Disabled Rights

Law Enforcement and the Americans with Disabilities Act

By Dale Conder, Jr.

Police departments must train officers and implement policies to comply with ADA requirements.

It is 4:00 a.m. and a police officer on patrol decides to stop a car after seeing the car run a stop sign. The officer stops the car and orders the driver to "show her hands." The driver, however, fails to comply with the officer's commands. When the officer approaches the car, he smells alcohol and orders the driver to get out of the car. After conducting a field sobriety test, the officer determines the driver is intoxicated and places her under arrest. As part of the field sobriety test, the officer had the driver perform the one leg stand exercise. Does this scenario present any problems for the officer or his employer?

Under the Fourth Amendment, the officer has probable cause for the initial stop and subsequent arrest. *See United States v. Garrido*, 467 F.3d 971, 977–78 (6th Cir. 2006) ("[A] roadside detention is lawful so long as the officer has probable cause to believe that the motorist has violated the traffic laws."); *Babers v. City of Tallassee*, 152 F. Supp. 2d 1298, 1306–07 (M.D. Ala. 2001) (holding that results of a field sobriety test provided officer with probable cause). But, is it a different result if the driver is deaf; suffers from a condition that so interferes with her ability to walk that she appears intoxicated; has a condition affecting equilibrium; or an old leg injury that interferes with her ability to walk and balance on one leg? Under the Americans with Disabilities Act (ADA), the driver might very well have a cause of action. Likewise, she might have a claim under the Rehabilitation Act. (The elements under both Acts are substantially similar; therefore, this article focuses on the ADA. *See*, *Wisconsin Correctional Service v. City of Milwaukee*, 173 F. Supp. 2d 842, 849 (E.D. Wis. 2001)).

The Americans with Disabilities Act

Scope of the ADA

In 1990, Congress enacted the ADA in a comprehensive effort to remedy discrimination against the disabled. 42 U.S.C. §12101(b). The ADA is divided into three titles, each directed at specific areas of disability discrimination. Title I prohibits disability discrimination in employment; Title II prohibits a public entity from excluding a disabled person from participating in or from denying to such person the benefits of

■ Dale Conder, Jr., is a member of the law firm Rainey, Kizer, Reviere & Bell, P.L.C., with offices in Memphis and Jackson, Tennessee. Mr. Conder is a resident in the firm's Jackson, Tennessee, office. He practices in the areas of general insurance defense, employment law, and defense of municipalities and their employees, particularly police officers in §1983 litigation. Mr. Conder has published and lectured in the areas of trial practice, civil procedure and civil rights litigation. He is a member of DRI.

the services or programs of the public entity; and Title III prohibits discrimination "by public accommodations involved in interstate commerce such as hotels, restaurants, and privately owned transportation services." *Gorman v. Bartch*, 152 F.3 907, 911 (8th Cir. 1998). If our driver has a cause of action, then it must be under Title II of the ADA. Any such action, however, can only be brought against the public entity. The plain language of the statute establishes that individual defendants cannot be held liable under Title II. *See*, *Calloway v. Borough of Glassboro Department of Police*, 89 F. Supp. 2d 543, 557 (D.N.J. 2000).

Elements of a Title II Action

In order to prevail under Title II, the plaintiff must show that she "(1) has a disability, (2) is otherwise qualified, and (3) is 'being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely because of her disability.'" *Tucker v. State of Tennessee*, 443 F. Supp. 2d 971, 973 (W.D. Tenn. 2006) ("*Tucker I*") A plaintiff is a "qualified individual" if she has a disability and, "with or without reasonable accommodations 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 participation in programs or activities provided by a public entity." *Id.* at 972–73 (quoting 42 U.S.C. §12131(2)).

A police department qualifies as a "public entity" under Title II of the ADA. 42 U.S.C. §12131(1) (a "'public entity' includes… local governments, as well as their departments…."); *see also*, *Gorman v. Bartch*, 152 F.3d at 912. Under the ADA, "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities…." *Felix v. New York City Transit Authority*, 324 F.3d 102, 104 (2nd Cir. 2003) (quoting 42 U.S.C. §12102(2) (A)). Major life activities are defined as "'functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.'" *Treiber v. Lindbergh School District*, 199 F. Supp. 2d 949, 958–59 (E.D. Mo. 2002) (quoting *Otting v. J.C. Penney Company*, 223 F.3d 704, 708 (8th Cir. 2000)). Therefore, our driver, with a hearing impairment or an impairment in her ability to walk, qualifies as disabled under the ADA.

What Is a Program, Service or Activity of a Police Department?

Is an Arrest a Service?

Assuming the plaintiff is disabled under the ADA, the issue then becomes whether she has been prevented from participating in or denied the benefits of the services, programs or activities of the police department and, if so, was it because of the plaintiff's disability. *Bircoll v. Miami-Dade County*, ___ F.3d ___, 2007 WL 677764 at *8 (11th Cir.). Cases analyzing whether an arrest is covered by the ADA fall generally into one of two categories. The first category involves a situation in which the police officer "wrongly arrest[s] someone with a disability because [he] misperceive[s] the effects of that disability as criminal activity." *Gohier v. Enright*, 186 F.3d 1216, 1220 (10th Cir. 1999). The second category involves a situation in which the "police properly investigate[ ] and arrest[ ] a person with a disability for a crime unrelated to the disability, [but] they fail[ ] to reasonably accommodate the person's disability in the course of the investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees." *Id.* at 1220–21.

The first category is demonstrated by *Jackson v. Town of Sanford*, 1994 WL 589617 (D. Me. 1994), in which the plaintiff was arrested when the officer misperceived the effects of a stroke as indications that the plaintiff was intoxicated. In denying the town's motion for summary judgment, the court noted that the legislative history of the ADA demonstrated that one of the concerns motivating Congress was the fact that "persons who have Epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed" because of a lack of training. *Id.* at *6 n. 12; *see also* H.R. Rep. No. 101-485(III), 101st Cong., 2d Sess. 50, reprinted in 1990 U.S.C.C.A.N. 473. The second category is demonstrated in *Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998), in which a wheelchair bound arrestee brought suit alleging a violation of the ADA because he was transported to jail in a van that was not equipped for wheelchair transport and, as a result, he suffered injuries. *Id.* at 909–10.

However, yet another category does not fit neatly within the two categories discussed above. *Gohier v. Enright*, 186 F.3d at 1221. In *Gohier*, the officer shot the plaintiff's decedent because the officer reasonably feared for his safety. *Id.* at 1222. The officer shot the decedent when he approached the officer and acted as if he had a knife and was going to stab the officer. *Id.* at 1217–18. Under the circumstances, the court held that the ADA was not violated. *Id.* at 1222. In *Gohier*, however, the court did not express an opinion as to whether the plaintiff could have prevailed under a theory that more training should have been provided to the officers. *Id.*

It is not reasonable to accommodate a claimed disability in a situation involving an aggressive or violent individual.

In such a case, however, the plaintiff's claims might very well fail on the issue of causation. *See*, *Thompson v. Williamson County*, 219 F.3d 555 (6th Cir. 2000). In *Thompson*, the police were called to the home of Charles Thompson Jr. by a relative because Mr. Thompson Jr., who was mentally handicapped, had "flipped his wig" and was threatening family members with a machete. *Thompson*, 219 F.3d at 556. The police left the scene when they were unable to locate Mr. Thompson Jr. because he had fled into a wooded area behind his house. *Id.* Shortly after the officers left, they were called back to the scene after Mr. Thompson Jr. returned armed with two machetes. *Id.* One of the officers encountered the suspect behind the house and, when Mr. Thompson Jr. began to approach, the officer ordered him to stop and to drop his weapons. *Id.* Rather than comply, however, the suspect raised one of the machetes and continued to approach. *Id.* At this time, the officer fatally shot Mr. Thompson Jr.

Id. Mr. Thompson Sr. filed suit, alleging, among other causes of action, a violation of the ADA. *Id.* at 558. The court concluded that if the decedent was denied a public service, it was not because he was disabled, but rather because he threatened the police officer and tried to kill him. *Id.* Similarly, the court concluded that the plaintiff's son was killed, not because the officer was inadequately trained to deal with a mentally disturbed individual, but because the plaintiff's decedent came at the officer in a violent and threatening manner. *Id.* at 558. The court noted that before Mr. Thompson Jr. could be provided with the emergency services his family claims he was denied, the officers had to disarm Mr. Thompson Jr. *Id.* at 558. Mr. Thompson Jr.'s violent behavior was the cause of any denial of public services. *Id.*

When a police officer has an encounter with a disabled individual under circumstances that do not present a threat to the safety of the officer, the officer must make reasonable accommodations for the disability.

While it is true there is no *per se* rule that makes the ADA inapplicable in the context of an arrest, it is also true that the ADA does not apply "to an officer's on-the-street responses to reported disturbances or other similar incidents… *prior* to the officer securing the scene and ensuring there is no threat to human life." *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000). For example, in the case of our intoxicated driver, it would not be reasonable to summon an interpreter to the roadside stop before administering the field sobriety test. *See*, *Bircoll v. Miami-Dade County*, ___ F.3d ___, 2007 WL 677764 at *11. Likewise, it is not reasonable to accommodate a claimed disability in a situation involving an aggressive or violent individual. *See Thompson v. Williamson County*, 219 F.3d 555 (6th Cir. 2000); *Tucker I*, 443 F. Supp. 2d 971 (W.D. Tenn. 2006).

Therefore, in the hypothetical fact situation set forth at the beginning of this article, the officer would not have violated the ADA by conducting a field sobriety test before calling for an interpreter. The officer, however, should take the appropriate steps to communicate as effectively as he can under the circumstances by using notes, demonstrating what the officer wants the suspect to do during the field sobriety test, etc. *Bircoll*, ___ F.3d ___, 2007 WL 677764 at *12; *see also*, *Tucker I*, 443 F. Supp. 2d at 976 (W.D. Tenn. 2006) (finding that the officers' communications by writing were sufficiently effective under the circumstances). Similarly, if the driver disclosed to the officer a condition that interfered with her ability to stand or to balance, then the officer would be obligated to modify his field sobriety test to accommodate the disability.

In *Rosen v. Montgomery County*, 121 F.3d 154 (4th Cir. 1997), the court rejected the notion that a drunk driving arrest was a "program or activity" under the ADA. *Rosen v. Montgomery County*, 121 F.3d at 157. In *Rosen*, one of the factors the court considered in rejecting the claim that an arrest was within the ADA was the fact that arrests are usually not voluntary from the point of view of the person arrested. *Id.* The Supreme Court's decision in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 211 (1998), however, removed any doubt that voluntariness is a factor in determining whether a particular action is a service or program.

In *Yeskey*, the Supreme Court was called upon to decide if Title II of the ADA protected inmates in state prisons from discrimination based on disability. *Yeskey*, 524 U.S. at 208. Mr. Yeskey was convicted and sentenced to serve 18 to 36 months in a Pennsylvania correctional facility. *Id.* At his sentencing, the judge recommended that he be sent to a boot camp for first time offenders. If Mr. Yeskey successfully completed this program, then he would be eligible for release in six months. *Id.* The Pennsylvania Department of Corrections, however, denied Mr. Yeskey admission to the boot camp because of his history of hypertension. *Id.* Mr. Yeskey then filed suit under the ADA against, among others, the Pennsylvania Department of Corrections ("Pennsylvania"). Mr. Yeskey argued that Pennsylvania had discriminated against him on the basis of his disability. *Id.*

Pennsylvania argued that the ADA did not cover state prisons. *Id.* at 209–10. The Court, in rejecting the argument, held that the term "public entity," as defined in 42 U.S.C. §12131(1) (B), included state prisons. *Id.* at 210. The Court held that prisons provide activities, services, and various programs that, at least arguably, benefit the inmate. *Id.* Therefore, it rejected Pennsylvania's argument that the use of the phrase "benefits of the services, programs, or activities of a public entity" in 42 U.S.C. §12132 did not include the programs, services, or activities of prisons. *Id.* Similarly, the Court rejected the argument that the term "'qualified individual with a disability'" did not include prisoners. *Id.*

Finally, Pennsylvania argued that the use of the words "eligibility" and "participation" in the definition of a "qualified individual with a disability," (42 U.S.C. §12131(2)) implied a voluntariness on the part of the individual seeking benefits from the state. *Id.* at 211. The Court held that "the words do not connote voluntariness." *Id.* In reaching its conclusion, the Court relied upon the common definitions of the two terms and concluded that "[w]hile 'eligible' individuals 'participate' voluntarily in many programs, services, and activities, there are others for which they are 'eligible' in which 'participation' is mandatory." *Id.* For example, a drug addict might be compelled to participate in a drug rehabilitation program as part of his sentence. As a drug addict, he is eligible, but his participation is not voluntary. *Id.* Furthermore, even if the words did carry a connotation of voluntariness, "it would still not be true that all… 'services,' 'programs,' and 'activities' are excluded from the ADA because participation in them is not voluntary." *Id.*

To the extent the *Rosen* decision was based on a lack of voluntariness in concluding that arrests are not covered by the ADA, it has been overruled by *Yeskey*. The decision, however, is still viable for the proposition that an officer need not necessarily

accommodate a disabled suspect while trying to effectuate an arrest.

Perhaps the issue is more correctly analyzed as whether the modification is reasonable, rather than whether an arrest is a service. *Bircoll v. Miami-Dade County*, ___ F.3d ___, 2007 WL 677764 at *11. 42 U.S.C. §12132 provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." The final clause of 42 U.S.C. §12132, which provides that "no qualified individual with a disability shall, by reason of such disability… *be subjected to discrimination by any such entity*," has been interpreted as a catch-all phrase that prohibits discrimination by a public entity because of a disability regardless of the context. *Bircoll*, ___ F.3d ___, 2007 WL 677764 at *6 and *10 (quoting 42 U.S.C. §12132) (emphasis added). In other words, "the final clause of §12132 'protects qualified individuals with a disability from being subjected to discrimination by any such entity, and is not tied directly to the services, programs, or activities of the public entity.'" *Bircoll*, ___ F.3d ___, 2007 WL 677764 at * 10 (quoting *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 821–22 (11th Cir. 1998)) (internal quotation marks omitted). If the modification is unreasonable, then the plaintiff's claim would fail. *Id.* at *11. Even if the plaintiff were to establish that the modification was reasonable, she would still have to prove causation. Regardless of the context of the police/citizen encounter, the alleged discrimination must still be because of the disability. If not, then the plaintiff's claim fails. *See*, *e.g.*, *Tucker I*, 443 F. Supp. 2d at 976 (finding that "the trigger for everything that happened that evening" was the plaintiff's assault of a bystander and not discrimination because of a disability).

The ADA and the Station-house

In *Rosen*, however, the court recognized that once the officer arrives at the police station, the accommodation requirement is heightened. *Id.* at 158. While it is true that the ADA requires "reasonable modification," this principle

> does not require a public entity to employ any and all means to make auxiliary aids and services accessible to persons with disabilities, but only to make "reasonable modifications' that would not fundamentally alter the nature of the service or activity of the public entity or impose an undue burden.

Bircoll v. Miami-Dade County, ___ F.3d. ___, 207 WL 677764 at *7 (citing *Tennessee v. Lane*, 541 U.S. 509, 531–32 (2004)).

The Department of Justice regulations prohibit public entities from "'provid[ing] 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.'" *Tucker v. Hardin County*, 448 F. Supp. 2d 901, 906 (W.D. Tenn. 2006) ("*Tucker II*") (quoting 28 CFR 35.130(b)(1)(iii)). In other words, "[t]he purpose of the [ADA] is to place those with disabilities on an equal footing, not to give them an unfair advantage." *Kornblau v. Dade County*, 86 F.3d 193, 194 (11th Cir. 1996); *see also Bircoll v. Miami-Dade County*, ___ F.3d ___, 2007 WL 677764 at *12.

For example, in the context of the hearing impaired, the officer would be required to provide communication that is as effective as communication with a non-hearing impaired individual. In deciding whether effective communication has been established with a hearing-impaired person, the following should be taken into consideration:

(1) The abilities of, and the usual and preferred method of communication used by, the hearing impaired arrestee;
(2) The nature of the criminal activity involved and the importance, complexity, context, and duration of the police communication at issue;
(3) The location of the communication and whether it is a one-on-one communication; and
(4) Whether the arrestee's requested method of communication imposes an undue burden or fundamental change and whether another effective, but non-burdensome, method of communication exists.

Bircoll v. Miami-Dade County, ___ F.3d ___, 2007 WL 677764 at *12.

There is no bright-line rule for determining what steps are required to achieve effective communication because the "inquiry is highly fact specific." *Id.* at *13. However, an interpreter is not required in every circumstance and, depending on the facts of the case, oral communication plus gestures and visual aids or note writing may be sufficiently effective. *Id.* Similarly, although the use of a TTD or TTY device may be preferable, the use of jail personnel or police officers to act as relay operators may be sufficient. *See id.*; *Tucker II*, 448 F. Supp. 2d at 906–07. The question is whether the hearing-impaired individual receives the same benefit a non-disabled person would have received. *Tucker II*, 448 F. Supp. 2d at 906.

Other Services of the Police Department

Although the issue of whether an arrest is a service, program, or activity under the ADA is fact specific (*Tucker I*, 443 F. Supp. 2d at 975), other police activities clearly fall within the ADA. *See*, *e.g.*, *Salinas v. City of New Braunfels*, 2006 WL 3751182 (W.D. Tex.). In *Salinas*, the plaintiff, who was hearing impaired, returned home to find her boyfriend lying motionless on the couch. *Salinas*, 2006 WL 3751182 at *1. The plaintiff's neighbor called 911 and requested the services of a qualified interpreter. *Id.* The police arrived on the scene, but a qualified interpreter was not allowed access to the plaintiff until much later. *Id.* at *2. The plaintiff filed suit, alleging that the failure to provide an interpreter violated the ADA. *Id.* The court, in rejecting the city's motion to dismiss, held that the police officers were under a duty to reasonably accommodate the plaintiff's disability, provided the area was secure. *Id.* at *5. Perhaps communication by writing would have been effective; however, the effectiveness of the communication under such circumstances is often a question of fact. *See Center v. City of West Carrollton*, 227 F. Supp. 2d 863, 870 (S.D. Ohio 2002).

Similarly, investigative questioning at the police department is a program, service or activity covered by the ADA. *See*, *Calloway v. Borough of Glassboro Department of Police*, 89 F. Supp. 2d 543 (D.N.J. 2000). In *Calloway*, the plaintiff, a deaf and functionally illiterate woman, arrived at the police department to file a complaint for assault against her neighbor. *Calloway*, 89 F. Supp. 2d at 547. The police had already received information indicating the plaintiff in fact

ADA, continued on page 84

ADA, from page 51
had committed the assault. *Id.* The police informed the plaintiff, through her sister, about the allegations. *Id.* The police, however, were unable to locate a sign language interpreter. *Id.* at 547–48. An uncertified interpreter was used to try to communicate with the plaintiff. *Id.* at 548. Then the plaintiff was arrested after she invoked her right not to speak with the officers. *Id.* The court held that the questioning of the plaintiff at the police station was an "activity" of the police department under the ADA. *Id.* at 555.

When a police officer has an encounter with a disabled individual under circumstances that do not present a threat to the safety of the officer, the officer must make reasonable accommodations for the disability. For example, if the individual is hearing impaired and the officer is taking a report, then the officer may be required to secure the services of a qualified American Sign Language interpreter. A lot of the cases deal with police encounters with hearing impaired subjects, however, the duty to accommodate can arise in a number of situations. For example, in *Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998), the transportation of arrestees was held to be a program under the ADA. *Gorman v. Bartch*, 152 F.3d at 913. The plaintiff was paralyzed and confined to a wheelchair. The police department failed to accommodate his disability by transporting him in a van that was not designed to transport individuals confined to wheelchairs. *Id.* at 913. As was noted in *Thompson*, an individual might well be entitled to an accommodation if the officers could have safely made a reasonable accommodation. *Thompson v. Williamson County*, 219 F.3d at 558.

Recommendations

Police officers face very difficult and often dangerous situations when dealing with the public. After all, it is rare that someone calls for a police officer because he or she is having a good day and wants to share it with the officer. When a police officer stops a motorist, often the individual is upset or, at the very least, annoyed that his or her travels have been interrupted. These problems may be compounded if the individual is disabled.

In order to help alleviate these problems, police departments should incorporate training as to how to deal with an individual who is disabled. For example, on a routine stop, the officer may expect the occupant of the car not to make any sudden moves, but if the individual is handicapped, he or she may reach for a cane or other mobility device. Police departments should train the officers to be aware of signs indicating the individual is handicapped, such as a license tag and how to anticipate and deal with the situation the officer may encounter. Similarly, a hearing-impaired person, who is trying to communicate with sign language, may appear to be aggressive and training in this area could be beneficial to officers who confront such situations. As was the case in *Gorman*, the standard techniques for transporting arrestees may be dangerous or at least problematic with a disabled individual.

Police departments also need to revise their policies to take into consideration the ADA and the reality that the officers will confront these situations. For example, departments may need to revise policies when it comes to how an individual may be transported. Departments should have available a list of sign language interpreters and inform the officers of the availability of the interpreters.

Furthermore, officers should be trained to keep any notes they use when communicating in writing with a hearing-impaired individual. If the notes are not maintained, then the effectiveness of the communication may very well become a factual dispute. Maintaining the notes provides a very effective means of establishing what was actually said.

Conclusion

The ADA and its regulations clearly apply to police departments. And, as is discussed above, may apply to arrests. Even if an arrest is not a service or program as defined under the ADA, the ADA may still be applicable to the situation under the concluding catch-all phrase found in 42 U.S.C. §12132. For these reasons, it is important that police departments be familiar with the requirements under the ADA, provide adequate training to their officers and implement policies designed to protect the rights of the disabled. For further information regarding frequently asked questions about the ADA and law enforcement, a Model Policy for Law Enforcement on Communicating with the Hearing Impaired, and videos on the ADA and law enforcement, visit http://www.usdoj.gov/crt/ada/.