

# THE ZAPPIA LAW FIRM

A PROFESSIONAL CORPORATION

— Labor & Employment Law —

## SPECIAL UPDATE

### LAW ENFORCEMENT/POLICE AND PUBLIC EMPLOYERS

February 26, 2014

#### ARREST / ENTRY / USE OF FORCE

#### AMERICANS WITH DISABILITIES ACT / PROVOCATION THEORY

##### **I. Chiefs' Executive Summary**

In a worrisome case to law enforcement, the Ninth Circuit held that:

1. Police officers can be held liable for injuries occurring during an arrest if they fail to consider or reasonably accommodate a suspect's known disability (applying the ADA to arrests in our jurisdiction); and
2. Police officers can be held liable for injuries resulting from a *reasonable* use of force if the police officer intentionally or recklessly created the dangerous situation (the "provocation theory").

##### **II. Facts**

Teresa Sheehan was a mentally ill woman living in a San Francisco group home. On August 7, 2008, after Sheehan exhibited abnormal behavior, a social worker entered her room without her permission to perform a welfare check. Sheehan responded with hostility, told him to get out, and threatened to kill him with a knife. The social worker responded to the threat by clearing the building of the other residents. He then arranged for her to be involuntarily committed temporarily for psychiatric evaluation and treatment at a separate mental health facility.

Officer Katherine Holder and Sergeant Kimberly Reynolds were the first to respond to the request for help in transporting her to the evaluation facility. Upon their arrival, they were briefed about Sheehan's violent threats and mental instability. Without permission or a warrant, the officers entered Sheehan's room for the first time using an access key furnished by the social worker. She responded by brandishing a knife and threatening to kill them. The officers retreated and called for backup.

However, the officers decided to re-enter Sheehan's room a second time before backup arrived. They drew their service weapons along with pepper spray and forcibly entered Sheehan's room again. According to the officers, Sheehan advanced towards them with a knife and continued to do so even after being pepper sprayed. Holder and Reynolds then shot and hit Sheehan five or six times, almost killing her. Officer Reynolds later admitted that she did not take Sheehan's mental illness into account when she decided to force the second entry.

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## III. Court Rulings

### a. ADA/Reasonable Accommodation

Sheehan sued the officers and the City and County of San Francisco, alleging violations of the Americans with Disabilities Act and her rights under the Fourth Amendment, among other related claims. The Ninth Circuit held that, although warrantless search or seizure in a person's home is presumptively unreasonable under the Fourth Amendment, the social workers and/or officers are permitted to do so in order to render emergency aid or address exigent circumstances. The Court affirmed that all searches and seizures, whether performed with a valid warrant, or justified by an exception to the warrant requirement, must be done in a reasonable manner and if needed, using reasonable force. The Court found the police officers were initially justified in initially entering Sheehan's apartment without a warrant under the emergency aid exception, since there was an objectively reasonable basis to conclude that Sheehan needed medical assistance. The Court further found they conducted themselves in a reasonable manner by assessing the situation and exiting.

However, as to the second forced entry, the Court refused to dismiss the case. The Court ruled that a jury could find that the officers acted unreasonably by failing to take into account Sheehan's mental illness before entering into a near fatal confrontation. According to expert testimony of a former deputy chief of the Los Angeles Police Department, their actions went against general police practices for dealing with the mentally ill. The expert asserted that officers are trained to request back up, calm the situation, communicate in a non-threatening manner, to move slowly, and to take time to assess the situation and let the individual calm down.

### b. Use of Force/Provocation Theory

The Court further held that there were triable issues as to whether the officers used excessive force by resorting to deadly force and shooting Sheehan. The use of deadly force is reasonable if the officers had probable cause to believe that Sheehan posed a significant threat of death or serious physical injury to the officer or others. *Although the force was clearly reasonable when viewed at the moment the shooting occurred since Sheehan posed an immediate danger with the knife, the officers may still be held liable based on a "provocation theory."* Under this theory, *officers can be held liable for even a reasonable use of force if they are found to have intentionally or recklessly provoked the violent confrontation, and if the provocation is an independent Fourth Amendment violation.* Sheehan's claim that the second entry violated the Fourth Amendment, which was allowed to go forward by this court, potentially satisfies the independent violation requirement for the provocation theory of liability for using defensive deadly force.

Additionally, Sheehan presented evidence that the officers acted recklessly by failing to take Sheehan's mental illness into account and rushing into an almost lethal confrontation rather than attempting to calm the situation down as they were trained to do. The court held that there are triable issues of fact as to whether the shooting was unreasonable on a provocation theory.

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The Ninth Circuit joined the majority on an issue where the circuits are split and held that Title II of the Americans with Disabilities Act applies to arrests. The Act provides that “no 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. 42 U.S.C. § 12132. Discrimination includes a failure to reasonably accommodate a person’s disability.” There are two types of Title II claims applicable to arrests: (1) wrongful arrests; and (2) failure to reasonably accommodate the person’s disability during an investigation or arrest. The court found there was a triable issue whether: (1) the officers failed to reasonably accommodate Sheehan’s disability when they forced their way back into her room without taking her mental illness into account; OR (2) whether they employed generally accepted police practices for peaceably resolving a confrontation with a person with mental illness. By emphasizing that exigencies must be used as a factor when determining the reasonableness of the officers’ actions similar to how it is factored into the reasonableness analysis under the Fourth Amendment, the court somewhat intertwined the analysis and standard of liability for the two distinct claims, and will inevitably narrow the scope of protection granted by qualified immunity for excessive force cases in the Ninth Circuit.

## IV. Commentary

This case could be problematic for law enforcement personnel. In the context of an arrest and/or entry, circumstances vary, an officer often has little or no knowledge of the suspect, things happen quickly, and all often occur in dangerous circumstances, and often in situations where the officer must act. Under all of these circumstances:

1. How does an officer know of a suspect’s disabilities? In what detail can/should an officer know of a suspect’s disabilities, or their effects?
2. How does/can a police officer decide on the spot what reasonable accommodation is necessary or appropriate? In the employment context the “reasonable accommodation” analysis can take months, including careful evaluation of medical records and discussions of the employee’s limitations and potential/various reasonable accommodations. How can this be done in seconds by an officer on the scene?
3. At what point is the Police Officer deemed to have “provoked” the situation of having to use force, as opposed to have simply responded and exercised their best judgment?