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Confusion in the Courts: What to Do with HIV-Positive and AIDS-Infected Public Employees

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CONFUSION IN THE COURTS: WHAT TO DO WITH HIV-POSITIVE AND AIDS-INFECTED PUBLIC EMPLOYEES

I. INTRODUCTION

Acquired Immunodeficiency Syndrome[1] is an epidemic that has gripped the nation in increasing proportions. Society at large is fearful of this deadly disease. Despite the emphasis on the need for further education concerning the transmission of AIDS,[2] misconceptions persist.[3] Many believe that those who have contact with the public in certain settings should mandatorily be tested for AIDS and the virus that causes AIDS, Human Immunodeficiency Virus.[4] Some cities have mandatory AIDS testing for certain government employees.[5] City officials hope that testing will restore faith in community services by

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[1]Hereinafter AIDS.

[2]*See* Anonymous Fireman v. City of Willoughby, 779 F. Supp. 402, 405 (N.D. Ohio 1991); Scott Burris, *Education to Reduce the Spread of AIDS, in* AIDS LAW TODAY 82, 82 (Scott Burris et al. eds., 1993).

[3]*See infra* IV.B. *AIDS in the Courtroom* and accompanying notes.

[4]Hereinafter HIV. Previous synonyms for HIV are HTLV-III, type 3, and lymphadenopathy associated virus. Helena Brett-Smith, M.D. & Gerald H. Friedland, M.D., *Transmission and Treatment, in* AIDS LAW TODAY, *supra* note 2, at 18, 21.

[5]*See, e.g., Anonymous Fireman*, 779 F. Supp. 402 (N.D. Ohio 1991).

providing physically healthy emergency personnel. Mandatory testing raises a question whether these cities can have such testing and manipulate employees' positions without violating federal legislation designed to reduce discrimination against persons with disabilities. Another question raised is whether the government can be held civilly or criminally liable for the acts of an employee who is infected with HIV or AIDS.

This paper is divided into five sections. Part one deals with background information on AIDS. Part two discusses current federal legislation. Part three examines how AIDS falls under federal legislation and case law, including the resulting impact of hiring AIDS-infected individuals. Part four evaluates possible violations of the Fourth Amendment resulting from the federal legislation and from an employer's mandatory testing of employees for the HIV virus. The last section discusses the government's liability when a public employee transmits AIDS to another individual during the course of employment.

II. BACKGROUND ON AIDS

AIDS has been in the public eye for over a decade.[6] At first, AIDS was categorized as a disease of homosexuals and drug users.[7] As a result, society at large was unconcerned about the disease spreading to the majority of the population. Moreover, society's general disapproval of homosexuality led to discrimination against those who contracted AIDS.

The AIDS disease is the result of HIV attacking human cells and then integrating into the host cell.[8] The time between initial infection and development of antibodies to HIV is called the "window period."[9] Individuals can be infected for months or even years before HIV makes its presence physically known.[10] The only sign of infection during the window period is a positive test for the HIV antibodies.[11] The presence of the antibody does not

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[6] Abe M. Macher, *HIV Disease/ AIDS: Medical Background, in* AIDS AND THE LAW 1 (Wiley Law Publications Editorial Staff eds., 2d ed. 1992).

[7] During the early 1980's, there were reports that "apparently previously healthy male homosexuals," intravenous drug abusers, and recipients of blood transfusions had "profound defects in their immune systems." *Id.* at 1-2.

[8] Harold Jaffe, *The Application of Medical Facts to the Courts, in* AIDS AND THE COURTS 7, 8 (Clark C. Abt & Kathleen M. Hardy eds., 1990).

[9] *Id.*

[10] *Id.*

[11] *Id.* Currently, there are two main tests used for determining whether or not an individual is HIV-positive. One is the ELISA (enzyme-linked immunosorbent assay), which tests for general antibodies to the HIV virus. The second is the Western blot, which detects specific HIV antibodies and is thus more accurate. Both tests detect the antibody produced by the immune system once the person has been exposed to HIV. Macher, *supra* note 6, at 4.

stop the progression of HIV.[12] Normally, the immune system "fights off infections by agents such as bacteria, viruses, fungi, protozoa, and other parasites."[13] However, since the immune system does not function effectively when an individual is infected with HIV, that individual is susceptible to numerous diseases not normally seen in individuals with healthy immune systems.[14]

Over the past decade, HIV has spread at uncontrollable rates while infecting new groups of people, such as young heterosexual females.[15] By 1991, between 1.5 and 2 million Americans were infected with the virus.[16] By the year 2000, an estimated 40 million people worldwide will be infected with HIV.[17] Moreover, 222,740 cases of AIDS were reported to the World Health Organization by February 1990, although the actual number of cases was probably closer to 600,000 due to underreporting.[18]

HIV and AIDS are spread only through very intimate contact. Currently, transmission can occur in three known ways:[19] "(1) through intimate sexual contact with an infected person; (2) through invasive exposure to contaminated blood or certain other bodily fluids; [and] (3) through prenatal exposure (i.e., from mother to infant)."[20] In order for infection to occur, the bodily fluids[21] of the infected individual must come into contact with the blood or mucous membranes[22] of the uninfected individual.[23] Once infected with HIV, a person's immune system is weakened, thereby leaving the victim susceptible

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[12]Jaffe, *supra* note 8, at 9.

[13]Macher, *supra* note 6, at 2.

[14]Some of the diseases that AIDS-infected individuals are unable to resist include pneumonia, candidiasis, toxoplasmosis, meningitis, and Kaposi's sarcoma. 1 J. E. SCHMIDT, M.D., SCHMIDT'S ATTORNEYS' DICTIONARY OF MEDICINE A-138 (1995).

[15]Pat Litchy, Note, *Mandatory HIV Testing of Health Care Professionals*, 13 HAMLINE J.PUB. L. & POL'Y 347, 351 (1992) (citing National Commission on AIDS report).

[16]779 F. Supp. at 411.

[17]Macher, *supra* note 6, at 17 (based on World Health Organization prediction).

[18]NIDA Workgroup Report, *AIDS/HIV Infection and the Workplace* 1 (1990). In New York City, AIDS is the third leading cause of death. *Id.* at 1. In the United States, for males between the ages of 25 and 45, it is the second leading cause of death. Laura Pincus, *The Americans with Disabilities Act: Employers' New Responsibility to HIV-Positive Employees*, 21 HOFSTRA L. REV. 561, 565 (1993) (based upon CDC statistics).

[19]Chalk v. U.S. Dist. Court Cent. Dist. of Cal., 840 F.2d 701, 706 (9th Cir. 1988).

[20]*Id.*

[21]Only blood, semen, or vaginal secretion are considered bodily fluids. Brett-Smith & Friedland, *supra* note 4, at 23.

[22]The mucous membranes include the mouth, eyes, urethra, vagina, or anus. *Id.*

[23]Direct contact between intact skin and infected body fluids does not transmit the virus and is therefore "not a risky exposure." *Id.* at 24.

to "so called 'opportunistic infections,'"[24] which are often contagious and usually deadly diseases.[25] Most of these opportunistic infections, however, are not transmissible to persons with healthy immune systems.[26]

Even with this knowledge, society continues to discriminate against those who have HIV and AIDS. Often those who contract the virus are unable to obtain or continue employment, not because of the inability to work, but rather, because of discrimination.[27] As a result of this discrimination, individuals infected with either HIV or AIDS are considered disabled[28] and are protected from discrimination in the workplace by the Rehabilitation Act of 1973[29] and the Americans with Disabilities Act.[30]

III. APPLICABLE FEDERAL LEGISLATION

In order to deal with the continued discrimination against those with disabilities,[31] President George Bush signed into law the ADA, comprehensive legislation aimed at incorporating forty-three million disabled Americans[32] into the workforce.[33] The general principle of the Act forbids an employer from discriminating against an individual with a disability when that person is capable of performing the essential functions of the job,[34] either with or without reasonable accommodations for his impairment.[35] Disabled individuals are thereby able to become uniformly more independent and self-sufficient while

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[24] Opportunistic infection is defined as "[a]n infection that occurs because the patient's resistance is compromised by medical or surgical treatment, malnutrition, climatic stress, etc." 3 SCHMIDT'S ATTORNEYS' DICTIONARY OF MEDICINE, *supra* note 14, at 0-68.

[25] 840 F.2d at 706.

[26] *Id.* at 706 n.8.

[27] Matthew E. Turowski, Note, *AIDS in the Workplace: Perceptions, Prejudices and Policy Solutions*, 20 OHIO N.U. L. REV. 139, 140 (1993).

[28] *See Chalk*, 840 F.2d 701.

[29] Hereinafter Rehabilitation Act. *See, e.g., Chalk*, 840 F.2d 701.

[30] Hereinafter ADA.

[31] Congress found that prior to the Americans with Disabilities Act, "individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination." 42 U.S.C. § 12101(a)(4) (Supp. IV 1992).

[32] 42 U.S.C. § 12101(a)(1). This is about 17% of the nation. OGLETREE ET AL., AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS & EMPLOYER OBLIGATIONS xv (1995).

[33] Thomas H. Christopher & Charles M. Rice, *The Americans with Disabilities Act: An Overview of the Employment Provisions*, 33 S. TEX. L. REV. 759, 760 (1992).

[34] The Rehabilitation Act of 1973 required the applicant to be able to perform all or most of the functions of a job before being a "qualified" handicapped person. G. William Davenport, *The Americans with Disabilities Act: An Appraisal of the Major Employment-Related Compliance and Litigation Issues*, 43 ALA. L. REV. 307, 318 (1992).

[35] Christopher & Rice, *supra* note 33, at 763.

fully participating in society.[36] The purpose of the Act is "to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities."[37]

Prior to the ADA, Congress passed the Rehabilitation Act.[38] The Rehabilitation Act covered the "federal government, federal government contractors and subcontractors, and recipients of federal financial assistance,"[39] yet excluded uniformed military personnel and Library of Congress employees.[40] This legislation left loopholes for employers in the private sector as well as some state and local governments.[41] As a result of the loopholes and exclusions, many disabled individuals were still left without much assistance in getting work with those employers. Due to this discrimination, Congress enacted the ADA, which developed from § 504 of the Rehabilitation Act.[42] The ADA provisions require equal treatment of disabled individuals in the private sector.[43]

The ADA covers employers, including state and local governments and agencies,[44] as well as labor organizations, employment agencies, and others employing fifteen or more individuals.[45] The ADA applies an equal or higher standard of conduct for employers during the hiring process than that required under the Rehabilitation Act.[46] Therefore, the ADA expands the protection provided in earlier legislation.[47]

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[36] 42 U.S.C. § 12101(a)(8).

[37] 42 U.S.C. § 12101(b)(1).

[38] 29 U.S.C. § 706 (Supp. IV 1992).

[39] Michael A. Faillace, *Title I of the Americans with Disability Act: Statutory Requirements, Legislative History, Regulations, Technical Assistance Manual, Relevant Cases Under the ADA and 1973 Rehabilitation Act and Practical Recommendations* 117, *in* 23RD ANNUAL INSTITUTE ON EMPLOYMENT LAW 965 (1994).

[40] OGLETREE, *supra* note 32, at 2-5.

[41] The ADA specifically regulates private employers and state and local governments. The term "employer" is defined by the ADA as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." 42 U.S.C. § 12111(5)(A).

[42] OGLETREE, *supra* note 32, at 3-7. *See also*, Pincus, *supra* note 18, at 568 n.42 (quoting from Federal Register).

[43] OGLETREE, *supra* note 32, at xv.

[44] The United States Government, corporations owned by the federal government, Indian tribes, and bona fide tax-exempt private membership clubs are not considered employers under the ADA. 42 U.S.C. § 12111(5)(B).

[45] 42 U.S.C. §§ 12111(2), 12112(5)(A). From July 26, 1992, until July 26, 1994, the ADA applied to those employers who employed 25 or more individuals. 42 U.S.C. § 12111(5)(A).

[46] 42 U.S.C. § 12201(a).

Although the ADA mandates that the disability of a candidate not be a factor in hiring, an employer does not have to give preferential treatment to those with a disability.[48] The ADA defines disability as: "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment."[49] The physical or mental impairment can be a physiological disorder, cosmetic disfigurement, or anatomical loss which affects one or more of the body systems.[50] It is believed that AIDS and HIV are examples of disabilities under this legislation.[51] Although alcoholics and drug abusers are also included as individuals with disabilities, they are included only to the extent that they are not currently using drugs or drinking alcohol on the job.[52] Prior legislation required employers of alcoholics to offer rehabilitation, often numerous times, but under the ADA, an alcoholic is held to the same employment standards as other employees.[53] Moreover, physical characteristics, such as hair or eye color, weight, and height, that are not the result of a physiological disorder, are not "disabilities" under the ADA.[54] This includes, for example, left-handedness[55] and one's sexual preference.[56]

Under the ADA regulations, having a disability does not automatically qualify an individual for protection.[57] The disability must limit one of life's major activities such as caring for oneself, performing manual tasks, seeing, hearing, speaking, breathing, or walking.[58] When determining whether an impairment falls under the ADA, three factors are to be considered: "the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long-term impact, or the expected permanent or long-term impact, of the impairment or the results of the impair-

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[47]OGLETREE, *supra* note 32, at 2-28.

[48]Christopher & Rice, *supra* note 33, at 763.

[49]42 U.S.C. § 12102(2).

[50]OGLETREE, *supra* note 32, at 3-12. The body systems include: neurological, musculoskeletal, special sense organs, respiratory and speech organs, cardiovascular, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine. *Id.* at 3-12 to 3-13.

[51]Christopher & Rice, *supra* note 33, at 765-66.

[52]*Id.* at 766-67.

[53]Faillace, *supra* note 39, at 119.

[54]*Id.* at 1.

[55]Torres v. Bolger, 781 F.2d 1134 (5th Cir. 1986).

[56]42 U.S.C. § 12211(a) specifically excludes homosexuality and bisexuality from the definition of disability.

[57]OGLETREE, *supra* note 32, at 3-21.

[58]Christopher & Rice, *supra* note 33, at 768-69.

ment."[59] The legislation indicates that temporary illnesses or physical conditions do not normally fall under the ADA.[60] Notwithstanding, the ADA protects those who are "regarded as having a substantially limiting impairment . . . even if they have no impairment at all."[61] The purpose of this provision is to protect those employees who are believed to have a disability even though this supposed disability has not been substantiated by tests.[62] Therefore, if the employer sees an impairment as disabling, whether real or fictitious, and if having that impairment would limit a major life activity, then the Rehabilitation Act or ADA applies.[63]

The ADA also prohibits the discrimination of individuals from employment opportunities based on the mere possibility that the employee may become unqualified in the future.[64] Nevertheless, the ADA permits employers to reject a disabled applicant when that individual poses a direct threat to the health or safety of other employees.[65] Direct threat is actually a defense the employer may raise to the accusation of discrimination.[66] In determining an employee's threat to others, the individual's current condition is the only factor to be considered.[67] The direct threat must constitute a "significant risk to the health or safety of others that cannot be eliminated or reduced by reasonable accommodation."[68] If a qualified individual poses a direct threat to himself which cannot be eliminated by reasonable accommodations, the employer does not have to hire that applicant.[69] Neither fear nor speculation that the employee poses a risk to others is enough to disqualify the individual from the job so long as that individual is otherwise qualified.[70] Yet, if the employer can show that a disabled individual would present a high probability of harm to others in a particular position and that there are no reasonable accommodations which could alleviate that harm, the employer may reject the applicant.[71]

Not only does the ADA have a provision that no one has to *be hired* who poses a direct threat to the safety and health of other employees, but the employer

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[59] OGLETREE, *supra* note 32, at 3-24.

[60] *Id.* at 3-35, 3-36, 3-37.

[61] Christopher & Rice, *supra* note 33, at 772.

[62] *Id.*

[63] *Id.*

[64] OGLETREE, *supra* note 32, at 4-62.

[65] 42 U.S.C. § 12113(b).

[66] OGLETREE, *supra* note 32, at 4-52 n. 1.

[67] Christopher & Rice, *supra* note 33, at 790.

[68] 42 U.S.C. § 12111(3).

[69] Faillace, *supra* note 39, at 108.

[70] Christopher & Rice, *supra* note 33, at 790.

[71] *Id.* at 789.

can also impose a provision "that no employee pose a direct threat to the safety and health of others in the workplace" after being employed.[72] This allows the employer to terminate the employment of an individual who, even with reasonable accommodations, poses a direct threat to other employees' or patrons' health or safety. The process for terminating employment due to a disability must be based on a threat which is authentically medically substantiated, not on speculation created by society's or an individual's fears and stereotypes.[73]

The ADA requires employers to use qualified medical or physical standards when making employment decisions for a particular job so long as those standards are job-related and consistent with current business practices.[74] The standards must apply uniformly to all individuals performing the same job.[75] The employer must be able to show that the criteria used in determining the standards were in fact job-related.[76]

When an employer is providing for a disabled employee, there are a number of reasonable accommodations that are available under the ADA and the Rehabilitation Act. One example allows for an employee who is qualified for one position to be transferred to another so long as he is qualified for this new position and does not pose a health threat to others.[77] Another example is that a restaurant employee, who is infected with a contagious disease, can be removed from handling food when reasonable accommodations are not available to eliminate the risk he presents. This employee can be moved to another vacant spot for which he is qualified.[78] Although a promotion is not necessary,[79] a demotion or lateral move is allowed provided that reasonable accommodations are not available to permit the employee to remain in the current position.[80] Therefore, if there are no positions for which the employee is qualified and there are no reasonable accommodations available to eliminate the risk the employee presents, the employment of the individual may be terminated.[81] The ADA reassignment provision is not applicable to those employers who do not have reassignment policies implemented.[82]

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[72] *Id.*

[73] *Id.* at 790.

[74] 42 U.S.C. § 12112(d)(4).

[75] OGLETREE, *supra* note 32, at 4-12.

[76] *Id.* at 4-50 (citing Prewitt v. United States Postal Serv., 662 F.2d 292 (5th Cir. 1981)).

[77] OGLETREE, *supra* note 32, at 4-87 to 4-93.

[78] 42 U.S.C. § 12111(9)(B).

[79] Christopher & Rice, *supra* note 33, at 779.

[80] Pincus, *supra* note 18, at 578.

[81] *Id.* at 590-91.

[82] *Id.* at 578-79.

Other types of reasonable accommodations include part-time and modified work schedules.[83] Furthermore, even though a disabled employee does not have to be given additional paid leave, another type of reasonable accommodation includes additional unpaid leave days.[84] Finally, in addition to reasonable accommodations within the work area, the ADA also requires that non-work areas such as lunchrooms, entrances and restrooms be accessible to the disabled individual.[85] It is important to note that the accommodations do not have to be the best solution, but only "sufficient to meet the needs of the individual with the disability."[86]

When making accommodations to an individual posing a direct threat, the risk caused by the individual's disability does not have to be completely eliminated. Rather, the risk must fall below the level of direct threat.[87] If the accommodation reduces the risk below the significant risk level, the employer is not to discriminate against the individual.[88] Only when the accommodation will neither eliminate nor reduce the direct threat below the level of "significant risk of substantial harm" can the employer exclude the individual from employment.[89]

The placement of a disabled person in a position with reasonable accommodations must not pose an undue hardship on the business.[90] An undue hardship is one which imposes "significant difficulty or expense."[91] If the accommodation is excessive in cost, requires extensive renovations, or causes disruptions, it does not have to be conducted.[92] Unlike previous recommendations on undue hardship,[93] the ADA does not require the employer to show that the accommodations would threaten the business.[94]

An employer must be able to prove that undue hardship will in fact occur; merely asserting the defense is not enough.[95] Four factors are used when considering undue hardship: "(1) the nature and cost of the accommodation; (2) [the] specific facility involved; (3) [t]he nature and type of the employer; and

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[83] *Id.* at 578.

[84] Pincus, *supra* note 18, at 578.

[85] *Id.* at 577.

[86] *Id.* at 579.

[87] OGLETREE, *supra* note 32, at 4-58.

[88] *Id.*

[89] *Id.*

[90] 42 U.S.C. § 12112(b)(5)(A).

[91] 42 U.S.C. §§ 12111(10)(A),(B).

[92] OGLETREE, *supra* note 32, at 7-4.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 7-7.

(4) [t]he type of operation or operations of the employer."[96] The employer can show "undue hardship by demonstrating that an accommodation would be unduly disruptive to its other employees or to the functioning of its business."[97]

In addition to requiring reasonable accommodations that do not impose undue hardship, the legislation prohibits employers from segregating, classifying, or in any way limiting an employee's opportunities for advancement based on the disability.[98] An example of this type of discrimination includes "creating a separate line of progression for disabled employees."[99] A disabled employee must have the same tenure and promotional track while conducting himself in the same manner as other employees. Moreover, the ADA prohibits employers from using disparate pay scales for disabled individuals and from providing a "separate work area for disabled employees,"[100] unless that work area is mandated under the reasonable accommodations requirement.

Historically, employers inquired about an applicant's background when making hiring decisions.[101] This included checking the individual's education, references, medical history, and former employment. Although the employer may want to inquire into the medical background of the applicant before making reasonable accommodations,[102] this is no longer allowed under the ADA. Employers cannot require a pre-employment physical exam,[103] nor can they require or request information "about the existence, nature, or severity of any disability" the individual may have through interviews or written questionnaires.[104] However, the employee may be asked about his ability to perform specific job-related functions[105] and about his qualifications.[106] For example, if lifting heavy boxes is an essential function of the job, an employer can ask if the individual has any problem lifting or carrying heavy objects.

Once an offer has been made, the employer may require a medical examination "prior to the commencement of the employment duties . . . and may condition an offer of employment on the results of such examinations."[107]

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[96] OGLETREE, *supra* note 32, at 7-8.

[97] Christopher & Rice, *supra* note 33, at 784.

[98] 42 U.S.C. § 12112(b)(1).

[99] Christopher & Rice, *supra* note 33, at 785.

[100] *Id.*

[101] *Id.* at 790.

[102] *Id.*

[103] 42 U.S.C. § 12112(d)(2)(A).

[104] Davenport, *supra* note 34, at 310.

[105] 42 U.S.C. § 12112(d)(2)(B).

[106] Christopher & Rice, *supra* note 33, at 791.

[107] 42 U.S.C. § 12112(d)(3).

This action is permissible if all employees are subject to the same examinations,[108] all the information acquired by the employer from the examinations is treated as confidential,[109] and the examination is "job-related and consistent with business necessity."[110]

Although federal government contractors and subcontractors are allowed to provide individuals an opportunity to identify themselves as disabled for affirmative action purposes under the Rehabilitation Act, this practice is prohibited to most other employers falling under the ADA.[111] The Rehabilitation Act requires affirmative action from federal government contractors and subcontractors, whereas the ADA does not have such a requirement for all other employers.[112]

IV. RELATIONSHIP BETWEEN AIDS AND FEDERAL LAW

A. Federal Legislation and AIDS

AIDS is believed to fall within the definition of a disability under the ADA. However, no cases have been decided by the United States Supreme Court under the ADA in which the Court held AIDS to be a disability.[113] Nevertheless, individuals with AIDS are protected from discrimination under the Rehabilitation Act.[114] Notwithstanding this, the Supreme Court has not ruled that an HIV-infected individual has been discriminated against due to disparate treatment by an employer.[115]

The ADA parallels the language used in the Rehabilitation Act and incorporates the standard required of federal agencies to apply to the private sector and to local governments. The case history of the Rehabilitation Act can be used as a guideline for deciding cases under the ADA. Although most provisions are similarly stated in the Rehabilitation Act and the ADA, in some instances, the ADA is more stringent than the Rehabilitation Act. For example,

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[108]42 U.S.C. § 12112(d)(3)(A).

[109]42 U.S.C. § 12112(d)(3)(B). However, managers and supervisors may be informed of the examination results "regarding necessary restrictions on the work or duties of the employee and necessary accommodations [and] first aid . . . personnel may be informed . . . if the disability might require emergency treatment." 42 U.S.C. §§ 12112(d)(3)(B)(i), (ii).

[110]42 U.S.C. § 12112(d)(4)(A).

[111]Faillace, *supra* note 39, at 120.

[112]*Id.* at 121.

[113]Pincus, *supra* note 18, at 572.

[114]*Chalk v. U.S. Dist. Court Cent. Dist. of Cal.*, 840 F.2d 701 (9th Cir. 1988).

[115]Although there are numerous state statutes dealing with discrimination against individuals with AIDS, these statutes will not be evaluated in this paper. For a discussion of state AIDS statutes see Turowski, *supra* note 27, at 139.

the ADA does not allow employers to discriminate against individuals with contagious diseases.[116]

In order for an AIDS-infected individual to qualify under the Rehabilitation Act or the ADA, he must satisfy a number of requirements. First, it must be determined whether AIDS and/or HIV fall under the definition of disability.[117] Second, the disability must "substantially limit a major life activity."[118] Procreation is considered a major life activity.[119] AIDS and HIV limit a major life activity since those who are infected with HIV and AIDS often cannot procreate due to the risk of transmission to the partner and fetus, therefore limiting intimate personal relations.[120]

The third requirement is that the reasonable accommodations may not cause undue hardship on the employer.[121] Although AIDS and HIV seem to fall within the ADA regulations, the burden on the employers, both financially and for the health and safety of others, can be too great to hire someone with HIV or AIDS. For example, a restaurant owner would not want to risk having an HIV-positive employee becoming infected with a contagious disease, opportunities the spreading of which could not be contained with reasonable accommodations.[122] The danger of serving unhealthy food is too risky, and the burden of making appropriate accommodations to protect others from the contagious disease is too great.[123]

Other examples include government positions in which the reasonable accommodations would be too burdensome on the employer. In *Dexler v. Tisch*,[124] the court held that the reasonable accommodations necessary to

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[116]42 U.S.C. §§ 12102(2), 12113(d).

[117]*See supra* notes 48-71 and accompanying text.

[118]29 C.F.R. App. § 1630.2(j), 56 Fed. Reg. 35,726, 35,741 (1991).

[119]OGLETREE, *supra* note 32, at 3-22 to 3-23.

[120]*Id.*

[121]*Id.* at 7-1.

[122]*See, e.g.*, Burgess v. Your House of Raleigh, Inc., 388 S.E.2d 134, 139-40 (N.C. 1990), in which the North Carolina Supreme Court relied on the North Carolina Handicapped Persons Act in concluding that the plaintiff, a short order cook, was not protected under the statute. *Id.* at 135.

[123]The employer may also terminate the employment of an employee who has a disease on the Secretary of Health's list of contagious diseases so long as reasonable accommodations cannot be made. 42 U.S.C. §§ 12113(d)(1),(2). The ADA requires the Secretary of Health and Human Services to "publish a list of infectious and communicable diseases which are transmitted through handling the food supply." 42 U.S.C. § 12113(d)(1)(B). An employer can terminate an AIDS-infected employee only if the disease is on the published list. AIDS may not be expressly on the list, but some of the opportunistic infections associated with AIDS may be listed. Christopher & Rice, *supra* note 33, at 776.

[124]660 F. Supp. 1418 (D.Conn. 1987).

employ an individual with achondroplastic dwarfism[125] were not required since the individual's disability would unduly interfere with the employee's working potential.[126] A further example is that a foreign service employee could be restricted to positions where reasonable accommodations can be made. In *American Federation of Government Employees v. United States Department of State*,[127] the court held that the Rehabilitation Act did not require accommodations for an HIV-positive employee who was not otherwise considered qualified for the job in question.[128] The court concluded that the disabled individual could be restricted to positions in locations where adequate health and medical services would be available, since any additional "accommodation would require the Department of State fundamentally to alter its medical fitness program's [policy] . . . or to incur an undue financial burden in upgrading medical care services."[129]

B. AIDS in the Courtroom

By far the greatest hurdle to AIDS-infected individuals searching for a job is the exclusion permitted by the ADA that "an employer may implement the requirement that no employee pose a direct threat to the safety and health of others in the workplace."[130] Nonetheless, employers are concerned about whether an HIV- or AIDS-infected employee is able to perform within the workforce.[131]

In *Doe v. District of Columbia*,[132] the court held that the District of Columbia violated the Rehabilitation Act by withdrawing an offer of employment as a firefighter after finding out that the applicant was HIV-positive.[133] The physical exam did not include an HIV test, but whoever passed the physical exam was considered "fully capable physically of performing the duties of a firefighter without risk to himself or others."[134] The plaintiff was offered a job as a firefighter, but after he notified the city of his HIV status, Doe was advised

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[125]Achondroplastic dwarf is defined as "[a] dwarf, affected with achondroplasis, having short limbs and a trunk of relatively normal size. The head is often enlarged." 1 SCHMIDT'S ATTORNEYS' DICTIONARY OF MEDICINE, *supra* note 14, at A-51.

[126]660 F. Supp. at 1425-26.

[127]662 F. Supp. 50 (D.D.C. 1987).

[128]*Id.* at 54.

[129]*Id.* at 54 n.7.

[130]Christopher & Rice, *supra* note 33, at 789.

[131]Pincus, *supra* note 18, at 562.

[132]796 F. Supp. 559 (D.D.C. 1992).

[133]*Id.* at 573.

[134]*Id.* at 561.

not to show up for work.[135] The Fire Department conducted two additional HIV tests, both of which had positive results, and Doe was never summoned to start work.[136] The court concluded that the District of Columbia discriminated against Doe because of his HIV status[137] and therefore violated § 504 of the Rehabilitation Act.[138]

The *Doe* court heard uncontested testimony that "several fire departments throughout the United States . . . employ HIV-positive firefighters in active-duty status."[139] These other departments did not require additional precautions for their HIV-positive firefighters because the use of the personal protective equipment[140] and universal precautions[141] was "sufficient to protect against harm to the firefighter or others."[142] Testimony indicated that using the equipment provided to the firemen "eliminates the risk of blood-to-blood contact in the performance of firefighting functions."[143] Even in the case of mouth-to-mouth contact, the transmission of HIV presents "no measurable risk."[144] The court therefore concluded that "an HIV-infected person poses no measurable risk of transmitting the disease through the performance of firefighting duties."[145]

Recently, many cities and other governmental entities started requiring AIDS testing.[146] This is often done in addition to other tests as part of the annual physical exam for those employed in high-risk occupations. The employees are

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[135] *Id.* at 565.

[136] 796 F. Supp. at 565.

[137] *Id.* at 570.

[138] *Id.* at 571.

[139] *Id.* at 564.

[140] The equipment issued to a firefighter includes: (1) a helmet with a shield which protects the face from blood splattering from a victim; (2) a hood which is used to provide additional covering to the neck and head; (3) a "bunker coat" which is a fire-resistant coat that is non-absorbent; (4) "bunker pants" made of the same material as the coat, but with additional protection on the knees, (5) fire-resistant gloves which because of their thickness, offer protection against cuts or punctures; (6) "bunker boots" made of rubber with steel toes; (7) a self-contained breathing apparatus which "enables a firefighter to breath safely when entering a smoke-filled building;" (8) a medical emergency kit containing gloves and a CPR mask (this provides protection in case of mouth-to-mouth contact) both of which should be in the bunker coat, along with other medical equipment such as dressings and other emergency supplies. 796 F. Supp. at 561-62.

[141] *See infra* notes 147-166 and accompanying text.

[142] 796 F. Supp. at 564.

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *See, e.g., Anonymous Fireman v. City of Willoughby*, 779 F. Supp. 402 (N.D. Ohio 1991).

usually policemen and firemen. The results of the test are used to help determine fitness for duty.

In *Anonymous Fireman v. City of Willoughby*,[147] the City implemented a policy requiring mandatory testing of all full-time employees for the HIV virus as part of the annual physical exam.[148] The test was required to determine fitness for duty of all City safety forces.[149] The collective bargaining agreement ("Agreement") between the City and the firemen's union stated that "individuals showing no symptoms of related disease and without significant immune system dysfunction remain eligible for all employment benefits. No employee will be separated, and benefits will not be affected by a finding of HIV infection."[150] The Agreement contained a provision that permitted the removal of an infected fireman from active duty to a position where there was no contact with the general public.[151] This permitted the City, at its discretion, to decline to make any changes in an employee's position after the employee tested positive for the AIDS antibodies, but before the employee was symptomatic with the actual disease.[152]

Since *Anonymous Fireman* was decided before the ADA went into effect, it was decided under the Rehabilitation Act. The Agreement appears to satisfy the Rehabilitation Act's requirements of reasonable accommodations to disabled employees.[153] In rendering its decision, the court referred to guidelines established by the Centers for Disease Control[154] that minimize the transmission of HIV in the health care setting.[155] The provisions developed by the CDC are routinely used by health care professionals and have been implemented by the Willoughby Fire Department.[156] The CDC recommends that firemen wear gloves, masks, gowns, protective eyewear and use puncture-resistant containers for the disposal of needles.[157] The *Anonymous Fireman* court stated that firemen and paramedics are to use these precautions

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147*Id.*

148*Id.* at 408.

149*Id.*

150779 F. Supp. at 410.

151*Id.*

152*Id.*

153Under both the Rehabilitation Act and the ADA, the reasonable accommodations provision can be affected by a collective bargaining agreement. *See* Christopher & Rice, *supra* note 33, at 781.

154Hereinafter CDC.

155779 F. Supp. at 412. These guidelines were established by the CDC in 1985.

156*Id.*

157*Id.*

since they are in a high-risk category for contracting or transmitting HIV.[158] Nevertheless, these individuals are also exposed to blood and other bodily fluids in a "non-controlled setting"[159] in which the precautions set up by the CDC would not be practical.[160] The CDC precautions are among the only ways to reduce the risk of transmission whether from the victim or from the city employee.

An employer can claim that an HIV-positive individual is not "otherwise qualified" if it can show the existence of a "bona fide occupational qualification"[161] for the position in which there is a direct threat of substantial harm should the individual be hired or maintained.[162] One example of a "bona fide occupational qualification" is the hiring of an employee in a medical institution, since an HIV-positive individual poses a higher risk to patients with whom he comes into contact.[163] The health care provider has the duty to protect the patients from AIDS transmission. This duty is enough to satisfy a "bona fide occupational qualification" and thus permit the employer's removal of any employee who poses a threat of substantial harm.[164] Thus, HIV-positive health care professionals may be limited in their degree of contact with patients.

It is clear that mandatory testing does not prevent the transmission of the AIDS virus, but it is argued that testing could eliminate some of the harm of transmission. Therefore, those employees working in high-risk or safety-related occupations could be eliminated from employment positions or opportunities by a bona fide standard which requires imminent harm to those needing assistance.

In *Anonymous Fireman*, the City claimed a legitimate, even compelling, governmental interest in its firefighters' "fitness for duty."[165] Mandatory testing is one of the factors in determining who is fit for duty and who is not.[166] It is this author's opinion that the claim of mandatory testing determining who is fit for duty was not substantiated by the Agreement nor by current medical information.

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158 *Id.*

159 The court did not define a "non-controlled setting."

160 779 F. Supp. at 412.

161 Pincus, *supra* note 18, at 589.

162 *Id.*

163 *Id.* at 589-90.

164 *Id.* at 590.

165 779 F. Supp. at 417.

166 The City also wanted to use the results of the test to establish a baseline to use in determining future worker's compensation claims, thereby determining whether or not the HIV exposure occurred during the firefighter's employment with the City. *Id.* at 408-09.

The Agreement provided the City with four options regarding the fate of the employment of an HIV-positive individual. The first allowed the City to determine whether an individual who tested positive for HIV could continue in his/her current position.[167] The second allowed that individual to be transferred to "another position in the Fire Department where the employee [would] not be in contact with the general public."[168] The third enabled the employer to move "the employee to another position outside the Fire Department."[169] Finally, the employee could be removed from all duties.[170] It is not mandatory that all those with positive results be isolated from the public, rather, the City may choose any of the aforementioned options when faced with an HIV-infected employee.[171]

The court in *Anonymous Fireman* concluded that those individuals who have negative test results will have "peace of mind" and can "practice prevention through the use of universal precautions and other means."[172] Moreover, those who test positive for HIV can take "extra precautions . . . to avoid the spread of AIDS."[173] Therefore, whether or not they test positive for the virus, all firefighters should use preventive measures to reduce the chance of spreading any deadly disease. The precautions available to those who test positive for HIV are no more stringent than those for individuals with negative results. Since the court held that there was a compelling governmental interest in "protection of the public from the contraction and transmission of AIDS by firefighters and paramedics,"[174] infected individuals could be removed from work without violating the Rehabilitation Act.

The court in *Anonymous Fireman* considered medical evidence establishing that the risk of transmitting HIV in this line of work is high.[175] It is well documented that the transmission of HIV has occurred through blood-to-blood contact.[176] This is a concern for all firefighters, especially paramedics, who deal with victims in uncontrolled environments.[177] In order for HIV to be transmit-

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167*Id.* at 410.

168*Id.*

169779 F. Supp. at 410.

170*Id.*

171*Id.*

172779 F. Supp. at 417.

173*Id.*

174*Id.* at 416.

175*Id.* at 411-12.

176Jaffe, *supra* note 8, at 17.

177Dr. Brian McNamee testified to the court that "[f]irefighters and paramedics are at higher risk than persons in hospitals because it is a non-controlled setting, as compared to an emergency room which is more controlled." 779 F. Supp. at 407.

ted by blood, there must be a fair amount of blood-to-blood contact.[178] For a paramedic, contact with blood or other bodily fluids can occur in numerous ways during an emergency call.[179] The expert medical witness was not aware of any cases of "transmission by or to any health care worker during the performance of firefighting duties or while rendering emergency medical care."[180]

Nonetheless, the *Anonymous Fireman* court determined that "[t]he City of Willoughby has a duty to keep its employees free from the risk of a contagious disease and to provide a safe workforce."[181] One doctor testified that "firefighters and paramedics generally are not at high risk to get infected on the job . . . [and] that the occupational risk for firefighters is low."[182] Without knowledge of any transmission of HIV or AIDS from a fireman or policeman to a citizen on which to base the City's fear of infection, the City should be required to provide another defense for its policies affecting the employment[183] of HIV-infected individuals. The employer is required to use only valid medical information when establishing standards under the Rehabilitation Act. In the case at hand, this requirement was not demonstrated.

Although transmission of HIV has occurred through blood-to-blood contact, there are no known cases as of yet, of the transmission of HIV to an individual from a fireman or paramedic through mouth-to-mouth resuscitation.[184] In addition, there are no known cases of transmission of HIV from saliva alone. Rather, there is only a *theoretical* possibility that the virus can spread through saliva.[185] The theory that HIV can be spread through salivary transmission developed because other infectious diseases are transmitted in that manner.

Cities are protected from having to make accommodations for HIV-positive employees by the direct threat defense.[186] A city only has to show that there is a significant risk to another's health and safety posed by the continued employment of the infected individual. Hospitals have successfully suspended

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[178]Doe v. District of Columbia, 796 F. Supp. 559, 563 (D.D.C. 1992).

[179]779 F. Supp. at 412.

[180]796 F. Supp. at 563 (testimony of Dr. David Parenti, Associate Professor of Medicine in the Division of Infectious Disease at George Washington University Medical Center).

[181]779 F. Supp. at 416.

[182]*Id.* at 406.

[183]This includes hiring, moving, and terminating the HIV-infected individual.

[184]Richard Roe v. District of Columbia, 842 F. Supp. 563, 566, *vacated*, 25 F.3d 1115 (D.C. Cir. 1994) (citing CDC publication "Guidelines for Prevention of Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Health-Care and Public Safety Workers," 1989).

[185]In *Anonymous Fireman*, the court stated, "[r]eports have indicated that AIDS *may* be spread through saliva, splashes to the skin, oral sex, and the mucous membrane." 779 F. Supp. at 411 (emphasis added).

[186]*See supra* notes 64-94 and accompanying text.

an HIV-positive doctor's duties against judicial attack.[187] Hospitals' use of the "no risk" standard could violate the ADA's requirement of "significant risk."[188] The "no risk" standard restricts the infected employee to positions and duties "that pose no transmission risks."[189] Under the ADA, a health care provider must show that there are no reasonable accommodations which could eliminate the harm.[190]

The Supreme Court stated in *School Board of Nassau County v. Arline*[191] that "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 accommodations will not eliminate that risk."[192] The Court came up with a four-step test to determine when reasonable accommodations are possible.[193] The four-step test as applied to HIV-positive health care employees requires the health industry to "examine [1] the modes of HIV transmission, [2] the duration of the risk, [3] the amount of risk to other healthy individuals, and [4] the likelihood of occupational transmission" when determining reasonable accommodations.[194]

The four factors may be evaluated separately. The first step examines the modes of transportation which, as discussed above, are threefold for the transmission of HIV and AIDS to an uninfected individual.[195] Since the disease never goes away and because it is deadly, the duration of the risk, evaluated in step two of the *Arline* test, will exist as long as the individual is employed.

Steps three and four may be looked at together when discussing HIV and AIDS. When there is only casual contact between the health care provider and other employees or patients, there is no proven documentation of transmission.[196] However, there is some controversy regarding the transmission of the HIV from a doctor to a patient. In 1990, the CDC issued a report informing the public about the possibility of the transmission of HIV from a dentist to numerous patients.[197] Whether the dentist transmitted the

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[187]In Estate of Behringer v. Medical Center at Princeton, 592 A.2d 1251 (N.J.Super. Ct. Law Div. 1991), the court upheld the exclusion of an AIDS-infected surgeon from performing invasive procedures.

[188]R. Bradley Prewitt, *The "Direct Threat" Approach to the HIV-Positive Health Care Employee Under the ADA*, 62 MISS. L.J. 719, 729 (1993).

[189]*Id.*

[190]42 U.S.C. § 12112(b)(5).

[191]480 U.S. 273 (1987).

[192]*Id.* at 287.

[193]*Id.* at 288.

[194]Prewitt, *supra* note 188, at 733.

[195]779 F. Supp. at 403.

[196]796 F. Supp. at 563.

[197]Litchy, *supra* note 15, at 1.

disease to all of the patients who tested positive for HIV is still unclear. If the dentist did in fact infect any of the individuals, it would be the first documented case of transmission of HIV from a health care provider to patient. Indications are that the likelihood of transmission from provider to patient is slim at best.

V. TESTING AND THE FOURTH AMENDMENT

The individual in *Anonymous Fireman* claimed that his rights under the Fourth,[198] Ninth,[199] and Fourteenth[200] Amendments were violated by the mandatory tests for HIV that were conducted on blood already extracted during his annual physical exam.[201] When determining whether there has been a violation of an individual's Fourth Amendment rights during mandatory testing, courts may compare HIV testing to drug testing. The City contended that the fireman's constitutional rights were waived by the Agreement.[202] Although the court held that a "labor organization cannot waive an individual's constitutional rights,"[203] it found, in the words of the Supreme Court commenting on blood tests, that "such tests are commonplace in these days . . . and that for most people the procedure involves virtually no risk, trauma, or pain,"[204] and reasoned that the intrusion upon the firefighter's rights was not significant enough to outweigh the City's interest in having physically fit employees.[205]

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[198]The Fourth Amendment states:

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

U.S. CONST. amend. IV.

[199]The Ninth Amendment states "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

[200]The pertinent part of the Fourteenth Amendment states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV § 1.

[201]779 F. Supp. at 402.

[202]*Id.*

[203]*Id.* at 415.

[204]*Id.* (quoting Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989)).

[205]779 F. Supp. at 416-17.

In the past, a permissible search could be conducted without a search warrant only upon probable cause that a crime had been committed.[206] The Supreme Court now relies on a "reasonableness" test rather than the probable cause standard.[207] The government's interest in conducting the search must be reasonably weighed against an individual's right to be left alone.[208] Therefore, the permissible search consideration requires a case-by-case approach, balancing the individual's privacy expectations against the "government's need for supervision, control, and efficient operation of the workplace."[209]

Since the Supreme Court has held that the removal of blood constitutes a search under the Fourth Amendment,[210] the *Anonymous Fireman* court weighed the competing interests of the City against those of the individual to determine if the search was reasonable. The court in *Anonymous Fireman* found that the City of Willoughby's testing policy was not an unreasonable search and seizure.[211] The court followed the precedent of *Skinner v. Railway Labor Executives' Ass'n.*[212] and *National Treasury Employees Union v. Von Raab*[213] in reaching this decision. In both of these cases, the Supreme Court developed a "special need" provision to be applied when the government's interest is in the "safety-sensitive"[214] industries.[215] The *Anonymous Fireman* court concluded by stating:

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[206]Kenneth C. Haas, *The Supreme Court Enters the "Jar Wars": Drug Testing, Public Employees, and the Fourth Amendment*, 94 DICK. L. REV. 305, 312 (1990).

[207]*Id.* at 314.

[208]*Id.*

[209]*Id.* at 315 (citing O'Connor v. Orega, 480 U.S. 709, 719-20 (1987)).

[210]Schmerber v. California, 384 U.S. 757, 767-68 (1966).

[211]779 F. Supp. at 418.

[212]The railway labor organization filed suit against the Secretary of Transportation to enjoin implementation of a regulation governing the testing for drugs and alcohol in railroad employees. The Supreme Court held that, although the Fourth Amendment was applicable to the mandatory testing under the Federal Railroad Administration regulations, those tests were reasonable regardless of suspicion or warrant. 489 U.S. 602 (1989).

[213]The National Treasury Employees Union brought an action to challenge the constitutionality of the United States Customs Service's drug-testing program. The testing required analyses of those individuals who were to be promoted to positions involving interdiction of illegal drugs, requiring the carrying of a firearm, or requiring handling of classified material. The Supreme Court again held that the test met the requirement of reasonableness under the Fourth Amendment regardless of suspicion due to the sensitive nature of the work. 489 U.S. 656 (1989).

[214]Although there is no definition of "safety-sensitive" occupations or industries, the case holdings indicate that "police officers, correctional officers, firefighters, train operators, bus drivers, airline pilots, [and] nuclear power plant workers" fall under this provision. Haas, *supra* note 206, at 321.

[215]*Id.*

> This case does not stand for the general proposition of mandatory testing of all employees for AIDS .... This is a very limited decision and only stands for the proposition that mandatory testing may be ordered for high-risk government employees such as firefighters and paramedics. A high-risk government employee is one who has a high risk of contracting AIDS or transmitting AIDS.[216]

The holdings of *Von Raab* and *Skinner* suggest that certain employees can be tested for drugs simply because of the positions they hold or the very nature of their jobs.[217] These case holdings can be construed to "permit unannounced periodic blood and urine testing of incumbent police officers . . ., correctional officer[s], firefighters, ... and other employees in positions that are irrefutably safety-sensitive."[218] Although the court found no violation of the plaintiff's constitutional rights in *Anonymous Fireman*, there remains the question whether compliance with the ADA could violate one's Fourth Amendment rights.

Since the ADA allows employers to conduct physical exams after a job offer is given,[219] the employee may be required to give a blood and/or urine sample. If the job falls under the safety-sensitive classification, this will not violate the Fourth Amendment. Moreover, once the individual is offered the job, but before commencing work, the applicant may be required to submit to a mandatory physical or mental test as a condition of employment.[220] Pre-employment drug testing is permissible when done in connection with the physical exam and the position for which the individual is applying is "safety-sensitive."[221] However, there is a difference between testing for drug or alcohol abuse and testing for HIV.

Unlike an employee who uses illegal drugs while working, the HIV-infected employee has neither committed a crime nor been suspected of using illegal substances at the time of the test. This separates an HIV blood test from a urine analysis that is used for determining substance abuse. Testing for HIV does not reveal any past illegal activity which may be in conflict with the individual's job. The arguments used for legalizing drug testing would not work for AIDS testing. For example, an HIV-positive train operator does not pose the same degree of threat as a train operator who is intoxicated. Therefore, the reasonableness test used in *Skinner* should not be applicable.

216779 F. Supp. at 418.

217Haas, *supra* note 206, at 352.

218*Id.* at 360.

21942 U.S.C. § 12112(d)(2)(A).

22042 U.S.C. § 12112(d)(3).

221Haas, *supra* note 206, at 324.

In *Skinner*, there were continuing problems of on-the-job intoxication.[222] In addition, the railroad industry experienced twenty-one major train accidents between 1972 and 1983 involving alcohol or drug use, causing twenty-five fatalities and numerous other injuries.[223] The Court stated that the government had a duty to insure safety since the employees were "engaged in safety-sensitive tasks."[224] The Federal Railroad Administration showed a connection between the conduct in question and the need to monitor illegal drug use by demonstrating that numerous deaths occurred due to the use of drugs or alcohol by employees while working. However, in HIV- and AIDS-related cases, local governments have not proven a connection between their need to insure safety (against the transmission of HIV or AIDS) and the HIV test requirement to determine the physical fitness of their employees.

The *Anonymous Fireman* court concluded that the firefighters' concerns regarding HIV infections were not enough to raise "constitutional privacy issues;"[225] rather, the testing itself is enough to implicate the Fourth Amendment.[226] The court stated that the government had an interest and a duty to "provide a safe workforce."[227] The government did not have to show actual harm from lack of knowledge regarding HIV-positive employees. Currently, there is only one case of possible transmission from a health care provider to a patient. This is not enough to warrant the government's intrusion upon the employee's Fourth Amendment rights without analyzing the individual's right to privacy.

VI. LIABILITY FOR STATES AS EMPLOYERS

A. Criminal Liability

Who should be held responsible when a city employee, who tested positive for HIV in his annual exam, transmits the disease to an an individual needing assistance during the course of employment? The city could be held liable since it knowingly allowed an individual, who could be a threat to another, to work in a high-risk area such as firefighting.

There are cases that have held that one who has knowingly and intentionally tried to transmit the HIV virus is criminally responsible. In *State of New Jersey v. Smith*,[228] the court affirmed the conviction of the defendant who was found

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[222] 489 U.S. at 607.

[223] *Id.*

[224] *Id.* at 620.

[225] 779 F. Supp. at 416.

[226] *Id.*

[227] *Id.*

[228] 621 A.2d 493 (N.J. Super. Ct. App. Div. 1993).

guilty of attempted murder after biting the victim.[229] The defendant believed that he could cause death by biting.[230] Since the defendant knew that he was HIV-positive and made numerous threats to kill a correctional officer by biting him, the court concluded that the defendant had the intent to kill the officer regardless of the unlikelihood of HIV transmission through biting.[231] Similarly, in *Weeks v. State of Texas*,[232] since the defendant thought he could transmit HIV by spitting twice at the guard's face, the defendant was found guilty of attempted murder.[233]

As previously stated, the attempt to transmit HIV intentionally has been considered to be attempted murder[234] by some courts.[235] In *Weeks*, the act of attempted transmission occurred during the commission of a crime.[236] It seems possible that an individual could be held criminally responsible for the transmission of HIV even without committing another criminal act. Current case law does not clear up the question of whether it is a crime to transmit HIV intentionally without committing another criminal act. Simply the knowledge that one is HIV-positive and that transmission could theoretically occur by certain conduct may be enough to satisfy the required elements (at least in some states) for attempted murder.[237]

If there has been no proof of transmission through a set of particular acts, but research indicates that there may be a possibility that transmission of HIV

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[229] *Id.* at 516.

[230] *Id.* at 496.

[231] *Id.*

[232] 834 S.W.2d 559 (Tex. Ct. App. 1992).

[233] The defendant argued that the State had to "prove either that there was any virus present in [defendant's] saliva or that the possibility of transmission was reasonably likely." *Id.* at 560. The record in the case indicates that the defendant believed that he could kill his victims by spitting on them. The trial presented different viewpoints on whether HIV could be transmitted through saliva. The jury was then instructed that "[a] person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails, to effect the commission of the offense intended. Such is an attempt to commit an offense." *Id.* at 565. The jury was properly given the elements of attempted murder and found the defendant guilty. *Id.* When looking at the facts of the case, it is unclear why the discussion of whether HIV could be transmitted by biting was used. The elements of the crime do not require that the "act amounting to more than mere preparation" ever be successful. The fact that the defendant believed that transmission could occur and death would be a result satisfies the elements of the crime. 834 S.W.2d at 559.

[234] For an attempted crime the individual must have "[a]n intent to commit a crime coupled with an act taken toward committing the offense." BLACK'S LAW DICTIONARY 127 (6th ed. 1991).

[235] *See, e.g., Weeks*, 834 S.W.2d 559; *Smith*, 621 A.2d 493.

[236] 834 S.W.2d at 561. The plaintiff verbally attacked the officers and vandalized the state's van. *Id.*

[237] *See, e.g.*, ILL. ANN. STAT. ch. 720 para. 5/8-4 (Smith-Hurd 1993).

or AIDS could occur, is the individual guilty of attempted murder simply by having the disease and performing the act in question? For example, there are no known cases of transmission of HIV from a firefighter to another individual.[238] If the firefighter is HIV-positive and performs his on-the-job duty to rescue another person in a way in which there is a possibility of transmission, is he guilty of attempted murder?

In the employment setting, it can be argued that there is an intent by the employer to infect others simply by knowingly placing the infected individual in a high-risk occupation. In addition, it can be argued that when there is an intent to infect another individual with HIV, there is intent to kill. If proper precautions are used, the argument of intent to infect another should be eliminated, thereby protecting cities from criminal prosecution.

It is unclear how far courts will go in construing criminal law regarding possible HIV transmissions. If the courts hold the individual responsible for the possibility of knowingly transmitting the disease, then it is in the individual's best interest not to be hired for specific high-risk positions. The ADA should not require cities to employ HIV-positive individuals in high-risk occupations when exposure to the public in those positions could lead to attempted murder charges.

B. Civil Liability

In addition to criminal charges, an HIV-infected individual may also have civil charges brought against him or his employer. These charges may be based on negligence, strict liability, or vicarious liability.

1. Negligence

There could be a claim of negligence against an employer after the transmission of HIV to a victim cared for by a city employee.[239] Negligence is defined as "conduct which involves an unreasonably great risk of causing damage."[240] The four elements for a cause of action in negligence are: (1) "[a] duty, or obligation" in which the law requires a standard of conduct "for the protection of others against unreasonable risks;" (2) a breach of the duty to conform to the standard; (3) "a reasonably close causal connection between the conduct and the resulting injury;" and (4) an "[a]ctual loss or damage resulting" to the injured party.[241]

The case law currently available indicates that a city has a duty of care to its residents.[242] Therefore, the first prong of the negligence test is met. If the city

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[238] *See Doe*, 796 F. Supp. 559.

[239] Pincus, *supra* note 18, at 589-90.

[240] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 31 at 169 (5th ed. 1984) (citations omitted).

[241] *Id.* § 31 at 164-65.

[242] *See Anonymous Fireman*, 779 F. Supp. 402.

can employ individuals with HIV,[243] did the city breach its duty of care by employing those individuals infected with the deadly disease in positions of high risk? It can be argued that there was a breach of the city's standard of conduct by placing employees in positions where transmission was possible.

The second element is harder to examine. This element requires the employer, in this case the city, to fail to conform to the standard. What this standard should be is unclear. The standard of care could range from reducing the likelihood of transmission, through the use of precautions, to the elimination of employees who cause the possible harm. If the standard is termination of infected employees, there again may be a conflict with the ADA regulations requiring the employment of individuals with disabilities.

Since the Supreme Court has not determined whether AIDS is a disability under the Rehabilitation Act or the ADA, it is difficult to determine if the city conformed to the required standard. If AIDS is not a disability, then there is a greater chance that the city would be held to a higher standard of care. The city would need to eliminate as much of the risk as possible. That would mean requiring those with HIV or AIDS to work away from the public in low-risk areas.

On the other hand, if HIV and AIDS are disabilities under the ADA and the Rehabilitation Act, then the employer may not discriminate against the individual without a defense such as undue hardship or direct threat to the health and safety of others.[244] This may place the employer in the precarious position of hiring an HIV-infected employee who does not pose a direct threat under the ADA, but allows a cause of action for negligence based upon his employment if he transmits the HIV virus to another during the course of employment. If the standard of care corresponds with the literature on the proper precautions for firefighters, the employees could eliminate the liability of the city by following the prescribed universal protection precautions.[245] Without a standard of care that corresponds with the federal legislation, cities may be held liable for the transmission of a deadly disease from employee to another, regardless of the care used in limiting the likelihood of transmission. As Prosser stated,

> [t]he odds may be a thousand to one that no train will arrive at the very moment that an automobile is crossing a railway track, but the risk of death is nevertheless sufficiently serious to require the driver to look for the train and the train to signal its approach. . . . As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution.[246]

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[243] *See Doe*, 796 F. Supp. 559.

[244] *See supra* notes 83-105 and accompanying text.

[245] *See supra* notes 147-166 and accompanying text.

[246] KEETON, *supra* note 240, § 31 at 171.

The third negligence requirement is proving the causal connection between the conduct and the harm caused. Once it is shown that a city's conduct was a cause of the injury, one must determine whether the city's conduct was significant enough to hold it liable.[247] Often the victim must prove that there was a duty which included the protection against this particular circumstance.[248]

If the city hires those who are HIV-positive, places them in high-risk areas, and then transmission of HIV occurs, the victim will be able to show that this requirement is met. The plaintiff could satisfy this requirement simply by arguing that the employment of the individual by the city resulted in the contact between the city employee and the victim, and that the contact lead to the transmission of the virus. This prong can be met with ease by anyone infected by a city employee.

The fourth element is also easy to satisfy. The injury is the infection itself. The actual loss would be hard to contest since death is 100% certain once transmission of the disease occurs. Once all four elements are met, the plaintiff would have a cause of action for negligence against the government.

2. Vicarious Liability

There could also be a cause of action in vicarious liability[249] against the city because of the city's relationship with the employee. Vicarious liability imputes negligence on the employer because of a negligent act of the employee.[250] The paramedic, as an employee, is working as an agent of the employer, the city. This relationship may open the city to liability for the negligent acts performed by the employee during the course of business. Ordinarily, the relationship does not include agents who are not servants, but there are situations in which liability does occur.[251] Therefore, if the employee is HIV-positive and transmits the disease to another during his employment because he failed to follow the guidelines set up by the city, the city can be responsible through vicarious liability. The city may not be able to limit its vicarious liability simply by implementing guidelines on procedures to be followed.

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[247] *Id.* § 42 at 273.

[248] *Id.*

[249] Black's Law Dictionary defines vicarious liability as "[t]he imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons. Indirect or imputed legal responsibility for acts of another; for example, the liability of an employer for the acts of an employee." BLACK'S LAW DICTIONARY *supra* note 234, at 1084.

[250] KEETON, *supra* note 240, § 69 at 499.

[251] *Id.* § 70 at 508.

3. Strict Liability

There is also a cause of action for strict liability.[252] Strict liability is based on the "defendant's intentional behavior in exposing those in his vicinity to such a risk."[253] Normally, the conduct does not depart from social standards so far as to be negligent "usually because the advantages which it offers to the defendant and to the community outweigh even abnormal risk."[254] Nevertheless, the conduct is "still so far socially unreasonable that the defendant is not allowed to carry it on without making good any actual harm which it does."[255] Therefore, the employer is held liable for damages since it is responsible, not because of fault, but because of its relationship to the employee.

4. Infliction of Mental Distress

There is also the tort of infliction of mental distress. Many people who have contracted HIV or AIDS have tried to sue their doctors, blood carriers, hospitals and even significant others under this cause of action.[256] In *Kerins v. Hartley*,[257] the plaintiff brought an action for emotional distress against her surgeon and the surgeon's partners.[258] The court relied on the recent holding of *Potter v. Firestone Tire and Rubber Company*,[259] which allowed for damages based on emotional distress if the plaintiff could prove: (1) that the defendant breached a duty of care, and the plaintiff was therefore exposed to a deadly disease, and (2) that the plaintiff's fear was a result of the knowledge corroborated by

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[252]Strict liability is defined as "[l]iability without fault." BLACK'S LAW DICTIONARY, *supra* note 234, at 991.

[253]KEETON, *supra* note 240, § 75 at 537.

[254]*Id.*

[255]*Id.*

[256]In Tischler v. Dimenna, 609 N.Y.S.2d 1002 (N.Y. Sup. Ct. 1994), the plaintiff sued her boyfriend's estate for his infliction of emotional distress. The plaintiff alleged that the deceased boyfriend had never told her of his HIV-positive status. The parties were sexually active for a period of nine years and only used a condom on occasion. The defendant moved for summary judgment, which was denied since the plaintiff made a showing of a prima facie claim of emotional distress. Under New York law, the plaintiff must prove that the decedent owed the plaintiff a "duty . . . not to intentionally or negligently inflict mental distress" since the plaintiff showed probable exposure. *Id.* at 1009.

[257]27 Cal.App.4th 1062 (Cal. Ct. App. 1994).

[258]*Id.* at 1066. The trial court held that the fear of AIDS infection was "unreasonable as a matter of law given the miniscule risk of HIV transmission with actual percutaneous exposure during surgery (0.3 percent)," the plaintiff's negative test result for HIV, and the lack of evidence that exposure did occur. *Id.* at 1071.

[259]863 P.2d 795 (Cal. 1993). The plaintiffs claimed they were exposed to toxic chemicals while living adjacent to a landfill the defendants used to dump toxic waste. *Id.* at 801.

medical evidence that the plaintiff was likely damaged.[260] In *Potter*, the California Supreme Court adopted a "more likely than not" standard when reviewing emotional distress cases based on medical practices.[261] The *Kerins* court applied this "more likely than not" standard when it considered whether there was a cause of action for emotional distress without proof of physical damages[262] and concluded that the plaintiff could not collect damages for emotional distress based on the fear of contracting AIDS.[263] The court stated that Ms. Kerins had to prove that the defendant's duty of care included protecting her emotional condition.[264] If *Kerins* is followed in other jurisdictions, plaintiffs will not have a cause of action for emotional distress unless the defendant "acted with oppression, fraud, or malice."[265] The plaintiff must prove that the fear of developing the disease is both reasonable and genuine and that the fear stems from reliable medical knowledge.[266] In addition, the plaintiff must demonstrate an actual risk of developing the disease based on the defendant's breach of duty.[267]

In some jurisdictions, courts are allowing emotional distress damages.[268] In these jurisdictions, the court allows the plaintiff to recover for "emotional distress damages due to the fear of developing AIDS for the reasonable window of anxiety—the period between which [sic] the plaintiff learns of the health care worker's or surgeon's HIV seropositivity, and receives fear-relieving information, such as proof of non-exposure, or HIV-negative test results."[269]

Since it is unclear whether the fear of developing or even being exposed to AIDS can constitute infliction of mental distress, a city will have to closely scrutinize the laws of the individual state in which it is located. The city could be opening itself to civil damages should an AIDS-infected individual work in one of the high-risk areas. The plaintiff may not need to demonstrate actual exposure to the disease, but rather only that there was a period of time during which the plaintiff was fearful of developing the disease. This reasoning leaves room for a case-by-case analysis of what is a reasonable time period between learning of the infected employee's condition and the plaintiff's negative test results.

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260 863 P.2d at 816.

261 *Id.*

262 27 Cal.App.4th at 1074.

263 *Id.* at 1078.

264 *Id.* at 1072.

265 *Id.* at 1075.

266 27 Cal.App.4th at 1075.

267 *Id.*

268 *See* Kerins v. Hartley, 21 Cal.App.4th 713, *reh'g granted*, 28 Cal.Rptr.2d 151 (Cal. Ct. App. 1993).

269 27 Cal.App.4th at 1067.

VII. CONCLUSION

Local governments find themselves in a tight position. They are stuck between new federal legislation and current state tort law. Often these laws conflict. It is unclear whether the state remedies will punish employers who try to follow the federal statutes.

The federal legislation requires that disabled employees not pose a direct threat to others. However, plaintiffs could argue that an infected employee does pose a direct threat because of the fear of transmitting the deadly disease. In some jurisdictions, the plaintiff may be able to recover damages without demonstrating actual exposure to HIV.

The problem with the federal legislation is the lack of clear definitions of key and often problematic words. Some phrases are defined under the ADA and the Rehabilitation Act, but even the definitions are not precise. There is no clear cutoff point for reasonableness when requiring reasonable accommodations. In addition, what would be considered "undue hardship"? Under the Rehabilitation Act, it meant financially burdensome. Under the ADA, there is no clear delineation as to how far an accommodation has to go before the employer can terminate an individual.

With the case law currently available, it is easy to see why individuals are fearful of AIDS. The courts cannot even determine the likelihood of transmission during employment as a firefighter. Moreover, medical knowledge indicated that there was little possibility that HIV or AIDS could be transmitted during the firefighters' duty. Finally, since the dentist in Florida was revealed to be HIV-positive and there are indications that his patients contracted the disease from him, there is a stronger argument that employees in high-risk occupations should be free of deadly infectious diseases.

The current state tort law may require local governments to be liable for their employment practices, as a result of hiring those individuals who are HIV-positive. If a governmental entity does not hire disabled individuals, it will violate the federal legislation. Until the Supreme Court rules on whether AIDS falls under the ADA's and the Rehabilitation Act's definitions of "disability" and until medical technology can determine whether or not the dentist infected his patients (either with or without following the CDC's guidelines), courts should be leery of rendering decisions against the state for its hiring and employment practices.

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