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# FBI Law Enforcement Bulletin



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# ***Police Officer Candidate Assessment and Selection***

By DAVID A. DECICCO



**F**or some individuals, the mere sight of a law enforcement officer can elicit feelings of excitement, curiosity, or fear; however, these are mild effects that citizens can experience from afar. Yet, the officers themselves often experience long periods of boredom, peppered with moments of excitement and even sheer terror. In the lives of many officers, adrenalin becomes a drug and adversity becomes part of their daily lives. Handling feelings of separation, uselessness, and frustration becomes a ritual habit. Some officers handle the stress of the job adequately, while for others

it can prove hazardous, if not debilitating.

Police officer misconduct may arise as a result of the various pressures this profession exerts, from officers' inappropriate management of the ensuing stress. The departments and governments that police officers represent frequently incur lawsuits as a result of the officers' reaction to stress. In addition, the actions of individual officers can impact civilian and officer safety, and more generally, public opinion of a department or of law enforcement as a whole. Police officers are entrusted with a tremendous amount of authority. They

make quick decisions and seldom make them under direct supervision. Improper actions can prove very costly, not only with regard to monetary judgements, but also in terms of investigative costs, personnel costs (i.e., staff shortages due to suspensions, dismissals, and temporary reassignments), and morale.<sup>1</sup>

Some experts believe that more or improved training will sufficiently manage the risks associated with police officer misconduct. However, departments rarely make improvements in the selection process of candidates prior to training. Police managers should direct critical emphasis in this initial phase in



Officer DeCicco serves with the Clarkstown Police Department in Rockland County, New York.

**“  
...the assessment  
center approach is...  
designed to simulate  
actual police officer  
responsibilities  
and working  
conditions.  
”**

order to effectively combat the problem. The New York City Police Department estimated that each new officer costs approximately \$500,000, which includes expenses incurred from recruitment through the end of an officer's probationary period.<sup>2</sup> Many benefits of weeding out potentially hazardous officers exist. These can include the financial savings of training and possible litigation as well as the influence that “bad” officers could have on their peers. Moreover, because supervisory and managerial positions generally are filled from within, the selection of entry-level officers greatly affects the future leadership of a department.<sup>3</sup> Police managers often assert that recruiters place too much emphasis on obtaining a large applicant pool, rather than quality applicants who have prepared for this type of career. Therefore, in order to have better patrol officer performance, departments should scrutinize the selection of candidates before attempting improvements in officer training.

#### **A COMPREHENSIVE APPROACH**

Although methods of assessment and selection of candidates vary among the approximate 12,000 local and state law enforcement agencies in the United States, many similarities exist between the long-standing departments. Some of the tactics used may include written tests, a background investigation, physical exam, and an interview. The majority of agencies must follow state civil service regulations. For example, the New York State Civil Service Commission administers the preliminary police officer exam and then reports the results to departments who supervise subsequent stages of selection and assessment within the regulations set by the Civil Service Commission. However, many larger city jurisdictions can administer their own exam while adhering to both city and state civil service directives.

A typical candidate will express their interest in becoming a police officer by either applying

directly for employment or taking a scheduled exam, usually given by the county or city personnel office. Administrators should remember that agencies hire less than 4 percent of those who apply to become police officers.<sup>4</sup> In the next phase, the personnel officer administers a group exam designed to test candidates' verbal skills, math aptitude and reasoning, clerical, and related perceptual abilities.<sup>5</sup> After grading this exam, which generally takes a few months, jurisdictions with openings will receive a list of the top-scoring candidates. Often, these candidates will have qualified already on a physical fitness test, which requires minimum performance on such exercises as sit-ups, pull-ups, squat thrusts, and a 50-yard dash.

Once applicants pass the first phase, agencies may use a variety of tests to further determine qualified candidates. For example, departments may use all or a combination of various methods, such as field background investigations, medical examinations, physical strength and agility tests, situational tests, psychological examinations, polygraph tests, and assessment centers.

#### **Background Investigation**

Research has shown that all departments use background investigations and medical examinations. Generally, departments place emphasis on the background investigation because an intensive background investigation can help to ensure agencies recruit only the most qualified individuals and also can indicate an applicant's competency, motivation, and personal

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ethics.<sup>6</sup> During this process, a candidate usually will complete a background questionnaire covering a breadth of data, including all places of residence, level of education, identities of family members and friends, and personal references. The questionnaire will ask an applicant to provide an employment record, credit history, criminal history, and any alcohol or other drug use. This document then serves as a basis for the investigation.

The investigator will confirm the veracity of each piece of information submitted by personally visiting all high schools and colleges that the candidate has attended, as well as interviewing past employers to discuss a candidate's work ethic, performance, honesty, and sociability. A candidate's credit history can serve as a cross-check of information on previous employers, addresses, creditors, history of credit payments, and any civil action taken against the candidate. Investigators can obtain driving and criminal records from state and federal authorities to determine if an applicant has any disqualifying offenses. In addition, the investigator should interview neighbors, spouses, and personal references to provide more details on the applicant's background and lifestyle. Finally, to complete this phase, a formal board interview should ask candidates to discuss current events, their interest in law enforcement, personal and professional backgrounds, and any discrepancies discovered by the investigating officer.<sup>7</sup>

### **Medical Exam**

This section of the hiring process requires that the candidate visit

a physician, appointed by the department or certifying personnel agency, for a complete physical examination. The physician should attest that the candidate is generally in good health and meets certain minimum standards such as a height to weight ratio, 20/20 eyesight (corrected), and adequate hearing.

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***...the selection of entry-level officers greatly affects the future leadership of a department.***

”

### **Physical Strength and Agility Tests**

Research revealed that 80 percent of departments require applicants to take a physical fitness test.<sup>8</sup> The state civil service commission may require this type of test, which departments may administer subsequent to the written exam. Most agencies hold this test in the gymnasium of a local high school and often include pull-ups, to test strength; sit-ups, to test endurance; a run, to measure aerobic endurance; and an obstacle course, squat thrusts, or side lunges, to test agility. The exam also may include a test of hand strength to verify an applicant's ability to pull the trigger of a gun.

Although these exercises remain typical among many departments, some individuals often

criticize the process as having a disparate impact on women. As a result, some applicants who fail this part of the process sue law enforcement agencies alleging that the tests do not assess job-related skills. If a physical agility test has a disparate impact on female applicants then such a test violates Title VII of the 1964 Civil Rights Act. The only justification for a disparate impact is proof that the standards tested are required for the job. Police agencies often have lost legal challenges in such cases unless they could show that these standards apply to all of their on-board sworn personnel. The argument is that if the standard is required for the job then it is necessary for people who already have the job. Because few police agencies are willing to fire employees who cannot meet such standards the courts have not upheld them. Only when the standard can be related to a public safety issue and is applied to on-board personnel, will such standards be upheld.

Some departments have developed a newer battery of tests to assess specific characteristics needed for police officers, but less simulative in nature than other tests and scaled based on age and sex. This new test uses push-ups or a bench press to test absolute strength, sit-ups for muscular endurance, a 1.5- to 2-mile run for aerobic capacity, and a “sit-and-reach” for flexibility. In one department, a male, age 20 to 29, would need to complete a minimum of 38 sit-ups in 1 minute, reach 1.5 inches past his toes, bench press 99 percent of his body weight, and complete 1.5 miles in less than 12 minutes and 51 seconds.<sup>9</sup>

## One Department's Assessment Method

The Appleton, Wisconsin, Police Department uses various exercises to assess their police officer candidates.

- *Group discussion* – A leaderless interaction regarding a law enforcement topic that an entry-level candidate can understand that will elicit information on a candidate's interpersonal and communication skills.
- *Situational response* – Observation of a department-prepared video tape requiring a written response regarding the situations presented that will obtain information to help gauge a candidate's problem-solving and written communication skills.
- *Oral presentation* – Assignment of a topic for a candidate to present, with a limited preparation time to stimulate stress. Topics should elicit information on how well a candidate can adapt and react to adverse situations.
- *Background/achievement report* – Response to questions that develop information about each candidate's life history and preparation for a law enforcement career.
- *Observational response* – Analysis of a crime scene or prepared room, with instructions to document observations or find clues, which illustrates a candidate's information-gathering and problem-solving skills.

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Source: B. D. Kolpack, "The Assessment Center Approach to Police Officer Selection," *Police Chief*, September 1991, 44-46.

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Departments use these screens to determine that a police officer candidate is mature, emotionally stable, independent, sociable, and capable of functioning in stressful situations. A certified psychologist, with experience in psychological assessment for law enforcement, should direct this screening process.

Initially, the candidate should take a personality inventory test. Of the exams used in police testing circles, the most popular are the Minnesota Multiphasic Personality Inventory, used by 60 percent of departments, and the California Personality Inventory, used by 19 percent of departments.<sup>11</sup>

Agencies must use the results in conjunction with other components of a psychological assessment in order for these test results to prove most useful. The psychologist should use the test results to indicate areas that investigators should probe further during an interview. The interview should follow a standardized format and elicit information relevant to a candidate's characteristics suitable for employment as a police officer.

The psychologist then should formulate a decision whether to permit or withhold employment of a candidate and prepare a written conclusive summary that completely articulates the assessment process and the reasoning behind the decision. In order to provide a legally defensible report, the assessor also should include specific examples of a candidate's character pathology (e.g., behavior, promptness, and dress).

Of all the phases in the selection process, administrators should

## Situational Tests

Fifty-eight percent of departments use some type of real-life, simulated testing.<sup>10</sup> These tests may include mock crime scenes, simulated traffic stops, shoot/don't shoot decisions, leaderless group discussions, or role-playing scenarios. Assessment centers also use these types of exercises that incorporate many of the traditional techniques of selection with the addition and emphasis on situational

exercises. Some individuals view this approach as an increasingly promising method of selection.

## Psychological Testing

Candidates disqualified from employment based on psychological findings also can file lawsuits against the police agency. Fortunately, adjustments to the methods used and the way the findings are reported can reduce the expense of defending such decisions.

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consider the psychological exam with particular caution and meticulous planning. The psychological testing must accurately predict an applicant's performance as a police officer before departments can use it as a basis to disqualify an individual.<sup>12</sup>

### **Polygraph Tests**

Although prohibited from use in most private sectors by the Employee Protection Act of 1988, government organizations can use polygraph testing. Approximately 56 percent of police departments use this test, based on measures of a person's respiration, heart rate, and galvanic skin response.<sup>13</sup> A qualified polygrapher will inquire about the information applicants provide on their background questionnaire in order to verify accuracy and completeness and to note any significant physiological irregularities.

A great deal of controversy has arisen as to the validity of polygraph measurements; therefore, departments should look at the results as a small part of a candidate's assessment process. Law enforcement professionals and polygraph administrators should use the machine to deter lying, rather than to detect it. The U.S. Court of Appeals for the Third Circuit decided that "...in the absence of scientific consensus, reasonable law enforcement administrators may choose to include a polygraph requirement in their hiring process without offending the equal protection clause."<sup>14</sup>

### **Assessment Centers**

First, police administrators must realize the difference between an assessment center and

an assessment center approach. An assessment center is a place where a series of events or exercises will occur; however, the assessment center approach is a method that supplements the traditional assessment and selection procedures with situational exercises designed to simulate actual police officer responsibilities and working conditions.

First used in its basic form by the Cincinnati, Ohio, Police Department in 1961, today, nearly 35 percent of police agencies use the assessment center approach in some form.<sup>15</sup> Some individuals predict this number to increase steadily, as

***...agencies may use a variety of tests to further determine qualified candidates.***

the legal defensibility of this method becomes more widely appreciated. However, the relatively high cost of implementation has hindered the employment of this approach by more departments. Additionally, the fact that the exercises used do not require the candidate to have knowledge about police procedure raises another concern.

A department using the assessment center approach should follow a general outline. The first phase, where the candidates take the police officer exam, remains unchanged. Next, test administrators contact the

individuals who scored highest on the exam to notify them of the date and time to report for the assessment test. Generally, this test occurs in a 1-day session, during which assessors rank all of the candidates. Most departments hold assessment centers in a local school or a large facility that offers a variety of rooms suitable for each phase of the testing.

Each candidate participates alternately in a series of five to eight exercises, each designed to assess a particular "dimension" necessary for a police officer. For example, the exercises ensure a candidate's ability to deal with the public, maintain emotional stability in stressful situations, work in teams, communicate adequately, and demonstrate the proper use of force.<sup>16</sup> Additionally, administrators should ensure that the tests—

- remain standardized;
- prove relevant and realistic to situations police officers might expect to face in the line of duty;
- have several alternative solutions;
- remain complex enough to engage the candidate;
- prove stressful enough to elicit a number of possible emotional responses; and
- not require specialized abilities.<sup>17</sup>

Individuals specifically selected and trained to serve as assessors will rate the performance of each candidate. Some experts suggest departments use one assessor for every two candidates and that the assessment panel include a

police administrator, a psychologist, and a local citizen with a background in social work or community service.<sup>18</sup> Assessors should remain thoroughly trained and familiar with the methodology of the process and the exercises used and the dimensions being tested. They also should practice performing such ratings. Assessors should develop an overall rating of each candidate by discussing individual performance on the exercises and then come to an agreement with other assessors on each dimension.

## CONCLUSION

Law enforcement agencies throughout the United States have a diverse choice of methods to assess and select their officers. The actual assessment and selection procedures prove critical in that process and present a prime opportunity to scrutinize those who will

hold an enormous amount of authority. The performance of these officers likely will undergo strict criticism by a more-watchful-than-ever public.

The courts have encouraged the use of assessment centers as the most fair and job-related method of assessing police officer candidates. No other assessment tool can better extract behavior from candidates that would parallel their performance on the job. When properly executed, the assessment center approach will raise emotions and stress that cannot be roused with other traditional testing methods.

Administrators should place the assessment center method as an integral part of a comprehensive selection procedure. In doing so, they can confidently make new officer hires, and more important, ensure residents that the highest

quality police officers serve and protect their communities. ♦

## Endnotes

<sup>1</sup> G. F. Coulton and H. S. Feild, "Using Assessment Centers in Selecting Entry-Level Police Officers: Extravagance or Justified Expense?" *Public Personnel Management*, 1995, 2: 223-243.

<sup>2</sup> E. Fitzsimmons, "N.Y.P.D. Psychological Screening of Police Candidates: The Screening Process, Issues and Criteria in Rejection," *Psychological Services for Law Enforcement*, Library of Congress No. 85-60053 8 (Washington, DC: Government Printing Office, 1986).

<sup>3</sup> Supra note 1.

<sup>4</sup> M. Hyams, "Recruitment, Selection, and Retention: A Matter of Commitment," *Police Chief*, September 1991, 24-27.

<sup>5</sup> P. Ash, K. B. Siora, and C. F. Britton, "Police Agency Officer Selection Practices," *Journal of Police Science and Administration*, 17, no. 4 (1990): 258-269.

<sup>6</sup> T. H. Wright, "Pre-employment Background Investigations," *FBI Law Enforcement Bulletin*, November 1991, 16-21.

<sup>7</sup> D. Bradford, "Police Officer Candidate Background Investigation: Law Enforcement Management's Most Effective Tool for Employing the Most Qualified Candidate," *Public Personnel Management*, 27, no. 1 (1998): 423-424.

<sup>8</sup> Supra note 5, 27, no. 1 (1998). The Americans With Disabilities Act (ADA) prohibits inquiries into disabilities until an agency has made a conditional offer of employment. This has the effect of prohibiting broad physical examinations prior to such an offer being made.

<sup>9</sup> As published in Suffolk County, New York, Police Officer Examination Announcement, given May 1999.

<sup>10</sup> Supra note 5.

<sup>11</sup> Supra note 5.

<sup>12</sup> D. Schofield, "Hiring Standards: Ensuring Fitness for Duty," *FBI Law Enforcement Bulletin*, November 1993, 27-32.

<sup>13</sup> Supra note 5.

<sup>14</sup> *Anderson v. City of Philadelphia*, 845 F.2d 1225 (3rd Cir. 1988).

<sup>15</sup> Supra note 1.

<sup>16</sup> J. Pynes, and H. J. Bemardin, "Entry-level Police Selection: The Assessment Center Is an Alternative," *Journal of Criminal Justice*, 1992, 20: 41-52.

<sup>17</sup> Supra note 1.

<sup>18</sup> Supra note 1.

## Use of Testing Procedures

Type of Procedure	Number of Agencies	Percentage
Field Background Investigation	62	100.0
Medical Exam	62	100.0
Physical Strength and Agility Tests	49	79.6
Situational Tests	36	58.1
Polygraph	35	56.5
Psychiatric Exam	35	56.5
Assessment Centers	14	22.6

Agency Usage (N=62)

Source: P. Ash, K.B. Siora, and C.F. Britton, "Police Agency Officer Selection Practices," *Journal of Police Science and Administration*, 17, no. 4 (1990): 258-69.



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# *The Advent of the Computer Delinquent*

By ARTHUR L. BOWKER, M.A.

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**I**n Chesterfield County, Virginia, a 16-year-old pleaded guilty to computer trespassing for hacking into an Internet provider's system, causing \$20,000 in damage.<sup>1</sup> Five boys, ages 14 to 17, pleaded guilty to charges stemming from counterfeiting money on one of the youth's home computers.<sup>2</sup> A 14-year-old boy in Mount Prospect, Illinois, pleaded guilty to possession of child pornography after downloading child pornographic images onto his computer.<sup>3</sup> Five juveniles faced federal adjudication<sup>4</sup> for hacking into computers at the Pentagon and NASA, accidentally shutting down an airport's runway

lights, and stealing passwords from an Internet provider.<sup>5</sup>

These and other incidents illustrate the types of computer delinquency<sup>6</sup> that have become commonplace in a technologically advanced society. What has led to this problem, and what can the law enforcement community do to deter those of today's youth who have grasped the computer's usefulness in committing serious acts of delinquency?

## **Factors Contributing to Computer Delinquency**

With the advent of the 21<sup>st</sup> century, new avenues of delinquency

have begun to develop with each technological advance. Four factors contribute to these new avenues. First, today's youth possess more technological knowledge than any previous generation. They have grown up with the personal computer and the Internet. Due to this exposure, today's young people can conceive readily of the potential for both legitimate and illegitimate computer use.

Next, some evidence points to an apparent ethical deficit in today's youth, concerning appropriate computer use. For example, a 1997 study of undergraduate college students revealed that a



substantial number had pirated software.<sup>7</sup> Many of these students had gained illegal access to a computer system to either browse or exchange information. These findings proved similar to those of another study done 5 years earlier. The 1997 analysis further concluded that parents, and even teachers, may have advocated certain computer crimes, particularly software piracy. The study also noted that youths involved in computer crime, similar to other types of deviance, appeared to learn this behavior through interaction with their peers.

Additionally, the peer groups that juveniles interact with have changed from school and neighborhood friends to a literal "global community." Unfortunately, this larger peer group contains hundreds of chat rooms, news groups, and Web sites advocating pedophilia, drugs, and hate and racist groups, along with information on identity falsification, credit card and check

fraud, and computer hacking. Through these peer contacts, many juveniles learn about and support computer crimes.

Finally, computers themselves make successful completion of certain acts of delinquency possible. Specifically, computer use over the Internet can conceal age and provide a degree of anonymity that did not exist previously. Youths not old enough to operate a motor vehicle can use their computers—in their own bedrooms, after curfew—to break into a system in another country. While in the past children may have had difficulty making fraudulent purchases, today they can go on-line and easily purchase those same age-restricted items by avoiding any suspicions based on their youthful appearance. The computer also greatly facilitates their escape after the fraud becomes known. The power of the computer makes counterfeiting or check fraud, offenses that once required

expensive equipment and extensive expertise, literally "child's play."

As all of these factors have come together, the number of juveniles who have direct access to a computer and the Internet has risen sharply. According to the Office of Justice Programs, more than 28 million children currently go on-line, and industry experts predict that more than 45 million young people will use the Internet by 2002.<sup>8</sup> Other projections indicate that by the year 2002, almost 80 percent of American teenagers will have access to on-line material.<sup>9</sup> This analysis also reveals that many parents do not provide careful oversight of this computer use. For example, depending on the age group (either from 11 through 15 or 16 through 18 years of age), 38 percent of the parents of the younger group and 9 percent of the parents of the older group reported that they sit with their children while they are on-line.

Sixty-eight percent of parents of on-line children between the ages of 11 and 15 said that they know which Web sites their children visit, while 43 percent of the parents of the 16- to 18-year-olds reported similar knowledge. In addition, 54 percent of the parents of the younger group revealed that they permit unlimited on-line access for their children, while 75 percent of the parents of the older children said that they allowed such computer usage.<sup>10</sup>

### **Costs of Computer Delinquency**

The losses or damages that a delinquent can inflict have changed



**“  
Fortunately, basic  
tools exist for  
officers to use  
in developing a  
preventive program  
for children.  
”**

*Mr. Bowker serves as a probation officer with the U.S. District Court, Northern District of Ohio Probation Office in Cleveland.*

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dramatically due to society's increasing dependence on computers. Traditionally, the actions of a single delinquent would cause very few losses, injuries, or deaths. In the past, for example, it proved almost impossible for a juvenile delinquent to steal the amount of funds that a white collar criminal, such as an embezzler, could purloin. Today, however, a delinquent easily can use a computer to facilitate a five-figure or other high-tech crime. The potential for disaster when a juvenile hacker disrupts or manipulates safety functions, such as traffic signals, air traffic control, floodgates, or power grids, constitutes an even more troubling prospect.

Indirect costs of computer delinquency also require noting. "Innocent" juvenile exploration into computer systems can cause expensive systems to crash and inflict financial burdens to restore them. The prevalence of computer intrusions causes companies to take additional security measures and obtain special computer insurance, adding to the cost of goods and services. Computer delinquency also wastes investigative resources that agencies could better employ. For instance, an attack against defense computers could represent the work of a juvenile "exploring" or an adult terrorist bent on destroying systems or stealing technology. Frequently, it takes a costly investigation to determine the suspects and their motives.

The jurisdictional concerns of technological crimes also makes adjudicating computer delinquents even more complicated than a typical delinquency case. Normally,

adjudicating a delinquent takes place at the local level. Issues revolve around keeping the case in the juvenile court system or, if serious enough, a referral to the adult system. Typically, few juvenile cases involve multiple jurisdictions. However, a juvenile hacker can cross state boundaries and even international boundaries with the click of a mouse. Moreover, it is

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***...the number of juveniles who have direct access to a computer and the Internet has risen sharply.***

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not inconceivable for future juvenile offenders to cause an international incident for hacking into an unfriendly foreign country's computer. The jurisdictional questions can begin to mount. Who handles these cases, the local authorities where the juvenile resides or the state or country of the target computer? Would federal prosecutors have an interest in the case? Who decides which jurisdiction will prosecute the case or whether the charge will be made in a juvenile or adult court?

Finally, some computer delinquents could become adult computer offenders. For example, several of the more infamous computer offenders began their criminal

careers as juveniles.<sup>11</sup> Also, research has shown that "...persons involved in computer crimes acquire their interest and skills at an early age. They are introduced to computers in school, and their usual 'career path' starts with illegally copying computer programs. Serious offenders then get into a progression of computer crimes including telecommunications fraud (making free long distance calls), unauthorized access to other computers (hacking for fun and profit), and credit card fraud (obtaining cash advances, purchasing equipment through computers)."<sup>12</sup> Therefore, the entire criminal justice community must not ignore or downplay the significance of computer delinquency because these "wayward youths" may present future problems when they enter adulthood.

#### **Law Enforcement Considerations**

To effectively deal with the computer delinquent, law enforcement officers must make adequate preparations. They must not forget their skills and rules of evidence/procedure that they employ in investigating traditional delinquent behavior. Just because youngsters have mastered computer skills does not mean that they can comprehend their actions as against the law. For example, a 9-year-old who scans money for a school project does not warrant the same response as a 15-year-old who counterfeits and passes money. Investigators must establish that delinquents have some knowledge that their behavior is problematic. Do the delinquents conceal their computer actions from

adults? Have they used passwords and encryption to protect their systems? Did they erase or destroy files to conceal their actions? What motivated them to commit the acts? Did they profit from their behavior? Was their offense committed to finance other delinquent behavior (e.g., drug use)? Have the youths exhibited similar behavior, either with or without a computer? What if officers uncover evidence on the youths' computers that indicate the delinquents have broken laws in

several states or countries? Having answers to these questions will prepare law enforcement officers to present their findings to the appropriate parties for adjudication of the delinquents.

The issue of child pornography and the computer delinquent raises additional concerns for law enforcement officers. How should they respond to a 15-year-old male who has pornographic images of a 16-year-old female on his computer? What if this 15-year-old

male is distributing these images to his friends? What about the 15-year-old male with pornographic images of an 8-year-old female on his computer? Where are they getting the images? Is an adult involved? Is the youth a victim of abuse? Law enforcement officers, in consultation with prosecutors, should consider such scenarios before they have to face them.

Law enforcement officers also should take a preventive approach to computer delinquency. Because

## **Code of Responsible Computing**

### **Respect for Privacy**

I will respect others' right to privacy. I will only access, look in, or use other individuals', organizations', or companies' information on computer or through telecommunications if I have the permission of the individual, organization, or company who owns the information.

### **Respect for Property**

I will respect others' property. I will only make changes to or delete computer programs, files, or information that belong to others, if I have been given permission to do so by the person, organization, or company who owns the program, file, or information.

### **Respect for Ownership**

I will respect others' rights to ownership and to earn a living from their work. I will only use computer software, files, or information

that I own or that I have been given permission to borrow. I will only use software programs that have been paid for or are in the public domain. I will only make a backup copy of computer programs I have purchased or written and will only use it if my original program is damaged. I will only make copies of computer files and information that I own or have written. I will only sell computer programs which I have written or have been authorized to sell by the author. I will pay the developer or publisher for any shareware programs I decide to use.

### **Respect for Others and the Law**

I will only use computers, software, and related technologies for purposes that are beneficial to others, that are not harmful (physically, financially, or otherwise) to others or others' property, and that are within the law.

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*Source: Computer Learning Foundation (<http://www.computerlearning.org/RespCode.htm>); accessed October 11, 2000.*

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of its potential to create havoc, computer delinquency warrants a serious preventive program aimed at the school-age child. In addition, the typical computer investigation is very time consuming and costly. Hence, the prevention of even one such investigation justifies the focus on educating youths regarding computer ethics. Researchers agree. "At one level, basic principles of computer ethics can be instilled in children (and adults) from the time of their initial introduction to information technology.

A greater emphasis on computer ethics in school curricula might also contribute to heightened ethical awareness over time. Training in computing should be accompanied by an ethical component; information making it clear that intrusion and destruction is costly and harmful to individual human beings, and to society in general, not merely to amorphous organizations."<sup>13</sup>

Fortunately, basic tools exist for officers to use in developing a preventive program for children. Specifically, in 1991, the Computer Learning Foundation (CLF) and the U.S. Departments of Education and Justice began emphasizing the need to teach responsible computer use to children. The CLF began disseminating information to schools on methods for teaching children to become responsible computer users and developed the Code of Responsible Computing. In addition, the Department of Justice (DOJ) and the FBI have Web sites<sup>14</sup> that contain information for children about appropriate computer use. DOJ's Web site also has a lesson plan for elementary and middle school

teachers to use when covering computer crime and ethics with their students. Law enforcement officers could use these same materials to develop outreach programs for schools in their communities. Such programs also could include "cyber-safety" tips to ensure that children do not fall victim to predators on the Internet.

**"...new avenues of delinquency have begun to develop with each technological advance."**

## Conclusion

The 21st century promises many technological changes for law enforcement. While some of these alterations will benefit the criminal justice community, such as the use of mapping technologies to determine crime trends, others, such as the emergence of computer delinquency, will produce negative challenges. Only by recognizing early on that computer delinquency is a serious matter that inflicts financial and ethical burdens on society can the criminal justice system hope to effectively handle these youths before they become master computer criminals. ♦

## Endnotes

<sup>1</sup> Arthur L. Bowker, "Juveniles and Computers: Should We Be Concerned?" *Federal Probation* 63, no. 2 (December 1999): 40-43.

<sup>2</sup> "Students Fined for Funny Money: Sentences Suspended in Butler," *Cincinnati Enquirer*, April 8, 1999.

<sup>3</sup> Supra note 1.

<sup>4</sup> Federal prosecution of juveniles rarely occurs because 18 U.S.C. § 5032 requires that a "substantial federal interest" exists and the state does not have or refuses to assume jurisdiction; the state does not have adequate services or programs for juveniles; or the offense is a violent felony, drug trafficking or importation, or is a firearms offense.

<sup>5</sup> Supra note 1.

<sup>6</sup> In this article, computer delinquency refers to any delinquent act or criminal behavior committed by a juvenile where a computer was the tool used in the offense, was the target of a delinquent act, or contained evidence of a delinquent act.

<sup>7</sup> A.M. Fream and W.F. Skinner, "Social Learning Theory Analysis of Computer Crime Among College Students," *Journal of Research in Crime and Delinquency* 24, no. 4 (November 1997): 495-518.

<sup>8</sup> U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *New Grants to Combat Internet Crimes Against Children*, May 17, 2000; available from <http://ojjdp.ncjrs.org/about/00juvjust/000517b.html>; accessed October 11, 2000.

<sup>9</sup> "Peril and Promise: Teens by the Numbers," *Newsweek*, May 10, 1999, 38-39.

<sup>10</sup> Ibid.

<sup>11</sup> For specific examples, see Shimomura, Tsutomu, and Markoff, *Takedown: The Pursuit and Capture of Kevin Mitnick, America's Most Wanted Computer Outlaw* (New York, NY: Hyperion, 1996), 370-372; Joshua Quittner and Michelle Statalla, *Masters of Deception: The Gang that Ruled Cyberspace* (New York, NY: Harper Collins, 1996); and Katie Hafner and John Markoff, *Cyberpunk: Outlaws and Hackers on the Computer Frontier* (New York, NY: Touchstone, 1995), 276-321.

<sup>12</sup> J. Thomas McEwen, "Computer Ethics," *National Institute of Justice Reports* (January/February 1991): 8-10.

<sup>13</sup> P.N. Grabosky and Russell G. Smith, *Crime in the Digital Age* (New Brunswick, NJ: Transaction Publishers, 1998), 59.

<sup>14</sup> DOJ's Web site is <http://www.usdoj.gov>, and the FBI's Web site is <http://www.fbi.gov>; accessed October 11, 2000.

# Technology Update

## Unsolved Case Fingerprint Matching

**W**hen investigators collected a latent fingerprint from a homicide crime scene in 1935, fingerprint examiners compared it to the prints of individuals suspected of committing the murder. A positive match produced strong evidence for trial and was usually the primary factor in gaining a conviction. If months of investigation failed to develop a principal subject, the print was eventually stored as a matter of evidence, along with the investigative file, in the hope that a future lead might prompt a new course of investigation. Although the FBI had an extensive collection of criminal fingerprints, no reliable method to search an unknown latent print against that collection for a match existed.

In July 1999, the FBI's Criminal Justice Information Services (CJIS) Division's Integrated Automated Fingerprint Identification System (IAFIS) became operational. IAFIS provides five key services: 10-print services, subject search and criminal history request services, document and image searches, remote search services, and latent print services. In its first 6 months of operation, IAFIS reduced the FBI's criminal 10-print processing time from 45 days to less than 2 hours. The system also introduced a number of new tools that were previously not available.

To demonstrate the IAFIS latent print search technique, the FBI encouraged law enforcement representatives who attended the July 2000 International Association of Identification (IAI) meeting in Charleston, West Virginia, to bring with them any latent fingerprint evidence from unsolved cases so that the prints could be run against the FBI's criminal database of 41 million entries for a match. The Georgia Bureau of Investigation (GBI) took up the challenge and

brought a print collected from a rape scene. Although the GBI concurred with officers from the Pleasant Prairie, Wisconsin, Police Department (PPPD) that the suspect was likely a serial criminal because of investigative similarities to rape cases in Georgia and Wisconsin that had been matched by DNA testing, neither agency had identified a suspect. After the unsolved case print was scanned in, a search of IAFIS was completed in less than 10 minutes. This search

produced a potential subject for the GBI and the PPPD to consider.

IAFIS is a remarkable use of technology. With IAFIS, the FBI replaced a 64-year-old fingerprint identification process that was not serving law enforcement needs with a system that provides timely and accurate identification services in a paperless environment. IAFIS makes finding the proverbial needle in the haystack not only possible, but easy. Its vast computing power examines the characteristics of fingerprints submitted by law enforcement



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# Technology Update

officers across the United States, converts them to searchable code, and adds them to the current criminal database of some 41 million entries.

When a department requests a latent search, IAFIS searches the characteristics of the latent against the criminal database for a possible match. Because each entry in the database includes all 10 fingers, the comparative process proves somewhat more tedious than might be expected because the search must run against all 10 fingers of the various entries. Nevertheless, the technical ability to search this large group of known fingerprint specimens allows for a previously unidentified piece of evidence, in some cases a bloody print, to be matched with the name of a person in the FBI's criminal records. This identification provides a new course for investigators to explore and the possible means to bring criminals to justice before they can strike again.

In the previously discussed serial rape case, the PPPD contacted the GBI because they noted common characteristics in rapes in Wisconsin and Georgia. The PPPD sent fingerprint and DNA samples for examination. Through DNA testing, the GBI tied those two rapes to a rape in Florence, Kentucky, but they still had not identified the individual responsible. The GBI provided the Wisconsin print for examination at the IAI meeting after their exhaustive investigation efforts with the PPPD, including a requested subject analysis by the FBI's Violent Crime Apprehension Program (VICAP), had yielded no viable leads. In a few minutes, the search produced the name of a suspect from Georgia. The victims worked as

clerks at retail strip malls near interstates. The suspect was located in jail at Lawrenceville, Georgia, where he was being held on an unrelated crime. The GBI was granted a search warrant to obtain a blood sample. Although he denied any involvement in the murders, his blood was matched to DNA samples from the serial

rapes. A few days after the sample was taken, he hanged himself in his jail cell with a bed sheet. He implicated himself in other rapes before his death. Efforts continue to resolve these claims.

The lessons from this investigation demonstrate the value of the IAFIS latent search technique. In spite of exhaustive investigate efforts, neither the GBI, PPPD, DNA testing, nor the FBI's National Center for the Analysis of Violent Crime (NCAVC) were able to identify a

suspect for these serial crimes. The IAFIS technique undoubtedly prevented further violent acts, a major step forward in investigative techniques from the 1935 standard. Law enforcement officers are encouraged to review unsolved pending and closed investigative files to identify latent fingerprints that they can submit to CJIS for a latent print services comparison. ♦

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**[IAFIS] examines the characteristics of fingerprints submitted by law enforcement officers across the United States, converts them to searchable code, and adds them to the current criminal database of some 41 million entries.**

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*Agencies may submit fingerprints in their original form, but digital format submissions are preferred. Agencies interested in conducting such examinations should contact Linda Click, Northeast Region, (304) 625-2767; Todd Commadore, North Central Region, (304) 625-2803; Kim Smith, South Region, (304) 625-2761; or Stephanie Louk, West Region, (304) 625-2753.*

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# Prohibited Discrimination Under the Americans with Disabilities Act

By THOMAS D. COLBRIDGE, J.D.

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**T**he Americans With Disabilities Act (ADA)<sup>1</sup> protects individuals with disabilities from discrimination based upon their disability. The protection extends to discrimination in a broad range of activities, including public services,<sup>2</sup> public accommodations,<sup>3</sup> and employment.<sup>4</sup> The ADA's prohibition against disability discrimination applies to the vast majority of private and public employers in the United States.<sup>5</sup>

However, not all individuals with disabilities are protected by

the ADA. To be protected, individuals with disabilities must demonstrate that they are otherwise qualified for the job they seek, can perform the essential functions of that job with or without reasonable accommodation, and have a disability that substantially limits a major life activity and suffered discrimination because of their disability.<sup>6</sup>

## WORKPLACE DISCRIMINATION

The ADA prohibits employer discrimination against qualified

individuals with a disability because of their disability in regard to application procedures, hiring and firing, promotions, pay, training, and other "terms, conditions, and privileges of employment."<sup>7</sup> This broad prohibition applies to the entire range of employer-employee relations, including such matters as testing, work assignments, discipline, leave, benefits, and lay-offs and recalls. In addition, the ADA prohibits retaliation against, and coercion of, individuals who seek the protection of the act, or in any way help those who do.<sup>8</sup>

Congress provided several examples of workplace discrimination, such as<sup>9</sup>—

- limiting, segregating, or classifying disabled job applicants or employees in a way that denies them employment opportunities because of their disability;
- using the services of organizations, such as employment agencies, referral services, labor unions, or healthcare providers, that discriminate against the disabled;
- using standards, criteria, or administrative methods that discriminate on the basis of disability or perpetuate such discrimination;



- denying employment or job benefits to individuals because they have an association or relationship with someone who is disabled;
- not making a reasonable accommodation for the known disabilities of qualified applicants or employees or denying employment opportunities to them because of the obligation to reasonably accommodate their disabilities;
- using qualification standards, employment tests, or selection criteria that screen out or tend to screen out the disabled unless they are job related and consistent with business necessity; and
- using employment tests that measure applicants' disabilities, instead of their ability to do the job.

This is not an exhaustive list of all forms of workplace discrimination prohibited by the ADA. Some of these examples apply only to specific stages in the employer-employee relationship. However, one form of workplace discrimination—the failure to reasonably accommodate the known disabilities of applicants and employees—applies to all stages of the employment process. A discussion of the impact of the ADA on the workplace must begin with an understanding of the concept of reasonable accommodation.

## REASONABLE ACCOMMODATION

The ADA itself does not specifically define the term “reasonable accommodation.” It merely

provides examples of employers' actions that may constitute reasonable accommodation. The list includes making physical facilities accessible to and usable by disabled persons; restructuring jobs; changing work schedules; initiating reassignments; modifying or acquiring equipment; changing tests, training materials, or policies; and providing readers or interpreters.<sup>10</sup>

Reasonable accommodation of disabilities is best understood in terms of ADA philosophy. An accommodation is any change in the workplace environment or in the way things are done in the workplace that gives individuals with disabilities equal employment opportunities.<sup>11</sup>

The Equal Employment Opportunity Commission (EEOC) has established general guidelines regarding the reasonable accommodation requirement. The accommodation provided by the employer must be effective. That means it must give individuals with disabilities the same opportunities as individuals without disabilities to compete for and

perform jobs and to enjoy all of the benefits of the job.<sup>12</sup> It does not mean that the accommodation must ensure absolute equality of opportunity.<sup>13</sup>

The reasonable accommodation requirement applies only to needs in the workplace. It is not required to meet the personal needs of the employee with a disability or to fulfill personal preferences.<sup>14</sup> For example, employers do not have to accommodate disabled employees' preferences to work in warmer climates or provide them with devices that assist them in their lives both on and off the job.

An employer is obligated to accommodate only those persons who qualify for ADA protection,<sup>15</sup> and the accommodation obligation applies only to *known* disabilities.<sup>16</sup> Some disabilities are obvious, such as blindness or the loss of a limb. However, when the disability is not obvious, applicants and employees with disabilities have the responsibility to tell employers that accommodation is needed.<sup>17</sup> Employees do not have to use any “magic

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***...the ADA obligates employers to reasonably accommodate the disabilities of employees and applicants.***

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*Special Agent Colbridge is a legal instructor at the FBI Academy.*

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words” when seeking an accommodation. They simply must provide enough information to employers to alert them that accommodation may be needed.<sup>18</sup> When accommodation of a hidden disability is requested, employers are permitted to ask for documentation to support the request.<sup>19</sup> While it is the disabled employees’ obligation to seek an accommodation, the EEOC requires that employers notify applicants and employees that accommodation is available if needed.<sup>20</sup> Employers should post notices outlining accommodation availability and should consider including the information in employment applications, vacancy notices, and personnel policy manuals.

When the need for reasonable accommodation is established, the ADA encourages the individuals with disabilities and their employers to discuss the best ways to remove impediments caused by the disability.<sup>21</sup> The solution may be obvious and simple, and the problem quickly resolved. If the solution is not so obvious, the EEOC recommends an employer-employee dialogue involving several steps.

The parties should determine both the purpose and essential functions of the job held or sought by the individual with a disability.<sup>22</sup> They should then precisely identify the job-related limitations imposed by the disability and the various means by which the limitations may be accommodated to allow the disabled persons to perform the essential functions of the job. Employers should consider the preferences of the employees and applicants with disabilities, and they should identify

accommodations together.<sup>23</sup> If either the employees with disabilities or employers refuse to participate in, or obstruct, this interactive process, courts are likely to give them an unsympathetic reception.<sup>24</sup>

If several effective accommodations are identified through these discussions, employers are free to choose among the possibilities, considering both cost and disruption to the business.<sup>25</sup> If employers offer a reasonable accommodation,

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***...the ADA prohibits retaliation against, and coercion of, individuals who seek the protection of the act, or in any way help those who do.***

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the individuals with disabilities are free to reject it.<sup>26</sup> However, if disabled employees cannot perform the essential functions of the job without that accommodation, the employees may not be considered qualified under the ADA and, therefore, not protected by its provisions.<sup>27</sup>

One more general consideration regarding the reasonable accommodation is important. Employers are not required to change the essential functions of a job in order to accommodate a person’s disability.<sup>28</sup> The purpose of the reasonable accommodation is to permit the individual with a disability

to perform those functions, not to force employers to change the way they do business.

## **THE UNDUE HARDSHIP LIMITATION**

The ADA requires that employers make only *reasonable* accommodations for the disabled. Congress stated that employers need not accommodate individuals with disabilities if the accommodation “would impose an undue hardship on the operation of the business of the covered entity.”<sup>29</sup>

The ADA defines an undue hardship as an act involving significant difficulty or expense.<sup>30</sup> Congress specified these factors to be considered when deciding if accommodations are unduly burdensome: the nature of the accommodations and their costs; the total financial resources of the facility considering the accommodations; the employer’s overall resources, including financial resources, size, number of employees, and the type and location of the employer’s facilities; the nature of the operation of the employer; and the overall impact of the accommodations on the employer’s operation.<sup>31</sup> Clearly, large employers with substantial resources will have a more difficult time convincing the EEOC and the courts that accommodations are unreasonable.

## **OTHER EXAMPLES OF WORKPLACE DISCRIMINATION**

The ADA identifies several other employment practices that are discriminatory. Such practices are also prohibited by the statute.

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## Limiting, Segregating, or Classifying the Disabled

Limiting, segregating, or classifying the disabled in a way that adversely affects their job opportunities also is discrimination.<sup>32</sup> This prohibition is included to ensure that employers do not limit the employment opportunities of the disabled based upon myths and stereotypes or steer the disabled into certain work areas, job classifications, or promotional paths. The aim of the ADA is to ensure that the disabled are assessed on an individualized, case-by-case basis, and judged according to their abilities, rather than by their disabilities. Employers should not presume to know either what is best for disabled employees or what their capabilities are.<sup>33</sup>

### Discriminatory Contractual Arrangements

It is also discrimination for an employer to participate in contractual or other arrangements that subject its applicants and employees with disabilities to discrimination.<sup>34</sup> As one court put it, the ADA prohibits “an entity from doing through a contractual relationship what it may not do directly.”<sup>35</sup> For example, using an employment or referral agency that discriminates against the disabled to screen applicants could subject employers to discrimination claims under the ADA.

Two concepts are important regarding this form of discrimination. Employers are liable only for discrimination suffered by their *own* employees as a result of these arrangements. They are not liable

because of the contractual arrangement for discrimination by the contractor against the contractor’s own disabled employees.<sup>36</sup> In addition, the EEOC has made it clear that employers are liable for any discrimination suffered by its employees whether or not employers intended for the contractual relationship to be discriminatory.<sup>37</sup>



### Relationship or Association with Disabled Persons

The ADA also prohibits employers from discriminating against applicants or employees because of their association or relationship with people known by the employer to be disabled.<sup>38</sup> In other words, if applicants or employees are otherwise qualified for employment, employers may not deny them job opportunities or benefits simply because they fear their associates or relations with disabilities will increase the employers’ medical costs or cause excessive absenteeism by their employees. This protection extends to otherwise qualified persons even if they are not disabled themselves.<sup>39</sup> This is another provision

of the ADA designed to prevent adverse job actions by employers based upon unfounded assumptions and stereotypes arising from employees’ associations with the disabled.<sup>40</sup> Examples of this form of prohibited discrimination include employers’ refusal to hire applicants based upon an unfounded assumption that they would miss work to care for a disabled relative or firing employees who do AIDS volunteer work out of an unfounded fear that the employees will contract AIDS.<sup>41</sup>

While the ADA prohibits discrimination against otherwise qualified applicants and employees because of their association or relationship with disabled persons, the ADA does not require the employer to accommodate the relative’s or associate’s disability. For example, employees who have disabled spouses are not entitled to flexible work schedules or additional time off beyond that mandated by law or contract to care for the family member with a disability. The accommodation obligation extends only to qualified disabled applicants or employees.<sup>42</sup>

### Utilization of Qualification Standards, Criteria, and Tests

Broadly stated, the ADA prohibits all employer discrimination against qualified individuals with disabilities in regard to all aspects of the employment relationship.<sup>43</sup> The final three examples of discrimination included in the ADA make it clear that Congress intended to bar disability discrimination not only in hiring and firing decisions, but also in all

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employment decisions impacting the disabled. These additional employment decisions include those regarding advancement, compensation, training, and “other terms, conditions, and privileges of employment.”<sup>44</sup>

Specifically, the ADA prohibits covered employers from using any “standard, criteria, or methods of administration” that result in discrimination against the disabled.<sup>45</sup> This broad language has no limitation regarding the types of employment actions covered by the statute. Consequently, applicants and employees with disabilities may use the ADA to attack employer decisions regarding hiring, firing, promotions, transfers, compensation, reductions in force, provision of benefits—literally any employment decision that adversely impacts them.

Employers also are prohibited from using qualification standards, employment tests, and other selection criteria that “screen out or tend to screen out” a class of individuals with disabilities, unless the test, standard, or criteria is shown to be both job related and consistent with business necessity.<sup>46</sup> The prohibition extends to all types of selection criteria, including employment tests, vision and hearing requirements, and other physical requirements.<sup>47</sup>

Finally, employers are prohibited from selecting and administering employment tests that measure only individuals’ disabilities rather than their actual abilities, skills, and aptitude to do the job.<sup>48</sup> This provision is meant to ensure that the disabled who are otherwise qualified for employment

are not barred from employment simply because their disability prevents them from taking a test. For example, people with dyslexia may not be able to take a written test. If employers are aware of the applicants’ dyslexia, they are required to reasonably accommodate their disability during the testing procedure (i.e., provide a reader or offer an oral test).<sup>49</sup> The only exception to this requirement is where the test is meant to judge a specific skill that is required to do the job being sought. For example, if applicants must be able to read to perform the job being

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***When accommodation of a hidden disability is requested, employers are permitted to ask for documentation to support the request.***

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sought, employers are permitted to test for that skill, without accommodation, because applicants who cannot read are not qualified for the position and, therefore, not protected by the ADA.<sup>50</sup>

The language that Congress used in prohibiting the use of discriminatory employment standards, criteria, and tests makes it clear that both intentional and unintentional discrimination violate the act. Using standards that “have the effect”<sup>51</sup> of discrimination on the basis of disability or that “screen out or

tend to screen out”<sup>52</sup> the disabled is prohibited.

Prohibited unintentional discrimination against the disabled is known as disparate impact<sup>53</sup> (as opposed to disparate treatment or intentional discrimination). In order to challenge an employment standard or test under the ADA, disabled people only must show that the challenged standard or test has a disproportionate adverse impact<sup>54</sup> on the disabled claimant or on disabled people as a whole. They do not have to prove that the employer intended for the standard or test to be, or even knew that the standard or test was, discriminatory.

## **MEDICAL EXAMINATIONS AND INQUIRIES**

### **The Preemployment Stage**

During the preemployment (application) stage of the employment process, employers are not permitted to ask any questions or conduct any medical examinations that identify applicants’ disabilities or the nature and extent of their disabilities.<sup>55</sup> This prohibition may even apply if applicants are not disabled.<sup>56</sup> Employers can, however, make preemployment inquiries concerning applicants’ ability to perform, with or without reasonable accommodation, essential, job related functions.<sup>57</sup> For example, employers may ask one-legged applicants for a home washing machine repairman position to explain or demonstrate how they would negotiate basement steps carrying repair tools. However, the employer may not inquire regarding the nature or severity of the disability.<sup>58</sup>

## The Conditional Offer Stage

Once employers decide to hire applicants, they may require those applicants to undergo medical examinations and even make their job offers conditional on passing the medical examinations.<sup>59</sup> There is no requirement that these medical examinations be job related or a matter of business necessity. The only prerequisites established by the statute are that employers require that all applicants (disabled and nondisabled) be subject to medical examinations and all medical information be kept confidential.<sup>60</sup>

If medical examinations conducted at the conditional offer stage reveal a disability, employers are required to consider reasonable accommodations that would permit the disabled applicant to perform the essential functions of the job. If no reasonable accommodation is possible, employers may withdraw the conditional offer of employment.<sup>61</sup>

## Medical Examinations of Employees

Employers may require their employees to undergo medical examinations or inquire if they are disabled only if the inquiry or examination is job related and a matter of business necessity. Practically, this limitation means that employers may make inquiries regarding employees' disabilities or require medical examinations only when questions arise concerning their employees' ability to perform the essential functions of their jobs or when employers are required to by medical standards, law, or business

necessity.<sup>62</sup> Courts have taken the view that requiring employees to undergo fitness-for-duty examinations does not violate the ADA when there is an honest question regarding the employees' ability to perform the essential functions of the job or whether employees represent a danger.<sup>63</sup>

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Many employers have voluntary wellness programs that include testing for high blood pressure, weight, and disease. The ADA does not prohibit such medical screening if the programs are voluntary, the information collected is kept confidential, and the information is not used to limit eligibility for health benefits.<sup>64</sup>

## Drug Testing

Tests for the use of illegal drugs<sup>65</sup> are not considered medical examinations for purposes of the ADA.<sup>66</sup> In fact, the ADA is neutral regarding the issue of testing for illegal drugs.<sup>67</sup> Employers consequently may inquire about applicants' or employees' current illegal use of drugs at any stage of the

employment process and may require applicants and employees to submit to drug tests, whether or not the tests are job-related and a matter of business necessity.<sup>68</sup>

## DEFENSES TO DISCRIMINATION CLAIMS

In order to win a disability discrimination case, plaintiffs must establish that they are qualified for the position sought, can perform the essential functions of the job with or without reasonable accommodation, and suffered an adverse employment action because they are disabled.<sup>69</sup> If plaintiffs cannot prove any one of these elements, their claims may be dismissed.<sup>70</sup>

## Nondiscriminatory Reasons

Once ADA claimants have proved the basic elements of their cases, the burden shifts to employers to show that the adverse employment action was taken for legitimate, nondiscriminatory reasons.<sup>71</sup> If employers come forward with such reasons, the burden will shift back to the claimant to show that the legitimate reasons offered by employers are pretexts for disability discrimination.<sup>72</sup>

## Undue Hardship Limitations

Although the ADA obligates employers to reasonably accommodate the disabilities of employees and applicants, it does not require accommodations if they would create undue hardships on employers.<sup>73</sup> Consequently, employers may defend against law suits by showing that they failed to accommodate plaintiffs' disabilities because the accommodation was too costly,

disruptive, extensive, or would fundamentally alter the nature or operation of their business.<sup>74</sup>

### **Job related, Business-necessity Qualifications and Standards**

Some claims of disability discrimination allege that the employer used employment qualifications, standards, or tests that screened out or tended to screen out the disabled. Even if that proves to be true, employers may defend the standards or tests by showing they are job related, matters of business necessity, and that the disability cannot otherwise be reasonably accommodated.<sup>75</sup> A standard or test is job related if it concerns any skill or trait that is required to do the job under consideration. It is a matter of business necessity if it concerns an essential function of the job applied for or desired.

### **Direct Threat Limitation**

The ADA also permits employers to take adverse employment actions against the disabled if they can demonstrate that they pose a direct threat to the health or safety of other employees.<sup>76</sup> The Supreme Court has made it clear that the threat must be a significant one, as viewed from the perspective of employers.<sup>77</sup> To claim this defense, employers must show that the threat assessment is objectively reasonable, meaning it is based upon medical or other objective evidence. A mere belief that the disabled person poses a danger, even if held in good faith, is not enough to claim this defense.<sup>78</sup>

### **CONCLUSION**

Any employers' decision or action that adversely impacts disabled

applicants or employees subjects them to claims of disability discrimination under the ADA. Disability discrimination claims can arise from decisions made during the application process, as well as during the employer-employee relationship. Discrimination claims can even arise when employers do not intentionally discriminate.

Many claims of workplace discrimination allege a failure to reasonably accommodate known disabilities of applicants or employees. The ADA obligates employers to make such accommodations unless to do so would create an undue

***“Employers are not required to change the essential functions of a job in order to accommodate a person's disability.”***

hardship for them. The ADA also recognizes other forms of workplace discrimination: classifying the disabled in a way that limits their employment opportunities; using tests and standards that adversely impact the disabled; discriminating against people who have a relationship with a disabled person; and entering into a contract that results in, or perpetuates, disability discrimination against the employers' own applicants or employees.

If a claim of disability discrimination is made, employers may use various defenses. They may argue that their decision was made for legitimate, nondiscriminatory reasons. They also may show that they could make no reasonable accommodation for the person's disability without undue hardship. If the claim is that the employer's test or standard resulted in discrimination, employers may show that the standard or test is job related and a matter of business necessity. Employers also may demonstrate that hiring or keeping the disabled employee would pose a direct risk of harm to others in the workplace. ♦

### **Endnotes**

<sup>1</sup> 42 USC 12101 et. seq.

<sup>2</sup> 42 USC 12131-12165.

<sup>3</sup> 42 USC 12181-12189.

<sup>4</sup> 42 USC 12111-12134.

<sup>5</sup> The United States (with the exception of Congress for some purposes), Indian tribes, and tax exempt bona fide private membership clubs are not covered by the act. See 42 USC 12111(5)(B). The act also exempts employers with fewer than fifteen employees. See 42 USC 12111(5)(A). The application of the ADA to states and state agencies is unclear. Some courts have held that states are not subject to the ADA because of the provisions of the Eleventh Amendment to the Constitution. See *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999).

<sup>6</sup> For a more comprehensive discussion of individuals' qualification for ADA protection, see Thomas D. Colbridge, "The Americans with Disabilities Act," *FBI Law Enforcement Bulletin*, September 2000, 26-31.

<sup>7</sup> 42 USC 12112(a).

<sup>8</sup> 42 USC 12203.

<sup>9</sup> 42 USC 12112(b)(1)-(7).

<sup>10</sup> 42 USC 12111(9)(A) and (B).

<sup>11</sup> 29 CFR Pt.1630, App. 1630.2(o).

<sup>12</sup> Equal Employment Opportunity Commission, "Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act," March 1, 1999.

<sup>13</sup> *Id.* See also Richard N. Block and Benjamin W. Wolkinson, *Employment Law: The Workplace Rights of Employees and Employers*, (Oxford, UK: Blackwell Publishers, Inc. 1999), 143-144.

<sup>14</sup> 29 CFR Pt. 1630, App., 1630.9.

<sup>15</sup> *Supra* note 6.

<sup>16</sup> 42 USC 12112(b)(5)(A).

<sup>17</sup> *Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1997), *cert. denied* 118 S. Ct. 871 (1988).

<sup>18</sup> *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, *cert. denied* 117 S. Ct. 586 (1996).

<sup>19</sup> 29 CFR Pt. 1630, App., 1630.9.

<sup>20</sup> Equal Employment Opportunity Commission, "Technical assistance in the employment provisions of the ADA: explanation of key legal requirements," Bureau of National Affairs, January 28, 1992, *Daily Labor Report*, No.18.

<sup>21</sup> *Id.* See also *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278 (11th Cir. 1997).

<sup>22</sup> For a discussion of the concept of "essential functions" of a job, see *supra* note 6 (Colbridge).

<sup>23</sup> *Supra* note 16.

<sup>24</sup> *Schmidt v. Methodist Hospital of Indiana, Inc.* 89 F.3d 342 (7th Cir. 1996).

<sup>25</sup> *Supra* note 16.

<sup>26</sup> 42 USC 12201(d).

<sup>27</sup> *Keever v. City of Middletown*, 145 F.3d 809 (6th Cir. 1998), *cert. denied* 119 S. Ct. 407 (1998).

<sup>28</sup> 29 CFR Pt. 1630, App. 1630.2(o); *Benson v. Northwest Airlines, Inc.* 62 F.3d 1108 (8th Cir. 1995).

<sup>29</sup> 42 USC 12112(b)(5)(A).

<sup>30</sup> 42 USC 12111 10(A).

<sup>31</sup> 42 USC 12111 10(B).

<sup>32</sup> 42 USC 12112(b)(1).

<sup>33</sup> 29 CFR 1630.5.

<sup>34</sup> 42 USC 12112(b)(2).

<sup>35</sup> *Piquard v. City of East Peoria*, 887 F.Supp 1106 (C.D.Ill. 1995).

<sup>36</sup> 29 CFR Pt. 1630, App., 1630.6.

<sup>37</sup> *Id.*

<sup>38</sup> 42 USC 12112(b)(4).

<sup>39</sup> 29 CFR Pt. 1630, App. 1630.8.

<sup>40</sup> *Oliveras-Sifre v. Puerto Rico Department of Health*, 241 F.3d 23 (1st Cir. 2000).

<sup>41</sup> 29 CFR Pt. 1630, App., 1630.8.

<sup>42</sup> *Der Hartog v. Wasatch Academy*, 129 F.3d 1076 (10th Cir. 1997).

<sup>43</sup> 42 USC 12112(a).

<sup>44</sup> *Id.*

<sup>45</sup> 42 USC 12112(b)(3).

<sup>46</sup> 42 USC 12112(b)(6).

<sup>47</sup> 29 CFR Pt.1630, App., 1630.10.

<sup>48</sup> 42 USC 12112(b)(7).

<sup>49</sup> 29 CFR Pt.1630, App., 1630.11.

<sup>50</sup> *Id.*

<sup>51</sup> *Supra* note 45.

<sup>52</sup> *Supra* note 46.

<sup>53</sup> See generally *Griggs v. Duke Power Company*, 401 U.S. 424 (1971)(disparate treatment claim under Title VII); *Watson v. Forth Worth Bank and Trust*, 487 U.S. 977 (1988)(Title VII claim); and *Smith v. Xerox Corporation*, 196 F.3d 358 (2nd Cir. 1999).

<sup>54</sup> A disproportionate adverse impact is judged on a case-by-case basis. Generally, the EEOC considers an adverse impact disproportionate if the selection rate for the protected class (in this case, disabled persons) is less than 80 percent (4/5ths) of the class with the highest selection rate. This standard is known as the "4/5ths Rule." 29 CFR 1607.4(D).

<sup>55</sup> 42 USC 12112(d)(2)(A); *Harris v. Harris & Hart, Inc.*, 206 F.3d 838 (9th Cir. 2000).

<sup>56</sup> *Griffin v. Steeltek, Inc.*, 160 F.3d 591 (10th Cir. 1998), *cert. denied Steeltek, Inc. v. Griffin*, 526 U.S. 1056 (1999).

<sup>57</sup> 42 USC 12112(d)(2)(B).

<sup>58</sup> 29 CFR Pt.1630, App., 1630.14(a).

<sup>59</sup> 42 USC 12112(d)(3); 29 CFR Pt.1630, App., 1630.14(b); *Buchanan v. City of San Antonio*, 85 F.3d 196 (5th Cir. 1996); *Holiday v. City of Chattanooga*, 206 F.3d 637 (6th Cir. 2000).

<sup>60</sup> 42 USC 12112(d)(3)(A)and(B). There are three exceptions to this confidentiality requirement: supervisors and managers may be given medical information regarding restrictions on the work and duties of the employee, as well as an accommodations that may be necessary; safety personnel may be told of conditions that may require their attention; and government compliance officials may be supplied relevant information.

<sup>61</sup> *Supra* note 59.

<sup>62</sup> 29 CFR Pt.1630, App., 1630.14(c)

<sup>63</sup> *Yin v. State of California*, 95 F.3d 864 (9th Cir. 1996); *Sullivan v. River Valley School District*, 197 F.3d 804 (6th Cir. 1999); *Krocha v. City of Chicago*, 203 F.3d 507 (7th Cir. 2000).

<sup>64</sup> 29 CFR Pt.1630, App., 1630.14(d).

<sup>65</sup> For a more comprehensive discussion of the ADA's treatment of drug and alcohol abuse,

see Thomas D. Colbridge, "Defining Disability Under The Americans with Disabilities Act," *FBI Law Enforcement Bulletin*, October 2000, 28-32.

<sup>66</sup> 42 USC 12114(d)(1).

<sup>67</sup> 42 USC 12114(d)(2).

<sup>68</sup> *Buckley v. Consolidated Edison of New York, Incorporated*, 155 F.3d 150 (2nd Cir. 1998).

<sup>69</sup> *McPaul v. Board of Commissioners of Madison County*, 2000 WL 1156427 (7th Cir. 2000); *Otting v. J.C. Penney Company*, 2000 WL 1060385 (8th Cir. 2000).

<sup>70</sup> For a fuller discussion of the concepts of qualified individuals and disability under the ADA, see *supra* note 6 (Colbridge); and *supra* note 65 (Colbridge) October 2000, 28-32.

<sup>71</sup> *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)(Title VII); *Kocsis v. Mult-Care Management, Inc.*, 97 F.3d 876 (6th Cir. 1996).

<sup>72</sup> *Id.*; *Collings v. Longview Fibre Co.*, 63 F.3d 828 (9th Cir. 1995), *cert. denied* 116 S. Ct. 711.

<sup>73</sup> 42 USC 12112(b)(5)(A).

<sup>74</sup> 29 CFR Pt.1630, App., 1630.2(p); *Cisneros v. Wilson*, 2000 WL 1336658 (10th Cir. 2000); *Holbrook v. Kerrville State Hospital*, 112 F.3d 263 (5th Cir. 1998).

<sup>75</sup> 42 USC 12113(a).

<sup>76</sup> 42 USC 12113(b); *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998); *Rizzo v. Child's World Learning Centers, Inc.*, 213 F.3d 209 (5th Cir. 2000).

<sup>77</sup> *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) (Rehabilitation Act case); *Bragdon v. Abbott*, *supra* note 74.

<sup>78</sup> *Id.*

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*Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.*

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# Focus on the Media

## ***Fine Tuning Your News Briefing***

By Ancil B. Sparks and Dennis D. Staszak



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**T**oday's modern law enforcement agency rivals nearly any Fortune 500 corporation in complexity, their use of technology, and especially their value to the community. As with any large corporation, law enforcement agencies quickly can become the focus of media attention around the world when a crisis or major event occurs. Today, the public recognizes that law enforcement activities impact more than just the crime rate—they can affect citizens' health and social welfare and impact environmental and economic issues as well. Most law enforcement executives recognize that they no longer have a choice whether they deal with the media. Because the media covers issues of public interest, prudent managers should realize the importance of proactively using the media as a tool to get their department's message out to the community.

Most public information officers (PIOs) and law enforcement spokespersons have a stable relationship with the media and a policy of openness and

cooperation, without intentional deception. When a newsworthy event occurs, PIOs should disseminate facts to the public as quickly as possible by bringing them to the attention of the media. To accomplish this, PIOs frequently employ a news briefing. Using this method, the department quickly disseminates the information, the media accurately can report a story, and, ultimately, the public receives factual information and becomes better informed.

To assess their agencies' news briefing program, PIOs should ask themselves two questions. Are they satisfied with stable media relations programs and good news briefings? Do they constantly strive to present the information in the best means possible? With some fine tuning and recollection of what the media wants, PIOs can turn news briefings into comprehensive, first-rate performances that prove valuable to the department and the community.

### **PREINTERVIEW PLANNING**

Designated PIOs or department spokespersons should consider numerous factors prior to conducting a meaningful news briefing. For instance, when possible, the PIOs should prepare by considering the target audience, anticipating questions, and practicing responses to the questions. Further, PIOs should have an agreement or establish ground rules with the media prior to conducting the actual briefing. In fact, PIOs can inform reporters of particular topics they will not discuss during the interview, or they can agree to provide related resource material (e.g., maps and diagrams) after the briefing.

### **Analyzing the Audience**

PIOs often overlook the fact that professional reporters represent a conduit for relaying news to the community. Law enforcement officials should remember that when they talk to a reporter, they are talking, essentially, to their community. Department spokespersons should conduct news briefings as though actual community members are sitting in front of them and listening to every word spoken. Using this technique may force PIOs to change their language and demeanor. They must remember that a news briefing not only conveys information, but provides assurance to the citizens that the department serves its community. Similarly, law enforcement

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spokespersons always must remember that their agency's employees also listen to what they say and how they say it and form opinions on their management's leadership and support of their agency.

### **Anticipating the Questions**

When law enforcement responds to a crisis, PIOs immediately should consider the need to hold a news conference and make a statement to the media. When the media questioning begins, PIOs often respond with statements, such as "I can't comment on that right now," or "we are not releasing that information yet." Although in many cases PIOs have justification to refuse comment on certain information, they frequently use those standard refrains when unprepared to answer a particular question.

Department spokespersons should take time to write down questions that reporters could ask and develop responses to them as well. This may help PIOs recall answers to questions asked later and will allow for reflection on the most appropriate way to answer the questions. Additionally, PIOs should write down at least three questions they would feel most uncomfortable answering if asked by a reporter. Depending on other critical issues involving the department (e.g., prior controversial use of deadly force), these written questions and answers may or may not be on the current topic. PIOs should exercise time and patience when writing answers to these questions and preparing suitable, polite, and diplomatic statements to help keep discussions focused on the current issue. In doing so, department spokespersons can reinforce their own self-confidence.

Prior to actually holding the news briefing, PIOs should practice aloud and enlist the help of their staff to help conduct a mock interview. This rehearsal will help them become better organized and more informed about the topic.

### **PUTTING "LIFE" IN THE NEWS BRIEFING**

To keep a story interesting, most reporters incorporate certain features in their report, such as

appropriate visuals, relevant sound bites, and the "human element." Too frequently and quite unintentionally, PIOs conduct the news briefing without giving serious thought to these features. Oftentimes, PIOs merely provide routine facts, display seized drugs or weapons, and then end the briefing. Most reporters want additional information to make a story more thorough for the public. Many times, PIOs can provide extra information by simply giving additional thought to the preparation and structure of the news briefing.

PIOs can stimulate a briefing by detailing the "how" and "why" of the issue. This will provide the reporter with a more detailed account of what hap-

pened and may help prevent speculation by the reporter "filling in the blanks."

Many law enforcement agencies have added additional life to news briefings by making the officer, lead detective, or department subject-matter expert available to answer questions upon conclusion of the prepared remarks by PIOs. Those officers who do not face the media on a routine basis may experience anxiety or have some reluctance about facing the media; however, these symp-

toms vanish quickly if the officer has received prior police-media relations training and assistance in understanding and interpreting the department's media policy. Oftentimes, involving officers in news briefings and helping them become more comfortable in responding to questions, by preparing them beforehand, may even lead officers to a sense of self-pride in appearing on television and confidently representing their department.

### **POSTINTERVIEW CRITIQUE**

Far too often, the absence of controversy or ability to avoid probing questions leaves PIOs with the mistaken belief that the news briefing went well, which leads them to conducting each briefing in a similar style. After each briefing, they await, often days or weeks, for the next briefing while continuing with their regular duties.

“

**...PIOs should have an agreement or establish ground rules with the media prior to conducting the actual briefing.**

”

PIOs should not have merely adequate news briefings, as this often leads an agency to a state of complacency or even stagnation. PIOs can improve performance effectively by critically examining and critiquing their own actions and reactions after conducting a news briefing. PIOs should consider occasionally video recording a briefing for later review to determine any mannerisms, responses, or idiosyncracies that they can improve to result in more effective news briefings. In doing so, department spokespersons will find ways to physically, psychologically, or academically prepare themselves and become a believable and influential representative of the department.

## CONCLUSION

A news briefing can either glorify or destroy the reputation of the principle information officer, as well

as the law enforcement agency itself. By coming to the briefing prepared and conducting the interview with confidence, control, and professionalism, PIOs will help to deliver a message in a manner that the public will receive well. Creating an atmosphere of mutual understanding, trust, and respect will solidify the department, the media, and most important, the community.

The PIOs should use each news briefing as an opportunity to convey a message to the public in the most effective and professional way. Critically reviewing and examining each media briefing will lead to changes that will make future briefings more dynamic and comprehensive. ♦

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*Special Agents Sparks and Staszak teach media relations at the FBI Academy.*

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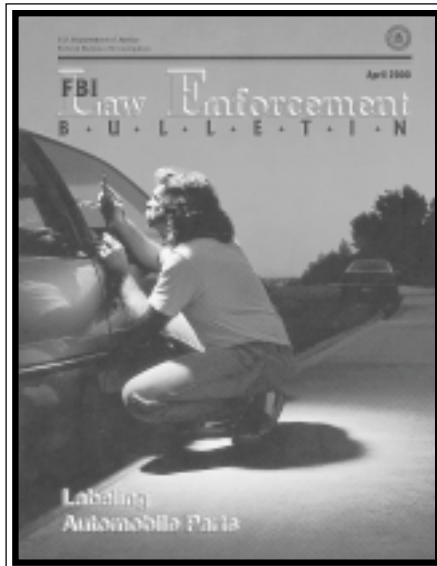
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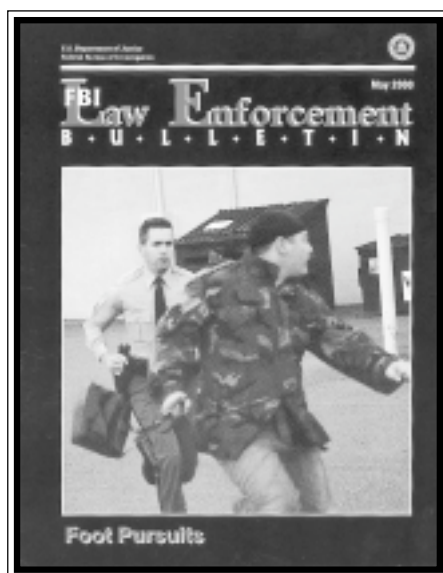
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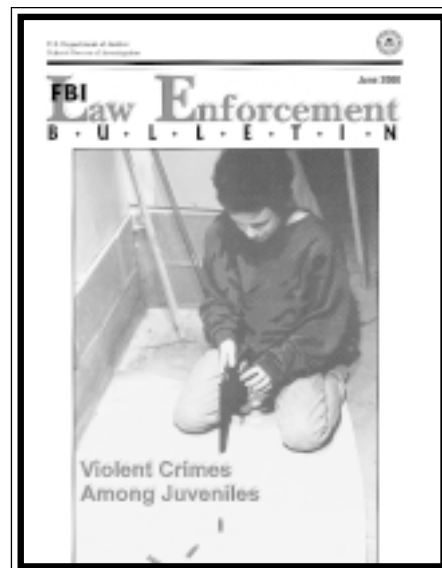
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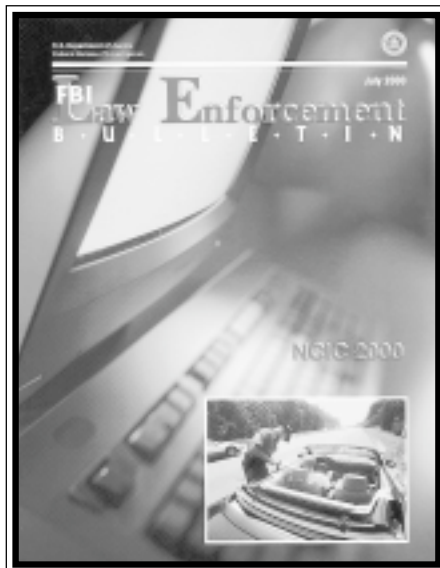
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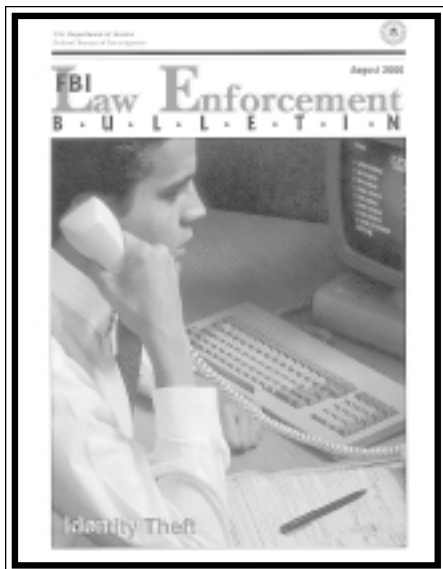
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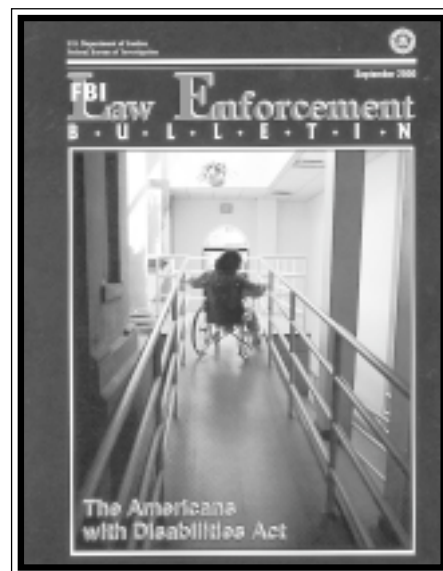
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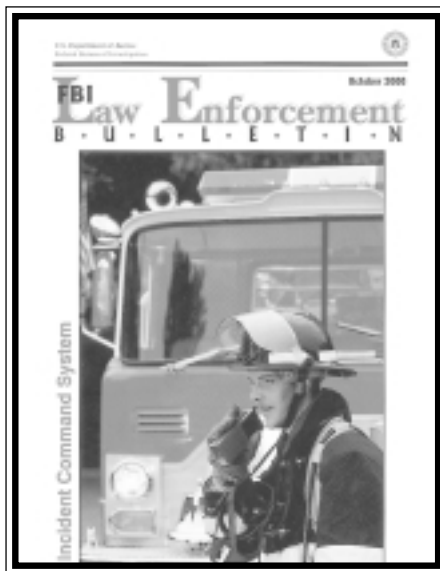
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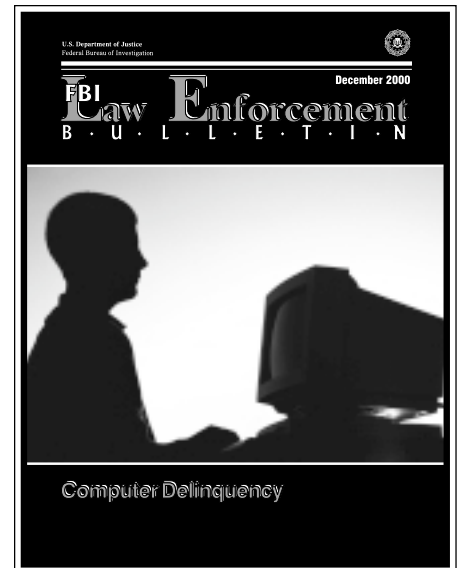
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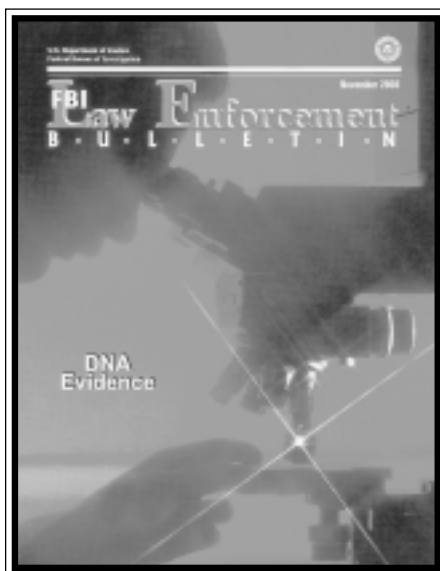
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# The Bulletin Notes

Law enforcement officers are challenged daily in the performance of their duties; they face each challenge freely and unselfishly while answering the call to duty. In certain instances, their actions warrant special attention from their respective departments. The *Bulletin* also wants to recognize their exemplary service to the law enforcement profession.



Officer Fitzgerald



Officer Oehmke



Lieutenant Nasalroad

Shortly after midnight, Officers Patrick Fitzgerald and Michael Oehmke and Lieutenant Lonnie Nasalroad of the St. Peters, Missouri, Police Department responded to a structure fire where they learned that an individual with physical disabilities was inside. Officers Fitzgerald and Oehmke and Lieutenant Nasalroad entered the burning building and located the victim,

who weighs approximately 800 pounds, in a rear bedroom. The victim, who initially was unwilling to accompany the officers from the residence, laid down on the floor so the officers could drag him to safety. The courageous actions of Officers Fitzgerald and Oehmke and Lieutenant Nasalroad prevented the victim from suffering serious physical injury or death.



Officer Fench



Officer Milliman

Officers Ralph Fench and Chris Milliman of the Forest Park, Georgia, Police Department responded to a burglary at a jewelry store. Upon arrival, they observed a suspect brandishing a pistol inside the store. The officers chased the suspect as he fled the store on foot. As the subject started to cross a busy state highway, he pointed his weapon at Officer Fench and the officers fired at the suspect, who jumped in front of and stopped a car carrying two females. The suspect, still armed, forced his way into the driver's seat. Reaching the vehicle, Officer Milliman struggled with the suspect while Officer Fench approached the passenger side, seized the weapon, and

disarmed the suspect. The brave actions of Officers Fench and Milliman resulted in the arrest of the suspect and saved two innocent motorists from injury or kidnapping.

Nominations for the **Bulletin Notes** should be based on either the rescue of one or more citizens or arrest(s) made at unusual risk to an officer's safety. Submissions should include a short write-up (maximum of 250 words), a separate photograph of each nominee (limit 3), and a letter from the department's ranking officer endorsing the nomination. Submissions should be sent to the Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Madison Building, Room 209, Quantico, VA 22135.

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## Patch Call



The patch of the Orange, Texas, Police Department features the colors of the Lone Star state. An oil well and green trees on the patch depict two of the area's largest industries—oil and lumber.



The St. Joseph, Missouri, Police Department patch features the Pony Express rider traversing the great plains on the way to Sacramento, California. The date "1860" depicted on the patch is the year the Pony Express started in St. Joseph, Missouri.