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Americans with Disabilities Act, Its Antecedents, and Its Impact on Law Enforcement Employment, The

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The Americans with Disabilities Act, Its Antecedents, and Its Impact on Law Enforcement Employment

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I. INTRODUCTION

The American With Disabilities Act (ADA),[1] signed into law on July 26, 1990, is the most significant legislation ever enacted to prevent discrimination against disabled Americans. The scope of the legislation is sweeping, encompassing employment (Title I), public services by state and local governments including transportation (Title II), all public accommodations (Title III), and all telecommunications (Title IV).[2] The law, in essence, recognizes the responsibility of the federal government to see to it that

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The views expressed in this Article are those of the author and not necessarily those of the New York City Police Department, its Legal Bureau, or the City of New York.

1. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213 (Supp. III 1991)).

2. Title II of ADA applies to all activities of public entities, including their employment practices. The Department of Justice, which has promulgated rules implementing Title II, did not promulgate its own rules regarding the employment practice of public entities but instead cross-referenced the regulation implementing Title I of the ADA issued by the Equal Employment Opportunity Commission (EEOC) at 29 C.F.R. § 1630 (1992). As a consequence, public entities have been required to comply with Title I employment rules since the effective date of Title II—January 26, 1992. The ADA also contains a miscellaneous provision (Title V, 42 U.S.C. §§ 12201-12213 (Supp. III 1991)), which in general depicts the ADA's relationship to other laws (§ 12201(b)), explains insurance issues (§ 12201(c)), prohibits state immunity (§ 12202), provides Congressional inclusion (§ 12209), sets regulations by the Architectural and Transportation Barriers Compliance Board (ATBCB) (§ 12204), explains the implementation of each Title (§ 12206), and notes amendments to the Rehabilitation Act of 1973 (§ 12201(a)).

disabled Americans are fully integrated into all aspects of American life rather than being deemed unfit merely because of their disability.

For the law enforcement community, however, particularly with respect to the employment provisions of Titles I and II, the ADA poses a severe challenge yet unmet. Under the ADA, it is no longer legal for an employer of twenty-five or more individuals (reduced to fifteen on July 26, 1994)[3] to discriminate against an "otherwise qualified" individual on the basis of a physical or mental disability.[4] The "otherwise qualified" standard assumes that the qualifications for the job are readily measurable and ascertainable as "job related" and "consistent with business necessity."[5] Such qualifications are intended to be measured by criteria that are necessary for and substantially related to an employee's ability to perform the essential functions of the job.[6]

The law enforcement community, however, because of its unique character as the essential bedrock of society's law and order, has traditionally been held to a higher standard of fitness and character than ordinary employers.[7] Thus, serious philosophical questions arise with respect to the ADA's employment standards and whether such standards should be deemed appropriate for law enforcement employers. The law enforcement community, because of past challenges to its job criteria, especially alleged sex discrimina-

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3. Title I of the Act defines an employer as one who has 15 or more employees "except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person." § 101 (5)(A) (codified at 42 U.S.C. § 12111(5)(A) (Supp. III 1991). Thus, since the subchapter took effect on July 26, 1992, the application of the Act to employers of 15 or more employees takes effect on July 26, 1994.

Title II of the Act, which prohibits discrimination by government agencies in any activity, including employment practices, took effect 18 months after enactment, on January 26, 1992. 42 U.S.C. § 12132 note (Supp. III 1991).

4. 42 U.S.C. § 12112(b)(5)(A) (Supp. III 1991).

5. *Id.* § 12112 (b)(6).

6. *Id.* § 12113 (a).

7. *See, e.g.*, Faure v. Chesworth, 489 N.Y.S.2d 641 (N.Y. App. Div. 1985) The court upheld the dismissal of a state trooper for improper use of a gun on three occasions, noting that a higher standard of fitness and character pertains to police officers than to ordinary civil servants. *Id.* at 642-43. *See also* Shedlock v. Connelie, 414 N.Y.S.2d 55 (App. Div. 1979), *aff'd*, 401 N.E.2d 217 (N.Y. 1979) (The court upheld the disqualification of a state trooper for lack of fitness and good moral character, observing, "[I]t has long been recognized that, due to the nature of the police function in society, higher standards of fitness and character pertain to police officers than to ordinary civil service employees." *Id.* at 56.)

tion concerning physical standards,[8] cannot presently come forth with job

8. See, *e.g.*, United States v. City of Wichita Falls, 704 F.Supp. 709 (N.D. Tex. 1988) wherein female police applicants for the city police department alleged that the physical agility tests used to determine eligibility disproportionately impacted on and discriminated against female applicants. The case was ultimately settled by a consent decree which, among others, prohibited the city of Wichita Falls from using a physical agility test as a screening device for applicants that "operate[d] disproportionately to disqualify female applicants if it [the test] [was] not . . . shown to be an operational necessity for the position of Police Officer or to be a valid predictor of job performance as defined in the Equal Employment Opportunity Commission's Guidelines on Employee Selection Procedures, 29 C.F.R. Sec. 1607." *Id.* at 710. The effect of the case and the consent decree was a lowered physical agility standard.

In New York City, the Police Department had maintained, until 1973, a two-tiered appointment and assignment system for police officers with lower physical standards and less dangerous matron duties (*i.e.*, guarding female prisoners) for policewomen. One consequence of this two-tiered system, however, was limited career advancement possibilities for policewoman. Under attack for sex discrimination, the N.Y.C. Police Department, in January 1973, merged the titles of Patrolman and Policewoman into the title of Police Officer with a single examination for men and women. This merger was designed to bring the N.Y.C. Police Department into compliance with the Civil Rights Act, as amended, effective March 24, 1972. However, the physical standards for female police officers had to be "normed," that is adjusted for the lesser physical capacities for females generally in order to prevent an adverse impact on female hiring.

When New York City experienced its fiscal crisis in 1975 and police layoffs were implemented, female police officers having less seniority were disproportionately laid off. The layoffs resulted in a successful sex discrimination case challenging the layoffs on the basis of discriminatory intent in creation of the seniority system and adverse impact. *See* Acha v. Beame, 401 F.Supp. 816, 817 (S.D. N.Y. 1975), *reversed*, 531 F.2d 648 (2d Cir. 1976), *on remand*, 438 F.Supp. 70 (S.D. N.Y. 1977), *aff'd*, 570 F.2d 57 (2d Cir. 1978). No attention at all was paid in the case to the female police officers' lesser seniority and general inability to perform the physical standards of the job as well as the men they were seeking to replace.

In current litigation against the New York City Police Department before the N.Y.C. Commission on Human Rights (Powers v. Beame, *et al.*, Complaint Nos. 7814-EG-7887-EG), 125 female police officers have asserted claims for back pay and retroactive seniority based on an alleged systematic pattern and practice of discrimination in assignment, transfer, and promotion against them from the early 1960s to the present. Although these complainants were spared the rigors and dangers of police work by performing largely matron duty, they now seek the promotions and compensation retroactively of those who did perform police work.

It is noteworthy that the Civil Rights Act of 1991 prohibits employers from "norming," or adjusting test scores for employment-related tests based on race, color, sex, religion, or national origin. 42 U.S.C. § 2000e-2(*l*) (Supp. III 1991). It is possible that this provision may bring into question the differential physical standards

standards and job criteria that can withstand a legal challenge under the ADA. Without such standards, the law enforcement community cannot meet its burden of proving why a disabled person, as defined by the ADA,[9] should not be hired, even if he or she cannot do the job that the general public expects. The potential repercussions of the lack of court-validated and generally accepted job standards and criteria is even greater for the general public than for the law enforcement community. The potentially disastrous result for the law enforcement community and the public at large is that public monies are spent to hire individuals who clearly cannot perform the job that they were hired to do. These individuals endanger themselves and the public that they are hired to protect, but they cannot be rejected as unqualified applicants because police job standards and criteria have not been court-validated or otherwise generally accepted.

The purpose of this Article is to examine the impact of the ADA on law enforcement employment. Critical to this analysis will be a review of the ADA's historical antecedents. This will include an overview of federal disability law prior to passage of the ADA, with particular emphasis on the Rehabilitation Act of 1973,[10] from which the ADA borrowed liberally.[11] Perhaps the major distinction between the ADA and the Rehabilitation Act of

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for men and women tested for police work. However, it is also possible, until this provision of the Act is litigated, that the "norming" prohibited is intended only for written examinations and not physical fitness to do the job.

9. The ADA defines a disabled person as an individual with: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." If an individual meets one of these three tests, he or she is considered to be an individual with a disability for purposes of coverage under the Americans with Disabilities Act. Act of July 26, 1991, Pub. L. No. 101-336, 104 Stat. 331 (1990) (codified at 42 U.S.C. § 12102(2) (Supp. III 1991); *see also* 28 C.F.R. § 35.104 (1993); 56 Fed. Reg. 35698 (1991).

10. 29 U.S.C. §§ 701-796 (1988 & Supp. III 1991).

11. The liberal borrowing by the ADA from the Rehabilitation Act of 1973 is openly acknowledged by the agencies responsible for implementation of the ADA. Thus, the Department of Justice, in its regulations implementing Title II of the ADA, states, "[m]ost programs and activities of State and local governments are recipients of Federal financial assistance from one or more Federal funding agencies and, therefore, are already covered by section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) ("section 504") which prohibits discrimination on the basis of handicap in federally assisted programs and activities. *Because Title II of the ADA essentially extends the nondiscrimination mandate of section 504 to those State and local governments that do not receive Federal financial assistance, this rule hews closely to the provisions of existing 504 regulations. . . .*" (emphasis added). 56 Fed. Reg. 35694 (1991).

1973 is that the ADA applies to virtually all employers,[12] while the latter applies only to federal contractors.[13] Review of the Rehabilitation Act is necessary because there is no existing body of case law under the ADA which may be analyzed, and the Rehabilitation Act has not yet been abrogated. Therefore, the federal courts' interpretation of the Rehabilitation Act as applied in the case law since 1973 will provide a significant clue as to how the ADA will be applied and how its impact on law enforcement will be felt.

Many state laws have also provided protection against job discrimination directed at the disabled. In the forefront of these protections is New York, which preceded the ADA with its own laws and applied those laws very vigorously on behalf of the disabled. This Article, therefore, shall also analyze the application of the New York anti-discrimination law ("Human Rights Law")[14] by the New York courts to the disabled to see what insights it offers into how the ADA is likely to be applied nationally.

This Article will next address the essential provisions of the ADA, which include: (1) who is a disabled but "otherwise qualified" individual entitled to the protection of ADA? (2) what is a "reasonable accommodation" that can be made to permit employment of a disabled individual "otherwise qualified?" (3) what is "undue hardship" for an employer when measured against the requirement of "reasonable accommodation?" (4) what are "essential functions of a job" under the ADA? (5) what are acts of discrimination under the ADA? and (6) what is the status of pre-employment and post-employment medical examinations and inquiries, physical and mental fitness tests, and physical agility tests under the ADA?

Finally, this Article will address the issue and the status of job criteria, including physical and mental standards, in law enforcement employment in light of the ADA. The focus will be on whether law enforcement employers can now or in the future base their job analyses and selection procedures on job-relatedness and business necessity to perform the "essential functions" of the job, as required by the ADA, and also make "reasonable accommodation," including restructuring of job requirements and workspace configurations, when such can be made without "undue hardship." Since it is obvious that law enforcement employers are in no position to flout the ADA, the issue is

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12. Employers exempt from coverage are the federal government (except for Congress) and its government-owned corporations, Indian tribes, bonafide tax exempt private membership clubs, and religious organizations that require as part of their faith that their employees be of their faith. *See* 42 U.S.C. §§ 12111(5)(B), 12113(C) (Supp. III 1991). It is significant that federal law enforcement agencies such as the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) are exempt from ADA coverage.

13. 29 U.S.C. § 794 (Supp. III 1991); *see also supra* note 11.

14. N.Y. EXEC. LAW §§ 290-301 (McKinney 1993).

how they are likely to adapt to it and whether such adaptation is in a manner consistent with public safety and the national interest.

II. THE REHABILITATION ACT OF 1973

The Rehabilitation Act of 1973 was intended as part of a national policy against discrimination by federal contractors on the basis of a handicap.[15] Section 504 of the Act provides:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[16]

Section 503 of the Act[17] defines a "handicapped individual" as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[18]

The phrase "is regarded as having such an impairment" is very broad and can conceivably create a handicap discrimination case from a wholly subjective evaluation by an employer that an applicant is unfit for mental or physical reasons even if such applicant appears to be fit by objective standards. However, such a broad interpretation has been narrowed by the federal courts. In *De La Torres v. Bolger*,[19] which could have application to the ADA, the court stated that "[a]n impairment that interferes with an individual's ability to do a particular job but does not significantly decrease that individual's ability to obtain satisfactory employment otherwise" does not

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15. Section 504 of the Rehabilitation Act, which addresses employment discrimination, is codified at 29 U.S.C. § 794 (1988). The Act defines "handicap" exactly as the ADA defined "disability" seventeen years later. *Compare* 29 U.S.C. § 701(8)(B) (Supp. III 1991) with 42 U.S.C. § 12102(2) (Supp. III 1991). The word "handicap" is now in political disfavor and so the word "disability" was substituted in the ADA. Prior to passage of the Rehabilitation Act, the protections offered disabled Americans were of a more piecemeal nature and were contained in the following legislation: (a) the Social Security Act of 1935; (b) the La Follette-Barden Act of 1943; (c) the Vocational Rehabilitation Amendments of 1954; (d) the Architectural Barriers Act of 1968; and (e) the Urban Mass Transportation Act of 1970.

16. 29 U.S.C. § 794(a) (Supp. III 1991).

17. 29 U.S.C. § 706(8)(b) (Supp. III 1991).

18. *Id.*

19. De La Torres v. Bolger, 610 F. Supp. 593, 596-97 (N.D. Tex. 1985), *aff'd*, 781 F.2d 1134 (5th Cir. 1986). *See also*, Jasany v. United States Postal Service, 755 F.2d 1244, 1249 (6th Cir. 1985).

"substantially limit" that individual for purposes of the Rehabilitation Act of 1973.[20]

The term "major life activities" under subsection 706(7) is defined as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."[21] The breadth of this definition, coupled with that of the phrase "is regarded as having such an impairment," is so great as to encompass, and potentially make illegal, various medical standards that would otherwise be used to reject employment applicants. For example, an applicant for the New York City Police Department with poor vision or hearing who had difficulty walking, speaking, breathing, learning or working would have protection of the Act and could not be automatically rejected as long as he claimed that he was "otherwise qualified." The burden would then shift to the police department to prove that he was not "otherwise qualified" and that the police hiring standards requiring the ability to perform these "major life activities" measure the job skills for a police officer. In the absence of court validation of such standards for police officers generally as of this date, it is by no means certain that New York's or another city's police department can meet that burden in litigation.

Since enactment, the only narrowing of the Rehabilitation Act by amendment took place in 1978, so that the definition of "handicapped individual" for employment purposes

> does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.[22]

Thus, only a *current* alcohol or drug abuser is denied the protection of handicap status in bringing an action against an employer or prospective employer if such individual is otherwise physically or mentally impaired, or regarded as such, so that his major life activities are substantially limited.

Section 503 of the Act, as provided through its implementing regulations, mandates that physical job qualifications, to the extent that they "tend to screen out qualified handicapped individuals," must be "related to the specific jobs for which the individual is being considered and shall be consistent with business necessity and the safe performance of the job."[23]

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20. *De La Torres*, 610 F. Supp. at 596-97.
21. 45 C.F.R. § 84.3(j)(2)(ii) (1993).
22. 29 U.S.C. § 706(7)(B) (1988).
23. 41 C.F.R. § 60-741.6 (1993).

The federal courts have adjudicated a number of the most significant aspects of handicap discrimination, namely, "reasonable accommodation," the risk of future injury, what constitutes a "handicap," and pre-employment inquiries.

A. Reasonable Accommodation

In *Southeastern Community College v. Davis*,[24] a case frequently cited although it is not an employment case, the United States Supreme Court decided how much "reasonable accommodation" had to be made for an applicant for admission to nursing school who had a serious hearing loss. On the basis of an audiologist's report, the Executive Director of the North Carolina Board of Nursing found that Davis' hearing disability made it unsafe for her to practice as a nurse or to participate in the school's normal clinical training program.[25] The Court held that there was no violation of Section 504 of the Act in the school's refusal to admit her, explaining that she was not the victim of handicap discrimination because she was not "otherwise qualified" as defined by the statute.[26] She was not "one who is able to meet all of a program's requirements in spite of her handicap."[27] The Court found that accommodations that would have been required for her hearing disability would not be reasonable because they would have required the substantial lowering of standards in the nursing program.[28]

Another early case involving "reasonable accommodation" was *Simon v. St. Louis County, Missouri*,[29] which is significant for its potential impact on law enforcement under the ADA. The district court, following the line of reasoning in *Davis*, refused to reinstate a police officer who had been terminated after being paralyzed by a gunshot.[30] Although the former officer was handicapped, the district court held that he was not "otherwise qualified" because he was prevented by his disability from performing nearly all of the police department's physical requirements.[31] The district court also found that the accommodations necessary to reinstate the officer would have been

24. 442 U.S. 397 (1979).

25. *Id.* at 401.

26. *Id.* at 406-07.

27. *Id.* at 406.

28. *Id.* at 413.

29. 497 F. Supp. 141 (E.D. Mo. 1980), *aff'd in part, rev'd in part*, 656 F.2d 31 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982).

30. *Id.* at 150-51.

31. *Id.* at 151.

substantial and, therefore, would not be reasonable.[32] Thus, the police department was discharged from any obligation to reinstate him.[33]

The court of appeals, however, overturned the district court's decision as "too rigid."[34] In taking upon itself the role of deciding physical standards, the court of appeals held that the physical requirements for a police officer position "were not in fact necessary, or were not required of all officers."[35] Therefore, the court of appeals remanded the case to the district court to consider the "functions within the [plaintiff's] department he has the physical abilities to perform" and "whether the accommodations necessary in order to employ [plaintiff] as a commissioned police officer are unreasonable."[36] Therefore, the St. Louis Police Department had to find a place for the disabled former police officer where he could perform without an unreasonable burden on the department.

The *Davis* and *Simon* cases apply to handicap discrimination cases the four-prong test enunciated in *McDonnell Douglas Corp. v. Green*[37] to analyze claims of disparate treatment on the basis of race, religion, national origin, and sex under Title VII. Under the four-prong test, the plaintiff must prove the following four elements: (1) that she is a "handicapped person" under the Act; (2) that she is "otherwise qualified" for the position sought; (3) that she is being excluded from the position solely by reason of her handicap; and (4) that the position exists as part of a program or activity receiving federal financial assistance.[38]

Second Circuit cases illustrate the way this test has been applied to measure medical standards and the possibilities of "reasonable accommodation." In *Doe v. New York University*,[39] a case reminiscent of *Davis*, the Second Circuit addressed a case based on Section 504 in which a medical student sought readmission to a medical school.[40] The court held against the student on the grounds that she failed to establish that, despite her handicap, she was "otherwise qualified" for acceptance to medical school.[41] The student had an extensive history of mental impairment requiring hospitaliza-

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32. *Id.*

33. *Id.*

34. Simon v. St. Louis County, Mo., 656 F.2d 316, 320 (1981), *cert. denied*, 455 U.S. 976 (1982).

35. *Id.* at 321.

36. *Id.*

37. *See* 411 U.S. 792, 802 (1973). *See also* New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644, 649 (2d Cir. 1979).

38. *See McDonnell Douglas*, 411 U.S. at 802.

39. 666 F.2d 761, 774-75 (2d Cir. 1981).

40. *Id.* at 765.

41. *Id.* at 779.

tions. She had departed from medical school because of psychiatric problems. To the court, these facts indicated that she suffered from substantial limitations on major life activity, including the ability to handle stressful situations of the type faced in the medical training environment.[42] The court found that an institution subject to the Rehabilitation Act is not required to disregard disabilities of handicapped applicants, provided that "the handicap is relevant to reasonable qualifications for acceptance," nor would the institution be required to "make substantial modifications in its reasonable standards or program to accommodate handicapped individuals."[43] The case law indicates, therefore, that: (a) a complainant under Section 504 must establish that he or she is "otherwise qualified," and (b) the medical standard must be "reasonable." Moreover, it is the plaintiff's "ultimate burden of showing by a preponderance of the evidence that in spite of the handicap he is qualified."[44]

In *New York State Ass'n for Retarded Children v. Carey*,[45] the Second Circuit applied the four-prong *McDonnell Douglas* test and struck down the plan of the New York City Board of Education to bar certain mentally retarded children from school because they were carriers of serum hepatitis. The court found that the Board's plan met the elements of a prima facie case of discrimination against handicapped children who were within the protection of the Act. Also, the Board had failed to make "at least some substantial showing" that its plan was justified to rebut the prima facie case.[46] Thus, under Section 504 and the *McDonnell Douglas* test, once the complainant has established a prima facie case, the burden shifts to the agency to provide evidence that the handicap is relevant. If the agency can establish that its medical standard is reasonable and substantially justified, then the ultimate burden shifts back to the complainant, who must prove by a preponderance of the evidence that, in spite of the handicap, he is as qualified as others deemed acceptable for admission or employment. Thus, the agency has the burden of establishing a factual or medical nexus between the medical condition and the job's duties.

The Fifth Circuit case of *Prewitt v. United States Postal Service*,[47] which involved a physically handicapped individual who applied for a job as a clerk/carrier with the U.S. Postal Service, reaffirmed the Second Circuit's interpretation of Section 504. The court reversed a summary judgment

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42. *Id.*

43. *Id.* at 775.

44. *Id.* at 776-77.

45. New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644, 649 (2d Cir. 1979).

46. *Id.* at 650.

47. 662 F.2d 292 (former 5th Cir., Unit A, Nov. 1981).

decision against the complainant and held that the Postal Service was required to make reasonable accommodation for a handicapped employee if the complainant could prove that reasonable accommodation could be made.[48] The court found that even if the plaintiff could not perform without reasonable accommodation, he might be entitled to relief as a victim of "surmountable barrier" handicap discrimination, that is, that the barrier of the handicap could be overcome by the agency's reasonable accommodation.[49] The court cited the Second Circuit's *Carey* decision, stating:

> [T]he test is whether a handicapped individual who meets all employment criteria except for the challenged discriminatory criterion "can perform the essential functions of the position in question without endangering the health and safety of the individuals or others." If the individual can so perform, he must not be subjected to discrimination.[50]

However, the courts have emphasized that only reasonable, and not extraordinary, accommodation is to be expected under the Act.[51] In the case of *Treadwell v. Alexander*,[52] the Eleventh Circuit held against a retired Air Force colonel, rated by the Veterans Administration as being 100 percent disabled because of his two handicaps, a nervous condition and a heart condition.[53] Colonel Treadwell argued that the Army Corps of Engineers improperly denied him a position because of his physical handicap.[54] The Army Corps argued that his weak physical condition would prevent Treadwell from doing the arduous tasks of the job. The Eleventh Circuit agreed with the Army that the physical criteria for the position were job-related and that reasonable accommodation could not be made for Treadwell's handicap.[55] Similarly, in the case of *Bey v. Bolger*,[56] the court held that a postal worker who had hypertension was not "otherwise qualified" because he could not perform essential Postal Service functions, a reasonable accommodation could not be made for the light duties he requested, and the physical standards for employment were job-related.[57]

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48. *Id.* at 311.
49. *Id.* at 305, 309-10.
50. *Id.* at 307 (citing 28 C.F.R. §§ 1613.702(f), .703).
51. *Id.* at 307-08.
52. Treadwell v. Alexander, 707 F.2d 473, 474 (11th Cir. 1983).
53. *Id.* at 477.
54. *Id.* at 475.
55. *Id.* at 478.
56. 540 F. Supp. 910, 927-28 (E.D. Pa. 1982).
57. *Id.* at 927-28.

B. *Risk of Future Injury*

The risk of future injury as a factor in rejecting an applicant has also been litigated under the Rehabilitation Act. In *E.E. Black Ltd. v. Marshall*,[58] a case significant for police applicants with back problems, the federal district court in Hawaii considered the risk of future injury for an apprentice carpenter who was denied employment by a federal contractor on the basis of a pre-employment physical examination.[59] The examination revealed a congenital back anomaly characterized as a "partially sacralized transitional vertebra," which made the plaintiff a poor risk for the heavy labor, bending, twisting, and lifting required of a carpenter's apprentice.[60] However, an orthopedist found that the applicant's back condition did not currently prevent him from performing the job.[61]

When the company still refused to employ him, he filed a complaint of handicap discrimination with the Office of Federal Contract Compliance Programs (OFCCP).[62] Although the OFCCP found the company to be in violation of the Act, the administrative law judge found no violation on the basis that the applicant was not handicapped under the Act because his impairment did not affect his employment generally.[63] The district court, however, found the applicant to be a qualified handicapped individual and dismissed the argument that his back condition should disqualify him for present employment because it was likely to render him disabled in the future.[64] The court concluded that the question of current job performance was "the only relevant inquiry in determining whether a rejected applicant is a qualified handicapped individual."[65]

The court further held that the only basis whereby a medical standard based upon the risk of future injury could legitimately disqualify an "otherwise qualified" handicapped individual would be that such standard was job-related and "consistent with business necessity and the safe performance of the job."[66] The court stated that "[n]on-imminent risk of future injury may possibly be a reason for rejecting an applicant, but it does not make an otherwise capable person incapable."[67] The court then explained that "in

58. 497 F. Supp. 1088, 1091 (D. Hawaii 1980).
59. *Id.* at 1091.
60. *Id.*
61. *Id.* at 1091-92.
62. *Id.* at 1093.
63. *Id.* at 1093-94.
64. *Id.* at 1103-04.
65. *Id.* at 1103.
66. *Id.*
67. *Id.*

some cases a job requirement that screens out qualified handicapped individuals on the basis of possible future injury, could be both consistent with business necessity and the safe performance of the job."[68] However, the court made clear that the employer would have the burden of proving that its medical standard was job-related and that the rejection of the handicapped applicant was consistent with business necessity and the safe performance of the job.[69] In *Black*, the court found that the employer had not met that burden.[70]

The Ninth Circuit Court of Appeals relied on the *Black* reasoning to overturn a medical disqualification by the city of Los Angeles in *Bentivegna v. Department of Labor*.[71] Bentivegna, a diabetic, was hired as a "building repairer" through the city of Los Angeles' Comprehensive Employment and Training Act (CETA) program.[72] As a condition of employment, applicants had to pass a physical examination.[73] Applicants with diabetes had to demonstrate "control" by maintaining blood sugar test results consistently below a certain level.[74] Bentivegna failed the exam because his blood sugar level was too high.[75] The basis for requiring the exam was that diabetics were subject to progressive vascular and neurological problems and that too high of a blood sugar level created a high risk of future injury.[76]

In overturning the medical disqualification, the court held that "[a]ny qualification based on the risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily, since almost all handicapped persons are at greater risk from work-related injuries."[77] The court determined that the city and the Department of Labor had the burden of "proving that controlling blood sugar levels to the [city's] required level contributes cognizably to personal health and safety" and that such a control requirement was "related to the performance of the job and . . . consistent with business necessity."[78] The court concluded that there was no clear elevated risk of injury in hiring diabetics and that the city had not supplied "evidence adequate to establish the direct connection between the particular job

68. *Id.* at 1104.
69. *Id.*
70. *Id.*
71. 694 F.2d 619 (9th Cir. 1982).
72. *Id.* at 620.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 622.
77. *Id.* at 622.
78. *Id.* (citing 29 C.F.R. § 32.14(a) (1982)).

qualifications applied and the considerations of business necessity and safe performance that the Act requires."[79]

In *Mantolete v. Bolger*,[80] the Ninth Circuit considered the case of the employability of an epileptic applicant who had been denied a position with the U.S. Postal Service based on her physical handicap.[81] The court determined that while a job requirement may screen out qualified handicapped individuals on the basis of possible future injury, "there must be a showing of a reasonable probability of substantial harm."[82] The court explained that it is unacceptable to make such determinations "based merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports."[83] The employer, in order not to violate the Rehabilitation Act, must make an effort to determine if reasonable accommodation can be made to protect the applicant against a reasonable probability of substantial injury.[84]

In *Arline v. School Board of Nassau County*,[85] the Eleventh Circuit reversed the termination of a school teacher who had tuberculosis on the ground that further findings were necessary to determine whether the risk of infection precluded the teacher from being otherwise qualified for the job.[86] The tuberculosis disease was held to constitute a handicap within the meaning of the Rehabilitation Act.[87] The court pointed out that even if the risk of infection precluded her from being qualified for her elementary school job, the school board had an obligation to attempt "to make some reasonable accommodation for her in that teaching position, in another position teaching less susceptible individuals, or in some other kind of position in the school system."[88] The court's ultimate decision was upheld in an appeal to the United States Supreme Court.[89] In dicta, the Supreme Court went beyond

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79. *Id.* at 623.

80. 767 F.2d 1416 (9th Cir. 1985).

81. *Id.* at 1417.

82. *Id.* at 1422.

83. *Id.*

84. *Id.* at 1422, 1423.

85. 772 F.2d 759 (11th Cir. 1985), *cert. granted in part*, 475 U.S. 1118 (1986), *judgment aff'd and remanded*, 480 U.S. 273 (1987).

86. *Id.* at 765.

87. *Id.* at 764.

88. *Id.* at 765.

89. 480 U.S. 273 (1987). *See also* Kling v. County of Los Angeles, 769 F.2d 532 (9th Cir. 1985), in which the Ninth Circuit overturned, on the basis of the Rehabilitation Act, the denial of admission to a nursing school of an applicant solely because she had Crohn's disease, an inflammatory bowel disease.

consideration of tuberculosis and stated that employees infected with AIDS are not necessarily unprotected under the Act.[90]

In *Chalk v. United States District Court*,[91] the Ninth Circuit reversed the district court and applied the Rehabilitation Act to a dispute over AIDS in the workplace.[92] This was the first federal appellate ruling applying the Act to an AIDS-infected employee.[93] The Ninth Circuit held that it was not necessary to prove with absolute certainty that transmission of AIDS could not occur from schoolroom or workplace contact in order to sustain a claim under the Act.[94] Consequently, Chalk, a high school special education teacher, was reinstated to a classroom teaching position after his physician certified him as able to return to work.[95]

C. *What Constitutes a "Handicap"*

The threshold requirement to sue under the Rehabilitation Act of 1973 is that the plaintiff be a "handicapped person" as defined by the Act.[96] Thus, if a person is not classified under the Act as handicapped, it does not matter how qualified she is for the position sought or how arbitrary the employer's actions are in disqualifying her. The following five cases, while by no means exhaustive, illustrate how the federal courts have determined who is a handicapped person and who is not.

In *Jasany v. United States Postal Service*,[97] a case possibly significant for police vision standards, the Sixth Circuit held that a postal worker who had strabismus (crossed eyes) was not regarded as handicapped under the Act because his impairment affected his ability to perform only a narrow range of jobs within the post office.[98] He was not qualified to perform the duties of operating a mail sorting machine for which he was hired, and the mail sorting

90. *Arline*, 480 U.S. at 282 n.7.

91. 840 F.2d 701, 709 (9th Cir. 1988).

92. *Id.* at 703.

93. The Ninth Circuit noted two Federal District Court decisions and one New York lower court decision upholding the rights of AIDS victims. *Id.* at 708. *See* Thomas v. Atascadero Unified School Dist., 662 F.Supp. 376 (C.D.Cal. 1987); Ray v. School Dist. of De Soto County, 666 F.Supp. 1524 (M.D.Fla. 1987); District 27 Community School Bd. v. Board of Educ., 502 N.Y.S. 2d 325 (Sup. Ct. 1986).

94. *Chalk*, 840 F.2d at 707-09.

95. *Id.* at 703-04.

96. *Id.* at 705.

97. 755 F.2d 1244 (6th Cir.1988).

98. *Id.* at 1247-50.

machine could not be modified to accommodate the postal worker's crossed eyes condition.[99]

In *Stevens v. Stubbs*,[100] the district court stressed the inability to perform in a case involving a civilian Army employee who suffered from an undisclosed transitory illness that required him to take periodic sick leave.[101] The court held that he was not a qualified handicapped person under the law.[102] The court found that he offered no evidence to show that he had a physical or mental impairment that substantially limited one or more of his major life activities.[103] The court also found that he was unable to cope with the pressures of his job.[104] Section 504 of the Rehabilitation Act, the court reasoned, was a discrimination law designed to protect "qualified handicapped persons," that is, those who can do their job in spite of their handicap rather than individuals who cannot do their job because of their handicap.[105]

In *De La Torres v. Bolger*,[106] the district court further defined handicap and determined that a former probationary postal worker was not a "handicapped individual" under the Act by virtue of his left-handedness or by his forced conversion to a right-handed carrier at the post office.[107] The court held that he enjoyed perfect health, had performed a wide variety of jobs without apparent difficulty, and was not regarded by the Postal Service as "substantially limited" or impaired.[108]

In *Tinch v. Walters*,[109] the Sixth Circuit considered alcoholism and held that a recovered alcoholic with an organic disability based on his prior overuse of alcohol was an "otherwise qualified handicapped individual" and not guilty of willful misconduct which would disqualify him from Veteran's Administration educational benefits.[110] The court held that the willful misconduct disqualification was valid only for current primary alcoholism and not for diseases that result from it.[111] The court proceeded to strike down the

99. *Id.* at 1250-51.
100. 576 F. Supp. 1409 (N.D. Ga. 1983).
101. *Id.* at 1413-15.
102. *Id.* at 1414.
103. *Id.*
104. *Id.* at 1411, 1413-14.
105. *Id.* at 1415.
106. 610 F. Supp. 593 (N.D. Tex. 1985), *aff'd*, 781 F.2d 1134 (5th Cir. 1986).
107. *Id.* at 596.
108. *Id.* at 596-97.
109. 765 F.2d 599 (6th Cir. 1985).
110. *Id.* at 603-604.
111. *Id.*

Veteran's Administration regulation that denied benefits to recovered alcoholics.[112]

In *Tudyman v. United Airlines*,[113] the district court addressed the question of whether an overweight applicant for a male flight attendant position, rejected for failure to meet the airline's weight guideline, had a cause of action under the Rehabilitation Act.[114] The court held that the applicant was not a "handicapped individual" within the meaning of the Act because he had no physical impairment and was not substantially limited in a major life activity.[115] The court also found that his weight resulted from his voluntary bodybuilding, which resulted in a low percentage of body fat and high percentage of muscle.[116] The court noted what it called the "Catch 22" aspect of Section 504 of the Act: the plaintiff must first show that he or she has some impairment that substantially limits a major activity, but at the same time must show that he or she is not so handicapped as to be unable to perform the job.[117] The plaintiff in the instant case was found not to be limited in his ability to work, but only in working in the specific job of his choice.[118] Therefore, the court held that he was not a handicapped person for purposes of the statute.[119] It was irrelevant for purposes of the Act that the employer's medical justification for its weight standard was illogical and arbitrary, because such actions *per se* are not prohibited by the Act.[120]

D. Pre-Employment Inquiries

The Rehabilitation Act prohibits not only discrimination in employment against the handicapped, but pre-employment inquiries related to possible handicaps as well.[121] The ADA contains the same prohibition.[122] In *Doe v. Syracuse School District*,[123] a Rehabilitation Act case, the plaintiff

112. *Id.* at 600.
113. 608 F. Supp. 739 (C.D. Cal. 1984).
114. *Id.* at 740.
115. *Id.* at 746.
116. *Id.*
117. *Id.* at 744.
118. *Id.* at 745.
119. *Id.* at 746-47.
120. *See also In re* National Airlines, Inc., 434 F. Supp. 269 (S.D. Fla. 1977) and Jarrell v. Eastern Airlines, Inc., 430 F. Supp. 884 (E.D. Va. 1977), where the court held that a weight limitation policy by the company did not discriminate against females in violation of Title VII of the Civil Rights Act of 1964.
121. 45 C.F.R. §84.14(a) (1979).
122. 42 U.S.C. § 12112 (d) (Supp. III 1991).
123. 508 F. Supp. 333 (N.D.N.Y. 1981).

complained that the Syracuse school district had made impermissible pre-employment inquiries regarding whether he had experienced or had ever been treated for any "migraine, neuralgia, nervous breakdown, or psychiatric treatment."[124] He had answered the question in the affirmative.[125] Subsequently he was examined by the school district physician who found him to be physically and mentally qualified for the teaching position.[126] However, his application for employment was rejected by the school district.[127]

The plaintiff charged that the pre-employment inquiry constituted illegal discrimination against the handicapped, and the court agreed.[128] The court cited the implementing regulations of Section 504, established in 1977 and promulgated in 45 C.F.R. section 84.14, which provides that:

> a recipient (of federal funds) may not conduct a pre-employment medical examination or may not make pre-employment inquiries of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make pre-employment inquiry into an applicant's ability to perform job-related functions.[129]

The court found that the pre-employment inquiry was improper because it was not a job-related inquiry and was prejudicial to a disabled person's ability to find employment.[130] The plaintiff's history of treatment for mental or emotional problems was held to be unrelated to his current ability or fitness to teach.[131] The court held that the pre-employment inquiry was precisely the handicap discrimination that section 84.14 sought to eliminate.[132]

E. Summary of Standards Applied by the Federal Courts in Section 504 Cases

The cases presented in this section illustrate that once the threshold burden of proving that the plaintiff is handicapped under the Act is met, the plaintiff may file a complaint of employment discrimination on the basis of

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124. *Id.* at 334-35.
125. *Id.* at 335.
126. *Id.*
127. *Id.*
128. *Id.* at 336-37.
129. *Id.* at 336 (quoting 45 C.F.R. § 84.14(a) (1979)).
130. *Doe*, 508 F.Supp. at 337.
131. *Id.*
132. *Id.* at 336-37.

medical standards that deny him or her employment. However, to succeed in this cause of action, plaintiffs must establish that: (1) they are "otherwise qualified" to do this particular job; (2) because their handicap they cannot readily do other jobs for this employer or for employers generally; (3) they are being excluded from the position solely because of their handicap; (4) the employer in question receives federal financial assistance; and (5) "reasonable accommodation" can be made by the employer for their handicap.[133] If the handicapped employee or applicant can meet these criteria, the employer cannot successfully defend on the basis of risk of future injury.[134] To succeed, the employer must show that the medical disqualification is based upon business *necessity*, the current safe performance of the job, or, at least, the reasonable probability of substantial harm.[135]

III. THE NEW YORK STATE HUMAN RIGHTS LAW

Section 296 of the New York Executive Law, otherwise known as the Human Rights Law, has even broader scope than the Rehabilitation Act of 1973 in defining what constitutes employment discrimination against the handicapped or disabled. Section 296 states the following:

> (1) It shall be an unlawful discriminatory practice:
> (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or *disability*, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.[136]

Disability is further defined in the statute as:

> (21) The term "disability" means (a) a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal

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133. 45 C.F.R. § 84.3(K)(1) (1993). *See also* Southeastern Community College v. Davis, 442 U.S. 397, 407 (1979), in which the U.S. Supreme Court held that an otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap. However, the Court made clear that this did not mean that reasonable accommodations are not required. *Id.* at 412-413.

134. *See* Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985).

135. *Id.*

136. N.Y. EXEC. LAW, § 296(1)(a) (McKinney 1993) (emphasis added). New York City has its own law protecting the disabled from job discrimination; *see* N.Y. COMP. CODES R. & REGS. tit. 8, ch. 1 (1993).

> bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which do not prevent the complainant from *performing in a reasonable manner the activities involved in the job or occupation* sought or held.[137]

Unlike the Rehabilitation Act, the Human Rights Law defines "disability" broadly enough to encompass "medical" impairments as well as physical or mental impairments. In addition, to qualify as a disability, the condition may manifest itself in one of two ways: (1) By preventing the exercise of a normal bodily function, or (2) by being "demonstrable by medically accepted clinical or laboratory diagnostic techniques."[138]

A. Disability Standards and Reasonable Performance

Once the disability threshold has been met, the employer must assess a disabled individual's ability to perform "in a reasonable manner the activities involved in the job or occupation sought."[139] It is clearly insufficient for the employer to defend against a handicap discrimination complaint by showing that an employee's "physical impairment is somehow related to duties he must perform in the position sought."[140] Nor is it sufficient for an employer "to show that the impairment precludes the employee from performing the required duties in a perfect manner."[141] The leading case in New York supporting this interpretation of the Human Rights Law is *Miller v. Ravitch*.[142]

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137. N.Y. EXEC. LAW, § 292(21) (McKinney 1993) (emphasis added).

138. *Id.*

139. Miller v. Ravitch, 458 N.E.2d 1235, 1237 (N.Y. 1983), *appeal after remand*, 515 N.Y.S.2d 518 (App. Div.1987). The so-called "individualized standard" to assess the ability of a disabled individual went into effect in New York in 1979 (L.1979, Ch. 594, now N.Y. EXEC. LAW § 292.21 (McKinney 1993)).

140. *Miller*, 458 N.E.2d at 1237.

141. *Id.*

142. 458 N.E.2d 1235 (N.Y. 1983). The New York Court of Appeals remanded this case back to the supreme court for trial on the factual issue of whether Miller, the plaintiff, could in fact reasonably perform apart from any possible impairment. The supreme court (Kings County) reversed his demotion upon remand, but the appellate division reversed the supreme court on appeal, thus supporting his demotion, because he could not climb stairs, which was a principal requirement of the job to which he wished to be promoted. Miller v. Ravitch, 515 N.Y.S.2d 518, *appeal denied*, 522 N.Y.S.2d 110 (App. Div. 1987).

In *Miller v. Ravitch*, the court of appeals interpreted the 1979 amendment of the Human Rights Law to require the employer not only to show that the condition impairs job performance, but to show that the employee or prospective employee cannot perform in a reasonable manner.[143] It is no longer sufficient for the employer to show that the medical standard in question is related to the nature of the employment. There must be a direct nexus between the disability and the inability to perform the job reasonably.[144] Under the *Miller* holding, even a probationary employee employed by the city of New York, who may be terminated without hearing and without stated reasons, may still not be terminated for reasons prohibited under the Human Rights Law.[145] Thus, the Human Rights Law has created a stringent "individualized standard," which subjects all medical job standards to the test of a demonstrable and unreasonable impairment of job performance in each individual case. Under the prior unamended definition, there was no need for an employer to establish that the complainant's impairment actually prevented him from performing the job activities in a reasonable manner, so long as it was related to the performance of those activities.[146]

The New York courts have consistently upheld the State Division of Human Rights in applying the "individualized standard" to the Human Rights Law, at least where there has been no direct conflict with the New York State Civil Service Law Section 50(4)(b).[147] That section specifically permits disqualification of a candidate for employment "who is found to have a physical or mental disability which renders him unfit for the performance of the duties of the position . . . *or which may reasonably be expected to render him unfit to continue to perform the duties of such position.*"[148]

Thus, in *State Division of Human Rights v. Leroy Central School District*,[149] the appellate division fully followed *Miller* in addressing the issue of the school district's failure to employ for a school bus driver position an applicant whose adrenal glands had been surgically removed, making it necessary for her to take daily hormone medication.[150] The school district showed that it relied upon the advice of its medical examiner in rejecting the applicant.[151] However, the State Division of Human Rights produced

143. *Miller*, 458 N.E.2d at 1237.

144. *Id.*

145. *Id.*

146. *Id.* at 1236-37. *See also* Westinghouse Elec. Corp. v. State Div. of Human Rights, 401 N.E.2d 196 (N.Y. 1980).

147. N.Y. CIV. SERV. L. § 50(4)(b) (McKinney Supp. 1993).

148. *Id.* (emphasis added).

149. 485 N.Y.S.2d 907 (N.Y. App. Div. 1985).

150. *Id.* at 908.

151. *Id.*

countervailing medical testimony indicating that the complainant's disability did not prevent her from performing the duties of a school bus driver in a reasonable manner.[152]

The court, in finding for the plaintiff, held that "the District could not ignore the 1979 amendment and refuse to hire the complainant simply because her handicap might in theory affect her ability to perform the job, even though it did not in fact do so."[153] The court noted how the legislature had amended the Human Rights Law and substituted "for the prior, general relatedness standard an individualized test."[154] The regulation of the Commissioner of Education, which barred employment as a school bus driver of anyone who had any "physical or mental condition which might impede the ability to operate a bus safely," was held to be invalid "insofar as that regulation may be construed as conflicting with the Human Rights Law."[155]

The broad scope of the Human Rights Law, going even beyond Section 504 of the Rehabilitation Act of 1973, is illustrated by the New York Court of Appeals decision in *McDermott v. Xerox Corp.*.[156] This case, which involves gross obesity, is New York's definitive view of overweight standards as a job disqualifier. Xerox Corporation refused employment to the plaintiff as a computer systems consultant because she was obese.[157] She was offered the position on the condition that she pass a pre-employment medical examination.[158] During that physical examination, the examining physician found that, since she was 5 feet 6 inches in height and weighed 249 pounds, she was obese and medically "not acceptable" for employment.[159] No other medically disqualifying conditions were found in clinical or laboratory findings.[160]

The plaintiff filed an employment discrimination complaint against Xerox with the State Division of Human Rights, charging discrimination based on her disability, in violation of the aforementioned Sections 296 and 292 of the Human Rights Law.[161] Xerox's defense was based, in part, on its use for employment criteria of tables, published in 1966 by an insurance company, of

152. *Id.* at 909.

153. *Id.*

154. Westinghouse Elec. Corp. v. State Div. of Human Rights, 401 N.E.2d 196 (N.Y. 1980).

155. *Leroy School Dist.*, 485 N.Y.S.2d at 908.

156. 480 N.E.2d 695 (N.Y. 1985).

157. *Id.* at 695.

158. *Id.* at 696.

159. *Id.*

160. *Id.*

161. *Id.*

"normal" weight ranges for given heights.[162] The plaintiff exceeded the normal weight range for her height by approximately 100 pounds.[163] The Xerox physician determined that because of plaintiff's "gross obesity," she should not be hired because such a condition "posed a significant risk to short and long term disability and life insurance programs administered" by Xerox.[164]

The State Division of Human Rights found that the plaintiff had been discriminated against because of a disability because she was able to satisfactorily perform the job of a systems consultant.[165] After much litigation, the court of appeals affirmed the finding of the State Division of Human Rights and the appellate division. The court found that it did not matter that her overweight condition was treatable or voluntary or was "unrelated to any glandular or organic deficiency."[166] The court of appeals also dismissed Xerox's argument that her condition posed a statistical likelihood that she would be impaired in the future, with a consequent adverse impact on the company's disability and life insurance programs.[167] The court found that the term "disability" was not limited to physical or mental impairments, but included "medical" impairment.[168]

The court of appeals ruling in *McDermott v. Xerox Corporation* is in accord with earlier rulings regarding the application of medical standards to disqualify employees or job candidates.[169] These standards, whether involving obesity or any other physical, mental, or medical condition, will not be upheld in the New York courts unless it can be demonstrated that at the time of employment disqualification the condition unreasonably impaired the ability to perform the job.[170] Without demonstrating a nexus between the employment duties and the condition in question, the medical standard used to disqualify an applicant is in violation of the Human Rights Law.[171] Of course, a complainant must first show that this condition qualifies as a handicap under the Human Rights Law.[172] For example, under *Xerox*, gross obesity *would* qualify while merely being overweight would not necessarily qualify.

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162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 697.
166. *Id.*
167. *Id.* at 697-98.
168. *Id.* at 698.
169. *Id.* at 699.
170. *Id.* at 698.
171. *Id.*
172. N.Y. EXEC. L. § 292(21) (McKinney 1993).

In *Kelly v. Town of North Hempstead*,[173] the court ruled that it would be unlawful discrimination against the handicapped to terminate a diabetic clerk since the condition did not adversely affect her ability to perform her duties or otherwise warrant dismissal from the position.[174] The court assumed that diabetes was a handicap condition under the law.[175]

Neither the State Division of Human Rights nor the New York courts have upheld handicap discrimination claims, however, where the complainant was clearly unable or unwilling to perform the duties of the job in a reasonable manner. In *Silk v. Huck Installation and Equipment Division*,[176] both the New York State Division of Human Rights and the appellate division saw fit to uphold the employer's dismissal of a secretary-clerk who suffered from a condition diagnosed as cervical and lumbar strain where her physical disability caused her to miss an unacceptably high number of days of work in a job that required consistently good attendance.[177] In *Vadney v. State Human Rights Appeal Board*,[178] the New York State Division of Human Rights and the appellate division saw fit to uphold the termination of an employee who had recovered from a heart attack but was still excessively absent after returning to work.[179] They found that the employee had used all of his sick leave upon returning to work and then had been advanced additional sick leave, but was still unable to report to work on a regular basis.[180]

The broad scope of the Human Rights Law is best illustrated in two relatively recent New York cases involving applicants for the New York City Police Department. In *State Division of Human Rights on the Complaint of Granelle v. City of New York*,[181] the court of appeals clarified what is meant under the state Human Rights Law to perform the job in a "reasonable manner." In that case, the police applicant had a physical condition that was currently nondisabling but likely to be disabling in the future.[182] The condition was spondylolisthesis, a potentially disabling back condition.[183] The court held that the prediction as to his future disability was mere

173. 477 N.Y.S.2d 396 (N.Y. App. Div. 1984).
174. *Id.* at 396.
175. *Id.*
176. 486 N.Y.S.2d 406 (N.Y. App. Div. 1985).
177. *Id.* at 406.
178. 462 N.Y.S.2d 311 (N.Y. App. Div. 1983).
179. *Id.* at 312.
180. *Id.*
181. 510 N.E.2d 799 (N.Y. 1987).
182. *Id.* at 800.
183. *Id.*

speculation.[184] Citing the individualized standard set forth in *Miller*[185] and *Westinghouse*,[186] the court of appeals overturned the appellate division and set aside statistical evidence that the applicant would suffer a future disability.[187] The individualized standard required the rejection of a police applicant to be based upon a showing that the applicant cannot currently perform or will not be able to perform in the imminent future.[188]

In *Antonsen v. Ward*,[189] another police applicant case, the court of appeals strongly reaffirmed its *Granelle* holding. The court held that statistical evidence suggesting as high as a fifty percent chance of recurrence of Crohn's Disease, an incurable inflammatory bowel disease, was insufficient as a basis for terminating a probationary police officer for lack of medical fitness. Without additional evidence showing a likelihood that the recurrence would prevent job performance, the termination could not be upheld.[190] The court found the New York City Police Department to be guilty of illegal job discrimination against the disabled employee in violation of New York's Human Rights Law.[191]

B. Summary of Disability Standards Applied by the New York Courts in Human Rights Law Cases

Until *Granelle* and *Antonsen*, the New York State appeals courts did not consider whether the risk of future disability, despite a current ability to perform job duties, is a lawful ground for failure to hire under the Human Rights Law, as amended. Now having considered this, the courts have determined that an applicant or employee, who qualifies as disabled under the law, cannot be disqualified from the police job unless it can be shown, with particularity, exactly why the individual cannot do the job. Generalities and statistical evidence will not suffice as a means of projecting future disability. A particularized medical analysis and an individualized assessment must be put forth to justify the disqualification of each individual. Since the Human Rights Law was amended in 1979, it is no longer enough that a disability be merely related to the job in question to disqualify someone. Nor is it

184. *Id.* at 802.

185. Miller v. Ravitch, 458 N.E.2d 558 (N.Y. 1983).

186. Westinghouse Elec. Corp. v. State Div. of Human Rights, 401 N.E. 2d 196 (N.Y. 1980).

187. *State Div. of Human Rights on the Complaint of Granelle*, 510 N.E.2d at 802.

188. *Id.*

189. 571 N.E.2d 636 (N.Y. 1991).

190. *Id.* at 639.

191. *Id.* at 641.

sufficient if the disability in question somewhat hinders job performance, as long as it does "not prevent the complainant from performing in a *reasonable manner* the activities involved in the job or occupation sought or held."[192]

IV. ESSENTIAL PROVISIONS OF THE ADA

An examination of the essential provisions of the ADA reveals how closely it follows the Rehabilitation Act of 1973 and the New York Human Rights Law.

A. Disabled But "Otherwise Qualified" Individual is Protected by the ADA

A "qualified individual with a disability" is an individual who has a condition serious enough to be considered disabled yet is still able to perform the essential functions of the job that he or she holds or desires with or without reasonable accommodation.[193] A person is deemed to have a disability under the ADA if: (1) he or she has a physical or mental impairment that substantially limits a major life activity; (2) he or she has a record of a substantially limiting impairment; or (3) he or she is regarded as having a substantially limiting impairment.[194] This is the identical language of Section 503 of the Rehabilitation Act. The following individuals are automatically excluded from disabled status: Temporary, non-chronic impairments of short duration such as broken limbs and passing illnesses; current users of illegal drugs; sexual preference, gender identity or other sexual disorders not resulting from physical impairments; or compulsive gambling, kleptomania and pyromania.[195] Examples of otherwise qualified individuals include former drug addicts, alcoholics, and persons with AIDS or the AIDS virus, provided they are able to perform the essential functions of the job.[196]

192. N.Y. EXEC. LAW § 292(21) (McKinney 1993) (emphasis added).
193. 42 U.S.C. § 12111(8) (Supp. III 1991).
194. *Id.* at § 12102(2).
195. *Id.* at § 12211.
196. 28 C.F.R. § 36.104 (1993).

B. Reasonable Accommodation

Under the ADA, an employer must make reasonable accommodations to allow the disabled person to perform the job.[197] A reasonable accommodation is any change or adjustment to a job that permits a qualified applicant or employee with a disability to perform the essential functions of the job.[198] The request for the reasonable accommodation must be initiated by the employee or applicant rather than by the employer or it need not be granted.[199] Examples of reasonable accommodation provided by the United States Equal Employment Opportunity Commission (EEOC) in its interpretive regulations for the ADA include, among others, job restructuring, part-time or modified work schedule, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, and training materials or policies to provide disabled employees with qualified readers or interpreters.[200] The examples of reasonable accommodation promulgated by the EEOC generally go beyond those considered to be required under the Rehabilitation Act.[201]

C. Undue Hardship

The ADA allows employers to justify failure to make "reasonable accommodation" if it would impose "undue hardship," that is, present a significant risk of substantial harm at the present time.[202] The risk of harm can be demonstrated by cost, difficulty, or how disruptive the accommodation would be.[203] The assessment of the risk of undue hardship must be objective and not speculative or remote.[204] If an undue hardship can be demonstrated, an applicant or employee with a disability must be given the opportunity to lower the cost of the accommodation below the level of the undue hardship.[205]

197. 42 U.S.C. § 12112(5)(A) (Supp. III 1991).
198. 29 C.F.R. § 1630.2(o) (1993).
199. 56 Fed. Reg. 35748 (1991); 29 C.F.R. § 1630.9 (1993).
200. 42 U.S.C. § 12111(a) (Supp. III 1991).
201. See Section II, *supra.*
202. 42 U.S.C. § 12112(b)(5)(A) (Supp. III 1991).
203. *Id.* § 12111(10)(B).
204. 56 Fed. Reg. 357(52) (1991); 29 C.F.R. § 1630.15(d) (1993).
205. *Id.*

D. Essential Functions of the Job

The "essential functions" are those basic job duties that an employee must be able to perform, with or without reasonable accommodation.[206] Under the ADA, an employer determines what are the "essential functions of the job."[207] However, courts will evaluate this determination by considering written descriptions of the job in collective bargaining agreements or otherwise on record before advertising for or interviewing applicants.[208] These written descriptions must note the time spent on each function, the skills and experience required for each function, and whether the job would exist at all without the function.[209]

E. Acts of Discrimination

Acts of discrimination are those directed against disabled applicants or employees in recruitment, hiring, advertising, job application procedures, pay or compensation in any form, job assignments, job qualifications, position descriptions, promotions, leaves of absence, terminations, employment fringe benefits, selection and financial support for training, meetings and conferences, employer-sponsored social and recreational programs, and all other employment-related activities.[210]

V. Law Enforcement Employment, Standards, and Potential Problems Under the ADA

The Rehabilitation Act of 1973, the New York Human Rights Law, and the case law applying the acts, provide guidance as to how the essential provisions of the ADA will impact on law enforcement employment, job criteria, and standards. One case directly involving police officers provides a clue as to such impact. Under the Rehabilitation Act, the case of *Simon v. St. Louis County, Missouri*[211] indicates the far reach of the Act to accommodate disabled individuals. In *Simon*, even a paralyzed police officer may be "otherwise qualified" and any accommodations he required might be deemed

206. 29 C.F.R. § 1630.2(n) (1993).
207. *Id.*
208. *Id.*
209. *Id.*
210. 29 C.F.R. § 1630.4 (1993).
211. 656 F.2d 316, 320 (8th Cir. 1981).

reasonable for the employer, since physical requirements for a police officer "were not in fact necessary, or were not required of all officers."[212]

Another case that involved a hearing-impaired bus driver offers a clue as to how a similarly disabled police applicant might fare under the ADA. In *Strathic v. Department of Transportation*,[213] the Third Circuit overturned the federal district court and held that a hearing requirement for a driver's license for a hard of hearing bus driver should have allowed a reasonable accommodation for him, thus allowing an otherwise qualified individual to keep his job.[214] The court cited the Rehabilitation Act and saw no problem with his wearing a hearing aid.[215]

The Rehabilitation Act reaches a relatively small segment of employers because its protection is limited to employees of federal employers, federal contractors, and recipients of federal financial aid. As a general rule, state and local police departments did not fall into these categories and so were not affected by the Rehabilitation Act. While the ADA does not pre-empt the Rehabilitation Act, it does provide vastly broader coverage to encompass

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212. *Id.* at 321. *But see* Leckelt v. Board of Comm'rs of Hospital District No. 1, 714 F. Supp. 1377 (E.D. La. Cir. 1990), *aff'd*, 909 F.2d 820 (5th Cir. 1990) (court upheld the discharge of a licensed practical nurse who refused to submit to an HIV test, holding that the perception of him as HIV-infected did not matter since he refused to submit to a test the same as other nurses in accordance with hospital policy); Copeland v. Philadelphia Police Dept., 840 F.2d 1139 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989) (court upheld the termination of a police officer who used marijuana as not violative of the Rehabilitation Act since he was not otherwise qualified to perform the job); Mahoney v. Ortiz, 645 F. Supp. 22 (S.D.N.Y. 1986) (The court upheld a police department medical standard that held ineligible a police officer applicant because he had two or more dislocations of the same shoulder. The court found no violation of the Rehabilitation Act since the medical standard was reasonable and he could not prove that he was qualified. The court found that there was a good chance that his shoulder could dislocate again under stress or otherwise during a chase or arrest, thus endangering himself, fellow officers, and others. Moreover, he had already had four or five dislocations of his right shoulder, and his own doctor thought that there was a chance of recurrence. The police department could not accommodate him because it "would interfere with the department's ability to shift manpower where most needed."); Huff v. Israel, 573 F. Supp. 107 (M.D. Ga. 1983), *vacated*, 732 F.2d 943 (11th Cir. 1984) (court held that the Rehabilitation Act did not support the disability discrimination complaint of a law enforcement employee convicted three times for driving off-duty while intoxicated because it was not his alcoholism disability that caused his dismissal but his inability to do the job as evidenced by his three convictions).

213. 716 F.2d 227 (3d Cir. 1983).

214. *Id.* at 234.

215. *Id.* at 229.

virtually all law enforcement employers.[216] Although the impact of *Simon* was limited to its facts, comparable cases brought under the ADA pose a severe threat to law enforcement employers, and, ultimately, the public.

In *Miller v. Ravitch*[217] the New York City Transit Authority had terminated an employee's probationary appointment to a supervisory position because a Transit Authority physician found that the employee was not medically qualified due to a heart condition that prevented his "excessive stair climbing."[218] The court of appeals, noting the amended Human Rights Law, however, ruled that the termination was improper even if it was assumed that an employee's heart condition prevented him from fully performing the duties of his supervisory position because he might still be able to perform in a reasonable manner.[219]

The *Miller* standard, based on criteria of performing the job in a "reasonable" rather than a perfect manner, and an individualized assessment of ability to perform rather than a generalized assessment of the applicant's or employee's medical condition, has been followed in the leading cases in New York,[220] but only sporadically in other jurisdictions.[221] Clearly, the

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216. While the Rehabilitation Act applies to recipients of federal financial assistance only, the ADA applies to employment, public services, transportation, and public accommodations, regardless of whether federal funding is received. 42 U.S.C. §§ 12111, 12131, 12141, 12181 (Supp. III 1991). Moreover, under the Rehabilitation Act, the 11th Amendment protects states that seek to invoke "sovereign immunity" from § 504 lawsuits, while the ADA specifically abrogates such 11th Amendment state immunity from suits filed under the ADA. 42 U.S.C. § 12202 (Supp. III 1991).

217. Miller v. Ravitch, 458 N.E.2d 1235 (N.Y. 1983), *on remand*, 515 N.Y.S.2d 518 (App. Div. 1987). *See also supra* note 56.

218. *Miller*, 458 N.E.2d at 1236.

219. *Id.* at 1237. The case was ultimately re-litigated on the issue of whether he could perform with a heart condition, and the court found that he could not and so he could be demoted. Miller v. Ravitch 515 N.Y.S.2d 518 (App. Div. 1987), *appeal denied*, 516 N.E.2d 1223 (N.Y. 1987).

220. Antonsen v. Ward, 571 N.E.2d 636 (N.Y. 1991); State Div. of Human Rights on the Complaint of Granelle v. City of New York, 510 N.E.2d 799 (N.Y. 1987); *but cf.* Caminiti v. New York City Transit Auth. Police Dept., 508 N.Y.S.2d 590 (N.Y. App. Div. 1986) (appellate division held that a police officer was not improperly discharged because of a disability when he could not be placed on patrol duty, which is a police officer's most important function); John B. v. Village of Rockville Centre, 495 N.Y.S.2d 674 (N.Y. App. Div. 1985), *aff'd*, 496 N.E.2d 686 (N.Y. 1985) (appellate division upheld the police commissioner's denial of permanent employee status to a probationary police officer who had received treatment for alcoholism and appeared unable to deal with stressful situations); *see also* Serrapica v. City of New York, 708 F. Supp. 64 (S.D.N.Y. 1989), *aff'd*, 888 F.2d 126 (2d Cir. 1989); Smith v. Ortiz, 517 N.Y.S.2d 352 (Sup. Ct. 1987); LaMotta v. N.Y.C. Transit Auth., 560 N.Y.S.2d 346 (App. Div. 1990); O'Hare v. N.Y.C. Police Dept., 555

ADA will have an impact even in New York with its existing and vigorously-enforced Human Rights Law. The impact will be much more significant among law enforcement employers in the rest of the country. Since the protections for the disabled under New York law closely parallel those provided under the Rehabilitation Act and the ADA, the New York experience offers insights into how the ADA will affect the law enforcement community nationally. The New York City Police Department, in particular, having lost litigation involving police applicants with spondylolisthesis (*Granelle*) and Crohn's Disease (*Antonsen*), is now seriously considering the employment of police applicants with HIV-infection, cancer, diabetes, vision problems, high blood pressure, and prior drug addiction in order to avoid further costly and prolonged litigation under the ADA and the State and City Human Rights Laws.

Similar to the New York experience under its Human Rights Laws, the law enforcement community nationally faces the very real prospect of being

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N.Y.S.2d 753 (App. Div. 1990) (police officer with a disabling leg injury that would never completely heal and would keep him from fully performing police officer duties was held to be properly dismissed); Seitz v. Suffolk County Dept. of Civil Service, 536 N.Y.S.2d 536 (App. Div. 1989); Rice v. Schuyler County Civ. Serv. Comm'n, 528 N.Y.S.2d 944 (App. Div. 1988), *appeal dismissed*, 531 N.E.2d 297 (N.Y. 1988) (police officer with a hearing problem who could not meet job-related hearing standards was held to be properly dismissed); LaMarre v. Granville Cent. School, 484 N.Y.S.2d 236 (App. Div. 1984), *appeal denied*, 478 N.E.2d 209 (N.Y. 1985).

221. *See, e.g.*, Coski v. City and County of Denver, 795 P.2d 1364 (Colo. Ct. App. 1990) (quadriplegic police officer could not be accommodated since the necessary job restructuring and work site modifications would endanger him, other police officers, and the general public); Maryland Comm'n on Human Relations v. Mayor and City Council of Baltimore, 586 A.2d 37 (Md. Ct. Spec. App. 1991), *cert. denied*, 593 A.2d 668 (Md. 1991) (court held that a mentally handicapped police officer could not be accommodated); *In re* Cahill, 585 A.2d 977 (N.J. Super. Ct. App. Div. 1991) (alcoholic firefighter could not be accommodated since several rehabilitative attempts had failed). *But see* Colorado Civil Rights Comm'n v. North Washington Fire Protection Dist., 772 P.2d 70 (Colo. 1989) (en banc) (the employer had the burden to show that no reasonable accommodation could be provided for firefighters with correctable vision and knee injuries); Brown v. City of Portland, 722 P.2d 1282 (Or. Ct. App. 1986), *review denied*, 730 P.2d 1250 (Or. 1986) (probationary police officer with knee and vision problems whose knee became inflamed after heavy exertion was still held to be capable of reasonably performing); Commonwealth of Pa. State Police v. Commonwealth of Pa. Human Relations Comm'n, 517 A.2d 1253 (Pa. 1986) (probationary police officer with only one kidney could not be summarily rejected but had to have his eligibility fully considered); and Packard v. Gordon, 537 A.2d 140 (Vt. 1987) (court held that a police officer with a hearing disability, correctable with a hearing aid, could be a "qualified handicapped individual" under Vermont law who, with "reasonable accommodation," could perform the "essential functions" of his job).

forced to hire disabled people and past drug offenders who are in fact not qualified for police employment and who actually endanger public safety. While the concept of elimination of discrimination against the disabled is a laudable goal, the ADA does not take account of the unique and special concerns of law enforcement agencies. Neither the ADA nor the EEOC interpretive regulations take cognizance of the need for police applicants not to compromise the security and integrity of police work and to have the physical strength to perform police work, particularly patrol duty.

Perhaps the foremost problem for law enforcement under the ADA is that, even though a drug addict need not be employed, a drug abuser who deems himself rehabilitated would have to first be hired conditionally as a police officer, and then the police department would have the burden of establishing that he was still abusing drugs in order to show that he was not qualified.[222] If he was temporarily not abusing drugs, he could probably

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222. Section 1630.3 of the EEOC interpretive guidelines for the ADA allows an employer to bar "individuals currently engaging in the illegal use of drugs." 56 Fed. Reg. 35,736 (1991); 29 C.F.R. § 1630.3(a) (1993). A prohibition against drug-users was upheld by the Supreme Court under Title VII, despite a disparate impact on blacks and Hispanics. New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979); *see also* Heron v. McGuire, 803 F.2d 67 (2d Cir. 1986); Tharpe v. City of Newark Police Department, 619 A.2d 228 (N.J. Super. Ct. App. Div. 1992). Current drug abusers thus have no job protection under New York state law or federal law; *see* N.Y. EXEC. L., § 292.21 (McKinney 1993); N.Y. City Human Rights Law, ADMIN. CODE § 8-102.16; *see also* 29 U.S.C. § 706(8)(C)(i) (Supp. III 1991) (as amended by § 512 of the Americans with Disabilities Act ("ADA")); 42 U.S.C. § 3602 (h) (1988); 24 C.F.R. § 100.201 (1993). However, there is a striking void in both the law and the interpretive guidelines on what constitutes the meaning of the word "currently." Thus, an individual may claim that he is not currently using drugs but that he is a "qualified individual with a disability" because he previously was a drug addict. A law enforcement employer would then have the burden of proving that the said individual was not a "qualified individual with a disability" either because he had been only a casual drug user rather than an addict or that he was a current drug user as determined by a drug test. 56 Fed. Reg. 35,752 (1991); 29 C.F.R. § 1630.16(c) (1992) (drug testing permitted). The first prospect puts the law enforcement employer in the untenable and ludicrous position of proving that a former drug user was only a casual user, while the applicant himself seeks to demonstrate that he used illegal drugs heavily enough to qualify as a drug addict. *See* Burka v. New York City Transit Auth., 680 F. Supp. 590 (S.D.N.Y. 1988) (case indicates that casual drug users cannot claim ADA protection as disabled persons from the legal consequences of their illegal drug use); *see also* Porcello v. General Motors Corp., New York State Div. of Human Rights, No. 3-E-D-85-103394 (January 18, 1990) (agency held that a "social or casual user of drugs, whether the drug of choice is alcohol or marijuana or cocaine, is not disabled within the meaning of the [New York State] Human Rights Law," although an individual who has been addicted or is perceived to be or to have been addicted to

pass a drug test and then he would have to be hired. Under the ADA, police departments could be prohibited from considering an applicant's prior drug use, and such a prohibition totally ignores the unacceptable risk to public safety posed by hiring former drug addicts.[223]

Another concern created by the ADA is that conditional offers of employment must be made to disabled persons before medical and psychological tests can be administered.[224] Thus, even people who can be determined

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drugs is covered under that law); Doe v. Roe, Inc., 539 N.Y.S.2d 876 (Sup. Ct. 1989), *aff'd*, 553 N.Y.S.2d 365 (App. Div. 1990). Such an exercise to force a job applicant to claim past drug addiction to qualify for ADA protection also raises Fifth Amendment self-incrimination problems for such an applicant when the statute of limitations may not have run for the claimed incidents of past heavy drug use. The second prospect allows a law enforcement employer to test applicants for drugs to determine current drug use. However, such tests can determine at best only whether the applicant tested had used drugs shortly prior to the test. Thus, a current drug user, claiming that he is rehabilitated or perceived by a prospective employer as a former drug addict, who uses drugs periodically rather that daily, would be able to pass such a test and become a police officer. It should be noted, though, that random drug testing has been upheld for police officers in an organized crime unit. Matter of Caruso v. Ward, 530 N.E.2d 850, 854 (N.Y. 1988). It has also been upheld for corrections officers. Matter of Seelig v. Koeler, 556 N.E.2d 125, 126 (N.Y.), cert denied 498 U.S. 847 (1990). *See* Matter of Barretto v. City of New York, N.Y.L.J., May 15, 1990 at 21, col. 3 (2d Dept. May 7, 1990) (N.Y. Supreme Court upheld the discharge of a Transit Authority police detective for evading a drug test after an automobile accident).

223. The *ADA Compliance Guide*, a monthly bulletin published about the ADA, notes that the EEOC would allow possible disqualification of a reformed drug addict on character rather than medical grounds. Even with ADA protection, a rehabilitated drug addict may be rejected as an employee by a law enforcement agency if it can show that prior illegal drug use would undermine the police officer's credibility as a witness for the prosecution of a criminal case and was thereby inconsistent with business necessity. However, even this argument is not foolproof. If the rehabilitated drug addict can demonstrate that he performed as a police officer elsewhere subsequent to his drug rehabilitation and prior to applying for a new police officer job, this disqualification strategy will not work. ADA COMPLIANCE GUIDE, April 1992, at 201 § 8.7.

224. Section 1630.13(a) of the EEOC interpretive guidelines for the ADA "makes clear that an employer cannot inquire as to whether an individual has a disability at the pre-offer stage of the selection process." 56 Fed. Reg. 35,750 (1991); 29 C.F.R. § 1630.13(b) (1992). Moreover, "[a]n employer is permitted to require post-offer medical examinations before the employee actually starts working. The employer may condition the offer of employment on the results of the examination, provided that all entering employees in the same job category are subjected to such an examination, regardless of disability, and that the confidentiality requirements specified in this part are met." 56 Fed. Reg. at 35,751. *See also* 29 C.F.R. § 1630.14(b) (1993).

from an in-person interview to be physically unfit for the job because of illness or physical or psychological disability would have to be given conditional offers of employment. The burden would shift to the law enforcement agency to show by medical or psychological tests, after an offer of conditional employment is made, that such individuals are not fit to do the job and that "reasonable accommodation" cannot be made for them because of "undue hardship" for the agency.[225] In fact, it is unclear what indicia or criteria other than the very superficial will be used to make a conditional offer of employment. The result is that large numbers of police applicants will have to be processed at prohibitive financial cost only to be ultimately disqualified. The burden on the police employer also greatly increases the likelihood of litigation for the law enforcement community from those denied employment after having received conditional offers. Such litigation would cause paralysis in the law enforcement community, making it next to impossible to hire police officers in a timely fashion to fulfill the pressing public need for more police officers, especially in the financially-pressed large urban and metropolitan areas. With current law enforcement practice, even in New York under its Human Rights Laws, police departments have the discretion to offer jobs only to those who first pass written, character, medical, psychological, and physical agility examinations.[226]

In a police department, the "essential functions" of the job are grounded in the traits expected of a police officer: good character, as manifested, in part, by the absence of a record of criminal arrests and drug use; physical strength and agility including the ability to carry a weapon and make forcible arrests; and psychological and emotional stability. It is difficult to see how

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Psychological evaluations are similarly restricted to the post-offer state. *Id.*

225. 56 Fed. Reg. at 35,730, 35,752.

226. In New York, the adaptation to the ADA has altered the police department's medical and psychological examinations so that doctors are now examining physical and mental fitness to do the job rather than disability *per se*. These "fitness" examinations are still being administered at the pre-offer stage. A successful candidate must still pass a written examination and a character investigation before he or she is offered a position as a probationary police officer. Then, the applicant must complete a very minimal physical agility requirement at the police academy to successfully complete probation. Thus far, the New York adaptation to the ADA has not been challenged in the courts. It remains to be seen whether other jurisdictions will emulate New York's effort to adapt to the ADA and whether such adaptation will survive a legal challenge. This information was obtained from interviews with Deborah L. Zoland, Managing Attorney, Legal Bureau, New York City Police Department in New York, New York (April 20, 1993), and Lt. Chris Sullivan, Research Analyst, Personnel Bureau, New York City Police Department in New York, New York (April 21, 1993). Both Ms. Zoland and Lt. Chris Sullivan are officials of the New York City Police Department who are charged with the responsibility for implementing the ADA.

a "reasonable accommodation" could be made with respect to these traits without compromising basic public safety functions.

The ADA's definition of who qualifies as disabled also presents problems for law enforcement agencies. Is a person with high blood pressure who can perform the police job with regular medication a "qualified individual" under the Act? First, it is hard to envision how a police department can hire those who, while in pursuit of a criminal, must take time out to administer high blood pressure medication. Second, it would appear that such an individual is not "substantially limited" in performing the "major life activities" such as is required for the protection of the ADA just because he or she has been declared unsuitable to be a police officer. A person with high blood pressure can still reasonably obtain other employment.

Similarly, is an individual with a back condition such as scoliosis or spondylolisthesis protected under the Act? Depending upon the severity of the condition, such an individual might be able to perform the major life activities without substantial limitation and so not be protected. On the other hand, if her condition is severe enough to make her a "qualified individual" under the ADA's protection, then she would likely be disqualified because of inability to perform the physical agility and strength requirements of the job. This ambiguity created by the ADA's definition of a "qualified individual" has significant implications for police departments, who can ill-afford to have prolonged litigation whenever they reject a police applicant and yet cannot hire those who are unable to perform the job adequately.

The promotional sequence of police recruits in law enforcement agencies is to begin their careers with training in the police academy and then progress to street work before desk jobs are allowed. This, of course, necessitates an adequate degree of physical strength and physical agility on the part of all applicants. It would be far from a reasonable accommodation to expect disabled applicants, lacking physical strength or agility, or both, or any police experience, to compensate for such shortcomings or to be given desk jobs at the start of their police careers. Desk jobs are given to experienced police officers or to those who become disabled while pursuing a criminal. Moreover, nearly 80% of law enforcement agencies in the country are small in size with no provision for specialized desk jobs; all officers are expected to perform and be available for street duty.[227] And yet it remains a distinct possibility under the ADA that desk jobs for disabled police applicants may be considered a "reasonable accommodation."

The requirements of the ADA are complicated because the law enforcement community, because of past challenges to its job criteria and physical

227. Draft letter from the International Association of Chiefs of Police (IACP) to EEOC, April 1990, in response to EEOC's publication of regulations governing the implementation of the ADA, 2.

and mental standards, especially with respect to alleged sex discrimination in employment, cannot presently come forth with job standards and criteria that can withstand a legal challenge under the ADA. Thus, the absence of court-validated or generally accepted job standards and criteria in law enforcement means that even the most obviously unfit and disabled police applicants could not be ultimately disqualified with any certainty that such disqualification would be upheld in court. This problem, while existing before the ADA under the Rehabilitation Act and state and local law, is exacerbated greatly by the ADA's sweeping application to all law enforcement agencies along with all the attendant publicity it has generated. It has been estimated by experts in the law enforcement field that the completion of a job task analysis to measure frequency and criticality of each police function is still years away from completion.[228] Until such an analysis is completed, police hiring decisions can not be supported on the basis of present job requirements and criteria.

The sequence of testing police candidates generally includes a written examination followed by medical and psychological examinations and then a character investigation. Under the ADA, all these examinations and investigations must be job-related and consistent with business necessity. In terms of the ADA, the passing of the written examination may be considered tantamount to a conditional offer of employment after which medical, psychological, and character evaluations may be used to determine whether the other conditions of employment are met. While it appears that the ADA need not alter this sequence, the larger question is whether any of these examinations and investigations can survive an eventual court challenge as being job-related or consistent with business necessity.

The focus of the ADA has been on making certain that medical examinations are not used arbitrarily against the disabled to keep them out of jobs that they are otherwise qualified to perform.[229] The irony of the ADA is that while it may make certain that medical examinations are used uniformly for all job applicants and not only the disabled, and that the criteria used to exclude applicants as a result of such medical examinations are job-

228. The New York City Police Department has been in the forefront of efforts to complete a job task analysis in order to develop job standards and criteria that can be quantified and validated as job-related through measurement of frequency and criticality of each police function. Interviews with Deborah L. Zoland, Managing Attorney of the Police Department's Legal Bureau, and Lt. Chris Sullivan, an employment specialist with the Police Department's Personnel Bureau, the Police Department's two leading officials in these efforts, conducted on April 13-16, 1993 at police headquarters in New York City, indicate that the completion of such efforts is at least three years away.

229. *See* §§ 1630.13(a) and 1630.13(b) in 56 Fed.Reg. 35,750 (1991); 29 C.F.R. §§ 1630.13(a), 1630.13(b) (1992) (pre-employment examination or inquiry).

related and consistent with business necessity, the ADA never considered whether in fact there were validated job criteria and job standards available for law enforcement agencies.

In effect, police physicians throughout the country are being called upon, as a result of the ADA, to examine police applicants, both those ostensibly fit and observably disabled, to determine whether they can perform the job without a clear indication of what the job is. Even before the establishment of validated job requirements and job criteria, police physicians are called upon to make an individualized medical assessment of the police applicant and his medical condition, evaluate the police function that the applicant is asked to perform, and determine whether his medical condition enables him to perform that function. The individualized assessment means that they cannot disqualify the applicant merely because he has a medical, physical, or mental impairment, but must determine whether such impairment prevents him from performing in a reasonable manner the job activities required. Thus, the police physician's job is no longer a medical screening *per se* but rather a physical and mental screening for ability or inability to do the job of a police officer.

The ADA has been termed a "nightmare for employers and a dream for lawyers,"[230] and nowhere is this impact more likely to prove true than in the law enforcement field. Yet even in the absence of a job task analysis and validation of job requirements there are certain things that law enforcement employers may do under the ADA, namely: (a) provide drug testing; (b) provide physical agility and physical fitness tests; and (c) question applicants closely about their ability to do the job without mentioning any disability, however obvious. While litigation will undoubtedly challenge the physical agility and physical fitness tests as not proven to be job-related, there is no reason to abolish such standards at this point. Such standards ought to be upheld because the standards are being used in good faith until the job analysis is completed. Also, the litigation challenging the standards is likely to take as long as the job task analysis.

VI. CONCLUSION

The impact of the ADA on law enforcement agencies represents a challenge yet unmet, namely, how to reconcile job rights for the disabled with proper law enforcement and public safety. There will be litigation against police departments across the country, which will undoubtedly cost the

230. *See* Thomas H. Barnand, *The Americans With Disabilities Act: Nightmare for Employers and Dream For Lawyers?*, 64 ST. JOHN'S L. REV. 229 (1990); Lawrence Lonergan, *Americans With Disabilities Act Guarantees Change*, EMPIRE STATE REPORT, March 1993, at 43.

taxpayer many millions of dollars. There will be individuals hired for police departments who will be more of a danger to themselves and their fellow officers than they are to criminals. Some drug users will undoubtedly be able to pass themselves off as drug-free and gain access to police employment. This will be the immediate impact of the ADA as awareness of the ADA grows and as police employment as a career, in a recessionary climate, becomes more attractive. With the completion of a job task analysis and the establishment of validated job standards and job criteria, the disastrous impact of the ADA on law enforcement will be somewhat alleviated in the long run. However, even then, there will be an enormous cost for the medical testing and processing of thousands of people who will ultimately be disqualified. Clearly, this burden imposed on law enforcement agencies by the ADA is an extensive one, considering that there was very little attention given to state and local law enforcement when the ADA was passed while exemptions were provided for the Federal Bureau of Investigation and the Drug Enforcement Administration.[231]

231. *See supra* note 12. Since the Rehabilitation Act applied to state and local governments which were recipients of federal financial aid while exempting the F.B.I. and D.E.A., the passage of the ADA followed the same pattern with little public debate about the rationality of such an arrangement.