TITLE II OF THE ADA AND LAW ENFORCEMENT ACTIVITIES THE CLASH OF THE NEED TO ENFORCE THE LAW AND THE REQUIREMENT TO ACCOMMODATE DISABILITIES

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CHAPTER 5

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TITLE II OF THE ADA AND LAW ENFORCEMENT ACTIVITIES – *The Clash of the Need to Enforce the Law and the Requirement to Accommodate Disabilities*

I. INTRODUCTION

Whether the Americans with Disabilities Act ("ADA") extends to disabled individuals during a police investigation or arrest has been the subject of much litigation, particularly of late. Though threshold questions, such as whether the ADA even applies to a police investigation or arrest have been settled in the Fifth Circuit, the scope of the ADA's application during investigative or arrest activities continues to develop in this circuit and nationwide. Although the Fifth Circuit has articulated that the ADA will not apply to an investigation or arrest of a disabled individual, so long as the scene has not been secured or there is a continuing threat, how this line is drawn, and whether the ADA applies to other in-the-field law enforcement situations remain unsettled questions. This paper surveys current Fifth Circuit law in this area and, where helpful to understanding the contours and open questions related to this law, reviews opinions from other circuits and district courts.

II. ADA AND LAW ENFORCEMENT

Enacted in 1990 and recently amended, the ADA is an attempt "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (1994). Thus, the ADA sets forth the standards that address the discrimination of individuals with disabilities. The ADA is divided into three Titles: Title I prohibits employers from discriminating against individuals with disabilities, Title II prohibits the discrimination of disabled individuals in public services, and Title III addresses public accommodations for individuals with disabilities. *See id*. §§ 12111–12117; §§ 12131–12165; §§ 12182–12189.

Title II addresses the standards to which law enforcement departments and agencies must adhere when dealing with individuals with a disability:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Id. § 12132. A qualified individual with a disability is:

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Id. § 12131(2). A "public entity" includes:

> (A) any State or local government; [and]
>
> (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government.

Id. § 12131(1).

III. NO INDIVIDUAL LIABILITY UNDER TITLE II

Notably, therefore, under the plain language of Title II, a disabled plaintiff cannot seek to hold government employees liable in their individual capacities, as Title II applies only to a "public entity." 42 U.S.C. § 12132. At least one district court in Texas has already applied this rationale. *See Gonzales v. City of Corpus Christi*, No. C-05-280, 2006 WL 1517507 (S.D. Tex. May 31, 2006).

IV. ELEMENTS OF A TITLE II CASE

In order to prevail on a case of discrimination under the ADA against a public entity, "a plaintiff must prove: (1) that he is a qualified individual within the meaning of the ADA; (2) that he is being excluded from participation in, or being denied benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination is by reason of his disability." *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 671–72 (5th Cir. 2004).

V. REQUIREMENT OF INTENTIONAL DISCRIMINATION FOR COMPENSATORY DAMAGES

Additionally, where a plaintiff seeks to recover compensatory damages for violations of the ADA, the plaintiff must establish intentional discrimination due to a disability. *Delano-Pyle v. Victoria County*, 302 F.3d 567, 574 (5th Cir. 2002). A failure to establish intentional discrimination will not, however, preclude

declaratory or injunctive relief. *Compare Carter v. Orleans Parish Public Schools*, 725 F.2d 263–64 (5th Cir. 1984). Further, the remedies, procedures, and rights available under § 504 of the Rehabilitation Act are also available under the ADA. *See, e.g., Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 288 (5th Cir. 2005); *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000).

VI. APPLICATION OF TITLE II TO LAW ENFORCEMENT ACTIVITIES

Although there has historically been some disagreement as to whether the ADA applies to in-the-field investigations by police officers that may lead to an arrest, the Fifth Circuit has acknowledged that such a claim exists, under some circumstances. *See Hainze*, 207 F.3d at 800. Notably, although the Fifth Circuit has embraced only one of them so far, two theories have been advanced by which a disabled plaintiff may advance an ADA claim against a public entity related to allegedly discriminatory conduct during such investigations or arrests. *See Patrice v. Murphy*, 43 F.Supp.2d 1156, 1159–60 (W.D.Wash. 1999); *Gohier v. Enright*, 186 F.3d 1216, 1221–22 (10th Cir. 1999) (surveying the case law concerning the ADA's applicability to arrests).

First, if a plaintiff was arrested because some otherwise lawful conduct was perceived as unlawful conduct due to a disability, the plaintiff may have a Title II claim under the "wrongful arrest theory." *Id*. Second, if the arresting officers properly investigate or arrest a disabled plaintiff for a crime unrelated to his disability, but cause the plaintiff to suffer a greater injury or indignity than non-disabled arrestees due to a failure to reasonably accommodate the plaintiff's disability in the course of the investigation or arrest, the disabled plaintiff may have an ADA claim under the "reasonable accommodation theory." *Id*.

However, although the Fifth Circuit has adopted the reasonable accommodation theory in applying the ADA to arrests, the wrongful arrest theory has apparently not been adopted by any Fifth Circuit court. *See Hainze* 207 F.3d at 800. In fact, in *Hainze*, the Fifth Circuit actually questioned the wrongful arrest theory. Id. Further, in light of the Supreme Court's holding in Graham v. Connor, 490 U.S. 386, 396 (1989), that the constitutionality of an arrest turns on objective, and not subjective, facts relating to the existence of probable cause, the suggestion that a misperception of the existence of probable cause for an arrest based upon a misapprehension of an arrestee's disability is a dubious claim. This is because, in as much as it is not expressly added by the statute, an adoption of a wrongful arrest theory under Title II would seem contrary to the holding in Graham and, as a practical matter, create an unworkable situation for police officers. It would seem unlikely that the Fifth Circuit would ever adopt the wrongful arrest theory, at least as it has been enunciated by those district courts that have espoused it thus far.

VII. THE FIFTH CIRCUIT LIMITATION: SECURING THE SCENE AND THREATS TO HUMAN SAFETY

Where a disabled plaintiff advances the more cognizable, and arguably intended, claim of lack of "reasonable accommodation," the Fifth Circuit has placed a clear limitation on the applicability of the ADA during a police investigation or arrest. In *Hainze v. Richards*, the Fifth Circuit expressly held that "Title II does not apply to an officer's on-the-street responses to reported disturbances or similar incidents...prior to the officer's securing the scene and ensuring that there is no threat to human life." 207 F.3d at 801. It is only upon securing the scene and after law enforcement officers may determine that there is no threat to human safety that an arresting officer must reasonably accommodate a disabled individual. Id. at 802. Therefore, in the context of law enforcement activity, whether the ADA may apply in a law enforcement setting initially turns on the question of when the ADA applies; that is whether the scene has been secured and there is no threat to safety.

In *Hainze*, police officers were called to a convenience store after being advised that a man, Hainze, was there and was under the influence of alcohol and antidepressants, carrying a knife, and threatening to commit suicide, sometimes referred to as "suicide by cop." Upon their arrival, the officers noticed that the man they believed to be Hainze was standing next to the passenger door of a truck which was occupied by two unknown individuals. He appeared to be holding the door to the truck with one hand, and a knife in the other. When the officers ordered Hainze away from the truck, Hainz*e* responded with profanities and began to walk toward the officers. Ignoring the officer's multiple orders to stop Hainze approached the officers while carrying the knife until he was within four to six feet of them. One of the officers shot, ostensibly, in self-defense. Hainze's family sued, alleging, inter alia, violation of the ADA. The Fifth Circuit, in affirming the trial court's dismissal of the ADA claim against the county for allegedly failing to reasonably accommodate Hainze's mental disability, held that, "in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians," requiring an officer to contemplate compliance with the ADA would pose an "unnecessary risk to innocents." *Id*. at 801. As the officer's actions were the result of a "quick discretionary decision made in self-defense and for the safety of those at the scene,"

the ADA was not applicable until after the scene had become secure. Id.

Accordingly, the Fifth Circuit has clearly articulated that the ADA will not apply to law enforcement activity until the scene is secure and there is no threat to human safety. Thus, the *Hainze* limitation to the ADA presents the threshold inquiry for determining whether a Title II ADA claim may be asserted against a governmental entity related to law enforcement activity.

Accordingly, in *DeLeon v. City of Alvin Police Dept.*, 2010 WL 4942648, (S.D. Tex. Nov. 20, 2010), the court determined the ADA did not apply at the time of the arrest of a deaf woman, where the woman's brother was found bleeding from what he described as a defensive knife wound, both her brother and cousin stated that she had attacked her brother with a knife, and her brother stated that, if she was not arrested, she would attack him again. Although the woman was undisputedly not provided with a sign language interpreter at the scene of the alleged crime, the court, citing *Hainze*, held the officers had a "right to arrest her immediately and secure the scene rather than call for a sign language interpreter." Id. After all, the trial court reasoned, the officers had a "right to believe" the reports of those present at the scene, and whether the plaintiff "could have understood the conversations around her" was "immaterial" under these "exigent circumstances" as the reports of others were sufficient to create probable cause for her arrest.

By contrast, in *Hobart v. City of Stafford*, 2011 WL 1638606, (S.D. Tex. April 29, 2011), the court refused to grant summary judgment after an ADA claim was brought by the family of a allegedly mentally disabled man who was killed during a mental health commitment arrest effort. In *Hobart*, officers were called to the man's home after he refused to leave his bedroom to go to a doctor's appointment. Though the evidence demonstrated that the man ran at the officer despite multiple orders to stop, there was a dispute concerning whether the man attacked the officer or simply ran from his bedroom with flailing arms prior to being shot. Accordingly, the court noted there was a factual issue as to whether the deceased's actions "could reasonably have been interpreted to present any serious threat, let alone 'threat of human life,' and whether there was any need for the officer to 'secur[e] the scene'" before accommodating the decedent's disability. Therefore, the court denied summary judgment. *Id*. at *18 (quoting *Hainze*, 207 F.3d at 801).

Similarly, in *Salinas v. City of New Braunfels*, 557 F.Supp.2d 771, 776–77 (W.D. Tex. 2006), the court determined the ADA did apply to a police response to a 911 call from a deaf woman who arrived home to find her boyfriend dead on the couch. Noting the City had not alleged that disabled plaintiff was a suspect in his death, and "even if she was, there is no evidence that she was a threat to the safety of the officers or that the scene was not secure," the court determined that, based on *Hainze*, the ADA applied as early as the officers' initial encounter with the plaintiff in responding to her call for their help. *Id*. at 775–76. The court held that, accordingly, as soon as the officers arrived at the scene and learned the plaintiff was deaf, they were "under a duty to reasonably accommodate her disability, so long as the area was secure and there was no threat to human safety." *Id*. at 776.

However, at least one court has indicated a willingness to extend the *Hainze* limitation to the ADA beyond situations encompassing an immediate threat to human safety. As such, the inapplicability of the ADA to certain law enforcement activities may extend beyond those situations where the scene has not been secured or there is a threat to human life.

In *Schmidt v. Texas*, 2009 WL 7808952 (S.D. Tex. Jan. 12, 2009), the plaintiff was stopped by a police officer during a routine traffic stop, and was asked to exit his vehicle and perform a Breathalyzer test. The plaintiff, who was disabled, as defined by the Social Security Administration and who suffered from chronic breathing problems, refused, stating he could not perform the test due to his medical condition. After denying the plaintiff's request to retrieve his inhaler from his vehicle, the officer asked him to perform a series of field sobriety tests, to which the plaintiff responded that he would try, but that he was weak from radiation treatments. Upon failing the tests in the opinion of the officer, the plaintiff was arrested. The plaintiff sued under the ADA, claiming the Texas Department of Public Safety should have accommodated his pulmonary disease by allowing him to take a blood test instead of a Breathalyzer. Likening the situation to *Hainze*, the court held that "DWI stops are the type of pre-arrest investigation that the Fifth Circuit envisioned when it articulated the [*Hainze* limitation]: officers are required to determine in a matter of moments, whether they should allow a suspect to continue driving or make an arrest." Therefore, the court held the ADA did not apply during the encounter and the DPS was not required to accommodate the plaintiff's disability during the DWI investigation.

VIII. APPLICATION OF HAINZE TO LAW ENFORCEMENT ACTIVITY OUTSIDE THE FIFTH CIRCUIT

Courts in other jurisdictions have also adopted the limitation enunciated by the Fifth Circuit in *Hainze* to law enforcement activity of a similar nature. *See, e.g., Spencer v. Dawson*, 2006 WL 3253574 (N.D. Ill. Nov. 7, 2006) (Deaf man was

allowed to proceed on an ADA claim after being arrested for assaulting a police officer because, unlike *Hainze*, there was no exigent threat to human life); *Brodlic v. City of Lebanon*, 2005 WL 2250840 (M.D. PA Sept. 15, 2005) (Family of mentally disabled man was allowed to proceed on an ADA claim after the man died during a mental health commitment, as the existence of exigent circumstances was a contested fact). However, unlike the opinion of the court in Schmidt, the courts that have adopted the reasoning enunciated in *Hainze*, have not demonstrated a willingness to extend the limitation beyond life threatening situations. *Id*.

For example, in *Morais v. City of Philadelphia*, 2007 WL 853811 (E.D. PA March 19, 2007), the court refused to apply the *Hainze* limitation to a scenario in which a mentally unstable man, who was barricaded in his apartment, was ultimately shot and killed after a mental health commitment arrest effort blossomed into a full SWAT standoff. Despite the fact the decedent claimed to have a gun, was holding multiple knives, had cut a SWAT member, and had not responded to the use of a Taser prior to being shot, the court determined the *Hainze* test did not apply. *Id.* Stating that the decedent "did not pose a threat to innocent parties" and that there was "no immediate threat to human life before the officers breached the apartment," the court held that the officers in this case "were not facing the type of pressurized situation that the Fifth Circuit seemed to be contemplating in *Hainze*." *Id*. at *13. Thus, as there was a dispute over the "exigency of the situation," the court refused to dismiss the deceased's claim under the ADA. Notably, the concept that the exigency of the circumstances can turn upon whether the danger is created by the suspect or the officers is inconsistent with Fifth Circuit decisions on this issue in the context of § 1983 use-of-force litigation and less likely to be considered by this Circuit in the ADA context as well.

The suggestion, whether in the consideration of a claim under Title II and/or the Fourth Amendment's prohibition of unreasonable seizure, that law enforcement responses to a call for service, or related threat, can create liability is most unworkable and, as it has been roundly rejected in the context of Fourth Amendment cases, one would expect it to be rejected, opinions such as that in *Morais* notwithstanding, in the consideration of claims under Title II as well. Since the Supreme Court has already held, in addressing this contention under the Fourth Amendment, that "[t]he fact that the protection of the public might, in the abstract, have been accomplished by less intrusive means does not, itself, render the [challenged police action] unreasonable," *Cady v. Dombrowski*, 413 U.S. 433, 447, 93 S.Ct. 2523, 2531 (1973), that "[t]he reasonableness of any particular governmental activity [including police use of force] does not necessarily or invariably turn on the existence of alternative less intrusive means." *Illinois v. Lafayette*, 462 U.S. 640, 647, 103 S.Ct. 2605, 2610 (1983) and that a police officer, therefore, is not constitutionally required to perform his duties in the best manner possible; he is only required under the Constitution, to act reasonably. *See United States v. Sharpe*, 470 U.S. 675, 686-87, 105 S.Ct. 1568, 1575-76 (1985), it is hard to imagine the Supreme Court would embrace a holding such as that in *Morais* in the context of a Title II case. As the Supreme Court has already observed – and the *Morais* opinion seems to prove – "a creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *United States v. Sharpe*, 470 U.S. 675, 686-87, 105 S.Ct. 1568, 1575-76 (1985). As has the Supreme Court, the Fifth Circuit has generally eschewed such an argument in an effort to create liability. *Cf., Young v. City of Killeen*, 775 F.2d 1349, 1352-53 (5th Cir. 1985) and *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992).

Interestingly, the Eleventh Circuit Court of Appeals has taken a very different approach from that adopted by the Fifth Circuit in *Hainze* in limiting how and when the ADA is applied to law enforcement activity. In *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1085 (11th Cir. 2007), the Eleventh Circuit held that "the question is not so much one of the applicability of the ADA" as it is what accommodation, if any, in a law enforcement setting is reasonable. In holding that a DUI arrest of a deaf man, where the officers failed to provide an interpreter did not fall under the ADA, the court explained that "the question is whether, given criminal activity and safety concerns, any modification of police procedures is reasonable before the police physically arrest a criminal suspect, secure the scene, and ensure that there is no threat to the public or officer's safety." *Id.* The approach enunciated in *Bircoll* seems to provide a more rational and workable approach to what the Fifth Circuit seemed to be trying to balance in *Hainze*. Indeed, several courts have found the approach of analyzing the reasonableness of the accommodation more appropriate than trying to draw a line as to when the Act applies. Although many courts have cited the rationale in *Bircoll* with approval, none outside the Eleventh Circuit have yet applied it to cases involving investigative or arrest scenes. However, the *Bircoll* approach seems more reasonably related to the concerns expressed by the court in *Hainze* and would likely make analysis of Title II claims much more straightforward in the review of investigation and arrest situations involving the police and those with disabilities.

IX. CONCLUSION

Whether a majority of the circuit courts will address this issue in terms of the timing and extent of applicability of Title II to investigative and arrest situations, as the Fifth Circuit did in *Hainze*, or whether they will adopt the Eleventh Circuit's approach to analyzing not applicability of the Act but, rather, the reasonableness of any accommodation under circumstances the Supreme Court acknowledged in *Graham v. Connor* are "tense…uncertain…and rapidly evolving," remains an open question subject to further debate and development.

For now, it is clear that, in the Fifth Circuit that, while Title II applies the ADA to law enforcement activities, it does not apply to law enforcement situations where the scene is not secure or where there is an existing threat to human safety. Therefore, although a plaintiff has the right to bring a claim under the ADA for violations that occurred during an investigation or arrest, that right does not encompass the periods of time during investigations or arrests where life-threatening circumstances were on-going. Further, at least one court has indicated that the ADA may not be applicable to law enforcement situations where officers are required to make quick, discretionary, assessments of whether criminal activity is afoot. Accordingly, while the ADA provides disabled plaintiffs the right to sue public entities that engage in discrimination in the context of law enforcement activity, that right is not without limitation and the limitations and application remain in flux.