



Inappropriate Law Enforcement Response to Individuals with Diabetes: An Introduction and Guide for Attorneys

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September 2014

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INTRODUCTION

Regrettably, police officers occasionally discriminate against individuals with diabetes during investigations, arrests, or pretrial holdings. Such discrimination takes many forms: an officer expressly targets an individual for adverse treatment because of his or her diabetes diagnosis; an officer mistakes hypoglycemia or other effects of diabetes as unlawful conduct; an officer fails to make reasonable accommodations for an individual with diabetes during an arrest or pretrial detention; an officer or jail official denies necessary medical care or supplies to an individual with diabetes during the immediate hours after he or she has been arrested; or a state or municipality fails to provide adequate training to its officers regarding recognizing and accommodating individuals with diabetes.

This paper is a guide for practitioners interested in bringing police misconduct cases on behalf of individuals with diabetes. In this guide, we will discuss federal claims against police officers or municipal governments under 42 U.S.C. § 1983, Title II of the Americans with Disabilities Act, and § 504 of the Rehabilitation Act and, likewise, supplemental state law claims practitioners may bring under a variety of common law tort theories. Our examination includes discussion of the elements of each federal claim; cases in which such claims have been pleaded both successfully and unsuccessfully; procedural hurdles that plaintiffs must overcome in pleading such claims; and forms of relief available under each claim.

It is advisable for plaintiffs to plead parallel claims under all three federal statutes, as well as under all applicable state law tort theories, but the procedural hurdles, evidentiary hurdles, and relief associated with each differ. Attorneys representing individuals aggrieved by police misconduct should investigate applicable state law claims; as such claims are an essential avenue of obtaining justice for plaintiffs. A state-by-state survey of relevant law is beyond the scope of

this memorandum, but state law theories are discussed briefly in section IV. *See* discussion *infra* at p.80.

Prevailing plaintiffs have received relief ranging from compensatory and punitive damages (as high as \$17.5 million in one recent case) to injunctive relief mandating that pretrial detainees and prisoners receive prompt medical evaluation and treatment, and that law enforcement officials receive training on responding appropriately to individuals with diabetes. Attorney's fees may be available depending on whether a plaintiff is a prevailing party pursuant to the particular cause of action upon which a court has ordered relief. When a plaintiff does prevail by obtaining a judgment on the merits or a court-ordered consent decree, a court has discretion over the award of reasonable attorney's fees.

THE SCIENCE AND MEDICINE OF DIABETES

It is critical to understand the science and medicine of diabetes in order to appropriately respond to claims that a person with diabetes is posing a safety threat to himself, the community, or to an officer. When police officers do take improper actions based on safety concerns, they almost always do so either out of ignorance of diabetes and its effects or because improper or insufficient medical evidence was considered in making the decision. Therefore, knowledge of the medicine and science of diabetes is critical in evaluating police officer or police department's action and deciding whether to take a case.¹

¹ This section is not intended as a comprehensive primer on diabetes; much more information about the disease can be found on the American Diabetes Association's (The Association) web site at www.diabetes.org. The Association also offers a guide to demonstrating coverage under the ADA Amendments Act of 2008 for people with diabetes: <http://main.diabetes.org/dorg/PDFs/Advocacy/Discrimination/atty-demonstrating-coverage-adaaa.pdf>.

I. Basic Information on Diabetes

Diabetes is a disorder of the endocrine system that affects over 29 million Americans² and is characterized by high blood glucose (sugar) levels resulting from defects in insulin secretion, insulin action or both. The pancreas is responsible for making and secreting insulin, a hormone that regulates the level of glucose in the blood. In diabetes, the pancreas produces insufficient or no insulin, limiting the body's ability to regulate glucose and convert it into energy.

Normally, during digestion, the body changes food into a form of sugar called glucose. The blood then carries this glucose to cells throughout the body. There, insulin allows glucose to enter the cells and it is changed into energy for the cells to use or store for future needs. Even in people without diabetes, blood glucose levels go up and down throughout the day in response to food and the needs of the body. However, in the person without diabetes, this is a finely tuned system that keeps blood glucose levels within the normal, healthy range.

In diabetes, this process is disrupted because insulin is not present or cannot be used properly. There are two main types of diabetes: type 1 diabetes and type 2 diabetes.³ In type 1 diabetes, the pancreas stops making insulin or makes only a tiny amount. Type 1 develops when the body's immune system destroys beta cells in the pancreas, the only cells in the body that make insulin. Thus a person with type 1 diabetes must receive insulin from an outside source (typically through injections or use of an insulin pump) in order to survive.

In type 2 diabetes, the body retains the ability to make insulin, but cannot make enough to meet its needs. It is generally believed that in people with type 2 diabetes the body's cells cannot

² *National Diabetes Statistics Report*. Atlanta, GA, U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, 2014.

³ Type 1 diabetes is sometimes still referred to as "juvenile diabetes" or "insulin-dependent diabetes," while type 2 diabetes is sometimes referred to as "adult-onset diabetes" or "non-insulin dependent diabetes." However, these terms should be avoided, as they are ambiguous and no longer favored by the diabetes health care community.

recognize insulin or use it as effectively as in people without diabetes (a condition known as insulin resistance). This causes the body to need more insulin to process the same amount of glucose. Generally over time the strain on the pancreas will decrease its ability to produce insulin and cause blood glucose levels to rise. Some people with type 2 (particularly in the early stages of the disease) can control their diabetes solely through diet and exercise. Others must take various types of medications, while still others use insulin much as those with type 1 do.⁴

When insulin is absent or ineffective, the glucose in the bloodstream cannot be used by the cells to make energy. Instead, glucose collects in the blood, leading to the high glucose levels or “hyperglycemia” that is the defining characteristic of untreated diabetes.

II. Hypoglycemia

Insulin and oral medications that lower blood glucose are used to treat diabetes. All types of insulin and some oral medications (sulfonylureas) can lower blood glucose too much, leading to a potentially dangerous condition known as hypoglycemia. The medical definition of hypoglycemia is a blood glucose reading of 70 mg/dL or lower.⁵ Symptoms of mild to moderate hypoglycemia include tremors, sweating, lightheadedness, irritability, confusion, and drowsiness. It is common to mistake the symptoms of hypoglycemia for alcohol or drug intoxication. Hypoglycemia usually can be treated easily and effectively by consuming a ready source of glucose such as fruit juice. If it is not treated promptly, however, hypoglycemia can become

⁴ A third type of diabetes, gestational diabetes, occurs during pregnancy, and usually ends when the pregnancy does. Individuals with gestational diabetes typically manage with very close monitoring of blood glucose, diet, and exercise, and, in some cases, insulin. If they take insulin, they are at risk of hypoglycemia just like people with type 1 and 2 who take insulin.

⁵ See *Defining and Reporting Hypoglycemia in Diabetes*, *Diabetes Care* vol. 28 no. 5, 1245–49 (May 2005) <http://care.diabetesjournals.org/content/28/5/1245.full>.

severe and potentially life-threatening. Symptoms of severe hypoglycemia include inability to swallow, convulsions or unconsciousness.

It is important to distinguish between severe hypoglycemia and its milder forms. All people with type 1 diabetes, and some people with type 2 (those who are taking insulin or oral medications which lower blood glucose levels) will experience hypoglycemia. It is simply not possible with current diabetes treatment to regulate blood glucose levels as tightly as people without diabetes do naturally. However, severe hypoglycemia is rare. It occurs when the individual is unable to treat herself, either due to unconsciousness or cognitive impairment, and must be assisted by others in order to receive treatment to raise blood glucose levels. Severe hypoglycemia is a serious medical problem, and will impair an individual's ability to perform almost any task. It does not develop instantaneously. When blood glucose levels drop, individuals with diabetes first experience milder hypoglycemia, which can then become severe if untreated. Most people with diabetes are able to recognize the signs and symptoms of mild hypoglycemia, and will be able to treat the condition to keep it from becoming severe.

However, some individuals over time lose the ability to recognize the early warning signs of hypoglycemia. This condition is known as hypoglycemia unawareness. These individuals are at increased risk for a sudden episode of severe hypoglycemia because they may not recognize the milder hypoglycemia that precedes it and may not be able to treat appropriately. Some of these individuals may be able to lessen this risk by modifying their diabetes management regimen (for example, more frequent blood glucose testing or using a continuous blood glucose meter, a sensor inserted under the skin which monitors blood glucose levels in real time).

Also, as noted earlier, not all people with diabetes are subject to hypoglycemia, severe or otherwise. Individuals who are not taking insulin or oral medications known as sulfonylureas (in

other words, those who have type 2 diabetes treated with diet and exercise, or with other classes of medications) are not subject to the risk of hypoglycemia.

III. Hyperglycemia

Hyperglycemia (high blood glucose) can cause a host of symptoms and can also eventually lead to unconsciousness.⁶ Hyperglycemia generally begins at 200 mg/dL, but individuals differ in the point at which they begin to show symptoms, sometimes only beginning at 300 mg/dL or higher. Hyperglycemia develops much more slowly, and should not develop at all if adequate insulin and/or oral medications are taken. The symptoms of mild to moderate hyperglycemia include hunger, thirst and dehydration, headache, nausea, fatigue, blurry vision, frequent urination, and itchy, dry skin. Individuals with hyperglycemia can also have fruity smelling breath, which can be mistaken for the smell of alcohol. In addition to these short-term consequences of acute hyperglycemia, chronic high blood glucose levels can cause a number of very serious long-term complications, such as nerve damage, heart disease, blindness, kidney failure, stroke, and death. Thus, in situations where a person is unable to take medication to address high blood glucose for an extended period of time, their chances of experiencing these health complications rises.

If a person who needs insulin is not able to take that medication for a period ranging from several hours to several days, s/he can experience diabetic ketoacidosis, abbreviated as DKA. Primarily persons with type 1 diabetes but also some with type 2 can experience this condition.⁷ It is a life-threatening and often deadly consequence of a shortage of insulin. The body begins to

⁶ Guillermo E. Umpierrez et al., *Diabetic Ketoacidosis and Hyperglycemic Hyperosmolar Syndrome*, *Diabetes Spectrum* vol. 15 no. 1, 28–36 (Jan. 2002), <http://spectrum.diabetesjournals.org/content/15/1/28.short>.

⁷ People with type 2 diabetes are more likely to develop hyperglycemic hyperosmolar syndrome. The mortality rate for this condition is high.

burn fatty acids for energy since it cannot use the glucose without insulin. The byproducts of breaking down fatty acids are ketone bodies, which render the blood acidic. Diabetic ketoacidosis, if left untreated, will result in death.

DISCUSSION

I. 42 U.S.C. § 1983

One avenue by which individuals with diabetes aggrieved by police misconduct may seek redress is through 42 U.S.C. § 1983 (2012):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

To state a claim under § 1983, a plaintiff must prove that (1) he or she was deprived of a right secured by the Constitution or laws of the United States and (2) the alleged deprivation was committed under color of state law.⁸

With respect to circumstances involving arrests by police officers, a person making an arrest is acting under color of law if . . . he [or she] is acting as a public officer.⁹ When an individual is deprived of a federally protected right during an arrest, the operative question for § 1983 liability becomes whether, when effectuating the arrest, a police officer was acting as a public official and, therefore, under color of law.¹⁰ A private individual, such as a private

⁸ *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999).

⁹ *Bryant v. Donnell*, 239 F. Supp. 681, 686 (W.D. Tenn. 1965).

¹⁰ *See, e.g., Delcambre v. Delcambre*, 635 F.2d 407, 408 (5th Cir. 1981) (finding no § 1983 liability for alleged assault by chief of police because the altercation arose out of an argument over family and political matters and the plaintiff was neither arrested nor threatened with arrest); *Washington-Pope v. City of Philadelphia*, 979 F. Supp. 2d 544, 552—54 (E.D. Pa. 2013) (creating the “fair attribution” standard for determining whether an individual is acting under color of state law and delineating several relevant but non-determinative factors); *Winfield v. United*

contractor, may also be found to be a state actor if she has acted with or obtained significant aid from a state official.¹¹

Nevertheless, before considering whether a police officer was acting under color of law when making an arrest, “[t]he first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right ‘secured by the Constitution and laws [of the United States].’”¹² Important federally protected rights to consider in relation to arrests include the Fourth Amendment right to be free from unreasonable seizures and the Fourteenth Amendment right of pretrial detainees to adequate medical care.

Attorneys can bring § 1983 actions against police officers in their individual and/or official capacities. Attorneys should note that where a suit alleges claims against an officer in his or her official capacity, it will be treated as a suit against the municipality. The municipality cannot be liable for individual officer actions under § 1983 absent an allegation that the action is part of the municipality’s custom or policy.¹³ So where practitioners bring suits against police officers in their official capacity, it will be necessary to allege that the officer’s unconstitutional action was part of the municipality’s custom or policy. If that cannot be alleged in good faith, the suit must be brought against the officer only in his or her individual capacity. But in many cases practitioners will be well advised to bring suit against particular officers in both their individual and official capacities.

States, 430 F. Supp. 912, 913–14 (S.D.N.Y. 1977) (finding that a police officer was acting under color of law when he erroneously arrested an individual, mistakenly believing that he was the individual named in a federal warrant).

¹¹ *West v. Atkins*, 487 U.S. 42, 57 (1988) (finding a physician, private contractor acted under color of state law for § 1983 purposes).

¹² *Baker v. McCollan*, 443 U.S. 137, 140 (1979).

¹³ *Monell v. Dep’t of Soc. Servs. of the City of New York*, 436 U.S. 658, 694 (1978) (“it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983”).

A. Fourth Amendment Right to Be Free from Unreasonable Seizures

1. *Prima Facie Case*

The Fourth Amendment of the U.S. Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Police officers' use of unreasonable force has been found to violate an individual's Fourth Amendment right to be free from unreasonable seizures.¹⁴ To state a claim of unreasonable force as an unreasonable seizure in violation of the Fourth Amendment, a plaintiff must prove that (1) a seizure occurred and (2) the seizure was unreasonable.¹⁵

For the purpose of invoking Fourth Amendment protections, a "seizure" occurs "only when government actors have, 'by means of physical force or show of authority . . . in some way restrained the liberty of a citizen.'"¹⁶ However, not all encounters between police and civilians constitute seizures and trigger Fourth Amendment protections.¹⁷ Consensual encounters between police and civilians are not seizures invoking the protections of the Fourth Amendment.¹⁸ Nevertheless, consensual encounters can mature into investigatory detentions and resultantly

¹⁴ *Graham v. Connor*, 490 U.S. 386, 394–95 (1989).

¹⁵ *Brower v. Cnty. of Inyo*, 489 U.S. 593, 599 (1989). The Fifth Circuit also requires that the plaintiff show more than a *de minimus* injury resulted from the unreasonable force. *Tarver v. City of Edna*, 410 F.3d 745, 752 (5th Cir. 2005).

¹⁶ *Graham*, 490 U.S. at 395 n.10 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)); see *Brower*, 489 U.S. at 596.

¹⁷ See, e.g., *Lum v. City of Grants Pass*, No. 09-3075-CL, 2011 U.S. Dist. LEXIS 24542, at *43 (D. Or. Jan. 6, 2011) (finding no seizure had occurred where the officer was assisting the paramedics in holding down a combative plaintiff so that the paramedics could assess his medical condition; *Harless v. City of Columbus*, 183 F. Supp. 2d 1024, 1029–30 (S.D. Ohio 2002) (finding that plaintiff's voluntary decision to speak with police officers during a traffic stop, despite his freedom to leave, vitiated his claim that a Fourth Amendment seizure had occurred).

¹⁸ *Id.* at 1029 (citing *United States v. Avery*, 137 F.3d 343, 352 (6th Cir. 1997)).

trigger the protections of the Fourth Amendment “if the officer takes actions that would indicate to a reasonable person that he [or she] was not free to leave.”¹⁹

Determining whether a seizure is unreasonable under the Fourth Amendment requires “a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.”²⁰ Courts will examine whether the force was unreasonable by considering whether it was “objectively reasonable under the particular circumstances.”²¹ The Supreme Court has emphasized that the inquiry into the countervailing government interests is not rigid but, rather, requires “careful attention to the facts and circumstances of each particular case, including (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he [or she] is actively resisting arrest or attempting to evade arrest by flight.”²² The reasonableness inquiry is approached objectively and asks “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”²³ Furthermore, the reasonableness of a seizure must be adjudged from the perspective of a “reasonable officer on the scene, rather than with the 20/20 vision of hindsight,”²⁴ and “must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”²⁵ Each case requires careful analysis of the facts and weighing each *Graham* factor.²⁶

¹⁹ *Id.* (citing *INS v. Delgado*, 466 U.S. 210, 215 (1984)).

²⁰ *Graham*, 490 U.S. at 396 (quoting *Terry*, 392 U.S. at 8) (internal quotation marks omitted).

²¹ *Greiner v. City of Champlin*, 27 F.3d 1346, 1354 (8th Cir. 1994).

²² *Graham*, 490 U.S. at 396 (numbers added). *See also Morrissey v. Town of Agawam*, 883 F. Supp. 2d 300, 308–09 (D. Mass. 2012) (for a clear and concise application of the *Graham* factors).

²³ *Id.* at 397.

²⁴ *Id.* at 396.

²⁵ *Id.* at 396–97.

Countering the factors outlined in *Graham*, when determining the reasonableness of a seizure, a court also may consider the level of intrusion by examining (1) the quantum of force used to effectuate an arrest, (2) the availability of less intrusive methods of apprehending or subduing a suspect, and (3) an arrestee’s mental or emotional state.²⁷ For example, the level of intrusion of a traffic stop—a brief, involuntary detention—is minimal. As a result, it does not constitute an unreasonable seizure in violation of the Fourth Amendment if a police officer has a reasonable and articulable suspicion that an individual has violated a traffic law, based on the officer’s observation of the alleged violation.²⁸

2. *Diabetes-Specific Cases*

Fourth Amendment unreasonable force claims under § 1983 represent an important avenue of redress for individuals with diabetes that have experienced police misconduct. Plaintiffs often have difficulty proving Fourth Amendment unreasonable force claims under § 1983,²⁹ but pleading particular facts may help such claims to survive summary judgment. First, when visible indicators—such as twitching or convulsing or the presence of a medical-alert tag—could have alerted a police officer that an individual has diabetes, or where officers are on notice of a person’s medical condition or emergency, courts are more likely to find that questions

²⁶ See, e.g., *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513 (7th Cir. 2012) (noting that summary judgment is frequently inappropriate in unreasonable force cases).

²⁷ See *Luchtel v. Hagemann*, 623 F.3d 975, 980 (9th Cir. 2010) (numbers added); *Solovy v. Morabito*, 375 Fed. Appx. 521 (6th Cir. 2010) (genuine issue of material fact existed on an unreasonable force claim where plaintiff was unconscious at the wheel and compliant when awoken, not threatening or engaging in illegal conduct; nevertheless medical records indicated multiple injuries inflicted by officers despite his compliance).

²⁸ *Harless*, 183 F. Supp. 2d at 1029–30; see also *Whren v. United States*, 517 U.S. 806, 817–19 (1996) (holding that a routine traffic stop does not constitute an unreasonable seizure in violation of the Fourth Amendment when a police officer has probable cause to believe that an individual has violated a traffic law).

²⁹ Though unreasonable force cases are typically highly fact driven, data indicates that summary judgment is disproportionately granted in civil rights cases, a category which includes unreasonable force lawsuits. See Fed. Judicial Ctr., *Estimates of Summary Judgment Activity in Fiscal Year 2006*, at 6 (2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/\\$file/sujufy06.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf) (showing that summary judgment is granted in seventy percent of civil rights cases in which it is sought compared with a rate of sixty percent for all cases generally).

of fact exist as to the reasonableness of the use of force and, therefore, deny summary judgment.³⁰

A second factor that is indicative of success in surviving a summary judgment motion is when the plaintiff posed no threat to officers or others, or when there is a substantial question as to whether a threat existed.³¹

Shumate v. Cleveland is a case that practitioners should pay particularly close attention to when bringing claims of unreasonable force³² against persons experiencing diabetes emergencies.³³ The facts alleged present a clear example of unreasonable force. In this case, the plaintiff's coworkers called 911 to report that the plaintiff was acting strangely, staggering around in the parking lot and speaking incoherently.³⁴ When defendant police officers arrived, the plaintiff informed them that he did not need assistance, that he was diabetic and needed sugar.³⁵ The defendants checked the plaintiff's license to discover he had outstanding traffic warrants. The defendants attempted to place him in handcuffs, citing a fear that the plaintiff

³⁰ Compare *McAllister v. Price*, 615 F.3d 877, 879 (7th Cir. 2010) (plaintiff was unresponsive, twitching, and convulsing in the driver's seat) and *Burns v. City of Redwood City*, 737 F. Supp. 2d 1047 (N.D. Cal. 2010) (question of fact as to whether Burns was wearing his medical-alert bracelet and whether the officers saw it) and *Hall v. Raech*, 677 F. Supp. 2d 784, 792, 798 (E.D. Pa. 2010) (plaintiff produced evidence from which a reasonable juror could conclude that defendant officers should have recognized plaintiff was experiencing a medical emergency where he testified there was a medical-alert decal on his windshield, that he was wearing a medical-alert necklace, and that he informed officers right away that he was experiencing low blood glucose) with *Morrissey*, 883 F. Supp. 2d at 304 (noting that plaintiff was not wearing anything to identify him as having diabetes, granting summary judgment for defendants).

³¹ Compare *Burns*, 737 F. Supp. 2d at 1047 (finding a triable issue of fact existed as to whether officers' use of force was unreasonable where plaintiff, a body builder having a hypoglycemia emergency in a movie theater, pushed or stumbled into the officer) with *Morrissey*, 883 F. Supp. at 305–06 (summary judgment granted where plaintiff could not dispute an extensive struggle between himself and officers).

³² The case also brings a claim of deliberate indifference to plaintiff's serious medical need, which is discussed at footnotes 184–190 and accompanying text.

³³ 483 Fed. Appx. 112 (6th Cir. 2012). It should be noted that the case was under review by the appellate court for defendants' motions for summary judgment on grounds of qualified immunity. This means that the court was assessing the claims under the question of whether it would have been clear to a reasonable officer that their conduct was unlawful in light of clearly established law, rather than assessing the prima facie elements of the claims directly. The discussion obviously includes assessment of the alleged facts, but through a slightly different lens. For a further discussion of qualified immunity, see page 44.

³⁴ *Id.* at 113.

³⁵ *Id.*

would wander in front of traffic, but the plaintiff resisted.³⁶ Eventually, handcuffs were successfully applied, and the plaintiff was placed in the back seat of a police vehicle.³⁷ The plaintiff inquired why he was being arrested, and some spittle landed on one defendant officer's face.³⁸ The defendant officer then punched the plaintiff in the face.³⁹ The court, noting the three factors, pointed out its prior holding that striking a person in handcuffs is objectively unreasonable.⁴⁰ It also found significant that the defendant could cite no reason why he needed to punch the plaintiff, as opposed to just close the vehicle door, to prevent any further spittle-transfer.⁴¹

Many cases hinging on whether there is a threat to officers or others involve situations in which plaintiffs experience a hypoglycemic episode while operating a vehicle. In these situations courts frequently find that plaintiffs present a serious threat to officers and others.⁴² Importantly, though, the threat must be an immediate one. If the threat is remote or speculative, use of force may be objectively unreasonable.⁴³

In *Wertish*, a witness reported that the plaintiff was driving erratically on a state highway, swerving between the shoulder and the eastbound lane.⁴⁴ A responding police officer activated his emergency lights several times to initiate a traffic stop, but the plaintiff did not respond.⁴⁵ A five-mile chase ensued, during which the plaintiff's vehicle veered far beyond the limits of the

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 114.

⁴¹ *Id.*

⁴² See, e.g., *Wertish v. Krueger*, 433 F.3d 1062, 1064 (8th Cir. 2006) (summary judgment granted where plaintiff was swerving through traffic because of hypoglycemia and stopped by officers who ordered him out of the vehicle, pinned him to the ground, and handcuffed him); *Janis v. Biesheuvel*, 428 F.3d 795, 797, 799 (8th Cir. 2005) (plaintiff was driving erratically and officers engaged in a 30-minute pursuit on a highway before successfully stopping her).

⁴³ *Hall v. Raech*, 677 F. Supp. 2d at 801 (plaintiff was in his stopped vehicle and immediately complied with officer's request to turn off the ignition and otherwise indicated no threatening behavior); *Abraham v. Raso*, 183 F.3d 279, 289-290 (3d Cir. 1999).

⁴⁴ 433 F.3d at 1064.

⁴⁵ *Id.* at 1064-65.

eastbound lane.⁴⁶ Eventually, the plaintiff stopped his vehicle at the side of the road, at which point two officers approached with their weapons drawn and ordered him to exit the vehicle.⁴⁷ After some delay, the plaintiff opened the vehicle door, and the officers threw him to the ground, pinned him in a prone position, and handcuffed him.⁴⁸ After the officers had brought him to his feet, he regained some awareness and informed them that he had diabetes.⁴⁹ The officers then transported him to a local hospital, where medical professionals confirmed that he had been experiencing a severe hypoglycemic episode.⁵⁰

The plaintiff brought a Fourth Amendment unreasonable force claim under § 1983 against the arresting police officer.⁵¹ Because there was nothing visible to signal to the officer that the plaintiff had diabetes and because the officer had acted reasonably in responding to the plaintiff as if he were intoxicated or a fleeing criminal, the Eighth Circuit affirmed the district court's grant of summary judgment.⁵²

While auto accidents frequently persuade courts that significant enough imminent threat existed to justify a degree of force, it is not always the case. In *McAllister*,⁵³ the plaintiff with diabetes, while driving on a state highway, experienced a severe hypoglycemic episode during which he struck two other vehicles. Once a police officer arrived at the scene, he asked the plaintiff whether he was all right and requested that he turn off his ignition, but the plaintiff remained unresponsive, twitching and convulsing, and was unable to turn off his ignition despite attempting to do so.⁵⁴ The officer became angry because he believed that the plaintiff was

⁴⁶ *Id.* at 1065.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1065–66.

⁵¹ *Id.* at 1064.

⁵² *Id.* at 1066–67.

⁵³ 615 F.3d at 879.

⁵⁴ *Id.*

intoxicated, and he forcibly removed the plaintiff from his vehicle, threw him to the ground, applied his knee to the plaintiff's back, and handcuffed him.⁵⁵ The plaintiff continued to twitch intensely while lying in a prone position on the ground.⁵⁶ At this point, a witness suggested that the officer check the plaintiff for a medical-alert tag, and upon discovering a necklace indicating that the plaintiff had diabetes, the officer removed the handcuffs.⁵⁷ The plaintiff eventually was diagnosed with a broken hip, a bruised lung, and abrasions to his face and wrists in connection with the altercation.⁵⁸

The plaintiff brought a Fourth Amendment unreasonable force claim under § 1983 against the defendant police officer in his individual capacity.⁵⁹ The Seventh Circuit affirmed the district court's denial of summary judgment for several reasons: (1) evidence linked the plaintiff's injuries to the officer's conduct; (2) it was apparent from the plaintiff's convulsing and unresponsive state that he had been impaired during and after the accident; and (3) the officer had used such a large degree of force against a nonresistant suspect.⁶⁰

In *Adams v. City of Laredo*,⁶¹ the plaintiff with diabetes, while driving his pickup truck, experienced an acute hypoglycemic episode causing him to blackout. As a result, he collided with vehicles parked along residential roads, ran a stop sign, and crashed into a metal roadway barrier. *Id.* at *2–3. Police officers arrived at the scene and attempted unsuccessfully to shatter his driver's side window in order to remove him from the truck. *Id.* at *3–4. Meanwhile, the plaintiff remained unresponsive with his hands on the steering wheel but eventually placed his

⁵⁵ *Id.* at 879–80.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 880–81.

⁶⁰ *Id.* at 881–86.

⁶¹ No. L-08-165, 2011 U.S. Dist. LEXIS 54384, at *1–2, *7 (S.D. Tex. May 19, 2011).

truck back into drive and departed the scene, nearly hitting several officers.⁶² After a brief chase, the plaintiff proceeded over a curb, and his truck came to rest at the embankment of a creek.⁶³ Officers quickly arrived at the scene, shattered his driver's side window, and forcibly removed him from the truck, placing him onto the ground and restraining him with handcuffs.⁶⁴ Because he appeared to be in pain, one officer transported the plaintiff to a local hospital, where medical staff confirmed that he had been experiencing a nearly fatal hypoglycemic episode.⁶⁵

The plaintiff brought a Fourth Amendment unreasonable force claim under § 1983 against the defendant municipality.⁶⁶ Because he and the responding police officers provided differing accounts as to whether the officers had hit and kicked him after handcuffing him and because both he and the municipality provided expert medical testimony to support their accounts, the district court denied the defendant's motion for summary judgment, reasoning that "the evidence shows that there are questions of fact as to the elements of an unreasonable force claim."⁶⁷ Outside of the vehicle accident context, the threat analysis is still relevant. The court in *Bady v. Murphy-Kjos* denied defendant's motion for summary judgment where the plaintiff was visibly disoriented and weak, posing no threat as he paced the sidewalk slowly even despite his serious alleged crime of assaulting a firefighter attempting to render first aid.⁶⁸ The court ruled that a jury could reasonably find unreasonable force where the police used a Taser/CED on the plaintiff multiple times after he was already handcuffed, lying face down in the ground.⁶⁹ The court further found that a jury could reasonably conclude that kneeling the plaintiff and taking

⁶² *Id.* at *4.

⁶³ *Id.* at *4–5.

⁶⁴ *Id.* at *5–6.

⁶⁵ *Id.* at *7–8.

⁶⁶ *Id.* at *8, *10.

⁶⁷ *Id.* at *10–15.

⁶⁸ No. 06-2254 (JRT/FLN), 2008 U.S. Dist. LEXIS 110212, at *14 (D. Minn. Aug. 7, 2008).

⁶⁹ *Id.* at *15.

him to the ground was an unreasonable seizure, under the circumstances.⁷⁰ In *Bady*, the plaintiff was visiting friends at their home when he began having difficulty breathing, experiencing chest and neck pain, and loss of balance. After the plaintiff passed out, his friends called 911. Firefighters arrived and attempted to administer glucose to regulate his blood glucose, but because the plaintiff was being unresponsive and combative, the police department was called.

This case illustrates a unique example where police officers certainly had the opportunity to know that the plaintiff was experiencing a medical emergency. Firefighters were called to the scene specifically to address a diabetic emergency.⁷¹ Despite his evident medical emergency, the court noted, “Rather than investigating and inquiring into the circumstances, however, the officers approached Bady and immediately attempted to take him down to the ground. Although assaulting a firefighter is a severe crime, a reasonable officer on the scene observing Bady’s behavior may have questioned whether Bady was indeed combative and whether he posed any threat to the officers.”⁷² The case supports the argument that police officers are not given *carte blanche* to arrive at a scene and take down any allegedly combative person.

Burns is another case where surviving summary judgment turned on a question of fact as to the threat the plaintiff posed. The hypoglycemic incident in this case occurred at a movie theatre.⁷³ Officers were alerted to a potentially loitering, intoxicated individual, and while they tried to assess the situation, the plaintiff either pushed or stumbled into an officer. Because the plaintiff was a body builder, and because testimony differed as to the degree of threat the plaintiff posed, the court affirmed the district court’s denial of summary judgment.⁷⁴ The court

⁷⁰ *Id.*

⁷¹ *Id.* at *2.

⁷² *Id.* at *14.

⁷³ 737 F. Supp. at 1052.

⁷⁴ *Id.* at 1059, 68.

found it persuasive that the plaintiff's "crimes" of public intoxication and eventually battery on an officer were "not severe."⁷⁵

Separate and apart from visual clues that the individual has diabetes, the force must still be objectively reasonable. It is frequently the case that an officer encounters a person with diabetes who is unconscious or semi-unconscious and non-combative. In these instances, courts have focused on the fact that the individual poses no threat to the officers, and found that very little use of force is justified. For example, in *Solovy*, the plaintiff was found slumped over the wheel of his car.⁷⁶ While officers suspected he may have been drinking and driving, he posed no risk to the public or officers while unconscious.⁷⁷ The *Solovy* court noted that while intoxicated persons can be unpredictable, raising some safety concerns, the reasonableness of force is still dependent on the individual's hostility: "the mere fact of intoxication does not justify gratuitous violence."⁷⁸ *Janis* brings *Solovy* into starker relief, and contrasting the two cases shows the effect on acceptable force, and how much that allowance depends on whether the person at issue is potentially putting another in danger. These cases are consistent with the Ninth's Circuit's explicit statement that the second *Graham* factor—whether the suspect is posing a safety risk to officers or others—is the most important factor.⁷⁹

3. *Tasers*

Under certain circumstances, the use of Tasers or conducted energy devices ("CEDs") also may support claims of unreasonable force in violation of individuals' Fourth Amendment right to be free from unreasonable seizures. The use of CEDs on individuals with diabetes is

⁷⁵ *Id.* at 1059. Mr. Burns won the lawsuit, and the jury awarded \$218,000 in damages. Haddad & Sherwin, *Diabetic Mr. Universe Bring Police Officers to Trial*, <http://www.haddadandsherwin.com/lower.php?url=mr-universe-case> (last visited March 25, 2014).

⁷⁶ 375 Fed. Appx. at 522.

⁷⁷ Compare *id.* at 525 with *Janis*, 428 F.3d at 795 (officers were entitled to qualified immunity where plaintiff was driving erratically on the highway as a result of his diabetic shock).

⁷⁸ *Solovy*, 375 Fed. Appx. at 526.

⁷⁹ *Mattos*, 661 F.3d at 441.

particularly significant because of the potentially adverse effects of such force on the endocrine system, which already is compromised in individuals with diabetes, as well as other bodily systems. At the present time, there has not been a published study on the effects of CEDs and diabetes. However, there is some indication that CEDs can impact the metabolic system.⁸⁰ Additionally, the National Institute of Justice (NIJ) is commissioning studies at the University of California in San Diego and New Jersey Medical School on the effects of CEDs on the metabolic pathways in the body, as well as the cardiac and respiratory systems.⁸¹ More scientific study of this issue is needed.⁸²

Few courts have examined the use of CEDs on individuals with diabetes in relation to claims of unreasonable force in violation of the Fourth Amendment. Nevertheless, resolving such a diabetes-related claim, the court in *Schreiner v. City of Gresham* held that a CED constitutes an intermediate level of force that must be justified by a strong and compelling government interest.⁸³

Mattos consolidated two cases involving claims against police officers that the use of CEDs constituted unreasonable force in violation of the Fourth Amendment. One case concerned a traffic stop during which the plaintiff “fail[ed] to sign a traffic citation [for] driving 32 miles per hour in a 20-mile-per-hour zone.” 661 F.3d at 444. Officers used a Taser on the plaintiff when she “stiffened her body and clutched her steering wheel to frustrate the officers’ efforts to

⁸⁰ See, e.g., Taser International has published a fact sheet on the risks of metabolic acidosis during CED use. Taser International, *Metabolic Acidosis-Detail* (2008), available at <http://www.ecdlaw.info/outlines/06-10-08 TRS Metabolic Acidosis.pdf>.

⁸¹ Information on NIJ’s research is available at www.nij.gov/topics/technology/less-lethal/conducted-energy-devices.htm.

⁸² For a more detailed discussion of medical research investigating the potentially adverse impact of the use of Tasers and CEDs on children, the elderly, pregnant women, and individuals with certain underlying medical conditions, see Amnesty International, ‘Less Than Lethal’?: The Use of Stun Weapons in US Law Enforcement 35–49 (2d ed. 2008), available at <http://www.amnesty.org/en/library/asset/AMR51/010/2008/en/530be6d6-437e-4c77-851b-9e581197ccf6/amr510102008en.pdf>.

⁸³ 681 F. Supp. 2d 1270, 1276 (D. Or. 2010); see also *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010) (in a case not involving diabetes, concluding that CEDs “when used in dart-mode constitute an intermediate, significant level of force that must be justified by the governmental interest involved”).

remove her from her car.” *Id.* at 445. The other case involved a domestic disturbance. *Id.* at 449. As the plaintiff was exiting her home to discuss the situation with an officer, another officer suddenly entered the hallway, obstructing her egress. *Id.* She extended her arms to prevent sudden bodily contact with the second officer, and the officer used a Taser on her. *Id.*

In both cases, the Ninth Circuit reversed the district courts’ denial of summary judgment on qualified immunity grounds⁸⁴ on the plaintiffs’ § 1983 unreasonable force claims.⁸⁵ Balancing the nature of the Fourth Amendment intrusions against the governmental interests at stake, the court found in each case that a reasonable fact finder could conclude that the officers’ use of Tasers was unreasonable and constitutionally unreasonable.⁸⁶ However, because at the time of the violations “there were three circuit courts of appeals cases rejecting claims that the use of a Taser constituted unreasonable force [and] there were no circuit Taser cases finding a Fourth Amendment violation,” the court could not conclude “in light of these existing precedents, that ‘every ‘reasonable official would have understood’ . . . *beyond debate*’ that tasing [the plaintiffs] in these circumstances constituted unreasonable force.”⁸⁷ Thus, despite the officers’ use of unreasonable force, they were entitled to qualified immunity against the plaintiffs’ § 1983 unreasonable force claims. *Id.* at 451–52.

In *Bryan*,⁸⁸ a police officer stopped the plaintiff for a seatbelt violation. The plaintiff pulled his vehicle to the side of the road and exited the car.⁸⁹ Because he was aware that he had failed to fasten his seatbelt, the plaintiff, wearing only boxer shorts and tennis shoes, became

⁸⁴ While it is discussed in detail later at page 45, an officer is entitled to qualified immunity where (1) the officer’s conduct violated a clearly established right which (2) the reasonable officer would have clearly understood that he or she was under an affirmative duty to refrain from such conduct. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). The Supreme Court held in *Saucier v. Katz* that a qualified immunity defense is available to claims of unreasonable force. 533 U.S. 194 (2001).

⁸⁵ *Id.* at 452.

⁸⁶ *Id.* at 441, 451.

⁸⁷ *Id.* at 452.

⁸⁸ 630 F.3d at 822.

⁸⁹ *Id.*

agitated and began “yelling gibberish and hitting his thigh.”⁹⁰ At a distance of approximately twenty to twenty-five feet, the officer perceived the plaintiff stepping toward him and then shot the plaintiff with his Taser.⁹¹ As a result, the plaintiff became incapacitated and fell to the ground, suffering four broken teeth and facial contusions.⁹² He maintained that he had not stepped toward the officer.⁹³

Among other claims, the plaintiff brought an unreasonable force claim under § 1983 against the police officer.⁹⁴ Citing “[t]he physiological effects, the high levels of pain, and foreseeable risk of physical injury,” that the use of Tasers occasions, the Ninth Circuit concluded that “the [officer’s Taser] and similar devices when used in dart-mode constitute an intermediate, significant level of force that must be justified by the governmental interest involved.”⁹⁵

Considering that the plaintiff had not attempted to flee, was visibly unarmed, and stood at a reasonable distance from the officer, the Ninth Circuit held that “the intermediate level of force employed by [the officer] against [the plaintiff] was unreasonable in light of the governmental interests at stake,” and that the officer had violated the plaintiff’s Fourth Amendment right to be free from unreasonable force.⁹⁶ Nevertheless, the Ninth Circuit ultimately reversed the district court’s denial of summary judgment because it found that “a reasonable officer in [the officer’s] position could have made a reasonable mistake of law regarding the constitutionality of the Taser use in the circumstances,” and thus, found that the officer was entitled to qualified immunity.⁹⁷

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 823.

⁹⁵ *Id.* at 825–26.

⁹⁶ *Id.* at 832.

⁹⁷ *Id.* at 833.

In *Schreiner*,⁹⁸ the plaintiff had diabetes and, while experiencing a hypoglycemic episode, was attempting to inject herself with insulin using a syringe with a bent needle. A friend contacted the police because the plaintiff was incoherent and in need of medical assistance.⁹⁹ When an officer arrived at the scene, the friend informed him that the plaintiff had diabetes and was not attempting to hurt herself, but could not release the syringe.¹⁰⁰ The officer instructed the plaintiff to drop the syringe, but she was unable to comply.¹⁰¹ Eventually, he and another officer decided to Taser the plaintiff to force her to drop the syringe, which they did, causing her to drop it.¹⁰²

The plaintiff brought claims under § 1983 against the municipality and one arresting officer, alleging that he had used unreasonable force in Tasing her.¹⁰³ The district court denied the defendants' motion for summary judgment as to the unreasonable force claims because "a jury could conclude that [the arresting officer] used unreasonable force in executing his seizure of plaintiff."¹⁰⁴ The court noted that "a Taser constitutes 'an intermediate, significant level of force that must be justified by a strong government interest that *compels* the employment of such force.'"¹⁰⁵

In *Gruver v. Borough of Carlisle*,¹⁰⁶ a police officer responded to an individual with diabetes who had been driving erratically and subsequently had parked his vehicle in a gas

⁹⁸ 681 F. Supp. 2d at 1273.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 1274 (plaintiff also brought ADA and Rehabilitation Act claims for the city's failure to accommodate her disability in rendering emergency services as well as for intentional discrimination. *Schreiner* at 1277. While she was unable to show that the defendant's discriminatory actions were motivated by her disability, she was allowed to proceed on the failure to accommodate theory. The court denied the defendant's motion for summary judgment on these claims, ruling that a question of fact remained as to whether defendants reasonably accommodated her). See discussion *infra* at 65.

¹⁰⁴ *Id.* at 1276.

¹⁰⁵ *Id.*

¹⁰⁶ No. 4:CV 05-1206, 2006 U.S. Dist. LEXIS 31448, at *4-5 (M.D. Pa. May 19, 2006).

station parking lot, his head slumped over the steering wheel. Following a brief exchange, the plaintiff exited his vehicle and began approaching the gas station in a disoriented fashion.¹⁰⁷ Because he risked walking into oncoming traffic and had resisted the officer's attempts to restrain him, the officer brought the plaintiff to the ground, where he pinned and handcuffed him and called for backup.¹⁰⁸ Later, another officer used a Taser on the plaintiff because he had failed to respond to subsequent requests that he cease resistance.¹⁰⁹ Once he had been escorted to a patrol car, the officers discovered his medical-alert necklace indicating that he had diabetes and realized that he was experiencing a hypoglycemic episode.¹¹⁰

The plaintiff brought claims under § 1983 against the municipality and arresting officers, alleging that they had used unreasonable force in their attempts to restrain him.¹¹¹ The district court granted the defendants' motion for summary judgment because the plaintiff "appeared to be intoxicated or in some state of distress," and "the Officers' use of force, including the application of the Taser gun, was consistent with the level of the Plaintiff's resistance [sic] and there [was] no indication that the Officers applied any gratuitous force to the Plaintiff."¹¹² For these reasons, the court could not find that the officers' conduct was objectively unreasonable. *Id.*

As evidenced by *Mattos*,¹¹³ *Bryan*,¹¹⁴ and *Schreiner*,¹¹⁵ courts may regard the use of Tasers or CEDs as an elevated level of force that must be justified by a strong and compelling

¹⁰⁷ *Id.* at *6–7.

¹⁰⁸ *Id.* at *7–8.

¹⁰⁹ *Id.* at *8.

¹¹⁰ *Id.* at *8–9.

¹¹¹ *Id.* at *10.

¹¹² *Id.* at *13.

¹¹³ 661 F.3d at 448.

¹¹⁴ 630 F.3d at 826.

¹¹⁵ 681 F. Supp. 2d at 1276.

government interest to avoid Fourth Amendment violations. Even so, *Gruver*,¹¹⁶ shows that courts continue to exercise expansive deference when reviewing police officers' on-the-scene determinations as to whether specific circumstances warrant the use of such technology, and proving that any use of force is objectively unreasonable thus remains an uphill battle.

*Mattos*¹¹⁷ and *Bryan*¹¹⁸ demonstrate that the defense of qualified immunity remains a significant hurdle for plaintiffs alleging § 1983 unreasonable force claims involving the use of Tasers. In fact, in many circuits, the burden is on the plaintiff to demonstrate that an officer is not entitled to qualified immunity.¹¹⁹ While the burden is high, and sometimes falls on the plaintiff, it is not unattainable. The Eastern District of Michigan laid out in *Eldridge*, that “reasonable officers are on notice that using a Taser and significant physical force on a citizen who is suffering a medical condition and not resisting arrest, and who poses no threat to the officer or public, violates the suspect’s clearly established constitutional right to be free from unreasonable force.”¹²⁰ In *Eldridge*, the plaintiff was having a hypoglycemic incident and stopped his car at a construction site when officers arrived and questioned him. The plaintiff was confused, repeating, “I’m fine.” The officers Tasered him as they pulled him out of the car, and when plaintiff had trouble getting to the ground and continued to be confused, the officers noticed a medical-alert bracelet. They asked if he had a medical condition, and shouted at him for not telling them. The court in this case denied the officers’ requests for qualified immunity, because this was not on the line between unreasonable and acceptable force.¹²¹ The court stressed the fact

¹¹⁶ 2006 U.S. Dist. LEXIS 31448, at *13.

¹¹⁷ 661 F.3d at 448.

¹¹⁸ 630 F.3d at 833.

¹¹⁹ *Eldridge v. City of Warren*, No. 10-12893, 2012 U.S. Dist. LEXIS 42818, at *9 (E.D. Mich. Mar. 28, 2012). *But see Bailey v. Pataki*, 708 F.3d 391, 404 (2d Cir. 2013) (“Qualified immunity is an affirmative defense and the burden is on the defendant-official to establish it on a motion for summary judgment.”); *Reedy v. Evanson*, 615 F.3d 197, 223 (3d Cir. 2010).

¹²⁰ *Id.* at *16.

¹²¹ *Id.* at *17.

that Eldridge posed no threat to the officers or anyone, since he was in a vehicle that was turned off as soon as the officers arrived. Furthermore, the court notes the lack of resistance and threat by Eldridge as the officers question him. It is important that the court noted this, because though he did not actively resist, Eldridge also did not comply with the officers' requests, and yet the court still found that a jury could find his response to mitigate in his favor.¹²²

4. *The Non-Criminal "Community Caretaker" Context*

A person is protected by the Fourth Amendment even where there is no allegation of criminal activity. "[A] person's Fourth Amendment rights are not eviscerated simply because a police officer may be acting in a non-investigatory capacity for 'it is surely anomalous to say that the individual . . . [is] fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.'"¹²³ Officers sometimes act in the "community caretaker" role, wherein, no criminal activity has been alleged or observed, but rather, the officers are involved to respond to a situation where a member of the community requires emergency assistance. In terms of the amount of force permitted in the law enforcement context as compared with the "community caretaker" context, there remains a question as to whether the officer may use the same amount of force, but he certainly cannot use greater force.¹²⁴ In *Policky*, officers arrived on scene to assist paramedics attempting to treat an uncooperative Mr. Policky, who was potentially having diabetes complications, and who committed no crime either preceding the officers' arrival or during the attempt to treat the situation.¹²⁵ The court found that a jury could reasonably conclude that the officer's use of force in pushing plaintiff to his knees was unreasonable, where

¹²² *Id.* at *14.

¹²³ *United States v. King*, 990 F.2d 1552, 1560 (10th Cir. 1993) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967)).

¹²⁴ *Policky v. City of Seward*, 433 F. Supp. 2d 1013, 1018 (D. Neb. 2006) (refusing to dismiss plaintiff's § 1983 claim for an unreasonable seizure against the officer in his individual capacity) (finding no evidence of a threat posed by plaintiff, despite plaintiff's yelling, cursing, and being upset).

¹²⁵ *Id.* at 1023.

the plaintiff had undisputedly committed no crime, and there was no evidence that the plaintiff posed any threat to anyone.

In *Borton v. City of Dothan*, the court pointed out that the *Graham* factors include one factor for the severity of the crime at issue. 734 F. Supp. 2d 1237, 1249 (M.D. Ala. 2010). Therefore, it makes logical sense that in cases where there is *no* crime at issue, the balancing of those *Graham* factors will be more likely to turn in the plaintiff's favor. In *Borton*, officers were called to the scene by the plaintiff's family member, who was concerned for her mental health and safety, but she had committed no crime. *Id.*

B. Failure to Train

1. Prima Facie Case

The Supreme Court in *City of Canton v. Harris*¹²⁶ held that inadequate training of municipal employees may underpin § 1983 liability where the failure to train amounts to a municipality's deliberate indifference to the federally protected rights of individuals with whom the municipal employees come into contact.¹²⁷ Beyond a municipality's deliberate indifference, the Court also held that the deficiency in the training program must be closely related to the ultimate injury.¹²⁸

In failure-to-train cases, the plaintiff seeks to impose liability against a municipality (city, county, etc.) rather than the officer individually. When the systematic failure to train police officers amounts to a custom, pattern or official policy, it justifies a finding of municipal

¹²⁶ 489 U.S. 378, 387–92 (1989).

¹²⁷ Similarly, municipal liability may be premised on a police department's failure to institute proper investigations and disciplinary procedures. These claims can be department-wide, or with regards to the failure to meaningfully investigate an individual officer. *See Beck v. City of Pittsburgh*, 89 F.3d 966, 972 (3d Cir. 1996); *Bielewicz v. Dubinon*, 915 F.2d 845 (3d Cir. 1990).

¹²⁸ *Id.* at 391.

liability.¹²⁹ The Supreme Court in *Harris* noted that it may seem strange to assert that a municipality has a *policy* of not training its employees:

But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is *so obvious*, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a *policy* for which the city is responsible, and for which the city may be held liable if it actually causes injury.¹³⁰

One particular officer's inadequate training, alone, will not suffice to establish the deliberate indifference standard.¹³¹ Deliberate indifference arises primarily where municipal employees' *repeated* violations of federally-protected rights evince that "the need for further training must have been plainly obvious to the city policymakers."¹³² Stated another way, failure to train municipal employees will be considered deliberate indifference "where the failure has caused a pattern of violations."¹³³

Absent evidence of a pattern of violations, a plaintiff may maintain a failure-to-train claim where the particular violation of federal rights at issue is "a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations."¹³⁴

¹²⁹ *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 694 (1978).

¹³⁰ 489 U.S. at 390 (emphasis added).

¹³¹ *Id.* at 391.

¹³² *Id.* at 390 n.10.

¹³³ *Berg v. Cnty. of Allegheny*, 219 F.3d 261, 276 (3d Cir. 2000).

¹³⁴ *Id.* at 276 (quoting *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 409 (1997)) (holding that in order for a failure-to-train to amount to deliberate indifference in the absence of a pattern of violations, the plaintiff must show both that the situation requiring the specific training is likely to recur and that officers lacking the training will frequently violate citizens' federal rights).

Practitioners should take note of the difficulties associated with pleading this type of claim. Following *Bell Atlantic Corp. v. Twombly*¹³⁵ and *Ashcroft v. Iqbal*¹³⁶ it is clear that conclusory or “bare-bones” allegations will no longer survive a motion to dismiss. To prevent dismissal, all civil complaints must now set out “sufficient factual matter” to show that the claim is facially plausible. *Iqbal* and *Twombly* have been particularly problematic in municipal liability cases, because it is difficult to obtain “sufficient factual matter” regarding a municipality’s policy absent discovery, but a plaintiff cannot survive a motion to dismiss and access discovery without it. The Ninth Circuit has additionally interpreted this requirement of showing a program-wide inadequacy in training to mean that a simple allegation that officers should have had a specific *type* of training will not suffice.¹³⁷

*Campbell v. City of Springboro*¹³⁸ is a clear illustration of a complete, across the board absence of training and supervision. There, the creation of a new canine unit in the police department was placed on the shoulders of one officer alone, with no supervision at all.¹³⁹ There was a question about whether there was any written policy in effect at all, because the policy defendants claimed was in effect was a model policy downloaded from the internet—not disseminated amongst staff, not placed in all policy manuals, and missing specific training and certification guidelines.¹⁴⁰ Despite many complaints from the officer, he was given insufficient time to spend training the canine, which meant that the canine went at least one month with no maintenance training, when 16 hours per month was recommended.¹⁴¹ On these facts, the court

¹³⁵ 550 U.S. 544, 556 (2007) (rejecting the traditional 12(b)(6) standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46).

¹³⁶ 556 U.S. 662, 677 (2009).

¹³⁷ *Alexander v. City & Cnty. of S.F.*, 29 F.3d 1355, 1367 (9th Cir. 1994); *Green v. Tri-County Metro. Transp. Dist.*, 3:11-CV-00876-BR, 2012 U.S. Dist. LEXIS 161092 (D. Or. Nov. 9, 2012).

¹³⁸ 788 F. Supp. 2d 637 (S.D. Ohio 2011).

¹³⁹ *Id.* at 679.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

found that the inadequate training and supervision may be fairly said to represent the policy of the city.¹⁴²

2. *Diabetes-Specific Cases*

Successfully pleading a claim of inadequate training under § 1983 is difficult, but including particular components may increase the likelihood of surviving summary judgment. An ideal pleading should show an established pattern of similar constitutional violations; that the plaintiff's injury is an obvious or highly predictable consequence of inadequate training; and a causal connection between a lack of training and the plaintiff's injury.¹⁴³ None of the failure-to-train cases involving diabetes have survived summary judgment.¹⁴⁴ This section offers examples of cases where plaintiffs with diabetes have alleged a failure to train officers, and the subsequent section discusses successful failure-to-train cases in other contexts.

In *Padula v. Leimbach*¹⁴⁵ the decedent had diabetes and, while driving one morning, he turned into a parking lot, drove against traffic onto a truck scale, stopped, and thereby clogged traffic. *Id.* He remained in his vehicle, unresponsive and muttering gibberish.¹⁴⁶ The police dispatcher told the responding officers that the incident involved an intoxicated man.¹⁴⁷ When the officers attempted to rouse the decedent, he began yelling incoherently and flailing his arms.¹⁴⁸ During the ensuing altercation, the officers pinned the decedent to the ground and

¹⁴² *Id.* at 680.

¹⁴³ *Hall v. Raech*, 677 F. Supp. 2d at 805 (officer's testimony that he never received training on identifying medical emergencies may satisfy the "likely to recur" prong since medical emergencies are likely to recur, but failed to show that it would result in officers frequently violating citizens' constitutional rights, under the *Bryan County* test).

¹⁴⁴ At least one failure to train diabetes case has survived a motion to dismiss. *Dewell v. Lawson*, 489 F.2d 877 (10th Cir. 1974) (overturning the trial court's grant of defendant's motion to dismiss where a plaintiff's wife notified the police department that her husband was experiencing a diabetes emergency and had wandered away, but an officer arrested him and put him in jail, despite an all-points bulletin specifically describing the plaintiff and his need for medical attention).

¹⁴⁵ 740 F. Supp. 2d 980, 985 (N.D. Ind. 2010).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 985–86.

handcuffed him.¹⁴⁹ After noticing that his eyes had rolled back and that he had begun foaming at mouth, one officer called for an ambulance.¹⁵⁰ Although emergency medical personnel administered dextrose and transported the decedent to a local hospital after determining that he was experiencing an episode of severe hypoglycemia, he died approximately one month later.¹⁵¹

The administrator of the decedent's estate brought a § 1983 claim against the defendant municipality for inadequately training its officers to recognize the symptoms of diabetes and distinguish them from symptoms of intoxication.¹⁵² The district court granted the municipality's motion for summary judgment because the plaintiff failed to demonstrate any pattern of constitutional violations against individuals with diabetes that would (1) suggest any deficiency in the officers' training and (2) reflect deliberate indifference to the decedent's constitutional rights.¹⁵³

In *Adams* the plaintiff had diabetes and, while driving his pickup truck, experienced an acute hypoglycemic episode causing him to blackout.¹⁵⁴ After a brief chase that ended when the plaintiff stalled his vehicle on a creek embankment, police officers shattered his driver's side window, forcibly removed him from the vehicle, placed him onto the ground, and restrained him using handcuffs.¹⁵⁵

The plaintiff brought § 1983 claims against the defendant municipality for inadequately training its police officers (1) on the use of force and (2) on identifying and dealing with suspects experiencing hypoglycemia.¹⁵⁶ As to the former claim, the district court granted the municipality's motion for summary judgment because (1) the plaintiff had not alleged any

¹⁴⁹ *Id.* at 986.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 987.

¹⁵² *Id.* at 990–91.

¹⁵³ *Id.* at 991.

¹⁵⁴ 2011 U.S. Dist. LEXIS 54384, at *1–2, *7.

¹⁵⁵ *Id.* at *4–6; *see* discussion *supra* at p.16.

¹⁵⁶ *Id.* at *21–22.

particular deficiency or defect in the training policy and (2) the responding officers had fulfilled all state-mandated training with regard to the use of force during arrests.¹⁵⁷ As to the latter claim, the court also granted the municipality's motion for summary judgment because the plaintiff had failed to show (1) a pattern of similar incidents; (2) that the use of unreasonable force is an obvious or highly predictable consequence of not training officers to recognize suspects experiencing hypoglycemia; or (3) any causal connection between the officers' lack of training and the use of unreasonable force during the arrest.¹⁵⁸

In *Bohnert v. Mitchell*¹⁵⁹ the plaintiff had diabetes and, while driving on an interstate highway, experienced an acute hypoglycemic episode. He subsequently sustained multiple serious injuries during the course of his arrest.¹⁶⁰ Although he had been carrying a card in his wallet noting his diabetes diagnosis,¹⁶¹ the plaintiff presented no evidence that the responding police officers were actually aware that he was not intoxicated.¹⁶² Only after he had been handcuffed did he ask the officers for help, at which point one officer called for an ambulance.¹⁶³ The officers then suspected that the plaintiff had diabetes after discovering a small packet of candy in his pocket.¹⁶⁴ The plaintiff brought § 1983 claims for inadequate training and supervision against the officers' supervisors as well as the county.¹⁶⁵ However, because there is

¹⁵⁷ *Id.* at *27–30.

¹⁵⁸ *Id.* at *30–32.

¹⁵⁹ No. CV-08-2303-PHX-LOA, 2010 U.S. Dist. LEXIS 114587, at *5 (D. Ariz. Oct. 26, 2010), *motion granted in part, motion denied in part sub nom. Bohnert v. Burke*, 2010 U.S. Dist. LEXIS 131696 (D. Ariz. 2010), *summary judgment granted*, No. CV-08-2303-PHX-LOA, 2010 U.S. Dist. LEXIS 134697 (D. Ariz. Dec. 20, 2010).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at *9–10.

¹⁶² *Id.* at *6.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at *8–9.

¹⁶⁵ *Id.* at *24 (the plaintiff also brought a claim under Title II of the ADA. The court granted summary judgment to the individually named defendants, citing 9th and 2nd Circuit court precedent that a public actor cannot be sued for damages in his individual capacity under Title II of the ADA. *Id.* at *16. The court also found that the state could not be held vicariously liable for the officer's alleged discrimination. In order to receive monetary damages under Title II of the ADA, a plaintiff must show intentional discrimination, and because the officer did not know that the

no *respondeat superior* liability under § 1983 and because the plaintiff had failed to plead that the officers had violated his constitutional rights in their individual capacities, the district court granted the defendants' motion for summary judgment, finding no violation of the plaintiff's constitutional rights.¹⁶⁶

Again, surviving summary judgment on a claim of inadequate training under § 1983 often is difficult. Establishing deliberate indifference by showing a pattern of similar constitutional violations or that the plaintiff's injury obviously or very likely follows from inadequate training is an imposing pleading standard.¹⁶⁷ Furthermore, demonstrating a causal connection between a plaintiff's injuries and deficient training policies is a difficult undertaking.¹⁶⁸ Nevertheless, courts may be more likely to deny summary judgment when plaintiffs have made some showing of these elements.

3. *Successful Non-Diabetes Failure-to-Train Cases*

To date, no person with diabetes has survived summary judgment on a failure-to-train claim, but others have been successful. While not an articulated factor, these cases share one thing in common: all have resulted in a very serious physical injury to the plaintiff.¹⁶⁹ Cases

plaintiff had diabetes until after he used force, the court granted summary judgment to the State as well. *Id.* at *21–22).

¹⁶⁶ *Id.* at *25–26; see also discussion *infra* at p.47 (discussing municipal immunity and the unavailability of *respondeat superior* liability under § 1983).

¹⁶⁷ See *Padula*, 740 F. Supp. 2d at 991; *Adams*, 2011 U.S. Dist. LEXIS 54384, at *30–31.

¹⁶⁸ See *Adams*, 2011 U.S. Dist. LEXIS 54384, at *31–32.

¹⁶⁹ *Conn v. City of Reno*, 591 F.3d 1081 (9th Cir. 2010) vacated by *City of Reno v. Conn*, 131 S. Ct. 1812 (2011), reinstated in part, on remand 658 F.3d 897 (9th Cir. 2011). Reinstated by, in part, On reconsideration by *Conn v. City of Reno*, 2011 U.S. App. LEXIS 18487 (9th Cir. Nev., Sept. 6, 2011) (plaintiff committed suicide); *Myres v. Hooton*, No. 1:03-cv-104, 2005 U.S. Dist. LEXIS 6981 (E.D. Tenn. Mar. 11, 2005) (plaintiff was choked, beaten, and kicked by officer); *Layman v. Alexander*, 343 F. Supp. 2d 483 (W.D.N.C. 2004) (permanent traumatic brain injury); *Comfort v. Town of Pittsfield*, 924 F. Supp. 1219 (D. Me. 1996) (serious head injury and injury to right eye); *Hopson v. Cheltenham Twp.*, Civil Action No. 90-0587, 1990 U.S. Dist. LEXIS 8905, at *30 (E.D. Pa. July 17, 1990) (suicide).

involving suicide, in particular, illustrate the path of demonstrating deliberate indifference via a recurring situation.¹⁷⁰

C. Fourteenth Amendment Right of Pretrial Detainees to Medical Care

1. Prima Facie Case

Police may detain or arrest an individual with diabetes, and during the detention period—however brief—an individual might be denied access to necessary medical care or supplies, such as blood glucose testing supplies, insulin, glucagon, pills, or food, thereby resulting in injury.¹⁷¹

Pretrial detainees may seek redress under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, which provides in pertinent part: “No State shall . . . deprive any person of life, liberty, or property, without due process of law.”¹⁷²

When identifying the applicable constitutional protections in such cases, it is important to distinguish between arrestees (individuals who have been arrested and have not yet received a judicial determination of probable cause), pretrial detainees, and convicted prisoners, for different standards apply to each group.¹⁷³ Thus, for cases involving a pretrial detainee, attorneys should use the Fourteenth Amendment’s due process principles to guide their complaints of

¹⁷⁰ For a fuller discussion of these types of cases in the context of prisoners with diabetes, the Association has a parallel publication to this one: Benjamin Eisenberg, *Legal Rights of Prisoners and Detainees with Diabetes: An Introduction and Guide for Attorneys and Advocates* (unpublished manuscript) (on file with the Association).

¹⁷¹ See *Ortiz v. City of Chic.*, 656 F.3d 523, 526–29 (7th Cir. 2011) (concerning police officers’ refusal to permit a pretrial detainee access to pills for diabetes, thereby contributing to detainee’s death one day later).

¹⁷² U.S. Const. amend. XIV, § 1.

¹⁷³ See, e.g., *Lopez v. City of Chic.*, 464 F.3d 711, 718–19 (7th Cir. 2006) (“due process principles govern a pretrial detainee’s conditions of confinement after the judicial determination of probable cause, and the Eighth Amendment applies following conviction”); *Weyant v. Okst.*, 101 F.3d 845, 856 (2d Cir. 1996); *Boswell v. Cnty. of Sherburne*, 849 F.2d 1117, 1120–21 (8th Cir. 1988) (citing *Bell v. Wolfish*, 441 U.S. 520, 523 (1979)) (“Pretrial detainees have not received a formal adjudication of the charges against them and as such are beyond the power of the state to punish”); *Drogosch v. Metcalf*, 557 F.3d 372, 378 (6th Cir. 2009) (“But it is the Fourth, rather than the Fourteenth, Amendment that applies to this case because the Fourth Amendment governs the period of confinement between arrest without a warrant and the preliminary hearing at which a determination of probable cause is made, while due process regulates the period of confinement after the initial determination of probable cause.”); *Hamm v. Hatcher*, No. 05-CV-503 (KMK), 2009 U.S. Dist. LEXIS 43975, at *11–17 (S.D.N.Y. May 5, 2009).

denial of medical care. For cases involving an arrestee, attorneys should seek to have courts apply the much more generous “objectively unreasonable” test under the Fourth Amendment. Both are discussed below.¹⁷⁴

The Supreme Court has held that the Eighth Amendment of the U.S. Constitution protects convicted prisoners against prison officials’ deliberate indifference to their serious medical needs.¹⁷⁵ “A serious medical need is one that has been diagnosed by a physician as requiring treatment, or one that is so obvious that even a layperson would easily recognize the necessity for a doctor’s attention.”¹⁷⁶ Prison doctors may manifest deliberate indifference in their responses to prisoners’ medical needs, and prison guards may manifest deliberate indifference by intentionally denying or delaying access to medical care or by intentionally interfering with prescribed treatments. *Estelle*, 429 U.S. at 104–05. However, “an inadvertent failure to provide adequate medical care” does not amount to a constitutional violation. *Id.* at 105–06.

Additionally, to prove a prison official’s deliberate indifference to a convicted prisoner’s serious medical need, a plaintiff must prove two elements: (1) the alleged constitutional deprivation must be “sufficiently serious,” demonstrating incarceration “under conditions posing a substantial risk of serious harm;” and (2) the prison official must have a “sufficiently culpable state of mind.”¹⁷⁷ The latter element speaks to deliberate indifference, which cannot be equated with simple negligence.¹⁷⁸ Rather, a prison official possesses a “sufficiently culpable state of

¹⁷⁴ For a discussion of the Eighth Amendment protections afforded prisoners with diabetes, see Benjamin Eisenberg, *Legal Rights of Prisoners and Detainees with Diabetes: An Introduction and Guide for Attorneys and Advocates* (unpublished manuscript) (on file with the Association).

¹⁷⁵ *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976).

¹⁷⁶ *Schaub v. VonWald*, 638 F.3d 905, 914 (8th Cir. 2011) (quoting *Camberos v. Branstad*, 73 F.3d 174, 176 (8th Cir. 1995)) (internal quotation marks omitted).

¹⁷⁷ *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). *But see Ortiz*, 656 F.3d at 530–31 (applying a four-factor test according to the Fourth Amendment’s reasonableness standard).

¹⁷⁸ *Farmer*, 511 U.S. at 835.

mind” when he or she “knows of and disregards an excessive risk to inmate health or safety.”¹⁷⁹

“[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he [or she] must also draw the inference.”¹⁸⁰

Beyond the Eighth Amendment floor articulated in *Estelle*, “the Supreme Court has not precisely limned the duties of a custodial official under the Due Process Clause [of the Fourteenth Amendment] to provide needed medical treatment to a pretrial detainee.”¹⁸¹

However, nearly all circuits merely apply the Eighth Amendment deliberate indifference standard under the Fourteenth Amendment’s Due Process Clause.¹⁸² So while pretrial detainees seek redress under different authority, their claims will be analyzed in the same manner.¹⁸³

¹⁷⁹ *Id.* at 837.

¹⁸⁰ *Farmer*, 511 U.S. at 837; *see also Araujo v. City of New York*, 08-CV-3715 (KAM) (JMA), 2010 U.S. Dist. LEXIS 26082 (E.D.N.Y. Mar. 19, 2010) (officers were not deliberately indifferent where they obtained detainee’s medicine after being informed of diabetes, but failed to administer it, where detainee was transferred four times in 37 hours and made no official aware of any pain or life-threatening conditions).

¹⁸¹ *Hamm*, 2009 U.S. Dist. LEXIS 43975, at *15–16 (quoting *Weyant*, 101 F.3d at 856) (internal quotation marks omitted).

¹⁸² Some courts suggest that in theory they are prepared to award greater protections to pretrial detainees, but have not actually awarded greater protections in actual cases. *Marsh v. Butler County*, 268 F.3d 1014, 1024 n.5 (11th Cir. 2001) (declining to decide how the Eighth and Fourteenth Amendment standards for evaluating medical needs claims differ given the lack of argument); *see also Gibson v. County of Washoe*, 290 F.3d 1175, 1189 n.9 (9th Cir. 2002) (“It is quite possible . . . that the protections provided pretrial detainees by the Fourteenth Amendment in some instances exceed those provided convicted prisoners by the Eighth Amendment.”); *cf. Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1121 (9th Cir. 2003) (holding that “the substantive due process rights of incapacitated criminal defendants are not governed solely by the deliberate indifference standard”).

¹⁸³ *See Allen v. York Cnty. Jail*, 213 Fed. Appx. 13 (1st Cir. 2007); *Caiozzo v. Koreman*, 581 F.3d 63, 70 (2d Cir. 2009) (“the standard for deliberate indifference is the same under the Due Process Clause of the Fourteenth Amendment as it is under the Eighth Amendment”); *Boring v. Kozakiewicz*, 833 F.2d 468, 472 (3d Cir. 1987); *Ervin v. Mangum*, No. 93-7129, 1997 U.S. App. LEXIS 29363, at *10 (4th Cir. Oct. 27, 1997) (“As a practical matter, however, we do not distinguish between the Eighth and Fourteenth Amendments in the context of a pretrial detainee’s § 1983 claim”); *Hare v. City of Corinth*, 135 F.3d 320, 326 (5th Cir. 1998); *Estate of Owensby v. City of Cincinnati*, 414 F.3d 596, 602–03 (6th Cir. 2005); *Cavalieri v. Shepard*, 321 F.3d 616, 620 (7th Cir. 2003); *Butler v. Fletcher*, 465 F.3d 340, 344 (8th Cir. 2006) (“we have . . . repeatedly applied the deliberate indifference standard of *Estelle* to pretrial detainee claims that prison officials unconstitutionally ignored a serious medical need”); *Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1449 (9th Cir. 1991); *Barrie v. Grand Cnty.*, 119 F.3d 862, 867 (10th Cir. 1997) (“Under the Fourteenth Amendment’s due process clause, pretrial detainees . . . are entitled to the same degree of protection regarding medical attention as that afforded convicted inmates under the Eighth Amendment”); *Hamm v. DeKalb Cnty.*, 774 F.2d 1567, 1574 (11th Cir. 1985).

Shumate v. Cleveland presents a clear example of deliberate indifference to a serious medical need, based on the facts alleged.¹⁸⁴ There, while staggering around a parking lot, the plaintiff stated to the defendant officers that he had diabetes and needed sugar.¹⁸⁵ The accompanying ambulance crew offered to check the plaintiff's blood glucose, but the officers refused.¹⁸⁶ Instead, after discovering that the plaintiff had several traffic warrants for his arrest, they decided to take him to the station first and then permit the ambulance crew to treat him.¹⁸⁷ The court pointed out that the plaintiff put the defendant officers on notice of his medical need both through his actions (staggering around and frothing at the mouth) and by verbally requesting medical attention.¹⁸⁸ The court also pointed to the officers' refusal of the medical crew's offer to treat the plaintiff on the scene.¹⁸⁹ The court affirmed the district court's ruling that the defendants were not entitled to qualified immunity based on these facts.¹⁹⁰

Arrestees are the final class of individuals who can bring a § 1983 claim for inadequate medical care. While the Supreme Court has not considered this issue, a number of circuits have ruled that the Fourth Amendment protects a person from the time of an initial, *warrantless* seizure until a formal arraignment or probable cause hearing. *Lopez*, 464 F.3d at 711; *Drogosch*, 557 F.3d at 378 (sixth circuit); *Gaylor v. Does*, 105 F.3d 572, 574 (10th Cir. 1997); *see also Luna v. Bell*, No. 3:11-cv-00093, 2013 U.S. Dist. Lexis 147497, at *5–8 (M.D. Tenn. Oct. 10, 2013) (discussing the difference between the Fourth and Eighth Amendment standards). In these circuits, only after a formal charge is made does the individual become a pretrial detainee and protection shifts from the Fourth Amendment to the Fourteenth Amendment's due process

¹⁸⁴ *See* 483 Fed. Appx. at 112.

¹⁸⁵ *Id.* at 113.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 114.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

clause. The theory behind the distinction is that where the officer’s probable cause determination has not been verified, either through a warrant or a *Gerstein* hearing, the arrestee is still protected under the Fourth Amendment’s prohibition against unreasonable seizures.¹⁹¹ Once the probable cause determination has been verified, the seizure ends, and the analysis shifts to the due process principles of the Fourteenth Amendment.¹⁹² As a matter of prudence, plaintiff’s counsel should plead both Fourth and Fourteenth Amendment violations.

The Fourth Amendment sets a standard that prevents officer conduct that is “objectively unreasonable.”¹⁹³ The Seventh Circuit provides a clear test for whether the defendant’s conduct was objectively unreasonable, enumerating four factors: (1) the defendant must have notice of the arrestee’s medical need, by word or by observation of physical symptoms; (2) the seriousness of the medical need—based on a sliding scale, balanced against the third factor; (3) the scope of the requested treatment; and (4) “police interests” relevant to the reasonableness determination, encompassing such factors as administrative, penological, or investigatory concerns.¹⁹⁴ In the Sixth, Seventh, and Tenth Circuits, then, a person bringing a claim for inadequate medical care provided to an arrestee has a much easier standard to meet than the same claim for a pretrial detainee or convicted inmate. Counsel should pay special attention to whether a warrant was issued or a *Gerstein* hearing took place, and claim arrestee status to avail their clients of this lower bar to establish denial of medical care. And though the remaining circuits have not yet

¹⁹¹ *Gerstein v. Pugh*, 420 U.S. 103 (1975).

¹⁹² *Lopez*, 464 F.3d at 718.

¹⁹³ *Id.* (citing *Abdullahi v. City of Madison*, 423 F.3d 763, 768 (7th Cir. 2005)) (where an arrestee was shackled to the wall of a small, windowless room for four days without a sink or toilet, and without food or drink, this was more than adequate to support a finding that the detectives’ conduct was objectively unreasonable).

¹⁹⁴ *Currie v. Cundiff*, No. 09-cv-866-MJR, 2012 U.S. Dist. LEXIS 38935, at *19 (S.D.Ill. Mar. 22, 2012), *aff’d sub nom. Currie v. Chhabra*, 728 F.3d 626 (7th Cir. 2013). The four-factor test was first explicitly established in *Williams v. Rodriguez*, 509 F.3d 392, 403 (7th Cir. 2007) in reflecting on the court’s own analysis in *Sides v. City of Champaign*, 496 F.3d 820 (7th Cir. 2007) a case in which the police forced a man to stand against the fender of his car for an hour on a 90 degree day. The Seventh Circuit has also created a separate standard for claims against medical professionals, as opposed to correctional staff, which it calls the “professional judgment” standard. This standard is comparable to the deliberate indifference standard, but the variation should be noted. *Chavez v. Cady*, 207 F.3d 901, 905 (7th Cir. 2000).

established this difference, there are no cases which strike down the distinction between arrestees and pretrial detainees, so counsel would be well advised to consider making the distinction even outside the sixth, seventh and tenth circuits.

2. *Diabetes-Specific Fourth and Fourteenth Amendment Cases*

Unlike failure-to-train cases, which have been frequently unsuccessful due to the difficulty of establishing system-wide deficiencies, claims of denial of adequate medical care under § 1983 are among the easiest claims for plaintiffs to plead. They are also among those most likely to survive summary judgment. Common to most successful pleadings are allegations that a plaintiff clearly communicated (1) his or her diabetic status to police officers as well as (2) the possibility of adverse effects following a denial of medical care. Successful pleadings also allege that police officers nevertheless ignored such information and failed to provide adequate medical treatment.

In *Ortiz*,¹⁹⁵ the decedent was arrested in her home and informed the arresting officers that she required medication to manage her diabetes but was not permitted to bring it with her to lockup. Her son soon delivered her medication to the facility where she was being held, but an officer refused to accept it, stating that the decedent would be taken to a hospital to receive care.¹⁹⁶ During a booking interview the decedent stated that she had “serious medical problems” and used medication to manage diabetes.¹⁹⁷ Her condition deteriorated over the following day, and officers repeatedly ignored or denied her requests for medical assistance.¹⁹⁸ Finally, the decedent passed away in her cell.¹⁹⁹

¹⁹⁵ 656 F.3d at 527.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 527–28.

¹⁹⁸ *Id.* at 528–29.

¹⁹⁹ *Id.* at 529.

The decedent's estate brought § 1983 claims against the defendant city and multiple police officers for failing to provide adequate medical care.²⁰⁰ Because the decedent was an arrestee, and had not yet had a judicial determination of probable cause, the Seventh Circuit applied the Fourth Amendment reasonableness standard to assess the decedent's § 1983 claims.²⁰¹ The court then applied the Seventh Circuit's four-factor reasonableness test, discussed above in the arrestee context.²⁰² The Seventh Circuit reversed the district court's grant of summary judgment with respect to the defendant city and officers for several reasons: (1) the officers had sufficient notice that the decedent required medical care to treat her serious medical conditions;²⁰³ (2) the district court had improperly excluded expert testimony demonstrating that the officers failure to act had caused the decedent's death;²⁰⁴ (3) there remained an unresolved dispute concerning whether the city had stipulated to accept liability if any of the officers were found to be liable;²⁰⁵ and (4) the officers were not entitled to qualified immunity because "providing no medical care in the face of a serious health risk constitutes deliberate indifference."²⁰⁶

In *Garretson v. City of Madison Heights*,²⁰⁷ the plaintiff was arrested; during the booking process she informed police that she had diabetes and would require an insulin injection. Despite her ongoing attempts to alert police to her medical needs, she was placed in a holding cell overnight without receiving any insulin and subsequently experienced symptoms of insulin deprivation and high blood glucose.²⁰⁸ The next morning, emergency medical personnel

²⁰⁰ *Id.* at 527.

²⁰¹ *Id.* at 530.

²⁰² *Id.*

²⁰³ *Id.* at 532–34.

²⁰⁴ *Id.* at 534–38.

²⁰⁵ *Id.* at 530.

²⁰⁶ *Id.* at 538–39.

²⁰⁷ 407 F.3d 789, 794 (6th Cir. 2005).

²⁰⁸ *Id.*

transported her to a local hospital, where she remained for several days receiving treatment for diabetic ketoacidosis.²⁰⁹

The plaintiff brought Fourteenth Amendment § 1983 claims against the defendant municipality and multiple police officers for failing to provide adequate medical care as required under the Fourteenth Amendment.²¹⁰ To prove *municipal* liability, she needed to establish causation between an official municipal policy and her injury and show that municipal officers had acted with deliberate indifference to her serious medical needs.²¹¹ The Sixth Circuit affirmed the district court’s grant of summary judgment because the plaintiff offered no evidence of a pattern of such detainee treatment or municipal sanction thereof or that her treatment constituted the “moving force” behind her injuries.²¹²

Regarding the police officers against whom the plaintiff had brought Fourteenth Amendment § 1983 claims, the Sixth Circuit affirmed the district court’s grant of summary judgment with respect to those that had no knowledge of her diabetic condition and, therefore, lacked “sufficiently culpable states of mind.”²¹³ However, with respect to those that had known of her diabetic condition, the Sixth Circuit reversed the district court’s grant of summary judgment because it found that their inaction created a genuine issue of material fact about whether their actions violated her Fourteenth Amendment right to adequate medical care. The court also found that her constitutional right was so clearly established that they reasonably

²⁰⁹ *Id.* at 794–95.

²¹⁰ *Id.* at 795.

²¹¹ *See id.* This entailed showing: “(1) a clear and persistent pattern of mishandled medical emergencies for pre-arraignment detainees; (2) notice, or constructive notice of such pattern, to [the municipality]; (3) tacit approval of the deliberate indifference and failure to act amounting to an official policy of inaction; and (4) that the custom or policy of inaction was the ‘moving force,’ or direct causal link, behind the constitutional injury.” *Id.* at 796.

²¹² *Id.*

²¹³ *Id.* at 797.

should have recognized their affirmative duty to act otherwise.²¹⁴ Consequently, the Sixth Circuit found that the officers were not entitled to qualified immunity for their actions.²¹⁵

In *Lolli v. Cnty. of Orange*,²¹⁶ the plaintiff was arrested pursuant to an outstanding warrant for an unpaid parking ticket. During the arrest he informed the police officer that he had diabetes, felt ill, and needed to eat as soon as possible.²¹⁷ A nurse at the jail to which he was transported also noted his diabetes diagnosis.²¹⁸ However, the plaintiff subsequently remained in a cell without food for several hours.²¹⁹ When he inquired as to the arrival of a snack that the nurse had promised, he contended that several officers removed him from his cell and beat him severely, causing serious and lasting physical injuries.²²⁰ The officers maintain that the plaintiff was unresponsive to orders, verbally abusive, and combative and denied knowing that he had diabetes. *Id.*

As a pretrial detainee, the plaintiff brought Fourteenth Amendment § 1983 claims against the defendant county and multiple police officers alleging that they had exhibited deliberate indifference to his serious medical needs.²²¹ The Ninth Circuit acknowledged, “[A] constitutional violation may take place when the government does not respond to the legitimate medical needs of a detainee whom it has reason to believe is diabetic.”²²² The court then found that “the officers’ indifference to [the plaintiff’s] extreme behavior, his obviously sickly appearance and his explicit statements that he needed food because he was a diabetic could easily lead a jury to find that the officers consciously disregarded a serious risk to [his]

²¹⁴ *Id.* at 798–99.

²¹⁵ *Id.*

²¹⁶ 351 F.3d 410, 412 (9th Cir. 2003).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 412–13.

²²¹ *Id.* at 412, 418.

²²² *Id.* at 420.

health.”²²³ The Ninth Circuit therefore reversed the district court’s grant of summary judgment with respect to those officers that the evidence showed may have known that the plaintiff had diabetes, and it affirmed with respect to those officers about whom the evidence revealed no such knowledge.²²⁴ Regarding the municipal liability claim, the Ninth Circuit affirmed the district court’s grant of summary judgment because the plaintiff neither challenged the order directly nor presented evidence of any omissions evincing the defendant county’s responsibility for the officers’ actions.²²⁵

In *Beatty v. Davidson*,²²⁶ the plaintiff had diabetes and was arrested at his home as he was conducting a blood glucose check and administering insulin. Although he expressed his need to complete the insulin administration, the arresting officer refused to allow him to proceed, stating that medical care would be provided at the holding center to which he was being taken.²²⁷ Despite this guarantee, the plaintiff remained jailed overnight without receiving any insulin because the medical department there was unstaffed overnight.²²⁸ During this interval, he communicated to police that he felt ill, disoriented, and dehydrated and required insulin; nevertheless, he received no medical attention.²²⁹ The next day, the medical department examined and scheduled the plaintiff for periodic blood glucose checks but failed to conduct an evening blood glucose check following his arraignment.²³⁰ The plaintiff ultimately required hospitalization for diabetic ketoacidosis, dehydration, and hypothermia.²³¹

²²³ *Id.* at 421.

²²⁴ *Id.*

²²⁵ *Id.* at 415.

²²⁶ 713 F. Supp. 2d 167, 169 (W.D.N.Y. 2010).

²²⁷ *Id.*

²²⁸ *Id.* at 169–170.

²²⁹ *Id.*

²³⁰ *Id.* at 170–71.

²³¹ *Id.* at 172.

The plaintiff brought Fourteenth Amendment § 1983 claims against the defendant medical department nurse, holding center supervisors, and municipality for denying him adequate medical care as a pretrial detainee in violation of the Fourteenth Amendment.²³² The district court denied the defendants' motion for summary judgment because it found that sufficient evidence existed to demonstrate that (1) the medical department nurse had exhibited deliberate indifference to the plaintiff's serious medical condition;²³³ (2) the holding center supervisors' gross negligence in supervising their subordinates had resulted in the plaintiff's injuries;²³⁴ and (3) the plaintiff's injuries resulted from the county's failure to institute a system to accommodate chronically ill pretrial detainees.²³⁵

Practitioners should keep in mind that where a pretrial detainee obtains some medical care, but disagrees with the course or adequacy of treatment, it will be exceptionally difficult to establish an actionable claim under § 1983.²³⁶ Indeed, the deliberate indifference standard is more than medical negligence.²³⁷

Because of the possibility of immediate and serious adverse effects from untreated diabetes, plaintiffs may not face substantial difficulty in demonstrating that police officers' and jail officials' denial of medical care or supplies posed a substantial risk of serious harm.²³⁸ Additionally, the preceding cases illustrate that plaintiffs often survive the summary judgment stage when they have pleaded that they expressly communicated to officers their diabetes diagnoses and the possibility of immediate adverse effects following denial of medical treatment.

²³² *Id.* at 168.

²³³ *Id.* at 173–76.

²³⁴ *Id.* at 176–77.

²³⁵ *Id.* at 178–79.

²³⁶ See *Schulker v. Kenton Cnty.*, No. 10-143-DLB-CJS, 2013 U.S. Dist. LEXIS 6950, at *9–12 (E.D. Ky. Jan. 17, 2013) (plaintiff received two shots of insulin instead of four during a 24 hour detention).

²³⁷ *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Natale v. Camden Cnty Corr. Facility*, 318 F.3d 575, 582 (3d Cir. 2003); *Nicini v. Morra*, 212 F.3d 798, 811 (3d Cir. 2000) (“Deliberate indifference is a ‘subjective standard of liability consistent with recklessness as that term is defined in criminal law.’”).

²³⁸ See *Lolli*, 351 F.3d at 420.

When attorneys evaluate the strength of a potential case, particular attention should be paid to whether the potential plaintiff conveyed his or her diabetes diagnosis and need for medical treatment to officials while detained. Although not an explicit element in any circuit's test, as a practical matter, *proof* that the detained individual gave actual notice (as compared with constructive notice) will strengthen the case significantly. This is because most courts have held that even under the Fourteenth Amendment, deliberate indifference is the standard by which to judge these claims.²³⁹ Establishing that officers and jail officials possessed such knowledge strongly supports findings of deliberate indifference, and providing actual notice is one of the easiest ways to establish this.²⁴⁰

D. Procedural Considerations

Attorneys should be aware of several important procedural points when bringing claims under § 1983.

1. Bivens Actions – Bringing a Claim against a Federal Agent

Litigation under § 1983 typically does not apply to actions against *federal* government employees.²⁴¹ However, the landmark case *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics* instituted a court-created right of action, via the Federal Question jurisdiction of the district courts.²⁴² This right of action allows plaintiffs to bring claims for damages for constitutional violations against federal officers in their individual—not official—capacities. *Id.* While the agents in *Bivens* attempted to argue that the right to privacy was a state-created right, the court disagreed, reasoning that the Fourth Amendment limits the exercise of federal

²³⁹ *Beatty*, 713 F. Supp. 2d at 173–76; *Lolli*, 351 F.3d at 421; *Ortiz*, 656 F.3d at 532–34.

²⁴⁰ *See Beatty*, 713 F. Supp. 2d at 173–76; *Lolli*, 351 F.3d at 421; *Ortiz*, 656 F.3d at 538–39.

²⁴¹ *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098 (2005).

²⁴² 403 U.S. 388, 389 (1971); 28 U.S.C. § 1331(a).

power.²⁴³ In *Bivens*, agents of the Federal Bureau of Narcotics allegedly made a warrantless entry of plaintiff's apartment, searched it, and arrested him on narcotics charges, all without probable cause.²⁴⁴ The court held that the plaintiff was permitted to bring a cause of action against the federal agents for violating his Fourth Amendment right to be free from unreasonable search and seizure.²⁴⁵ While it may be less likely for an individual with diabetes to interact with a federal agent than a state or municipal police officer, it should be noted that in those cases, the aggrieved possess the same right to bring an action for unreasonable searches and seizures in violation of the Fourth Amendment.

2. *Qualified Immunity*

A police officer may be entitled to a defense of qualified immunity for any monetary liability incurred as a result of using unreasonable force in violation of the Fourth Amendment, failure to provide adequate medical care in violation of the Fourth or Fourteenth Amendments or failure to train in violation of the Fourteenth Amendment.²⁴⁶ An officer may claim qualified immunity unless (1) the evidence, viewed in the light most favorable to the plaintiff, establishes a violation of a constitutional or statutory right and (2) the right was clearly established at the time of the violation, such that a reasonable official would have known that his or her actions were unlawful.²⁴⁷ The Supreme Court has emphasized that qualified immunity is an inquiry "in which the result depends very much on the facts of each case."²⁴⁸

²⁴³ *Id.* at 391–92.

²⁴⁴ *Id.* at 389.

²⁴⁵ *Id.*

²⁴⁶ See *Stafford v. Stewart*, 461 Fed. Appx. 767, 771 (10th Cir. 2012); *Estate of Henson v. Callahan*, 440 Fed. Appx. 352, 356, 358 (5th Cir. 2011); *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1312–15 (10th Cir. 2009).

²⁴⁷ *Gardner v. Bd. of Police Comm'rs*, 641 F.3d 947, 950 (8th Cir. 2011); see *Pearson v. Callahan*, 555 U.S. 223, 231–32 (2009).

²⁴⁸ *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004); see also *Scott v. Harris*, 550 U.S. 372, 383 (2007) ("Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still sloop our way through the factbound morass of 'reasonableness.'").

The first step of this analysis—whether an official violated a constitutional or statutory right—requires assessing “the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.”²⁴⁹ Regarding the second step of this analysis, the Supreme Court has stated that “officials can be on notice that their conduct violates established law even in novel factual situations.”²⁵⁰ Upon revisiting this framework, the Supreme Court held that the two-step analysis need not be addressed in sequence.²⁵¹ Courts often require case law narrowly defining the applicable standards to find that a right has been clearly established, but the Supreme Court has stated, “in an obvious case, these standards can ‘clearly establish’ the answer, even without a body of relevant case law.”²⁵²

The qualified immunity defense often serves as a substantial obstacle to recovery in § 1983 claims. Arguing against the defense frequently is an uphill battle: “As a practical matter, officials almost always secure qualified immunity, either from the trial court or the appellate tribunal. Only the most flagrant and shocking conduct will defeat qualified immunity; merely ‘stupid’ actions are insufficient.”²⁵³ One exception to the powerful qualified immunity defense is that where plaintiffs seek injunctive relief in addition to or in lieu of damages, qualified immunity will not be an available defense.²⁵⁴

3. *Municipal Immunity*

A municipality can be liable under § 1983 “only where the municipality itself causes the constitutional violation at issue . . . *Respondeat superior* or vicarious liability will not attach

²⁴⁹ *Thomson*, 584 F.3d at 1313 (quoting *Pearson*, 555 U.S. at 244) (internal quotation marks omitted).

²⁵⁰ *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

²⁵¹ *Pearson*, 555 U.S. at 236 (noting that sequential analysis “is often beneficial,” but that courts may exercise discretion where application would result in unnecessary litigation and determination of constitutional issues, ultimately “disserv[ing] the purpose of qualified immunity” and resulting in “substantial expenditure of scarce judicial resources”).

²⁵² *Brosseau*, 543 U.S. at 199.

²⁵³ James C. Harrington, *The ADA and Section 1983: Walking Hand in Hand*, 19 REV. LITIG. 435, 438 (2000).

²⁵⁴ *Pearson*, 555 U.S. at 242.

under § 1983.”²⁵⁵ Thus, in cases in which police officers allegedly have deprived individuals of federally protected rights under color of state law, a municipality will not be liable “*solely* because it employs a tortfeasor.”²⁵⁶ Rather, for § 1983 liability to attach to a municipality, “there [must be] a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.”²⁵⁷ Additionally, when a plaintiff alleges that a municipality is liable for failing to train its police officers, the municipality will be liable “only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.”²⁵⁸

4. *Eleventh Amendment Immunity of State Entities*

Although *municipal* entities and employees do not have immunity under the Eleventh Amendment, *state* entities and employees do. The Eleventh Amendment of the U.S. Constitution prevents plaintiffs from obtaining relief against state government entities or state employees in their official capacities.²⁵⁹ State employees are not immune from suit, however, in their individual capacities.²⁶⁰ For this reason, attorneys must be mindful of issues of Eleventh Amendment (or sovereign) immunity when bringing claims under § 1983.

The Eleventh Amendment states: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. Although the language of the Eleventh Amendment does not mention suits by

²⁵⁵ *City of Canton*, 489 U.S. at 385 (citing *Monell v. Dep’t of Soc. Servs.*, 436 U.S. at 694–95).

²⁵⁶ *Monell*, 436 U.S. at 691.

²⁵⁷ *City of Canton*, 489 U.S. at 385.

²⁵⁸ *Id.* at 388; see discussion *supra* at p.26.

²⁵⁹ See, e.g., *Everson v. Leis*, 556 F.3d 484, 493 n.3 (6th Cir. 2009), *aff’d*, 412 F. App’x 771 (6th Cir. 2011) (declining to address claims against police officers in their official capacities because of Eleventh Amendment immunity); *Fitch v. Ky. State Police*, No. 3:10-49-DCR, 2010 U.S. Dist. LEXIS 120013, at *15–16 (E.D. Ky. Nov. 10, 2010) (applying Eleventh Amendment Immunity for state police and state transportation agency).

²⁶⁰ *Sutton v. Utah State Sch. For the Deaf & Blind*, 173 F.3d 1226, 1237 (10th Cir. 1999).

citizens against their own states, the Supreme Court has held that its cases “have extended the [Eleventh] Amendment’s applicability to suits by citizens against their own States.”²⁶¹ Sovereign immunity applies not only to states themselves, but also to state instrumentalities.²⁶² In all such cases, states or state government entities cannot be made parties to suits in federal court without their consent.²⁶³

Of particular importance to attorneys bringing § 1983 claims against police officers, Eleventh Amendment immunity extends to state officials, including police officers, acting in their official capacities.²⁶⁴ However, while sovereign immunity bars federal actions against police officers in their official capacities to the extent that plaintiffs seek monetary damages, the Eleventh Amendment does not bar federal actions against officers in their official capacities wherein plaintiffs seek only prospective injunctive relief.²⁶⁵ Such actions are not regarded as actions against the state.²⁶⁶ Additionally, “the Eleventh Amendment does not extend its immunity to units of local government,” *Garrett*, 531 U.S. at 369, including cities and counties.

The Eleventh Amendment bars federal actions against state police officers acting in their official capacities only to the extent that plaintiffs seek monetary damages. Plaintiffs still may

²⁶¹ *Bds. & Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001).

²⁶² *Harris v. Angelina Cnty.*, 31 F.3d 331, 338 n.7 (5th Cir. 1994).

²⁶³ *Id.* at 339.

²⁶⁴ *See Robinette v. Jones*, 476 F.3d 585, 589–90 (8th Cir. 2007).

²⁶⁵ *Fry v. McCall*, 945 F. Supp. 655, 660 (S.D.N.Y. 1996). In order to take advantage of the exception to state immunity from liability, the plaintiff must name a person (usually the agency head) in his or her official capacity, rather than naming the agency. *See also Stoner v. Wis. Dep’t of Agric., Trade & Consumer Prot.*, 50 F.3d 481, 482–83 (7th Cir. 1995) (affirming dismissal of damages action against state employees in their official capacities); *Channer v. Murray*, 247 F. Supp. 2d 182, 187–88 (D. Conn. 2003), *motion denied, summary judgment granted*, No. 3:00cv230 (SRU), 2005 U.S. Dist. LEXIS 5304 (D. Conn. Mar. 31, 2005) (“The Eleventh Amendment immunity that protects the state from suits for monetary relief also protects state officials sued for damages in their official capacities.”); *Salvador v. Lake George Park Comm’n*, No. 1:98-CV-1987 (FJS/DRH), 2001 U.S. Dist. LEXIS 23465, at *3 (N.D.N.Y. Mar. 28, 2001) (“[C]ompensatory and punitive damages [are] not available in an action brought by a citizen against a state or state agency.”); *see generally Mountain Cable Co. v. Pub. Serv. Bd.*, 242 F. Supp. 2d 400, 403–04 (D. Vt. 2003) (quoting *Milliken v. Bradley*, 433 U.S. 267, 289 (1977)) (“In its long-standing exception to Eleventh Amendment sovereign immunity, *Ex parte Young* ‘permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury.’”).

²⁶⁶ *Alley v. Angelone*, 962 F. Supp. 827, 831 n.1 (E.D. Va. 1997) (citing *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 n.10 (1989)).

obtain prospective injunctive relief from state police officers in their official capacity despite sovereign immunity.²⁶⁷ Separately, plaintiffs may sue state actors in their individual capacities, if the plaintiff is intent on seeking damages.²⁶⁸ Furthermore, plaintiffs may obtain both legal and equitable relief from municipal police officers.²⁶⁹

5. *Limitations Period*

Section 1983 does not provide a statute of limitations, and for that reason, federal courts apply the statutes of limitations of the states in which § 1983 actions are brought.²⁷⁰ When a federal cause of action lacks a statute of limitations, a court will adopt the most appropriate or most analogous state statute of limitations, as long as it is not inconsistent with federal law or policy to do so.²⁷¹ Because statutes of limitations vary from state to state, the limitations period applied to § 1983 necessarily will vary also. Most courts apply state statutes of limitations governing statutorily created actions to § 1983 actions.²⁷² Some courts apply state statutes of limitations governing contract claims,²⁷³ state civil rights actions,²⁷⁴ or actions against public officials²⁷⁵ to § 1983 actions.

6. *Notice*

²⁶⁸ *Sutton*, 173 F.3d at 1237.

²⁶⁹ This discussion of sovereign immunity applies only to suits in federal court. The Eleventh Amendment does not bar plaintiffs from obtaining relief in state court.

²⁷⁰ *Deepwells Estates, Inc. v. Inc. Vill. of the Head of the Harbor*, 973 F. Supp. 338, 344 (E.D.N.Y. 1997) (citing *Wilson v. Garcia*, 471 U.S. 261, 268–69 (1985)).

²⁷¹ See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660 (1987); *Wilson v. Garcia*, 471 U.S. at 266–68.

²⁷² See, e.g., *Bd. of Regents v. Tomanio*, 446 U.S. 478, 484 n.4 (1980) (applying New York’s three-year statute of limitations for actions “to recover upon a liability, penalty or forfeiture created or imposed by statute” to § 1983); *Wolfe v. Horn*, 130 F. Supp. 2d 648, 657 (E.D. Pa. 2001) (applying Pennsylvania’s two-year statute of limitations for personal-injury actions to § 1983); *Williams v. D.C.*, 676 F. Supp. 329, 331 (D.D.C. 1987) (applying the District of Columbia’s three-year statute of limitations for tort actions seeking recovery for personal injuries to § 1983); *Shorters v. Chic.*, 617 F. Supp. 661, 662–66 (N.D. Ill. 1985) (applying Illinois’ five-year statute of limitations for “all civil actions not otherwise provided for” to § 1983).

²⁷³ See, e.g., *Vanlaarhoven v. Newman*, 564 F. Supp. 145, 150 (D.R.I. 1983) (applying Rhode Island’s ten-year statute of limitations for breach of implied warranty to § 1983).

²⁷⁴ See, e.g., *Hall v. Asher*, 355 F. Supp. 808, 811 n.6 (D. Md. 1973) (applying Maryland’s three-year statute of limitations for violations of an article of the Maryland Declaration of Rights to § 1983).

²⁷⁵ See, e.g., *Freeze v. Griffith*, 849 F.2d 172, 175 (5th Cir. 1988) (applying Louisiana’s one-year statute of limitations for actions against state officials to § 1983).

Most states require that a plaintiff bringing a tort claim against a state (including a municipality within the state) provide timely notice before initiating claim in state or federal court.²⁷⁶ Plaintiffs bringing tort claims in state court therefore should consult state law for any applicable notice requirements.

Even though § 1983 claims generally are characterized as torts,²⁷⁷ a plaintiff need not adhere to a state notice-of-claim requirement prior to initiating a § 1983 claim in state court.²⁷⁸ The *Felder* Court concluded that state notice-of-claim requirements conflict with the Supremacy Clause and the remedial objectives of § 1983.²⁷⁹ Additionally, a plaintiff usually is not required to comply with any notice provisions before initiating a federal claim in federal court.²⁸⁰

E. Remedies

1. Damages, Equitable Relief, and Attorney's Fees

Compensatory damages are typically recoverable for violations of § 1983 involving police misconduct.²⁸¹ A judge can find a damages award to be excessive when it is “so high as to

²⁷⁶ *E.g.*, Wis. Stat. § 893.80(a) (2011) (requiring that a plaintiff provide written notice of the circumstances of the claim to the relevant governmental subdivision within 120 days after the happening of the event giving rise to the claim); Cal. Gov't Code §§ 905, 910, 911, 915 (requiring filing of tort claim within six months of incident absent certain exceptions).

²⁷⁷ *Wilson v. Garcia*, 471 U.S. at 276.

²⁷⁸ *Felder v. Casey*, 487 U.S. 131, 138 (1988).

²⁷⁹ *Id.*

²⁸⁰ *See Brown v. United States*, 742 F.2d 1498, 1500 (D.C. Cir. 1984); *Rosa v. Cantrell*, 705 F.2d 1208, 1221 (10th Cir. 1982).

²⁸¹ *See, e.g., Chaudhry v. City of Los Angeles*, No. 11-55820, 2014 U.S. App. LEXIS 9208 (9th Cir. May 19, 2014) (finding that California's bar against pre-death pain and suffering damages in survival actions was inconsistent with the deterrence policy underlying § 1983 and holding that California law disallowing pre-death pain and suffering does not apply to § 1983 claims where the decedent's death was caused by a violation of federal law); *Carey v. Piphus*, 435 U.S. 247, 260 (1978); *Ciraolo v. City of New York*, 216 F.3d 236, 238 (2d Cir. 2000) (district court awarded compensatory damages, not contested on appeal); *Sabir v. Jowett*, 214 F. Supp. 2d 226, 244–47 (D. Conn. 2002) (endorsing award of compensatory damages when the record demonstrated that the plaintiff sustained injuries

shock the judicial conscience and constitute a denial of justice;”²⁸² When determining whether a damages award is excessive, a court also may consider whether it is “within the reasonable range based on awards in other cases of a similar nature.”²⁸³

Additionally, punitive damages may be awarded under § 1983 to deter or punish constitutional violations.²⁸⁴ The Supreme Court in *Smith v. Wade* articulated the standard for punitive damages in a § 1983 action: “[A] jury may be permitted to assess punitive damages in an action under § 1983 when the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.”²⁸⁵ When deciding whether a punitive damages award is excessive or shocks the judicial conscience, a court will consider three guideposts: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.”²⁸⁶ Finally, the Supreme Court has held that punitive damages are not available against municipalities in a § 1983 action, unless expressly authorized by statute.²⁸⁷

for which medical treatment was required, resultantly was required to hire an attorney, and experienced continuing physical injuries and emotional distress); *Hogan v. Franco*, 896 F. Supp. 1313, 1325–29 (N.D.N.Y. 1995) (endorsing award of compensatory damages for serious physical injuries, denial of medical treatment, and pain and suffering because it fell “within the range of reasonableness of comparable cases”).

²⁸² *Sabir*, 214 F. Supp. 2d at 244–45 (quoting *O’Neill v. Krzeminski*, 839 F.2d 9, 13 (2d Cir. 1988)) (internal quotation marks omitted) or “if it is the result of a miscarriage of justice and represents a windfall to the plaintiff without regard to [his] [sic] injury,” *id.* at 245 (quoting *Oliver v. Cole Gift Ctr., Inc.*, 85 F. Supp. 2d 109, 114 (D. Conn. 2000)) (internal quotation marks omitted).

²⁸³ *Sabir*, 214 F. Supp. 2d at 245; *see Hogan*, 896 F. Supp. at 1325–29.

²⁸⁴ *Smith v. Wade*, 461 U.S. 30, 56 (1983); *Robinson v. Cattaraugus Cnty.*, 147 F.3d 153, 161 (2d Cir. 1998) (even where compensatory damages are not found, a jury may still award punitive damages); *Sabir*, 214 F. Supp. 2d at 246 (citing *Carey v. Piphus*, 435 U.S. at 257 n.11).

²⁸⁵ 461 U.S. at 56.

²⁸⁶ *Estate of Moreland v. Dieter*, 395 F.3d 747, 756 (7th Cir. 2005) (quoting *State Farm Mut. Auto. Ins. Co., Inc. v. Campbell*, 538 U.S. 408, 418 (2003)); *see also Sabir*, 214 F. Supp. 2d at 574–75 (identifying same guideposts).

²⁸⁷ *Newport v. Fact Concerts*, 453 U.S. 247, 271 (1981).

Equitable relief also is available for violations of § 1983 involving police misconduct.²⁸⁸ However, in cases seeking injunctive relief plaintiffs may encounter a significant obstacle to establishing standing. In *L.A. v. Lyons*, the plaintiff sought a preliminary and permanent injunction against the City to bar the use of the control holds.²⁸⁹ He had been the recipient of a control hold during a routine traffic stop, and presented evidence that since his complaint many individuals had also been placed in control holds in circumstances where there was no threat of injury to officers, and had died.²⁹⁰ The Court found that this evidence fell short of the standard, which requires the plaintiff to assert that he is in real and immediate danger of sustaining the injury again.²⁹¹ The Court went on to state that,

In order to establish an actual controversy in this case Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the City ordered or authorized police officers to act in such manner.

Id. at 105.

In § 1983 cases, a court may award reasonable attorney’s fees to a prevailing party pursuant to the Civil Rights Attorney’s Fees Awards Act of 1976.²⁹² To recover attorney’s fees under § 1988, a plaintiff must be a “prevailing party.”²⁹³ Plaintiffs are considered to be “prevailing parties” if “they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.”²⁹⁴ That is, a court must award actual relief on the

²⁸⁸ See, e.g., *Lewis v. Kugler*, 446 F.2d 1343, 1350 (3d Cir. 1971) (“If the plaintiffs can establish that they are subjected to a deliberate pattern and practice of constitutional violations by the [state police], we believe that they are entitled to appropriate injunctive relief.”). Cf. *Pearson v. Callahan*, 555 U.S. at 242 (treating as assumed the availability of injunctive relief in § 1983 claims).

²⁸⁹ 461 U.S. 95, 98 (1983).

²⁹⁰ *Id.* at 100.

²⁹¹ *Id.* at 101—05.

²⁹² 42 U.S.C. § 1988(b) (2006).

²⁹³ *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

²⁹⁴ *Id.* (internal quotation marks omitted) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278–79 (1st Cir. 1978)).

merits of the case; “a favorable judicial statement of law in the course of litigation” does not suffice for an award of attorney’s fees.²⁹⁵

2. *Diabetes-Specific Settlements*

The New York Attorney General investigated a police department for an alleged practice of unreasonable use of force, including inappropriate use of Tasers, against African Americans. One such incident included in the investigation involved an individual with diabetes who was Tasered repeatedly as he was experiencing an acute hypoglycemic episode on the side of the road, causing substantial and enduring injuries. The parties entered a consent decree providing for substantial revisions to the defendant police department’s use-of-force training and oversight policies.²⁹⁶

In a notable recent case, a man with diabetes was arrested and held for fifty-eight hours without receiving medical care.²⁹⁷ He subsequently developed diabetic ketoacidosis, become comatose, and sustained disabling brain damage.²⁹⁸ At trial, a jury awarded damages totaling \$17.5 million.²⁹⁹

In another recent case, a man with diabetes, who had been denied adequate medical care for a foot injury during a pretrial detention period, received a settlement totaling \$12,500 from the defendant city, Lowell, Massachusetts.³⁰⁰ More significantly, the settlement agreement

²⁹⁵ *Hewitt v. Helms*, 482 U.S. 755, 763 (1987).

²⁹⁶ Press Release, N.Y. State Attorney Gen., Attorney General Cuomo Reaches Agreement with the City of Niagara Falls to Reform Its Police Practices (Nov. 30, 2010), http://www.ag.ny.gov/media_center/2010/nov/nov30a_10.html.

²⁹⁷ *Vargas v. City of New York*, No. 33215/07, 2010 WL 4718952 (N.Y. Sup. Ct. Oct. 19, 2010) *rev’d on other grounds*, 105 A.D.3d 834 N.Y. App. Div. (2013) (on the basis of a procedural error by plaintiff’s counsel).

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ Settlement Agreement and Release at 1, *Bailey v. City of Lowell*, No. 1:09-cv-10546-RGS (D. Mass. Dec. 11, 2009).

dictated that Lowell’s police officers and detention attendants would receive training on diabetes, hypoglycemia, and hyperglycemia for at least three years from the date of the settlement.³⁰¹

Following class certification in *Rosen v. City of Philadelphia*,³⁰² the plaintiffs—consisting of persons with diabetes that had been denied timely and appropriate medical care and diet while in police custody—obtained substantial concessions from the defendant city.³⁰³ The relief obtained included: (1) law enforcement directives providing for prompt medical evaluation of and, if necessary, food for detained individuals with diabetes, (2) contractual relationships with service providers to administer routine and sufficient medical care to prisoners with diabetes, (3) an eighteen-month monitoring period during which the defendant city’s police department agreed to provide documentation of its implementation of the settlement agreement to the American Diabetes Association (The Association), (4) changes to the defendant city’s police training procedures incorporating instruction on diabetes and its effects, and (5) attorneys’ fees and costs.³⁰⁴

In 2010, an Ohio plaintiff settled with the Mentor City Police Department for \$110,000.³⁰⁵ His complaint alleged that the police drew a loaded weapon on him and forcibly removed him from the vehicle. The complaint also alleges that the officers withheld evidence of Coxon’s diabetic condition, and that the prosecution engaged in malicious prosecution by instituting criminal proceedings that lacked probable cause against Mr. Coxon, with malice and ulterior purpose.³⁰⁶

³⁰¹ *Id.* at 2.

³⁰² No. 00-764, 2001 U.S. Dist. LEXIS 5371, at *6–7 (E.D. Pa. Mar. 6, 2001).

³⁰³ Settlement Agreement for Injunctive Relief at 3–9, *Rosen v. City of Phila.*, available at <http://main.diabetes.org/dorg/living-with-diabetes/correctmats-lawyers/ad-rosen-settlement-agreement.pdf>.

³⁰⁴ *Id.* at 3–9.

³⁰⁵ Max Reinhart, *Kirtland Teacher Settles Suit against Mentor Police*, News Herald (Nov. 5, 2010, 12:00 AM), <http://www.news-herald.com/general-news/20101105/kirtland-teacher-settles-suit-against-mentor-police>.

³⁰⁶ Complaint on file at the Association.

II. Title II of the Americans with Disabilities Act

Title II of the Americans with Disabilities Act (“ADA”) provides: “[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.”³⁰⁷ The ADA also mandates that, no later than one year after its enactment (July 26, 1990), the Attorney General shall “promulgate regulations in an accessible format that implement [Title II].”³⁰⁸ Accordingly, the Department of Justice has established that:

A public entity shall . . . evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of [Title II] and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.³⁰⁹

Nevertheless, modifications are not always required, as “[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”³¹⁰ The majority of circuits have held that Title II of the ADA applies to arrests.³¹¹

To establish a violation of Title II of the ADA, a plaintiff must prove that (1) he or she is a qualified individual with a disability; (2) he or she either was excluded from participation in or denied the benefits of a public entity’s services, programs, or activities, or otherwise was

³⁰⁷ 42 U.S.C. § 12132 (2006).

³⁰⁸ *Id.* § 12134(a).

³⁰⁹ 28 C.F.R. § 35.105(a) (2011).

³¹⁰ *Id.* § 35.130(b)(7).

³¹¹ *Sheehan v. City & Cnty. of S.F.*, No. 11-16401, 2014 U.S. App. LEXIS 3321, at *8 (9th Cir. Feb. 21, 2014).

discriminated against by the public entity; and (3) the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability.³¹²

A. *Prima Facie* Case

When bringing claims under Title II of the ADA, attorneys should address several preliminary procedural hurdles at the outset—namely, attorneys should ensure that the public-entity and qualified-individual-with-a-disability elements are satisfied. First, the ADA defines a “public entity,” in part, as “any department, agency, special purpose district, or other instrumentality of a State or States or local government.”³¹³ A state employee in his or her individual capacity does not satisfy the definition of “public entity.”³¹⁴ Additionally, the term “instrumentality of a State” refers to governmental units or units created by them.³¹⁵

The Supreme Court has held that Title II is applicable to state correctional facilities, and therefore that inmates may bring Title II claims.³¹⁶ In *Yeskey*, the Court found that state prisons “fall squarely within the statutory definition of ‘public entity.’”³¹⁷ Partly as a consequence, lower courts have held that local police departments are “public entities” within the meaning of the ADA.³¹⁸

Second, as defined by the ADA, a “qualified individual with a disability” is:

³¹² *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1083 (11th Cir. 2007).

³¹³ 42 U.S.C. § 12131(1)(B).

³¹⁴ *See Roque v. Armstrong*, 392 F. Supp. 2d 382, 389 (D. Conn. 2005).

³¹⁵ *Edison v. Douberly*, 604 F.3d 1307, 1310 (11th Cir. 2010).

³¹⁶ *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209–10 (1998).

³¹⁷ *Id.* at 210.

³¹⁸ *See, e.g., Hainze v. Richards*, 207 F.3d 795, 799–800 (5th Cir. 2000) (“The broad language of the statute and the absence of any stated exceptions has occasioned the courts’ application of Title II protections into areas involving law enforcement.”); *Waller v. City of Danville*, 515 F. Supp. 2d 659, 662–63 (W.D. Va. 2007) (“Courts have liberally interpreted the definition of a ‘public entity’ . . . to include state-run prisons as well as local police forces.”); *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 771, 775 (W.D. Tex. 2006) (“A municipal police department qualifies as a public entity.”).

[A]n 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.³¹⁹

To meet this definition, an individual must show that he or she has a disability as defined by the ADA. The ADA defines “disability,” with respect to an individual, as “a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment”³²⁰ Significantly, the ADA Amendments Act of 2008³²¹ has greatly expanded the range of cases wherein an individual is regarded as having a disability. As amended, the ADA now provides that:

An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.³²²

Following the ADA Amendments Act of 2008, the term “disability” is to be construed broadly, and this directive is the most crucial aspect of determining whether an individual has a disability within the meaning of the ADA.³²³ The federal regulations also state that “[t]he term ‘substantially limits’ shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.³²⁴ ‘Substantially limits’ is not meant to be a demanding standard.” Section 1630.2(j)(1)(iii) elaborates:

³¹⁹ 42 U.S.C. § 12131(2).

³²⁰ *Id.* § 12102(1)(A)–(C).

³²¹ Pub. L. No. 110-325, 122 Stat. 3553 (2008).

³²² 42 U.S.C. § 12102(3)(A).

³²³ The ADA Amendments Act of 2008 expressly disapproves of the narrow interpretation of “disability” offered in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482–83 (1999), and *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 196–99 (2002).

³²⁴ 29 C.F.R. § 1630.2(j)(1)(i) (2011).

The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.

The ADA defines "major life activities" as including, but not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working," as well as "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."³²⁵ "Major life activities" encompasses the functioning of the endocrine system.

The regulations also provide that the operation of a major bodily function may include the operation of an individual organ within a body system. This would include, for example, the operation of the kidney, liver, pancreas, or other organs. . . . The link between particular impairments and various major bodily functions should not be difficult to identify. Because impairments, by definition, affect the functioning of body systems, they will generally affect major bodily functions. For example . . . diabetes affects the operation of the pancreas and also the function of the endocrine system.³²⁶

Additionally, a number of pre-ADAAA cases acknowledged that diabetes is a physical impairment.³²⁷ The current versions of the ADA and its accompanying regulations, together with supporting case law, indicate that individuals submitting well-pleaded complaints should have little difficulty establishing that diabetes is a disability under the ADA and, therefore, that they

³²⁵ 42 U.S.C. § 12102(2)(A)—(B). *See also* 29 C.F.R. § 1630.2(i)(1)(i)–(ii) (expanding the statutory definitions).

³²⁶ Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16978, 17007 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630.2(i)).

³²⁷ *See, e.g., Fraser v. Goodale*, 342 F.3d 1032, 1038 (9th Cir. 2003) ("We have little difficulty in concluding that diabetes is a 'physical impairment' under the ADA."); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 923 (7th Cir. 2001) ("We have no difficulty in determining that [appellant's] insulin-dependent diabetes and related medical conditions are physical impairments under the [ADA]."); *Gonzales v. City of New Braunfels*, 176 F.3d 834, 837 (5th Cir. 1999) (describing diabetes as a "serious impairment").

satisfy the definition of “qualified individuals with disabilities.”³²⁸ Following *Yeskey*, federal courts generally have relied on two theoretical bases when determining whether the ADA is applicable in arrest contexts: the so-called wrongful arrest and reasonable accommodation theories.³²⁹

B. Wrongful Arrest

Under the wrongful arrest theory, an individual may be able to state a claim under Title II of the ADA when he or she is arrested because police officers misperceived the lawful effects of his or her disability as unlawful conduct.³³⁰ Courts are in disagreement as to whether an arrest qualifies as “a program, service or activity” covered by Title II of the ADA.³³¹ However, the Eleventh Circuit has articulated that the final clause of § 12132 protects qualified individuals with a disability from being subjected to discrimination by any such entity, and is not tied directly to the services, programs, or activities of the public entity.³³² This final clause in Title II

³²⁸ See also U.S. Equal Opportunity Employment Commission, Questions & Answers about Diabetes in the Workplace and the Americans with Disabilities Act (ADA), <http://www.eeoc.gov/laws/types/diabetes.cfm> (“As a result of changes made by the ADA, individuals who have diabetes should easily be found to have a disability within the meaning of the first part of the ADA’s definition of disability because they are substantially limited in the major life activity of endocrine function.”); Brian East, The ADA Amendments Act of 2008: Including Final EEOC Regulations and Guidance and Current Case Law *passim* (May 1, 2011) (unpublished manuscript) (on file with the Association), <http://www.diabetes.org/assets/pdfs/know-your-rights/for-lawyers/employment/adaaa-and-final-eeoc-regs-east.pdf> (examining strategy for proving that diabetes is a disability under the amended ADA); Brian Dimmick & Katie Hathaway, Demonstrating Coverage under the ADA Amendments Act of 2008 for People with Diabetes (2011) <http://main.diabetes.org/dorg/PDFs/Advocacy/Discrimination/atty-demonstrating-coverage-adaaa.pdf>.

³²⁹ *Gohier v. Enright*, 186 F.3d 1216, 1220 (10th Cir. 1999); *Buchanan v. Maine*, 417 F. Supp. 2d 45, 72–74 (D. Me. 2006). See Rachel E. Brodin, Comment, *Remedying a Particularized Form of Discrimination: Why Disabled Plaintiffs Can and Should Bring Claims for Police Misconduct Under the Americans with Disabilities Act*, 154 U. PA. L. REV. 157, *passim* (2005) (expounding on the wrongful arrest and reasonable accommodation theories).

³³⁰ See *Lewis v. Truitt*, 960 F. Supp. 175, 176–79 (S.D. Ind. 1997).

³³¹ *Ryan v. Vt. State Police*, 667 F. Supp. 2d 378 (D. Vt. 2009); *Bircoll*, 480 F.3d at 1072; *Catlett v. Jefferson Cnty. Corr. Dep’t*, No. 3:00CV-340-S, 2000 U.S. Dist. LEXIS 21662 (W.D. Ky. Nov. 3, 2000) (“while lower courts have come to varying outcomes with respect to whether Title II applies in the context of a valid arrest, the common thread that runs through all of the decisions is that the determination is fact-specific”); *Gohier*, 186 F.3d at 1221 (“a broad rule categorically excluding arrests from the scope of Title II ... is not the law.”).

³³² *Bledsoe v. Palm Beach Cnty. Soil & Water Conservation Dist.*, 133 F.3d 816, 821–22 (11th Cir. 1998) (quoting 42 U.S.C. § 12132).

is a catch-all phrase that prohibits *all* discrimination by a public entity, regardless of the context. Therefore, practitioners should carefully review law in their jurisdiction to determine how to approach pleading a wrongful arrest Title II claim. In order to recover under the wrongful arrest theory, a plaintiff must show that (1) he or she was disabled; (2) the defendants knew or should have known that he or she was disabled; and (3) the defendants arrested him or her because of legal conduct related to his or her disability.³³³

The central sticking point of this type of claim seems to be the third prong; proving that the arrest is *because of* conduct related to the arrestee's disability. A common defense that courts are happy to accept is that the arrest was because of illegal conduct, not because of disability-related conduct.³³⁴ In *Ryan*, the court accepted the argument that officers arrested the deaf amputee not because of his inability to communicate with them, but because they believed he was obstructing their entry to his bar. This type of distinction illustrates the importance of perspective in a claim like this. Even though the wrongful arrest theory was not properly before the court, the court nevertheless opined that there was *nothing* in the complaint to permit a reasonable juror to conclude that the VSP decided to arrest Ryan solely because he was deaf or an amputee.

Further complicating the third prong analysis is that some, but not all, courts have required that plaintiffs show they were arrested *solely* because of legal conduct related to their disability.³³⁵ 42 U.S.C. § 12132 states:

Subject to the provisions of this title, 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.

³³³ *Lewis v. Truitt*, 960 F. Supp. at 178.

³³⁴ *See, e.g., Ryan v. Vt. State Police*, 667 F. Supp. 2d at 378.

³³⁵ *Lewis v. Truitt*, 960 F. Supp. at 178 (not using the word "solely"); *Ryan*, 667 F. Supp. 2d at 387 (requiring a showing of *solely* because).

The word “solely” does not appear. By contrast, the Rehabilitation Act does employ the word “solely”:

No otherwise qualified individual with a disability . . . shall, *solely* by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.³³⁶

Nevertheless, courts have articulated that discrimination must be solely based on a person’s disability.³³⁷

Lewis v. Truitt is a good illustration of a court accepting the wrongful arrest theory.³³⁸

There, police officers arrived at the plaintiff’s home and arrested him when he refused to relinquish custody of his young granddaughter pending the outcome of a custody dispute.³³⁹ The plaintiff was deaf, and although others present at the scene had informed the officers of his disability and that the most effective way to communicate with him was to write down any questions, the officers refused to believe that he was deaf and refused to write down their questions.³⁴⁰ Subsequently, the officers physically assaulted the plaintiff, causing bruises, contusions, and severe internal injuries, before eventually arresting him.³⁴¹ The district court denied the defendants’ motion for summary judgment as to the plaintiff’s Title II claim because the plaintiff “most assuredly had the right to be informed by what authority the officers had come upon his property and by what authority they were entering his house,” and “a genuine issue of

³³⁶ 29 U.S.C. § 794(a) (emphasis added).

³³⁷ *Tucker v. Tennessee*, 539 F.3d 526, 532 (6th Cir. 2008).

³³⁸ 960 F. Supp. at 177–79.

³³⁹ *Id.* at 176–77.

³⁴⁰ *Id.* at 176.

³⁴¹ *Id.*

material fact exist[ed] on the question of whether Defendants arrested Plaintiff because of his disability.”³⁴²

In *Jackson v. Inhabitants of the Town of Sanford*,³⁴³ following a traffic collision, the plaintiff, who had partial right-side paralysis and slurred speech as the result of an earlier stroke, was arrested for operating a motor vehicle under the influence of intoxicating liquor or drugs. When the arresting officer arrived at the scene, the other driver involved in the collision stated that he believed that the plaintiff was drunk.³⁴⁴ The plaintiff was not drunk, but rather, his physical disabilities caused him to appear to be unsteady and confused.³⁴⁵ The officer arrested him after he poorly performed several field sobriety tests.³⁴⁶

The plaintiff brought claims under Title II of the ADA against the defendant municipality for disability-based discrimination; failure to train its police officers to recognize symptoms of disabilities; and failure to modify law-enforcement policies and procedures to prevent discriminatory treatment of disabled individuals.³⁴⁷ The district court denied the defendants’ motion for summary judgment, concluding that “[t]he legislative history of the ADA demonstrates that Congress was concerned with unjustified arrests of disabled persons such as [the plaintiff] alleges here.”³⁴⁸ In support, the court cited a House Judiciary Committee report concerning the ADA, stating:

In order to comply with the nondiscrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the

³⁴² *Id.* at 178—79.

³⁴³ No. 94-12-P-H, 1994 U.S. Dist. LEXIS 15367, at *1–3 (D. Me. Sept. 23, 1994).

³⁴⁴ *Id.* at *2.

³⁴⁵ *Id.*

³⁴⁶ *Id.* at *2–3.

³⁴⁷ *Id.* at *22–23.

³⁴⁸ *Id.* at *24.

recognition of and aid of seizures. Such discriminatory treatment based on disability can be avoided by proper training.³⁴⁹

Thus far, no individuals with diabetes have brought Title II claims relying on the wrongful arrest theory, although several recent cases describe factual situations in which such claims would have been possible.³⁵⁰ In light of all-too-commonplace factual scenarios in which police officers mistake the effects of diabetes—especially the effects of hypoglycemia—as intoxication,³⁵¹ the wrongful arrest theory may be well worth consideration in contexts in which individuals’ behavior during hypoglycemic episodes has caused police officers to respond and effectuate arrests.³⁵²

C. Reasonable Accommodation

Under the reasonable accommodation theory, an individual with a disability may be able to state a claim under Title II of the ADA when police officers have properly investigated and arrested him or her for a crime unrelated to his or her disability but have failed to reasonably accommodate that disability during the investigation or arrest, thereby causing him or her to suffer greater injury or indignity in the process than other arrestees.³⁵³ As in other contexts, determining whether an accommodation is reasonable requires a fact-specific, individualized analysis of the individual with disabilities’ circumstances.³⁵⁴

³⁴⁹ *Id.* at *24 n.12 (quoting H.R. Rep. No. 101-485, pt. 3, at 49–50 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 472–73).

³⁵⁰ *See, e.g., Burns*, 737 F. Supp. 2d at 1052–56 (concerning the arrest of an individual experiencing a hypoglycemic episode when responding officers mistook his behavior for intoxication); *Fitch*, 2010 U.S. Dist. LEXIS 120013, at *8–11 (concerning the arrest of an individual for operating a motor vehicle while intoxicated when officers detected a sweet and fruity odor that his body exuded as a result of his diabetic condition).

³⁵¹ *See Burns*, 737 F. Supp. 2d at 6–7; *Fitch*, 2010 U.S. Dist. LEXIS 120013, at *8–9.

³⁵² Although beyond the scope of this memorandum, the Association becomes aware of many situations each year in which individuals arrested during hypoglycemic episodes are charged with driving under the influence, resisting arrest, or assaulting police officers. Typically—but not always—such charges are dismissed.

³⁵³ *Gohier*, 186 F.3d at 1220–21.

³⁵⁴ *Wong v. The Regents of the Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999).

In *Schreiner*,³⁵⁵ the plaintiff had diabetes and, while experiencing a hypoglycemic episode, was attempting to inject herself with insulin using a syringe with a bent needle.³⁵⁶ A friend contacted the police because the plaintiff was incoherent and in need of medical assistance.³⁵⁷ When an officer arrived at the scene, the friend informed him that the plaintiff had diabetes and was not attempting to hurt herself, but could not release the syringe.³⁵⁸ The officer instructed the plaintiff to drop the syringe, but she was unable to comply.³⁵⁹ Eventually, he and another officer decided to Taser the plaintiff to force her to drop the syringe, which they did, causing her to drop the syringe.³⁶⁰

The plaintiff brought a claim under Title II of the ADA against the defendant municipality and responding police officers alleging that they had failed to reasonably accommodate her disability while providing emergency services.³⁶¹ The district court denied the defendants' motion for summary judgment on the basis that "the situation was under control and rather than inflicting pain upon [the plaintiff], [the responding officer] should have consulted with paramedics and administered medical treatment."³⁶²

While there is a duty to reasonably accommodate individuals in an arrest context, there are often exigent circumstances that militate against police officers' duty to modify their services, policies, and practices.³⁶³

³⁵⁵ 681 F. Supp. 2d at 1273.

³⁵⁶ See *discussion supra* at pp. 21–22.

³⁵⁷ 681 F. Supp. 2d at 1273.

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.* at 1278.

³⁶² *Id.* at 1279.

³⁶³ See *Hainze*, 207 F.3d at 801–02 (concluding that it is within the discretion of officers to use reasonable force against individuals with disabilities in such "exigent circumstances" because it was not convinced that requiring them to "use less than reasonable force in defending themselves and others, or to hesitate to consider other possible actions in the course of making such split-second decisions, is the type of 'reasonable accommodation' contemplated by Title II."); *Waller ex rel. Estate of Hunt v. City of Danville*, 556 F.3d at 175 ("exigency is one circumstance that bears materially on the inquiry into reasonableness under the ADA."); *Tucker*, 539 F.3d at 536

Courts are often very deferential to officer decisions made under exigent circumstances. However, the Ninth Circuit recently overturned a district court grant of summary judgment to officers in a case involving a woman with mental illness, discussing the exigencies of the circumstances in a way that was quite favorable for the plaintiff.³⁶⁴ Police entered Sheehan's home without a warrant, to provide emergency assistance with committing her for psychiatric treatment, per her social worker's request.³⁶⁵ They entered her bedroom, and Sheehan brandished a knife, at which point they retreated back into the hallway and closed the door.³⁶⁶ They then drew their weapons, forced their way into the room a second time, and Sheehan was still holding the knife, so officers pepper sprayed her and then shot her five to six times.³⁶⁷ One officer admitted she did not take into account Sheehan's mental illness at the time of the second entry.³⁶⁸ The court held that despite these exigent circumstances, a reasonable jury could find that once the officers exited the bedroom, the situation had been defused sufficiently to wait for back-up and proceed with less confrontational tactics, to accommodate her mental illness.³⁶⁹

In *Wilson v. Blackman Charter Twp.*,³⁷⁰ the plaintiff felt the onset of a hypoglycemic episode and returned to his vehicle, which was located in the parking lot of the shopping mall where he and his fiancée had been shopping. His family quickly arrived and gave him orange juice to counteract the episode; however, the township already had dispatched a police officer to

("[W]e rely on and expect law enforcement officers to respond fluidly to changing situations and individuals they encounter. Imposing a stringent requirement under the ADA is inconsistent with that expectation . . ."); *Bircoll*, 480 F.3d 1072 ("the question is not so much one of the applicability of the ADA because Title II prohibits discrimination by a public entity by reason of disability. The exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance.").

³⁶⁴ *Sheehan*, 2014 U.S. App. LEXIS 3321, at *6–8.

³⁶⁵ *Id.* at *4.

³⁶⁶ *Id.*

³⁶⁷ *Id.* at *4–5.

³⁶⁸ *Id.* at *16.

³⁶⁹ *Id.* at *57.

³⁷⁰ No. 09-10150, 2010 U.S. Dist. LEXIS 46421, at *1–2 (E.D. Mich. May 12, 2010).

the scene.³⁷¹ When the officer arrived, family members of the plaintiff informed him that the plaintiff was experiencing low blood glucose.³⁷² The officer attempted to engage the plaintiff, but he responded coldly and began flailing his arms.³⁷³ The plaintiff also struggled with emergency medical technicians when they arrived, and officers eventually forcibly removed and restrained the plaintiff so that he could be transported to a local hospital.³⁷⁴ The plaintiff was charged with disorderly conduct, but the charge was rescinded when an internal investigation revealed that the responding officer had acted in an unnecessarily confrontational manner with respect to the plaintiff's family.³⁷⁵

The plaintiff brought claims against the defendant municipality and several police officers under Michigan law,³⁷⁶ to which the district court concluded that an analysis of the relevant facts under Title II of the ADA would apply and be dispositive.³⁷⁷ The court relied on the "exigent circumstances" exception and found that the officers were required to secure the area and neutralize any threat to human life before reasonably accommodating the plaintiff's disability.³⁷⁸ Consequently, the court granted the defendants' motion for summary judgment because "at the time [the officers] removed [the plaintiff] from the vehicle, the situation was not under control. [The plaintiff] was not cooperating with the EMTs, who were unable to administer medical treatment."³⁷⁹

As illustrated by *Wilson*, the "exigent circumstances" exception to police officers' duty to make reasonable accommodations for individuals with disabilities is a significant obstacle to

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.* at *2–3.

³⁷⁴ *Id.* at *3–4.

³⁷⁵ *Id.* at *4.

³⁷⁶ Mich. Comp. Laws § 37.1102(1) (2011).

³⁷⁷ *Wilson*, 2010 U.S. Dist. LEXIS 46421, at *19.

³⁷⁸ *Id.* at *21–23.

³⁷⁹ *Id.* at *23.

prevailing on Title II claims under the reasonable accommodations theory.³⁸⁰ Indeed, courts have expressed willingness to defer to officers' discretion in determining whether particular circumstances involving arrests even allow for reasonable accommodations.³⁸¹ Courts have also attached temporal and spatial limitations to the application of Title II. For example, in *Rosen*, the court noted that even if "the police were required to provide auxiliary aids at some point in the process, that point certainly cannot be placed before the arrival at the stationhouse."³⁸² Nevertheless, if a plaintiff can show that the immediate area was secure and that there was no threat to human safety, a court may be more likely to find that officers should have made reasonable accommodations for his or her disability.³⁸³

D. Limitations Period

Title II of the ADA does not provide a statute of limitations.³⁸⁴ Rather, Title II expressly states that "[t]he remedies, procedures, and rights" available under § 504 of the Rehabilitation Act shall be the same as those available under Title II.³⁸⁵ Thus, the jurisprudence surrounding the limitations periods adopted in Rehabilitation Act cases is applicable to cases involving Title II of

³⁸⁰ 2010 U.S. Dist. LEXIS 46421, at *23.

³⁸¹ See *Tucker*, 539 F.3d at 536; *Hainze*, 207 F.3d at 801 (holding that only once there is *no* threat to human safety, officers are under a duty to reasonably accommodate individuals with disabilities); *Rosen v. Montgomery Cnty., Md.*, 121 F.3d 154, 158 (4th Cir. 1997) (noting that "the police do not have to get an interpreter before they can stop and shackle a fleeing bank robber").

³⁸² 121 F.3d at 158.

³⁸³ See *Schreiner*, 681 F. Supp. 2d at 1279.

³⁸⁴ *Stewart v. D.C.*, No. 04-1444, 2006 U.S. Dist. LEXIS 12991, at *26 (D.D.C. Mar. 12, 2006).

³⁸⁵ 42 U.S.C. § 12133; see discussion *infra* at p.71.

the ADA.³⁸⁶ As with the Rehabilitation Act, a court will adopt the most appropriate or most analogous state statute of limitations, provided that it is not inconsistent with federal law or policy to do so.³⁸⁷ Most courts have applied state statutes of limitations for personal injury actions to actions under Title II of the ADA.³⁸⁸

E. Remedies

Title II expressly provides that “[t]he remedies, procedures, and rights” available under § 504 of the Rehabilitation Act shall be the same as those available under Title II of the ADA.³⁸⁹

In turn, the Rehabilitation Act provides:

The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act.³⁹⁰

Thus, the same remedies are available for violations of Title VI of the Civil Rights Act, § 504 of the Rehabilitation Act, and Title II of the ADA. The discussion of the remedies available under § 504—which typically include compensatory damages, but not punitive damages, as well as declaratory and injunctive relief—thus is fully applicable in the context of Title II.³⁹¹

*Jackson*³⁹² is notable for its resolution following the court’s denial of summary judgment as to the plaintiff’s Title II claims. A few days after the summary judgment ruling, the plaintiff

³⁸⁶ *Frame v. City of Arlington*, 575 F.3d 432, 437 n.4 (5th Cir. 2009).

³⁸⁷ See *Goodman*, 482 U.S. at 660; *Wilson v. Garcia*, 471 U.S. at 266–68.

³⁸⁸ See, e.g., *Frame*, 575 F.3d at 437 (applying Texas’ two-year statute of limitations for personal-injury actions to Title II of the ADA); *Everett v. Cobb Cnty. Sch. Dist.*, 138 F.3d 1407, 1409 (11th Cir. 1998) (applying Georgia’s two-year statute of limitations for personal-injury actions to Title II of the ADA); *Smith v. City of Phila.*, 345 F. Supp. 2d 482, 485–86 (E.D. Pa. 2004) (applying Pennsylvania’s two-year statute of limitations for personal-injury actions to Title II of the ADA).

³⁸⁹ 42 U.S.C. § 12133.

³⁹⁰ 29 U.S.C. § 794a(a)(2).

³⁹¹ See discussion *infra* at p.80.

³⁹² 1994 U.S. Dist. LEXIS 15367, at *23–25.

received a five-figure settlement.³⁹³ The defendant town also agreed to amend its police officers' training regimen to comply with the ADA as interpreted by the district judge.³⁹⁴ To assure that officers would not discriminate against individuals with disabilities, they would be required to receive "adequate training to enable them to distinguish between symptoms of disabilities and criminal activity."³⁹⁵

Regarding attorney's fees, the ADA provides:

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.³⁹⁶

To qualify as a "prevailing party" for purposes of the ADA, a plaintiff typically must secure either a judgment on the merits or a court-ordered consent decree.³⁹⁷

III. Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 provides:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance³⁹⁸

³⁹³ Rachel E. Brodin, *Remedying a Particularized Form of Discrimination: Why Disabled Plaintiffs Can and Should Bring Claims for Police Misconduct Under the Americans with Disabilities Act*, 154 U. PA. L. REV. 157, 163 n.41 (2005).

³⁹⁴ Brent Macey, *Sanford Settles Suit over Arrest of Disabled Man*, PORTLAND PRESS HERALD, Sept. 30, 1994, at 1A.

³⁹⁵ *Id.*

³⁹⁶ 42 U.S.C. § 12205.

³⁹⁷ *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603–04 (2001); *see also Lazarus v. Cnty. of Sullivan*, 269 F. Supp. 2d 419, 421 (S.D.N.Y. 2003) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992)) ("A party prevails 'when actual relief on the merits of his [or her] claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'").

³⁹⁸ 29 U.S.C. § 794(a).

A. Relation to Title II of the Americans with Disabilities Act

The language of Title II of the ADA generally tracks the language of § 504 of the Rehabilitation Act of 1973.³⁹⁹ Title II expressly provides that “[t]he remedies, procedures, and rights” available under § 504 shall be the same as those available under Title II.⁴⁰⁰ Furthermore, Title V of the ADA provides that “nothing in this Act shall be construed to apply a lesser standard than the standards applied under . . . the Rehabilitation Act of 1973. . . .”⁴⁰¹

Considering the parallel construction, statutorily created rights, and legislative intent of Title II of the ADA and § 504 of the Rehabilitation Act, the *Hainze* court concluded that “[j]urisprudence interpreting either section is applicable to both.”⁴⁰²

B. Prima Facie Case

To establish a *prima facie* violation of § 504, a plaintiff must prove that (1) he or she is a “handicapped person” under the Rehabilitation Act; (2) he or she is “otherwise qualified” for participation in the program or activity; (3) he or she is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program or activity solely by reason of his or her handicap; and (4) the relevant program or activity receives federal financial assistance.⁴⁰³

The Rehabilitation Act defines “disability” as “a physical or mental impairment that constitutes or results in a substantial impediment to employment,” or as “a physical or mental

³⁹⁹ Compare 42 U.S.C. § 12132 and 42 U.S.C. § 12131(1)(B) with 29 U.S.C. § 794(a) and 29 U.S.C. § 794(b)(1)(A).

⁴⁰⁰ 42 U.S.C. § 12133.

⁴⁰¹ 42 U.S.C. § 12201(a).

⁴⁰² 207 F.3d at 799; see also *Scheerer v. Potter*, 443 F.3d 916, 919 (7th Cir. 2006) (“Because of the similarity between the prima facie requirements under Rehabilitation Act and the Americans with Disabilities Act . . . we look to our case law under the ADA to determine whether a plaintiff has established his prima facie burden.”); *Gorman v. Barch*, 152 F.3d 907, 912 (8th Cir. 1998) (quoting *Allison v. Dep’t of Corr.*, 94 F.3d 494, 497 (8th Cir. 1996)) (“The ADA has no federal funding requirement, but it is otherwise similar in substance to the Rehabilitation Act, and ‘cases interpreting either are applicable and interchangeable.’”).

⁴⁰³ *Mayberry v. Von Valtier*, 843 F. Supp. 1160, 1167 (E.D. Mich. 1994).

impairment that substantially limits one or more major life activities.”⁴⁰⁴ The Rehabilitation Act therefore incorporates the definition of “disability” specified in Title II of the ADA,⁴⁰⁵ and as a result, “ADA standards apply to determining whether a person is ‘disabled’ within the meaning of the Rehabilitation Act.”⁴⁰⁶

An individual is “otherwise qualified” for participation in a program or activity if he or she is “‘able to meet all of a program’s requirements *in spite of* his [or her] handicap.”⁴⁰⁷ “The definition does *not* include someone ‘who would be able to meet the requirements of a particular program in every respect *except as to the limitations imposed by* their disability.’”⁴⁰⁸ Prisoners are not excluded from coverage under § 504 (or Title II of the ADA) for failing to meet the criteria of “otherwise qualified individuals with a disability.”⁴⁰⁹ The Third Circuit found that the terms “eligibility” and “participation” in Title II of the ADA “do not . . . ‘imply voluntariness’ or mandate that an individual seek out or request a service to be covered,” but rather, “the term ‘eligibility’ simply describes those who are ‘fitted or qualified to be chosen,’ without regard to their own wishes.”⁴¹⁰ The Supreme Court simply stated that “the words do not connote voluntariness.”⁴¹¹

C. Diabetes-Specific Cases

Courts generally apply the Rehabilitation Act in the same manner as they apply Title II of the ADA; thus, attorneys should be alert to the possibility of cross-application of cases involving

⁴⁰⁴ *Id.* § 705(9)(A)—(B) (citing 42 U.S.C. § 12102).

⁴⁰⁵ 42 U.S.C. § 12102(1)(A).

⁴⁰⁶ *Ryan v. Shawnee Mission Unified Sch. Dist. No. 512*, No. 05-2213-JWL, 2006 U.S. Dist. LEXIS 61307, at *18 (D. Kan. Aug. 25, 2006); see discussion *supra* p.56.

⁴⁰⁷ *St. Johnsbury Acad. v. D.H.*, 240 F.3d 163, 173 (2d Cir. 2001) (quoting *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979)).

⁴⁰⁸ *Id.* (quoting *Davis*, 442 U.S. at 406 (emphasis added)).

⁴⁰⁹ *Yeskey v. Pa. Dep’t of Corr.*, 118 F.3d 168, 173–74 (3d Cir. 1997), *aff’d*, 524 U.S. 206 (1998).

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 211.

either statute. Importantly, any claim made under § 504 of the Rehabilitation Act must allege that the defendant state or municipal entity has received federal funding. Failure to allege this element may be fatal to an otherwise meritorious claim.

In *Schreiner*, the plaintiff had diabetes and, while experiencing a hypoglycemic episode, was attempting to inject herself with insulin using a syringe with a bent needle.⁴¹² A friend contacted the police because the plaintiff was incoherent and in need of medical assistance.⁴¹³ When an officer arrived at the scene, the friend informed him that the plaintiff had diabetes and was not attempting to hurt herself, but could not release the syringe.⁴¹⁴ The officer instructed the plaintiff to drop the syringe, but she was unable to comply.⁴¹⁵ Eventually, he and another officer used a Taser on the plaintiff to force her to drop the syringe, which caused her to drop the syringe.⁴¹⁶

The plaintiff brought claims under § 504 of the Rehabilitation Act against the defendant municipality and responding police officers alleging that they had discriminated against her because of her disability and that they had discriminated against her in failing to reasonably accommodate her disability.⁴¹⁷ The district court first noted that “Section 504 of the Rehabilitation Act . . . tracks the language in Title II of the ADA, and case law interpreting either statute is applicable to the other.”⁴¹⁸ Then, rejecting the defendants’ exigent circumstances argument, the court denied their motion for summary judgment on the basis that “the situation

⁴¹² 681 F. Supp. 2d at 1273; *see* discussion *supra* pp. 22–23; 65.

⁴¹³ 681 F. Supp. 2d at 1273.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* at 1277–78.

⁴¹⁸ *Id.* at 1277 (citing *Hainze*, 207 F.3d at 799).

was under control and rather than inflicting pain upon [the plaintiff], [the responding officer] should have consulted with paramedics and administered medical treatment.”⁴¹⁹

In *Hahn v. Walsh*,⁴²⁰ the plaintiff had diabetes as well as several mental health impairments. On the occasion at issue, police officers arrested her for aggravated domestic battery and admitted her to a local jail as a pretrial detainee.⁴²¹ At multiple times before being transported to the jail, upon her arrival, and while incarcerated, she communicated to the officers that she had diabetes, was mentally unbalanced, and required medical attention.⁴²² However, “[a]t no time did anyone from the jail contact [the plaintiff’s] husband, doctors, or any other person to get [her] medications or to obtain information about her medical conditions.”⁴²³ The plaintiff subsequently became seriously ill, collapsed, and died at the jail.⁴²⁴

The plaintiff’s estate brought claims under § 504 of the Rehabilitation Act against the defendant municipality and arresting police officers alleging that they had discriminated against the plaintiff because of her disability and that they had discriminated against her in failing to provide adequate medical care.⁴²⁵ The district court rejected the defendants’ argument that the estate could not show that the plaintiff was “otherwise qualified” to receive medical care, concluding: “[The plaintiff] was eligible for medical treatment because she was a pretrial detainee; therefore, she was ‘otherwise qualified’ for the benefit she sought.”⁴²⁶ The court also found that the estate’s allegations that “Defendants refused to provide [her] with necessary medical treatment for her diabetes (and mental illness) ‘[a]s a punishment for [her] incoherent, erratic, uncooperative and/or irrational behaviors’” sufficiently demonstrated that the defendants

⁴¹⁹ *Id.* at 1279.

⁴²⁰ No. 09-2145, 2009 U.S. Dist. LEXIS 120619, at *3 (C.D. Ill. Nov. 24, 2009) (subsequent history omitted).

⁴²¹ *Id.*

⁴²² *Id.* at *3–4.

⁴²³ *Id.* at *4.

⁴²⁴ *Id.*

⁴²⁵ *Id.* at *5, 21.

⁴²⁶ *Id.* at *24.

had discriminated against the plaintiff on the basis of her disabilities.⁴²⁷ Therefore, the court denied the defendants’ motion to dismiss the plaintiff’s Rehabilitation Act claims.⁴²⁸

In *Fitch*,⁴²⁹ the plaintiff worked as a commercial truck driver and had diabetes and “impairments which affect his equilibrium, balance and hearing.” While traveling through Kentucky, he entered a weigh station where police officers “told him that he smelled of alcohol and . . . accused him of operating his truck while intoxicated.”⁴³⁰ He explained that, “as a result of his diabetic condition, his body produces ‘ketones’ which cause him to exude a sweet/fruity odor.”⁴³¹ Rather than administering a breathalyzer test to measure his blood alcohol content, the officers required the plaintiff to perform several field sobriety tests assessing his balance and equilibrium—even though the plaintiff had informed the officer that his disabilities prevented him from performing them successfully.⁴³² The officers subsequently arrested the plaintiff for operating a motor vehicle while intoxicated, but a blood test later confirmed that he had not consumed alcohol prior to his arrest.⁴³³

The plaintiff brought claims under § 504 of the Rehabilitation Act against the Kentucky State Police and arresting police officer alleging that they “negligently and recklessly failed to provide reasonable accommodations to [him] [sic] in the form of properly training and equipping their personnel.”⁴³⁴ Dismissing the claim against the Kentucky State Police, the district court noted that the plaintiff had not alleged that the entity had received any federal funding “with respect to any program or activity implicated by the allegations made in the action”—a necessary

⁴²⁷ *Id.* at *26–27.

⁴²⁸ *Id.* at *24–25, *27.

⁴²⁹ 2010 U.S. Dist. LEXIS 120013, at *8.

⁴³⁰ *Id.* at *9.

⁴³¹ *Id.*

⁴³² *Id.* at *9–10.

⁴³³ *Id.* at *10–11.

⁴³⁴ *Id.* at *14–15 (internal quotation marks omitted).

element of a claim under the Rehabilitation Act.⁴³⁵ The court also expressed skepticism that an individual could be “otherwise qualified” for participation in an arrest—another necessary element of a claim under the Rehabilitation Act.⁴³⁶ Dismissing the claim against the arresting officer, the court found that “there is no individual liability under . . . the Rehabilitation Act.”⁴³⁷

To restate, because courts apply the Rehabilitation Act in the same manner as they apply Title II of the ADA,⁴³⁸ the rulings in the above cases express the same principles illustrated by the previously discussed ADA cases.⁴³⁹ In particular, *Schreiner*⁴⁴⁰ shows that the “exigent circumstances” argument invoked by police officers to militate against their duty to provide reasonable accommodations under Title II of the ADA also may apply in § 504 suits—although *Schreiner* further demonstrates that courts do not always accept “exigent circumstances” arguments.⁴⁴¹ *Fitch*⁴⁴² offers at least two important lessons for attorneys: (1) failure to allege that a defendant state entity has received federal funding may be fatal to a § 504 claim and (2) courts may interpret the “otherwise qualified” element, as well as other elements more narrowly than in the ADA context.

D. Procedural Considerations

Attorneys should be aware of several important procedural points when bringing claims under § 504. Inattention to these matters frequently creates difficulty in establishing § 504 liability, but developing strategies to address them early on will help to ensure that they do not serve as bars to recovery.

⁴³⁵ *Id.* at *18.

⁴³⁶ *Id.* at *18–19 (citing *Rosen v. Montgomery Cnty. Md.*, 121 F.3d at 157).

⁴³⁷ *Id.* at *19.

⁴³⁸ See *Hainze*, 207 F.3d at 799.

⁴³⁹ See *supra* 60–69.

⁴⁴⁰ 681 F. Supp. 2d at 1279.

⁴⁴¹ See discussion *supra* at pp. 22–23; 65; 74.

⁴⁴² 2010 U.S. Dist. LEXIS 120013, at *18–19.

1. *Federal Financial Assistance*

The Rehabilitation Act does not define “financial assistance.”⁴⁴³ However, as used in § 504, the phrase “financial assistance” refers to transactions involving a transfer of government funds by way of subsidy or sale of government assets.⁴⁴⁴ The Tenth Circuit has defined “financial assistance” as a government subsidy, and “[t]he test to determine whether a government transfer of money to an entity is a subsidy is whether Congress or the federal agency administering the program intended to subsidize the entity.”⁴⁴⁵ Absent such intent, a transfer of money is not considered to be “financial assistance,” even if the entity has received some benefit.⁴⁴⁶ The “congressional intent test” is an illustration of the distinction drawn by Congress between recipients of federal financial assistance and mere beneficiaries of such assistance.⁴⁴⁷ Only recipients with discretion to receive federal aid are required to comply with § 504; mere beneficiaries with no such discretion are not similarly bound.⁴⁴⁸ This might be called the “accept or reject test.” Relatedly, in the context of Title IX coverage, the Supreme Court has broadly construed a similar “receiving federal financial assistance” requirement.⁴⁴⁹

2. *Eleventh Amendment Immunity*

⁴⁴³ *Shepherd v. U.S. Olympic Comm.*, 94 F. Supp. 2d 1136, 1146 (D. Colo. 2000).

⁴⁴⁴ *Culp v. Phila. Newspapers, Inc.*, 59 Fair Empl. Prac. Cas. (BNA) 194 (E.D. Pa. 1991).

⁴⁴⁵ *Shepherd*, 94 F. Supp. 2d at 1146.

⁴⁴⁶ *Id.*

⁴⁴⁷ *See United States Dep’t of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597, 605–06 (1986).

⁴⁴⁸ *See id.* at 606 (“By limiting coverage to recipients, Congress imposes the obligations of § 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to ‘receive’ federal funds.”).

⁴⁴⁹ *See Grove City Coll. v. Bell*, 465 U.S. 555, 569 (1984) (concluding that Title IX coverage is not foreclosed because federal funds are granted to college students rather than directly to one of the college’s educational programs); Megan L. Rehberg, *Grove City College v. Bell*, Law & Higher Education (Mar. 1, 2011, 6:15 PM), <http://lawhighereducation.org/70-grove-city-college-v-bell.html> (noting that because Congress was dissatisfied by the outcome in Grove City, it essentially mooted the case three years later with the enactment of the Civil Rights Restoration Act of 1987, thereby interpreting Title IX more expansively. *See generally* James Lockhart, Annotation, *Who Is Recipient of, and What Constitutes Program or Activity Receiving, Federal Financial Assistance for Purposes of § 504 of Rehabilitation Act (29 U.S.C.A. § 794), Which Prohibits Any Program or Activity Receiving Financial Assistance from Discriminating on Basis of Disability*, 160 A.L.R. FED. 297 (2000) (collecting and summarizing cases and secondary sources).

States are not immune under the Eleventh Amendment of the U.S. Constitution from federal suit pursuant to § 504 of the Rehabilitation Act.⁴⁵⁰ “Section 2000d-7 unambiguously conditions the receipt of federal funds on a waiver of Eleventh Amendment immunity to claims under . . . section 504 of the Rehabilitation Act,” and state agencies waive their immunity “[b]y continuing to accept federal funds.”⁴⁵¹ However, some courts have held that states do not waive their Eleventh Amendment immunity by accepting federal funds pursuant to § 504 unless such waiver is given knowingly.⁴⁵²

Waiver of sovereign immunity applies only to those state agencies receiving federal funds; if a state agency does not accept federal funds, it can avoid waiver of its Eleventh Amendment immunity.⁴⁵³

3. *Limitations Period*

The Rehabilitation Act does not provide a statute of limitations.⁴⁵⁴ When a federal cause of action lacks a statute of limitations, a court will adopt the most appropriate or most analogous state statute of limitations, as long as it is not inconsistent with federal law or policy to do so.⁴⁵⁵ Because statutes of limitations vary from state to state, the limitations period applied to the Rehabilitation Act necessarily will vary also. Most courts have applied state statutes of

⁴⁵⁰ See 42 U.S.C. 2000d-7(a)(1) (2006) (“A State shall not be immune under the Eleventh Amendment . . . for a violation of section 504 of the Rehabilitation Act . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.”).

⁴⁵¹ *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1293 (11th Cir. 2003).

⁴⁵² See, e.g., *Shariff v. Coombe*, 655 F. Supp. 2d 274, 306–07 (S.D.N.Y. 2009) (finding that inmates’ claims against the State of New York and prison officials for monetary relief under § 504 were barred by the Eleventh Amendment because the inmates’ claims were filed before New York had reason to suspect that § 504 was enacted pursuant to the Commerce Clause, and thus, they had not yet made a knowing waiver of their sovereign immunity at the time the inmates filed their claims).

⁴⁵³ *Doe v. Nebraska*, 345 F.3d 593, 598 (8th Cir. 2003).

⁴⁵⁴ *Stewart*, 2006 U.S. Dist. LEXIS 12991, at *26.

⁴⁵⁵ See *Goodman*, 482 U.S. at 660; *Wilson*, 471 U.S. at 266–68; see also *Ling Yuan Hu v. George Washington Univ.*, 766 F. Supp. 2d 236, 241 (D.D.C. 2011) (quoting *Doe v. Se. Univ.*, 732 F. Supp. 7, 8–9 (D.D.C. 1990)) (“The Rehabilitation Act does not contain its own statute of limitations, and therefore the period to be applied must be drawn from the appropriate state statute. . . .”).

limitations for personal-injury actions to actions under § 504 of the Rehabilitation Act.⁴⁵⁶

However, courts have applied other state statutes of limitations in a variety of contexts.⁴⁵⁷

E. Remedies

The Rehabilitation Act provides:

The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act.⁴⁵⁸

Because Title VI creates a private right of action but lacks a remedies provision, federal case law determines the available remedies.⁴⁵⁹ In doing so, federal courts rely on the analysis in *Franklin v. Gwinnett Cnty. Pub. Schs.*⁴⁶⁰ There, the Supreme Court held that when a statute creates a private right of action but lacks a remedies provision, “federal courts may use any available remedy to make good the wrong done.”⁴⁶¹ In doing this, the court will investigate whether

⁴⁵⁶ See, e.g., *Everett*, 138 F.3d at 1409 (applying Georgia’s two-year statute of limitations for personal-injury actions to the Rehabilitation Act); *Howard v. Mendez*, 304 F. Supp. 2d 632, 634–35 (M.D. Pa. 2004) (applying Pennsylvania’s two-year statute of limitations for personal-injury actions to the Rehabilitation Act); *BD v. DeBuono*, 130 F. Supp. 2d 401, 423–24 (S.D.N.Y. 2001) (applying New York’s three-year statute of limitations for personal injury actions to the Rehabilitation Act).

⁴⁵⁷ See, e.g., *Hutchings v. Erie City & Cnty. Library Bd. of Dirs.*, 516 F. Supp. 1265, 1270–71 (W.D. Pa. 1981) (focusing on the contractual employment relationship between the parties and determining that the statute of limitations governing contract claims was most appropriate); *M.K. ex. rel. Mrs. K. v. Sergi*, 554 F. Supp. 2d 175, 192–93 (D. Conn. 2008) (applying Connecticut’s three-year statute of limitations for tort actions to the Rehabilitation Act); *Andrews v. Conrail*, 831 F.2d 678, 683–84 (7th Cir. 1987) (applying Indiana’s two-year statute of limitations for “actions relating to the terms, conditions, and privileges of employment except actions based upon a written contract” to the Rehabilitation Act); *Jones v. Frederick Cnty. Bd. of Educ.*, 689 F. Supp. 535, 538–39 (D. Md. 1988) (applying Maryland’s general three-year statute of limitations for civil actions to the Rehabilitation Act); *Marin v. N.Y. State Dep’t of Labor*, 512 F. Supp. 353, 355 (S.D.N.Y. 1981) (applying New York’s three-year statute of limitations for statutorily created actions to the Rehabilitation Act); *Wolsky v. Med. Coll. of Hamptons Rds.*, 1 F.3d 222, 223–25 (4th Cir. 1993) (applying the one-year statute of limitations under the Virginia Rights of Persons with Disabilities Act to the Rehabilitation Act because the former was modeled after and is almost identical to the Rehabilitation Act).

⁴⁵⁸ 29 U.S.C. § 794a(a)(2).

⁴⁵⁹ *Tafoya v. Bobroff*, 865 F. Supp. 742, 748–49 (D.N.M. 1994).

⁴⁶⁰ 503 U.S. 60, 65–76 (1992); see also *Tafoya*, 865 F. Supp. at 749.

⁴⁶¹ *Franklin*, 503 U.S. at 66 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

Congress intended to limit the remedies available, and whether the remedies sought are appropriate.⁴⁶²

Courts typically have found that monetary damages are available for violations of § 504.⁴⁶³ Additionally, courts usually have held that a showing of intentional discrimination is necessary for recovery of compensatory damages.⁴⁶⁴ However, punitive damages are not recoverable for violations of § 504.⁴⁶⁵

Declaratory relief also is available for violations of § 504.⁴⁶⁶

Regarding attorney's fees, the Rehabilitation Act provides: "In any action or proceeding to enforce or charge a violation of a provision of [the Rehabilitation Act], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."⁴⁶⁷ To qualify as a "prevailing party" for purposes of the Rehabilitation Act, a plaintiff typically must secure either a judgment on the merits or a court-ordered consent decree.⁴⁶⁸

⁴⁶² *Tafoya*, 865 F. Supp. at 749.

⁴⁶³ *See, e.g., W.B. v. Matula*, 67 F.3d 484, 494 (3d Cir. 1995) (holding that plaintiffs may seek damages directly under § 504); *Rodgers v. Magnet Cove Pub. Schs.*, 34 F.3d 642, 643–45 (8th Cir. 1994) (relying on the principle that where legal rights have been invaded and a federal statute creates a private right of action, federal courts may use any available remedy to make good the wrong); *Smith v. Barton*, 914 F.2d 1330, 1333–38 (9th Cir. 1990) ("[M]oney damages are available in the Ninth Circuit for violations of section 504."). *But see Longoria v. Harris*, 554 F. Supp. 102, 106–07 (S.D. Tex. 1982) (holding that only injunctive and declaratory relief and not monetary damages are available under § 504).

⁴⁶⁴ *See, e.g., Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1152–54 (10th Cir. 1999) (concurring with other circuit courts that entitlement to compensatory damages under § 504 requires proof of intentional discrimination); *Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998) ("[C]ompensatory damages are not available under . . . § 504 absent a showing of discriminatory intent.").

⁴⁶⁵ *Barnes v. Gorman*, 536 U.S. 181, 189–90 (2002).

⁴⁶⁶ *See Gowins v. Greiner*, No. 01 Civ. 6933 (GEL), 2002 U.S. Dist. LEXIS 14098, at *17 (S.D.N.Y. July 31, 2002) (holding that claims under the Rehabilitation Act for declaratory relief against state officials may proceed to the extent permitted by *Ex Parte Young*, 209 U.S. 123, 159 (1908)), as is injunctive relief); *Nat'l Org. on Disability v. Tartaglione*, No. 01-1923, 2001 U.S. Dist. LEXIS 16731, at *18–19 (E.D. Pa. Oct. 11, 2001) (affirming that injunctive relief is available for violations of Title VI, whose remedies, procedures, and rights have been incorporated into the Rehabilitation Act).

⁴⁶⁷ 29 U.S.C. § 794a(b).

⁴⁶⁸ *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 603–04 (examining nearly identical fee-shifting language in the Americans with Disabilities Act).

IV. State Law Claims

In addition to claims for violations of 42 U.S.C. § 1983, Title II of the ADA, and § 504 of the Rehabilitation Act, individuals with diabetes that have experienced police misconduct may bring supplemental state law claims under a variety of common-law tort theories, including: negligence; intentional or negligent infliction of emotional distress; assault; battery; false arrest; false imprisonment; wrongful death; and negligent hiring, training, or supervision.⁴⁶⁹ Because tort law varies from state to state, attorneys should investigate the applicable standards in the jurisdictions in which they are bringing suit.

All states also have their own version of these federal anti-discrimination laws, though they vary significantly in their definitions of disability and in other ways.⁴⁷⁰ Practitioners should consult local authorities for guidance on how these state laws differ from their federal versions, because some may provide greater protections. In addition, each state has an administrative body, usually called civil rights commissions, which practitioners might find to be more desirable venues to redress police misconduct.⁴⁷¹

V. Criminal Law Considerations

In the context of criminal prosecutions, defense attorneys should use the science and medicine of diabetes in their pre-trial strategy. Depending on the circumstances of the case,

⁴⁶⁹ See *Everson*, 556 F.3d at 502 (asserting claim for emotional distress); *Lolli*, 351 F.3d at 442 (asserting claims for negligence, intentional and negligent infliction of emotional distress, and assault and battery); *Padula*, 740 F. Supp. 2d at 984 (asserting claims for negligence, wrongful death, and negligent hiring, training, and supervision); *Bohnert*, 2010 U.S. Dist. LEXIS 114587, at *26–27 (asserting claims for negligence, infliction of emotional distress, false arrest, and assault and battery); *Gruver*, 2006 U.S. Dist. LEXIS 31448, at *14 (asserting claims for false imprisonment and assault and battery); *Wertish*, 433 F.3d at 1067 (asserting claims for assault, battery, false arrest, and false imprisonment).

⁴⁷⁰ See, e.g., Fla. Stat. § 760.01 (LexisNexis 2013); Ind. Code § 22-9-1-1 (LexisNexis 2013); Me. Rev. Stat. tit. 5 § 4552 (2013); Mich. Comp. Laws § 37.2102 (LexisNexis 2013); Va. Code Ann. § 2.2-3900B (2013). See also Claudia Center and Anne Hill, *Chart Comparing State Definitions of Disability*, ArchiveADA (Jan. 23, 2014, 1:12PM), <http://www.law.georgetown.edu/archiveada/documents/statebystatechart--updated.pdf>.

⁴⁷¹ See States Civil Rights Offices, <http://civilrights.findlaw.com/enforcing-your-civil-rights/state-civil-rights-offices.html> (last visited Aug. 6, 2013).

motions to suppress evidence may be appropriate, and attorneys should stress the particular medical consequences of otherwise somewhat ordinary police misconduct for those with diabetes.⁴⁷²

Individuals with diabetes may have grounds to move to suppress evidence obtained in violation of the Fourth and Fifth Amendments. Whenever officers make unreasonable searches and seizures in violation of the Fourth Amendment, evidence that comes from these unconstitutional seizures should be suppressed. Individuals who are seized for an extended period of time and denied medical care may have grounds to move to suppress evidence under the Fourth Amendment. Under the Fifth Amendment, individuals questioned while experiencing hyperglycemia or hypoglycemia may move to suppress statements or confessions that are not a product of a knowing and intelligent waiver of the right to remain silent, on the grounds that their state of mind was impaired.

Common examples of criminal charges that occur for persons with diabetes will include resisting arrest, assault on a police officer, and driving under the influence. These are typical charges because the effects of hyper and hypoglycemia can result in combative or obstinate behavior that police officers perceive as knowingly resisting. Practitioners should look out for these charges in particular, but any charge could result in evidence that should be suppressed.

A. Unconstitutionally Lengthy Detentions

⁴⁷² See Nicola N. Zammitt et al., *Delayed Recovery of Cognitive Function Following Hypoglycemia in Adults with Type 1 Diabetes*, 57 *Diabetes* no. 3 732—36 (2008), <http://diabetes.diabetesjournals.org/content/57/3/732>; Alex J. Graveling et al., *Acute Hypoglycemia Impairs Executive Cognitive Function in Adults with and without Type 1 Diabetes*, 36 *Diabetes Care* no. 10 3240—46 (2013), <http://care.diabetesjournals.org/content/36/10/3240.full>; Christopher T. Knodl and Elizabeth R. Seaquist, *Cognitive Dysfunction and Diabetes Mellitus*, 29 *Endocrine Reviews* no. 4 494—511 (2008), <http://edrv.endojournals.org/content/29/4/494.full.pdf+html>.

The need to manage diabetes has arisen in several situations throughout the law enforcement process, and has been considered a convincing factor in courts' assessments of whether constitutional violations have occurred. For example, in *United States v. Song Ja Cha*, the court found a 26.5 hour-long seizure of a man's house to be unconstitutionally long, in violation of the Fourth Amendment.⁴⁷³ Courts will weigh many considerations in determining whether a detention is too long, one being whether the police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy.⁴⁷⁴ In *Song Ja Cha*, the same reconciliation weighed in favor of the plaintiffs because the police did not allow Mr. Cha to enter his residence even with police accompaniment for eleven hours after he sought permission, and more than four hours after the police were informed that Mr. Cha needed medicine for his diabetes.⁴⁷⁵ The court emphasized Mr. Cha's diabetes in its summation of the "poignant facts" of the case.⁴⁷⁶ On these facts, there was no reason to deny entry to the home with police accompaniment, especially in light of Mr. Cha's serious medical need. The law enforcement need did not outweigh the demand of personal privacy. Thus, the court concluded that the evidence had to be suppressed as a direct result of the Fourth Amendment violation.⁴⁷⁷

B. Involuntary Confessions

For a confession or any incriminating statement to be admissible into evidence, it must be voluntary.⁴⁷⁸ A statement cannot be voluntary unless there is a finding of *knowing* and *intelligent*

⁴⁷³ 597 F.3d 995, 1000 (9th Cir. 2010).

⁴⁷⁴ *Illinois v. McArthur*, 531 U.S. 326, 331–32 (2001) (also finding significant that there was probable cause that drugs were in the home, the police had good reason to believe the suspect would destroy the drugs unless restrained, and finally the total length of restraint was only two hours).

⁴⁷⁵ 597 F.3d at 1000.

⁴⁷⁶ *Id.* at 1002.

⁴⁷⁷ *Id.*

⁴⁷⁸ *United States v. Watson*, 469 F.2d 362 (5th Cir. 1972) (setting a preponderance of the evidence standard for admissibility).

waiver.⁴⁷⁹ In order to determine whether a defendant’s Miranda waiver is valid, the court must engage in a two-part inquiry:

First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the “totality of the circumstances surrounding the interrogation” reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.⁴⁸⁰

A suspect with diabetes may experience hypoglycemia or hyperglycemia to the extent that it affects her ability to knowingly and intelligently waive her right to remain silent. In this case, practitioners should move to suppress any incriminating statements made while the suspect was in that state. The primary question in these cases will be whether, by a preponderance of the evidence, the government is able to establish that the suspect gave a knowing and voluntary waiver of the privilege against self-incrimination, despite experiencing the effects of hypoglycemia or hyperglycemia.⁴⁸¹ One factor courts seem to find persuasive is whether the individual, at any point, asked to stop the interrogation for medical attention or in some way indicate that she was not feeling well.⁴⁸² Absent an

⁴⁷⁹ *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (“If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination”); *Watson*, 469 F.2d at 362.

⁴⁸⁰ *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

⁴⁸¹ Other considerations will still need to be addressed, for example, establishing that the suspect was in custody and therefore entitled to Miranda warnings. The entitlement to Miranda warnings attaches only “when custodial interrogation begins.” *United States v. Acosta*, 363 F.3d 1141, 1148 (11th Cir. 2004). “A defendant is in custody for the purposes of Miranda when there has been a ‘formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.’” *United States v. Brown*, 441 F.3d 1330, 1347 (6th Cir. 2006) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983); see also *United States v. McDowell*, 250 F.3d 1354, 1362 (11th Cir. 2001) (Whether a suspect is in custody “depends on whether under the totality of the circumstances, a reasonable man in his position would feel a restraint on his freedom of movement to such extent that he would not feel free to leave.” (quotation marks and alterations omitted)).

⁴⁸² See, e.g., *United States v. Galvan-Mena*, No. 08-CR-30019-MJR, 2008 U.S. Dist. LEXIS 104764, at *10 (S.D. Ill. Dec. 29, 2008) (suppression denied when, among other factors, suspect never informed interrogators of any

abundantly clear symptom of hypoglycemia or hyperglycemia, such as losing consciousness, it appears that courts will rely on some kind of verbal notice to officers.

In *Watson*, the court examined a circumstance where FBI agents questioned a suspect within five minutes after he informed officers that his insulin level was low and requested a coke.⁴⁸³ Despite officers' testimony that the suspect "appeared to be basically alright" the court found that the suspect's waiver was not voluntary.⁴⁸⁴ The court stated there was no evidence that these agents had any expert knowledge with regard to how a person would "appear" while experiencing insulin shock, and so their testimony about how the suspect appeared was not persuasive.⁴⁸⁵ The circuit court remanded the case for a redetermination in light of the fact that the government offered no medical testimony on the effects of hypoglycemia.⁴⁸⁶

In *United States v. Harrison* the court addressed a very contrasting interrogation of an individual with diabetes.⁴⁸⁷ Though the court found that the suspect was not in custody for the purposes of *Miranda* protection, it went on to address the voluntariness of his confession nonetheless.⁴⁸⁸ The court found a valid waiver.⁴⁸⁹ First, under the first prong of the *Moran* inquiry, the court noted that the officers used a normal tone of voice, and did not make any promises or threats to the suspect.⁴⁹⁰ Under the second prong, the suspect argued that he was experiencing a diabetes attack and that rendered his confession involuntary.⁴⁹¹ The court identified the facts that the suspect never asked to end the interview, never asked for medical

diabetes-related symptoms); *United States v. Harrison*, No. 2:12CR193-MEF, 2013 U.S. Dist. LEXIS 65737 (M.D. Ala. Apr. 5, 2013) (suppression denied when suspect never asked for an opportunity to take his medication).

⁴⁸³ 469 F.2d at 365.

⁴⁸⁴ *Id.* at 367.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ 2013 U.S. Dist. LEXIS 65737.

⁴⁸⁸ *Id.* at *9–10.

⁴⁸⁹ *Id.* at *10.

⁴⁹⁰ *Id.* at *13.

⁴⁹¹ *Id.* at *16.

attention,⁴⁹² was able to answer all questions coherently, and wrote out a two and a half page statement with no difficulty.⁴⁹³ Furthermore, the suspect presented no medical evidence that he actually had diabetes.⁴⁹⁴ The court noted that these facts did not raise sufficient issues with the voluntariness of the suspect's confession to suppress it.⁴⁹⁵

C. Pleading

Criminal defense attorneys should be careful to counsel their clients about the consequences of pleading guilty to any criminal charge. A guilty plea (or even something like a diversion program)⁴⁹⁶ can present serious difficulties to any § 1983 claims the defendant might choose to bring later. The Supreme Court has ruled that in order to recover damages in a § 1983 case, a plaintiff must have had any conviction or sentence deemed invalid by a state tribunal, reversed on appeal, expunged, or called into question by a federal court's writ of habeas corpus.⁴⁹⁷ So for example, if a client accepts a plea deal and pleads guilty to resisting arrest as a lesser offense than assault on a police officer, the client's ability to bring a suit under § 1983 for unreasonable use of force would be seriously damaged and potentially foreclosed entirely.

CONCLUSION

It is an all-too-common reality that some police officers across the country violate the civil rights of individuals with diabetes during investigations, arrests, or pretrial holdings. In the less serious cases, individuals have been humiliated and harassed for having diabetes, and in

⁴⁹² While the court does not note this as an important fact, the suspect here did not use insulin, but rather, oral medications, to control his diabetes.

⁴⁹³ *Id.* at *18.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.*

⁴⁹⁶ *Gilles v. Davis*, 427 F.3d 197, 211-212 (3d Cir. Pa. 2005) (diversion program is not a favorable termination under *Heck* and participation bars a § 1983 claim).

⁴⁹⁷ *Heck v. Humphrey*, 512 U.S. 477 (1994).

more serious cases, the results have been catastrophic, even fatal. However, persons so aggrieved, and their estates, are not with avenues of redress; they may bring federal claims against officers or municipal governments under 42 U.S.C. § 1983, Title II of the Americans with Disabilities Act, and § 504 of the Rehabilitation Act and, likewise, may bring supplemental state law claims under a variety of common law tort theories. It is advisable for plaintiffs to consider pleading parallel claims under all three federal statutes, as well as under all applicable state law theories, but the procedural hurdles, evidentiary hurdles, and relief associated with each differ. Consequently, what constitutes a successful pleading able to withstand summary judgment will vary depending on the specific claims alleged. Attorneys are welcome to contact the Legal Advocacy Department at the Association for assistance with legal research in any case involving diabetes.⁴⁹⁸

⁴⁹⁸ The Legal Advocacy Department may be reached at LegalAdvocate@diabetes.org.