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Risk Reduction in Office Workplace Encounters Between Newly-Disabled Employees and Management of New York City Companies

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RISK REDUCTION IN OFFICE WORKPLACE ENCOUNTERS BETWEEN NEWLY-DISABLED EMPLOYEES AND MANAGEMENT OF NEW YORK CITY COMPANIES

*Marta B. Varela**

INTRODUCTION

The Americans with Disabilities Act (the "ADA"),[1] enacted by Congress in 1990 to bring disabled Americans into the mainstream workplace,[2] has become a widely-available tool for individual workers to receive concessions from management. Many employ-

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1. 42 U.S.C. § 12101 (1994).

2. *See id.*

(a) *Findings*

The Congress finds that —

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

ers realize that developing workplace policies to reduce the risk of disability discrimination is more efficient than litigating "undue hardship" claims in court.[3]

Disability laws can subject the unwary employer to liability. For instance, employers that immediately reject requests for accommodations violate disability laws,[4] because an employer has an obligation to consider whether the requested accommodation requested constitutes an "undue hardship."[5] Employers may also subject themselves to liability by making insufficient descriptions of the essential functions of a job.[6] The title of a job can have a counter-

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(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) 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.

(b) *Purpose*

It is the purpose of this chapter —

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Id.

3. *Id.* at § 12111(10)(A).

4. *See* DaSilva v. New York Racing Ass'n, NYCCHR Compl. No. E95-0668, Rec.Dec. & Order (April 16, 1996), *adopted*, Dec. & Order (June 25, 1996), *aff'd sub nom.* New York Racing Ass'n, Inc. v. New York City Comm'n on Human Rights, N.Y. L.J., Jan. 10, 1997, at 28 (Sup. Ct., Queens County, Jan. 10, 1997).

5. *See, e.g.*, 42 U.S.C. § 12111(10)(B); N.Y. EXEC. LAW § 296 (McKinney 1998); N.Y.C. ADMIN. CODE §§ 8-101 to 8-131 (1996).

6. As is apparent from the language used in the EEOC's Technical Assistance Manual, the EEOC takes the position that the authority to determine what are the "essential functions of a job" is not reserved to the employer:

2.3(a) Identifying the Essential Functions of a Job

productive impact on an employer's ability to successfully recruit without liability for discrimination, particularly among employers whose thin organizational structure requires them to ask employees to perform several different functions.[7] For example, a law firm who expects the person who answers the phone in the reception area to also perform a variety of other tasks which require mobility but advertises the job as for a "receptionist," may find itself having to explain to the Equal Employment Opportunity Commission ("EEOC") why an obviously disabled employee (but one without a speech or hearing-affecting disorder) could not perform the essential functions of the job as described.

Employers should also recognize the danger in hiring an employee with little or no experience over a qualified disabled candidate, because such conduct establishes a *prima facie* case of discrimination.[8] Finally, employers must refrain from making inquiries of employees not obviously disabled about the possible existence of a disability, including requesting pre-hire medical examinations.[9] On the flip side, employers must not breach confidential information concerning their employee's disabilities and accommodations.[10] The potential liability stemming from such statements demonstrates the need for experienced human relations professionals to train supervisors in how to avoid asking potentially dangerous questions in job interviews.

The unwary employer can easily fall into one of these traps and face substantial liability. This Article concentrates on the potential

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> Sometimes it is necessary to identify the essential functions of a job in order to know whether an individual with a disability is "qualified" to do the job. The regulations provide guidance on identifying the essential functions of the job. The first consideration is whether employees in the position are required to perform the function.
>
> *For example*: A job announcement or job description for a secretary or receptionist may state that typing is a function of the job. If, in fact, the employer has never or seldom required an employee in that position to type, this could not be considered an essential function.
>
> If a person holding a job does perform a function, the next consideration is whether removing that function would fundamentally change the job.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N TECHNICAL ASSISTANCE MANUAL, DISABILITY DISCRIMINATION EEOC-M-1A ch. 2, § 2.3(a), at II-12 (Jan. 1992) [hereinafter "TECHNICAL ASSISTANCE MANUAL"].

7. *See* Muller v. Hotsy Corp., 917 F. Supp. 1389 (N.D. Iowa 1996).

8. *See* Leventhal v. Louis Harris and Assocs., Inc., NYCCHR Compl. No. 10174356-EP, Rec. Dec. & Order (May 23, 1991), *adopted as modified*, Dec. & Order (Dec. 10, 1991), *aff'd sub nom.* Louis Harris and Assocs., Inc. v. deLeon, 634 N.E.2d 603 (N.Y. 1994).

9. *See* 42 U.S.C. § 12112(d).

10. *See id.* § 12112(d)(3)(B).

pitfalls for employers arising from the ADA protections afforded to employees with no prior record of disability returning to work after medical certification of a disability requiring accommodation. Philosophically, many advocates for the disabled "see little conflict between demanding that the disabled be treated like everyone else, while insisting that more physical and mental problems be labeled disabilities, entitling [more] people to special treatment."[11] In practice, however, employers need to walk a thin line to avoid lawsuits, which suggests how far from the original intent of the ADA the law has traveled. As the New York City Commission on Human Rights (the "Commission") enforces both the ADA[12] and its own law (which contains an even more expansive definition of disability), a comparison of the levels of risk to employers posed by the two laws is instructive. The Occupational Health and Safety Act of 1970 ("OSHA")[13] and Family Medical Leave Act of 1993 (the "FMLA")[14] regulations complicate factors even, as well as the increased possibility of rapid transmission of infectious diseases to the working population due to the increased popularity of air travel, all making the office workplace a more challenging environment to manage.

Part I of this Article describes the Federal laws that afford disabled employees protection from unnecessary intrusion into their private lives and sets out the requirements imposed on employers. Part II discusses the disability laws of New York City. Lastly, Part III of this Article demonstrates the applicability of the different laws to employers in New York City.

I. THE FEDERAL LAWS

A. The ADA

In essence, the ADA prohibits discrimination against a qualified person who has a disability in employment matters solely because of the person's disability.[15] While seemingly simplistic, the ADA is

11. Robert Samuelson, *Where Disability Law Can't Reach*, N.Y. POST, July 1, 1999, at 31.

12. The New York City Commission on Human Rights has a work-sharing agreement with the Equal Employment Opportunity Commission which permits it to investigate ADA complaints with concurrent jurisdiction, i.e., allegations of workplace discrimination occurring in New York City on the basis of a "disability" as defined by the ADA.

13. 29 U.S.C. § 651 (1994).

14. 29 U.S.C. § 2611 (1994).

15. *See* 42 U.S.C. § 12112 (1994).

filled with intricacies. These specifics are discussed in the separate subsections below.

1. *Perform Essential Functions "With or Without Reasonable Accommodation"*

Under the ADA, an applicant for a particular position, or an incumbent who has become disabled, must be able to perform the "essential functions"[16] of a job "with or without reasonable accommodation."[17] Section 2.3(b) of the EEOC's *Technical Assistance Manual*[18] indicates that determining the essential functions of a job can be established in a variety of ways, including "an informal analysis by observing and consulting with people who perform the job or have previously performed it and [sic] their supervisors."[19] Although a formal job analysis may be conducted, it may prove to be less helpful in the event of litigation. This is due to the probability that the attorney for the complainant will counter that analysis with a competing analysis that introduces evidence that the essential functions of the job were not what the employer would have the jury believe.[20]

2. *Pre and Post-offer Employment Inquiries About a Disability*

In most cases, if an applicant or an employee wants to make an issue of his disabled status, an employer must be prepared to either accommodate the employee or litigate. Employers must be careful about the questions they ask job applicants and current employees and must avoid deliberately or inadvertently revealing confidential

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16. 42 U.S.C. § 12111(8) (1994).

> (8) *Qualified individual with a disability*
> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

Id.; *See also* 29 C.F.R. § 1630.2(n) (describing "essential functions" as "fundamental job duties of employment position the individual with the disability holds or desires" and not "the marginal functions of the position").

17. *See* 42 U.S.C. § 1211(8).

18. *See* TECHNICAL ASSISTANCE MANUAL, *supra* note 6, at II-19 to 21.

19. *Id.* at II-20.

20. *See, e.g.*, Ryan v. City of Highland Heights, 1995 WL 584733, at *2 (N.D. Ohio 1995) (stating that the plaintiffs offered a competing analysis of essential functions of the job).

information,[21] because the ADA's rules about preserving employee confidentiality restrict what an employer can tell other employees about any connection between a change in the disabled employee's working conditions and the existence of a disability.[22] In addition, an employer may not make any pre-employment inquiries about a disability, or about the nature or severity of a disability on application forms, in an interview, or, in background and reference checks.[23] An employer may not make any medical inquiry or require a medical examination prior to making a conditional offer of employment.[24]

An employer *may* ask a job applicant questions about the applicant's ability to perform specific job functions, tasks, or duties, as long as these questions are not phrased in terms of a disability.[25] An employer may ask all applicants to describe or demonstrate how they will perform a job. If an individual has a known disability that the employer believes might interfere with or prevent performance of job functions, the applicant may be asked to describe or demonstrate how these functions will be performed.[26] This is true even if other applicants are not asked to do so.[27]

An employer may condition a job offer on the results of a medical examination or on the responses to medical inquiries if such an examination or inquiry is required of all entering employees in the same job category, regardless of disability.[28] Information obtained from such inquiries must remain strictly confidential.[29] A post-offer examination or inquiry has to be "job-related" and "consistent with business necessity" if the examination or inquiry is conducted in accordance to the regulations set out in the statute.[30]

An employer may condition a job offer on the satisfactory result of a post-offer medical examination or medical inquiry if this is required of all entering employees in the same job category regardless of disability.[31] Questions may be asked about previous injuries and workers' compensation claims.[32] If, however, an individual is

21. *See* TECHNICAL ASSISTANCE MANUAL, *supra* note 6, at V-4 to 16.
22. *See* 42 U.S.C. § 12112(d)(3)(B) (1999).
23. *See id.* § 12112(d)(2)(A).
24. *See id.*
25. *See id.* § 12112(d)(2)(B).
26. *See id.* § 12112(d)(3).
27. *See id.* § 12112(d)(4)(A).
28. *See id.* § 12112(d)(3)(A).
29. *See id.* § 12112(d)(3)(B). There are exceptions to the confidentiality rule.
30. *Id.* § 12112(d)(4)(A). *See also* 29 C.F.R. § 1630.14(b)(3) (1999).
31. *See* 42 U.S.C. § 12112(d)(3)(A); *see also* 29 C.F.R. § 1630.14(b).
32. *See* 42 U.S.C. § 12112(d)(4)(B).

not hired because a post-offer medical examination or inquiry reveals a disability, the reasons for not hiring must be job-related and necessary for the business.[33] The employer also must show that no reasonable accommodation was available that would enable this individual to perform the essential job functions, or that accommodation would impose an undue hardship.[34]

A post-offer medical examination may disqualify an individual who would pose a "direct threat" to health or safety,[35] and such disqualification must be job-related and consistent with business necessity.[36] In addition, a post-offer medical examination may not disqualify an individual with a disability who is currently able to perform essential job functions because of speculation that the disability may cause a risk of future injury.[37]

a. Examples:

> An individual who has an abnormal back X-ray may not be disqualified from a job that requires heavy lifting because of fear that she will be more likely to injure her back or cause higher workers' compensation or health insurance costs. However, where there is documentation that this individual has injured and re-injured her back in similar jobs, and the back condition has been aggravated further by injury, *and* if there is no reasonable accommodation that would eliminate the risk of reinjury or reduce it to an acceptable level, an employer would be justified in rejecting her for this position.
>
> If a medical examination reveals that an individual has epilepsy and is seizure-free or has adequate warning of a seizure, it would be unlawful to disqualify this person from a job operating a machine because of fear or speculation that he might pose a risk to himself or others. But if the examination and other medical inquiries reveal that an individual with epilepsy has seizures resulting in loss of consciousness, there could be evidence of significant risk in employing this person as a machine operator. However, even where the person might endanger himself by operating a machine, an accommodation, such as placing a shield over the machine to protect him, should be considered.

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33. *See id.* § 12112(d); *see also* 29 C.F.R. § 1630.14(b)(3).

34. *See* 42 U.S.C. § 12112(d); *see also* 29 C.F.R. §§ 1630.14(b)(3), 1630.15(b)(1).

35. *See* 42 U.S.C. § 12111(3) ("The term 'direct threat' means a significant risk to the health or safety of others that can not be eliminated by reasonable accommodation."). *See also* 29 C.F.R. 1630.15(b)(2).

36. *See* 42 U.S.C. § 12112(d)(4); *see also* 29 C.F.R. 1630.15(b)(1).

37. *See supra* note 36.

b. Sample Impermissible Questions:

> How many days were you absent from work because of illness last year?
>
> Have you had a major illness in the last 5 years?
>
> Is there any health-related reason you may not be able to perform the job for which you are applying?
>
> Have you ever been treated for any mental condition?
>
> Have you ever been treated by a psychiatrist or psychologist? If so, for what condition?
>
> Have you ever been hospitalized? If so, for what condition?
>
> Please list any conditions or diseases for which you have been treated in the past 3 years.
>
> Have you ever had or been treated for any of the following conditions or diseases?
> (Followed by a checklist of various conditions and diseases.)

While it is possible to ask about convictions for a crime as a way of ferreting out information about possible drug addiction, if the applicant ultimately selected is less qualified than the rejected applicant with a conviction, under both New York State and New York City law such inquiries subject the employer to liability for discrimination on the basis of arrest or conviction record.[38]

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38. *See* N.Y. CORRECT. LAW § 753 (McKinney 1998). Article 23-A of the New York Correction Law, entitled "Licensure and Employment of Persons Previously Convicted of One or More Criminal Offenses," was enacted to address discrimination against former inmates. Section 753 of the New York Correction Law lists specific factors relevant to the extension of an offer of employment to an ex-offender as follows:

> 1. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall consider the following factors:
>
> (a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
>
> (b) The specific duties and responsibilities necessarily related to the license or employment sought.
>
> (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
>
> (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
>
> (e) The age of the person at the time of occurrence of the criminal offense or offenses.
>
> (f) The seriousness of the offense or offenses.
>
> (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

3. *Reasonable Accommodation*

Compliance with the requirements of the pre-employment process, as seen above, are not the only challenge for employers. Many employees will become disabled during the course of their careers, and many will not be prepared to retire as a result. Under the ADA, those disabilities that are held to be substantially life-impairing require reasonable accommodation,[39] even if they are not directly job-related.[40] For instance, a request from a desk-bound employee with whiplash following an automobile accident may be entitled to an ergonomic chair to ease pressure on the injured back, unless the employer can establish undue hardship.[41] This is so, notwithstanding that while an ergonomic chair may make doing desk work easier for everyone because it supports the back in an upright posture, it is not necessary for all employees to maintain an upright posture to do their deskwork comfortably. This kind of indirect, job-related need for accommodation is distinguishable from a direct, job-related need for accommodation, such as the use of telecommunication devices for the deaf that make it possible for people with hearing and/or speech impairments to communicate over the telephone.

(h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

2. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.

Id. The state Human Rights Law, which governs the administration of the New York State Division of Human Rights, provides that the agency is obliged to investigate complaints alleging discrimination on the basis of arrest or conviction record. *See* N.Y. EXEC. LAW § 296(16) (McKinney 1998). The relevant section of the New York City Human Rights Law is section 8-107.11 of the Administrative Code of the City of New York, and it protects ex-offenders against discrimination with respect to the acquisition of a license, employment, or the provision of credit. *See* N.Y.C. ADMIN. CODE § 8-107.11 (1996).

39. *See* 29 C.F.R. § 1630.2(o)(1) (defining reasonable accommodation as modifications or adjustments to a job application process or work environment as to allow a disabled applicant to be considered for a position or an employee to perform the essential duties of the position).

40. *See* 42 U.S.C. § 12112(b)(5) (requiring reasonable accommodation without conditioning the requirement on whether the disability was job-related).

41. *See id.* § 12112(b)(5)(A) (excepting from the requirement to make a reasonable accommodation when such accommodation will "impose an undue hardship" on the employer).

The EEOC's *Technical Assistance Manual*[42] makes it clear that if more than one accommodation would be effective for the individual with a disability, or if the individual would prefer to provide his or her own accommodation, the individual's preference should be given first consideration.[43] While employers may choose the accommodations that are less expensive or easier to provide, they should be aware that their right to choose is no guarantee that employees will not turn around and allege discrimination on the basis of inadequate accommodation.

4. *Undue Hardship*

While the ADA provides that an employer is not required to make a reasonable accommodation if it would impose an "undue hardship"[44] on the operation of the business, the employer is not likely to prevail unless the accommodation requested would impose a "significant difficulty or expense."[45]

In reviewing the factors the EEOC will consider in determining whether an accommodation imposes an undue hardship on an employer, it is clear that in the event of a suit over failure to provide a requested accommodation, the EEOC will exercise its prerogative to review the company's business, financial, and other operations to evaluate whether the hardship alleged by the employer is actually "undue."[46] Some of the factors which the EEOC will consider are:

> 1) The nature and net cost of the accommodation needed, after tax credits and deductions for making accommodations are balanced against the actual cost of the actual accommodation;
>
> 2) The financial resources of the facility making the accommodation, the number of employees at this facility, and the effect on expenses and resources of the facility;
>
> 3) The overall financial resources, size, number of employees, and type and location of facilities of the entity covered by the ADA;
>
> 4) The type of operation of the covered entity, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the fa-

42. *See* TECHNICAL ASSISTANCE MANUAL, *supra* note 6, at III-8 to 10.
43. *See id.*
44. *See* 42 U.S.C. § 12111(10).
45. *Id.*
46. *See* TECHNICAL ASSISTANCE MANUAL, *supra* note 6, at III-8 to 10.

> cility involved in making the accommodation to the larger entity;
>
> 5) The impact of the accommodation on the operation of the facility that is making the accommodation.[47]

5. *The Impact of the Accommodation on Operations*

There are, however, some undue hardship claims that the employer may not present. First, an employer may not claim undue hardship solely because providing an accommodation has a negative impact on the morale of other employees.[48] Secondly, an employer claim may not present a claim of undue hardship because of "disruption" due to employee fears about, or prejudices toward, a person's disability.[49]

These exclusions from the definition of "undue hardship" are the soft underbelly of the ADA. Furthermore, these exclusions are areas where employers have the most to worry about, particularly those companies that require employees to work in environments where employees must work in close contact with each other, such as financial trading desks and assembly lines. While an employer may not be able to avoid a reasonable accommodation due to employee fears about a co-worker's disability, employee fears cannot be wished away: they will have an effect on workplace morale. Employees will freely speculate about the severity of the disability underpinning an obvious accommodation. Some employees will suspect that it was manufactured to justify special treatment. Other employees will overstate the severity of the disability or illness, spreading fear in the workplace. Others will have no idea as to the existence or lack of a disability, but will be persuaded that special treatment is being provided for unknown reasons.

In addition to employee morale issues, these exclusions will pose other management challenges. For example, employees may have irrational responses to disfigurements that they may believe represent a health risk. Consequently, the employer is vulnerable to suits from both sides: from the non-accommodated or inadequately accommodated employee on one side, and from employees who perceive themselves to be exposed to unnecessary health or safety risks on the other.

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47. *See id.*
48. *See id.*
49. *See id.*

Nevertheless, separating myth from reality while preserving an employee's confidentiality is essential if an employer is to develop a rational and legally sustainable approach to addressing disability issues in a particular workplace. In light of an employer's OSHA obligation to provide a workplace safe from foreseeable health and safety risk,[50] the ADA forbids employers from claiming undue hardship in anticipation of low employee morale or prejudices about a particular disability. In order to meet both OSHA and ADA standards, employers must be prepared to respond to unfounded employee fears about a coworker with a disability by explaining that anything less than a workplace free from foreseeable health and safety risks is a source of liability for the employer.

6. *Retracting the Broadening Reach of the ADA:* Sutton v. United Airlines

The only brake on the ever-widening reach of the ADA has been the Supreme Court's 7-2 decision in *Sutton v. United Airlines*,[51] which stated that a person with a correctable impairment is not disabled for purposes of the ADA if as a result of the correction, the impairment does not substantially limit a major life activity.[52] The plaintiffs, myopic twin sisters, applied to United Airlines for employment as commercial airline pilots but were rejected because they did not meet United's minimum requirement of uncorrected vision of 20/100 or better without corrective lenses.[53] They filed suit alleging that they were being discriminated on the basis of a disability covered by the ADA.[54] The Court rejected plaintiff's assertion that they were part of the protected class embraced by the ADA and found in favor of United Airlines.[55]

The Court excluded the plaintiffs from the protected class by pronouncing that the language of the ADA, read in its plainest sense, focuses on the degree of limitation of a major life activity presently, not previously, experienced by the plaintiff and the limitations the complainant continues to face despite corrective measures.[56] By focusing on the degree of life-impairment, the Supreme Court took a practical approach to the question of who is covered by the ADA and stated that "[t]hat use or nonuse of a corrective

50. *See* discussion *infra* Part I.B.
51. 119 S. Ct. 2139 (1999).
52. *See id.* at 2149.
53. *See id.* at 2141.
54. *See id.*
55. *See id.*
56. *See id.* at 2146.

device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment actually faces are in fact substantially limiting."[57] Thus, as the Court pointed out in response to Judge Stevens' dissent, someone with a prosthetic device will be covered under the ADA because even with the prosthetic, the complainant is substantially limited in life activities.[58]

Attorneys for plaintiffs, however, had a second argument (to make) based on the "perceived to be disabled" prong of the ADA definition of disability.[59] This argument advanced the idea that someone may be discriminated against because they are mistakenly regarded as substantially limited by an impairment, in this case the need for corrective lenses.[60] The *Sutton* complainants argued that United Airlines stereotyped applicants with correctable vision impairments by excluding them from consideration for positions as pilots.[61] The Court rejected this argument by pointing out that although United's "no glasses or contact lenses" policy barred them from being hired as pilots for United Airlines, they could work for other airlines because United's policy was not industry-wide.[62]

The Court rejected the complainant's concern about other airlines adopting United's policy by characterizing United's decision as the exercise of a preference, not the practice of discriminatory exclusion.[63] Justice Stevens' dissent, however, supported the plaintiff's argument.[64] Had Stevens' opinion been adopted by the majority of the court, it would have further undermined the employer's right to exercise a preference. The following paragraph taken from the dissent illustrates this point:

> Indeed, it seems to me eminently within the purpose and policy of the ADA to require employers who make hiring and firing decisions based on individuals' uncorrected vision to clarify why having, for example, 20/100 uncorrected vision or better is a valid job requirement. So long as an employer explicitly makes its decision based on an impairment that in some condition is substantially limiting, it matters not under the structure of the

57. Sutton v. United Airlines, 119 S. Ct. 2139, 2149 (1999) (emphasis omitted).
58. *See id.*
59. *See id.* at 2143.
60. *See id.* at 2144.
61. *See id.* at 2143.
62. *See id.* at 2152.
63. *See id.* at 2150.
64. *See id.* at 2152 (Stevens, J., dissenting).

> Act whether that impairment is widely shared or so rare that it is seriously misunderstood. Either way, the individual has an impairment that is covered by the purpose of the ADA, and she should be protected against irrational stereotypes and unjustified disparate treatment on that basis.[65]

7. *Exercise of a Preference or Discriminatory Exclusion?*

One particularly interesting point in *Sutton* is the Court's rejection of the complainant's concern about the implications of having all employers of airline pilots adopt a policy excluding applicants using corrective lenses. Plaintiffs argued that if the court ruled against them, commercial airlines would freely reject applicants wearing corrective lenses. Thus, the "perceived to be" prong of the disability definition would be violated by the perpetuation of stereotypes.[66]

By rejecting this argument,[67] the Court accorded employers a new freedom to determine the physical prerequisites of a position, without fear of being sued by a rejected applicant whose physical impairment had affected the hiring decision. Implicitly, this decision also confers on the employer the right to exclude a qualified applicant with a correctable disability. The result is that the "perceived to be" prong of the ADA's definition of disability is inaccessible to plaintiffs with substantially correctable impairments.

Extrapolating from the Court's reasoning, in order for this class of excluded plaintiffs to receive protection under this prong of the ADA, they would have to demonstrate that: 1) there is an industry-wide policy of discriminating against them; 2) it stereotypes them; and 3) it substantially limits them in working. In *Sutton*, the complainants were unable to meet this threshold because the Court did not accept their categorization of "global airline pilot"[68] as a position they were substantially impaired in performing. The Court indicated complainants could be employed as flight instructors or regional pilots, and quoted the EEOC's Interpretative Guidance in support of its position that "an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service,

65. *Id.* at 2158. Justice Breyer's dissent also questioned the Court's wisdom in not giving deference to the EEOC's regulation-writing authority with respect to the ADA's definition of disability. *See id.* at 2161 (Breyer, J., dissenting).

66. *See id.* at 2143.

67. *See id.* at 2152.

68. *See id.* at 2151.

would not be substantially limited in the major life activity of working."[69]

Citing the EEOC, this Court had no qualms about keeping a "dream job" out of the reach of an applicant with a correctable disability provided there was alternative employment.[70] The Court was clearly more concerned about the potential increase in litigation if the ADA definition of "disability" were found to include correctable conditions, than with the perpetuation of stereotypes.

Even with the exclusion of individuals with substantially correctable disabilities, the ADA nevertheless presents serious challenges for employers. While other anti-discrimination laws have changed the composition of the workforce, but not the nature of the job, under the disability laws, employers can be compelled to substantially change the nature of the jobs performed by particular employees to protect the disabled.

8. *Business Necessity*

> *Section 12113: Defenses*
>
> (a) In general
>
> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.[71]

Unlike the burden of production and persuasion of identifying a reasonable accommodation that lies with the plaintiff,[72] the defendant employer bears the burden of demonstrating a business necessity to justify excluding a disabled employee.[73] In order for the employer to use the business necessity defense, the employer must first demonstrate that all alternatives presented by the plaintiff would pose an undue hardship to the employer.[74] Alternatively,

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69. *Id.* (quoting section 1630.2 of title 29 of the Code of Federal Regulations).

70. *See* COPLAND (Buena Vista 1997) (depicting Sylvester Stallone as a small-town cop whose punctured eardrum keeps him out of consideration for his "dream" job with the New York City Police Department).

71. 42 U.S.C. § 12113 (1994).

72. *See* Stewart v. Happy Herman's Chesire Bridge, Inc., 117 F.3d 1278, 1286 (11th Cir. 1997).

73. *See* 42 U.S.C. § 12113.

74. *See* Anderson v. Gus Mayer Boston Store, 924 F. Supp. 763, 780 (E.D. Tex. 1996).

the employer may show that even with accommodation, the employee remains unable to fulfill the essential functions of the job.

Dey v. Milwaukee Forge[75] illustrates an employer's burden in a reasonable accommodation claim. In *Dey*, the worker did not receive his proposed accommodations after back surgery leaving him with an extremely limited range of motion. The worker was a dye polisher on the first shift, a position requiring heavy lifting and substantial bending.[76] Dey filled the position for almost four years before he was injured in March, 1991. He returned to work part-time on a light duty assignment on March 30, 1992. A September, 1992 Rehabilitation Work Capacity Evaluation of Dey performed by an independent party reported to Dey's doctor and Dey's employer that Dey could stoop, squat, climb stairs, lift and carry, but on a restricted basis.[77]

A month later his physician informed Dey and his employer that Dey could not bend in accordance with the physical requirements of the dye polisher position, even with modifications.[78] A subsequent report by an independent physician, dated November 19, 1992, concluded that Dey could return to work with a permanent 50 pound weight lifting restriction, provided he avoided repetitive bending or lifting.[79] A December report from Dey's physician amplified the previous reports and indicated that Dey would be permanently unable to do any lifting that required continued maintenance of even a mildly flexed posture; he was also not to repetitively bend or lift more than thirty pounds.[80] Dey's employer reviewed Dey's records to determine whether there were any available jobs that Dey could perform within these restrictions. Because Dey had held a machine-hand position in 1988 for a brief time, Dey's employer offered that position to Dey. Even though some bending was involved, it was much less than that required in the dye polisher position.[81]

After a brief trial period, Dey indicated he could not use the machines without additional accommodation in the form of an adjustable stool. Dey's supervisor was sympathetic, but suggested that if Dey stooped, squatted and set machine dials to avoid bend-

75. 957 F. Supp. 1043 (E.D. Wis. 1996).
76. *See id.* at 1047.
77. *See id.*
78. *See id.*
79. *See id.*
80. *See id.*
81. *See id.* at 1048.

ing, he could avoid the repetitive bending that irritated his back.[82] Even with this accommodation, however, Dey still had to bend periodically.

Presented with Dey's requirements, Dey's supervisor temporarily assigned very light duties to Dey. On February, 1993, the company's president informed Dey that there was no more light duty available and that Dey would have a week to decide whether he would work in the machine-hand position offered him.[83] The company made the ultimatum based on the independent doctor's report that Dey should be able to perform the duties of the machine hand position provided he stooped and squatted as an alternative to bending. By Dey's own admission, without using this alternative approach, even with the accommodation of an adjustable stool, he was capable of performing only fifty to sixty percent of tasks the machine-hand position required. He conceded, too, that the temporary work assignments meted out by his supervisor were "just 'make work.'"[84] A week after the company made the ultimatum, Dey responded by saying he would work only within his doctor's restrictions. The company informed Dey that it had no work within those parameters and the plaintiff commenced suit against the company.[85]

From December 1992 to February 12, 1993, prior to instituting his suit, Dey suggested to management that he should be considered for a foreman's position, a promotion to a supervisory position that he was not qualified for.[86] He also asked to be considered for a timekeeper position. Neither a foreman nor a timekeeper position was available at the time Dey made his suggestions, nor were they to be imminently available.[87] Dey also thought that he might be considered for a clerical position, but never broached the idea with management to verify whether any such positions were available. The court found for the employer, stating very clearly what an employer is or is not obligated to do to accommodate an employee under the ADA:

> The ADA requires an employer to make whatever accommodations are reasonably possible in circumstances so as to allow the employee to perform the functions essential to his position.

82. *See id.*
83. *See id.* at 1049.
84. *Id.*
85. *See id.*
86. *See id.*
87. *See id.* at 1050.

> However, the ADA does not obligate an employer to provide a disabled employee every accommodation on his wish list.
>
> The ADA may require an employer to reassign a disabled employee to a different position as a reasonable accommodation where the employee can no longer perform the essential functions of their current position. However . . . there are 'significant limitations on an employer's potential obligation to reassign a disabled employee as a reasonable accommodation. An employer is not obligated to provide an employee the accommodation he requests or prefers; the employer need only provide some reasonable accommodation. Nor is an employer obligated to "bump" other employees to create a vacancy for the disabled employee or to create a "new" position for the disabled employee.[88]

Dey's requests for accommodation to perform the machine-hand job included asking for occasional assistance of other machine hand workers in performing his machine-hand job.[89] He did not establish that he could perform the job with the help of other machine-hand workers. He also did not provide evidence that such intervention would be at most minimally disruptive to the productivity of other machine-hand workers. Citing *Gilbert v. Frank*,[90] the court pointed out that reallocating job duties in order to accommodate the requests of a disabled employee is not mandated by the ADA.[91] Further, if a reduction in productivity of the operations would be a result of reallocating job duties, such an accommodation would be unreasonable, because it posed an undue hardship on the employer. Thus, if after a sustained period of evaluation and attempts at accommodation, Dey could not perform the functions of his original position, and could not perform the functions of the available alternative job offered to him, the employer would not be required to do more.[92]

To prevail against a claim that a disabled employee was not reasonably accommodated under the ADA, an employer must: 1) seriously evaluate the request for accommodation; 2) evaluate whether modification of the employee's duties or reassignment to other duties that do not implicate the employee's physical limitations is possible; 3) evaluate the employee's request against the exact nature of the medically documented disability, balancing the limitations

88. *Id.* at 1050-51 (citations omitted).
89. *See id.* at 1052.
90. 949 F.2d 637 (2nd Cir. 1991).
91. *See Dey*, 957 F. Supp. at 1052.
92. *See id.* at 1054.

mandated by the employee's physician against the percentage of actual tasks inherent in the employee's present job that implicate the disability; 4) evaluate whether the reassignment will disrupt productivity or result in unfairness to other employees; and 5) produce a record that upon receiving the employee's request, the employer has both evaluated the employee's doctor recommendations and workplace, for the purpose of determining whether accommodation is reasonable.

B. Integrating OSHA into the ADA Framework

Employers of New York City businesses are aware that the Occupational Safety and Health Act impose a general duty to "furnish to each of [their] employees employment and a place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm to [their] employees."[93] Particularly in larger companies, employers seek to define their obligations to employees with viruses such as HIV or Hepatitis C, and their obligations to the other members of their staff who come into contact with such employees.

It is not uncommon for a large company to have several employees who are infected with either HIV or Hepatitis C.[94] These viruses are not eradicated by antibiotic pharmaceuticals, which have worked so well against bacterial infections.[95] A majority of such employees will want to remain in the workforce. Under OSHA and the ADA, how should an employer balance the competing interests of infected employees and healthy employees?

1. *OHSA Analysis*

The OSHA standards can be broken down into five parts: (1) "freedom from"; (2) "recognized"; (3) "hazards"; (4) that "cause

93. 29 U.S.C. § 654(a)(1) (1982).

94. Katherine E. Finkelstein, *Medical Workers Nervous Over Spread of Hepatitis C*, N.Y. TIMES, Oct. 2, 1999, at 2.

95. *See* WORLD HEALTH ORGANIZATION, WORLD HEALTH REPORT 1999: MAKING A DIFFERENCE 1, 22 (1999) (visited Feb. 2, 2000) <http://www.who.org/whr/1999/en/report.htm> ("Increases in international air travel, trade . . . and tourism mean that disease-producing organisms, the deadly as well as the commonplace, can be transported rapidly from one continent to another."). *See also* Dennis Pirages, *Ecological Theory and International Relations*, 5 IND. J. GLOBAL LEGAL STUD. 53, 61 (1997) ("Large scale movements of people . . . internationally place more human beings in contact with each other and accelerate the spread of communicable disease.").

or are likely to cause"; (5) "death or serious physical harm."[96] Of course, employees such as restaurant workers, sanitation, hazardous waste disposal and sewage treatment workers, police, fire and other rescue workers, health care personnel and morticians by the very nature of their work are exposed to the risk of infection. OSHA has specified that protective equipment is a must in such environments,[97] and a substantial literature has developed regarding that topic.[98] Hence, the question of an employer's duty when the risk is inherent in the workplace and recognized is largely settled. Instead, the challenge to employers is how to respond to the safety and health challenges resulting from the presence of an infected individual in the workplace.[99]

This challenge is amply exemplified in infectious diseases such as HIV, Hepatitis C, and tuberculosis. While it is not in dispute that

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96. Debra A Abbott, Comment, *Symposium on AIDS and the Rights and Obligations of Health Care Workers: Workplace Exposure to AIDS*, 48 MD. L. REV. 212, 214 (1989).

97. *See* 29 C.F.R. §§ 1910.132-1910.139 (1999).

98. *See* Arthur J. Marinelli, *Worker Protection and the Law of the Occupational Safety and Health Act*, 21 SUFFOLK U. L. REV. 1053 (1987); Salwa G. Spong, *AIDS and the Health Care Provider: Burgeoning Legal Issues*, 67 MICH. B.J. 610 (1988); McDonald, Bruce A. *Ethical Problems for Physicians Raised by AIDS and HIV Infection: Conflicting Legal Obligations of Confidentiality and Disclosure*, 22 U.C. DAVIS L. REV. 557 (1989); Feitshans, Ilise L. *Confronting AIDS in the Workplace: Balancing Employment Opportunity and Occupational Health Under Existing Labor Laws* 1989 DET. C.L. REV. 953 (1989).

99. Employees may be aware they are ill, but not aware of the extent of their illness. HIV, because it suppresses the immune system, can give rise to a range of coexisting opportunistic infections whose diagnoses are not coincident with the HIV diagnosis. *See* U.S. Dep't of Health and Human Services, Centers for Disease Control and Prevention, *Guidelines for Preventing the Transmission of Mycobacterium Tuberculosis in Health Care Facilities*, 1994, 43 Morbidity and Mortality Weekly Report 25 (1994) [hereinafter *Guidelines*].

> TB may be more difficult to diagnose among persons who have HIV infection (or other conditions associated with severe suppression of cell-mediated immunity) because of a non-classical clinical or radiographic presentation and/or the simultaneous occurrence of other pulmonary infections (e.g., *P. carinii* pneumonia and *M. avium* complex). The difficulty in diagnosing TB in HIV-infected persons may be further compounded by impaired responses to PPD skin tests, the possibly lower sensitivity of sputum smears for detecting AFB, or the overgrowth of cultures with *M. avium* complex in specimens from patients infected with both *M. avium* complex and *M. tuberculosis*.
>
> Immunosuprressed patients who have pulmonary signs or symptoms that are ascribed initially to infections or doncitions other than TB should be evaluated initially for coexisting TB. The evaluation for TB should be repeated if the patient does not respond to appropriate therapy for the presumed cause(s) of the pulmonary abnormalities.

Id.

HIV or Hepatitis C infection will shorten the life-span of the infected individual, the proposition that this occurs through social contact is a myth, albeit one with great currency. Employers may also need to be concerned about tuberculosis when it is airborne.[100] Tuberculosis may be transmitted by long-term exposure to persons infected with active tuberculosis.[101] New strains can be resistant to currently available treatments, if incorrectly administered, or ad-

100. *See id.* at 4. Further,

> M[ycobacterium] tuberculosis is carried in airborne particles, or droplet nuclei, that can be generated when persons who have pulmonary or laryngeal TB sneeze, cough, speak, or sing. The particles are an estimated 1-5μm in size, and normal air currents can keep them airborne for prolonged time periods and spread them throughout a room or building. Infection occurs when a susceptible person inhales droplet mucli containing *M. tuberculosis*, and these droplet nuclei traverse the mouth or nasal passages, upper respiratory tract, and bronchi to reach the alveoli of the lungs. Once in the alveoli, the organisms are taken up by alveolar macrophages and spread throughout the body. Usually within 2-10 weeks after initial infection with *M. tuberculosis*, the immune response limits further multiplication and spread of the tubercle bacilli; however, some of the bacilli remain dormant and viable for many years. This condition is referred to as latent TB infection. Persons with latent TB infection usually have positive purified protein derivative (PPD)-tuberculin skin-test results, but they do not have symptoms of active TB, and they are not infectious.

Id. at 58.

101. *See id.* at 4-5.

> In general, patients who have suspected or confirmed active TB should be considered infectious if they a) are coughing, b) are undergoing cough-inducing procedures, or c) have positive AFB sputum smears, *and* if they a) are not on chemotherapy, b) have just started chemotherapy, or c) have a poor clinical or bacteriologic response to chemotherapy. A patient who has drug-susceptible TB and who is on adequate chemotherapy and has had a significant clinical and bacteriologic response to therapy (*i.e.*, reduction in cough, resolution of fever, and progressively decreasing quantity of bacilii on smear) is probably no longer infectious. However, because drug susceptibility results are not usually known when the decision to discontinue isolation is made, all TB patients should remain in isolation while hospitalized until they have had three consecutive negative sputum smears collected on different days and they demonstrate clinical improvement.

Id. As a result,

> persons who become infected with *M. tuberculosis* have approximately a 10% risk for developing active TB during their lifetimes. This risk is greatest during the first 2 years after infection. Immunocompromised persons have a greater risk for the progression of latent TB infection to active TB disease; HIV infection is the strongest known risk factor for this progression. Persons with latent TB infection who become coinfected with HIV have approximately an 8%-10% risk per year for developing active TB. HIV-infected persons who are already severely immunosuppressed and who become newly infected with *M. tuberculosis* have an even greater risk for developing active TB.

Id. at 58.

ministered when the disease is advanced.[102] Notwithstanding that knowledge of the causes and the effective treatments for all three conditions are disparate, all are conditions that in their early stages do not impede the infected individual from working,[103] but which arouse paranoia in the workplace, both on the part of the infected and those who come in contact with the infected and are aware of the condition. Employers, whose workplace does not inherently pose a risk of infection transmission, may be unclear as to the best approach to take when presented with the competing challenges of an employee requesting protection of his confidentiality under the disability laws along with an accommodation, and the potential that providing the accommodation may create suspicion and hostility in healthy co-workers.

If, in the employer's view, it would be better to disclose the infected employee's condition to a select group of supervisors and employees, may the employer do so without risking suit for breach of the infected employee's right of confidentiality under the ADA? Whether or not the employer determines that some disclosure of the employee's condition is advisable, may the employer discipline the "refuse-nik" employee who balks at working with a perceived-to-be infected employee?[104]

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102. *See* Richard L. Riley and Edward A. Nardell, *Controlling Transmission of Tuberculosis in Health Care Facilities: Ventilation, Filtration, and Ultraviolet Air Disinfection*, *in* 1993 PLANT TECHNOLOGY & SAFETY MANAGEMENT SERIES 25.

> The interruption of person-to-person transmission of pulmonary tuberculosis (TB) is particularly difficult because the infecting particles are airborne and a single TB-containing particle, strategically deposited in the lung, is enough to infect . . .
>
> The source of tubercle bacilli that transmit tuberculosis is the lung of an infected person . . . A person breathes about 0.353 cubic feet of air per minute or about 500 cubic feet per day, yet it ordinarily takes months or even years of association with tuberculosis patients before infection occurs . . . Because of the huge cumulative columns of air that people breathe over time, such a dilute suspension of tubercle bacilli in the air was found adequate, by calculation, to account for the rate of infection of student nurses working on tuberculosis wards. On average, it took about a year. When patients produce larger numbers of airborne organisms or dilution by room ventilation is less, organisms may be less widely separated and infection may occur more rapidly. Nevertheless, the fact that airborne tubercle bacilli occur sporadically, together with the fact that a single one when deposited in the lung can cause infection, makes transmission of tuberculosis difficult to control.

Id. (footnotes omitted).

103. *See* School Bd. v. Airline, 480 U.S. 273 (1987) (discussing tuberculosis).

104. Query: "What if an employer decides not to disclose information about an infected employee and an employee refuses to work with the infected employee that he correctly perceives to be infected?" Answer: Whether the employer discloses or

2. *Public Health Overlap*

With respect to tuberculosis, employers in New York City need to know that under the City's Health Code, physicians with a patient testing positive for active tuberculosis bacilii are required to report that fact to the New York City Department of Health (the "Health Department"), which will then track down the patient's employer.[105] Once identified as a person with infectious, active tuberculosis, the Commissioner of the Health Department will issue an exclusion order that may exclude the person from the workplace, school, and "any premises or facilities the [Health] Department determines cannot be maintained in a manner adequate to protect others against spread of the disease."[106]

In this situation, the Health Department's authority supersedes both the employer's authority and that of the ADA.[107] Notwithstanding, an individual may be infected with active tuberculosis for some time before visiting a physician to confirm the diagnosis.[108] Indeed, according to a combined American-Australian study,[109] delayed diagnosis increases the risk that co-workers will be infected at a higher than normal rate.[110] A study by the United

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does not disclose the infected employee's status, the answer is the same: whether the refusal is based on fact or fancy, the query goes to factual question of whether the employer has provided against recognized workplace hazards adequately. If he has, the employee is without cause to refuse to work as he did prior to the advent of the employer's knowledge of the infected employee's condition.

105. *See* N.Y.C. HEALTH CODE art. 11, § 47 (1999).

> *Tuberculosis; reporting, examination, exclusion, removal and detention.* (a) A physician who attends a case of active tuberculosis, or the person I charge of a hospital, dispensary or clinic giving out-patient treatment to such a case, shall report to the Department at such times that the Department requires. The report shall state whether the case is still under treatment, the address of the case, the stage, clinical status and treatment of the disease and the dates and results of sputum and X-ray examinations and any other information required by the Department. The physician who attends the case or the person in charge of a hospital, dispensary or clinic giving out-patient care to such a case shall report promptly to the Department when the case ceases to receive treatment and the reason for the cessation of treatment.

Id.

106. *See id.* at 47(d).

107. City of New York v. Antoinette R., 630 N.Y.S.2d 1008 (1995); City of New York v. Doe, 614 N.Y.S.2d 8 (1994).

108. *See Guidelines*, *supra* note 99, at 25.

109. *See* C. Raina MacIntyre et al., *High Rate of Transmission of Tuberculosis in an Office: Impact of Delayed Diagnosis*, 21 CLINICAL INFECTIOUS DISEASES 1170 (1995).

110. *See id.* In 1993, a Melbourne, Australia office notified the State Health Department of Victoria in Victoria, Australia, that two of its employees had pulmonary TB. *See id.* at 1170. One of the infected individuals had "a productive cough and night sweats and noted weight loss since the end of September 1992," for which she

States Navy indicated that individuals with no direct contact with an infected individual may be infected by inhalation of airborne droplets carrying the tuberculosis bacilii that are "rapidly and evenly dispersed throughout a closed environment with a recirculation ventilation system."[111]

While an employer cannot be held liable for unforeseeable hazards in the workplace, recent increases in the incidence of tuberculosis[112] do raise troubling issues for employers, caught between the concern about being sued for having been insufficiently alert to the hazard of an infected individual in the workplace, and the obligation to protect an infected employee from discrimination.

3. *Employer's Duties*

The simplest situation for the employer is when the employer is faced with an obviously ill employee with symptoms of an underlying infection, such as fever. In this situation, the employer should always send the employee home without delay — albeit without making conclusions about the causes of his particular symptoms. An employee who has the outward symptoms of an infection should not return to work until the employee's physician has certified that employee's fitness to return to work. Due to the em-

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had seen a doctor who had not tested her for tuberculosis initially. *See id.* The other infected individual, who was found to have pulmonary TB, was employed at the same office as the first individual but had transferred to another state. *See id.* at 1171. The second individual did not work closely with the first individual. *See id.* The office, which is in a western suburb of Melbourne, has 150 people that work on site and 60 that work at other areas yet come to the office once a week. *See id.* "The majority of on site employees (85 of 150) are customer service representatives who work in a large, unpartitioned office area and answer telephone calls from customers." *Id.* The study found that 24% of the employees (46 people) were infected with tuberculosis, albeit in an inactive form. *See id.* at 1172.

111. V.N. Houk et al., *The Epidemiology of Tuberculosis Infection in a Closed Environment*, 16 ARCHIVES ENVTL. HEALTH 26, 34 (1968).

112. *See Current Epidemiology of Tuberculosis in the United States, Control of Tuberculosis in the United States*, 146 AM. REV. OF RESPIRATORY DISEASE 1623 (1992). In fact,

> [i]n 1991, the number of reported cases of TB in the United States was 26, 283 — an increase of two percent compared with the previous year. Although there had been an annual decline of approximately five percent in the number of TB cases since the 1950s and six to seven percent annual decline in cases during the years 1981 to 1984, in 1985 to 1991 the number of cases increased by 18%. Using the trend for 1981 to 1984 to estimate the expected number of cases for 1985 to 1991, it can be calculated that more than 39,000 excess cases of TB occurred between 1985 and 1991 (figure 1). The occurrence of TB among persons with HIV infection is a major factor contributing to this change in the decades-long pattern of decline of TB.

Id.

ployer's lack of knowledge as to the causes of the employee's symptoms, an employer should keep an obviously ill employee out of the workplace.[113]

This situation, however, is not identical to the circumstance where an employee with a non-obvious disability approaches an employer for an accommodation. To avoid liability for discrimination on the basis of a disability and breach of an employee's confidentiality, employers who suspect that an employee is infected with a life-threatening disease may not make inquiries to determine the existence of any disability,[114] even one that poses a public health risk to others, such as tuberculosis. In the case of an employee infected with HIV who approaches the employer with a request for an accommodation, the employer must preserve the confidentiality of the employee's disclosure.[115]

The same is true for an employee with AIDS requesting an accommodation in a workplace in which there is no inherent risk of transmission of blood or other bodily fluids. Absent proof that the employee's continued employment poses "a direct threat to the health and safety of other individuals in the workplace,"[116] the employer may not discharge or transfer the employee. The case of *Estate of William C. Mauro v. Borgess Medical Center*[117] illustrates the level of risk an employee must pose to others before the direct threat threshold is met.

4. *Mauro*

Borgess Medical Center, a Michigan hospital, employed Mauro from May 1990 through August, 1992 as an operating room technician.[118] In June 1992, the employer learned that Mauro had AIDS.[119] Because of concern that Mauro might expose a patient to HIV, the employer created a new full-time position that eliminated all risks of transmission of the HIV virus for Mauro.[120] Mauro re-

113. An employee and his doctor may be initially aware that the employee is ill, but not of the extent of the illness. The case of HIV makes possible coexisting opportunistic infections is a case in point. *See Guidelines*, *supra* note 85 and text within the footnote.

114. *See* 42 U.S.C. § 12112(d) (1999).

115. *See id.*

116. 42 U.S.C. § 12113(b). The Rehabilitation Act applies in addition to the ADA where the employer is federally-funded in whole or part. *See* 29 U.S.C. §§ 705, 793-794 (1999).

117. 137 F.3d 398 (6th Cir. 1998).

118. *See id.* at 400.

119. *See id.*

120. *See id.*

fused the position offered to him in July 1992.[121] Borgess then created a task force to determine whether an HIV positive employee could safely perform the job responsibilities of a technician.[122] The task force determined that a job requiring an HIV-infected worker to place his or her hands into a patient's body cavity in the presence of sharp instrumentation represented a direct threat to patient safety.[123] Subsequently, Borgess discharged Mauro and he sued.[124]

Initially, Mauro lost at trial in the federal district court of Michigan.[125] On appeal Mauro argued that the district court erred in concluding that there was no genuine issue of material fact about whether the likelihood of him transmitting HIV in the course of his job posed a significant risk or direct threat to the health and safety of others, thus rendering him unqualified under the ADA.[126] The question on appeal was whether the risk was "significant" in line with the factors laid out in the *Airline* case,[127] which specified that a court must consider:

> (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.[128]

Equal Employment Opportunity Guidelines cited by the court, however, indicated that an employer is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk.[129] The risk can only be considered when it poses a significant risk, *i.e.* high probability, of substantial harm; a speculative or remote risk is insufficient.[130] Thus, the *probability of infection* is the dispositive factor in the determination, not the *possibility of infection.*

In Mauro's situation, the scientific consensus was that following a surgeon's incision of the area to be treated, as a surgical techni-

121. *See id.*
122. *See id.*
123. *See id.*
124. *See id.*
125. *See* Mauro v. Borgess Medical Center, 886 F. Supp. 1349 (W.D. Mich. 1995).
126. *See* Mauro v. Borgess Medical Center, 137 F.3d 398, 401 (6th Cir. 1998).
127. *See* School Bd. v. Airline, 480 U.S. 273 (1987).
128. *See id.* at 288.
129. *See Mauro*, 137 F.3d. at 403.
130. *See id.* at 403; *see also* 29 C.F.R. § 1630.2(r) (1996) (defining "direct threat").

cian, he could occasionally be required to supplement the retraction of muscle tissue effected with a surgical clamp by sticking his surgically-gloved hand in the wound.[131] In fact, the record indicated that during surgery on one occasion Mauro had sliced his right index finger while removing a knife blade from a handle and on another that he had scratched his hand with the sharp end of a dirty needle while threading it.[132] The medical expert who testified at the trial agreed with Borgess Medical Center that the theoretical model used by the Center for Disease Control estimated that the risk of a patient being infected by an HIV-positive surgeon during a single operation as being somewhere between one in 42,000 and one in 420,000.[133] The medical expert noted, however, that if a job required an HIV-infected worker to place his or her hands into a patient's body cavity with a sharp instrument in the vicinity of the cavity and the technician's hand, such contact with the body cavity represented a real risk to patient care and safety which could lead to the transmission of the AIDS virus.[134]

Notwithstanding the medical expert's persuasive testimony as to the probable risk, the *Mauro* case did not turn on statistical information alone. Rather, it turned on: (1) the analysis of the HIV Task Force evaluating the problem Mauro's condition represented; (2) the willingness of Borgess Medical Center to accommodate Mauro in a reasonable way; and (3) Mauro's refusal to accept the accommodation. Employers should not read *Mauro* to support employers' use of doctors' opinions to justify employment action against a disabled person. Concerned about an employee with an infectious disease not covered under the list of diseases justifying exclusion by the Health Department, employers should be prepared to engage in an *Airline* analysis,[135] whether the condition is HIV, AIDS or a common cold.

5. *Non-Infectious Disabilities*

Turning to employees with non-infectious disabilities, the rule is that employers may not automatically discharge such employees. For example, in cases concerning morbid obesity, the futility of using a physician's opinion to justify discrimination on the basis of such a non-infectious disability is well-illustrated by *EEOC v.*

131. *See Mauro*, 137 F.3d at 404.
132. *See id.*
133. *See id.* at 405.
134. *See id.*
135. *See* School Bd. v. Airline, 480 U.S. 273 (1987).

Texas Bus Lines,[136] *EEOC v. Chrysler Corp.*[137] and *EEOC v. Exxon Corp.*[138]

In *Texas Bus Lines*, the court held that an employer's reliance on a physician's opinion that under a federal Department of Transportation regulation an applicant's obesity would disqualify her for a bus driver's position was improper and erroneous and constituted a violation by the employer of the Americans with Disabilities Act.[139] While the relevant DOT regulation instructed the examining physician to consider the applicant's weight as a factor in assessing the applicant's physical qualifications for the job, the court ruled that obesity was only to be considered as evidence of disqualifying illnesses and was not a *per se* disqualification under the regulation.[140]

In the case the EEOC brought against the Chrysler Corporation[141] the automatic exclusion of a diabetic electrician from certain types of work without individual analysis of the specific degree of impairment manifested was a violation of the ADA.

EEOC v. Exxon Corp. is another example of a knee-jerk reaction by an employer which unnecessarily exposed it to liability under the ADA.[142] In that case, excluded employees challenged Exxon's policy of automatically excluding current Exxon employees who are rehabilitated substance abusers from safety sensitive positions.[143] Citing the ADA's direct threat test,[144] Exxon defended by introducing a claim that a blanket policy was required because individualized assessment was if not, impossible, impractical due to the highly unpredictable risk of relapse, and the safety threat presented by a relapsed employee.[145] Ultimately, the court accepted Exxon's arguments and held that the ADA does not prohibit blanket policies based on safety-related concerns. In order to qualify as a blanket exclusion under the ADA, the employer must establish as a matter of fact that it is impossible or impractical to individually assess each employee affected by the policy.[146] Whether Exxon could meet that standard was a question of fact

136. 923 F. Supp. 965 (S.D. Tex. 1996).
137. 917 F. Supp. 1164 (E.D. Mich. 1996).
138. 967 F. Supp. 208 (N.D. Tex. 1997).
139. *See Texas Bus Lines*, 923 F. Supp at 973.
140. *See id.* at 972.
141. *See* EEOC v. Chrysler Corp., 917 F. Supp.1164 (E.D. Mich. 1996).
142. *See Exxon Corp.*, 967 F. Supp. at 208.
143. *See id.* at 209.
144. *See* 42 U.S.C. §§ 12111(3), 12113(b) (1994).
145. *See Exxon Corp.*, 967 F. Supp. at 211.
146. *See id.*

and did not therefore require the court to order summary judgment for Exxon.

In sum, an employer hoping to exclude an applicant or employee from a particular field of work must be able to demonstrate that the exclusion is premised on an individual assessment of the safety risk to others posed by the employee's disability, or that individual assessment is impractical. An assessment must be well-founded and may not be premised on speculation. Additionally, the employer may not hide behind a company's doctor's opinion, but must analyze the risk posed in light of the *Airline* factors.[147] Otherwise, the employer should expect to lose if the employee challenges the limitation in court.

C. The FMLA

Any employer with fifty (50) or more employees for at least twenty weeks is subject to the FMLA.[148] The FMLA requires employers to permit employees[149] unpaid leave of twelve weeks a year as maternity leave, to effect an adoption, to care for a close relative, or on account of a serious health problem.[150] The employee is entitled to return to the position he held prior to the leave, or to be restored to an equivalent position to that he held prior to the leave.[151] The only exception to this entitlement is a case in which the employer denied the leave and can prove "such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer," and the employee is so notified prior to the leave; or, if the leave has already commenced, the employee is so notified and "elects not to return to employment after receiving such notice."[152] Such an employee must also be among the ten percent of employees most highly paid.[153]

147. *See* School Bd. v. Airline, 480 U.S. 273 (1987). *See also supra* notes 126-127 and accompanying text.

148. 29 U.S.C. § 2611(4)(A) (1994).

149. *See id.* § 2611(2)(A).

150. *See id.* § 2612(a)(1)(A)-(C).

151. *See id.* § 2612(D) (stating that leave is permitted "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee"). *See also id.* § 2611(11) (defining "serious health condition" as an "illness, injury, impairment, or physical or mental condition that involves . . . inpatient care in a hospital, hospice, or residential medical care facility; or . . . continuing treatment by a health care provider." *Id.*

152. *Id.* § 2614(b)(1)(A).

153. *See id.* § 2614(b)(B).

An employer may require advance notice in the case of a foreseeable need for leave,[154] as well as certification of the serious health condition[155] and, a second medical opinion as to the existence of that health condition.[156] The FMLA, however, also contains a section prohibiting any interference with the employee's right to leave and a non-discrimination section[157] with provision for lost wages and benefits, with interest, and equitable relief including employment, promotion and reinstatement. Thus, an employer, in most cases, must grant a properly certified medical leave and may not retaliate against an employee who absents himself from the workplace on medical leave. In the case of highly compensated employees who wish to sue the employer for denying a leave, the employer has no safe harbor, and must be prepared to litigate and prove that the employee's departure from the workplace at the time of the requested leave would impose "substantial and grievous economic injury"[158] to the employer, a very high burden.

II. NEW YORK CITY LAW

Most disability claims filed at the Commission that grow out of workplace encounters are brought in consequence of the termination of an employee.[159] Because the threshold definition of disability permits any physical or psychological condition to be the basis of a complaint, the terminated employee can maintain an action based on an employer's refusal to accommodate even a minor disability. It, however, is the obligation of the employee to make the disability known to the employer, as well as to request the accommodation. A former employee making a post-termination disability claim cannot prevail unless the existence of the disability and the request for accommodation were known or should have been known to the employer prior to the termination.

When a currently disabled employee submits medical documentation of the disability, the employer must attempt to accommodate it, regardless of the employer's perception of the severity of the disability. In such cases, if a complaint is ultimately filed, the matters are better suited for mediation rather than litigation.

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154. *See id.* § 2612(e)(1).
155. *See id.* § 2613(b).
156. *See id.* § 2613(c).
157. *See id.* § 2615(a).
158. *Id.* § 2614(b)(1)(A).
159. Of the 135 cases filed in fiscal year 1999 alleging disability-based discrimination in employment, 61% alleged discharge claims.

Mediation is a voluntary process. The Commission can compel neither the employer nor the complainants to participate. Notwithstanding, the Commission often advises both parties to mediate, because it saves time and leads to mutually satisfactory resolution sooner than litigation. In these instances there is little public interest at stake, and the Commission's litigative resources can be used in a more constructive manner. If mediation fails, the matter will return to the docket without prejudice (except in cases where the complainant refuses to accept a reasonable settlement offer).

1. *The Balking Employee*

To protect against double litigation, employers confronted with an employee who balks at working with a co-worker he perceives to be HIV positive must be aware of the applicable laws prohibiting discrimination against those defined as "disabled," the laws prohibiting disclosure of confidential information, and the standards for a safe workplace promulgated by the Occupational Health and Safety Organization. Disclosure of confidential information about a disabled employee can subject the employer to an ADA discrimination lawsuit based on selective disclosure of confidential information about an employee. Under New York State law, an employer may communicate the fact of an employee's disability to a small number of persons without incurring liability for a breach of confidentiality, provided the disclosure is not casual and is essential to the provision of an accommodation to the disabled employee.[160]

With regard to the "balking employee," if there is no regular contact with bodily fluids or risk of such contact, employees have no right to claim that there is a recognized risk of exposure to AIDS. The ADA requires that "direct threat" to the health or safety of others be proved by a showing a "significant risk of substantial harm." Speculation about the possibility of a freak accident will not discharge the employee's burden. Therefore, while AIDS phobia claims generated in the health care context pose challenges for the management of hospitals and health centers,[161] a claim by an office worker that the environment poses a "direct threat" within the meaning of the ADA is unlikely to survive a summary judgment motion.

160. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. a, at 384 (1977).

161. Leo T. Crowley, *AIDS Phobia Claims and the Disabilities Act*, N.Y. L.J., Oct. 20, 1994, at 3.

In sum, in addressing an employee who balks at working with a co-worker with a non-obvious disability, an employer should never confirm the existence or non-existence of a disability. In an office context, refusal to work with a co-worker because of such a perception should be dealt with according to standard procedures designed to address an instance of insubordination.

2. *Undue Hardship*

The defense of "undue hardship" contained in the ADA is of very limited value to the employer. In the first place, the ADA provides no safe harbor for employers who believe a requested accommodation poses substantial problems: they can only find out whether their position is a correct one by being sued by the employee and learning whether a court agrees with them. This is not a proactive form of business planning, and most employers will not avail themselves of it until repeated attempts at accommodation have failed and the employer has no choice but to defend itself in the litigation.

It is almost axiomatic that courts do not recognize any employer claim of "undue hardship" under the ADA, assuming that the employer, if not bankrupt, is capable of making the accommodation, whatever the cost. Each workplace is different and each employee is unique: while two employees may share a disability, each will certainly have individual characteristics unique to him as a disabled individual. While the EEOC provides guidelines, there are few bright line rules, and each employer must be alert to the issues in order to avoid major pitfalls.[162]

3. *New York City Human Rights Law and Sick Leave Policies*

Reviewing sick leave policies for non-substantially-limiting impairments should not be a function of the anti-discrimination laws. Because, however, the definition of "disability" contained in the City's law includes any physical or psychological condition that can be verified by a physician, employers, having terminated an employee for excessive absences, may have to provide a City agency with sick leave records for conditions which meet the ADA threshold for a disability. In the employment context (versus the public

162. *See generally*, Barbara A. Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, 14 BERKELEY J. EMP. & LAB. L. 201 (1993); Lawrence P. Postol & David D. Kadue, *An Employer's Guide to the Americans with Disabilities Act: From Job Qualifications to Reasonable Accommodations*, 24 J. MARSHALL L. REV. 693 (1991).

accommodations area, where the agency has played a useful role in expanding accessibility to the disabled)[163] disability cases arising out of the employment context are all too often unsubstantiated wrongful termination cases. This will continue to be the case as long as the definition of "disability" contained in the City's law is not restricted to seriously impairing conditions as defined by the ADA.

CONCLUSION

In no other area of anti-discrimination law do the policy consequences of implementing an expanding definition of who is protected present themselves so starkly. In the area of disability discrimination, unlike exclusion on the basis of race, religion, national origin, age or gender, *who* is a member of the protected class is subject to contraction *and* expansion. Contraction because due to medical breakthroughs, recovery from disabilities that would have formerly been permanent is possible. Expansion because new psychological and physical dysfunctions are constantly being identified and their sources isolated by scientific research. In addition, as scientific research establishes more and more correlation between substances ingested and the development of disabling conditions — or between environmental conditions —the more the taxonomy of disability will expand. The result of this might be that in the future, disability law will look very similar to tort law —a jackpot for lawyers— and less like a social vehicle for doing the right thing by those born with impairing disabilities.

Employers who want to minimize their litigation risks should: 1) carefully analyze workplace structures to come up with employer-oriented job descriptions of the essential functions of a job, relying

163. *See* Torres v. Prince Management Corp., No. 301/98, 1997 WL 1051932 (N.Y.C. Com. Hum. Rts.), Report & Recommendation (August 14, 1997), *adopted as modified*, Dec. & Order (October 27, 1997), *aff'd sub nom.* Commission on Human Rights v. 3591-93 Bainbridge Realty, Ltd., Index No. 400356/98 (Sup. Ct., NY County, 1998) (mother with child in wheelchair denied appropriate access to building whose front door was at the top of a series of steps); Commission on Human Rights, ex rel. ronnie Ellen Raymond v. 325 Cooperative, Inc., No. 1423/98, 1999 WL 152526 (N.Y.C. Com. Hum. Rts.), Report and Recommendation (Jan. 12, 1999), adopted as modified, Dec. & Order (Jan. 12, 1999) (Woman owner of co-op apartment becomes disabled and board denies her safe access to building, citing possible suit by first floor apartment owner whose view would be obstructed by presence of lift at front of building.); New York City Commission on Human Rights v. Pathmark Stores, Index No. 4011134/99 *slip op.* (Sup. Ct., NY County 1999) (order enforcing settlement agreement and imposing fines; substantial compliance with a conciliation agreement to eliminate supermarket cart corrals insufficient to discharge company's burden of compliance which must apply to 100% of its New York City supermarkets).

especially on information from former employees and supervisors to round out the descriptions with a supervisor's assessment of how the job fits into the company's big picture; 2) interview applicants for positions with those descriptions firmly in mind, avoiding impermissible inquiries about a possible disability; 3) if an employee becomes disabled and returns requesting accommodation *never* dismiss it out of hand; and 4) if, after serious evaluation, the accommodation requested would require more than the work structure can comfortably provide, have human resources meet with the employee to map out the employee's workplan to determine what alternatives to the original request for accommodation can meet the employee's need.

Finally, remember that the employee's lack of performance is never a defense to refusal to entertain or implement a requested accommodation. If an employee with a disability needs to be terminated, the employer may do so only because the employee can no longer perform the essential functions of the job. Refusing a problem employee an accommodation out of spleen only opens the door to a disability discrimination suit.

Because there is no limitation on what conditions are covered, under the law of the City of New York, all the above goes is especially true. Faced with a request for reasonable accommodation, a New York City employer needs to exercise its right to compel a medical examination from a physician of its own choosing to verify the existence of the alleged disability and be ready to litigate if, after accommodation, the employee is still unable to perform the essential functions of the job.