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AIDS, EMPLOYMENT, AND THE DIRECT THREAT DEFENSE: THE BURDEN OF PROOF AND THE CIRCUIT COURT SPLIT

*Sarah R. Christie**

This Note examines disability-related discrimination in light of the protections afforded by the Americans with Disabilities Act (ADA) and in the context of an HIV- or AIDS-infected employee. Under the ADA, an employer may legally fire a worker who poses a direct threat to the individuals around him or her. It is unclear, however, whether the burden of proving or disproving the claim that an individual is a direct threat lies with the employer or the employee. This Note analyzes the circuit split over which party bears the burden of proof under the direct threat standard in light of prospective HIV-related litigation.

INTRODUCTION

Although a considerable number of disability-related discrimination cases have been litigated, few of those cases have specifically addressed discrimination in the context of an HIV-positive employee where the employer's defense was that the worker posed a direct threat to the individuals around him or her. While the general American public may be unaware of the large contingent of HIV-positive individuals that comprise part of the workforce, statistics indicate that the number of employees with the illness is significant and growing. Because the Americans with Disabilities Act (ADA) was passed before much of what is now known about human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS) was discovered, the statute contains a gap, and threatens the possibility that HIV-positive individuals will not be sufficiently protected against an employer's discriminatory actions. The stigma that continues to surround the AIDS virus underscores how prevalent intolerance of infected individuals continues to be, and how important it is for courts to help eradicate discriminatory practices.

In 1990, Congress enacted the ADA in response to findings that, "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."[1] The ADA makes it unlawful for an employer to

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1. 42 U.S.C. § 12101(a)(2) (2000).

discriminate against an otherwise qualified individual because of his or her disability.[2] Nonetheless, an employer may terminate or refuse to hire someone if that person poses a direct threat to the health or safety of others.[3] A direct threat to other employees, for example, might come in the form of an insulin-dependent diabetic who experiences several seizures while at work, performing his job handling hazardous chemicals.[4] While it is the employee's burden to prove that he or she is "otherwise qualified" for the job,[5] the statute and case law do not definitively answer whether the burden of proving or disproving the allegation that an individual is a direct threat lies with the defendant employer or with the plaintiff employee.[6] The ambiguous statutory language has generated disagreement among the U.S. Courts of Appeals: The Sixth, Seventh, and Ninth Circuits have found that the employer bears the burden of proof, while the First, Tenth, and Eleventh Circuits have held that it is the employee's burden; the Fifth Circuit has taken a mixed approach.[7] The U.S. Supreme Court has not directly addressed this controversy.[8]

The purpose of this Note is to analyze the circuit split over which party bears the burden of proof under the direct threat standard in light of prospective HIV-related litigation. The alleged ambiguity in Title I of the ADA has brought about conflicting outcomes among the circuit courts in cases with relatively similar fact patterns. Generally, where the burden of proof rests with the plaintiff employee, the defendant employer wins; where the burden is on the defendant employer, the results are mixed. This Note will examine each of the seven primary cases that serve as the framework for disagreement,[9] specifically analyzing those decisions in light of their potential impact on litigation involving individuals infected with HIV or AIDS who bring suit under the ADA. Applying the holdings in *School Board v. Arline*[10] and *Bragdon v. Abbott*[11] as the basis for analysis, this Note urges that the conflicting standard effectively minimizes the protection of an employee's rights where that individual is disabled because of an infectious disease. As a result, the legal standard in jurisdictions where the burden of disproving the direct threat claim rests with the plaintiff,

2. *See id.* § 12112(a).
3. *See id.* § 12113(b).
4. *See* Hutton v. Elf Atochem N. Am., Inc., 273 F.3d 884, 886–87 (9th Cir. 2001).
5. *See infra* Part I.A2.
6. *See infra* Part II.
7. *See infra* Part II.
8. *See infra* Part I.B1.a.
9. The seven cases are *Branham v. Snow*, 392 F.3d 896 (7th Cir. 2004); *McKenzie v. Benton*, 388 F.3d 1342 (10th Cir. 2004); *Hutton v. Elf Atochem N. Am., Inc.*, 273 F.3d 884 (9th Cir. 2001); *Rizzo v. Children's World Learning Ctrs., Inc. (Rizzo II)*, 173 F.3d 254 (5th Cir. 1999); *EEOC v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997); *Moses v. Am. Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996); and *EEOC v. Chrysler Corp.*, 917 F. Supp. 1164 (E.D. Mich. 1996).
10. 480 U.S. 273 (1987).
11. 524 U.S. 624 (1998).

irrespective of factual circumstances, disregards extenuating factors that counsel for a different application of the rule.

The inconsistent decisions on the direct threat issue are even more problematic in the context of HIV-related employment discrimination because the Supreme Court has not decided whether HIV infection is a "per se" disability,[12] thus leaving continued opportunity for courts to exercise their own interpretation of the ADA. The unclear statutory language, compounded by inconsistent case law, is of particular concern for employees with HIV who sue their employers because the virus is often unpredictable; an employee could conceivably go from being healthy, to being a direct threat, to once again being healthy.[13] There exists a clear need to alleviate the tension between eliminating discrimination against disabled individuals who have a communicable disease and preventing the contraction of that disease by others.[14] Nevertheless, that necessity should not lead courts to conclude that one set standard, where the employee bears the burden of proof, is the correct answer.

If the legal determination of whether a person with HIV poses a direct threat to those around him is an individualized inquiry,[15] then ideally courts should use analogous reasoning in resolving the burden of proof issue. Analysis of existing case law demonstrates that a case-by-case determination of which party bears the burden of proof is the most equitable solution. However, the potential threat that an individualized approach to the burden of proof issue would result in too great a disparity among different jurisdictions counsels against a case-by-case determination and in favor of one legal standard. Because the claim that an employee is a direct threat is an affirmative defense, the employer should bear the burden of proof. This standard makes particular sense under circumstances where the employer is much better suited to evaluate whether the disabled individual can safely perform the essential functions of the job. The success of antiretroviral drugs means that HIV-infected individuals live longer, healthier lives.[16] If an employer seeks to lawfully discriminate against such an individual by asserting the protection of the direct threat defense, then that employer should be legally responsible for justifying that decision.

Part I of this Note examines the historical and legislative background of the ADA, case law regarding the current interpretation of how a disability is classified, the alleged ambiguity inherent in the statute, and the way in which courts determine if an individual may be classified as having a disability. Part I also offers a brief history of the AIDS virus, including the Supreme Court's relatively recent decision protecting individuals with

12. *See id.* at 641–42.

13. *See infra* Part I.B.

14. *Bragdon*, 524 U.S. at 649 (citing Sch. Bd. v. Arline, 480 U.S. 273, 287 (1987)).

15. *See* 29 C.F.R. § 1630.2(r) (2006) ("The determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job.").

16. *See infra* Part I.B.

asymptomatic HIV.[17] This part also examines the role of HIV and AIDS in the workplace.

The analysis in Part II focuses on the seven cases comprising the circuit split over which party bears the burden of proving, or disproving, that the employee poses a direct threat to the health or safety of others. In Part III, this Note urges that, while ideally the determination of which party bears the burden of proof should be an individualized inquiry, analogous to the individualized inquiry required in determining whether an individual poses a direct threat, case law suggests that it should be the employer who bears the burden of proof. This Note argues that although the Fifth Circuit used the right approach in *Rizzo v. Children's World Learning Centers, Inc.* (*Rizzo II*) by creating a balancing test designed to shift the burden of proof from the employee to the employer based on the existence of certain facts,[18] that court did not go far enough in protecting individuals with disabilities who are also infected with a contagious disease. This Note explains why the burden of proof issue is so critical in the context of HIV, why a case-by-case determination is often appropriate, and ultimately why the employer is often in the best position to bear the burden of proving that an employee poses a direct threat to those around him. Finally, the conclusion discusses the new leadership on the Supreme Court, examining the possibility that the current Court will not continue to support forward-thinking protections for individuals disabled because of an infectious disease in a credible, meaningful, or substantive way.

I. BACKGROUND AND PURPOSE OF THE ADA

In 1920, upon the return of disabled World War I veterans, Congress passed the first Rehabilitation Act, also known as the Fess-Kenyon Act.[19] The goal of this law was the integration of the disabled into mainstream society.[20] Thus began the fundamental shift from perceiving disabled individuals as "charity cases" to recognizing that the disabled were a group who should be granted basic civil rights protections. This change in mentality marked the "future of inclusion and integration"[21] sought by the ADA and the end to the "exclusion and segregation"[22] that had previously characterized society's actions and attitudes toward the disabled.

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17. *See Bragdon*, 524 U.S. at 630–31.

18. *See* Rizzo v. Children's World Learning Ctrs. (*Rizzo II*), 173 F.3d 254, 259–60 (5th Cir. 1999); *see also* Part II.C1.1.

19. H.R. Rep. No. 101-485(III), at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 448.

20. *Id.* at 25–26, *reprinted in* 1990 U.S.C.C.A.N. at 448.

21. *Id.* at 26, *reprinted in* 1990 U.S.C.C.A.N. at 449.

22. *Id.* Senator Harrison Williams remarked,

> [F]or too long, we have been dealing with [the handicapped] out of charity . . . . I wish it to be said of America in the 1970's that when its attention at last returned to domestic needs, it made a strong and new commitment to equal opportunity and equal justice under law . . . . The handicapped are one part of our Nation that have been denied these fundamental rights for too long. It is for the Congress and the Nation to assure that these rights are no longer denied.

The Rehabilitation Act of 1973 was the broad antidiscrimination law to follow the Fess-Kenyon Act and was the first law enacted to create federal civil rights protection for individuals with a disability.[23] The Rehabilitation Act reads, "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[24] The act applied only to disabled persons employed by federal contractors,[25] and was notably the first time that the government sought to encourage employers to be proactive in hiring individuals with a disability.[26]

After the passage of the Rehabilitation Act but prior to the enactment of the ADA, individuals with disabilities were still subject to abhorrent treatment;[27] particularly, they were often denied access to public services.[28] Among Congress's many findings during the 1990 hearings that preceded the ADA was the recognition that, historically, Americans with disabilities had suffered "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, [and] exclusionary qualification standards . . . ."[29] Statistical analysis further validated these findings. A survey conducted at the time found that Americans with disabilities were not only underprivileged and disadvantaged, but also that they generally had less economic wealth, less education, and fewer social and community opportunities.[30] History assumed that those with disabilities could not be active contributors to society because of the physical and mental limitations resulting from their condition.[31] Just as society belatedly recognized that groups traditionally subject to discrimination (namely African Americans and women) could be active participants in society but were simply being constrained by the

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Id. (alteration in original).

23. H.R. Rep. No. 101-485(III), at 24–26 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 446, 448.

24. 29 U.S.C. § 794(a) (2000 & Supp. 2006).

25. *See, e.g.*, Scott E. Schaffer, *Echazabal v. Chevron USA, Inc.: Conquering the Final Frontier of Paternalistic Employment Practices*, 33 Conn. L. Rev. 1441, 1451 (2001) (citing 42 U.S.C. § 12111(5)(A) (2000), which defines "employer" 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").

26. *See id.* at 1445–46.

27. *See* Sch. Bd. v. Arline, 480 U.S. 273, 282 n.9 (1987) (citing, as an example of improper disability discrimination, a case where "a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance 'produced a nauseating effect' on his classmates" (citing Alexander v. Choate, 469 U.S. 287, 295 n.13 (1985))).

28. H.R. Rep. No. 101-485(III), at 24, *reprinted in* 1990 U.S.C.C.A.N. at 447.

29. 42 U.S.C. § 12101(a)(5) (2000).

30. H.R. Rep. No. 101-485(III), at 25, *reprinted in* 1990 U.S.C.C.A.N. at 447–48.

31. *Id.*

discriminatory policies in place, the passage of the ADA marked the realization and correction of this constraint on individuals with disabilities.[32]

A. *Legislative History*

Today, according to the International Center for Disability Information, approximately fifty-eight million Americans have a disability.[33] This is roughly a twenty-six percent increase over the number of Americans who had disabilities in 1990, the year in which the ADA was signed into law.[34] The Judiciary Committee, which reviewed the law in 1990, explained that the purpose of the statute was "to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring those individuals into the economic and social mainstream of American life."[35] In further describing the law being promulgated, the committee underscored that "[t]he ADA provides enforceable standards addressing discrimination against individuals with disabilities and ensures that the federal government will play a central role in enforcing these standards on behalf of individuals with disabilities."[36] The legislators who wrote the ADA viewed the statute's enactment as historic, similar to the protections afforded to women and minorities by the Civil Rights Act of 1964.[37] Because the Rehabilitation Act served as a foundation for the ADA, "[m]any of the standards of discrimination set out in regulations implementing . . . the Rehabilitation Act [were] incorporated in the ADA."[38]

Not everyone in Congress agreed that the law was well formulated, however. The dissenting view of Representative Charles Douglas of New Hampshire argued that it would be impossible for employers to meet the required standard of demonstrating a "business necessity" in order to justify actions which negatively impacted individuals with a disability.[39]

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32. *Id.* at 26, *reprinted in* 1990 U.S.C.C.A.N. at 448–49. Although the Americans with Disabilities Act (ADA) House report specifically mentions the U.S. Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), by way of analogizing belated recognition of civil rights, it does not reference discrimination against women.

33. Nat'l Catholic P'ship on Disability, The Demographics of Disability (2003), http://www.ncpd.org/demographics%20of%20disability.htm. The estimate is based on figures from 2003.

34. *See* 42 U.S.C. § 12101(a)(1) ("[S]ome 43,000,000 Americans have one or more physical or mental disabilities.").

35. H.R. Rep. No. 101-485(III), at 23, *reprinted in* 1990 U.S.C.C.A.N. at 446.

36. *Id.*

37. *Id.* at 26, *reprinted in* 1990 U.S.C.C.A.N. at 449.

38. Americans with Disabilities Act of 1990: Law and Explanation 9 (1990) [hereinafter ADA Book].

39. H.R. Rep. No. 101-485(III), at 93, *reprinted in* 1990 U.S.C.C.A.N. at 510 (arguing that the standard should mirror the "legitimate business purpose" standard applied in discrimination cases against women and minorities). Douglas's reference to "business necessity" refers to language throughout the ADA. *See* 42 U.S.C. § 12112(b)(6) ("[T]he term 'discriminate' includes . . . using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of

Douglas's remarks hinged on the importance of an individual not posing a direct threat to those around him or her, and in his discussion Douglas also directly addressed the issue of AIDS in the workplace. An AIDS-infected food service worker, Douglas believed, might well succeed in putting the worker's restaurant out of business because the mere mention of an infected person in the workplace would cause panicky Americans to patronize the restaurant down the street.[40] "[F]or the restaurant with an employee known to have AIDS," wrote Douglas, "it will translate to no customers and no business at all."[41] In his concluding remarks, Douglas argued that, though one purpose of the legislation was to establish "reasonable expectation between parties in conflict," here "Congress [had] abrogat[ed] its constitutional duty by writing vague laws which must be clarified by the Federal courts."[42] The notion that the law, or portions thereof, is vague has also become the predominate view today.[43]

1. How Disability Is Classified

The general provision of the ADA mandates that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[44] Several definitions are key to understanding the statute. A covered entity is an employer,[45] employment agency, labor organization, or joint labor management committee.[46] Disability is defined as "[a] physical or mental impairment that substantially limits one or more of the major life activities"[47] of an individual, where an impairment is described as "[a]ny physiological disorder, or condition" which affects the body systems.[48] Where an individual cannot "perform a major life activity that the average person in the general population can perform," or where that individual is

individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.").

40. H.R. Rep. No. 101-485(III), at 93–94, *reprinted in* 1990 U.S.C.C.A.N. at 511.

41. *Id.*

42. *Id.*

43. *See infra* Part I.A2.

44. 42 U.S.C. § 12112(a). Note that the ADA does not cover discrimination by the federal government. Under "Exceptions" in section 12111(5)(B)(i) of the ADA, the statute indicates that the term "employer" does not include the United States. When individuals bring an action for disability discrimination against the government, the alleged violation is brought under the Rehabilitation Act. *See* 29 U.S.C. § 794(a) (2000 & Supp. 2006).

45. The statute contains a de minimis exception: "The term employer means 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 . . . ." 29 C.F.R. § 1630.2(e)(1) (2006).

46. *Id.* § 1630.2(b).

47. *Id.* § 1630.2(g)(1).

48. *Id.* § 1630.2(h)(1).

"[s]ignificantly restricted" as to the way in which, and the amount of time during which, he or she can perform that activity in comparison to the general population, that individual is "substantially limited" in his or her life activities.[49] Examples of major life activities included in the statute are caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[50] Finally, "[q]ualified individual with a disability" means that the person "satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position."[51]

Employers are permitted, under the ADA, to impose "[q]ualification standards," which may include establishing specific requirements for a position.[52] Those standards may be related to skill, experience, education, or physical and medical requirements that serve as baseline criteria an individual must satisfy in order to be considered eligible for the job.[53] According to the ADA, an employer may use concern for the health or safety of workers as a reason for not hiring or retaining an individual with a disability; this exception has been termed the direct threat defense.[54] This provision of the statute reads,

> 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 . . . .[55]

The statute further explains that it is permissible for those standards to include a requirement that an individual "not pose a direct threat to the health or safety" of others in the workplace.[56] The federal regulations interpreting the ADA define direct threat as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[57] The regulation further clarifies that the determination of whether an individual poses a direct threat should be made on a case-by-case basis, established by that individual's abilities and the requirements imposed by the job.[58]

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49. *Id.* § 1630.2(j)(1)–(2)
50. *Id.* § 1630.2(i).
51. *Id.* § 1630.2(m).
52. *Id.* § 1630.2(q).
53. *Id.*
54. 42 U.S.C. § 12113(a) (2000).
55. *Id.*
56. *Id.* § 12113(b).
57. 29 C.F.R. § 1630.2(r).
58. *Id.*

2. Ambiguity of the ADA: Contrasting Views

While there is generally no disagreement that the plaintiff bears the burden of proving that he or she is a qualified individual with a disability,[59] courts and scholars strongly disagree over which party bears the burden of proving or disproving that the employee poses a direct threat to him- or herself or others. Some scholars argue that the structure and language of the ADA are ambiguous, "plagued by vague terminology and inconsistent cross-references"[60] when it comes to determining which party bears the burden of proof. As one scholar explained,

> [T]he statute includes the Direct Threat Defense under 'Defenses,' a placement that suggests the employer has the burden of proof. But, the statute also classifies the Direct Threat Defense as a 'qualification standard,' language which suggests the employee has the burden of proof. As numerous court opinions have pointed out, the statute simply points in two directions.[61]

When the statute was first enacted, the effort to clarify the law's provisions resulted in various published reports that sought to condense the law so as to make it more readable. One such report, in clarifying the sections on qualification standards and direct threat, explained,

> Employers are not prohibited from setting qualification standards for their employees . . . . A qualification standard may also include a requirement that an individual not pose a direct threat to the health or safety of other[s] . . . . It is not the responsibility of applicants or employees to prove that they pose no risk.[62]

This is one of the two accepted interpretations of the statute, the other being that the employee does have an affirmative responsibility to prove that he or she is not a direct threat. Because the language and structure of the ADA "point in two different directions," both sides of the debate have been able to justify their positions.[63]

Various solutions to the ambiguity have been proposed. At least one article has argued that Congress did not fully consider whether courts were the proper branch of government to evaluate the substantive issues in

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59. *See, e.g.*, Hutton v. Elf Atochem N. Am., Inc., 273 F.3d 884, 892 (9th Cir. 2001) (citing Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1108 (9th Cir. 2000); EEOC v. Amego, Inc., 110 F.3d 135, 144 (1st Cir. 1997) (resolving the "qualified individual" burden in the same way as the *Hutton* court but coming out differently on the direct threat issue); EEOC v. Chrysler Corp., 917 F. Supp. 1164, 1167 (E.D. Mich. 1996) ("To sustain a claim under the ADA, a plaintiff must establish . . . that he is qualified . . . ." (citing Milton v. Scrivner, Inc., 53 F.3d 1118, 1123 (10th Cir. 1995)))).

60. Jon L. Gillum, *Tort Law and the Americans with Disabilities Act: Assessing the Need for a Realignment*, 39 Idaho L. Rev. 531, 532 (2003). In his analysis, Gillum concludes that efforts to find a "'hidden' answer" in the statute show "that the statute is facially and totally ambiguous." *Id.* at 565. This assessment could be construed as being particularly harsh, although undoubtedly the law could have been more effectively drafted.

61. *Id.* at 565–66.

62. ADA Book, *supra* note 38, at 37.

63. *See infra* note 207 and accompanying text.

analyzing whether an employee poses a direct threat in the workplace.[64] This argument insists that, because evaluating the direct threat standard requires analyzing scientific data, the determination should be made by medical and scientific experts qualified to render their opinion.[65] Supportive of this view is the fact that, in certain industries, a panel of doctors is often used to determine if an employee is medically competent to continue working at the job in question.[66] Scientific determination of the issues is thus seen as a way to legitimize the legal process, with the involvement of the courts limited to situations where the medical panel has failed to comply with regulations or where members of the panel are implicated by fraud.[67]

Another view suggests that because the employer is better situated to offer evidence about the risks that would be created by a disabled employee, the employer should bear the burden of proof.[68] This view argues against the employee bearing the burden of proof because it would put "disabled persons in the same position they were prior to the passage of the ADA—a position where they must single-handedly cure their second-class status."[69] The contention is that placing the burden of proof on the employee "gives employers a license to make preemptive and irrational risk assessments," thus encumbering employees with a difficult standard while giving employers a "windfall."[70] Employers are in the unique position of having the best access to information about the job, so the argument goes, and the requirement that employers bear the burden of proof best conforms to the antidiscrimination mandate the ADA sought to achieve.[71]

a. *Importance of Which Party Bears the Burden of Proof*

> Legal issues are nominally about facts, but in practice they are often contests of persuasion concerning indeterminate matters. Where persuasion requires the jury to build complex inferences . . . the risk of non-persuasion becomes a heavy burden indeed.[72]

There have been several cases involving HIV-positive individuals, decided in favor of the defendant employer, which have highlighted the extreme significance that the threat to others plays in deciding the outcome

64. Jeffrey A. Van Detta, *'Typhoid Mary' Meets the ADA: A Case Study of the 'Direct Threat' Standard Under the Americans with Disabilities Act*, 22 Harv. J.L. & Pub. Pol'y 849, 936–37 (1999).

65. *See id.* at 938, 940. In the context of an employee claiming discrimination on the basis of HIV infection, Van Detta's suggestion would pose difficulty. *See supra* text accompanying notes 109–14.

66. Van Detta, *supra* note 64, at 945.

67. *Id.* at 948, 955.

68. Gillum, *supra* note 60, at 567–70.

69. *Id.* at 567.

70. *Id.* at 567–68.

71. *Id.* at 569–70.

72. Richard H. Gaskins, Burdens of Proof in Modern Discourse 26 (1992).

of the case.[73] From a policy perspective, that result makes sense. However, rather than focusing "on the fact that no transmission of HIV [had] ever been medically documented . . . or on the fact that the risk of such transmission [was] extremely difficult to quantify," the courts instead concentrated their analysis on the possible "catastrophic consequences" that would ensue should transmission occur.[74]

The Supreme Court has said 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 accommodation will not eliminate that risk."[75] As a result, the determination of which party bears the burden of proof becomes significant, as a multitude of academic work indicates. An article published several years ago by Harvard Law School Professor Bruce L. Hay explained,

> [T]he plaintiff will file a claim if the defendant bears the burden of proof, so long as the plaintiff's estimated chance of winning is greater than zero. If, instead, the plaintiff bears the burden of proof, then she will file a claim if and only if the plaintiff's threshold for presenting evidence is satisfied. For if that threshold is not satisfied, the plaintiff knows she will lose the case . . . so there is no point in suing.[76]

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73. *E.g.*, Borgialli v. Thunder Basin Coal Co., 235 F.3d 1284, 1291 n.15 (10th Cir. 2000) (citing Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261 (4th Cir. 1995); Estate of Mauro v. Borgess Med. Ctr. 137 F.3d 398 (6th Cir. 1998)). In both cases cited by the *Borgialli* court, the plaintiff employees were HIV-positive and working in a surgical capacity; both courts determined that the decision to terminate employment based on HIV status was lawful. *Compare* Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 Nw. U.L. Rev. 1279, 1281 (2001) ("A surgical patient has more to fear—including death—from a surgeon infected with hepatitis B than from one who has HIV, yet hospitals will transfer or fire health care workers infected with the well-publicized HIV even as they let the greater risks from the less-publicized hepatitis pass largely unnoticed."), *with* Roni Caryn Rabin, *When the Surgeon Is Infected, How Safe Is the Surgery?*, N.Y. Times, July 3, 2007, at F5 (discussing the danger surgeons infected with contagious diseases, including HIV, pose to their patients).

74. Van Detta, *supra* note 64, at 933; *see also Univ. of Md. Med. Sys. Corp.*, 50 F.3d at 1263 n.5 ("[T]here is to date no documented case of an HIV-positive surgeon transmitting the virus to a patient, even though there are a number of known cases of HIV-positive surgeons operating on patients.").

75. Sch. Bd. v. Arline, 480 U.S. 273, 287 n.16 (1987) (explaining further that the ADA "would not require a school board to place a teacher with active, contagious tuberculosis in a classroom with elementary school children").

76. Bruce L. Hay, *Allocating the Burden of Proof*, 72 Ind. L.J. 651, 661 (1997). In his article, Professor Hay develops a model with the objective of analyzing how to best minimize the total costs of litigation. He uses the model to demonstrate that "the traditional justification for giving the plaintiff the burden is incomplete," and to further argue that the initial allocation must be examined to determine "how the burden of proof operates under conditions where litigants are uncertain of a claim's merit and where out-of-court settlement is possible." *Id.* at 651–53. This Note uses Professor Hay's work in order to articulate the general principle that what transpires leading up to and during litigation correlates to which party bears the burden of proof.

This point of view argues that there is a stronger case for assigning the burden of proof to the defendant as opposed to the plaintiff.[77] The rationale for the argument is that,

> if the plaintiff expects her case to be heard in court, she has no incentive to bring a claim she knows to be meritless [because it would be a waste of time] . . . . Accordingly . . . there is no point in forcing the plaintiff to prove her case is meritorious, because she would not have brought it if it were otherwise.[78]

3. Disability and Contagious Disease

In 1987, the Supreme Court heard *School Board v. Arline*,[79] a case of first impression. The issues were, first, whether an individual with a contagious disease could be considered handicapped under the Rehabilitation Act and, second, if so, whether that individual was "otherwise qualified" to teach at an elementary school.[80] Plaintiff Arline, who had been diagnosed with tuberculosis in 1957 but who, for the next twenty years, remained in remission, alleged employment discrimination when she was suspended and then ultimately discharged from her teaching position.[81] She was discharged only after her tuberculosis became active again and after she had experienced several relapses.[82] In holding that a contagious disease is a disability under the Rehabilitation Act,[83] the Supreme Court explained that "[a]llowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of [the Act]," given the Act's goal of ensuring that the disabled are not denied job opportunities because of assumptions about or ignorance of their condition.[84]

Post-*Arline*, courts use the four-factor inquiry developed by the Supreme Court in that case as a first step in determining whether an individual with a contagious disease is otherwise qualified or whether that individual poses a direct threat to those around him.[85] The four factors for consideration are (1) the nature of the risk, (2) the duration of the risk, (3) the severity of the risk, and (4) the probability that the disease will be transmitted and will cause varying degrees of harm.[86] This four-factor test was codified in the

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77. *See id.* at 657.
78. *Id.*
79. 480 U.S. 273 (1987).
80. *Id.* at 275 (internal quotation marks omitted).
81. *Id.* at 276.
82. *Id.*
83. *Id.* at 289. However, Chief Justice William Rehnquist, joined by Justice Antonin Scalia, dissented, arguing that contagiousness was not a handicap within the meaning of the Rehabilitation Act. *See id.* at 289–93 (Rehnquist, C.J., dissenting). For further discussion, see *infra* Part III (discussing contagiousness and comparing the behavior of tuberculosis vis-à-vis HIV).
84. *Arline*, 480 U.S. at 284.
85. *Id.* at 288.
86. *Id.*

federal regulations implementing the ADA,[87] and would also apply where an HIV-infected individual brought suit under the statute. Although not every individual infected with HIV or AIDS is considered disabled, because the determination of whether a person is disabled is an inquiry particular to the facts of each case,[88] individuals with overt manifestations of virus symptoms would be considered disabled under the ADA. The statute's protection of individuals with HIV and the limits on that protection are further discussed in Part I.B.1.

B. *History of HIV/AIDS*

Today, more than one million people in the United States are living with HIV or AIDS,[89] but the virus has a much more pronounced history outside this country. Forty-seven years after the first known case of AIDS appeared in a human being, the disease still kills 8000 people per day and infects 14,000 more.[90] The largest number of these fatalities occurs in sub-Saharan Africa, but AIDS mortality rates in India and China are quickly approaching similarly dire levels.[91] According to the Joint United Nations Programme on HIV/AIDS (UNAIDS), forty million people worldwide are infected with the virus.[92]

HIV is the virus that causes AIDS, and is transmitted from an infected person to an uninfected person through blood, semen, or vaginal secretions that come into contact with broken skin or mucous membranes.[93] Although scientists have not determined how the first known person to test positive for the virus became infected, there is data showing that the earliest case of HIV-1 appeared in 1959, in a man's blood in Kinshasa, Democratic Republic of Congo.[94] The virus has existed in the United States since at least the 1970s, when a large number of homosexual men were diagnosed with rare types of pneumonia (*pneumocystis carinii*), cancer (Kaposi's sarcoma), and other illnesses, conditions not regularly found in individuals

87. *See* 29 C.F.R. § 1630.2(r) (2006); *see also* H.R. Rep. No. 101-485(III), at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 457.

88. Sutton v. United Air Lines, 527 U.S. 471, 483 (1999) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.") (citing 29 C.F.R. § 1630.2(j)).

89. *See* Centers for Disease Control and Prevention, CDC Statistics, http://www.cdc.gov/hiv/topics/surveillance/basic.htm (last visited Sept. 17, 2007).

90. Nicholas D. Kristof, Op-Ed., *The Deep Roots of AIDS*, N.Y. Times, Sept. 19, 2006, at A25.

91. *See* Robert Steinbrook, *The AIDS Epidemic in 2004*, 351 New Eng. J. Med. 115–17 (2004).

92. Comprehensive International Program of Research on AIDS (CIPRA), Mar. 2006, http://www.niaid.nih.gov/factsheets/cipra.htm.

93. Centers for Disease Control and Prevention, What is HIV?, http://www.cdc.gov/hiv/resources/qa/qa1.htm (last visited Sept. 17, 2007).

94. Centers for Disease Control and Prevention, Where Did HIV Come From?, http://www.cdc.gov/hiv/resources/qa/qa3.htm (last visited Sept. 17, 2007).

with uncompromised immune systems.[95] As a result of a 1999 study by an international team of researchers, it is now known that "[a] subspecies of chimpanzees native to west equatorial Africa [was] the original source of the virus . . . [and] that HIV-1 was introduced into the human population when hunters became exposed to infected blood."[96]

For the purpose of discussing workplace discrimination, this Note uses the terms HIV and AIDS interchangeably; clinically, they are not the same thing. HIV is a virus that progresses by destroying blood cells, specifically, CD4+ T cells, which protect the immune system. According to studies, most people carry HIV for a long time before enough cells are destroyed to effect the onset of AIDS.[97] The causal relationship between HIV and AIDS has been long established by scientists and medical researchers. Twenty years of research has confirmed that once a person is infected with HIV, that individual will most likely develop AIDS.[98]

HIV infection is generally divided into five phases: the primary infection phase (acute sero-conversion, meaning the change of an individual's status from HIV-negative to HIV-positive); the asymptomatic latent phase; the minor symptomatic phase; the major symptomatic phase marked by opportunistic diseases; and the severe symptomatic phase characterized by AIDS-defining conditions.[99] Phase one usually begins between four and eight weeks after someone has been infected, and between thirty and sixty percent of those who are infected develop symptoms that include sore throat, headache, fever, and muscle and joint pain, symptoms that generally persist for seven to fourteen days.[100] During the second, asymptomatic phase, often referred to as the "silent" phase, an infected individual displays no symptoms, but the virus nonetheless remains active, continuing to weaken the individual's immune system.[101] The disease is no less transmittable during this latent stage than during any other.[102]

The third and fourth stages are marked by growing symptoms of increasing severity, at which point opportunistic diseases—herpes, tuberculosis, and others—appear because the CD4+ T cell count becomes

95. *Id.*

96. *Id.*

97. Centers for Disease Prevention and Control, How Does HIV Cause AIDS?, http://www.cdc.gov/hiv/resources/qa/hivaids.htm (last visited Aug. 21, 2007).

98. Centers for Disease Prevention and Control, Why Do Some People Make Statements That HIV Does Not Cause AIDS?, http://www.cdc.gov/hiv/resources/qa/qa38.htm (last visited Aug. 21, 2007). *But see* Michael Specter, *The Denialists*, The New Yorker, Mar. 12, 2007, at 32 (discussing South African President Thabo Mbeki's refusal to acknowledge that HIV causes AIDS and the resulting rise in clinics selling herbal remedies purporting to cure AIDS).

99. Symptoms and Phases of HIV Infection & AIDS, http://www.health24.com/medical/Condition_centres/777-792-814-1756,22216.asp (last visited Sept. 11, 2007) [hereinafter Symptoms and Phases].

100. *Id.*

101. *Id.*

102. *See infra* text accompanying notes 121–23.

very low and the viral count is greatly elevated.[103] Finally, during phase five, the onset of which normally occurs eighteen months after phase four, the symptoms become more acute, marked by rare viruses that antibiotics cannot treat.[104] People living with AIDS may have continuous diarrhea, nausea, vomiting, respiratory infections, other sexually transmitted diseases, cancer, warts, and infections of the central nervous system or brain.[105]

Increasingly, however, a greater number of HIV-positive patients who receive early antiretroviral drug therapy are living longer, healthier lives.[106] Before 1996, it was estimated that fifty percent of those with HIV would develop AIDS within ten years.[107] Now, due to the availability of antiretroviral drugs, HIV can be a manageable condition. In 2005, between 250,000 and 350,000 deaths were prevented through proper treatment.[108]

Even after twenty-five years of studying the virus, however, there is still much that scientists and doctors do not know about the disease. As one doctor wrote in *The New York Times* in observance of the twenty-fifth anniversary of the cluster of pneumonia cases among gay men that spawned the discovery of AIDS,

> Not everyone who is infected gets sick. Not everyone who is treated gets well. Some people progress along the road from initial infection to progressive immune deficiency to life-threatening illness at the expected pace, then with treatment head right back again to health. Others stall along the way, sick or well, defying our dire predictions and happy reassurances alike.[109]

The article then provides examples of infected individuals who defy medical logic in their recovery, including one of the author's biggest success stories: a "skeletal fellow . . . skin pulled taut over his skull, folds of denim covering his wasted legs," who is actually "perfectly well."[110] Despite the fact that a decade ago he almost died of AIDS, this patient is now "living with it—or, more accurately, living almost without it, his

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103. Symptoms and Phases, *supra* note 99; *see also supra* text accompanying note 97.

104. Symptoms and Phases, *supra* note 99.

105. *Id.*

106. Antiretroviral drugs prevent the reproduction of retroviruses, of which HIV is a specific type. These drugs help to minimize other illnesses caused by the virus, such as opportunistic infections. *See* Nancy Ross-Flanigan, *Antiretroviral Drugs*, Gale Encyclopedia of Med. (1999), http://www.findarticles.com/p/articles/mi_g2601/is_0001/ai_2601000122. However, antiretroviral drugs also have many negative side effects, and the infection can become resistant to these drugs. For a more complete explanation, see U.S. Dep't of Health and Human Servs. et al., Guidance for Industry: Role of HIV Drug Resistance Testing in Antiretroviral Drug Development (2006), *available at* http://www.fda.gov/CDER/GUIDANCE/5879dft.pdf.

107. Centers for Disease Prevention and Control, How Long Does It Take for HIV to Cause AIDS?, http://www.cdc.gov/hiv/resources/qa/qa4.htm (last visited Aug. 21, 2007).

108. Global Health Council, http://www.globalhealth.org/view_top.php3?id=227 (last visited Sept. 11, 2007). Created in 1972, the Global Health Council is a U.S.-based, nonprofit organization whose purpose is to identify and report on world health problems.

109. Abigail Zuger, *A Long Life? A Death Sentence? AIDS Still Offers No Easy Answers*, N.Y. Times, June 6, 2006, at F1.

110. *Id.*

immune system normal, no trace of virus detectable in his blood. It is the lifesaving drugs that have transformed his appearance . . . [yet] [h]is appearance makes it hard for him to find work."[111]

A number of health organizations that work with HIV patients also support the notion that doctors should not make overarching conclusions regarding the prospective health of an infected individual. The American Association of HIV Medicine, in its amici curiae brief[112] in support of a plaintiff who was refused a position as a foreign service officer at the State Department because he was HIV-positive,[113] argued this very point. The association reported that, after treating "tens of thousands of individuals who [were] infected with HIV," it had found, "[b]ased on [their] experience and knowledge about the course, effects and treatment of HIV disease . . . that individuals with HIV experience a wide range of symptoms and responses to treatment regimens, and that generalizations about the health of any person with HIV are difficult to make with scientific accuracy."[114]

1. Limits on the Protections for HIV-Positive Individuals

In *School Board v. Arline*, the Supreme Court determined that individuals with contagious diseases are disabled within the definition of the ADA and are thus protected under the statute.[115] Whether HIV or AIDS may always be considered a disability, however, is a question that the highest court has not answered definitively. Prior to 1998, the Court had not had the opportunity to address the issue. In *Arline*, the Court explained, in dicta,

> The United States argues that it is possible for a person to be simply a carrier of a disease, that is, to be capable of spreading a disease without having a "physical impairment" or suffering from any other symptoms associated with the disease. The United States contends that this is true in the case of some carriers of . . . [the AIDS] virus. From this premise the United States concludes that discrimination solely on the basis of contagiousness is never discrimination on the basis of a handicap. The argument is misplaced in this case, because the handicap here, tuberculosis, gave rise both to a physical impairment *and* to contagiousness. This case does not present, and we therefore do not reach, the questions [of] whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.[116]

111. *Id.*

112. Brief for American Association of HIV Medicine et al. as Amici Curiae Supporting Appellant, Taylor v. Rice, 451 F.3d 898 (D.C. Cir. 2006) (No. 05-5257), 2006 WL 558087 [hereinafter Taylor Amici Curiae Brief].

113. *See Taylor*, 451 F.3d 898.

114. Taylor Amici Curiae Brief, *supra* note 112, at 1–2.

115. *See* Sch. Bd. v. Arline, 480 U.S. 273, 276–77, 279–86 (1987).

116. *Id.* at 282 n.7.

The 1998 case of *Bragdon v. Abbott*[117] was the first time that the Supreme Court had the opportunity to revisit, and also directly address, the issue of whether HIV or AIDS infection constitutes a disability.

a. *The U.S. Supreme Court's Decision in* Bragdon v. Abbott

In *Bragdon*, the Court held that HIV infection, even in an asymptomatic individual, "is a physical impairment which substantially limits a major life activity, as the [ADA] defines it."[118] This decision was a huge step forward in protecting individuals with HIV who might also be protected under the ADA.

The asymptomatic HIV-positive plaintiff in *Bragdon* brought suit after a dentist refused to treat her in his office but offered to do so instead at the local hospital, where the plaintiff would have had to pay additional fees in order to use the hospital's facilities.[119] The issue was twofold: first, whether HIV infection could be considered a disability under the ADA when the individual was still in the asymptomatic stage of the disease, and second, whether there was enough evidence on record to determine that the plaintiff's infection did not pose a direct threat to the dentist treating her.[120]

The asymptomatic or "silent" phase is described as the second stage, after initial infection, where symptoms subside and the infected individual returns to relative health.[121] Unlike tuberculosis, the infectious disease at issue in *Arline*, which is not contagious when the disease is inactive, AIDS, once thought to become inactive during the asymptomatic phase, is now understood to remain active and infectious throughout all stages.[122] The seemingly inactive phase occurs as the virus progresses from the circulatory system to the lymph nodes, where it thrives.[123] The Supreme Court found that ADA section 12102(2)(A), which defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [the] individual,"[124] encompassed HIV infection, even during the asymptomatic stage.[125] In reaching this conclusion, the Court stipulated that the statute only applied where the condition implicated a major life

117. 524 U.S. 624 (1998).

118. *Id.* at 641. Justice Anthony Kennedy delivered the opinion of the Court, in which Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer joined. However, Justice Stevens filed a concurring opinion, in which Justice Breyer joined. *Id.* at 655. Justice Ginsburg also filed a concurring opinion. *Id.* at 656. Chief Justice Rehnquist concurred in part and dissented in part, joined by Justices Scalia and Clarence Thomas and Justice Sandra Day O'Connor in part II. *Id.* at 657. Justice O'Connor also filed an opinion, concurring in part and dissenting in part. *Id.* at 664.

119. *Id.* at 628–29.

120. *Id.* at 628.

121. *See* Medical Encyclopedia, http://www.nlm.nih.gov/medlineplus/ency/article/000682.htm (last visited Sept. 11, 2007); *see also supra* text accompanying note 101.

122. *Bragdon*, 524 U.S. at 635–36.

123. *Id.*

124. 42 U.S.C. § 12102(2)(A) (2000).

125. *Bragdon*, 524 U.S. at 637–38.

activity. For the *Bragdon* plaintiff, HIV infection limited her ability to conceive children, and the majority had little trouble concluding that reproduction was a major life activity.[126]

The Court then proceeded to decide whether, in this individual's case, the physical impairment was a substantial limit on the identified "major life activity."[127] Because of the high risk of virus transmission during gestation and childbirth, as well as the possibility of transmission between adult partners during sexual relations, the Court determined that infection did substantially limit the plaintiff's ability to reproduce.[128] Significantly, the Court concluded the discussion by declaring that "disability . . . does not turn on personal choice."[129] Subsequently, even though an HIV-infected woman's actual ability to bear a child was not impossible, because physiologically speaking she could still give birth, that fact did not supersede the existence of a disability.[130] In conclusion, though the Court maintained that, "[w]hen significant limitations result from the impairment, the definition [of a disability] is met even if the difficulties are not insurmountable," it nonetheless declined to decide whether HIV infection was a "per se" disability under the ADA.[131] In contrast to the Court's refusal to decide whether HIV could be categorized as a "per se" disability, at least one congressional committee during the 1990 ADA hearings found that it could be so labeled.[132]

Notably, the Court's decision in *Bragdon* was extremely contentious.[133] Chief Justice William Rehnquist's dissent, in which Justices Antonin Scalia and Clarence Thomas joined, and in which Justice Sandra Day O'Connor joined in part, suggests the possibility of circumstances under which the case might have been decided differently.[134] Key to the analysis, and, wrote the dissent, a factor overlooked by the majority, was that there was no evidence to indicate that, but for being infected with HIV, the plaintiff would have otherwise had children.[135] Furthermore, Justice Rehnquist

126. *Id.* Additionally, the Court noted that HIV infection implicates other major life functions, as though to suggest that the plaintiff might have made her claim more broadly:

> Given the pervasive, and invariably fatal, course of the disease, its effect on major life activities of many sorts might have been relevant to our inquiry . . . it may seem legalistic to circumscribe our discussion to the activity of reproduction. We have little doubt that had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities.

Id. at 637.

127. *Id.* at 639.

128. *Id.* at 639–41 (citing several major studies on the percentage risk of transmission).

129. *Id.* at 641.

130. *Id.*

131. *Id.* at 641–42.

132. *See* H.R. Rep. No. 101-485(III), at n.18 (1990) ("Persons infected with [HIV] are considered to have an impairment that substantially limits a major life activity, and thus are considered disabled under this first test of the definition.").

133. *See supra* note 118.

134. *See Bragdon*, 524 U.S. at 657 (Rehnquist, C.J., dissenting).

135. *Id.* at 659.

maintained that conceiving children might well not be categorized as a major life activity.[136] The suggestion, ultimately, is that what constitutes a life function should also be decided on an individualized basis, just as the determination of whether a person is disabled is an individualized inquiry.[137] In furtherance of this point, Justice Rehnquist cited the two accepted meanings for defining "major": either "greater in dignity, rank, importance, or interest," or, alternatively, "greater in quantity, number, or extent."[138] The latter "greater in quantity" definition was the one Rehnquist believed was most consistent with what the ADA legislators had conceived.[139]

The dissent's conclusions, should they become the majority opinion of the new Supreme Court, could have serious repercussions in the field of employment discrimination for an HIV-infected individual. For example, suppose someone had never worked, either because of personal choice or because of abundant family resources, then suddenly decided to apply for a job and was rejected because he or she was infected. Prior to the point of having applied for the position, the activity of working would never have been "repetitively performed and essential in the day-to-day existence"[140] of that individual. Under Rehnquist's view, that would mean that the discrimination was permissible because working was not a major life activity in that person's life. Although working is listed in the regulations applicable to the ADA as a life function,[141] the Supreme Court could nonetheless decide that the inquiry of what constitutes a major life activity should also be individualized. The question would then become whether that holding would preempt the objectives Congress set out to achieve.

2. AIDS in the Workplace: Stigma and Discrimination

Despite the fact that AIDS has existed in the United States for more than thirty years, as with any disease transmitted primarily through sexual intercourse, a considerable stigma still surrounds the virus. Although public campaigns by celebrities—Magic Johnson, Greg Louganis, and Arthur Ashe, to name a few[142]—have been hugely successful in educating society about the virus, that work has not eradicated the negative perceptions about those infected with HIV. Although some commentators argue that AIDS is so mainstream—like cancer, also once a hugely stigmatized disease—that the phobia once surrounding the disease is no

136. *Id.* at 658 n.2 ("Calling reproduction a major life activity is somewhat inartful. Reproduction is not an activity at all, but a process. One could be described as breathing, walking, or performing manual tasks, but a human being . . . would never be described as reproducing.").

137. *See* 29 C.F.R. § 1630.2(r) (2006).

138. *See Bragdon*, 524 U.S. at 659–60 (citation omitted).

139. *Id.* at 660.

140. *Id.*

141. *See* 45 C.F.R. § 84.3(j)(2)(ii) (1997).

142. For a more complete list, see Wikipedia, List of HIV-Positive People, http://en.wikipedia.org/wiki/List_of_HIV-positive_people (last visited Aug. 21, 2007).

longer a fear shared by the majority of the American public, that argument overlooks the difficulty in dispelling myths ingrained in the national psyche. In discussing the "irrational fear" of contagious diseases, the Supreme Court noted in *Arline* that "[f]ew aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness."[143] The Court continued, "[T]he isolation of the chronically ill and of those perceived to be ill or contagious appears across cultures and centuries, as does the development of complex and often pernicious mythologies about the nature, cause, and transmission of illness."[144] A treatise on employment law and discrimination on the basis of HIV status further discusses these fears:

> A compilation of surveys in 1988 reported that a minority of persons, but a substantial number, viewed persons with AIDS as "offenders" who were getting their rightful due and who should be isolated from the rest of society; one in four persons indicated that they would refuse to work alongside of a person with AIDS and that employers should have a right to fire persons based on having AIDS. It is not unlikely that some of the persons who hold these views are employers or judges who will be deciding claims of employment discrimination based on AIDS or HIV status.[145]

Although the data for this research was collected more than fifteen years ago, the findings should not be overlooked. In addition, at least one more recent study has demonstrated the great extent to which discrimination on the basis of HIV infection or AIDS exists both in the American workplace and in society generally.[146]

Given evidence of the American public's negative perception of individuals infected with AIDS, employer response might be the same. Indeed, corporate response to the onslaught of HIV-positive employees has often been hostile and discriminatory.[147] Under most circumstances, people are generally not willing to disclose their medical information, or anything about their personal lives, to those outside their immediate circle of friends and family. A claim for HIV discrimination in employment exposes a plaintiff to both of those painful realities. According to Dr. Cheryl Gore-Felton, assistant professor of psychiatry at the Medical College of Wisconsin, "The stigma around HIV, particularly because it can be transmitted via sex and via injection drug use, makes it a particularly volatile disease for people because they feel like they have to keep it secret. That imposes a lot of stress on people about who they can disclose to . . . ."[148] That stigma results in an agency problem inherent in the

143. Sch. Bd. v. Arline, 480 U.S. 273, 284 (1987).
144. *Id.* at 284 n.12 (citations omitted).
145. 2 L. Camille Hebert, Empl. Privacy Law § 11:6 (2007) (citation omitted).
146. *See id.*
147. *Id.*
148. Dan Ullrich, *People with HIV/AIDS Now Considering Quality of Life*, Healthlink, Nov. 13, 2003, http://healthlink.mcw.edu/article/1031002311.html.

relationship between the employer and the employee: The employee wants to keep his illness secret because he fears being fired, which results in a lower probability that the employer will discover the employee's illness. If the employee does justifiably pose a threat to the health of those around him, the employer might have no way of knowing about the illness or any means of creating a "reasonable accommodation"[149] for that employee so as to neutralize the threat.

II. THE CIRCUIT SPLIT

There is an almost even split among U.S. courts of appeals regarding which party bears the burden of proof on whether an employee poses a direct threat to his or her own safety or the safety of others in an employment discrimination claim brought under the ADA.[150] While the Sixth, Seventh, and Ninth Circuits have held that the defendant employer bears the burden of proof, the First, Tenth, and Eleventh Circuits have said that, generally, the burden lies with the plaintiff employee.[151] The Second Circuit has said that the burden of proof lies with the defendant, but the court only briefly touched on the issue in dicta.[152] Other circuits have not handled the issue: Both the Third[153] and D.C. Circuits[154] declined to decide the issue. In contrast, the Fifth Circuit takes a middle ground, suggesting that after certain components of the burden are satisfied, the obligation then shifts to the opposing party.[155]

A1. *The Employer Bears the Burden of Proof*

In three of the cases discussing the burden of proof on the direct threat issue—*EEOC v. Chrysler Corporation*,[156] *Hutton v. Elf Atochem North America, Inc.*,[157] and *Branham v. Snow*[158]—the plaintiffs who brought suit against their employers for discrimination in violation of the ADA were diabetic. In all three circuits—the Sixth, Ninth, and Seventh—the courts

149. *See* 42 U.S.C. § 12111(9) (2000).

150. *See* Branham v. Snow, 392 F.3d 896, 906 n.5 (7th Cir. 2004) (discussing the circuit split on the burden of proof issue).

151. *See id.*

152. *See, e.g.*, Hargrave v. Vermont, 340 F.3d 27, 35 (2d Cir. 2003) (discussing Title II of the ADA); Lovejoy-Wilson v. Noco Motor Fuel, Inc., 263 F.3d 208, 220 (2d Cir. 2001) ("The legislative history of the ADA also supports the premise that '[t]he plaintiff is not required to prove that he or she poses no risk.'").

153. *See* Donahue v. Consol. Rail Corp., 224 F.3d 226, 230 (3d Cir. 2000) (explaining that the plaintiff waived his right to dispute the burden of proof issue when he failed to raise the argument with the district court).

154. *See* Taylor v. Rice, 451 F.3d 898, 905 n.14 (D.C. Cir. 2006) ("In light of our disposition, we need not decide who bears the burden of proving that the plaintiff poses a direct threat to his health or safety. The parties did not argue the issue." (citation omitted)).

155. *See Branham*, 392 F.3d at 906 n.5 (7th Cir. 2004); *see also* Rizzo v. Children's World Learning Ctrs., Inc. (*Rizzo II*), 173 F.3d 254, 259–60 (5th Cir. 1999).

156. 917 F. Supp. 1164 (E.D. Mich. 1996).

157. 273 F.3d 884 (9th Cir. 2001).

158. 392 F.3d 896 (7th Cir. 2004).

held that the employer bore the burden of proving that the former employee had posed a direct threat to the health or safety of others.[159] In *Chrysler* and *Branham*, the employee prevailed; in *Hutton*, the court held that the defendant employer had lawfully discriminated because the employee was a direct threat to those around him.[160]

The courts' reasoning and decisions suggest that, where an employee brings an HIV-related ADA discrimination claim, that employee would be highly favored by a standard under which the employer bore the burden of proof. Under the Sixth Circuit's approach, the inquiry regarding concerns posed by a diabetic individual must be made on an individualized basis.[161] This requirement would similarly lead to a prohibition on blanket inferences about an employee based on his HIV status. A court using the standard adopted by these circuits would find unacceptable a company's overly broad policies based on the alleged nature of a disease. In responding to a suit by an HIV-positive plaintiff, an employer would be required in these jurisdictions to make his case under more exacting criteria and would have to defend the company's actions in a manner similar to how those actions would be defended where an employee was diabetic.

In spite of the heavy burden imposed on a defendant employer, that party would nonetheless be protected from the potential danger an HIV-positive worker might pose. For example, where the risk was comparable to the one presented by the plaintiff in *Hutton*, a court would find judgment in favor of the defendant, just as the Ninth Circuit found in *Hutton*, despite having allocated the burden of proof to of the defendant employer.[162] The holding in these circuits might also result in a lower barrier to initiating an ADA claim for an HIV-positive employee who would not have otherwise pursued such an action if the reverse standard applied.

1. The Sixth Circuit

In *EEOC v. Chrysler Corporation*, the U.S. District Court for the Eastern District of Michigan held that it is the defendant employer's burden to prove that the plaintiff employee suing for discrimination under the ADA does not pose a direct threat to the health or safety of others.[163] Ultimately, the plaintiff prevailed.

The case involved charges brought by the Equal Employment Opportunity Commission (EEOC) on behalf of David Darling, an applicant for a heavy industrial electrician position at Chrysler, a job that he had performed at other companies for the preceding twenty-five years.[164] Darling was offered the job at Chrysler contingent upon his submission to

159. *See supra* text accompanying notes 156–58.
160. *See supra* text accompanying notes 156–58.
161. *See infra* Part II.A1.1.
162. *See infra* Part II.A1.2.
163. *See* 917 F. Supp. 1164, 1171 (E.D. Mich. 1996), *rev'd on other grounds*, 172 F.3d 48 (6th Cir. 1998) (unpublished disposition).
164. *Chrysler*, 917 F. Supp. at 1165.

drug and medical tests as required by company policy. The test results revealed that he had elevated blood sugar levels, and he was diagnosed with Type II diabetes mellitus.[165] At that time, Darling was not prescribed medication even after he had appointments with a private physician and his blood sugar levels continued to be elevated.[166] Over the next several weeks, Darling's blood sugar levels remained normal, but he was nonetheless prescribed medication.[167] Thereafter, the plant employment supervisor informed him that the employment offer was being withdrawn because of his elevated blood sugar levels.[168] Subsequently, the EEOC filed suit on Darling's behalf.[169]

Although the first point of disagreement was whether Darling could even be classified as an individual with a disability, the court held that Darling had a definite impairment, which restricted his ability to perform a variety of jobs.[170] However, the court also found that Darling was qualified for the job, was in control of his diabetes, and was receiving the proper care and appropriate treatment.[171] Furthermore, the court concluded that, letters from Darling's physician clearly stated that the patient did not manifest any "diabetic complications" and that he was "able to work without restrictions."[172]

The district court's final analysis centered on Chrysler's claim that Darling would be a direct threat to his colleagues at the plant because of his elevated blood sugar level.[173] In specific terms, the court explained that the determination of whether an employee is a direct threat is similar to the analysis of whether a person is a qualified individual, with the critical difference being that in the instance of demonstrating a direct threat, the defendant has the burden of proof.[174] Finding that the defendant Chrysler had no solid evidence to support "ominous predictions" of what might happen to Darling during the course of his employment as a result of his diabetes,[175] the court issued an injunction against the company, prohibiting the "blanket exclusionary" policy of denying employment to anyone with a blood sugar level greater than a specific, arbitrary number.[176] Of particular concern to the court was the fact that the company doctor never examined

165. *Id.* at 1165–66.
166. *Id.* at 1166.
167. *Id.*
168. *Id.*
169. *Id.* For a discussion on diabetes and the ADA, see Margaret C. McGrath, *Insulin-Dependent Diabetes and Access to Treatment in the Workplace: The Failure of the Americans with Disabilities Act to Provide Protection*, 37 J. Marshall L. Rev. 957 (2004).
170. *See Chrysler*, 917 F. Supp. at 1167–69.
171. *Id.* at 1169–70.
172. *Id.* at 1170 (quoting Letter from Bradley C. Berger, Private Physician to Chrysler (Oct. 13, 1993); Letter from Bradley C. Berger, Private Physician to Chrysler (Oct. 4, 1993)).
173. *Id.*
174. *Id.* at 1171.
175. *Id.*
176. *See id.* at 1173.

Darling, but rather "that she determined Darling posed a threat based on the experiences related to her by other employees about their diabetic conditions, not on an individual assessment of Darling."[177] This conclusion, said the court, was manifestly contrary to the policy required by 29 C.F.R. § 1630.2(r).[178] The speculative risk that Darling posed a direct threat to those around him, which Chrysler attempted to use in order to effectively withdraw the employment offer without subjecting the company to liability for an ADA violation, failed both by the court's reasoning and by a detailed reading of the evidence on record in relation to the statute.[179]

2. The Ninth Circuit

The defendant employer in *Hutton v. Elf Atochem North America, Inc.* operated a twenty-four-hour chlorine and chemical product manufacturing plant, where the plaintiff Hutton was employed as a chlorine finishing operator for nine years.[180] Unlike the *Chrysler* plaintiff, Hutton was a Type I diabetic, and the company was aware of his diagnosis at the time of hiring him.[181] Hutton was not in control of his diabetes, however, and had experienced a number of diabetic episodes, including insulin shock, seizures, and loss of consciousness, while at work.[182] Particularly troubling about Hutton's incidents, the court found, was the fact that his position entailed operating equipment that produced, stored, and transferred liquid chlorine.[183] Hutton's employer notified him on several occasions of the position's requirements, including that he remain under the company doctor's care, submit evidence of medical examinations, and maintain a daily log chronicling his diet and insulin intake.[184] After a period of inconsistency in complying with those requirements, in addition to another diabetic incident while on the job, Hutton was suspended and then ultimately terminated when the company could not find another position at the plant where Hutton's condition could be accommodated.[185]

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177. *Id.* at 1171–72 (relying on the company doctor's deposition).

178. *Id.* at 1172. 29 C.F.R. § 1630.2(r) (2006) provides in part that "[t]he determination that an individual poses a 'direct threat' shall be based on an individualized assessment . . . based on reasonable medical judgment."

179. *See Chrysler*, 917 F. Supp at 1172.

180. Hutton v. Elf Atochem N. Am., Inc., 273 F.3d 884, 886 (9th Cir. 2001).

181. *Id.*

182. *Id.* at 886–87, 889; *see also id.* at 892 n.3 (explaining that the district court had misread the record and that "Hutton experienced a 'blackout' on only one occasion, when he lost consciousness . . . . The other instances [were] 'diabetic episodes' in which Hutton experienced difficulty communicating and muddled thoughts, but did not black out").

183. *Id.* at 886. Although liquid chlorine is not explosive independently, it can become so upon contact with other compounds. *See* Centers for Disease Control and Prevention, Facts About Chlorine, http://www.bt.cdc.gov/agent/chlorine/basics/pdf/chlorine-facts.pdf (last visited Sept. 20, 2007).

184. *See Hutton*, 273 F.3d at 887.

185. *Id.* at 887–88, 891 (citing Letter from Larry Hellie, Reg'l Human Res. Manager, Elf Atochem N. Am., Inc., to Norman Hutton (Mar. 22, 1999)).

In evaluating Hutton's claim that the district court had erroneously ruled that he was a direct threat to the health and safety of those around him,[186] the Ninth Circuit recited the four-factor test from *Arline*, ultimately concluding that, "[b]ecause it is an affirmative defense, the employer bears the burden of proving that an employee constitutes a direct threat."[187] Similar to analysis by other courts,[188] the Ninth Circuit acknowledged in a footnote the discrepancy among U.S. Courts of Appeals' holdings on this issue but, unlike the other circuits, did not suggest a rationale for the difference.[189] Despite the Ninth Circuit's conclusion that the defendant employer carried the burden of proof, the court nonetheless held that the potential for harm, should Hutton continue in the position of chlorine finishing operator, posed a grave risk under the direct threat analysis.[190] Subsequently, the court found Elf's decision to terminate Hutton warranted.[191]

3. The Seventh Circuit

The plaintiff in *Branham v. Snow* was also a Type I insulin-dependent diabetic but, in contrast to Hutton, was in control of his disease by way of diet, exercise, medication, and a physician's care.[192] By all accounts, Branham exercised excellent management of his diabetes.[193] Employed by the Internal Revenue Service (IRS) as a revenue agent for twelve years, Branham sought and applied for a position as a criminal investigator within the same organization.[194] In addition to the educational and physical requirements of the investigator position, which included carrying a weapon and working under inclement weather conditions, the qualification standards specified that "'[a]ny condition that would hinder full, efficient performance of the duties . . . or that would cause the individual to be a hazard to himself/herself or to others is disqualifying.'"[195] The additional restrictions stipulated that those applicants with a chronic disease or condition would be ineligible if the condition rendered full performance of

186. *See id.* at 886, 891–92.
187. *Id.* at 893.
188. *See* Branham v. Snow, 392 F.3d 896, 906 n.5 (7th Cir. 2004).
189. *See Hutton*, 273 F.3d at 893 n.5 (explaining that "[n]ot all other circuits share our view that the defendant-employer should bear the burden of proof on the direct threat issue"). The court further explained that the burden lies with the plaintiff in the First and Eleventh Circuits, but that the Seventh, Tenth, Third, and Fifth Circuits have not provided a clear answer. *Id.* Note that *Hutton* was decided before the definitive case law on this issue occurred in either the Seventh or Tenth Circuits. *See* Branham v. Snow, 392 F.3d 896, 906 n.5 (7th Cir. 2004); McKenzie v. Benton, 388 F.3d 1342, 1353–55 (10th Cir. 2004).
190. *See Hutton*, 273 F.3d at 894 (citing Donahue v. Consol. Rail Corp., 224 F.3d 226, 231 (3d Cir. 2000)).
191. *Id.* at 895.
192. *Branham*, 392 F.3d at 899.
193. *See id.* at 901.
194. *Id.* at 899–900.
195. *Id.* at 900.

their duties impossible.[196] Several months after applying for the position, and after examination by a doctor working for the IRS, Branham was deemed unable to perform the essential functions of the job, either with or without reasonable accommodation.[197] Branham then brought suit against the IRS under the Rehabilitation Act.[198]

The parties in *Branham* agreed that diabetes was a physical impairment that could potentially limit an individual's major life activities. The Seventh Circuit then sought to address whether in the plaintiff's case his diabetes so limited him.[199] Citing *Bragdon v. Abbott*[200] and *Sutton v. United Air Lines*[201] as precedent, the court concluded that Branham's diabetes did in fact limit his major life activity of eating.[202] The court then turned to the overriding issue of whether the plaintiff posed a direct threat to the health or safety of others,[203] and subsequently found that he did not.[204]

In reaching the central holding in *Branham*, the Seventh Circuit explained that while generally it is the plaintiff's burden to prove that he is qualified to perform the essential functions of a job (for a claim brought under either the Rehabilitation Act or the ADA), "it is the employer's burden to show that an employee posed a direct threat to workplace safety that could not be eliminated by a reasonable accommodation."[205] In a lengthy footnote, the court went on to explain the disagreement among the circuit courts over the burden of proof issue, ultimately concluding,

> We see no reason to revisit the established law of this circuit in this case. Our earlier decision [in *Dadian v. Village of Wilmette*] finds support in the plain wording of the statute and in common sense. The [IRS] is certainly in the best position to furnish the court with a complete factual assessment of both the physical qualifications of the candidate and of the demands of the position.[206]

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196. *Id.* at 900.

197. *Id.*

198. *Id.*; *see also* 29 U.S.C. § 794(a) (2000 & Supp. 2006). Dubbed "the Rehabilitation Act," this legislation prohibits discrimination in a government agency against an otherwise qualified individual because of that individual's disability. *See supra* Part I.

199. *Branham*, 392 F.3d at 902.

200. 524 U.S. 624 (1998).

201. 527 U.S. 471 (1999).

202. *See Branham*, 392 F.3d at 902 ("An impairment need not cause an 'utter inabilit[y]' to perform the major life activity in order to constitute a substantial limitation on that activity." *Id.* at 902 (citing Bragdon v. Abbott, 524 U.S. 624, 641 (1998))); *see also id.* at 903 ("[T]he Supreme Court has noted that it would be contrary to the language of the ADA to find 'all diabetics to be disabled,' regardless of whether an individual diabetic's condition actually impaired his daily activities." (quoting Sutton v. United Air Lines, 527 U.S. 471, 483 (1999))).

203. *Branham*, 392 F.3d at 904.

204. *Id.* at 908.

205. *Id.* at 905–06 (quoting the court's prior decision in Dadian v. Vill. of Wilmette, 269 F.3d 831, 841 (7th Cir. 2001)) (internal quotation marks omitted).

206. *Branham*, 392 F.3d at 906 n.5 (referring to *Dadian*, 269 F.3d 831).

However, the court acknowledged the understandable struggle by other circuits in deciphering which party is legally required to bear the burden of proof:

> Commentators have suggested that the confusion stems from the language of the ADA itself, since the statute includes the direct threat language in a section entitled 'Defenses,' which suggests it is an affirmative defense on which the defendant bears the burden of proof, but also classifies the direct threat analysis as a 'qualification standard,' which suggests that the plaintiff bears the burden of proving that he or she does not constitute a direct threat, as part of the burden to prove he or she is qualified.[207]

Nonetheless, the court relied on prior Seventh Circuit case law, the statute itself, and "common sense" to establish the unambiguous legal principle at play.[208]

In arguing that no evidence existed to prove that he posed an imminent threat to those around him, Branham used the court's findings in *Hutton* as support.[209] Branham highlighted the fact that frequent occurrences of an on-the-job medical incident often served as a precursor to a court's conclusion that the plaintiff was a direct threat. Thus, Branham himself was not a threat because he had never suffered a serious hypoglycemic incident while at work.[210] The Seventh Circuit ultimately declined to answer whether an at-work episode was a prerequisite for concluding that an employee poses a direct threat to those around him.[211] The case was eventually remanded after the court's finding that Branham did not pose an imminent risk of harm and that he was qualified for the criminal investigator position.[212]

A2. *The Effect of the Employer Burden of Proof Standard in the Context of HIV-Related Discrimination*

The courts in pro-employee circuits make clear that it is not permissible to discriminate against a disabled employee under the pretext of a direct threat defense based on the remote possibility that a downturn in that individual's condition might occur, thus threatening those around him.[213] This standard would result in a huge advantage for HIV-infected employees: An employee's susceptibility to contagions brought on by a compromised immune system would make it more difficult for an employer to determine when that individual was a threat. Because this standard

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207. *Id.* at 907 n.5.

208. *Id.*

209. *Id.* at 908; *see also* Hutton v. Elf Atochem N. Am., Inc., 273 F.3d 884 (9th Cir. 2001). In *Hutton*, the court found that the defendant employer bore the burden of proof but nonetheless held for the defendant. *See infra* Part II.A2.

210. *Branham*, 392 F.3d at 908 (citing *Hutton*, 273 F.3d at 884).

211. *See id.* at 908. For a discussion on proof rules in general, see Ronald J. Allen, *The Nature of Juridical Proof*, 13 Cardozo L. Rev. 373, 383–84 (1991).

212. *See Branham*, 392 F.3d at 908–09.

213. *See supra* Part II.A1.1; *see, e.g.*, text accompanying notes 173–79.

requires that an employer bear the burden of proof following an adverse employment decision based on a worker's disability, a plaintiff employee would be able to spend less time refuting the defendant's affirmative defense and more time proving the other elements of an ADA claim, which in the context of HIV is an inordinately difficult task. The legal system might benefit from this approach as well: Higher scrutiny of the medical evidence presented by the plaintiff as part of his prima facie case might either point to weak elements of his argument or underscore holes in the employer's affirmative defense.

Conversely, this standard could also produce negative implications for an employer that could not be cured absent judicial manipulation of the standard's rigidity. Given that an HIV-positive plaintiff will have difficulty proving the medically related components of his claim, an employer would be at an even greater disadvantage not only because he would bear the burden of proof on the direct threat issue, but also because of the near impossibility of proving that the employee poses a direct threat. Where an employee's health regressed to the point at which he did pose a direct threat, but where he later regained health and was no longer a threat, an employer would be hard pressed to prove that somewhere in that narrow window the employee was fired under circumstances which constituted lawful discrimination. This standard might also substantially obstruct a jury's ability to scrutinize the issues by redirecting the burden of proof to the defendant when the direct threat might be perceived as part of the plaintiff's threshold case. A remedial measure, such as a jury instruction, could compensate for this problem; however, studies have proven that, statistically speaking, jurors do not accord jury instructions as much weight as the legal system might believe.[214]

B1. *The Employee Bears the Burden of Proof*

The three cases holding that the employee bears the burden of proving that he or she is not a direct threat to the health or safety of others were decided by the First, Tenth, and Eleventh Circuits.[215] In the first case, the 1996 decision of *Moses v. American Nonwovens*,[216] the plaintiff was an epileptic working at a heavy machinery plant. The second and third cases, *EEOC v. Amego, Inc.*[217] and *McKenzie v. Benton*,[218] decided in 1997 and 2004 respectively, both involved plaintiffs who were suffering from psychological disorders and were directly responsible for the care or safety of others. In all three cases, the defendant employer prevailed on appeal.

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214. This might be because jury instructions are often long and difficult for jurors to remember. To further complicate the issue, some jurisdictions do not even permit the instructions to be given in writing to a jury. *See generally* Ronald J. Allen et al., Evidence: Text, Problems, and Cases 85–86 (4th ed. 2006).

215. *See infra* notes 216–18.

216. 97 F.3d 446 (11th Cir. 1996).

217. 110 F.3d 135 (1st Cir. 1997).

218. 388 F.3d 1342 (10th Cir. 2004).

Just as an HIV-positive employee benefits under a standard where the employer bears the burden of proof,[219] an employer benefits equally or to an even greater degree under a standard where the employee bears the burden of proof. A court following pro-employer reasoning would adhere to the alleged unequivocal language of the statute that each of these circuits embraces. For an HIV-positive plaintiff litigating in the Eleventh Circuit, the result would be that he or she would always bear the burden of proof, regardless of extenuating circumstances.[220] Although the First and Tenth Circuits both purported to reject the strong language asserted by the Eleventh Circuit, the resulting burden on an HIV plaintiff would nonetheless be the same.

Assigning the burden of proof to the employee would uniquely affect an HIV-positive plaintiff because the nature of the AIDS virus creates difficulty in establishing nearly any element of a prima facie case, let alone disproving the direct threat element.[221] This standard would render it that much more difficult for an infected employee to sustain the foundational components of his or her case, and the inability to disprove the employer's direct threat defense could offset the otherwise sound elements of the claim.[222]

1. The Eleventh Circuit

The strongest language insisting that the burden of proof lies with the plaintiff was articulated by the Eleventh Circuit in *Moses v. American Nonwovens, Inc.*[223] The *Moses* court explained that "[t]he employee retains at all times the burden of persuading the jury . . . that he was not a direct threat."[224] The court came to that conclusion upon finding that Moses, the epileptic plaintiff who worked as, among other things, a product inspector and who supervised fast-moving press rollers from an elevated platform, had not produced sufficient evidence to prove that he did not pose a direct threat.[225] Indeed, Moses did not dispute the possibility that had he not been terminated by American, he might have had seizures while at work.[226] The district court, according to the Eleventh Circuit, had not erred by granting summary judgment for the defendant employer because the plaintiff had not sustained his burden of disproving that he was a direct threat to those around him.[227]

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219. *See supra* Part II.A1.
220. *See supra* Part II.A2.1.
221. *See generally supra* Part I.B.
222. *See supra* Part I.A.2.a.
223. 97 F.3d 446 (11th Cir. 1996).
224. *Id.* at 447.
225. *Id.* Moses also worked in several other capacities, including those which required him to sit underneath a conveyer belt and next to machinery with temperatures as high as 350 degrees Fahrenheit. *See id.* at 447–48.
226. *Id.*
227. *Id.*

2. The First Circuit

Similar to the Eleventh Circuit's holding in *Moses*, in *Amego*, the First Circuit agreed that the burden of proof was with the plaintiff, but specified that such a standard was implicated where an essential function of the job involved securing the health or safety of others.[228] Unlike the *Moses* court's insistence that the plaintiff bore the burden of proof "at all times,"[229] the *Amego* court undertook a more detailed analysis of the direct threat issue, which included scrutiny of the statutory language and legislative intent.[230] Ultimately, however, the court reached a conclusion similar to the Eleventh Circuit, and the *Amego* plaintiff lost on appeal.[231]

Amego, the defendant employer, was a nonprofit organization providing care for individuals with autism and other severe behavioral problems.[232] The patients in residence at Amego were considered "legally incompetent" and most had such severe disabilities, including aggression and a tendency to engage in self-injuring behavior, that they came to Amego only after having been discharged or rejected by other facilities.[233] Employed as a "Team Leader," plaintiff Anne Marie Guglielmi's responsibilities entailed caring for severely disabled patients; she was also charged with administering their medications.[234] In 1991, Guglielmi began to have acute mental and emotional problems and thereafter sought therapy for drug abuse, bulimia, and depression.[235] After her suspected involvement in a series of problems at various Amego facilities, including patients' overdoses and the disappearance of large amounts of medication, she revealed to Amego that she had attempted to commit suicide by overdosing on drugs twice within the previous six weeks.[236] The company's safety committee subsequently concluded that she could not safely perform the essential functions of her job, and more specifically the task of administering medication to patients, and Guglielmi was later fired.[237]

The First Circuit's discussion of the contested issues in *Amego* centered on the wording of the ADA statute and the confusion, or disagreement, engendered by the statute's language regarding the burden of proof for the direct threat issue. In discussing the direct threat and qualification standards components of the ADA, the court said, "The rub is that the language about 'qualification standards' under Title I appears in a section of

228. 110 F.3d 135, 144 (1st Cir. 1997).
229. *Moses*, 97 F.3d at 447.
230. *Amego*, 110 F.3d at 142–44.
231. *Id.* at 144.
232. EEOC v. Amego, Inc., 956 F. Supp. 1039, 1040 (D. Mass. 1996). Some facts of the case are more thoroughly described in the district court opinion. This part uses both cases to describe the factual background.
233. *See id.* at 1040; *see also Amego*, 110 F.3d at 135, 138.
234. *Amego*, 110 F.3d at 137.
235. *Id.* at 138–40.
236. *Id.* at 138–41.
237. *Id.* at 141.

the statute entitled 'Defenses.'"[238] After introducing the EEOC's argument that the direct threat provision should be read as the employer's burden to prove because it falls under the "Defenses" section, the court explained in a footnote,

> The confusion on this point is reflected in the legislative history. During congressional hearings, Representative Dannemeyer asked a witness, who had contributed to the drafting of the ADA, who had the burden of proof on the direct threat issue in the communicable disease context. The witness replied that the plaintiff, as part of his prima facie case, would have to put on evidence that his communicable disease would not pose a direct threat to others.[239]

The court then went on to cite the unequivocal language from *Moses* that the "'employee retains at all times the burden of persuading the jury . . . that he was not a direct threat.'"[240] Although the First Circuit's holding does not appear until two pages after this discussion, the court essentially implied that the statutory scheme, supplemented by established case law, could nonetheless independently render the burden of proof issue dispositive, despite the statute's confusing structure.[241]

In deciding that the statutory language was ambiguous, the court returned to legislative history to resolve the matter.[242] The court found that there was "no congressional intent to preclude the consideration of essential job functions that implicate the safety of others as part of the 'qualifications' analysis, particularly where the essential functions of a job involve the care of others unable to care for themselves."[243] The court then discussed Congress's objective in codifying the direct threat standard (articulated by the Supreme Court in *School Board v. Arline*[244]), which the court interpreted as suggesting that, based on legislative objective, "the burden is on [the] plaintiff to show that he or she is qualified in the sense of not posing a direct threat."[245] Thus, the court reasoned, the direct threat issue should be analyzed under the qualification section, where the burden of proof would rest with the plaintiff employee.[246]

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238. *Id.* at 142.

239. *Id.* at 142 n.4 (citing Staff of H. Comm. on Educ. & Labor, 101st Cong., The Americans with Disabilities Act 1896 (Comm. Print 1990)).

240. *Id.* at 142 n.4 (citing Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996)).

241. *See id.* at 142–44.

242. *Id.* at 143.

243. *Id.*

244. 480 U.S. 273, 284–86 (1987).

245. *Amego*, 110 F.3d at 143. In furtherance of its point, the court also cited the 1990 House report: "'[I]f the applicant is otherwise qualified for the job, he or she cannot be disqualified on the basis of a physical or mental condition unless the employer can demonstrate that the applicant's disability poses a direct threat to others in the workplace . . . . The plaintiff is not required to prove that he or she poses no risk.'" *Id.* (citing H.R. Rep. No. 101-485, pt. 3, at 46 (1990), *reprinted in* 1990 U.S.C.C.A.N. 469).

246. *Id.* at 143.

Using the Rehabilitation Act[247] and the Supreme Court's discussion in *Arline*,[248] the court explained that whether the plaintiff is otherwise qualified and whether that individual poses a direct threat to others were questions that should be considered together.[249] Unlike the questions under consideration in *Arline*, which necessitated that the otherwise qualified question and the direct threat matter be analyzed separately, the issues in *Amego* could not be resolved separately because "the issue of risk posed to others [arose] in the context of a core function of the job."[250] In dismissing the EEOC's claim that the ADA defines "qualified individual" differently than the Rehabilitation Act (because the issue of potential danger to others is not mentioned in that section of the ADA), the court explained that, in spite of the ADA's language, Congress intended for the statute to be analyzed in light of the definition embodied by the Rehabilitation Act.[251] Under the Rehabilitation Act, qualification does include the risks posed to others and consequently, the court argued, that definition should be read into the ADA.[252]

Additionally, the court found that in Guglielmi's position the inability to perform the essential job function of supplying patients with medication would create a danger to others.[253] In further discussion of this point, the court stated "[t]hat a failure to perform a job function correctly creates a risk to others does not preclude the ability to perform that function from being a job qualification."[254] If that were not the case, the court explained, then the result would be a "lesser burden" on the plaintiff in a position where she was caring for others than where she was not.[255] Finally, in reaching the central holding of the case, the court highlighted that in other jurisdictions courts had considered the "risk" issue and the qualification issue together where the plaintiff's position involved the care of others.[256] In conclusion, the court held,

> [I]t is the plaintiff's burden to show that he or she can perform the essential functions of the job, and is therefore "qualified." Where those essential job functions necessarily implicate the safety of others, plaintiff

247. 29 U.S.C. § 794(d) (2000).
248. 480 U.S. at 287–89.
249. *Amego*, 110 F.3d at 143.
250. *Id.* at 143–44.
251. *Id.* at 144.
252. *Id.*
253. *Id.* Disclosure of psychological problems to an employer can often be risky, despite protections afforded by the ADA. *See generally* Susan G. Goldberg et al., *The Disclosure Conundrum: How People with Psychiatric Disabilities Navigate Employment*, 11 Psychol. Pub. Pol'y & L. 463 (2005).
254. *Amego*, 110 F.3d at 144.
255. *Id.*
256. *Id.*

> must demonstrate that she can perform those functions in a way that does not endanger others.[257]

The court upheld the district court's ruling of summary judgment for defendant Amego.[258]

3. The Tenth Circuit

When the Tenth Circuit decided *McKenzie v. Benton*, the court specifically referred to the factual circumstances and holding in *Amego* as authority for concluding that the plaintiff Lorraine McKenzie bore the burden of proving that she was not a direct threat.[259] McKenzie served as a deputy sheriff in Wyoming for ten years until she voluntarily resigned in 1996 in order to seek psychological treatment.[260] Earlier that year, McKenzie had been diagnosed with various psychological problems, including post-traumatic stress disorder, which was the result of being sexually abused by her father when she was a child.[261] Absenteeism from her job became more frequent as McKenzie's condition deteriorated.[262] Following an incident in which she fired shots at her father's grave,[263] McKenzie was placed on leave; thereafter, several more episodes occurred during which she imposed self-inflicted wounds and overdosed on drugs.[264] Although a letter from her psychiatrist was sent to the sheriff's office warning that McKenzie might pose a danger both to other officers and to the public, she was never fired but rather resigned on her own accord.[265]

After several weeks of treatment, McKenzie reapplied for a job with the state after her physician wrote a letter clearing her to resume work. The letter, however, did not mention McKenzie's disability or the possibility of further psychological breakdowns.[266] Thereafter, a series of events occurred whereby McKenzie was passed over for several different jobs within the sheriff's office because of her past psychological episodes.[267] At trial, "the jury found that McKenzie was 'disabled' under the law, that she was 'otherwise qualified,' and that the defendants had 'discriminated' against her because of [her] disability, [but] they also found that McKenzie

257. *Id.* Following this holding, the court said that "[t]here may be other cases . . . where the issue of direct threat is not tied to the issue of essential job functions but is purely a matter of defense, on which the defendant would bear the burden." *Id.*

258. *Id.*

259. McKenzie v. Benton, 388 F.3d 1342, 1354–55 (10th Cir. 2004) (citing *Amego*, 110 F.3d at 144).

260. *McKenzie*, 388 F.3d at 1345–47.

261. *Id.* at 1345.

262. *Id.*

263. *Id.* It should be noted that McKenzie's actions were not as such illegal, a fact that was acknowledged by the defendants on the first appeal. *See* McKenzie v. Dovala, 242 F.3d 967, 974 n.7 (10th Cir. 2001). The defendant's name changed in the 2004 appeal because Benton replaced Dovala as sheriff following this suit. *See id.* at 969 n.2.

264. *McKenzie*, 388 F.3d at 1345–46.

265. *Id.* at 1346.

266. *Id.*

267. *Id.* at 1346–47.

posed a 'direct threat' to herself or other officers."[268] Thus, though there had been discrimination, the actions taken by the sheriff's office were nonetheless not in violation of the ADA because McKenzie was a direct threat and therefore could be legally subject to discrimination by an adverse employment decision.[269] The Tenth Circuit noted in the 2001 appeal,

> [S]ubject to narrow exceptions such as those for employees who pose a "direct threat" to the health or safety of others, the ADA's anti-discrimination provision . . . protects McKenzie from adverse employment action based on conduct related to her illness so long as she does not pose a "direct threat."[270]

On the second appeal, one of the issues the plaintiff contested was that the trial court had incorrectly instructed the jury that she, as the employee, bore the burden of proof.[271] The Tenth Circuit disagreed, holding that the trial court had correctly found that the burden should lie with the plaintiff, not with the defendant employer.[272] In so holding, the *McKenzie* court offered a comprehensive analysis of the ADA and relevant case law, including *Moses*, *Rizzo II*, *Amego*, and *Borgialli v. Thunder Basin Coal Co.*[273] After a discussion of those cases, the Tenth Circuit explained, "We are . . . persuaded that it is proper for the defendant-employer here to consider the direct threat factor in connection with possible re-employment of McKenzie [and] that McKenzie bore the burden of proof on not being a direct threat."[274] The court's reasoning was based on the language of the ADA, which, although it lists direct threat under an employer's defenses, explains that "'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[275] The Tenth Circuit did not further elaborate on the statute's meaning, but focused instead on evidence presented at trial that McKenzie had engaged in repeated acts of violence, including self-inflicted wounding, the grave-shooting incident, and generally "reckless and dangerous conduct."[276] These factors, in light of the wording of the statute, served as the basis for concluding that McKenzie bore the burden of proving that she did not pose a direct threat to others.[277]

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268. *Id.* at 1347.
269. *Id.*
270. McKenzie v. Dovala, 242 F.3d 967, 974 (10th Cir. 2001) (citations omitted).
271. *McKenzie*, 388 F.3d at 1348.
272. *See id.* at 1353–56.
273. *See id.* at 1354 (citing Borgialli v. Thunder Basin Coal Co., 235 F.3d 1284 (10th Cir. 2000); Rizzo v. Children's World Learning Ctrs., Inc. (*Rizzo II*), 173 F.3d 254 (5th Cir. 1999); EEOC v. Amego, Inc., 110 F.3d 135 (1st Cir. 1997); Moses v. Am. Nonwovens, Inc., 97 F.3d 446 (11th Cir. 1996)); *see also infra* Part II.C.
274. *McKenzie*, 388 F.3d at 1354–55.
275. *Id.* at 1355 (citing 42 U.S.C. § 12113(b) (1990)).
276. *McKenzie*, 388 F.3d at 1355–56.
277. *Id.*

B2. *The Effect of the Employee Burden of Proof Standard in the Context of HIV-Related Discrimination*

The pro-employer standard effectively allows a defendant employer the security of asserting an affirmative defense in response to a charge of HIV-related discrimination which will not be subject to question unless the plaintiff is able to sustain the burden of disproving that defense.[278] For an employer who acted lawfully in terminating an employee, where the AIDS-induced illness did make the employee a direct threat but where it would be impractical for the employer to so prove, the employer is protected from expending additional time and money.[279] Furthermore, in the event that the HIV-induced illness was a highly complicated ailment,[280] an employer could avoid the onerous task of pinpointing why that disease would render the infected employee a threat to those around him.

Under the standard espoused by the Eleventh, First, and Tenth Circuits, an employer would have an indisputable advantage, and the employee would be at an equivalent disadvantage. Under circumstances where the adverse actions taken against the employee were discriminatory, an HIV-positive plaintiff might be unable to prove the employer's underlying wrongful intent, especially if there is insufficient medical documentation to corroborate the employee's health.[281] The employee's case becomes more complicated under this standard because of the difficulty of proving sequentially that the action was not taken at a time when the employee was ill and posed a threat. In assigning the employee the burden of proof, the presumption of innocence swings in favor of the employer.

Aside from the problems posed for a plaintiff employee, there are other considerations that might reflect negatively on this standard. One such concern is the potential for diminishing the plaintiff's credibility as a witness, a problem that is significantly exacerbated in a jury trial. If voir dire does not screen out jurors with an obvious bigotry towards HIV-infected individuals, and if jurors do not generally comprise a standard distribution of biases that are reflective of those held by the American public, then the stigma against HIV-positive individuals could be perpetuated in the courtroom.[282] Under the pro-employer burden of proof standard, the plaintiff might already have two strikes against him or her: one, because of HIV or AIDS status, and two, because of the burden of proving why, in spite of that illness, he or she did pose a direct threat to others at the time of the firing.

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278. *See supra* Part I.A.2.a.

279. *See supra* Part I.A.2.a.

280. *See generally supra* Part I.B. (discussing the rare types of diseases that AIDS can produce).

281. *See generally infra* Part I.B.

282. There is, however, a valid argument "that a diverse jury will express a range of views during deliberation and will correct for . . . stereotypes." Allen, *supra* note 214, at 123.

C1. *Middle of the Road Approach*

The Fifth Circuit's 1999 decision effectively split the difference between which party bears the burden of proof on the direct threat analysis. In reaching the central holding in *Rizzo v. Children's World Learning Centers, Inc.* (*Rizzo II*), the court explained that while the burden initially lies with the plaintiff to prove that as a qualified individual she is not a direct threat, insofar as a court determines that safety constraints routinely screen out those who are disabled, then the burden of proof shifts to the defendant employer.[283] The court's analysis flatly rejected the contention in *Moses* that the burden of proof always lies with the plaintiff.[284] On the contrary, the Fifth Circuit's middle of the road approach suggests that the employer should bear the burden of proof when it is not apparent that the job function at issue poses a threat to others.[285] Ultimately, affirming the district court decision, the Fifth Circuit held in favor of the plaintiff.[286]

The middle of the road approach endorsed by the Fifth Circuit would result in an uncertain and highly variable outcome for an HIV-positive employee who claimed discrimination. It is unlikely that an employer would have already instituted a policy that screened out that class of individuals because the nature of the disease would make it difficult to do so. Under such circumstances, the HIV-positive plaintiff would have a heavy burden indeed. Alternatively, where an employer had previously screened out individuals with contagious diseases, and where the employee was sick with such an infection at the time he or she was terminated, then the employer would bear the burden of proof. The behavior of the AIDS virus would greatly frustrate the ability to prove the existence of elements that would shift the burden of proof to the defendant employer. That difficulty could easily result in the HIV-positive plaintiff generally bearing the burden of proof.

1. The Fifth Circuit

Plaintiff Victoria Rizzo was a hearing-impaired employee of an educational and day care facility, Children's World Learning Center

283. Rizzo v. Children's World Learning Ctrs, Inc. (*Rizzo II*), 173 F.3d 254, 259–60 (5th Cir. 1999).

284. *Id.* at 259 (explaining that "[w]e disagree with the *Moses* opinion only insofar as that opinion allows for no exceptions to [the] rule"). The court also cited the *Moses* language that the employee "'*at all times*'" retains the burden of proof. *Id.* (quoting Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996)).

285. *See, e.g.*, Borgialli v. Thunder Basin Coal Co., 235 F.3d 1284, 1293–94 (10th Cir. 2000) (discussing *Rizzo II*, 173 F.3d 254).

286. *Rizzo II*, 173 F.3d at 258, 263. *But see id.* at 263–74 (Wiener, J., dissenting) ("[W]hen an employee plaintiff is responsible for ensuring the safety of others entrusted to her care as part of her essential job duties, she bears the initial burden of proving that she can perform those duties in a way that does not endanger others. If she cannot sustain this burden, she cannot show that she is an 'otherwise qualified individual with a disability,' an indispensable element of her prima facie case." (citation omitted)).

(CWLC), who claimed that she was demoted because of her disability.[287] The district court determined that CWLC had discriminated against Rizzo because of her hearing impairment, a decision from which the employer appealed.[288] The facts in *Rizzo II* were disputed,[289] and thus bear repeating.

Rizzo suffered from what the court found to be a "substantial" hearing impairment, which was implicated primarily in her duty of driving students to and from school in the CWLC van.[290] After complaints from a parent that Rizzo had been unable to hear the request of a child riding in the van, in addition to that parent's concern that Rizzo's hearing impairment might prevent her from hearing an emergency (such as a child choking), which could occur while Rizzo was driving, CWLC relieved Rizzo of her duty to transport children.[291] Thereafter, her other duties were impacted as well, such that she worked two different shifts, one in the morning and one in the afternoon in order to compensate for the lost hours.[292] By the time Rizzo quit her job and filed suit for discrimination under the ADA, she was working fewer hours than were required to retain her health benefits.[293]

In addressing CWLC's claims that the lower court erred in reaching its decision, the Fifth Circuit reframed the two issues central to the conflict: whether Rizzo posed a direct threat to the children under her direction and whether CWLC or Rizzo bore the burden of proving or disproving that she was a direct threat.[294] In rephrasing these questions, the court underscored the controversy over the burden of proof issue.[295] CWLC's defense, which utilized the Eleventh Circuit's language from *Moses*, was that the plaintiff, as one element of proving that she was a qualified individual with a disability, bore the burden of proving that she was not a direct threat.[296] The *Rizzo II* court explained the Eleventh Circuit's rationale, reiterated by CWLC, that "'the employee retains at all times the burden of persuading the jury . . . that he was not a direct threat'"[297] by pointing to the Eleventh Circuit's reliance on the official interpretation for the correct reading of the ADA. The interpretation, the court explained, provided by a provision of the interpretive guidance to 29 C.F.R. § 1630.2(r) reads, "An employer may require, as a qualification standard, that an individual not pose a direct

287. *See id.* at 257.
288. *See id.*
289. *Id.*
290. *Id.* at 258.
291. *Id.*
292. *Id.* Rizzo claimed that in changing her duties, CWLC effectively demoted her. One of Rizzo's new tasks was to cook meals in the CWLC kitchen. *Id.*
293. *Id.* However, as the court pointed out, CWLC never in fact rescinded Rizzo's benefits. *See id.*
294. *Id.*
295. *Id.* The court explained, "At first glance both the caselaw from the different federal circuits and the federal regulations themselves appear to be in conflict." *Id.*
296. *Id.*
297. *Id.* at 258–59 (quoting Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996)).

threat to the health or safety of himself/herself or others."[298] Because this guideline discusses whether the plaintiff is a "qualified individual with a disability," the Fifth Circuit clarified, "the burden of proof would apparently fall on the plaintiff."[299]

The Eleventh Circuit's interpretation, however, was not the only way in which the interpretive guidance could be construed, according to the plaintiff.[300] In support of her position, Rizzo used the Fifth Circuit's holding in *Rizzo v. Children's World Learning Centers., Inc.* (*Rizzo I*) to bolster the contention that, "'as with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat.'"[301] Furthermore, Rizzo contended, the interpretive guidance states that "'with regard to safety requirements that screen out or tend to screen out an individual with a disability . . . an employer must demonstrate that the requirement, as applied to the individual, satisfies the direct threat standard.'"[302] Finding in favor of Rizzo on this issue, the court insisted that, despite disagreement by other courts, a correct reading of the case law and regulations indicated that no conflict actually existed.[303] There was no discrepancy, the court reasoned, because the burden only lies with the defendant when requirements have already screened out those with a disability.[304] The court proceeded to further elucidate the point in a footnote, stating,

> For example, had CWLC instituted a "safety requirement" that any teacher whose responsibilities included van driving also be a state-certified teacher with a minimum of a bachelor's degree in education, the burden in such a case would remain on the plaintiff to prove that she is not a direct threat. It is the nature of the safety requirement itself, and whether it tends to screen out the disabled, that determines if the burden of proof should shift to the defendant.[305]

In other words, if a class of disabled individuals had previously been eliminated from the pool of employees, then subsequent termination of an employee because of the threat he or she poses would likely be held discriminatory. In the instant case, the court found that CWLC had established a policy whereby any employee who transported children in the

298. *Rizzo II*, 173 F.3d at 259 (citing 29 C.F.R. § 1630.2(r) interpretive guidance (emphasis and internal quotation marks omitted)).

299. *Id.*

300. *See id.*

301. *Id.* (citing Rizzo v. Children's World Learning Ctrs., Inc. (*Rizzo I*), 84 F.3d 758, 764 (5th Cir. 1996)). In *Rizzo I*, the district court granted summary judgment in favor of CWLC. The Fifth Circuit reversed and remanded, holding that there were issues of material fact as to whether Rizzo posed a direct threat to the safety of the children in her care, and whether CWLC's actions in changing her employment duties were in violation of the ADA. *See Rizzo I*, 84 F.3d at 765.

302. *Rizzo II*, 173 F.3d at 259 (quoting 29 C.F.R. § 1630.15(b)–(c)) (citations omitted).

303. *See Rizzo II*, 173 F.3d at 259.

304. *See id.*

305. *Id.* at 259 n.6.

van had to be able to distinguish among spoken words.[306] This policy constituted a safety requirement to screen out persons with hearing disabilities, and for that reason the defendant would bear the burden of proving that Rizzo was a direct threat.[307]

The *Rizzo II* court concluded by summarizing its findings with reference to the *Moses* holding. The Fifth Circuit explained that, although it generally agreed that the burden of proof lies with the plaintiff to demonstrate that she is not a direct threat, it nonetheless objected to the *Moses* court's refusal to permit any exceptions to the rule.[308] Finally, the court reiterated its central holding that where the employer's safety requirements screen out a certain class of individuals with a disability, when a lawsuit is brought, the employer bears the burden of proving that the employee is a direct threat.[309] In so holding, the Fifth Circuit flatly rejected CWLC's argument that the court should use a "balancing test" as a means of weighing the importance of protecting the children in an employer's care against the necessity of preserving a plaintiff's employment interest.[310] Under the court's scrutiny of the ADA, congressional intent was quite clear: Had Congress intended the balancing test that CWLC proposed, it would have done so unambiguously.[311] Notwithstanding this rebuke, however, the court declined to find that CWLC's appeal was "frivolous" and deserving of sanctions, as requested by Rizzo.[312] The court found that CWLC had acted in "good faith" given the Eleventh Circuit's holding in *Moses* and the generally conflicting case law.[313]

The dissent's approach in *Rizzo II*, written by Judge Jacques Wiener and premised on the plaintiff's failure to produce a report by her audiologist establishing that she could safely operate a van with children on board, seriously questioned the majority's reconciliation of the direct threat issue.[314] In Judge Wiener's view, previous Fifth Circuit decisions[315] and

306. *See id.* at 259.

307. *See id.*

308. *See id.* (citing Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996) (holding that the employee "*at all times*" retains the burden of proof")).

309. *Rizzo II*, 173 F.3d at 259–60.

310. *Id.* at 261. CWLC suggested that the court should "determine whether CWLC 'properly balanced the need to protect the children in its care and Rizzo's interest in continued employment at the Learning Center.'" *Id.* (citation omitted).

311. *See id.*

312. *Id.* at 263.

313. *Id.*

314. *Id.* at 263 (Wiener, J., dissenting). Judge Jacques Wiener's reference to the audiologist's report is discussed in *Rizzo I*. After a parent expressed concern and a director from CWLC questioned whether Rizzo could hear a child choking in the back of the van, CWLC removed her from driving duties until she brought a report from her audiologist confirming that she was capable of driving the van. *See Rizzo I*, 84 F.3d 758, 760 (5th Cir. 1996). Rizzo did submit a report stating that she could hear emergency vehicles, but it contained no mention of whether she would be able to hear a child choking. As a result, CWLC maintained that Rizzo would not be permitted to resume her driving responsibilities until it had received that report. *See id.* at 760–61. Rizzo explained that the audiologist

the holding in *EEOC v. Amego, Inc.*[316] made clear that "when an employee plaintiff is responsible for ensuring the safety of others entrusted to her care as part of her essential job duties, she bears the initial burden of proving that she can perform those duties in a way that does not endanger others."[317] However, Judge Wiener admitted that the statutory language was vague, in part because the qualification standards, including that an employee not pose a direct threat to those around him, which the ADA permits, appear in the "Defenses" section of the statute.[318] The burden is on the employee to prove that he or she is a qualified individual, but the qualification standards appear under "Defenses"; therefore the statute is potentially ambiguous as to which party bears the burden of proving or refuting the direct threat claim.[319]

In contrast to what he characterized as the majority's "burden-shifting formula,"[320] which sought to "harmonize the ADA's apparently conflicting requirements that both the employer and the employee prove their direct threat contentions,"[321] Judge Wiener felt that by reconciling the statute to shift the burden of proof based on the presence of certain facts, the majority incorrectly read the law.[322] Judge Wiener believed that by assigning the plaintiff the burden of proof on the direct threat issue for essential duties, while still retaining for the employer the direct threat claim as an affirmative defense for nonessential tasks, the inherent tension in the ADA's statutory language would resolve itself.[323]

The dissenting opinion pointed to three critical factors as to why the majority's analysis was faulty. First, in practice the defendant always bears the burden of proof because whenever the direct threat issue arises, it necessarily suggests that the employer has imposed safety standards, thus requiring an inquiry into those standards. Second, the majority's analysis produces the paradoxical result of imposing a lesser burden on the plaintiff where the job involved risk to others and a greater burden where it did not. Finally, the majority's "burden-shifting formula" conflicted with other Fifth Circuit decisions prior to *Rizzo I*.[324] In conclusion, Judge Wiener explained

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would have to accompany her to work so as to make that determination, an arrangement to which CWLC agreed. *See id.* at 761. However, no report was ever issued. *See id.* In *Rizzo II*, the majority observed that "there is no evidence that a choking child even makes a sound." 173 F.3d at 259. This finding was a continuation of the discussion in *Rizzo I*, where the court said "there is no evidence that a choking child makes any noise, let alone exactly what sound the child would make. It is possible that even a driver with perfect hearing could not hear a child choking in the back of the van." 84 F.3d at 763 n.3.

315. In support of his point, Judge Wiener cited to *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993) and *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995).

316. 110 F.3d 135 (1st Cir. 1997).

317. *Rizzo II*, 173 F.3d at 263 (Wiener, J., dissenting).

318. *Id.* at 271 (emphasis omitted).

319. *Id.* (internal quotation marks and emphasis omitted).

320. *Id.* at 272.

321. *Id.* at 271.

322. *See id.* at 272.

323. *See id.* at 273.

324. *Id.* at 272–73. For the other cases that Judge Wiener cited see *supra* note 315.

that, at least initially, the burden of refuting the contention that the employee is a direct threat must lie with the plaintiff.[325]

C2. *The Effect of the Fifth Circuit Approach in the Context of HIV-Related Discrimination*

The Fifth Circuit's approach in many ways reconciles the objectionable aspects of the other two standards as applied to an HIV-related ADA case, namely that both the pro-employer and pro-employee standards always favor one litigant over another.[326] In contrast, the *Rizzo II* court's approach provides no clear-cut favoritism for either the employer or the employee, a fact suggesting that it is a more equitable standard.[327]

The middle of the road approach introduces an additional problem: the risk that neither party will be adequately protected. Arguably a standard that favors one party over another is no better than a standard that equally disfavors both; however, the latter creates a circumstance where there is no clear expectation of the rights between the parties, thus leaving too much uncertainty. The danger is that, because proving or disproving the direct threat in the context of HIV is so difficult, the plaintiff might never bring a claim at all or the defendant might settle too early, both in spite of the relative strengths of their cases.[328]

Another problematic component of the burden-shifting standard is that, while the *Rizzo II* majority provides a brief example of what would constitute a qualification standard that had already screened out a certain class of individuals, that example and accompanying explanation do not definitively resolve the issue.[329] The court overlooks the possibility of a less obvious qualification standard that might effectively screen out a class of disabled individuals but where that restriction would not be readily apparent.

Lastly, Judge Wiener's dissenting view points out that the Fifth Circuit's standard makes it possible for a plaintiff to maintain a lower burden of proof where the employment position involves risk to others than where it does not.[330] This prospect raises the concern that an employer might not be able to sufficiently protect individuals in circumstances where an HIV-positive employee deals with sharp objects or other dangerous instruments that could injure him or her and expose others to infected blood. The public health implications under such circumstances could potentially be severe.

325. *See id.* at 274.
326. *See supra* Parts II.A2, II.B2.
327. *See supra* Part II.C1.1.
328. *See supra* Part I.A.2.a.
329. *See supra* note 305 and accompanying text.
330. *See supra* text accompanying notes 314–25.

III. DETERMINING WHICH PARTY BEARS THE BURDEN OF PROOF: THE DEFENDANT EMPLOYER'S ROLE

The determination of whether an employee is a direct threat is made on an individualized basis.[331] Although there is a sound argument that a similar standard should be used in determining which party bears the burden of proving that an employee is a direct threat, equitable considerations counsel against such reasoning. The burden of proof assignment is often outcome determinative in litigation, a truism that requires a more careful legal standard when an employer claims that an employee poses a direct threat to those around him.[332] Where an employer creates a specific set of requirements for a position, which an employee must meet in order to be qualified for the job, an employer is better situated to demonstrate why an individual cannot perform those requirements safely and without being a threat to others. For those jobs where the requirements are less well defined, an employer is the only one who could know why an employee is a threat. This argument is even more compelling in the context of alleged AIDS-related employment discrimination because the nature of the disease presents uncertainty about how the virus will affect an individual[333] and is a key reason why the employer should bear the burden of proof for a direct threat defense.

Contagious-disease-related discrimination claims also merit a more demanding burden on the defendant employer because of the tremendous and continued stigma borne by those who are infected. Recall that in *School Board v. Arline*, the issue was whether the school district had lawfully discriminated against a teacher who was infected with a contagious disease, tuberculosis.[334] In order to answer this question, the Supreme Court had to decide, first, whether a contagious disease could be considered a handicap, and, second, if so, whether a person with a contagious disease would be "otherwise qualified" to teach schoolchildren.[335] The behavior of Arline's tuberculosis is quite similar to how HIV might behave; Arline was in remission for years before her tuberculosis became active again.[336] Individuals who are HIV-positive might progress to full-blown AIDS, only to revert back to HIV status.[337] Unlike tuberculosis, however, which is principally an airborne disease, spread through saliva droplets that are emitted into the air when a person coughs, sneezes, or speaks,[338] there are no studies demonstrating that either HIV or AIDS can be transmitted via

331. *See* 29 C.F.R. § 1630.2(r) (2006).

332. *See supra* Part I.A.2.a.

333. *See supra* Part I.B.

334. *See* Sch. Bd. v. Arline, 480 U.S. 273, 275 (1987). For further discussion of *Arline*, the history of the ADA with respect to contagious disease, and the direct threat standard, see Van Detta, *supra* note 64, at 849.

335. *Arline*, 480 U.S. at 275.

336. *See supra* text accompanying note 81.

337. *See supra* Part I.B.

338. National Institute of Allergy & Infectious Disease, http://www3.niaid.nih.gov/healthscience/healthtopics/tuberculosis/basics/transmission.htm (last visited Aug. 21, 2007).

saliva.[339] Since there are essentially two ways in which AIDS can be transmitted—through blood or sexual intercourse—and because it cannot be transmitted through casual contact, the argument that an employer's discrimination against an infected individual would ever constitute a legitimate direct threat defense is weak. If that contention is true, then it necessarily follows that the law should impose a more exacting burden on a defendant employer.

Arguably the ADA was never intended to apply to temporary conditions.[340] Although AIDS is a terminal illness for which there is no cure and it would be incorrect to label it a "temporary" affliction, the characteristics of the disease often render opportunistic infections transitory because infected individuals may recover from those illnesses.[341] Furthermore, unlike a situation where an employee has a psychiatric disorder,[342] or is prone to sudden seizures, as in the case of an epileptic or diabetic individual, the side effects of HIV and AIDS generally do not appear without warning.[343] An individual living with the virus may function in relative health for years, perhaps without ever even knowing that he or she is infected.[344] With 40,000 new cases of AIDS in the United States each year, and with estimates that perhaps as many as 250,000 members of the total AIDS population in the United States are living unaware of the fact that they are positive,[345] the possibility of discrimination is quite high.

In spite of the circuit split, one might reasonably argue that courts were generally able to reach the appropriate result in each of the seven cases discussed above.[346] Should someone with uncontrolled, post-traumatic stress syndrome who had previously demonstrated dangerous behavior be armed with a gun and working in law enforcement?[347] Should a highly

339. *See* Ctrs. for Disease Control & Prevention, HIV and Its Transmission 1 (1999) http://www.cdc.gov/hiv/resources/factsheets/PDF/transmission.pdf (explaining that "no scientific evidence to support [the fears that HIV might be transmitted in other ways] has been found. If HIV were being transmitted through other routes . . . the pattern of reported AIDS cases would be much different from what has been observed"); *see also id.* at 3 ("Contact with saliva, tears, or sweat has never been shown to result in transmission of HIV.").

340. Borgialli v. Thunder Basin Coal Co., 235 F.3d 1284, 1290 (10th Cir. 2000) (citing Bolton v. Scrivner, Inc., 36 F.3d 939, 942–43 (10th Cir. 1994)). In *Borgialli*, the plaintiff suffered from psychiatric problems, including severe depression and personality disorders. *Id.* at 1287. The Tenth Circuit upheld the verdict in favor of the defendant, who had employed the plaintiff as a blaster in a mine, upon finding that the plaintiff was not a "qualified person" for the position. *Id.* at 1295.

341. *See supra* text accompanying notes 106–14.

342. *See Borgialli*, 235 F.3d at 1287.

343. *See generally supra* Part I.B.

344. *See id.* For more on the topic of individuals living with the virus undetected, see Donald G. McNeil, Jr., *U.S. Urges H.I.V. Tests for Adults and Teenagers*, N.Y. Times, Sept. 22, 2006, at A1 (discussing the federal government's recommendation that all teenagers and many adults be subject to HIV tests as part of their annual checkup).

345. *See* McNeil, *supra* note 344.

346. *See supra* Part II.

347. *See generally* McKenzie v. Benton, 388 F.3d 1342 (10th Cir. 2004).

qualified individual be prevented from becoming a criminal investigator simply because he has diabetes, a condition that he has nonetheless controlled with diet and medication?[348] Undoubtedly, the answer to both questions is no. If courts generally reach the right decision, all the while using conflicting standards in assigning the burden of proof to the parties, then why does it matter that there is disharmony among the courts? It matters because of the potentially disastrous deterrent effect of not having a clear, equitable standard.

The possibility that an individual who has legitimately experienced discrimination on the basis of his disability might not bring suit because of the difficulty of proving that he is not a direct threat to those around him is unacceptable under any standard. This is further compounded when the individual has been the subject of discrimination because he or she has AIDS. Under those circumstances, discrimination could be shrouded by an employer's direct threat defense where an individual had an illness as a result of the underlying infection, but where the real concern was AIDS itself; then, the discrimination would have less legitimacy than if it were based on the actual illness.

A. *Impact of Continued Workplace Discrimination*

With no cohesive guidance from the federal courts on the way in which the direct threat issue should be resolved, HIV-infected employees who feel that they have been the subject of wrongful discrimination will be more hesitant to bring claims against their employers. The result will be a negative impact not only on the lives of those employees, but also on the companies who may have violated the ADA. Even without a cure for AIDS, people who receive proper medical care will continue to live productive, successful, generally healthy lives.[349] To further ostracize those individuals by saddling them with the burden of proof under all circumstances sends the message that society does not care about their active contributions to the workforce and reinforces the potency of already existing stereotypes. If the purpose of protecting people with disabilities stems from the fact that "society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem,"[350] then the effective result of the circuit split thwarts the goal of a progressive, inclusive American society.

B. *The Approach in* Rizzo II

The Fifth Circuit, along with the Seventh Circuit in *Branham v. Snow*,[351] thoroughly addressed the circuit split on the direct threat burden of proof

348. *See generally* Branham v. Snow, 392 F.3d 896 (7th Cir. 2004).
349. *See supra* text accompanying notes 106–14.
350. 42 U.S.C. § 12101 (a)(2) (2000); *see also* Parts I.A1–A3.
351. 392 F.3d 896.

issue.[352] The *Rizzo II* court, however, used a more careful analysis to reconcile the ambiguous statutory language and conflicting case law with the court's holding.[353]

While the *Branham* court touched on the problem but ultimately concluded that existing case law in that jurisdiction prevailed and that no further discussion was warranted, the Fifth Circuit identified the nuances raised by the issue, recognizing that the unbending Eleventh Circuit standard, whereby a plaintiff would always have the burden of proof, was both unrealistic and undesirable.[354] The Fifth Circuit acknowledged the sensitive nature of the burden of proof issue and the importance of offsetting concerns, and upheld a standard which the court thought would serve the interests of both parties while respecting the legal constraints imposed by Congress.[355] Although the court purported to reject the "balancing test" proposed by defendant CWLC,[356] the eventual standard recognized by the Fifth Circuit did balance competing interests in the form of a shifting burden: Where qualifications standards previously screened out individuals with disabilities, the defendant would have to bear the burden of proof.[357] This standard permits a balance between allowing an employer to create qualification standards and protecting an employee from standards that, as applied, potentially violate the ADA.

While the court's comprehensive discussion bears recognition in light of the cursory way in which several other courts handled the controversy,[358] the *Rizzo II* holding nonetheless did not go far enough in protecting individuals from the effects of an employer's discriminatory behavior. In discussing the Fifth Circuit's legal standard, the *Rizzo II* court offered an example where the burden of proof on the direct threat issue would remain with the plaintiff in spite of a safety requirement instituted by an employer.[359] Although the court's hypothetical—requiring all teachers to have a bachelor's degree in education—is a straightforward example of a requirement that could not be construed as screening out the disabled, it ignores the possibility of a less obvious requirement that could be interpreted in two different ways, either as a prescreen for the disabled or not. For a very technical position, where a court would not have the expertise necessary to evaluate whether a requirement was arbitrarily screening out the disabled, there is a risk that a court might misinterpret the requirement's purpose and, under the *Rizzo II* court's standard, erroneously keep the burden of proof with the plaintiff. This possibility renders the *Rizzo II* holding unsatisfactory.

352. See *supra* text accompanying notes 205–08 for a discussion of *Branham* and 287–313 for a discussion of *Rizzo II*.
353. *See supra* Part II.C1.1.
354. *See supra* Part II.B1.1.
355. *See supra* Part II.C1.1.
356. *See supra* note 310 and accompanying text.
357. *See supra* notes 305–06 and accompanying text.
358. *See supra* Part II.C1.1.
359. *See supra* text accompanying note 305.

Resolution of the burden of proof issue requires that a court undertake a thoughtful analysis, as did the *Rizzo II* court, but necessitates that the ensuing standard be straightforward and easily applied. Had the Seventh Circuit in *Branham* gone further in explaining its findings by elucidating the considerations at play and explaining the reasons for the perceived ambiguity in the ADA, that court's holding would have stood as a fine example for other courts to follow. Because the Seventh Circuit did not do so, the ambiguity persists, and what Judge Wiener termed the Fifth Circuit's "burden-shifting formula"[360] is insufficient to rectify that ambiguity.

1. The Employer and the Burden of Proof

Apart from the argument that the language of the ADA and legislative history support assigning the burden of proof to the employer,[361] there are other compelling reasons for doing so. Scholars have underscored the notion that the employer is often in the best position to demonstrate why an employee would be a threat to those around him.[362] Consider that an employer creates a job, is familiar with the intricacies required by that position, and knows how and in what capacity the person who performs that job will interact with others in the organization. It would be unreasonable to expect employers to know the specifics of a complaining employee's illness or disability, but it is not unreasonable to expect an employer to respond to a claim of discrimination with proof of why someone would need to be able to meet certain physical requirements in order to perform the job. Furthermore, an employer would also be aware of the ways in which that employee could be isolated from others so as to nullify the threat he would have otherwise posed. By requiring that the employer bear the burden of proof, courts will further ensure that defendant employers are not engaging in unlawful discrimination because the legal standard will impose on them a more onerous obligation, that of proving the legitimacy of the direct threat defense.[363] This standard forces the employer to act when faced with a charge of discrimination, rather than allowing the employer to simply assert a direct threat defense and do little else.[364]

2. Public Policy Concerns

This country was founded on principles of equity. That those principles have subsisted over time is a credit to their underlying spirit and purpose. There were, unquestionably, many practices that were acceptable and legal

360. *See supra* text accompanying notes 320–25.

361. *See supra* Part I.A.2.

362. *See id.*; *see also* Gillum, *supra* note 60, at 569. Gillum argues that this approach "limit[s] the potential for employers to revert to discriminatory practices based on subjective or insincere determinations of risk." Gillum, *supra* note 60, at 569.

363. *See* Gillum, *supra* note 60, at 569.

364. *See id.* (explaining that assigning the burden of proof to the employer "still gives employers a powerful defense to charges of discrimination, but the interpretation also makes employers 'work' for that concession").

at the time the U.S. Constitution was written that today's society no longer finds compatible with the basic guarantees of freedom espoused by that very document. The Constitution's guiding principles serve as a framework for this country's legal system and are the reason today that there are laws in place protecting those whom the law has long failed to protect. The core of that basic principle—that the law seeks to correct wrongs against those who cannot protect themselves—serves as a fundamental reason for which an employer should bear the burden of proof. This approach also supports the goal of balancing considerations between discouraging frivolous litigation and ensuring a just legal system that enables wronged individuals to bring meritorious claims.

Because AIDS has proven to be a disease that tends to ostracize individuals from society, it is especially important in AIDS-related employment discrimination cases that courts be cognizant of equitable issues. The sensitive nature of an infection-related discrimination claim requires that employees be given ample opportunity to demonstrate how and why they were wronged. This should be done without assigning to them the additional burden of proving why they are not a direct threat, particularly in light of the other elements of an ADA claim that a plaintiff is required to prove.[365]

CONCLUSION

Without legislative action to clarify the burden of proof issue, this controversy will only be resolved when decided by the Supreme Court. The recent change in leadership on the Court, however, raises concern regarding the relevance of the direct threat defense in employment discrimination cases. During Justice Samuel Alito's confirmation hearings, liberal groups expressed concern over his support, during his tenure in the Reagan administration, of what he believed was an employer's prerogative to fire an employee with AIDS.[366] Explaining his reasons for supporting that right, Justice Alito "told *The Washington Post*, 'We certainly did not want to encourage irrational discrimination, but we had to interpret the law as it stands.'"[367] This comment demonstrates the importance of an unambiguous standard because "the law as it stands" on this issue is not at all clear.[368] Indeed, Justice Alito's colleague, Justice Scalia, who joined Justice Rehnquist's dissenting opinion in *Arline*, might similarly interpret the law as it currently exists. One basis for the dissenting opinion in that case was

365. *See supra* note 59 and accompanying text; *see also supra* text accompanying note 5. For a discussion of the elements of an ADA claim that a plaintiff is required to prove, see Branham v. Snow, 392 F.3d 896, 905–08 (7th Cir. 2004). *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973) (discussing the Title VII burden shifting paradigm, which also applies in ADA cases).

366. David D. Kirkpatrick, *Liberal Coalition Is Making Plans to Take Fight Beyond Abortion*, N.Y. Times, Nov. 14, 2005, at A1.

367. *Id.*

368. *See id.*

that the school district had dismissed Arline because she was contagious, not because of any diminished physical capabilities.[369] The dissent found that the Rehabilitation Act did not cover contagiousness as a handicap, a rule that could also screen out a healthy AIDS patient from legal protection under the ADA.[370]

Despite how far the United States has come since the first known cases of AIDS, both with regards to understanding the virus and in terms of success in treating it, evidence suggests that "employers still continue to take actions that appear to be based simply on their negative reactions to employing individuals who are HIV-positive rather than on any valid concerns about the ability of those persons to perform the jobs in question."[371] Standing alone, this finding supports an argument for greater protections for individuals who are disabled because of an infectious disease. A law protecting infected individuals only has credibility if it is successful in the pursuit of that protection. As the direct threat issue now stands, blighted by ambiguous statutory language and conflicting legal standards among the circuits, it fails to adequately protect the individuals that it was designed to defend.

369. *See supra* note 83.
370. *See supra* note 83.
371. *See* Hebert, *supra* note 145, § 11:6 (June 2007).