IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

C.A. NOS. 96-K-370 & 93-K-2263

UNITED STATES OF AMERICA, JACK L. DAVOLL; DEBORAH A. CLAIR; and PAUL L. ESCOBEDO, Plaintiffs, v. THE CITY AND COUNTY OF DENVER; THE DENVER POLICE DEPARTMENT; and THE CIVIL SERVICE COMMISSION FOR THE CITY AND COUNTY OF DENVER, Defendants.	)	Hon. John L. Kane Jr.

UNITED STATES' MEMORANDUM
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT
ON LIABILITY UNDER TITLE I IN CIVIL ACTION NO. 96-K-370

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I. INTRODUCTION

Each year, several patrol officers ("officers") employed by the City and County of Denver Police Department ("DPD") become disabled -- some due to injuries suffered in the line of duty -- such that they can no longer effect a forcible arrest or shoot a weapon. Although these officers may have served on the DPD's police force for many years, they are not reassigned to jobs they still can perform. Instead, they are required to retire on disability. The City and County of Denver ("City") refuses to reassign them to vacancies for which they are qualified, within the DPD or elsewhere in the City and County. The financial repercussions for the officers are great: disability pensions may be less than half of the officers' former salaries, and officers on disability are responsible for securing their own health insurance. See Appendix A, Plaintiff United States' Statement of Undisputed Facts ("Fact") Nos. 46, 47.

The City's policy discriminates in employment on the basis of disability in violation of both title I of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12112, and title II of the ADA, 42 U.S.C. § 12132.[1] The United States' Motion for Summary Judgment on Liability is limited to the United States' claim under title I; namely, that Defendants'[2] policy results in a pattern or practice of employment discrimination against individuals with disabilities.[3] Specifically, Defendants' policy precludes them from making

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[1] Title I of the ADA prohibits employment discrimination on the basis of disability by public and private employers alike. 42 U.S.C. § 12111 et seq. Title II prohibits discrimination on the basis of disability in all services, programs or activities of state and local governmental entities. 42 U.S.C. § 12131 et seq.

[2] Defendants are the City and County of Denver, the Denver Police Department and the Civil Service Commission for the City and County of Denver in Civil Action No. 96-K-370. They are referred to throughout as "Defendants."

[3] A pattern or practice exists where discrimination is the standard operating procedure of the defendant -- the regular rather than the unusual practice. International Bhd. of Teamsters

"reasonable accommodation" to the known physical limitations of qualified individuals with disabilities, in violation of 42 U.S.C. § 12112(b)(5)(A).

The ADA defines unlawful discrimination to include the failure to make reasonable accommodation to an otherwise qualified employee with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. 42 U.S.C. § 12112(b)(5)(A). The ADA specifically includes "reassignment to a vacant position" in its definition of reasonable accommodation. Id. § 12111(9)(B).

Defendants admit that they have a policy that prohibits officers with disabilities from being reassigned[4] to Career Service or non-sworn (civilian) vacancies located within the DPD or elsewhere in the City. Defendants claim, however, that this policy is required by the Charter for the City and County of Denver ("Charter"), which establishes several different personnel systems for City employees. The Charter provision on which Defendants rely establishes the "Classified Service" personnel system for police officers and fire fighters, and the "Career Service" personnel system for the remaining City employees. Defendants contend that because the Charter does not affirmatively provide for transfers between these personnel systems, disabled officers cannot be reassigned to Career Service vacancies. See Appendix A, Fact Nos. 18-22, 72-75.

For the vast majority of City employees this bar on transfers between personnel systems is not of great moment: 9,500 of the City's 12,000 strong workforce are employees of the Career Service, which has a transfer policy specifically designed for employees with

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v. United States, 431 U.S. 324, 336 (1977). "[I]f the admissions [of a policy of discrimination] are credited, the ... violation ... has been proven." United States v. Gregory, 871 F.2d 1239, 1243 (4th Cir. 1989).

[4] The terms "transfer" and "reassignment" are used interchangeably throughout to refer to placement into a vacant position that is equivalent in terms of pay and status. See 29 C.F.R. app. § 1630.2(o) at 408.

disabilities, as well as a separate transfer policy for non-disabled employees. The disability transfer policy permits Career Service employees who develop disabilities such that they cannot perform their current positions to transfer to other Career Service jobs for which they are still qualified. Because there are nearly a thousand different job classifications within the Career Service, and hundreds of positions vacant each month, Career Service employees who develop disabilities but can still work are not likely to have difficulty remaining employed by the City. Appendix A, Fact Nos. 4, 5, 27, 29, 85-87.

In contrast, the Classified Service -- although it has a general transfer policy -- has no available positions to which officers with disabilities can transfer. This is because the DPD requires every member of its sworn force of nearly 1,500, no matter what his or her actual duties, to be able to shoot a weapon and effect a forcible arrest.[5] The result of this requirement is that there are no positions to which officers whose disabilities prevent them from being able to shoot a weapon and effect a forcible arrest can transfer within the Classified Service. Appendix A, Fact Nos. 6, 14-17, 19, 23.

If disabled officers seek to retain City employment, the only avenue remaining is to compete for Career Service jobs as brand-new applicants for City employment. No credit is given to disabled officers for their years of service to the City; they must undergo whatever entry-level tests and interview assessments are required for external applicants, and compete with these applicants as though they had never before worked for the City. Since Career Service vacancies often draw hundreds of applicants, this is no small feat. Appendix A, Fact No. 15.

Because Defendants do not dispute the existence of their "no reassignment" policy, this case is ideally suited for summary judgment. Liability here is purely a question of law:

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[5] Whether Defendants' identification of these as essential functions of every police force position complies with the ADA is at issue in private plaintiffs' lawsuit (C.A. No. 93-K-2263) ("Davoll I").

namely, whether the City can refuse to reassign employees with disabilities to vacancies they can perform based on a Charter provision establishing separate personnel systems. The United States maintains that Defendants cannot do so consistent with the ADA.

The only defense available to a reasonable accommodation claim is "undue hardship," which Defendants cannot establish. Defendants admit that they have never actually assessed or studied the costs or burdens of reassigning officers with disabilities to Career Service positions. Appendix A, Fact Nos. 53-62. The United States does not contend that Defendants must create one entity responsible for all City personnel functions rather than maintaining several personnel systems. What the United States does contend is that Defendants cannot rely on their structure of separate personnel systems to shield them from compliance with the ADA. The ADA prohibits Defendants from perpetuating a structure that builds a "wall" between personnel systems for purposes of reassignment. If Defendants' Charter is read to preclude reassignment, the provision at issue is preempted insofar as it conflicts with the ADA.[6] Even if the provision were not preempted, Defendants would be required to change their reassignment policy by amending the Charter. Of course, if the Charter is not read to preclude reassignment, Defendants need not amend the Charter in order to comply with the ADA; they need only establish a policy whereby officers with disabilities are permitted to transfer to Career Service positions.

II. STANDARD FOR SUMMARY JUDGMENT

Under Fed. R. Civ. P. 56(c), summary judgment is proper only if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of

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[6] Where a state or local law is inconsistent with the operation of a federal statute the state or local law is preempted. Gibbons v. Ogden, 22 U.S. 1 (1824). The Supremacy Clause of the U.S. Constitution provides that "the Laws of the United States which shall be made in Pursuance" of the Constitution "shall be the supreme Law of the Land...." U.S. Const. art. VI, cl. 2.

law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). An issue of fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmovant. Id. at 248. An issue of fact concerns "material" facts only if establishment thereof might affect the outcome of the lawsuit under governing substantive law. Id. The burden of proving that no issue of material fact exists falls upon the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A court must view all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion, and must resolve all reasonable doubts against the moving party. Anderson, 477 U.S. at 255, 261. The undisputed facts of this case support a finding of summary judgment in favor of the United States.

III. ARGUMENT

A. THE UNITED STATES HAS ESTABLISHED A PRIMA FACIE CASE OF LIABILITY IN A PATTERN OR PRACTICE CASE OF EMPLOYMENT DISCRIMINATION UNDER THE ADA[7]

In order to prove a prima facie case of liability in a pattern or practice case of employment discrimination under the ADA, the United States must establish that (a) defendant is a covered entity under title I; (b) defendant's policy or practice is undisputed; and (c) defendant's policy or practice discriminates against "qualified individuals with

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[7] On July 1, 1996, the Court bifurcated discovery and trial of the title I portion of the United States' action into two phases: stage one, dealing with Defendants' liability; and if necessary, stage two, addressing remedial relief. At the initial "liability" stage of a pattern or practice suit, the United States is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden, in stage one, is to establish a prima facie case that such a policy existed. Questions of individual relief such as the employment status of an individual, rejection of his or her request for reassignment to vacant positions, and entitlement to relief are deferred until the remedial phase and are undertaken only if this Court finds that the defendants violated title I. See International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). Thus, the identity of all of the victims of Defendants' discriminatory policy and practices and the issues surrounding remedial relief will not be addressed in this Motion.

disabilities." The undisputed facts establish a prima facie case of liability.

1. DEFENDANTS ARE COVERED ENTITIES UNDER TITLE I OF THE ADA

Defendants admit they are persons, employers, and covered entities within the meaning of title I. Appendix A, Fact Nos. 1-3.

2. DEFENDANTS' POLICY BARS THE REASSIGNMENT OF OFFICERS WITH DISABILITIES TO VACANT POSITIONS FOR WHICH THEY ARE QUALIFIED

Defendants further admit that they have a policy and practice that prohibits the reassignment of officers who develop disabilities to Career Service or non-sworn (civilian) vacancies. Appendix A, Fact Nos. 14-21.

3. DEFENDANTS' POLICY DISCRIMINATES AGAINST "QUALIFIED INDIVIDUALS WITH DISABILITIES" COVERED BY TITLE I

a. Title I of the ADA Obligates Employers to Provide "Reasonable Accommodation" to Employees with Disabilities

The ADA defines unlawful discrimination to include the failure to make reasonable accommodation to an otherwise qualified employee with a disability, unless the employer can show that the accommodation would impose an undue hardship on the operation of its business. 42 U.S.C. § 12112(b)(5)(A). Reasonable accommodation is a modification or adjustment to a job, the work environment, or the way things are usually done in order to allow a qualified individual with a disability to enjoy equal employment opportunity. 29 C.F.R. app. § 1630.2(o) at 406-07.

b. The ADA'S Title I "Reasonable Accommodation" Obligation Includes Reassignment

The ADA specifically includes "reassignment to a vacant position" in its definition of reasonable accommodation. 42 U.S.C. § 12111(9)(B).[8] Reassignment need only be to

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[8] The statute states:

"an equivalent position, in terms of pay, status, ... if the individual is qualified, and if the position is vacant within a reasonable amount of time." 29 C.F.R. app. § 1630.2(o) at 408.[9] Committee reports describing the final ADA legislation chronicle Congress's steadfast intent to remove barriers confronting the disabled worker by explicitly including reassignment as a reasonable accommodations:

> Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of disability, can no longer perform the essential functions of a job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and employer from losing a valuable worker.

> The term "reasonable accommodation" may include:
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

See 42 U.S.C. § 12111(9) (emphasis added); see also 29 C.F.R. app. § 1630.2(o) at 406-08.

[9] Reassignment may not be used to limit, segregate or otherwise discriminate against individuals with disabilities by forcing reassignment to undesirable positions or to designated offices or facilities. 29 C.F.R. app. § 1630.2(o) at 407-08. Here, Defendants limit police officers with disabilities to Classified Service positions which by virtue of their disabilities, they cannot perform.

Regulations to title I of the ADA were promulgated by the Equal Employment Opportunity Commission ("EEOC") and are contained in 29 C.F.R. § 1630. "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984); see also Griggs v. Duke Power, 401 U.S. 424, 434-35 (1971) (discussing guidelines issued by the EEOC interpreting Title VII, and noting that the "administrative interpretation of the Act by the enforcing agency is entitled to great deference"); see also Philbin v. General Elec. Capital Auto Lease, 929 F.2d 321, 324 (7th Cir. 1991) (citing to Chevron and noting that the Court is bound to give substantial weight to the EEOC's interpretation of a statute that it administers).

H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 63 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 305 (emphasis added).[10]

Courts have routinely recognized reassignment as a form of reasonable accommodation. See White v. York Int'l Corp., 45 F.3d 357, 362 (10th Cir. 1995) (reassignment to a vacant position is possible accommodation); Benson v. Northwest Airlines, 62 F.3d 1108, 1114 (8th Cir. 1995) (same). The court in Vande Zande v. Wisconsin Dep't of Admin., 851 F. Supp. 353 (W.D. Wis. 1994), aff'd, 44 F.3d, 538 (7th Cir. 1995), found that "offering an employee a new position without a reduction in pay or benefits is a reasonable accommodation 'virtually as a matter of law.'" Id. at 361 (quoting Guice-Mills v. Derwinski, 967 F.2d 794, 798 (2d Cir. 1992)); see also Hogue v. MQS Inspection, Inc., 875 F. Supp. 714, 721 (D. Colo. 1995); Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1104 (S.D. Ga. 1995); and Vazquez v. Bedsole, 888 F. Supp. 727, 731 (E.D.N.C. 1995) (all recognizing reassignment as a form of reasonable accommodation).

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[10] The ADA's legislative history is particularly important because the definition of "reasonable accommodation" in the regulations implementing the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. -- from which the ADA evolved -- did not refer to reassignment. Accordingly, under the Rehabilitation Act some courts had determined that "reasonable accommodation" did not include reassignment.

As the court in Haysman v. Food Lion Inc., 893 F. Supp. 1092, 1104 (S.D. Ga. 1995), explained: "[t]he ADA, unlike the Rehabilitation Act, contains explicit language concerning the employer's duty to consider reassignment to a vacant position as a possible accommodation if the employee is no longer able to perform the essential functions of his original job.... Thus, under the ADA, reassignment is appropriate when no accommodation would enable the plaintiff to remain in his current position, he is qualified (with or without reasonable accommodation) for another position, and that position is vacant within a reasonable time." Id. (emphasis added).

In 1992, the Rehabilitation Act was amended to provide that the standards applied in title I ADA cases -- including the explicit addition of "reassignment" as a form of reasonable accommodation -- henceforth were also applicable to cases of employment discrimination brought under the Rehabilitation Act. 29 C.F.R. § 1614.203. See discussion in Shiring v. Runyon, No. 95-3547, 1996 WL 417636 (3rd Cir. 1996) at *3-*4.

c. The ADA Requires Defendants to Make Reasonable Changes in Their Regular Reassignment Policies, Practices, and Procedures in Order to Provide Equal Opportunities to Qualified Individuals with Disabilities

Reassignment as a means of reasonable accommodation is more than making the usual opportunities available on a nondiscriminatory basis; it requires a change in the usual policy where doing so is "reasonable." Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 542-43 (7th Cir. 1995) ("It is plain enough what 'accommodation' means. The employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work."); see also Beck v. University of Wisc. Bd. of Regents, No. 95-2479, 1996 WL 29449, at *3 (7th Cir. Jan. 26, 1996).

Some courts have interpreted reasonable accommodation to require employers to reassign qualified individuals with disabilities to vacant positions if, and only if, the employer has a regular practice or policy of reassigning non-disabled employees to other positions.[11] But this interpretation makes a nullity of the ADA's inclusion of reassignment as a form of reasonable accommodation. If reassignment is only required where a reassignment policy already exists for all employees, there would be no need for the ADA to require that it be provided for employees with disabilities. Congress clearly did not intend to limit reassignment for qualified individuals with disabilities to situations where reassignment is already generally available.

There is no question that the ADA forces employers to move beyond the traditional analysis used to appraise non-disabled workers and to consider reassignment to a vacant position as a method of enabling a disabled worker to do the job without creating undue hardship. See, e.g., Leslie v. St. Vincent New Hope, Inc., No. IP 94-0922-C H/G, 1996 WL 69550, at *9 (S.D. Ind. Feb. 7, 1996) (the ADA may require reassignment even if the

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[11] See, e.g., Emrick v. Libbey-Owens-Ford, 875 F. Supp. 393, 398 (E.D. Tex. 1995).

employer does not have a regular policy or practice of permitting non-disabled employees to transfer).[12]

In the present case, the employer -- the City and County of Denver -- already has a regular practice or policy of reassignment. Both the Career Service and Classified Service personnel systems have transfer policies that allow non-disabled employees to transfer to other positions of the same or similar classifications. Appendix A, Fact Nos. 7-11, 26-28. The ADA here would not require the creation of a reassignment policy where none existed before, but rather only modification of practices that prohibit transfers across personnel systems.[13]

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[12] Defendants contend in their Answer that reassignment of officers with disabilities is not required because "[t]he ADA does not require affirmative action." Defs.' Answer, Affirmative Defense No. 6. Of course, this is not a case of affirmative action. Affirmative action refers to a "remedial policy for the victims of past discrimination." The term reasonable accommodation relates to the "elimination of existing obstacles against the handicapped." Alexander v. Choate, 469 U.S. 287, 300 n.20 (1985).

Nevertheless, citing Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995), Defendants argue that the ADA does not obligate them to give "priority" to disabled individuals over those who are not disabled. Defendants' reliance on Daugherty is misplaced. The plaintiff in Daugherty was a part-time employee, who demanded as reasonable accommodation a promotion to a full-time job. Under the ADA, an employer has no duty to promote a disabled employee as a reasonable accommodation. All that the ADA mandates is that the reassignment be to "an equivalent position, in terms of pay, status, etc.," 29 C.F.R. app. § 1630.2(o) at 408, if the individual is qualified, and a vacancy exists. Indeed, an employer may reassign an individual to a lower graded job if no equivalent job is available. 29 C.F.R. app. § 1630.2(o) at 408.

[13] As noted previously, the City has a separate disability transfer policy for Career Service employees. According to Glen Legowik, the Employee Relations Supervisor for the Career Service, the City enacted this disability transfer policy in 1993 in order to give a "disabled employee at least a decent chance of remaining employed somewhere in the career service system. And we felt that was fair, and it was the least we could do." Appendix A, Fact No. 28.

The case of Jack Davoll ("Davoll"),[14] a patrol officer who served on the DPD for nineteen years, aptly illustrates how Defendants' reassignment policy discriminates against qualified individuals with disabilities. Davoll suffered injuries in the line of duty which resulted in a physical impairment that substantially limits a major life activity within the meaning of the ADA.[15] Davoll is an individual with a disability under the ADA.[16] Appendix A, Fact Nos. 31-44.

Davoll is also a "qualified individual with a disability who with or without

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Even Defendants' former Manager of Safety recognized the unfairness of not providing similar opportunities to police officers and other members of the Classified Service. In a letter dated March 2, 1993, Manager of Safety Ms. Elizabeth McCann sought advice from Mr. Fred Timmerman, Personnel Director of the Career Service Authority, regarding the feasibility of a transfer. Specifically, Ms. McCann asked Mr. Timmerman to consider moving fire fighters and police officers, who were permanently injured in the line of duty to Career Service positions, in a "more direct manner" such as "waiv[ing] the testing procedures" she stated: "<u>These people have been trained by the city and given a great deal of service to the city; since they have been injured as a result of working for the city, it would seem appropriate that they remain employees of the City in a civilian capacity</u>." <u>See</u> Appendix A, Fact No. 24.

[14] The United States offers Mr. Davoll's case as an example of how Defendants' policy operates to discriminate against individuals covered by title I. This discussion is not intended to support summary judgment as to the United States' claim under title II on Mr. Davoll's behalf.

The United States expects to show in the stage two portion of its action (addressing remedial relief) that at least twenty-five (25) officers were affected by Defendants' discriminatory policies for the period July 26, 1992 (when the ADA became effective for employers with twenty-five (25) or more employees) to the present.

[15] On January 29, 1991, Davoll's police car was struck broadside during a high speed chase. Davoll sustained injuries to his neck, back and shoulder. These injuries caused the Medical Director of the City's Occupational Health and Safety Clinic to conclude that Mr. Davoll should have "no involvement in resistive activities or altercations." Appendix A, Fact Nos. 32-34.

[16] The term "disability" means, with respect to an individual, "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2). Davoll is unable to sit, stand or walk for any given length of time. Davoll's condition substantially limits -- among other major life activities -- his ability to lift, walk and stand. Appendix A, Fact Nos. 35-36, 39-40.

reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires," 42 U.S.C. § 12111(8), as his breadth of police experience and years of satisfactory performance in the DPD demonstrate. During his nineteen-year tenure with the DPD, Davoll gained important experience that is relevant for a wide range of non-sworn positions including an investigator, lab technician, firearms instructor, or dispatcher. Defendants do not dispute that Davoll requested reasonable accommodation for his disability. Defendants also do not dispute that their policy precluded them from granting Davoll's reassignment requests. Appendix A, Fact No. 31.

B. DEFENDANTS CANNOT DEMONSTRATE THAT ALLOWING REASSIGNMENT WOULD RESULT IN UNDUE HARDSHIP

1. DEFENDANTS HAVE THE BURDEN OF PROVING THAT REASSIGNMENT WILL RESULT IN SIGNIFICANT DIFFICULTY OR EXPENSE

Defendants bear the burden of proving the affirmative defenses raised in their Answer.[17] The only defense available to a reasonable accommodation claim is "undue hardship," which Defendants cannot establish.

Under the ADA, "undue hardship" is "an action requiring significant difficulty or expense." 42 U.S.C. § 12111(10)(A).[18] Undue hardship "refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."[19] Criteria used to establish

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[17] Bryant v. Better Business Bureau of Greater Md., Inc., 923 F. Supp. 720, 738 (D. Md. 1996) (citing Barth v. Gelb, 2 F.3d 1180, 1182 (D.C. Cir. 1993), cert. denied, -- U.S. --, 114 S. Ct. 1538 (1994)).

[18] The EEOC's interpretative guidance explains that undue hardship means "significant difficulty or expense in, or resulting from, the provision of an accommodation. 29 C.F.R. app. § 1630.2(p) at 408.

[19] 29 C.F.R. app. § 1630.2(p) at 408 (citing S. Rep. No. 116, 101st Cong., 1st Sess. 35 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 67 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 349).

this defense include: the size of the employer; the size of its budget; nature of its operation; number of employees; structure of its workforce and the nature and cost of the accommodation. Id. The larger the employer, the larger the budget and the greater the burden it will be expected to assume. See, e.g., Nelson v. Thornburgh, 567 F. Supp. 369, 376 and 380 (E.D. Pa. 1983); EEOC Title I Technical Assistance Manual at III-12.[20]

2. DEFENDANTS HAVE NO FACTUAL BASIS FOR A CLAIM OF UNDUE HARDSHIP[21]

Defendants concede that they have never performed any analysis of the cost or difficulty of providing an accommodation by reassignment. Defendants admit they have no idea what the cost to the City would be of adopting a policy whereby officers with disabilities could transfer to the Career Service. Appendix A, Fact Nos. 50-67.

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[20] Courts have also deferred to the EEOC's interpretation of its regulations in the agency's Title I Technical Assistance Manual. See, e.g., Thompson v. Borg-Warner Protective Services Corp., No. C-94-4015 MHP, 1996 WL 162990 at *4 (N.D. Cal. Mar. 11, 1996) (according "broad deference" to interpretations in the EEOC 1995 ADA Manual on Enforcement Guidance, citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)).

[21] In their undue hardship defense, Defendants assert that "[n]either Jack Davoll nor any other member of the putative class of plaintiffs represented by the United States can be accommodated to perform the job of Denver Police officer without undue hardship and expense to the Defendants." Appendix A, Attachment 2, Affirmative Defense No. 4 (emphasis added). The United States does not contend that officers with disabilities should be reassigned to sworn Civil Service positions (for which the DPD requires an individual have the ability to shoot a weapon and effect a forcible arrest). Such a contention would be fruitless. Police officers whose disabilities prevent them from being able to shoot a weapon or effect a forcible arrest cannot be reassigned to positions for which the DPD maintains these are essential functions. On the contrary, the United States is challenging Defendants' policy barring the reassignment of officers with disabilities to non-sworn vacancies for which they are qualified.

Defendants' Affirmative Defense No. 4 recalls an argument raised in the summary judgment motion Defendants filed in Davoll I. There, Defendants insisted that, in order to be considered a "qualified individual with a disability" eligible for a reassignment, employees would have to be able to perform the essential functions of the job for which they were originally hired. But, of course, if they could do so, there would be no need to accommodate them by reassignment.

In order to withstand judicial scrutiny, an employer's undue hardship defense must have a strong factual basis. Bryant v. Better Business Bureau of Greater Md., Inc., 923 F. Supp. at 740-41 (D. Md. 1996). In Bryant, an employer raised undue hardship as a defense for its refusal to provide a TTY device[22] as an accommodation to a hearing impaired employee. The court found that the employer's decision to deny the accommodation without consulting anyone or reviewing relevant literature demonstrated that the employer did not perform any genuine analysis of providing the TTY device as an accommodation. Id. at 741. Thus, the court, in denying the employer's motion for partial summary judgment, held that:

> [A]lthough [the employer was] not required to determine with mathematical certainty whether the TTY system would have caused [it] an 'undue hardship,' a decision lacking any substantial evidentiary basis whatsoever is clearly insufficient.... In sum, the [employer has] failed to meet [its] burden with respect to the undue hardship defense.

Id.; see also Buckingham v. United States, 998 F.2d 735, 740 (9th Cir. 1993) ("An employer, to meet its burden under the [Rehabilitation] Act, may not merely speculate that a suggested accommodation is not feasible."); Henchey v. Town of North Greenbush, 831 F. Supp. 960, 965 (N.D.N.Y. 1993) (under the Rehabilitation Act, "the ultimate burden of proof on the issue of reasonable accommodation is on the employer.") (citing Gilbert v. Frank, 949 F.2d 637, 642 (2d Cir. 1991)).

3. THE CITY AND COUNTY OF DENVER CHARTER DOES NOT CREATE A LEGAL BAR TO REASSIGNMENT

The United States contends, and Defendants concede, that there is nothing in the Charter which expressly prohibits the reassignment of officers to vacancies in the Career Service. But Defendants nevertheless maintain that a Charter provision that establishes

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[22] Otherwise known as a "TDD," or "telecommunications device for the deaf," this device functions like a telephone for people who are deaf. The device allows someone who is deaf to communicate over the telephone lines by typing directly to other TDD users, or through a "relay" operator to communicate with any telephone user.

separate personnel systems for Classified Service and Career Service employees should be understood to preclude reassignment between personnel systems. Appendix A, Fact No. 73, 76-77.

Even if the Charter is interpreted to preclude reassignment, however, the provision at issue is preempted insofar as it conflicts with the ADA. Where a state or local law is inconsistent with the operation of a federal statute the state or local law is preempted. Gibbons v. Ogden, 22 U.S. 1 (1824).[23] Any state or local law, however clearly within a jurisdiction's acknowledged power, "which interferes with or is contrary to federal law, must yield." Free v. Bland, 369 U.S. 663, 666 (1962).[24]

Absent preemption, Defendants can interpret or amend their Charter to provide for reassignment for officers with disabilities. Amending the Charter is not a complicated or expensive process, and is undertaken quite frequently; some five to seven proposed

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[23] The Supremacy Clause of the U.S. Constitution, art. VI, cl. 2, provides that "the Laws of the United States which shall be made in Pursuance" of the Constitution "shall be the supreme Law of the Land...." For purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of state-wide laws. See, e.g., City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 632 (1973).

[24] See Hillsborough County, Fla. v. Automated Medical Lab. Inc., 471 U.S. 707, 713 (1985); see also Evans v. Evans, 818 F. Supp. 1215 (N.D. Ind. 1993) (policy creating a waiting period before students with learning disabilities could get assigned to residential placement in private schools was preempted by the Individuals with Disabilities Education Act, which mandated implementation "as soon as possible."). See also North Dakota v. United States, 495 U.S. 423, 434, (1990); Don't Tear It Down, Inc. v. Pennsylvania Ave. Dev. Corp., 642 F.2d 527, 533 (D.C. Cir. 1980); Beveridge v. Lewis, 939 F.2d 859, 862 (9th Cir. 1991).

Moreover, any state or local laws not preempted by the ADA are explicitly identified as such in the statute. See 42 U.S.C. § 12113(d)(3) (nothing in the ADA is to be construed to preempt state and local food handling laws).

amendments are included on the ballot at election time each year.[25] Appendix A, Fact Nos. 78-80. Further, the amendment would be simple to draft, and likely to pass. In 1978, a similar amendment to the Charter was enacted permitting certain members of the Classified Service of the Police Department to be appointed to Career Service positions without examination -- precisely what is needed here.[26] Appendix A, Fact Nos. 79, 81-83. The same type of amendment would suffice to bring Defendants into ADA compliance here.

4. THE COST OF REASSIGNMENT DOES NOT CONSTITUTE A SIGNIFICANT EXPENSE

The key component of the undue hardship defense is a calculation of the financial or administrative costs of the accommodation at issue relative to the entity's overall operations. Defendants admit that they have never actually assessed or studied the costs or burdens of the accommodation at issue here. Appendix A, Fact Nos. 53-62. To the extent these can be estimated, however, the undisputed facts show the administrative and financial costs to be negligible. Appendix A, Fact Nos. 51-62.

Each time that the Career Service Authority seeks to fill a vacancy, it expends resources. It must advertise the vacancy; recruit to fill the vacancy; assess the qualifications of applicants; test applicants; interview applicants; and rank applicants. Given that for some vacancies, the Career Service Authority receives hundreds of applications, the financial costs of filling a vacancy can be substantial. Appendix A, Fact Nos. 87-89.

Overall cost savings are likely to result from reassignment also because when

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[25] Defendants can and have amended the Charter in the past. In his deposition, Police Chief Michaud testified that at least on two occasions he "asked" for and received at least two "charter changes." Chief Michaud's testimony suggesting that revising the Charter is not burdensome was echoed by other deponents. Deposition testimony indicates that the cost of placing such an amendment proposal on the ballot costs as little as $3,000. The City's budget is $500 million. Appendix A, Fact No. 8.

[26] The Charter amendment provides that a Radio Engineer may "resign from the Classified Service and be appointed to a corresponding position in the Career Service <u>without examination</u>." <u>See</u> Appendix A, Fact No. 82.

officers are reassigned, the City retains the benefit of its investment in years of the employee's training and experience. Appendix A, Fact No. 25. Moreover, a reassignment policy for officers with disabilities is likely to save rather than cost additional resources due to the amount the State of Colorado expends on disability retirement pensions. Appendix A, Fact No. 45, 48-49.

Defendants employ nearly 12,000 individuals in facilities located all over the Denver metropolitan area. Given the size of the workforce, Defendants cannot argue that reassignment as a reasonable accommodation will strain its administrative resources or hamper any of its municipal functions.[27] Appendix A, Fact No. 4. In light of the size of Defendants' budget ($500 million), the potential cost of modifying Defendants' policy to permit the reassignment of officers with disabilities to Career Service vacancies is de minimis. This is particularly true since the number of positions that would be affected by a change in the DPD's reassignment policy is small -- the number of officers who apply for disability retirement averages only four (4) officers per year. Appendix A, Fact Nos. 8, 16-17.

At least one court has found "undue hardship" in similar circumstances. See, e.g., Nelson v. Thornburgh, 567 F. Supp. 369, 376 and 380 (E.D. Pa. 1983) (court held that in view of the welfare department's large budget, requiring the department to reasonably accommodate blind income maintenance workers by providing readers was not an undue

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[27] Indeed, Police Chief Michaud testified that reassigning officers with disabilities to non-sworn vacancies would not pose an undue hardship:

Q: Okay. Now, is it your belief that the second option, reassignment or transfer of disabled officers to Career Service Authority [non-sworn] positions, would be an undue burden on the police department?

A: It would not be an undue burden on the police department if I think the laws or rules were changed.

See Appendix A, No. 68.

hardship.), aff'd, 732 F.2d 146 (3d Cir. 1984), cert. denied, 469 U.S. 1188 (1985).

5. REASSIGNMENT WILL NOT DISRUPT DEFENDANTS' OPERATIONS

Defendants have argued that permitting reassignment would undermine the Career Service's "merit system." The Career Service Authority requires all applicants who are not transferees to complete various entrance examinations and interview assessments. Defendants contend that allowing officers -- who, of course, are already employees of the City, and were required to undergo rigorous training and examination to become officers -- would somehow weaken the "merit system." Appendix A, Fact Nos. 69-70, 84, 88.

As a threshold matter, officers with disabilities seeking reassignment under the ADA need be reassigned only to jobs for which they are qualified. Further, although applicants new to City employment must complete entrance examinations and interview assessments in order to ranked and placed on a "certification list," the hiring agency need not hire the highest ranking applicant, or indeed, anyone on the list. It could instead fill the position with a transferee, or someone seeking reemployment, for example. Defendants admit that there exist no criteria governing how hiring decisions are ultimately made, and that there is no tracking or monitoring by the Career Service of decisions by hiring agencies. Appendix A, Fact Nos. 88-92.

Even more importantly, the entry requirements for officers are just as, if not more rigorous than, entry requirements for Career Service jobs of similar status and pay. Treating officers with disabilities the same as brand-new applicants for City employment undervalues the significant training and experience officers with disabilities have obtained as employees of the City -- training that demonstrates qualification for various type of jobs in the Career Service. Appendix A, Fact Nos. 93-94.

Defendants cannot escape responsibility for complying with the ADA by attempting to characterize the Career Service and Classified Service personnel systems as inviolate,

independently operating units which have no connection to each other. The City is the ultimate employer of all employees of every personnel system provided for in its Charter. It is the City that pays the salaries of every member of the Classified and Career Service. It is the City which establishes the operating budgets and determines the functions of its several personnel systems. And it is the City as a whole which is responsible for ensuring that the rights of all of its employees are protected under the ADA. Appendix A, Fact No. 9.

IV. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court grant the United States' Memorandum In Support of Its Motion for Summary Judgment on Liability Under Title I In Civil Action No. 96-K-370.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Sheila Foran, hereby certify that the foregoing United States' Motion and Memorandum in Support of its Motion for Summary Judgment On Liability Under Title I in Civil Action No. 96-K-370 was served on August 15, 1996, via overnight express mail delivery, on the following counsel:

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