MEDICAL EXAMINATION OR OBJECTIVE MEDICAL EVIDENCE: WHAT IS THE CORRECT PROCEDURE TO DETERMINE IF AN EMPLOYEE INFECTED WITH THE HIV VIRUS PRESENTS A DIRECT THREAT UNDER THE AMERICANS WITH DISABILITIES ACT — EEOC V. PREVO'S FAMILY MARKET, INC.

INTRODUCTION

A person infected with the human immunodeficiency virus ("HIV") encounters discrimination in the workplace every day.1 While HIV is not a new disease, society still places a stigma on individuals infected with this disease, despite the fact that current medical evidence concludes that HIV cannot be transmitted through casual contact.2 The Americans with Disabilities Act of 1990 ("ADA") was designed to decrease the odds of discrimination by employers against individuals with disabilities, ensuring that all persons would have an equal opportunity to lead full lives.3 To accomplish this goal, the ADA prohibits discrimination against an individual with a disability who is "otherwise qualified" to perform the essential functions of the job.4 The ADA further prohibits the use of medical examinations to determine if the employee has a disability "unless the medical examination is job-related and consistent with business necessity."5

---


2. Studdert & Brennan, 549 ANNALS AM. ACAD. POL. & SOC. SCI. at 85 (discussing the stigma and fear still surrounding people infected with HIV); Mitchell Katine, Returning To Work After HIV Disability Leave, 61 TEx. B.J. 932, 933 (Oct. 1998) (noting that activities such as sexual intercourse, blood transfusions, child birth and intravenous drug use are the known modes of HIV transmission).


4. 42 U.S.C. § 12111(8) (1994). Section 12111(8) provides, in pertinent part, that "[t]he term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Id.

5. 42 U.S.C. § 12112(d)(4)(A) (1994). Section 12112(d)(4)(A) provides, in part, that "[a] covered entity shall not require a medical examination . . . unless such examination or inquiry is shown to be job-related and consistent with business necessity." Id.
In *EEOC v. Prevo's Family Market, Inc.*, the United States Court of Appeals for the Sixth Circuit held that Prevo's Family Market, Inc. ("Prevo's") did not violate the ADA when it required an employee to submit to a medical examination, which was found to be job-related and a business necessity. In *Prevo's*, Stephen Sharp believed that Prevo's terminated him based on his HIV status after Prevo's required him to submit to a medical examination. The Sixth Circuit declared, however, that a medical examination of Sharp was job-related and consistent with business necessity to determine if Sharp posed a "direct threat" to others. The court reasoned that Prevo's request for a medical examination was for the legitimate purpose of protecting the health and safety of Sharp, his co-workers, and the public.

The Sixth Circuit further determined that Prevo's request for a medical examination was necessary, because the store did not have access to current medical knowledge concerning HIV transmission within its organization.

This Note will first review the facts and holding of *Prevo's*. This Note will then examine cases in which courts have evaluated whether an individual with a disability is "otherwise qualified" to perform the functions of the job, thereby not posing a "direct threat" to others. This Note will then address cases which discuss when a medical examination is job-related and consistent with business necessity. Finally, this Note will scrutinize the Sixth Circuit's decision in *Prevo's* and will criticize the Sixth Circuit for: (1) failing to consider the mandates established in 42 U.S.C. § 12113(d)(2) that an employer cannot reassign an individual with an infectious disease working in a food handling position unless the disease is found on the list prepared by the Secretary of Health and Human Services; (2) declaring that Prevo's request for a medical examination was job-related and consistent with business necessity even though its request failed to fall under one of the four categories recognized by the ADA Technical Assistance Manual, which allows for medical examinations only in limited circumstances; and (3) determining that the "direct threat" analysis could only be effectuated with a medical examination, even

6. 135 F.3d 1089 (6th Cir. 1998).
10. *Id.* at 1094.
11. *Id.* at 1096.
12. See infra notes 16-116 and accompanying text.
13. See infra notes 149-365 and accompanying text.
though objective medical evidence established that the risk of transmitting HIV in this situation was low. 15

FACTS AND HOLDING

In May 1992, Prevo's Family Market, Inc. ("Prevo's") hired Steven Sharp as a part-time produce clerk, and later that fall, Sharp became a full-time employee as a night-shift stock person. 16 In November 1992, Sharp asked for and was granted a transfer to the produce department. 17 As a result of the transfer from a full-time to part-time position, Sharp became ineligible for "company paid medical benefits." 18

On January 13, 1993, Sharp informed Prevo's of his positive human immunodeficiency virus ("HIV") test result, asserting that he wanted to tell Prevo's rather than have the store hear the news from another party. 19 In fact, Sharp later admitted that he had worked from May 2, 1992, until August 31, 1992, in the produce department with the knowledge that he was infected with the HIV virus, but he had chosen not to reveal this fact to Prevo's. 20 Sharp informed Prevo's that he had agreed to speak about HIV and acquired immune deficiency syndrome ("AIDS") at the Traverse City High School in connection with its "AIDS awareness and education program." 21 Sharp further informed Prevo's that he did not intend to disclose the fact that he worked at Prevo's. 22

During a conversation in January of 1993 between Sharp and Dan Prevo, the President of Prevo's, the parties discussed the possibility of Sharp working in another department. 23 Sharp did not object to the transfer, because he wanted to work in the cash room. 24 However, Sharp was reassigned to the receiving area in a part-time capacity with comparable hours and pay. 25 Dan Prevo conceded during his deposition that he did not attempt to ascertain whether Sharp could

---

15. See infra notes 466-605 and accompanying text.
17. Brief for Appellee at 4, Prevo's (No. 97-1001).
19. Prevo's, 135 F.3d at 1091.
20. Id. at 1091 n.2.
21. Id. at 1091.
22. Id.
23. Brief for Appellee at 4-6, Prevo's (No. 97-1001).
24. Prevo's, 135 F.3d at 1091.
function in the produce department without engendering harm to his co-workers prior to reassigning Sharp.\textsuperscript{26}

Two days after assuming his new position in the receiving area, Sharp expressed his concerns to Dan Prevo that he missed the interaction with store customers.\textsuperscript{27} Sharp further disclosed that other store employees were concerned over his reassignment, because it disrupted their work schedules, and they wanted an explanation for the reassignment.\textsuperscript{28} As a result, both parties agreed that Sharp was to assume a paid leave of absence with medical benefits.\textsuperscript{29} Dan Prevo contended that he chose this course of action in order to relieve Sharp of having to answer the employees' questions, and to allow Prevo's to gather the information needed to address the situation.\textsuperscript{30} During this time, Sharp agreed to obtain medical verification of his HIV-positive status from his physician and to provide Prevo's with this information.\textsuperscript{31}

By March 1993, Sharp had not furnished Prevo's with the medical verification of his HIV-positive status.\textsuperscript{32} Instead, Sharp consulted with attorneys to determine whether he was required to provide such information to Prevo's.\textsuperscript{33} In May 1993, both parties sought to reach an agreement as to whether Sharp's employment would be continued with Prevo's.\textsuperscript{34} Prevo's again requested that Sharp provide medical verification of his HIV-positive status.\textsuperscript{35} Prevo's also expressed concern over Sharp's use of knives in the produce department, which typically resulted in cuts and nicks when the produce workers prepared produce for display.\textsuperscript{36} Prevo's and Sharp agreed that cuts and nicks were a common occurrence during the course of a produce worker's job duties, which entailed trimming and packaging produce for public sale in a small area of the store.\textsuperscript{37} Prevo's also expressed concerns "that Sharp would be susceptible to other infectious diseases, including hepatitis and tuberculosis."\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{26} Brief for Appellee at 6, Prevo's (No. 97-1001).
\item \textsuperscript{27} Prevo's, 135 F.3d at 1091.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id. Sharp was provided with medical benefits during his leave of absence even though he was not entitled to them because of his part-time employment status with Prevo's. Id.
\item \textsuperscript{30} Prevo's, 135 F.3d at 1091.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Brief for Appellant at 8, Prevo's (No. 97-1001).
\item \textsuperscript{34} Prevo's, 135 F.3d at 1091.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Id. at 1091-92 n.3.
\item \textsuperscript{38} Id. at 1092.
\end{itemize}
Sharp's attorney advised him to furnish Prevo's with the requested medical information. While Sharp promised to comply with the request, the medical information was not forthcoming. Ultimately, in November 1993, Prevo's requested and obtained Sharp's consent "to a medical examination by an infectious disease expert" at the store's expense.

Prevo's set an appointment for Sharp with Dr. David Baumgartner for November 19, 1993. Prevo's requested that Dr. Baumgartner make a comprehensive diagnosis and prognosis regarding: (1) whether Sharp tested positive for hepatitis, HIV, or any related conditions; (2) whether future medical treatment would necessitate Sharp's absence from work; (3) whether Prevo's should consider reassigning Sharp to an office position; (4) the ability of the HIV virus to survive on tools and produce; and (5) the degree of risk Sharp posed to his co-workers and to the customers in the produce position. Sharp failed to appear at the appointment with Dr. Baumgartner, contending that he did not have transportation.

Sharp, however, did go to his personal physician, who rendered a simple opinion noting that Sharp tested negative for tuberculosis and hepatitis; however, the tests failed to disclose whether Sharp was HIV-positive. Prevo's refused to accept Sharp's personal physician's opinion, because the results did not specifically address Sharp's diagnosis, prognosis, or employment suitability. At this same time, Prevo's offered Sharp a new position with the company as a Data Analyst, which would require Sharp to work at home using a computer to develop marketing information. Subsequently, Sharp declined Prevo's job reassignment offer in writing. Sharp included in his declination response a letter from his personal physician, stating that "Sharp tested negative for hepatitis and tuberculosis." The medical information provided to Prevo's by Sharp was again rejected as being insufficient.

On December 3, 1993, Prevo's Human Resources Coordinator contacted Sharp to determine when Sharp could reschedule his examina-

39. Id.
40. Id.
41. Id.
42. Brief for Appellant at 9, Prevo's (No. 97-1001).
43. Prevo's, 135 F.3d at 1092.
44. Id.
45. Id.
46. Id.
47. Brief for Appellee at 10, 11 & n.6, Prevo's (No. 97-1001).
48. Prevo's, 135 F.3d at 1092.
49. Id.
50. Id.
tion, and gave Sharp twenty-four hours to provide an acceptable date for the examination.\textsuperscript{51} Sharp was also informed that should he fail to provide the information as requested, his actions would be deemed a refusal to follow through with the examination.\textsuperscript{52} Sharp failed to respond to Prevo’s request and was subsequently terminated by Prevo’s.\textsuperscript{53}

On June 28, 1995, the Equal Employment Opportunity Commission (“EEOC”) filed a complaint in the United States District Court for the Western District of Michigan, Southern Division, against Prevo’s on behalf of Sharp, alleging that Prevo’s illegally discriminated against Sharp because he tested positive for the HIV virus and terminated Sharp because he refused to take a medical examination.\textsuperscript{54} Following discovery, Prevo’s and the EEOC filed summary judgment cross-motions on the issue of liability for an Americans with Disabilities Act (“ADA”) violation.\textsuperscript{55} The district court granted the EEOC’s motion for summary judgment in August of 1996, finding “that Prevo’s had discriminated against Sharp in violation of the ADA.”\textsuperscript{56} The district court reasoned that a medical examination in Sharp’s situation did not fall within the typical circumstances requiring a medical examination, as provided for in the ADA Technical Assistance Manual.\textsuperscript{57}

In addition, the district court found that the medical testimony showed that the risk of Sharp transmitting the HIV virus was low and could be further reduced by utilizing proper hygiene procedures, such as: “(1) wearing protective, steel-lined gloves; (2) using an individual set of knives and other utensils; and (3) enhanced clean-up procedures.”\textsuperscript{58} Based on this evidence, the district court reasoned “that inquiries into Sharp’s health and a demand for a medical examination were not strictly necessary” and “that it was unlawful . . . for Prevo’s to suspend and discharge Sharp for failure to undergo a medical examination.”\textsuperscript{59}

After a trial for damages, the jury awarded Sharp $45,000 in punitive damages and $10,000 in compensatory damages.\textsuperscript{60} The district court further ordered Prevo’s to reinstate Sharp to the produce department, in addition to back pay, pending reinstatement.\textsuperscript{61}

\begin{itemize}
  \item \textsuperscript{51} Brief for Appellant at 10, \textit{Prevo’s} (No. 97-1001).
  \item \textsuperscript{52} \textit{Prevo’s}, 135 F.3d at 1092.
  \item \textsuperscript{53} \textit{Id}.
  \item \textsuperscript{54} Brief for Appellant at vi, 1, \textit{Prevo’s} (No. 97-1001).
  \item \textsuperscript{55} \textit{Prevo’s}, 135 F.3d at 1092.
  \item \textsuperscript{56} \textit{Id}.
  \item \textsuperscript{57} \textit{Id.} at 1092-93.
  \item \textsuperscript{58} \textit{Id.} at 1093 & n.6.
  \item \textsuperscript{59} \textit{Id.} at 1093.
  \item \textsuperscript{60} \textit{Id}.
  \item \textsuperscript{61} \textit{Id}.
\end{itemize}
court stayed the jury’s monetary judgment, but upheld Sharp’s reinstatement. Prevo’s requested that the punitive damage award be set aside through a post-trial motion, but that motion was denied on December 5, 1996.

Prevo’s appealed the decision of the district court to the United States Court of Appeals for the Sixth Circuit, arguing that the district court erred in granting the EEOC’s motion for summary judgment on the issue of liability and the damage awards. The Sixth Circuit reversed, finding that a medical examination “of an alleged HIV-positive employee, in the unique circumstances of this particular case, to be job-related and consistent with a business necessity.” The Sixth Circuit noted that the interpretive guidelines of the ADA illustrated that 42 U.S.C. § 12112(d)(1) was designed to prohibit medical examinations and inquiries that do not effectuate a legitimate business purpose. The Sixth Circuit recognized that “Prevo’s legitimate business purpose and business necessity was to protect the health of Sharp, its other employees, and the general public from HIV infection.” The Sixth Circuit reasoned that the high frequency of bleeding related to work in the produce department necessitated Prevo’s verification of Sharp’s medical condition in order to analyze their options.

The Sixth Circuit further stated that Prevo’s conduct was not based on mere suspicion, which the ADA was designed to prevent, because Sharp revealed his alleged HIV-positive condition to Prevo’s. The court declared that Prevo’s request for a medical examination was based on Sharp’s disclosure of his HIV-positive status and the store’s concerns about implementing infection preventing measures. The court noted that an employer may require an employee to “confirm or disprove the employee’s statement” about an “illness that may require special accommodation.” The court further noted that if an employer was not able to request such information, any employee could claim a disability requiring an accommodation and the employer

62. Id.
63. Brief for Appellant at 2, Prevo’s (No. 97-1001).
64. Prevo’s, 135 F.3d at 1089-90.
65. Id. at 1093.
67. Prevo’s, 135 F.3d at 1094.
68. Id.
69. Id. The court noted that, in enacting the ADA, Congress was partially concerned with the fact that employees may be subject to unwanted exposure of their disability and the stigma associated with it. Id. at 1094 n.8.
70. Prevo’s, 135 F.3d at 1094.
71. Id.
would be unable to confirm that a need for an accommodation really exists.\textsuperscript{72} Therefore, the court held that "Sharp's refusal to provide necessary medical information . . . prevented Prevo's from knowing whether he had a condition for which federal law may require accommodation."\textsuperscript{73}

The Sixth Circuit reasoned that \textit{Leckelt v. Board of Commissioners of Hospital District No. 1}\textsuperscript{74} was applicable to the determination of whether Sharp posed a "direct threat" to his co-workers, because the situation presented in this case involved "a profession and environment in which there is continuous blood exposure."\textsuperscript{75} In relying on \textit{Leckelt}, the Sixth Circuit concluded that "the probabilities of the transmission of an infectious disease is just one of four factors to be considered [and] . . . it is the existence of exposure and transmission opportunities that are instrumental in determining if a medical examination is necessary."\textsuperscript{76} The four factors the court referred to include: "(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm."\textsuperscript{77} Therefore, the court noted that the medical information requested through the medical examination was to help determine if Sharp could fulfill his job functions, involving cuts and scrapes, while limiting others to HIV exposure.\textsuperscript{78}

The Sixth Circuit further declared that Prevo's could not be required to assume expertise in the field of HIV control and transmission before it could request an employee to submit to a medical examination.\textsuperscript{79} The court reasoned that Prevo's needed to consult a third party for a medical examination to confirm Sharp's HIV status and to ascertain what measures were necessary for Sharp's employment, because Prevo's did not have access to the most current medical information, as mandated by the statute, within its organization.\textsuperscript{80} The court refused to accept the EEOC's contention that Prevo's could have consulted an outside medical source or Sharp himself to determine what the potential risks of transmission were in this situation,

\textsuperscript{72} Id. at 1094-95.
\textsuperscript{73} Id. at 1096.
\textsuperscript{74} 909 F.2d 820 (5th Cir. 1990).
\textsuperscript{75} \textit{Prevo's}, 135 F.3d at 1096. In \textit{Leckelt}, the Fifth Circuit held that a licensed practical nurse "was not [an] otherwise qualified individual" entitled to protection from discrimination by his employer under the Rehabilitation Act. \textit{Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1}, 909 F.2d 820, 830 (5th Cir. 1990).
\textsuperscript{76} \textit{Prevo's}, 135 F.3d at 1096.
\textsuperscript{77} Id. at 1095 (quoting 29 C.F.R. § 1630.2(r) (1996)).
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 1096-97.
\textsuperscript{80} Id. at 1096.
and therefore obviating the medical examination of Sharp.\textsuperscript{81} The court maintained that a medical examination was necessary to comply with the assessment mandated by statute.\textsuperscript{82}

The Sixth Circuit also held that Prevo's actions did not "rise to the level of 'adverse employment decisions based on stereotypes and generalizations,'" because "the language of the regulation is instructive on how to discover an individual's actual characteristics of disability; and in order to understand those characteristics under these particular circumstances, a medical examination was needed."\textsuperscript{83} The court noted that Prevo's made a concentrated effort to continue Sharp's employment at the same prior salary and time scale.\textsuperscript{84} Further, the court noted that Sharp was given a paid leave of absence, which he was not entitled to as a part-time employee.\textsuperscript{85} The court further noted that even when Sharp failed to attend the company paid medical examination and failed to provide medical information from his personal physician, Prevo's offered Sharp a position as a Data Analyst.\textsuperscript{86} Therefore, the court held that Prevo's conduct was not tantamount to the discrimination at which the statute was aimed.\textsuperscript{87}

Circuit Judge Karen Nelson Moore dissented from the opinion of the court.\textsuperscript{88} Judge Moore noted that, during the debate prior to the passage of the ADA, Representative Jim Chapman of Texas proposed an amendment which would have allowed an employer to bar an HIV infected employee from working with food without any medical evidence that he/she posed a risk to others, simply because "'many Americans would refuse to patronize any food establishment if an employee were known to have a communicable disease.'"\textsuperscript{89} Judge Moore argued that despite the fact that the Centers for Disease Control ("CDC") has not uncovered a case where an HIV infected food service worker has transmitted the disease while handling food, and that HIV has never appeared on the list of communicable diseases that can be transmitted through the handling of food, the Prevo's majority adopted "the Chapman amendment and the fear, prejudice, and ignorance it represented."\textsuperscript{90}

\textsuperscript{81} Id. at 1096-97.
\textsuperscript{82} Id. at 1097.
\textsuperscript{83} Id. (quoting 29 C.F.R. § 1630 app. (1996)).
\textsuperscript{84} Id.
\textsuperscript{85} Id. The court further noted that Sharp was not entitled to the continued benefits provided to him by Prevo's. Id.
\textsuperscript{86} Prevo's, 135 F.3d at 1097.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 1098 (Moore, J., dissenting).
\textsuperscript{89} Id. (Moore, J., dissenting) (citations omitted).
\textsuperscript{90} Id. at 1098-1100 (Moore, J., dissenting).
Judge Moore stated that the members of Congress refused to enact this amendment because, as Senator Thomas R. Harken of Iowa stated, “in spite of the clear and convincing, overwhelming medical evidence that AIDS cannot be transmitted either through air or food is simply to codify ignorance.”

Judge Moore opined that Congress enacted the ADA with an amendment requiring a list of communicable diseases transmitted through the handling of food to be prepared and, for those diseases, an employer could reassign the employee. Judge Moore noted that “Congress chose facts over fear, information over ignorance, and medicine over mythology.”

Judge Moore further argued that “an employer must have some relevant objective medical evidence that a food-handling employee poses a direct threat to others prior to reassigning that employee to a non-food-handling position” and that an employer could “conduct a direct-threat analysis based on objective medical evidence without requiring the employee to submit to a medical examination.” Judge Moore distinguished Leckelt from the present case on the grounds that, in Leckelt, before the hospital administrator took action towards the employee, “the administrator consulted legal counsel and reviewed the hospital’s infection control policies and the applicable guidelines concerning HIV and AIDS promulgated by the CDC and the American Hospital Association.” In comparison, Judge Moore stated that Dan Prevo admitted that he did not seek “to obtain relevant objective medical evidence as to whether he needed to reassign Sharp.” Judge Moore further noted that Dan Prevo spoke only to Dr. Tom Bannow, “who is not an infectious disease specialist, and to human resource personnel, none of whom were doctors or who specialized in AIDS/HIV in the workplace.” Judge Moore concluded that Sharp was reassigned to the receiving department and subsequently placed on administrative leave with pay without obtaining objective medical evidence that Sharp posed a “direct threat” to others.

Contrary to the majority’s opinion, Judge Moore maintained that an employer is required to obtain outside objective evidence before an employer can require an employee to submit to a medical examina-

91. *Id.* at 1099 (Moore, J., dissenting) (citations omitted).
92. *Id.* (Moore, J., dissenting).
93. *Id.* (Moore, J., dissenting).
94. *Id.* at 1100 (Moore, J., dissenting).
95. *Id.* (Moore, J., dissenting) (citing *Leckelt*, 909 F.2d at 822).
96. *Id.* (Moore, J., dissenting).
97. *Id.* at 1101 (Moore, J., dissenting). Justice Moore recognized that Dr. Tom Bannow was not an infectious disease specialist; rather, he was merely Dan Prevo’s neighbor. *Id.* (Moore, J., dissenting).
98. *Prevo’s*, 135 F.3d at 1101-02 (Moore, J., dissenting).
tion. Judge Moore also argued that an employer must be required to obtain this medical information "to ensure that employers are acting on fact rather than fear, information rather than ignorance, and medical evidence rather than mythology." Because Prevo's reassigned Sharp without medical evidence necessitating the need for his reassignment, Judge Moore stated that Prevo's actions showed that it acted "out of fear, prejudice, and ignorance whether it was his own or that of his customers."

Judge Moore further argued that a medical examination is not necessary to conclude if Sharp fell within the four factors used to determine if a "direct threat" is present, because extensive medical evidence showed that Sharp was not a "direct threat." Judge Moore determined that the only issues that existed regarding the four factor test were to determine "the likelihood that the potential harm will occur and the imminence of the potential harm." While no one disputed that bleeding frequently occurred in the produce department, Judge Moore noted that Dr. Baumgartner, Prevo's expert, stated that an HIV infected employee working with food usually does not pose a risk of transmitting the disease and often times required no restriction in employment. Judge Moore determined that the expert testimony suggested that the risk of transmitting HIV was low in regard to Sharp and his fellow co-workers, and therefore Sharp did not pose a "direct threat." Judge Moore further opined that even if Sharp did pose a "direct threat," reasonable accommodations would eliminate that threat, thereby making him a qualified individual under the ADA.

Judge Moore noted that the medical testimony presented before the court showed that a determination regarding the "direct threat" of an employee could have been made without resorting to a medical examination of the employee. Judge Moore further noted that the majority focused on the expert testimony where both experts agreed that a medical examination would have been beneficial "to determine

99. Id. (Moore, J., dissenting).
100. Id. at 1101 n.3 (Moore, J., dissenting).
101. Id. at 1101 (Moore, J., dissenting).
102. Id. at 1102 (Moore, J., dissenting). The four factors the court referred to included: "(1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm." Id. at 1095 (quoting 29 C.F.R. § 1630.2(r) (1996)).
103. Prevo's, 135 F.3d at 1102 (Moore, J., dissenting).
104. Id. (Moore, J., dissenting).
105. Id. (Moore, J., dissenting).
106. Id. (Moore, J., dissenting). Justice Moore noted that providing Sharp with separate knives and steel gloves were reasonable accommodations that could reduce the likelihood of transmissions. Id. (Moore, J., dissenting).
107. Prevo's, 135 F.3d at 1102 (Moore, J., dissenting).
Sharp's intellect or personal hygiene habits," but no one "had observed or reported any aberrations in Sharp's intellect or personal hygiene habits." Therefore, Judge Moore determined that Prevo's had no reason to believe that a personal medical examination was necessary to determine if Sharp posed a "direct threat." Judge Moore further argued that the medical examination of Sharp was not "job-related and consistent with business necessity," because Sharp's situation did not fit within the four recognized legitimate business purposes. Judge Moore noted that the four recognized legitimate business purposes, identified by the court, are: "(1) when an employee is having difficulty performing his or her job effectively; (2) when an employee becomes disabled on the job or wishes to return to work after suffering an illness; (3) if an employee requests an accommodation; and (4) if medical examination, screening, and monitoring is required by other laws." Judge Moore reasoned that none of these situations existed in Sharp's case.

Judge Moore concluded that the majority's finding of the existence of a legitimate business purpose permitted discrimination by singling Sharp out from other employees. Judge Moore noted that if everyone in the produce department was prone to cuts, scrapes, and bleeding from preparing produce for sale, then everyone is at risk to be infected from all blood-borne diseases. Judge Moore hypothesized that Sharp and his co-workers were just as likely to be infected with a blood-borne disease, such as hepatitis from each other, as Sharp's co-workers are at risk from being infected by him. Therefore, Judge Moore concluded that, instead of singling out Sharp because of his HIV infection, Prevo's should have "adopted safety measures applicable to all produce clerks to reduce the risk of transmission of any blood-borne pathogen," which fairness and the law require.

BACKGROUND

A. THE AMERICANS WITH DISABILITIES ACT OF 1990

The enactment of the Americans with Disabilities Act of 1990 ("ADA") marked "the beginning of a new era for individuals with disa-

108. Id. (Moore, J., dissenting).
109. Id. at 1102-03 (Moore, J., dissenting).
110. Id. at 1103-04 (Moore, J., dissenting).
111. Id. at 1103 (Moore, J., dissenting) (citations omitted).
112. Id. (Moore, J., dissenting).
113. Id. at 1104 (Moore, J., dissenting).
114. Id. (Moore, J., dissenting).
115. Id. (Moore, J., dissenting).
116. Id. (Moore, J., dissenting).
bilities.” Since its enactment, the ADA has become “the most significant and far-reaching measure ever enacted for the protection of the handicapped.” The ADA was designed to extend the rights of the disabled to the private sector, beyond those programs and activities receiving federal funding. Initially, the ADA applied only to employers with twenty-five or more employees; however, in 1994, an amendment reduced the minimum number of employees to fifteen. The ADA accomplished its goal of protecting disabled persons by prohibiting employer discrimination of an employee with a disability who is a “qualified individual with a disability . . . in regard to . . . [the] discharge of employees.” An “otherwise qualified individual” with a disability is defined under the ADA as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” The determination of which duties are essential functions of an employee’s job is within the discretion of the employer.

The ADA further prohibits an employer from requiring an employee to submit to a medical examination or medical inquiries “as to...
whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.”124 The drafters of the ADA explained that the terms “job-related” and “consistent with business necessity” required that the medical examination of a current employee is “to be carefully tailored to measure the person’s actual ability to do [the] essential function[s] of the job.”125 The ADA was not designed to prohibit an employer from acquiring medical information, which is “necessary to evaluate the ability of the . . . employees to perform essential job functions, or to promote health and safety on the job.”126

The ADA Technical Assistance Manual further explains that an employer can require an employee to submit to a medical examination when: (1) “there is evidence of a job performance or safety problem;” (2) federal laws require a medical examination; (3) there is a necessity to know if the employee is fit to perform his/her job; and (4) “voluntary examinations . . . are part of employee health programs.”127 However, the ADA Technical Assistance Manual also provides that the medical documentation regarding the employee’s qualification with a disability or whether the employee poses a “direct threat” does not require the only source of information to stem from medical doctors.128 The employer may need to seek information from other sources, such as experts “knowledgeable about the individual and disability concerned” and the employee’s prior work history, which may be more relevant than an evaluation by a physician.129

The ADA Technical Assistance Manual recognizes four situations where an employer can require an employee to submit to a medical examination: (1) “when an employee is having difficulty performing his or her job effectively . . . to determine if s/he can perform essential job functions with or without an accommodation;” (2) when an employee suffers an injury on the job; (3) “if an employee requests an accommodation on the basis of disability;” and (4) medical exa

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

Id.

125. Feldblum, 64 Temp. L. Rev. at 547 (quotations omitted).


128. Id. at VI-3.

129. Id.
tions “required by federal, state or local laws.” However, when an employee seeks “to return to work after an injury or illness,” a medical examination may be required:

- to determine if the person can perform essential functions of the job . . . with or without reasonable accommodation, and without posing a ‘direct threat’ to health or safety that cannot be reduced or eliminated by reasonable accommodation . . . [or] to identify an effective accommodation that would enable the person to perform essential job functions.\(^{131}\)

An individual who poses a “direct threat” to others is not a qualified individual with a disability if the threat cannot be eliminated by a reasonable accommodation.\(^{132}\) The ADA defines a “direct threat” as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”\(^{133}\) The nature of the risk involved must be more than a “speculative or remote risk” of harm.\(^{134}\) There must be a “high probability, of substantial harm” in order for the employee to be considered a “direct threat” to others.\(^{135}\) The determination of whether an individual poses a “direct threat” must be based on individualized medical judgments regarding “the most current medical knowledge and/or . . . objective evidence” regarding the following four factors: “(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm.”\(^{136}\) An employer is not allowed to base employment decisions on “subjective perception, irrational fears, patronizing attitudes, or stereotypes.”\(^{137}\)

\(^{130}\) Id. at VI-13-14.

\(^{131}\) Id. at VI-14.

\(^{132}\) School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n.16 (1987); 42 U.S.C. § 12113(a), (b) (1994). Sections 12113(a) and (b) provide:

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

(b) The term “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.

\(^{133}\) 42 U.S.C. § 12111(3) (1994). Section 12111(3) states: “The term ‘direct threat’ means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” Id.

\(^{134}\) 29 C.F.R. § 1630.2(r) app. (1998).

\(^{135}\) Id.

\(^{136}\) Id. § 1630.2(r).

\(^{137}\) Id. § 1630.2(r) app.
B. LEGISLATIVE HISTORY AND Plain LANGUAGE OF THE ADA

Prior to the enactment of the ADA, Representative Jim Chapman of Texas introduced an amendment to the ADA, which would have allowed an employer to reassign an employee with an infectious or contagious disease from a food-handling position. Representative Chapman proposed this amendment, arguing that "[t]he reality is that many Americans would refuse to patronize any food establishment if an employee were known to have a communicable disease." In effect, Representative Chapman concluded that, under the current draft of the ADA, an employer could not move a food-service worker infected with AIDS to another position even though customers may not patronize the business if they discovered that the employer's food-service worker had AIDS. Representative John R. Lewis of Georgia, a strong opponent to the Chapman Amendment, responded that the proposed legislation was based on the "same tired arguments that were used to justify segregated restaurants." Several representatives further stated during the debate on the Chapman Amendment that the current medical evidence showed that HIV could not be transmitted through the handling of food. Despite this evidence, Representative Chapman intended to allow discrimination based on the fact that the business may suffer economic hardship from the public's misperception of AIDS. In opposition to this amendment, Admiral James Watkins further testified that:

138. Winterscheidt, 28 ARIZ. ATT'Y at 14. Representative Chapman's proposed amendment stated: (d) Food Handling Job. It shall not be a violation of this act for an employer to refuse to sign or assign or continue to assign any employee with an infectious or communicable disease of public health significance to a job involving food handling, provided that the employer shall make reasonable accommodation that would offer an alternative employment opportunity for which the employee is qualified and for which the employee would sustain no economic damage. Id. at 14 n.16 (quotations omitted).


140. Winterscheidt, 28 ARIZ. ATT'Y at 14.


142. Id. (statement of Rep. Miller). Representative John R. Miller of Washington stated: "The sponsor admits there is no evidence that AIDS can be transmitted in food handling, but his amendment allows discrimination in such cases because food handling businesses may be hurt by public perception of AIDS victims. ... This Congress should not license discrimination of any kind." Id.; see also 136 CONG. REC. S7422, S7437 (daily ed. June 6, 1990) (statement of Sen. Harkin) ("To pass legislation ... in spite of clear and convincing, overwhelming medical evidence that AIDS cannot be transmitted either through air or food is simply to codify ignorance.").

[a]s long as discrimination occurs, and no strong national policy with rapid and effective remedies against discrimination is established, individuals who are infected with HIV will be reluctant to come forward for testing, counseling, and care. This fear of potential discrimination ... will undermine our efforts to contain the [AIDS] epidemic and will leave HIV-infected individuals isolated and alone.144

Members of Congress hotly debated the Chapman Amendment, but they were able to reach a compromise known as the Hatch Amendment, which gave the Public Health Service the responsibility under 42 U.S.C. § 12113(d)(1) to compile “a list of infectious diseases that could be communicated through food handling.”145 The effect of the infectious diseases list, as provided in 42 U.S.C. § 12113(d)(2), is to ensure that:

[i]n any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.146

Therefore, employers could reassign only those employees who are infected with a listed contagious disease if the risk of transmission posed by the disease could not be eliminated by reasonable accommodation.147 This infectious diseases list does not include AIDS or HIV as an infectious disease that can be transmitted through the process of handling food.148

---

144. Pedreira, 35 CATH. LAW. at 212 (citations omitted).
The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall — (A) review all infectious and communicable diseases which may be transmitted through handling the food supply; (B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply; (C) publish the methods by which such diseases are transmitted; and (D) widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public. Such list shall be updated annually.
146. 42 U.S.C. § 12113(d)(2).
147. Winterscheidt, 28 ARIZ. ATT’Y at 15 (citations omitted).
148. Diseases Transmitted Through the Food Supply, 63 Fed. Reg. 49,359 (1998) (noting that neither AIDS or HIV is listed). The most current list compiled by the Secretary of Health and Human Services states:
I. Pathogens Often Transmitted by Food Contaminated by Infected Persons Who Handle Food, and Modes of Transmission of Such Pathogens
The contamination of raw ingredients from infected food-producing animals and cross-contamination during processing are more prevalent causes of foodborne disease than is contamination of foods by persons with infectious or con-
C. "OTHERWISE QUALIFIED INDIVIDUAL" AND THE "DIRECT THREAT" DEFENSE

A number of courts have held that an "otherwise qualified individual" is a person who can perform the essential functions of his/her current job despite his/her disability. The United States Supreme Court, in School Board of Nassau County v. Arline, established the standard for determining whether a person infected with a contagious disease is a qualified individual with a disability, and thus set the

tagious diseases. However, some pathogens are frequently transmitted by food contaminated by infected persons. The presence of any one of the following signs or symptoms in persons who handle food may indicate infection by a pathogen that could be transmitted to others through handling the food supply: diarrhea, vomiting, open skin sores, boils, fever, dark urine, or jaundice. The failure of food-handlers to wash hands (in situations such as after using the toilet, handling raw meat, cleaning spills, or carrying garbage, for example), wear clean gloves, or use clean utensils is responsible for the foodborne transmission of these pathogens. Non-foodborne routes of transmission, such from one person to another, are also major contributors in the spread of these pathogens. Pathogens that can cause diseases after an infected person handle food are the following:

Caliciviruses (Norwalk and Norwalk-like viruses);
Hepatitis A virus;
Salmonella typhi;
Shigella species;
Staphylococcus aureus;
Streptococcus pyogenes;

II. Pathogens Occasionally Transmitted by Food Contaminated by Infected Persons Who Handle Food, But Usually Transmitted by Contamination at the Source or in Food Processing or by Non-foodborne Routes

Other pathogens are occasionally transmitted by infected persons who handle food, but usually cause disease when food is intrinsically contaminated or cross-contaminated during processing or preparation. Bacterial pathogens in this category often require a period of temperature abuse to permit their multiplication to an infectious dose before they will cause disease in consumers. Preventing food contact by persons who have an acute diarrheal illness will decrease the risk of transmitting the following pathogens:

Campylobacter jejuni;
Cryptosporidium parvum;
Entamoeba histolytica;
Enterohemorrhagic Escherichia coli;
Enterotoxigenic Escherichia coli;
Giardia lamblia;
Nontyphoidal Salmonella;
Rotavirus;
Taenia solium;
Vibrio cholerae 01;
Yersinia enterocolitica.

Id. See infra notes 150-465 and accompanying text.

149. See infra notes 150-465 and accompanying text.
stage for future human immunodeficiency virus ("HIV") litigation. In Arline, the Supreme Court held that "a person suffering from the contagious disease of tuberculosis can be a handicapped person within the meaning" of the Rehabilitation Act. Further, the Court declared that the analysis of an "otherwise qualified individual" requires an individualized assessment by the district court using four factors to determine whether a person with a contagious disease poses "significant health and safety risks" to others. The School Board of Nassau County ("School Board") terminated Gene Arline, an elementary teacher, because she was diagnosed with active tuberculosis. The elementary teacher was hospitalized for tuberculosis in 1957, but she was in remission until 1977 when she again tested positive for active tuberculosis. After the elementary teacher had her third relapse in November 1978, she was placed on suspension through the rest of the school year and was subsequently terminated, because of the "continued reoccurrence [sic] of tuberculosis." The teacher brought an action against the School Board in the United States District Court for the Middle District of Florida.

The district court held that the elementary teacher was not a handicapped individual as contemplated under section 504 as amended in sections 701-797(a) of the Rehabilitation Act. The district court reasoned that Congress did not intend to include persons with contagious diseases in the meaning of the term "handicapped person." The district court then noted that even if Congress did

151. School Bd. of Nassau County v. Arline, 480 U.S. 273, 287-88 (1987). The well established standard includes the following four factors: "(a) the nature of the risk . . ., (b) the duration of the risk . . ., (c) the severity of the risk . . ., and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." Arline, 480 U.S. at 288; Scott Burris, Public Health, "AIDS Exceptionalism" and the Law, 27 J. MARSHALL L. REV. 251, 264 (1994) (recognizing that the Supreme Court had established the standard to be used in future HIV litigation).

152. Arline, 480 U.S. at 289.


154. Arline, 480 U.S. at 276.

155. Id.

156. Id. (quotations omitted).


158. Arline, 480 U.S. at 277. Under 29 U.S.C. § 706(8)(B), an "individual with a disability" is defined as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 42 U.S.C. § 706(8)(B) (1994).

159. Arline, 480 U.S. at 277.
intend to include a person with a contagious disease to be handicapped under the Act, the elementary teacher was not an "otherwise qualified individual." 160

The elementary teacher appealed the decision of the district court to the United States Court of Appeals for the Eleventh Circuit, arguing that she was terminated in violation of section 504 of the Rehabilitation Act. 161 The Eleventh Circuit reversed, holding that the term "handicapped person" under the Rehabilitation Act does encompass a person with a chronic contagious disease. 162 The Eleventh Circuit reasoned that the language of 29 U.S.C. § 706(8)(B) and 45 C.F.R. § 84.3(j)(2) "supports the conclusion that persons with contagious diseases are within the coverage of section 504," because in the case of tuberculosis "the disease can significantly impair respiratory functions as well as other major body systems." 163 The Eleventh Circuit further concluded that objective evidence existed to show that Congress did not intend for persons with contagious diseases to be excluded from protection under the Rehabilitation Act. 164 The School Board appealed the decision of the circuit court to the United States Supreme Court, which granted certiorari to consider "whether a person afflicted with tuberculosis, a contagious disease, may be considered a 'handicapped individual' within the meaning of section 504 of the Act, and if so, whether such an individual is 'otherwise qualified' to teach elementary school." 165

On appeal, the Supreme Court affirmed the decision of the circuit court, holding that a person with "the contagious disease of tuberculosis can be a handicapped person within the meaning of section 504 of the Rehabilitation Act of 1973." 166 The Supreme Court further held that the determination of whether an individual is "otherwise qualified" for the particular job must be based on reasonable medical judgments, which include four factors. 167 Justice William J. Brennan, writing for the majority, determined that the elementary teacher was a handicapped individual within the meaning of the Rehabilitation Act. 168 The Court noted that the elementary teacher’s tuberculosis constituted a physical impairment, which is characterized under the

---

160. Id.
161. Arline, 772 F.2d at 759-60.
162. Id. at 764.
164. Arline, 772 F.2d at 764.
165. Arline, 480 U.S. at 275.
166. Id. at 289.
167. Id. at 287-88.
168. Id. at 275, 289.
statute as a "physiological disorder or condition ... affecting [her] ... respiratory [system]." The Court recognized that the evidence showed that the teacher's tuberculosis substantially limited "one or more of her major life activities" when she was hospitalized. However, the Supreme Court did not specifically address the issue of whether an HIV infected individual is a handicapped individual under the Rehabilitation Act.

The Court addressed the Rehabilitation Act, noting that it was "structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of 'handicapped individual' is broad, but only those individuals who are both handicapped and otherwise qualified are eligible for relief." The Court further noted that the definition of a handicapped individual only provides protection to those individuals who are "both handicapped and otherwise qualified." The Rehabilitation Act, the Court opined, does not justify excluding individuals accused of being contagious without an "opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were 'otherwise qualified.'" In the Court's view, if these individuals were excluded from this protection, such individuals would be discriminated against "on the basis of mythology — precisely the type of injury Congress sought to prevent."

The Supreme Court further discussed the relevant factors which are necessary to determine if an individual with a contagious disease is an "otherwise qualified individual" under the Rehabilitation Act. The Supreme Court noted that a district court is required in most cases "to conduct an individualized inquiry and make appropriate findings of fact" to ensure that handicapped individuals are not discriminated against "based on prejudice[s], stereotypes, or unfounded fear[s]." Further, the Court recognized that an "otherwise qualified individual" does not include an individual with a contagious disease if that person poses a significant risk of transmitting the disease "to others in the workplace."

The Supreme Court also noted that "an otherwise qualified person" is able to perform "the essential functions' of the job in ques-

---

169. Id. at 281 (quotations omitted).
170. Id.
171. Id. at 282 n.7.
172. Id. at 284-85.
173. Id. at 285.
174. Id.
175. Id.
176. Id. at 287-88 n.17.
177. Id. at 287.
178. Id. at 287 n.16.
However, the Court further recognized that if an individual cannot "perform the essential functions of the job," the reviewing court must then consider "whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions." The Supreme Court then articulated a test to determine if an individual with a contagious disease is "otherwise qualified." According to the Court, the first part of the test requires the district court to make findings:

based on the reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

The Court noted that, when a court considers these factors, a court "should defer to the reasonable medical judgments of public health officials," but the Court did not address the issue of whether the medical judgments of private physicians should receive the same treatment. The Court established that the second part to the "otherwise qualified" test is to determine "in light of these medical findings, whether the employer could reasonably accommodate the employee under the established standards for that inquiry." A number of courts have used the four factors established in Arline to determine if an individual infected with the HIV virus is an "otherwise qualified individual." In Chalk v. United States District Court of the Central District of California, the United States Court of Appeals for the Ninth Circuit held that an individual was not required to disprove "every theoretical possibility of harm" to be successful on his/her claim under the Rehabilitation Act. In Chalk, Vincent Chalk, a teacher, brought an action in the United States District Court for the Central District of California, claiming that the Orange County Department of Education ("Department") discriminated against an "otherwise qualified individual" in violation of section 504

179. Id. at 287-88 n.17 (citations omitted).
180. Id.
181. Id. at 287-88.
182. Id. at 288 (quotations omitted).
183. Id. at 288 & n.18.
184. Id. at 288.
185. See infra notes 186-465 and accompanying text.
186. 840 F.2d 701 (9th Cir. 1988).
of the Rehabilitation Act of 1973 after banning him from the classroom upon learning of his AIDS diagnosis.\footnote{Chalk, 840 F.2d at 703. Chalk was employed in the Orange County School District for approximately six years before this suit was filed. Id.}

The teacher was diagnosed with AIDS after undergoing hospitalization for pneumocystis carinii pneumonia.\footnote{Chalk, 840 F.2d at 703.} After a period of treatment and rehabilitation, the teacher was released to return to work.\footnote{Id.} Instead, the teacher was placed on administrative leave until the Department received a recommendation from Dr. Thomas Prendergast, the Director of Epidemiology and Disease Control for the Orange County Health Care Agency.\footnote{Id.} Dr. Prendergast advised the Department that Chalk’s teaching position did not subject his students to a risk of being infected with the HIV virus.\footnote{Id.}

The teacher consented to remain on administrative leave until the school year ended; however, in August, the parties met to determine if he could return to the classroom.\footnote{Id.} The Department offered the teacher an administrative position with the same pay and benefits.\footnote{Id.} In addition, the Department advised that if the teacher “insisted on returning to the classroom, it [the Department] would file an action for declaratory relief.”\footnote{Id. at 703 n.4.} After the teacher declined the Department’s offer, the Department filed a suit in the Orange County Superior Court.\footnote{Id.} Subsequently, the teacher filed an action for injunctive relief in the United States District Court for the Central District of California.\footnote{Id. at 703-04.} Pursuant to an agreement between the parties, the Department did not proceed with their state court action, but, instead, filed a counterclaim with the district court.\footnote{Id. at 701, 703.} The district court denied the teacher’s request for a preliminary injunction for reinstatement.\footnote{Id. at 701, 703.}

The teacher appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit, arguing that the district court erred in denying his reinstatement.\footnote{Id. at 704.} The Ninth Circuit reversed, holding that the district court erred in requiring the
teacher to disprove "every theoretical possibility of harm." The Ninth Circuit declared that the Rehabilitation Act protects individuals with contagious diseases. In reaching its decision, the Ninth Circuit relied on the definition of an "otherwise qualified individual" as provided for in Arline:

"an otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap. In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. When a handicapped person is not able to perform the essential function of the job, the court must also consider whether any "reasonable accommodations" by the employer would enable the handicapped person to perform those functions. Accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on a grantee, or requires a "fundamental alteration in the nature of [the] program."

The Ninth Circuit recognized that "[t]he problem is in reconciling the needs for protection of other persons, continuation of the work mission, and reasonable accommodation — if possible — of the afflicted individual." The court further relied on Arline's decision that an individual who poses a "direct threat" of transmitting a contagious disease to others is not "otherwise qualified" unless the risk can be eliminated through reasonable accommodation.

The Ninth Circuit acknowledged that there is "no apparent risk of HIV infection to individuals exposed through close, non-sexual contact with AIDS patients" based on articles from medical journals and medical experts on AIDS. The Ninth Circuit declared that the district court ignored Arline's mandate to defer questions to public health officials regarding the significant risk assessment. In addition, the Ninth Circuit recognized that the district court rejected the objective medical evidence presented and based its decision "on speculation for which there was no credible support in the record." Therefore, the Ninth Circuit concluded that the district court had placed an impossible burden on the teacher, because "[l]ittle in science can be proven with complete certainty."

201. Id. at 709.
202. Id. at 704 (citations omitted).
203. Id. at 705 (citations omitted).
204. Id.
205. Id. (citations omitted).
206. Id. at 706-07.
207. Id. at 707-08.
208. Id. at 708.
209. Id. at 707.
Three years after *Arline* was decided, the United States Court of Appeals for the Fifth Circuit held, in *Leckelt v. Board of Commissioners of Hospital District No. 1*, that Kevin Leckelt, a licensed practical nurse ("LPN"), "was not [an] otherwise qualified individual." In *Leckelt*, Terrebone General Medical Center ("hospital") terminated the LPN's employment, because he failed to provide the hospital with the results of his HIV test. Subsequently, the LPN brought an action against the hospital in the United States District Court for the Eastern District of Louisiana. As an LPN, Leckelt "administered medication, orally and by injection, changed dressings, performed catherizations, and administered enemas, and started intravenous tubes (IVs)." However, the hospital became concerned about the health and safety of the LPN and its patients after it was informed that the LPN's roommate, a current patient at the hospital, was suspected to be infected with AIDS.

The hospital requested that the LPN submit to an HIV test only after it conferred with an attorney, reviewed the hospital's infection control policies, and considered the recommendations of the Centers for Disease Control ("CDC") and the American Hospital Association ("AHA"). The LPN responded to the hospital's request for an HIV test by stating that he had already taken the test and that he would provide the hospital with the results after he received them. The LPN's continued employment with the hospital was conditioned on him providing the HIV test results to the infection control practitioner; however, the LPN did not comply with this requirement. As a result, the hospital terminated the LPN on May 1, 1986. The district court found in favor of the hospital after a bench trial, holding that the hospital was justified in terminating the LPN after he refused to submit the results of his HIV test. The district court reasoned that the hospital had a right to require the LPN, an employee believed to have been exposed to the HIV virus, to submit to an HIV test to ensure that the health and safety of its employees and public were

---

210. 909 F.2d 820 (5th Cir. 1990).
211. *Leckelt*, 909 F.2d at 821, 824.
212. *Leckelt*, 909 F.2d at 821, 824.
213. *Leckelt*, 909 F.2d at 821.
216. *Id.* at 822.
217. *Id.* at 822-23.
218. *Id.* at 823-24.
219. *Id.* at 824.
220. *Id.*
The district court further concluded that the hospital reasonably believed that he was not an "otherwise qualified individual," because the hospital was prevented from determining the possible risk of infection the LPN posed in his position.222

The LPN appealed the decision to the United States Court of Appeals for the Fifth Circuit, arguing that the district court erred in dismissing his federal and state statutory claims.223 The Fifth Circuit affirmed the lower court's decision, holding that the hospital was justified in: (1) refusing to allow the LPN to work until he provided the results of an HIV test, and (2) terminating him under the Rehabilitation Act of 1973.224 The court noted that, as an employee of the hospital, the LPN was required to "report any exposure to infectious diseases to the infection control practitioner . . . and, where appropriate, to undergo testing and working restrictions for such diseases."225 The Fifth Circuit reasoned that the risk posed by the LPN's association with his roommate, "who died of AIDS related-complications," and his homosexual lifestyle reasonably led the hospital to conclude that he had been exposed to the HIV virus, which may require certain precautions.226 Therefore, the Fifth Circuit concluded that when the LPN refused to submit the results from his HIV test, in violation of the hospital's infection control policies, the LPN's termination was not based solely on discrimination stemming from a suspicion that he was HIV-positive.227

The Fifth Circuit further declared that the LPN was not an "otherwise qualified individual."228 The court analyzed factors relevant to a determination of whether an individual is "otherwise qualified" to perform the essential functions of his/her job.229 The Fifth Circuit relied on Arline, which provided that the court should "defer to the reasonable medical judgments of public health officials."230 The court further noted that the CDC guidelines declared that "asymptomatic health care workers" were not required to submit to routine, mandatory HIV testing, because the risk of transmitting HIV to patients was extremely low.231 The court further considered the testi-

221. Id.
222. Id. at 827.
223. Id. at 820-21.
224. Id. at 833.
225. Id. at 826.
226. Id.
227. Id.
228. Id. at 830.
229. Id. at 827.
230. Id.
231. Id. at 828. The court noted that the "CDC guidelines defined invasive procedures as surgical entry into tissues, cavities, or organs, or repair of traumatic injuries in a variety of settings." Id. at 828 n.15. See Philip Walden, Leckelt v. Board of Commis-
mony of Dr. Peter Mansell, the hospital's infection control expert, who remarked that the employer and the employee's personal physician should "determine what duties the health care worker can adequately and safely fulfill," but that this determination can only be made after the HIV status of the employee is known.\textsuperscript{232}

The Fifth Circuit applied the four factors set forth in \textit{Arline} to determine if the LPN posed a significant threat to others.\textsuperscript{233} Noting that the probability of transmission is only one of the four factors that must be considered, the Fifth Circuit reasoned that "[e]ven though the probability that a health care worker will transmit HIV to a patient may be extremely low," and could be reduced by using universal precautions, HIV is not curable and "the potential harm of HIV infection is extremely high."\textsuperscript{234} The Fifth Circuit reasoned that although the LPN's duties created a potential for HIV transmission, the LPN still violated the hospital's infection control procedures by failing to report the exposure to infectious diseases to the infection control practitioner and, on occasion, failing to abide by the universal precautions.\textsuperscript{235} Further, the Fifth Circuit noted that the hospital consulted outside sources regarding the transmission of HIV.\textsuperscript{236} In addition, the court recognized that the LPN refused to submit to an HIV test; therefore, the hospital was prevented from complying with the recommendations from those sources and from determining what precautions were necessary to protect the health and safety of the involved parties.\textsuperscript{237} Thus, the Fifth Circuit concluded that the LPN was not an "otherwise qualified individual."\textsuperscript{238}

The United States Court of Appeals for the Fifth Circuit addressed the same issue as in \textit{Leckelt} three years later in \textit{Bradley v. University of Texas M.D. Anderson Cancer Center.}\textsuperscript{239} In \textit{Bradley}, the Fifth Circuit held that a surgical assistant infected with HIV was not an "otherwise qualified individual," and a reasonable accommodation did not exist to make the surgical assistant an "otherwise qualified individual."\textsuperscript{240} Brian Bradley, a surgical assistant, brought suit

\begin{thebibliography}{9}
\bibitem{Leckelt} Leckelt, 909 F.2d at 828.
\bibitem{Id.} Id. at 829.
\bibitem{Id.} Id.
\bibitem{Id.} Id. at 829-30.
\bibitem{Id.} Id. at 830.
\bibitem{Id.} Id.
\bibitem{Id.} Id.
\bibitem{3 F.3d} 3 F.3d 922 (5th Cir. 1993).
\bibitem{Bradley} Bradley v. University of Tex. M.D. Anderson Cancer Ctr., 3 F.3d 922, 924-25 (5th Cir. 1993).
\end{thebibliography}
against the University of Texas M.D. Anderson Cancer Center ("hospital") in the United States District Court for the Southern District of Texas, alleging a violation of section 504 of the Rehabilitation Act.241

"In a July 20, 1991 Houston Chronicle article, . . . [the surgical assistant] revealed that he was HIV-positive" and that he worked for the hospital.242 In response to the article, the hospital reassigned the surgical assistant to the purchasing department.243 As a surgical assistant, he was required to work in a sterile environment where surgeries were performed, requiring him to place his hands into the body cavity of a patient.244 The surgical assistant was also required to handle sharp surgical instruments.245 The surgical assistant filed this action against the hospital, alleging that his reassignment to the purchasing department violated section 504 of the Rehabilitation Act.246 The district court granted the motion for summary judgment in favor of the hospital, and dismissed the surgical assistant's pendent state law claims.247

The surgical assistant appealed the decision of the district court to the United States Court of Appeals for the Fifth Circuit, arguing that the district court erred in granting summary judgment to the hospital.248 The Fifth Circuit affirmed, holding that an HIV-positive surgical assistant is not “otherwise qualified” and that there were no reasonable accommodations available to the hospital to make the surgical assistant a qualified individual.249 In reaching its decision, the Fifth Circuit relied on the four factors set forth in Arline to determine if the surgical assistant was “otherwise qualified.”250 The court further recognized that “[t]he court should give deference to the reasonable medical judgments of public health officers.”251 Based on the Arline decision, the Fifth Circuit concluded that the determination of whether an employee is an “otherwise qualified individual” must also include a determination of whether a reasonable accommodation exists to remedy the potential harm.252

241. Bradley, 3 F.3d at 923.
242. Id.
243. Id.
244. Id. at 924.
245. Id. Despite handling the instruments with care, the surgical assistant acknowledged that he had suffered five needle puncture wounds while employed at the hospital. Id.
246. Bradley, 3 F.3d at 923.
247. Id.
248. Id. at 922-23.
249. Id. at 924-25.
250. Id. at 924.
251. Id.
252. Id.
The Fifth Circuit noted that the disputed issue was the fourth Arline factor: the "probability of transmitting the virus." The Fifth Circuit acknowledged that the CDC's recommendations suggested that the risk of transmission posed by the surgical assistant was small, but that the risk did exist. Therefore, the Fifth Circuit determined that even though the risk of transmitting HIV to another individual was small, the risk was "not so low as to nullify the catastrophic consequences of an accident." The court then declared that the permanent and lethal consequences of the HIV virus did not make the surgical assistant an "otherwise qualified individual.

Next, the Fifth Circuit stated that a reasonable accommodation did not exist, which would "eliminate the risks connected with the 'essential functions'" of the surgical assistant's job. The court also found that the hospital was not required to eliminate or redefine an essential function of the surgical assistant's job. To accommodate the surgical assistant, the court determined that the hospital would need to add an additional assistant to the operating room to perform the procedures the surgical assistant could not perform. The Fifth Circuit noted that such redefinition of the surgical assistant's job duties exceeded reasonable accommodation. In addition, the court declared that when a reasonable accommodation does not exist, the employer does not have a duty to reassign that individual to any particular job within the company. Rather, the court noted that an employer is only required to offer "alternative employment opportunities reasonably available under the employer's existing policies."

---

253. Id. The court noted that the parties agreed that the first three factors were not in dispute, because both parties recognized that: (1) blood which enters a patient's body can cause HIV transmission; (2) the disease is perpetual; and (3) HIV would undoubtedly cause the fatal disease of AIDS. Id.

254. Bradley, 3 F.3d at 924. The court noted the following recommendation from the CDC:

[The risk of transmitting HBV [Hepatitis B Virus] from an infected HCW [Health Care Worker] to a patient is small, and the risk of transmitting HIV is likely to be even smaller. [The] CDC also notes that the risk of exposure is greater for certain procedures designated as exposure-prone such as the simultaneous presence of the HCW's fingers and a needle or other sharp instrument or object in a ... highly confined anatomic site.]

Id. (quotations omitted).

255. Bradley, 3 F.3d at 924.

256. Id.

257. Id. at 925.

258. Id.

259. Id.

260. Id. The court rejected the surgical assistant's contention that the hospital should have reassigned him to an employment position involving patient contact. Id.

261. Bradley, 3 F.3d at 925.

262. Id.
Seven years after Arline, the United States District Court for the Eastern District of Pennsylvania addressed the issue of whether a doctor infected with the HIV virus posed a "direct threat" to others in Scoles v. Mercy Health Corp. of Southeastern Pennsylvania, holding that Dr. Paul Scoles posed a "direct threat" to his patients' health. In Scoles, Mercy Health Corporation of Southeastern Pennsylvania ("hospital") prohibited Dr. Paul Scoles ("doctor"), an orthopedic surgeon, from performing invasive procedures without "inform[ing] his patients of his HIV-positive status" after he disclosed to the hospital that he was HIV-positive. The hospital brought an action in the Court of Common Pleas of Delaware County, alleging that under a state confidentiality statute a compelling need existed to inform the doctor's former surgical patients regarding his HIV-positive status. The court granted the hospital permission to inform the doctor's former patients.

The hospital notified 1050 of the doctor's former patients that an HIV-infected surgeon performed their orthopedic surgery. That same day, the doctor was suspended from his practice as an orthopedic surgeon after he disclosed he was HIV-positive to the hospital. The hospital held a press conference for the purpose of informing the public regarding its actions, but the hospital did not reveal the doctor's name. The hospital also disclosed this information to its Board of Directors, its employees and other staff members, and two neighboring hospitals. The doctor then requested a hearing according to the hospital's by-laws. The hearing resulted in the doctor's reinstatement with the recommendation that he notify "his patients of his HIV status prior to any invasive procedure."

The doctor brought an action in the United States District Court for the Eastern District of Pennsylvania against the hospital, alleging that the hospital violated the Rehabilitation Act and the Americans with Disabilities Act. The hospital moved for partial summary

---

266. Id.
267. Id.
268. Id.
269. Id. The court noted that the hospital required the doctor to obtain his surgical patients' consent to perform their surgery. Id.
271. Id.
272. Id.
273. Id. The court noted that the hospital's Medical Board reinstated the doctor's full privileges with the hospital. Id.
judgment, claiming that the doctor was not an “otherwise qualified individual” because he posed a “direct threat” to his patients. The doctor also moved for partial summary judgment, claiming that the hospital’s actions were based on the “unreasonable fear of AIDS” and not on the objective evidence that the risk of transmitting AIDS “is minuscule and theoretical.” The district court granted the hospital’s partial motion for summary judgment, holding that the hospital neither violated the Rehabilitation Act nor the ADA.

The district court relied on both the Rehabilitation Act and the ADA to make its determination that the doctor was not “otherwise qualified,” because he posed a “direct threat” to the health and safety of others. The court noted that the current medical knowledge was uncertain as to whether a surgeon could transmit the HIV virus to a patient during surgery or other invasive procedures. The district court further noted that the doctor presented medical evidence, which characterized the current situation presented by the doctor as not being a significant risk to others. Despite the evidence presented by the doctor, the district court stated that the risk of transmitting the HIV virus is real, because the possibility that the doctor’s blood could come in contact with that of his patient’s during an invasive procedure does exist. The district court reasoned that the four prong test of Arline, used to determine if an individual poses a “direct threat” and is therefore not otherwise qualified, provided a basis to conclude that the doctor posed a “direct threat” to his patients even though the risk of transmission is low. Applying the four factors of Arline, in particular the “duration and severity of the risk,” the district court concluded that: (1) the harm posed by the transmission of the HIV virus is high; (2) the duration of the disease will lead to the patient’s death; and (3) the risk will be present each time the doctor performs an operation.

The district court then distinguished the present case from Chalk and Martinez v. School Board of Hillsborough County, Florida on
the grounds that those cases arose out of a classroom setting, which is greatly different than that of an operating room. Instead, the district court agreed with the analysis of several cases from other jurisdictions, where the courts held that the HIV infected health care worker posed a "direct threat" to others and is not "otherwise qualified." Therefore, the district court concluded that, under the Rehabilitation Act, the doctor was not an "otherwise qualified individual," because the risk of transmitting HIV to his patients existed each time he performed surgery.

The court then proceeded to the ADA claim, noting that the Equal Employment Opportunity Commission ("EEOC") guidelines follow the same Arline factor test used under the Rehabilitation Act, which includes "consideration of the duration and severity of the harm" presented by the doctor. The district court reiterated its finding that the risk of the doctor transmitting HIV to his patients would exist as long as he performs surgery and that the disease would be fatal. Therefore, the court held that the doctor posed a "direct threat" to the health and safety of others.

The United States Court of Appeals for the Fourth Circuit addressed a similar issue in Doe v. University of Maryland Medical Systems Corp., holding that "Dr. [John] Doe ... posed a significant risk to the health and safety of his patients that could ... not be eliminated by reasonable accommodation." The University of Maryland Medical System Corporation ("hospital") terminated Dr. John Doe for refusing other employment opportunities provided by the hospital. The doctor, a neurosurgical resident at the hospital, experienced a needle stick while he treated an individual possibly infected with HIV; later, he tested positive for HIV. As a result of the doctor's HIV test results, he was suspended from surgery until the "panel of experts on blood-borne pathogens" made its recommendations concerning the doctor's employment status. The panel's recommendation allowed the doctor to return to surgery with the

286. Id. at 770-71 (citing Estate of Behringer v. Medical Ctr., 592 A.2d 1251 (N.J. Super. Ct. Law Div. 1991); Bradley, 3 F.3d at 922; Doe v. Washington Univ., 780 F. Supp. 628 (E.D. Mo. 1991)).
287. Id. at 771.
288. Id. at 770. The district court noted that analysis of Rehabilitation Act cases is similar to ADA cases. Id. at 771.
289. Scoles, 887 F. Supp. at 770, 772.
290. Id. at 772.
291. 50 F.3d 1261 (4th Cir. 1995).
293. Doe, 50 F.3d at 1263.
294. Id. at 1262.
295. Id.
following conditions: (1) the doctor could not perform procedures which required the use of exposed wire; (2) the doctor must "rigorously follow infection control procedures;" (3) if the doctor's blood came in contact with the non-intact skin of a patient, then the doctor's supervisor and the patient must be informed; and (4) the doctor provide a sample of his blood for future use. However; the doctor was not required to receive a patient's informed consent before performing surgery. The hospital rejected these recommendations upon further consideration and suspended the doctor from surgery. The doctor refused the hospital's offer to place him in non-surgical residencies, and insisted that the hospital reinstate him with full surgical privileges. Thereafter, the hospital terminated the doctor from its residency program. Thus, the doctor filed suit against the hospital in the United States District Court for the District of Maryland, alleging discrimination against him in violation of the Rehabilitation Act of 1973 and the ADA.

The district court granted the hospital's motion for summary judgment, holding that the doctor was "not an otherwise 'qualified individual' with a disability," because the doctor was a "carrier of the human immunodeficiency virus." The district court reasoned that the doctor's HIV status posed a significant risk to the hospital's patients, which reasonable accommodation could not eliminate. The doctor appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit, arguing that the district court erred in granting the hospital's motion for summary judgment.

The Fourth Circuit affirmed, holding that the hospital was justified in terminating the doctor, because he "pose[d] a significant risk to the health and safety of his patients that cannot be eliminated by reasonable accommodation." The Fourth Circuit considered the CDC's estimates regarding the risk of a surgeon transmitting HIV to his patients, which ranged from 1 in 42,000 to 1 in 47,000. The Fourth Circuit opined that, while determining whether to terminate the doctor, the hospital reviewed the CDC's recommendations, which provided that health care workers infected with the HIV virus "should

296. Id.
297. Id.
298. Id. at 1262-63.
299. Id. at 1263.
300. Id.
301. Id. at 1261, 1264.
302. Id. at 1262.
303. Id.
304. Id.
305. Id. at 1266-67.
306. Id. at 1263 (citations omitted).
not be barred from performing most surgical procedures" as long as "universal precautions" are strictly followed.\textsuperscript{307} However, the court noted that the CDC did make a distinction between invasive and "exposure-prone" procedures which posed a more significant risk "of percutaneous (skin-piercing) injury to the surgeon."\textsuperscript{308} The court recognized that the CDC defined an "exposure-prone" procedure as:

Characteristics of exposure-prone procedures include digital palpation of a needle tip in a body cavity or the simultaneous presence of the [health care worker's] fingers and a needle or other sharp instrument or object in a poorly visualized or highly confined anatomic site. Performance of exposure-prone procedures presents a recognized risk of percutaneous injury to the [health care worker], and — if such an injury occurs — the [health care worker's] blood is likely to contact the patient's body cavity, subcutaneous tissues, and/or mucous membranes.\textsuperscript{309}

The court opined that the hospital had the responsibility to determine which procedures are exposure-prone and "under what circumstances, HIV-positive [health care worker's] should perform such procedures."\textsuperscript{310} The Fourth Circuit concluded that the hospital correctly determined that the procedures performed by the doctor as a neurosurgeon were exposure-prone procedures which the hospital could prevent the doctor from performing.\textsuperscript{311}

The Fourth Circuit recognized that the hospital further relied on the Tokars study, which studied the occurrence of "percutaneous injuries to [health care workers] during surgical procedures," to make its decision to terminate the doctor.\textsuperscript{312} The court examined the conclusions of the Tokars study that percutaneous injuries "occur[red] in approximately 6.9% of all surgeries," especially "during the suturing of wounds — a practice common to neurosurgery."\textsuperscript{313} The Fourth Circuit noted that the hospital based part of its decision to terminate the doctor on the Tokars study, because a real possibility of transmitting the HIV virus existed when the doctor could have been injured during an operation, thereby exposing patients to his infected blood.\textsuperscript{314}

\begin{itemize}
\item \textsuperscript{307} Id.
\item \textsuperscript{308} Id.
\item \textsuperscript{309} Id. (citations omitted).
\item \textsuperscript{310} Id. at 1264 (citations omitted).
\item \textsuperscript{311} Id.
\item \textsuperscript{312} Id. at 1263-64. The court noted that the purpose of the Tokars study was to demonstrate that percutaneous injuries, which may occur during surgical procedures, "create a risk of HIV transmission." Id. at 1264 n.6.
\item \textsuperscript{313} Doe, 50 F.3d at 1264 n.6.
\item \textsuperscript{314} Id. at 1264.
\end{itemize}
The Fourth Circuit concluded that for the doctor to be successful in his suit against the hospital, he must prove: "(1) that he has a disability; (2) that he is otherwise qualified for the employment or benefit in question; and (3) that he was excluded from the employment or benefit due to discrimination solely on the basis of the disability." Based on these elements, the court determined that the dispute in this case is whether the doctor was a qualified individual. The court recognized that an individual with a contagious disease is not "otherwise qualified" when he "poses a significant risk of communicating an infectious disease to others . . . [and] reasonable accommodation will not eliminate that risk." The Fourth Circuit noted, "in the words of the district court below, the Arline factors 'discount . . . the severity of anticipated harms by the statistical probability that they will occur.'" In applying the Arline factors, the Fourth Circuit determined that the doctor posed a significant risk to his patients, which reasonable accommodation could not eliminate. The court agreed with the doctor that Arline requires a court "to defer to the reasonable medical judgment of public health officials." The Fourth Circuit concluded that the CDC's recommendation to bar HIV-positive surgeons from performing exposure prone procedures must be given deference. The court determined that the hospital made its decision after careful review of the CDC's recommendations and other sources; therefore, the Fourth Circuit would not substitute its own judgment in this case.

The Fourth Circuit reasoned that even though a documented case of surgeon-to-patient transmission of HIV has not occurred, the risk of transmission is clearly possible. Further, the court concluded that a reasonable accommodation did not exist, because the nature of the doctor's duties as a neurosurgeon created an atmosphere where the risk of transmission will always exist. The Fourth Circuit also reasoned that the hospital carefully examined all sources of information regarding HIV and acted in the best interests of the doctor and its

315. Id. at 1264-65.
316. Id. at 1265.
317. Id. (citations omitted).
318. Id. (quotations omitted).
319. Id. at 1265-66.
320. Id. at 1266.
321. Id.
322. Id.
323. Id.
324. Id. The court noted that "such [precautions] as wearing two pairs of gloves, making stitches with only one hand, and using blunt-tipped, solid-bore needles" would not eliminate the risk. Id.
patients by paying the doctor his salary during negotiations, offering alternative residencies to the doctor, and attempting to obtain a teaching position for the doctor after he completed his residency.\textsuperscript{325} Therefore, the Fourth Circuit held that the hospital did not violate the Rehabilitation Act nor the ADA.\textsuperscript{326}

Eleven years after Arline was decided, the United States Court of Appeals for the Sixth Circuit held, in \textit{Mauro v. Borgess Medical Center},\textsuperscript{327} that an HIV infected surgical technician “posed a ‘direct threat’ to the health and safety of others.”\textsuperscript{328} In \textit{Mauro}, William Mauro, a surgical technician, filed an action in the United States District Court for the Western District of Michigan, Southern Division, alleging that the hospital unlawfully discriminated against him in violation of the ADA and the Rehabilitation Act.\textsuperscript{329} The surgical technician was “to place his hands upon and into the patient’s surgical incision to provide room and visibility to the surgeon.”\textsuperscript{330} The surgical technician was also exposed to the chance of “a needle stick or minor lacerations” in the operating room; in fact, the surgical technician suffered two such injuries during his employment.\textsuperscript{331} An unknown source informed the hospital that the surgical technician had “full blown” AIDS.\textsuperscript{332} Based upon this information, the hospital had reason to believe that the surgical technician had been infected with HIV.\textsuperscript{333} When the surgical technician refused to submit to an HIV test and to take an alternative position, the hospital laid him off.\textsuperscript{334}

The district court granted the hospital’s motion for summary judgment, holding that the surgical technician’s removal from the operating room was not a violation of the ADA or the Rehabilitation Act.\textsuperscript{335} The district court determined that in order for an employee to be an “otherwise qualified individual” under the ADA and the Rehabilitation Act, the employee must be able to perform the essential functions of his job.\textsuperscript{336} An “otherwise qualified individual,” the district court noted, does not pose “a direct threat to the health and safety of

\begin{itemize}
\item 325. \textit{Doe}, 50 F.3d at 1266-67 & n.11.
\item 326. \textit{Id. at} 1266.
\item 327. 137 F.3d 398 (6th Cir. 1998).
\item 330. \textit{Mauro}, 886 F. Supp. at 1352.
\item 331. \textit{Id. at} 1354.
\item 332. \textit{Id. at} 1354.
\item 333. \textit{Id. at} 1354.
\item 334. \textit{Id. at} 1352 (citing \textit{Bradley}, 3 F.3d at 924).
\end{itemize}
others that cannot be eliminated by reasonable accommodation. 337

The district court then applied the four Arline factors to determine if the surgical technician was an “otherwise qualified individual” who did not pose a “direct threat” to others. 338 The district court noted that the possibility of transmission of the disease to others, the fourth Arline factor, was the focus of the dispute between the parties. 339

While both parties presented conflicting expert medical testimony regarding the risk of transmission, the district court reviewed the decisions of Doe and Bradley, which held “as a matter of law, on nearly identical facts, that an HIV-infected surgeon or surgical technologist is a ‘direct threat’ and is not otherwise qualified.” 340 The district court recognized that these cases were substantively indistinguishable and properly reasoned. 341 The district court, relying on Doe and Bradley, noted that the “probability of transmission is but one of four factors used to determine significance of the risk.” 342 The district court determined that even if the risk of transmission is small, a real possibility of transmission exists which, if transmission occurred, will lead to death. 343 Therefore, the district court concluded that patient safety was threatened by the surgical technician’s presence in the operating room, because he presents a direct and significant threat to others. 344

The district court also discussed the availability of a reasonable accommodation for the surgical technician’s HIV-positive status by the hospital and determined that no reasonable accommodation existed for the surgical technician’s position. 345 The district court noted that the surgical technician’s job duties required him to have direct patient contact on an emergency basis. 346 Because these contacts could not be planned in advance, the hospital would be required to place an additional person in the operating room to assist with the operation. 347 This type of accommodation, the district court opined, would impose an unreasonable requirement upon the hospital. 348 The court further noted that the current law does not require an employer

337. Id. The court noted that a “direct threat” poses a significant risk of harm to others. Id.
339. Mauro, 137 F.3d at 400.
341. Id.
342. Id.
343. Id.
344. Id. The court noted that although the risk is small it is not so small as to negate the catastrophic consequences of a possible accident. Id. (citing Bradley, 3 F.3d at 924).
346. Id.
347. Id.
348. Id.
to redefine the essential functions of the employee's job so that an employee can perform the essential functions of the job. Therefore, the district court determined that the need for the surgical technician to have direct contact with a patient during an operation was an essential function of the job.

The surgical technician appealed the decision of the district court to the United States Court of Appeals for the Sixth Circuit, arguing that the district court erred in granting the hospital's summary judgment motion. The Sixth Circuit affirmed, holding that the surgical technician's continued employment with the hospital would pose a significant risk of harm to others. The Sixth Circuit declared that the "otherwise qualified" analysis does not require the person infected with a contagious disease to eliminate all risk of transmission. The court relied on Arline, which concluded that if the risk of transmission is not significant, the infected individual will be "otherwise qualified" to perform the duties of his job. Therefore, the court focused its decision on the fourth factor of Arline, the probability of transmission, and not on the possibility of HIV transmission.

The Sixth Circuit relied on the CDC guidelines regarding HIV transmission in health-care workers to reach its decision regarding the "direct threat" issue. In fact, the court specifically recognized that the CDC is a public health official, one which the Arline court instructed other courts to accord deference to in making the "direct threat" analysis. The court noted that the CDC report concluded that the risk of transmitting the HIV virus in a health care setting is very small and those infected individuals would be allowed to continue performing many surgical procedures as long as they followed the appropriate safety precautions. However, the court further noted that these same recommendations also distinguished exposure-prone procedures from those identified as general invasive procedures.

---

349. Id. The court noted that requiring the hospital to alter the responsibilities of a surgical technician would be an unreasonable burden that should not be imposed on the hospital. Id.
351. Mauro, 137 F.3d at 398, 400.
352. Id. at 407.
353. Id. at 402.
354. Id. at 402-03.
355. Id. at 403.
356. Id. at 403-04.
357. Id. at 403.
358. Id.
359. Id. The court defined these two terms in their opinion: "General invasive procedures cover a wide range of procedures from insertion of an intravenous line to most types of surgery. Exposure-prone procedures, however, involve those that pose a greater risk of percutaneous (skin-piercing) injury." Id.
EEOC V. PREVO'S FAMILY MARKET, INC.

Therefore, the Sixth Circuit concluded that it "must defer to the medical judgment expressed in the Report of the Centers for Disease Control in evaluating the district court's ruling on whether Mauro [the surgical technician] posed a 'direct threat' in the essential functions of his job."\footnote{360}

The Sixth Circuit discussed the medical evidence presented before the district court and, in particular, the testimony of Dr. David Davenport, an infectious disease specialist.\footnote{361} In his deposition, Dr. Davenport testified that when a job required an HIV infected individual to place his/her hands into a patient's body when sharp surgical instruments were present, the HIV infected individual posed "a real risk to patient care and safety because it could result in blood to blood contact which could lead to the transmission of the AIDS virus."\footnote{362} The court noted that several other individuals concurred with the testimony of Dr. Davenport that a risk of transmission existed, because the surgical technician could possibly come in contact with the patient's surgical incision.\footnote{363} The court further noted that the hospital's written offer of an alternate position within the company provided additional support for the hospital's conclusions.\footnote{364} Based on this evidence, the Sixth Circuit concluded that the surgical technician "posed a direct threat to the health and safety of others."\footnote{365}

D. Medical Examinations

The ADA Technical Assistance Manual describes four situations which do not violate the ADA's prohibition on medical examinations.\footnote{366} Several courts have based their decisions on the directives of the ADA Technical Assistance Manual to determine when a medical examination is job-related and consistent with business necessity.\footnote{367} In \textit{Judice v. Hospital Service District No. 1},\footnote{368} the United States District Court for the Eastern District of Louisiana held that Terrebonne General Medical Center ("hospital") was justified in requiring a doctor to submit to a medical examination to determine if he posed a "direct threat" to others.\footnote{369} In \textit{Judice}, the hospital failed to reinstate Dr. Mauro, 137 F.3d at 404.\footnote{360} Id. at 403-06.\footnote{361} Id. at 405.\footnote{362} See id. at 405-06 (noting the expert testimony of Sharon Hickman, Dr. Steven C. Ross, and Dr. Stanford Tolchin addressing HIV transmission for an infected health care worker, which the Sixth Circuit relied on to make its decision).\footnote{363} Id. at 406.\footnote{364} Id. at 407.\footnote{365} \textit{TECHNICAL ASSISTANCE MANUAL, supra} note 126, at VI-13-14.\footnote{366} See \textit{infra} notes 368-465 and accompanying text.\footnote{367} 919 F. Supp. 978 (E.D. La. 1996).\footnote{368} \textit{Judice v. Hospital Serv. Dist. No. 1}, 919 F. Supp. 978, 979, 984 (E.D. La. 1996).
Donald Judice ("doctor") after he successfully completed an alcohol inpatient program. The doctor brought an action in the United States District Court for the Eastern District of Louisiana, alleging that the hospital discriminated against him by requiring him to submit to a medical examination in violation of the ADA. The doctor was a licensed neurosurgeon with staff privileges at the hospital, who had experienced recurring bouts with alcoholism. The doctor sought treatment for alcoholism after he committed a surgical error, which may have caused a patient's death. The doctor was reinstated three months later, but in 1993, the doctor's alcoholism resurfaced. After alcohol was found in his blood prior to a surgery, the hospital suspended the doctor. After entering and successfully completing rehabilitation again, the doctor sought to have his medical license reinstated.

The State Board reinstated the doctor to practice medicine, imposing six monitoring conditions to aid the doctor in his recovery. The doctor then sought reinstatement with the hospital for his staff privileges, but the hospital requested that the doctor submit to a "fitness-for-duty" examination at the hospital's expense. The doctor resisted the examination based on concerns under the ADA.

The district court granted the hospital's motion for summary judgment, holding that the hospital was justified in requiring the doctor to submit to a medical evaluation to determine if he posed a "direct threat" to others. The six conditions included: (1) that Dr. Judice continue to participate in outpatient treatment; (2) that Dr. Cook make quarterly reports to the board concerning the doctor's progress and fitness; (3) Dr. Judice's complete abstinence from alcohol or any non-prescribed mood-altering substances; (4) restrictions in his work activities, including limitations on the number of his offices and hospitals, weekly work-hours, on-call time, number and type of surgical procedures, and litigation-related medical activities (such as trial and deposition testimony); (5) that another doctor monitor and review Dr. Judice's medical performance and report regularly to the board; and (6) that Dr. Judice investigate career opportunities in his field that provided "more structure" than his present practice such as teaching.

Id.

Id.
severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.\textsuperscript{381} The district court found that the doctor posed a "direct threat" to others due to: (1) the likelihood of a relapse to his alcohol addiction; (2) his prior work history; (3) his past history of depression with suicidal tendencies; (4) a controversial death; (5) an aborted operation due to the presence of alcohol in his system; and (6) his repeated denials of his addiction.\textsuperscript{382} Based on these circumstances, the court found that the hospital was justified in requiring a second evaluation.\textsuperscript{383}

The district court further recognized that the hospital's request for an evaluation was based on objective and reasonable medical judgments, because the hospital sought a professional consultation before making its decision to request an examination.\textsuperscript{384} The district court noted that combining the doctor's great power over his patients' lives with his likelihood of relapse, the doctor's condition was "a recipe for disaster" — as evidenced by the aborted operation due to alcohol.\textsuperscript{385} The district court further noted that while a mere assertion of a "direct threat" is insufficient to overcome the ADA's prohibition on medical examinations, progress cannot rebut the doctor's past history, which included a relapse four months before his reinstatement application.\textsuperscript{386} As a result, the district court concluded that the hospital acted reasonably after making an independent assessment of the risks involved.\textsuperscript{387} Therefore, the district court held that the doctor "posed a significant risk to public safety," justifying a second evaluation based on the doctor's uncertain past history and reasonable medical judgments of specialists and not on generalized fears associated with persons suffering from alcoholism.\textsuperscript{388}

Shortly after \textit{Judice} was decided, the United States District Court for the Southern District of Florida, in \textit{EEOC v. Dolphin Cruise Line, Inc.},\textsuperscript{389} held that an individual infected with the HIV virus did not pose a significant risk to the health of others.\textsuperscript{390} David Seivers filed an action through the EEOC against Dolphin Cruise Line, Inc., in the United States District Court for the Southern District of Florida after the cruise line withdrew its offer of employment when Seivers re-

\textsuperscript{381} Id. at 982-83 (quoting 29 C.F.R. § 1630.2(r) (1995)).  
\textsuperscript{382} Id. at 983.  
\textsuperscript{383} Id. at 984.  
\textsuperscript{384} Id. at 983.  
\textsuperscript{385} Id. (citations omitted).  
\textsuperscript{386} Id. at 982, 984.  
\textsuperscript{387} Id. at 984.  
\textsuperscript{388} Id.  
\textsuperscript{389} 945 F. Supp. 1550 (S.D. Fla. 1996).  
revealed that he was HIV-positive. The district court granted the HIV-positive individual's motion for summary judgment, holding that his HIV-positive status did not pose a significant risk to the health of others.

The district court reasoned that the "direct threat" analysis requires more than a slightly increased risk of harm to others in connection with the four factors articulated in Arline. However, the district court concluded that the "direct threat" defense was improper in this case, because HIV cannot be transmitted to an individual through casual contact. The district court further concluded that the medical evidence presented in the case at bar showed that "the risk of HIV transmission in an employment setting is remote." Therefore, the district court stated that the employer's concerns were based on speculation and stereotyping, and did not prove that the HIV-positive individual posed a significant health risk to others.

The district court further distinguished the present case from Scoles and Mauro, because they involved a heightened risk of transmission due to the possibility of puncture wounds from sharp surgical instruments and from a surgical technician's placement of his/her hands in a patient's body cavity. Therefore, the district court concluded that no genuine issue of material fact existed establishing the HIV infected individual posed a significant risk to others if he had been employed.

Later that same year, the United States Court of Appeals for the Ninth Circuit, in Yin v. California, held that an employer's request of its employee to submit to a medical examination due to excessive absenteeism did not violate the ADA's prohibition on medical examinations. The State of California allegedly discriminated against an employee, Cecelia Yin ("employee"), by requiring her to submit to a medical examination. The employee, a State of California tax auditor, used an excessive amount of sick leave, increasing to five and six

---

392. Id. at 1555, 1557.
393. Id. at 1555.
394. Id.
395. Id.
396. Id. See Arline, 480 U.S. at 288 (noting that "courts should normally defer to the reasonable medical judgment of public health officials"); Chalk, 840 F.2d at 709 (stating that "HIV positive classroom teacher not required to disprove every theoretical possibility of harm").
398. Id.
399. 95 F.3d 864 (9th Cir. 1996).
400. Yin v. California, 95 F.3d 864, 868 (9th Cir. 1996), cert. denied, 519 U.S. 1114 (1997).
401. Yin, 95 F.3d at 866-67.
times that of an average tax auditor during the five years prior to this action.\textsuperscript{402} After another absence in May 1993, the employee's supervisor requested a copy of her medical records, and the employee denied the request.\textsuperscript{403} As the employee's absences continued, her supervisor requested that the employee submit to a medical examination by a state selected doctor.\textsuperscript{404} The employee refused to submit to a medical examination and retained an attorney.\textsuperscript{405} As a result of the employee's continued absenteeism, the employee's overall performance and productivity was dramatically lower than other tax auditors in her office for four fiscal years.\textsuperscript{406} Subsequently, the employee brought an action in the United States District Court for the Northern District of California, alleging that the employer's request for a medical examination violated the ADA.\textsuperscript{407}

The district court found for the State of California on all claims, holding that the State's request for a medical examination did not violate the ADA's prohibition of medical examinations.\textsuperscript{408} The district court reasoned that even if the medical examination's purpose was to determine the employee's disability status, the medical examination was a business necessity.\textsuperscript{409}

The employee appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit, arguing that the district court erred in finding for the State of California.\textsuperscript{410} The Ninth Circuit affirmed, holding that a medical examination fits within the business necessity exception to determine if an employee with repeated absences was able to perform her duties.\textsuperscript{411} The Ninth Circuit reasoned that 42 U.S.C § 12112(d)(4)(A) prohibits a medical examination, which is designed to determine if an employee has a disability, unless the examination "is job-related and consistent with business necessity."\textsuperscript{412} In this case, the Ninth Circuit determined that the re-

\begin{itemize}
  \item \textsuperscript{402} \textit{Id.} at 867.
  \item \textsuperscript{403} \textit{Id.}
  \item \textsuperscript{404} \textit{Id.}
  \item \textsuperscript{405} \textit{Id.}
  \item \textsuperscript{406} \textit{Id.} The court noted that the employee's productivity, "whether measured in terms of the numbers of audits completed or additional tax liability found, was less than any or almost any of the other auditors." \textit{Id.}
  \item \textsuperscript{407} Yin, 95 F.3d at 867.
  \item \textsuperscript{408} \textit{Id.} at 867 n.1.
  \item \textsuperscript{409} \textit{Id.} at 867.
  \item \textsuperscript{410} \textit{Id.} at 864, 867.
  \item \textsuperscript{411} \textit{Id.} at 868, 873.
  \item \textsuperscript{412} \textit{Id.} at 867; 42 U.S.C. § 12112(d)(4)(A) (1994). Section 12112(d)(4)(A) states: A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.
\end{itemize}
quest of the employee to submit to a medical examination was job-related, because her supervisors were trying to determine if the employee was able to perform her job functions.\textsuperscript{413} The court stated that the employee’s repeated absences had a detrimental impact on her job performance and productivity.\textsuperscript{414} Therefore, the Ninth Circuit reasoned that when an employee’s health problems have a “substantial and injurious impact on an employee’s job performance,” the employer can request the employee to submit to a medical examination in order to determine if the employee is fit to perform her duties.\textsuperscript{415}

One year later, in \textit{Den Hartog v. Wasatch Academy},\textsuperscript{416} the United States Court of Appeals for the Tenth Circuit held that an employer does not violate the ADA if the employer discharges “a non-disabled employee when that employee’s disabled relative or associate . . . poses a direct threat to the employer’s workplace.”\textsuperscript{417} In \textit{Den Hartog}, Den Hartog (“teacher”) brought an action in the United States District Court for the District of Utah, claiming that Wasatch Academy (“Wasatch”) violated the ADA by terminating his employment.\textsuperscript{418} The teacher, who worked at the private boarding school, was terminated after his son, Nathaniel, who was diagnosed with bipolar affective disorder, attacked and threatened a number of individuals within the Wasatch community.\textsuperscript{419} Wasatch alleged that it was justified in its decision to terminate the teacher as he and/or his son posed a “direct threat” in violation of 42 U.S.C. § 12113(b) of the ADA.\textsuperscript{420} The district court granted Wasatch’s motion for summary judgment relating to the ADA claim.\textsuperscript{421}

The teacher appealed the district court’s decision to the United States Court of Appeals for the Tenth Circuit, arguing that the district court erred in granting Wasatch’s motion for summary judgment.\textsuperscript{422} The teacher’s claim against Wasatch was based on the association discrimination provisions of the ADA.\textsuperscript{423} Wasatch asserted in response to the teacher’s claim that the teacher and his son posed a “direct

\textsuperscript{413} Yin, 95 F.3d at 868.
\textsuperscript{414} Id.
\textsuperscript{415} Id.
\textsuperscript{416} 129 F.3d 1076 (10th Cir. 1997).
\textsuperscript{417} Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1077 (10th Cir. 1997).
\textsuperscript{418} Den Hartog, 129 F.3d at 1076, 1080.
\textsuperscript{419} Id. at 1077.
\textsuperscript{420} Id. at 1080.
\textsuperscript{421} Id. at 1077-78.
\textsuperscript{422} Id. at 1077, 1080.
\textsuperscript{423} Id. at 1081-83. The court further discussed the applicability of the “direct threat” defense on association discrimination claims and the elements necessary to establish an association discrimination claim. Id. at 1082-92.
threat" to the Wasatch community.\textsuperscript{424} The Tenth Circuit noted that the "direct threat" defense requires that the employee not pose "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."\textsuperscript{425} The court further noted that the factors to consider when determining whether an individual poses a "direct threat" are found in 29 C.F.R. § 1630.2(r), which provides: (1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm.\textsuperscript{426} The Tenth Circuit further recognized that these factors must be evaluated "based on an individualized assessment of the individual’s present ability to safely perform the essential functions of his job."\textsuperscript{427} The court also noted that they should be "based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."\textsuperscript{428}

The Tenth Circuit determined that Wasatch was not entitled to summary judgment on the basis that the teacher posed a "direct threat," because the testimony of Wasatch officials showed that they did not believe the teacher to pose a "direct threat" to others.\textsuperscript{429} As for the possibility of a "direct threat" posed by the teacher’s son, the Tenth Circuit stated that the objective facts available at the time Wasatch made its decision showed that the teacher’s son repeatedly issued direct threats to Wasatch community members.\textsuperscript{430} The Tenth Circuit reasoned that the objective evidence of Nathaniel’s past behavior showed the risk of harm "to be grave in nature, likely to result in harm severe in magnitude, and both imminent and ongoing in duration, thereby satisfying all the factors under 29 C.F.R. § 1630.2(r)."\textsuperscript{431} The court concluded that the decision to terminate the teacher was based on an individualized assessment of the teacher’s son and not "upon any predetermined or unfounded general stereotypes about people with bipolar disorder."\textsuperscript{432} Therefore, the Tenth Circuit determined that:

\textquote{the purpose of creating the “direct threat” standard is to eliminate exclusions which are not based on objective evidence about the individual involved. Thus, in the case of a


\textsuperscript{425} Den Hartog, 129 F.3d at 1088.

\textsuperscript{426} Id. at 1088-89 (quoting 29 C.F.R. § 1630.2(r) (1996)).

\textsuperscript{427} Id. at 1089 (quoting 29 C.F.R. § 1630.2(r)).

\textsuperscript{428} Id.

\textsuperscript{429} Id.

\textsuperscript{430} Id. at 1090.

\textsuperscript{431} Id.

\textsuperscript{432} Id.
person with mental illness there must be objective evidence from the person's behavior that the person has a recent history of committing overt acts or making threats which caused harm or which directly threatened harm. 433

One year following the decision in Wasatch, the United States District Court for the District of Puerto Rico addressed the issue of whether a medical examination of an HIV infected employee is job-related and consistent with business necessity. 434 In Rodriguez v. Loctite Puerto Rico, Inc., 435 the United States District Court for the District of Puerto Rico held that Loctite Puerto Rico, Inc. ("employer") did not violate the ADA by requesting Virginia Vega Rodriguez ("employee") to submit to an independent medical examination, because it was consistent with a business necessity. 436 The employee filed an action against the employer in the United States District Court for the District of Puerto Rico, claiming "that she was subjected to a hostile work environment and eventually forced to resign due to the harassment she was subject to . . . based on her disability." 437 The employer requested the employee to submit to a medical examination after her doctor ordered the employee to take a two month leave of absence due to her Systematic Lupus Erthematosus ("Lupus"). 438 The employee subsequently resigned. 439 In response, the employer alleged that the employee did not prove that she was disabled under the ADA, that she was fired or subjected to a hostile work environment due to purported disability. 440 After the employer moved for summary judgment, the district court dismissed the employee’s complaint, holding that the requested medical examination was consistent with a business necessity. 441 The district court reasoned that section 12112(d)(4)(A) prohibits an employer from requiring a medical examination “for the purpose of determining ‘whether such employee is an individual with a disability or as to the nature and severity of the disability’ unless the examination ‘is shown to be job-related and consistent with business necessity.’" 442 The court found that the examination fell within the business necessity exception. 443

433. Id. (quotations omitted).
434. See infra notes 435-49 and accompanying text.
438. Id. at 660.
439. Id.
440. Id. at 655.
441. Id. at 655, 661, 667.
442. Id. at 660-61 (quoting Yin, 95 F.3d at 867).
443. Id. at 661.
Relying on the record, the district court noted that the employer had been aware that the employee may have Lupus, but it did not request the employee to submit to a medical examination until she requested a medical leave of absence. The court further noted that the record disclosed that the employee did not have a "substantial record of absenteeism due to illness." The district court relied on the interpretive guidelines of the ADA, which provide that a medical examination must serve a legitimate business purpose. The district court recognized that an employer is prohibited from requesting an employee to submit to a medical examination when the "employer develops a suspicion regarding the employee's health, but has no justified concern about the employee's ability to perform the job." Because the employee requested a leave of absence due to her Lupus condition, the district court found that the employer could reasonably determine that the employee "could be unable to perform her job;" therefore, the employer could request the employee to submit to a medical examination. Based on its finding, the district court held that an employer's request for an independent medical examination after an employee requests a leave of absence for health reasons "is job-related and consistent with business necessity," so long as "the sole intention of . . . [the medical examination] cannot be the search for a particular disability.

The United States District Court for the Western District of Michigan, Southern Division, also addressed the issue of when a medical examination is job-related and consistent with business necessity after the Sixth Circuit's decision in Prevo's. The district court held, in Sullivan v. River Valley School District, that the school district's request for a medical examination to assess the mental health of one of its employees was based on a "legitimate business purpose and business necessity." In Sullivan, Richard Sullivan ("teacher") brought an action in the United States District Court for the Western District of Michigan, Southern Division, against the River Valley

444. Id.
445. Id. The court acknowledged that the employee's supervisor noted in one of her evaluations that the employee was a responsible person who complied with her job duties despite feeling ill. Id.
447. Id.
448. Id.
449. Id.
450. See infra notes 451-65 and accompanying text.
School District ("school district"), alleging disability discrimination and retaliation, in violation of the ADA and a state statute.\textsuperscript{453}

In March 1995, the teacher's performance evaluation disclosed that his performance was unsatisfactory "in the areas of teacher-staff relationships and adherence to administrative policies."\textsuperscript{454} The school district consulted Dr. Onkka, a psychologist, regarding the teacher's job.\textsuperscript{455} Dr. Onkka determined, from the teacher's letters regarding prior claims and grievances, that the teacher's fitness necessitated a further formal assessment of the teacher's personality.\textsuperscript{456} Dr. Onkka further advised the school district that a pattern emerged from the teacher's letters, which suggested that the teacher was "struggling with a possible psychiatric disorder which warranted further investigation."\textsuperscript{457} After the teacher was subsequently suspended with pay, the School Board ordered the teacher to submit to a mental and physical examination.\textsuperscript{458}

The district court granted the school district's motion for summary judgment, holding that the school district did not violate the ADA when it required the teacher to submit to a medical examination.\textsuperscript{459} The district court focused its decision on whether the medical examination was job-related and consistent with a business necessity.\textsuperscript{460} The court noted that a request for a medical examination is justified when the employee's health problems have "a substantial and injurious impact on the employee's job performance."\textsuperscript{461} The district court reasoned that the school district had reasonable concerns prompting a determination as to whether the teacher was fit to teach, because concerns existed that "he was undergoing a breakdown of his interpersonal skills."\textsuperscript{462} The district court further considered the School Board's consultation with a psychologist before requiring the teacher to submit to a medical examination.\textsuperscript{463} Therefore, the court noted that the school district "had a right and duty to look into [the

\textsuperscript{453} Sullivan, 20 F. Supp. 2d at 1120, 1122.  
\textsuperscript{454} Id. at 1123.  
\textsuperscript{455} Id. The court noted that Dr. Onkka performed an informal assessment of the teacher's fitness as a teacher. Id.  
\textsuperscript{456} Sullivan, 20 F. Supp. 2d at 1123.  
\textsuperscript{457} Id.  
\textsuperscript{458} Id.  
\textsuperscript{459} Id. at 1126-27.  
\textsuperscript{460} Id. at 1126.  
\textsuperscript{461} Id. (quoting Yin, 95 F.3d at 868).  
\textsuperscript{462} Id. The court noted that the employee "had shown poor judgment in his communications with students, he had disclosed confidential student records, he had resisted or ignored numerous legitimate directives of his supervisor, and threatened Board members." Id.  
\textsuperscript{463} Sullivan, 20 F. Supp. 2d at 1126.
ANALYSIS

In *EEOC v. Prevo's Family Market, Inc.*, the United States Court of Appeals for the Sixth Circuit held that an employer is justified in requiring an employee to submit to a medical examination in order to determine if an employee is a "direct threat" to the health and safety of others before returning to work. The Sixth Circuit reversed the district court's decision, finding that Prevo's had a legitimate business purpose in protecting the health of their employee, Stephen Sharp, and the general public from contracting the human immunodeficiency virus ("HIV"). Therefore, the Sixth Circuit determined that Prevo's request for a medical examination was job-related.

The decision in Prevo's is inconsistent with the provisions of the Americans with Disabilities Act ("ADA"), its interpretive guidelines and cases construing the ADA. Thus, Prevo's raises three points of criticism. First, the Sixth Circuit incorrectly determined that Prevo's justifiably reassigned Sharp and requested a medical examination to determine if Sharp posed a "direct threat" to others. The legislative history and the plain language of the ADA demonstrate that Congress strongly opposed and rejected an amendment which would have allowed employers to reassign or terminate individuals with HIV from food-service positions based only on their infected status. Second, the Sixth Circuit failed to apply the determinations of the ADA Technical Assistance Manual as to when a medical examination is job-related and consistent with business necessity. Third, the court incorrectly determined that the only method available to Prevo's to determine if Sharp posed a "direct threat" to himself, his coworkers, and the general public was through a medical examination,

---

464. Id.
465. Id.
466. 135 F.3d 1089 (6th Cir. 1998).
468. Prevo's, 135 F.3d at 1094.
469. Id.
470. See infra notes 476-605 and accompanying text.
471. See infra notes 476-605 and accompanying text.
472. See infra notes 476-98 and accompanying text.
473. See infra notes 476-98 and accompanying text.
474. See infra notes 499-526 and accompanying text.
because this determination could have been made by referring to objective medical evidence.\footnote{475}

A. **The Sixth Circuit Incorrectly Disregarded the Plain Language and the Legislative History of the Americans with Disabilities Act, Failing to Consider the Mandates of 42 U.S.C. § 12113(d)(2).**

1. **Plain Language**

   Section 12113(d)(2) dictates that the medical community must determine that acquired immune deficiency syndrome ("AIDS") or HIV can be transmitted through the handling of food before an employer may legitimately remove an employee with AIDS or HIV from a food-handling position.\footnote{476} Section 12113(d)(2) specifically provides that:

   [\textit{In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.}]\footnote{477}

   If an employer removes an individual with an infectious disease, which is not included on the Secretary of Health and Human Services' ("SHHS") list, from a food-handling position, the ADA exposes the employer to liability.\footnote{478}

   The Sixth Circuit ignored the mandates of section 12113(d)(2) in its holding and determined that Sharp was not entitled to protection under the ADA on other grounds.\footnote{479} Instead, the Sixth Circuit in Prevo's analyzed: (1) whether Prevo's request for a medical examination of Sharp was "job-related and consistent with business necessity," and (2) whether a medical examination was necessary to determine if Sharp posed a "direct threat" to others.\footnote{480} The Sixth Circuit overlooked the plain language of section 12113(d)(2), which legitimizes the removal or reassignment of an employee only when that individual is infected with a "communicable disease that is transmitted to others

\footnote{475. See infra notes 527-605 and accompanying text.}


\footnote{477. 42 U.S.C. § 12113(d)(2) (1994).}

\footnote{478. Winterscheidt, 28 Ariz. Atty at 15.}

\footnote{479. See generally Prevo's, 135 F.3d at 1090-98 (failing to address section 12113(d)(2) and the infectious disease list compiled by the Secretary of Health and Human Services).}

\footnote{480. Id. at 1093-97.
through the handling of food, that is included on the list developed by 
the Secretary of Health and Human Services." Contrary to section 
12113(d)(2), the Sixth Circuit did not find Sharp's reassignment and 
restriction of duties to be discriminatory, even though the medical 
evidence set forth in the SHHS's list of infectious diseases transmitted 
through food does not include AIDS or HIV. The absence of HIV or 
AIDS from the SHHS's list of communicable diseases transmitted 
through the handling of food dictates that Sharp could not be reas-
signed to another position within Prevo's, because he was infected 
with the HIV virus without evidence that Sharp posed a "direct 
threat" to others.

The Sixth Circuit disregarded Dan Prevo's deposition testimony 
that Sharp was reassigned to the receiving area without any medical 
evidence suggesting that Sharp posed a "direct threat" to others. Prevo 
further testified that Sharp's transfer was necessitated, because 
"people who are ignorant about HIV transmission would be concerned 
about an HIV-positive person handling fresh produce, and might re-
frain from shopping at the store on that account." This evidence 
suggests that Sharp was reassigned to the receiving area based on 
nothing more than the fact that he was infected with HIV — the type 
of employment decision the defeated Chapman Amendment sought to 
permit. Clearly, the Sixth Circuit failed to consider the plain lan-
guage of the ADA, which prohibited an employer from reassigning an 
employee with an infectious disease based solely on the fact that the 
individual was infected with the disease.

2. Legislative History

In Prevo's, the Sixth Circuit incorrectly disregarded the legisla-
tive history of the ADA in its determination that Sharp was required 
to undergo a medical examination to determine if he posed a "direct 
threat" to others. The legislative history of the ADA demonstrates 
that Congress thoroughly discussed and rejected an amendment to the 
ADA, which would have permitted an individual with an infectious 
disease, such as HIV, working in a food-handling position to be reas-

481. Id. at 1090-98; 42 U.S.C. § 12113(d)(2) (1994).
482. Prevo's, 135 F.3d at 1099-1100 (Moore, J., dissenting).
483. Id. (Moore, J., dissenting).
484. Id. at 1100-01 (Moore, J., dissenting).
485. Brief for Appellee at 5-6, EEOC v. Prevo's Family Mkt., Inc., 135 F.3d 1089 (6th 
Cir. 1998) (No. 97-1001).
486. Prevo's, 135 F.3d at 1101 (Moore, J., dissenting).
487. Id. at 1099 & n.1., 1101 (Moore, J., dissenting).
488. See infra notes 489-98 and accompanying text.
signed based only on the fact that the individual had an infectious disease.\textsuperscript{489}

Representative Jim Chapman of Texas proposed the amended legislation because, in his view, "[t]he reality is that many Americans would refuse to patronize any food establishment if an employee were known to have a communicable disease."\textsuperscript{490} Those members of Congress opposing the Chapman Amendment stated that the medical evidence showed that HIV could not be transmitted from one individual to another through the handling of food.\textsuperscript{491} Representative John R. Lewis of Georgia opposed the Chapman Amendment, responding that the proposed legislation was based on the "same tired arguments that were used to justify segregated restaurants."\textsuperscript{492} Admiral James Watkins summarized the issue as follows:

\begin{quote}
\[a\]s long as discrimination occurs, and no strong national policy with rapid and effective remedies against discrimination is established, individuals who are infected with HIV will be reluctant to come forward for testing, counseling, and care. This fear of potential discrimination . . . will undermine our efforts to contain the [AIDS] epidemic and will leave HIV-infected individuals isolated and alone.\textsuperscript{493}
\end{quote}

When the Chapman Amendment debate came to a close, Congress refused to adopt the legislation as it was first introduced, because it codified the exact type of "fear, prejudice, and ignorance" the ADA was designed to prevent.\textsuperscript{494} Rather, Congress' final legislation permitted employers to reassign individuals with infectious diseases under 42 U.S.C. § 12113(d)(2) only when the individuals were infected with diseases that could be transmitted through the handling of food and a reasonable accommodation could not eliminate or reduce the risk of transmission.\textsuperscript{495} The SHHS was required to compile a list of such diseases each year, and to this day, neither AIDS nor HIV have

\textsuperscript{489} Prevo's, 135 F.3d at 1089-1100 (Moore, J., dissenting); Winterscheidt, 28 Ariz. App'y at 13.
\textsuperscript{494} Prevo's, 135 F.3d at 1099-1100 (Moore, J., dissenting).
\textsuperscript{495} Winterscheidt, 28 Ariz. App'y at 15; 42 U.S.C. § 12113(d)(2) (1994); see supra note 477 and accompanying text.
been added to this list. Because neither AIDS nor HIV is included in this list, Prevo's erred in reassigning or restricting Sharp's employment due solely to his HIV-positive status. Thus, the Prevo's court incorrectly disregarded the plain language and legislative history of the ADA, which clearly prohibited an employer from reassigning or terminating an employee with an infectious disease based solely on the fact that the individual was infected with the disease.

B. THE SIXTH CIRCUIT FAILED TO APPLY THE ADA TECHNICAL ASSISTANCE MANUAL'S DETERMINATIONS AS TO WHEN A MEDICAL EXAMINATION IS JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY

The ADA prohibits an employer from requiring a medical examination of an employee to determine if that individual has a disability unless the examination is "job-related and consistent with business necessity." The ADA Technical Assistance Manual identifies four situations which would enable an employer to require a medical examination of an employee: (1) "when an employee is having difficulty performing his or her job effectively . . . to determine if s/he can perform essential job functions with or without an accommodation;" (2) when an employee suffers an injury on the job; (3) "if an employee requests an accommodation on the basis of disability;" and (4) medical examinations "required by federal, state or local laws."

Rather, the Sixth Circuit circumvented those permissible parameters, simply stating that Prevo's had a legitimate business purpose to require Sharp to submit to a medical examination.

---

496. Prevo's, 135 F.3d at 1099 (Moore, J., dissenting). See 42 U.S.C. § 12113(d)(1) (mandating that the SHHS publish a list of diseases which may be transmitted through the handling of food).
498. See supra notes 477-97 and accompanying text.
A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

Id.
501. See infra notes 502-26 and accompanying text; TECHNICAL ASSISTANCE MANUAL, supra note 500, at VI-13-14.
502. See generally Prevo's, 135 F.3d at 1094, 1104 (Moore, J., dissenting) (noting that the majority opinion failed to cite to any caselaw authority regarding its decision
In Yin v. California and Sullivan v. River Valley School District, the Ninth Circuit and the United States District Court for the Western District of Michigan, respectively, held that an employer may require an employee to submit to a medical examination when the employee's work performance is unsatisfactory. The determinations of these two courts were reached in accordance with the ADA Technical Assistance Manual, which states that a medical examination is proper if its purpose is to determine if the employee can perform his/her job duties effectively. The dissent in Prevo's recognized that nothing in the record of the instant case indicated that Sharp's HIV-positive status impacted his job performance. In contrast, the record in Yin and Sullivan did disclose that a question existed as to whether the involved employees could perform their jobs effectively.

The United States District Court for the Eastern District of Louisiana, in Judice v. Hospital Service District No. 1, determined that a hospital could require a doctor to submit to a medical evaluation when the doctor requested reinstatement after being suspended due to alcoholism. This conclusion was reached in accordance with the ADA Technical Assistance Manual, which provides that an employer can require an employee to submit to a medical examination when the employee seeks to return to work after an illness. In Prevo's, Sharp was not "seeking to return to work after suffering illness or injury, nor was he claiming to have become injured on the job."

In Rodriguez v. Loctite Puerto Rico, Inc., the United States District Court for the District of Puerto Rico determined that an employer could require an employee to submit to a medical examination when the employee requested an accommodation.

---

503. 95 F.3d 864 (9th Cir. 1996).
506. TECHNICAL ASSISTANCE MANUAL, supra note 500, at VI-13-14.
507. Prevo's, 135 F.3d at 1103 (Moore, J., dissenting).
508. Yin, 95 F.3d at 896; Sullivan, 20 F. Supp. 2d at 1126. In Sullivan, the employer's request for a medical examination was based not only on its own perception, but also the recommendation from a psychologist. Sullivan, 20 F. Supp. 2d at 1126.
511. TECHNICAL ASSISTANCE MANUAL, supra note 500, at VI-13-14.
512. Prevo's, 135 F.3d at 1103 (Moore, J., dissenting).
ployee requested a two month leave of absence from her employment because she was suffering from Lupus. The district court reasoned that her employer's awareness of her condition and her request for accommodations justified the employer's conclusion that the employee could not perform her job duties. The ADA Technical Assistance Manual provides that an employee's request for accommodation is a permissible circumstance in which to require a medical examination. In contrast, Sharp revealed his HIV-positive status to Prevo's to give the company advance notice that he had planned to speak to students at a local school about AIDS and HIV. Sharp did not request an accommodation due to his HIV-positive status.

The Sixth Circuit's conclusion that Prevo's request for a medical examination was job-related and consistent with business necessity perpetuates discrimination. Sharp's situation did not fit within the narrow circumstances defined by the ADA Technical Assistance Manual. The Sixth Circuit based its determination that Prevo's had a legitimate business purpose for requiring Sharp to submit to a medical examination on the unsupported belief that the examination was necessary "to protect the health of Sharp, its other employees, and the general public from HIV infection." The decisions of Yin, Sullivan, Judice, and Rodriguez were reached in conformity with the articulations of the ADA Technical Assistance Manual. In contrast, the Sixth Circuit made its own determination as to what constitutes a job-related and consistent with business necessity medical examination without recognizing any other law. In so doing, the majority adopted a broad standard outside the narrowly defined circumstances set forth in the manual. Furthermore, the Sixth Circuit legitimized a decision by an employer made out of "fear, prejudice, and ignorance" — the very type of decisions the ADA was designed and enacted to prevent.

516. Id. at 661.
517. TECHNICAL ASSISTANCE MANUAL, supra note 500, at VI-14.
518. Prevo's, 135 F.3d at 1091.
519. Id. at 1103 (Moore, J., dissenting).
520. Id. at 1104 (Moore, J., dissenting).
521. Id. at 1103 (Moore, J., dissenting).
522. Id. at 1094, 1104 (Moore, J., dissenting).
523. See supra notes 503-22 and accompanying text.
524. Prevo's, 135 F.3d at 1103-04 (Moore, J., dissenting).
525. See supra notes 503-24 and accompanying text.
526. Prevo's, 135 F.3d at 1101 (Moore, J., dissenting).
C. The Sixth Circuit incorrectly concluded that a medical examination was necessary to determine if Sharp posed a "direct threat" to others when objective medical evidence stated to the contrary.

In School Board of Nassau County v. Arline, the United States Supreme Court mandated that the analysis of whether an individual with a contagious disease is "otherwise qualified" and therefore does not pose a "direct threat" to others must be:

- based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

The Supreme Court further found that a district court should defer to the medical judgments of public health officials when determining whether the individual poses a significant risk to the health and safety of others. The Code of Federal Regulations further explains that the assessment of the four factors must be "based on a reasonable medical judgment that relies on the most current medical knowledge and/or . . . objective evidence." The Sixth Circuit failed to rely on the objective medical evidence presented by the medical experts for both parties — that a risk of Sharp transmitting the HIV virus was low — when it concluded that Prevo's could require Sharp to submit to a medical examination to determine if Sharp posed a "direct threat" to others.

1. Courts Which Have Correctly Based Their Decisions On Objective Medical Evidence as Required Under Arline

Since Arline was decided in 1987, several courts have interpreted its mandates, but only a few of those courts have interpreted those directives correctly. Those courts have concluded that the risk in-
volved must be significant and based on objective medical evidence. In Chalk v. United States District Court for the Central District of California, the Ninth Circuit followed Arline's dictate that the determination of whether an individual presents a significant risk to others be based on the medical judgments of public health officials. Contrary to the district court's reasoning, the Ninth Circuit determined that an individual is not required to disprove every remote or theoretical risk. Additionally, in Den Hartog v. Wasatch Academy, the Tenth Circuit accurately determined that when objective medical evidence is available, such evidence must be used to make the "direct threat"/significant risk determination. The Tenth Circuit followed the congressional direction that "[th]e purpose of creating the 'direct threat' standard [was] to eliminate exclusions which are not based on objective evidence about the individual involved." In Prevo's, the Sixth Circuit considered similar medical evidence as that presented in Chalk, which established that the risk of transmitting HIV to another individual in the produce department was low. The court, however, failed to give this evidence proper weight as mandated by the Equal Employment Opportunity Commission ("EEOC") guidelines and applied in Den Hartog. Instead, the court concluded that the objective medical evidence was insufficient to determine if Sharp posed a "direct threat" to others and allowed Prevo's to conduct a medical examination to analyze the "direct threat."

Similarly, in EEOC v. Dolphin Cruise Line, Inc., the United States District Court for the Southern District of Florida held that an entertainer on a cruise ship did not pose a significant risk to the

533. See infra notes 534-50 and accompanying text.
534. 840 F.2d 701 (9th Cir. 1988).
536. See Chalk, 840 F.2d at 706-08 (discussing the medical evidence presented by Chalk and how the district court failed to consider this evidence thereby rejecting the analysis of Arline).
537. Id. at 709.
538. 129 F.3d 1076 (10th Cir. 1997).
539. Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1090 (10th Cir. 1997).
540. Den Hartog, 129 F.3d at 1090 (quotations omitted).
541. See Prevo's, 135 F.3d at 1095-96 (noting that the district court recognized that the risk of transmitting HIV to other co-workers was extremely small); Chalk, 840 F.2d at 706-08 (recognizing that the medical evidence presented and accepted by the district court, showed that the risk of transmitting HIV in this context was small).
542. Prevo's, 135 F.3d at 1102 (Moore, J., dissenting).
543. Id. at 1096-97.
The district court recognized that the four factors articulated in *Arline* required more than a slightly heightened risk of harm. The district court based its decision on the medical evidence presented, indicating that the risk of transmitting the HIV virus was remote in an employment setting and that HIV cannot be transmitted through casual contact. Therefore, the district court found that the employer's concerns were based on speculation and stereotyping and did not prove that the employee posed a significant health risk to others. The Sixth Circuit ignored the mandates of *Arline* as evidenced by the decisions of *Chalk*, *Den Hartog*, and *Dolphin*. The court equated a remote chance of potential harm with the significant risk analysis, although the medical evidence sufficiently showed that the risk of transmission involved by Sharp's HIV-positive status was low.


The Sixth Circuit relied on *Leckelt v. Board of Commissioners of Hospital District No. 1* to conclude that a medical examination of Sharp was necessary to determine if Sharp was HIV-positive. In addition, the court utilized *Leckelt* in order to determine whether Sharp's condition required Prevo's to make an accommodation for him. However, the Sixth Circuit, like many other courts, including *Leckelt*, have misinterpreted the significant risk standard. As a result, any conceivable risk is now recognized as a significant risk even when medical evidence holds to the contrary. By failing to accurately apply the medical evidence presented before the court, the parameters of the significant risk analysis has been expanded from cases involving medical professionals to any type of employment situation. This modern trend in the law, concerning the significant risk

546. *Dolphin Cruise Line*, 945 F. Supp. at 1555 (quoting 29 C.F.R. § 1630.2(r) (1984)).
547. Id.
548. *Id.* See *Arline*, 480 U.S. at 288 (noting that "courts should normally defer to the reasonable medical judgment of public health officials"); *Chalk*, 840 F.2d at 709 (stating that an "HIV-positive classroom teacher [is] not required to disprove every theoretical possibility of harm").
549. See supra notes 527-48 and accompanying text.
550. See supra notes 522-48 and accompanying text.
551. 909 F.2d 820 (5th Cir. 1990).
552. *Prevo's*, 135 F.3d at 1096.
553. Id.
554. *Id.* at 1102-03; Scidurlo, 69 *Temp. L. Rev.* at 1571, 1574, 1583, 1587, 1600.
556. *Id.* at 1583.
standard, is "inconsistent with the purpose of the Rehabilitation Act and the ADA, both of which attempt to prohibit discrimination against disabled individuals resulting from irrational fear or prejudice."557

In Leckelt, the Fifth Circuit determined that a licensed practical nurse ("LPN") was not "otherwise qualified" when he did not submit the results of his HIV test to his employer (a hospital).558 The Fifth Circuit based its decision on the fact that the LPN violated the hospital's infection control policies by failing to report his potential exposure to the HIV virus.559 The LPN's exposure was from his roommate, who was diagnosed with AIDS.560 In addition, the court found that the LPN further prevented the hospital from knowing whether the LPN had a disability which required accommodation.561 The Fifth Circuit considered the fact that prior to its decision to require the LPN to submit to a medical examination, the hospital consulted with an attorney, the hospital's infection control policies, and the recommendations of the Centers for Disease Control ("CDC") and the American Hospital Association ("AHA").562 However, the Sixth Circuit misplaced its reliance on Leckelt, because Prevo's did not consult medical information from a public health official, but instead acted against Sharp based on its fear of the HIV virus.563 Arline's requirement that employers make decisions based on objective medical information from public health officials does not require Prevo's to become an expert in HIV transmission, as the Sixth Circuit suggests.564 Rather, this requirement ensures that an employer's decisions regarding an employee with an infectious disease will be based on the truth and not on fear.565 The Sixth Circuit disregarded the fact that in many cases involving health care professionals, such employers consulted outside medical advice to conduct the "direct threat" analysis instead of first requiring the employee to submit to a medical examination.566

Further, Leckelt can be distinguished from the situation in Prevo's because the occurrence of bleeding in the produce room is quite different from that of an operating room or hospital setting.567 In Prevo's, there was no evidence presented about how often the potential for

557. Id. at 1587.
558. Leckelt, 909 F.2d at 821, 824, 830.
559. Id. at 826, 830.
560. Id.
561. Id. at 830.
562. Id. at 822.
563. Prevo's, 135 F.3d at 1100-01 (Moore, J., dissenting).
564. Id. at 1101 n.3 (Moore, J., dissenting).
565. Id. (Moore, J., dissenting).
566. See infra notes 567-605 and accompanying text.
567. See generally Prevo's, 135 F.3d at 1096 (declaring that Sharp's position as a produce worker presents a situation where there is continuous blood exposure, but failing to demonstrate how that conclusion was reached).
blood exposure occurs. While the Fifth Circuit appeared to give deference to the recommendations of the CDC and the AHA, the Fifth Circuit based its decision not on the actual risk of transmitting the HIV virus but upon the results of contracting the disease. By relying on this irrelevant consideration, the Fifth and Sixth Circuits succumbed to the myths and fears associated with the HIV virus and not on the judgments of public health officials as mandated in Arline.

A major factor in the Fifth Circuit's Leckelt decision was the LPN's disregard of the hospital's policy to report the exposure of infectious diseases. In Prevo's, no evidence was presented that Sharp violated company policy by not reporting the exposure of an infectious disease. Indeed, the record does show that Prevo's was pleased with Sharp's work and had no problems with him. Therefore, the scope of the significant risk standard as set forth in cases involving medical professionals to all types of employment situations has been expanded by failing to give deference to the medical judgments of public health officials.

In Bradley v. University of Texas M.D. Anderson Cancer Center, the Fifth Circuit addressed the issue of whether an HIV-positive employee is "otherwise qualified" under the Rehabilitation Act. The Fifth Circuit, in Bradley, held that the employee was not an "otherwise qualified individual" even though the court acknowledged that the medical evidence stated that the risk of transmitting the HIV virus in the health care setting was low. In essence, any remote possibility that HIV can be transmitted is a significant risk to the health and safety of others. As demonstrated in the EEOC's interpretive guidelines, the risk of transmission must be greater than a theoretical or remote chance of transmission. In Prevo's, the medical evidence showed that the risk of Sharp transmitting the HIV vi-

---

568. Brief for Appellee at 11-12, Prevo's (No. 97-1001).
570. Walden, 42 MERCER L. REV. at 1143.
571. Leckelt, 909 F.2d at 826-27.
572. See generally Prevo's, 135 F.3d at 1090-98 (failing to identify evidence suggesting that Sharp violated company policy by failing to report the potential exposure to an infectious disease).
573. Brief for Appellee at 4, Prevo's (No. 97-1001).
574. Scidurlo, 69 TEMP. L. REV. at 1583.
575. 3 F.3d 922 (5th Cir. 1993).
577. Bradley, 3 F.3d at 924.
578. Scidurlo, 69 TEMP. L. REV. at 1574.
579. 29 C.F.R. § 1630.2(r) app. (1998).
rus to another individual in the workplace was low.\textsuperscript{580} In fact, both parties' experts in Prevo's concluded that "under ordinary circumstances an HIV infected person working in a food service area does not pose any threat of transmission and needs no restriction in employment."\textsuperscript{581} The Sixth Circuit erred by requiring Sharp to undergo a medical examination when the medical evidence clearly demonstrated that Sharp did not pose a significant risk to others.\textsuperscript{582}

In Scoles v. Mercy Health Corp. of Southeastern Pennsylvania,\textsuperscript{583} the United States District Court for the Eastern District of Pennsylvania also concluded that an HIV-positive orthopedic surgeon, Dr. Paul Scoles, posed a "direct threat" to others despite the medical evidence.\textsuperscript{584} The Fourth Circuit reasoned that the doctor was a "direct threat" to others because he was a surgeon.\textsuperscript{585} Clearly, there would be opportunities for the doctor's blood to come in contact with a patient's blood during invasive operating procedures.\textsuperscript{586} In Prevo's, Sharp was a produce worker, a position in which the risk of his blood coming in contact with that of his co-workers appeared to be considerably less than a surgeon performing his duties.\textsuperscript{587} However, one commentator noted that the risk of HIV transmission is the same no matter which factual scenario is presented.\textsuperscript{588}

In Doe v. University of Maryland Medical System Corp.,\textsuperscript{589} the Fourth Circuit addressed the issue of whether an HIV-positive health care professional posed a "direct threat" to others.\textsuperscript{580} The Fourth Circuit determined that the doctor posed a "direct threat" to his patients and others because he was HIV-positive.\textsuperscript{590} In making its judgment, the Fourth Circuit considered the fact that the hospital obtained information from outside sources, such as the Tokars study, the CDC's recommendations, and the hospital's panel of experts when it terminated the doctor.\textsuperscript{591} The Fourth Circuit concluded that the risk of transmitting HIV in this case is "clearly possible," but "clearly possible" is not

\begin{itemize}
\item \textsuperscript{580} Prevo's, 135 F.3d at 1095-96.
\item \textsuperscript{581} See id. at 1096 n.9 (noting that Dr. Baumgartner, Prevo's expert, stated that the only exception to this rule would be if the employee suffered from an illness that interfered with personal hygiene); Brief for Appellee at 13-14, Prevo's (No. 97-1001) (recognizing that Dr. MacArthur concluded that the employee did not pose a risk to others in the workplace).
\item \textsuperscript{582} Prevo's, 135 F.3d at 1102-03 (Moore, J., dissenting).
\item \textsuperscript{583} 887 F. Supp. 765 (E.D. Pa. 1994).
\item \textsuperscript{584} Scoles v. Mercy Health Corp. of S.E. Pa., 887 F. Supp. 765, 772 (E.D. Pa. 1994).
\item \textsuperscript{585} Scoles, 887 F. Supp. at 769-70.
\item \textsuperscript{586} Id.
\item \textsuperscript{587} Brief for Appellee at 14, Prevo's (No. 97-1001).
\item \textsuperscript{588} Seidurlo, 69 Temp. L. Rev. at 1533.
\item \textsuperscript{589} 50 F.3d 1261 (4th Cir. 1995).
\item \textsuperscript{590} Doe v. University of Md. Med. Sys. Corp., 50 F.3d 1261, 1265 (4th Cir. 1995).
\item \textsuperscript{591} Doe, 50 F.3d at 1266.
\item \textsuperscript{592} Id. at 1263-66.
\end{itemize}
the correct standard to make the "direct threat" determination.\textsuperscript{593} The standard for determining whether an individual poses a "direct threat" is the existence of a significant risk which must be based on more than a remote or theoretical possibility of transmission.\textsuperscript{594} In \textit{Prevo's}, Prevo admitted that the decision to transfer Sharp was not based on any form of medical evidence from outside medical sources.\textsuperscript{595} Despite this evidence and the medical evidence presented to the court, the Sixth Circuit determined that Prevo's was justified in requiring Sharp to submit to a medical examination to determine if he posed a "direct threat" to others.\textsuperscript{596}

The Sixth Circuit, after it decided \textit{Prevo's}, in \textit{Mauro v. Borgess Medical Center},\textsuperscript{597} held that a surgical technician infected with the HIV virus posed a "direct threat" to others.\textsuperscript{598} The Sixth Circuit recognized that the CDC was a public health official whose medical judgments should be given deference in its "direct threat" analysis.\textsuperscript{599} The CDC recommends that an infected health care worker should be allowed to continue most of his/her surgical duties so long as safety measures were followed, because the risk of transmitting the HIV virus in a health care setting is "very small."\textsuperscript{600} However, the Sixth Circuit found that the surgical technician posed a "direct threat."\textsuperscript{601} Therefore, as one commentator has noted, "[i]n HIV employment discrimination cases, particularly in the health care setting, the significant risk threshold has been so minimized, it is now almost non-existent."\textsuperscript{602}

In \textit{Prevo's}, the Sixth Circuit similarly rejected medical evidence which established that the risk of transmitting the HIV virus in the produce department was small.\textsuperscript{603} Further, the court in \textit{Prevo's}, failed to require Prevo's to obtain relevant medical information from public

\begin{itemize}
\item \textsuperscript{593} See id. at 1266 (stating that although there was "no documented case of surgeon-to-patient transmission, such transmission clearly is possible"); Scidurlo, 69 TEMP. L. REV. at 1590-91 (noting that the "court incorrectly applied the significant risk standard . . . and concluded that any risk of HIV transmission constitutes a significant risk").
\item \textsuperscript{594} 42 U.S.C. § 12111(3) (1994). Section 12111(3) states that "[t]he term 'direct threat' means a significant risk to the health and safety of others that can not be eliminated by reasonable accommodation." \textit{Id.}
\item \textsuperscript{595} \textit{Prevo's}, 135 F.3d at 1100 (Moore, J., dissenting).
\item \textsuperscript{596} \textit{Id.} at 1101 & n.3 (Moore, J., dissenting).
\item \textsuperscript{597} 137 F.3d 398 (6th Cir. 1998).
\item \textsuperscript{599} \textit{Mauro}, 137 F.3d at 403.
\item \textsuperscript{600} \textit{Id.} Instead, the Sixth Circuit made a distinction between exposure-prone and general invasive procedures. \textit{Id.} at 403-04.
\item \textsuperscript{601} \textit{Mauro}, 137 F.3d at 407.
\item \textsuperscript{602} Scidurlo, 69 TEMP. L. REV. at 1600.
\item \textsuperscript{603} \textit{Prevo's}, 135 F.3d at 1095-96.
\end{itemize}
health officials as required by the EEOC guidelines. Thus, the Sixth Circuit has improperly expanded the reach of the EEOC and Arline directives to any employment situation, even when the risk of exposure is not "significant" through its decisions in Mauro and Prevo's.

CONCLUSION

In EEOC v. Prevo's Family Market, Inc., the United States Court of Appeals for the Sixth Circuit held that a grocery store chain was justified in requiring a produce worker infected with the human immunodeficiency virus ("HIV") to submit to a medical examination for the purpose of determining if he posed a "direct threat" to others. In requiring the produce worker, Stephen Sharp, to submit to a medical examination as a condition of continued employment, the Sixth Circuit reasoned that Prevo's had a legitimate concern for the health and safety of all its employees and the general public when it required Sharp to submit to a medical examination. However, the Sixth Circuit clearly disregarded the applicable statutes and caselaw in its decision, thereby expanding the scope of the Americans with Disabilities Act ("ADA") beyond its permissible parameters. The Sixth Circuit based its decision on the fear, prejudice and stereotypes of an uninformed public regarding the transmission of HIV or acquired immune deficiency syndrome ("AIDS"), which the ADA was specifically designed to prevent.

First, the plain language and the legislative history of 42 U.S.C. § 12113(d)(2) clearly indicate that a food service worker infected with a contagious disease cannot be reassigned to another position or terminated because of that disease, unless the disease is specifically mentioned in the Secretary of Health and Human Services' list of contagious diseases that can be transmitted through the handling of food. This list has never included AIDS or HIV. The absence of AIDS or HIV from the list dictate that Prevo's unjustifiably discriminated

---

604. Id. at 1100-03 (Moore, J., dissenting).
605. See supra notes 551-604 and accompanying text.
606. 135 F.3d 1089 (6th Cir. 1998).
608. 42 U.S.C. § 12113(d)(2) (1994). Section 12113(d)(2) provides:

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

Id.
against Sharp based on the fact that he is HIV-positive. The Sixth Circuit transformed the public's fear of AIDS and HIV into the law of the land. The Sixth Circuit, in one fell swoop, has allowed employers to openly discriminate against their employees, an action which the drafters of the ADA fought so desperately to avoid.

Second, the ADA Technical Assistance Manual supplied the Sixth Circuit with a narrow list of circumstances which would have allowed it to determine that Prevo's request for a medical examination was job-related and consistent with business necessity. The district court in Prevo's used this list as a cornerstone for its holding that Prevo's request for a medical examination was not job-related and consistent with business necessity. However, the Sixth Circuit completely disregarded the manual's directives and the caselaw following those directives by simply stating that Prevo's request was job-related and consistent with business necessity.

Finally, the Sixth Circuit completely ignored the Supreme Court's mandate in *School Board of Nassau County v. Arline* that the "direct threat" analysis must be based on reasonable medical judgments and the court must give deference to the opinions of public health officials. By allowing Prevo's to require Sharp to submit to a medical examination, even though the medical evidence showed that Sharp did not pose a risk to others, the Sixth Circuit has now granted a license to all employers, whether in the health field or any other type of employment, to openly discriminate against an employee with a contagious disease. The ADA clearly prohibits such action. The ADA requires all employment decisions to be based on facts, not fears, prejudices, or stereotypes.

The Sixth Circuit has set a dangerous precedent for individuals with HIV or AIDS who wish to maintain their current employment, because the court allows employers to base their employment decisions on fear, prejudice and stereotypes. These individuals are now likely to be less forthcoming to their employers about their medical conditions, because if they voluntarily come forward, as did Sharp, their future with the company may be threatened. Everyone wishes to be treated fairly and equally, but the Sixth Circuit's opinion demonstrated that this is not always the case. Unfortunately, until all Americans become informed about HIV and AIDS and realize that individuals with these diseases are just as capable to perform their jobs without posing a harm to others, discrimination will occur.

---

The Supreme Court has taken the first step to remedy this situation with its recent holding in *Bragdon v. Abbott*\(^6\)\(^{11}\) that "HIV infection was a disability under the ADA" and that a significant risk must be shown by objective, scientific evidence.\(^6\)\(^{12}\) The Supreme Court reiterated its previous holding in *Arline* that the medical judgments of public health authorities should be given special weight and authority when making the significant risk decision.\(^6\)\(^{13}\) Hopefully, this decision will bring some relief to those infected with HIV or AIDS.

*Rebecca Trapp – '00*

---

611. 118 S. Ct. 2196 (1998).