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911: HOW WILL POLICE AND FIRE DEPARTMENTS RESPOND TO PUBLIC SAFETY NEEDS AND THE AMERICANS WITH DISABILITIES ACT?*

*Dawn V. Martin***

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* I dedicate this article first to the memory of my father, Alfonzo Quinto Martin, who served as a New York City police officer from 1957 to 1958, and as a firefighter from 1958 to 1970. He was medically retired due to several disabilities. My father taught me to understand the tremendous responsibility entrusted to police officers and firefighters and to appreciate those persons who selflessly live up to it. Second, I dedicate this article to those persons who struggle to be recognized for their abilities, rather than their disabilities. I am privileged to know some outstanding individuals who excel in this endeavor. Finally, I thank Cleveland-Marshall College of Law, Howard University School of Law, and my research assistants, Freda Wallace, Suzanne Peters, Coretta Taylor, Osa Benson, Cherelle Tolor, and Shannon Shumpert, for their support of and contributions to this article.

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I

INTRODUCTION

A. *The ADA Dilemma*

A person with diabetes applies for a position as a police officer. A firefighter applicant has only one eye. A corrections officer has a disability which prevents him from running. A police officer tests HIV positive. A firefighter develops tuberculosis. What's a city to do?

These are just a few examples of the questions facing law enforcement agencies, fire departments, and other public safety employers after the passage of the Americans with Disabilities Act of 1990 (the "ADA").¹ Their answers to these questions could drastically change the structure of police and fire departments and the services they provide. What is the future of the response to 911?

The answers to these questions depend upon whether police and fire departments can continue to use physical hiring criteria which screen out persons with disabilities for "sworn" or "uniformed" positions.² If cities reject persons with diabetes, monocular vision, missing limbs, or AIDS for positions as police officers or firefighters, do they violate the ADA? If they hire such persons, do they endanger the public?

Commentators from opposite ends of a continuum have offered their opinions. On one end, a disability rights advocate argues that the ADA requires that persons with disabilities be hired as police officers even if they admittedly cannot perform as full-duty police officers.³ This commentator argues that such persons should be permanently assigned to only non-contact, non-hazardous "desk" duties.⁴ At the other end, counsel for a police department questions whether law enforcement agencies should be subject to the ADA, or granted an exemption, as were the major federal law enforcement agencies.⁵

[T]he law enforcement community nationally faces the very real prospect of being 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 elimina-

1. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101-12213 (1994).

2. "Sworn" or "uniformed" personnel are distinguished from civilian employees of police or fire departments. Most police and fire departments employ civilians in addition to sworn members. These civilians are in positions which do not require the physical ability to affect arrests or to rescue others from danger. These positions primarily involve office work. Nothing prohibits a person with a disability who cannot physically qualify as a police officer or firefighter from applying for civilian positions in police or fire departments. *See EEOC v. Massachusetts*, 864 F.2d 933, 937 (1st Cir. 1988) (noting that state legislature created civilian examiner position to allow sworn members to go back to patrol assignments).

3. *See* Ellen M. Saideman, *The ADA as a Tool for Advocacy: A Strategy for Fighting Employment Discrimination Against People with Disabilities*, 8 J.L. & HEALTH 47, 61-63 (1993-94) (discussing litigation standards and hiring criteria for police officers with disabilities).

4. *Id.* at 62-63.

5. *See* Martin Schiff, *The Americans with Disabilities Act, its Antecedents, and its Impact on Law Enforcement Employment*, 58 MO. L. REV. 869 (1993) (arguing that law enforcement agencies, because of their unique character, should not be subject to ADA).

tion 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 [consider the physical strength, mobility, and vision necessary to perform police work effectively, especially patrol work].⁶

There will be litigation against police departments across the country, which will undoubtedly cost the taxpayers 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. . . . Clearly, this burden imposed upon 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.⁷

The answer offered by the disability rights advocate fails to meet public safety needs. It would essentially reduce the “officer’s” duties to those of a civilian clerical worker, while paying this employee the larger salary of a police officer. In addition, since this employee would fill the “slot” of a full-duty officer, the number of full-duty officers available to protect the public would be decreased.

The solution offered by the police department counsel would allow for the unnecessary exclusion of persons with minor disabilities, or even perceived disabilities, which would not affect performance in sworn positions. Although the argument for a law enforcement exemption is compelling in many respects, it would leave the door open for law enforcement agencies to develop and maintain job criteria that may be based on antiquated, stereotyped presumptions that could not be shown to be job-related if challenged. Furthermore, other employers could argue similarly for exemptions because the positions in question require physical abilities for the safe and efficient performance of a job which affects public safety. Such positions might include firefighter, private security guard, airline pilot, flight attendant, bus driver, taxi driver, truck driver, train engineer, doctor, nurse, hos-

6. *Id.* at 899-900.

7. *Id.* at 905-06; see Martin Schiff, *The Age Discrimination in Employment Act: Whither the Bona Fide Occupational Qualification and Law Enforcement Exemptions?*, 67 ST. JOHN’S L. REV. 13 (1993), for a similar criticism of the inconsistency between providing an ADEA exemption for federal law enforcement officers while extending coverage to state and local law enforcement agencies. Schiff states that “[a]lthough there is an absence of logic in justifying an exemption based solely on whether a law enforcement officer or firefighter is classified as federal as opposed to state or local, that is the current status of the law.” *Id.* at 21.

pital orderly, pre-school teacher or assistant, construction worker, or electrical worker. Should they all be exempt? If so, why not exempt other positions involving physical tasks?

The language and legislative history of the ADA show that Congress considered the competing interests involved in the passage of the ADA. The ADA does not mandate jeopardizing public safety, dismantling the structure of police and fire departments, or putting police officers and firefighters on the street who cannot be relied upon to perform their jobs in emergency, life-threatening situations; nor is it necessary to grant police and fire departments “absolute” discretion to simply presume that all persons with a particular disability, whether real or perceived, are unable to perform in those positions.

The ADA was drafted in a manner which, if applied in accordance with equal employment law precedent and a realistic understanding of the job in question, will answer the legitimate interests of both persons with disabilities and the public. Title I of the ADA, regulating employment,⁸ was intended to reasonably accommodate individuals with disabilities in positions for which they qualify—that is, such individuals must be able to perform the essential functions of the job.⁹ The ADA was not intended to prevent employers from maintaining physical requirements which are reasonably related to the safe and efficient performance of the job,¹⁰ particularly in public safety positions, such as those occupied by police officers and firefighters.¹¹ In those positions, the ability to perform a particular job function may mean the difference between life and death.

Courts have acknowledged the special needs of public safety positions under all previously enacted employment discrimination statutes, including Title VII of the Civil Rights Act of 1964,¹² the Age

8. See Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12111-12117 (1994).

9. See *id.* § 12111(8).

10. See H.R. REP. NO. 101-485, pt. 3, at 43-45 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 325-27.

11. See *id.* at 93.

12. Civil Rights Act of 1964, 42 U.S.C. § 2000(e)(1)-(e)(17) (1994). See, e.g., *Zamlen v. City of Cleveland*, 906 F.2d 209 (6th Cir. 1990) (holding that firefighter qualifying exam did not discriminate against female applicants because certain physical abilities are needed to ensure public safety); *Levin v. Delta Airlines, Inc.*, 730 F.2d 994 (5th Cir. 1984) (holding non-pregnancy to be bona fide occupational qualification for flight attendants because of potential safety risk to passengers in event of accident); *Tye v. City of Cincinnati*, 794 F. Supp. 824 (S.D. Ohio 1992) (holding that City's hiring process for firefighters did not have discriminatory effect because of potential public safety risk resulting from hiring incompetent firefighters).

Discrimination in Employment Act (ADEA),¹³ and Section 504 of the Rehabilitation Act of 1973.¹⁴ Since the ADA was modeled after the Rehabilitation Act, cases decided under the latter Act should serve as precedent for ADA cases.¹⁵ Congress specifically recognized the special needs of public safety employers when enacting the ADA¹⁶ and directed the courts to use the case law decided under the Rehabilitation Act when deciding whether job criteria are job-related and consistent with business necessity.¹⁷ Since these concepts were developed under Title VII case law, guidance for this standard can also be found in cases brought under Title VII.¹⁸

Misapplication of the ADA in public safety cases will not only endanger the public, but will also create fear of and hostility toward the ADA. This hostility may well result in amendments or case law which will diminish opportunities for people with disabilities. The hiring decisions made by police and fire departments, and the legal analyses used by courts in reviewing those decisions, will affect all groups of people in one way or another. Affected persons fall into six

13. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994); *see, e.g.*, *Western Airlines, Inc. v. Criswell*, 472 U.S. 400 (1985) (holding that age-based qualification is justified only if qualification is “reasonably necessary” to ensure public safety); *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982) (holding that age-based qualifications in correctional facility are bona fide occupational qualifications (BFOQ) to ensure safety); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) (holding that bus company’s policy of refusing applicants over forty years old was BFOQ reasonably necessary to ensure public safety).

14. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (1994).

15. *See* H.R. REP. NO. 101-485, pt. 3, at 27-33, *reprinted in* 1978 U.S.C.C.A.N. 267, 308-15; 29 C.F.R. § 1630 (1998); *see, e.g.*, *Daugherty v. City of El Paso*, 56 F.3d 695, 697 (5th Cir. 1995) (explaining that elements of cause of action under ADA are “virtually the same” as those under Rehabilitation Act); *Smaw v. Virginia Dep’t of State Police*, 862 F. Supp. 1469, 1474 (E.D. Va. 1994) (explaining that ADA incorporates language and standards of Rehabilitation Act); *Dorris v. City of Kentwood*, No. 1:94-CV-249, 1994 WL 762219, at *2 (W.D. Mich. Oct. 4, 1994) (explaining that relevant case law developed under Rehabilitation Act should be used to analyze ADA claims). For the EEOC definition of “disability,” *see* 29 C.F.R. § 1630.2(g).

16. *See* H.R. REP. NO. 101-485, pt. 3 at 42-44, *reprinted in* 1990 U.S.C.C.A.N. 267, 324-26.

17. *See* H.R. REP. NO. 101-485, pt. 2, at 70-73, *reprinted in* 1990 U.S.C.C.A.N. 267, 352-56; H.R. REP. NO. 101-485, pt. 3, at 44-45, *reprinted in* 1990 U.S.C.C.A.N. 267, 326-27; *see also* *Easley v. Snider*, 36 F.3d 297, 305 (3d Cir. 1994); *Stillwell v. Kansas City Bd. of Police Comm’rs*, 872 F. Supp. 682, 686-87 (W.D. Mo. 1995); *Conner v. Branstad*, 839 F. Supp. 1346, 1357 (S.D. Iowa 1993); *Medical Soc’y v. Jacobs*, No. Civ. A. 93-3670, 1993 WL 413016, at *6 (D.N.J. Oct. 5, 1993); *EEOC v. AIC Sec. Investigations, Ltd.*, 820 F. Supp. 1060, 1064 (N.D. Ill. 1993).

18. *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 4.3(2), at IV-3 to IV-4 (1992) [hereinafter EEOC TECHNICAL ASSISTANCE MANUAL].

basic groups: (1) individual plaintiffs with disabilities seeking to become or remain police officers or firefighters; (2) members of the public who depend upon police and fire departments to protect them from injury—and pay taxes to finance this protection; (3) police and fire departments, which are obligated to protect those members of the public as well as their own personnel; (4) police officers and firefighters without disabilities; (5) senior police officers and firefighters currently on “limited duty” status due to temporary or long-term disabilities; and (6) the disability community at large. Any policy developed will have economic, social, political, or practical ramifications for all of these groups. Therefore, their interests must be factored into a final analysis of the problems facing public safety employers in their attempts to meet public safety needs and comply with the ADA.

B. Rehabilitation Act Coverage of Police and Fire Departments

Most police and fire departments have been subject to the Rehabilitation Act since 1973,¹⁹ and persons with disabilities sued under this Act to become police officers and firefighters long before the ADA was enacted.²⁰ Arguably, then, the ADA should not substan-

19. 29 U.S.C. § 794 (1994).

20. See *Thomlinson v. Omaha*, 63 F.3d 786 (8th Cir. 1995) (concerning female firefighter with back impairment); *Paegle v. Department of Interior*, No. 93-5112, 1994 WL 245607 (D.C. Cir. May 26, 1994) (concerning park police officer with back impairment); *Cook v. Rhode Island Dep't of Mental Health, Retardation and Hosps.*, 10 F.3d 17 (1st Cir. 1993) (concerning obese firefighter applicant); *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993) (concerning city employees with insulin-dependent diabetes and impaired vision); *Little v. FBI*, 1 F.3d 255 (4th Cir. 1993) (concerning FBI agent with alcoholism); *DiPompo v. West Point Military Academy*, 960 F.2d 326 (2d Cir. 1992) (concerning firefighter applicant with dyslexia); *Severino v. North Fort Meyers Fire Control Dist.*, 935 F.2d 1179 (11th Cir. 1991) (concerning firefighter with AIDS); *Butler v. Thornburgh*, 900 F.2d 871 (5th Cir. 1990) (concerning alcoholic FBI agent); *Simon v. St. Louis County*, 735 F.2d 1082 (8th Cir. 1984) (concerning paraplegic police officer); *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983) (concerning seasonal park technician with heart condition); *Roe v. District of Columbia*, 842 F. Supp. 563 (D.D.C. 1993) (concerning firefighter with hepatitis B), *vacated as moot*, 25 F.3d 1115 (D.C. Cir. 1994) (unpublished table decision); *Doe v. District of Columbia*, 796 F. Supp. 559 (D.D.C. 1992) (concerning HIV-positive firefighter applicant); *Peoples v. City of Salina*, No. 88-4280-S, 1990 U.S. Dist. LEXIS 4070 (D. Kan. Mar. 20, 1990) (concerning firefighter with sickle-cell anemia); *Salmon Pineiro v. Lehman*, 653 F. Supp. 483 (D.P.R. 1987) (concerning INS agent with epilepsy); *Mahoney v. Ortiz*, 645 F. Supp. 22 (S.D.N.Y. 1986) (concerning police officer with multiple dislocations of the shoulder). The Rehabilitation Act continues to apply to police and fire departments even after the passage of the ADA. See *Andrews v. Ohio*, 104 F.3d 803 (6th Cir. 1997) (holding overweight highway patrol officers were not persons with disabilities); *Huber v. Howard County*, No. 94-1651, 1995 WL 325644 (4th Cir. May 24, 1995) (firefighter applicant with asthma); *Fedro v. Reno*, 21 F.3d 1391 (7th Cir. 1994) (concerning federal marshal with hepatitis B); *Santos v. Port Auth.*, No. 94 Civ. 8427, 1995 WL 431336 (S.D.N.Y. July 20, 1995) (concerning

tially change the basic hiring criteria which have been deemed appropriate under the Rehabilitation Act; nevertheless, courts have begun to render decisions under the ADA which require police and fire departments to ask questions that, arguably, have already been answered under the Rehabilitation Act. For example, in *Bombrys v. City of Toledo*, the court held that, under the ADA, the City of Toledo could not bar insulin-dependent diabetics from becoming police officers.²¹ This decision stands in opposition to precedent set under the Rehabilitation Act in *Davis v. Meese*, which upheld the blanket exclusion of insulin-dependent diabetics from positions as FBI agents.²² Some courts have followed *Bombrys*,²³ while others continue to follow the Rehabilitation Act model in ADA cases by excluding insulin-dependent diabetics as “unqualified” to perform the essential functions of certain positions involving public safety.²⁴

police officer with permanently injured foot); *Lassiter v. Reno*, 885 F. Supp. 869 (E.D. Va. 1995) (concerning U.S. Marshal with paranoid personality disorder), *aff'd*, 86 F.3d 1151 (4th Cir. 1996).

21. See 849 F. Supp. 1210, 1220 (N.D. Ohio 1993); *accord Sarsycki v. United Parcel Service, Inc.*, 862 F. Supp. 336, 341 (W.D. Okla. 1994) (holding that UPS discriminated against diabetic driver who was “otherwise qualified” to drive vehicles weighing 10,000 pounds or less). The court, however, held that Officer Bombrys could be terminated pursuant to an individual determination that he was not fit for duty, based on a hypoglycemic episode which he had while on duty. See *Bombrys*, 849 F. Supp. at 1220. He became confused and combative and had to be administered an intravenous solution and transported to the hospital. See *id.*; see also *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666 (7th Cir. 1995) (rejecting blanket exclusion, but holding that plaintiff police officer was properly terminated for failure to monitor his diabetes, which resulted in severe diabetic reaction while driving his squad car).

22. See 692 F. Supp. 505, 517 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989); *accord Chandler v. City of Dallas*, 2 F.3d 1385, 1393-95 (5th Cir. 1993) (granting blanket exclusion of insulin-dependent diabetic from position of driver); *Serrapica v. City of New York*, 708 F. Supp. 64, 75 (S.D.N.Y. 1989) (holding that sanitation worker with uncontrolled diabetes could not perform essential functions of the job because he posed a safety risk), *aff'd*, 888 F.2d 126 (2d Cir. 1989).

23. See *Siefken*, 65 F.3d at 666; *Stillwell*, 872 F. Supp. at 686-87; *Sarsycki*, 862 F. Supp. at 341.

24. See *Daugherty v. City of El Paso*, 56 F.3d 695, 697 (5th Cir. 1995) (holding insulin-dependent diabetics are not “qualified” individuals for position of bus driver, pursuant to Department of Transportation regulation); *Christopher v. Laidlaw Transit*, 899 F. Supp. 1224, 1227-28 (S.D.N.Y. 1995) (holding school bus driver properly terminated under United States Department of Transportation and New York State regulations excluding insulin-dependent diabetics from driving such vehicles).

C. *Survey of Police and Fire Department Cases
Involving Disabilities*

1. *ADA Cases*

ADA decisions are extremely fact-specific. In addition to diabetes cases,²⁵ courts have examined the requirements of police and fire departments for employment of sworn, or “rescue,” personnel with disabilities such as heart disease,²⁶ a lung impairment,²⁷ cerebral palsy,²⁸ hemophilia,²⁹ HIV infection,³⁰ lost use of an arm,³¹ an impaired or missing leg,³² an impaired ankle,³³ an impaired foot,³⁴ a

25. See *Deckert v. City of Ulysses*, No. 93-1295, 1995 WL 580074 (D. Kan. Sept 6, 1995), *aff'd*, 105 F.3d 669 (10th Cir. 1996) (unpublished table decision); *Daugherty*, 56 F.3d at 695; *Christopher*, 899 F. Supp. at 1224; *Siefken*, 65 F.3d at 664; *Bombrys*, 849 F. Supp. at 1210.

26. See *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1318-20 (8th Cir. 1996) (holding that security guard’s heart condition did not constitute disability because it did not exclude him from broad range of jobs); *Kuntz v. City of New Haven*, No. Civ. N-90-480, 1993 WL 276945 (D. Conn. 1993) (declaring that police sergeant should not have been denied promotion to lieutenant since he already performed most duties of lieutenant in his current position and there were other lieutenants on force who had heart conditions), *aff'd*, 29 F.3d 622 (2d Cir. 1994) (unpublished table decision); *Hamlin v. Charter Township of Flint*, 942 F. Supp. 1129 (E.D. Mich. 1996) (holding that Assistant Fire Chief’s claim survived motion to dismiss to determine whether he could perform essential functions of job); *McDonald v. Department of Corrections*, 880 F. Supp. 1416 (D. Kan. 1995) (holding that corrections officer was not “qualified” within meaning of ADA because officer could only perform “light duty” jobs).

27. See *Smith v. City of Des Moines*, 99 F.3d 1466, 1472 (8th Cir. 1996) (citing that firefighter was not person with disability, or “regarded as” such, since firefighter was not disqualified from, or regarded as disqualified from, broad range of jobs).

28. See *Koblosh v. Adelsick*, No. 95-C-5209, 1996 U.S. Dist. LEXIS 17254 (N.D. Ill. November 27, 1996) (denying motion for summary judgment since defendant, applicant for security guard position who could only walk with braces and on crutches, might be able to prove at trial that he is qualified for position).

29. See *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996) (stating that firefighter applicant did not have disability, nor was “regarded as” having disability merely because firefighter was excluded from police work).

30. See *EEOC v. Prevo’s Family Market, Inc.*, 135 F.3d 1089 (6th Cir. 1998) (reversing district court’s holding that HIV-positive produce clerk was qualified individual with disability and had to be accommodated by allowing clerk to use his own set of knives and steel protective gloves).

31. See *Champ v. Baltimore County*, 884 F. Supp. 991 (D. Md. 1995) (holding that police officer who lost use of his arm was not “otherwise qualified” for the position because officer could not make forcible arrests), *aff'd*, 91 F.3d 129 (4th Cir. 1996); *Ethridge v. Alabama*, 860 F. Supp. 808 (M.D. Ala. 1994) (holding that police officer with restricted use of right arm and hand could not perform essential functions of job).

32. See *Johnson v. Maryland*, 940 F. Supp. 873 (D. Md. 1996) (holding that corrections officer with neuromuscular disorder that caused a limp and hand tremors was not “otherwise qualified” because officer could not perform the essential function of safely using firearm to control prison population), *aff'd*, 113 F.3d 1232 (4th Cir. 1997) (unpublished table decision); *Bell v. Retirement Board of the Firemen’s Annu-*

missing or impaired hand,³⁵ degenerative joint disease,³⁶ arthritis,³⁷ a head injury,³⁸ a back injury,³⁹ a neck injury,⁴⁰ blindness,⁴¹ impaired vision,⁴² deafness in one ear,⁴³ abdominal ruptures and vein liga-

ity, No. 92-C-5197, 1993 WL 398612 (N.D. Ill. Oct 6, 1993) (denying motion to dismiss for lack of factual finding whether medically retired police officer with partially amputated leg could be reasonably accommodated and return to force).

33. *See Conklin v. City of Englewood*, 98 F.3d 1341 (6th Cir. 1996) (unpublished table decision) (affirming lower court holding that police officer with injured ankle could no longer perform essential functions of job; reassignment to dispatcher, at police officer's salary, would not be reasonable accommodation since police officer's salary was nearly twice that of dispatcher).

34. *See Santos v. Port Auth.*, No. 94 Civ. 8427, 1995 WL 431336 (S.D.N.Y. July 20, 1995) (holding that police officer with permanent foot injury was not "qualified" as full-duty police officer and could not be accommodated through permanent light-duty assignment).

35. *See Lee v. City of Aurora*, 76 F.3d 392 (10th Cir. 1996) (unpublished table decision) (affirming jury determination that police officer with injured hand could no longer perform essential functions of job); *Pinkerton v. City of Tampa*, 981 F. Supp. 1455 (M.D. Fla. 1997) (denying summary judgment because issues of fact remained about whether policeman with immobile hand was disabled and could be accommodated); *Stillwell v. Kansas City Bd. of Police Comm'rs*, 872 F. Supp. 682 (W.D. Mo. 1995) (holding applicant for police officer was entitled to individual determination regarding ability to perform essential functions of job with only one hand).

36. *See Dorris v. City of Kentwood*, No. 1:94-CV-249, 1994 WL 762219 (W.D. Mich. Oct. 4, 1994) (denying summary judgment where plaintiff police officer sought waiver of national policy physical requirements in order to continue as police officer in officer's assignment of teaching drug abuse resistance to elementary and junior high school students).

37. *See Martin v. Kansas*, 996 F. Supp. 1282 (D. Kan. 1998) (holding that corrections officer with arthritis was not qualified for position since permanent "light duty" assignment is not reasonable accommodation).

38. *See Vazquez v. Bedsole*, 888 F. Supp. 727 (E.D.N.C. 1995) (denying motion for summary judgment to determine whether reassignment would be reasonable accommodation).

39. *See Keever v. City of Middletown*, 145 F.3d 809 (6th Cir. 1998) (holding that police officer with back and neck impairments and mental disabilities refused desk job and was not entitled to position and schedule of officer's choice as reasonable accommodation); *see also Allison v. Department of Corrections*, 94 F.3d 494 (8th Cir. 1996), *petition for cert. filed*, 67 U.S.L.W. 3156 (U.S. Aug. 27, 1998) (No. 98-345) (holding that corrections officer with back injury was no longer qualified to perform essential functions of job); *Serrano v. City of Arlington*, 986 F. Supp. 992 (E.D. Va. 1997) (holding that firefighter with back problem was not person with disability since firefighter could perform work other than firefighting, nor was firefighter "qualified" since he could not perform essential functions of job).

40. *See Burns v. City of Columbus Dep't of Public Safety*, 91 F.3d 836 (6th Cir. 1996) (holding that police officer who was terminated for other reasons failed to show that termination was result of neck injury).

41. *See Miller v. Illinois Dep't of Corrections*, 107 F.3d 483 (7th Cir. 1997) (holding that corrections officer who became blind and required a seeing-eye dog was not qualified within meaning of ADA).

42. *See Sicard v. City of Sioux City*, 950 F. Supp. 1420 (N.D. Iowa 1996) (denying defendant's motion to dismiss because firefighter with myopia raised material issue of fact as to whether uncorrected vision constituted disability); *see also Doane v. City of*

tions,⁴⁴ mental disabilities,⁴⁵ depression,⁴⁶ paraplegia,⁴⁷ inability to

Omaha, 115 F.3d 624 (8th Cir. 1997) (holding that officer with monocular vision was entitled to ADA protection), *cert. denied*, 118 S.Ct. 693 (1998); *Holbrook v. City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997) (holding that police detective who was visually impaired could not perform essential job functions). *But cf.* *Sutton v. United Airlines, Inc.*, No. 96-5-121, 1996 U.S. Dist. LEXIS 15106 (D. Colo. Aug. 28, 1996) (holding that uncorrected vision of less than 20/100 did not constitute disability, because even though it prevented plaintiffs from becoming airline pilots for at least one airline, it did not do so at all airlines), *aff'd*, 130 F.3d 893 (10th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3783 (U.S. June 1, 1998) (No. 97-1943); *Joyce v. Suffolk County*, 911 F. Supp. 92 (E.D.N.Y. 1996) (dismissing complaint because 20/200 vision is not a disability within the meaning of the ADA).

43. *See Karbusicky v. City of Park Ridge*, 950 F. Supp. 878 (N.D. Ill. 1997) (granting summary judgment against park police officer with congenital total hearing loss in left ear who could not hear all radio calls over outside noise; officer was not qualified for such a position, and transfer to community service officer position was reasonable accommodation).

44. *See Kulnieszewski v. Swist*, No. 94-CV-0806E(F), 1998 WL 135815 (W.D.N.Y. Mar. 16, 1998) (granting summary judgment to transit authority because abdominal ruptures and vein ligations are not disabilities within meaning of ADA).

45. *See Keever v. City of Middletown*, 145 F.3d 809 (6th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3156 (U.S. Aug. 27, 1998) (No. 98-345) (holding that police officer with back and neck impairments and mental disabilities who refused desk job was not entitled to position and schedule of officer's choice as a reasonable accommodation); *see also Graehling v. Village of Lombard*, 58 F.3d 295 (7th Cir. 1995) (holding that alcoholic police officer with manic depression was not otherwise qualified for the position); *Carrozza v. Howard County*, 45 F.3d 425 (4th Cir. 1995) (unpublished table decision) (affirming district court holding that plaintiff with manic depression was not "otherwise qualified" because she was frequently insubordinate); *Dibenedetto v. City of Reading*, No. Civ. 96-CV-5055, 1998 WL 474145 (E.D. Pa. July 16, 1998) (holding that former police officer with psychological disorders was entitled to jury determination of whether officer was qualified for rehire); *Metzenbaum v. John Carroll Univ.*, 987 F. Supp. 610 (N.D. Ohio 1997) (mem.) (granting summary judgment against campus police officer who could not prove he was qualified for position without providing required psychological records); *Varnagis v. City of Chicago*, No. 96 C 6304, 1997 WL 361150 (N.D. Ill. June 20, 1997) (denying defendant's motion to dismiss because fitness could not be adjudicated on motion); *Hindman v. GTE Data Servs., Inc.*, No. 93-1046-CIV-T-17C 1994 WL 371396 (M.D. Fla. June 24, 1994) (holding that plaintiff posed direct threat to other employees because plaintiff brought weapon onto company property).

46. *See Leisen v. City of Shelbyville*, 153 F.3d 805 (7th Cir. 1998) (holding that firefighter suffering from depression neither had a disability because she successfully completed courses other than the one from which she sought exemption, nor was qualified for the position because the course was related to an essential function of the job); *see also Miller v. City of Springfield*, 146 F.3d 612 (8th Cir. 1998) (holding that police officer suffering from depression was not disabled because she could work at other positions); *Doe v. Seymour*, No. 3:95CV1538, 1998 WL 26410 (D. Conn. Jan. 16, 1998) (holding that police officer could not be accommodated by scheduling of officer to work hours which violated the collective bargaining agreement).

47. *See Stone v. City of Mt. Vernon*, 118 F.3d 92 (2d Cir. 1997), *cert. denied*, 118 S.Ct. 1044 (1998) (holding that City had not proven that fire suppression was required part of firefighter duties).

stand,⁴⁸ stress,⁴⁹ chronic fatigue syndrome,⁵⁰ alcoholism,⁵¹ drug addiction,⁵² obesity,⁵³ sleep disorder,⁵⁴ various disabilities of police officers who had temporarily been placed on limited duty positions, then medically retired,⁵⁵ and various police officers with disabilities who

48. See *Clark v. City of Chicago*, No. 97-C-4820, 1998 WL 25760 (N.D. Ill. Jan. 12, 1998) (holding that it is jury question whether police officer confined to wheelchair can be reasonably accommodated by assignment to permanent "light duty").

49. See *Dewitt v. Carsten*, 941 F. Supp. 1232 (N.D. Ga. 1996), *aff'd*, 122 F.3d 1079 (11th Cir. 1997) (holding that police officer with job-related stress did not have disability since officer could work at other jobs that would not trigger her condition).

50. See *Gonzales v. Sandoval County*, 2 F. Supp.2d 1442, 1444-45 (D.N.M. 1998) (holding that police department was not required by business necessity to inquire into chronic fatigue syndrome of police officer).

51. See *Brennan v. New York City Police Dep't*, 141 F.3d 1151 (2d Cir. 1998) (unpublished table decision) (affirming district court holding that alcoholic police officer was not qualified for position because of carelessness with his weapon, which was unrelated to officer's disability of alcoholism).

52. See *Montegue v. City of New Orleans*, No. Civ.-A-95-2420, 1997 WL 327113 (E.D. La. June 12, 1997) (denying plaintiff's motion for judgment as matter of law where jury found that firefighter had not shown by preponderance of evidence that he was an addict and therefore disabled under ADA); see also *Herman v. City of Allentown*, 985 F. Supp. 569 (E.D. Pa. 1997) (holding that City discriminated against firefighter it erroneously "perceived as" using illegal drugs); *Dauen v. Board of Fire and Police Comm'rs*, 656 N.E.2d 427 (Ill. App. Ct. 1995) (holding that firefighter was not protected by ADA because he was not rehabilitated at time of termination).

53. See *Zarek v. Argonne Nat'l Lab.*, No. 97 C 6964, 1998 WL 547288 (N.D. Ill. Aug. 27, 1998) (mem.) (holding that overweight firefighter neither had disability nor was qualified for position); see also *Keel v. City of Hopkinsville*, 134 F.3d 371 (6th Cir. 1997) (unpublished table decision) (holding that overweight firefighter with sleep disorder could not be accommodated by being excused from twenty-four hour shifts); *Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997) (holding that overweight firefighter does not have disability); *Butterfield v. New York*, No. 96-Civ.-5144, 1998 WL 401533 (S.D.N.Y. July 15, 1998) (holding that obese corrections officer was not person with disability because officer was not substantially limited in major life activity); *Andrews v. Ohio*, 104 F.3d 803 (6th Cir. 1997) (holding that highway patrol officers who did not have physiological disorder were not perceived to be disabled by defendants under ADA simply because they were physically unqualified for these positions); *Smaw v. Virginia Dep't of State Police*, 862 F. Supp. 1469 (E.D. Va. 1994) (holding that obesity, even if physical impairment, did not rise to level of disability because it did not substantially limit plaintiff's ability to pursue employment; therefore upheld plaintiff's transfer from trooper to dispatcher).

54. See *Keel*, 134 F.3d 371.

55. See *Fasone v. Clinton Township*, 142 F.3d 433 (6th Cir. 1998) (holding that firefighter with disability was not entitled to have light-duty position created for him as reasonable accommodation); *United States v. City and County of Denver*, 943 F. Supp. 1304 (D. Colo. 1996) (holding that, although plaintiffs could not perform essential functions of police officer, ADA goes beyond Rehabilitation Act and requires consideration of reassignment to vacant, civilian positions). *But see* *Castellano v. City of New York*, 946 F. Supp. 249 (S.D.N.Y. 1996) (holding that medically retired police officers were not "qualified" within meaning of ADA, and therefore not protected by Act); *Emrick v. Libby-Owens-Ford Co.*, 875 F. Supp. 393 (E.D. Tex. 1995)

were retained on the force, but denied promotions.⁵⁶ In the *Colwell* case, the United States Department of Justice prevailed in arguing that the police department was obligated to consider reassignment to civilian positions as a “reasonable accommodation.”⁵⁷ The Department of Justice is currently litigating *United States v. City of Pontiac*, brought against a fire department which rejected an applicant with monocular vision.⁵⁸ The position taken by the government in this case may well indicate its future approach to similar challenges under the ADA.⁵⁹

2. *Rehabilitation Act Cases*

Public safety cases decided under the Rehabilitation Act have involved disabilities such as insulin-dependent diabetes (as discussed),⁶⁰ paraplegia,⁶¹ tuberculosis,⁶² hepatitis B,⁶³ AIDS/HIV infection,⁶⁴ a head injury,⁶⁵ heart disease and a nervous condition,⁶⁶ epilepsy,⁶⁷

(holding that ADA is not intended to give persons with disabilities preferential treatment).

56. See *Colwell v. Suffolk County*, 967 F. Supp. 1419 (E.D.N.Y. 1997).

57. See *id.* at 1430.

58. See *United States v. City of Pontiac*, No. 94-74997 (E.D. Mich. filed Dec. 12, 1994) (involving applicant with vision in only one eye seeking to become firefighter). For additional explanation of this case, see *infra* note 498.

59. Although this case was scheduled for trial in July, 1996, it was settled by consent decree. See *infra* note 498.

60. See *supra* note 25; *Chandler v. City of Dallas*, 2 F.3d 1385, 1390-96 (6th Cir. 1993) (declining to hold that any insulin-dependent diabetic has a disability per se).

61. See *Simon v. St. Louis County*, 735 F.2d 1082, 1084 (8th Cir. 1984) (holding that paraplegic plaintiff could not satisfy burden of proving he was otherwise qualified to become police officer).

62. See *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

63. See *Roe v. District of Columbia*, 25 F.3d 1115 (D.C. Cir. 1994) (involving firefighter with hepatitis B who could not be required to use protective mechanical device when performing mouth to mouth resuscitation); *Fedro v. Reno*, 21 F.3d 1391 (7th Cir. 1994) (holding that criminal investigator could not perform essential functions of job because of risk that physical confrontation might occur where investigator's blood might mix with that of others).

64. See *Severino v. North Fort Meyers Fire Control Dist.*, 935 F.2d 1179 (11th Cir. 1991) (involving firefighter with AIDS who was temporarily reassigned to “light duty” rather than rescue duties because he posed threat of contagion; firefighter was subsequently fired for objecting to performing his light-duty assignment). *But see Doe v. District of Columbia*, 796 F. Supp. 559 (D.D.C. 1992) (holding that any threat to others posed by HIV-positive firefighter applicant was “theoretical” and “remote”).

65. See *Beal v. Board of Selectmen*, 646 N.E.2d 131 (Mass. 1995) (holding police officer who suffered fatigue and blackouts could not perform essential function of protecting public).

66. See *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983) (finding that plaintiff could not perform duties of seasonal park technician because it required walking six hours per day and plaintiff could not walk more than one mile at a time).

sickle-cell anemia,⁶⁸ a back impairment,⁶⁹ vision,⁷⁰ a shoulder injury,⁷¹ asthma,⁷² dyslexia,⁷³ a mental disability,⁷⁴ alcoholism,⁷⁵ obesity,⁷⁶ and various other disabilities.⁷⁷

3. *State Equal Employment Law Cases*

Law enforcement and firefighting cases have been addressed under state laws prohibiting discrimination against persons with disabilities as well. These cases have involved disabilities such as insulin-

67. See *Salmon Pineiro v. Lehman*, 653 F. Supp. 483 (D.P.R. 1987) (finding that INS agent applicant could not perform essential functions of job because applicant was seizure-free only when taking medication).

68. See *Peoples v. City of Salina*, No. 88-4280, 1990 U.S. Dist. LEXIS 4070 (D. Kan. Mar 20, 1990) (upholding termination because conditions of firefighting could precipitate acute condition in plaintiff).

69. See *Thomlison v. City of Omaha*, 63 F.3d 786 (8th Cir. 1995) (remanding for jury determination whether firefighter suffering from back ailment was fit for duty); *Paegle v. Department of Interior*, 813 F. Supp. 61 (D.D.C. 1993), *aff'd*, 24 F.3d 1464 (D.C. Cir. 1994) (holding that park police officer was not qualified for promotion while officer was on temporary limited duty since he could not perform all essential functions of job).

70. See *Padilla v. City of Topeka*, 708 P.2d 543 (Kan. 1985) (holding that myopia is not handicap simply because it disqualifies person from becoming police officer).

71. See *Mahoney v. Ortiz*, 645 F. Supp. 22 (S.D.N.Y. 1986) (holding that police officer with multiple dislocations of same shoulder could not be relied upon to perform essential functions of job).

72. See *Hubert v. Howard County*, 849 F. Supp. 407 (D. Md. 1994), *aff'd*, 56 F.3d 61 (4th Cir. 1995) (holding that applicant's need for inhaler on job would both cause fire hazard and be difficult to reach in emergency situation).

73. See *DiPompo v. West Point Military Academy*, 770 F. Supp. 887 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 326 (2d Cir. 1992) (holding that dyslexic applicant could not establish that he could perform essential functions of position of firefighter, which required applicant to read signs dealing with safety quickly and accurately).

74. See *Barnes v. Cochran*, 944 F. Supp. 897 (S.D. Fla. 1996) (involving police officer's mental disability that resulted in misconduct and prevented officer from performing essential functions of job); *Lassiter v. Reno*, 885 F. Supp. 869 (upholding termination because U.S. Marshal was not qualified to carry gun).

75. See *Little v. FBI*, 1 F.3d 255 (4th Cir. 1993) (holding that FBI agent was not otherwise qualified for position since agent was intoxicated on duty during relapse); *Butler v. Thornburgh*, 900 F.2d 871 (5th Cir. 1990) (holding that FBI agent who was drunk on the job three times was not otherwise qualified for position).

76. See *Andrews v. Ohio*, 104 F.3d 803 (6th Cir. 1997) (holding that overweight highway patrol officers were not persons with disabilities); *Cook v. Rhode Island Dep't of Mental Health*, 10 F.3d 17 (1st Cir. 1993) (finding that obese plaintiff was entitled to trial to determine whether obesity is handicap and whether plaintiff was qualified to be firefighter); *Butterfield v. New York*, No. 96-Civ-5144, 1998 WL 401533 (S.D.N.Y. 1998) (finding that obese corrections officer was not person with disability because officer was not substantially limited in major life activity).

77. See *Dyer-Neely v. City of Chicago*, No. 83 C 5376, 1997 WL 308843 (N.D. Ill. June 3, 1997).

dependent diabetes,⁷⁸ heart disease,⁷⁹ history of cancer,⁸⁰ Crohn's disease,⁸¹ a missing kidney,⁸² a missing or injured limb,⁸³ spine irregularity,⁸⁴ impaired vision,⁸⁵ hearing loss,⁸⁶ paraplegia,⁸⁷ quadriplegia,⁸⁸

78. See *Miller v. Sioux Gateway Fire Dep't*, 497 N.W.2d 838 (Iowa 1993) (holding that diabetic firefighter was not qualified to retain his position).

79. See *Shoemaker v. Pennsylvania Human Relations Comm'n*, 634 A.2d 772 (Pa. Commw. Ct. 1993) (holding that police officer was not qualified to work because officer could not perform all functions of police officer).

80. See *Burris v. City of Phoenix*, 875 P.2d 1340 (Ariz. Ct. App. 1993) (holding that applicant with no current disabling condition could not be rejected as firefighter).

81. See *Blanchette v. Spokane County Fire Protection Dist. No. 1*, 836 P.2d 858 (Wash. Ct. App. 1992) (denying summary judgment because there were genuine issues of material fact as to whether freedom from physical handicaps of Crohn's disease was valid bona fide occupational qualification for position of firefighter); see also *Antonsen v. Ward*, 571 N.E.2d 636 (N.Y. 1991) (reinstating plaintiff's action because dismissal was not based on individual assessment of plaintiff's ability to perform as police officer).

82. See *Pennsylvania State Police v. Pennsylvania Human Relations Comm'n*, 483 A.2d 1039 (Pa. Commw. Ct. 1984) (holding that rejection from academy admission was not justified as job-related), *rev'd on other grounds*, 517 A.2d 1253 (Pa. 1986).

83. See *Santos v. Port Auth.*, No. 94 Civ. 8427, 1995 WL 431336 (S.D.N.Y. July 20, 1995) (holding that police officer with permanently injured foot could not perform the essential functions of the job); *Stratton v. Missouri Dep't of Corrections and Human Resources*, 897 S.W.2d 1 (Mo. Ct. App. 1995) (holding that applicant for corrections officer who was missing four fingers could not perform essential job function of defending himself and others); *O'Hare v. New York City Police Dep't*, 555 N.Y.S.2d 753 (N.Y. App. Div. 1990) (reasoning that since persons who could not perform job were excluded from statutory definition of "an otherwise qualified person with a disability," plaintiff was not covered); *Colorado Civil Rights Comm'n v. North Washington Fire Protection Dist.*, 772 P.2d 70 (Colo. 1989) (en banc) (remanding for specific inquiry into whether applicant's rejection for knee injury was justified by business necessity).

84. See *In re Granelle*, 510 N.E.2d 799 (N.Y. 1987) (holding that police officer with asymptomatic spondylosisthesis was person with disability who could perform essential functions of job, despite prognosis that officer was susceptible to disability at later time).

85. See *Greenwood v. State Police Training Ctr.*, 606 A.2d 336 (N.J. 1992) (holding that officer with impaired vision in one eye could not be dismissed for physical limitations because officer was not impaired in his ability to shoot or perform other essential functions of job); *Brown v. City of Portland*, 722 P.2d 1282 (Or. Ct. App. 1986) (reinstating police officer because there was no reasonable probability that officer could not perform his duties, and because the officer qualified under modified vision standard); *Padilla v. City of Topeka*, 708 P.2d 543 (Kan. 1985) (holding that because "less than perfect is not the definition of handicap," employer had not discriminated unlawfully by failing to hire applicant who was myopic).

86. See *Rice v. Schuyler County Civil Serv. Comm'n*, 583 N.Y.S.2d 583 (N.Y. App. Div. 1992) (requiring that department show that its hearing requirement was not arbitrarily adopted); *Packard v. Gordon*, 537 A.2d 140 (Vt. 1987) (remanding case for determination as to whether police officer trainee was "qualified handicapped individual" as measured by whether trainee could be reasonably accommodated on firing range; court did not address the question of whether officer was qualified to be on patrol).

stuttering,⁸⁹ a mental disability,⁹⁰ alcoholism,⁹¹ various disabilities admittedly preventing full-duty performance,⁹² and a “perceived,” though not actual, disability.⁹³

4. *How Can the Cases Be Reconciled?*

Why are these decisions inconsistent? What can be done to offer guidance to police and fire departments, potential plaintiffs with disabilities, disability advocates, and to the public? It is within this inquiry that this article examines the ADA and its ancestral statutes.

Many issues which arise in ADA litigation involving police and fire departments will test the limits of the statute. When are physical requirements valid? What was the purpose and intent of the ADA with respect to physical requirements for employment? Does the ADA or its legislative history recognize that physical requirements are legitimate for some positions? How should a police or fire department determine whether a person is a “qualified” individual with a disability, entitled to coverage under the ADA? How much latitude is the employer allowed in setting physical criteria in public safety positions? What type of proof must the employer offer to justify those requirements? Is it the plaintiff’s burden to prove that her disability does not prevent her from performing the “essential functions of the

87. See *Ensslin v. Township of North Bergen*, 646 A.2d 452 (N.J. Super. Ct. App. Div. 1994) (holding that paraplegic was unable to perform essential functions of job of police sergeant and, furthermore, paraplegic’s handicap could not be reasonably accommodated).

88. See *Coski v. City and County of Denver*, 795 P.2d 1364 (Colo. Ct. App. 1990) (holding that police officer who became quadriplegic in line of duty could not perform essential functions of job).

89. See *City of Columbus v. Liebhart*, 621 N.E.2d 554 (Ohio Ct. App. 1993) (holding that firefighter was “otherwise qualified” to perform duties because, although firefighter did stutter in his interview, he did not stutter while firefighting).

90. See *Maryland Comm’n on Human Relations v. Mayor of Baltimore*, 586 A.2d 37 (Md. Ct. Spec. App. 1991) (holding that police officer with mental disability could not be reasonably accommodated); *John B. v. Village of Rockville Ctr.*, 495 N.Y.S.2d 674, 677-80 (N.Y. App. Div. 1985) (holding that police officer may not be able to perform essential functions of job due to mental illness).

91. See *In re Cahill*, 585 A.2d 977 (N.J. Super. Ct. App. Div. 1991) (holding that, although substance abuse is handicap, firefighter under influence of alcohol could be dismissed because continued employment may be hazardous to individual or others).

92. See *Matos v. City of Phoenix*, 859 P.2d 748 (Ariz. Ct. App. 1993) (holding that officers could be terminated for failure to perform duties because it was not reasonable accommodation to offer “light duty” assignment).

93. See *LaCrosse Police and Fire Comm’n v. Labor and Indus. Review Comm’n*, 407 N.W.2d 510 (Wis. 1987) (holding that qualified applicant was discriminated against when applicant was not given job due to non job-related back muscle disability); *Brown v. City of Portland*, 722 P.2d 1282 (Or. Ct. App. 1986) (reinstating claim because knee inflammation was temporary condition and did not constitute disability).

job,” or is this question only reached as part of a “direct threat” defense and thus, the defendant’s burden? Should cases brought under the ADA follow Rehabilitation Act precedent?

Part I of this article will provide an overview of the ADA, discussing its purposes, history, and coverage. Part II will examine public safety cases decided under the employment discrimination statutes that preceded the ADA, including the Rehabilitation Act (the “Parent Act” of the ADA). Part III will examine public safety cases decided under Title VII of the Civil Rights Act of 1964 (the “Grandparent Act” of the ADA), and the Age Discrimination in Employment Act (the “First Child” of Title VII). Part IV will examine the essential functions of the positions of police officer and firefighter against the precedent set under the ADA cases already decided and the ADA’s ancestral statutes. Part V will offer a workable, consistent legal analysis for these cases. The social and practical implications of ADA litigation in police and fire department cases will be examined, with a focus on the interests of all affected parties, including the applicants with disabilities, the public, police and fire departments, senior officers and firefighters with disabilities, and the disability community as a whole. Finally, the conclusion will summarize the problems involved in ADA litigation against police and fire departments and highlight the reasons for the recommended legal analysis.

II

OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT⁹⁴

A. *Purpose and History*

The Americans with Disabilities Act was enacted “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁹⁵ It is hailed as “the most comprehensive piece of disability civil rights legislation ever enacted, and the most important piece of civil rights legislation since the

94. See Dawn V. Martin, *Symposium: The Americans with Disabilities Act—Introductory Comment*, 8 J. L. & HEALTH 1, 1-2 (1993).

95. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101(b)(1) (1994). The ADA’s statement of “Findings and Purpose” states that 43 million “Americans have one or more physical or mental disability, and that this number is increasing.” *Id.* § 12101(a)(1). Historically, persons with disabilities have been isolated, segregated, and otherwise discriminated against in the areas of employment, housing, education, transportation, communication, recreation, health services, access to public services, and even in the pursuit of guaranteed constitutional rights, such as the right to vote. See *id.* § 12101(a)(2)-(3).

1964 Civil Rights Act.”⁹⁶ Title I of the ADA prohibits discrimination in employment.⁹⁷ Title II prohibits discrimination by state and local governments⁹⁸ and incorporates the requirements of Title I.⁹⁹ These employment requirements have widespread implications for the disability community, the general work force, employers, consumers, and the economy as a whole.

The employment provisions of the ADA will change the way workers interact in the workplace. In some instances, they will alter job descriptions, duties, and even the way that employers conduct their businesses. Nevertheless, the ADA is not the first piece of federal legislation enacted to protect persons with disabilities. The Rehabilitation Act of 1973 protects “handicapped individuals” from discrimination by entities which receive federal funding.¹⁰⁰ However, until the implementation of the ADA, entities which existed entirely in the private sector were free to discriminate against persons with disabilities.¹⁰¹ The ADA remedied this anomaly by prohibiting discrimination by private employers (as well as state and local governments), employment agencies, and joint labor-management committees.¹⁰²

B. Specific Provisions

1. A “Qualified Individual with a Disability”

a. “Disability”

The ADA only protects a “qualified individual” who has a “disability”¹⁰³ or who is “regarded as” having a “disability.”¹⁰⁴ A disability is defined as “a physical or mental impairment that substantially

96. Arlene Mayerson, *The Americans with Disabilities Act—An Historic Overview*, 7 THE LABOR LAW. 1, 1 (1991).

97. See 42 U.S.C. §§ 12111-12117 (1994).

98. See *id.* §§ 12131-12165. Charges against state and local governments are filed with the Equal Employment Opportunity Commission (EEOC). The EEOC investigates the charges, gathers evidence, summarizes the facts and makes a recommendation for or against litigation to the U.S. Department of Justice (DOJ). DOJ will then determine whether it will follow the EEOC recommendation. DOJ litigates employment discrimination cases against state and local governments while the EEOC litigates against private employers. See *id.* § 12117 (1994) (incorporating procedures in Title VII, 42 U.S.C. § 2000e-5).

99. See 42 U.S.C. § 12132 (1994).

100. See 29 U.S.C. § 794 (1994).

101. See 42 U.S.C. § 12209 (1994). Until passage of the 1991 Civil Rights Act, neither Congress nor the executive branch was subject to Title VII of the Civil Rights Act of 1964; each was therefore free to discriminate on the basis of race, national origin, gender, and religion.

102. See *id.* § 12111(2), (5).

103. *Id.* § 12111 (8).

104. *Id.* § 12102(2)(C).

limits one or more of the major life activities of such individual.”¹⁰⁵ The Act also protects an individual who has a record of a disability¹⁰⁶ or is “regarded as” having a disability, irrespective of whether the person has such disability.¹⁰⁷

All possible disabilities are not listed. Courts must define “substantially limits” and “major life activity” on a case-by-case basis. The Rehabilitation Act serves as a model¹⁰⁸ and regulations promulgated by the Equal Employment Opportunity Commission (EEOC)¹⁰⁹ are helpful. Although some conditions have been specifically excluded from coverage,¹¹⁰ all disabilities and their effects on an individual’s daily life cannot be predicted and incorporated into legislation, regulations, or case law. A disability which substantially limits one person’s major life activities may not do so to another, depending on the degree of disability and particular aspects of the individual’s life.¹¹¹ Temporary disabilities are not covered by the

105. *Id.* § 12102(2)(A).

106. *See id.* § 12102(2)(B).

107. *See id.* § 12102(2)(C).

108. *See* H.R. REP. No. 101-485, pt. 2, at 57 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 339-40; S. REP. No. 101-116, at 44-45 (1989).

109. *See* 29 C.F.R. §§ 1630-1630.16 (1998).

110. *See* 42 U.S.C. §§ 12110(b)-12214(b) (1994). The ADA exempts from coverage persons who currently use illegal drugs, whether or not this use is due to an addiction. However, the Act does protect persons who have undergone or are undergoing drug rehabilitation and are no longer using illegal drugs. In addition, the Act specifically excludes conditions in the following three categories from the definition of disability: (1) homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; (2) compulsive gambling, kleptomania, or pyromania; or (3) psychoactive substance use disorders resulting from current illegal use of drugs. The Act also provides that an employer may restrict or prohibit smoking in the workplace. *See id.* §§ 12201(b)-12211(b).

111. *See id.* § 12102(2)(A); 29 C.F.R. § 1630.2(j); *see also* *Bridges v. City of Bossier*, 92 F.3d 329, 334 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 770 (1997) (holding that physical disqualification from narrow range of jobs exposing employee to trauma, such as firefighter, does not constitute disability); *Rayha v. United Parcel Service, Inc.*, 940 F. Supp. 1066, 1068-69 (S.D. Tex. 1996) (holding that respiratory condition which disqualified plaintiff clerk from handling hazardous materials did not constitute disability within the meaning of ADA); *Sutton v. United Airlines, Inc.*, No. 96-5-121, 1996 U.S. Dist. LEXIS 15106, at *8 (D. Colo. Aug. 28, 1996), *aff’d*, 130 F.3d 893 (10th Cir. 1997) (holding that myopia, corrected by glasses, did not constitute disability); *Murphy v. United Parcel Service, Inc.*, 946 F. Supp. 872, 881-82 (D. Kan. 1996), *aff’d*, 141 F.3d 1185 (10th Cir. 1998) (holding that high blood pressure did not constitute disability since only employment limitation was restriction of lifting to items of less than two hundred pounds); *Dewitt v. Carsten*, 941 F. Supp. 1232, 1232-37 (N.D. Ga. 1996), *aff’d*, 122 F.3d 1079 (11th Cir. 1997) (holding that stress which disqualified plaintiff from continuing as deputy sheriff was not disability since it was only triggered by plaintiff’s position, “out of the universe of hundreds of jobs”).

ADA.¹¹² Even where an impairment lasts as long as two years, it may not be a disability within the meaning of the ADA.¹¹³

b. “Qualified”

The ADA requires that a person with a disability be “qualified” for the position in question. The Act places the initial burden on the applicant to prove that she is a “qualified individual with a disability” within the meaning of the Act.¹¹⁴ A person with a disability must be able to perform the “essential functions of the job” with or without a reasonable accommodation in order to be covered by the ADA.¹¹⁵ If an individual with a disability is not “qualified” for the position sought, the individual is not covered by the Act and the analysis proceeds no further.¹¹⁶

2. “Reasonable Accommodation”

“Reasonable accommodation” can only be defined in a specific context. A reasonable accommodation may include providing additional equipment, changing or reducing work hours, allowing for work-at-home or additional sick leave, reassigning duties to other employees, restructuring the job and perhaps the jobs of co-workers, and, in some instances, hiring additional employees to perform tasks (such

112. See *Wilmarth v. City of Santa Rosa*, 945 F. Supp. 1271, 1277 (N.D. Cal. 1996).

113. See *id.* (noting that, although carpal tunnel syndrome disqualified the plaintiff clerk typist from broad range of jobs in plaintiff’s classification of education and experience, plaintiff’s condition was corrected by surgery two years after diagnosis and could have been corrected sooner).

114. See 42 U.S.C. § 12111(8); see, e.g., *Smith v. City of Des Moines*, 99 F.3d 1466, 1474 (8th Cir. 1996); *Conklin v. City of Englewood*, No. 95-3786, 1996 U.S. App. LEXIS 26173, at *7 (6th Cir. Oct. 1, 1996); *Champ v. Baltimore County*, No. 95-2061, 1996 U.S. App. LEXIS 16417, at *3-*4 (4th Cir. May 9, 1996); *Murphy*, 946 F. Supp. at 878; *Johnson v. Maryland*, 940 F. Supp. 873, 877 (D. Md. 1996), *aff’d*, 113 F.3d 1232 (4th Cir. 1997); *Montegue v. City of New Orleans*, No. CIV-A-95-2420, 1997 WL 327113, at *1 (E.D. La. June 12, 1997); *Wilmarth*, 945 F. Supp. at 1275; *Sutton*, 1996 U.S. Dist. LEXIS 15106, at *4; *Barnes v. Cochran*, 944 F. Supp. 897, 901 (S.D. Fla. 1996), *aff’d*, 130 F.3d 443 (11th Cir. 1997); *Hamlin v. Charter Township of Flint*, 942 F. Supp. 1129, 1136 (E.D. Mich. 1996); *Rayha*, 940 F. Supp. at 1068; *EEOC v. AIC Sec. Investigations, Ltd.*, 820 F. Supp. 1060, 1064 (N.D. Ill. 1993), *aff’d in part, rev’d in part*, 55 F.3d 1276 (7th Cir. 1995). But see *Hamlin*, 942 F. Supp. at 1137 (although plaintiff bears burden of proving that she is “qualified,” defendant bears burden of proving that challenged job function is essential).

115. See 29 C.F.R. § 1630.2(n).

116. See *Smith v. City of Des Moines*, 99 F.3d at 1474; *Murphy*, 946 F. Supp. at 878; *Conklin*, 1996 U.S. App. LEXIS 26173, at *7; *Champ*, 1996 U.S. App. LEXIS 16417, at *4.

as a reader for a blind person or a “signing” interpreter for a deaf person) for persons with disabilities.¹¹⁷

3. *Direct Threat*

The ADA defines “direct threat” as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”¹¹⁸ If a person with a disability poses a “direct threat” to the health or safety of others, the employer may exclude that person from the workforce.¹¹⁹ This is particularly relevant for public safety positions, such as police officer, firefighter, bus driver, and airline pilot.

4. *Undue Hardship*

Once the plaintiff has established that she is a qualified individual with a disability, the burden shifts to the employer to demonstrate that it would cause undue hardship to accommodate the person with the disability as an employee. In determining whether an employer would experience “undue hardship” in accommodating an individual, several variables, including cost, the functions of the workforce, the abilities of other employees, and similar factors are considered.¹²⁰

III

FOLLOWING THE MODEL: THE REHABILITATION ACT OF 1973—THE “PARENT ACT”

A. *Background*

The Rehabilitation Act of 1973 was, in effect, the “Parent Act” of the ADA. The Rehabilitation Act prohibited discrimination against an “otherwise qualified handicapped individual”¹²¹ by federal employers,¹²² federal contractors,¹²³ and entities receiving federal funds.¹²⁴ However, until the effective date of the ADA, nearly twenty years later, private employers that did not receive federal funds could dis-

117. See 42 U.S.C. § 12111(9)(B).

118. 42 U.S.C. § 12111(3); see *Johnson*, 940 F. Supp. at 878 (identifying potential correctional officer’s inability to carry firearm as direct threat to public safety).

119. EEOC Regulations include the requirement that the person with a disability not pose a threat to herself while performing the essential functions of the job. See 29 C.F.R. § 1630.2(r).

120. See 42 U.S.C. § 12111(10).

121. See 29 U.S.C. § 794(a) (1994).

122. See *id.*

123. See *id.*

124. See *id.*

criminate against persons with disabilities without violating federal law.

Much of the ADA's language is taken verbatim from the Rehabilitation Act, except that the term "disability" is used in the ADA in place of "handicap."¹²⁵ Additionally, the ADA simply uses the term "qualified" rather than "otherwise qualified."¹²⁶ Courts have recognized the Congressional directive to use case law decided under the Rehabilitation Act for interpretive guidance in ADA cases.¹²⁷

The emergence of the ADA does not create a new avenue for claims in the area of disability discrimination; rather, the ADA incorporates the existing language and standards of the Rehabilitation Act in this area.¹²⁸

Despite minor differences in language, the ADA covers the same individuals covered under the Rehabilitation Act, but expands the scope of the employers covered.¹²⁹

Courts have had a wealth of experience with the phenomenon of reasonably accommodating persons with disabilities in the context of

125. See 42 U.S.C. § 12111(8). Congress amended the Rehabilitation Act in 1992, substituting the word "disability" for the word "handicap." See Rehabilitation Act Amendments of 1992, Pub. L. 102-569, § 102(p)(1)(A),(B), 106 Stat. 4344, 4356, cited in *Burns v. City of Columbus*, 91 F.3d 836, 842 (6th Cir. 1996); see also *Andrews v. Ohio*, 104 F.3d 803, 807 (6th Cir. 1997) (holding that "handicap" under Rehabilitation Act and "disability" under ADA are substantially same and are subject to same analysis); *Allison v. Department of Corrections*, 94 F.3d 494, 497 (8th Cir. 1996) (holding that same definitions apply to ADA and Rehabilitation Act; therefore, case law is interchangeable); accord *Castellano v. City of New York*, 946 F. Supp. 249, 253 (S.D.N.Y. 1996). However, the ADA specifically amended the Rehabilitation Act by excluding from coverage: (1) persons who *currently* use illegal drugs; and (2) persons whose current use of alcohol interferes with their performance of the essential functions of the job or poses a "direct threat" of harm to others in the workplace. See 42 U.S.C. § 6008 (1994).

126. See 42 U.S.C. 12131(2) (1994).

127. See H.R. REP. NO. 101-485, pt. 2, at 23-24 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 304-06; H.R. REP. NO. 101-485, pt. 3, 44-45 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 326-27; see, e.g., *Easley v. Snider*, 36 F.3d 297, 302 (3d Cir. 1994); *Stillwell v. Kansas City, Mo. Bd. of Police Comm'rs*, 872 F. Supp. 682, 686 (W.D. Mo. 1995); *Peoples v. Nix*, No. CIV.A. 93-5892, 1994 WL 423856, at *2 (E.D. Pa. Aug. 11, 1994); *Conner v. Branstad*, 839 F. Supp. 1346, 1357 (S.D. Iowa 1993); *Medical Soc'y of New Jersey v. Jacobs*, No. CIV.A. 93-3670, 1993 WL 413016, at *6 (D.N.J. Oct. 5, 1993); *EEOC v. AIC Sec. Investigations, Ltd.*, 820 F. Supp. 1060, 1064 (N.D. Ill. 1993).

128. See *Smaw v. Virginia Dep't of State Police*, 862 F. Supp. 1469, 1474 (E.D. Va. 1994) (citing H.R. REP. NO. 101-485, pt. 2, at 66 (1990); S. REP. NO. 101-116, at 35 (1989)).

129. See *Smaw*, 862 F. Supp. at 1474.

Section 504¹³⁰ of the Rehabilitation Act.¹³¹ Case law under the Rehabilitation Act has already provided variations on fact patterns that can serve as a cumulative “blueprint” for determining definitions of “qualified,” “disability,”¹³² “reasonable accommodations,” and “undue hardship” under various circumstances.

B. “Otherwise Qualified”

The Supreme Court has defined an “otherwise qualified person” as “one who is able to meet all of a program’s requirements in spite of

130. Section 503 of the Act prohibits discrimination in employment by federal contractors. See 29 U.S.C.A. § 793 (West Supp. 1998). Section 501 of the Rehabilitation Act regulates public services provided by the federal government. See *id.* § 791.

131. See 29 U.S.C.A. §§ 701-797 (West Supp. 1998); see e.g., *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 275-86 (1987) (stating that persons infected with contagious diseases are within scope of Rehabilitation Act); *Southeastern Community College v. Davis*, 442 U.S. 397, 405-14 (1979) (upholding educational institution’s right to employ minimum physical standards for admission to its nursing program); *Tuck v. HCA Health Servs.*, 7 F.3d 465, 469-74 (6th Cir. 1993) (requiring hospital to make “reasonable accommodations” for disabled nurse who was “otherwise qualified” to perform her duties); *Serrapica v. City of New York*, 888 F.2d 126 (2d Cir. 1989), *aff’d* 708 F. Supp. 64, 73-75 (S.D.N.Y. 1989) (upholding dismissal of disabled worker for valid safety concerns); *Davis v. Meese*, 865 F.2d 592 (3d Cir. 1989), *aff’d* 692 F. Supp. 505, 579 (E.D. Pa. 1988) (allowing Federal Bureau of Investigation to reject insulin-dependent applicants for specific job categories for safety reasons); *Stutts v. Freeman*, 694 F.2d 666, 668-69 (11th Cir. 1983) (requiring Tennessee Valley Authority to make reasonable accommodations for dyslexic applicant); *Strathie v. Department of Transp.*, 716 F.2d 227, 228-34 (3d Cir. 1983) (holding that otherwise qualified school bus driver could not be denied license due to driver’s need for hearing aid); *Bentivegna v. United States Dep’t of Labor*, 694 F.2d 619, 620-23 (9th Cir. 1982) (approving Los Angeles requirement that diabetic municipal employees demonstrate ability to control blood sugar levels); *Crane v. Dole*, 617 F. Supp. 156, 161-63 (D.D.C. 1985) (holding that Federal Aviation Administration had violated Rehabilitation Act by refusing to hire otherwise qualified candidate for position as information specialist due to hearing loss); *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F. Supp. 1130, 1135-38 (S.D. Iowa 1984) (holding that school district should attempt to accommodate teaching applicant whose handicap prevented him from fulfilling responsibility of operating school bus).

132. “Disability” is construed to be synonymous with “handicap,” as indicated by the nearly identical definitions of each in the respective Acts. Compare 42 U.S.C.A. § 12102(2) (West 1995) (defining “disability” as meaning, “with respect to individual: (A) a physical or mental impairment that substantially limits one or more major life activities . . . (B) a record of such impairment; or (C) being regarded as having such impairment”) with 29 U.S.C.A. § 706(7)(B) (West 1995) (defining “handicapped individual” as 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 impairment, or (iii) is regarded as having such an impairment”). Amendments to the Rehabilitation Act have replaced “handicapped individual” with the term “individual with a disability” while maintaining the same definition. See 29 U.S.C.A. § 706(8)(B) (West Supp. 1998).

his handicap.”¹³³ The Fifth Circuit has opined that, “[t]aken literally, ‘otherwise qualified’ could be defined to include those persons who would be able to meet the particular requirements of a particular program ‘but for’ the limitations imposed by their handicaps.”¹³⁴ However, the Supreme Court has specifically rejected the argument that in determining whether a plaintiff was “otherwise qualified” for a position, the examination is confined to only academic and technical qualifications.¹³⁵ “Under such a literal meaning, a blind person possessing all the qualifications for driving a bus except sight could be said to be ‘otherwise qualified’ for the job of driving. Clearly, such a result was not intended by Congress.”¹³⁶ Other courts have thus concluded that, “[i]f a handicap prevents the plaintiff from doing the job in question, the plaintiff cannot be found to be ‘otherwise qualified.’”¹³⁷ Despite the Supreme Court’s interpretation of this language in a manner which discounts the word “otherwise,” this Rehabilitation Act language has found its way into ADA cases.¹³⁸ This phenomenon is ironic since the phrase “otherwise qualified” does not even appear in the ADA.¹³⁹

133. *Southeastern Community College*, 442 U.S. at 406.

134. *See Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993).

135. *Southeastern Community College*, 442 U.S. at 407; *see also Chandler*, 2 F.3d at 1393.

136. *Southeastern Community College*, 442 U.S. at 407.

137. *Florence v. Frank*, 774 F. Supp. 1054, 1061 (N.D. Tex. 1991) (citing *Carty v. Carlin*, 623 F. Supp. 1181, 1186 (D. Md. 1985) (citing *Pushkin v. Regents of Colorado*, 658 F.2d 1372, 1387 (10th Cir. 1981))).

138. *See, e.g., Keel v. City of Hopkinsville*, No. 97-5479, 1997 WL 809916, at *2 (6th Cir. Dec. 16, 1997) (despite being ADA case, Sixth Circuit used term “otherwise qualified,” rather than “qualified” in its analysis).

139. Although the case law under the Rehabilitation Act indicates that “otherwise qualified” is synonymous with “qualified,” the EEOC ADA Technical Assistance Manual states that there are two basic steps in determining whether an individual is “qualified” within the meaning of the ADA. First, the EEOC endeavors to “determine whether the individual meets necessary prerequisites for the job, such as: education, work experience, training, skills, licenses, certificates, and other job-related requirements, such as good judgment or ability to work with other people.” EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 18, § 2.3.1, at II-11 to II-12. The EEOC concludes that if the individual meets those requirements, she is “otherwise qualified” for the position. *Id.* The EEOC departure from the Rehabilitation Act precedent may be one of semantics since, at the “second step” in the “qualified” analysis, the EEOC examines whether the disability-based requirement is “job-related and consistent with business necessity.” *Id.* Nevertheless, there is confusion over whether the terms are synonymous, whether one includes the other (i.e., in order to be “qualified,” one must first be “otherwise qualified”), or whether the ADA only requires that a person with a disability be “otherwise qualified,” as defined by the EEOC’s “first step” in the qualified analysis, to be covered by the ADA.

1. *The Ability to “Rescue” as an “Essential Function” and the Inability to Rescue as a “Direct Threat”*

Rehabilitation Act precedent makes clear that “[p]erforming the essential functions of a job means, among other things, being able to perform those functions without serious risk of serious physical harm to oneself or others.”¹⁴⁰ Where public safety is involved, courts may examine the issue in terms of the individual’s ability to perform the essential functions of the job or whether placing the person in that position would pose a “direct threat” to the public, co-workers, or the person with a disability. Courts have found persons with disabilities not “otherwise qualified” for positions involving public safety where the requirements were reasonably calculated to prevent harm to the prospective employee,¹⁴¹ potential co-workers,¹⁴² customers,¹⁴³ students,¹⁴⁴ patients,¹⁴⁵ or other members of the public.¹⁴⁶ Safety issues arise not only from questions of whether a person can be relied upon

140. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1126 (11th Cir. 1993).

141. *See Cook v. Rhode Island*, 10 F.3d 17, 27 (1st Cir. 1993) (recognizing state’s claim that appellant’s obesity might pose threat to her personal safety but finding insufficient showing of fact to support assertion).

142. *See Mazarella v. United States Postal Serv.*, 849 F. Supp. 89, 96 (D. Mass. 1994) (allowing dismissal of violently unstable postal employee who posed unmitigatable threat to co-workers).

143. *See Crane v. Dole*, 617 F. Supp. 156, 161-63 (D.D.C. 1985) (stating that Federal Aviation Administration violated Rehabilitation Act by not considering former employee for position of Aeronautical Information Specialist—a position which, unlike employee’s former position, posed no safety threat to airline customers).

144. *See School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287-88 (1987) (leaving open question of whether teacher with tuberculosis was qualified to continue employment as teacher).

145. *See Bradley v. University of Tex. M.D. Anderson Cancer Ctr.*, 3 F.3d 922, 925 (5th Cir. 1993) (allowing reassignment of HIV-positive surgical technician); *Doe v. New York Univ.*, 666 F.2d 761, 775 (2d Cir. 1981) (allowing medical school to refuse reentry to emotionally handicapped student based on threat to patients, students, and doctors); *Doe by Lavery v. Attorney Gen. of United States*, 814 F. Supp. 844, 849 (N.D. Cal. 1992) (approving FBI decision to suspend physician from examining agents due to reports of physician’s HIV infection), *rev’d*, 62 F.3d 1424 (9th Cir. 1995).

146. *See Graehling v. Village of Lombard*, 58 F.3d 295, 296 (7th Cir. 1995); *Huber v. Howard County*, 56 F.3d 61 (4th Cir. 1995) (unpublished table decision), *aff’g* 849 F. Supp. 407, 413 (D. Md. 1994); *Fedro v. Reno*, 21 F.3d 1391, 1395 (7th Cir. 1994); *Paegle v. U.S. Dep’t of Interior*, 24 F.3d 61 (D.C. Cir. 1994) (unpublished table decision); *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993); *Little v. FBI*, 1 F.3d 255, 259 (4th Cir. 1993); *DiPompo v. West Point Military Academy*, 960 F.2d 326, 327 (2d Cir. 1992); *Severino v. North Fort Meyers Fire Control Dist.*, 935 F.2d 1179, 1183 (11th Cir. 1991); *Davis v. Meese*, 865 F.2d 592 (3d Cir. 1989), *aff’g* 692 F. Supp. 505, 516-17 (E.D. Pa. 1988); *Serrapica v. City of New York*, 888 F.2d 126 (2d Cir. 1989) (unpublished table decision); *Simon v. St. Louis County*, 735 F.2d 1082, 1085 (8th Cir. 1984); *Lassiter v. Reno*, 885 F. Supp. 869, 874 (E.D. Va. 1995); *Hogarth v. Thornburgh*, 833 F. Supp. 1077, 1086-87 (S.D.N.Y. 1993); *Salmon Pineiro*

to perform an essential function of a public safety position, but also in determining whether a person can physically perform the job without posing or creating an independent threat, such as contagion. Therefore, direct threat may be divided into two types: (1) a threat of serious harm caused by an employee's inability to rescue in a situation where that employee has a duty to rescue; and (2) a threat of serious harm caused by the mere presence of the person with a disability.

Where an essential function of a job is to protect others from harm, a disability that necessarily and substantially hinders the performance of that function disqualifies a person with that disability from the position. In *Southeastern Community College v. Davis*, a hearing-impaired applicant was denied admission to nursing school.¹⁴⁷ The Supreme Court determined that patients might be endangered by her inability to hear them or her co-workers.¹⁴⁸ Specifically, the Court noted that the plaintiff would not be able to hear sounds made by a patient which might indicate a life-threatening condition, nor would she be able to hear clearly all instructions in an operating room or in other emergency situations.¹⁴⁹ The Court concluded that it was essential that she be able to hear these things to save a patient in danger; therefore, she was not "otherwise qualified" for admission because she could not perform the essential functions of the job.

In *Huber v. Howard County, M.D.*, the Fourth Circuit found that a firefighter with asthma was not "otherwise qualified" for the position.¹⁵⁰ The firefighter could not carry his inhaler to the scene of a fire because it was flammable.¹⁵¹ If he could not use his inhaler, he would likely become incapacitated and unable to perform rescue duties in emergency situations.¹⁵²

The court in *American Federation of Government Employees v. Dole* upheld drug testing as reasonable for aviation-related positions, as well as for firefighters, nurses, railroad safety inspectors, armed law enforcement officers, and "top secret" security clearance personnel, despite possible coverage of rehabilitated drug addicts.¹⁵³ Assuming,

v. Lehman, 653 F. Supp. 483, 493 (D.P.R. 1987); *Beal v. Board of Selectmen*, 646 N.E.2d 131, 137 (Mass. 1995).

147. 442 U.S. 397, 405-14 (1979).

148. *See id.* at 407-08.

149. *Id.* at 407, 408 n.8.

150. No. 94-1651, 1995 U.S. App. LEXIS 12604 (4th Cir. Apr. 5, 1998).

151. *See id.* at *3.

152. *See id.* at *19. Actually, Huber posed a direct threat in both ways: his presence with an inhaler created a risk of harm independent of a fire (an explosion); however, without an inhaler, his inability to rescue victims from a fire posed the threat.

153. 670 F. Supp. 445, 446 (D.D.C. 1987), *aff'd*, 885 F.2d 884 (D.C. Cir. 1989).

arguendo, that rehabilitated drug addicts were covered by the Rehabilitation Act, such persons were reasonably perceived as posing an unacceptable risk to public safety because they might become incapacitated while on the job.¹⁵⁴

2. *Plaintiff as the Independent Source of the "Direct Threat"*

The second question to be asked in the "otherwise qualified" analysis is whether the plaintiff can safely perform the essential functions of the job. Again, the Supreme Court has answered, holding that if the plaintiff poses an independent threat of harm to others while performing the duties of her job, she is not "otherwise qualified" for the position. In *School Board of Nassau v. Arline*, the Supreme Court examined whether a teacher with tuberculosis was "otherwise qualified" under the Rehabilitation Act.¹⁵⁵ There was no question that the plaintiff teacher could perform all the tasks necessary to teach children. The Court remanded the case for a determination as to whether she could perform her duties without posing a threat of contagion to her students. If such a threat existed, the Court stated that she would not be a "qualified" handicapped individual. The Court recognized that many interests must be balanced so that persons with disabilities are integrated as fully as possible into the mainstream of American life, without endangering other members of society.¹⁵⁶

In *Chiari v. City of League City*, the Fifth Circuit held that a construction inspector who suffered from Parkinson's disease could no longer perform the essential functions of his job because his "unsteady 'shuffling gait' and muscle rigidity" caused him to lose his balance and made him a possible danger to others at the site.¹⁵⁷ The plaintiff was therefore not "otherwise qualified" for the position and was not protected by the Rehabilitation Act.¹⁵⁸ Similarly, in *Serrapica v. City of New York*, an applicant was rejected for the position of sanitation worker on the basis of his uncontrolled diabetes.¹⁵⁹ The Second Circuit held that he was not "otherwise qualified" for the position because the essential functions of the job included operation of heavy machinery which could create a danger to him, his co-workers, and the pub-

154. *See id.* at 447.

155. 480 U.S. 273, 275 (1987).

156. *See id.* at 287, 289.

157. 920 F.2d 311, 313 (5th Cir. 1991).

158. *See id.* at 319.

159. 708 F. Supp. 64, 75 (S.D.N.Y. 1989), *aff'd*, 888 F.2d 126 (2d Cir. 1989) (unpublished table decision).

lic.¹⁶⁰ The “direct threat” language of the ADA¹⁶¹ has also been interpreted to justify exclusion of individuals from employment if they pose a direct threat to themselves.¹⁶²

C. Blanket Exclusions

Directly related to police and fire departments, *Davis v. Meese* upheld a blanket exclusion of persons with insulin-dependent diabetes from becoming FBI agents.¹⁶³ The *Davis* court held that the physical requirement was “directly connected with and [designed to] substantially promote legitimate safety and job performance.”¹⁶⁴ Based on expert testimony, the trial court in *Davis* concluded:

[T]here is an ever present risk that an insulin-dependent diabetic will have a sudden and unexpected hypoglycemic occurrence. History and testing, such as an insulin infusion test, are helpful in predicting the probability that an individual will suffer a severe hypoglycemic occurrence, but there is presently no test that can reliably predict whether, when and under what precise circumstances an individual will have a severe hypoglycemic occurrence. However, the risk increases as the lifestyle becomes irregular as to work hours, uncertain mealtimes and diets, and unplanned heavy or extreme physical, mental and emotional stress.¹⁶⁵

The court in *Davis* stressed the FBI’s need for the transferability of all full-duty officers, such that the essential functions of the job include the ability to perform “all functions and assignments” in the

160. *See id.* at 69. Although *Serrapica* is still the law in the Second Circuit, it is not as compelling a case as are police and firefighter cases. In *Serrapica*, the plaintiff may have been able to pull over to the side of the road to take precautions without presenting a threat to public safety. In contrast, police officers and firefighters must act in emergency situations to protect others. They must respond to dangerous situations without prior notice. They may not be able to stop to inject insulin, ingest sugar, or take other necessary precautions.

161. *See* 29 C.F.R. § 1630.15 (1998).

162. *See, e.g.,* *Bridges v. City of Bossier*, 92 F.3d 329, 332-33 (5th Cir. 1996) (upholding decision of fire department to reject applicant with mild hemophilia due to risk of excessive bleeding if exposed to trauma while performing firefighter duties). *Bridges* is a departure from the law under Title VII, which rejects such analysis as paternalistic. *But see* *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206-07 (1991) (stating that Title VII prohibited exclusion of fertile women from lead manufacturing positions, despite evidence that lead exposure during pregnancy caused birth defects).

163. 865 F.2d 592 (3d Cir. 1989), *aff’g* *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988).

164. *Davis*, 692 F. Supp. at 517; *see also* *Sharon v. Larson*, 650 F. Supp. 1396 (E.D. Pa. 1986) (upholding state regulation which prohibited visually handicapped persons (who needed bioptic eyeglasses in order to pass the state vision test) from obtaining driver’s licenses, due to the danger driving would pose to themselves and others).

165. *Davis*, 692 F. Supp. at 519.

field of criminal investigations.¹⁶⁶ Many of these assignments place agents in situations involving irregular hours and mealtimes, as well as severe physical and mental stress.¹⁶⁷ The court was not unsympathetic to the plaintiff's position, nor did it uphold the blanket exclusion without reservation or concern.¹⁶⁸

If a method of testing could be devised which reliably determined whether certain individual insulin-dependent diabetics presented no, or very little, risk of a severe hypoglycemic occurrence while on an assignment in a situation where such an occurrence could pose a serious risk of damage or harm to co-workers, the public, or the individual, then the blanket exclusion of all insulin-dependent diabetics would be invalid. Unfortunately, such is not the case.¹⁶⁹

Though regrettable, the exclusion of the entire class of persons with insulin-dependant diabetes was necessary in order to avoid the unacceptable danger that insulin-dependent agents would pose to themselves or others.

Although blanket exclusions are generally unacceptable, legitimate physical requirements are proper even though such requirements may, in effect, exclude an entire class If the requirements are directly connected with and substantially promote legitimate safety and job performance concerns that are tailored to those concerns, then such requirements may be held valid notwithstanding that they affect a group or class rather than a single individual.¹⁷⁰

An employer is allowed to consider potential safety risks to applicants, co-workers, and others in making a decision about employment criteria¹⁷¹ An employer is not obligated to materially rewrite its job description, to lower or to effect substantial modifications of standards, or to overlook the handicap when the impairment relates to reasonable criteria for employability in a particular position.¹⁷²

166. *See id.* at 519. For a discussion of para-military organizations, see *supra*, Part V(A)(2)(c).

167. *See id.* at 519.

168. *See id.* at 520-21.

169. *Id.* at 518.

170. *Id.* at 519 (internal citation omitted) (citing *Southeastern Community College v. Davis*, 442 U.S. 397, 407 (1979)).

171. *Serrapica v. City of New York*, 708 F. Supp. 64, 73 (S.D.N.Y. 1989) (citing *Doe v. New York Univ.*, 666 F.2d 761, 777 (2d Cir. 1981); *Mahoney v. Ortiz*, 645 F. Supp. 22, 24 (S.D.N.Y. 1986); *Bento v. I.T.O. Corp. of R.I.*, 599 F. Supp. 731, 742-45 (D.R.I. 1984)).

172. *Serrapica*, 708 F. Supp. at 73 (citing *Brookhart v. Illinois State Bd. of Educ.*, 697 F.2d 179, 184 (7th Cir. 1983); *Cook v. United States Dep't of Labor*, 688 F.2d 669, 670 (9th Cir. 1982)).

Although blanket exclusions must be scrutinized and are generally rejected, they have been permitted in limited circumstances.¹⁷³ These circumstances most frequently include positions involving public safety, and in particular law enforcement officers and firefighters.

IV

FOLLOWING THE MODELS OF TITLE VII AND THE ADEA

A. Title VII: The “Grandparent Act” of Equal Employment Law

Title VII of the Civil Rights Act of 1964¹⁷⁴ can be viewed as the “Grandparent Act” of the ADA. Title VII was the first statute to specifically prohibit discrimination in employment in the United States.¹⁷⁵ Section 504 of the Rehabilitation Act was grounded in language and concepts taken from Title VII.¹⁷⁶ The purpose and findings of the ADA parallel those that served as the motivation for the enactment of the Civil Rights Act of 1964.¹⁷⁷ Both the language and concepts of the ADA are modeled after the 1964 Act.¹⁷⁸ In its Statement of Findings and Purpose, Congress characterized the ADA as the legislation which does for persons with disabilities what the Civil Rights Act of 1964 did for racial, ethnic, and religious minorities, and women.¹⁷⁹ Therefore, Title VII cases offer a familiar point of reference for determining when employment practices or job descriptions can be altered without compromising the employer’s business or operational needs.

173. The ADA specifically includes at least one blanket exclusion. Persons with infectious diseases which may be transmitted through the handling of food may be excluded from positions involving food handling. *See* 42 U.S.C. §12113(d)(2) (1994). *But see* EEOC v. Prevo’s Family Market, No. 1:95 CV 446, 1997 WL 604984 (W.D. Mich. Aug. 27, 1996), *rev’d in part, vacated in part*, 135 F.3d 1089 (6th Cir. 1998) (holding that HIV-positive produce clerk was qualified individual with disability and had to be accommodated with own set of knives and steel protective gloves).

174. 42 U.S.C. §§ 2000(e), (e-3), (e-5)-(e-15) (1994), and *id.* §§ 2000(e-1), (e-2), (e-4) (1994 & 1997 Supp.).

175. The EEOC was established under Title VII. *See id.* § 2000(e-4)(a).

176. *Compare* 29 U.S.C. § 794 (1994) (prohibiting discrimination against people with disability in connection with receipt of benefits under any federal grant or program) with 42 U.S.C. §§ 2000(e), (e-3) and 42 U.S.C. §§ 2000(e-1), (e-2) (prohibiting discrimination against employees or prospective employees on basis of race, sex, color, religion, or national origin).

177. *Compare* 42 U.S.C. § 12101(a) (1995 Supp.) with *id.* § 2000(e-2).

178. *Compare id.* §§ 12101-12213 with *id.* §§ 2000(e), (e-3), (e-5)-(e-15), and *id.* §§ 2000(e-1), (e-2), (e-4).

179. *Id.* § 12101(a)(4) (“[U]nlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse . . .”).

Under Title VII analysis, the plaintiff has the burden of proving a prima facie case of discrimination.¹⁸⁰ The employer may then rebut the case by asserting legitimate, non-discriminatory business reasons for the challenged action.¹⁸¹ The burden then shifts back to the plaintiff, either to show that the stated reason is pretextual or that the business purpose could be accomplished by a less discriminatory alternative.¹⁸²

Since Section 504 of the Rehabilitation Act was modeled after Title VII, there is a “conceptual similarity” between the “reasonable accommodation” provision of Section 504 and the “alternative practice” rule of Title VII.¹⁸³ As discussed, the cases decided under the Rehabilitation Act mirror case law under Title VII involving public safety positions where physical requirements were upheld as job-related and justified as bona-fide occupational qualifications (BFOQs) or business necessity.¹⁸⁴ In addition, burdens of proof and persuasion in Rehabilitation Act cases are generally modeled after those in Title VII.¹⁸⁵

Title VII provides no statutory exemption or treatment for public safety positions; yet, in pregnancy cases involving flight attendants, courts have considered public safety risks, allowing a higher standard of physical fitness than could be required for other types of positions.¹⁸⁶ In *Levin v. Delta Airlines*, although the plaintiffs established

180. This may be accomplished under either the disparate treatment or disparate impact theories. Under the disparate treatment theory, the plaintiff would have to show that she: (1) belongs to a protected class; (2) applied for a position for which she was qualified; (3) was rejected; and (4) after she was rejected, the employer continued to seek applications from persons having plaintiff's qualifications. See *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); see also *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 502-03 (1993). The burden would then shift to the employer to state a legitimate, non-discriminatory reason for the rejection. Once the employer offered such a reason, the burden would shift back to the plaintiff to show that the stated reason was pretextual and that the true reason for the rejection was illegal discrimination. Under an adverse impact analysis, a hiring criterion may be eliminated where it disproportionately eliminates members of protected groups and cannot be justified by business necessity. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-33 (1970); see also *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 645-46 (1989) (discussing U.S. Civil Rights Act of 1964, 42 U.S.C. § 20002 (k), with respect to burdens of proof).

181. See *St. Mary's Honor Ctr.*, 509 U.S. at 502; *Wards Cove Packing Co.*, 490 U.S. at 645-46; *McDonnell-Douglas Corp.*, 411 U.S. at 802-03; *Griggs*, 401 U.S. at 431-33.

182. See *supra* note 180.

183. See *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1126-27 (11th Cir. 1993).

184. See *supra* notes 15-17 and accompanying text.

185. See *Guinn v. Bolger*, 598 F. Supp. 196, 200 (D.D.C. 1984).

186. See, e.g., *Levin v. Delta Airlines, Inc.*, 730 F.2d 994 (5th Cir. 1984) (allowing corporate policy of removing pregnant flight attendants from flight duty as soon as

that the likelihood of a pregnant flight attendant becoming incapacitated at the same time that an emergency evacuation would be required is “infinitesimally small,” the Fifth Circuit held that because of the importance of ensuring passenger safety, even this small risk justified the blanket exclusion of pregnant women from being flight attendants.¹⁸⁷

In *Tye v. City of Cincinnati*, the court upheld the use of background investigations which had an adverse impact on Black applicants, finding that they were justified by business necessity.¹⁸⁸ The court specifically refused to require the fire department to hire an industrial psychologist to perform a formal job analysis in order to justify the background investigation or each other criterion used in the hiring process, explaining:

Employers use their knowledge of the skills needed to successfully fill the position and their common sense to determine which applicant should be hired. We refuse to hold the City to a higher standard than we would any other employer. In fact, a public employer hiring a firefighter is held to a lighter burden in demonstrating that its employment criteria is [sic] job-related, because of the potential risk to public safety of hiring incompetent firefighters.¹⁸⁹

Similarly, the Sixth Circuit in *Zamlen v. City of Cleveland* upheld a physical test which disproportionately eliminated women.¹⁹⁰ The test included lifting a thirty-three pound barbell, dragging a hose, and dragging a dummy seventy feet.¹⁹¹ The court, accepting the factual findings of the district court, held that the test measured the applicant’s ability to perform actual tasks which a firefighter might have to perform while fighting a fire.¹⁹² The court held that the test was therefore justified by business necessity.¹⁹³

pregnancy was discovered despite finding that likelihood of flight attendant becoming incapacitated during emergency was “infinitesimally small”); *see also* *Burwell v. Eastern Airlines, Inc.*, 633 F.2d 361 (4th Cir. 1980) (per curiam) (allowing corporate policy of mandatory leave following thirteenth week of pregnancy as business necessity); *Harris v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980) (declaring policy requiring leave upon commencement of pregnancy as prima facie sexual discrimination, which is justified as business necessity due to safety considerations of employees and passengers).

187. *See Levin*, 730 F.2d at 997.

188. *See* 794 F. Supp. 824, 833 (S.D. Ohio 1992) (including investigations regarding arrests, convictions, and sexual assault).

189. *Id.* (citing *Zamlen v. City of Cleveland*, 906 F.2d 209 (6th Cir. 1990)).

190. 906 F.2d 209 (6th Cir. 1990).

191. *See id.* at 213.

192. *See id.* at 218-19.

193. *See id.* at 220.

In *Levin, Tye, and Zamlen*, the plaintiffs could offer no less discriminatory alternative practice which would eliminate the safety risks associated with their employment in the positions sought. Therefore, in the interest of public safety, the plaintiffs were justifiably excluded from the positions sought. The public safety concerns expressed by courts in Title VII cases are no less compelling in ADA cases. Due to the similarities in both the purpose and language of Title VII and the ADA, similar analyses should be applied where similar issues are presented.¹⁹⁴ This is particularly true in public safety cases where concerns regarding “rescue” personnel in emergency situations are the same under either statute.

B. *The ADEA: The “First Child” of Title VII*

The Age Discrimination in Employment Act of 1967 (ADEA)¹⁹⁵ was the second major federal statute specifically prohibiting employment discrimination. The ADEA did for persons over the age of forty what Title VII did for racial, ethnic, religious minorities, and

194. Although Title VII analysis may serve as guidance for ADA cases with respect to many issues, it does not in all cases. This is true with respect to affirmative action, since Congress specifically chose language which differed from Title VII in the ADA’s definition of prohibited discrimination. Title VII prohibits discrimination in employment “because of” or “on the basis of” race, color, sex, national origin, or religion. *See* 42 U.S.C. §§ 2000e-2(a)(1)-(2), (b), (d), (e)(1), (h), (k) (1994). In contrast, Title I of the ADA prohibits discrimination against persons with disabilities. *See* 42 U.S.C.A. §§ 12101(b)(1)-(2), 12112(a) (1995). In the Title VII context, it is not only the discrete and insular minority which is protected against discrimination, but also members of the majority group. *See, e.g.,* *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (holding that modified lay-off plan protecting black employees over white employees with more seniority violates Title VII rights of senior white employees); *McDonald v. Santa Fe Trail Transp.*, 427 U.S. 273 (1976) (holding that Title VII applies to discrimination against any racial group, including whites). However, the ADA protects only persons with disabilities against discrimination. Therefore, an employer is free to extend preferential treatment to a job applicant with a disability without fear that an applicant without a disability will bring a “reverse discrimination” lawsuit.

The ADA also differs from Title VII in that the latter does not impose upon the employer an affirmative duty to accommodate the employee by altering the job in question. Racial and ethnic minorities are entitled to no job modifications to enable them to perform the duties of their positions; however, there are some instances in which duties have been modified under Title VII to accommodate differences based on gender and religious beliefs. For example, some courts have required prison officials to alter the duties of female deputies or prison guards in male facilities in order to protect the privacy rights of inmates. *See, e.g.,* *Harden v. Dayton Human Rehabilitation Ctr.*, 530 F. Supp. 769, 779-80 (S.D. Ohio 1981) (ordering that female guards must not be prevented from being assigned to male prisons, but that they shall not perform strip searches or monitor showers of male inmates).

195. 29 U.S.C. §§ 621-634 (1994).

women.¹⁹⁶ Therefore, it is not surprising that in ADEA public safety cases, courts have followed the Title VII model.

When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, courts should examine closely any pre-employment standards or criteria that discriminate against minorities. In such cases, the employer should bear a heavy burden to demonstrate to the court's satisfaction that employment criteria are job-related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer ought to bear a correspondingly lighter burden to show that his employment criteria are job-related. Courts, therefore, should proceed with great caution before requiring an employer to lower his pre-employment standards for such a job.¹⁹⁷

Where public safety is an issue, the employer is justified in holding employees to a higher standard of physical requirements, even where it screens out all members of the class protected by the statute.¹⁹⁸ The court in *Usery v. Tamiami Trail Tours* stated that "[t]he greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications."¹⁹⁹ The court held that age was a BFOQ for bus drivers based on statistical evidence that "all or substantially all" persons over the age of forty posed a higher risk than persons under forty of accident-causing impairments.²⁰⁰ There was no more reliable predictor than age to test a person's individual susceptibility to heart attacks. Therefore, age could be used as a "proxy" for this condition.²⁰¹

Significantly, when the ADEA was extended to cover federal employees, the 1974 amendment exempted certain classes of federal employees, including law enforcement officers and firefighters.²⁰² The D.C. Circuit upheld such exemptions in *Stewart v. Smith*, when it allowed the head of an agency to set minimum and maximum ages for

196. The ADA's Statement of Findings and Purpose refers to similarity in purpose to that of Title VII and the ADEA. See 42 U.S.C.A. § 12101(a)(4).

197. *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972).

198. See, e.g., *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985) (flight engineers); *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982) (corrections officers); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) (bus drivers); *Spurlock*, 475 F.2d at 219 (airline pilots).

199. *Usery*, 531 F.2d at 236.

200. See *id.* at 238.

201. See *id.*

202. See 5 U.S.C. § 8335 (1994).

law enforcement positions.²⁰³ The court reasoned that the statute provided a valid ADEA exemption designed to secure a “young and vigorous” force of law enforcement officers.²⁰⁴

In 1986, Congress expanded the exemption for all law enforcement agencies and fire departments, rather than maintaining the exemption for only federal public safety positions.²⁰⁵ The exemption took effect in 1987 and expired in 1993.²⁰⁶ As part of the amendment, Congress required the EEOC and the Department of Labor to conduct a study investigating the connection between age and the ability to perform successfully law enforcement and firefighting tasks during the six year effective period of the amendment.²⁰⁷ The study was mandated “[t]o determine whether physical and mental fitness tests are valid measurements of the ability and competency of police officers and firefighters to perform the requirements of their jobs . . .” and “[t]o develop recommendations with respect to specific standards that such tests, and the administration of such tests should satisfy.”²⁰⁸

Under an EEOC contract, the study was conducted by the Center for Applied Behavioral Sciences, Intercollegiate Research Programs, at Pennsylvania State University.²⁰⁹ This research resulted in the 1992 report entitled, “Research on the Use of Fitness Tests for Police and Firefighting Jobs” (“The Penn. State Report”). The Penn. State Report examined the specific tasks necessary for safe performance of police and firefighting duties and determined whether the ability to perform these tasks could be individually tested, rather than using age as a proxy. The Penn. State Report concluded that people could be individually tested as opposed to being mandatorily retired at a designated age²¹⁰ and that the ADEA exemption for law enforcement officers and firefighters should not be renewed for 1994 or beyond.²¹¹

Nevertheless, on March 28, 1995, the House of Representatives passed an ADEA exemption for law enforcement officers and

203. 673 F.2d at 492 (exempting corrections officers from ADEA under 5 U.S.C. § 3307(d)).

204. *See id.*; accord *Patterson v. United States Postal Serv.*, 901 F.2d 927, 930 (11th Cir. 1990) (exempting postal inspectors who exercise law enforcement powers from ADEA under § 3307(d)).

205. *See* 29 U.S.C.A. § 623(j) (1998).

206. *See id.*

207. *See* CENTER FOR APPLIED BEHAVIORAL SCIENCES, PA. STATE UNIV., ALTERNATIVES TO CHRONOLOGICAL AGE IN DETERMINING STANDARD OF SUITABILITY FOR PUBLIC SAFETY JOBS, 1, 15, 16 (1992) [hereinafter PENN. STATE STUDY].

208. *Id.* at 1-1.

209. *See id.* at 1-1, 1-15, 1-16.

210. *See id.* at 8-19, 8-20.

211. *See id.* But *see* Schiff, *supra* note 7, at 16-18.

firefighters, as part of the crime bill.²¹² Although it was not passed by the Senate, counsel for the House Education and Labor Subcommittee on Select Education and Civil Rights, stated that it is “not a dead issue.”²¹³ The House is expected to reintroduce the bill in other forms.²¹⁴ This proposed amendment restates Congress’s concern for ensuring public safety, even at the expense of the individual rights of older officers and firefighters.

V

APPLICATION OF THE ADA TO POLICE AND FIRE DEPARTMENTS

A. *The Prima Facie Case: A “Qualified” Individual with a “Disability”*

1. *“Disability” Defined*

As set forth in Part II(B)(1), the ADA only protects a “qualified individual” who has a “disability,”²¹⁵ or who is “perceived” as having a “disability.”²¹⁶ Determining coverage involves several steps. Initially, a court must determine whether the plaintiff’s particular condition meets the ADA definition of disability.²¹⁷ Where the plaintiff does not have a “disability,” as defined by the ADA, the plaintiff is excluded from coverage and the court need not even reach the issue of whether the plaintiff is “qualified” for the job.²¹⁸

The plaintiff must establish a disability by a two-step process, proving: (1) that her condition constitutes “a physical or mental impairment” within the meaning of the ADA;²¹⁹ and (2) if this definition is met, the plaintiff must then demonstrate that the impairment “substantially limits” one or more of her “major life activities.”²²⁰ The EEOC defines a physical or mental impairment as follows:

- (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive,

212. See H.R. 849, 104th Cong. (1995).

213. FEP Summary, August 29, 1994, p. 101.

214. *Id.*

215. See generally Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(8) (1994) (defining qualified individual with disability).

216. See *supra* Part II(B)(1). See generally 42 U.S.C. § 12102(2) (1994) (defining disability).

217. See *supra* Part II(B)(1). See generally 42 U.S.C. § 12102(2).

218. See *supra* Part II(B)(1). See generally 42 U.S.C. § 12102(2).

219. See *supra* Part II(B)(1). See generally 42 U.S.C. § 12102(2).

220. See generally 42 U.S.C. § 12102(2)(A).

digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.²²¹

A major life activity is defined as, “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”²²² EEOC Regulations state that the following factors should be considered in determining whether an individual is substantially limited in major life activities: (1) the nature and severity of the impairment; (2) its duration or expected duration; and (3) its actual or expected long-term impact.²²³

Courts have made inconsistent determinations as to what conditions constitute disabilities. There is a clear tension between a liberal construction of the ADA (to protect the rights of persons with disabilities) and a narrow construction of the Act (to protect the rights of persons with disabilities, as well as the public and employers). The ADA, like the Rehabilitation Act:²²⁴

assures that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountable nature of their handicaps. It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared.²²⁵

EEOC Regulations state that an impairment should be examined in its “untreated” state. The determination of whether an individual is substantially limited in a major life activity is to be determined with-

221. 29 C.F.R. § 1630.2(h) (1998).

222. *Id.* § 1630.2(i).

223. *Id.* § 1630.2(j)(2).

224. Congress amended the Rehabilitation Act in 1992, substituting the word “disability” for the word “handicap.” See Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 102(p)(32)(a), (p)(32)(b), § 506, 106 Stat. 4344, 4360, 4428; see also *Andrews v. Ohio*, 104 F.3d 803, 806-07 (6th Cir. 1997) (“handicap” under Rehabilitation Act and “disability” under ADA are substantially same and are determined by same analysis); *Allison v. Department of Correction*, 94 F.3d 494, 497 (8th Cir. 1996) (stating that same definitions apply to ADA and Rehabilitation Act; therefore, case law is interchangeable); accord *Castellano v. City of New York*, 946 F. Supp. 249, 252 (S.D.N.Y. 1996) (stating that ADA and Rehabilitation Act provide similar definitions for “disability” and “handicap”), *aff’d*, 142 F.3d 58 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 60 (1998).

225. *Andrews*, 104 F.3d at 810 (citing *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986)) (stating that police officers who failed to meet the department’s weight requirements were not covered by the ADA as persons with disabilities).

out regard to mitigating measures such as medicines, or assistive or prosthetic devices.²²⁶

Until recently, certain impairments had consistently been held to be disabilities under the ADA. For example, insulin-dependent diabetes was held to be a disability under the ADA²²⁷ and the Rehabilitation Act.²²⁸ Interestingly, however, in *Deckert v. City of Ulysses*, the court held that despite plaintiff's diabetes and the EEOC Guidelines concluding that diabetes is per se a disability under the ADA, the plaintiff was not a person with a disability within the meaning of the ADA.²²⁹ Similarly, other courts have rejected EEOC regulations, holding that physical conditions should be considered in their medicated state to determine whether they qualify as disabilities.²³⁰ By defining disability in this manner, courts can exclude particular insulin-dependent diabetics without struggling through the analysis of whether a blanket exclusion of such diabetics is permissible under the ADA.

There is also much confusion over whether impaired vision, short of blindness, is a disability under the ADA. Impaired vision which can be corrected by glasses or contact lenses has been held to be a common condition unprotected by either the ADA or the Rehabilitation Act,²³¹ but not all courts are in agreement on this issue.²³²

226. See 29 C.F.R. § 1630.2(j).

227. See *Christopher v. Laidlaw Transit, Inc.*, 899 F. Supp. 1224, 1226-27 (S.D.N.Y. 1995) (noting that both plaintiff and defendant agreed that insulin dependence is disability under ADA); see also *Daugherty v. City of El Paso*, 56 F.3d 695, 698 (5th Cir. 1995) (concluding that insulin-dependent diabetics, although recognized as disabled by EEOC, are not "qualified" individuals for position of bus driver).

228. See *Davis v. Meese*, 692 F. Supp. 505, 517 (E.D. Pa. 1988) (stating that insulin-dependent diabetic is "clearly a 'handicapped person' within meaning of Rehabilitation Act"). But see *Gilday v. Mecosta County*, 920 F. Supp. 792 (W.D. Mich. 1996) (granting summary judgment for defendant, stating that diabetes is not disability under ADA since plaintiff did not suffer from impairment that substantially limited one or more of plaintiff's major life activities).

229. No. 93-1295, 1995 U.S. Dist. LEXIS 14526, at *16-*17 (D. Kan. Sept. 6, 1995), *aff'd*, 105 F.3d 669 (10th Cir. 1996).

230. See *Murphy v. United Parcel Service, Inc.*, 946 F. Supp. 872, 880 (D. Kan. 1996) (stating that controlled high blood pressure is not disability); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 812 (N.D. Tex. 1994) (concluding that insulin-dependent diabetes does not per se constitute disability under ADA).

231. See *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454-56 (7th Cir. 1995) (doctor; ADA); *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir. 1993) (driver; Rehabilitation Act); *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1248-50 (6th Cir. 1985) (mail sorter; Rehabilitation Act); *Sutton v. United Airlines, Inc.*, No. CIV.A.96-5-121, 1996 U.S. Dist. LEXIS 15106, at *9 (D. Colo. Aug. 28, 1996) (airline pilots; ADA); *Sweet v. Electronic Data Sys.*, No. 95 CIV.A.3987, 1996 WL 204471, at *4 (S.D.N.Y. Apr. 26, 1996) (plaintiff's diminished vision in one eye did not qualify as "disability" because it did not substantially limit any major life activ-

Courts have also differed on the question of whether an impairment substantially limits an individual in the major life activity of “working.” An impairment which excludes a person from a single, particular job does not constitute a substantial limitation in the major life activity of working.²³³ “Indeed, the very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage in his or her search for satisfactory employment.”²³⁴ Consequently, numerous courts have held that a physical impairment does not constitute a disability within the meaning of the ADA if it only disqualifies the individual for one job or a narrow classification of jobs.²³⁵ Specifically, courts have held that an impairment which prevents an individual from performing the essential functions of the position of police officer does not “substantially limit” the “major life activity” of “working.”²³⁶ Courts have reached the same conclusion with respect to

ity); *Joyce v. Suffolk County*, 911 F. Supp. 92, 96 (E.D.N.Y. 1996) (police officer; ADA and Rehabilitation Act); *Venclauskas v. Connecticut Dep’t of Pub. Safety*, 921 F. Supp. 78, 80-82 (D. Conn. 1995) (state trooper; ADA and Rehabilitation Act); *Walker v. Aberdeen-Monroe County Hosp.*, 838 F. Supp. 285, 288 (N.D. Miss. 1993) (ambulance driver and maintenance employee; Rehabilitation Act).

232. The court in *Sutton v. United Airlines, Inc.*, countered the EEOC Regulations by citing the legislative history of the ADA, which arguably indicated that the visual impairments contemplated by Congress as within ADA coverage went beyond those correctable by glasses. See *Sutton*, 1996 U.S. Dist. LEXIS 15106, at *15. The court in *Deckert v. City of Ulysses* flatly rejected the EEOC Regulations on this issue. See *Deckert v. City of Ulysses*, No. 93-1295-PFK, 1995 U.S. Dist. LEXIS 14526, at *15 (D. Kan. Sept. 6, 1995). Nevertheless, based on the language from the EEOC Regulations rejected by the *Deckert* and *Sutton* courts, the recent case of *Sicard v. City of Sioux City* held that a firefighter applicant with myopia was entitled to have his *uncorrected* vision evaluated, and therefore, could be a person with a disability. See *Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1439 (N.D. Iowa 1996); see also *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997) (stating specifically that “disability” was determined without consideration of mitigating measures).

233. See 29 C.F.R. § 1630.2(j)(3)(i) (1998); see also *Bridges v. City of Bossier*, 92 F.3d 329, 336 (5th Cir. 1996).

234. *Andrews v. Ohio*, 104 F.3d 803, 810 (6th Cir. 1997) (quoting *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) (citing *Jasany*, 755 F.2d at 1249)).

235. See *id.* at 809; *Smith v. City of Des Moines*, 99 F.3d 1466, 1474 (8th Cir. 1996); *Burbank v. City of Idaho*, No. 95-35095, 1996 WL 518098, at *2 (9th Cir. Sept. 11, 1996); *Bridges*, 92 F.3d at 336; *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319-20 (8th Cir. 1996).

236. *Andrews*, 104 F.3d at 809; *Burbank*, 1996 WL 518098, at *1 (finding individual with partial vision in one eye was not person with disability merely because individual was unable to qualify as police officer); *Aucutt*, 85 F.3d at 1319-20 (finding that angina, high blood pressure and coronary artery disease did not constitute disabilities since they did not substantially limit overall employment opportunities, although they disqualified individual from position of seasonal security guard).

firefighting positions.²³⁷ However, other courts have held that similar physical impairments do constitute disabilities, even though the individual may qualify for a broad range of jobs outside of the class sought.²³⁸

Even if the plaintiff does not actually have a disability, she may still be covered by the ADA as a person “regarded as” having a disability.²³⁹ A person is “regarded as” having a disability if the individual: (1) has an impairment which is not substantially limiting, but which the employer perceives as constituting a substantially limiting impairment; (2) has an impairment which is substantially limiting only because of the attitudes of others toward such an impairment; or (3) has no impairment at all, but is regarded by the employer as having a substantially limiting impairment.²⁴⁰

2. “Qualified:” Performing the Essential Functions of the Job

Even when certain impairments are held to be disabilities within the meaning of the ADA, persons with these disabilities are often held not to be “qualified” for the positions which they seek, and are therefore not entitled to ADA protection despite qualifying as “persons with disabilities.” “The statutory language and case law indicate that these provisions do not provide protection for all disabled individuals; instead, protection is limited to those persons who are able to meet all of a program’s requirements *in spite of their handicap.*”²⁴¹

237. See *Smith v. City of Des Moines*, 99 F.3d at 1474 (finding that firefighter with lung impairment did not have disability because “working” did not mean working at particular job of choice); *Bridges*, 92 F.3d at 336 (finding that firefighting jobs, including emergency medical technicians who serve as back-up firefighters, are too narrow a field to qualify as “class of jobs” under the ADA; therefore, applicant with mild hemophilia was not person with disability); see also *Welsh v. Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992) (finding firefighter applicant with minor sensory deficit in two fingers not “handicapped” under Rehabilitation Act).

238. See *Champ v. Baltimore County*, 91 F.3d 129 (4th Cir. 1996) (unpublished table decision) (affirming holding of district court that police officer who lost use of upper arm was person with disability under ADA, although not protected by ADA since not “qualified” for position).

239. See 42 U.S.C. § 12102(2)(C) (1994).

240. 29 C.F.R. § 1630.2(g)(1) (1998); see *Bridges*, 92 F.3d at 332; *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727-28 (5th Cir. 1995).

241. *Castellano v. City of New York*, 946 F. Supp. 249, 252-53 (S.D.N.Y. 1996) (emphasis added) (quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979)); accord *Milton v. Scrivner*, 53 F.3d 1118, 1124 (10th Cir. 1995); see also *Montegue v. City of New Orleans*, No. CIV-A-95-2420, 1997 WL 327113, at *1 (E.D. La. June 12, 1997) (stating that addiction to cocaine and marijuana constitutes disability; however, if plaintiff is not rehabilitated, plaintiff is not “qualified” for position of firefighter); *Barnes v. Cochran*, 944 F. Supp. 897, 902 (S.D. Fla. 1996) (stating defendant’s dismissal of plaintiff as police officer was based on actual misconduct).

Congress specifically required that the “essential functions” of a job be defined by first looking to the employer’s definition of the job. “If an employer has prepared a written description before advertising or interviewing the applicants for the job, this description should be considered evidence of the essential functions of the job.”²⁴² The Code of Federal Regulations explains that, “[T]he inquiry into essential functions is not intended to second guess an employer’s business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards.”²⁴³

In addition to the employer’s written description of the job, the following factors may be considered: (1) whether the position exists to perform the function; (2) the time spent performing the function; (3) whether the nature of the job would be changed if that function were removed; (4) whether other persons are available to perform the function; and (5) the consequence of not requiring a person in this job to perform a function.²⁴⁴

The EEOC illustrates the application of these criteria, using three examples: (1) A *firefighter* being able to carry a heavy person from a burning building; (2) an airline pilot being able to land a plane; and (3) a clerical worker answering a phone when no one else is available to do it.²⁴⁵ The analysis involved in defining “qualified” under the ADA is very closely related to determining whether a physical job requirement is a “bona-fide occupational qualification” within the meaning of Title VII and the ADEA. “This standard is similar to the legal standard under Title VII of the Civil Rights Act which provides that a selection procedure which screens out a disproportionate number of persons of a particular race, sex or national origin must be justified as a ‘business necessity.’”²⁴⁶

while intoxicated, rather than “archaic attitudes,” “erroneous perceptions,” “speculation,” or “myths” about disability).

242. 42 U.S.C. § 12111(8) (1994).

243. 29 C.F.R. § 1630.2(n) (1998).

244. *See id.*; EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 18, § 2.3(a), at II-17.

245. *See* 29 C.F.R. § 1630.2(n); EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 18, § 2.3(a), at II-17.

246. EEOC TECHNICAL ASSISTANCE MANUAL *supra* note 18, § 4.3.2, at IV-3; *see also* Ellen M. Saideman, *The ADA as a Tool for Advocacy: A Strategy for Fighting Employment Discrimination Against People with Disabilities*, 8 CLEV.-MARSHALL J.L. AND HEALTH 47, 58-60 (1993-94).

Since public safety cases have been litigated with respect to pregnancy,²⁴⁷ sex,²⁴⁸ and age discrimination,²⁴⁹ this area is not unfamiliar to courts. The question in all instances is whether the physical requirement is a valid measure of whether the person can perform the essential functions of the job.

Under all civil rights legislation enacted prior to the ADA, Congress and the courts have acknowledged that employers hiring for public safety positions have a legitimate basis for maintaining physical requirements for these positions where those requirements are reasonably related to safety concerns.²⁵⁰ The ADA is the most recently enacted heir to this legal legacy.

A 1990 House Labor Committee report discussed circumstances under which physical requirements would be job-related and consistent with business necessity.²⁵¹ In discussing the “narrow” exception to the rule that employment cannot be conditioned upon a physical examination, the Committee specifically named police officers and construction workers as examples of those exceptions.²⁵² “This exception to the general rule meets the employer’s need to discover possible disabilities that do, in fact, limit the person’s ability to do the job, i.e. those that are job-related and consistent with business necessity.”²⁵³ The Committee further stated:

Certain jobs require periodic physicals in order to determine fitness for duty. For example, Federal safety regulations require bus and truck drivers to have a medical exam at least biennially. In certain industries, such as air transportation, physical qualifications for some employees are critical [B]ecause a particular job function may have a significant impact on public safety, e.g. flight attendants, an employee’s state of health is important in establishing job qualifications The Committee does not intend for this Act to override any medical standards or requirements established by Federal, State or local law as a prerequisite for performing a particular job, if the medical standards are consistent with this Act (or in

247. See *Levin v. Delta Airlines, Inc.*, 730 F.2d 994 (5th Cir. 1984); *Burwell v. Eastern Airlines, Inc.*, 633 F.2d 361 (4th Cir. 1980); *Hariss v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980).

248. See *Zamlen v. City of Cleveland*, 906 F.2d 209 (6th Cir. 1990).

249. See *Western Airlines, Inc. v. Criswell*, 472 U.S. 400 (1985); *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982); *Usery v. Tamiami Trails Tours*, 531 F.2d 224 (5th Cir. 1976); *Spurlock v. United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972).

250. See *infra* notes 247-49.

251. See H.R. REP. NO. 101-485, pt. 2, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 355.

252. See *id.* at 73.

253. *Id.* at 74.

the case of federal standards, if they are consistent with section 504)—that is, if they are job-related and consistent with business necessity.²⁵⁴

[R]egarding physical qualifications for drivers of certain classifications of motor vehicles, it is the Committee's intent that a person with a disability applying for or currently holding a job subject to these standards must be able to satisfy any physical qualification standard that is job related and consistent with business necessity in order to be considered a qualified individual with a disability under Title I of this legislation.²⁵⁵

The legislative history of the ADA demonstrates Congressional intent to exempt from the definition of discrimination job criteria which are job-related and consistent with business necessity, even when they screen out persons with disabilities.²⁵⁶

Police and fire department cases are peculiar in that the most essential function of the job is to ensure public safety.²⁵⁷ The EEOC states that "specific physical or mental abilities may be needed to perform certain types of jobs," listing "policemen,"²⁵⁸ and "firefighters"²⁵⁹ among examples of such positions. The EEOC more specifically addresses a police department example with the following hypothetical:

A police department that requires all its officers to be able to make forcible arrests and to perform all job functions in the department might be able to justify stringent physical requirements for all officers, if in fact they are all required to be available for any duty in an emergency.²⁶⁰

254. *Id.* at 74 (citing *Strathie v. Department of Transp.*, 716 F.2d 227, 231 (3d Cir. 1983)).

255. *Id.* at 57.

256. *See id.* at 11; *see also* *Murphy v. United Parcel Service, Inc.*, 946 F. Supp. 872, 883-84 (D. Kan. 1996) (holding that ADA does not protect truck driver dismissed because of high blood pressure).

257. Recognizing congressional intent, the EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 18, § 4.4, at IV-5, states that, "[a]n employer may establish physical or mental qualifications that are necessary to perform specific jobs (for example, jobs in the transportation and construction industries; police and firefighter jobs; security guard jobs) or to protect health and safety." *See also Pre-employment Disability-Related Questions and Medical Examination*, EEOC COMPLIANCE MANUAL § 902 (1995).

258. The EEOC generally uses more sex-neutral terms, such as "police officer."

259. EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 18, § 4.4, at IV-7.

260. *Id.* § 4.4, at IV-8.

The EEOC also acknowledges that “[s]ometimes a function that is performed infrequently may be essential because there will be serious consequences if it is not performed.”²⁶¹

The consequences of failing to require the employee to perform the function may be another indicator of whether a particular function is essential. For example, although a firefighter may not regularly have to carry an unconscious adult out of a burning building, the consequence of failing to require the firefighter to be able to perform this function would be serious.²⁶²

“The disability is not thrown out when considering if the person is qualified for the position sought.”²⁶³ Although blanket exclusions are generally unacceptable, legitimate physical requirements are proper.²⁶⁴ Where the decision to exclude the person with the disability was rational, rather than based on “‘archaic attitudes,’ ‘erroneous perceptions,’ ‘speculation,’ or ‘myths,’” such exclusion is permissible.²⁶⁵

Both police and fire departments have been resolving questions regarding the relationship between physical requirements and the ability to perform the job since their inception. Such questions are raised in every involuntary medical retirement case, as well as in cases involving requests for medical retirement, and limited-duty assignment.²⁶⁶ These decisions are internal, administrative personnel matters, generally heard by retirement/pension boards or chiefs of personnel. They may be appealable to state courts, but they are not civil rights cases, nor could they be brought under federal law.²⁶⁷ Evidence in these cases typically consists of medical testimony, including that

261. 29 C.F.R. § 1630.2(n) (1991); see EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 18 § 2.3.d, at II-17.

262. See 29 C.F.R. § 1630.2(n).

263. *Knapp v. Northwestern Univ.*, 101 F.3d 473, 482 (7th Cir. 1996) (quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 405-06 (1979)).

264. See *Davis*, 442 U.S. at 407; *Davis v. Meese*, 692 F. Supp. 505, 517 (E.D. Pa. 1988) (concluding that such requirements may be held valid notwithstanding that they affect group or class rather than individual); see also *Rayha v. United Parcel Service, Inc.*, 940 F. Supp. 1066, 1069 (holding clerk who could not obtain OSHA certification due to respiratory condition unqualified to perform essential functions of job involving handling of hazardous material).

265. See *Barnes v. Cochran*, 944 F. Supp. 897, 902 (S.D. Fla. 1996) (quoting *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995)).

266. See, e.g., *Bell v. Retirement Bd.*, No. 92 c 5197, 1993 WL 398612, at *2 (N.D. Ill. Oct. 6, 1993); *EEOC v. New Jersey*, 631 F. Supp. 1506, 1508 (D.N.J. 1986) (challenging mandatory retirement age of sixty-five for state police officers); *Danko v. Board of Trustees*, 608 N.E.2d 333, 337, 340-41 (Ill. App. Ct. 1992) (reversing administrative rejection of officer's disability retirement petition).

267. See cases cited *supra* note 266.

from the department's doctor, who is familiar with the duties of the position.²⁶⁸ Other police or fire department officials or officers may testify as to the job duties. In addition, national standards have been established which set out the essential functions of the positions of police officer²⁶⁹ and firefighter.²⁷⁰

a. Duties of a Police Officer

The law enforcement community has developed a national consensus with respect to the essential functions of a "typical" police officer. The following is a list of such essential functions.

- 1) Make Custodial Arrests
- 2) Drive, Operate, and Maintain Departmental Vehicles
- 3) Provide Care and Treatment to Citizens and Prisoners
- 4) Communicate Orally and in Writing
- 5) Conduct Investigations and Interviews
- 6) Use Force
- 7) Perform Patrol Functions
- 8) Perform Rescue Operations and Render Citizen Assistance
- 9) Conduct Searches and Seizures
- 10) Perform Public Safety Operations²⁷¹

The ability to affect forcible arrests is a national standard for police officers and has been held to be a reasonable and necessary requirement for the position.²⁷² Police officers also bear the responsibility of safely and appropriately carrying and using weap-

268. See *EEOC v. New Jersey*, 631 F. Supp. at 1510; *Danko*, 608 N.E.2d at 336.

269. See generally NATIONAL EXECUTIVE INSTITUTE ASSOCIATES AND FEDERAL BUREAU OF INVESTIGATION ACADEMY, PHYSICAL FITNESS TESTING IN LAW ENFORCEMENT: IMPLICATIONS OF THE AMERICANS WITH DISABILITIES ACT, CIVIL RIGHTS ACT OF 1991, AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT, MAJOR CITY CHIEFS (August 1993) [hereinafter MAJOR CITY CHIEFS].

270. PENN. STATE STUDY, *supra* note 207, at 3-20, 3-34, 3-67.

271. See MAJOR CITY CHIEFS, *supra* note 269 at 8-21. The Report also includes an Appendix, provided by the Florida Sheriffs Association, instructing law enforcement agencies on how to perform a Job and Task Analysis ("JTA") and to write job descriptions in an effort to comply with the ADA. See *id.* app. at 48; FLORIDA SHERIFFS ASSOC., FSA GUIDE TO JOB AND TASK ANALYSIS AND JOB DESCRIPTIONS FOR ADA COMPLIANCE (1992). A Job and Task Analysis lists each task an officer may perform, based on actual answers to questionnaires given to officers. The frequency that the task is performed and the importance of the task are factored in when determining whether the task is an essential function of the job. See also PENN. STATE STUDY, *supra* note 207, at 3-1, 3-4. A similar job analysis for police officers was discussed in *EEOC v. Pennsylvania*, 645 F. Supp. 1545, 1547-49 (M.D. Pa. 1986), *vacated on other grounds*, 829 F.2d 392 (3d Cir. 1987) (denying on remand police officer's challenge of mandatory retirement age under ADEA).

272. See *Champ v. Baltimore County*, No. 95-2061, 1996 U.S. App. LEXIS 16417, at *4 (4th Cir. July 10, 1996); *Simon v. Saint Louis County*, 735 F.2d 1082, 1083 (8th Cir. 1984) (questioning if ability to make arrest is appropriate requirement); *Davoll v.*

ons.²⁷³ Generally, all full-duty police officers are expected to be able to handle emergency situations and are trained to do so.²⁷⁴

The argument that a plaintiff has proven that she can perform the duties of the job simply because she has been employed in such a position should be closely scrutinized. Past performance in a public safety position may be only marginally relevant—or completely irrelevant—in determining whether a person is “qualified” if such person has not been faced with an emergency situation. When the most essential function of the job is to rescue people from emergency situations, the duties of the job may change from day to day.²⁷⁵ Although the need to perform a particular job function may arise infrequently (or not at all), the function is essential if the consequences of non-performance in that situation would be disastrous. In public safety positions, the test of performance does not occur until the employee is called upon to perform in an emergency situation.²⁷⁶

Police officers are not able to call a “time out” in emergencies while they look for their glasses or lost contact lenses No one likes to contemplate a police officer trying to determine before he fires, which of two blurry shapes is the felon and which is the hostage or his fellow officer.²⁷⁷

Webb, 943 F. Supp. 1289, 1299 (D. Colo. 1996); *Dorris v. City of Kentwood*, No. 1:94-CV-249, 1994 WL 762219, at *3 (W.D. Mich. Oct. 4, 1994).

273. *Champ*, 1996 U.S. App. LEXIS 16417, at *4; *EEOC v. Pennsylvania*, 645 F. Supp. at 1548; *EEOC v. New Jersey*, 620 F. Supp. at 985.

274. There may be exceptions, particularly in small town police or sheriff’s departments. If such a department does not depend upon the transferability of personnel or require all of its officers to affect arrests, it may be possible for the department to accommodate a person with a disability. However, this raises the question of whether permanent assignments which do not require affecting arrests or carrying guns should be civilian positions, even in a small department.

275. *See Paegle v. Department of Interior*, 813 F. Supp. 61, 65 (D.D.C. 1993) (explaining that National Park Service Police have duty to “prevent, suppress, investigate, or solve” crimes as part of their position).

276. *See Allison v. Department of Corrections*, 94 F.3d 494, 499 & n.2 (8th Cir. 1996) (arguing that both ADA and Rehabilitation Act permit discharge of correctional officer who is unable to physically restrain inmates since “[i]t is essential that the corrections officers be able to adequately perform the defensive tactics in order to control inmates and suppress disorders as well as to protect themselves and others”) (quoting *Stratton v. Missouri Dep’t of Corrections*, 897 S.W.2d 1, 5 (Mo. Ct. App. 1995)); *see, e.g., Johnson v. Maryland*, 940 F. Supp. 873, 878-79 (D. Md. 1996) (granting summary judgment for defendant because no reasonable jury could conclude that plaintiff, with a limp, neuromuscular disorder, and Charcot-Mane Tooth disease, was “qualified,” since, in emergency situations, all corrections officers must be able to assume positions requiring the use of firearms), *aff’d*, 113 F.3d 1232 (4th Cir. 1996).

277. *Joyce v. Suffolk County*, 911 F. Supp. 92, 97 (E.D.N.Y. 1996) (quoting *Padilla v. City of Topeka*, 708 P.2d 543, 547-48 (Kan. 1985)).

Police officers must be ready for dangerous encounters even if they never occur, just as soldiers must be trained for war even though they may never find themselves in combat. Officers must be ready for the unexpected emergency. They may perform the daily demands of the job for years without ever being tested, in the line of duty, as to physical agility, ability to shoot, or ability to detect someone in peripheral vision range who might pose a danger. Nevertheless, on the day that the officer is called upon to perform that task in an emergency situation, she must be able to do it—or someone may die.

b. Duties of a Firefighter

Much like police officers, firefighters are expected to be flexible and multi-skilled. They must be knowledgeable of dangers and department procedures, mentally and emotionally able to make sound emergency decisions, and physically fit to handle the unexpected risks. Also, like police officers and soldiers, they risk physical injury—and even death—to protect the public. Firefighters must also be ready and able to continue the “battle” against a fire that has just taken the life of, or incapacitated, a fellow firefighter. It is essential that firefighters meet the physical criteria to perform functions that may not be part of their daily activities, but that would be crucial in an emergency situation.

[T]he duties of a firefighter are inherently dangerous. The Department requires its firefighters to meet a high standard of physical fitness in order for them to respond immediately and effectively to emergencies. It is critical that every firefighter be able to perform his or her duties at a moment’s notice in such emergencies.²⁷⁸

National standards developed for firefighters illustrate the need for these abilities. Generally, the duties of a firefighter include the following:

- 1) Operate both as a member of a team and independently at incidents of uncertain duration.
- 2) Spend extensive time outside exposed to the elements.
- 3) Tolerate extreme fluctuations in temperature while performing duties. Must perform physically demanding work in hot (up to 400 degrees), humid (up to 100%) atmosphere while wearing equipment that significantly impairs body-cooling mechanisms.
- 4) Experience frequent transition from hot to cold and from humid to dry atmospheres.
- 5) Work in wet, icy, or muddy areas.

278. *Miller v. Sioux Gateway Fire Dep’t*, 497 N.W.2d 838, 842 (Iowa 1993).

- 6) Perform a variety of tasks on slippery, hazardous surfaces such as rooftops or from ladders.
- 7) Work in areas where sustaining traumatic or thermal injuries is possible.
- 8) Face exposure to infectious agents such as hepatitis B or HIV.
- 9) Wear personal protective equipment that weighs approximately 50 pounds while performing fire fighting tasks.
- 10) Perform physically demanding work while wearing positive pressure breathing equipment with 1.5 inches of water column resistance to exhalation at a flow of 40 liters per minute.
- 11) Perform complex tasks during life-threatening emergencies.
- 12) Work for long periods of time, requiring sustained physical activity and intense concentration.
- 13) Face life or death decisions during emergency conditions.
- 14) Be exposed to grotesque sights and smells associated with major trauma and burn victims.
- 15) Operate in environments of high noise, poor visibility, limited mobility, at heights, and in enclosed or confined spaces.
- 16) Use manual and power tools in the performance of duties.
- 17) Rely on senses of sight, hearing, smell, and touch to help determine the nature of the emergency, maintain personal safety, and make critical decisions in a confused, chaotic, and potentially life-threatening environment throughout the duration of the operation.²⁷⁹

Job Task Analyses of firefighting positions have also determined that the position's demands include, *inter alia*, breaking glass, doors, or other structures,²⁸⁰ moving or lifting heavy objects,²⁸¹ stooping or crawling,²⁸² digging to free victims,²⁸³ restraining aggressive victims,²⁸⁴ and applying first aid, including controlling a victim's bleeding.²⁸⁵ One court graphically explained that the evidence produced at trial demonstrated:

that when firefighters enter a structure fire, often they are unable to see, hear, or smell, and that they crawl along the walls to maintain a reference point while continuously sweeping their arms and legs in attempts to locate injured victims [F]irefighters must move as quickly as possible to save lives, and, thus, . . . firefighters trying to locate victims in an atmosphere of no visibility often must "lead

279. NATIONAL FIRE PROTECTION ASSOC., PUBLICATION 1582, MEDICAL REQUIREMENTS FOR FIREFIGHTERS, app. C (1992).

280. PENN. STATE STUDY, *supra* note 207, at 3-21, 3-22.

281. *Id.* at 3-21.

282. *Id.* at 3-20.

283. *Id.* at 3-22.

284. *Id.* at 3-21.

285. *Id.*

with [their] head[s].” There is evidence that the City’s firefighters have fallen through ceilings and floors and from roofs and ladders, have been struck by falling televisions, tables, chests of drawers, bar bells, and ceiling joists, and have been knocked around by an over-pressurized fire hose. And, in contrast to when similar injuries are received in other jobs, the City presented evidence that firefighters do not have the luxury of seeking immediate medical treatment because every minute counts in saving lives during a fire. Whether or not the actual trauma encountered by firefighters is quite so routine or severe, this is sufficient evidence to sustain the district court’s finding of the City’s good faith, actual *perception* that firefighters routinely encounter extreme trauma in their jobs.²⁸⁶

Courts have recognized that in addition to entering burning buildings to put out fires and carry people to safety,²⁸⁷ firefighters must read quickly and accurately to identify hazardous materials,²⁸⁸ and prepare accurate, literate written reports.²⁸⁹

Although firefighters are not typically sent into fires facing knives and guns, they have now become, on a national scale, the organization of “first response” to emergency situations. Firefighters also function as paramedics and may arrive on a violent scene before the police. Firefighters do not wear their protective gear while performing these tasks, nor do they carry guns for self-protection. This phenomenon makes firefighters perhaps just as likely to be wounded at an emergency scene as police officers.

Even the traditional duties of a firefighter listed include the administration of first aid, including controlling a victim’s bleeding.²⁹⁰ The list also specifically includes the risk of being exposed to hepatitis B or HIV.²⁹¹ This description of firefighting anticipates the possible mingling of a victim’s blood with that of a firefighter.

286. *Bridges v. City of Bossier*, 92 F.3d 329, 333 n.4 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 770 (1997) (emphasis in original).

287. *See* *Huber v. Howard County*, 849 F. Supp. 407, 409, 413 (D. Md. 1994) (finding that firefighters are subject to demanding physical tasks).

288. *See* *DiPompo v. West Point Military Academy*, 770 F. Supp. 887, 889 (S.D.N.Y. 1991).

289. *See id.* at 890-92.

290. *See supra* note 279 and accompanying text.

291. *See* MEDICAL REQUIREMENTS FOR FIREFIGHTERS *supra* note 279, at 64.

c. Needs of Para-Military Organizations

Police and fire departments are considered para-military organizations.²⁹² Para-military organizations are characterized by a highly structured “chain of command”²⁹³ and typically employ the use of uniforms to denote rank.²⁹⁴ They depend upon the transferability of personnel in order to protect the public safety, requiring sworn personnel to be available for any assignment at any time.²⁹⁵ Sworn personnel are expected to be able to appropriately handle physically dangerous situations.²⁹⁶ Even senior officers may be called upon to perform strenuous physical tasks under certain situations.²⁹⁷ Non-patrol officers assigned to “light duty” may also be “pulled” from these assignments to assist in emergencies.²⁹⁸ Furthermore, police officers are typically required to carry weapons at all times while in their juris-

292. Police department cases include: *Johnson v. New York*, 49 F.3d 75, 82 (2d Cir. 1995); *Gately v. Massachusetts*, 2 F.3d 1221, 1227 (1st Cir. 1993); *EEOC v. Missouri*, 748 F.2d 447, 457 (8th Cir. 1984); *Mahoney v. Trabucco*, 738 F.2d 35, 38 (1st Cir. 1984); *EEOC v. Pennsylvania*, 645 F. Supp. 1545, 1546-47 (M.D. Pa. 1986), *vacated*, 829 F.2d 392 (3d Cir. 1987); *EEOC v. New Jersey*, 620 F. Supp. 977, 984 & n.6 (D.N.J. 1985); *Greenwald v. Frank*, 40 A.D.2d 717, 721 (N.Y. App. Div. 1972), *aff'd*, 32 N.Y.2d 862 (1973).

Fire department cases include: *Cox v. City of Chicago*, 868 F.2d 217, 218 (7th Cir. 1989); *Wilcher v. City of Wilmington*, 891 F. Supp. 993, 1001 (D. Del. 1995) (citing *Policeman's Benevolent Ass'n Local 318 v. Washington Township*, 850 F.2d 133 (3d Cir. 1988)), *vacated*, 139 F.3d 366 (3d Cir. 1998); *Harper v. Crocket*, 868 F. Supp. 1557, 1575 (E.D. Ark. 1994); *see also Penny v. City of Chattanooga*, 915 F.2d 1065, 1070 (6th Cir. 1990) (Wellford, J., concurring) (referring to slip opinion in concurring opinion).

293. *See Cox*, 868 F.2d at 218-19; *EEOC v. New Jersey*, 620 F. Supp. at 996.

294. *See EEOC v. New Jersey*, 620 F. Supp. at 984-85 (stating high ranking officers are required to participate in holiday sobriety patrols).

295. *See Champ v. Baltimore County*, No. 95-2061, 1996 U.S. App. LEXIS 16417, at *6 (4th Cir. July 10, 1996); *Johnson*, 49 F.3d at 77; *Gately*, 2 F.3d at 1226-27 (explaining that age qualification applies to all members of state police due to quasi-military nature of organization) (citing *Mahoney v. Trabucco*, 738 F.2d 35, 39 (1st Cir. 1984)); *EEOC v. Missouri*, 748 F.2d at 450-51 (describing wide array of duties highway patrolman is called upon to perform); *Mahoney*, 738 F.2d at 39; *Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17, 21 (2d Cir. 1979); *EEOC v. Pennsylvania*, 645 F. Supp. at 1546-47; *EEOC v. New Jersey*, 620 F. Supp. at 985; *cf. Penny*, 915 F.2d at 1070 (Wellford, J., concurring) (describing police officers as on duty at all times); *Johnson v. Maryland*, 940 F. Supp. 873, 878 (D. Md. 1996) (stating correctional officers must be prepared for emergencies).

296. *See supra* note 2 and accompanying text for distinction between sworn personnel and civilian employees.

297. *See EEOC v. Missouri*, 748 F.2d at 450-51 (noting high ranking officers performed patrol duties on weekends, holidays, and in emergencies); *Hamlin v. Charter Township of Flint*, 942 F. Supp. 1129, 1133-34 (E.D. Mich. 1996) (noting Assistant Fire Chief required to perform all duties of firefighter, as needed).

298. *See Champ*, 1996 U.S. App. LEXIS 16417, at *6.

diction, whether on or off duty.²⁹⁹ This provides additional protection to the public since even off-duty officers are equipped and obligated to protect the public within the department's jurisdiction.³⁰⁰

A para-military structure helps to protect the public in numerous ways. All sworn members are able to perform the basic rescue functions of the position, so that if one member becomes incapacitated during an emergency, the next available member can pick up those duties immediately—as does a soldier during battle. In other words, if a member of the rescue mission becomes incapacitated, or is unable to otherwise protect, rescue, or defend against the confronted danger, other members of that rescue mission must compensate for that inability. In emergency situations, the additional time or effort needed to compensate could result in serious injury or death for members of the public, the person with a disability, or other members of the department.³⁰¹ Therefore, where a department is held to be a para-military organization, “BFOQ should be considered in the context of the generic ‘occupation’ of police officers [and firefighters] required to perform front-line duties, regardless of the present assignment of any particular officer.”³⁰²

Since para-military organizations are modeled after the military in many respects, it is worth noting that *sworn* members of the military are not covered by Title VII, the ADEA, the Rehabilitation Act, or the ADA.³⁰³ The United States Army does have its own regulations prohibiting discrimination on the basis of race, national origin, sex, and religion; however, it has no regulations prohibiting discrimi-

299. See *EEOC v. Pennsylvania*, 645 F. Supp. at 1547; *EEOC v. New Jersey*, 620 F. Supp. at 985.

300. The protection which off-duty police officers provide is illustrated by the facts of *EEOC v. Missouri*, 748 F.2d 447 (8th Cir. 1984). In that case, a police lieutenant who normally worked at a desk chased a speeding motorist on his way home from work. The motorist attempted to shoot the lieutenant but the lieutenant shot and killed him first. See *id.* Clearly, fitness for duty, at least with respect to weapons use, was crucial in this instance.

301. See *Miller v. Sioux Gateway Fire Dep't*, 497 N.W.2d 838, 842 (Iowa 1993) (noting that National Fire Protection Association has determined that diabetics may not serve as firefighters).

302. *EEOC v. New Jersey*, 620 F. Supp. at 984 n.6 (citing *Mahoney v. Trabucco*, 738 F.2d 35, 39 (1st Cir. 1984)); accord *EEOC v. Pennsylvania*, 645 F. Supp. at 1553 (finding *EEOC v. New Jersey* inapplicable because Pennsylvania State Patrol did not have mandatory fitness requirements).

303. Sworn members of the armed forces are not “employees” within the meaning of these statutes, nor is service in the armed forces employment. See *Roper v. Department of the Army*, 832 F.2d 247, 248 (2d Cir. 1988) (Title VII); *Kawitt v. United States Army*, 842 F.2d 951, 953 (7th Cir. 1988) (ADEA).

nation on the basis of disability.³⁰⁴ To the contrary, the physical requirements for service in the United States Army include blanket exclusions of persons with certain disabilities, including *inter alia*, insulin-dependent diabetes,³⁰⁵ hearing impairment,³⁰⁶ lack of visual acuity in both eyes,³⁰⁷ missing or impaired limbs,³⁰⁸ HIV/AIDS,³⁰⁹ and numerous other physical conditions.³¹⁰ A soldier who becomes physically disqualified is given a medical discharge.³¹¹ Waivers of these physical requirements are granted only in exceptional situations involving highly skilled personnel, usually officers, who are deemed necessary to national security.³¹²

Understanding that police officers and firefighters, like soldiers, must use their physical abilities to “protect and serve,” it is not surprising that most police and fire departments use physical hiring criteria that mirror military requirements.

3. *The Burden of Proving “Direct Threat”*

In public safety cases, there is an overlap between “essential functions of the job” and “direct threat.” There has been resulting confusion as to whether it is the plaintiff’s or the defendant’s burden to prove that the person with the disability in question would cause a public safety risk.³¹³

If the case is superficially examined and characterized as one involving health and safety, the necessary “qualified” analysis might be bypassed, moving directly to “direct threat” as a defense. However,

304. *See, e.g.*, U.S. Army Reg. 600-20, at 6-3 (1988). Each branch of the military has its own medical standards regulation, but the physical standards are similar.

305. *See* U.S. Army Reg. 40-501, at 2-8(c) (1995).

306. *See id.* at 2-7.

307. *See id.* at 2-13(a).

308. *See id.* at 2-9, 2-10, 2-11.

309. *See id.* at 2-4(f); *see also* U.S. Army Reg. 600-110, at 1-14(a) (1988); Army Reg. 40-501, at 4-2, 4-7 (1995) (prohibiting the enlistment or appointment of HIV-infected persons into the Army); *id.* at 1-14(e) (mandating that soldiers who become HIV-infected be confined to assignments within the United States, Guam, the Virgin Islands, and the American Samoa).

310. *See generally* U.S. Army Reg. 40-501, Chapter 2.

311. *See* U.S. Army Reg. 635-40, at 3-1 (1990).

312. *See id.*, at 6-3.

313. In conformity with *Arline*, numerous courts have held that the plaintiff has the burden of proving that she does not pose a direct threat as part of the “qualified” analysis. *See* Christopher v. Laidlaw Transit Inc., 899 F. Supp. 1224, 1226-27 (S.D.N.Y. 1995); Roe v. District of Columbia, 842 F. Supp. 563, 568-69 (D.D.C. 1993), *vacated*, 25 F.3d 1115 (D.C. Cir. 1994) (Rehabilitation Act); Doe v. District of Columbia, 796 F. Supp. 559, 567 (D.D.C. 1992) (Rehabilitation Act). Other courts place the burden of proving direct threat on the employer. *See, e.g.*, Sarasycki v. United Parcel Service, Inc., 862 F. Supp. 336, 341 (W.D. Okla. 1994).

where the primary purpose of the job is to protect health and safety, health and safety considerations are paramount—not secondary; therefore, they must be discussed in the context of the essential functions of the job.

Congress intended that the burden of proof with respect to the essential functions of the job³¹⁴ and direct threat³¹⁵ be construed “in the same manner in which parallel agency provisions are construed under Section 504 of the Rehabilitation Act”³¹⁶ However, “direct threat” is addressed in the “qualified” analysis under the Rehabilitation Act, placing the burden of proof on the applicant;³¹⁷ yet, “direct threat” appears only under “Defenses” in the ADA.³¹⁸

The “direct threat” language was not contained in the Rehabilitation Act, but developed through case law, most notably, *Arline*. Congress integrated the *Arline* concept of “direct threat” into the ADA as a defense, separating it from the question of whether a person with a disability could actually perform the essential functions of a particular job.³¹⁹

In interpreting the direct threat provisions of the ADA, EEOC Regulations state:

314. See 42 U.S.C. § 12111(8) (1994).

315. See *id.* § 12113(b).

316. H.R. REP. NO. 101-485 (II), at 72 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 354.

317. For discussion of *Arline* and its progeny, see *infra* Part III.

318. See 42 U.S.C. § 12113(b). Congress explained in the House Judiciary Committee’s Report:

A qualification standard may also include a requirement that an individual not pose a direct threat to the health or safety of other individuals in the workplace. During Committee consideration, this “direct threat” standard was extended to all individuals with disabilities, and not simply to those with contagious diseases or infections.

This concept is also contained in the Civil Rights Restoration Act of 1988 and the Fair Housing Amendments Act. It is based on the same standard for “qualified” person with a disability that has existed for years under the Rehabilitation Act of 1973.

In order to determine whether an individual poses a direct threat to the health or safety of other individuals in the workplace, the Committee intends to use the same standard as articulated by the Supreme Court in *School Board of Nassau County v. Arline*. In *Arline*, the court held that a “person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk.”

H.R. REP. NO. 101-485 (III), at 45, *reprinted in* 1990 U.S.C.C.A.N. 445, 468 (internal citations omitted).

319. See H.R. REP. NO. 101-485 (II), at 72-73, *reprinted in* 1990 U.S.C.C.A.N. 303, 354-56.

The determination that an individual applicant or employee with a disability poses a “direct threat” to health or safety must be based on objective factual evidence related to that individual’s present ability to safely perform the essential functions of a job.³²⁰

Determining whether an individual poses a significant risk of harm to others must be made on a case-by-case basis. For individuals with mental or emotional disabilities, the employer must identify the specific behavior on the part of the individuals with physical disabilities; the employer should then consider the four factors listed in part 1630: “(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm.”³²¹

The EEOC depicts the standard for establishing direct threat as high.³²² However, the ADA itself does not require a “high probability of harm,” but defines direct threat as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”³²³ The following EEOC examples acknowledge that the nature and the severity of the potential harm is also a significant factor in this analysis.

An elementary school teacher who has tuberculosis may pose a risk to the health of children in her classroom. However, with proper medication, this person’s disease would be contagious for only a two-week period. With an accommodation of two-weeks absence from the classroom, this teacher would not pose a “direct threat.”³²⁴

A person with epilepsy, who has lost consciousness during seizures within the past year, might seriously endanger her own life and the lives of others if employed as a bus driver. But this person would not pose a severe threat if employed in a clerical job.³²⁵

The EEOC also uses an example of an individual with a psychological disorder whose behavior is “violent, aggressive, destructive or threatening” as a person who might pose a direct threat to the health

320. EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 18, § 4.5.4, at IV-11 to IV-12 (1992) (emphasis omitted).

321. 29 C.F.R. § 1630.2(r) (1998). “Direct threat” is addressed in Section IV of the EEOC TECHNICAL ASSISTANCE MANUAL, entitled “Establishing Nondiscriminatory Qualification Standards and Selection Criteria.” *See* EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 18, § 4.5, at IV-1.

322. *See* EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 18, § 4.5.3, at IV-11 (stating that employer must be prepared to show that there is significant risk, that is, high probability of substantial harm, if person were employed).

323. 42 U.S.C. § 12111(3) (1994).

324. EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 18, § 4.5.2, at IV-10.

325. *See id.*

and safety of others in the workplace.³²⁶ Therefore, as illustrated by the examples, it appears that the EEOC does not actually hold to the standard of “a high probability of harm,” or even imply that the threatened harm must be likely to occur. It appears sufficient under “direct threat” analysis that a serious harm need be only a real, rather than fictional, possibility.

The EEOC discusses police officers, firefighters, and other public safety positions under the heading “Establishing Job-Related Qualification Standards,”³²⁷ rather than under the heading of “Standards Necessary for Health and Safety: A ‘Direct Threat.’”³²⁸ This indicates that public safety cases generally present questions of whether a person is qualified to perform the essential functions of the job in order to protect the public, rather than under a direct-threat defense analysis.³²⁹ The EEOC examples of possible direct threat involve a teacher with a contagious disease (as in *Arline*), a person with a violent psychological disorder, a bus driver with epilepsy, and a narcoleptic who used power tools.³³⁰ None of the examples involve positions which require acting in emergency situations to protect the public. Instead, they involve the person with the disability as the source of the danger.³³¹ It is the presence of the person with the disability at the worksite which causes the danger to health and safety.

This analysis is easily contrasted with the situations generally present in the majority of police and fire department cases challenging physical fitness requirements. In those cases, the presence of the person with the disability is not the source of the potential harm, but rather, the potential harm to health and safety is derived from the applicant’s inability to perform the essential functions of the job (e.g., saving others from harm in emergencies).³³² These examples further illustrate that, in at least most police and fire department cases, “direct

326. *See id.* § 4.5.4, at IV-12.

327. *See id.* § 4.4, at IV-5.

328. *Id.* § 4.5, at IV-9.

329. *See id.* §§ 4.5-4.6, at IV-9 to IV-17.

330. *See id.*

331. However, of these examples, the bus driver with epilepsy is the closest to the positions of police officer or firefighter. Although bus drivers are not rescuers in emergency situations, a driver experiencing a seizure will not be able to perform the essential function of the job—driving safely.

332. *See, e.g.,* *Johnson v. Maryland*, 940 F. Supp. 873, 878 (D. Md. 1996) (holding inability to control prison population in emergency situation “poses a direct threat to the safety of other corrections officers and to the public at large”) (citing *Champ v. Baltimore County*, 884 F. Supp. 991, 995 (D. Md. 1995), *aff’d*, 91 F.3d 129 (4th Cir. 1996) (unpublished table decision)), *aff’d*, 113 F.3d 1232 (4th Cir. 1997) (per curiam) (unpublished table decision).

threat” should be determined within the “qualified” analysis as part of the plaintiff’s prima facie case of proving that she is qualified for the position.

There are situations within police and fire departments where the direct threat is posed by the presence of the person with the disability rather than by an inability to rescue in an emergency. This situation is best illustrated by two independent Rehabilitation Act cases brought against the District of Columbia Fire Department.

The first case, *Doe v. District of Columbia*, involved a firefighter applicant who was HIV-positive.³³³ Following the *Arline* analysis, the court placed the burden on the plaintiff to prove that he did not pose a direct threat to the health or safety of himself or others.³³⁴ Nevertheless, the court held that the plaintiff met this burden by presenting an expert witness who testified that the risk of transmitting the virus during firefighting duties was “‘like getting struck by a meteor while walking down Constitution Avenue.’”³³⁵ Illustrating how difficult it is to transmit HIV, the expert stated that 0.3 - 0.5 percent of health care workers “become infected with HIV as a result of being stuck with a needle contaminated with HIV-positive blood.”³³⁶ An expert in infection control further testified that other fire departments across the nation employ firefighters who are HIV-positive.³³⁷ The court therefore ordered the city to hire “Doe” as a firefighter in the District of Columbia.³³⁸

The second case, *Roe v. District of Columbia*, involved a District of Columbia firefighter infected with Hepatitis B.³³⁹ The city had settled with Roe, so that the only remaining issue at trial was whether Roe could be restricted in his duties in one respect: the city sought to prohibit him from administering mouth to mouth resuscitation without

333. 796 F. Supp. 559 (D.D.C. 1992).

334. *See id.* at 567-68.

335. *Id.* at 563 (quoting testimony of Dr. David Parenti).

336. *Id.* Note that this is a very specific, limited way of contracting the disease, particularly since health care institutions take tremendous precautions to avoid such contagion and health care workers do not generally stick themselves with the needles they use for patients.

337. *See id.* at 563-64. The city presented no evidence during this one day trial and made no opening or closing arguments. It may be that the court believed that it was compelled, as a matter of law, to rule in favor of the plaintiff, since his two expert witnesses appeared to be credible and none of his evidence was contested.

338. *See id.* at 573.

339. 842 F. Supp. 563, 564 (D.D.C. 1993) (describing hepatitis B as highly contagious virus which attacks liver; although hepatitis B has lower mortality rate than does HIV (“one-tenth of one percent”), it can cause liver damage, cancer, and death), *vacated as moot*, 25 F.3d 1115 (D.C. Cir. 1994) (per curiam) (unpublished table decision).

the use of mechanical equipment, unless no one else was available to perform the procedure in an emergency situation.³⁴⁰ As in *Doe*, the same court held that the plaintiff, “Roe,” had the burden of proving that he did not pose a direct threat to the health or safety of others.³⁴¹ This was determined to be part of his prima facie case showing that he was an “otherwise qualified” individual within the meaning of the Rehabilitation Act.³⁴² Despite the undisputed presence of the Hepatitis B virus in saliva, the court similarly held that the plaintiff carried his burden by showing that the chances of transmission were low and that other firefighters may be infected with the virus because the department does not test for Hepatitis B.³⁴³

The statistical data presented in *Doe* and *Roe* should be analyzed against the chances of contracting the HIV virus through sexual contact. On motion for summary judgment, the court in *Doe v. Johnson* held that, if the defendant had reason to suspect that he was infected with HIV, he had a duty to inform the plaintiff of his condition before engaging in intercourse with her.³⁴⁴ This was so even though the chance of transmitting AIDS after one incident of unprotected intercourse was one in 300 to 500.³⁴⁵ If the woman who had contracted the virus unknowingly consented to sex, he would be liable for her injuries for exposing her to a foreseeable risk of infection.³⁴⁶ Although the chances of transmitting HIV during each act of unprotected sexual intercourse are not statistically great, contagion is foreseeable. Few persons would knowingly dismiss the risk of contagion based on the low statistical chance of becoming infected. Indeed, there is a national campaign to discourage taking such chances and the problem is portrayed as an epidemic in this country.

340. *See id.*

341. *See id.* at 568-69.

342. *See id.*

343. *See id.* at 569-70. Note that the *Doe* and *Roe* line of cases were decided by the same court and the same two experts were relied upon in deciding for plaintiffs in both cases. In *Roe*, the city did present an expert witness, but the court was still not persuaded that the risk of contagion was high enough to preclude “Roe” from performing mouth to mouth resuscitation without protective gear. *See id.* at 569. *But see* EEOC v. Prevo’s Family Market, 135 F.3d 1089, 1096 (6th Cir. 1998) (reversing district court’s holding that HIV-positive produce clerk posed “negligible” risk of contagion to customers and was therefore qualified individual with disability who did not pose direct threat to health or safety of others).

344. 817 F. Supp. 1382, 1393 (W.D. Mich. 1993) (holding that duty to disclose risk of HIV infection exists when defendant has actual knowledge of HIV infection, has experienced HIV symptoms, or has knowledge that prior partner has HIV).

345. *See id.*

346. *See id.*

The negligence standard under tort law should be instructive in assessing whether the department should take precautions against the infection of members of the public by not sending “rescuers” who might infect them with fatal diseases. Under long-established tort law, a person is civilly liable for conduct which causes reasonably foreseeable harm.³⁴⁷ Such person is not relieved of liability simply because the statistical chances of the harm are minimal. Instead, the law imposes upon every individual the duty to use reasonable care to avoid harm which is foreseeable, even if the harm is not probable.³⁴⁸ Negligence is generally assessed by balancing the gravity and probability of harm against the burden of avoidance and the utility of the challenged conduct.³⁴⁹

The consequences of contracting AIDS are obviously at the heaviest end of the gravity scale. The likelihood of contagion is low, but quite reasonably foreseeable. The utility of the conduct is that it guarantees a person who is HIV-positive the job of his or her choice. For each one who is benefited, there is risk to many others. Furthermore, balancing in favor of the many does not unduly burden the person with the disability. There are certainly many other jobs that an HIV-infected person could perform without placing such person in a position which poses a reasonably foreseeable risk to the public and co-workers; after all, most jobs in this country do not require employees to regularly subject themselves to physically threatening situations which often involve bleeding by one or more persons at a particular “job site.”

B. Does the Qualification Standard Constitute Prohibited Discrimination?

Once it is determined that a particular individual is covered by the ADA, the next step is to determine whether the act committed by the employer is prohibited by the Act. In setting out specific illegal conduct, the ADA prohibits:

using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the stan-

347. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 280 (5th ed. 1984).

348. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928) (“The risk reasonably to be perceived defines the duty to be obeyed”); see also *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (discussing Judge Learned Hand’s balancing test in maritime negligence case).

349. See *United States Fidelity & Guar. Co. v. Plovodba*, 683 F.2d 1022, 1026 (7th Cir. 1982).

standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.³⁵⁰

This provision must be considered in the context of public safety positions, namely the police and fire departments.

In the context of police department hiring, a group of African-American applicants in *Davis v. City of Dallas* challenged college credit requirements and the consideration of past drug use and conviction records.³⁵¹ In upholding the use of these criteria by the police department, the court stated:

The degree of public risk and responsibility which the job of . . . police officer entails, considered alone, would warrant examination of the job relatedness of the [hiring criteria] under the lighter standard imposed under *Spurlock*

Moreover, the responsibility and potential for danger and abuse inherent in the position make the question of what constitutes a *minimally* qualified or “adequate” police officer a less appropriate standard for selecting members of the force than would be the case in most other job positions³⁵²

The court in *Tye v. City of Cincinnati* made a similar assessment in analyzing the hiring criteria used by the fire department.³⁵³ In upholding the fire department’s background investigation as job related, the court stated, “[a] public employer hiring a firefighter is held to a lighter burden in demonstrating that its employment criteria is [sic] job-related, because of the potential risk to public safety of hiring incompetent firefighters.”³⁵⁴ The selection criteria for public safety positions may be higher than those for other positions, provided that they are related to the candidate’s ability to perform the essential functions of the job.³⁵⁵ Consequently, the same job analysis which applies to

350. 42 U.S.C. § 12112(b)(6) (1994); cf. 29 C.F.R. § 1630.15 (1997) (discussing defenses to allegation of discrimination).

351. See *Davis v. City of Dallas*, 777 F.2d 205, 215 (5th Cir. 1985) (upholding as job-related college credit requirements and consideration of past drug use and conviction records for positions in police department); see also *United States v. Wichita Falls*, 704 F. Supp. 709, 713 (N.D. Tex. 1988) (upholding physical agility test, including obstacle course, as representing tasks which police officer must be able to perform in emergency situations). In *Wichita*, the EEOC had challenged the use of a physical agility test as having a disparate impact on women.

352. *Davis*, 777 F.2d at 215, 217.

353. See *Tye v. City of Cincinnati*, 794 F. Supp. 824, 833 (S.D. Ohio 1992); see also *Zamlen v. City of Cleveland*, 906 F.2d 209, 218-19 (6th Cir. 1990) (upholding physical test which disproportionately eliminated women, because test was designed to measure ability to perform tasks actually used in firefighting).

354. *Tye*, 794 F. Supp. at 833.

355. See *supra* Part IV, discussing Title VII and ADEA public safety cases.

the “qualified” definition applies to a determination as to whether the selection criteria are job-related and justified by business necessity. The use of employment qualifications which are job-related and consistent with business necessity does not constitute prohibited discrimination under the ADA, even if those qualifications screen out individuals with certain disabilities.³⁵⁶

C. Reasonable Accommodation and “Light” or “Limited” Duty

The ADA requires that an employer provide a reasonable accommodation for a person with a disability if this accommodation will allow the individual to successfully perform the essential functions of the job.³⁵⁷ Courts have utilized these concepts under both the Rehabilitation Act and the ADA.³⁵⁸ Some disability rights advocates recommend that, where it cannot be persuasively argued that an applicant with the disability can perform the essential functions of the job description as written, the position should be “modified” or “restructured” to a “limited duty” position as a “reasonable

356. See *Burns v. City of Columbus*, 91 F.3d 836, 842 (6th Cir. 1996) (“The Rehabilitation Act forbids discrimination based on stereotypes about a handicap, but it does not forbid decisions based on the actual attributes of the handicap.”) (quoting *Pesterfield v. Tennessee Valley Auth.*, 941 F.2d 437, 443 (6th Cir. 1991)); *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1184 (6th Cir. 1996) (holding employment qualification essential to position sought). But see *Hamlin v. Charter Township of Flint*, 942 F. Supp. 1129, 1137 (E.D. Mich. 1996) (stating that *Monette* analysis “effectively turns on its head the burden of proof in an ADA case because rather than the plaintiff being required to show that he or she is capable of performing all of the essential functions of a job, all he or she need do is challenge the essentiality of one of the job functions and, thereby, shift the burden of proof on one of the critical factors for showing that he or she is qualified for the job. Such a shift is clearly unwarranted because it allows a plaintiff to avoid making his or her prima facie case.”).

357. See 42 U.S.C. § 12111(9)(b) (1994). The Act specifically mentions some examples:

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9); see also *supra* Part II(B)(2).

358. Compare *Davis v. Frank*, 711 F. Supp. 447 (N.D. Ill. 1989) (decided under Rehabilitation Act, holding that excusing plaintiff from answering phones, communicating through written notes, providing plaintiff with “TTY” keyboard, and training some employees to use basic sign language to communicate with plaintiff constituted reasonable accommodation for deaf post office clerk), with *Johnston v. Morrison*, 849 F. Supp. 777 (N.D. Ala. 1994) (brought under ADA, upholding dismissal of waitress who suffered panic attacks in crowded situations because no reasonable accommodation was possible).

accommodation.”³⁵⁹ Under this theory of the ADA, a person with a disability who applies for the position of police officer, but cannot affect forceful arrests due to a disability, would be “accommodated” by being placed in a non-contact, administrative, or limited-duty position within that department.³⁶⁰

Typically, “light” or “limited duty” assignments are made for sworn members who suffer temporary disabilities but are expected to return to full-duty status.³⁶¹ The percentage of sworn members in limited-duty positions at any given time is necessarily small. This process allows an officer who has been injured to maintain her livelihood while recovering, but does not jeopardize the public safety by significantly reducing the number of full-duty officers available.

A police or fire department would face numerous operational hardships, at a severe cost to the public, if it adopted a policy of creating permanent limited-duty positions. Most police departments also have civilian members who perform non-hazardous duties and are not required to meet the physical standards applicable to full duty officers.³⁶²

Comparisons of the salaries for police officers and civilians of the same department reflect that sworn members are compensated for physical abilities and hazardous duty rather than special incoming skills.³⁶³ The difference between these employees is not education, experience, or potential for skilled professional work; it can only be explained by the differences in the physical demands and the hazards of the position of police officer. If the physical requirements and duties of the position of police officer were waived, the remaining duties would appropriately reclassify the position as a civilian “clerical worker.” Understanding this problem, the court in *Conklin v. City of*

359. See Saideman, *supra* note 3, at 62-63.

360. See *id.*

361. See, e.g., *Lee v. City of Aurora*, 76 F.3d 392 (10th Cir. 1996) (accreditation officer); *Davoll v. Webb*, 943 F. Supp. 1289 (D. Colo. 1996); *Santos v. Port Auth.*, No. 94 Civ. 8427, 1995 WL 431336 (S.D.N.Y. July 20, 1995) (restricted duty position); *Champ v. Baltimore County*, 884 F. Supp. 991 (D. Md. 1995); *Matos v. City of Phoenix*, 859 P.2d 748 (Ariz. Ct. App. 1993).

362. See *EEOC v. Massachusetts*, 864 F.2d 933, 938 (1st Cir. 1988); *Danko v. Board of Trustees*, 608 N.E.2d 333, 343 (Ill. App. Ct. 1993); *D’Amico v. Willis*, 534 A.2d 1248, 1249 (Conn. App. Ct. 1987).

363. For example, the salary for an entry-level police officer for the D.C. Metropolitan Police Department in 1995-96 was \$27,945 per year. The position requires no special skills or education beyond a high school diploma. In contrast, the civilian employee with a high school diploma and no special skills, if hired, would be classified as a GS-3 clerical worker, at a salary of \$15,600. OFFICE OF COMPENSATION AND BENEFITS, D.C. OFFICE OF PERSONNEL, SALARY SCHEDULE FOR UNIFORMED AND CIVILIAN POSITIONS (October 1, 1995).

Englewood found that the plaintiff police officer with a disability “did not desire a position as a dispatcher, but rather wanted a new position: dispatcher with a police officer’s salary.”³⁶⁴ His request that the department “employ him as a dispatcher and pay him as a police officer” was an “unreasonable accommodation.”³⁶⁵

How would the placement of limited-duty officers into full-duty “slots” affect a law enforcement agency’s ability to rely on the transferability of sworn personnel? How many persons with disabilities should a police department be required to permanently assign to clerical jobs while paying them the wages of uniformed, full-duty officers? At what point does hiring persons who will never be full-duty police officers become an “unreasonable accommodation,” or “undue hardship”³⁶⁶ for the department or the public? Is the new position, in effect, a civilian position? If so, should it be paid at a civilian, rather than a uniformed, salary? If the department is required to substitute lower paying civilian positions for uniformed positions to accommodate applicants with disabilities, would the payment of lower wages arguably constitute discrimination against persons with disabilities in the terms and conditions of employment?

To date, courts have not imposed a duty upon police or fire departments to hire a person with a disability in a sworn position only to place her in a permanent limited-duty position with no expectation that she will ever perform the full duties of the sworn position. Under the Rehabilitation Act, a federal agency is under no duty to transfer an employee from an already assigned position to another position which she could perform.³⁶⁷ The employer is not required to find or create a new job for the plaintiff.³⁶⁸

364. *Conklin v. City of Englewood*, No. 95-3786, 1996 U.S. App. Lexis 26173, at *5 (6th Cir. Oct. 1, 1996).

365. *Id.* at *8-*9.

366. For discussion of the related defense of “undue hardship,” see *infra* Part V(D)(2).

367. See *Florence v. Frank*, 774 F. Supp. 1054, 1062 (N.D. Tex. 1991) (citing *Wimbley v. Bolger*, 642 F. Supp. 481, 486 (W.D. Tenn. 1986)); *Carty v. Carlin*, 623 F. Supp. 1181, 1188-89 (D. Md. 1985); see also *Florence*, 774 F. Supp. at 1062 (citing *Black v. Frank*, 730 F. Supp. 1087, 1091 (S.D. Ala. 1990)) (“[T]he duty to reasonably accommodate only contemplates accommodation of a qualified handicapped employee’s present position.”).

368. See, e.g., *Daugherty v. City of El Paso*, 56 F.3d 695, 697 (5th Cir. 1995) (finding insulin-dependent diabetic bus driver not qualified individual with disability); *Christopher v. Laidlaw Transit Co.*, 899 F. Supp. 1124, 1128 (S.D.N.Y. 1995) (finding employer not required to re-train plaintiff for maintenance work where plaintiff was no longer qualified as school bus driver, due to Department of Transportation regulations barring insulin-dependent diabetics from position).

Where the plaintiff was already on “limited duty” status before termination, some courts have left as a trial question whether the “qualified” analysis should surround the original, full-duty position or the final, limited-duty position.³⁶⁹ These courts are unclear as to the status of a police officer who is classified as “full-duty,” but is assigned to a position which does not require the performance of all of the essential functions of a full-duty officer. For example, in *Dorris v. City of Kentwood*, the court denied summary judgment where the plaintiff officer had been assigned to the Drug Abuse Resistance Education program (“D.A.R.E.”) for the ten months preceding his termination.³⁷⁰ The plaintiff argued that the court should examine the “essential functions” of a D.A.R.E. officer, rather than those of a full-duty officer, in determining whether he was qualified for the position.³⁷¹ Based on his experience as a D.A.R.E. officer, the officer asserted that the primary function of the position was to teach drug resistance to elementary and junior high school students.³⁷² The officer requested that the department’s physical requirements, adopted pursuant to national policy for police officers, be waived for him as a “reasonable accommodation.”³⁷³ The court declined to decide whether the department was required to permanently assign the plaintiff to a “comparable” job,³⁷⁴ but left the question to be decided after trial.³⁷⁵

The *Dorris* court did not address the additional benefits of having full-duty, uniformed officers in the D.A.R.E. program. If the only purpose of the program were to teach students drug resistance, this

369. See, e.g., *Tuck v. HCA Health Serv.*, 7 F.3d 465 (6th Cir. 1993) (involving nurse with back problems who was placed on light duty and then terminated for inability to perform full-duty position which included lifting patients); *Taylor v. Garrett*, 820 F. Supp. 933 (E.D. Pa. 1993) (involving civilian rigger for Navy who was placed on light duty after back injury); *Dancy v. Kline*, 639 F. Supp. 1076 (N.D. Ill. 1986) (involving federal protection officer suffering from chronic low back syndrome who was placed on light duty); cf. *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 696-97 (7th Cir. 1998) (upholding granting of employer’s summary judgment motion where light duty position was clearly temporary, and defendant had no permanent light-duty positions).

370. No. 1:94-CV-249, 1994 WL 762219, at *5 (W.D. Mich. Oct. 4, 1994).

371. See *id.* at *3.

372. See *id.* at *1. D.A.R.E. officers were required to be full-time, uniformed police officers. See *id.* at *4. As a full-duty officer, the plaintiff was required to affect forcible arrests, climb, jump, and enter and exit vehicles quickly. See *id.* at *3. The plaintiff officer suffered from degenerative joint disease and was advised by doctors not to run, jump, or engage in other similar movements. See *id.* at *1.

373. The court cited plaintiff’s brief as stating that the City may have been able to obtain a waiver but gave no information to explain that contention. See *id.* at *4.

374. See *id.*

375. See *id.* at *5.

could well be handled by a health teacher. The presence of a full-duty police officer in a school helps to provide protection for students and teachers in schools, which have become increasingly violent.³⁷⁶ “Uniformed” implies carrying a gun and possibly other weapons. Full-duty, uniformed officers serve a dual function in such schools. In addition to teaching the dangers of drug abuse, they protect students and teachers, help to maintain order in schools, and expose students to full-duty officers in a safe, positive context. Furthermore, granting a waiver would, in effect, civilianize the position, thereby depriving the public of the protection of one more officer armed to protect while off-duty. At the same time, the public would be required to pay a police officer’s salary for a civilian position.

To suggest that an employee should be guaranteed a particular job or type of job throughout her career as a police officer reflects a basic misunderstanding of police departments as para-military organizations and their need for the transferability of personnel.³⁷⁷ Eliminating the ability to transfer personnel to meet operational needs, particularly in emergency situations, would fundamentally alter the nature of the job as well as thwart the legitimate goals of the department.

Should an officer who had been assigned to traffic duty for three months be permanently excused from the full-duty requirement of weapons qualifications and guaranteed a non-weapon-using position because she subsequently developed or discovered a disability? Similarly, if assigned to fingerprinting for two weeks, should an officer be permanently excused from running and guaranteed a non-running position until retirement?

In two recent cases, one involving a police officer confined to a wheelchair,³⁷⁸ and another involving an officer with an injured hand,³⁷⁹ the courts have allowed the plaintiffs to go to trial to let juries determine whether the police departments could “reasonably accommodate” them by assigning them to “permanent” light-duty positions. If the courts continue to allow such cases to proceed to trial, their outcomes will continue to be inconsistent, varying with the jury, the

376. See Pam Riley, *School Violence: Getting It Out of Our System*, NATIONAL SCHOOL SAFETY CENTER NEWS JOURNAL, Fall 1995, at 4, 5 (discussing programs to reduce school violence in North Carolina, including one in which police officer was placed on campus).

377. See *infra* Part V(A)(1) discussing the “qualified” analysis with respect to police and fire departments.

378. See *Clark v. City of Chicago*, No. 97-C-4820, 1998 WL 25760 (N.D. Ill. Jan. 9, 1998).

379. See *Pinkerton v. City of Tampa*, 981 F. Supp. 1455 (M.D. Fla. 1997).

attorneys for each side, and other factors. The inconsistencies will result in some police and fire departments having to use full-duty officer slots to accommodate persons with handicaps in office positions, while other departments will not have to do so. This will also leave police and fire departments in a state of confusion while attempting to develop policies that meet public safety needs and comply with this interpretation of the ADA. They will have no legal framework within which to develop such policies and will be inundated with litigation by individuals with disabilities. Juries will increasingly be asked to determine the duties of police officers and firefighters. Those determinations, in turn, will depend largely on the department's ability to make jurors understand the concepts of, and need for, para-military organizations in emergency situations. Additionally, juries may be influenced by differences in compensation for non-hazardous desk jobs and often dangerous full-duty law enforcement and firefighting positions.

The court in *Santos v. Port Authority* recognized the problems with putting these issues before a jury.³⁸⁰ A police officer with a permanently injured foot performed in a "light duty" status for more than two years.³⁸¹ In granting defendant's motion for summary judgment, the court stated that "no rational fact-finder could conclude that the essential functions of the job of a police officer do not include duties well beyond the limited clerical work that plaintiff is capable of performing."³⁸² The court unapologetically held, as a matter of law, that "[a] showing by plaintiff that he can satisfactorily perform light duty functions is insufficient, for these duties do not encompass all of the essential duties of a . . . police officer,"³⁸³ and that "[a]n accommodation that eliminates an essential function of the job is not reasonable."³⁸⁴

To fully demonstrate the inconsistency in interpretation of the ADA in the area of law enforcement and firefighting, a subsequent case has offered an entirely innovative approach to this issue, which could not have been predicted at the time that the department was developing its policy with respect to the ADA and the Rehabilitation

380. No. 94 Civ. 8427, 1995 WL 431336 (S.D.N.Y. July 20, 1995).

381. *Id.* at *1.

382. *Id.* at *2.

383. *Id.* at *3; *see also* *Blissitt v. City of Chicago*, No. 86-C-9584, 1990 U.S. Dist. LEXIS 5132, at *21 (N.D. Ill. Apr. 30, 1990) (stating that "it does not follow that an individual who can perform Clerical duties" can be police officer).

384. *Santos*, 1995 WL 431336, at *3 (quoting *McDonald v. Department of Corrections*, 880 F. Supp. 1416, 1423 (D. Kan. 1995)). *See supra* Part II(B)(2) discussing the standard for "reasonable accommodation" under the ADA.

Act. In *United States v. City and County of Denver*, the court imposed upon the City the burden of considering police officers with disabilities for civilian positions both within the police department as well as within the City's overall personnel system.³⁸⁵ This approach goes further than the approach used in *Dorris v. City of Kentwood*.³⁸⁶ In *Dorris*, the court held that the "qualified" analysis could be applied to the job duties which the plaintiff actually performed in his last assignment as a police officer, although it was not a full-duty police officer position.³⁸⁷ *City and County of Denver* expanded the reach of the initial "qualified" analysis to a hypothetically vacant civilian position which the plaintiff has never held. This approach is problematic, since if the plaintiff is not "qualified" in the initial analysis, she is not even covered by the ADA.³⁸⁸ The court justified its position by stating that the ADA amended the Rehabilitation Act by imposing upon employers the new duty of considering reassignment of a person with a disability to a vacant position for which she qualifies.³⁸⁹

In *Davoll v. Webb*, a case consolidated with *City and County of Denver*, the court applied the "qualified" analysis to civilian positions based on the ADA's definition of a qualified individual as one who "can perform the essential functions of the employment position that such individual holds or desires."³⁹⁰ The irony of this analysis is that the positions desired by plaintiffs in this case were not civilian positions at civilian salaries, but rather, "non-patrol commissioned positions within the police department."³⁹¹ The plaintiffs had not even sought these jobs. Since neither the job title nor the essential functions of these positions were identified, there was no basis for a determination as to whether any of the plaintiffs were "qualified" for any of the positions which the court deemed were "desired." Therefore, the element of the plaintiffs' prima facie case requiring proof that they were "qualified" appears to have been bypassed.³⁹²

385. 943 F. Supp. 1304, 1312 (D. Colo. 1996), *motion for injunctive relief rev'd sub nom.*, *Davoll v. Webb*, 955 F. Supp. 110 (D. Colo. 1997).

386. No. 1:94-CV-249, 1994 WL 762219 (W.D. Mich. Oct. 4, 1994).

387. *See id.* at *4.

388. *See supra* Part II(B)(1)(b).

389. *See Davoll v. Webb*, 943 F. Supp. 1289, 1301 (D. Colo. 1996) (citing *Leslie v. Saint Vincent New Hope, Inc.*, 916 F. Supp. 879, 887 (S.D. Ind. 1996)).

390. *Id.* at 1300 (quoting 42 U.S.C. § 12111(8) (1994)).

391. *Id.* at 1299.

392. In fact, even the issue of whether plaintiffs were persons with disabilities appears to have been bypassed. Instead, the court held that, in this class action suit, the government was only required to show evidence of employer discrimination against "some" of the employees which it sought to represent. *See United States v. City and County of Denver*, 943 F. Supp. 1304, 1309 (D. Colo. 1996). The court held this

The approach in *City and County of Denver* does not endanger the public, nor would it cause the public to pay for services it does not receive. The question is, rather, does the ADA require it? The plaintiffs in *City and County of Denver* sought “special treatment rather than simply nondiscriminatory treatment,” which several courts have held is not required by the ADA.³⁹³ Furthermore, it remains to be seen how the court’s mandate will be implemented. Currently, a retired police officer or firefighter is certainly free to apply for any civilian position for which she is qualified. How, then, would a person with the disability be advantaged by being eligible for a transfer to a position for which she is qualified? Sworn and civilian positions are generally represented by separate bargaining units. The positions merit different types of benefits, particularly with respect to retirement eligibility and benefits, health benefits, accumulated leave, terms for taking sick leave or administrative leave, reassignments, rank, seniority, and disciplinary matters.³⁹⁴ As a practical matter, the sworn member with a disability who is “reassigned” to a civilian position would have to terminate her employment as a sworn member and be “re-hired” as a civilian—at a new, civilian salary. There would be numerous questions with respect to whether sick or annual leave would be transferable from sworn positions to civilian positions. Seniority may also be an issue.

burden met by the department’s admission that it has “a policy and practice that prohibits reassignment of officers who develop disabilities to Career Service or non-sworn (civilian) vacancies.” *Id.* at 1309-10. Although the court compared this analysis to that taken under Title VII, the comparison is inappropriate. In a sex discrimination case under Title VII, brought by a class of women, plaintiffs would have to at least be women to have standing to sue, even if the individual qualifications of each class member were assessed after liability to the class was established. Under the ADA, if the plaintiffs are not both “persons with disabilities” and “qualified” for the position, they have no standing to bring suit. In *City and County of Denver*, the court has required them to prove neither. *See id.*

393. *See MacGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 860 (5th Cir. 1993) (“[T]he additional accommodations, if granted, would constitute preferential treatment”); *Castellano v. City of New York*, 946 F. Supp. 249, 255 (S.D.N.Y. 1996) (quoting *Felde v. City of San Jose*, 839 F. Supp. 708, 711 (N.D. Cal. 1994), *aff’d*, 66 F.3d 335 (9th Cir. 1995)), *aff’d in part, vacated in part*, 142 F.3d 58 (2d Cir. 1998); *Lincoln CERCPAC v. Health and Hosps. Corps.*, 920 F. Supp. 488, 497 (S.D.N.Y. 1996) (“[T]he disabled are not entitled to more public services than the abled receive”).

394. *See Castellano*, 946 F. Supp. at 255 (holding no ADA violation where retirement benefits differ for full twenty-years service retirees, medical retirees for work-related disabilities, and medical retirees for non-work related disabilities) (citing *Felde v. City of San Jose*, 839 F. Supp. 708, 710 (N.D. Cal. 1994), *aff’d*, 66 F.3d 335 (9th Cir. 1995)); EEOC NOTICE, QUESTIONS AND ANSWERS ABOUT DISABILITY AND RETIREMENT PLANS UNDER THE ADA, No. 915.002, May 11, 1995.

Under this system, a transferred employee would presumably forfeit any right to medical retirement as a sworn member. This may be undesirable for many sworn members with disabilities. Typically, in urban departments, a young officer who is no longer physically qualified for police work could receive a medical disability retirement pension and then work in the private sector in a less physically demanding position. In jurisdictions where “double dipping”³⁹⁵ is prohibited, a city retiree may have to delay retirement benefits from one city job while employed in another city job. Of course, the individual would be free to make the choice between the pension and the job; however, the combination of the pension and the civilian salary might well exceed the sole income she could receive as a civilian civil servant with no special skills outside of police work.

The court in *City and County of Denver* did not provide any guidance with respect to these matters.³⁹⁶ The court was not impressed with the City’s arguments that “[r]equiring the City to alter its Charter, change its Career Service Authority merit system of filling vacancies, and transfer disabled police officers into vacant Career Service positions would require fundamental alteration in the nature of the City’s personnel program.”³⁹⁷

The court further held that even if the city’s charter barred transfers and reassignments between classified and Career Services, “it would be preempted by the ADA, which specifically directs employers to modify existing practices and policies which do not conform with it.”³⁹⁸ The court based this conclusion on the ADA’s provision that, among a list of other possibilities,³⁹⁹ a “reasonable accommodation” may include “reassignment to a vacant position.”⁴⁰⁰ However, the court seems to have interpreted the term “may” as “must.” It is an employer’s burden to show undue hardship in refusing to provide a

395. The term is used to describe receiving a pension from a municipality as a retiree, while, at the same time, receiving a salary from that municipality as a current employee. Many municipalities prohibit “double dipping,” so that a retiree of a municipality may only be rehired by it if she gives up her pension while employed by the municipality.

396. 943 F. Supp. 1304 (D. Colo. 1996).

397. *Id.* at 1311.

398. *Id.*

399. Other listed accommodations include job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. See 42 U.S.C. § 12111(9)(b) (1994).

400. See *City and County of Denver*, 943 F. Supp. at 1310.

“reasonable accommodation;”⁴⁰¹ however, the ADA did contemplate the consideration of collective bargaining agreements and other personnel matters in deciding what accommodations would be “reasonable” for the employer.⁴⁰² Must the department transfer a minimally qualified person with a disability into a civilian, government position while more qualified candidates named on civil service lists await employment or experienced civilian employees are “bumped” for promotion? The ADA does not mandate that persons with disabilities be guaranteed jobs or that they be “transferred” into vacant positions where the employer would otherwise choose to hire or promote a more qualified candidate.⁴⁰³

The *City and County of Denver* court may have obligated employers to “accommodate” persons with disabilities well beyond making the “reasonable” personnel adjustments intended by Congress; nevertheless, the City did not convince the court that it could not reassign the police officers with disabilities due to undue hardship.⁴⁰⁴

D. Defenses

1. “Job-Related and Consistent with Business Necessity,” Incorporating “Direct Threat”

The “job-related and consistent with business necessity” language is used not only to define illegal conduct,⁴⁰⁵ but is reiterated under the heading “Defenses.”⁴⁰⁶ Defenses are appropriately asserted

401. See 42 U.S.C. § 12112(b)(5)(A) (1994).

402. See *Milton v. Scrivner*, 53 F.3d 1118, 1124 (10th Cir. 1995) (citing 29 C.F.R. § 1630, app. § 1630.2(n) (1998)); *Murphy v. United Parcel Service, Inc.*, 946 F. Supp. 872, 883 (D. Kan. 1996) (holding that “reasonable accommodation” under ADA does not include requiring employer to reassign essential function to other employees).

403. See *Castellano v. City of New York*, 946 F. Supp. 249, 254 (S.D.N.Y. 1996) (quoting *Pottgen v. Missouri State High Sch. Activities Assoc.*, 40 F.3d 926, 930 (8th Cir. 1994)), *aff’d in part, vacated in part*, 142 F.3d 58 (2d Cir. 1998) (“Reasonable accommodations are those that do not require an organization ‘to lower or to effect substantial modifications of standards to accommodate a handicapped person.’”).

404. *City and County of Denver*, 943 F. Supp. at 1301. The court noted: “The government asserts Defendants fail to explain how the transfer [of] an average of four officers a year into a 9,500 employee organization (Career Service) would require the City to modify completely its personnel system.” *Id.*

405. See 42 U.S.C. § 12112(b)(6) (1994).

406. The ADA states:

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation as required under this subchapter.

Id. § 12113(a).

only after there has been a determination that an individual with a disability is qualified to perform the essential functions of a job. Once a plaintiff has established a prima facie case, the employer may defend by proving that, despite the plaintiff's demonstration that she can perform the essential functions of the job, a particular physical job criterion is job-related, and therefore, necessary to the safe and efficient operation of the business.⁴⁰⁷ This is the defendant's burden. It is in this context that "direct threat" appears once again: "The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."⁴⁰⁸

The burden of demonstrating whether the plaintiff can safely perform the essential functions of the job is placed on the plaintiff as part of the prima facie case, or more specifically under the *Arline*⁴⁰⁹ analysis, where "job-relatedness" and "business necessity" are specifically discussed in the EEOC Regulations and Manual examining public safety cases.⁴¹⁰ However, where courts do deviate from the *Arline* model and address direct threat only as a defense, the issues presented will be identical to those addressing direct threat as part of the plaintiff's burden to prove that she is a qualified individual with a disability.⁴¹¹ The only difference is that the burdens of proof are reversed. In "close" cases, this could make a difference.

2. "Undue Hardship"

As the direct threat defense is the reciprocal of the qualified analysis, the undue hardship defense is the reciprocal of the reasonable accommodation analysis. The issues and evidence presented are very much the same; however, the plaintiff bears the burden of proving reasonable accommodation and the defendant bears the burden of proving undue hardship.⁴¹²

As in defining "reasonable accommodation," the related defense of "undue hardship" must be examined on a case-by-case basis. An accommodation which constitutes an undue hardship for one employer may be easily accomplished by another. The cost of the accommoda-

407. See *Andrews v. State of Ohio*, 104 F.3d 803, 808 (6th Cir. 1997) (dismissing overweight police officers' claims of discrimination for failure to show that they were disabled as a result of their obesity). This is the defendant's burden. See *id.* at 810.

408. See 42 U.S.C. § 12113(b).

409. See *School Bd. of Nassau County v. Arline*, 481 U.S. 273 (1987) (finding schoolteacher with tuberculosis disabled).

410. See *supra* Part V(A)(2).

411. See *id.*

412. See *supra* Part II(B)(4).

tion must be assessed in relation to the budget of the particular employer, the salary or economic worth of the employee to be accommodated, and other economic factors.⁴¹³ Personnel changes and reassignments are considered in relation to the number, assignment, and duties of the particular employees involved and the nature of the employer's business.⁴¹⁴

The same operational problems posed by the analysis of "reasonable accommodations" are posed in the undue hardship analysis as well. The cost of supporting limited-duty officers at full-duty salaries would unduly burden the departments and the public, both operationally and financially. The alternative is to lower physical standards to permit persons with disabilities to function as full-duty officers. This option would also cause an undue and unacceptable hardship because it would put the public and members of the department (including the person with the disability) at an increased risk of harm.⁴¹⁵

E. Individual Evaluations or Blanket Exclusions?

The ADA has been interpreted to prohibit all blanket exclusions.⁴¹⁶ However, all blanket exclusions are not prohibited by the ADA any more than they have been prohibited under the Rehabilitation Act. When the court in *Davis v. Meese* upheld the blanket exclusion of persons with insulin-dependent diabetes from the position of FBI agent, it carefully explained the narrow circumstances under which such an exclusion would be appropriate.⁴¹⁷ The court stressed that although blanket exclusions are not generally acceptable under the Rehabilitation Act, they may be valid "if the requirements are directly connected with and substantially promote legitimate safety and job performance concerns and are tailored to those concerns, then such requirements may be held valid notwithstanding that they effect a group or class rather than a single individual."⁴¹⁸

413. See EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 18, § 3.9, at III-12 to III-16.

414. See *id.* § 3.9.2 to .5, at III-13 to III-15.

415. See *supra* Part V(C); see also *infra* Part VI(A).

416. See *Bombrys v. Toledo*, 849 F. Supp. 1210, 1219 (N.D. Ohio 1993) ("An individualized assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices."); see also *supra* Part III(C) and Part V(A)(2).

417. See *Davis v. Meese*, 692 F. Supp. 505, 520 (E.D. Pa. 1998).

418. See *id.* at 517; see also, *supra*, Part III(C) for full quotation and discussion.

The definition of “qualified” under the ADA is identical to the definition of “otherwise qualified” under the Rehabilitation Act.⁴¹⁹ The Rehabilitation Act also sought to measure the individual for the position and to carefully scrutinize any blanket exclusion based on disability.⁴²⁰ Nevertheless, there were circumstances under which all persons with a particular disability would have been disqualified from the position if individually tested; therefore, the courts—including the Supreme Court—upheld blanket exclusions of persons with certain disabilities.⁴²¹ There is no reasonable rationale for interpreting the ADA inconsistently with the Rehabilitation Act with respect to public safety cases and hiring criteria. Several courts have specifically stated that there is no substantive difference between the two Acts.⁴²²

419. See 42 U.S.C. § 12111(8) (1994); Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 102(p)(32)(A), (B), § 506, 106 Stat. 4344, 4360, 4428 (1992) (cited in *Burns v. City of Columbus*, 91 F.3d 836, 840 (6th Cir. 1996)). See generally *Andrews v. Ohio*, 104 F.3d 803, 807 (6th Cir. 1995) (finding overweight highway patrol officers do not fit the definition of handicapped under ADA or Rehabilitation Act); *Castellano v. New York*, 946 F. Supp. 249, 252 (S.D.N.Y. 1996) (finding police officers who retired early due to disability were not otherwise qualified for certain retirement benefits), *aff'd*, 142 F.3d 58 (2d Cir. 1998).

420. See *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993) (stating insulin-dependent workers with vision impairment were not otherwise qualified to drive); *Serrapica v. City of New York*, 708 F. Supp. 64, 73 (S.D.N.Y. 1989) (stating insulin-dependent applicant for sanitation position was not otherwise qualified because of safety concerns), *aff'd*, 808 F.2d 156 (2d Cir. 1989); *Davis v. Meese*, 692 F. Supp. 500, 505 (E.D. Pa. 1988) (stating insulin-dependent applicant for FBI position was not otherwise qualified for position as law enforcement officer).

421. See *Southeastern Community College v. Davis*, 442 U.S. 397, 407 n.7 (1979) (denying prospective nurse admission in training program due to deafness); *Ferdo v. Reno*, 21 F.3d 1391, 1396-97 (7th Cir. 1994) (upholding exclusion of hepatitis-B positive federal marshals due to public safety concerns); *DiPompo v. West Point Military Academy*, 960 F.2d 326, 327 (2d Cir. 1992) (upholding blanket exclusion of firefighters with dyslexia); *Huber v. Howard County, Md.*, 56 F.3d 61 (D. Md. 1995) (unpublished table decision) (upholding exclusion of asthmatics); *Serrapica v. City of New York*, 708 F. Supp. 64, 73-74 (S.D.N.Y. 1989) (stating sanitation worker with diabetes not otherwise qualified), *aff'd*, 808 F.2d 156 (2d Cir. 1989); *Davis v. Meese*, 692 F. Supp. 505, 520 (E.D. Pa. 1988) (upholding blanket exclusion against all insulin-dependent diabetics for position of FBI agent); *American Fed'n of Gov. Emp. v. Dole*, 670 F. Supp. 445, 448-49 (D.D.C. 1987) (stating employees in certain responsible industries may not be otherwise qualified due to drug use).

422. See *Burns v. City of Columbus*, 91 F.3d 836, 842 (6th Cir. 1996) (stating police officer failed to make prima facie case of discrimination since City did not know of disability); *Andrews*, 104 F.3d at 807; *Chandler*, 2 F.3d at 1387 (stating driver with severe vision problems and insulin-dependent diabetes not otherwise qualified); *Castellano*, 946 F. Supp. at 252-53; *Joyce v. Suffolk County*, 911 F. Supp. 92, 98 (E.D.N.Y. 1996) (finding that candidate for police force failed to show that he was considered disabled by the potential employer); *Champ v. Baltimore County*, 884 F. Supp. 991, 995 (D. Md. 1995) (finding disabled police officer was not otherwise qualified and accommodations requested not reasonable).

Consistent with the position taken in *Davis v. Meese* and its progeny, the EEOC ADA Technical Assistance Manual and the legislative history of the ADA acknowledge that blanket disability-based exclusions may be justified in:

the very limited situation where in all cases [the] physical condition, by its nature, would prevent the person with a disability from performing the essential functions of the job, even with reasonable accommodations.⁴²³

In addition, use of uniformly applied qualification standards that measure a specific physical or mental ability, such as a visual acuity requirement for airline pilots, is more likely to withstand challenge.⁴²⁴

Congress specifically acknowledged that, particularly for positions involving public safety, physical qualifications are valid hiring criteria if they are job-related and consistent with business necessity, even if they screen out all persons with a particular disability.⁴²⁵ No court has held that blind persons should not be subject to a blanket exclusion for the position of airline pilot. It is not necessary that an employer individually test each blind applicant when the result will necessarily be that no blind person can see the control panels, other aircraft, the area surrounding the plane, or weather conditions. The condition itself—blindness—is determinative of whether a person could see while flying. This is a blanket exclusion, no matter how it is characterized.

For similar reasons, how can it be argued that blind applicants should be accepted as full-duty police officers or firefighters?⁴²⁶ The question becomes where to draw the line. This question can be answered as follows: where the condition itself defines the inevitable results of individual testing, blanket exclusions should be permitted. Conversely, where a disability varies substantially from person to person, such that individual testing will result in some class members being able to perform the essential functions of the job, then individual testing is mandated by the ADA.

423. S. REP. NO. 101-116, at 27 (1989).

424. See EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 18, § 4.4, at IV-5 to IV-9.

425. See H.R. REP. NO. 101-485, pt. II (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 339. For further discussion of the legislative history of the ADA, see *supra* Part V(A)(2).

426. Lawyers and judges may typically have more experience depending on airline pilots for their physical safety than on police officers or firefighters; this may explain why the duties of the latter positions and the importance of safe and efficient performance in these positions have been misunderstood or underestimated by both litigators and courts.

Police and fire departments should not have to repeatedly test individuals with identical conditions, only to arrive at an inevitable, obvious conclusion (e.g., no blind person can conduct surveillance of a suspect or see an unconscious victim in a fire, no paraplegic can chase a suspect over a fence or climb a ladder to pull a child out of a burning building, and no completely deaf person can hear a cry for help). Yet, to eliminate such persons from police and firefighting positions is to use blanket exclusions.

What is the practical difference between: (a) determining that a particular individual, because she is dependent upon insulin, is subject to sudden incapacitation; and (b) determining that all insulin-dependent diabetics are subject to incapacitation? The court in *Bombrys v. Toledo* instructed the department to “evaluate each police officer candidate on a case-by-case basis and determine what risks that individual presents to him/herself and the public.”⁴²⁷ However, the *Bombrys* court, like the court in *Davis v. Meese*, concluded that it is impossible to predict which officers will have a catastrophic incident while on duty.⁴²⁸ If it is impossible to predict who will become incapacitated, how can individual assessments of risks be made?

Does the ADA require a police or fire department to hire a person who is insulin-dependent and wait for a hypoglycemic or hyperglycemic episode to occur?⁴²⁹ This is exactly what happened in *Bombrys*. Plaintiff *Bombrys* brought suit to be accepted into the police academy.⁴³⁰ The court issued a restraining order mandating that the City admit *Bombrys* into the academy and permit him to complete the course.⁴³¹ *Bombrys* completed the course, but, while still a probationary police officer, suffered a severe, incapacitating hypoglycemic episode while on duty.⁴³² Fortunately, this incident did not occur during

427. See *Bombrys v. Toledo*, 849 F. Supp. 1210, 1219 (N.D. Ohio 1993).

428. See *id.*; see also *Davis v. Meese*, 692 F. Supp. 505, 513 (E.D. Pa. 1988).

429. “Hypoglycemia is an abnormally low concentration of glucose in the blood which may lead to tremulousness, cold sweat, headache, hypothermia, irritability, confusion, hallucinations, bizarre behavior, and ultimately, convulsions and coma.” *Wood v. Omaha School Dist.*, 25 F.3d 667, 668 (8th Cir. 1994) (quoting DORLAND’S ILLUSTRATED MEDICAL DICTIONARY, 804 (27th ed. 1988) [hereinafter DORLAND]). This condition is remedied by the ingestion of food or glucose. See *Bombrys*, 849 F. Supp. at 1214. “Hyperglycemia is an abnormally increased concentration of glucose in the blood.” *Wood*, 25 F.3d at 668 (citing DORLAND, *supra*, at 793). This can also cause blurred vision, loss of consciousness, or death, but can be prevented by the use of insulin. See *Bombrys*, 849 F. Supp. at 1214.

430. See *Bombrys*, 849 F. Supp. at 1212.

431. See *id.*

432. See *id.* at 1213.

an emergency situation and Bombrys was administered an intravenous solution and taken to the hospital.⁴³³

The *Bombrys* court acknowledged that in an emergency situation, the plaintiff police officer trainee might not be able to monitor his blood sugar or ingest food or glucose to correct his condition.⁴³⁴ The court further conceded that “if Mr. Bombrys were to become incapacitated while involved in an emergency situation, the consequences to him and to those around him could be tragic.”⁴³⁵

The *Bombrys* court specifically refused to give “controlling weight” to the decision in *Davis v. Meese*.⁴³⁶ The court questioned whether *Davis* was still good law after the passage of the ADA and “suspect[ed]” that the FBI would revise its policy after the passage of the ADA.⁴³⁷ The policy employed by the Federal Bureau of Investi-

433. *See id.*

434. *See id.* at 1218.

435. *Id.* at 1218-19.

436. *See id.* at 1220.

437. *See id.* The court also stated that the U.S. Department of Transportation (DOT) was “revising its policy . . . to allow certain insulin-dependent diabetics to drive over the road trucks in interstate commerce.” *Id.*; see 49 C.F.R. § 391.41(b)(3) (1997) (in its physical qualifications for drivers, requiring that a person “has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control.”). The court cited no authority for either prediction concerning future federal policy. Nevertheless, pursuant to congressional directive (the legislative history of the ADA indicates that Congress “expected” DOT to review its regulations and make any necessary changes to bring them into compliance with the ADA, see H.R. REP. NO. 101-485, at 42 (1990)), on July 29, 1993, DOT implemented a waiver program for a limited number of carefully chosen experienced drivers of large interstate commercial vehicles with insulin-dependent diabetes and vision impairments. See 49 U.S.C. § 31136(e) (Supp. 1996); see also *Rauenhorst v. United States Dep’t of Transp.*, 95 F.3d 715 (8th Cir. 1996) (reversing Federal Highway Administration’s (FHWA) denial of plaintiff’s application for waiver of federal regulation requiring binocular vision to obtain driver’s license, finding that FHWA acted arbitrarily and capriciously in its decision). *But see* *Advocates for Highway and Auto Safety v. Federal Highway Admin.*, 28 F.3d 1288 (D.C. Cir. 1994) (nullifying FHWA’s waiver program for drivers with impaired vision until evidence was gathered to confirm that waivers would not endanger public safety). The FHWA subsequently found that there was enough additional evidence to justify the safety of the waiver program, and therefore put it back into effect on November 17, 1994. See *Rauenhorst*, 95 F.3d at 718. The program was experimental, closely monitored, and designed to study whether all such drivers with these impairments present a public safety risk. See 49 U.S.C. § 31136(e)(2) (describing the waiver program as a “safety pilot program” and outlining how it was to be “monitored”). Furthermore, it allowed drivers with these impairments who had been driving safely for at least three years to continue their employment. See *id.* § 31136(e)(2)(A)(ii)(III). However, as of January 8, 1996, DOT has proposed only that those drivers currently in the waiver program be permitted to remain driving so that DOT can continue to study the issue. See Proposed Rules, Department of Transportation, 61 Fed. Reg. 606 (1996). Consequently, unless specifically granted waivers, new drivers are still subject to the blanket exclusions. *But see*

gation would serve as an appropriate model for a police department since the FBI is the lead federal law enforcement agency in the nation. In June of 1993, when *Bombrys* was decided,⁴³⁸ the ADA had been in effect for nearly a year and had been enacted nearly three years earlier.⁴³⁹ If the ADA invalidated the FBI's policy, the agency had ample time to bring its requirements into compliance before *Bombrys* was decided.⁴⁴⁰ This is particularly true since Congress specifically instructed DOT to examine its requirements and ensure that its regulations were in compliance with the ADA within two years of its enactment.⁴⁴¹

The *Bombrys* decision demonstrates that even when courts invalidate blanket exclusions, they may simultaneously uphold the rejection or termination of the plaintiff challenging the exclusion. Interestingly, the *Bombrys* court did not need to set the broad precedent established in its opinion in order to invalidate the blanket exclusion of insulin-dependent police officers. The court could have held the exclusion violative of the ADA because the City of Toledo discriminated between different disabilities which could result in similar sudden incapacitation. The City did not apply a blanket exclusion to persons suffering from epilepsy or asthma.⁴⁴² Furthermore, the department did not relieve police officers from duty once they developed disabling conditions, including *inter alia*, insulin-dependent diabetes.⁴⁴³ The court concluded that these inconsistencies weakened the department's argument that it could not retain the plaintiff because he posed an un-

Sarsycki v. United Parcel Service, Inc., 862 F. Supp. 336 (W.D. Okla. 1994) (finding discrimination based on physical disability where UPS transferred insulin-dependent diabetic from his position as driver).

Even if DOT eventually waives these requirements, the duties of a truck driver differ substantially from those of a police officer or firefighter. A truck driver may well have time to pull over and take insulin or food, while a police officer or firefighter cannot "call 'time out' to care for his or her own physical needs when called upon to rescue someone else from imminent harm." See *Joyce v. Suffolk County*, 911 F. Supp. 92, 97 (E.D.N.Y. 1996).

438. *Bombrys v. Toledo*, 849 F. Supp. 1210 (N.D. Ohio 1993).

439. The ADA took effect on July 26, 1992 and was enacted on July 26, 1990. See *supra* note 1.

440. The FBI was the lead author of the August 1993 Major City Chiefs Report. See MAJOR CITY CHIEFS, *supra* note 269, Foreword. In discussing physical requirements for law enforcement officers, the Report does not indicate that blanket exclusions are impermissible. Instead, the Report advises that "any employment qualification, standard or criteria that screens out or tends to screen out persons with a disability must be job-related and consistent with business necessity." *Id.* at 36.

441. H.R. REP. NO. 101-485, at 57 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 339-40, quoted in *Rauenhorst*, 95 F.3d at 716.

442. See *Bombrys*, 849 F. Supp. at 1219.

443. See *id.*

acceptable risk to safety.⁴⁴⁴ Some courts purport to use the *Bombrys* rationale of prohibiting blanket exclusions in favor of individual assessments of fitness, but their reasoning implies that any person with the plaintiff's disability would be disqualified.⁴⁴⁵ For example, in *Wood v. Omaha*, the court stated that its individualized assessment of two insulin-dependent bus drivers indicated that the plaintiffs would pose unacceptable safety risks to the riders.⁴⁴⁶ The court held that they were not "otherwise qualified"⁴⁴⁷ for their positions within the meaning of the ADA because they might lose consciousness or become visually impaired while driving, posing an unacceptable safety risk to the riders.⁴⁴⁸ However, the court did not cite any incidents of hypoglycemic episodes that these individuals had experienced on the job, nor did it discuss any evidence indicating that these two drivers were any more prone to sudden incapacitation than were any other insulin-dependent persons.

The *Wood* court appears to have based its conclusion on the fact that the drivers were dependent upon insulin, specifically relying on the trial court's finding that the plaintiffs were:

*insulin-using diabetic persons, and as such [are] at appreciable [risk] of developing hypoglycemia, the symptoms of hypoglycemia and complications from hyperglycemia, the onset of which may occur without warning and that constitute a danger to the Plaintiffs, the school children, and any others on the van, and other persons using the road or highway.*⁴⁴⁹

Similarly, in *Siefken v. Village of Arlington Heights*, a police officer was terminated after he drove recklessly, at high speed, during a hypoglycemic episode.⁴⁵⁰ Citing *Bombrys*, the court held that "blanket exclusions provide a potential for abuse based on stereotypical views."⁴⁵¹ However, based on the hypoglycemic episode which caused him to endanger the public, himself, and government property, this plaintiff could not be reasonably accommodated and posed a di-

444. *See id.* at 1214-15, 1219.

445. *See Wood v. Omaha School Dist.*, 25 F.3d 667, 668 (8th Cir. 1994).

446. *See id.*

447. The court was apparently using the Rehabilitation Act "otherwise qualified" language rather than the ADA "qualified" language. For discussion, *see supra* Part III(B).

448. *See Wood*, 25 F.3d at 669.

449. *See id.* at 668 (emphasis added) (quoting *Wood v. School Dist. of Omaha*, 784 F. Supp. 1441, 1445-46 (D. Neb. 1992) (second and third alterations in original)).

450. *See Siefken v. Village of Arlington Heights*, No. 94 C 2404, 1994 U.S. Dist. LEXIS 13015 (September 14, 1994), *aff'd*, 65 F.3d 664 (7th Cir. 1995).

451. *See id.* at *6.

rect threat to the safety of others.⁴⁵² Although the incident was used to show that this particular plaintiff did not have his diabetes under control, the court conceded that “the discussion in cases indicates a hypoglycemic episode cannot entirely be ruled out even for insulin-dependent diabetics exercising good control”⁴⁵³ The court continued to explain that the risks do vary among individuals; however, this concession raises the question of whether anyone who was insulin-dependent would pose an unacceptable risk of danger to themselves or others.

In *Miller v. Sioux Gateway Fire Department*, under state law mirroring the ADA, the court upheld the termination of an insulin-dependent diabetic airport firefighter whose diabetes was uncontrolled.⁴⁵⁴ Although there was specific evidence of the plaintiff’s individual condition, the court appeared to rely primarily on generalized information about insulin-dependent diabetes.⁴⁵⁵ The court noted that the National Fire Protection Association determined that diabetes should be a valid reason for rejection of applicants for the position of firefighter.⁴⁵⁶ The court further cited the department’s evidence that a diabetic could not receive insulin or nourishment while wearing the clothing and breathing apparatus required in many fire situations.⁴⁵⁷ The court accepted the department’s argument that if the plaintiff were to have an “insulin reaction” during an emergency situation, “he would risk his life, the lives of airplane passengers, and the lives of other firefighters.”⁴⁵⁸ The court emphasized that “[t]he window of opportunity in controlling aircraft fire is three to five minutes.”⁴⁵⁹

Although these courts claimed to have made individual inquiries regarding the ability of a plaintiff with a disability to perform a job, the conclusion in each case was that the individual was not qualified because of the risk of sudden incapacitation necessarily due to dependence on insulin. Based on the reasoning set forth by these courts, can it truly be said that anyone who was insulin-dependent could be “qualified” for these positions? The analyses used in such cases often amounts to a blanket exclusion of all insulin-dependent diabetics no matter how it is camouflaged.

452. *See id.* at *5.

453. *Id.* at *7.

454. *See Miller v. Sioux Gateway*, 497 N.W. 2d 838, 839 (Iowa 1993).

455. *See id.*

456. *See id.* at 842.

457. *See id.*

458. *See id.*

459. *See id.*

On the other hand, some courts have clearly held that persons with specific disabilities would pose a direct threat to public safety if employed in certain positions.

The issue whether an insulin-dependent diabetic is otherwise qualified for positions involving driving or other high risk activities has been addressed by several federal courts. Those courts have uniformly held that insulin-dependent diabetics present an unacceptable risk, and are thus not otherwise qualified, to be employed as, inter alia, sanitation truck drivers or special agents within the Federal Bureau of Investigation. We are aware of no cases holding that insulin-dependent diabetes does not present a significant risk in connection with the operation of motor vehicles on public highways.

We hold that, as a matter of law, a driver with insulin dependent diabetes . . . presents a genuine substantial risk that he could injure himself or others “Woe unto the employer who put such an employee behind the wheel of a vehicle owned by the employer which was involved in a vehicular accident.”⁴⁶⁰

The rationales set forth in such cases create confusing and misleading precedent. Courts are torn between a belief that blanket exclusions are never permissible under the ADA and the realistic understanding that there are practical limitations imposed on individuals by certain disabilities. This confusion is unnecessary. The legislative intent of the ADA and precedent set under the Rehabilitation Act provide adequate instruction for analysis of blanket exclusions under the ADA, at least with respect to public safety positions.

VI

SOCIAL AND PRACTICAL IMPLICATIONS OF ADA LITIGATION IN POLICE AND FIREFIGHTER CASES

A. *The Interested Parties*

How will the solutions that police and fire departments develop to respond to the dilemmas posed by the ADA impact affected groups?⁴⁶¹ What are the interests of each group? How can they be protected? What is the cost of that protection as weighed against the interests of the other groups that must be considered? There must be a realistic, reasonable, and fair balance of interests.

460. *Daugherty v. City of El Paso*, 56 F.3d 695, 698 (5th Cir. 1995) (quoting *Chandler v. City of Dallas*, 2 F.3d 1385, 1395 (5th Cir. 1993) (citations omitted in original)).

461. *See supra* Part V(C)-(D).

1. *The Plaintiffs*

It is crucial that the overall purpose of the ADA be fulfilled if persons with disabilities are to participate fully in society. The ADA was intended to create opportunities for, and accommodate individuals with disabilities in positions for which they qualify, that is, positions in which such individuals can perform the essential functions of the job. The law must ensure that persons with disabilities are no longer prevented from developing their potential in, and contributing to, the work force. Certainly, no one should be barred from a position that can be competently performed because of a disability.

The obvious, immediate benefit to the plaintiffs who prevail in ADA cases is that they will be employed in the positions of their choice, receiving salaries and other benefits. However, it may be short-sighted to view this as a victory in all cases. Individual plaintiffs with disabilities may not necessarily be the ultimate victors if they prevail with decisions that place them in public safety positions. Police and firefighter positions demand the performance of highly physical tasks.⁴⁶² The ability to perform a particular job function in an emergency situation could mean the difference between life and death. Where their disabilities do, in fact, prevent them from performing physical tasks which could have prevented death or injury to a member of the public, fellow employees, or themselves, the legal victory is a practical tragedy. Even if all persons with certain types of disabilities were subject to blanket exclusion from law enforcement and firefighting, this would not significantly affect the disability community. An endless list of positions—from cashier to rocket scientist—would remain open to persons who could not qualify to be police officers or firefighters.

2. *The Public*

The public at large clearly needs the best police protection it can afford. In emergency situations, the physical capabilities of emergency personnel, such as police officers or firefighters, could determine life, death, or serious injury to those being rescued. Police and fire departments are para-military organizations which depend upon the transferability of sworn personnel. Any sworn member may be called upon to perform the duties of another, particularly when the other member may be killed or injured.

If threatened with a life or death situation, is it unreasonable to expect that the persons entrusted with the rescue are the most able

462. *See supra* Part V(A)(2).

runners, lifters, climbers, and shooters that the population has to offer? Is it unreasonable to require those persons to have at least average vision and hearing ability so that they can detect danger from as many directions as possible?

Police officers are “on call” at all times. They are usually obligated to wear their weapons while in their employer’s jurisdiction and are sworn to protect the public and prevent crime even when off-duty.⁴⁶³ Limited-duty officers may not carry weapons and cannot provide this off-duty protection to the public. Therefore, an increase in the number of limited-duty officers decreases police protection to the public.

Taxpayers, as members of the public, would also be affected if “reasonable accommodations” were interpreted by the courts to require police and fire departments to hire applicants with disabilities and assign them to permanent “limited” or “light” duty positions. The salaries of full-duty officers include compensation for the physical risks they are required to take.⁴⁶⁴ Generally, the tasks performed by limited-duty members are administrative or clerical, and could be performed by civilians at lower salaries. The taxpayers would thus be paying clerical workers police officer or firefighter salaries, with no expectation that these employees will ever perform the duties of those positions.

3. *The Employers*

Police and fire departments, which are sworn to protect and defend the public, must make hiring decisions that further that goal. They must also protect their own members to the extent reasonably possible. They need to hire the most physically and mentally capable people available to perform this function. The transferability of personnel is an operational need in providing the most efficient service to the public.⁴⁶⁵ Departments require the flexibility necessary to assess their operational needs and determine how many limited-duty positions they can support at a given time.

The ADA was not intended to prevent employers that are in the business of protecting the public from using physical hiring criteria that are reasonably related to the ability to protect the public in emergency situations.⁴⁶⁶ Police and fire departments may even be liable

463. *See supra* Part V(A)(2)(a).

464. *See supra* Part V(C).

465. *See supra* Part V(A)(2).

466. *Id.*

for civil suits by members of the public or other employees who suffer injury based on hiring decisions that may be regarded as negligent.⁴⁶⁷

Of course, where there is evidence that qualification standards were written with animus toward a person or persons due to a disability, this would aid the plaintiff in proving that a particular requirement was not job-related and consistent with business necessity.⁴⁶⁸ While police and fire departments do have a history of showing animus toward racial and ethnic minorities and women, there is no record of such a history with respect to persons with disabilities.⁴⁶⁹ In fact, police and fire departments routinely provide for medical retirements for such persons, rather than discharges that provide no benefits.⁴⁷⁰ They also often provide limited or light-duty positions for members with temporary disabilities.⁴⁷¹

These protections indicate that police and fire departments are particularly sensitive to the fact that anyone can acquire a disability, particularly persons who routinely put themselves in physical danger to protect others. This explains why police and firefighter unions specifically bargain for medical retirements for members who suffer per-

467. Negligence in such instances would include hiring decisions that created an unreasonable risk to any persons injured. *See generally*, Bruce D. Platt, Comment, *Negligent Retention And Hiring In Florida: Safety Of Customers Versus Security Of Employers*, 20 FLA. ST. U. L. REV. 697 (1993).

468. *See Davis v. Frank*, 711 F. Supp. 447, 454 (N.D. Ill. 1989) (using intentional discrimination by employer to fortify plaintiff's prima facie case).

469. There is similarly no record of a history of animus based on age. This may be because aging is another condition with which most police officers and firefighters can identify. Since everyone ages, police officers and firefighters may be concerned that age eventually will hinder their own ability to continue in their positions.

470. *See, e.g., United States v. City and County of Denver*, 943 F. Supp. 1304, 1305 (D. Colo. 1996) (regarding disabled police officer who was terminated with direction to apply for disability retirement); *Bell v. Retirement Bd.*, No. 92-C-5197, 1993 WL 398612, at *1 (N.D. Ill. 1993) (regarding firefighter, who was severely injured on job and subsequently granted permanent-duty disability benefits and employed on duty disability status).

471. *See, e.g., Lee v. City of Aurora*, 76 F.3d 392, 392 (10th Cir. 1996) (regarding injured police officer who worked for ten months in light-duty assignment, after which officer was given several retirement options); *Davoll v. Webb*, 943 F. Supp. 1289, 1294 (D. Colo. 1996) (regarding disabled officers who were injured in line of duty and were assigned to temporary light-duty positions); *Santos v. Port Auth.*, No. 94 Civ. 8427, 1995 WL 431336, at *1 (S.D.N.Y. 1995) (regarding police officer injured in line of duty who was assigned to light-duty status for a duration of two years, after which he was notified of his dismissal); *Champ v. Baltimore County*, 884 F. Supp. 991, 994 (D. Md. 1995) (examining Baltimore County Police Department regulations that limit injured officer to 251 days of light duty, though plaintiff performed light-duty assignments for sixteen years); *Matos v. City of Phoenix*, 859 P.2d 748, 750 (Ariz. Ct. App. 1993) (regarding disabled officers assigned to light-duty positions; light-duty policy amended to limit such assignment to six months unless the officer's injury was work-related).

manent disabilities, and for limited-duty assignments for members with temporary disabilities. Police officers and firefighters are commonly injured in the line of duty. Even those who have never even had a temporary physical disability likely recognize that it could happen to them. Since anyone can unexpectedly become a person with a disability, people tend to be more compassionate with respect to disabilities than to race, sex, national origin, religion, or other categories that are often used to alienate people from each other. In addition, police departments commonly use a military preference.⁴⁷² This fact increases the chances that persons seeking police or firefighting positions began their careers in superior physical condition, but have since suffered disabilities as a result of fulfilling their duties.

Absent evidence to the contrary, there is no reason to assume that police and fire departments have established physical hiring criteria based on an irrational desire to exclude and demean persons with disabilities based on unfounded stereotypes or myths; rather, it is reasonable to assume that the criteria are believed to be necessary to protect the public.

4. *Police Officers and Firefighters Without Disabilities*

Clearly, police and firefighters who do not have disabilities will be affected by the physical abilities of their co-workers. If full-duty police officer and firefighter positions are filled by persons with disabilities who cannot perform full duties, those who can perform the duties will have to “pick up the slack” in terms of hours and assignments. More importantly, they will be subject to additional dangers since there will be less “back-up” co-workers in emergency situations to protect them and the public. Where persons with job-related disabilities are permitted to function as full-duty officers, their inability to perform in an emergency situation could cost the lives of their co-workers.

5. *Senior Police Officers and Firefighters with Disabilities*

Currently, most police departments use limited or light-duty positions to accommodate sworn members who have temporary disabilities.⁴⁷³ Some departments have been particularly lenient by allowing a sworn member to remain in such a position long-term, where that

472. *See, e.g.*, *Zamlen v. City of Cleveland*, 906 F.2d 209, 213 (6th Cir. 1990) (regarding applicants to Cleveland Fire Training Academy who were required to perform heavy lifting as part of physical entrance exam).

473. *See supra* Part V(C).

member has a long history of service, but has developed a disability which prevents full-duty status.⁴⁷⁴ This member may still be of value to the department because of knowledge of the work. Such member's guidance, based on practical experience, can be of great value to new recruits and other experienced members. Conversely, this practice helps more senior police officers or firefighters with disabilities stay on the department long enough to collect full retirement benefits.

The number of senior members accommodated is comparatively small⁴⁷⁵ and is counter-balanced by the constant influx of new recruits who can perform as full-duty members. Departments have generally been unregulated with respect to the number of limited-duty positions they may establish. Therefore, they have had the flexibility to assess their own operational and financial needs and determine the maximum number of limited-duty positions and the conditions under which such positions are assigned.

If applicants for these positions can point to the accommodated senior members as examples proving that all officers need not be full-duty, then police and fire departments will be motivated to discontinue such leniency. Departments would need to discontinue this policy in order to avoid losing lawsuits brought by applicants who seek to be paid as police officers and firefighters while essentially performing clerical work. This result would fall most harshly on police officers or firefighters over the age of forty, who have spent most of their lives learning and performing police work and could qualify for little else. Since these persons also face age discrimination in employment,⁴⁷⁶ these members may well have to live solely on the lower rate of disability retirement benefits rather than full retirement benefits.

However, a department might be able to develop a system whereby senior members with disabilities are rehired into supervisory civilian positions that require experience in police work and knowledge of police procedures. Requirements for these civilian jobs could include a minimum number of years of full-duty performance.⁴⁷⁷ This

474. See *Champ v. Baltimore County*, No. 95-2061, 1996 U.S. App. LEXIS 16417, at *2 (4th Cir. 1996) (regarding officer with disability who was permitted to remain in limited-duty positions well beyond the 251 days allocated per the personnel regulations; this officer was only involuntarily retired when budgetary constraints prevented hiring new, full-duty officers).

475. See *supra* Part V(C).

476. See preamble to the ADEA, 29 U.S.C. § 621 (1994).

477. The United States Army has a policy of retaining persons with disabilities on active duty in specialized positions under certain circumstances, including, *inter alia*, that the soldier has fifteen, but less than twenty, years of service. See U.S. Army Reg. 635-40, 6-3d(1) (1990).

policy would prevent the loss of a senior member with a physical disability whose practical experience could be put to use in an administrative or supervisory position.⁴⁷⁸

6. *The Disability Community*

Advocates for the disability community should be mindful that the misapplication of the ADA to public safety cases could create fear of and hostility toward the ADA. Since the ADA is still relatively new, disability rights advocates should focus on the strongest and most sympathetic cases for litigation in order to establish solid, consistent case law upon which the disability community can rely and build. The disability community at large may be disadvantaged by decisions that appear to increase the risk of serious physical harm to members of the public in the face of imminent danger. Such decisions may result in a serious backlash against the ADA, prompting Congress, or the courts, to cut back on the coverage or alter their interpretation of the ADA's protections.

Cases brought on behalf of applicants who have no vested interest in the positions sought are less sympathetic than those of vested employees who have developed disabilities while on the job. Applicants who concede that they cannot perform as full-duty officers, but request permanent limited-duty status are particularly unsympathetic. They are seeking to be paid for services which have never been, and never will be, rendered. Applicants who honestly want to perform as full-duty members are sympathetic; however, they may just as honestly present an unacceptable risk of danger to the public, other members, and themselves. Particularly where they have no experience in the position, they may not realize the importance of employing the most physically able persons available.⁴⁷⁹

478. This policy would differ from the one mandated by the court in *United States v. City and County of Denver*, 943 F. Supp. 1304 (D. Colo. 1996), in that it would recognize that the officer or firefighter would have to be terminated from the sworn position and rehired into a civilian position. In addition, this system would not obligate the department to hire a minimally-qualified officer or firefighter with a disability over a more qualified candidate (with or without a disability).

479. One radio personality mocked what he considered to be the abuse or misinterpretation of the Massachusetts anti-discrimination laws. Comments were repeated in print, under the heading, "Take \$2,000 and Call Me in the Morning," reading, in part:

A guy who's completely deaf in one ear wanted to be a policeman, but his city wouldn't hire him because they believed he wasn't capable of performing the essential functions of the job without risk of injury to himself or others. Prescription: 25,000 greenbacks and a job as a cop.

Howie Carr, *Emotional Distress Fever: Catch it! (It pays well)*, THE BOSTON HERALD, March 1, 1995, at 4.

Some disability rights advocates may have lost sight of the persons whom the ADA was enacted to protect. If the ADA definition of “disability” is unduly over-inclusive, it will be abused by people who cannot truly fulfill the legitimate requirements of a job or an education program. As the public becomes aware of people who are paid for jobs which they do not actually perform, or graduate from educational programs while other people have performed their work for them; application of the ADA will breed resentment instead of understanding, intolerance instead of accommodation.

Even absent any animus toward persons who benefit from, or even abuse, the ADA, members of the public will have serious, legitimate concerns about the way the ADA is used with respect to public safety positions. As it becomes publicized that police officers and firefighters are no longer being required to meet basic physical criteria like “average” hearing and sight, members of the public who were previously sympathetic toward, or disinterested in, the ADA are likely to begin to examine the statute. People are likely to become involved

Although this particular radio personality generally takes conservative positions and does not present an in-depth analysis of the subject, a major, national television news show aired a more detailed story conveying the same message. Broadcast journalists John Stossel and Barbara Walters presented a story entitled, “How Americans with Disabilities Law Can Backfire.” *ABC 20/20* (ABC television broadcast, Aug. 15, 1997) (Transcript #97081504-j11 on file with the *New York University Journal of Legislation and Public Policy*). Among the examples of ADA plaintiffs ridiculed was a police officer who refused to work the night shift because of a sleep disorder. *Id.*

The problem of defining disabilities under the ADA has not been limited to the employment arena. The broad definition of “disability” has been mocked in the area of education as well. For example, a recent magazine article features a cartoon with a baby pictured. The headline reads: “What Does Your Healthy, Normal, Perfect, Little Darling Need to Get Ahead in Life? A Small Disability to Qualify for Special Aid!” In smaller letters, an advertisement reads, “And we can find just the one you are looking for! Contact ADA Research Inc. For Complete Details and Prospectus.” Ruth Shalit, *Defining Disability Down*, *THE NEW REPUBLIC*, Aug. 25, 1997, at 19. The article highlights students diagnosed as having learning disabilities or stress disorders who receive special privileges, such as exemption from the time limits of exams, provision of class notes, and in one student’s case, arrangements for a professor to “fill her in” on information “missed” should she “doze off.” *Id.* at 16. The author recognizes that the Rehabilitation Act of 1973 and the ADA were “inspired by the most humane of motives, to protect the disabled from prejudices that deprived them of equal opportunities in the workplace and in the classroom . . .” *Id.* She then critiques the interpretation and application of these laws as follows:

[T]here were some limits written into the disability laws. For instance, only “otherwise qualified” individuals are entitled to protection; accommodations are only mandated if they do not result in “undue hardship.” But recently a number of rulings by federal courts and government enforcement agencies have revealed how flimsy these limits are.

Id. at 17.

when they have concerns about the ability of their police and fire departments to protect them.

Congress has twice amended the ADEA to exempt law enforcement agencies and fire departments precisely due to courts' perceived inability to interpret the Act in a way which protects public safety.⁴⁸⁰ In recent years, Congress has revisited the issue of reinstating the 1986 exemption.⁴⁸¹ Public concern over the implications of the ADA for law enforcement and firefighting may well be the impetus for consideration of amendments to both statutes.

The case for a public safety exemption under the ADA is stronger than for an ADEA exemption. As the Penn. State Report demonstrates, individuals can be tested for specific conditions rather than excluded on the assumption that persons beyond a specified age actually do or will suffer from those conditions.⁴⁸² In contrast, persons with disabilities are directly tested for the disabling condition; no disability is presumed based on a criterion highly correlated with the condition.

The "backlash" against the ADEA, in the form of the 1986-1993 exemption for law enforcement and fire departments and proposed 1995 reinstatement of the amendment,⁴⁸³ demonstrates that where courts go beyond what Congress intended or the public deems appropriate, the rights of those protected under the Act are ultimately jeopardized. If courts construe the ADA in a manner that contradicts the legislative intent and creates public concern that safety will be compromised, a similar "backlash" by Congress or the courts will likely result. A recent example of such judicial backlash is *Murphy v. United Parcel Service*.⁴⁸⁴ The court ruled that the plaintiff mechanic with high blood pressure was not an "individual with a disability," and that, in any case, he could not perform one of the essential functions of the job—driving;⁴⁸⁵ furthermore, this court took an additional step and assessed the costs of the litigation against the plaintiff.⁴⁸⁶ The practical effect of the court's ruling was to impose a sanction on the plain-

480. See 5 U.S.C. § 3307 (1994); 29 U.S.C. § 623(i) (1988) (repealed 1993) (1986 amendment to the ADEA); see also *supra* Part IV(B).

481. See H.R. 849, 104th Cong. (1995); FEP Summary, Aug. 29, 1994, p. 101; see also *supra* Part IV(B); 29 U.S.C. § 771 (1988) (repealed 1992).

482. See PENN. STATE STUDY, *supra* note 207, at 8-19, 8-20.

483. See *supra* Part IV(B).

484. 946 F. Supp. 872, 881 (D. Kan. 1996).

485. See *id.* at 882. For a discussion of recent cases finding that conditions such as diabetes and hemophilia were not disabilities within the meaning of the ADA, see *supra* Part V(A)(1).

486. See *Murphy*, 946 F. Supp. at 882.

tiff, similar to that of Rule 11 of the Federal Rules of Civil Procedure, for bringing a suit which it deemed frivolous. Clearly, the imposition on a mechanic, particularly when litigating against a major corporation such as UPS, sends a chilling message to all potential ADA litigants.

In addition, persons with disabilities are members of the public needing protection. In fact, persons with disabilities may have a greater need for physically able police officers and firefighters than would persons without disabilities, since they may be more limited in their ability to escape danger on their own.

“It is hardly a startling proposition that a law enforcement organization, and the public it serves, must be able to rely on the physical abilities of its members to perform their duties.”⁴⁸⁷ Congress should not need to specifically legislate such an obvious, common-sense recognition. As demonstrated through some of the hypotheticals below, a complete exemption for law enforcement officers and firefighters is not necessarily a desirable result—nor is it necessary if the ADA is analyzed consistently with its legislative intent and its Rehabilitation Act model.⁴⁸⁸

B. Balancing the Legal Rights and Practical Needs of All Interested Parties: Applying the Analysis to Specific Fact Patterns

The following fact patterns are offered in order to illustrate the appropriate analysis of ADA police and firefighter cases under various circumstances.

487. EEOC v. New Jersey, 620 F. Supp. 977, 998 (D. N.J. 1985).

488. See *infra* Part VII.

1. *Insulin-Dependent Diabetes*⁴⁸⁹

a. *Police Officer*

Hypothetical

An applicant for the position of police officer has diabetes.⁴⁹⁰ She is insulin-dependent and has taken her medication reliably. She reports that she feels the “warning signs” of numbness in her hands and slight quivering before a hypoglycemic episode occurs. She has always been able to avoid an episode by immediately taking insulin or a sugar cube, which she carries with her at all times. She has worked as a computer programmer, a stock clerk, and a messenger. She played high school basketball. Medical experts agree that stress tends to increase the likelihood of a hypoglycemic attack.

*Analysis*⁴⁹¹

A police officer must be available for any duty in an emergency situation. The inquiry, then, is can the applicant perform this essential

489. Cases upholding blanket exclusions of persons with insulin-dependent diabetes include: *Daugherty v. City of El Paso*, 56 F.3d 695, 699 (5th Cir. 1995) (holding that under ADA, insulin-dependent diabetic is not qualified as individual with disability for position of bus driver); *Wood v. Omaha School Dist.*, 25 F.3d 667, 669 (8th Cir. 1994) (upholding policy excluding insulin-dependent diabetics from driving school buses under Rehabilitation Act); *Chandler v. City of Dallas*, 2 F.3d 1385, 1395 (5th Cir. 1993) (holding that under Rehabilitation Act, a driver with insulin-dependent diabetes presents genuine substantial risk to others); *Serrapica v. City of New York*, 708 F. Supp. 64, 73-75 (S.D.N.Y. 1989), *aff'd*, 888 F.2d 126 (2d Cir. 1989) (holding policy against hiring poorly controlled insulin-dependent diabetics as sanitation workers does not violate Rehabilitation Act); *Davis v. Meese*, 692 F. Supp. 505, 521 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989) (holding that preclusion of insulin-dependent diabetics from FBI positions of special agent or investigative specialist does not violate Rehabilitation Act).

Cases denying relief to individual plaintiffs include: *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 667 (7th Cir. 1995) (holding that when an employee needs no accommodation and fails to control controllable disability, he cannot state a cause of action under ADA); *Miller v. Sioux Gateway Fire Dep't*, 497 N.W.2d 838, 842 (Iowa 1993) (holding termination of insulin-dependent diabetic did not constitute disability-based discrimination under state law).

Cases rejecting blanket exclusions of people with insulin-dependent diabetes include: *Sarsycki v. United Parcel Service, Inc.*, 862 F. Supp. 336, 341 (W.D. Okla. 1994) (citing *Bombrys v. City of Toledo*, 849 F. Supp. 1210 (N.D. Ohio 1993) in support of individualized assessment approach); *Bombrys*, 849 F. Supp. at 1221 (holding blanket disqualification of insulin-dependent diabetics as candidates for police officer violates Rehabilitation Act, ADA, Fourteenth Amendment, and state law).

490. This analysis would apply to other disabilities which could cause unpredictable incapacitation, such as epilepsy or other conditions that cause seizures or unconsciousness.

491. For a discussion of individual evaluations and blanket exclusions, see *supra* Part V(E).

function of the job? If an emergency arises at a time when she feels the effects of her blood sugar becoming too low and must stop to eat, take further medication or sugar tablets, she would be unavailable to perform the essential duties of her job. This interruption could result in harm to health and safety, which she is employed to protect. In the alternative, if she did not stop to care for her own medical needs, she would go into hypoglycemic shock, which would leave her incapacitated and again, unavailable to protect the public, her fellow officers, or herself, from harm.

It is irrelevant that the applicant's diabetes has not interfered with her previous employment or participation in sports. Her previous employment did not require her to respond to emergency situations. She could have stopped at any time during the course of her day at her past employment to take medication without serious consequence. In addition, these were not stressful positions which would tend to increase her predisposition to an attack. The applicant is not a "qualified" individual with a disability under the ADA. The job requirement that police officers be physically able to handle emergencies at all times is justified as job-related and consistent with business necessity.

Although this case is more appropriate in terms of the applicant's ability to perform the essential functions of the job, i.e., rescue persons in danger,⁴⁹² it may also be viewed as a direct threat to the safety of others. The severity of the potential harm in this case would justify her exclusion from the police force. If the applicant experienced an incapacitating hypoglycemic attack while driving at high speed in pursuit, in the process of subduing a suspect, or while shooting at a suspect who is shooting back, she would pose a direct threat to the public, her fellow officers, and herself.⁴⁹³

In public safety cases, the relevant inquiry appears to be whether an individual with diabetes is subject to a hypoglycemic episode without immediate access to insulin. If the person with diabetes remained free of such episodes without insulin, the person would not be "insulin-dependent." The term "insulin-dependent diabetic" ensures that all persons with diabetes are not excluded, but only those who depend on insulin to avoid an unpredictable hypoglycemic attack. The term itself answers the relevant inquiry.⁴⁹⁴

492. See *supra* Part V(A)(2).

493. See, e.g., EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 18, § 4.4, at IV-12 (stating that a bus driver with epilepsy could properly be excluded from the position of bus driver due to the direct threat to health and safety which she posed).

494. An inquiry into the applicant's history of hypoglycemic episodes would depend primarily on the applicant's own disclosure of such information. A police department

Although *Bombrys v. City of Toledo* questions whether the *Davis* holding is applicable to the ADA,⁴⁹⁵ there is no authority for distinguishing between the statutes on this issue. To the contrary, Congress specifically intended that the analysis of the ADA definition of “qualified” be construed in accordance with the definition of “otherwise qualified” under the Rehabilitation Act.⁴⁹⁶ Similarly, “direct threat” was to be construed as it was in *Arline*, under the Rehabilitation Act.⁴⁹⁷ Therefore, the rationale of *Davis v. Meese* is as valid under the ADA as it was under the Rehabilitation Act.

b. Firefighter

Hypothetical

The facts are the same as above, except that plaintiff applies for a firefighter position.

Analysis

Essentially, the arguments above are the same. Firefighters, like police officers, must be physically capable of rescuing people in emergency situations. The requirement that she not be pre-disposed to unexpected incapacitation is justified by business necessity. In addition, as a firefighter, she would have tremendous difficulty reaching and taking her medication in a smoke-filled environment, wearing protective gear.

2. *Monocular Vision*⁴⁹⁸

a. Police Officer

Hypothetical

An applicant for the position of police officer has only one eye. He has been employed as a police officer in a smaller, neighboring

might never know of prior hypoglycemic episodes unless they result in injury or a public incident. The department should not be required to hire an insulin-dependent diabetic and wait until he or she has a hypoglycemic episode which may result in serious injury to persons or property.

495. See *Bombrys*, 849 F. Supp. at 1219-20.

496. See *supra* Part III(B).

497. See *supra* Part V(A)(3).

498. See 1997 DAILY LAB. REP. (BNA) No. 160, at A-6 (Aug. 19, 1997), for a synopsis of *United States v. City of Pontiac*, 94-CV-74997-DT (E.D. Mich. Aug. 15, 1997). A 1994 lawsuit alleging individual employment discrimination against a firefighter with monocular vision was settled by consent decree, under the terms of which the City of Pontiac agreed to hire the firefighter immediately and offer retroactive back pay, seniority, and pension benefits. See *id.*; see also *Greenwood v. State Police Training Ctr.*, 606 A.2d 336 (1992) (holding that dismissal from police training

jurisdiction for less than a year. He offers this as evidence that he is qualified to become a police officer for a major metropolitan police department.

Analysis

The first inquiry must be, what essential job functions is the department trying to assess? How does the police department test for vision? Is every person with one eye eliminated without a vision test? Is it at all possible that anyone with one eye could pass the vision test? What is the expert evidence regarding monocular vision?⁴⁹⁹

A person with monocular vision does not have the field of vision available to a person with two eyes.⁵⁰⁰ Peripheral vision is necessarily limited by the absence of a second eye.⁵⁰¹ The question then becomes, how important is a police officer's field of vision, or peripheral vision? In *Doane v. City of Omaha*, the City's expert testified that "binocular vision and peripheral vision are very important in a law enforcement situation and that a person with monocular (one-eyed) vision would have a lower reaction time, rendering that person a danger to himself, fellow officers, and the public."⁵⁰²

Despite this testimony, the court found that a reasonable jury could find that the plaintiff could perform the essential functions of the position of police officer. The court said that Doane had "made adjustments that compensate for his limited peripheral vision" and stressed that Doane had been a police officer for nine years with his disability.⁵⁰³

It may be that the City's greatest mistake in *Doane* was leaving him on the force for nine years after the discovery of his disability. It is ironic that the department's attempt to accommodate Doane for as long as it did provided Doane with the "ammunition" to argue that he could perform the essential functions of the job.⁵⁰⁴ There was no evidence that Doane's reaction time was tested in those nine years, or that

program of trainee with limited vision in one eye was without good cause, because there was no substantial evidence that trainee could not complete program, or that trainee's condition created serious risk of injury to himself or others).

499. The U.S. Department of Transportation is still studying this question. *See generally supra*, Part V.

500. *See Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 693 (1998).

501. *See id.*

502. *See id.* at 628.

503. *See id.*

504. As an alternative to resignation, Doane was offered a position with 911 communications. *See id.* at 626.

he performed as well as an officer with vision in two eyes in an emergency situation. The court simply did not address these concerns.

How can it be argued that acuity of vision, particularly peripheral vision and depth perception, is not as important for a police officer as they are for a pilot? An officer's ability to visually observe the surrounding area is crucial in aspects of police work ranging from surveillance to a "shoot out." An officer's inability to see danger from one angle in a split second, while turning to focus on another, might well mean the difference between life and death in the midst of gunshots. This applicant's inability to see someone pointing a gun from his "blind side" may cost the life of the officer himself, a fellow officer, or a member of the public. In a less dramatic scenario, a full range of vision may be crucial in observing suspected criminals to detect crimes and to prevent escapes. This is particularly true in a modern urban setting.

In consideration of these job duties, having a "full" rather than limited range of vision may well be an essential function of the job. The best "designed" police officers would probably have additional eyes in the backs of their heads. Since it is not possible yet to build "Robocop,"⁵⁰⁵ police departments must select officers from the most capable available persons.

The job duties and training of a police officer should be examined independently, and in comparison to the duties performed by a similarly situated officer in a neighboring jurisdiction. Are the duties he has actually performed the same as those he would be expected to perform as an officer in a major metropolitan police department? Has the applicant faced any emergency situations related to his ability to see? How has he handled them? The fact that the applicant has been a police officer in another jurisdiction is not determinative. The particular needs of the community must be considered. A high-crime metropolitan police department may be permitted to require higher hiring standards than does a low-crime rural police department.

505. *Robocop* (Orion Pictures 1987) (motion picture depicting specially-designed robot police officer).

*b. Firefighter*⁵⁰⁶

Hypothetical

The same applicant has also been a volunteer firefighter for fourteen years. He offers this as proof that he is qualified to be a full-time, paid firefighter for the fire department of this major urban city.

Analysis

The vision testing and expert evidence regarding monocular vision should be analyzed in accordance with the above hypothetical. Again, the job duties and training of a department's firefighters should be examined, both independently and in comparison to the duties he performed as a volunteer firefighter. There may be many differences between the essential duties of a volunteer firefighter and the essential duties of a full-time, trained firefighter on the City's payroll. It may be that volunteers are not even permitted to enter burning buildings. Since volunteers are not city employees, there may be civil liability questions if either the volunteer or a member of the public is injured due to the volunteer's actions.

There are many differences among fire departments and the needs of the particular jurisdiction with respect to firefighting. The structures of a city and its buildings may well determine the degree of danger involved in firefighting and how well trained and physically fit firefighters should be in order to meet the demands of the job. Like the police department, the fire department is not constrained to accept the hiring standards of another jurisdiction.

Neither the statutory language of the ADA nor its legislative history indicate an intent to prevent a metropolitan fire department from requiring that a firefighter have a full range of vision when he rushes into smoke-filled, dark, burning buildings, perhaps dodging falling structures, to find and save people who may be unconscious from smoke inhalation and unable to cry out for help. Would he see a frightened child huddled in a corner, a falling beam in a stairwell, or a hazard sign indicating that explosive chemicals were present? How many of these things would he need to see at once in order to save the child and himself?

506. See, e.g., *Michigan City Hires One-Eyed Firefighter; Changes Hiring Standards Under ADA Decree*, 1997 DAILY LAB. REP. (BNA) No. 160, at A-6 (Aug. 19, 1997) (discussing *United States v. City of Pontiac*, 94-CV-74997-DT (E.D. Mich. Aug. 15, 1997)). The *City of Pontiac* case involved a firefighter candidate rejected for employment because of monocular vision. The case was resolved by consent decree. *Id.*

c. Corrections Officer

Hypothetical

A former corrections officer applies for re-instatement after being medically retired. The applicant suffered a job-related injury, as a result of an attack by a juvenile inmate, which caused blindness in one eye. His doctors predict that he will lose sight in his other eye if he is hit in the head or eye area again. He requests an accommodation of wearing a protective helmet over his eye in order to protect himself from attack. The applicant argues that another corrections officer in an adult facility wears such a helmet to accommodate his disability.

Although the applicant cannot qualify to use a gun, he is not required to do so. In fact, he may not do so in a juvenile facility. Therefore, he contends that he is “otherwise qualified” for the position. However, the department of corrections claims that a protective helmet would make the officer an easy target for attack.

Analysis

This is a closer case than the two above. It is more sympathetic because the applicant has invested time, training, and effort into this position. In fact, he was injured in the line of duty. The applicant does not address the fact that the officer in the adult facility could stop an attack with a gun before an attacker could get close enough to remove his helmet, as opposed to an officer in a juvenile facility who would have to rely on “hand-to-hand” self defense and defense of others. Therefore, the department’s claim that the applicant would pose a direct threat to himself and others might justify the applicant’s exclusion. The likelihood and consequences of physical attacks on corrections officers in this juvenile facility should be examined. The experiences of the officer in the adult facility might also be instructive.

Since the applicant’s original injury was the result of an attack by a juvenile inmate, the department may be correct in asserting that returning him to his previous position would pose a threat to him and others. It may be that a protective helmet would serve as a sign for inmates to see where he is most vulnerable and make him a target for future attacks. Excluding the applicant seems a harsh result in this instance; nevertheless, a blow to his head which leaves him completely blind, while leaving other juveniles and officers open to danger, would be an eminently harsher one. The department specifically provides for medical retirements to respond to the needs of officers in this position. Therefore, such an exclusion should be permitted.

3. HIV/AIDS⁵⁰⁷

a. Police Officer

Hypothetical

A police officer cadet tests HIV-positive⁵⁰⁸ before being assigned to street duty. She has graduated from the Academy at the top of her class. There is no question that she is capable of performing all of the specific life-saving tasks which she was trained to perform in an emergency situation. Rather, the question is whether she can safely perform those other duties,⁵⁰⁹ or whether she will pose a direct threat to the health and safety of others.⁵¹⁰ The threat posed is real only if her blood enters the blood of another person. The question then, is how high do the chances of contagion have to be for the threat to be “direct?”

Analysis

It cannot be said that every soldier who serves in battle will “probably” be wounded; nevertheless, United States Army Regula-

507. See, e.g., EEOC v. Prevo's Family Market, Inc., 135 F.3d 1089, 1090-91 (6th Cir. 1998) (holding employer did not violate ADA when it required employee to submit to medical exam as condition of continued employment); Severino v. North Fort Meyers Fire Control Dist., 935 F.2d 1179, 1182 (11th Cir. 1991) (holding lower court's finding that HIV-positive firefighter presented risk to others not clear error); Doe by Lavery v. Attorney Gen. of the United States, 814 F. Supp. 844, 849 (N.D. Cal. 1992), *aff'd*, 95 F.3d 29 (9th Cir. 1996) (holding plaintiff not “otherwise qualified” if he refuses to provide information about medical condition to employer) (citation omitted); Doe v. District of Columbia, 796 F. Supp. 559, 569 (D.D.C. 1992) (holding HIV status irrelevant to assessing physical capability to perform duties of firefighter).

508. The same analysis applies to other serious diseases which are transmitted through blood, such as hepatitis B. See Fedro v. Reno, 21 F.3d 1391 (7th Cir. 1994) (involving U.S. Marshal with hepatitis B); Roe v. District of Columbia, 842 F. Supp. 563 (D.D.C. 1993) (involving firefighter with hepatitis B).

509. This would be the cadet's burden of proof in establishing her prima facie case that she is “qualified” under *Arline*. Like the teacher in *Arline*, the cadet can perform the essential functions of the job; the question is whether, in the process of performing that job, she may infect others with a contagious deadly disease. If so, she cannot *safely* perform the essential functions of the job and is not qualified. See *supra* Part V(A)(2).

510. This would be the department's burden of proof if the court determines that “direct threat” is addressed only as a defense and not as part of the “qualified” analysis. The cadet is able to protect the victim from the initial threatened harm at the scene. A court could determine that her ability to protect at the scene renders her “qualified” under the ADA. It might then address the issue of direct threat as a defense, since it is the cadet's presence at the scene which causes the threat of contagion. This interpretation would deviate from *Arline* and its progeny and violate the Congressional directive to interpret direct threat consistent with the definition outlined in *Arline*.

tions prohibit a soldier who is HIV-positive or AIDS-infected from being sent to a war zone.⁵¹¹ The federal government has decided not to take the chance that this particular soldier will not be wounded and be in physical contact with another soldier, or civilian, who is wounded. Full-duty police officers are, in many ways, like soldiers in a war zone. They are required to carry guns and must respond to scenes of unpredictable weaponry and violence. Although particular police officers may never be wounded, they are often sent into situations which increase the risk of being wounded. They are specifically sent as the rescuers of people who have been the victims of violence or have otherwise been injured. Even if the chances of blood mixing are small, the possibility nevertheless exists.

The rate of violent crime in the jurisdiction might also be relevant. The likelihood of infection could be determined by statistics indicating how many officers have been shot, cut, or otherwise left bleeding in a public place. If another person at the scene is also wounded, the chances of exchanging blood are increased, but the cadet's blood could enter the body of another person from an open scratch or the mouth of the other person. In addition, someone could become infected from blood left at the scene after the initial crisis is over. Nevertheless, if direct threat is to be determined only by the statistical chance of the recruit's blood mixing with that of another person, it is likely that no direct threat will be found.⁵¹²

Even if the statistics indicate that the chance of infecting someone in the line of duty is small, is this a chance worth taking, considering that AIDS is brutally debilitating and fatal? Where life and death are concerned, some courts have refused to accept any chance of

511. See U.S. Army Reg. 600-110, Chapter 1, Section III, 1-14(e) (1994); see also *supra* Part V(A); 32 C.F.R. § 58 (1997) (stating Department of Defense policy to deny eligibility for appointment or enlistment for military service to individuals with evidence of HIV infection).

512. See, e.g., *Doe by Lavery v. Attorney Gen. of the United States*, 62 F.3d 1424 (9th Cir. 1995) (holding doctor could not be required to disclose his HIV status to hospital, but only to explain his infection control procedures), *vacated sub nom.*, *Reno v. Doe by Lavery*, 518 U.S. 1014 (1996); *EEOC v. Prevo's Family Market, Inc.*, No. 1:95 CV 446, 1996 WL 604984, at *3 (W.D. Mich. Aug. 27, 1996), *rev'd*, 135 F.3d 1089 (6th Cir. 1998) (holding produce clerk did not pose direct threat of contagion to co-workers or customers since risk of transmission was low and could be further minimized if plaintiff used steel protective gloves and used exclusively his own knives). *But see* *Bradley v. University of Tex. M.D. Anderson Cancer Ctr.*, 3 F.3d 922 (5th Cir. 1993) (finding HIV-positive surgical technician was not "otherwise qualified" because of risks of contagion).

harm, even if such chance is “infinitesimally small.”⁵¹³ Even when the risks are small, they cannot nullify the “catastrophic consequences of the transmission of AIDS.”⁵¹⁴

If the department hired the applicant and was later sued for negligent hiring by someone who contracted AIDS from her while being rescued from a crime, would the department be able to successfully defend by arguing that statistics indicated that HIV transference was not likely? The courts should use the negligence standard under well-established tort law as a guide for assessing the risk of harm to others.⁵¹⁵ The question should not be whether the statistical likelihood of the harm is high, but rather, whether the threatened harm is foreseeable.

It is reasonably foreseeable, though not statistically probable, that an officer would be wounded while in contact with a member of the public or a fellow officer. Furthermore, the threat is very real for the person who is in the small statistical percentage who has contracted AIDS while being “rescued” by an infected police officer. This risk must be balanced against the social benefit of employing persons as police officers and firefighters.

Should the ADA require the department to hire a police officer who is HIV-positive when that department would probably be held civilly liable, based on negligence, for hiring such person if she infects someone in the line of duty? As the Fifth Circuit has commented, “Woe unto the employer who put such an employee” in a position to endanger the public.⁵¹⁶

*b. Firefighter*⁵¹⁷

Hypothetical

The facts are the same as above, except that the applicant is a new firefighter who has just finished her training.

513. *See, e.g., Levin v. Delta Airlines, Inc.* 730 F.2d 994, 997 (5th Cir. 1984) (noting that while airline’s policy of removing pregnant flight attendants was prima facie discriminatory, the policy was justified by business necessity of ensuring safety).

514. *Bradley*, 3 F.3d at 924 (stating that even slight risk that HIV-positive surgical technician might infect patient was sufficient to make technician unable to perform duties of technician’s employment).

515. *See supra* Part V(A)(3).

516. *See Chandler v. City of Dallas*, 2 F.3d 1385, 1395 (5th Cir. 1993) (quoting *Collier v. City of Dallas*, No. 86-1010, slip op. at 3 (5th Cir. Aug. 19, 1986)).

517. *See generally Doe v. District of Columbia*, 796 F. Supp. 559, 568-69 (D.D.C. 1992) (holding that firefighter who tested HIV-positive posed no measurable risk of transmission and was qualified for full-duty position with no restrictions).

Analysis

The analysis is the same with respect to the “direct threat” element; however, the essential duties of the job are different in that firefighters do not carry weapons and are not expected to “attack” any perpetrators. Nevertheless, since firefighters now often function as paramedics, their contact with injured persons poses a ripe opportunity for the mingling of blood.

Even in their more traditional roles, firefighters are thrust into situations in which bleeding is a reasonably foreseeable consequence. Firefighters do wear heavy protective gear to protect against fire, falling glass, and other debris; nevertheless, firefighters often have to break glass to release smoke out of windows, hatchet through walls or doors, and often bleed if they are burned. Victims who are carried to safety by firefighters may also be bleeding if burned or injured from falling glass or debris.

Since firefighters often carry people out of burning buildings, physical contact between a firefighter and the public may be more foreseeable than physical contact between a police officer and the public. A bleeding, HIV-positive firefighter may be more of a threat to victims of a fire than would a similarly bleeding police officer to victims of a crime. Furthermore, any blood left at the scene would pose a health threat to persons arriving thereafter.

4. *Missing or Dysfunctional Limbs*⁵¹⁸

a. *Police Officer*

Hypothetical

An applicant for police officer has only one hand. The department requires all police officers to have two hands. It argues that two hands are necessary to perform arrests and to qualify for weapons use.

518. *See generally*, *Stillwell v. Kansas City Bd. of Police Comm'rs*, 872 F. Supp. 682 (W.D. Mo. 1995) (finding applicant for armed security guard license entitled to an individualized determination of his ability to perform the essential functions of the job); *Champ v. Baltimore County*, 884 F. Supp. 991 (D. Md. 1995) (police officer who lost partial use of arm was not “otherwise qualified” for position because he could not make forcible arrests), *aff'd*, 91 F.3d 128 (4th Cir. 1996); *Ethridge v. Alabama*, 860 F. Supp. 808 (M.D. Ala. 1994) (finding officer with limited use of right arm and hand who could not fire weapon in two-handed stance unable to perform essential function of his job); *Bell v. Retirement Bd.*, No. 92-C-5197, 1993 WL 398612 (N.D. Ill. Oct. 6, 1993) (denying motion to dismiss on question of whether medically retired firefighter with partially amputated leg could be reasonably accommodated); *Stratton v. Missouri Dep't of Corrections and Human Resources*, 897 S.W.2d 1 (Mo. Ct. App. 1995) (finding applicant for corrections officer position, missing four fingers, could not perform essential job functions because unable to use

The applicant says that he can qualify with weapons for both “hands” and can perform all of the physical restraint moves taught at the Academy by using a prosthesis. The department responds by arguing that the applicant poses a direct threat because the prosthesis might come off in a struggle, startling people.

Analysis

This is a police department that has taken its requirements for granted, expecting them to be upheld based on “common sense.” The rule was obviously adopted because a person cannot shoot a gun with a hand which does not exist. However, this department has not thought through its legal arguments and is completely unprepared for possible tools which are now available to people with disabilities. Allowing the applicant to use his prosthesis might well be a reasonable accommodation.

This applicant should be given an individual evaluation to determine whether he can perform the required tasks with the reasonable accommodation of using his prosthesis. If the prosthesis is likely to come off during an altercation, the issue is not whether someone is startled (this could be an advantage), but rather, that the officer would then be one-handed. At that point, he would not be able to shoot with either “hand” or perform the two-handed physical maneuvers taught at the Academy.

Requirements regarding missing limbs might be rewritten to factor in any prosthesis which may substitute for the limb. For example, a department might require “two hands or the functional equivalent of two hands.” In this manner, the department would not have the burden of individually testing every applicant who was missing a hand when such test would inevitably be futile. However, a person with an appropriate functional equivalent of a hand might qualify.

b. Firefighter

Hypothetical

An application for firefighter has two missing toes on her right foot. The department requires that all firefighters have five toes on each foot, claiming that this is necessary for running, climbing ladders, and balance. The applicant runs track and has been a gymnast. She has passed all of the physical performance tests administered by the department as part of the application process.

most defensive techniques selected by Department to control inmates and suppress disorder).

Analysis

The first question is whether the applicant is covered under the ADA. She is not properly characterized “an individual with a disability” because her condition does not amount to “an impairment⁵¹⁹ that substantially limits one or more of the major life activities of such individual.”⁵²⁰ Nevertheless, she is arguably covered under the provision protecting persons who are “regarded as having such an impairment.”⁵²¹ The department “regards her” as being impaired in her ability to run, climb, and maintain her balance. These functions may qualify as major life activities, particularly if they can be closely linked to “walking,” which is listed in the EEOC Regulations.⁵²²

The second question is whether she is “qualified.” Since she can perform the essential functions of the job even without an accommodation, she has clearly met this burden. The burden would then shift to the department to show that she posed a direct threat to herself or others or that accommodating her would cause undue hardship. Clearly, the department would endure no hardship by hiring this applicant and she would pose no threat of harm to anyone. The applicant must be hired and the department must discontinue its blanket exclusion of persons with less than five toes on each foot.

*5. Heart Disease⁵²³**a. Police Officer**Hypothetical*

A police officer has been on the force for fifteen years. He has developed a heart condition which prevents him from running or lift-

519. According to the EEOC regulations, the applicant’s condition does meet the definition of an “impairment,” which specifically includes any “anatomical loss” affecting the “musculoskeletal” system. *See* 29 C.F.R. § 1630.2(h)(1) (1998).

520. 42 U.S.C. § 12102(2)(A) (1994); *cf. supra* Part (V)(A)(1).

521. 42 U.S.C. § 12102(2)(C) (1994).

522. The EEOC regulations include “walking” and “performing manual tasks” as examples of major life activities. *See* 29 C.F.R. § 1630.2(h)(2)(i) (1998). *But see* *Welsh v. City of Tulsa*, 977 F.2d 1415 (10th Cir. 1992) (finding firefighter applicant with minor sensory deficit in two fingers not “handicapped” within the meaning of Rehabilitation Act because impairment did not substantially limit major life activity).

523. *See, e.g., Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983) (regarding park technician with heart condition who was denied job because work was “too arduous” and would impose an undue hardship on defendant if accommodated); *McDonald v. Kansas Dep’t of Corrections*, 880 F. Supp. 1416 (D. Kan. 1995) (regarding plaintiff corrections officer who was not “otherwise qualified” within the meaning of ADA because officer could only perform “light duty” jobs since he weighed over 400 pounds and was suffering from congestive heart failure); *Kuntz v. City of New Haven*, No. Civ. N-90-480, 1993 WL 276945, at *2, *5 (D. Conn. Mar. 3, 1993) (holding

ing heavy objects without pain and fatigue. His doctor has advised him to avoid physical conflicts and stress. His condition is diagnosed as permanent.

Analysis

The officer is not qualified as a police officer if the department is in conformity with the national police standards, requiring all full-duty officers to be able to perform arrests.

Ironically, without the ADA or Rehabilitation Act, the department would be free to accommodate this officer by assigning him to desk jobs where he could still use his knowledge of police work to benefit the department. The only restriction on the department would be its own operational needs. As long as the department could absorb such officers in limited-duty positions, it could keep them on the force. Only when the number of officers with permanent or long-term disabilities hindered its ability to provide the public with enough full-duty officers to meet its needs would the department be forced to terminate such persons. As long as the number of officers with disabilities was small and new full-duty officers were plentiful, this officer could have been accommodated under the pre-ADA/Rehabilitation Act system.

However, the recent interpretations some courts have given the ADA has provoked a new inquiry and a new standard. The department cannot keep this officer in a permanent limited-duty position even if operational needs and personnel regulations allow it. If it does, new applicants with disabilities will use him as an example of a police officer who does not perform arrests; this will strengthen those applicants' claim that performing arrests is not an essential function of the job. The department would leave itself open to endless litigation brought by applicants with disabilities seeking to be "accommodated" by being hired as police officers, but being assigned to desks.⁵²⁴ Courts would then decide when the department is saturated with lim-

police sergeant should not have been denied promotion to lieutenant since he already performed most duties of lieutenant in current position and other lieutenants on force had heart conditions); *Shoemaker v. Pennsylvania Human Relations Comm'n*, 634 A.2d 772 (Pa. Commw. Ct. 1993) (regarding police officer suffering from symptoms of angina who was not qualified because officer could not perform arrests).

524. The position of such applicants specifically ignores the fact that most "desk jobs" are supervisory and administrative, requiring years of patrol experience for competent performance. *See EEOC v. Missouri State Highway Patrol*, 748 F.2d 447, 456 (8th Cir. 1984). The court also makes an excellent case for maintaining radio dispatcher positions as full-duty positions, noting that patrol experience prepares the dispatcher to make judgments in emergency situations and to properly advise the caller and police units. *See id.* at 457.

ited-duty officers. Therefore, the department must terminate the officer. He may also be medically retired pursuant to department procedure.⁵²⁵

b. Firefighter

The same analysis would apply to a firefighter. Although the job duties differ from those of a police officer, a firefighter with the condition described above would not be fit to run through fires, climb ladders, carry people, or break down doors.

VII

CONCLUSION

Civil Rights statutes are generally to be construed liberally for the benefit of the protected group and to further the goals of the legislation for the benefit of society at large.⁵²⁶ However, the compelling state interests in preserving life and preventing injury override the need to liberally construe the ADA in police and fire department litigation.

Who would truly benefit by the liberal construction in such cases? Individual plaintiffs might benefit financially and be employed in the positions they desire, but it would be at the cost of public safety. The practical long-term benefits of such a construction to members of the protected group would be outweighed by the consequences. Persons with disabilities would be put in positions in which they were particularly susceptible to physical danger and in which their own physical disabilities may cause serious harm to others.

525. *See, e.g., Lee v. City of Aurora*, 76 F.3d 392 (10th Cir. 1996) (finding police department properly “retired immediately with a medical disability” patrol officer who could not perform his job functions due to decline in hand strength). *See also supra* Part VI(A)(5) for suggestions regarding possible civilian positions for such officers.

526. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-45 (1974) (stating that private right of action is an essential means of Title VII enforcement because it not only redresses private litigant’s own injury but also “vindicates the important congressional policy against discriminatory employment practices”); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (finding Civil Rights Act of 1969 showed “a congressional intention to define standing as broadly as is permitted by Article III of the Constitution” by allowing suit to be started “by a person claiming to be aggrieved.”); *Green v. Connally*, 330 F. Supp. 1150, 1164 (D.D.C. 1971) (stating Internal Revenue Code provisions on charitable exemptions and deductions must be construed to avoid frustrations of federal policy against federal support for private schools that practice racial discrimination), *aff’d sub nom., Coit v. Green*, 404 U.S. 997 (1971).

If courts respond to the ADA by placing persons with disabilities in public safety positions from which they were excluded under the Rehabilitation Act, there may well be a backlash of court decisions or legislation cutting back on the rights of persons with disabilities. Congress could simply respond with an exemption for law enforcement officers and firefighters, as it did twice with the ADEA.⁵²⁷ This would allow police and fire departments to set their own criteria.⁵²⁸ With a complete exemption for law enforcement and firefighters, there would be no legal basis for challenging hiring criteria that exclude persons with real or only “perceived” disabilities, but that are not job-related.

If Congress is to amend the ADA, law enforcement and firefighting positions should not be made exempt from the Act; rather, Congress should: (1) clarify the standard and burdens of proof with respect to direct threat; and (2) name, and direct the courts to follow, specific ADA decisions that are consistent with legislative intent and, again by name, repudiate incorrect ADA decisions.⁵²⁹ This would preserve the integrity of the ADA and thus the benefits to the disability community, without diminishing protection to the public.

The ADA should be liberally construed where safety is not at issue. In most cases, if it is questionable whether a person’s disability will prevent her from performing a job, that person should be permitted the opportunity to perform it. Stereotypical thinking has excluded such persons from performing jobs for which they are truly qualified. However, society cannot afford the luxury of a liberal construction of the ADA in cases involving police and firefighters. The ADA was enacted to give individuals with disabilities a “chance” in life; however, giving one person “a chance in life” should not mean taking a chance with someone else’s life.

911 . . . How should the courts respond?

527. *See supra* Part IV(B).

528. *See id.*

529. Congress might also indicate whether analyses are correct or incorrect, particularly the EEOC Guidelines, articles, commentaries, or other authoritative sources.