

## **Accommodating Public Safety Workers**

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# ACCOMMODATING PUBLIC SAFETY WORKERS

## I. The (Basic) Legal Framework

### A. The Americans with Disabilities Act

1. A plaintiff seeking relief under the ADA must show:
  - a. he/she is disabled person as defined by the ADA,
  - b. he/she is qualified to perform the essential functions of his/her job with or without reasonable accommodation, and
  - c. he/she suffered an adverse employment action because of his/her disability. Americans with Disabilities Act of 1990, §102(a), 42 U.S.C.A. § 12112(a).
2. The ADA defines an “individual with a disability” as a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment.
  - a. “major life activities” include, but are not limited, to seeing, hearing, speaking, walking, breathing, caring for oneself, and working
3. A person is “qualified” if he/she meets the legitimate skill, experience, education, or other requirements of a position and can perform the essential functions of the position with or without a reasonable accommodation.
4. A “reasonable accommodation” is a modification or adjustment to the work or the environment that will enable a qualified individual to perform the essential functions of the job, and includes adjustments to ensure that a qualified individual with a disability has the same rights and privileges on the job as a non-disabled employee.

### B. The Minnesota Human Rights Act

1. Claims arising under the Minnesota Human Rights Act (MHRA) are considered under the same analysis as claims arising under the ADA. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.; Minn. Stat. Ann. § 363A.08(2).
2. However, the MHRA defines a qualified individual as someone with a “physical, sensory, or mental impairment which materially limits one or

more major life activities”. Minn. Stat. § 363A.03, subd. 12. This standard of a ‘material limitation’ is less stringent than the ADA standard of a ‘substantial limitation’. See *Kammueler v. Loomis, Fargo & Co.*, 383 F.3d 779 (8th Cir. 2004).

## II. Accommodating Public Safety Workers: Case Law

### A. Reasonable Accommodation

1. An employer does not have to find an employee a different job where no reasonable accommodation would allow him to perform the essential functions of a police officer. *Lang v. Maplewood*, 574 N.W.2d 451 (1998); *Eldridge v. City of St. Paul*, 809 F.Supp.2d. 1011 (2011).
  - a. Lang was a long term employee who had been diagnosed with depression and mixed personality disorder. He received psychiatric treatment while continuing to work until 1995, when his doctor concluded that he was no longer able to perform the duties of a police officer. Shortly thereafter, a neurologist concluded that he had a brain malformity, for which he underwent brain surgery. His mental status improved after the surgery, but he was still unable to perform the duties of a police officer.
  - b. Lang sued under the MHRA, arguing that the city did not reasonably accommodate him by offering him another position for which he may have been qualified. Summary judgement was granted in favor of the city, and Lang appealed.
  - c. The court affirmed the summary judgement, noting that Lang did not fall within the definition of a “qualified disabled person” because he could not perform the essential function of the police officer position even with a reasonable accommodation. The MHRA does not require an employer to find an employee a different job as a reasonable accommodation.
2. Light Duty as a Reasonable Accommodation
  - a. “Reassignment of a disabled employee to a vacant light-duty position is well established as a reasonable accommodation under the ADA”, but an employer is not required to create a new light duty position when none exists. *Abram v. New York State Div. of Human Rights*, 896 N.Y.S.2d 764 (2010).

- b. The ADA requires an employer to restructure a position by redistributing marginal functions which an individual cannot perform due to a disability, but the employer is not required to reassign essential functions to ‘lighten’ duty. *Hoskins v. Oakland County Sheriff’s Dept.*, 227 F.3d 719 (6th Cir. 2000).
  - i. Hoskins was a correctional officer for Oakland County. She received severe injuries after a horse fell on her, leaving her with a decreased range of motion in her shoulders and chest. Her disability prevented her from restraining inmates. No light duty positions were available.
  - ii. Hoskins requested that, as a reasonable accommodation, she receive assistance from other deputies when it came to restraining inmates. She argued that since it was the department’s policy that deputies call for assistance when restraining inmates, such assistance should be provided to her as a reasonable accommodation.
  - iii. The court disagreed, noting that the ADA does not require employers to accommodate disabled employees by shifting an essential job function onto others. (*See also* 29 C.F.R. pt. 1630, App. § 1630(o)).
- c. Light duty is not required if there are other accommodations that are also reasonable. *Swanson v. Village of Flossmoor*, Case No. 14-3309 (7th. Cir. 2015).
  - i. Swanson was a detective for the village police department. He suffered his first stroke in 2009. He took FMLA leave for nearly three weeks until his doctor released him for part-time work. He was allowed to work three days per week and take two days of vacation, enabling him to receive a full paycheck. After several more health issues, he resigned.
  - ii. In 2011 he sued the Village alleging violations of Title VII and the ADA. With regard to the ADA claim, he alleged that the Village failed to make reasonable accommodations for him when he returned to work after his first stroke. Swanson requested light duty work but was told that there was no light duty policy. He argued that the employer failed to engage in the interactive process by refusing to consider a light duty option.

- iii. The court affirmed the district court's grant of summary judgment in favor of the employer. Even if light duty was Swanson's preferred option, "the ADA does not entitle a disabled employee the accommodation of his choice. Rather, the law entitles him to a reasonable accommodation in view of his limitations and his employer's needs. Accordingly, permitting an employee to use paid leave can constitute a reasonable accommodation."

## B. Fitness for Duty

1. Fitness for duty requirements must be job related and consistent with business necessity.
  - a. Employer's practice of requiring all firefighters be fit for duty did not result in disparate impact disability discrimination in violation of MHRA for firefighter with leukemia. *Jung v. City of Minneapolis*, 187 F.Supp.3d 1034 (2016).
    - i. Jung began working as a firefighter for the city in 1994. In 1999, she was promoted to fire captain. In 2003, she was diagnosed with leukemia. Her doctor advised her against returning to firefighting. The city offered her a position as a staff captain hazmat inspector in 2007, which she accepted.
    - ii. In 2011, when hazmat inspection responsibilities were removed from the fire department, Jung remained in the department as a staff captain, performing personnel services, fire inspections, and other duties. Following a reorganization of the department in 2013, Jung was informed that she would be transferred to fire suppression. In 2014, Jung sued the city, alleging several claims, including disability discrimination in violation of the MHRA.
    - iii. Jung argued that the city had a practice of not reasonably accommodating firefighters, and that its policy that all fire fighters be able to work in fire suppression effectively forced disabled firefighters out of employment. She also argued that the policy made it impossible to return to work with restrictions or to get an interactive process to consider accommodations.
    - iv. The court found that Jung's disparate impact claim failed as a matter of law. Even if she could assert a prima facie case of

disparate impact, the city demonstrated that the policy was job related and consistent with business necessity. “Being fit for duty is properly regarded as an essential job function of the position as firefighter.”

- b. The ADA allows an employer to establish physical criteria in determining fitness for duty, and if those criteria do not disqualify a plaintiff from a broad class of jobs he/she will not be “substantially limited” in one or more major life activities. *Shipley v. City of University City*, 195 F.3d 1020 (1999).
  - i. Shipley retired twice from his firefighter position, both times due to disabling on-the-job injuries. He applied for reinstatement with supporting letters from several doctors. His application was denied due to the employer’s non-specific concerns about his ability to perform the job.
  - ii. “By its terms, the ADA allows employers to prefer some physical attributes over others and to establish physical criteria’ even if those criteria would substantially limit a person’s employment opportunities if they were adopted by a large number of employers.” *Id.* at 1023, citing *Sutton v. United Airlines*, 527 U.S. 471 (1999).

2. Not being fit for duty is distinguishable from having a disability.

- a. Freaked out firefighter was frightened of fire, not disabled. *City of Houston v. Proler*, 437 S.W.3d 529 (2014).
  - i. Proler was a firefighter for the city. He was promoted to captain and led a fire suppression crew.
  - ii. In March of 2006, Proler was at the scene of a house fire and was unable to put on his firefighting gear or take orders, and had difficulty walking. He was taken to a hospital and diagnosed with global transient amnesia. Another captain on the scene stated that Proler did not seem to be aware of his surroundings and appeared frightened. Shortly after the incident, Proler was reassigned to the training academy. He filed a grievance and was reinstated to a fire suppression crew. The city appealed and Proler countersued for disability discrimination under federal and state law. The court of appeals reversed, in part. The case was appealed to the Texas Supreme Court.

- iii. “Being unable to set aside the normal fear of entering a burning building is not a mental impairment that substantially limits a major life activity. In determining disability, the issue is whether Proler was ‘unable to perform the variety of tasks central to most people’s daily lives’, not whether he was ‘unable to perform the tasks associated with [his] specific job.’”
- iv. The Court rejected Proler’s argument that he was regarded as having a disability. Rather, Proler was perceived to be unable to do his particular job as captain of a firefighting crew. “A reluctance to charge into a burning building is not a mental impairment at all; it is the normal human response.”
- v. “[T]he law prohibiting disability discrimination does not protect every person who desires employment but lacks the skills required to adequately perform the particular job.”

### C. The Direct Threat Defense

- 1. The direct threat defense is an affirmative defense for which the employer bears the burden of proof. *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561 (8th Cir. 2007); Minn. Stat. §363A.25.
  - a. A “direct threat” is 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.” 29 C.F.R. § 1630.2(r); Minn. Stat. §363A.25 (“...a disability which in the circumstances and even with reasonable accommodation...poses a serious threat to the disabled person or others.”)
  - b. The Supreme Court requires an individualized direct threat analysis that relies on “the best current medical or other objective evidence” in order to “protect disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear.” *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1248 (9th Cir. 1999) (citing *Bragdon v. Abbott*, 524 U.S. 624 (1998)). “Specific factors to be considered include (1) the duration of risk, (2) the nature and severity of potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm.” *Id.* See also 29 C.F.R. § 1630.2(r).
- 2. Post-Traumatic Stress Disorder (PTSD)

- a. Officer's PTSD posed a direct threat, entitled City to summary judgement on plaintiff's disability discrimination claims. *Johnson v. City of Blaine*, 970 F.Supp.2d 893, 911 (2013).
  - i. Johnson was hired as a patrol officer in 1993. In 1999, she was the primary responding officer to a pedestrian accident which resulted in the death of a 14-year old boy. She responded to a second fatal pedestrian accident that occurred a few days later. She the developed PTSD and depression and took a short leave of absence.
  - ii. The following year, Johnson responded to a homicide call with another patrol officer. She administered first aid to the victim, but the victim died at the scene. Johnson was left alone with the body, which triggered her PTSD causing her to have a 'breakdown' at the scene. She was unable to continue performing her duties, and had to be driven back to the station by another officer.
  - iii. The PTSD and depression following the homicide call caused Johnson to take an extended leave of absence. During the leave, she was hospitalized for suicidal ideation. She transitioned back to work in January of 2001.
  - iv. In June of 2001, Johnson again exhibited symptoms of PTSD and depression, including a statement at the firing range that she had recent feelings of self-harm. She was placed on a two-week leave of absence by the City.
  - v. For the next five years, Johnson's PTSD and depression were under control and did not affect her ability to perform her duties as a police officer. She was promoted to detective in 2006.
  - vi. In late 2006 and early 2007, Johnson was confronted with the deaths of her coworker (who committed suicide), her friend, the mother of a different friend, and her father. Her marriage was also problematic at that time. In August of 2007, Johnson was hospitalized for depression and suicidal ideation. She requested and received FMLA leave. She was hospitalized intermittently for the next month. She requested additional leave, and after a series of fitness for

duty exams and negotiations between her union and the City, Johnson eventually returned to work in early 2008.

- vii. In 2009, several complaints were made against Johnson, involving misconduct, insubordination, and harassing behavior toward supervisors and co-workers. In June of that year, she was placed on administrative leave while a criminal investigation into her conduct took place by an outside agency. While on leave, she was again hospitalized for her mental health issues and requested FMLA leave. She submitted to another fitness for duty exam prior to her return to work. In the meantime, she was charged criminally for threats made against a city employee (the threats were part of the reasons for the administrative leave in June). In January of 2010, prior to the City taking any action with regard to the results of the fitness for duty exam or the criminal charges, Johnson resigned.
- viii. Johnson filed two discrimination charges with the EEOC, one in 2008 and one in 2009. Both alleged discrimination based on sex, retaliation, disability, and failure to accommodate. In 2012, she sued the City claiming various violations of the ADA, MHRA, Title VII, and the FMLA.
- ix. The court held that the fitness for duty report, issued by an objective medical professional after a thorough and individualized assessment, as well as Johnson's extensive history of suicidal ideation and the fact that her position required her to be armed with a gun, supported the City's direct threat defense. It cited *Burroughs v. City of Springfield*, 163 F.3d 505, 508 (8th Cir. 1998):

“[T]he risk of an armed patrol officer being unable to function in an emergency situation is not a risk we are prepared to force a police department to accept. The inherent and substantial risk of serious harm arising from such episodes, given the nature of police work, is self-evident.”