

Law Enforcement and the Americans with Disabilities Act:



The Risk Management Challenge.



Risk managers are frequently faced with accessibility or employment accommodation claims filed under the Americans With Disabilities Act (ADA). Accommodation claims are most commonly filed by the general citizenry or present or speculative employees. Recently, however, a trend has begun to evolve: the filing of ADA claims against law enforcement - not by employees of the entity, but by arrestees or prison inmates.

The Americans With Disabilities Act

To belabor the obvious, 42 U.S.C. Title II, or the Americans With Disabilities Act, provides in pertinent part that "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 subject to discrimination by such entity." To establish an ADA claim under Title II, a qualified disabled person must demonstrate either that he was excluded from participation

in or denied the benefits of services, programs, or activities of a public entity, or that he was otherwise subjected to discrimination by any such entity.

Law Enforcement Claims and the ADA

Plaintiffs, when attempting to apply the ADA to the actions of law enforcement, follow a simple theory: they assert - and some courts have agreed - that law enforcement officers, once aware of a person's limitations, should reasonably accommodate those limitations. This, regardless of whether the ADA qualified individual is a crime suspect or a prison inmate.

Claims Against Patrol Officers

A classic example of the above theory put into effective practice was demonstrated in the case of *Delano-Pyle v. Victoria County, Texas*. In the *Delano* case, a federal judge ruled that there existed sufficient evidence to support a jury's finding that a sheriff's deputy intentionally

discriminated against an arrestee, and therefore violated the ADA, when the deputy failed to take into account the arrestee's severe hearing impairment during the process of arresting him for driving while intoxicated.

The *Delano court* found that the plaintiff/arrestee, who was severely hearing-impaired, was involved in a car accident when he rear-ended another vehicle. Despite the fact that the arresting deputy had knowledge of the arrestee's disability, the deputy proceeded to administer three sobriety test without asking the arrestee which form of communication would be effective for him. The jury ultimately found both the sheriff's department and the county liable for the actions of the deputy and for a clear violation of the ADA.

A second case involving a hearing impaired arrestee is *McCray vs. Dothan*. In this case, a federal judge

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Planning Special Events



Nothing invokes a sense of community pride like a parade, old home day, or bicentennial celebration. It's a time for families to enjoy the uniqueness of their municipality, an opportunity for friends and neighbors to congregate, and a chance for children to experience homespun activities of days gone by. These memory-making events usually require a great deal of behind-the-scenes coordination, yet some essential risk management aspects of the planning process are often overlooked.

Who is sponsoring the event? A municipality-sponsored event is one 1) whose organizers are officially appointed by the Board of Selectmen/Council; 2) where the Board of Selectmen/Council has the authority to decide what activities may be part of the event; 3) when all funds expended upon or generated by the event are accounted for through municipal accounts and the annual municipal financial audit.

Special events are often the culmination of efforts by several organizations and ultimate responsibility for the event may not be clear. It is an important risk management step to determine which is the official "sponsoring entity". Municipalities planning to sponsor a special event hold consult their commercial insurance agent or, if participating in the MMA Property and Casualty Pool, their Risk

Management Services Underwriter to discuss the event activities and coverage issues.

Is the municipality covered for all exposures related to the event? Even if the event is town-sponsored, don't assume that the municipality's coverage will automatically apply to all activities contemplated. Include your Risk Management Services Underwriter or commercial agent in the communication loop long before the date of the event. Obtain confirmation of coverage in writing. The Pool coverage does not extend to certain high-risk activities including, but not limited to, dunk tanks, motorized racing, hot air balloon activities, or alcohol-related functions. Separate commercial coverage for high-risk activities may be required.

Has each event been evaluated carefully? The activity may sound like great fun, but does it have inherent risks that the municipality and its insurer are not willing to accept? What precautions will be implemented to reduce the likelihood of injury or damage (adult supervision, security, roped-off areas, protective equipment, participant waiver agreements)?

Have Certificates of Insurance been collected from all vendors? Risk Management Services strongly urges municipalities to obtain from all vendors a certificate of insurance/proof of insurance naming the town as an ADDITIONAL INSURED. The additional insured status means the vendor's insurance should defend the municipality if the vendor's negligence results in a claim against the vendor and municipality. Municipalities should require such a certificate whenever they enter into a contract, allow an individual or entity to utilize town facilities or equipment, or permit vendors to participate in a municipally-sponsored event. Inspect the certificate carefully and if the municipality is shown only as a "certificate holder", ask again for proof of ADDITIONAL INSURED status.

If your municipality has any questions or concerns about Property and Casualty Pool coverage for an upcoming special event, or you need help reviewing a certificate, please call Risk Management Services, Underwriting Department, at 1-800-590-5583.

The Municipal Risk Manager

The Municipal Risk Manager is published seasonally to inform you of developments in municipal risk management which may be of interest to you in your daily business activities. The information in these articles is general in nature and should not be considered advice for any specific risk management or legal question; you should consult with legal counsel or other qualified professional of your own choice.

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held police officers liable for violating the ADA when they arrested a deaf individual, who responded to written questions posed to him about a private property damage dispute to the extent he was capable of understanding them. The arrestee repeatedly requested that an interpreter be obtained to assist him in answering police questions. Despite the fact that the police were aware of the fact that the arrestee was incapable of reading lips, they continued to question him and ultimately arrested him prior to complying with his request for an interpreter. The court found the actions of the police to be a clear violation of the ADA.

In example of a case in which a federal judge ruled that arresting officers acted properly when arresting a suspect who had a disability is found in the case of *Bates ex rel. Johns v. Chesterfield County, Virginia*. In *Bates*, police officers encountered an autistic teenager suspected of being intoxicated and having committed a trespass. The officers had no prior notice of the teen's autism. When the officers confronted the arrestee, he initiated a series of physical confrontations in which he assaulted one officer by scratching and biting him, and incapacitated another officer by kicking him directly in the groin. The arrestee actively resisted arrest until four officers restrained him.

The arrestee's parents sued the county for excessive use of force and for violating the ADA. The jury found and the court agreed that the officers did not use pepper spray or their batons against the arrestee, he suffered minimal injury, and most importantly, that the officers were not aware of the fact that the arrestee was autistic

until after they began arrest proceedings. Further, the court found that, even after arresting officers were informed of arrestee's autism, the force used by the officers was reasonable. In light of the arrestee's resistance to police, including scratching, spitting, biting, and kicking, the court concluded that officers acted reasonably by forcibly restraining him.

The first two cases can be distinguished from the third in that in the *Delano and McCray* cases, the officers were aware of the arrestees' impairments, yet failed to reasonably accommodate them. In the *Bates* case, the officers had no prior knowledge of the arrestee's impairment, and upon learning of same, acted in a reasonable and prudent manner. The officers' actions, the *Bates* court held, represented reasonable accommodation.

Federal courts appear to be increasingly willing to find that police officers have certain obligations under the ADA to accommodate arrestees who pose no threat to human safety. Such ruling imply that officers need not sacrifice their own personal safety or the safety of the general public merely to accommodate an arrestee. The pivotal term in such cases is "reasonable accommodation."

Challenges for the Risk Manager

It is incumbent upon risk managers to remind law enforcement personnel of the following:

- ◆ The immunities officers may enjoy at the state level do not necessarily (and most often do not) transfer over to federal causes of action;

- ◆ Claims founded in the ADA and aimed at police conduct are on the rise;
- ◆ Courts are more closely scrutinizing the actions of officers as they come into contact with persons who suffer from a disability;
- ◆ Officers, upon learning of an inmate's or arrestee's disability, may be required to make a reasonable accommodation;
- ◆ Supervisors should ensure that officers receive adequate ADA training.

In summary, the ADA has been expanded far beyond its original purpose of eliminating discrimination in the workplace or ensuring unencumbered access to facilities. Today's risk manager must impress upon law enforcement and corrections supervisors that in today's litigious society, they cannot afford to be cavalier about the needs of arrestees and inmates, regardless of criminal history or the circumstances under which the officers come into contact with the aforementioned. Claims involving the ADA are best managed via avoidance, as compared to transfer, as recent jury awards continue to remind us.

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WELCOME NEW MEMBERS!!!

Property & Casualty Pool

Acadia Disposal Dist
Limestone Water & Sewer Dist
Town of Limington
Town of Hersey
Moro Plantation
Tri-Comm. Recycl & Sanitary
Town of Cushing
Town of Carthage
Augusta
Van Buren Housing
Auburn Water
Auburn Sewer

Workers' Compensation Fund

Lincoln & Sagadahoc County Jail
Moro Plantation



2004 HIGHWAY CONGRESS



The Maine Chapter, American Public Works Association Highway Congress was held at the Skowhegan Fair Grounds in June. For the past several years Loss Control Consultants from

the Maine Municipal Association's Risk Management Services Department have participated by presenting a "Time Out For Training" booth at this annual event.

The training theme this year was working safely with power tools. Employees representing many participating members of the Property & Casualty Pool and Workers Compensation Fund visited with the Loss Control Consultants, took a safety quiz, and learned more about tool safety.

In the photograph, Senior Loss Control Consultants Bob Thomas and Pete Noddin talk with attendees.



!DIVIDENDS!

Yes, it is nearly that time again for members of the MMA Property & Casualty Pool and Workers Compensation Fund. Again this year the Board of Directors of the Pool and the Board of Trustees of the Fund have authorized the payment of Dividends to eligible participating members. More than \$500,000 in total Dividends will be distributed to eligible Pool and Fund members late this summer.

Dividends, of course, are never guaranteed and their award depends not only on the claims experience of each member but also on the overall claims experience of the Pool and the Fund. It is always a delight when we are able to announce that the results of our experience warrant a Dividend for our eligible members.

