

Understanding the ADA

The Blog of William D. Goren, J.D. LL.M.

Reconsider Using *Graham v. Connor* as the Basis for Training Police on Excessive Force

By [William Goren](#) on September 12, 2018

Before starting the blog entry of the week, I want to wish all my Jewish brethren a happy new year. Here is hoping that it is a healthy, happy, and successful new year for you and your families.

It seems in Georgia that there is an epidemic of police shootings. In fact, I read the other day in the Atlanta Journal-Constitution, that police shootings in Georgia are way above the pace in previous years. That article also mentioned that *Graham v. Connor* was the seminal case for training police forces on whether force is excessive. So, I pulled *Graham v. Connor*. When I did that, it became pretty obvious to me that if this particular case is the one being used for training police on excessive force, then people doing the training really need to reconsider. This blog entry will talk about that case, explain why it is not a good idea for trainers to be using this case as the vehicle for training police forces on excessive force, and then will talk about a case that trainers may want to use instead. As usual, the blog entry is divided into categories, and they are: *Graham v. Connor*; *Graham v. Connor* looked familiar; *Graham v. Connor* thoughts; *Vos v. City of Newport Beach* introduction and facts; *Vos* court's reasoning-excessive force; *Vos* court's reasoning-ADA; and takeaways. Of course, the reader is free to focus on any or all of the sections of the blog entry.

I

Graham v. Connor

In ***Graham v. Connor***, the petitioner, a type I diabetic, asked his friend to drive him to a convenience store to purchase orange juice to counteract the onset of insulin reaction. Upon entering the store and seeing the number of people ahead of them, he hurried out and asked his friend to drive him to a friend's house instead. A police officer became suspicious after seeing

Graham hastily enter and leave the store, and so he followed the car. He made an investigative stop, ordering Graham to wait while he found out what had happened in the store. Backup police officers arrived on the scene, handcuffed Graham, and ignored or rebuffed attempts to explain and treat Graham's condition. During the encounter, Graham sustained multiple injuries. Once the police officer learned that nothing that happened in the store, he was released.

As the court put it:

On November 12, 1984, Graham, a diabetic, felt the onset of an insulin reaction. He asked a friend, William Berry, to drive him to a nearby convenience store so he could purchase some orange juice to counteract the reaction. Berry agreed, but when Graham entered the store, he saw a number of people ahead of him in the checkout **3899*38910** line. Concerned about the delay, he hurried out of the store and asked Berry to drive him to a friend's house instead.

Respondent Connor, an officer of the Charlotte, North Carolina, Police Department, saw Graham hastily enter and leave the store. The officer became suspicious that something was amiss and followed Berry's car. About one-half mile from the store, he made an investigative stop. Although Berry told Connor that Graham was simply suffering from a "sugar reaction," the officer ordered Berry and Graham to wait while he found out what, if anything, had happened at the convenience store. When Officer Connor returned to his patrol car to call for backup assistance, Graham got out of the car, ran around it twice, and finally sat down on the curb, where he passed out briefly.

In the ensuing confusion, a number of other Charlotte police officers arrived on the scene in response to Officer Connor's request for backup. One of the officers rolled Graham over on the sidewalk and cuffed his hands tightly behind his back, ignoring Berry's pleas to get him some sugar. Another officer said: "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M. F. but drunk. Lock the S. B. up." App. 42. Several officers then lifted Graham up from behind, carried him over to Berry's car, and placed him face down on its hood. Regaining consciousness, Graham asked the officers to check in his wallet for a diabetic decal that he carried. In response, one of the officers told him to "shut up" and shoved his face down against the hood of the car. Four officers grabbed Graham and threw him headfirst into the police car. A friend of Graham's brought some orange juice to the car, but the officers refused to let him have it. Finally, Officer Connor received a report that Graham had done nothing wrong at the convenience store, and the officers drove him home and released him.

39011*39012 At some point during his encounter with the police, Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder; he also claims to have developed a loud ringing in his right ear that continues to this day. He commenced this action under 42 U. S. C. § 1983 against the individual officers involved in the incident, all of whom are respondents here, **[1]13** alleging that they had used excessive force in making the investigatory stop, in violation of “rights secured to him under the Fourteenth Amendment to the United States Constitution and 42 U. S. C. § 1983.” Complaint ¶ 10, App. 5.**[2]14** The case was tried before a jury. At the close of petitioner’s evidence, respondents moved for a directed verdict. In ruling on that motion, the District Court considered the following four factors, which it identified as “[t]he factors to be considered in determining when the excessive use of force gives rise to a cause of action under § 1983”: (1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) “[w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.” 644 F. Supp. 246, 248 (WDNC 1986). Finding that the amount of force used by the officers was “appropriate under the circumstances,” that “[t]here was no discernable injury inflicted,” and that the force used “was not applied maliciously or sadistically for the very purpose of causing harm,” but in “a good faith effort to maintain or restore order in the face of a potentially explosive **39115*39116** situation.” *id.*, at 248-249, the District Court granted respondents’ motion for a directed verdict.

Graham brought suit alleging they had used excessive force in making the stop. The court held that the standard for evaluating whether force was excessive was, “objective reasonableness,” and vacated and remanded the decision.

II

Graham v. Connor looked familiar?

I could not believe it when I read the facts of Graham v. Connor because just recently the Sixth Circuit affirmed a jury verdict in favor of the EEOC for \$277,565 where Dollar General terminated a diabetic employee left with very little choice under company policies and decisions made by its employees to drink a \$1.69 bottle of orange choose to deal with a diabetic attack and then was promptly terminated for violating company policies. You can see Jon’s write up of the Sixth Circuit affirming the jury verdict [here](#), and the **Sixth Circuit’s affirmance of the jury verdict here.**

III

Graham v. Connor Thoughts

1. *Graham v. Connor* was a 1989 US Supreme Court case. Of course, that means the case was decided prior to the advent of the ADA (signed on July 26, 1990).
2. Absolutely no doubt in my mind that **under the case we discussed here**, the police force would be on the hook for damages for violating title II of the ADA.
3. This case was almost 30 years ago and things have changed considerably, especially with respect to the rights of persons with disabilities. *Graham* facts may well be excessive today even under an objective reasonableness standard. Even assuming no excessive force claim, if this happened today there undoubtedly would be a successful title II claim as well as a successful Rehabilitation Act claim.

IV

Vos v. City of Newport Beach Introduction and Facts

A much better case that trainers may want to consider using when it comes to excessive force and ADA compliance would be **Vos v. City of Newport Beach** decided by the Ninth Circuit on June 11, 2018. Here are the facts.

At approximately 8:15 PM on May 29, 2014, plaintiff entered a 711 convenience store. He became very agitated and ran around the store shouting things like, “shoot me already, dog.” A person called 911. For the next six minutes, plaintiff ran around the store cursing at people. Meanwhile, video footage showed other customers going about their business of shopping and checking out at the cash register. The Newport Beach Police Department dispatch stated that the reporting party was advising that the subject was holding a pair of scissors inside the store and there were still people inside. At one point, plaintiff grabbed and immediately released a 711 employee, yelling, “I’ve got a hostage!” An Officer Kresge arrived on the scene and saw the plaintiff behind 7-Eleven’s glass doors yelling, screaming, and pretending to have a gun. He then broadcasted on the police radio that the subject is simulating having a handgun behind his back and is asking me to shoot him. He then asked for backup and specifically asked for a 40 mm less-lethal projectile launcher. As other officers arrived, he informed them that the plaintiff was agitated and likely under the influence of narcotics.

By 8:30 PM, several more officers had arrived. Immediately before the fatal shooting, at least eight officers were present. A trainee armed himself with the requested less-lethal device. The others readied themselves with lethal weapons. There was also a K-9 unit on the scene. Everybody knew that the plaintiff had been simulating having a gun, was agitated, appeared angry, and was potentially mentally unstable and under the influence of drugs. They also heard the plaintiff yell “shoot me,” and other similar cries. The police on site discussed using non-lethal force to subdue the plaintiff both over the radio and among themselves at the scene.

At about 8:43 PM plaintiff open the door of the 711’s back room. As he did so, some officers shouted doors opening. Plaintiff then ran around the front check out counter and towards the open doors holding an object over his head in his hand. At that point, there was about 30 feet in distance between the plaintiff and the officers. One officer shouted that the plaintiff had scissors. Over the public address system, Officer Preasmyer twice told the plaintiff to drop the weapon. When he did not drop the weapon that kept charging toward the officers, Officer Preasmyer then shouted shoot him. All the officers then opened up fire shooting the plaintiff four times whereupon he died from his wounds. During the 20 minutes from when the officers arrived until the plaintiff ran at them, the officer did not communicate with the plaintiff. The officers who fired the lethal weaponry did not know that another officer had fired non-lethal weaponry. Testimony also said that they saw a metallic object, which they believed to be scissors. When the plaintiff’s blood was later tested, it came up positive for both amphetamine and methamphetamine. His medical history later revealed that he was a schizophrenic. Plaintiff’s parents sued the City of Newport for violating §1983 (excessive force), and for violating title II of the ADA and for violating the Rehabilitation Act of 1973. They also filed claims under California State law as well. The District Court granted summary judgment to the City of Newport and the plaintiff appealed.

V

Vos Court’s Reasoning Excessive Force

1. The standard for determining whether the force was excessive is *Graham v. Connor’s* objectively reasonable standard.
2. Whether force is objectively reasonable involves balancing the nature and quality of the intrusion on the individual’s fourth amendment interests against the governmental interests at stake.

3. Use of deadly force implicates the highest level of fourth amendment interests because the suspect has a fundamental interest in his own life and because that kind of force frustrates the interests of the individual and of society in having the judiciary determine guilt and punishment.
4. Assessing the government's interest means looking to: the severity of the crime at issue; whether the suspect posed an immediate threat to the safety of the officers or others; and whether the suspect was actively resisting arrest or attempting to evade arrest by flight.
5. The officers were not responding to the report of a crime, rather they were there because of plaintiff's erratic behavior.
6. Once the officers were at the scene, plaintiff had little opportunity to flee.
7. There were simply not reasonable grounds to suggest that the police officers could have perceived an immediate threat from the plaintiff to themselves requiring deadly force. More particularly: the officers had surrounded the front door to the 711; they had established positions behind cover their police vehicles, they outnumbered the plaintiff 8 to 1; even though plaintiff charged the officers, the officer did not believe he had a gun, and they had less-lethal methods available to stop the plaintiff from charging; and the plaintiff was within the range of a less-lethal weapon, a Taser, or a K-9 when he was shot.
8. Other relevant factors in deciding whether deadly force is warranted include the availability of less intrusive force, whether proper warnings were given, and whether it should have been apparent to the officer that the subject of the force used was mentally disturbed. Here, the officers had upwards of 15 minutes to create a perimeter, assemble less-lethal means, coordinate a plan for the use of force, establish cover, and, arguably, attempt to communicate with the plaintiff. Also, it was really clear that the plaintiff was mentally unstable, acting out, and at times even inviting officer to use deadly force on him. Those indications of mental illness diminished the government's interest in using deadly force. Indeed, six of the officers were aware and prepared to respond by using only non-lethal weapons.
9. Since existing precedent was not beyond debate that the officers acted unreasonably, the officers get qualified immunity for their actions (of course, that doesn't help the City of Newport at all).

Court's Reasoning ADA

1. The ADA and the Rehabilitation Act applies to arrests. **See this blog entry.**
2. The officers had time and opportunity to assess the situation and employ accommodations identified by the parents, such as de-escalation, communication, or get specialized help.
3. The facts show that further accommodation was possible.
4. The same factual questions preventing the determination of whether the police officers engaged reasonably with respect to excessive force also informed the question of whether they provided reasonable accommodations. Those concerns also undercut the City of Newport's argument that the plaintiff posed an immediate threat, i.e. a direct threat, and was not entitled to accommodation.
5. For the reasons discussed in the court's discussion of excessive force as well as for the reasons discussed in this section of the blog entry, VI, the defendants were not entitled to summary judgment on the ADA and Rehabilitation Act claims.

VII

Takeaways

1. For trainers that are using *Graham v. Connor* as the basis for training police on excessive force, reconsider, especially in light of the Sixth Circuit affirmance of the jury verdict in the Dollar General case. By using *Graham*, trainers are communicating to the police that they have wide latitude with excessive force and implicitly suggesting that they are off the hook otherwise. That is simply not the case. *Graham v. Connor* is a clear violation of title II of the ADA and the Rehabilitation Act.
2. A much better case to use than *Graham v. Connor* is *Vos v. City of Newport Beach*.
3. While the police officers were given qualified immunity so that they did not face individual liability. That is a one off because now the case law is clear beyond debate that officers simply can't behave the way they did in *Graham v. Connor*, let alone in *Vos v. City of Newport Beach*.
4. It is clear that whenever you have an excessive force case combined with a person with a disability being subject to that force, you will have both excessive force claims and title

II/Rehabilitation Act claims to deal with simultaneously. Whether the employer of the police officers will face damages, **will depend upon this blog entry.**

5. Qualified immunity is a one off. That is, an individual officer might get qualified immunity, but if the case goes against the officer's employer, then it can be said that the precedent may be beyond debate and the next officer will not be so lucky. Also, civil cases may inform that analysis. Certainly, *Graham v. Connor* if it came up today would not only subject the police force to title II liability, Rehabilitation Act liability, and excessive force liability, it would also be unlikely that the police officers would get qualified immunity.
6. With respect to excessive force, the police should not limit themselves to the factors in *Graham v. Connor*. They should also consider the other relevant factors mentioned in *Vos* as well.

Understanding the ADA

The Blog of William D. Goren, J.D. LL.M.

Ignorance is Bliss for Police

By [William Goren](#) on November 4, 2021

Before getting started on the blog entry of the week, the Atlanta Braves are world champions!! Our local school district is not going to have school tomorrow. It was senior skip day and the Atlanta Braves parade is tomorrow. So, the decision not to have school makes perfect sense. The community we live in is about 20 minutes directly east of the Atlanta capital building. The county we live in is also shutting down its school system for tomorrow as well. Congratulations to the Braves!

Also, CMS and OSHA have now released their interim final rules on Covid-19 vaccination. I am sure labor and employment and health law bloggers will be all over that. I don't rule out commenting on either or both of those regulations in the future, but it is entirely possible that other bloggers will be very comprehensive about it. So, I will wait to see what develops there.

Today's blog entry deals with the question of whether police officers and forces who do not understand the rights of people with disabilities can be held liable for interfering with their protected rights when a person with a disability with a service animal gets thrown out of the place of public accommodation. The case is *Wilhelm v. City of Alexandria*, decided by the United States District Court for the Western District of Louisiana on February 7, 2020, which can be found [here](#). I have actually in another life been to Alexandria, Louisiana. A very nice town. As usual, the blog entry is divided into categories and they are: facts; court's reasoning granting summary judgment to defendants on ADA claims; and thoughts/takeaways. Of course, the reader is free to read any or all of the categories.

Facts

1. At approximately 9:30 p.m. on July 22, 2017, Wilhelm and her fiancé Parker went to Buds N Suds, a bar in Alexandria, Louisiana to celebrate their engagement. ECF Nos. 17-2 at 1, 17-6 at 23-24.
2. Wilhelm brought her dog, Viggo, with them. ECF Nos. 17-2 at 1, 1-2 at 1. Viggo is a very large eight-year-old Neapolitan mastiff. ECF Nos. 17-2 at 1, 17-6 at 18-19.
3. Shortly after they entered the bar, Buds N Suds's security guard Mumford told Wilhelm she could not bring Viggo inside. ECF Nos. 17-2 at 1, 17-6 at 25, 17-7 at 2. Mumford was reportedly acting at the direction of Buds N Suds's owner, Michael Barnhill ("Barnhill"), who did not want Viggo inside the bar because he was turning away customers and created a liability issue. ECF Nos. 17-2 at 1-2, 18.
4. Wilhelm refused to leave and remained inside the bar with Parker and Viggo for approximately two hours. ECF Nos. 17-2 at 2, 17-6 at 25.
5. Because Wilhelm refused to leave, Mumford called the Alexandria Police Department. ECF Nos. 17-2 at 2, 17-6 at 26. Before the police arrived, Wilhelm, Parker, and Viggo went outside. ECF Nos. 17-2 at 2, 17-6 at 27.
6. Officers Helminger and Voorhies responded to the scene. Upon arrival, Helminger and Voorhies spoke to Mumford and Barnhill, who explained they wanted Wilhelm to leave. ECF Nos. 17-2 at 2, 17-4 at 1, 17-5 at 1, 19.
7. The officers then went to speak to Wilhelm, who was seated outside on a picnic table with Viggo standing by her side. ECF Nos. 17-2 at 2, 19. Parker was standing nearby. *Id.*
8. Wilhelm told the officers she felt she had the right to remain on the property with Viggo because he is her "service dog." ECF Nos. 17-2 at 2-3, 19.
9. Voorhies explained that Wilhelm was on private property and the owner wanted her to leave. ECF Nos. 17-2 at 3, 19. Wilhelm continued to argue her position. *Id.*

10. Voorhies then explained to Wilhelm if she did not leave she would be arrested for “remaining after being forbidden.” ECF Nos. 17-2 at 3, 19.
11. Voorhies also explained to Wilhelm if she felt she was being discriminated against by Buds N Suds, she had the right to get an attorney and pursue a civil matter against the bar. ECF Nos. 17-2 at 3, 19.
12. Wilhelm, Parker, and Viggo finally complied and left the bar. ECF Nos. 17-2 at 3, 19.
13. Throughout the encounter, the officers remained extremely calm and polite, even after being called “dumb.” ECF Nos. 17-2 at 3, 19.
14. At no time did either officer use any force against Wilhelm, Parker, or Viggo. ECF Nos. 17-2 at 3, 18, 19.
15. Viggo does not qualify as a “service animal” under the ADA. ECF Nos. 17-2 at 3, 17-9 at 2-25.
16. No history existed between the plaintiff and the City of Alexandria with respect to ADA noncompliance issues in the past.
17. Plaintiff also filed excessive force claims, which we are not going to discuss in this blog entry.

II

Court’s Reasoning Granting Summary Judgment to Defendants on ADA Claims

1. In a footnote, the court noted that there is no individual liability under the ADA and parallel 42 U.S.C. §1983 claims are not allowed either.
2. The Fifth Circuit has allowed title II claims in the specific context of police officers failing to reasonably accommodate the known limitations of persons with disabilities they detain.
3. Since the ADA does not require clairvoyance, the burden is on the plaintiff to specifically identify the disability and resulting limitations, and to request an accommodation in direct and specific terms.
4. The Fifth Circuit has also held that title II does not apply to an officer’s on the street response to reported disturbances or other similar incidents, whether or not those calls involve

subjects with mental disabilities, prior to the officer securing the scene and ensuring that there is no threat to human life.

5. To establish a prima facie case of discrimination under title II of the ADA, plaintiff have to demonstrate that: 1) he or she is qualified per the ADA; 2) he or she is being excluded from participation in, or being denied benefits of, services, program, or activities but with the public entity is responsible, or is otherwise being discriminated against by the public entity; and 3) such exclusion, denial of benefits, or discrimination is by reason of his or her disability.
6. The two officers who were called to the scene told the plaintiff that the matter was a civil matter and if she felt she was being discriminated against by the place of public accommodation, she should then retain an attorney and pursue a civil suit.
7. Whether a service dog is permitted in a restaurant is a straightforward question of law.
8. The plaintiff had no previous experience with the officers or the City of Alexandria with respect to ADA noncompliance issues. As a result, there wasn't intentional discrimination.
9. In a footnote, the court said that in order to recover compensatory damages for disability discrimination under title II of the ADA, a plaintiff must show that the discrimination was intentional, i.e. more than disparate impact. In this same footnote, the court said that the Fifth and Ninth Circuit have taken the position that an entity lacking knowledge and understanding about ADA compliance requirements does not even suggest deliberate indifference, which is the standard you have to meet to get damages under title II of the ADA, which we discussed **here**.
10. While plaintiff allegations were poorly pleaded and the lack of evidence proved fatal to her claims, her complaint was not frivolous, unreasonable, or groundless. Therefore, the defendants request for costs was denied.

III

Thoughts/Takeaways

1. No individual liability exists for violating the ADA in any of the titles, with a rare exception in the 11th Circuit pertaining to public entities per **this case**.
2. If the reasoning of this court is taken at face value, there is no incentive for police forces to learn about the rights of people with disabilities because they never have to worry about damages since ignorance does not equal deliberate indifference.
3. A critical piece of this case was that the plaintiff had no history of working with the police force regarding ADA noncompliance issues. If the plaintiff had such a history, it is possible the outcome of this case would be different.
4. Within the next couple of months, the Supreme Court will be hearing a case asking the question of whether §504 of the Rehabilitation Act includes a disparate impact cause of action.
5. Another way the police force can escape damages for not knowing the law in these situations is to simply advise the individual that they can retain a private attorney to sue the owner for disability discrimination.
6. Another option for a plaintiff in this situation to consider is to file a claim under the Rehabilitation Act. True, the standard for damages is the same. However, **29 U.S.C. §794(b)(1)(A)** states that all operations of an instrumentality of local governments must be meaningfully accessible to persons with disabilities. As such, the Rehabilitation Act goes further than the requirements of title II, which focuses on program accessibility. That said, many cases have held that title II applies to everything that a public entity does.
7. The case doesn't discuss **42 U.S.C. §12203(b)**, the ADA's interference provisions.
8. What is concerning about the case is that there is now an incentive for police forces to not know the ADA. The history requirement for establishing deliberate indifference has the weird incentive of actually promoting serial suits.
9. The Supreme Court will also be hearing a case asking the question of whether §504 of the Rehabilitation Act includes damages for emotional distress. If a Rehabilitation Act claim had been filed in this case, whether §504 allows for emotional distress would be a very real issue as actual damages do not seem to be in existence here.
10. The facts listed by the court say a service dog was not involved. However, no mention of that is found in the court's reasoning. That is interesting in and of itself because it should have

been game over for the plaintiff at that point.

11. The court said that the plaintiff has the burden to request accommodations in specific and direct terms. However, we know, as we discussed [**here**](#), that magic words are not required.
12. The Supreme Court let stand a Ninth Circuit decision, [**here**](#), holding that title II of the ADA applies to arrests when it decided she can on other grounds, as we discussed [**here**](#).

Understanding the ADA

The Blog of William D. Goren, J.D. LL.M.

ADA and §504 Claims in Excessive Force Cases

By [William Goren](#) on February 13, 2023

Today's blog entry is *Short v. City of Rochester*, which can be found [here](#). In this case, a young black man with mental illness was killed by the police. His family sues for violation of the ADA, the Rehabilitation Act, and under §1983. The City of Rochester moved to dismiss all claims. For the reasons discussed below, the court was having none of it and denied the motion to dismiss.

As usual, the blog entry is divided into categories, and they are: Facts; Court's Reasoning That the ADA and Rehabilitation Act Claims Can Go Forward; Court's Reasoning That the §1983 Claim Can Go Forward; Court's Reasoning That the State Law Claims Can Go Forward; and Thoughts/Takeaways. Of course, the reader is free to focus on any or all of the categories.

I

Facts (taken directly from the opinion)

Jones was “a young Black man with mental illness.” (*Id.* at ¶ 1). He had been diagnosed with post-traumatic stress disorder, anxiety, and borderline personality disorder, and his mother “also believes he exhibited signs of schizophrenia.” (*Id.* at ¶ 29).

At approximately 4:00 p.m. on March 9, 2021, Jones was observed walking around the Town of Gates, just outside the City, without any shoes. (*Id.* at ¶ 35). A security guard at a residential building, seeing that Jones was visibly distressed, called the police. (*Id.*). Gates police brought

Jones to a homeless shelter on Hobart Street in the City. (*Id.* at ¶ 36). Jones was provided with shoes and granted entry. (*Id.*). He spent the rest of that afternoon and most of the evening at the Hobart Street shelter. (*Id.*).

Jones began experiencing acute mental distress and voluntarily left the Hobart Street shelter around midnight on March 10, 2021. (*Id.* at ¶ 37). By 2:00 a.m., he had arrived at the Open Door Mission (the “Mission”), a shelter located at 210 West Main Street in the City. (*Id.* at ¶ 38). The Mission is a not-for-profit organization that provides emergency food and services to the City’s homeless community. (*Id.*). Many of the individuals whom the Mission serves suffer from mental illness, and the RPD is aware of this fact. (*Id.* at ¶¶ 38-39).

When Jones arrived at the Mission, he was greeted by employee Allen Woodruff (“Woodruff”). (*Id.* at ¶ 40). Woodruff opened the door and Jones walked inside to the kitchen, where he grabbed “a bucket of ordinary kitchen knives used for food preparation at the shelter[.]” (*Id.*). Jones then left, without encountering any other guests or attempting to harm anyone. (*Id.*). Woodruff called the police and reported that Jones had taken knives from the Mission. (*Id.*).

Several nearby RPD officers, “including Officers Drake, Audrey Jackson, Sir Glynn, and Jared Carello,” were dispatched to the scene and arrived shortly before 3:00 a.m. (*Id.* at ¶ 42). Officer Drake located Jones, who was in severe mental distress, at approximately 3:03 a.m. (*Id.* at ¶ 44). Officer Drake reported to dispatch that Jones was at the intersection of Cascade Drive and Industrial Street and was “actively cutting himself.” (*Id.* at ¶ 44). At this time, no civilians other than Jones were on the street, and Officer Drake was aware of that fact. (*Id.* at ¶ 45).

The responding RPD officers lacked the appropriate equipment to engage with Jones in light of his mental state. (*Id.* at ¶ 46). “Acknowledging this, a fellow officer said to Officer Drake, ‘just get in your car, Drake, and let’s back off.’” (*Id.*). However, Officer Drake, flanked by Officers Glynn and Jackson, surrounded Jones and shone bright lights in his eyes while pointing their guns at him. (*Id.*).

Jones was in clear distress and experiencing a severe mental health episode. (*Id.* at ¶ 47). Jones stated that he was dangerous and begged the officers to shoot him, telling them that if they did not kill him, he would have to kill them “for Jesus.” (*Id.*). Officers Drake, Glynn, and Jackson shouted commands at Jones, including telling him to drop the knife he had in his hand, which he was using to cut himself. (*Id.* at ¶ 49). Jones did not acknowledge their requests, but instead began to walk

towards Officer Drake. (*Id.*). As Jones continued walking towards Officer Drake, who was on the sidewalk at the time, Officer Drake fired five fatal shots, striking Jones once in the chest, twice in the abdomen, once in the groin, and once in the arm. (*Id.* at ¶ 50). Jones was transported to the University of Rochester Medical Center, where he was pronounced dead by 4:30 a.m. (*Id.* at ¶ 54).

II

Court's Reasoning That the ADA and Rehabilitation Act Claims Can Go Forward

1. In order to prove a violation of title II of the ADA or §504 of the Rehabilitation Act, a plaintiff has to show: 1) he is a qualified individual with a disability; 2) he was excluded from participation in a public entity's services, programs or activities or was otherwise discriminated against by a public entity; and 3) such exclusion or discrimination was due to his disability.
2. Courts have generally found that title II of the ADA applies to the interaction between law enforcement and persons with disabilities, but the reasonableness of the accommodation required must be assessed in light of the totality of the circumstances of the particular case.
3. Plaintiffs alleged that the person killed was: 1) in visible mental distress; 2) was actively engaging in self harm; 3) was begging the responding officers to shoot him; and 4) had come from a place known to the Rochester Police Department as a place serving individuals with mental illness. Therefore, a reasonable inference exists that the responding officers were aware of the person ultimately killed as having a mental disability.
4. Plaintiffs identified several proposed reasonable accommodations that may have prevented the person from being killed, including: 1) waiting to engage with him; 2) equipping the responding officers with nonlethal weapons; 3) using alternative means to remove the knife from his possession; and 4) utilizing the City's Person in Crisis Team.
5. Whether defendant's claim that it was unreasonable to suggest that the police should have remained in the vehicle and attempted to block the street because of danger to individuals, is a factual dispute not amenable to resolution on a motion to dismiss.
6. Whether the use of force was objectively reasonable is not the point. The ADA and the Rehabilitation Act claims address action taken and decisions made before a shot was ever fired. To phrase it another way, if he was not reasonably accommodated that conclusion is not undermined by a holding that the police officer was ultimately justified in using deadly force.

7. Case law does not address a standard for asserting a viable disability discrimination claim with respect to the fourth amendment.
8. Numerous courts within the Second Circuit have concluded that the ADA requires police departments to make reasonable accommodations for disabled suspects. For example, it cited to one case holding that the only reasonable interpretation of title II is that law enforcement officers acting in an investigative or custodial capacity are performing services, programs, or activities within the scope of title II. Whether a person with the disability succeeds in proving discrimination depends upon whether the accommodations were reasonable under the circumstances. See also [**this blog entry**](#).
9. The qualified immunity argument of the defendant simply doesn't work because no individual defendants are present in this case. Qualified immunity is only available to individuals sued in their individual capacity. Whether qualified immunity exists for an individual is irrelevant to the liability of the municipality.

III

Court's Reasoning That the §1983 Claim Can Go Forward

1. The complaint contained numerous factual allegations regarding alleged policies and practices by the Rochester Police Department using unconstitutional force against people who are black and people with mental illnesses. Those factual allegations are sufficient to survive a motion to dismiss and defendant has not articulated otherwise.

IV

Court's Reasoning That the State Law Claims Can Go Forward

1. New York law allows for municipalities to be held vicariously liable for the wrongdoing of its employees even if the employees themselves enjoy immunity.
2. Cases cited by the defendant involving negligence do not apply to the context of intentional torts, which is what is involved here. That is, New York law makes clear that municipalities may be held vicariously liable for tortious conduct by their police officers.

Thoughts/Takeaways

1. We discussed previously how courts have found that title II of the ADA applies to the interaction between law enforcement and persons with disabilities, such as [here](#). It also makes absolute sense to me to say that the reasonableness of the accommodation needs to be considered in light of the totality of the circumstances of each individual case.
2. We have frequently talked about how magic words are not required to initiate the interactive process, such as [here](#). In this case, we see that a situation can in essence serve as magic words.
3. You are beginning to see several cases talking about how an interactive process is required with respect to title II even if the court does not explicitly say it quite like that.
4. Always a good idea for a plaintiff to make clear that several proposed reasonable accommodations were suggested by him or her or they.
5. You are seeing lots of police forces beginning to use social workers and mental health professionals to respond either on their own and/or with the police to individuals in obvious mental distress.
6. Excessive force applies to the force used while the ADA and the Rehabilitation Act applies to what happened before that force is used.
7. Qualified immunity only applies to individual defendants and not to their employers.
8. You want to check your jurisdiction to see whether your state law allows for municipality to be held vicariously liable for the wrongdoing of its employees even if the employees themselves enjoy qualified immunity.
9. You also want to check your state law to see how it deals with vicarious liability for intentional torts of their employees.
10. Another question is whether police officers are being appropriately trained on excessive force, especially with the ADA and its amendments being around. A separate question is whether police departments are being trained on the rights of people with disabilities in general. We

discussed the excessive force issue **here**. We discussed the question of the police departments not being aware of disability rights and what that might mean **here**.

11. You wonder about the Rochester's Police Department sensitivity to disabilities in general. I have read before that the City of Rochester has more deaf/Deaf individuals than just about anywhere else in the United States because of the city being the home for the Rochester Institute of Technology and the National Technical Institute for the Deaf within it.

Understanding the ADA

The Blog of William D. Goren, J.D. LL.M.

Compliance with the ADA When Arresting and Qualified Immunity

By [William Goren](#) on July 27, 2016

Today's case discusses the issue of just when is an arrest out of compliance with the ADA. There is also a nice little bonus of qualified immunity as well. The case is *Trujillo v. Rio Arriba County ex rel. Rio Arriba County Sheriff's Department*, 2016 U.S. Dist. LEXIS 96797 (D. N.M. June 15, 2016). We know from [this blog entry](#) that arrests are subject to the ADA. This case goes further by talking about when might an arrest be out of compliance with the ADA. The case is actually a discovery dispute, but there is some excellent analysis and discussion of when an arrest might be out of compliance with the ADA as well as a discussion of just how far qualified immunity goes. As is my usual practice, the blog entry is divided into categories: facts; issues; court's reasoning with respect to when is an arrest out of compliance with the ADA; court's reasoning with respect to the County's qualified immunity; and takeaways. The reader is free to focus on any or all of the categories.

I

Facts

The plaintiff, an honorably discharged veteran of the United States Army, suffered from degenerative joint disease in his knees, nephropathy, and end-stage renal disease associated with diabetes mellitus. At approximately 7 PM on August 22, 2013, the plaintiff was stopped while at a driving while intoxicated checkpoint where an officer asked him to perform sobriety tests. Because of his disability, the plaintiff asked the officer if he could retrieve his walking cane from the trunk of his car. The officer denied him the opportunity to retrieve his cane even though the plaintiff repeatedly attempted to explain to the officer that he had a physical disability and offered to produce his handicap placard to prove his physical limitations. The officer noted that the plaintiff struggled to perform various walking and standing tests and that he was informed by the plaintiff

that the plaintiff had knee problems and other ailments that prevented him from performing the tests adequately. The officer eventually arrested the plaintiff for driving under the influence of alcohol and kept him in handcuffs until the plaintiff's daughter paid his bail around midnight. Throughout the encounter, the plaintiff was only allowed out of the handcuffs in order to sign paperwork related to his arrest. The plaintiff brought civil rights and tort claims against the County and the two individual officers in their individual capacities. For our purposes, we are particularly interested in the ADA claims against the County where the plaintiff claimed that he was denied the benefits of services, programs, and activities of the Department of Public Safety with respect to: 1) an encounter with an officer properly trained to deal with citizens suffering from service related disability; and 2) being treated with dignity by the government entities in that the County failed to provide adequate accommodation for persons with disabilities while conducting field sobriety tests and when he was placed in jail.

II

Issues:

1. Just when is an arrest out of compliance with the ADA?
2. Can the County claim qualified immunity?

III

Court's Reasoning with Respect to When Is an Arrest Out Of Compliance with the ADA

1. Drawing on a case from the 10th Circuit (***Gohier v. Enright***, 186 F.3d 1216 (10th 1999)), and one from the Fourth Circuit adopting the 10th Circuit's reasoning (***Waller ex rel Estate of Hunt v. Danville***, 556 F.3d 171 (4th Cir. 2009)), there were two possible theories under which federal courts have addressed claims under the ADA arising from arrests: 1) where police wrongly arrest someone with a disability because they misperceive the effects of that disability as criminal activity; and 2) where police properly investigate and arrest the person with a disability for crimes unrelated to the disability but fail to reasonably accommodate that person's disability in the course of the investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees.

2. With respect to wrongful arrest, a plaintiff must establish three things: 1) the plaintiff was a person with a disability; 2) the arresting officers knew or should have known that the plaintiff had a disability; and 3) the defendant arrested the plaintiff because of legal conduct related to the plaintiff's disability.
3. With respect to whether arresting officers knew or should have known that the plaintiff had a disability, that means the arresting officer must know or have reason to know that the arrestee is a person with a disability.
4. The essence of the reasonable accommodation during arrest theory is that once the police have a situation under control, the police have a duty to accommodate a disability.

IV

Court's Reasoning with Respect to the County's Qualified Immunity

1. Since the Sheriff's department through the County is not being sued in its individual capacity but only vicariously, qualified immunity, which only applies to individual capacity suits, is not available.

V

Takeaways:

1. This case puts some meat on the bone so to speak with respect to how you would go about proving up a case involving an arrest that may be out of compliance with the ADA. With respect to the wrongful arrest theory, we now have the elements of a prima facie case.
2. With respect failure to provide a reasonable accommodation when arresting theory, *Trujillo* and the cases *Trujillo* is based upon ([here](#) and [here](#)), do not lay out the prima facie case for such a claim. However, from reading these cases, we might be able to hazard a guess as to what a prima facie claim for lack of a reasonable accommodations when arresting someone might look like, namely: 1) plaintiff had a disability; 2) the arresting officers knew or should have known that the plaintiff was a person with disability; 3) plaintiff suggested to the officer a reasonable accommodation; and 4) the officer ignored that request or did not engage in any effort to explore what reasonable accommodations might work. Keep in mind, this theory only applies after the scene has been secured by the police.

3. With respect to qualified immunity, it does not apply where a person or entity is not being sued in an individual capacity. So, plaintiff's attorneys may want to consider that in structuring their complaint.
4. A governmental entity can be vicariously liable under title II of the ADA where their employees violate the ADA.