

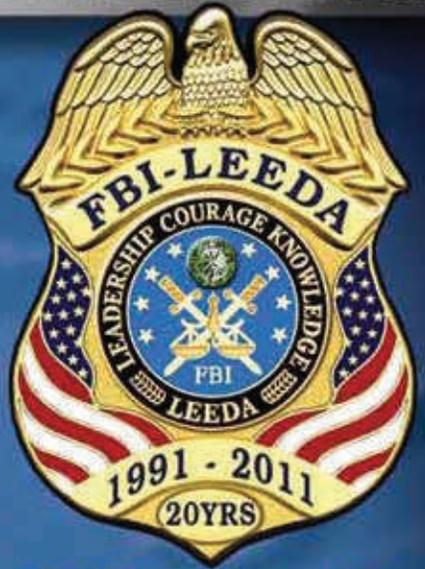


FBI-LEEDA

July 2011 Issue II

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2011 CONFERENCE HIGHLIGHTS



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The Hiring Process: **TIMING IS** (or Can Be) **EVERYTHING**

Police Departments often find the process of hiring officers to be a costly and lengthy undertaking. As such, departments often extend “conditional offers of employment” (“COE”) before completing the hiring process. Before departments extend COEs, they typically conduct several components of the hiring process, including physical agility tests and other non-medical inquiries. Some departments, however, hold off conducting background checks until after they have extended a COE. For those departments, performing background checks post-offer may provide the benefits of (1) decreasing the length of the hiring process significantly; and (2) being more cost effective. Conducting the hiring process in this manner, however, raises the question of whether it is legally necessary for police departments to conclude background investigations before making a COE.

Under the Americans with Disabilities Act (“ADA”), employers may ask about a prospective employee’s disability or give a medical examination only after they have offered that employee a job.¹ Moreover, all questions and medical examinations must be relevant to the job, consistent with business necessity, and required of all applicants.² An offer of employment is considered “bona fide” under the ADA once the employer has “evaluated all relevant non-medical information which, from a practical and legal perspective, could reasonably have been analyzed prior to extending the offer.”³

The purpose of requiring employers to follow these guidelines during the hiring process is to prevent employers from using “information about an applicant’s physical and/or mental condition [to] exclude applicants with disabilities before their ability to perform the job [is] even evaluated.”⁴ These guidelines are designed to allow an employer to evaluate essential non-medical information during its hiring process. They therefore ensure that police departments will not consider an applicant’s medical condition when deciding whether to hire that person.

The danger in conducting background investigations after extending a COE is that if the employer later decides to withdraw the offer, the applicant may question whether the offer was withdrawn because of a disability of the applicant rather than for job-related reasons consistent with business necessity. While police departments are not absolutely prevent-

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winner of **SILENT AUCTION**

Congratulations to **Mike Prusinski** of **LifeLock** for submitting the winning bid of \$4,600 during our Silent Auction for the Fiddle autographed by Charlie Daniels. at our 20th Annual Conference held in April 2011. The proceeds of the auction were donated to the Nashville Children’s Alliance. Thank you to everyone who participated in the auction to help this worthy cause.



DuPont Kevlar **SURVIVORS**

Detective Albert Fong Receives the DuPont Kevlar Survivors Award

On Monday, April 18, 2011, **Detective Albert Fong** from the Saginaw Michigan Police Department, was inducted into the IACP / DuPont Kevlar Survivors’ Club. Detective Fong, a member of the “Emergency Service Team,” was part of a team conducting a drug raid at a home in Saginaw when a suspect fired, hitting him in the chest twice.



Pictured left to right: Jacob Fong (Albert’s son); Detective Albert Fong; and Medal of Honor recipient Thomas R. Norris.

ed from performing post-offer background checks, if they choose to perform such checks after issuing a COE, they run the risk of having to demonstrate that any reasons for withdrawing the COE do not violate the ADA. A police department may have to demonstrate, for example, that it was unable to conduct a proper background check before issuing the COE because of its need to consult medical records and personnel for the hiring clearance process.

One of the advantages of performing background checks before making a COE is that if the police department decides not to make such conditional offers to certain individuals, it reduces the likelihood that such applicants may claim that the department utilized medical information improperly to make such a hiring decision in violation of the ADA. If, however, an applicant challenges a decision to withdraw a COE that was made before the department performed a background check, the department would carry the burden of proving that it did not violate the ADA.

In fact, the U.S. Department of Justice has instructed that “[f]ederal investigators will carefully scrutinize situations in which a police department withdraws an offer after a post-offer background examination to determine whether the withdrawal was based on non-medical information in the background check or on information obtained through post-offer medical examinations and disability-related inquiries. If it is determined that the offer was withdrawn because of the applicant’s disability, then the police department must demonstrate that the reasons for the withdrawal are job-related and consistent with business necessity.”⁵

Police departments and administrators maintain an ongoing interest in protecting the department from potential litigation. These departments, therefore, must be mindful that certain practices followed during the hiring process put the department at a heightened risk of exposure to litigation arising from claims of discrimination under the ADA. A department’s claim that it delayed the background check until a conditional offer of employment had been made to save both time and cost may not be adequate to demonstrate why the department made non-medical inquiries during the time period following the offer.⁶

Police departments that perform background checks after making a COE should be very careful when deciding whether to rescind such an offer. Departments must base all such withdrawals of offers on factors that relate to and are necessary for the job. Furthermore, departments must subject all po-

tential applicants to the same standards and criteria during the hiring process. To protect itself, a department that conducts post-offer background checks would be wise to seek a written legal opinion from counsel before withdrawing a previously-made COE. Such a practice may help the department avoid unnecessary and costly litigation as a result of claims of discrimination under the ADA.

1 42 U.S.C. § 12112.

2 *Id.*

3 U.S. Dept. of Justice, Civil Rights Division, Disability Rights Section, “Questions and Answers: The Americans With Disabilities Act and Hiring Police Officers,” (Mar. 25, 1997), <http://www.ada.gov/copsq7a.htm>.

4 Equal Opportunity Comm’n, “ADA Enforcement Guidance: Preemployment Disability Related Questions and Medical Examinations,” (Oct. 10, 1995), <http://www.eeoc.gov/policy/docs/preemp.html>.

5 U.S. Dept. of Justice, Civil Rights Division, Disability Rights Section, “Questions and Answers: The Americans With Disabilities Act and Hiring Police Officers,” (Mar. 25, 1997), <http://www.ada.gov/copsq7a.htm>.

6 See *Leonel v. American Airlines, Inc.*, 400 F.3d 702 (9th Cir. 2005).

Attorney Eric Daigle, General Counsel for FBI-LEEDA, practices civil litigation in federal and state court, with an emphasis on defending municipalities and public officials. He focuses on civil rights actions, including police misconduct litigation and employment actions, as well as premises and general tort liability cases.

Mr. Daigle currently serves as a member of the Oakland California Independent Monitoring Team and works with Law Enforcement Agencies who are under investigation or are under a Consent Decree by the Department of Justice Civil Rights Litigation Section. He is a former member of the Connecticut State Police and currently maintains his certification as a reserve officer.

