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Understanding disability rights litigation in police-misconduct and jail-detention cases

WHY AND HOW TO ALLEGE CLAIMS UNDER THE ADA AND REHAB ACT WHENEVER YOU ALLEGE CIVIL-RIGHTS CLAIMS UNDER SECTION 1983

The Ninth Circuit's recent opinion in *Hart v. City of Redwood City* (9th Cir. Apr. 19, 2024) No. 22-17008, 2024 WL 1689092, granting qualified immunity to officers who shot and killed a suicidal man, demonstrates the pervasive challenge posed by qualified immunity to practitioners litigating claims for damages under section 1983 of title 42 of the United States Code.

In *Hart*, officers approached a suicidal man in his home, who was holding a knife to his throat and had been cutting himself with that same knife. The Ninth Circuit held that the officer who shot and killed the man was entitled to qualified immunity because his conduct was objectively reasonable. Given the uncertainty wrought by qualified immunity, civil-rights practitioners must utilize other causes of action to ensure accountability and justice for their clients.

One such remedy, in the context of both initial police encounters and subsequent detention in county jails, is the Americans with Disabilities Act (ADA) and the Rehabilitation Act. ADA and Rehab Act claims are analyzed together under the same standard "because 'there is no significant difference in the analysis of rights and obligations created by the two Acts.'" (*Payan v. Los Angeles Cmty. Coll. Dist.* (9th Cir. 2021) 11 F.4th 729, 737.) For ease of reading, this article will simply refer to the ADA.

Although the general contours of an ADA claim may be familiar, plaintiffs' attorneys have been bedeviled by an issue that has plagued the reasoning of courts and led to the demise of meritorious claims: causation. Frequently, civil-rights plaintiffs will struggle to show causation under the ADA – that the denial or exclusion was by reason of the plaintiff's disability. There is also some confusion about "reasonable accommodation." You have properly alleged that your mentally ill client needed a reasonable accommodation by police but didn't receive one. Now how do you show the denial was due to the client's disability? Is that even the correct legal standard? (Spoiler alert: You have established causation by showing a failure to accommodate!)

The objective of this article is to help you prevail when litigating ADA claims on behalf of injured plaintiffs. This article has four parts. Part I will provide a primer on the elements of an ADA claim with an emphasis on helping practitioners under causation under the ADA. Part II will discuss ADA claims in the context of initial police encounters and arrests. Part III will focus on ADA claims for those detained in jails and prisons. Part IV will conclude with a brief discussion on the damages.

I. Elements of an ADA claim

To state a claim for disability discrimination under Title II of the ADA, a disabled arrestee must allege four elements: (1) he was a disabled individual; (2) he was qualified to "participate in or receive the benefit of" a government entity's

services, programs, or activities; (3) he was excluded from participating in, or denied the benefits of those services, programs, or activities, or otherwise discriminated against; and (4) such exclusion, denial, or discrimination was "by reason of" his disability. (*McGary v. City of Portland* (9th Cir. 2004) 386 F.3d 1259, 1265.)

1. **Disabled individual**

The Department of Justice's implementing regulations for the ADA define disability "broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA." (28 C.F.R. § 35.108(a)(2).) A disability is a "physical or mental impairment that substantially limits one or more of the major life activities of such individual[.]" (*Id.* § 35.108(a)(1).) Physical or mental impairment includes: "orthopedic, visual, speech, and hearing impairments, and cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, dyslexia and other specific learning disabilities, Attention Deficit Hyperactivity Disorder, Human Immunodeficiency Virus infection (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism." (*Id.* § 35.108(b)(2).)

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Whether that impairment substantially limits a major life activity "requires an individualized assessment[]" but is also broadly construed under the DOJ's regulations. For example, an impairment that is "episodic or in remission is a disability if it would substantially limit a major life activity when active." (*Id*. § 35.108(d)(1)(iv).) And whether an impairment substantially limits a major life activity "shall be made without regard to the ameliorative effects of mitigating measures." (*Id*. § 35.108(d)(1)(viii).)

Relevant to many civil rights plaintiffs is the DOJ's regulation recognizing that "[m]ajor depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia each substantially limits brain function." (*Id*. § 35.108(d)(2)(iii)(K).) Thus, you should evaluate the viability of an ADA claim if your client suffers from a psychiatric disorder or even a traumatic brain injury.

2. **A government entity's services, programs, and activities**

The Ninth Circuit has construed Title II of the ADA as covering "'anything a public entity does.'" (*Barden v. City of Sacramento* (9th Cir. 2002) 292 F.3d 1073, 1076 (internal citation omitted).) "The focus of the inquiry, therefore, is not so much on whether a particular public function can technically be characterized as a service, program, or activity, but whether it is 'a normal function of a governmental entity.'" (*Ibid*. (internal citation omitted).)

"Because of the unique nature of correctional facilities, in which jail staff control nearly all aspects of inmates' daily lives, most everything provided to inmates is a public service, program or activity, including sleeping, eating, showering, toileting, communicating with those outside the jail by mail and telephone, exercising, entertainment, safety and security, the jail's administrative, disciplinary, and classification proceedings, medical, mental health and dental services, the library, educational, vocational, substance abuse and anger management classes and discharge services." (*Hernandez v. Cnty. of Monterey* (N.D. Cal. 2015) 110 F.Supp. 3d 929, 935-36.)

3. **Denial of the benefit of the service, program, or activity**

This one is self-explanatory and if your client wasn't denied the benefit of a service, program, or activity by a state or local entity, you don't have an ADA claim.

4. **Denial, discrimination, or exclusion by reason of the plaintiff's disability (causation)**

Ah yes, causation, where all plaintiffs' hopes and dreams are destroyed. Frequently, civil-rights plaintiffs will struggle to show causation under the ADA – that the denial or exclusion was by reason of the plaintiff's disability – because of confusion in the law. There is also some confusion about "reasonable accommodation" – if your client needed accommodation but didn't receive one, how do you show the denial was due to the client's disability?

To establish causation, you need to be clear about the theory of liability under which you are proceeding. Under the ADA, a "qualified individual can base a discrimination claim on any of 'three available theories: (1) intentional discrimination (disparate treatment); (2) disparate impact; and (3) failure to make a reasonable accommodation.'" (*Fulton v. Goord* (2d Cir. 2009) 591 F.3d 37, 43 (internal citation omitted); *Accord Payan v. Los Angeles Cmty. Coll. Dist.* (9th Cir. 2021) 11 F.4th 729, 738.)

The intentional-discrimination theory of liability is the prototypical employment-discrimination-type lawsuit, requiring that the plaintiff demonstrates he was treated less favorably than non-disabled employees. (See *DeLuca v. Winer Indus., Inc.* (7th Cir. 1995) 53 F.3d 793, 798.)

A disparate-impact theory of liability requires a plaintiff to show "that a facially neutral government policy or practice has the 'effect of denying meaningful access to public services' to people with disabilities. (*Payan*, 11 F.4th at 738.) A classic example is the case of *Crowder v. Kitagawa* (9th Cir. 1996) 81 F.3d 1480, 1482, in which two plaintiffs, both visually impaired users of guide dogs, challenged the State of Hawaii's requirement that dogs, cats, and other animals coming from the mainland be quarantined for 120 days. (*Id*. at 1482.)

The court explained, "Although Hawaii's quarantine requirement applies equally to all persons entering the state with a dog, its enforcement burdens visually impaired persons in a manner different and greater than it burdens others." (*Id*. at 1484.) That burden on visually impaired persons effectively denied such persons "meaningful access to state services, programs, and activities while such services, programs, and activities remain open and easily accessible by others." (*Ibid*.) For this reason, the Ninth Circuit concluded Hawaii's quarantine discriminated against the plaintiffs "by reason of their disability." (*Ibid*.)

A reasonable-accommodation theory of liability shares some characteristics with a disparate-impact theory. If a public entity's practice denies disabled people with meaningful access to a government program or service, causing a disparate impact, then a public entity is required to make reasonable modifications to its practice – the "reasonable accommodation" the disabled person may require.

The critical difference between a claim alleging disparate impact and a claim alleging a failure to reasonably accommodate "is that a reasonable accommodation claim is focused on an accommodation based on an individualized request or need, while a reasonable modification in response to a disparate impact finding is focused on modifying a policy or practice to improve systemic accessibility." (*Payan*, 11 F.4th at 738.)

The "disparate impact" and "disparate treatment" theories of ADA liability have caused considerable confusion among district courts when evaluating "reasonable accommodation"

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claims. (See, e.g., *McGary*, 386 F.3d at 1266; *Payan*, 11 F.4th at 739; *Henrietta D. v. Bloomberg* (2d Cir. 2003) 331 F.3d 261, 276.)

In *McGary*, the district court assumed that a "disparate impact" had to be shown to prove that the discrimination, denial, or exclusion was "by reason of" the plaintiff's disability. (*Id*. at 1265.) But the Ninth Circuit reversed because a plaintiff does not need to show either disparate treatment or disparate impact to establish a public entity's failure to reasonably accommodate. (*McGary v. City of Portland* (9th Cir. 2004) 386 F.3d 1259, 1266.)

In other words, a reasonable-accommodation claim does not need to show that a comparison class of non-disabled individuals was treated more favorably. (*Id*. at 1266-67.) "Quite simply, the demonstration that a disability makes it difficult for a plaintiff to access benefits that are available to both those with and without disabilities is sufficient to sustain a claim for a reasonable accommodation." (*Henrietta D.*, 331 F.3d at 277.)

II. ADA claims related to police encounters and arrests

In the Ninth Circuit, Title II of the ADA, 42 U.S.C. § 12132, applies to police arrests. (*Sheehan v. City & Cnty. of San Francisco* (9th Cir. 2014) 743 F.3d 1211, 1232 ("*Sheehan I*"), *rev'd in part, cert. dismissed in part sub nom. City & Cnty. of San Francisco, Calif. v. Sheehan* (2015) 575 U.S. 600 ("*Sheehan II*").) Although the Supreme Court reversed the Ninth Circuit's denial of qualified immunity in *Sheehan I*, it dismissed, as improvidently granted, the first question on which the Court granted certiorari – whether Title II of the ADA applied to arrests. (*Sheehan II*, 575 U.S. at 610.) Therefore, *Sheehan I*'s initial holding that the ADA applies to arrests remains the law of the Ninth Circuit. (See *Vos v. City of Newport Beach* (9th Cir. 2018) 892 F.3d 1024, 1036.)

There are two types of Title II ADA claims that arise in the context of arrests: "(1) wrongful arrest, where police wrongly arrest someone with a disability because they misperceive the effects of that disability as criminal activity;" and (2) where police properly arrest a disabled person for a crime unrelated to the disability, but officers "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." (*Sheehan I*, 743 F.3d at 1232. *Accord Gohier v. Enright* (10th Cir. 1999) 186 F.3d 1216, 1220 , *citing Lewis v. Truitt* (S.D. Ind. 1997) 960 F.Supp. 175, 178 and *Jackson v. Inhabitants of Town of Sanford* (D. Me. Sept. 23, 1994) No. CIV. 94-12-P-H, 1994 WL 589617, at *6.)

Misperceiving the effects of the disability as criminal conduct

The opinion in *Lewis v. Truitt*, 960 F.Supp. 175, is particularly instructive in understanding how an ADA claim can be made if your disabled client was wrongfully arrested due to an effect of their disability.

In *Lewis*, plaintiff Charles Lewis was beaten, kicked, handcuffed, and arrested in his home by officers who sought to remove plaintiff's granddaughter from the home. Other occupants of the home told officers that Lewis was deaf and could not hear their instructions. The officers refused to believe Lewis was deaf. Defendant officers arrested Lewis and charged him with "[r]esisting Law enforcement."

The district court held genuine issues of fact precluded entry of summary judgment on plaintiff's ADA claim for his arrest. The *Lewis* court articulated a three-prong test governing plaintiff's claim under the ADA: "a plaintiff may recover under the ADA where he can show that (1) he was disabled, (2) the defendants knew or should have known he was disabled, and (3) the defendants arrested him because of legal conduct related to his disability." (*Id*. at 178.)

In *Jackson v. Inhabitants of Town of Sanford*, plaintiff Jackson alleged the Town of Sanford violated the ADA when police officers arrested plaintiff Jackson for being under the influence. (1994 WL 589617 at *1.) Mr. Jackson was not under the influence, but suffered partial paralysis and slurred speech as a result of a stroke. (*Ibid*.) The police officer "[w]ithout further inquiry as to the type of medication and any side effects," asked Mr. Jackson to perform field sobriety tests, which he performed poorly due to his disability." (*Ibid*.)

The officer arrested plaintiff for being under the influence. Plaintiff made two claims against the city under the ADA: (1) that his arrest was an act of discrimination based on his disability; and (2) that the city "failed to train its police officers to recognize symptoms of disabilities and failed to modify police policies, practices and procedures to prevent discriminatory treatment of the disabled, as required by the anti-discrimination regulations promulgated pursuant to 42 U.S.C. § 12134." (*Id*. at *6.) The district court held the ADA applied to plaintiff Jackson's arrest.

Thus, *Lewis* and *Jackson* demonstrate how the ADA can apply in the context of a wrongful arrest of a disabled individual.

Failure to accommodate during an arrest even when probable cause exists

The Ninth Circuit's opinions in *Sheehan I*, 743 F.3d at 1233, and *Vos v. City of Newport Beach*, 892 F.3d at 1037, demonstrate the viability of ADA claims when police do not deescalate or use alternatives to the use of force during encounters with disabled individuals.

In *Sheehan I*, police officers responded to a request to conduct a "5150" hold on a mentally ill woman, Teresa Sheehan. After confronting Ms. Sheehan, who held a knife, officers retreated from the room and called for backup. Instead of waiting and employing other alternatives, officers forcibly reentered the room and shot her five or six times. Ms. Sheehan asserted officers should have accommodated her disability by communicating with her and defusing the situation.

The Ninth Circuit wrote that a reasonable jury "could find that the situation had been defused sufficiently, following the initial retreat from Sheehan's room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics,

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including the accommodations that Sheehan asserts were necessary." Because the "reasonableness of an accommodation is ordinarily a question of fact," the Ninth Circuit held that judgment as a matter of law as to Sheehan's ADA claim was inappropriate.

Similarly, in *Vos v. City of Newport Beach*, the Ninth Circuit reversed the district court's grant of summary judgment as to plaintiffs' ADA and Rehabilitation Act claims, finding that police officers had time to communicate with the disabled person to deescalate the situation. (892 F.3d at 1037.) In *Vos*, a Newport Beach Police Department officer fatally shot and killed Gerritt Vos at a 7-Eleven. (*Id*. at 1028.) Officers knew Vos was "agitated, appeared angry, and was potentially mentally unstable or under the influence of drugs." (*Id*. at 1029.)

When Mr. Vos ran out of the 7-Eleven carrying scissors, two officers fired their AR-15 rifles at decedent. Approximately 20 minutes passed from the time officers arrived until Vos ran out of the store. At no point during this time did the officers attempt to communicate with Mr. Vos. Mr. Vos's medical history later showed he suffered from schizophrenia. In reversing the district court's grant of summary judgment as to the ADA and Rehabilitation Act claims, the Ninth Circuit observed, "the officers here had the time and the opportunity to assess the situation and potentially employ the accommodations identified by the Parents, including de-escalation, communication, or specialized help." (*Id*. at 1037.)

III. ADA claims in jails and prisons

The implementing regulation applying the ADA to jails and prisons is found at 28 C.F.R. § 35.152 ("Public entities shall ensure that qualified inmates or detainees with disabilities shall not, because a facility is inaccessible to or unusable by individuals with disabilities, 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 public entity.").

ADA regulations explicitly prohibit placement of disabled detainees in "inappropriate security classifications because no accessible cells or beds are available[]" and [s]hall not deprive inmates or detainees with disabilities of visitation with family members by placing them in distant facilities where they would not otherwise be housed." (28 C.F.R. § 35.152.)

The Ninth Circuit has recognized that an ADA violation occurs when disabled inmates are housed in a place where they are denied access to programs, activities, and services that non-disabled inmates enjoy. (*Pierce v. County of Orange* (9th Cir. 2008) 526 F.3d 1190, 1221 ["The ADA does not require perfect parity among programs offered by various facilities that are operated by the same umbrella institution. But an inmate cannot be categorically excluded from a beneficial prison program based on his or her disability alone.... the County may not shunt the disabled into facilities where there is no possibility of access to those programs"].)

Notably, in the context of jail and prison claims, the Supreme Court has held that the ADA permits "a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment." (*United States v. Georgia* (2006) 546 U.S. 151, 159 (emphasis in original).) Thus, even if qualified immunity foreclosed a condition of confinement claim under 42 U.S.C. § 1983, damages could still be recovered under the ADA for a detained person. As discussed in the final section, the damages recoverable under the ADA can be significant.

Courts have recognized ADA claims related to the denial of safe sleeping or housing accommodations. (See, e.g., *Greer v. Cnty. of San Diego* (S.D. Cal. Apr. 14, 2020) No. 3:19-CV-0378-GPC-AGS, 2020 WL 1864640, at *9 [plaintiff who suffered seizure disorder stated a claim under ADA for denial of his request for a lower bunk]; *Patterson v. Kerr County* (W.D. Tex. July 18, 2007) No. SA-05-CA-0626-RF, 2007 WL 2086671 *8 [finding issues of material fact concerning whether assigning an epileptic inmate to lower bunk was a reasonable accommodation and whether this accommodation was necessary to avoid depriving epileptics of safe sleeping facilities on the basis of their disability]; *Simmons v. Godinez* (N.D. Ill. Aug. 16, 2017) No. 16 C 4501, 2017 WL 3568408, at *6 ["Providing a prisoner with a bed that he cannot access is no less a failure to reasonably accommodate than housing him in a cell from which he cannot access meals."]; *Rosario v. Wexford Health Care* (S.D. Ill. Oct. 13, 2015) No. 15-cv-1008-MJR, 2015 WL 5935244, at *3 [denial of a "medical bed" to an inmate with serious back problems may form the basis for an ADA claim for failure to accommodate]; *Ramos v. Monteiro* (C.D. Cal. Sept. 8, 2008) 2008 WL 4184644, at *25-26 [plaintiff, who suffered from a seizure disorder, sufficiently alleged ADA claim for denial of bottom bunk where he advised defendants that he required one but they failed to accommodate his request].)

One area of confusion is whether denial of medical-care claims is recognized under the ADA. The First Circuit has held that "access to prescription medications is part of a prison's medical services and thus is one of the 'services, programs, or activities' covered by the ADA." (*Kiman v. New Hampshire Dep't of Corr.* (1st Cir. 2006) 451 F.3d 274, 286-87.) In contrast, "[s]everal circuits have expressly concluded that neither the ADA nor the Rehabilitation Act provide remedies for alleged medical negligence." (*Fitzgerald v. Corr. Corp. of Am.* (10th Cir. 2005) 403 F.3d 1134, 1144.)

IV. Damages

Damages recoverable under the ADA and Rehabilitation Act include compensatory damages, attorneys' fees, and costs, including expert costs. (See 42 U.S.C. § 12133, referencing 42 U.S.C. § 2000e-5(k) [prevailing party entitled to "a reasonable attorney's fee (including expert fees) as part of the costs"].) Although compensatory damages can be recovered for violations of Title II of the ADA, punitive damages cannot be

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awarded. (*Barnes v. Gorman* (2002) 536 U.S. 181, 189.)

"To recover monetary damages under Title II of the ADA or the Rehabilitation Act, a plaintiff must prove intentional discrimination on the part of the defendant." (*Duvall v. Cnty. of Kitsap* (9th Cir. 2001) 260 F.3d 1124, 1138, *as amended on denial of reh'g* (Oct. 11, 2001).) "Intentional discrimination" is satisfied by a showing of deliberate indifference. (*Ibid*.) Deliberate indifference requires (1) "knowledge that a harm to a federally protected right is substantially likely," and (2) "a failure to act upon that the likelihood." (*Ibid*.)

The first prong is satisfied when the plaintiff alerts the public entity of his need for an accommodation or "where the need for accommodation is obvious, or required by statute or regulation[.]" (*Id*. at 1139.) The second element requires more than "bureaucratic slippage" such that the "failure to act must be a result of conduct that is more than negligent, and involves an element of deliberateness." (*Ibid*.)

In conclusion, make sure to allege claims under the ADA and Rehab Act whenever you allege claims under section 1983!

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