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THE AMERICANS WITH DISABILITIES ACT: 
EMPLOYERS' NEW RESPONSIBILITIES TO HIV-POSITIVE EMPLOYEES

Laura Pincus*

The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on Politics, “A man has a right to be employed, to be trusted, to be loved, to be revered.” It does many men little good to stay alive and free and propertied if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.1

The handicapped live among us. They have the same hopes, the same fears, and the same ambitions as the rest of us. They are children and adults, black and white, men and women, rich and poor. They have problems as varied as their individual personalities.

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Yet, they are today a hidden population because their problems are different from most of ours. Only the bravest risk the dangers and suffer the discomforts and humiliation they encounter when they try to live what we consider to be normal, productive lives. In their quest to achieve the benefits of our society they ask no more than equality of opportunity.²

Due to the unpredictable nature of Acquired Immune Deficiency Syndrome ("AIDS") and Human Immunodeficiency Virus ("HIV"),³ employers are naturally concerned about the infected employee’s ability to adequately perform. However, many infected employees are actually perfectly capable of performing most, if not all, of the essential requirements of their positions. In fact, research has shown that the performance of a disabled worker equals that of an able-bodied worker when the disabled worker is appropriately accommodated.⁴ Moreover, the disabled individual may actually surpass his co-workers as he overcomes the effects of his disability.⁵ Yet, there continues to exist pervasive discrimination against HIV-infected employees based on misconceptions related to the condition. As a result, federal law has become necessary in order to prevent rampant discrimination against HIV-infected employees as well as non-infected members of the classes of persons perceived to be at risk.

While federal laws, such as the Civil Rights Act of 1964,⁶ protected many of America’s minorities, individuals with disabilities⁷

3. AIDS is a life-threatening virus that attacks the immune system, preventing the human body from fighting infections. The disease is caused by HIV. The virus attacks T-Lymphocytes, a type of white blood cell, which assists the body in protecting itself against infection. The assault of the virus occurs in several stages. The first is the asymptomatic HIV infection. During this stage the individual is contagious and will exhibit detectable abnormalities of the immune system, yet will evidence no physical symptoms of the disease. During the next stage, the individual begins to show signs of AIDS Related Complex ("ARC") and may evidence symptoms such as weight loss, fever, night sweats, diarrhea, skin rashes, enlarged lymph nodes, lack of stamina and inability to fight off infection. During the last stage the individual actually has AIDS. The virus destroys the body’s immune system, and the individual thus becomes susceptible to a variety of other infections that cause “opportunistic diseases” such as pneumonia, meningitis, tuberculosis and cancer. See U.S. DEP’T OF HEALTH AND HUMAN SERVS., SURGEON GENERAL’S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 9-11 (1986) [hereinafter REPORT].
have continued to face the frustration of physical and attitudinal employment barriers. Consequently, the National Council on Disability (the "Council"), an independent federal agency that gives recommendations to Congress on the disabled, responded to this problem. The Council recommended the enactment of comprehensive legislation in order to stem further discrimination against persons with disabilities. Congress reacted by introducing the Americans with Disabilities Act of 1990 (the "ADA"). Senator Lowell Weicker (R-Conn.) and Senator Tom Harkin (D-Iowa) sponsored the original bill in the Senate; a similar bill was introduced into the House of Representatives. The purpose of these two bills was to prohibit discrimination against individuals with disabilities in employment, public accommodations, public transportation, and telecommunications. Following negotiations with congressional sponsors in September of 1989, the Bush administration agreed to endorse a new Senate version.

The bill was subsequently passed by the Senate on September 7, 1989, but faced a battle in the House of Representatives. The basis for the disapproval in the House came from pressure exerted by the Department of Health and Human Services ("HHS"), which expressed

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1990) eliminates the use of the term "handicap," as found in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1988) [hereinafter Rehabilitation Act], and instead introduces the term "disability." The Senate Report relating to the enactment of the ADA explained the reason for the change:

The use of the term "disability" instead of "handicap" . . . represents an effort by the Committee to make use of up-to-date, currently accepted terminology. In regard to this legislation, as well as in other contexts, the Congress has been apprised of the fact that to many individuals with disabilities the terminology applied to them is a very significant and sensitive issue. As with racial and ethnic epithets, the choice of terms to apply to a person with a disability is overlaid with stereotypes, patronizing attitudes, and other emotional connotations. Many individuals with disabilities and organizations representing them object to the use of such terms as "handicapped person" or "the handicapped."

10. Id.
14. See Kelley & Aalberts, supra note 13, at 675-76.
concerns about the great numbers of employees affected by the AIDS epidemic and other contagious diseases. Specifically, the concern was over whether individuals could transmit these types of diseases by certain types of personal contact or food handling.

A compromise on the food handling issue was reached whereby HHS would be required to publish a list of diseases that may be transmitted by handling food: "AIDS-infected workers could be reassigned only if HHS found that the disease could be transmitted through contact with food. Since the weight of scientific opinion indicates that AIDS cannot be transmitted through casual contact, it is unlikely that the disease will appear on the HHS list." The amended version of the ADA was passed by the Senate on July 11, 1990, and by the House the following day. The ADA was finally signed into law by President George Bush on July 26, 1990 and portions became effective in January of 1992. This law "was widely hailed as a declaration of independence for the disabled and the most sweeping civil rights law in a quarter century."


17. There are only four manners in which to transmit the HIV or AIDS virus: 1) through sexual contact where there is an exchange of blood or semen; 2) sharing intravenous drug needles; 3) through blood transfusions or other nonsexual contact with contaminated blood or blood products; or 4) through an infected mother to her child either in utero or during post-partum breast feeding. See Centers for Disease Control, U.S. Dep't of Health and Human Servs., Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace, 34 Morbidity and Mortality Weekly Rep. 682, 682-83 (1985) [hereinafter Recommendations for the Workplace]. Casual contact with HIV-infected employees is not a risk to others. See REPORT, supra note 3, at 13-21; Robert S. Klein et al., Low Occupational Risk of Human Immunodeficiency Virus Infection Among Dental Professionals, 318 New Eng. J. Med. 86, 89 (1988) (low occupational risk of infection despite frequent occupational exposure to persons at increased risk for HIV infection); Alan R. Lifson, Do Alternate Modes for Transmission of Human Immunodeficiency Virus Exist?, 259 JAMA 1353, 1354 (1988) (risk of transmission through mouth-to-mouth resuscitation or human bites is extremely low, if present at all); Merle A. Sande, Transmission of AIDS: The Case Against Casual Contagion, 314 New Eng. J. Med. 380, 382 (1986) (casual contact unlikely to cause infection).

18. See Kelly & Aalberts, supra note 13, at 675-76.

19. Id. at 676; see, e.g., Recommendations for the Workplace, supra note 17.


22. Statement, supra note 9, at 1165.


The ADA protects the civil rights of disabled persons by imposing new requirements on and demanding more of employers. In July of 1992, businesses with twenty-five or more employees fell under the ADA’s jurisdiction, and in July of 1994, a business with fifteen or more employees will be subject to this law. Consequently, many businesses in the United States will be affected.

Given the breadth of the ADA, the first question addressed in this article is whether an employee with HIV is considered “disabled” pursuant to the ADA. By 1988, one to two million individuals had acquired HIV, and through January, 1993, 249,217 AIDS cases had been reported, so the answer to this question should be of great interest to almost every employer. As of May, 1990, more than 83,000 individuals had died as a result of the disease. Among men ages twenty-five to forty-four, AIDS has become the second leading killer. If current trends continue, the number of AIDS infections will only increase in the next several decades. Such statistics are not just evidence of a serious health concern, but considering the recently effective law, they may represent a legal concern for every employer.

Further, as a result of misconceptions about the disease, much has been misunderstood about HIV, relating to its transmission, contagion, and disabling effects. For example, of those questioned in a 1987 survey conducted by the National Center for Health Statistics, 21% believed that they were likely or somewhat likely to catch AIDS by working with someone who has AIDS. ROPER CENTER FOR PUBLIC OPINION RESEARCH, AIDS: MODES OF CONTAGION 1985, 1987, 1990 (Aug. 8, 1991) (question identification number USNCHS. 87AUG. R07D). The survey also found that 12% believed that it was likely or somewhat likely that they would contract AIDS by shaking hands or merely touching someone who has AIDS. Id. (USNCHS. 87AUG. R07G). Furthermore, 16% believed that they were likely or somewhat likely to contract the disease by kissing an AIDS-infected individual on the cheek. Id. (USNCHS. 87AUG. R07K).

Fortunately, public opinion may be changing. A comparison of Gallup Polls News
ployers are now being forced to develop strategies for handling HIV-infected employees in the face of unreasonable and irrational fears of co-workers, supervisors, and customers. More than twenty-five states have pronounced discrimination based on AIDS or HIV to be unlawful.\footnote{31} Most of these proclamations are found in the form of state human rights acts enforced by state human rights commissions.\footnote{32}

The ADA is the first federal law enacted to protect persons with AIDS from discrimination by private employers.\footnote{33} The ADA requires that employers provide reasonable accommodations to otherwise qualified individuals with disabilities, provided that these accommodations do not impose an undue burden on the employer.\footnote{34} However, the estimated cost of these accommodations is sixteen million dollars.\footnote{35} In response to this situation, the next issues discussed in this Article are what constitutes "reasonable accommodation" and "undue hardship" under the ADA.

In order to avoid additional and unnecessary costs, employers must also strive to educate their workforces regarding the employment of disabled workers, including workers who are HIV-positive. While this Article addresses the need for, and manner by which to implement, an HIV policy in the workplace, no policy will be effective

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\footnote{31}{Service surveys reveals that 25\% of Americans questioned in 1987 believed that employers should have the right to fire a worker with AIDS. \textit{Roper Center for Public Opinion Research, AIDS and Employment} (Aug. 8, 1991) (question identification number USGALLUP. 112287. R1H). This figure declined to 21\% in 1991. \textit{Id.} (USGALLUP. 051591. R1G). Likewise, the comparison reveals that there has been a substantial decrease in the percentage of people who say they would refuse to work alongside a person with AIDS. In 1987 the figure was 25\%, \textit{Id.} (USGALLUP. 112287. R1G), while in 1991, the figure reduced to 16\%. \textit{Id.} (USGALLUP. 051591. R1H).}


\footnote{34}{42 U.S.C. § 12112(b)(5)(A).}

unless, and until, those who will be affected by the policy are educated regarding the rights of disabled employees, and specifically, the facts about HIV and AIDS in the workplace. The purpose of this Article is to identify the legal framework in which employers operate, to discuss the responsibilities of employers to accommodate HIV-infected employees, and to identify the potential liability of employers in connection with AIDS transmission. The Article concludes by advising employers on how to develop both a plan to comply with the ADA and an education program by which to implement this plan.

I. THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT

The ADA grew from section 504 of the Rehabilitation Act of 1973\(^{36}\) (the “Rehabilitation Act”), the first breakthrough for disabled Americans, which “widen[ed] the doors,” as expressed by Attorney General Dick Thornburgh.\(^{37}\) While the Rehabilitation Act only covers federally assisted activities, the ADA covers nearly all private and public entities. Nevertheless, both Acts provide that employers may not discriminate against otherwise qualified individuals with disabilities on the basis of those disabilities.\(^{38}\) The employer is required to provide reasonable accommodation of the individual’s disability unless to do so would constitute an undue hardship.\(^{39}\) The Acts protect both disabled workers and those workers who are perceived to be disabled but are not actually disabled.\(^{40}\) Both Acts protect disabled individuals from three types of barriers that they confront: (1) intentional discrimination based on social bias against disabled individuals; (2) neutral standards with disparate impact; and (3) surmountable impairment barriers.\(^{41}\)

Because the ADA was passed only recently, no court has yet addressed the application of the Act to HIV-infected workers. However, the language of the ADA virtually parallels that of the Rehabilitation Act.

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38. See 42 U.S.C. § 12112; 29 U.S.C. § 794(a) (1988) (“No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance . . .”).
41. 42 U.S.C. § 12112(b); see 29 U.S.C. §§ 701, 791-794d.
citation Act. The legislative history of the ADA evidences a desire to apply standards to private sector employers similar to those in the Rehabilitation Act. Therefore, case law interpreting the terminology and effect of the Rehabilitation Act is likewise applicable to an analysis of the ADA, with few modifications.

Despite this, the ADA is dissimilar from the Rehabilitation Act in several ways. The most significant distinction is that, while the Rehabilitation Act applies only to federal agencies, contractors and federal grant recipients, the ADA now imposes these same requirements on private sector employers. Prior to the passage of the ADA, only federally-assisted employers were required by federal law to reasonably accommodate employees with disabilities in hiring and continued employment as long as that accommodation did not result in an undue hardship upon the employer, pursuant to Sections 503 and 504 of the Rehabilitation Act. Another distinction is that the ADA is more stringent than the Rehabilitation Act as it states that an employer may not discriminate against an individual with a contagious disease, which includes HIV, unless it can be shown that the employee poses a direct threat to others.

Though the ADA may seem comprehensive, it is vague in many areas. For instance, neither the ADA nor the Rehabilitation Act adequately defines "disability," and the ever-elusive term "reasonable" has been used to qualify the bounds of the required accommodations. Likewise, it is far from clear at what point the burden of providing accommodations rises to an "undue hardship."


43. See Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app., § 1630.2(g) (1992) [hereinafter ADA Guidelines].


46. See 42 U.S.C. §§ 12102(2), 12113(d); 29 C.F.R. § 1630.16(e).

47. See, e.g., Robbins v. Clark, 946 F.2d 1331, 1335 (6th Cir. 1991) ("Like AIDS, tuberculosis and hepatitis are merely two specific types of infectious and contagious diseases . . . .")


In an attempt to clarify the extent of the employers’ obligations, the Equal Employment Opportunity Commission (the “EEOC”) has promulgated its final rules (the “ADA Regulations”) to implement Title I of the ADA as required by the Act. At the same time the EEOC issued interpretive guidance (the “ADA Guidelines”) on implementing Title I as an appendix to the ADA Regulations. Despite these voluminous interpretations, many questions remain. Ultimately, many issues must be determined on a case-by-case basis.

The evaluation of an individual’s right to accommodation or the burden which such an accommodation places on the employer depends on the nature of the disability as well as the nature of the employer’s operation. Courts have wrestled with some of these terms in connection with a host of maladies in section 504 Rehabilitation Act litigation and are constantly faced with inventive interpretations of the terms and their applications. Given the number of HIV cases nationwide, it is likely that courts will soon be faced with numerous cases that will require them to examine the application of the ADA to that disease. But this new legislation offers HIV-infected employees or employees perceived to be HIV-positive, many for the first time, the ability to effectively preclude discrimination based on their contraction of the disease.

II. “DISABILITY” UNDER THE ADA

The relevant sections of the Rehabilitation Act, paralleled by the ADA, define an individual with a disability as one who (a) has a physical or mental impairment which substantially limits a major life activity, (b) has a record of such impairment, or (c) is regarded as having such an impairment. The Act defines neither “physical [nor] mental impairment” nor “major life activities.” However, the ADA Regulations define “impairment” as “[a]ny physiological disorder, or

54. ADA Guidelines, supra note 43.
55. See id. § 1630.2(o).
57. See, e.g., McWright v. Alexander, 982 F.2d 222 (7th Cir. 1992) (finding cognizable claim under Rehabilitation Act where past employee brought suit against employer alleging, inter alia, discrimination due to her inability to bear children).
58. See REPORT, supra note 3, at 12 (placing the estimate at 1.5 million).
condition . . . affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or . . . [a]ny mental or psychological disorder” which substantially limits one of life’s major activities.60 “Major life activities” is interpreted by the ADA Regulations as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.”61 “Substantially limit[ed]” is described by the ADA Regulations as being “[u]nable to perform a major life activity that the average person in the general population can perform; or . . . [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity.”62

No court has yet applied the ADA to situations involving HIV-positive employees. However, while a federal court determining the issue is not bound by judicial interpretations of parallel state laws regarding HIV discrimination in employment, such decisions may be indicative of the manner in which the ADA may be applied to similar situations. A federal district court applying a Pennsylvania statute held that, “[b]ecause of the risk of transmission, an HIV carrier cannot procreate [a major life activity] ‘without endangering the lives of both the offspring and the other parent.’”63 Therefore, while no court has reinforced this conclusion in connection with the ADA, it appears that HIV may be covered by the ADA definition of “disability.”

Under the Act’s relatively broad definition of “disability,” one is disabled if he or she is “regarded as” having an impairment.64 The ADA Regulations state that one is regarded as having an impairment if, among other possibilities, he or she “[h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment.”65 The ADA Guidelines offer the example of an individual with a disfiguring facial scar, which does not limit that individual’s employment capabili-

60. ADA Regulations, supra note 52, § 1630.2(h)(1)-(2).
61. Id. § 1630.2(i).
62. Id. § 1630.2(j)(i)-(ii).
64. 42 U.S.C. § 12102(2)(C).
65. ADA Regulations, supra note 52, § 1630.2(j)(2).
ties. If the employer discriminates against this person because of the negative reaction of its customers or clients, "the employer would be regarding the individual as disabled and acting on the basis of that perceived disability." Similarly, HIV-positive individuals might be perceived as incapable of functioning while, in fact, no symptoms of the disease are yet manifested or inhibiting.

The ADA Regulations specifically state that an employer would be violating the ADA if an employer discharged an employee in response to an erroneous rumor that the employee tested HIV-positive. Unfortunately, the ADA Regulations do not address the question of whether an employee who is terminated because he or she is in fact HIV-positive would satisfy the requirements of this section as he or she may be completely qualified for the position but is considered to be substantially limited. The ADA Regulations direct, however, that an individual should not automatically be considered to have a disability merely because he or she is diagnosed as HIV-positive, as this is an infection that may or may not result in an immediate impairment. Such an individual is an individual with a disability only if the impairment affects the individual to such a degree that it substantially limits a major life activity. Accordingly, individuals with AIDS or who are HIV-positive and who are physically affected would appear to be covered under the Act.

The ADA and the Rehabilitation Act do, in fact, protect those individuals who are not actually disabled but who are perceived as being disabled. An employee may be discriminated against based

67. Id.
68. See Benjamin R. v. Orkin Exterminating Co., 390 S.E.2d 814, 817 (W. Va. 1990) (holding that HIV infection severely limits individual's ability to "socialize," which the court considered a major life activity under state regulations); Cerisse Anderson, *Court Allows AIDS Bias Claim*, N.Y. L.J., Feb. 22, 1991, at 1 (stating proof that employee has AIDS is not a prerequisite for discrimination suit if action is based on employer's perception that claimant has AIDS).
70. See ADA Regulations, *supra* note 52, § 1630.2(g)-(h)(1), (i)-(j).
71. See David B. Ritter & Ronald Turner, *AIDS: Employer Concerns and Options*, 38 LAB. L.J. 67, 67 ("Current cases of AIDS have resulted from exposure to the virus that occurred up to seven years prior to diagnosis. The possibility of longer incubation periods has not been excluded by the medical community.").
on a positive response on an HIV test, his or her receipt of medical treatment, or his or her inclusion or perceived inclusion in a "high-risk" group. Any employee is protected from adverse employment determination based on the employer’s belief that the employee is HIV-positive, notwithstanding the fact that she or he may not actually have the virus, or that the virus does not in fact render the employee impaired.

While the Supreme Court has not yet had the opportunity to determine whether HIV or AIDS is covered under the Act, the Court determined in 1987 that a contagious disease may constitute a disability. In School Board v. Arline, the Court held that a school teacher with tuberculosis was a handicapped person within the meaning of section 504 of the Rehabilitation Act. Although Arline did not directly address the issue of HIV, the lower court did discuss contagious diseases such as tuberculosis or HIV in its opinion:

Neither the regulations nor the statutory language give any indication that chronic contagious diseases are to be excluded from the definition of "handicap." To the extent that the statute and regulations express any intent to limit the scope of section 504, Congress’ failure to exclude contagious diseases from coverage when it specifically excluded alcoholism and drug abuse implies that it harbored no similar disapproval about them. We would as a general matter be reluctant to create an exemption where there is not a scintilla of evidence that Congress had any intention of doing so. We are especially reluctant in a situation where, as here, identifying an exemption would free recipients of federal funds from any duty even to consider whether reasonable accommodation could be made to those afflicted with contagious diseases.

Arline served as the basis for the district court’s conclusion in Cain v. Hyatt, in which the court held that the Pennsylvania statute relating to discrimination in employment protected HIV-positive employees. Only time will evidence whether this holding is adopted throughout the court system.

Other indications exist to support the conclusion that HIV and AIDS are covered disabilities under the ADA. In 1986, the Depart-

ment of Justice issued an opinion which stated that if the fear of contagion is the basis for the termination, the employee is not considered disabled and is not protected under the Rehabilitation Act because the ability to communicate the disease to another is not a disability. The opinion made no distinction based on whether the fear of contagion is reasonable or unreasonable on the part of the employer. However, because the Department of Justice’s opinion was in direct contravention of the Supreme Court’s determination in Arline (which specifically stated that chronic contagious diseases are considered to be protected disabilities), it issued a second memorandum which reversed its earlier analysis, stating that the federal definition of a handicapped person does include HIV-positive asymptomatic carriers, and individuals with AIDS. Therefore, it is the opinion of the Department of Justice that even asymptomatic HIV-infected individuals are considered “disabled” pursuant to the Rehabilitation Act and employers may not discriminate against them as long as they are otherwise qualified to perform their jobs, with or without reasonable accommodation.

Taking a direct step to avoid such discrimination, the ADA provides that an employer should not terminate or refuse to hire an employee with a disability who is “otherwise qualified” for the position. An otherwise qualified individual is one who remains able to perform the essential requirements of her or his position, with or without reasonable accommodations. As stated in the regulations implementing sections 501 and 504 of the Rehabilitation Act, “inclusion of the phrase [essential functions] is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job.” “Essential” has now taken on a meaning similar to “business necessity.”

78. Application of Section 504 of the Rehabilitation Act to Persons with AIDS, AIDS-Related Complex, or Infection with the AIDS Virus, Memorandum of the U.S. Dep’t of Justice, Daily Lab. Rep. (BNA) No. 122, at D-1 (June 20, 1986); see Michael S. Cecere, Working with AIDS, 16 THE BRIEF 6, 8 (1987).
81. 42 U.S.C. § 12111(8).
82. Id.
84. “Business necessity” is a term frequently used in connection with discrimination ac-
A district court evaluated the ability of the employee to perform the functional requirements of his position in *Dexler v. Tisch*. In that case, the district court held that an employment applicant who suffered from achondroplastic dwarfism was unable to do many of the tasks required by the position for which he applied. This prevented him from being qualified for the job. Since, under the Rehabilitation Act, the employer must reasonably accommodate only those applicants who are otherwise qualified, the court held that accommodation in this case was not required and, further, would unduly interfere with the workings of the potential employer, a post office. As is evidenced by this case, the definition of the essential position requirements is determinative; therefore, it is that definition that will be carefully scrutinized by the court.

The definition of “otherwise qualified” was also addressed by the Supreme Court in *Arline*. The Court held that the determination should be made based on the nature of risk (how the disease is transmitted); the duration of the risk (how long the carrier is infectious); the severity of the risk (potential harm to third parties); and the probability that the disease will be transmitted and will cause harm.

Legal scholars as well as courts have either interpreted the Supreme Court's decision in *Arline* as a directive that the protection of the Rehabilitation Act safeguards the rights of employees with HIV or
predicted that that would be the effect.\textsuperscript{90} In one case, for example, the trier of fact determined that an employee with AIDS was discriminated against on the basis of disability when he was fired merely because he had AIDS.\textsuperscript{91} The basis for the decision was that his condition fell within the plain meaning of the Rehabilitation Act term "handicapped."\textsuperscript{92} As defined by previous cases, a handicapped person "does not enjoy, in some manner, the full and normal use of his sensory, mental, or physical faculties."\textsuperscript{93}

In yet another related decision applying section 504 of the Rehabilitation Act, \textit{Local 1812, American Federation of Government Employees v. United States Department of State},\textsuperscript{94} a District of Columbia court held that HIV-infected foreign service employees were not "otherwise qualified" for worldwide duty based on the fact that HIV-infected individuals would be subject to poor medical care and unsanitary conditions at many posts, and that these conditions may endanger the health of the employee due to their heightened risk of infection.\textsuperscript{95} Therefore, the HIV-positive employees and applicants were restricted to positions where adequate health and medical services could be maintained. The court said that the Rehabilitation Act did not require the State Department to ignore the obvious relevance of HIV to the job qualifications.\textsuperscript{96} Additionally, the court held that "any further accommodation would require the State Department fundamen-
tally to alter its medical fitness program... or to incur an undue financial burden in upgrading medical care services.97 The essence of the holding is that the individuals with HIV were not “otherwise qualified” for the jobs involved. This case exemplifies the limits of the Rehabilitation Act as constrained by the terms “otherwise qualified” and “essential functions.”

Until the Supreme Court issues a conclusive determination regarding the applicability of the ADA to individuals with HIV or AIDS, lower courts will continue to struggle with the EEOC regulations and definitive statements made by that office and the Department of Justice. However, the case law appears to suggest that there is no correct conclusion but that HIV-positive employees will be considered disabled as defined by the ADA. But the question remains as to the extent of the protection that will be provided.

III. REASONABLE ACCOMMODATION OF HIV-INFECTED EMPLOYEES

A. Types of Reasonable Accommodation

Once it has been determined that an individual is disabled and otherwise qualified, the ADA and the Rehabilitation Act affirmatively require the employer to make reasonable accommodations to the known disabilities of applicants and employees.98 The primary issue of concern to employers, naturally, is the interpretation of “reasonable.” The ADA lists many important accommodations that must be considered in making employment decisions.99 The ADA states that reasonable accommodations may include but are not limited to:

[M]aking facilities used by employees readily accessible to and usable by individuals with disabilities; ... and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of readers or interpreters, and other similar accommodations for individuals with disabilities.100

“Reasonable accommodation” as explained by the EEOC includes any modification or adjustment that enables a qualified individual

97. Id. at 54 n.7.
100. Id. § 12111(9).
with a disability to 1) be considered for the position such qualified individual desires, 2) perform the essential functions of that position, or 3) enjoy the same benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities, and which will not impose an undue hardship on the operation of the covered entity’s business."\(^1\)

The accommodations listed as reasonable accommodations in the ADA itself are generally self-explanatory. However, there are a few that require further explanation. One of these is the accommodation of making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities. This accommodation includes those areas that must be accessible for employees to perform essential job functions, as well as non-work areas used by the employees for other purposes. For example, access to break rooms, lunch rooms, training rooms, or rest rooms may be required as reasonable accommodations.\(^0\)

A clear example of this type of reasonable accommodation that must be made is adapting work space to accommodate wheelchairs. If an employer has two applicants for an open position, one who requires the use of a wheelchair and another who has no disability, the employer may not choose the individual without a disability solely because of the need to modify the work space for the other applicant.

One potentially dramatic reasonable accommodation contemplated by the ADA is “job restructuring.”\(^3\) “Job restructuring” simply entails the modification of a job by removing barriers to its performance by limiting non-essential functions, for example, or by exchanging assignments with other employees.\(^4\) An employer is not required to alter or reallocate essential functions of the job.\(^5\) By definition, the essential functions are those that the individual who holds the job would have to perform with or without reasonable accommodation in order to be considered qualified for the position.\(^6\)

Reassignment is another potential reasonable accommodation.\(^7\) Although the concept of reassignment is relatively self-explanatory, the ADA and its regulations have limited the concept to a certain

1. ADA Regulations, supra note 52, § 1630.2(o).
2. ADA Guidelines, supra note 43, § 1630.2(o).
4. ADA Guidelines, supra note 43, § 1630.2(o).
5. Id.
6. Id.
extent. The ADA Regulations point out that reassignment is not available to all applicants. An applicant for a position must be qualified for, and be able to perform the essential functions of, the position sought, with or without reasonable accommodations.

Reassignment is only to be considered where the individual can be reassigned to a currently vacant position or a position that will become vacant within a reasonable amount of time. Therefore, "bumping" another employee to create a vacancy is not required. Further, the employer is not required to promote an individual with a disability as an accommodation. However, an employer may reassign an individual to a lower graded position if there are no accommodations that will enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified.

Part-time or modified work schedules may be an inexpensive form of accommodation. Though the ADA does not require an employer to provide disabled employees with more paid leave time than it provides to non-disabled employees, reasonable accommodations may include providing additional unpaid leave days. The ADA Guidelines specifically provide that accommodations may include permitting the use of accrued paid leave or providing additional unpaid leave for necessary medical treatment.

In various cases addressing the type of accommodation required for such persons under the Rehabilitation Act, courts have stated that the requirement of reasonable accommodation does not compel the creation of a new job, nor the modification of a full-time position in order to create a part-time position, a modification of the essential functions of the job, or reassignment. Reassignment would only

108. ADA Guidelines, supra note 43, § 1630.2(o).
109. Id.
110. Id.
111. Id.
112. Id.
113. Id.
114. Id.
115. See, e.g., Jasany v. United States Postal Serv., 755 F.2d 1244, 1250-51 (6th Cir. 1985) (holding that Postal Service is not required to accommodate plaintiff by eliminating one of the essential functions of his job because § 504 of the Rehabilitation Act imposes no requirement to lower or to effect substantial modifications of standards to accommodate a handicapped person); Dancy v. Klime, 639 F. Supp. 1076, 1080-81 (N.D. Ill. 1986) (holding that "reasonable accommodation" refers to making the job for which a handicapped person was hired, and not another job, accessible to handicapped persons, and qualifying "position in question" so as not to include all positions to which a handicapped employee may be reas-
be required where the employer has an existing policy regarding reassignments,116 and is not available to an applicant for a specific position.117 As the court stated in Arline, "[a]lthough [the employer is] not required to find another job for an employee who is not qualified for the job he or she was doing, [it] cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies."118 In another case decided under the Rehabilitation Act, an air traffic control specialist with a hearing problem requested a transfer to the position of information specialist, which had no restrictive hearing requirements.119 The court found that the defendant-employer failed to meet its burden of providing a reasonable accommodation of the plaintiff's handicap.120 The court found that, while a transfer seemed unnecessary and burdensome, the defendant should have suggested "reasonable accommodations, such as hearing aids . . . , and test[ed] plaintiff's performance with them. If plaintiff cannot perform adequately without a compensatory device and refuses to use one then the agency will have fulfilled its responsibility to plaintiff."121

Other section 504 cases have held that an accommodation need not be the best possible solution, but need only be sufficient to meet the needs of the individual with the disability.122 While the accommodations enumerated may not be what the employee would consider the best option, they satisfy the employer's duty under the Rehabilitation Act. Furthermore, once an employer offers an accommodation that would allow the employee to adequately perform the requirements of the position, the employee must either accept that accommodation or discontinue working.123

An employee with AIDS may be unable to maintain consistent

116. See Carter v. Tisch, 822 F.2d 465, 467 (4th Cir. 1987) (ruling that Postal Service was not required to accommodate custodian by assigning him to permanent light duty where Service did not normally assign permanent light duty to employees who had served less than five years).
117. ADA Guidelines, supra note 43, § 1630.2(o).
118. 480 U.S. at 289 n.19.
120. Id. at 31.
121. Id. at 31-32.
122. See ADA Guidelines, supra note 43, § 1630.9.
123. ADA Regulations, supra note 52, § 1630.9(d); see also Butler v. Department of the Navy, 595 F. Supp. 1063, 1067-68 (D. Md. 1984).
stamina or a high degree of effort throughout an entire workday.\textsuperscript{124} HIV-positive individuals have a much lower resistance to infection or viruses and therefore may require an accommodation in order to prevent further exposure to health hazards. There are numerous ways to accommodate these individuals, some of which are more burdensome for the employer than others. While the reasonableness of the request depends on the factual circumstances presented by each case, the accommodations that might be necessitated by an employee with HIV may include job reassignments to positions which require less physical exertion, flexible or reduced hours, lower salary for reduced job demands, work-at-home arrangements, more breaks, use of labor-saving equipment, or positions with no physical contact. Additionally, employees with HIV or AIDS may further require the use of accrued paid leave or additional unpaid leave in order to visit a doctor.

B. Confidentiality

An employee with HIV or AIDS may also require the accommodation of confidentiality regarding information not previously treated by the employer as requiring confidentiality. Whether the employee will demand confidentiality will depend on the type of position and other personal factors. As stated by Justice Louis Brandeis, the right to privacy is "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."\textsuperscript{125} It has been suggested that, after health care, privacy in the workplace may be the most important social issue in the 1990s.\textsuperscript{126} An individual may hesitate to come forward in order to receive adequate testing, counseling, and treatment unless his or her employer agrees to maintain that employee's confidence related to the disease.\textsuperscript{127} In certain employment environments, this request may necessitate a small accommodation of the employer's regulations regarding access to medical and other personal information. The mere presence of an HIV infection should not affect the actual day-to-day affairs of the company.

Twenty-seven states have taken a direct approach to this issue by codifying the requirement that test results be kept confidential.\textsuperscript{128} To

\begin{flushleft}
\textsuperscript{124} See supra note 3.
\textsuperscript{125} Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
\textsuperscript{127} Gostin & Ziegler, supra note 90, at 13.
\end{flushleft}
illustrate, in Massachusetts an employee was forced to inform his supervisor of the reason for a medical examination.\textsuperscript{129} After having been told that the employee visited his doctor because he had AIDS, the supervisor informed the employee’s co-workers of the employee’s condition. The employee thereafter received threats to his life from those co-workers. The court upheld a cause of action for disability discrimination and invasion of privacy pursuant to that state’s human rights act, as well as a violation of civil rights against the employer for its failure to protect the employee from this assault.\textsuperscript{130}

If an employer learns that an employee has contracted AIDS, the next step is to evaluate the necessity of informing the employee’s co-workers. This evaluation requires that personal privacy be weighed against public good. Disclosure of medical information regarding an employee may violate that employee’s right to privacy and subject the employer to substantial tort liability. As stated above, many states have enacted legislation specifically requiring confidentiality of test results. These state statutes differ from the federal statutes mentioned above as they do not concern only the employment arena; the state laws identify those individuals who may be privy to the data and those who may not have access.

However, at least one federal court has held that an employee’s right to privacy in public sector employment is not violated by the failure of his employer to maintain the confidentiality of his positive HIV test results.\textsuperscript{131} While these evaluations certainly are not easy for employers or infected individuals, carelessness on the part of the employer can expose him or her to liability.\textsuperscript{132}

\textbf{C. Contact Positions}

Depending on the progress of the employee’s infection, some accommodation of the employee may be required to eliminate the risk of communicating the disease to others. Thus the need for accommodation would only arise if the individual’s position involved the kind

\begin{itemize}
\item \textsuperscript{130} \textit{Id.} at 1274-77.\textsuperscript{131} Plowman v. United States Dep’t of the Army, 698 F. Supp. 627, 632 (E.D. Va. 1988) (stating that the right to privacy regarding an employee’s medical condition is “neither clearly established nor absolute”).
\item \textsuperscript{132} For a discussion of the employer’s potential liability for transmission of the virus to other co-workers, see \textit{infra} notes 192-230 and accompanying text.
\end{itemize}
of physical contact with others that could potentially transmit the infection. In evaluating the employer's responsibility to provide this accommodation, the employer must consider whether the accommodation would actually eliminate the risk to others and whether the employee, with the accommodation, will be able to function adequately. Specifically, "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." Therefore, to be otherwise qualified for a particular position, an employee must not put co-workers at risk of contracting a disease.

Transmission of HIV and AIDS in the workplace was forced to the forefront by the media recently when it seized upon the stories of various HIV-infected physicians, dentists and others in "contact positions." A New Jersey court ruled that "the patient's rights must prevail" when faced with a case involving an AIDS-infected surgeon. The court balanced the right to informed consent, which requires that a patient be informed of all risks concomitant with medical treatment, with the doctor's right to protection from discrimination as a disabled individual under New Jersey law, including the invasion of privacy based on the disability. The Centers for Disease Control have recommended that each doctor reach his or her own decision regarding whether to inform the patient, based upon his or her own professional judgment. The American Medical Association (the "AMA") has echoed this position, and in its support has refused to prepare a list of those procedures which may be considered sufficiently invasive as to require medical personnel to disclose their HIV status.

In addition, a doctor should not be required to disclose his or

133. See Kelly & Aalberts, supra note 13, at 675-76.
135. Id. at 287 n.16.
139. Campbell, supra note 137, at 1.
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her HIV infection to a patient because similar disclosure of other serious diseases with significantly higher risks of transmission is not required. It is persuasive to note that the Centers for Disease Control has estimated that the risk of contracting the HIV infection from a dentist ranges from 1 in 260,000 to 1 in 2,600,000, and from a surgeon, 1 in 41,667 to 1 in 416,667;\textsuperscript{141} the risk of getting Hepatitis B from a doctor ranges from 1 in 417 to 1 in 4167.\textsuperscript{142} In fact, of 182,000 Americans with AIDS in the past ten years, "only five are thought to have contracted the virus from a practicing health care professional."\textsuperscript{143} In those situations, however, there is no evidence that the infection was transmitted by a health care worker—the infection may have instead been transmitted through the use of unclean instruments infected by other patients. While even one death or malady as a result of HIV transmission from a health care provider is unacceptable, it must be noted that the risk of contracting many other diseases is radically higher than that of contracting HIV.

D. "Undue Hardship"

While the duty to provide reasonable accommodations can be immense, the employer must only provide these accommodations if their provision can be accomplished without undue hardship on the employer.\textsuperscript{144} As one commentator wrote, "'reasonable accommodation' is but one side of the coin; 'undue hardship' . . . is the other side."\textsuperscript{145} Therefore, courts must look not only to the type of accommodation requested but to the effect of that accommodation on the employer.\textsuperscript{146}


\textsuperscript{142} Id.

\textsuperscript{143} Cracking Down on Doctors with AIDS, NEWSWEEK, July 29, 1991, at 47.

\textsuperscript{144} 42 U.S.C. § 12113(a); see Southeastern Community College v. Davis, 442 U.S. 397, 413 (1979) (holding that defendant employer's unwillingness to make major adjustments in its nursing program did not constitute discrimination because undue hardship would be suffered by the defendant as a result of such accommodation); Simon v. St. Louis County, 735 F.2d 1082, 1085 (8th Cir. 1984) (holding that requirements for police officers were reasonable, legitimate, and necessary requirements for all positions within the department, and thus modification of such requirements would constitute an undue hardship on defendant employer).


\textsuperscript{146} ADA Regulations, supra note 52, § 1630.9(a); see also Davis v. United States Postal Serv., 675 F. Supp. 225, 236 (M.D. Pa. 1987) (stating that employer is not required to violate its existing contractual arrangements by offering reassignment to disabled employee who was otherwise unqualified for reassignment).
Defining undue hardship is essential to an employer’s determination regarding which actions it must take to avoid liability. The ADA defines undue hardship as “an action requiring significant difficulty or expense.”147 But the determination goes beyond a consideration of the actual financial expenditure and resources of the employer. The impact of the accommodation on the operation of the facility must also be considered, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business.148 In addition, the ADA Guidelines suggest that, where the cost of the accommodation would result in an undue hardship and outside funding is not available from assistance organizations or other federal agencies, the individual with a disability should be given the option of paying the portion of the cost that constitutes an undue hardship.149

The first case to address HIV-infected employees since the enactment of the Rehabilitation Act was *Cain v. Hyatt*.150 Pursuant to Pennsylvania’s Human Relations Act,151 the state’s version of the Rehabilitation Act, an employee brought a cause of action against his employer for failure to accommodate his disability. The court held that the employer had a duty to accommodate the infected employee in three manners: (1) by not terminating him during his first AIDS hospitalization; (2) by permitting him to take his sick and vacation days at that time; and (3) to place him on medical leave until he could return to his job or until the employer could prove that the situation imposed an undue hardship.152 These requirements effectively balance accommodating a disabled individual and preventing

147. 42 U.S.C. § 12111(10)(A). The Act sets out four factors that are to be considered when determining whether or not an accommodation would impose an undue hardship on an employer: (1) the nature and cost of the accommodation; (2) the overall financial resources of the facility involved in providing the reasonable accommodation, the number of persons employed at such facility, the effect on its expenses and resources, or the impact of such accommodation upon the operation of that facility; (3) the overall financial resources of the covered entity, overall size of the covered business entity, with respect to the number of its employees, and the number, type, and location of its facilities; and (4) the type of operation of the covered entity, including the compensation, structure, and functions of the work force of such entity; geographic separateness, administrative, or fiscal relationship of the facility or facilities in question of the covered entity. *Id.* § 12111(10)(B).
149. ADA Guidelines, *supra* note 43, § 1630.2(p).
151. 43 PA. CONS. STAT. ANN. § 955 (Supp. 1992) (Act is modelled upon and follows Rehabilitation Act definitions).
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discrimination with the potential for undue hardship imposed on employers.

The ADA Guidelines suggest that undue hardship is not limited to financial concerns, but may also include any accommodation that would be "unduly . . . extensive, substantial or disruptive, or that would fundamentally alter the nature or operation of the business." For example, even though the plaintiff in Dexler v. Tisch was deemed unqualified by the court for the position for which he applied, the court evaluated the applicant's accommodation request using the above framework. This determination was a result of the court's obligation to first determine if the applicant was qualified with an accommodation, then to evaluate whether the accommodation was unduly burdensome on the employer. The court addressed the various accommodations proposed by the applicant, including the use of a step stool, the use of a platform, and job restructuring. Based upon the operations of the employer as a post office, the court held that job restructuring was not a possible alternative since such restructuring would often leave the plaintiff without work to do, which the court held was an undue burden. In addition, the court found that the nature and the costs of the proposed accommodations also constituted an undue hardship. The stool or platform was not considered appropriate as the court found that either would cause safety problems and a loss of efficiency. Therefore, the court held that failure to hire the individual was not a violation of the Rehabilitation Act.

Employers may also attempt to show that the adverse employment action was based on their fears relating to future absences or potentially higher insurance costs, which constitute an undue hardship. Courts, however, have not accepted this concern over possible future costs as a defense to a claim of discrimination.

153. ADA Guidelines, supra note 43, § 1630.2(p).
155. Id. at 1427-29.
156. Id. at 1428; see also Bey v. Bolger, 540 F. Supp. 910, 927-28 (E.D. Pa. 1982) (holding that the Postal Service was not under a duty to accommodate plaintiff who suffered from uncontrolled hypertension as the necessary accommodation would have imposed upon the post office an undue hardship).
158. The average annual health care cost per AIDS-infected employee is estimated to range from $20,320 to $33,842. Bay Area Study by Economists Shows Lower Costs for Some Patients, 2 AIDS Pol'y and Law (BNA) No. 20, at 2 (Oct. 21, 1987).
dition, speculation regarding possible higher costs of health care and insurance are unfounded in connection with individuals who are HIV-positive but who have not yet developed AIDS. While it is probable that the individual will develop AIDS, there remain individuals today who have been HIV-positive for some time but have not yet developed AIDS.  

In a case evaluating an employer's concern that an obese employee would cost the employer more in the future in connection with health care, the New York Court of Appeals held that this was not a valid defense even though obese people, as a class, are at a greater risk for certain health problems than others. The court explained this result by stating that employment can only be refused if the condition is related to the performance of the position's duties. Defenses based on nothing more than an employer's fears and speculations about the possible collateral effects of an applicant's disability will not succeed against charges of discrimination.

Not only must the undue hardship be more than speculative, but the ADA requires more than a de minimis expense, such as that required by Title VII, because of the nature of the discrimination against disabled individuals and the possibilities for the removal of artificial barriers to employment. While the type, and accompanying expense, of accommodations will vary with each case, it is generally

employer's fears, well founded or not, concerning the future performance of an employee or applicant who is presently able to discharge the functions of the position do not justify adverse employment actions, unless the safety of that person or others is implicated; see also Polz v. Marriott Corp., 594 F. Supp. 1007, 1014-15 (W.D. Mo. 1984) (holding that termination of employee to avoid economic consequences that would result from plaintiff's continued participation in employer-funded medical plans was unlawful); State Div. of Human Rights ex rel. McDermott v. Xerox Corp., 480 N.E.2d 695, 697 (N.Y. 1985) (holding that employment may not be denied on the basis of any actual or perceived undesirable effect the person's employment may have on disability or life insurance programs); see generally Comment, Section 504 of the Rehabilitation Act: Analyzing Employment Discrimination Claims, 132 U. PA. L. Rev. 867, 884-91 (1984).

160. See supra note 71.
162. Id. at 697-98.
163. ADA Guidelines, supra note 43, § 1630.15(d) ("To demonstrate 'undue hardship' pursuant to the ADA . . . an employer must show substantially more difficulty or expense than would be needed to satisfy the 'de minimis' Title VII [of the Civil Rights Act] standard of undue hardship.").
164. While the Supreme Court, in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), held that an employer need not suffer more than a de minimis expense in order to reasonably accommodate a religious practice under Title VII, courts have consistently held that this low standard does not apply to claims of handicap discrimination. See, e.g., Prewitt v. United States Postal Serv., 662 F.2d 292, 308 n.22 (5th Cir. 1981).
believed that the average accommodation expense is normally quite low, approximately $261 per disabled employee.\textsuperscript{165} In addition, employees with HIV or AIDS may require the use of accrued paid leave in order to visit their physician. It would be difficult for many employers to prove that these intermittent departures constitute an undue hardship or financial hardship.\textsuperscript{166} Therefore, few employers will be successful in asserting a defense that the expense is too great. The Ninth Circuit specifically rejected this argument in \textit{Bentivegna v. United States Department of Labor.}\textsuperscript{167} stating:

\begin{quote}
[Allowing remote concerns to legitimize discrimination against the handicapped would vitiate the effectiveness of section 504 of the Act. Potentially troublesome health problems will affect a large proportion of the handicapped population. Consistent attendance and an expectation of continuity will be important to any employer. Such considerations cannot provide the basis for discriminatory job qualifications unless they can be connected directly to "business necessity or safe performance of the job."\textsuperscript{168}
\end{quote}

\section*{E. Other Defenses}

Under the Rehabilitation Act, the employer could also rebut an employee’s claim of discrimination for failure to provide reasonable accommodation based on termination if it could show that the infected employee poses a reasonable probability of substantial harm to others.\textsuperscript{169} The Rehabilitation Act defines an “otherwise qualified” disabled employee as one who, “with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others.”\textsuperscript{170}

The standard for balancing the risk of harm to others against the employer’s duties under the Rehabilitation Act was articulated in

\begin{itemize}
\item \textsuperscript{165} Equal Employment Opportunity For Individuals With Disabilities, Supplementary Information, 56 Fed. Reg. 8578, 8583-84 (1991) (using average of several statistical studies to predict the net economic effect of accommodation expenses to be $261 per individual as a result of the reasonable accommodations requirement of Title I of the ADA).
\item \textsuperscript{166} See, e.g., Rodgers v. Lehman, 869 F.2d 253, 259 (4th Cir. 1989) (holding that refusal to grant leave for in-patient treatment of alcohol abuse violated requirement of reasonable accommodation).
\item \textsuperscript{167} 694 F.2d 619 (9th Cir. 1982).
\item \textsuperscript{168} Id. at 623.
\item \textsuperscript{169} Cecere, supra note 78, at 8, 10-11.
\item \textsuperscript{170} 29 C.F.R. § 1614.203(a)(6) (1992).
\end{itemize}
Mantolete v. Bolger. There the court held that in order to refuse employment to a disabled individual, the employer must show that there is a reasonable probability of substantial injury to the potential employee or others. As it has been shown that HIV is not transmitted through casual contact, but only through intimate contact, "it seems unlikely that a showing of reasonable probability of [infection]... can be made." Therefore, employers who take adverse employment actions based on the unreasonable complaints or fears of co-employees or customers would violate the Rehabilitation Act.

This rejection of unreasonable fear as the basis for discrimination was further supported by the Ninth Circuit in Chalk v. United States District Court Central District. In that case, a teacher was removed from his classroom based on the fact that he had contracted AIDS. The court held that the possibility that the plaintiff’s return to the classroom would produce fear and apprehension in parents and students was insufficient grounds on which to deny a preliminary injunction.

To allow the court to base its decision on the fear and apprehension of others would frustrate the goals of section 504 [of the Rehabilitation Act]. “[T]he Basic purpose of § 504 [is] to ensure that disabled individuals are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others.”

This decision is directly in line with the Supreme Court’s decision in Arline, which rejected the argument that exclusion of the disabled individual from opportunities could be justified on the basis of “pernicious mythologies” or “irrational fears.” In Cain, the court

171. 767 F.2d 1416 (9th Cir. 1985).
172. Id. at 1422-23.
173. Recommendations for the Workplace, supra note 17, at 682; see also LaRocca v. Dalsheim, 467 N.Y.S.2d 302, 307 (N.Y. Sup. Ct. 1983) (citing support for view that infection through casual contact offers “little or no risk”).
174. Cecere, supra note 78, at 11; see also Crawford v. Industrial Comm’n, 534 P.2d 1077, 1082 (Ariz. Ct. App. 1975) (holding that “there must be a causal connection with the employment, and not a mere coincidental connection, and there must be a clearly established facet of special exposure in excess of the ‘commonality’”).
175. 840 F.2d 701 (9th Cir. 1988).
176. Id. at 703.
177. Id. at 710-11.
178. Id. at 711 (quoting School Bd. v. Arline, 480 U.S. 273, 284 (1987)) (alterations in original).
179. Arline, 480 U.S. at 284; see also Ray v. School Dist., 666 F. Supp. 1524, 1535
held that "the asserted reticence or unwillingness of co-workers and clients to associate with an AIDS victim who is without any contagious opportunistic infections does not convert a handicap into a job-related one."\textsuperscript{180} It is just such attitudes and prejudices that tread upon the rights of infected individuals.

The ADA definition of "qualified individual with a disability"\textsuperscript{181} indicates a similar effort to protect the rights of the disabled employee in this regard. The ADA definition omits the words of the Rehabilitation Act, "without endangering the health and safety of the individual or others."\textsuperscript{182} In lieu of this provision, the ADA specifies that qualification standards for any given position "may include a requirement that an individual . . . not pose a direct threat to the health and safety of other individuals in the workplace."\textsuperscript{183} "Direct threat" imposes a much more stringent standard than the Rehabilitation Act's standard of "endangerment." The ADA Regulations define the term as "a significant risk of substantial harm . . . that cannot be eliminated or reduced by reasonable accommodation."\textsuperscript{184} The existence of a mere reasonable possibility of harm is insufficient.

It is undisputed that there remain certain employment contexts in which an employer's claim that an HIV-infected individual was legitimately fired for safety reasons is likely to succeed. The employer may be able to show that, based on a bona fide occupational qualification (a "BFOQ") for the position, there is a direct threat of substantial harm if the individual is hired or maintained. A BFOQ is an assertion by the defendant-employer that the position requirement which the employer claims is not satisfied by the disabled individual is a "bona fide" requirement of the position, and not one articulated merely for the purpose of discriminating against that individual.\textsuperscript{185} For instance, an employee in a medical institution poses a more likely risk to the individuals with whom he or she comes into contact than does an electrician. If an employee's position subjects him or her to a  

\textsuperscript{181} Cain v. Hyatt, 734 F. Supp. 671, 681 (E.D. Pa. 1990); see also Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1181 (7th Cir. 1982) (holding that the refusal to hire an individual because of the preferences of co-workers, the employer, customers, or clients is not permissible under Title VII); cf. Guidelines on Discrimination Because of Sex, 29 C.F.R. pt. 1604, § 1604.1(iii) (1992).
\textsuperscript{182} 42 U.S.C. § 12111(8).
\textsuperscript{183} Compare id. § 12111(8) with 29 U.S.C. § 706(8).
\textsuperscript{184} 42 U.S.C. § 12113(b).
\textsuperscript{185} ADA Regulations, supra note 52, § 1630.2(r).
\textsuperscript{186} See id. § 1630.10.
large number of abrasions, the employer may be held liable for negligent hiring or maintaining of an employee with HIV.

Health care professionals find themselves on both sides of this issue. A health care institution has the obligation to protect its employees from the transmission of HIV from one of their patients, as well as the obligation to the patients to protect them from the transmission of HIV from one of its employees. In order to safeguard all involved, health care institutions have established regulations related to the handling of blood and other bodily fluids, as well as invasive medical apparatus. In fact, the Department of Justice has proposed that there should be no obligation to accommodate those health care employees who engage in invasive surgical procedures. However, the Centers for Disease Control recommend that infected health care workers should not be routinely restricted from performing these procedures, but that a determination should be made based on the individual circumstances of each case. Nevertheless, an employer in any type of business may also be subject to a cause of action if the employer has knowledge relating to the medical condition of an employee, yet fails to adequately protect other employees. However, it should be noted that the employer may be able to reduce the risk by reasonable accommodation (i.e., job modification) rather than termination.

If no reasonable accommodation is possible or if the accommo-

188. Centers For Disease Control, U.S. Dep’t of Health and Human Servs., Recommendations for Prevention of HIV Transmission in Health-Care Settings, 36 MORBIDITY AND MORTALITY WKLY. REP. 3S, at 155-16S (1987) [hereinafter Recommendations for Health-Care Settings]. Note that the most recent compilation of recommendations from the Centers for Disease Control relating to the transmission of HIV during invasive procedures states that infected health care workers who adhere to universal precautions and who do not perform invasive procedures pose no risk for transmitting HIV or the Hepatitis B virus to patients. Infected health care workers who adhere to universal precautions and who perform certain exposure-prone procedures pose a small risk for transmitting Hepatitis B virus to patients. HIV is transmitted less readily than the Hepatitis B virus. Centers for Disease Control, U.S. Dep’t of Health and Human Servs., Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures, MORBIDITY AND MORTALITY WKLY. REP., July 12, 1991, at 1. The CDC further recommends that “[Health care workers] whose practices are modified because of their HIV or HBV infection status should, whenever possible, be provided opportunities to continue appropriate patient-care activities.” Id. at 6.
dation proposed causes an undue hardship on the employer, the em-
ployer may discharge the employee with impunity.\textsuperscript{189} However, if 
the employer claims that the employee cannot be accommodated or 
no accommodation is reasonable, the employer must show that "the 
employee's performance has deteriorated below minimum standards 
and that 'reasonable accommodation' was made for the employee's 
handicap or would cause undue financial burden on the employer."\textsuperscript{190} There are defenses available to employers who are charged 
with discrimination that extends beyond one isolated case.

It may be a defense to a charge of disparate treatment . . . that the 
challenged action is justified by a legitimate, non-discriminatory 
reason [or] . . . that an alleged application of qualification standards, 
tests, or selection criteria that screens out or tends to screen out or 
otherwise denies a job or benefit to an individual with a disability 
has been shown to be job-related and consistent with business ne-
cessity, and such performance cannot be accomplished with reason-
able accommodation . . . . \textsuperscript{191}

\section*{F. Some Direction for Employers}

It is evident that some cohesive guidelines are necessary in order 
to provide some direction to employers regarding the definition of 
"reasonable accommodation." Under the Rehabilitation Act, courts 
addressed many claims by alcoholic employees alleging a disability 
due to their alcoholism. In relation to these claims, the courts estab-
lished guidelines for federal agencies that were very tough on agency 
employers. In \textit{Rodgers v. Lehman},\textsuperscript{192} the court established a five-
step directive for the benefit of federal agency employers dealing with 
alcoholic employees:

1) If the employer suspects alcoholism, she must inform the em-
ployee of counselling services.

2) If the alcoholism continues, the employer must give the employee 
a "firm choice" between treatment and discipline.

3) The employee must be permitted to participate in an outpatient

\textsuperscript{189} However, the employer should be vigilant to avoid liability pursuant to § 510 of the 
considers termination wrongful if it is based on the employee's use or anticipated use of em-
ployee medical benefits. \textit{Id.}

\textsuperscript{190} Franklin & Robinson, \textit{supra} note 27, at 121.

\textsuperscript{191} ADA Regulations, \textit{supra} note 52, § 1630.15(a)-(b).

\textsuperscript{192} 869 F.2d 253 (4th Cir. 1989).
treatment program.

4) If this is unsuccessful, the employee must be permitted to participate in an inpatient treatment program.

5) Only if the first four steps fail can the employer legally discharge the employee.\(^{193}\)

Discharge is a last resort; only after affirmative action has been taken by the agency does it become a viable option.\(^{194}\)

In this way, non-agency employers were given the benefit of a directive from the courts as to the proper means of handling such a case under the Rehabilitation Act. The same is necessary for dealing with HIV-infected employees under the ADA (for private employers) and the Rehabilitation Act (for federal employers). It is expected that the guidelines which the courts will establish in connection with HIV claims under the ADA will include the factors set forth in *Arline*. While the alcoholism cases are evidence that the courts will provide employers with tough guidelines related to claims of disability discrimination, the courts may provide for lenient guidelines in order to protect co-workers because HIV has the potential to create more of a health risk to co-workers than does alcoholism. This determination will depend on the state of the medical research. In the final analysis, courts will need to balance the interests and rights of the employee with the factors set forth in *Arline* on an individual, case-by-case basis.

The determination relating to the provision of reasonable accommodation comprises a three-step analysis.\(^{195}\) First, the employer must determine whether the employee is “disabled” pursuant to the ADA definition.\(^{196}\) AIDS is an apparent disability while a diagnosis of HIV-positive may or may not be a disability. The diagnosis of either AIDS or HIV-positive may also be perceived as a disability which would provide for protection of the individual under the Act. Second, the employer must determine whether the individual is “otherwise qualified” for the position. Can the employee perform the essential requirements of his or her position, with or without accommodation? Third, the employer must determine whether the accommo-

\(^{193}\) Id. at 259.

\(^{194}\) Id.

\(^{195}\) See 42 U.S.C. § 12111(8)-(10).

\(^{196}\) The term “disability” is defined as (1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual, (2) a record of such impairment, or (3) being regarded as having such impairment. 42 U.S.C. § 12102(2); see also supra notes 53-97 and accompanying text.
dation that is necessary in order to allow the employee to perform his or her job effectively is "reasonable." Would the accommodation impose an undue hardship on the employer in terms of cost or the compromise of the business environment? The accommodation must be provided if the employer ascertains (1) that the employee is disabled, (2) that, with or without reasonable accommodation, the employee is qualified, and (3) that the accommodation does not impose an undue hardship.

IV. POTENTIAL LIABILITY OF THE EMPLOYER FOR TRANSMISSION AFTER REASONABLY ACCOMMODATING AN EMPLOYEE

The employer of an HIV-infected individual may be liable to co-workers of the individual based on a variety of common law tort theories. While typically, an employee's sole remedy for workplace injury is workers' compensation, the employer may be liable to its employee for any intentional torts. The employer has not only a statutory duty to provide a safe environment in which to work pursuant to federal regulations, but also a similar common law duty to refrain from committing an intentional wrong upon the employee. One manner in which such a tort may arise relates to the response of the employer to the news that an employee has acquired the HIV infection. If the employer reacts by engaging in outrageous conduct that causes the employee severe emotional distress, the employer would be liable in tort. In addition, unwarranted invasions of privacy, breaches of confidentiality, and defamation have been held to be bases for actions against employers. A tortious invasion of privacy

197. See, e.g., ILL. REV. STAT. ch. 48, paras. 138.5(a), 138.11 (1991). In addition, the workers' compensation remedy is only available to plaintiffs who can show that a disease is work-related and not a disease to which the general public is exposed. See, e.g., Workers' Occupational Diseases Act, ILL. REV. STAT. ch. 48, para. 172.36(d) (1991); Stewart Warner Corp. v. Industrial Comm'n, 33 N.E.2d 196, 198 (Ill. 1941) (superseded by statute as stated in General Am. Life Ins. Co. v. Industrial Comm'n, 454 N.E.2d 643 (Ill. 1983)).


199. Schneider v. TRW, Inc., 938 F.2d 986, 992 (9th Cir. 1991).

200. See Norman v. General Motors Corp., 628 F. Supp. 702 (D. Nev. 1986) (ruling that employee's cause of action for defamation against employer survives motion to dismiss); K-Mart Corp., Store No. 7441 v. Trotti, 677 S.W.2d 632, 636 (Tex. Ct. App. 1984) (affirming a civil cause of action for invasion of the right to privacy, specifically an intentional intrusion upon the solitude or seclusion of another that is highly offensive to a reasonable person); Houston Belt & Terminal Ry. v. Wherry, 548 S.W.2d 743 (Tex. Civ. App. 1976)
occurs where the employer intentionally intrudes into an employee's private affairs and such intrusion is found to be "highly offensive to a reasonable person."201

Several cases have been filed by non-infected employees regarding their requests for additional protection when forced to work with infected employees, or their actual refusals to work with infected employees.202 However, only where an employer willfully and wantonly disregards the safety of its employees will the employer be liable.203 For example, in California a group of nurses claimed that they would be exposed to unhealthful working conditions by their hospital employer's refusal to allow them to wear protective gowns, masks, and gloves when treating HIV patients.204 The California Labor Commissioner found that the nurses' safety was not jeopardized by the hospital's refusal to permit them to wear the protective attire, as there was no health danger, in most instances, from working in an AIDS ward without protective clothing.205 Therefore, the Commissioner determined that the hospital had not acted with disregard to the best interests of its employees. The nurses have not appealed the decision of the Labor Commissioner.

In an Illinois case, a customer of American Airlines sued the company, alleging negligent hiring when an HIV-infected ticket agent bit the customer during an altercation over the customer's boarding pass.206 American Airlines settled the action with its customer.

(holding that railroad employee should be awarded damages for defamation arising from letter from employer to U.S. Labor Department), cert. denied, 434 U.S. 962, (1977); Armstrong v. Morgan, 545 S.W.2d 45, 47 (Tex. Civ. App. 1976) (holding that employee may bring action against employer doctor for libel based on allegedly false and inaccurate medical report).

201. KEETON ET AL., supra note 198, at § 652B.

202. Court Rules AIDS Handicap Under Massachusetts Law, 1 AIDS Pol'y and Law (BNA) No. 18, at 2 (Sept. 24, 1986) (reporting an incident in which an employee with AIDS was threatened by co-employees with lynching if he continued to work with the telephone company); Sanitation Workers Refuse to Work with Colleague, 1 AIDS Pol'y and Law (BNA) No. 12, at 7 (July 2, 1986). But see Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1199 (7th Cir.) (holding that a customer preference is not a lawful basis to reduce employment opportunities to female flight attendants who are married), cert. denied, 404 U.S. 991 (1971).


204. Bernales v. City and County of San Francisco, Dep't of Pub. Health, Nos. 11-1700-1 to 11-1700-4 (Cal. Lab. Comm'r Sept. 9, 1985), reported in Daily Lab. Rep. (BNA) No. 184, at A-6 (Sept. 23, 1985) (the hospital was following the infection control procedures suggested by the scientific community and the Centers for Disease Control).

205. Id.

In certain cases, the employer's duty to protect its employees or clients may be satisfied by warning those employees or clients of the individual's condition. The employer's duty to warn is limited to those individuals who may be potentially infected, but is also limited by confidentiality concerns of the infected individual and whether the information regards its employee, client, or customer. In one case, The Court of Appeals for the Eighth Circuit held that the risk of transmission from certain employees of the Eastern Nebraska Human Services Agency who have contact with mentally retarded persons was so negligible that mandatory HIV testing violated the employees' Fourth Amendment rights against unreasonable searches and seizures. However, the Fifth Circuit recently held to the contrary. In Leckelt v. Board of Commissioners of Hospital District No. 1, the court held that a licensed practical nurse, who was discharged by the defendant after refusing to submit his HIV test results to the hospital, had no cause of action based on a violation of his civil rights. The court found that the plaintiff had violated the hospital's infection control policy related to reporting infectious or communicable diseases, and was not discharged because he was regarded as being HIV-positive. Additionally, the court concluded that the plaintiff was not "otherwise qualified" under the Rehabilitation Act.

If co-workers of the employee with HIV refuse to work with the HIV-infected individual, what is the responsibility of the employer? A national survey revealing that one in four employees would refuse to work with an HIV-infected co-worker makes this an important question. Such a refusal may fall within the meaning of sections 7 and 8(a)(1) of the National Labor Relations Act (the "NLRA"), which state respectively that two or more employees have the right to engage in concerted activity for the purpose of mutual aid or protection, and that termination in response to such actions is unlawful.

1987, at 62.

210. 909 F.2d 820 (5th Cir. 1990).
211. Id. at 831.
212. Id. at 830.
215. See NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) (holding that the con-
The employees’ fears must be based merely on an honest, good faith belief that their safety is threatened.216 Traditionally, this belief did not even have to be reasonable,217 but recently the National Labor Relations Board and federal courts have begun to use a standard of reasonableness related to the actions of the employees.218 If the employees continue to refuse to work, however, the employer is allowed to hire permanent replacements.219 Further, pursuant to the Occupational Safety and Health Act, an employer must provide a safe workplace for its employees, free from conditions reasonably believed in good faith to be hazardous.220 Since the employer is therefore required to protect both the HIV-infected employee, by virtue of the ADA, and the complaining employees, by virtue of the NLRA221 and the Occupational Safety and Health Act,222 the employer’s only recourse must be complete education of the workforce in order to preclude any “good faith” belief that the employee with HIV presents a health danger. The Occupational Health and Safety Administration (“OSHA”) has, in fact, issued guidelines in connection with the maintenance of a safe working environment relating to HIV transmission.223 This advisory notice identified protective measures to be taken by employers to prevent HIV transmission through exposure to blood and other bodily fluids and adopted the Centers for Disease Control’s universal precautions policy.224

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216. NLRB v. Tamara Foods, Inc., 692 F.2d 1171, 1182 (8th Cir. 1982) (holding that apprehension of injury was reasonable and objectively proven in light of the commonly known effects of exposure to the drug in question), cert. denied, 461 U.S. 928 (1983); see also Washington Aluminum, 370 U.S. at 16, 17.
219. See Laidlaw Corp. v. NLRB, 414 F.2d 99, 104-05 (7th Cir. 1969) (stating that employer may hire permanent replacements for striking workers in effort to continue operations), cert. denied, 397 U.S. 920 (1970).
220. 29 U.S.C. § 654(a)(1) (1988); Tamara Foods, 692 F.2d at 1181 (stating that the NLRA creates an express mechanism for protecting workers from employment conditions believed to pose an emergent threat of death or serious injury (citing Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980))).
224. See id.; see also Marco L. Colosi, AIDS: Human Rights Versus the Duty to Provide
The Centers for Disease Control have issued guidelines for the prevention of HIV transmission in the workplace\textsuperscript{225} and in health care settings.\textsuperscript{226} If an employer fails to implement these guidelines, there is the possibility that it may be held liable in tort for negligent or reckless disregard for the safety of its clients or others. In addition, OSHA has promulgated standards that, in contrast to those of the Centers for Disease Control, are legally binding on employers, who are subject to fines for noncompliance.\textsuperscript{227}

An employer is charged with knowledge of the possible means of transmission of HIV, as contained in the official reports of OSHA and the Center for Disease Control. In one California case, an employer terminated the employment of an individual with AIDS based on its belief that the individual posed a risk to the health and safety of other workers, as well as its belief that fear among co-workers would injure company morale.\textsuperscript{228} The California Court of Appeals held that the employer's beliefs were irrational and insupportable, and affirmed the lower court's determination that this type of speculation "is exactly the sort of speculation that has been uniformly rejected as a justification for physical handicap discrimination."\textsuperscript{229}

The issue of whether the employee's co-workers have a right to information related to the employee's condition is an area of hot dispute. Recently, the AMA was faced with complaints from patients regarding the responsibility of HIV-infected doctors to inform patients of the doctors' infection.\textsuperscript{230} The burden of proof regarding the necessity of dissemination of HIV-related information continues to rest with the employer.

\textsuperscript{a} Safe Workplace, 39 LAB. L.J. 677, 680 (Oct. 1988) (discussing universal precautions).

\textsuperscript{225} Recommendations for the Workplace, supra note 17.

\textsuperscript{226} Recommendations for Health-Care Settings, supra note 188, at 155-65.


\textsuperscript{229} Raytheon, 212 Cal. App. 3d at 1251.

V. CONCLUSION

Employers, of course, must be aware of the ramifications of every employment decision they make. The ADA imposes new burdens on private employers. While the Surgeon General has recommended that all employers develop a comprehensive HIV policy, fewer than 10 percent of executives responding to one study reported that their companies had developed a written policy on HIV.231 The Surgeon General has issued a statement proposing that:

Offices, factories, and other work sites should have a plan in operation for education of the work force and accommodation of AIDS or ARC patients before the first such case appears at the work site. Employees with AIDS or ARC should be dealt with as are any other workers with a chronic illness. In-house video programs provide an excellent source of education and can be individualized to the needs of a specific work group.232

This type of education can eliminate unnecessary conflicts between an infected individual and his or her co-workers, and avoid legal problems for employers. Compliance with the Surgeon General’s recommendation need not be in the form of a specific "HIV policy" but instead may require nothing more than updating present policies to reflect an understanding that HIV will be treated as any other disability or illness, as well as developing ideas for reasonable and necessary accommodations. The decision regarding whether to merely update and reformulate a present policy or to begin from scratch is one that should be made after reviewing the efficacy of the policy in place and evaluating the modifications which will be necessitated by the reformulation.233

To successfully integrate HIV-infected employees into a functioning work environment, organizations must understand that the education of the workforce is vital. A well-documented HIV policy is an employer’s first line of defense against a discrimination action. It is the most simple and cost-effective means by which to reduce an

232. REPORT, supra note 3, at 32.
233. For a more detailed discussion of corporate policy and program formulation, see Laura B. Pincus & Shefali M. Trivedi, A Decade of Change, a Time for Action: HIV in the Workplace (June 1992) (unpublished manuscript, on file with the DePaul Business Law Journal).
employer's potential liability. Potential benefits to the employees include gaining a greater understanding regarding the transmission of HIV, through the provision of information on HIV and AIDS treatment, alternate sources of additional information, and an appropriate forum for discussing employees' questions, concerns, and fears relating to the disease and workplace safety.

Education can also benefit the employer. First, employers who are currently obligated to comply with the Rehabilitation Act could use these information-dissemination programs to prevent potential discrimination against protected individuals by management. Used as a proactive measure, this would ensure more successful compliance with the Act. In addition, education programs may insulate employers somewhat against possible litigation from their employees, in that it would provide evidence of the employer's knowledge of and concern for the disease. Further, the employer would reap social and economic benefits from such a program. As stated above, in a recent poll, twenty-five percent of the respondents stated that they would refuse to work next to someone with AIDS. Therefore, these workers may therefore be forced by their biases to quit. The cost associated with such turnover could be substantially diminished through an education program which served to reduce or eliminate these unfounded fears. This would be most beneficial for employers with skilled or professional workers, since the cost of replacing these employees is higher. Further, an education program would alleviate employee stress and anxiety by dispelling rumors and myths about HIV. Ultimately, the employer would benefit from the release of tension and the development of more peaceful relationships within the organization.

No matter how much education and training managers receive, however, the reaction to news that an employee is HIV-positive remains consistently negative. Training and education must be continually reinforced to combat this tendency. In order to assist the employer in making informed, legal decisions in connection with the employment of HIV-infected individuals, the National Leadership Coalition on AIDS has promulgated a framework for workplace policies and programs. The Coalition essentially directs that employees who

234. Blendon & Donelan, supra note 213.
235. This framework provides the following:

1. Persons with HIV infection, including AIDS, have the same rights, responsibilities and opportunities as others with serious illnesses or disabilities;
2. Our employment policies comply with federal, state and local laws and regulations;
are HIV-positive receive exactly the same benefits of employment as a non-disabled employee. Note that this does not mean that the HIV-positive employee be treated in exactly the same way, because that may lead to disparate results. In addition, the Coalition's framework recognizes that an HIV-positive employee does not pose a risk to others in the work environment through casual contact. The framework also provides for an education program in order to ensure that most HIV-related issues are avoided before they become workplace conflicts. The Coalition contends that compliance with its articulated principles will ensure fair treatment of the infected employee as well as her or his co-workers, clients, and employer.

Finally, employers must beware of terminations of HIV-infected employees for one additional reason. It is estimated that the treatment of some AIDS patients can cost up to $250,000 per patient. An employee may have a cause of action pursuant to the Employee Retirement Income Security Act ("ERISA") if the employer has discharged her in order to avoid incurring insurance costs. However, the employee must show that the adverse decision was made with the intent to deprive her of benefits, a difficult claim to support and prove. When the employer reduces the benefits payable to HIV-infected individuals, it is acceptable and lawful as long as the reduction is applied equally to all employees filing AIDS-related claims.

3. Our employment policies are based on the scientific fact that persons with HIV infection, including AIDS, do not cause risk to others in the workplace through ordinary workplace contact;
4. Our management and employee leaders endorse a non-discrimination policy;
5. Special training and equipment will be used when necessary, such as in health care settings, to minimize risks to employees and others;
6. We will ensure that AIDS education is provided to all of our employees;
7. We will endeavor to ensure that education takes place before AIDS-related incidents occur in our workplace;
8. Confidentiality of persons with HIV infection and AIDS will be protected;
9. We will not screen for HIV as part of pre-employment or workplace physical examinations;
10. We will support these policies through their clear communication to all current and prospective employees.

NATIONAL LEADERSHIP COALITION ON AIDS, TEN PRINCIPLES FOR THE WORKPLACE (1988); see also NATIONAL LEADERSHIP COALITION ON AIDS, SMALL BUSINESS AND AIDS (1988).

236. See Robert G. Knowles, AIDS Cost Hikes Spur Tough Employer Choices, NAT'L UNDERWRITER, Dec. 17, 1990, at 19 (discussing the case of one individual's medical bills which exceeded $250,000 in a two year period).
238. See Simmons v. Willcox, 911 F.2d 1077, 1079 (5th Cir. 1990) (affirming the granting of summary judgment on the grounds that the employee had failed to prove intent to deprive her of her prison benefits).
and the effects of the reductions would not be felt by only one employee. In one case, the employer reduced the benefits provided from $1 million to $5,000 a mere seven months after an HIV-positive employee filed a claim for coverage.\(^{239}\) The court looked only to the motivation of the employer for the reduction and the equity of the application to the employees.\(^{240}\) Further, an employer who self-funds its health care plan may limit benefits to employees with HIV.\(^{241}\)

AIDS is a disease that must be controlled without the transgression of individual rights. AIDS and HIV sufferers are disabled and are legally protected from employment discrimination. The HIV-infected employee may be discharged, but only after it is shown that he or she can no longer perform the essential elements of the position with reasonable accommodation.


\(^{240}\) Id. at 408 (holding that employers may discriminate in the creation, alteration, or termination of employee benefit plans among category of diseases, provided that the same plan is applied to all employees).
