

ADA

Do You Have a Policy for That?

There are certain policies that those who advise law enforcement agencies consider to be “high risk policies.” Use of Force and Force Related Policies, Pursuit Policy, Sexual Harassment and the Citizen Complaint Process are just some of them. Typically, a violation of a “high risk” policy could make a law enforcement agency more susceptible to an increased level of liability and a higher damages award. Due to the greater risk of extensive litigation, an Americans with Disabilities Act (“ADA”) policy is one that should be included on the list of “high risk” policies. A violation of the ADA brings with it an array of causes of action, both on the Federal and State level, and the ability to create a litigation nightmare for departments.

Under Title II of the ADA, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”¹ The ADA prohibits discrimination based on disability, perceived disability, or association to a person with a disability². “Discrimination” includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.”³ Accordingly, the ADA prohibits discrimination against individuals with disabilities in both state and local governments, services, programs, and employment.

As state and local government entities, law enforcement agencies are governed by the requirements of the ADA. Under the ADA law enforcement agencies are required to make reasonable modifications to policies, police practices, and procedures to accommodate individuals with disabilities⁴. Proper police practices dictate that a police department should have a policy identifying ADA guidelines to its officers and should amend specific policies to accommodate individuals with disabilities. Law Enforcement Agencies must also adequately train their officers on the ADA policy requirements and applications.

When considering law enforcement procedures, there are two theories generally recognized by courts in applying the ADA in the context of arrests: first, when police wrongly arrest someone with a disability because they confuse the signs and symptoms of that disability as criminal activity; second, when police properly investigate and arrest an individual with a disability for a crime unrelated to that disability, but fail to reasonably accommodate the person's disability in the course of investigation or arrest causing the person to suffer greater injury or indignity in that process than other arrestees.

¹ See 42 U.S.C. §12132

² See 42 U.S.C. §§12101(2), 12132, 12182(b)(2)

³ See *Id.* § 12112(b)(5)(A)

⁴ See §12182(b)(2)(A)(ii).

In a recent Fourth Circuit case, *Seremeth v. Bd. of County Commissioner Frederick County*¹, the Appellate Court held that the ADA applies to police investigation of criminal conduct. Specifically, the Court stated that “[a] public entity must ‘make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.’”⁵ The Court further stated that when dealing with “communication related disabilities, the ADA requires public entities to ‘take appropriate steps to ensure that communications with . . . members of the public . . . with disabilities are as effective as communications with others,’”⁶ and to “furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity,”⁷

In *Seremeth*, the police were called to Seremeth’s home on a report of a possible domestic violence situation. The police officers were instructed that the entire Seremeth family was deaf. The officers entered Seremeth’s home, handcuffed him, and detained him at his home while they investigated the situation. Ultimately, the officers determined that no domestic violence incident had occurred and released Seremeth. Seremeth later brought suit against the department and others claiming a violation of his rights, including a violation of the ADA, based in part on the actions of the police officers during the incident. The District Court granted summary judgment in favor of the defendants. The Appellate Court upheld the district court’s decision because it found that the measures taken by the police department and officers to accommodate Seremeth were a reasonable pursuant to meet the requirements of ADA given the exigent circumstances of responding to a domestic violence call. Some of the measures included: (1) the officers utilized their headlights and flashlights to warn the family of their arrival; (2) the officers requested that an officer who was knowledgeable in sign language respond to the scene; (3) upon entering the home, the officers used hand motions to instruct Seremeth to drop his remote control and turn around; (4) the officers put their fingers to their lips to instruct the suspect to remain silent; and (5) the officers used Seremeth’s father to translate.²

In an Eighth Circuit case, *Barnes v. Gorman*,³ an individual confined to a wheelchair brought an action against the city police department and others under the ADA for injuries received when being transported in a police van that was not properly equipped with wheelchair restraints. Gorman was arrested for trespassing after he failed to leave a night club following an altercation. When the police van arrived, it lacked wheelchair locks and only contained a narrow bench. Gorman informed the officers that he could not safely ride in the van. Gorman told the officers that given his disability he would fall from the bench. Despite Gorman’s statement, the officers placed Gorman on the bench and used a seatbelt to strap him in. The seatbelt did not adequately hold Gorman upright. When Gorman complained the officers loosened the seatbelt and used Gorman’s own belt to strap him to the mesh behind the bench to hold him upright. The officers were unable to fold the wheelchair and place it unfolded in the back of the van with Gorman. During transportation to the

⁵ Citing: 28 C.F.R. § 35.130(b)(7)

⁶ See *Id.* § 35.160(a)(1)

⁷ See *Id.* § 35.160(b)(1).

department the belt came undone and Gorman fell to the van floor, sustaining injury. Gorman's unsecured wheelchair was also damaged during transportation. Following a trial the jury found the defendants liable and awarded Gorman over \$ 1 million in compensatory damages.⁴

Given the potential for extensive litigation and substantial monetary awards law enforcement agencies would be wise to protect themselves from potential liability by amending, updating, or drafting a comprehensive ADA policy. One area the policy should address is police officers' interaction with the hearing impaired, including providing a list of available interpreters and access to a TDD device. Other areas include: procedures for responding to requests for assistance for disabled individuals and the transportation of suspects with wheelchairs or other mobility devices, procedures for handling custodial interrogations and bookings including the use of a medical screening form to help identify individuals with emotional, psychological, or medical-based disabilities, procedures for field enforcement and investigations including traffic stops and crowd/traffic control, and accommodations for holding areas and cells as well as access to bathroom facilities.

The preceding information, however, is by no means intended to be an all inclusive list of the areas of which a department's ADA policy should include. To ensure that Departments draft proper, comprehensive policies it would be wise for Departments to seek legal advice from counsel to avoid potential unnecessary and costly litigation as a result of claims of discrimination under the ADA.

Furthermore, it is not enough for departments to merely have a comprehensive ADA policy. It is equally important for departments to ensure that their officers receive regular and thorough training on the policy and the ADA in general. As we found in *Seremeth*, it is imperative that officers are knowledgeable with regard to incidents involving persons with disabilities. If the officers in *Seremeth* had not been knowledgeable with regard to the accommodations that they provided the Appellate Court could have come to a very different conclusion.

The Department of Justice: Civil Rights Division is a very useful resource for law enforcement agencies that endeavor to develop, amend, or update appropriate ADA policies and procedures. For example, the Department of Justice provides a pocket handbook to assist officers when communicating with deaf individuals. The handbook can be downloaded at <http://www.ada.gov/policeinfo.htm>. Other useful information pertaining to the application of the ADA in law enforcement can be found at the following Department of Justice website as well: <http://www.ada.gov/publicat.htm>.

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¹ *Seremeth v. Bd. of County Comm. Frederick County*, 2012 U.S. App. LEXIS 5105 (Mar. 12, 2012.)

² It is typically not advisable, however, to utilize a family member as an interpreter for reasons that the emotional connection may interfere with the ability to interpret impartially. Given the exigent circumstances in the *Seremeth* case, however, the Appellate Court found the use of Seremeth's father as an interpreter reasonable.

³ *Barnes v. Gorman*, 257 F.3d 738 (8th Cir. Mo. 2001.)

⁴ Although the jury also awarded \$1.2 million in punitive damages that portion of the award was reversed on appeal. The United States Supreme Court held that an individual cannot recover punitive damages in a private action against a municipality related to discrimination under the ADA. See *Barnes v. Gorman*, 536 U.S. 181, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002.)