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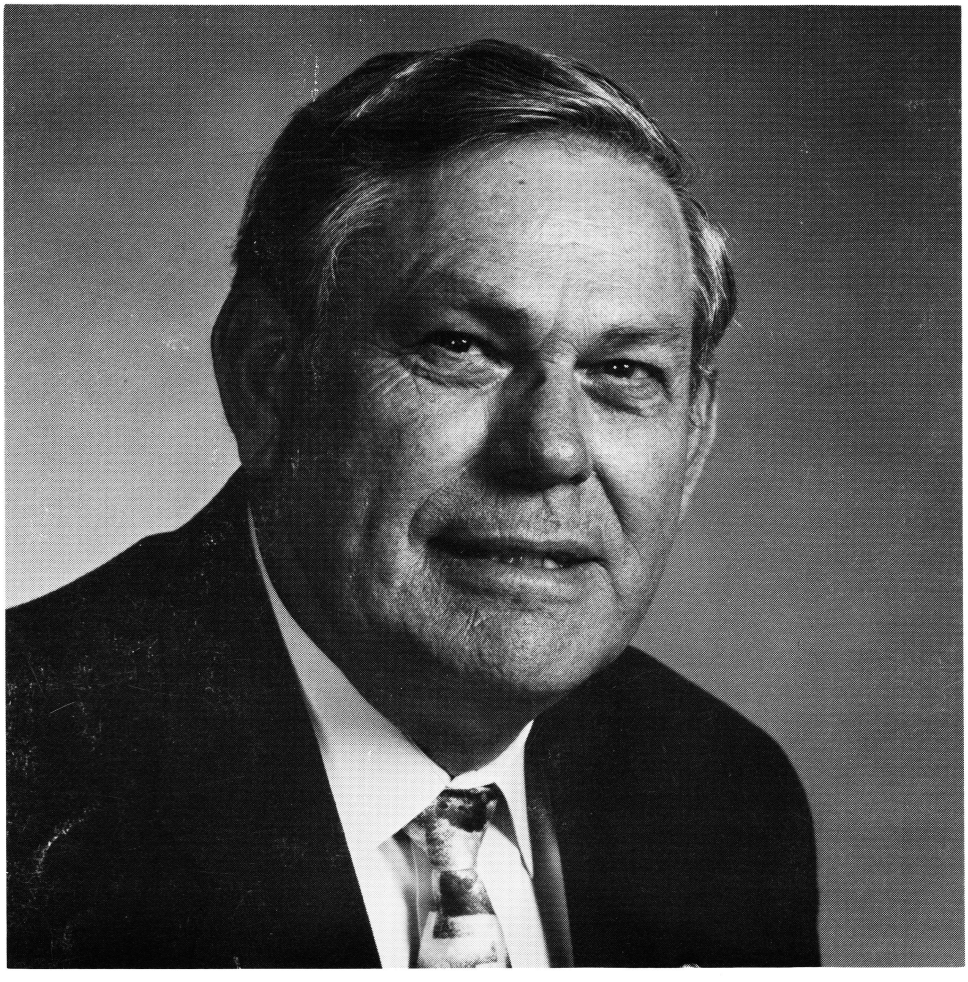

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AIDS and the ADA: Maneuvering Through a Legal Minefield

By Charles Alan Krugel

The Americans with Disabilities Act of 1990 (the Act or ADA) [1] is a legal mine field for job applicants and employers alike because of the confusing federal regulations and guidelines and the lack of interpretive case law. This article will discuss how the ADA will affect employers and employees and, by examining the hiring process of a fictional applicant, point out the difficulties for both, but it will focus on the employer's perspective, the purpose being to describe what an employer should or should not do when dealing with an AIDS-infected individual in the workplace.

The first half of the article will examine federal case law and statutes dealing with AIDS and employment discrimination. Here, the relevant statutes are the Rehabilitation Act of 1973 [2] and the ADA. The cases will later be incorporated into an analysis of a fictional applicant (Matt) and employer (Beldar). ADA will be emphasized because covers a wide range of disabled individuals and provides substantial remedies.[3] Moreover, due to the intent of Congress and the President to make a strong federal commitment to civil rights for all disabled individuals,[4] the Act will have far-reaching ramifications.

The ADA will revolutionize the way society perceives HIV- and AIDS-infected individuals. The ADA is a hybrid of the Rehabilitation Act of 1973 and its interpreting regulations and cases. But the ADA is broader in coverage and in remedies available.[5] Furthermore, the Act has some similarities to Title VII of the Civil Rights Act of 1964 [6] because employment discrimination on the basis of being handicapped is illegal.[7] Also, the Act requires that reasonable accommodations be made for infected applicants or employees.[8]

AIDS is currently the most feared and misunderstood disease in America. This is due to a myriad of factors: (a) AIDS is a communicable disease; (b) AIDS results in severe debilitation or death; (c) there is no vaccination or cure; (d) the number of those contracting the disease is increasing; and (e) AIDS was first brought to America by homosexuals. In a society where homosexuality is perceived as immoral and/or abnormal, there is a mystique that if you have AIDS then you are a homosexual and therefore practice immoral behavior and/or are abnormal. However, current research proves that an individual's sexual orientation is irrelevant. Heterosexuals can transmit the disease to each other. The relevant factors

[1] Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 42 USCA 12101 et seq. West, 1990).

[2] Rehabilitation Act of 1973, 29 USC 701 et seq. as amended by P.L. 101-336 (1990), 104 Stat 327.

[3] 42 USCA 12102(2)(A).

[4] 42 USCA 12101(b).

[5] Renee L. Cyr, Note, "The Americans with Disabilities Act: Implications for Job Reassignment and the Treatment of Hvpersusceptible Employers," 57 *Brook. L. Rev.* 1237, 1258 (1992).

[6] Id. at 1237.

[7] Id.; 42 USCA 12112(a) and (b).

[8] 42 USCA 12112(b)(5)(A).

are an individual's sexual and lifestyle practices.

Anyone, including non-sexually active people, can catch the virus by means other than sex (e.g., blood transfusions, organ transplants, or shared syringes). Probably the biggest fear is that the virus is still incurable, and all treatments of the disease seem only to stall the symptoms of full-blown AIDS. Statistics indicate that through 1981, the year the disease was first found in the United States, 164 people had died from AIDS. In 1990, the death toll reached 26,300.[9] In 1993 alone, the number of AIDS-caused deaths is estimated to be between 53,000 and 76,000.[10] In 1991 there were 45,506 reported AIDS cases in the United States, an estimated 10 percent increase from 1990.[11]

In 1989, AIDS was the second leading cause of death for all males in 25 to 44 age bracket. AIDS is expected to be one of the five leading causes of death in women aged 15 to 44 in 1991.[12] Moreover, the numbers of infected individuals in the heterosexual populations for each sex are also increasing. As of March 1992, 12,881 individuals with the virus had acquired AIDS through heterosexual intercourse, a little more than 25% of the total number of those infected.[13] Clearly the numbers of infected and affected people are increasing.

Legal Background of AIDS and Employment Issues

There are currently no cases interpreting the ADA.[14] However, the forerunner of the ADA is the Rehabilitation Act of 1973.[15] There are numerous cases which interpret this with regard to AIDS and HIV. This discussion will briefly examine some of those which are relevant to employment relations.

School Board of Nassau County v. Arline[16] was the first federal declaration that certain communicable diseases are handicaps under the Rehabilitation Act. The Nassau County, Florida, high school system fired an elementary school teacher who was infected with tuberculosis.[17] The Supreme Court held that tuberculosis is a protected disability under Section 504 of the Rehabilitation Act.[18]

Under Section 504, the Court said that the teacher met the Act's definition of handicap. According to the Act, a handicapped individual is "any person who (a) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (b) has a record of such an impairment, or (c) is regarded as having such an impairment." [19]

On remand from the Supreme Court, the District Court held that terminating Arline because of her history of tuberculosis was based upon society's aggregate misconceptions about tuberculosis. The District Court awarded Arline back pay and benefits, for the period of her layoff. Furthermore, the court also ordered the equitable relief of either reinstatement or front pay (i.e., compensation from the point of reinstatement until retirement at age 65). Through expert testimony this was determined to be $768,724.[20]

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[9] Gary R. Noble, "How the Response to the Epidemic of HIV Infection Has Strengthened the Public Health System," U.S. Dept. Health and Human Services, *Pub. Health Rep. No. 106* at 609 (1991).

[10] Id.

[11] "From the Centers for Disease Control: Acquired Immunodeficiency Syndrome," 268 JAMA 713 (1992).

[12] Cited at footnote 9 above.

[13] Mary E. Guinan, *HIV, Heterosexual Transmission and Women*, 268 JAMA 520 (1992).

[14] Editor's Note: Since this article was written, there have been several ADA court decisions. See, e.g., *EEOC v. AIC Security Investigation, Ltd.*, 61 EPD ¶ 42,136 (DC Ill 1993).

[15] Cited at footnote 2 above.

[16] *School Board of Nassau County, Fla. v. Arline*, 480 U.S. 273 (1987). 42 EPD ¶ 36,791.

[17] Id. at 276.

[18] Id. at 289.

[19] Id. at 279.

[20] *Arline v. School Board of Nassau County*, 692 F. Supp. 1286, 1292-93 (M.D. Fla. 1988), 48 EPD ¶ 38,397.

Because AIDS was not at issue in this case, the Court did not decide whether an AIDS infected individual would be protected. However, the United States appeared as amicus curiae and requested a determination on this issue. The Court declined, but did say that "it would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment." [21] The cases following *Arline* have decided that AIDS is a protected handicap in such settings as the workplace and public schools.

Deferring to *Arline*, the 9th Circuit held that an AIDS infected high school teacher was handicapped under Section 504. *Chalk v. United States District Court Central District of California*[22] followed *Arline*'s rule for dealing with contagious diseases and Section 504. The court's rationale was based on an empirical examination of: (a) the nature of the risk (how the disease is transmitted); (b) the duration of the risk (how long is the carrier infectious?); (c) the severity of the risk (what is the potential harm to third parties?); and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.[23] When making determinations regarding these factors, courts should defer to expert medical and scientific knowledge and testimony. Moreover, courts should not consider baseless fears or misconceptions regarding communicable diseases.[24]

Through examination of expert medical testimony and the more than 100 medical journal articles submitted by Chalk, the 9th Circuit said that the risk of transmitting AIDS at the workplace was insignificant.[25] Furthermore, the court also said that once Chalk was reinstated the District Court would be in the best position to monitor Chalk's condition and supervise the implementation of any accommodations to insure the safety and health of Chalk and his students.[26] Thus, the court was placed in the position of policing the employer.

In *Cain and Barone, Trustee v. Joel Hyatt and Hyatt Legal Services*,[27] the Pennsylvania court held that an AIDS-infected lawyer was wrongfully discharged from his job due to his non-job related handicap.[28] Also, the court ruled that the defendant had violated the Pennsylvania Human Relations Act, an act very similar to the Rehabilitation Act, by discharging Cain.[29] The Pennsylvania Act adopts the Rehabilitation Act's definition of handicap. Consequently, the court held that AIDS is a handicap under state law.[30]

The court also explored what a "non-job related" handicap is. "A handicap or disability is 'non-job related' if it 'does not substantially interfere with the ability to perform the essential functions' of the position at issue." [31] Because the virus would soon render Cain incapable of performing his attorney functions, and due to the fact that his firm had taken actions to try to isolate Cain from co-workers and pander to their fears, the court declared that Cain's handicap had become job-related.[32] The court also ordered that, although Cain's condition had deteriorated, Hyatt could have taken measures to accommodate Cain.[33]

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[21] 480 U.S. at 282.

[22] *Chalk v. United States District Court Central District of California*, 840 F.2d 701 (9th Cir. 1988). 44 EPD ¶ 37,502.

[23] Id. at 705 (quoting *Arline*, 480 U.S. at 288).

[24] Id.; accord *Arline*, 480 U.S. at 288.

[25] 840 F.2d at 705-709.

[26] Id. at 711.

[27] *Cain and Barone, Trustee v. Joel Hyatt and Hyatt Legal Services, et al.*, 734 F. Supp. 671 (E.D. PA 1990).

[28] Id. at 685.

[29] Id.

[30] Id. at 678.

[31] Id. at 680 (quoting 43 Pa. Cons. Stat. Ann. Section 954(p) (West 1991)).

[32] Id. at 680.

[33] Id. at 681.

Pennsylvania's Act also followed the Rehabilitation Act in regards to reasonable accommodations. *Cain* says that an employer cannot discharge an AIDS-infected employee without giving him the opportunity return to work and perform his usual duties.[34] Furthermore, like *Arline*, *Chalk* and the Rehabilitation Act, *Cain* held that accommodations must be made in either the same job or in a job similar in duties and responsibilities to the employee's previous job. Moreover, the employer cannot just hide the employee away in the back room or attempt to force the employee to quit through the unreasonable addition or reduction of duties. This is because any actions taken by the employer, absent undue hardship or evidence that the handicap was job related, must be based on objective medical and scientific evidence and fairness to the individual. That is, the accommodations must objectively address the handicapping condition, not the subjective preconceived or misconceived notions or fears of coworkers or management.[35] Finally, pursuant to Pennsylvania's Act, the court awarded Cain damages totaling $157,888. This included backpay and interest, mental and emotional distress, and punitive damages.[36]

Leckelt v. Board of Commissioners of Hospital District No. 1[37] involved HIV testing. Here, the employer fired the plaintiff-nurse for failing to disclose the results of a privately conducted HIV test. The Fifth Circuit said that the employer's action was justified and that the employee was not protected by Section 504.[38]

Using the shifting burdens of proof test, adopted from Title VII, the court said that Leckelt was not protected by Section 504.[39] Even though Leckelt was regarded as having a handicap, he was not discharged solely for being handicapped. The Hospital had justified its reasons for requiring disclosure of the test results due to their need to insure the safety of Leckelt, coworkers and patients in this highly sensitive environment. The Hospital had a reasonable need to know just what Leckelt's condition was, so they could determine whether accommodations for Leckelt and for the Hospital should be implemented.[40] Furthermore, as a result of Leckelt's actions, the court held that Leckelt was not otherwise qualified, under Section 504, to perform his duties. Consequently the Hospital's actions were justified under Section 504.[41]

The final four cases are not employment cases but all involve AIDS-infected individuals successfully pursuing their rights under Section 504. The relevance of these cases is that, even in public school and in-patient drug rehab settings, courts construe Section 504 to permit HIV- or AIDS-infected individuals to matriculate with noninfected individuals. This is partly due to the possibility of transmission being remote, and the fact that effective accommodations can remove any chance of transmission.

In *Thomas v. Atascadero Unified School District*,[42] *Ray v. School District of DeSoto County*,[43] and *Martinez v. School Board of Hillsborough County, Florida*,[44] each district court ordered that the HIV- or AIDS-positive children could attend school with other school age children. In *Ray* and *Thomas*, pursuant to Section 504, the children were permitted to attend regular classes, while in *Martinez*, the seven-year-old mentally retarded

[34] Id. at 683.

[35] Id. at 682-84.

[36] Id. at 686.

[37] *Leckelt v. Board of Commissioners of Hospital District No. 1, et al.*, 909 F.2d 820 (5th Cir 1990), 54 EPD ¶ 40,223.

[38] Id. at 833.

[39] Id. at 825.

[40] Id. at 830.

[41] Id. at 830.

[42] *Thomas v. Atascadero Unified School District et al.*, 662 F. Supp. 376 (C.D. Cal. 1987).

[43] *Ray v. School District of DeSoto County et al.*, 666 F. Supp. 1524 (M.D. Fla. 1987).

[44] *Martinez v. School Board of Hillsborough County, Florida*, 692 F. Supp. 1293 (M.D. Fla. 1988).

AIDS-infected child was permitted, through court supervised accommodations, to attend a public special education school, with noninfected children of her age. The fourth case involved an HIV-positive individual being kicked out of an in-patient drug rehabilitation program.

In *John Doe v. Centinela Hospital*,[45] consistent with *Arline*, the District Court ruled that the Hospital could not place a blanket prohibition on HIV- and AIDS-infected people, solely on the basis of their condition, unless the defendant could prove that any accommodations would prove to be unreasonable, or that the risk to others could outweigh any precautions taken or accommodations made. Consequently, the court denied the defendant's summary judgment motion on these issues.[46]

Generally, the cases dictate that employers must incorporate objective scientific and medical evidence into their decisions, or face being liable for discrimination. The courts will punish those employers who pander to the baseless fears of coworkers or management, without factoring in objective evidence. Moreover, an employer must make reasonable and good faith efforts to accommodate an infected employee. And, absent undue hardship or lack of job relatedness, courts will balance the equities of allowing an infected employee to stay on the job with the realistic possibility of transmission. Because the pragmatic possibility of transmission in the workplace is almost zero, the courts will usually find for the employee. Finally, because the possibility of workplace transmission is so low, and if reasonable accommodations are not implemented, it is highly unlikely that the courts will permit an employer to discharge or "hide away" an infected employee, solely of the basis of her condition.

Issues needing further exploration include what if any role customer's perceptions play in this balancing act, and just how far an employer needs to go to accommodate an AIDS infected employee or applicant? Furthermore, just what role does the ADA play in this, that the Rehabilitation Act does not cover? The following sections will begin to deal with these and other related issues.

Overview of AIDS and the ADA

With special implications for AIDS-infected individuals, one of the ADA's goals addresses the problem that "[the] continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.[47]

The Act covers "individuals with disabilities." [48] Disability defined under the Act is the same definition as used by the Rehabilitation Act: "[D]isability means, with respect to an individual - (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." [49]

Now the question to answer is where in the Act does it mandate that HIV or AIDS is a disability? Nowhere. However, strong precedent from the Rehabilitation Act, *Arline, Chalk*, and the other cases, have already declared that HIV and AIDS are handicapping disabilities. Furthermore, in late February 1991, the Equal Employment Opportunity Commission (EEOC) issued proposed regulations for the ADA.[50] Under the heading

[45] *John Doe v. Centinela Hospital. et al.*, No. CV 87-2514 PAR, 1988 U.S. Dist. LEXIS 8401 (C.D. Cal. July 7,1988).

[46] Id. at 31-32.

[47] 42 USCA 12101(a)(9).

[48] 42 USCA 12101(b)(1).

[49] 42 USCA 12102(2).

[50] Equal Employment Opportunity Commission Proposed Rulemaking for the Americans with Disabilities Act of 1990, 56 Fed. Reg. 8578 (1991), codified at 29 CFR 1630, see CCH EMPLOYMENT PRACTICES GUIDE ¶ 4903.

"Frequently Disabling Impairments," the EEOC said: "The ADA, like the Rehabilitation Act of 1973, does not attempt a 'laundry list' of impairments that are 'disabilities' . . . There are, however, a number of impairments that far more often than not result in a disability. The following . . . is provided to indicate the types of impairments that usually are disabling . . . [A]n individual is an individual with a disability only if the impairment impacts on the individual to such a degree that it substantially limits a major life activity. Commonly disabling impairments include HIV infection [and] AIDS." [51]

The Act also mandates that the federal government will play a centralized role in carrying out the Act's provisions.[52] The role of the federal government has been implemented through the Act's edict that the Equal Employment Opportunity Commission (EEOC) is authorized to enforce the Act, and to issue proposed interpretive regulations, just as it does for Title VII of the Civil Rights Act of 1964.[53]

With regards to AIDS, the "General Rule" of the Act is: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, . . . hiring [or] job training . . ." [54] A "covered entity" is "an employer, employment agency, labor organization, or joint labor-management committee." [55]

An "employer" is defined as private, state or municipal employers who employ 25 or more individuals (effective 1992), or who employ 15 or more employees (effective July 26, 1994). There are exceptions for part-time employees and the federal government.[56]

"Discriminate" is defined at great lengths in the Act, but it generally means treating a qualified handicapped individual differently solely on the basis of her condition.[57] A "qualified individual with a disability" is an individual who for our purposes is HIV- or AIDS-infected or is regarded as being so. But, the kicker is that this individual must be able to perform the "essential" job functions "with or without reasonable accommodations." [58]

"Essential job functions" can be determined by the employer, but it is essential, for purposes of potential litigation, that the employer be able to document just what the functions are. Such a medium as a written job description could communicate whether or not the employer believes these functions to be essential. Pragmatically, an adjudicatory body would have the ultimate say so, but an employer would be aiding her case through documenting the job description process.[59]

One of the key provisions of the Act, just mentioned, is "reasonable accommodations." Generally, the Act broadly defines accommodation as whatever necessary changes in the job or workplace, which enables an infected applicant to work.[60] The accommodation part is relatively simple. The tricky part is explaining what is reasonable.

An accommodation is reasonable as long as it does not "impose an undue hardship on the operation of the business of such covered entity." [61] Basically, "undue hardship" means that the accommodation would be unreasonable in terms of financial costs or workplace changes.[62]

[51] Id. at 8594; see also Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 CFR 1630.2(j) ("Other impairments, however, such as HIV infection, are inherently substantially limiting").

[52] 42 USCA 12101(b)(4).

[53] 42 USCA 12116 and 12117.

[54] 42 USCA 12112(a).

[55] 42 USCA 12111(2).

[56] 42 USCA 12111(5)(A)-(B).

[57] 42 USCA 12112(b).

[58] 42 USCA 12111(8).

[59] Id.

[60] 42 USCA 12111(9)(A) and (B).

[61] 42 USCA 12112(b)(5)(A).

[62] 42 USCA 12111(10)(A) and (B).

This is a broad exception and, just like its counterpart in the Rehabilitation Act, would require interpretation from the EEOC or the courts on a case-by-case basis. More on "undue hardship" will be discussed later.

Although both acts provide similar coverage and protection, there are fundamental differences in terms of enforcement and remedies, coverage, reasonable accommodations, and employer defenses.

Under Section 504 of the Rehabilitation Act, an individual has a private right of action, and remedies include back pay and attorney's fees.[63] The aggrieved party can get the same remedies set forth in Title VII of the Civil Rights Act of 1964.[64] Moreover, under the Civil Rights Act of 1991, the ADA also provides for attorney's fees and compensatory and punitive damages.[65] There are also significant differences in coverage under both acts.

Under Section 504 of the Rehabilitation Act, any recipient of federal funds is covered, and there are no de minimus requirements.[66] Under the ADA employers with 25 or more employees are covered. But after July 26, 1994, employers with 15 or more employees will be covered.[67]

With regards to reasonable accommodations, the language of the ADA is more comprehensive than that of the Rehabilitation Act. However, due to case law broadening the accommodation standards of the Rehabilitation Act, both acts have essentially the same requirements. With respect to HIV/AIDS, these standards will be explored in the next section, which applies the ADA to a hypothetical employment situation.

The Fictitious Applicant and Employer

Matt is applying for a food processing/handling position with Beldar Corporation. Beldar produces cheese flavored snacks. Matt is 34 and is married with children. In 1987 he was in a car accident in which he lost enough blood to require transfusions. The blood used was tainted with the HIV virus. After hearing news reports about HIV contaminated blood supplies Matt decided to submit for testing. Matt was diagnosed with HIV in 1989. He has yet to develop AIDS.

Matt was concerned about insurance coverage at his old job. He had worked for this company for 10 years and had believed he could trust his supervisor with his concern. When management discovered his condition they immediately fired him. Matt was embarrassed, humiliated, and so scared that management might tell his former coworkers, he immediately moved his family to another state. Matt has put this incident behind him and is ready to start over again. He has kept up to date with recent legislation and research and development in AIDS treatments and cures. Now he realizes that he can be an effective employee at most any work site.

Beldar Corporation is in a small company town. Beldar currently employs 450 non-supervisory personnel who work three shifts. Beldar is covered under the Act because it meets the requisite number of employees for coverage.[68] Beldar is also covered because it is "engaged in an industry affecting commerce,"[69] as required by the Act. Most of Matt's neighbors and friends work for Beldar or have jobs resulting from Beldar's existence. His friends, who have no knowledge

[63] 29 USC 794.

[64] 42 USCA 12117(a).

[65] Id.; Civil Rights Act of 1991, Pub. L. No. 102-106, Section 102, 105 Stat. 1071, 1073 (1991).

[66] 29 USC 794.

[67] 42 USCA 12111(5)(A).

[68] Id.

[69] 42 USCA 12111(5)(A) and (7). (7) refers to Title VII of the Civil Rights Act of 1964, 42 USC 2000e(h), which states: "The term 'industry affecting commerce' means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry 'affecting commerce' within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 . . . ."

of Matt's condition, helped him get an interview at Beldar.

Beldar's application process for food processing positions is relatively simple. The process starts with a paper application which asks for general information like name, references and work history. The application also asks whether the applicant is a member of a race or handicap class. In regards to handicap, the application only asks whether the applicant is physically unable to perform certain jobs.

Matt also has to undergo a face-to-face interview with a member of the plant's human resources department. This twenty-minute interview's purpose is to find out whether or not the applicant will fit in with the other rank and file employees. The human resources representative interviewing Matt will ask about his job history, and will ask questions about any peculiarities appearing in his application. Typically, if the human resources representative likes what she sees she may make an offer the day of the interview, or Beldar may wait a few days should it decide to check on references.

Matt has some knowledge of the ADA and the requirement that an employer needs awareness of his handicap so accommodations can be made. Therefore, if asked, Matt has decided to disclose that he is handicapped on his application. However, he will not discuss any treatment or medication he is receiving. Furthermore, Matt will only disclose his HIV infection if asked during the interview.

We know that Matt is HIV-infected, but Beldar does not know this. Perhaps the first question which needs to be asked is: Does Matt have a duty to Beldar to disclose his condition? No. But, if Matt does not disclose that he at least has a handicap, then Beldar would have no notice of such disability and, therefore, could not be liable for any subsequent damages. Beldar, however, could make limited inquiries of Matt under the Act.

First, it is key to note that the Act prohibits discrimination "in regard to job application procedures [or] the hiring" of applicants.[70] This prohibition also includes recruitment.[71] Also, according to EEOC regulations, employers cannot "use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability . . ., on the basis of a disability, unless the standard, test or other selection criteria as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity." [72]

However, the Act does permit Beldar to "make preemployment inquiries into the ability of an applicant to perform job related functions." [73] Also, the Act lets Beldar adopt certain defenses to charges of discrimination. The defenses relevant to Beldar are job-relatedness and business necessity, direct threat, and a food handlers exemption.

The defense of job relatedness and business necessity may apply where the job cannot be performed, even with reasonable accommodation, and where the performance or selection criteria that prevent an individual with a disability from getting that job "has been shown to be job related and consistent with business necessity." [74] This exception is also consistent with § 504 of the Rehabilitation Act.[75] Furthermore, the regulations direct employers to ensure that selection criteria and the actual abilities utilized are consistent.[76] Moreover, the Act says that the "term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the

[70] 42 USCA 12112(a).

[71] 29 CFR 1630.4(a).

[72] 29 CFR 1630.10.

[73] 42 USCA 12112(d)(2)(B).

[74] 42 USCA 12113(a).

[75] 29 CFR 1630.10.

[76] Id.

health or safety of other individuals in the workplace." [77]

"Direct threat" means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions on the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available evidence. Furthermore, Beldar cannot factor in generalized and irrational fears or misunderstandings. In determining whether an individual poses a direct threat, the factors to be considered include: "(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm." [78] Not coincidentally, these are the same four factors utilized in *Arline* and *Chalk*.[79]

Especially relevant to Beldar is a narrowly applied defense which permits disqualification of applicants, with certain communicable diseases, from food handling positions.[80] However, according to the EEOC, "[t]he Department of Health and Human Services is to prepare a list of infectious and communicable diseases that are transmitted through the handling of food. If an individual with a disability has one of the listed diseases and . . . applies for a position in food handling, *the employer must determine whether there is a reasonable accommodation that will eliminate the risk of transmitting the disease* through the handling of food. If there is an accommodation that will not pose an undue hardship, and that will prevent the transmission of the disease through the handling of food, the employer must provide the accommodation to the individual. The employer, under these circumstances, would not be permitted to discriminate against the individual because of the need to provide the reasonable accommodation and would be required to maintain [or employ] the individual in the food handling job. If no such reasonable accommodation is possible, the employer may refuse to assign . . . the individual to a position involving food handling. This means that if such an individual is an applicant for a food handling position the employer is not required to hire the individual." [81]

This is a rather ambiguous provision due to the EEOC's addition of the reasonable accommodation caveat. The legislative history of this defense indicates that the food handling provision was proposed by the Senate as a loophole to appease the restaurant industry, which fears customer perceptions, whether rational or not.[82] However, the House of Representatives made clear "that a reasonable accommodation must be made if such accommodation will eliminate the risk of the disease being transmitted in the particular job." [83]

What the Employer Should Do

What do these statutory defenses mean for Beldar? The application form should be general and not overly intrusive. However, Beldar also needs to have notice of any applicant's disability so that it may reasonably accommodate that individual. My suggestion is that Beldar states, in its application, that the ADA requires a qualified employer to make reasonable accommodations for handicapped applicants and employees. Therefore, it has a need to know whether or not an applicant or em-

[77] 42 USCA 12113(b).

[78] 29 CFR 1630.2(r).

[79] 42 USCA 11213(d)(2).

[80] 480 U.S. at 288; 840 F.2d at 705.

[81] 29 CFR 1630.16(e) (emphasis added).

[82] 136 Cong. Rec. 59536 (July 11, 1990) (letter to Senator Jesse Helms from the National Restaurant Association).

[83] H.R. Conf. Rep. No. 101-596, 101st Cong., 2d Sess. 58 at 62 (1990).

ployee is handicapped, so that it may make such accommodations.

Does this mean that Beldar should try to find out the exact nature of the handicap? Can it ask whether an applicant has a physical or mental disability? Should it ask if the condition is communicable? Could Beldar ask exactly what the handicap is?

The answer to all of the above is "No." The application questions should be general and nonspecific. Also, Beldar should not focus on the disability, but should concentrate on the accommodations needed and what that applicant can presently do or could do with the right accommodations. It seems that under the EEOC regulations any questions which go beyond what is needed to put Beldar on notice may be discriminatory. Moreover, the EEOC interpretive guidelines state: "An employer cannot inquire as to whether an individual has a disability at the pre-offer stage of the selection process. Nor can an employer inquire at the pre-offer stage about an applicant's workers' compensation history. Employers may ask questions that relate to the applicant's ability to perform job-related functions. However, these questions should not be phrased in terms of disability . . . Employers may ask about an applicant's ability to perform both essential and marginal job functions. Employers, though, may not refuse to hire an applicant with a disability because the applicant's disability prevents him or her from performing marginal functions." [84]

An example of what Beldar could ask is: The Americans with Disabilities Act of 1990 requires that we, as a covered employer, not discriminate against individuals with handicaps. Moreover, the Act requires us to make reasonable accommodations for otherwise qualified handicapped individuals. So that we may accommodate a disabled employee we must know that an individual cannot perform the essential functions of a job. A disabled individual, as defined by the Act, has either: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual (employment/work is considered a major life activity under the Act); (B) a record of such impairment. That is, the individual has a history of or has been misclassified as having a disability; or (C) has been regarded as having a disability. If you believe that you fit the above description, or know that you are disabled, then please briefly discuss what physical or mental job related functions you would be limited at or unable to perform. Examples include not being able lift heavy objects, unable to work for periods of time such as exceeding two hours in length, or unable to work in tight or enclosed spaces. No further information is required. Nor will we inquire through an interview what your exact condition is.

Will this example work? In spite of the Act's vagueness, relating to employer concerns in the application and hiring process, I believe it could. This is due to the fact that it follows the Act's definition of disability and is a good faith attempt to put Beldar on notice as to whether an accommodation will have to be made. Moreover, through the interview Beldar can further inquire about the general nature of the disability. For example, Beldar can inquire whether or not Matt is receiving treatment or if Matt has medical evidence to support his answers. Although I suggested that Beldar not inquire through the application or interview what the exact nature of the handicap is, could it still discover such information by requiring a preemployment medical exam, or requiring some type of medical release?

The Act mandates that employers not require a medical exam or make inquiries as to whether a job applicant is disabled.[85] However, as I previously stated, an employer can make a preemployment in-

[84] 29 CFR 1630.13(a).

[85] 42 USC 12112(d)(2)(A).

quiry "into the ability of an applicant to perform job-related functions." [86] Moreover, the regulations state that an employer can require an "applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions." [87] All of this points to Beldar finding out that Matt has some sort of disability anyway, with or without a medical exam or preemployment inquiry. Medical exams are also permissible under certain circumstances.

Medical examinations are permitted: (a) where they are administered to all employees;[88] (b) only "after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant;" [89] (c) all medical information regarding the applicant is kept in a separate file and great care is kept to maintain confidentiality of these records;[90] and (d) the reasons for having an examination or making the inquiry are "job-related and consistent with business necessity." [91] Consequently, there would be no legal way for Beldar to discover Matt's infection during the application process under the Act, unless Matt voluntarily discloses such information.

Of importance is the potential for Beldar to use what may be questionable or even coercive methods to achieve disclosure. Beldar could tell Matt that they need to know if he has a communicable disease in order to make necessary accommodations. However, could Beldar specifically ask or force disclosure of HIV or AIDS infection? Probably not under these circumstances. It would be one thing to find out about communicable diseases, because this is a general inquiry and it seems necessary for the purposes of notice and protecting other employees. However, if Matt discloses his HIV infection, or even that he has a communicable disease, and Beldar refuses to hire him for this reason, Matt would have a cause of action for discrimination. This is because once the applicant or employee is branded disabled, and is discriminated against for being disabled, he is protected. Once the application process is finished, the necessary inquiry becomes, what can Beldar ask during the interview?

If Matt answered in his application that he has no physical or mental limitations then Beldar can ask the same question again, but it cannot get more specific. Legally, Beldar is safe to assume that if Matt says he is not limited then he is telling the truth and Beldar would not be held liable for incidents regarding potential HIV transmission. Consequently, if Matt never discloses his condition then Beldar is not likely to be held liable for discrimination under the ADA. This conclusion assumes that Beldar gave Matt reasonable opportunities for disclosure without the threat of discrimination.

However, this does not mean that Beldar could deny Matt any opportunities for disclosure as a subterfuge for discrimination. This is because in a case of employment discrimination Beldar's personnel practices would be called into question, and any suspect practices resulting in discrimination would be held accountable under the Act. The rationale for this is that the Act's definition of "discriminate" includes: "limiting . . . a job applicant . . . in a way that adversely affects the opportunities or status of such applicant . . . because of the disability of such applicant . . .;" [92] and "utilizing . . . methods of administration (A) that have the effect of discrimination on the basis of disability or (B) that perpetuate the discrimination of others who are subject to common administrative control." [93]

[86] 42 USC 12112(d)(2)(B).
[87] 29 CFR 1630.14(a).
[88] 42 USC 12112(d)(3)(A).
[89] 42 USC 12112(d)(3).
[90] 42 USC 12112(d)(3)(B) (emphasis added).
[91] 42 USC 12112(d)(4)(A).
[92] 42 USC 12112(b)(1).
[93] 42 USC 12112(b)(2).

If Matt discloses his handicap, then explain to him that under the ADA you may be required to make accommodations for him. In order to make accommodations you need to know the nature of his handicap. By "nature," what I mean is whether the handicap is mental or physical, and just what the characteristics are. Not the name of the condition.

What happens if Matt says that he has some condition Beldar believes is related to AIDS? Beldar may perceive their hands as being tied and might try some underhanded tactics. For example, Beldar may decide to hire Matt to avoid discrimination in hiring practices, then disclose his condition to a few "choice" employees, so that they may "convince" Matt that he does not fit in with Beldar. The problem with this practice is that it results in discrimination because a court may find that Matt was constructively discharged by Beldar. This would result because Beldar was in the best position to supervise and educate its employees and prevent ignorance and fear from controlling company policy. But, if Beldar hires Matt and does make accommodations, then the incumbent employees might associate the timing or location of the changes with Matt's hiring. This may cause them to believe that something is wrong with Matt, further leading to fear and confusion among the employees.

Undue Hardship

What happens if Matt comes right out and says that he has HIV? Beldar will have to make the appropriate accommodations or make sure that any adverse decision towards Matt is based strictly on the undue hardship of the accommodations or job relatedness and business necessity.

"Undue hardship" is defined as: "an action requiring significant difficulty or expense, when considered in light of the factors set forth . . . [F]actors to be considered include—(i) the nature and cost of the accommodation needed under this Act; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity . . ." [94]

This explanation is similar to the definition for direct threat. However, these explanations do little to help Beldar. The EEOC's interpretive regulations offer more assistance. The regulations state that the concept of "undue hardship" is not just limited to monetary issues. " 'Undue hardship' refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business." [95] However, even if Beldar could show that the cost of accommodation would impose an undue hardship, it would still be required to provide the accommodation if the funding is available from another source, e.g., a State vocational rehabilitation agency, or if Federal, State or local tax deduction or tax credits are available to offset the cost of the accommodation. If the employer or other covered entity receives, or is eligible to receive, monies from an external source that would pay the entire close of the accommodation, it cannot claim cost as an undue hardship . . . To the extent that such monies pay or would pay for only part of the cost of accommodation, only that portion of the cost of the accommodation that could not be recovered—the final net cost to the entity—

[94] 42 USC 12111(10)(A) & (B).

[95] 29 CFR 1630.2(p).

may be considered in determining undue hardship." [96]

Now, the preeminent questions are: 1) Does Beldar meet the undue hardship qualifications? and 2) What are the accommodations that Beldar would need to make for Matt?

Because Matt is applying for a food handling position, perhaps the most obvious accommodation would be protective gloves. Also, it would be advisable to keep Matt away from any sharp and moving objects, such as cutting blades or rotors. These accommodations in and of themselves seem relatively cheap. In fact, most food manufacturing facilities already require gloves and other protective wear. Moreover, keeping Matt away from moving or sharp objects should be simple. But what if other employees become afraid? The EEOC interpretive guidelines and the case law answer this question.

The regulations state that Beldar "would not be able to show undue hardship if the disruption to its employees were the result of those employees[']' fears or prejudices toward the individual's disability and not the result of the provision of the accommodation." [97] Nor would Beldar be able to prove undue hardship "by showing that the provision of the accommodation has a negative impact on the morale of its other employees but not on the ability of these employees to perform their jobs." [98] Case law interpretive of the Rehabilitation Act of 1973 also discusses this problem and restates the above guidelines. Employers cannot factor into undue hardship or business necessity baseless fears or misunderstandings.[99] Consequently, it seems unlikely that Beldar would be able to document undue hardship.

Another option that Beldar might try in accommodating Matt is to see if he would take a position of comparable pay in any other area of the plant. The Act's definition of reasonable accommodation includes "reassignment to a vacant position." [100] However, "[r]eassignment is not available to 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 accommodation." [101] Consequently, under the Act, Beldar cannot try to shift Matt to another position to get him to refuse the option. However, if Beldar attempts to accommodate Matt, and if Matt refuses to accept the reasonable accommodations for the food handling positions, then Beldar can legally decline to hire him.

Matt would not be required to accept any accommodations which are deemed reasonable. However, by refusing to do so, if Matt cannot perform the essential functions of that job, then he "*will not* be considered a qualified individual with a disability." [102] Does this leave Beldar a loophole for trying to use coworker fears and potential ostracism to scare Matt into not accepting a job offer? As I said before, probably not. If Matt could prove that Beldar did nothing to stem these fears, such as making the appropriate reasonable accommodations and educating their employees, then Beldar would probably be liable for discrimination. The case law previously examined supports the fact that ignorance and misunderstanding are not legitimate grounds for denial of employment. But, what can Beldar or other employers do to prevent the indoctrination of ignorance, fear and misunderstanding among its workforce? Below are some suggestions.

First, Beldar needs to determine what goals to accomplish by educating its em-

[96] Id.

[97] 29 CFR 1630.15(d).

[98] Id.

[99] 480 U.S. at 284-285; 840 F.2d at 705-706; 734 F. Supp. 681-682.

[100] 42 USCA 12111(a)(9)(B).

[101] 29 CFR 1630.2(o).

[102] 29 CFR 1639.9(d) (emphasis added).

ployees. These goals can range from such simplistic goals as avoiding charges of discrimination, to the more complex goals like implementing an AIDS policy for hiring, treating, and insuring AIDS-infected individuals. The policy requiring the least effort is to distribute information contained in pamphlets or other sources to employees. In conjunction with this it would be even better to have company managers or supervisors talk with employees about HIV/AIDS. However, this would require Beldar to educate its managers and supervisors on the disease. Furthermore, the lasting effects of such actions are speculative, and could be of short tenure and of little use in the long haul, if done only once. Perhaps the most comprehensive policy would reflect the use of periodic workshops and education seminars along with a stern and consistent company commitment to combating ignorance and fear, and focusing on education and understanding. And even one step further would be to incorporate an insurance and benefits package encompassing the coverage of communicable diseases including HIV and AIDS.

[The End]

Filing of LMSA Forms Postponed

The Labor Department postponed the effective date of revisions to annual financial reporting requirements and forms under the Labor-Management Reporting and Disclosure Act (also known as the Landrum-Griffin Act) until December 31, 1994, which means that unions are not required to use the revised forms until Jan. 1, 1995. Until then, unions must file their reports on the preexisting forms. The department is also reevaluating the October final rules to determine whether modification or rescission of some or all of the revisions may be appropriate. The new financial reporting rules require allocation of union expenditures among functional categories such as contract negotiation and administration, organizing, strikes, and political activities. They also permit the use of the accrual method of accounting for completing the forms; raise the annual receipts limit for filing the simplified Form LM-3 from $100,000 to $200,000; and provide for a new, abbreviated annual financial report, Form LM-4, for small unions.