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Protecting Police Applicants from Disability Discrimination under the Americans with Disabilities Act

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ARTICLES

PROTECTING POLICE APPLICANTS FROM DISABILITY DISCRIMINATION UNDER THE AMERICANS WITH DISABILITIES ACT

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ABSTRACT

Recently, employers, including police departments, have successfully utilized the Americans with Disabilities Act ("ADA"), which is meant to protect disabled individuals from discrimination, as a sword to summarily disqualify applicants who they claim pose a "direct threat" to the workplace. But courts should interpret the direct threat provision of the ADA to protect police applicants with disabilities, especially those with mental impairments. Thousands of young men and women in the United States—including individuals with mental and behavioral impairment—aspire to join the ranks of the workforce, including law enforcement. Considerable legal analysis has been dedicated to employment discrimination against individuals with such impairments, because such impairments, and the stigmas associated with them, render them especially vulnerable to discrimination in the workplace. Yet while legal analysis of disability discrimination in the field of law enforcement is scarce, it is particularly important due to the significant discretion our society has afforded police officers and the dangerous and emotionally taxing nature of the field.

The essential function of policing is to protect and serve the community. Following several high-profile deaths of young black men at the hands of police officers, the public trust in police has deteriorated, and extensive legal analysis has rightfully been devoted to police misconduct. In response, major police departments have employed extensive and thorough application procedures to identify those recruits who can withstand the rigors of policing and wield their discretion responsibly and without prejudice. But little legal analysis has considered who or what will protect police applicants with such impairments from discrimination in this application process.

As the jurisprudence surrounding the direct threat provision of the ADA varies significantly among circuit courts, this essay attempts to identify a uniform analysis of the provision that is consistent with the provision itself, the purpose of the ADA as a whole, and Supreme Court precedent. Specifically, courts should

afford less deference to employers when considering whether applicants are qualified individuals, and consider the ADA's direct threat provision as an affirmative defense, rather than placing the burden on plaintiffs to show they are not a direct threat as part of the prima facie case. Moreover, employers should be required to prove that its determination that an individual is a direct threat was objectively reasonable in reliance of an objectively reasonable medical opinion. Departments and society may fear that individuals with mental and behavioral impairments are a danger to the community and incapable of adequately performing the essential functions of an officer. In reality, the effects of these disabilities can be controlled or mitigated with medication and therapy, and applicants with these disabilities are often capable of performing the essential functions of a police officer.

I. INTRODUCTION

Randy Umanzor is a Staten Island man in his twenties who has dreamed of becoming a police officer in the New York Police Department ("NYPD").[1] Per the NYPD's requirement that an applicant earn 60 college credits, Umanzor enrolled at John Jay College of Criminal Justice in 2012.[2] In May, 2013, Umanzor was diagnosed with multiple sclerosis ("MS"), which "is an unpredictable, often disabling disease of the central nervous system that disrupts the flow of information within the brain, and between the brain and body."[3] Due to the "unpredictable" nature of

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[1] *See* Reuven Fenton & Josh Saul, *I Couldn't Become a Cop Because of Multiple Sclerosis*, NY POST (Oct. 5, 2015, 1:21 AM), https://nypost.com/2015/10/05/i-couldnt-become-a-cop-because-of-my-multiple-sclerosis/ (reporting on Umanzor's attempt to join NYPD).

[2] *See* Umanzor v. New York City Police Department, No. 14-CV-9850, 2018 WL 840084, at *2 (S.D.N.Y. Feb. 12, 2018) (providing factual background of case); *Hiring Process*, NYPD, https://www1.nyc.gov/site/nypd/careers/police-officers/po-hiring.page (last visited May 29, 2019) (listing minimum qualifications for NYPD applicants).

[3] *What is MS?*, NAT'L MULTIPLE SCLEROSIS SOC'Y, https://www.nationalmssociety.org/What-is-MS (last visited May 29, 2019); *see*

MS, the symptoms and their severity vary widely.[4] Despite the diagnosis, Umanzor graduated from John Jay College and applied to the NYPD Cadet Program in April of 2014.[5] While Umanzor's personal neurologist recommended that he was medically capable to join the Cadet Program, the NYPD's neurologist ultimately disqualified him from consideration, citing concerns of "the brief period of time that had elapsed between his MS diagnosis and the date that he applied to the Police Cadet Corps."[6] Subsequently, in December, 2014, Umanzor sued the NYPD under the Americans with Disabilities Act ("ADA") and New York Law for discrimination on the basis of his disability.[7] The NYPD filed for summary judgement, arguing that Umanzor was not qualified for the position of cadet because he "present[ed] a *potential threat* to himself or others."[8]

While the Southern District of New York denied NYPD's motion for summary judgement and litigation is still on-going, Randy Umanzor's case presents important questions concerning police department hiring practices and applicants with disabilities.[9] Since "protect[ing] the community from unstable or incompetent police recruits" is a critical goal for police departments, it is important for police departments to identify undesirable characteris-

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Fenton & Saul, *supra* note 1 (reporting when Umanzor was diagnosed with MS). "People with relapsing-remitting MS can have periodic attacks in which their neurological functions break down." *Id.*

[4] *See Umanzor*, 2018 WL 840084, at *2 (noting "many clinical indicators for MS are only observable by monitoring an individual's condition over a number of years").

[5] *See id.* (providing factual background of the case).

[6] *Id.* at *3.

[7] *See id.* at *1, *3; *see also* Americans with Disabilities Act (ADA), 42 U.S.C. § 12112-12113 (2012).

[8] *See* Fenton & Saul, *supra* note 1 (emphasis added) (quoting NYPD lawyer Joseph Lockinger) ("The basis for the doctor's decision to disqualify is entirely based on the idea that [he could] present a potential threat to himself or others[.]"); *see also Umanzor*, 2018 WL 840084, at *7 (stating NYPD's argument); Fenton & Saul, *supra* note 1 (alteration in original) (Lockinger stated that the unpredictable nature of Umanzor's MS made him a threat to himself and others because "officers [are required to] carry and use deadly weapons, as well as possess concentration, split-second good judgment and self-control.").

[9] *See Umanzor*, 2018 WL 840084, at *9 (denying NYPD's motion for summary judgment).

tics for police recruits.[10] But what happens when those undesirable characteristics include considerations that are impermissible under federal and state law? Thousands of young men and women aspire to become police officers, and many of these young recruits include individuals with physical and mental disabilities.[11] Who or what will protect these recruits from discrimination on the basis of these disabilities? In particular, who or what will protect hopeful applicants with a history of psychological, neurological, and cognitive disabilities from discrimination?[12]

The essential duty of police departments and their officers is "to protect and serve."[13] Following several high profile deaths of young black men at the hands of police officers, the public trust in police has deteriorated, and police department procedures and

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[10] Beth A. Sanders, *Using Personality Traits to Predict Police Officer Performance*, 31 POLICING: INT'L J. POLICE STRAT. & MGMT. 129, 129 (2008).

[11] *Cf. Nearly 1 in 5 People Have a Disability in the U.S., Census Bureau Reports*, U.S. CENSUS BUREAU (July 25, 2012), https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html ("About 56.7 million people — 19 percent of the population — had a disability in 2010, according to a broad definition of disability, with more than half of them reporting the disability was severe, according to a comprehensive report on this population released today by the U.S. Census Bureau.").

[12] *See infra* note 85 and accompanying text (noting that individuals with mental and behavioral disabilities are often discriminated against in employment); *see Neurological Disorders*, UCSF HEALTH https://www.ucsfhealth.org/conditions/neurological_disorders/ (last visited May 29, 2019) (Examples of neurological disorders include epilepsy, multiple sclerosis (MS), and memory disorders); *see Cognitive*, WEBAIM, https://webaim.org/articles/cognitive/ (last visited May 29, 2019) (examples of cognitive disabilities include traumatic brain injury (TBI), attention deficit disorder (ADD), and dyslexia); *see Characteristics of Psychological Disabilities*, VILL. OFF. PROVOST, https://www1.villanova.edu/villanova/provost/learningsupport/facstaff/characteristics_ofpsychologicaldisabilities.html (last visited May 29, 2019) (examples of psychological disabilities include depression, anxiety, obsessive compulsive disorder (OCD), and bipolar disorder).

[13] *The Origin of the LAPD Motto*, LAPD, http://www.lapdonline.org/history_of_the_lapd/content_basic_view/1128 (last visited May 29, 2019) (describing how Los Angeles Police Department adopted its official motto, "To protect and serve").

policies have been heavily scrutinized.[14] As one scholar notes, "there is a problem with giving enormous amounts of physical and moral authority" to police officers, and this problem is amplified when those officers are new recruits with little or no experience of policing.[15] Accordingly, police departments throughout the country are now, more than ever, cognizant of the importance of hiring competent police officers.[16]

Part II of this article will discuss the essential functions and characteristics of police officers, as well as the extensive and thorough application procedures major police departments throughout the country utilize in order to recruit officers with desirable characteristics and weed out those with undesirable characteristics.[17] This section will also provide an overview of psychological, neurological, and cognitive impairments and how the Americans with Disabilities Act protects individuals with such impairments from employment discrimination.[18]

Part III will discuss trends in ADA litigation both before and after the Act was amended in 2008 and how these trends have effected plaintiffs.[19] In addition, this section contains this article's

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[14] *See, e.g.*, Rachel Moran, *In Police We Trust*, 62 VILL. L. REV. 953, 953-54 (2017) (discussing police shootings of young black males, including Michael Brown, Tamir Rice, Alton Sterling, among others). According to a 2016 study, only 1/3 of black Americans "believe that the police do 'an excellent job' in treating racial and ethnic minorities equally and holding officers accountable for misconduct." *Id.* at 955 (citing Rich Morin & Renee Stepler, *The Racial Confidence Gap in Police Performance*, PEW RES. CTR. (Sept. 29, 2016), http://www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance/.

[15] *Id.* at 956.

[16] *See, e.g.*, Sanders, *supra* note 10, at 129 ("[P]olice agencies are expected to have hiring procedures in place that protect the community from unstable or incompetent police recruits.").

[17] *See infra* notes 27-76 and accompanying text; *see also* NYPD, *supra* note 2 (listing necessary requirements, including a physical fitness test, written exams, interviews, and medical and psychological exams, for applicants to New York City's Police Department); *Qualifications and Requirements*, JOINPHILLYPD.COM, https://joinphillypd.com/index.php/qualifications/overview (last visited May 29, 2019).

[18] *See infra* notes 77-108 and accompanying text.

[19] *See infra* notes 113-143 and accompanying text.

chief argument that courts should interpret the ADA's direct threat provision to protect police applicants with mental and behavioral disabilities from being summarily disqualified on the basis of such disabilities.[20] As the jurisprudence surrounding this provision varies significantly among circuit courts, this article attempts to identify a uniform analysis of the provision that is consistent with the provision itself, the purpose of the ADA as a whole, and Supreme Court precedent.[21] First, courts should interpret the direct threat provision of the ADA as an affirmative defense, rather than placing the burden on plaintiffs to prove they are not significant risks.[22] Next, courts should reverse the trend of being over-deferential to employers' understanding of what constitutes essential job functions and significant risks of substantial harm.[23] Finally, employers should be required to prove that its determination that an individual is a direct threat was objectively reasonable in reliance of an objectively reasonable medical opinion.[24] Such an interpretation is especially important to police applicants with mental and behavioral impairments because such impairments, and the stigmas associated with them, render them vulnerable to discrimination.[25] In reality, the effects of these disabilities can be controlled or mitigated with medication and therapy, and individuals with these disabilities are often capable of performing the essential functions of a job, such as a police officer.[26]

II. BACKGROUND

A. Police Department Hiring Policies

According to the Federal Bureau of Intelligence's ("FBI") Uniform Crime Reporting ("UCR") program, there are approxi-

[20] *See infra* notes 109-180 and accompanying text.
[21] *See infra* notes 143-172 and accompanying text.
[22] *See infra* notes 148-165 and accompanying text.
[23] *See infra* notes 134-165 and accompanying text.
[24] *See infra* notes 166-172 and accompanying text.
[25] *See* Andrew Hsieh, *The Catch-22 of ADA Title I Remedies for Psychiatric Disabilities*, 44 MCGEORGE L. REV. 989, 1002 (20134) (discussing perception of psychiatric disabilities).
[26] *See infra* notes 89-91 and accompanying text.

mately 17,379 police agencies in the United States.[27] Many of these agencies are relatively small, as two-thirds serve populations of less than 10,000.[28] But other departments, such as those in major cities like New York and Philadelphia, serve populations in the hundreds of thousands.[29] Accordingly, different departments implement different requirements for applicants, although many states have statutory minimum requirements.[30] As of 2013, most police departments require that applicants have graduated from high school or receive their GED, as only 15 percent of police departments require that applicants have some form of college education.[31]

Almost all police departments require that applicant's pass written examinations and a physical fitness test.[32] Police departments' written and physical requirements are a means to determine

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[27] *See* U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS, NCJ 249681, NAT'L SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA (2016).

[28] *See id.*

[29] *Police Employment, Officers Per Capita Rates for U.S. Cities*, GOVERNING, http://www.governing.com/gov-data/safety-justice/police-officers-per-capita-rates-employment-for-city-departments.html (last updated July 2, 2018).

[30] *See, e.g.*, ALASKA ADMIN. CODE tit. 13, § 85.010 et seq. (2018); 240 IND. ADMIN. CODE 1-4-3 (2013); 37 PA. CODE § 203.11 (2018) (requiring police applicants be at least 18 years old, have a high school degree or GED, and have a physical examination, among other requirements).

[31] COMMUNITY ORIENTED POLICING SERVICES, U.S. DEP'T OF JUSTICE, HIRING FOR THE 21ST CENTURY LAW ENFORCEMENT OFFICER: CHALLENGES, OPPORTUNITIES, AND STRATEGIES FOR SUCCESS 9 (2017) [hereinafter COPS], https://ric-zai-inc.com/Publications/cops-w0831-pub.pdf ("Miami Beach Police Department recently added a four-year degree requirement for new officers."); *see also* NYPD, *supra* note 2 (requiring that applicants have at least 60 college credits).

[32] *See, e.g.*, 37 PA. CODE § 203.11; *see also* COPS, *supra* note 31, at 5, 11 ("[F]orum participants said there should be more research on how to evaluate physical fitness standards for police officers and ensure they are directly related to the tasks that officers must typically complete. Fitness standards should be evidence-based, not simply guided by tradition."). An example of a written examination is the Nelson-Denny Reading Test, which is required in some states, like Pennsylvania. *See* § 37 PA. CODE 203.11(5). For a further discussion of the test, *see* Chris Coleman et al., *Passageless Comprehension on the Nelson-Denny Reading Test: Well Above Chance for University Students*, 43 J. LEARNING DISABILITIES 244 (2010).

whether applicants can perform the basic, albeit essential, duties of a police officer.[33] Failure to meet these minimum requirements automatically disqualifies an applicant, although some police department requirements, especially physical fitness tests, have been challenged by protected classes under Title VII and the ADA.[34]

Beyond these functions, police officers are empowered with significant discretion and often are placed in high pressure and dangerous situations where they must make critical, and sometimes life-altering decisions.[35] Through the interview process that departments require, it is imperative for police departments to "weed out" those applicants that possess traits that indicate they are incapable of adequately protecting their communities.[36] Determining the qualities of a "good" police officer is difficult, and one scholar notes that "many researchers would agree that current selection methods are based on eliminating the unfavorable candidates rather [than] finding recruits with certain positive qualities."[37]

After applicants pass the departments' written and physical requirements, they are given conditional offers of employment, which can be rescinded if the applicant fails the required medical

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[33] *See, e.g.*, Stefan Annel et al., *Police Selection Implications During Training and Early Career*, 38 POLICING: INT'L J. POLICE STRAT. & MGMT. 221 (2015). As the court in *Umanzor* noted, these include the following: "running after fleeing suspects, climbing upstairs, gripping persons to prevent escape, detecting odors caused by smoke or gas leaks, being physically active for prolonged periods of time, and intervening in ongoing criminal activity." *Umanzor*, 2018 WL 840084, at *2, *7.

[34] ALAN ANDREWS & JULIE RISHER, WHAT DOES THAT HAVE TO DO WITH BEING A COP? 4-9 (Int'l Ass'n of Chiefs of Police ed., 2006) (noting framework for challenging physical fitness tests and noting policies that have been challenged). Physical and Written examinations can be challenged under disparate impact theory. *See infra* note 105 (a further discussion of disparate impact theory). Since the subject of this article concerns individual allegations of discrimination arising after the psychological and physical examinations required after the conditional offer of employment, disparate impact theory will not be discussed.

[35] *See generally, e.g.*, Stephen M. Soltys, *Officer Wellness: A Focus on Mental Health*, 40 S. ILL. U. L. J. 439, 440 (2016) (discussing risks involved in policing and effect on mental health).

[36] Sanders, *supra* note 10, at 129.

[37] *Id.*

and psychological evaluations.[38] Under the Americans with Disabilities Act, it is only after an applicant is given a conditional offer of employment that a department may make disability-related inquiries and perform medical and psychological evaluations.[39] Despite such limitations, interviewers may ask applicants pre-offer questions related to the "ability of an applicant to perform job-related functions."[40] Police applicants must not lie when answering lawful questions under the ADA, but they are under no obligation to disclose their impairments.[41] Further, employers do not violate the ADA if applicants voluntarily disclose their disorders, and this may happen if applicants are unaware of their rights under the ADA.[42] Because mental and behavioral impairments are often invisible, it is crucial that applicants know their rights under the

[38] *See, e.g.*, U.S. DEP'T OF JUST. CIVIL RIGHTS DIVISION, QUESTIONS AND ANSWERS: THE AMERICANS WITH DISABILITIES ACT AND HIRING POLICE OFFICERS (Mar. 2017), https://www.ada.gov/copsq7a.htm.

[39] *See* 42 U.S.C. § 12112(d)(2)(A) (2012) (stating unless employers have made conditional offer of employment, employers may "not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."); 29 C.F.R. § 1630.14(b) (2018) (allowing employers to make medical inquiries after conditional offer of employment). Under EEOC enforcement guidance, a medical examination "is a procedure or test that seeks information about an individual's physical or mental impairments or health." U.S. Equal Emp. Opportunity Comm'n, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (2000) [hereinafter EEOC: DISABILITY-RELATED INQUIRIES], https://www.eeoc.gov/policy/docs/guidance-inquiries.html#N_11_. Many states, including Pennsylvania, require that applicants take the Minnesota Multiphasic Personality Inventory, which is considered a "medical examination" under the ADA. *See* Karraker v. Rent-A-Center, Inc., 411 F.3d 831, 834 (7th Cir. 2005).

[40] *See* 42 U.S.C. § 12112(d)(2)(B). Acceptable questions may include: whether an applicant can perform the functions of an officer with or without a reasonable accommodation; how an applicant would perform the functions of an officer; and whether applicants can meet the attendance requirements of the job. *See* EEOC: DISABILITY-RELATED INQUIRIES, *supra* note 39.

[41] *See, e.g.*, Smith v. Chrysler Corp., 155 F.3d 799 (6th Cir. 1998) (stating employer may discharge applicants who lie when answering questions that are lawful under ADA).

[42] *See* EEOC: DISABILITY-RELATED INQUIRIES, *supra* note 39.

ADA and not disclose them.[43] If an applicant does disclose their affliction, the remainder of the applicant's interview and the application process may be tainted by preconceived notions and stereotypes of individuals with mental and behavioral impairments.[44]

The extensive application process is a means of determining whether officers can withstand the mental and physical rigors of being an officer.[45] While this is certainly crucial, departments may incorrectly assume that applicants with mental and behavioral impairments, even if their effects are controlled or mitigated, are incapable of coping with these demands.[46] This is especially true if the departments' decision makers subscribe to outdated and scientifically debunked myths about individuals with such illnesses.[47]

In addition, the interview process and psychological evaluations are a means of identifying applicants who may abuse their discretion through excessive force, racial profiling, corruption, and other undesirable behaviors.[48] Eliminating these undesirable applicants is beneficial to police departments in the long run. It helps them preserve resources because unruly officers may harm others, require "greater supervision," and may, eventually, need to be dismissed.[49] Moreover, departments who weed out undesirable officers can avoid costly litigation and avoid "undermin[ing] the public trust," which is especially critical given present negative attitudes towards police.[50]

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[43] *Cf.* SOUTHEAST ADA CENTER, KNOW YOUR EMPLOYMENT RIGHTS UNDER THE ADA: A GUIDE FOR VETERANS, 4, 6 http://adasoutheast.org/publications/ada/Employment_Rights_Under_ADA_Vets.pdf (last visited May 29, 2019).

[44] *Cf.* Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 350 (1997).

[45] *See, e.g.*, Stefan Annel et al., *supra* note 33, at 221-23 (discussing application process).

[46] *See* Sarah Powell, *Dispelling Myths on Mental Illness*, NAT'L ALLIANCE ON MENTAL ILLNESS (July 17, 2015), https://www.nami.org/blogs/nami-blog/july-2015/dispelling-myths-on-mental-illness.

[47] *Cf.* Hsieh, *supra* note 25, at 1002-04 (discussing perception of psychiatric disabilities).

[48] *See* Annel et al., *supra* note 33, at 222.

[49] *See id.*

[50] *Id.*

The next question to ask is what traits should police departments consider when screening out applicants and what specific mechanisms should they use to identify them?

1. Minnesota Multiphasic Personality Inventory

The most common psychological test administered by police departments throughout the United States is the Minnesota Multiphasic Personality Inventory ("MMPI").[51] Since the MMPI is considered a "medical evaluation" under the ADA, police departments may not administer it to applicants until they have made a conditional offer of employment.[52] The MMPI is administered by a trained psychologist and involves applicants answering true/false questions that allow psychologists to assess personality traits and mental disorders.[53] The test is often led by prior interview of the applicant by the psychologist.[54] These are the tests that can ultimately lead police departments to conclude that applicants, including those with mental and behavioral impairments, are incapable of performing the essential functions of policing or pose a direct threat to the community.[55]

Many studies have identified the MMPI as an effective test to "predict future job performance and behavioral problems among

[51] *See* Anthony M. Tarescavage et al., *Use of Prehire Minnesota Multiphasic Personality Inventory-2–Restructured Form (MMPI-2-RF) Police Candidate Scores to Predict Supervisor Ratings of Posthire Performance*, 22 ASSESSMENT 411, 412 (reporting that 70 percent of police departments utilize MMPI).

[52] *See Karraker*, 411 F.3d at 834; *see also* 42 U.S.C. § 12112(d)(2)(A) (2012) (stating unless employers have made conditional offer of employment, employers may "not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability").

[53] *See* Jane Framingham, *Minnesota Multiphasic Personality Inventory (MMPI)*, PSYCHCENTRAL, https://psychcentral.com/lib/minnesota-multiphasic-personality-inventory-mmpi/ (last visited May 29, 2019).

[54] *See id.*

[55] Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 NW. U. L. REV. 1279, 1294 (2001).

police officers."[56] The test consists of ten clinical subscales, including Emotional/Internalizing Dysfunction, Thought Dysfunction, Cognitive Complaints, and Behavioral/Externalizing Dysfunction.[57] In the context of predicting police behavior, studies have shown that several Emotional Dysfunction scales "showed convergent associations with emotional control and stress problems."[58] Further, studies have shown that officers with high scores in the Cognitive Complaints scale "may have more difficulty processing information, both in routine tasks and conflict situations."[59]

Although the MMPI and other similar tests have been lauded for their ability to predict future behaviors, researchers have identified several issues related to how police departments utilize these tests.[60] One study found that larger police departments "use a pass–fail approach to psychological assessment and a minimum cutoff score approach to the selection process," which allows them to make quick decisions regarding which applicants

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[56] *See* Anthony M. Tarescavage et al., *Minnesota Multiphasic Personality Inventory–2–Restructured Form (MMPI-2-RF) Predictors of Police Officer Problem Behavior*, 22 ASSESSMENT 116, 117 (reporting studies).

[57] *See id.* at 117, 120.

[58] *Id.* at 129. In particular, these scales identify the following problems in officer performance: "restraint and control problems under stress conditions, learning problems under normal conditions, radio problems, decision making problems under normal conditions, initiative/drive, and multitasking under normal and stress conditions." *Id.*

[59] *Id.* at 130.

[60] *See, e.g.*, Robert E. Cochrane et al., *Psychological Testing and the Selection of Police Officers: A National Survey*, 30 CRIM. JUSTICE & BEHAVIOR 511, 516 (2003); Kimberly D. Simmers et al., *Pre-Employment Psychological Testing of Police Officers: The MMPI and the IPI as Predictors of Performance*, 5 INT'L J. POLICE SCI. & MGMT. 277, 278 (2003) (identifying arguments of problems with psychological testing). Issues that have been identified with such tests include the fact that "screening for individual characteristics may not predict future behaviour because that behaviour is strongly influenced by situational factors as well as pressures on officers to adhere to the requirements of the police culture." *Id.* Additionally, it has been argued that tests are "impersonal" and may "miss critical behaviors by not asking the right questions." *Id.* Finally, there are "concern[s] expressed by mental health professionals, administrators, and civilian groups that psychological testing may result in unfair stigmatisation, discrimination against minorities, and invasion of privacy." *Id.*

to disqualify and conserve resources.[61] Additionally, arguments have been made that such psychological tests are too "impersonal" and that they may perpetuate discriminatory attitudes.[62]

2. Explicit and Implicit Bias

Racial inequalities in the criminal justice system, from policing to prosecution, have been an unfortunate reality throughout the history of the United States.[63] Indeed, black Americans and other people of color have far too often been the intentional targets of discrimination by police officers.[64] Furthermore, black Americans view the criminal justice system as unfair and discriminatory, while many white Americans fail to recognize and acknowledge these systematic racial inequities.[65]

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[61] Cochrane et al., *supra* note 60, at 515.

[62] *See* Simmers et al., *supra* note 60, at 278.

[63] *See generally* Mark Peffley & Jeffrey Mondak, *Taking a Step Back: Racial Injustice in America*, 105 KY. L.J. 671, 673 (2016) (discussing racial inequality in criminal justice system); Moran, *supra* note 14 (discussing racial discrimination in policing and prosecution).

[64] Moran, *supra* note 14, at 970 ("From the nascent moments of the drug war, people of color have been both intentionally targeted and disproportionately prosecuted."). Racial inequalities in the criminal justice system continue to persist today. In 2016, blacks accounted for 33% of the incarcerated population, but just 12% of the U.S. adult population. *See* John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison is Shrinking*, PEW RES. CTR. (Jan. 12, 2018), http://www.pewresearch.org/fact-tank/2018/01/12/shrinking-gap-between-number-of-blacks-and-whites-in-prison/. In contrast, whites account for 64% of the U.S. adult population, but just 30% of the incarcerated population. *See id.* High profile shooting deaths of young black men by police officers have ignited the discussion about race and policing. *See* Moran, *supra* note 14, at 953-54.

[65] *See* Peffley & Mondak, *supra* note 63, at 672 (citations omitted) ("Survey studies over the last twenty years consistently find that most blacks view the system as unfair and discriminatory, while most whites view the system as fair and 'color blind.'"); Moran, *supra* note 14, at 955 (citing Rich Morin & Renee Stepler, *The Racial Confidence Gap in Police Performance*, PEW RES. CTR. (Sept. 29, 2016), http://www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance/) (stating only 1/3 of black Americans "believe that the police do 'an excellent or good job' in treating racial and ethnic minorities equally and holding officers accountable for misconduct").

Accordingly, it is important that police departments screen out applicants who display explicit racial biases, as well as other unacceptable prejudices, and identify implicit biases and provide training to combat them.[66] Departments can identify applicants' explicit biases through interviews and looking at their social media accounts.[67] Additionally, for police departments hiring officers who previously worked for another agency, it is important to "ensur[e] that the officer did not leave the first agency under allegations or findings of misconduct."[68] Police departments should review the circumstances behind an officer's past disciplinary record in order to determine if the officer is capable of fairly policing the community.[69] Implicit bias involves unconsciously categorizing unfamiliar individuals into specific groups and attributing the stereotypes associated with that group to those individuals.[70] Implicit bias "does not require animus; it requires only *knowledge* of the stereotype."[71] Therefore, it is difficult for applicants, let alone police departments, to recognize their implicit biases.[72] Since all people hold implicit bias, applicants should not be automatically screened out for having them.[73] Nevertheless, identifying and acknowledging implicit biases is important for police recruiters, as it could raise red flags about an applicant and can be mitigated through training.[74]

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[66] COPS, *supra* note 31, at 16.

[67] *See id.* at 17 (explaining how departments identify explicit bias of applicants).

[68] *Id.* at 21.

[69] *See id.*

[70] *See* Lorie Fridell, *This Is Not Your Grandparents' Prejudice: The Implications of the Modern Science of Bias for Police Training*, TRANSLATIONAL CRIMINOLOGY, Fall 2013, at 10.

[71] *Id.*

[72] *See* COPS, *supra* note 31, at 16 (discussing implicit bias).

[73] *See id.* ("Most social scientists agree that every person harbors various types of implicit bias, so finding officer candidates who are 100 percent bias-free is an unrealistic expectation.").

[74] *See id.* at 16-17 ("The key to effective hiring is to weed out candidates who display explicit bias and work to acknowledge and provide training for implicit bias.").

3. Focus on the Positive

While police departments often use the hiring process to screen out undesirable applicants, the DOJ's Community Orientated Policing Services recommends that departments "proactively identify and bring on board candidates who possess the values, character traits, and capabilities that agencies are seeking."[75] This involves engaging with the communities that the potential officers will be policing and ascertaining those communities' needs and value.[76]

B. Neurological, Cognitive and Psychological Disabilities

An estimated one in five American adults suffer from psychological impairments, commonly known as mental illnesses, in a given year.[77] Mental illnesses can affect an individual's behavior, mood, and cognitive functions.[78] Examples of psychological impairments include depression, anxiety, obsessive compulsive disorder ("OCD"), post-traumatic stress disorder ("PTSD") and bipolar disorder.[79] Neurological disorders "are diseases of the brain, spine and the nerves that connect them."[80] Examples of neurological disorders include epilepsy, multiple sclerosis (MS), and

[75] *See id.* at 26.

[76] *See id.* ("Agencies should consult with the community when identifying the desired traits, characteristics, and capabilities they are seeking in their newly hired officers.").

[77] *See Mental Health by the Numbers*, NAT'L ALLIANCE ON MENTAL ILLNESS, https://www.nami.org/learn-more/mental-health-by-the-numbers (last visited May 29, 2019) [hereinafter NAMI] ("Approximately 1 in 5 adults in the U.S.—43.8 million, or 18.5%—experiences mental illness in a given year. . . . 1.1% of adults in the U.S. live with schizophrenia. . . . 2.6% of adults in the U.S. live with bipolar disorder. . . . 18.1% of adults in the U.S. experienced an anxiety disorder such as posttraumatic stress disorder, obsessive-compulsive disorder and specific phobias.").

[78] *See Behavioral Health Treatments and Services*, SUBSTANCE ABUSE & MENTAL HEALTH ADMIN., https://www.samhsa.gov/treatment/mental-disorders (last visited May 29, 2019) [hereinafter SAMHSA] (discussing effects of mental illnesses).

[79] *See* VILL. OFF. PROVOST, *supra* note 12.

[80] UCSF HEALTH, *supra* note 12.

memory disorders.[81] An estimated 16 million people in the US have cognitive impairments, which occur "when a person has trouble remembering, learning new things, concentrating, or making decisions that affect their everyday life."[82] Examples of cognitive disabilities include traumatic brain injury ("TBI"), attention deficit disorder ("ADD"), dyslexia and dementia.[83]

In 2016, the unemployment rate for persons with a physical or mental disability (10.5%), was nearly double the unemployment rate of those with no disability.[84] Individuals with mental and behavioral impairments further endure an unfortunate stigma in the workplace, which includes the assumptions of incompetence, dangerousness and unpredictability, the belief that these individuals are unfit to work, and the belief that employing them is "an act of charity" contradictory to an efficient workplace.[85] Due to a lack of understanding of mental illness, as well as media portrayals that depict individuals with psychological disorders as violent, there is a stigma surrounding psychiatric disorders that are different than those of physical disabilities.[86] Therefore, in the realm of polic-

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[81] *See id.* Common symptoms of neurological disorders include seizures, diminished cognitive abilities, difficulty reading and writing, emotional problems, and muscle weakness. *See also Neurological Symptoms, Causes and Effects*, PSYCHGUIDES.COM, https://www.psychguides.com/guides/neurological-problem-symptoms-causes-and-effects/ (last visited May 29, 2019).

[82] *Cognitive Impairment: A Call for Action, Now!*, CENTER FOR DISEASE CONTROL (Feb. 2011), https://www.cdc.gov/aging/pdf/cognitive_impairment/cogimp_poilicy_final.pdf . Such disabilities are most prevalent in individuals over the age of 65, but approximately 4.5% of Americans age 18-64 have cognitive disabilities. *See* INST. ON DISABILITY: UNIV. OF N.H., 2016 DISABILITY STATISTICS ANNUAL REPORT 13 (2017), https://disabilitycompendium.org/sites/default/files/user-uploads/2016_AnnualReport.pdf.

[83] *See* CENTER FOR DISEASE CONTROL, *supra* note 82, at 2; *see also* WEBAIM *supra* note 12.

[84] BUREAU OF LABOR STATISTICS, *Persons with a Disability: Labor Force Characteristics Summary*, U.S. DEP'T OF LABOR (June 21, 2017), https://www.bls.gov/news.release/disabl.nr0.htm ("Unemployed persons are those who did not have a job, were available for work, and were actively looking for a job in the 4 weeks preceding the survey.").

[85] Janki Shankar et al., *Employers' Perspectives on Hiring and Accommodating Workers with Mental Illness*, 4 SAGE OPEN 1, 2 (2014).

[86] *See* Hsieh, *supra* note 25, at 1002 (discussing perception of psychiatric disabilities).

ing, the general public may view police officers with mental illnesses as unstable and violent, and police departments may perceive hiring individuals with these illnesses as an undesirable risk.[87] Moreover, police departments, like the NYPD in *Umanzor*, may have reservations about hiring officers with such disorders because their symptoms, although controllable, can manifest unpredictably and affect officers' ability to protect themselves and others.[88]

While some psychological, neurological, and cognitive disorders are debilitating, the symptoms of other such impairments are mild and/or can be controlled by medication, therapy, and counseling.[89] The ADA, enacted in 1990, recognizes the barriers of employment for disabled individuals that have been perpetuated by outdated stereotypes.[90] When given the opportunity, individuals with mental and behavioral impairments can be and are productive members of the workforce, including as police officers.[91]

C. The Americans with Disabilities Act

The Americans with Disabilities Act was passed in 1990 in order to protect Americans with disabilities from discrimination in a manner commensurate with protections provided to individuals under Title VII of the Civil Rights Act of 1964.[92] Chapter I of the

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[87] *Cf. id.* at 1002-03 (discussing perception of individuals with mental disorders in public and workplace in general).

[88] *See Umanzor*, 2018 WL 840084, at *7 (stating NYPD's argument for disqualifying Umanzor from being NYPD Cadet).

[89] *See, e.g.*, CENTER FOR DISEASE CONTROL, *supra* note 82, at 1 ("With mild impairment, people may begin to notice changes in cognitive functions, but still be able to do their everyday activities."); *Epilepsy Information Page*, NAT'L INST. OF NEUROLOGICAL DISORDERS & STROKE, https://www.ninds.nih.gov/Disorders/All-Disorders/Epilepsy-Information-Page (last visited May 29, 2019); *Mental Health Treatment & Services*, NAT'L ALLIANCE OF MENTAL ILLNESS, https://www.nami.org/learn-more/treatment (last visited May 29, 2019) (discussing how to treat mental illnesses).

[90] *See* 42 U.S.C. § 12101 (2012).

[91] *Cf. id.*

[92] *See* 42 U.S.C. § 12101 (2012) et seq. *See also* 42 U.S.C. § 2000e-2 (2012) (prohibiting employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment,

ADA prohibits "covered entit[ies]" from "discriminat[ing] against a qualified individual on the basis of disability in regard to job application procedures, hiring, advancement, or discharge of employees," among other actions.[93]

Individuals, such as police applicants, who believe they have been discriminated against on the basis of their disability may bring a suit under the ADA, which is examined under the burden shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*.[94] First, a plaintiff must establish a prima facie case of discrimination.[95] To establish a prima facie case under the ADA, plaintiffs must show the following: (1) they are disabled within the meaning of the ADA; (2) they are a qualified individual able to perform the essential functions of the job with or without reasonable accommodation; (3) they suffered an adverse employment action because of their disability; and (4) the employer hired someone outside the protected class or there were circumstances giving rise to an inference of discrimination.[96]

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because of such individual's race, color, religion, sex, or national origin"). In implementing the ADA, Congress found that "unlike 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 to redress such discrimination." 42 U.S.C. § 12101(a)(4) (2012). The ADA and Title VII prohibit discrimination in employment, public services and public accommodations. This article will discuss the ADA and employment discrimination as it relates to police hiring practices.

[93] 42 U.S.C. § 12112(a) (2012).

[94] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Similarly, the Rehabilitation Act of 1973 prohibits disability discrimination by federal employers. *See* 29 U.S.C. § 794 (2012). The Rehabilitation Act is interpreted the same as the ADA for determining employment discrimination. *See, e.g.*, U.S. DEP'T OF JUST., *A Guide to Disability Rights Laws,* ADA.GOV (July 2009), https://www.ada.gov/cguide.htm#anchor65610.

[95] *See, e.g., ADA Amendments Make It Easier to Establish Disability Discrimination*, WRADY & MICHEL, LLC (Mar. 28, 2014), http://www.wmalabamalaw.com/employment-law-blog/2014/march/ada-amendments-make-it-easier-to-establish-disab/ ("Congress has essentially made it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the statute. The ADAAA states that the definition of disability should be interpreted broadly in favor of coverage.").

[96] *See, e.g.*, Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1237 (9th Cir. 2012).

If a plaintiff proves his prima facie case, then the employer has the burden of offering a legitimate, nondiscriminatory reason ("LNDR") for the employer's action.[97] Finally, the plaintiff has the burden of proving that the employer's LNDR is in fact pretext.[98]

The prima facie case, in particular its first two prongs, are generally the most litigated aspects of an ADA claim.[99] These two prongs serve as "gatekeeper[s]" in which many plaintiffs lose their claims in the summary judgment phase.[100] As will be discussed, burdens of proof, as in all cases, are especially important in ADA cases.[101] Employers have a duty to provide reasonable accommodations to their disabled employees, but they can assert as an affirmative defense that an otherwise reasonable accommodation can "impose an undue hardship on the operation of the business."[102] Other affirmative defenses employers can assert include the "job-related" and "business necessity" defense, as well as the direct threat defense.[103] Some courts, however, do not consider the direct threat provision an affirmative defense, and instead, require plaintiffs to prove that they are not a direct threat as part of the second prong of the prima facie case.[104]

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[97] *See, e.g.*, Oehmke v. Medtronic, Inc., 844 F.3d 748, 755 (8th Cir. 2016).

[98] *See id.*

[99] *See generally,* Michelle A. Travis, *Disqualifying Universality Under the Americans with Disabilities Act*, 2015 MICH. ST. L. REV. 1689, 1692 (2015) (discussing importance of first two prongs of prima facie case).

[100] *Id.* at 1721, 1758. *See infra* notes 113-141 and accompanying text.

[101] *See infra* notes 148-157 and accompanying text.

[102] 42 U.S.C. § 12112(b)(5)(A) (2012); *see also* Felix v. Wis. Dep't of Transp., 828 F.3d 560, 569 (7th Cir. 2016).

[103] *See* 42 U.S.C. § 12113(a) (2012) ("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 tend to 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."); 42 U.S.C. § 12113(b) ("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.").

[104] *See infra* notes 148-157 and accompanying text.

In the context of police hiring, police departments can disqualify disabled applicants who are unable to meet the established hiring policies and procedures, which include education, physical fitness, and medical requirements.[105] Under the ADA, such requirements are considered "qualification standards," which aid in informing whether an applicant can perform the essential functions of policing.[106] Furthermore, as in the case of Umanzor, police departments, after extending a conditional offer of employment, will further determine through medical and psychological evaluations whether an applicant can perform the essential functions of a police officer.[107] Police departments that are sued by a rejected disabled applicant will frequently argue that a disabled applicant is not qualified to perform the essential functions of policing because they "pose a *direct threat* to the health or safety of other individuals."[108]

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[105] *See Umanzor*, 2018 WL 840084, at *2. These policies can be challenged in court under a disparate impact claim. *Cf.* Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003) (citing 42 U.S.C. § 12112(b)) (stating "disparate-impact claims are cognizable under the ADA"). Disparate impact claims, which are analyzed similarly under the ADA and Title VII, "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335, 336 n.15 (1977). Plaintiffs can prove their prima facie case of disparate impact through statistical evidence, although this type of evidence is not required, like it is under Title VII, under the ADA because of the significant variety of disabilities. *See, e.g.*, Lopez v. Pac. Maritime Ass'n, 657 F.3d 762, 769 (9th Cir. 2011). An employer can argue that its policy is a business necessity so long as the policy "measures the minimum qualifications necessary for successful performance of the job in question." Lanning v. SEPTA, 181 F.3d 478, 489 (3d Cir. 1999). If an employer demonstrates that its policy meets a business necessity, then a plaintiff has the burden of proving that there is a less discriminatory alternative employment practice to meet the employer's needs. *See, e.g.*, Jones v. City of Boston, 752 F.3d 38, 56 (1st Cir. 2014).

[106] *Cf.* 42 U.S.C. § 12113(b) (2012) ("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.").

[107] *See, e.g.*, U.S. Equal Emp. Opportunity Comm'n, Discussion Letter, ADA "Bona Fide" Job Offer (May 5, 2008), https://www.eeoc.gov/eeoc/foia/letters/2008/ada_bona_fide.html.

[108] 42 U.S.C. § 12113(b) (emphasis added); *see, e.g.*, *Umanzor*, 2018 WL 840084, at *5 (noting NYPD's direct threat defense).

III. ANALYSIS

Courts should interpret the ADA's direct threat provision to protect police applicants with psychological, neurological, and cognitive disabilities from discrimination.[109] Specifically, courts should afford less deference to employers when considering whether applicants are "qualified individuals," and consider the ADA's direct threat provision as an affirmative defense, rather than placing the burden on plaintiffs to show they are not a direct threat as part of the prima facie case.[110] Finally, the proper standard courts should apply when analyzing a direct threat defense is whether the employers' actions were objectively reasonable in reliance on an objectively reasonable medical opinion.[111] The stigmas associated with the aforementioned controlled and mitigated, and individuals with these disabilities are perfectly capable of performing the essential functions of a job, such as a police officer.[112]

A. Disabled within the Meaning of the ADA: Neurological, Cognitive, and Psychological Disorders

As previously mentioned, the first prong of a plaintiff's prima facie case under the ADA is to prove that they are "disabled" within the meaning of the Act.[113] A disability is defined as "a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such impairment; or being regarded as having such an impairment."[114]

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[109] *See infra* notes 143-172 and accompanying text.

[110] *See infra* notes 130-172 and accompanying text.

[111] *See infra* notes 166-172 and accompanying text.

[112] *See* Hsieh, *supra* note 25, at 1002-04 (discussing perception of psychiatric disabilities); *see also infra* notes 89-91 and accompanying text.

[113] *See Samper,* 675 F.3d at 1237.

[114] Americans with Disabilities Act (ADA), 42 U.S.C. § 12102(1)(A) (2012); § 12102(2)(A) (stating that the ADA lists major life activities to "include but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, lifting, bending, speaking, breathing, reading, concentrating, thinking, communicating, and working"); § 12102(2)(B) ("a major life activity also includes the *operation of a major bodily function*, including but not limited to, functions of the immune system, normal cell growth,

Historically, judicial narrowing of what courts considered an impairment that substantially limits a major life activity often meant plaintiffs with mental and behavioral illnesses failed at summary judgment because their afflictions were not considered disabilities within the meaning of the Act.[115]

First, in the 1999 Supreme Court case, *Sutton v. United Air Lines, Inc.*,[116] the Court held that determination of a disability under the ADA should be made in reference to an individual's ability to mitigate his or her impairment through corrective measures.[117] Then, in 2002, the Court struck another blow to plaintiffs in *Toyota Motor Manufacturing, Kentucky, Inc.*[118] In that case, the Court held that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[119]

In order to combat judicial narrowing of what qualified as a disability, Congress passed the ADA Amendments Act ("ADAAA") in 2008, which overturned the Supreme Court's holdings in *Sutton* and *Toyota Motor* and called for "broad coverage" of who is considered disabled under the Act.[120] In response to *Sutton*, the ADA now states that the inquiry of whether an im-

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digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions") (emphasis added).

[115] *See* Hsieh, *supra* note 25, at 993 (noting difficulty of plaintiffs with psychiatric disorders to get beyond summary judgment).

[116] *See* Sutton v. United Airlines, 527 U.S. 471 (1999).

[117] *See id.* at 475, 482 (rejecting EEOC's view that for purposes of considering whether persons are disabled under the ADA, "persons are to be evaluated in their hypothetical uncorrected state").

[118] *See* Toyota Motor Mfg. v. Williams, 534 U.S. 184 (2002).

[119] *Id.* at 198.

[120] *See* Hsieh, *supra* note 25, at 994 (noting context of why Congress passed the ADAAA); *see also* 42 U.S.C. § 12102(4)(A) (2012) ("The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter."); 29 C.F.R. § 1630.1(c)(4) (2018) ("The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.").

pairment substantially limits a major life activity should not consider "the ameliorative effects of mitigating measures," which includes medication and "learned behavioral or adaptive neurological modifications."[121] In response to *Toyota Motor's* narrowing of substantially limits, the EEOC directed courts to conduct an individualized assessment of whether the impairment "limits the ability of an individual to perform a major life activity as compared to most people in the general population."[122]

The ADAAA's expansion of who qualifies as disabled will help police applicants avoid losing on summary judgment on this issue.[123] In a failure to hire claim, especially in a police hiring scenario, plaintiffs may not be required to show that their disability actually substantially limits a major life activity.[124] Instead, police applicants can plead that the department subjected them to an adverse action because it *regarded* them as disabled, but not that the impairment substantially limits a major life activity.[125]

Therefore, even if a police applicant cannot adequately plead that they have an actual disability that substantially limits a major life activity, they should be able to confidently demonstrate that their potential employer regarded them as disabled.[126] Nota-

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[121] 42 U.S.C. § 12102(4)(E)(I)(IV) (2012); § 12102(4)(D) (adding that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity").

[122] 29 C.F.R. § 1630.2(j)(1)(ii) (2018).

[123] *See* Travis, *supra* note 99, at 1693 (stating that ADAAA's greatest accomplishment was to expand who is considered disabled under the Act).

[124] *See* 42 U.S.C. § 12102(3)(A) (2012).

[125] *See id.* ("An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subject to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."); *see also, e.g.* Alexander v. Wash. Metro. Area Transit Auth., 826 F.3d 544, 547-48 (D.C. Cir. 2016); *see also* 42 U.S.C. § 12102(3)(A) ("An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subject to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.").

[126] *Cf. Alexander*, 826 F.3d at 547 (noting that "after the 2008 Amendments, the regarded-as prong has become the primary avenue for bringing" many types of ADA claims); Travis, *supra* note 99, at 1693 ("It was through the

bly, if a plaintiff argues that they were "regarded as" disabled, they are not entitled to a reasonable accommodation.[127] This is important if applicants must contest a direct threat defense because they will not be afforded the opportunity to show, if necessary, that the "significant risk" they pose to themselves or others can be reduced by a reasonable accommodation.[128] Therefore, the prudent police applicant should still make efforts to prove that they are actually disabled under the ADA.[129]

B. Essential Functions of Policing

1. The Problem: Essential Functions, Direct Threats, and Judicial Deference

As "[c]ourts have almost universally embraced the expansive definition of disability under the ADAAA," the new battleground for ADA claims is whether a plaintiff can perform the es-

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"regarded as" amendments that Congress established nearly universal impairment-based antidiscrimination protection, thereby solidifying the ADA's status alongside Title VII as a core civil rights law."). In fact, police departments may not even challenge that a plaintiff is disabled. *See, e.g.*, *Umanzor*, 2018 WL 840084, at *6 (noting that NYPD did not challenge that Umanzor was disabled within meaning of ADA). Nonetheless, it would be sensible for employers to challenge whether plaintiffs actually have a disability because if plaintiffs have to rely on being regarded as disabled, then they would not be entitled to a disability. *See* 29 C.F.R. § 1630.2(r).

[127] *See* 29 C.F.R. § 1630.2(O)(4) (2018) ("A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the "actual disability" prong, . . . or "record of" prong, . . . but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong.").

[128] *See* 29 C.F.R. § 1630.2(r). For a further discussion of the ADA's direct threat provision, see *infra* notes 143-165 and accompanying text.

[129] Under the case law, it does seem that police applicant plaintiffs are arguing that there is a reasonable accommodation that could reduce the direct threat they may impose; instead, they argue that they can perform the duties of a police officer without a reasonable accommodation. *See generally, e.g.* Makinen v. City of New York, 53 F. Supp. 3d 676 (S.D.N.Y. 2014); Pesce v. N.Y.C. Police Dep't, 159 F. Supp. 3d 448 (S.D.N.Y. 2016); *Umanzor*, 2018 WL 840084, at *5. Nonetheless, this does not mean that police applicant plaintiffs cannot utilize this argument under appropriate circumstances.

sential functions of the job.[130] To the detriment of plaintiffs, courts have been increasingly receptive to employer's understandings of the "essential functions of the job" and who can and cannot perform them.[131] This trend could be especially troubling for disqualified police applicant plaintiffs, as safety—which encompasses not being "a significant risk of substantial harm" to the communities they serve—is undoubtedly an essential function of policing.[132] Police departments that disqualify potential applicants after psychological evaluations will argue that applicants cannot perform the essential functions of policing because their medical conditions, which may be unpredictable, could render them a "direct threat" to the community during crisis situations.[133]

i. The Aftermath of the ADAAA and the Battle over Essential Functions

After the ADAAA passed in 2008, defense attorneys began to formulate new strategies and focus their energy on placing their employer clients in the best position to win claims on summary judgement by attacking the second prong of the prima facie case, the "qualified individual" prong.[134] To the delight of employers, their attorney's strategies have largely been successful.[135] In the context of challenging the "qualified individual" prong of the plaintiff's prima facie case, a 2013 study showed that before the

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[130] Michael Edward Olsen, Jr., *Disabled but Unqualified: The Essential Functions Requirement as a Proxy for the Ideal Worker Norm*, 66 HASTINGS L.J. 1485, 1496 (2015); *see* Travis *supra* note 99, at 1699 (noting that after ADAAA, defense attorneys began to focus on winning cases under "qualified individual" prong).

[131] *See infra* notes 134-142 and accompanying text.

[132] 29 C.F.R. § 1630.2(r); *see also Makinen*, 53 F.Supp.3d at 695 (identifying "the carriage and usage of deadly weapons, undeviating concentration, split-second good judgement . . . self- control . . . [and] the ability to tolerate a high degree of danger, and periods of enormous physical and emotional stress" as essential functions of policing) (citations omitted) (alteration to original).

[133] *See, e.g.*, *Umanzor*, 2018 WL 840084, at *6-7.

[134] *See* Travis *supra* note 99, at 1699-1704 (noting that after ADAAA, defense attorneys began to focus on winning cases under "qualified individual" prong).

[135] *See id.* at 1704-05.

ADAAA, employers won on this issue 47.9% of the time.[136] After the ADAAA, employers have won on this issue 69.7% of the time.[137]

Essential functions "are the fundamental job duties but not the marginal functions of a particular job."[138] The EEOC promulgated seven non-exclusive factors for courts to consider when determining whether a task is an essential function, including written job descriptions and employer's determinations as to what is essential.[139] After the ADAAA, employers were counseled to strategically formulate detailed job descriptions for each position within their organization.[140] This strategy has been largely successful, as plaintiffs have been often been unable to meet the burden of showing they can perform the essential functions of a job because courts have given wide deference to employer's judgment and written job descriptions.[141] Indeed, one scholar notes that courts have "described an employer's judgment as being subject to

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[136] *See* Olsen, *supra* note 130, at 1499 (citing Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2067 (2013)).

[137] *Id.* (citing Befort, *supra* note 136, at 2067).

[138] Rehrs v. Iams Co., 486 F.3d 353, 356 (8th Cir. 2007) (citing 29 C.F.R. § 1630.2(n)(1) (2018)).

[139] 29 C.F.R. § 1630.2(n)(3)(i)(vi). These include: (i) The employer's judgment as to which functions are essential; (ii) Written job descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job performing the function; (iv) The consequences of not requiring the incumbent to perform the function; (v) The terms of a collective bargaining agreement; (vi) The work experience of past incumbents in the job; and/or (vii) The current work experience of incumbents in similar jobs.

[140] *See* Travis, *supra* note 99, at 1700-01 ("Employment attorneys recognized that broadly defining a job's essential functions would help employers use a disqualification strategy later in court.").

[141] *See* Olsen, *supra* note 130, at 1498 ("Deference to an employer's judgment about essential job functions severely limits the success of a plaintiff's claim because it prevents the employee from proving the qualified individual prong of her prima facie case."); *see also* 42 U.S.C. § 12111 (2012) ("[C]onsideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.").

'substantial' or 'significant' deference or weight, and as being 'highly probative' in determining the essential job functions."[142]

ii. A Troubling Trend: The Direct Threat Provision as a Shield for Employers

As employers have focused their attention on the "qualified individual" prong in the wake of the ADAAA, it is inevitable that employers, especially police departments, will employ the direct threat defense to show that an employee is not qualified.[143] The direct threat defense first emerged from the Supreme Court case, *School Board of Nassau County v. Arline*,[144] and was later codified in the ADA.[145] ADA section 12113(b) states that "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."[146] A direct threat is defined as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[147]

Although the direct threat provision is listed as a defense, courts are split as to whether the employer or employee has the burden of proof concerning this provision.[148] The courts who have

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[142] Travis, *supra* note 99, at 1711 (citations omitted).

[143] *Id.* at 1729 (arguing direct threat defense will be utilized more after ADAAA). In the past two years, the Southern District of New York has considered two claims of discrimination under the ADA by applicants in which the NYPD raised the direct threat defense. *See generally Pesce*, 159 F. Supp. 3d at 457-58; Umanzor v. N.Y.C. Police Dep't, No. 14-CV-9850, 2018 WL 840084 at *8 (S.D.N.Y. Feb. 12, 2018) (holding that the NYPD failed to establish a direct threat).

[144] *See* Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 285 n.14 (1987).

[145] 42 U.S.C. § 12113 (2012).

[146] *Id.*

[147] 29 C.F.R. § 1630.2(r) (2018).

[148] *Compare Felix*, 828 F.3d at 569 (stating employer has burden of proving direct threat defense because it is an affirmative defense), *with* EEOC v. Amego, Inc., 110 F.3d 135, 144 (1st Cir. 1997) (holding plaintiff has burden when "essential job functions necessarily implicate the safety of others"). The Supreme Court has not considered the direct threat provision of the ADA since

ruled that plaintiffs have the burden of proving they are not a direct threat have conflated some "qualification standards" as "essential job functions."[149] This approach is rational because "qualification standards" may very well overlap with the "essential functions" of a job.[150] Therefore, where the listed attributes are also essential job functions, courts reason and employers argue, plaintiffs should bear the burden of proving they are not a direct threat as part of their prima facie case.[151] In contrast, other courts have ruled that the direct threat provision is an affirmative defense and, therefore, the employer bears the burden of proof.[152]

2002, and it did not determine whether or not it was an affirmative defense. *See also* Chevron v. Echazabal, 563 U.S. 73, 87 (2002).

[149] *See, e.g., Amego, Inc.*, 110 F.3d at 144; Moses v. American Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996) ("The employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available."). In *Moses*, the plaintiff had epilepsy and was terminated from his job working near fast moving press rollers and conveyor belts. *Id.*

[150] *See* 29 C.F.R. § 1630.2(q) (defining qualification standards as "the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.").

[151] *See, e.g.*, Rizzo v. Children's World Learning Centers, Inc., 213 F.3d 209, 213 n.4 (5th Cir. 2000) ("It is unclear from the statutory scheme who has the burden on this issue. It may depend on the facts of the particular case. The EEOC suggested at argument that where the essential job duties necessarily implicate the safety of others, the burden may be on the plaintiff to show that she can perform those functions without endangering others; but, where the alleged threat is not so closely tied to the employee's core job duties, the employer may bear the burden."); *Amego, Inc.*, 110 F.3d at 137 (stating that plaintiff, who suffered from depression and twice attempted suicide, was fired from her job at an organization that cared for severely disabled people).

[152] *See, e.g., Felix*, 828 F.3d at 569; *Cf.* Lockett v. Catalina Channel Exp., Inc., 496 F.3d 1061, 1066 (9th Cir. 2007) ("[I]t is clear that ultimately the entity asserting a "direct threat" as a basis for excluding an individual bears a heavy burden of demonstrating that the individual poses a significant risk to the health and safety of others."). In some circuits, the question of whether the direct threat provision has not been decided. *See Makinen*, 53 F. Supp. 3d at 694 n.6 ("The Court is mindful that it is an open question in [the Second] Circuit whether the plaintiff or defendant bears the burden of proof on the direct threat issue.").

In failure to hire claims for police applicants, therefore, whether the department or applicant carries the burden is crucial to whether the applicant can get beyond summary judgement.[153] The burden of proving or disproving a direct threat is an onerous one, but scholars note that "courts have been particularly receptive to employers' arguments when mental illness or other stigmatized impairments are involved."[154] Placing the burden on police applicants, and any plaintiffs for that matter, would make it even more difficult to prove the prima facie case in a post-ADAAA climate where courts are already very deferential to employers' understandings of the essential functions of the job.[155] If courts, like the Tenth Circuit in *EEOC v. The Picture People, Inc.*,[156] express "hesita[tion] in displacing the business judgment of [a portrait studio for children] on how to run its business," then it would not be surprising for courts to show even more deference to police de-

[153] *See generally* 29 C.F.R. § 1630.2(r)(1)(4) (2018). EEOC regulations elaborate on the direct threat provision as follows:

> Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:
>
> (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.

[154] Travis, *supra* note 99, at 1729 (citing Michelle A. Travis, *The Part and Parcel of Impairment Discrimination*, 17 EMP. RTS. & EMP. POL'Y J. 35, 85 (2013); Brian S. Prestes, *Disciplining the Americans with Disabilities Act's Direct Threat Defense*, 22 BERKLEY J. EMP. & LAB. L. 409, 420, 422-36 (2001)).

[155] *See supra* notes 134-142 and accompanying text.

[156] EEOC v. Picture People, Inc., 684 F.3d 981, 981, 991 (10th Cir. 2012).

partments, especially when they are using respected and ubiquitous psychological evaluations, like the MMPI.[157]

Courts should interpret the direct threat provision as an affirmative defense even when safety is an essential job function for several reasons. First, although the ADA does not explicitly state who bears the burden, the direct threat provision, section 12113(b) is listed under "Defenses."[158] Furthermore, section 12113(b) must be interpreted in conjunction with 12113(a), which provides a defense to allegations that qualification standards "that screen out or tend to screen out . . . an individual with a disability . . . [are] job-related and consistent with business necessity."[159] The Supreme Court has acknowledged that section 12113(a)'s business necessity is an affirmative defense.[160] Moreover, "[t]he fact that subsection (b) speaks not simply of "qualification standards," but of "*[t]he term* 'qualification standards,'" suggests that it refers to that term in subsection (a)."[161] Accordingly, since section 12113(a) is an affirmative defense and section 12113(b) "is a specific instance" of 12113(a), the direct threat provision should also be interpreted as an affirmative defense.[162]

Interpreting the direct threat provision as an affirmative defense is also consistent with the goals and purpose of the ADA to eradicate the outdated stereotypes and prejudices that historically ostracized disabled individuals and that are still pervasive today.[163] One scholar notes that "[w]hile the ADA purports to prohibit em-

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[157] *Id.* at 991; *see, e.g.*, Bruzzese v. Lynch, 191 F. Supp. 3d 237, 245 (E.D.N.Y. 2016) (stating that in a direct threat analysis, "the courts quite properly accord a significant measure of deference to a [law enforcement agency]'s determination that an officer poses too great a risk to [him]self and the public") (citation omitted). For a further discussion of the MMPI, see *supra* notes 51-62 and accompanying text.

[158] 42 U.S.C. § 12113 (2012); *see also* Hubbard, *supra* note 55, at 1337 (making the same observation).

[159] 42 U.S.C. § 12113(a); *see also* Hubbard, *supra* note 55, at 1338 (arguing both subsections should be interpreted together).

[160] *See Chevron,* 536 U.S. at 78.

[161] Hubbard, *supra* note 55, at 1338.

[162] *Id.*; for a further argument as to why sections 12113(a)(b) are affirmative defenses, *see* Hubbard, *supra* note 55, at 1339-45.

[163] *See* 42 U.S.C. § 12101(a)(2) (2012) (stating Congress' findings and purpose in enacting ADA).

ployers from acting upon disability-based stereotypes, it allows employers to invoke just such biases through the direct threat provisions."[164] Therefore, it is antithetical to the purpose of the ADA to force plaintiffs to carry the burden to disprove that they are a significant risk to the health and safety of others, which, in many instances, are based on outdated stereotypes.[165]

After concluding that the direct threat provision is an affirmative defense, the next question to ask is how the employer can meet their burden of proof both at the summary judgment phase and if the case reaches a jury. The court or jury itself should not determine whether proof of an actual threat existed.[166] While some courts have endorsed this approach, the proper inquiry is whether the employer held an objectively reasonable belief that the employee posed a significant risk of substantial harm.[167] That belief must be in reliance of an objectively reasonable medical opinion that makes an individual assessment of the nature, severity, likelihood, and imminence of potential harm.[168]

This standard is supported by the Supreme Court's decision in *Bragdon v. Abbot*[169] and EEOC's regulations.[170] In

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[164] Travis, *supra* note 99, at 1728.

[165] *Cf.* Hsieh, *supra* note 25, at 1002-04 (discussing perception of psychiatric disabilities).

[166] *See, e.g.*, Jarvis v. Potter, 500 F.3d 1113, 1122 (10th Cir. 2007) ("[T]he fact-finder does not independently assess whether it believes that the employee posed a direct.").

[167] *See, e.g.*, Bragdon v. Abbot, 524 U.S. 624, 650 (1998) (stating employer's actions must be objectively reasonable); Michael v. City of Troy Police Dep't, 808 F.3d 304, 307 (6th Cir. 2015) (stating employer's determination of direct threat must be objectively reasonable); 29 C.F.R. § 1630.2(r) (2018) (defining direct threat as "significant risk of substantial harm"); *see also* Stragapede v. City of Evanston, 865 F.3d 861, 867 (7th Cir. 2017) ("The jury was free to discount this evidence or to treat it as insufficient to support an inference that [Plaintiff] posed an actual threat to his own safety or the safety of others.").

[168] *See, e.g.*, *Michael*, 808 F.3d at 307 (stating employer can meet its burden by demonstrating that its determination that individual is significant risk of substantial harm "is objectively reasonable when the employer relies upon a medical opinion that is itself objectively reasonable"); 29 C.F.R. § 1630.2(r)(1)(4) (stating factors to consider include duration, nature, severity, likelihood, and imminence of risk).

[169] *See Bragdon*, 524 U.S. at 648-49.

[170] 29 C.F.R. § 1630.2(r)(1)(4).

Bragdon, the Court stated that an employer's good faith belief that a significant risk existed is not enough; instead, the employer's actions must be based on objective medical evidence.[171] Courts and juries assess whether a medical opinion is objectively reasonable by determining whether (1) the opinion involves an individualized assessment of "the individual's actual medical condition, and the impact, if any, the condition might have on that individual's ability to perform the job in question"; and (2) whether there is credible medical or scientific evidence in the record that refutes the opinion.[172]

2. Reassessing the "Direct Threat" of Policing

Because of the nature of policing, the essential functions of a police officer are more than just the physical requirements of the job. In order to hire competent police officers with integrity, police departments should disqualify applicants who exhibit explicit biases and should focus on identifying applicants who possess the values and understand the needs of the communities they are policing.[173] In addition, departments can utilize psychological evaluations such as MMPI, to eliminate applicants who will be unable to withstand the mental rigors of policing and who indicate that they will abuse the wide discretion that is entrusted to them by the public.[174]

Although the MMPI and similar tests have been identified as successful predictors of police performance, it is important that police departments do not utilize them to implement minimum

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[171] *See Bragdon*, 524 U.S. at 650 (stating that employer's "state of mind could [not] excuse discrimination without regard to the objective reasonableness of his actions."); 29 C.F.R. § 1630.2(r).

[172] *Michael,* 808 F.3d at 313, 315 (quoting Holiday v. City of Chattanooga, 206 F.3d 637, 643 (6th Cir. 2000)); *Cf. Bragdon*, 524 U.S. at 650 ("[T]he views of public health authorities . . . are of special weight and authority . . . [but] are not conclusive. A health care professional who disagrees with the prevailing medical consensus may refute it by citing a credible scientific basis for deviating from the accepted norm.").

[173] *See supra* notes 63-76 and accompanying text.

[174] *See* Cochrane et al., *supra* note 60, at 531; *see also supra* notes 56-62 and accompanying text.

cutoff scores that summarily disqualify certain applicants just because they have a mental or behavioral impairment.[175] The direct threat provision imposes a finding that requires that an applicant poses "a significant risk of substantial harm."[176] This highly "individualized assessment" requires findings of the nature, severity, likelihood and imminence of potential harm.[177] Accordingly, department practices that simply cutoff applicants who fail to meet a minimum psychological "score" risk subjecting qualified applicants to discrimination and risk failing to screen out applicants who actually may be unfit to serve their communities.[178]

Before asserting the direct threat defense against police applicants with mental and behavioral illnesses who have brought ADA claims, police departments should reassess which of their active personnel constitute a "direct threat" to the community, albeit not in the legal sense. Indeed, there have been shocking cases where departments have failed to hold officers with extensive disciplinary records accountable for their actions.[179] For example, Chicago's Police Accountability Task Force released a comprehensive report in 2016, which concluded that the Chicago Police Department and its two oversight authorities (staffed almost entirely with former or current law enforcement officers) had "not engaged in efforts to identify officers whose records suggest re-

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[175] *See supra* notes 56-62 and accompanying text.

[176] 29 C.F.R. § 1630.2(r) (2018).

[177] *See* 29 C.F.R. § 1630.2(r)(1)(4).

[178] *Cf.* Cochrane et al., *supra* note 60, at 514, 520, 529.

[179] *See, e.g.*, Jennifer Smith Richards et al., *Over 125k Complaints Against More Than 25k Chicago Cops*, CHI. TRIB. (Oct. 14, 2016), http://www.chicagotribune.com/news/watchdog/ct-chicago-police-complaints-met-20161013-story.html (discussing Chicago officers with long lists of complaints, including Jerome Finnigan, who amassed 157 complaints in 20 years as officer); Matt Sledge & Saki Knafo, *Why Bad New York Cops Can Get Away with Abuse*, HUFFINGTON POST (July 30, 2014), https://www.huffingtonpost.com/2014/07/30/nypd-accountability_n_5630665.html; Mark Fazlollah et al., *The Full List of Philadelphia's 66 Problem Cops*, PHILA. INQUIRER (Mar. 13, 2018), http://www.philly.com/philly/news/crime/philadelphia-police-list-larry-krasner-problem-cops-names-details.html (listing "66 current or former Philadelphia police officer whom former District Attorney Seth Williams identified as facing allegations of misconduct on and off the job" and recommended should not be called as witnesses in court).

peated instances of misconduct or bias."[180] The obvious contradiction between police departments who argue that police applicants with disabilities may pose a direct threat to the community while simultaneously failing to properly investigate and discipline their own current officers who are a direct threat to the community is both troubling and hypocritical.[181]

IV. CONCLUSION

Following the ADAAA Amendments in 2008, essential functions and the direct threat provision have emerged as employers most frequent and effective arguments during summary judgment.[182] Police departments, like the NYPD in *Umanzor*, that disqualify potential applicants after administering psychological examinations, like the MMPI, will argue that applicants are a direct threat to the community because their medical conditions, which may be unpredictable, may render them incapacitated during crisis situations.[183] Courts should deter police departments from over-relying on the direct threat provision in order to justify their blanket or discriminatory exclusion of applicants with mental or behavioral illnesses.[184]

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[180] Moran, *supra* note 14, at 975-76 (quoting POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE 73 (Apr. 2016), https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf). Moran further notes that one Chicago Police Officer received 89 complaints of misconduct between 2000 and 2008, but the Chicago Police Department failed to take any disciplinary actions. *Id.* at 975.

[181] *See id.* at 976.

[182] *See supra* notes 130-143 and accompanying text.

[183] *See, e.g.*, *Umanzor*, 2018 WL 840084, at *6-7. For a further discussion of the MMPI, see *supra* notes 51-62 and accompanying text.

[184] *Cf.* Ann Hubbard, *The ADA, The Workplace, and the Myth of the 'Dangerous Mentally Ill'*, 34 U.C. DAVIS L. REV. 849, 852 (2001) ("An employer who falls prey to the powerful and widespread belief that persons with mental illnesses are inherently dangerous might cursorily conclude that it can, and indeed should, exclude an applicant or employee with a mental disability from the workplace under the ADA's direct threat provision."); *see* 42 U.S.C. § 12113(b) (2012) (stating direct threat defense); *see also supra* notes 158-172 and accompanying text.

Individuals with mental and behavioral illnesses have been subjected to the pervasive characterization that they are inherently violent, dangerous, and incompetent, especially in the workplace.[185] But society's fear of such afflictions is overblown and not consistent with empirical evidence.[186] Therefore, police departments and courts should dispel "[t]he belief that the mentally ill are disproportionately dangerous" because this "is precisely the type of discriminatory myth that the Rehabilitation Act and ADA were intended to confront."[187] A reform on how police departments treat applicants with disabilities would align with broader efforts that many scholars believe police should take when interacting with disabled individuals in their communities.[188] Police Departments can make strides to improve their inter-community relations and legitimacy with the public by both being more inclusive of applicants with disabilities and implementing both training on how to deal with individuals with disabilities and internal policies that provide reasonable accommodations to disabled individuals during police interactions.[189]

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[185] *See* Hubbard, *supra* note 184, at 852.

[186] *See id.* at 852-53 ("[P]ublic fears are way out of proportion to the empirical reality concerning the link between mental disorders and violence.").

[187] Quiles-Quiles v. Henderson, 439 F.3d 1, 6 (1st Cir. 2006).

[188] Shanna Rifkin, *Safeguarding the ADA's Antidiscrimination Mandate: Subjecting Arrests to Title II Coverage*, 66 DUKE L.J. 913, 917 (2017). While deaths of black males at the hands of police officers has (rightfully) dominated media coverage, an estimated half of individuals killed by police have a disability; *see* Marti Hause & Ari Melber, *Half of People Killed by Police Have a Disability: Report*, NBC NEWS (Mar. 15, 2016), https://www.nbcnews.com/news/us-news/half-people-killed-police-suffer-mental-disability-report-n538371 (citing study by the Ruderman Family Foundation, which is a disability organization). In response to this startling phenomena, many have advocated that Title II of the ADA, which prohibits public entities and officials from engaging in disability discrimination, should be applied to arrests and that "law enforcement officers should reasonably accommodate an individual's disability in the course of an arrest." *E.g.*, Rifkin, *supra* note 188, at 916; *see also, e.g.* Susan Mizner, *There is No Police Exception to the Americans with Disabilities Act*, ACLU (Jan. 8, 2015), https://www.aclu.org/blog/speakeasy/there-no-police-exception-americans-disabilities-act.

[189] *See* Curtis Ramsey-Lucas, *Improving Police Interactions with People with Disabilities*, AAPD (July 22, 2016), https://www.aapd.com/improving-police-interactions-with-people-with-disabilities/; Press Release, Vera Inst. of

While there are undoubtedly situations in which police applicants with mental and behavioral impairments will not be qualified to be officers, there are many individuals with such impairments who are perfectly capable of performing the essential functions of an officer.[190] Therefore, courts should interpret the direct threat provision as an affirmative defense, which requires employers to prove that their belief that an employee is a direct threat is objectively reasonable in reliance of an objectively reasonable medical opinion.[191] In the realm of policing, the general public may erroneously view police officers with mental illnesses as unstable and violent, and police departments may perceive hiring individuals with these illnesses as an undesirable risk.[192] But exclusion of disabled applicants cannot legally be justified by an undesirable risk; instead, the risk must be *significant*.[193]

Justice, *National Initiative to Enhance Police Interactions with Persons with Mental Illnesses and Developmental Disabilities Launches Today* (May 1, 2018), https://www.vera.org/newsroom/press-releases/national-initiative-to-enhance-police-interactions-with-persons-with-mental-illnesses-and-developmental-disabilities-launches-today.

[190] *Cf. Umanzor*, 2018 WL 840084, at *7 (noting that NYPD "does not dispute that individuals with MS are potentially qualified to perform the essential functions of a police officer" and that NYPD doctors have qualified individuals in the past for service in NYPD).

[191] *See supra* notes 143-180 and accompanying text.

[192] *Cf.* Hsieh, *supra* note 25, at 1002 (discussing perception of individuals with mental disorders in public and workplace in general).

[193] *See* 29 C.F.R. § 1630.2(r) (2018).