriminating on the basis of sex with respect to compensation, terms, conditions, or privileges of employment. In addition, another form of sex discrimination is sexual harassment.

Sexual harassment in employment has been defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct that en-

Highlights

continued . . .

- While uncommon, a single severe incident of offending behavior may be sufficient to constitute hostile work environment harassment.
- An agency may investigate and take action where there is evidence of unwelcome conduct even if a complaint has not been filed.
- Failure to investigate promptly and take appropriate remedial action when a sexual harassment complaint has been filed may result in an agency being held liable for damages.
- Prevention—in the form of policy, training, supervision, and discipline—is the best way to avoid sexual harassment in the workplace.

ters into employment decisions and/or conduct that unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment. This guideline identifies two forms of sexual harassment: (1) quid pro quo harassment; and (2) hostile work environment harassment. In the first type, the harasser demands sexual conduct as a condition for receiving a tangible benefit (note, however, a claimant might acquiesce to the demand, receive the benefit and nevertheless still have a claim[2]). In the second type, the work environment becomes so offensive as to adversely affect an employee's job performance.

Quid pro quo harassment. Loosely translated, "quid pro quo" means "something for something." This type of harassment occurs when an employee is required to choose between submitting to sexual advances or losing a tangible job benefit. An essential aspect of quid pro quo harassment is the harasser's power to control the employee's employment benefits. This kind of harassment most often occurs between supervisor and subordinate.

A claim of quid pro quo harassment must meet several criteria:

- The harassment was based on sex.
- The claimant was subjected to unwelcome sexual advances.
- A tangible economic benefit of the job was conditional on the claimant's submission to the unwelcome sexual advances.

In quid pro quo cases, the harassment consists of "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[3] However, there is no requirement that these requests be *express demands* for sexual favors.[4] The advances may be implied by the circumstances and actions: for example, inviting a claimant out for drinks or offering the claimant sexually explicit magazines.

A hallmark of a sexual harassment claim, whether it be quid pro quo or hostile work environment harassment, is that the advances are unwelcome. "Unwelcome" means that the person did not invite or solicit the advances. This is determined by an objective standard and not the claimant's subjective feelings.

On the other hand, acquiescence or even voluntary participation in sexual activity does not mean that the advances were not unwelcome.[5] One factor to consider is whether the person indicated that the advances were unwelcome notwithstanding acquiescence.

Hostile work environment harassment. Hostile work environment harassment is unwelcome conduct that is so severe or pervasive as to change the conditions of the claimant's employment and create an intimidating, hostile, or offensive work environment. In the landmark case of *Meritor Savings Bank* v. *Vinson*,[6] the U.S. Supreme Court found that a hostile work environment amounts to unlawful sex discrimination even in the absence of the loss of a tangible job benefit.

What distinguishes hostile work environment harassment from quid pro quo harassment? There are several differences. Hostile work environment harassment:

- Does not require an impact on an economic benefit.
- Can involve coworkers or third parties, not just supervisors.
- Is not limited to sexual advances; it

can include hostile or offensive behavior based on the person's sex.

• Can occur even when the conduct is not directed specifically at the claimant but still impacts on his or her ability to perform the job.

• Typically involves a series of incidents rather than one incident (although a single offensive incident may constitute this type of harassment).

Three criteria must be met in a claim of harassment based on a hostile work environment:

• The conduct was unwelcome.

• The conduct was severe, pervasive, and regarded by the claimant as so hostile or offensive as to alter his or her conditions of employment.

• The conduct was such that a reasonable person would find it hostile or offensive.

Since this form of sexual harassment does not require the unwelcome conduct to involve sexual advances, other actions may give rise to a claim of hostile work environment. Obviously, gender-based actions such as calling the claimant derogatory names (including names referring to body parts or reproductive anatomy) could be actionable depending on the severity and the pervasiveness. Forms of hazing used to intimidate or dominate the claimant, such as insulting remarks, threats, or negative graffiti, may also constitute this type of harassment. Even actions not directed at a particular claimant may be considered hostile work environment harassment, e.g., the display of sexually explicit materials such as posters, pin-ups, and magazines.

In proving a claim of hostile work environment harassment, courts look at the totality of the circumstances. Severity and pervasiveness are pivotal. The more severe the conduct, the less pervasive it may need to be. Conversely, the more pervasive the conduct, the less severe it may need to be. That is why, although rare in hostile

Areas of concern for criminal justice professionals. Here are some frequently asked questions about sexual harassment:

Q: Is sexual harassment limited to conduct toward women?

A: Obviously not. This form of discrimination is gender based. "Female supervisors who use their power to exact sexual favors from male subordinates similarly are harassing their subordinates on the basis of gender."[7] Conduct that is motivated by a person's sex may give rise to sexual harassment. Moreover, the offensive conduct does not have to be explicitly sexual to be actionable.

Q: Does a complaint need to be lodged for an agency to investigate and take action?

A: No. The fact that a person fails to complain is not determinative. Agencies may take appropriate action when there is evidence of unwelcome conduct. In one instance, a male police sergeant was suspended for 5 days for making sexually suggestive remarks to a female subordinate even though the woman did not file a complaint. The chief took remedial action by suspending the sergeant. The chief's actions were upheld by the Board of Police Commissioners and a three-judge appellate court.[8]

Q: Do inmates and others held in custody have the right to sue for sexual harassment?

A: Yes, sexual harassment of inmates by prison or jail employees is actionable. The inmate could sue for damages under Federal statute 42 U.S.C. §1983. A lawsuit brought under this law is based on a claim that a governmental entity deprived the individual of a constitutional right. Courts have held that prisoners are entitled to protection under the eighth amendment to be free from sexual harassment at the hands of prison staff.[9] The plaintiff would need to allege facts demonstrating unlawful conduct in support of the claim.

Q: Should sexually explicit materials, such as posters and magazines be banned from criminal justice facilities to avoid claims of hostile work environment?

A: That depends. A recent Federal court decision in California held as unconstitutional a fire department policy banning sexually oriented magazines in Los Angeles county firehouses as part of its sexual harassment policy.[10] The court found that *private* possession, reading, and consensual sharing of such magazines is protected by the first amendment to the Constitution. A critical element of the court's decision rested on the private nature of the possession and use of such materials. When sexually explicit materials are not private but are public, then their presence may rise to the level of actionable sexual harassment. Examples of public displays of such materials may include: obscene cartoons, sexually oriented pictures in the workplace, sexually oriented drawings or graffiti on pillars and other public places in the workplace.

work environment cases, a single severe incident may still constitute this kind of harassment.[11] Severity of conduct may depend on whether the action is physically threatening or degrading, in contrast to offensive language. Pervasiveness is also more likely to be found in cases where there is more than one harasser.

A determining factor in a claim of hostile work environment harassment is that the conduct unreasonably interferes with the claimant's work performance.[12] "Unreasonable interference" means that the offensive conduct made it more difficult for the complainant to do his or her job.

By what standard is hostile work environment determined? Courts will generally use a "reasonable person" standard. That means that a reasonable person's work environment would be affected by the conduct. In addition, a 1991 circuit court decision allowed a female plaintiff to assert a "reasonable woman" standard.[13] This standard seeks to eliminate the perceptions that a reasonable male might have about what constitutes offensive, unwelcome conduct.

On the other hand, courts have refused to simply consider how the claimant perceived his or her work environment. In other words, Title VII does not serve as "a vehicle for vindicating the petty slights suffered by the hypersensitive."[14]

Must the claimant suffer injuries to prevail and, if so, how much? The U.S. Supreme Court offered guidance in the case of *Harris* v. *Forklift*.[15] To prevail on a claim of hostile work environment harassment, the conduct need not seriously affect an employee's psychological well-being nor cause an injury. The decisive issue is whether the conduct interfered with the claimant's work performance.

Implications for criminal justice

Sexual harassment may impact on criminal justice agencies in two ways. First, claims from employees expose the agency to liability in its capacity as an employer. Second, the agency may also be sued by third parties claiming to have been harassed by persons under the authority or control of the agency. Often these claims are brought under the Civil Rights Act of 1871 (42 U.S.C. Section 1983). Section 1983 imposes liability on any person who, under color of State law, deprives a person of rights guaranteed by Federal law.

Agency liability. The degree to which a criminal justice agency can be held responsible for the actions of its employees depends on the type of harassment complaint filed and the identity of the claimant. Employers have consistently been found strictly liable for quid pro quo harassment by supervisors under their authority.

Strict liability is a legal standard that imposes liability even though the employer had no knowledge of the unlawful conduct. So, for example, if a superior officer makes sexual favors a condition of a subordinate's promotion, the department will be held liable even if it did not know about the superior officer's demands.

On the other hand, criminal justice agencies will not be automatically liable for claims by their employees of hostile work environment harassment. When hostile work environment harassment by a supervisor is alleged, employer liability will turn on such things as whether the employer had notice of the conduct, the means by which the harassment was committed, whether the claimant had the chance to complain about the conduct, what the employer did in response to any complaint or knowledge of the conduct, and what preventive and remedial measures the employer has taken. Some courts have, however, taken a broader approach to impose liability.[16]

When is the agency charged with knowledge of harassing conduct? That is, when will an agency without formal knowledge of the conduct be deemed to know that the offensive conduct exists? When a complaint is filed with someone high enough in the agency to infer notice to the agency; when supervisors see the offending conduct; or when the harassment is so pervasive that the agency should have known it was going on. For example, "pervasive graffiti and pornography can give rise to an inference of knowledge on the part of the employer."[17]

Agency liability is not limited to the abuse of power between supervisor and subordinate, nor the actions of coworkers. Inmates, suspects, arrestees, crime victims, and others having interaction with the agency can be involved in this unlawful conduct. In these instances the agency may be liable if the agency, its agents, or supervisory employees knew or should have known of the conduct but failed to take immediate action.

If a complaint is filed. An essential part of limiting an agency's liability for sexual harassment is the action it takes when a complaint is filed or, in cases where there is no complaint, when the agency knows or should have known of the offensive conduct. The

worst thing an agency can do is nothing. A Federal jury in Los Angeles awarded $3.9 million to two female police officers who alleged that male coworkers sexually harassed them and their supervisors ignored their complaints.[18] Conversely, an employer's prompt and appropriate response to complaints can limit its liability.[19]

A failure to take prompt, remedial action can result in an agency being held liable for an award of damages. These may include back pay (limited to 2 years prior to the filing of an EEOC charge), front pay, and compensatory damages. Punitive damages, while recoverable by employees in the private sector, are *not* available to governmental employees.

Here are some steps to take when a complaint is filed:

• **Act immediately.** Take every complaint seriously. Do not assume that the problem will work itself out or go away on its own. A delay in taking action might be viewed as tacit approval of the conduct.

• **Investigate and act on every complaint.** This includes even those claims where victims minimize the incident(s). Often victims of sexual harassment are embarrassed or ashamed of the incident and may be reluctant to talk about it. The person responsible for handling sexual harassment complaints should conduct a thorough investigation or cause one to be conducted. Anyone and everyone involved in the incident(s) should be interviewed. Interviews should endeavor to answer *who, what, where, how, and when.* They should be conducted in private and their contents kept confidential.

• **Keep accurate records of the investigation.** It is a good idea to document all phases of the investigation from receipt of the complaint through any remedial action taken. These records may be valuable evidence of measures taken by the agency.

• **Ensure that there is no retaliation against the complainant.**

Preventing sexual harassment

No matter how flawless the investigation or how quickly and fairly a complaint is handled by the agency, prevention is still the best approach to sexual harassment. Criminal justice agencies should consider building their prevention programs around four areas: policy, training, supervision, and discipline.

Policy. Every criminal justice agency should have a policy that clearly states that the agency prohibits any type of sexual harassment. However, having such a policy is not enough; it must be communicated to all employees and consistently and fairly enforced. To the extent practical, agencies should consider posting the policy for a period of time in employee work areas, locker rooms, or break rooms. Thereafter, copies should be kept in accessible locations. In addition, the policy should be included in any employee handbooks.

At a minimum, any sexual harassment policy should include:

• A statement that the criminal justice agency will not tolerate sexual harassment.

• A definition of sexual harassment, including examples of quid pro quo and hostile work environment harassment.

• A statement advising employees of the agency's grievance procedure and requiring employees to immediately report incidents.

• A statement that complaints will be taken seriously and investigated immediately.

• A statement of the penalty for violating the policy.

• A statement that all employees are to treat each other professionally and respectfully.

Training. Having a policy and talking about sexual harassment in a vacuum is often not enough. Criminal justice agencies should consider putting these ideas into a context to ensure that employees understand what sexual harassment is. Conducting sexual harassment training is an effective way to communicate the agency's policy.

Training should:

• Identify and describe forms of sexual harassment and give examples.

• Outline the agency's grievance procedure, explain how to use it, and discuss the importance of doing so.

• Discuss the penalty for violating the policy.

• Emphasize the need for a workplace free of harassment, offensive conduct, intimidation, or other forms of discrimination.

Supervision. A policy against sexual harassment is only as good as the supervisors who enforce it. For that reason, supervisors should be taught how to build and maintain a professional work environment. Training should cover such matters as:

• How to spot sexual harassment.

• How to investigate complaints including proper documentation.

• What to do about observed sexual harassment, even when no complaint has been filed.

• How to keep the work environment as professional and nonhostile as possible.

Discipline. The agency's grievance procedure should be clearly delineated and communicated to all employees. In addition, to ensure that this grievance procedure is credible, it should be strictly and promptly followed. This is especially important since courts look at the action taken by employers in determining liability. When violations occur, proper disciplinary action should follow. Consider the following measures:

• Informing employees in advance of conduct that may result in immediate dismissal or in disciplinary action; in the latter case, describe the penalties involved.

• Following up on an incident, after an interval of time, to make sure the problem has not returned.

• Counseling all parties, and training (or retraining) all employees in cases where harassment has been alleged but cannot be determined.

• Repeating assurances that sexual harassment will not be tolerated.

Conclusion

Sexual harassment is as common to the field of criminal justice as to any other area of American enterprise, and the laws regarding how it should be regarded and dealt with apply to criminal justice agencies as much as to private sector workplaces. Awareness of the law and the consequences for disregarding it should guide criminal justice managers in effectively carrying out their responsibilities and avoiding liabilities for the agencies they administer.

Notes

[1] 42 U.S.C. 2000–2(a)(1).

[2] *Kariban* v. *Columbia University*, 14 F.3d 773 (2nd Cir. 1994).

[3] EEOC Guideline §1604.11(a).

[4] See: *Nichols* v. *Frank* 22, 9th Cir., December 12, 1994.

[5] See: *Kariban* v. *Columbia.*

[6] 477 U.S. 57, 40 FEP Cases 1822 (1986).

[7] Lindemann, Barbara and David D. Kadue, *Primer on Sexual Harassment,* Bureau of National Affairs, Inc., Washington, D.C., 1992, p. 32 citing *Hubebschen* v. *Department of Health and Human Services*, 716 F.2D 1167, 32 FEP Cases 1582 (7th Cir. 1983).

[8] *State ex rel. Rice* v. *Bishop,* 858 S.W. 2d 734 (Mo.App. 1993) as reported in *Fire & Police Personnel Reporter*, January 1994, p. 12.

[9] *Battle* v. *Seago*, 431 S.E.2d 148 (Ga. App. 1993); *McKenzie* v. *State of Wis. Department of Corrections*, 762 F. Supp. 255 (E.D. Wis. 1991); case later dismissed as frivolous.

[10] *Johnson* v. *Los Angeles County Fire Department*, DC C Calif., CV 93–7589, October 28, 1994.

[11] *Huitt* v. *Market Street Hotel Corp.*, 62 FEP 539 (D.Kan. 1993).

[12] EEOC Guidelines §1604.11(a)(3).

[13] *Ellison* v. *Brady*, 924 F.2d. 872, 54 FEP Cases 1346, republished as amended, 55 FEP Cases 111 (9th Cir. 1991); See also: *Jensen* v. *Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993).

[14] *Zabkowicz* v. *West Bend Co.*, 589 F. Supp. 780, 784, 35 EPD Par. 34, 766 (E.D. Wis. 1984).

[15] 114 S.Ct. 367 (1993).

[16] See: *Kariban* v. *Columbia.*

[17] *Primer on Sexual Harassment*, p. 59.

[18] *Clerkin* v. *City of Long Beach; Allison* v. *City of Long Beach*, U.S. Dist. Ct. (CD Cal. 1991) as reported in *Fire and Police Reporter*, November 1991, p. 170.

[19] *Beardsley* v. *Isom*, 828 F. Supp. 397 (E.D. Va. 1993); aff'd *Beardsley* v. *Webb*, 30 F.3d 524 (4th Cir. 1994).

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Please note that when free publications are out of stock, they are available in photocopies for a minimal fee or through interlibrary loan. They are also usually available on the NCJRS Bulletin Board System or on the Department of Justice Internet gopher site for downloading. Call NCJRS for more information.

McDonald, Douglas, C., Ph.D and Michele Teitelbaum, Ph.D., *Managing Mentally Ill Offenders in the Community: Milwaukee's Community Support Program*, NIJ Program Focus, March 1994, NCJ 145330.

Rubin, Paula N., *Civil Rights and Criminal Justice: Employment Discrimination Overview*, Research in Action, June 1995, NCJ 154278.

Rubin, Paula N. and Toni Dunne, *The Americans With Disabilities Act: Emergency Response Systems and Telecommunications Devices for the Deaf*, Research in Action, February 1995, NCJ 151177.

Rubin, Paula N., *The Americans With Disabilities Act and Criminal Justice: Hiring New Employees*, Research in Action, August 1994, NCJ 147479.

Rubin, Paula N., *The Americans With Disabilities Act and Criminal Justice: An Overview*, NIJ Research in Action, September 1993, NCJ 142960.

Rubin, Paula N. and Susan W. McCampbell, *The Americans With Disabilities Act and Criminal Justice: Providing Inmate Services*, Research in Action, July 1994, NCJ 148139.

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The Americans with Disabilities Act and Criminal Justice: Litigation Report

by

Paula N. Rubin

It has been six years since the Americans with Disabilities Act (ADA) was signed into law and four years since the law went into effect. Since that time there have been volumes written about this sweeping piece of civil rights legislation. Many of the initial questions about the scope and impact of the law have been answered by the federal agencies responsible for administering and enforcing it.

To the extent that these questions have been answered, criminal justice agencies and governmental entities are integrating the ADA into their policies and procedures, both in their employment practices as well as in their delivery of programs, services, and activities. However, where questions remain unanswered or the answers are disputed, lawsuits are being filed in court or complaints are lodged with the U.S. Department of Justice.

With courts reviewing the issues raised and points of contention, new information is emerging which provides useful guidance for criminal justice professionals. On the other hand, courts from different jurisdictions have sometimes come to conflicting conclusions on the same or similar issues.

This Litigation Report surveys various court decisions as well as settlements entered into with the U.S. Department of Justice of particular interest and relevance to the criminal justice system. These cases are valuable not so much for the final decisions rendered but rather for the reasons and processes by which the courts arrived at those decisions. Since, however, a great deal has been written about AIDS and HIV in corrections, this Litigation Report will not repeat those efforts here.[1]

A word of caution, however: the ADA is very fact specific and every disability is a disability of one. Therefore, any case dealing with issues involving the ADA should be based on an individualized assessment. This Litigation Report is intended to be used as a reference and source of information and guidance. It is meant to be a starting point for any inquiry and should not be used in lieu of independent legal advice.

The ADA and Employment

Title II of the ADA prohibits all public entities, regardless of the size of the workforce, from discriminating against qualified

persons with disabilities in employment. Title I of the ADA as well as the Rehabilitation Act of 1973 also prohibit such discrimination by certain public employers. As public entities, criminal justice agencies must ensure that their treatment of job applicants as well as incumbents comports with these laws.

Here is a very brief review of the salient aspects of the ADA with respect to employment.[2] Only qualified individuals with disabilities are covered by the employment provisions of the ADA. That means that the person must (a)have a disability <u>for purposes of the ADA</u>, and (b)otherwise be qualified for the job.

The ADA defines "disability" as (1)a mental or physical impairment that substantially limits a major life activity; (2)a record of such an impairment; or (3)being perceived or regarded as having such an impairment. A substantial limitation means that the person with the disability cannot do those things that the average person in the general population can do. Examples of major life activities include walking, seeing, hearing, breathing, bending, lifting, speaking, or working. If an individual does not meet this definition, then they do not have a disability for purposes of the ADA and would therefore not be covered by this law.

People with disabilities will not be covered by the ADA unless they are also otherwise qualified for the position. That means that they can perform the essential functions of the job with or without a reasonable accommodation. Essential functions are those that are fundamental, not marginal, to the job. Reasonable accommodation is any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy an equal employment opportunity.[3] A reasonable accommodation will not be required where doing so poses a direct threat to the health and safety of the person with the disability or others or where it would impose an undue financial or administrative hardship on the employer.

<u>Threshold Procedural Issue</u>.

Under Title I, private employees are required to pursue all administrative remedies before bringing a lawsuit under the ADA. This is not the case for those employees covered by Title II. According to <u>Petersen v. University of Wisconsin Board of Regents(Petersen)</u>,[4] an employee suing his employer under Title II instead of Title I may proceed directly to federal court without first exhausting all administrative remedies.

In <u>Petersen</u>, a state university employee filed a lawsuit in federal court without first exhausting administrative remedies by filing a complaint with the U.S. Department of Justice. The ADA prohibits employment discrimination by public entities. Moreover, the regulations interpreting Title II, which pertain to public

entities, follow the Rehabilitation Act of 1973 which does not require the exhaustion of administrative remedies.

Otherwise Qualified and Direct Threat: A Delicate Balance

Persons with disabilities who are otherwise qualified for a particular job may nevertheless fall outside the scope of the ADA's protection if the individual poses a "direct threat" to the health and safety of others or himself. A direct threat involves significant risk of substantial harm based on objective evidence and not mere speculation.

In addition, a direct threat must be a present risk, not a remote possibility in the future. For instance, an employer may not refuse to hire an individual with a vision impairment for a job that requires a great deal of reading because the extensive use of the person's eyes might cause further damage to the eyes sometime in the future.[5]

How has the delicate balance between protecting the rights of qualified persons with disabilities and protecting the health and safety of both others and the person with the disability shown up in cases involving criminal justice agencies? What are the courts saying about this issue? Cases involving both job applicants and incumbents shed some light.

Job Applicants.

In Stratton v. Missouri Dept. of Corrections(Stratton),[6] a former corrections officer missing four fingers on his right hand applied for a position with the Missouri Department of Corrections as a new employee. The application process for this job included a defensive tactics test involving, in part, demonstrating certain defensive hand motions that might be necessary for officers to use in controlling inmates or quieting a disturbance.

In this case, a Missouri Appeals court upheld a lower court's decision that the agency's refusal to hire the applicant did not violate the ADA based on the evidence presented. The court found that the ability to perform the defensive hand motions was an essential function of the job and since the applicant could not perform this essential job function, he was not "otherwise qualified" for the position.

A caveat. Another applicant missing four fingers on his or her right hand might be otherwise qualified for this job if the applicant is able to perform the defensive hand motions. Criminal justice agencies should not assume persons with the same disability will have the same limitations.

Indeed, the issue of blanket policies regarding disabilities was

addressed in Stillwell v. Kansas City Board of Police Commissioners(Stillwell).[7] In Stillwell, an applicant born without his left hand successfully challenged the Missouri Police Board's blanket policy that applicants for positions as licensed security guards, as well as police officers, are required to have two hands.

The court in Stillwell found that the policy violated the ADA because it was based on an impermissible stereotype, i.e., that all persons with one hand cannot perform the essential job functions of a police officer or licensed security guard. Such a policy offends the intent of the ADA which is that there be an individualized assessment of applicants' ability to perform the essential functions of a particular job.

Did the court in this case say that the applicant was otherwise qualified for the job as a licensed security guard? No. What the court said was that agencies could not automatically eliminate persons with one hand from consideration. This applicant was entitled to demonstrate whether or not he could meet the physical requirements of the job with or without a reasonable accommodation.

Incumbents.

A Sarasota, Florida sheriff's detective was awarded $289,000 by a jury after being demoted to a desk job because of his hearing impairment.[8] The detective sustained the hearing impairment in the line of duty in 1989. It was not until 1992 that he was demoted.

The agency tried to defend its actions by arguing that the hearing impaired detective posed a direct threat to the health and safety of himself or others. In agreeing with the detective that the agency had violated Title II of the ADA as well as the Rehabilitation Act of 1973, several factors were significant. First, during the four years between the injury and the demotion, the evidence showed that the detective had performed his job at an above-average level. Second, the agency admitted that their reason for demoting the detective was his hearing impairment. Third, the agency made no showing of trying to provide a reasonable accommodation to the detective.

It is important to note that the jury verdict does not support either the position that hearing impairments do not pose a direct threat to the heath and safety of the person or others, nor that they do. Establishing a direct threat requires more than simply asserting that one exists. Moreover, once it can be shown that there is a direct threat, the employer's obligation does not stop there. Before the employer can take adverse action against the person with the disability, the employer must first try to eliminate the threat by reasonable accommodation. In this case, the fact that the Sheriff's office permitted this employee to continue to do the job for four years and was evaluated as doing so

at above average levels was compelling evidence that this employee was qualified for the job and did not pose a direct threat either to himself or to others.

A similar result was reached in the case of Greenwood v. State Police Training Center(Greenwood).[9] In Greenwood, an employee hired as a temporary sheriff's officer was taking a defensive training course required to become a permanent employee. The individual had perfect vision in his left eye, but had blurred vision in his right eye as a result of a childhood disease. The employee's own doctor certified that he was medically fit. However, a state opthamologist ruled that he was in great risk of injuring his left eye if a combat situation were to occur. The opthamologist recommended that the employee not participate any the defensive combat training course. The county then fired the employee for his failure to complete the training course.

The court found that the employee was wrongly rejected from the training course. Determinations of direct threat may not be based on subjective or conclusory medical reports but, rather, must be based on scientifically-validated evidence. As the court noted, any candidate taking a defensive tactics training course risks being injured.

Diabetes as a Disability.

Diabetes as a disability has been the subject of several lawsuits involving criminal justice professionals. Whether or not diabetes is a disability "per se" has been addressed as well as whether it may be a basis for excluding individuals with this disability from consideration. Not surprisingly, the answers to these questions depends on the facts and circumstances in each case.

On this issue, the courts seem divided. A federal district court found that insulin-dependent diabetes is not a "per se" disability under the ADA. According to the court in Coghlin v. H.J. Heinz Co.("Coghlin"),[10] the EEOC's interpretive guidance discussing diabetes conflicts with the language in the statute itself. On the other hand, a federal district court in Oklahoma accepted the EEOC's interpretive guidance in finding a particular individual's diabetes to be a disability under the ADA.

How has this issue appeared in cases involving criminal justice? A federal district court in Kansas held that the EEOC's interpretive guidance provision to the extent it creates as a general rule that diabetes is automatically a disability under the ADA is invalid.[11] The court found that whether or not diabetes should be considered a disability will turn on whether or not the condition substantially limits a major life activity. In other words, a diagnosis, alone, is not enough.

In Deckert, the court found that the plaintiff, a police officer,

with diabetes was not disabled for purposes of the ADA because his condition did not substantially limit a major life activity. Two years after the officer joined the police department he was diagnosed with diabetes. Despite not checking his blood very frequently, the officer's diabetes was under control. In addition, he did not require any accommodation to do his job.

While on the force, the officer had been reprimanded, demoted, and ultimately fired after several incidents. These incidents included his failure to find obvious physical evidence at a crime scene, the failure to secure his police vehicle while investigating a call which resulted in the car's disappearance, the failure to properly investigate and report a domestic violence call, and colliding with the rear of another car and then leaving the scene without completing the investigation, calling another officer, or reporting the accident.

From these facts it appears that the officer's termination was the result of poor performance, to say the least, and not as a result of having diabetes. Having a disability will not insulate an individual from adverse action on the job. If a person with a disability cannot perform the essential functions of the job with or without an accommodation, then he will not be considered qualified for the job. Here, the officer required no accommodation for his diagnosis, and had demonstrated time and time again his inability to satisfactorily perform the duties of the job.

On the other hand, excluding someone from consideration for a job as a police officer because he is an insulin-diabetic may offend the ADA. In the case of Bombrys v. City of Toledo(Bombrys),[12] the court found that the City of Toledo's blanket exclusion of people with insulin-dependent diabetes as candidates for police officer violated the ADA.

The basis for the City's exclusion was the belief that as an insulin-dependent diabetic, the candidate posed a danger to himself and others. In response, the plaintiff argued that each applicant with diabetes must be viewed on his or her own merits and that even if he was not otherwise qualified for the position because of his diabetes there might be other candidates with insulin-dependent diabetes who are otherwise qualified. The court agreed.

What was the compelling evidence that contributed to the court's decision? First, the City of Toledo already had insulin-dependent diabetics on the police force. These officers had joined the force prior to the city instituting its blanket exclusion of insulin-dependent diabetics in 1985. Moreover, the testimony by these officers at trial suggested that there was little evidence that the diabetes had interfered with any of their duties while on the job.

In addition, a retired deputy chief testified that once an officer is on the force, the officer's health is never checked unless there

is a specific incident requiring scrutiny. Officers have developed epilepsy, obesity, asthma and other health conditions while serving on the Toledo police force.

Also compelling was the fact that neighboring police departments in Cleveland, Columbus, Dayton, and Youngstown did not automatically exclude insulin-dependent diabetic individuals from their police forces. These cities employed a case-by-case evaluation of job applicants' qualifications. With the evidence presented at trial, it is easy to see why the City of Toledo was unable to prove that insulin-dependent diabetes, in and of itself, poses a direct threat to the health and safety of the individual with the diabetes or to others.

On the other hand, individuals with disabilities are responsible for taking proper care of their condition. A police officer who failed to properly monitor his condition and had a diabetic reaction while on the job resulting in a high speed driving incident was not entitled to protection under the ADA.[13]

The evidence in Siefken demonstrated that there is technology and proper monitoring systems which can reduce the possibility of a severe hypoglycemic reaction to nearly zero. The plaintiff could have prevented his diabetic reaction monitoring his condition but failed to do so. Indeed, the officer even admitted that he knew how to control these reactions. The employer, the court found, should not be required to pay for the officer's failure.

It is interesting to note that the only reasonable accommodation the officer requested in connection with his disability came after the accident. The accommodation he requested was a second chance and his promise to properly monitor his condition in the future. A second chance, the court found, is not a reasonable accommodation in this case nor is it required under the ADA.

Drugs and Criminal Justice.

Under the ADA, drug addiction is protected as a disability. However, current illegal use of drugs is not protected. This includes prescription drugs as well as illegal drugs. Drug use is considered current if it occurred recently enough to justify an employer's belief that the involvement with drugs is an on-going problem. The ADA will only protect those addicted to drugs who are currently in or who successfully completed a rehabilitation program.

The ADA distinguishes between drug addiction and casual or recreational drug use. This distinction was underscored by a federal district court in Hartman v. Petaluma(Hartman).[14] The court relied on the EEOC's Technical Assistance Manual which states that a person who casually used drugs in the past, but was not addicted is not covered by the ADA. In Hartman, a candidate for a position

on the Petaluma, California police force represented that he had used only 1-1/2 ounces of marijuana and a small amount of cocaine in his life. Later, he admitted that he was a voluntary, casual user of illegal drugs approximately 100 times.

The court found that casual drug use did not constitute a disability under the ADA. It is also important to note that even if the candidate had established coverage under the ADA, the fact that he lied on his application for employment would have justified the Department's rejection of his application.

Mental Illness and Fitness for Duty.

The ADA covers physical and mental disabilities which substantially limits a major life activity. Mental disabilities can include mental illness.

In Graehling v. Village of Lombard, Ill.(Graehling),[15] a police officer was diagnosed with bipolar disorder, alcoholism, and post traumatic stress disorder. After certain incidents of unstable behavior, the police department found the plaintiff unfit for duty. The department permitted the officer to resign immediately with the resignation effective after his pension vested. In between the tendering of the resignation and its effective date, the ADA went into effect.

The plaintiff tried to revoke his resignation after the ADA went into effect, however, the department refuse to rescind the resignation. Thereafter, the plaintiff sued under the ADA. The court held in favor of the police department and against the plaintiff saying that the department did not have to accept the plaintiff back. The court felt that the only action subject to scrutiny under anti-discrimination laws, including the ADA, was the original basis for its decision. The fact that the department would not reconsider its position after the effective date of the ADA did not create a new act of discrimination under the ADA. In Greahling, the plaintiff was found not to be otherwise qualified for the job.

An area of controversy has been to what extent prospective employers or organizations, such as state Bar Examiners, can inquire about a history of mental illness. While this question is far from settled, there has been some response from the courts.

In the case of Doe v. The Judicial Nominating Commission of the Fifteenth Judicial Circuit(Doe),[16] a federal judge preliminarily restrained a judicial selection panel from asking broad questions about applicants' health. Some of the questions considered to be overbroad included:

* whether the applicant has been hospitalized within the last five years or been treated for any form of

emotional disorder

* whether they have ever had problems with drugs or alcohol.

The judge in Doe found that the questions were overly broad because an applicant who suffered from emotional abuse as a child and sought help as an adult would be required to disclose the treatment.

Likewise, in Clark v. Virginia Board of Bar Examiners(Clark),[17] the court found that broadly worded questions to applicants for admission to practice law before the Virginia Bar violated Title II of the ADA. Questions found excessively broad included, "Have you within the past five years been treated or counselled for any mental, emotional, or nervous disorders?"

Delivering Programs, Services, and Activities Under the ADA

Title II of the ADA applies to governmental entities and their delivery of programs, services, and activities. Like Title I, Title II makes it illegal to discriminate against qualified persons with disabilities.[18]

Qualified individuals with disabilities are those persons who meet the essential eligibility requirements necessary to participate in the program, service, or activity. Individuals may become qualified by: reasonable modifications to rules, policies, or procedures; the removal of architectural, communication, or transportation barriers; or the provision of auxiliary aids and services.

An example of an essential eligibility requirement might be requiring inmates to have a high school diploma or GED to take college level classes. An example of a reasonable modification might be to relocate college level classes to an accessible location so that an inmate with a mobility impairment could attend the class.

Title II issues have appeared in a myriad of ways for criminal justice agencies. Here are some highlights.

The ADA and Arrests.

How law enforcement officers conduct arrests is covered under the ADA. This includes reading Miranda warnings, transporting arrestees, and recognizing the difference between a person with a disability and someone under the influence of drugs or alcohol.

In Jackson v. Inhabitants of Sanford("Jackson"),[19] the court permitted a man with disabilities caused by a stroke to proceed to trial under the ADA. In Jackson, the plaintiff was involved in an

auto accident with another car. The arresting officer noticed that Mr. Jackson, was unsteady, swayed noticeably, had slurred speech, and was confused. Mr. Jackson told the arresting officer that he suffered from a stroke and was on medication for high blood pressure. Mr. Jackson was required to perform a field sobriety test, but because of his disabilities, he performed poorly.

As a result of his poor performance on the test, Mr. Jackson was handcuffed and put in the back seat of the police car. Due to his disability, he fell face forward on to the back seat and was unable to sit up. He was transported to the police station in this manner. He remained in police custody for over an hour until the police determined he was not under the influence of alcohol or drugs and then he was released.

In permitting the case to go to trial, the court said that wrongful arrests of persons with disabilities who are mistakenly believed to be under the influence of drugs or alcohol are covered by the ADA.

The Jackson decision provides a clear message: law enforcement agencies should train their officers on how to recognize symptoms of disabilities as well as sensitive ways of interacting with persons with these disabilities. This training should also include teaching ways to distinguish between symptoms of disabilities and criminal behavior.

Communications: Sign Language Interpreters.

How are criminal justice professionals expected to work with persons who are deaf or hearing impaired? Two separate agreements between the United States Department of Justice and police departments in Clearwater, Florida and Rochester, New York offer some insight.

To help with communications for persons dealing with departments, auxiliary aids and services must be available. This includes qualified interpreters, written materials, note pads, and other effective methods to convey information.

Departments must make these services available to arrestees, persons detained or questioned, hearing-impaired attorneys representing individuals, relatives, and members of the public.

The goal should be to ensure effective communication. Under the Clearwater agreement, the Clearwater police agreed to provide sign language interpreters under certain situations. Such situations may involve occasions where there is probable cause to make an arrest, where an officer is unable to convey the nature of the charges to an arrestee, or when questioning or interviewing witnesses.

The Rochester agreement also included provisions to train all

personnel on appropriate use of sign language interpreters, and to publicize the policy.

Jury Service.

As stated before, the ADA does not permit blanket exclusions of a class of persons with disabilities. This prohibition is not limited to Title I. Title II also prohibits such exclusions.

In Galloway v. Superior Court of District of Columbia, (Galloway),[20] the court held that a policy which automatically disqualified persons who are blind from serving as jurors violates the ADA. The policy excluded blind individuals from the jury pool based on the stereotype that blind jurors would not be able to effectively evaluate the credibility of witnesses or access physical evidence.

In striking down the policy, the court held that such assumptions are invalid because they presume the sight is an essential ability to evaluating evidence. The District of Columbia did not proffer any studies or proof to support this conclusion. On the other hand, ten other states have explicitly prohibited excluding people with vision impairments from serving as jurors. In fact, as the judge in Galloway noted, there are several blind judges effectively presiding over cases.

1. For an excellent survey of this important issue see: Hammett, Theodore M., et al., 1994 Update: HIV/AIDS and STDs in Corrections Facilities, National Institute of Justice and the Centers for Disease Control and Prevention, December 1995.

2. For a more in depth explanation of the ADA and employment, see: Rubin, Paula, The Americans with Disabilities Act and Criminal Justice: Hiring New Employees, National Institute of Justice Research in Action Series, October 1994.

3. Equal Employment Opportunity Commission, Technical Assistance Manual, Section 3.1.

4. 818 F. Supp. 1276 (W.D. Wis. 1993).

5. Equal Employment Opportunity Commission (EEOC), Technical Assistance Manual(TAM), 4.5 A.4.

6. 897 S.W. 2d 1 (Mo.CtApp 1995).

7. 872 F. Supp. 682 (W.D. Mo. 1995).

8. Kemp v. Monge, 919 F. Supp. 404 (M.D. Fla. 1993).

9. 606 A. 2d 336 (N.J. SCt. 1992).

10. 3 AD Cases 273 (N.D. Tex. 1994).

11. Deckert v. City of Ulysis(Deckert), 4 AD Cases 1569 (D.C. Kan. 1995).

12. 849 F. Supp 1210 (N.D. Oh. 1993).

13. Siefken v. Village of Arlington Heights (Sieflen), 65 F.3d 664 (7th Cir. 1994).

14. 841 F. Supp. 946 (N.D. Cal. 1994).

15. 58 F.3d 295 (7th Cir. 1995).

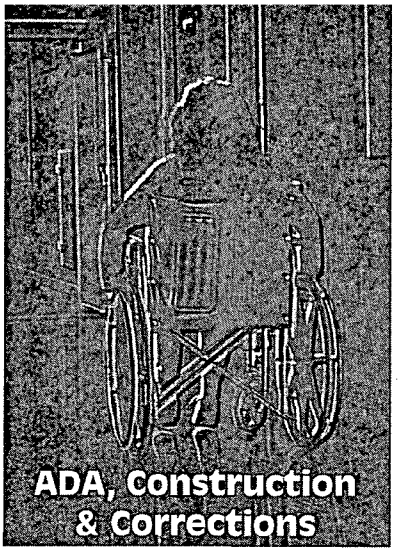
16. 906 F. Supp. 1534 (S.D. Fla. 1995).

17. 1995 U.S. Dist. LEXIS 14502.

18. For a brief overview of Title II see: Rubin, Paula N., The Americans with Disabilities Act and Criminal Justice: Providing Inmate Services, National Institute of Justice Research in Action Series, July 1994.

19. 1994 U.S. Dist. LEXIS 15367.

20. 1994 U.S. Dist. LEXIS 20730.



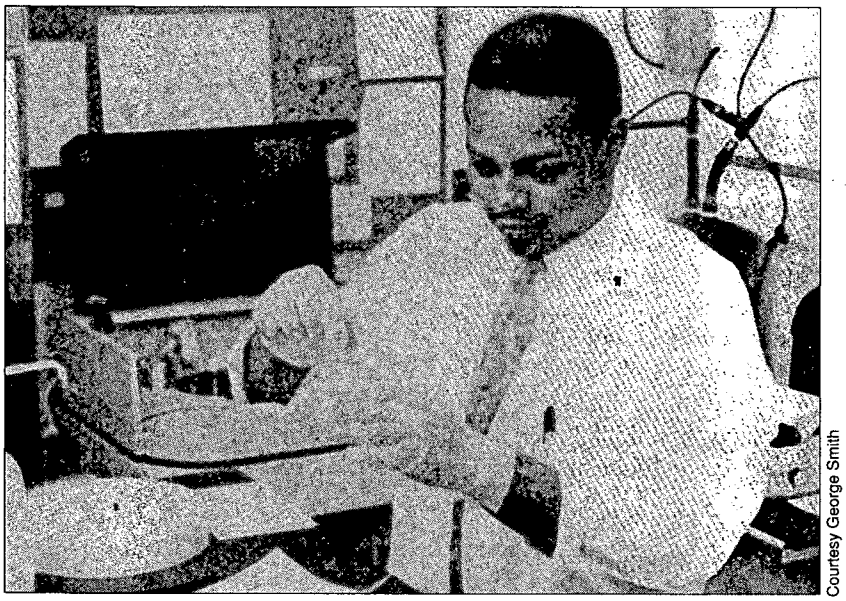
The Americans with Disabilities Act's Impact on Corrections

by Paula N. Rubin

The Americans with Disabilities Act (ADA) is the most sweeping civil rights legislation enacted in the past 30 years. Inspired by a desire to integrate more than 43 million individuals with disabilities into the mainstream, this law affects virtually every segment of society.

Every industry and profession is affected by the ADA, and corrections is no exception. Title I of the ADA covers employment issues; Title II dictates how correctional facilities deliver their programs, services and activities.

The ADA has significant consequences on how corrections hires personnel. The ADA prohibits administering medical exams or conducting any disability-related inquiries prior to extending a conditional offer of employment. In addition to ADA employment requirements, corrections administrators must ensure that the delivery of programs, services and activities does not exclude persons with disabilities. Administrators can meet this obligation by examining three areas: (1) policies and procedures, (2) physical access to programs and (3) communications systems. This examination should ensure that inmates, individuals with a legitimate right to interact with or visit inmates, and the public are not denied access to the facility's programs, services or activities because of a disability.


Courtesy George Smith

Invasive tests, such as urine screening, are medical in nature and not permitted at the pre-offer stage of employment.

The ADA in Brief

The ADA identifies individuals with disabilities in three ways: (1) individuals having a mental or physical impairment that substantially limits a major life activity, (2) individuals with a record of such an impairment or (3) individuals who are perceived or regarded as having such an impairment.

Title I. Although a person may have a disability for purposes of the ADA, protection is not automatic. Under Title I, the person must also be otherwise qualified for the job, with or without reasonable accommodation. Being otherwise qualified means that the individual can perform the essential functions (those that are fundamental, not marginal) of the job.

If a person is not qualified for the job, the correctional agency needs to determine whether reasonable accommodation that will enable the person to perform the

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essential functions of the job can be made available. A reasonable accommodation is "any modification or adjustment to a job, an employment practice, or work environment that makes it possible for the person with the disability to perform the essential functions of the job."

Reasonable accommodations must not be provided, however, where doing so poses a direct threat to the health and safety of the person or others, or causes an undue financial or administrative hardship. Direct threat means a significant risk of substantial harm. It must be based on objective evidence and not mere speculation. Undue hardship is significant difficulty or expense compared with the size and total resources of the employer.

Title II. Compare those requirements with those under Title II of the ADA. Title II protects individuals with disabilities who are otherwise eligible to participate in a program, service or activity with or without a reasonable modification to its rules, policies or practices; the removal of architectural, communication or transportation barriers; or the provision of auxiliary aids or services.

Modification will not be required when it poses a direct threat to the health and safety of others (under Title II, a direct threat to one's self is not included), or causes an undue administrative or financial burden (similar to undue hardship for Title I). In addition, modifications that would fundamentally alter the nature of the program, service or activity are not required. A fundamental alteration changes the very nature of the program, service or activity so that the correctional facility is, in effect, offering a different program, service or activity.

Title I: New Developments that Affect Hiring Practices

A significant effect of the ADA on hiring corrections personnel is the prohibition against conducting medical exams or making disability-related inquiries before giving a conditional offer of employment. Most correctional agencies will need to conform their hiring process with this requirement.

In May 1994, the Equal Employment Opportunity Commission (EEOC) issued guidance addressing this critical issue. This guidance offers useful information on what constitutes a medical exam or a disability-related inquiry.

The guidance does something that the ADA, its regulations and the technical assistance manual do not do—it defines the term "medical exam." Medical exams are procedures or tests that seek information about the existence, nature or severity of a person's mental or physical impairment, or that seek information regarding an individual's physical or psychological health.

Which of the tests most commonly administered by correctional agencies are medical? Here is a brief summary:

Agility Tests. Agility tests are not considered medical in nature and may be administered at any time in the selection process. However, measuring an applicant's physical or psychological response to the agility test would be considered medical and, therefore, cannot be done before a conditional offer of employment is made. Additionally, because the ADA does not permit disability-related inquiries at the pre-offer stage, correctional agencies may not screen out applicants for medical conditions before administering the agility test.

Medical exams are procedures or tests that seek information about the existence, nature or severity of a person's mental or physical impairment, or that seek information regarding an individual's physical or psychological health.

One solution is to ask the applicant to release the agency from liability for injuries incurred while taking the test. The agency also may give the applicant a description of the test and require that the applicant get a doctor's certificate stating that he or she can safely perform the test.

Drug Tests. For purposes of the ADA, tests for the illegal use of drugs are not medical exams. However, take care not to elicit information about prior or current lawful drug use if doing so could lead the applicant to reveal the existence, nature or severity of a disability.

Alcohol Tests. Invasive tests designed to determine whether and/or how much alcohol a person has consumed are medical in nature and not permitted at the pre-offer stage. Invasive tests include testing blood or urine or administering a breathalizer.

Psychological Exams. There are many types of tests on the market today, including IQ tests, aptitude tests, honesty tests and personality tests. When a test measures the applicant's ability to perform the job, it may be allowed. To the extent that the test measures things such as tastes, habits or honesty, it would probably not be considered medical. On the other hand, if a psychological exam provides evidence that the applicant has a mental disorder, it may be medical in nature and should not be administered at the pre-offer stage. The EEOC has indicated that determinations as to whether a psychological exam is medical in nature should be made on a case-by-case basis.

Polygraph Tests. Polygraph tests are not specifically addressed by the ADA. Although a polygraph exam, in and of itself, is not a medical exam, often preliminary questions attendant with the administration of the exam are medical. For example, questions such as, "Are you currently on any medication?", "Do you have any mental disorders that would

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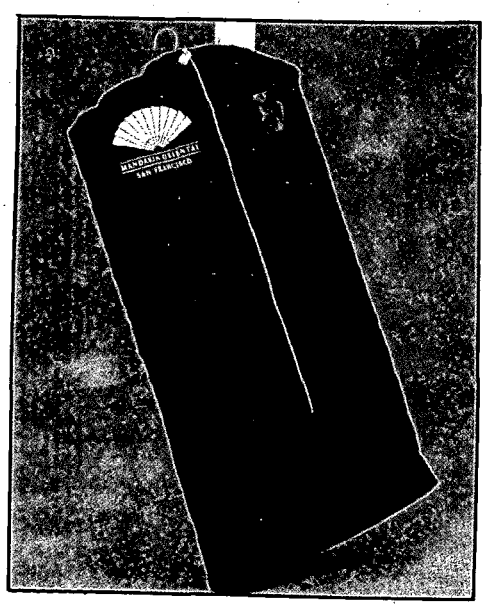

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ADA'S IMPACT ON CORRECTIONS

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hamper your performance?" and "Have you ever been treated for drug or alcohol addiction?", would be impermissible before extending a conditional offer of employment.

Background Checks. To the extent background checks involve disability-related inquiries, they must be delayed until the offer is made. On the other hand, high school and college transcripts, credit checks and FBI checks may be conducted at any time.

Vision Tests. Tests that determine an individual's ability to see would be medical in nature. However, it is permissible to determine whether an applicant can read labels or distinguish objects, as long as it is job-related and consistent with business necessity.

Drug or alcohol addiction is considered a disability under the ADA as long as the individual has successfully completed, or is currently in, a rehabilitation program. However, recreational use of drugs does not necessarily constitute drug addiction.

Disability-related inquiries are likely to elicit information about a disability and may not be made at the pre-offer stage. Questions like "Do you have AIDS?" or "Have you ever been addicted to drugs?" should not be asked. The ADA permits questions about how applicants would perform the essential functions of the job. Likewise, applicants may be asked to demonstrate how they would perform these essential functions.

Here are common areas in which disability-related inquiries may arise:

Attendance. Questions about an applicant's attendance record can be asked. However, the interviewer should not ask why an applicant was absent, because this might elicit information about a disability or impairment.

Worker's Compensation History. The ADA prohibits questions about an applicant's worker's compensation history as well as job-related injuries.

Drug Use. Questions about current illegal use of drugs are allowed. However, questions regarding prior or current lawful use of drugs are not permitted. Drug or alcohol addiction is considered a disability under the ADA as long as the individual has successfully completed, or is currently in, a rehabilitation program. However, recreational use of drugs

does not necessarily constitute drug addiction. Therefore, correctional agencies may ask about prior illegal use of drugs but, at the pre-offer stage, may not ask about the extent of such prior use. Although it may be permissible to ask, "Have you ever used marijuana?" at the pre-offer stage, it would probably not be permissible to ask, "How often did you use marijuana in the past?"

Certificates/Licenses. Inquiries regarding certificates or licenses are allowed at the pre-offer stage if they are related to essential or marginal functions of the job. This includes questions about why an applicant does not have a particular certificate or license.

Lifestyle. Inquiries about eating habits, weight and exercise habits are allowed at the pre-offer stage, with certain precautions. For example, agencies may ask whether an applicant regularly eats three meals a day but should not ask whether an applicant eats a number of small snacks at regular intervals throughout the day because this might require an applicant to reveal a disability, such as diabetes. Questions about whether an applicant drinks alcohol would be permitted. However, because alcohol addiction is considered a disability under the ADA, questions about how much the applicant drinks should not be asked.

Conditional offers must be bona fide and made in good faith. That means that all nonmedical information has been evaluated before making the conditional offer. Large numbers of offers should not be made for small numbers of positions.

Applicant Pools. The ADA allows for establishing qualified pools of candidates. However, pools should not be used to avoid hiring individuals with disabilities. Continuously placing individuals with disabilities at the bottom of the pool is not permitted. The EEOC's guidance provides that employers "must hire from the pool based on pre-established, objective standards such as date of application." In addition, if the agency reranks applicants in a pool, based on the results of post-offer exams, then the correctional agency must advise the applicant of his or her rank before the exam, as well as after the exam.

Delivering Inmates Services under Title II

Because integration into mainstream society—even a prison or jail "society"—is a cornerstone of the ADA, programs, services or activities that discriminate on the basis of a disability should be avoided. However, correctional facilities may offer separate or special programs when needed to provide individuals with disabilities an equal opportunity to benefit from the programs.

Continued next page

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Corrections administrators should evaluate three areas to ensure accessibility to their programs, services and activities: (1) policies and procedures, (2) architectural barriers and (3) communications.

Policies and Procedures. Administrators should determine whether there are policies or procedures that screen out inmates with disabilities from participating in programs. If they do, then reasonable modification to those policies and procedures may be necessary.

Architectural Barriers and "Program Access." Correctional facilities may not deny the benefit of their programs simply because the facilities are physically inaccessible. This does not mean that correctional agencies must retrofit their existing facilities. What the ADA does require is that the facility operate each program, service or activity it offers so that, when viewed in its entirety, the service, program or activity is readily accessible to or usable by individuals with disabilities. This standard is called "program access" and applies to all new construction and alteration to existing structures. Achieving access can include relocating the program to an accessible part of the facility, redesigning equipment, providing auxiliary aids or altering existing facilities.

Communications. Corrections administrators must make sure that inmates with hearing, vision or speech impairments have effective communications. This may be accomplished through auxiliary aids and services, such as telecommunication devices for the deaf (TDDs), qualified readers or audiotaped texts.

Making Programs and Services Accessible

Corrections administrators will need to survey the programs, services and activities offered to ensure accessibility. These programs, services and activities might include:

Educational Programs. Agencies are free to establish whatever eligibility requirements are necessary to offer educational programs. However, care should be taken to modify policies that adversely affect inmates with learning disabilities. For example, it would be permissible to require inmates taking college credit courses to have a general equivalency diploma (GED). However, inmates who could not get a GED because of a learning disability might need some accommodation as long as doing so does not fundamentally alter the nature of the program. Likewise, requirements that inmates be able to attend classes in places that are physically inaccessible may violate the ADA. In such cases, where possible, classes should be relocated to an accessible area.

Drug and Alcohol Treatment. Programs like Alcoholics Anonymous or Narcotics Anonymous should be accessible to inmates with disabilities. In cases where deaf or hard of hearing inmates want to attend, it may be necessary to provide a sign language interpreter.

Library Services. Inmates who are blind or have vision impairments are entitled to access to a facility's library. This does not mean, however, that the agency must replicate the entire library in Braille. Rather, this may be accomplished by providing books on tape, qualified readers, or books or parts of books in Braille.

Inmate Work Programs. Many correctional facilities offer programs that allow inmates to earn early release in exchange for strenuous physical labor. Clearly, inmates with certain physical disabilities will not be eligible for such programs. Because early release from prison or jail is such a fundamental benefit, it may not be proper to exclude inmates with disabilities from this opportunity. This is an area that may require corrections administrators to create programs where none exist in order to give inmates with disabilities the same opportunity for early release that is available to inmates without disabilities.

Because integration into mainstream society—even a prison or jail "society"—is a cornerstone of the ADA, programs, services or activities that discriminate on the basis of a disability should be avoided.

Finally, compliance with the ADA is not limited to inmates and employees. Those having a legitimate right to be on the premises also are included. Family members, clergy, attorneys, counselors, probation and parole officers and volunteers may need to be accommodated. For example, even if a facility does not have an inmate who is deaf or hard of hearing, a TDD machine may be necessary to provide access to family members, attorneys or others who need this auxiliary aid to be able to communicate with an inmate. CT

Paula N. Rubin, a lawyer, is a visiting fellow at the National Institute of Justice (NIJ), coordinating NIJ's initiative to research, develop and deliver publications and training for the criminal justice system on the Americans with Disabilities Act, as well as other human resource management issues.

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Questions Most Frequently Asked About the ADA by Criminal Justice Professionals

by Paula N. Rubin

The Americans With Disabilities Act (ADA) was signed into law in 1990, effecting the most sweeping change in civil rights law in nearly 30 years. A primary goal of the ADA is to integrate into the mainstream of society the estimated 43 million persons with disabilities in the Nation.

Among other things, the ADA requires the elimination of barriers to equal access in employment opportunities and public accommodations such as hotels, restaurants, and shopping centers, and the programs, services, and activities provided by Federal, State, and local government agencies and facilities.

The notion of ending discrimination against individuals with disabilities is not new to criminal justice. For the past 20 years the Rehabilitation Act of 1973 has prohibited discrimination against persons with disabilities by any agency receiving Federal funds. The ADA expands this antidiscrimination obligation to include private employers, public accommodations, and State and local government entities.

The portion of the ADA most relevant to criminal justice agencies went into effect on January 26, 1992. Even before the law took effect, however, administrators and managers began to conduct self-analyses and inventories to determine what changes needed to be made to come into compliance with ADA requirements.

As criminal justice professionals have implemented this law, questions have emerged. Here are some of the questions most frequently asked by criminal justice professionals about the ADA:

Are public safety agencies exempt from the ADA?

Often criminal justice professionals ask whether the ADA applies to law enforcement and corrections. The answer is yes. While certain agencies in the Federal Government such as the Federal Bureau of Investigation (FBI) are exempt from the ADA (the FBI is, however, subject to the Rehabilitation Act of 1973), State and local governments and the agencies they administer are covered by this law.

Title I of the ADA addresses employment issues. This section explicitly states that State and local governments are included as covered entities. Moreover, while private employers with fewer than 15 employees are not covered by the ADA, there is no minimum employee requirement for State and local governments under Title II of the law.

Title II of the ADA deals with programs, services, and activities of public entities and applies to State and local governments, including their departments and agencies.

Under the ADA, criminal justice agencies may not discriminate against qualified individuals with disabilities. This antidiscrimination mandate applies to an agency's recruitment, hiring, and promotion practices.

Likewise, agencies must eliminate discrimination in the delivery of programs, services, and activities. This includes law enforcement agencies as well as prisons, jails, detention centers, and other correctional facilities.

Are persons with disabilities entitled to preference in hiring?

No. The ADA is not an affirmative action law. The ADA simply requires that employers hire the most qualified person for the job.

To be covered by the ADA, an individual must have a disability. This means that the individual:

✦ Has a mental or physical impairment that substantially limits a major life activity.

✦ Has a record of such an impairment.

✦ Is regarded or perceived as having such an impairment.

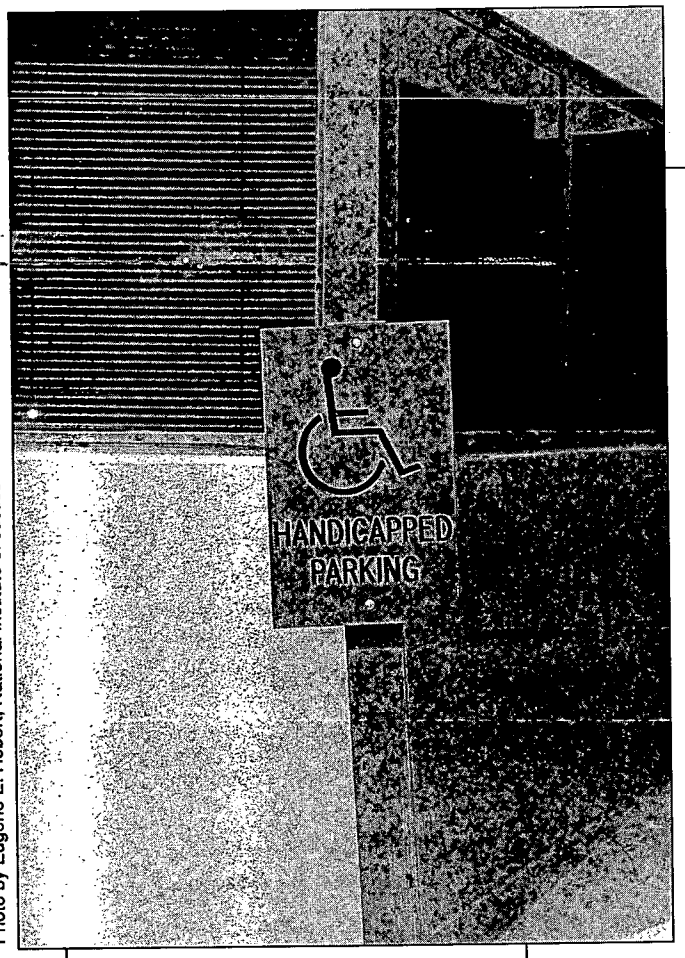

Photo by Eugene E. Hebert, National Institute of Justice

Under the Americans With Disabilities Act, criminal justice agencies—like other government agencies—must eliminate discrimination in the delivery of programs, services, and activities. This mandate includes providing physical access through reasonable modifications such as providing handicapped parking.

Persons with disabilities need not be considered unless they are otherwise qualified for the job. This means that the individual can perform the essential functions of the position with or without a reasonable accommodation. Essential functions are those that are fundamental, not marginal.

Finally, employers will not be required to provide a reasonable accommodation where doing so causes an undue hardship (i.e., significant difficulty or expense) or poses a direct threat to the health and safety of others. Direct threat means a significant risk of substantial harm based on objective evidence.

Who decides what accommodation to provide?

The agency decides. There is no requirement that a person with a disability be given the accommodation requested. Likewise, accommodations do not have to be state-of-the-art, the best, or the most expensive. All that is necessary is that the accommodation be effective in enabling a person to perform the essential functions of the job.

Providing accommodations does not have to cost a lot of money. The March 1992 edition of the *Americans With Disabilities Act Manual Newsletter* reported that "80 percent of reasonable accommodation for persons with disabilities costs under $100."

In determining what accommodation to provide, it is a good idea to start by talking to the person being accommodated. Often the person with the disability will know the most effective and least expensive way to obtain the accommodation.

Another valuable resource is the Job Accommodation Network (JAN) of the President's Committee on Disabilities. JAN is an information and reference service that advises on accommodations and can be reached by telephone by dialing 800–ADA–WORK.

Does the ADA require architectural renovations?

Not necessarily. The ADA is not a law that requires "retrofitting" America. New construction and renovations to existing facilities, however, must conform to ADA requirements.

On the other hand, criminal justice agencies should look at the program, service, or activity they are attempting to deliver. Is it accessible? That is, do persons with disabilities have physical access? Are there barriers to effective communication? Can the person participate in or enjoy it? If

the answer to any of these questions is "no," then one should ask if there is a way to change the way the program, service, or activity is delivered.

Achieving physical accessibility can include moving programs to an accessible part of the facility, such as the first floor, providing home delivery, or telephoning persons with mobility impairments. If physical access can be accomplished this way, then architectural construction or renovations to existing facilities may not be necessary.

Agencies may also need to look at any eligibility requirements for program participation. If such criteria tend to eliminate qualified persons with disabilities, then reasonable modifications to the program, service, or activity may be required. Reasonable modifications are not required, however, if doing so would fundamentally alter the nature of the program, service, or activity.

Does the ADA apply to prisoners, inmates, or those held in custody?

Yes. Programs offered to inmates must be accessible. If, for example, a hearing-impaired inmate wished to attend Alcoholics Anonymous meetings, the corrections facility would need to make reasonable modifications that permit the inmate to participate in a meaningful way. This could include effective auxiliary aids, such as providing a sign language interpreter or, where appropriate, writing notes for short exchanges.

Inmates with disabilities should not be segregated into one cell block unless they specifically request such an accommodation. Integration is a key component of the ADA. Inmates with disabilities should be classified and housed as inmates without disabilities unless doing so poses a direct threat to the safety of other inmates or staff. So, for example, while it may be permissible to place all inmates with mobility impairments on the first floor for safe evacuation in case of fire, it is probably a good idea to integrate these inmates with *all* inmates on the first floor.

Finally, eligibility requirements that prevent prisoners with disabilities from participating in programs, services, or activities should be evaluated. For instance, programs that give credit toward early release in exchange for hard labor or boot camps may tend to screen out inmates with physical disabilities. Since early release is a fundamental benefit, prisons and jails offering such programs should consider developing comparable programs for inmates whose disabilities prevent them from participation. One solution may be to give credit toward early release for other tasks, such as allowing inmates with mobility impairments to serve as readers for inmates with vision impairments.

Paula N. Rubin, a lawyer, is an NIJ Visiting Fellow currently coordinating the Institute's initiative to research, develop, and deliver publications and training for the criminal justice community on the Americans With Disabilities Act and other civil rights issues.

Young People, Violence, and Guns—What NIJ Is Doing Now

by Lois Felson Mock

Public concern with crime, notably violent crime, may be at an all-time high, and according to some polls surpasses the economy for top position on the Nation's agenda. The concern is well-founded. Although the Nation's overall crime rate declined in 1992 (for the first time since 1984), the rate of violent crime is holding steady[1], and rates of violent crime in this country are among the highest in the world.[2] The health community's recognition of violence as a public health problem is by now common knowledge, as is the possibility that given current trends, homicide may overtake traffic accidents as the leading cause of death by injury.

Violence in which firearms are used may well embody the public's perception of the Nation's crime problem. Recent incidents of multiple deaths by firearms—an attack on children at a public swimming pool in Washington, D.C., and on commuters on the Long Island Rail Road—generated renewed interest in control mechanisms.

The involvement of young people with violence—either as victims or assailants—may elicit the greatest concern, and even alarm. Among young people in general, the level of violence has been unprecedented in recent years. According to the FBI's Uniform Crime Reports for 1991, "The Nation is experiencing an unrivaled period of juvenile violent crime." In the 1980's, crimes of violence became a larger component of all crime committed by young people, and during that period arrests for violent crime by juveniles rose 27 percent.[3] Firearms are playing a large part in these disturbing developments.

The rise in juvenile violence extends even to murder, with the rate of arrests for this offense climbing much faster among people under 18 than among those age 18 and over.[4] The highest rate of handgun crime victimization is among young men, particularly young African-American men,[5] and homicide as the leading cause of death among young African-American men is a well-known fact.[6]

Immediate action is being demanded of law enforcement and other public officials and policymakers. They know that public safety requires no less. To assist criminal justice professionals in finding effective approaches, the National Institute of Justice (NIJ) is supporting a number of projects that address the issue of violence, with special emphasis on young people's involvement in it.

Firearms and violence

Review of research to date. Is there a causal relationship between firearms and violence? The National Academy of Sciences' Panel on the Understanding and Control of Violent Behavior reviewed what researchers know to date about violence in the United States,[7] and in reporting the results, gave considerable attention to that question.[8]

The research reviewed by the Panel did *not* demonstrate that greater gun availability is associated with overall rates of violent crime.[9] Firearms were found to potentially modify both the probability that certain violent events will occur and the severity of events. Thus, some correlation was found between gun availability and the specific crimes of felony gun use and felony murder. Injuries caused by guns were found to have more serious consequences than those caused by other weapons. For example, in robberies and assaults, victims are far more likely to die when the perpetrator is armed with a gun than when he or she has another type of weapon or is unarmed.

Other findings of the Panel's review related to the accessibility of guns for committing crime:

✦ Self-defense is the reason people cite most commonly for acquiring a gun, but it is unclear how often these guns are used for self-protection against unprovoked attacks.

✦ People who use guns to commit violent crime rarely purchase them directly from licensed dealers; most guns used in crime have been stolen or transferred between individuals after the original purchase.

The Panel's emphasis was on what can be done in response. Several

NACO National Association of Counties

April 22, 1996

6237 Washington Blvd.
Arlington, VA 22205

Paula Rubin
Office of Justice Programs
National Institute of Justice
Washington, D.C. 20531

Dear Paula:

Thank you for the material you sent me regarding the relationship of the Americans with Disabilities Act with the criminal justice system. Your cogent articles provide terrific summaries and models/cases for this practitioner.

I have also contacted a number of organizations such as the International Association of Police Chiefs who reference your work as a leading source of ADA and criminal justice information. I look forward to reading your future work.

Sincerely,

Margaret M. Rice

Margaret M. Rice
ADA Project Coordinator for the
Training and Technical Assistance Initiative

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Washington, DC 20001–2080
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MICHAEL F. EASLEY
ATTORNEY GENERAL

State of North Carolina
Department of Justice
P. O. BOX 629
RALEIGH
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June 26, 1995

Ms. Paula Rubin
Office of Justice Programs
National Institute of Justice
U.S. Department of Justice
633 Indiana Avenue, N.W.
Washington, DC 20531

Dear Ms. Rubin:

On behalf of myself and my supervisor, Dennis Worley, I would like to thank you for your help regarding the ADA's applicability to a hearing disabled prison inmate. Your assistance was much-needed and informative.

We may be in contact with you again soon regarding this case. As we try to find a proper balance between the needs of the inmate and the resources of the state, I hope you will be available for guidance in this new area of the law.

Again, thank you, and I look forward to hearing from again soon.

Sincerely,

E. Neil Morris

E. Neil Morris
N.C. Attorney General's Office
Correction Section

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department of corrections

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PARKER EVATT, Commissioner

December 29, 1994

Mr. Jeremiah Travis, Director
National Institute of Justice
633 Indiana Avenue, N.W.
Washington, D.C. 20531

Dear Mr. Travis:

On November 4, 1994, Ms. Paula Rubin and Susan McCampbell provided a one day training program on providing services to clients under the ADA regulations for the South Carolina Department of Corrections. Over 130 people attended; other agencies participating included the Department of Juvenile Justice, S.C. Protection and Advocacy for the Physically Handicapped, and the University of South Carolina.

The session was well received; evaluations were extremely high and positive. The main deficiency noted was lack of time. The two presentors received excellent evaluations, both for their knowledge and delivery.

I want to thank you for providing this training to our Agency. As we are all aware, ADA is a complicated and little understood subject. This training certainly heightened our awareness as well as giving us strategies for compliance.

Yours truly,

Judy C. Anderson

Judy C. Anderson
Deputy Regional Administrator
Midlands Correctional Region

JLH:sdp

cc: Ms. Paula Rubin
Ms. Susan McCampbell
Mr. Tony Strawhorn
Mr. David Corbitt
Ms. Betty Robinson
MCR File

International Correctional Education Association
1993 Annual Conference
Palmer House Hilton
Chicago, Illinois
July 11 - 14, 1993

Raymond J. Quick, Chairman - 1301 Concordia Court - P.O. Box 19277 - Springfield, Illinois 62794-9277

July 27, 1993

Paula J. Rubin
National Institute of Justice
633 Indiana Avenue N.W.
Washington, D.C. 20531

Dear Paula,

Thank you for your participation in the 1993 International Correctional Education Association Conference in Chicago.

The evaluations have been reviewed and the responses were overwhelmingly positive. Your presentation contributed to the conference being one of the most successful in recent years.

Again, thank you for your support, cooperation and enthusiasm.

Best of luck in your future endeavors.

Sincerely,

Janet M. Meyer
Program Chair
IDOC School District #428
2848 W. McDonough Street
Joliet, IL 60436

JMM:lac

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF VOCATIONAL AND ADULT EDUCATION

FEB 22 1994

Ms. Paula Rubin
National Institute of Justice
633 Indiana Avenue, N.W.
Room 917
Washington, D.C. 20531

Dear Ms. ~~Rubin~~: Paula

Thank you for leading a legislative round table session at the 1994 Correctional Education Leadership Forum. We have received excellent feedback on the presentations and discussions (aside from universal concern about the noise level!).

We truly appreciate your taking time from your busy schedule to share your expertise with members of the correctional education community and for supporting the Office of Correctional Education.

Sincerely,

Gail

Gail M. Schwartz, Ed.D.
Chief
Office of Correctional Education

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202

Our mission is to ensure equal access to education and to promote educational excellence throughout the Nation.

K O B A A S S O C I A T E S, I N C.

March 7, 1994

Carol V. Petrie
Acting Director
National Institute of Justice
633 Indiana Avenue, N.W.
8th Floor
Washington, DC 20531

Dear Carol:

As you may know, some months ago Paula Rubin graciously offered to hold a two hour training session for senior management at Koba Associates on issues related to the ADA.

I just wanted to drop you a note to let you know what a splendid session we had with Paula last Monday. About twenty-five project directors and most of the vice presidents attended the symposium and everyone here is still remarking about how much we got out of the session and will be able to utilize in our work as managers. Not only does Paula have the substantive expertise, but she is also so adept at making the issues "come alive" in a witty, thought provoking way. We learned something and even enjoyed ourselves!

On behalf of the senior management at Koba Associates, I want to express our appreciation to you and to the Institute for making Paula Rubin available to us.

Sincerely,

June

June B. Kress
Acting Director
Government and Legal Services Division

cc: Paula Rubin

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Stephen J. Ingley
Executive Director
Hagerstown, Maryland

Merry Gay McMackin
Immediate Past President
Atlanta, Georgia

May 23, 1994

Dear AJA Conference Presenter:

I would like to take this opportunity to personally thank you for your participation in the American Jail Association's 13th Annual Training Conference and Jail Expo.

The Conference was a tremendous success, much of which can be attributed to persons such as yourself who take the time and expend the energy to share your knowledge and experiences with your colleagues. This is extremely beneficial to the field and we hope that it was equally beneficial to you.

In the near future, we will be reviewing the participant evaluations and reporting the results to you. In the meantime, if we can be of any assistance to you, please do not hesitate to call us.

I hope to see you in Charlotte next year!

Sincerely,

Stephen J. Ingley
Executive Director

Future Conference Sites
Charlotte, North Carolina - April 30 - May 4, 1995
St. Louis, Missouri - May 5 - May 9, 1996