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Severino v. North Fort Myers Fire Control District: AIDS Discrimination in the Workplace-Will Disclosure Leave HIV-Infected Workers Jobless?

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CASENOTE

Severino v. North Fort Myers Fire Control District: AIDS Discrimination in the Workplace—Will Disclosure Leave HIV-Infected Workers Jobless?

> "[S]ociety's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."
>
> Justice Brennan[1]

I. INTRODUCTION: EMPLOYEES WITH AIDS—THE EPIDEMIC HITS THE AMERICAN WORKPLACE

Deaths attributable to Acquired Immune Deficiency Syndrome ("AIDS") continue to increase worldwide at epidemic proportions.[2]

1. School Bd. v. Arline, 480 U.S. 273, 284 (1987).

2. The AIDS epidemic has affected every continent. *See* RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC 564-66 (1987); *see also* Steve Rabin, *Kenya: AIDS as if it Mattered*, WASH. POST, Nov. 17, 1991, at C5 (reporting that

At least one million Americans carry the Human Immunodeficiency Virus ("HIV")[3] that causes AIDS.[4] An estimated 40,000 Americans will become infected this year.[5] In response, President Bush declared war against AIDS.[6] The battle for many HIV-infected Americans, however, begins years before they contract AIDS, when they are treated like lepers in their own communities.[7]

Although AIDS is incurable and fatal, there are only five documented transmission modes:[8] (1) sharing needles with an infected person; (2) unprotected sexual contact with an infected person; (3) receiving a transfusion of tainted blood or blood products; (4) from an infected mother to fetus during pregnancy or while breast-feeding; and (5) in rare instances, blood-to-blood contact initiated through a cut.[9] Many people, nevertheless, wrongly believe HIV is highly con-

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6.9 million Africans are HIV-positive); Mia S. Vansun, *Ignorance Continues to Hobble Fight Against Killer,* VANCOUVER SUN, Oct. 7, 1991, at C5 (reporting World Health Organization estimate that by the year 2000, forty million people worldwide will be HIV-positive; currently, 50,000 to 100,000 Canadians are estimated to be infected); Alison White, *Fighting the Virus of Fear in the Workplace,* THE INDEPENDENT, Nov. 18, 1990, at 24 (Britain reports 14,723 HIV-positive citizens of which 3,884 have developed AIDS).

3. HIV attacks the body's immune system and prevents it from fighting other types of infections. AIDS is defined as the presence of HIV as well as one or more of the related infections resulting from the suppression of the immune system. Donald R. Hoover, et al., *The Effect of Changing the Definition of AIDS on the Modeling of AIDS,* 267 JAMA 273 (1992).

4. Malcolm Gladwell, *An Epidemic the Public Might Finally Confront: Johnson Could End Stigma of Aids,* WASH. POST, Nov. 10, 1991, at A1.

5. *Id.*; *see also* Employment and Earnings, 35 U.S. Dept. of Lab., Bur. of Lab. Stat. 13, 93, 194 (1988) (reporting that 5.7% of the American workforce has full-blown AIDS); Inst. of Med., NAT'L ACAD. OF SCIENCE, CONFRONTING AIDS—UPDATE 1988 49-50 (1988) (estimating that between 945,000 and 1.4 million Americans are HIV-positive).

6. *Bush Says Nation is on 'Wartime Footing' Against AIDS, Assails Bias,* L.A. TIMES, Mar. 29, 1990, at 2.

7. Some people believe that HIV-infected individuals should not be permitted to attend ordinary schools, maintain normal jobs, and live in public housing. *See* Robert J. Blendon & Karen Donelan, *Discrimination Against People with AIDS: The Public's Perspective,* 319 NEW ENG. J. MED. 1022, 1023-24 (1988). Such beliefs are reflected in controversies reaching the courts. *See, e.g.,* Martinez v. School Bd., 861 F.2d 1502 (11th Cir. 1988) (challenging school board's decision barring HIV-infected child from attending elementary school); Glanz v. Vernick, 756 F. Supp. 632 (D. Mass. 1991) (alleging discrimination in surgeon's refusal to perform emergency ear operation on HIV-infected patient); Jasperson v. Jessica's Nail Clinic, 265 Cal. Rptr. 301 (Cal. Ct. App. 1989) (contesting refusal to provide pedicure to HIV-infected individual); Y Person v. X Corp., 606 So. 2d 1219 (Fla. 2d DCA 1992) (seeking declaratory judgment that HIV-positive employee submit to physical and mental examination); Hurwitz v. New York City Comm'n on Human Rights, 535 N.Y.S.2d 1007 (N.Y. Sup. Ct. 1988) (challenging dentist's refusal to treat AIDS patient), *aff'd,* 553 N.Y.S.2d 323 (N.Y. App. Div. 1990).

8. *See* RICHARD D. MOHR, GAYS/JUSTICE, A STUDY OF ETHICS, SOCIETY, AND LAW 217-219 (1988); *see also How People Catch the AIDS Virus,* USA TODAY, Dec. 11, 1991, at 8B. The average time span from HIV infection to AIDS diagnosis is eight to ten years, with an average life span of 1 1/2 to three years following AIDS diagnosis. *Id.*

9. Nolley v. County of Erie, 776 F. Supp. 715, 718 (W.D.N.Y. 1991); *see also* Larry

tagious and fear infection through casual contact with infected persons.[10] Irrational fear of infection has resulted in HIV-infected workers losing their jobs after disclosing their HIV-positive status.[11] In fact, discrimination in the workplace is the leading type of discrimination faced by HIV-infected individuals.[12]

The courts have begun to address HIV and AIDS discrimination in the workplace. A lawyer,[13] physician,[14] and nurse[15] were first to challenge their dismissals under Section 504 of the Rehabilitation Act of 1973[16] (the "Act"), which prohibits federally-funded employers from discriminating against handicapped individuals.[17] Although the

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Gostin, *Hospitals, Health Care Professionals, and AIDS: The "Right to Know" the Health Status of Professionals and Patients*, 48 MD. L. REV. 12, 15 (1989) (listing studies that show the occupational risk of acquiring HIV in health care setting is extremely low); *How People Catch the AIDS Virus*, *supra* note 8.

10. *See* Blendon & Donelan, *supra* note 7, at 1023-25. According to current medical knowledge, HIV cannot be transmitted by casual contact with an infected person, toilet seats, doorknobs, air-conditioning, coughing, sneezing, urine, feces, sputum, nasal secretions, saliva, sweat, tears, or vomit. *See Nolley*, 776 F. Supp. at 718.

11. *See, e.g.*, Doe v. Garrett, 903 F.2d 1455 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1102 (1991) (HIV-positive reserve member released from active duty in the naval reserve recruiter program); Benjamin v. Orkin Exterminating Co., 390 S.E.2d 814 (W. Va. 1990) (exterminator discharged after he voluntarily told his supervisor that he was HIV-positive); Doe v. Westchester Cty. Med. Ctr., No. 1B-P-D-87-117683, slip op. (N.Y. Exec. Dep't Div. of Human Rights, filed Oct. 23, 1987) (pharmacist's offer of employment revoked after HIV-positive status revealed to prospective employer).

12. Daily Lab. Rep. No. 120 (BNA), Jun. 21, 1990, at A-9 (noting employment discrimination as the most commonly reported HIV-related discrimination complaint); *see also* Philip J. Hilts, *New Study Says AIDS Bias Grows Faster than Disease*, N.Y. TIMES, Jun. 17, 1990, at 20.

13. Cain v. Hyatt, 734 F. Supp. 671 (E.D. Pa. 1990) (attorney sued law firm following termination after voluntary disclosure of AIDS condition).

14. Doe v. Attorney Gen., 723 F. Supp. 452 (N.D. Cal. 1989), *aff'd in part, vac. in part, rev'd in part*, 941 F.2d 780 (9th Cir. 1991) (HIV-infected physician sued FBI after it stopped referring agents and applicants to the clinic where he worked).

15. Leckelt v. Board of Comm'rs, 909 F.2d 820 (5th Cir. 1990) (nurse sued hospital after discharge for failure to disclose the results of a HIV test, which was requested because he was gay and lived with an AIDS patient).

16. 29 U.S.C. § 794 (1991) (originally enacted as Act of Sept. 26, 1973, Pub. L. No. 93-112, § 504, 87 Stat. 394) (1973). The Act is commonly referred to by its public law number, "Section 504". Section 504 in pertinent part states: "no otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be *subjected to discrimination* under any program or activity receiving Federal financial assistance . . . ." *Id.* § 794(a) (emphasis added).

17. Handicapped employees also have challenged their dismissals and mandatory AIDS-testing programs under state laws and under the Fourth, Fifth, and Fourteenth Amendments. *See, e.g., Leckelt*, 909 F.2d at 831-33 (HIV-infected nurse challenged dismissal on Fourth and Fourteenth Amendment grounds); Local 1812, American Fed'n of Gov't Employees v. Department of State, 662 F. Supp. 50, 53 (D.D.C. 1987) (mandatory AIDS-testing program challenged on Fourth and Fifth Amendment grounds); Duran v. City of Tampa, 451 F. Supp. 954 (M.D. Fla. 1978) (police officer suffering from epilepsy sued city under Section 504 and the Fourteenth amendment); *Cain*, 734 F. Supp. at 672 (attorney with AIDS contested

Supreme Court has yet to address HIV or AIDS discrimination in the workplace,[18] several courts have concluded that HIV-positive workers qualify as "handicapped" under the Act.[19]

Recently, in *Severino v. North Fort Myers Fire Control District*,[20] an HIV-infected firefighter sued under Section 504, claiming that his condition was the sole basis for his termination by the fire department. Mr. Severino was terminated after voluntarily disclosing his HIV-positive status to the Fire Chief and refusing to perform the non-firefighter related tasks subsequently assigned to him because of his disclosure.[21] Contrary to other recent handicap and AIDS discrimination cases, the court held in favor of the employer even though the employer admitted changing Mr. Severino's duties solely because of his HIV-positive status and failed to introduce evidence that HIV-positive firefighters posed risks to co-workers or the public.[22]

The district court concluded that the employee failed to present a prima facie case under Section 504, finding that he was not terminated "solely" because of his handicap.[23] Specifically, the district court found that the employee had been terminated as a result of his refusal to perform the "light duty" tasks assigned to him after he disclosed

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termination under Pennsylvania's Handicap Act); Benjamin v. Orkin Extermination Co., 390 S.E.2d 814 (W. Va. 1990) (HIV-infected exterminator challenged termination under Virginia handicap law); M.A.E. v. Doe & Roe, 566 A.2d 285 (Pa. Super. Ct. 1989) (administrator of an employee's estate sued employer under state's Human Relations Act). Notably, all fifty states and the District of Columbia have enacted handicap statutes. *See* Gostin, *supra* note 9, at 45.

Because Mr. Severino voluntarily submitted to a blood test and disclosed the results to his employer, his Fourth Amendment rights were not implicated and this Note will not address this issue. For an excellent discussion of this issue, see generally Charles D. Curran, Note, *Mandatory Testing of Public Employees For the Human Immunodeficiency Virus: The Fourth Amendment and Medical Reasonableness*, 90 COLUM. L. REV. 720 (1990).

18. For purposes of this Note, the terms "HIV discrimination" and "AIDS discrimination" mean the workplace discrimination HIV-infected individuals face at any stage of their disease.

19. *See, e.g.*, Chalk v. United States Dist. Court Cent. Dist. of Cal., 840 F.2d 701, 704 (9th Cir. 1988); Doe v. Washington Univ., 780 F. Supp. 628, 632 (E.D. Mo. 1991); Ray v. School Dist., 666 F. Supp. 1524, 1536 (M.D. Fla. 1987). Similarly, state courts have construed state handicap acts as protecting HIV-infected individuals from discrimination. *See, e.g.*, *M.A.E.*, 566 A.2d at 287 (noting that Pennsylvania's Human Relations Act covers AIDS and its related conditions) (Cavanaugh, J., concurring); *see also* Gostin, *supra* note 9, at 45; *infra* note 58 and accompanying text.

20. 935 F.2d 1179 (11th Cir. 1991).

21. *Id.* at 1180.

22. *See id. Compare* Duran v. City of Tampa, 451 F. Supp. 954, 954 (M.D. Fla. 1978) (holding handicapped applicant's Section 504 rights were violated based on Police Chief's admission that he considered an epileptic unfit to withstand the working conditions and nature of a police officer's job).

23. Severino v. North Fort Myers Fire Control Dist., No. 88-142, slip op. at 49 (M.D. Fla. Feb. 15, 1990) (mem.), *aff'd*, 935 F.2d 1179 (11th Cir. 1991).

his HIV-positive status.[24] On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed on the same basis.[25]

This Note disputes the reasoning and conclusion reached by the court of appeals with respect to the employee's Section 504 prima facie case. Part II explores the development of AIDS discrimination law in the context of Section 504 jurisprudence. Next, it examines the burden of proof created by the Supreme Court in *School Board v. Arline*[26] to resolve discrimination cases where the "handicap" is a contagious disease—the framework applied by both the trial and appellate court in *Severino*. To place *Severino* in perspective, the Note also reviews other cases in which employees infected by a contagious disease have challenged their terminations under Section 504.

Part III details *Severino*'s procedural and factual background. Part IV questions the appellate court's application of the *Arline* framework and argues that Mr. Severino established a prima facie case of handicap discrimination by showing that he was reassigned solely because of his HIV-positive status without evidence that regular firefighting duties posed a risk to co-workers or the public. This Part further argues that the court focused on the wrong level of the employer's conduct in determining that the employee was not discharged because of his HIV-positive status, by ignoring the fact that his reassignment to light duty was illegal. This Part also argues that the court relied on irrelevant factors in assessing whether Mr. Severino was "otherwise qualified" under Section 504, and failed to engage in an individualized inquiry to determine whether his HIV-positive status mandated the light duty reassignment.

This Note proposes that courts find a prima facie case of handicap discrimination once an employer admits that it based an adverse employment decision, such as reassignment to light duty, on an employee's handicap. To rebut a prima facie case of discrimination, the employer would have to show medical evidence that the employee could not be otherwise accommodated.

Severino represents an alarming erosion of handicapped individuals' rights. First, it lowers an employer's burden of proof under Section 504 so that virtually any excuse articulated by an employer can defeat the causation element of a Section 504 claim. Second, it implicitly sanctions adverse employment decisions by employers without requiring a showing of necessity. If adopted by other courts, the

24. *Id.* at 50.

25. *Severino*, 935 F.2d at 1182.

26. 480 U.S. 273 (1987), *reh'g denied*, 481 U.S. 1024 (1987), *on remand*, 692 F. Supp. 286 (M.D. Fla. 1988).

Severino rationale could seriously undermine the rights of the handicapped under Section 504 as well as the newly enacted Americans with Disabilities Act.[27]

II. PERSPECTIVE

A. *The Development of Section 504 Jurisprudence in the Workplace*

Section 504 of the Rehabilitation Act of 1973 gives handicapped individuals a private right of action for discrimination by federally-funded agencies and certain private entities.[28] The Act's primary purpose is to promote handicapped employment by prohibiting discrimination against handicapped persons who are "otherwise qualified" to perform a job.[29] The language of the Act promises "to share with handicapped Americans the opportunity for . . . jobs that [non-handicapped] Americans take for granted."[30] To achieve this goal, the Act protects handicapped individuals from *any* adverse employment decision improperly based on their handicap.[31]

Section 504 was patterned after Title VII,[32] which prohibits dis-

27. 42 U.S.C. § 12101-213 (1991). The Americans with Disabilities Act (ADA) in pertinent part provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* § 12112(a). The ADA also extends handicapped protection to the private sector. *Id.* § 12101. Since the ADA also protects the handicapped, courts might refer to Section 504 cases in construing the ADA.

28. *See* 29 U.S.C. § 794(a) (1991); *see* Pushkin v. Regent of Univ. of Colo., 658 F.2d 1372, 1380 (10th Cir. 1981) (recognizing that the Act created a private cause of action); *see also* Doe v. Attorney Gen., 723 F. Supp. 452, 489-91 (N.D. Cal. 1989), *aff'd in part, vac. in part, rev'd in part*, 941 F.2d 780 (9th Cir. 1991), *on remand*, 1992 U.S. Dist. LEXIS *20136 (N.D. Cal. 1992) (recognizing a private right of action against an entity receiving federal funds that discriminates against handicapped persons).

29. *See* Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 634 (1984). The Act also prohibits discrimination against the handicapped in education, public accommodations, and housing. *See* 29 U.S.C. § 794(a); *cf.* 42 U.S.C. § 12101(a)(3) (stating ADA's goals).

30. 123 CONG. REC. S13515 (1977) (statement of Sen. Humphrey); *see also* Alexander v. Choate, 469 U.S. 287, 304 (1985) (stating that Section 504's central purpose is to assure that handicapped individuals receive "evenhanded treatment" in relation to non-handicapped individuals).

31. *See* 29 U.S.C. § 794(a). Adverse employment decisions include: (1) refusing to promote a handicapped individual; (2) denying a handicapped individual employment or the benefits of a federally-funded program; and (3) limiting handicapped individual's duties. CITE; *cf.* 42 U.S.C. § 12112(b)(1) (1991) (defining the term "discriminate" to include "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.").

32. Civil Rights Act of 1964, 42 U.S.C. § 2000d (1992) (commonly referred to as "Title VII"). The Act provides: "No person . . . shall, on the ground of race, sex, color, or national

crimination on the basis of gender, race, religion, or ethnic background.[33] Section 504 grants handicapped employees all of the remedies available under Title VII.[34] Accordingly, courts often refer to Title VII cases in interpreting Section 504.[35] Courts, however, have yet to apply the mixed-motive[36] causation standard of Title VII discrimination cases to Section 504 claims.[37]

In further pursuit of the goals underlying Section 504, Congress recently passed the Americans with Disabilities Act ("ADA"),[38] which also promises equal opportunity to individuals with disabilities. The ADA applies to most private sector employers.[39] Modeled after Section 504 as well as Title VII, the ADA extends protection to per-

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origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

33. *See Alexander*, 469 U.S. at 293 n.7 (acknowledging that Section 504 was patterned after Title VII); *cf. Darrone*, 465 U.S. at 632-33 n.13 (recognizing distinctions between Section 504 and Title VII).

34. 29 U.S.C. § 794(a)(2) (1991) ("The remedies, procedures, and rights set forth in title VI . . . shall be available to any person aggrieved by any act or failure to act . . . under section 794."). For example, handicapped employees can receive reinstatement and back pay. *See* Lengen v. Department of Transp., 903 F.2d 1464 (11th Cir. 1990). A court can award future damages and even an expungement of records to vindicate the rights of an employee subjected to handicap discrimination. Ross v. Beaumont Hosp., 678 F. Supp. 680, 682-83 (E.D. Mich. 1988) (citing Shore v. Federal Express Corp., 777 F.2d 1155, 1160 (6th Cir. 1985)), *appeal dismissed without opinion*, 844 F.2d 789 (6th Cir. 1988). Other courts have ordered that the employer compute seniority rights of a discriminated applicant from the date of application for employment. *See* Duran v. City of Tampa, 451 F. Supp. 954, 955 (M.D. Fla. 1978). Furthermore, a successful employee can also receive damages for mental anguish, loss of earnings, and attorneys' fees. *See* Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130, 1138-39 (S.D. Iowa 1984). Moreover, while punitive damages are not available under Section 504, handicapped employees subject to discrimination may be entitled to punitive damages under state handicap law. *See* Cain v. Hyatt, 734 F. Supp. 671, 686 (E.D. Pa. 1990) (AIDS-infected employee recovered $50,000 in punitive damages under Pennsylvania law).

35. *See, e.g.*, Doe v. Garrett, 903 F.2d 1455, 1461 (11th Cir. 1990) (reasoning that because Title VII does not apply to the military, neither does Section 504); *Duran*, 451 F. Supp. at 954 (stating that plaintiff could prove handicap discrimination under Section 504 by advancing the disparate treatment and impact models applied in Title VII cases). *But see* Pushkin v. Regent of University of Colo., 658 F.2d 1372, 1384 (10th Cir. 1981) (court refused to apply Title VII's burden of proof to Section 504 cases).

36. The term "mixed-motive" means that an employer has two motives for terminating an employee, one of which is illegal. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *overruled by* 42 U.S.C. § 12101-213 (1991). Under these circumstances, the Supreme Court required an employer to show that she would have made the "same decision" absent the discriminatory motive. *Id.* at 258.

37. At least one court has specifically refused to apply a mixed-motive causation standard under Section 504. *See, e.g., Ross*, 678 F. Supp. at 681-83.

38. 42 U.S.C. §§ 12101-12213 (1991).

39. 42 U.S.C. § 12111(5)(A) (1991) (employers with fifteen or more employees are subject to ADA's proscriptions). *But see* 42 U.S.C. § 12111(5)(B) (1991) (private clubs are not subject to ADA).

sons infected with contagious diseases.[40] Although based on Section 504, *Severino* may also adversely impact the legal framework adopted by courts construing and applying the ADA.

1. ELEMENTS OF A PRIMA FACIE CASE OF HANDICAP DISCRIMINATION UNDER SECTION 504

The Supreme Court initially construed Section 504 in *Southeastern Community College v. Davis*,[41] enumerating four elements required to establish a prima facie case of handicap discrimination.[42] First, the individual must show that she is handicapped within the meaning of Section 504.[43] Second, she must establish that she is "otherwise qualified" to perform the job.[44] Third, the individual must establish that she was discriminated against "solely on the basis" of her handicap.[45] This is the causation prong of the Act.[46] Fourth, the employer must be a recipient of federal funds.[47]

A physical condition is a "handicap" within the meaning of the Act if it results in a "physical impairment"[48] that affects the perform-

40. *Compare* 42 U.S.C. § 12101 (1991) (ADA) *with* 42 U.S.C. § 2000d (1992) (Title VII); 29 U.S.C. § 794(a). Notably, ADA expressly excluded homosexuality and bisexuality from its definition of physical impairments and thus disabilities. *See* 42 U.S.C. § 12211(a).

41. 442 U.S. 397 (1979).

42. *Id.* at 405-06.

43. *See* 29 U.S.C. § 794(a). Section 504 incorporates Section 706(8)(A) and its definition of the term "handicap." Section 706(8)(A) defines "handicapped" as "any individual who (i) has a physical . . . disability which for such individual constitutes or results in a substantial handicap to employment." Section 706(8)(B) defines "individual with handicap" as a person whose impairment substantially limits one or more of [her] major life activities, (ii) has a record of such impairment, or (iii) is *regarded* as having such impairment." *Id.* § 706(8)(B) (emphasis added). *See generally* Francis M. Dougherty, Annotation, *Who is "Individual With Handicaps" Under Rehabilitation Act of 1973*, 97 A.L.R. Fed. 40, 46-50 (1991) (listing numerous impairments considered to be handicaps within the meaning of Section 504); *see also* Maureen O'Connor, *Defining "Handicap" for Purposes of Employment Discrimination*, 30 ARIZ. L. REV. 633 (1988).

44. *See* 29 U.S.C. § 794(a). *See generally* Colleen R. Courtade, Annotation, *Who is a "Qualified" Handicapped Person Protected from Employment Discrimination Under Rehabilitation Act of 1973 and Regulations Promulgated Thereunder?*, 80 A.L.R. Fed. 830 (1991) (citing cases where courts have applied the "otherwise qualified" element of Section 504).

45. 29 U.S.C. § 794(a).

46. *See infra* notes 137-48 and accompanying text for a discussion of the causation prong.

47. *Id.* Federal agencies obviously are subject to Section 504. *See id.* Private institutions such as universities and hospitals also are subject to the Act because they commonly receive federal financial assistance. *See, e.g.*, Pushkin v. Regent of Univ. of Colo., 658 F.2d 1372, 1376 (10th Cir. 1981) (university subject to Section 504's requirements). *But see* 42 U.S.C. § 12101 (ADA imposes no similar requirement).

48. 29 U.S.C. § 794(a). The term "physical impairment" is defined in federal regulations as "any physiological disorder or condition . . . affecting . . . neurological; musculoskeletal; special sense organs; respiratory; reproductive; digestive; cardiovascular; lymphatic; skin; endocrine [systems]." 45 C.F.R. § 84.3(j)(2)(i) (1991).

ance of "major life activities."[49] Conditions such as excessive weight,[50] narcolepsy,[51] epilepsy,[52] hepatitis,[53] and alcoholism[54] are among the handicaps covered by the Act. Section 504 also includes certain contagious diseases as handicaps.[55] Courts addressing the issue have held that HIV infection is a handicap under Section 504.[56] These courts have thus applied the same burden of proof requirements to AIDS discrimination cases as other handicap discrimination cases.[57] Until the Supreme Court decides an HIV or AIDS discrimination case, however, uncertainty remains as to whether HIV infection (or AIDS) is a handicap under the Act.

Those favoring inclusion argue that including asymptomatic HIV infection within the meaning of "handicap" encourages early testing and thus helps prevent the spread of AIDS.[58] The early test-

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49. *See* 29 U.S.C. § 794(a). The Supreme Court has relied on the regulations promulgated by the Department of Health in determining whether a physical condition qualifies as a handicap within the meaning of Section 504. *See* School Bd. v. Arline, 480 U.S. 273, 278-79 (1987). The term "major life activities" includes working. *See id.* at 281; *see also* 42 U.S.C. § 12102 (adopting the same definition of the term "disabled"); 45 C.F.R. 84.3(j)(2)(ii) (1991) (defining "major life activities" as including "functions such as caring for one's self walking, sleeping, learning, and working").

50. Ross v. Beaumont Hosp., 678 F. Supp. 680 (E.D. Mich. 1988), *appeal dismissed without opinion*, 844 F.2d 789 (6th Cir. 1988).

51. *Id.*

52. *See, e.g.*, Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130 (S.D. Iowa 1984).

53. Lussier v. Dugger, 904 F.2d 661 (11th Cir. 1990).

54. Traynor v. Turnage, 485 U.S. 535, 566 (1988) (Blackmun, J., concurring in part, dissenting in part); *see also* 43 Op. Att'y Gen. 2 (1977) (opining that drug addicts and alcoholics are covered by Section 504). *But see* 42 U.S.C. § 12210(9) (1991) (drug addicts engaging in illegal drug use are excluded from the protection of ADA).

55. School Bd. v. Arline, 480 U.S. 273, 285-86 (1987).

56. *See* Doe v. Washington Univ., 780 F. Supp. 628, 632 (E.D. Mo. 1991); *see also* Chalk v. Orange City Dep't of Educ., 832 F.2d 1158 (9th Cir. 1987); Ray v. School Dist., 666 F. Supp. 1524, 1536 (M.D. Fla. 1987). *But see* Doe v. Garrett, 903 F.2d 1455, 1459-61 (11th Cir. 1990) (holding that Section 504 does not apply to members of the armed services who are HIV-positive or contract AIDS).

Similarly, courts have found that HIV infection qualifies as a handicap under state acts. *See, e.g.*, Cain v. Hyatt, 734 F. Supp. 671, 677-79 (E.D. Pa. 1990) (attorney with AIDS contested his termination and reassignment under the Pennsylvania handicap act); Petri v. Bank of New York, 582 N.Y.S.2d 608, 610 (N.Y. App. Div. 1992) (homosexual loan officer challenged his dismissal under Human Rights Act and court concluded HIV infection was a disability within the meaning of the Act); Benjamin v. Orkin Exterminating Co., 390 S.E.2d 814, 819 (W. Va. 1990) (HIV-infected exterminator challenged his dismissal under West Virginia Human Rights Act); Shuttleworth v. Broward County, 639 F. Supp. 654, 656 (S.D. Fla. 1986) (Florida handicap law interpreted as covering HIV infection and AIDS); *see also Chalk*, 832 F.2d at 1157-58.

57. *See, e.g., Washington Univ.*, 780 F. Supp. at 632 (applying the burden in a suit by a dental student against university that dismissed him after discovering his HIV-positive status).

58. *Benjamin*, 390 S.E.2d at 819 (argument accepted by Virginia court); *see also* Patricia Mitchell, *Employment Discrimination and AIDS: Is AIDS a Handicap under Section 504 of the*

ing rational has led some legal commentators to contend that federal and state handicap laws should extend to persons *perceived* as HIV-infected.[59] Opponents counter that Congress never intended to protect individuals not visibly physically impaired.[60]

The Supreme Court has held that "otherwise qualified" means that an employee meets all of a job's qualifications "in spite" of her handicap.[61] Section 504 regulations provide that a "qualified handicapped" person means "a handicapped person who, with reasonable accommodation, can perform the essential functions of the job."[62] Despite little guidance from the Supreme Court on application of the causation element of a Section 504 claim, courts have vigorously applied the "otherwise qualified" standard.[63]

2. AN EMPLOYER'S ACCOMMODATION DEFENSE

An employer may still prevail against a prima facie case by showing either that it "reasonably accommodated" an individual's handicap or that a "reasonable accommodation" would cause "undue hardship."[64] Courts have imposed this affirmative duty on employers so that handicapped individuals have meaningful access to employ-

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Rehabilitation Act?, 38 U. FLA. L. REV. 649, 670 (1986); Terry L. Pabst, *Protection of AIDS Victims from Employment Discrimination Under the Rehabilitation Act*, 10 U. ILL. L. REV. 355, 378 (1987); Robert A. Kushen, Note, *Asymptomatic Infection with the AIDS Virus as a Handicap Under the Rehabilitation Act of 1973*, 88 COLUM. L. REV. 566, 565-67 (1988) (arguing that the broad purpose of the Act indicates that HIV infection comes within the Act's protection because HIV infection is a physiological abnormality).

59. *See* Mitchell, *supra* note 58, at 670-71.

60. *See* Kushen, *supra* note 58, at 565-69.

61. *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 305 (5th Cir. 1981) (stating "otherwise qualified" means qualified in all respects except for being handicapped); *see also* Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979) (delineating employer's accommodation responsibilities under Section 504 when interpreting the term "otherwise qualified").

62. 45 C.F.R. § 84.3(k)(l) (1991) (defining "qualified handicapped person"); *see also* Martinez v. School Bd., 861 F.2d 1502, 1505 (11th Cir. 1988) ("As a second step, the court must evaluate whether reasonable accommodations would make the handicapped individual otherwise qualified.").

63. *See, e.g.*, Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130, 1136 (S.D. Iowa 1984) (applying regulations).

64. For a thorough discussion on the duty to reasonably accommodate handicapped individuals, see Katharine W. Tate, *The Federal Employer's Duties Under the Rehabilitation Act: Does Reasonable Accommodation or Affirmative Action Include Reassignment?*, 67 TEX. L. REV. 781 (1987); Mark E. Martin, Note, *Accommodating the Handicapped: The Meaning of Discrimination under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. REV. 881, 900 (1980); *see also* 80 A.L.R. Fed. 837, 838-48 (1986) (listing cases where accommodations were necessary, where accommodations were not necessary, and where accommodations were not considered).

ment opportunities.[65] In spite of this duty to accommodate, an employer is not required to lower its standards or to make "substantial modifications" to accommodate a person's handicap. The employer is required only to make "reasonable" accommodations.[66] Courts view the reasonableness of an accommodation from the employer's perspective.[67]

Where an employer demonstrates that an accommodation would result in "undue hardship," courts have not required the employer to make the accommodation.[68] By contrast, where an accommodation can be achieved with minimal expenditure, courts will impose a duty to accommodate on the employer.[69] Significant factors in determining whether an accommodation poses "undue hardship" include: (1) the nature of the accommodation; (2) the type of employer operation;[70] (3) the size of the operation;[71] and (4) the cost of the accommodation.[72] In short, an employer violates Section 504 by not providing an accommodation deemed "reasonable" by the court.[73]

Because the handicap and federal-funding elements of a Section 504 claim usually are clear, the primary inquiries under Section 504 are whether the employee is "otherwise qualified" and whether the employer's decision was improperly based "solely" upon the

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65. *See, e.g.*, School Bd. v. Arline, 480 U.S. 273, 289 n.19 (1987); Brennan v. Stewart, 834 F.2d 1248, 1261 (5th Cir. 1988); *Prewitt*, 662 F.2d at 307.

66. *See* Southwestern Community College v. Davis, 442 U.S. 397, 413-14 (1979) (holding that a college did not have to lower its educational standards or make major adjustments in its clinical nursing program to accommodate a deaf nursing student); *see also* Alexander v. Choate, 469 U.S. 287, 300-01 (1985).

67. *See, e.g., Southwestern Community College*, 442 U.S. at 413-14.

68. *See Davis*, 442 U.S. at 413-14. Under E.E.O.C. regulations, "[r]easonable accommodation may include, but shall not be limited to (1) making facilities readily accessible and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules . . . and other similar actions." 29 C.F.R. 1613.704(b) (1991). *See generally* Steven F. Stuhlbarg, Comment, *Reasonable Accommodation under the Americans with Disabilities Act: How Much Must One do Before the Hardship Turns Undue*, 59 U. CIN. L. REV. 1311 (1991).

69. *See, e.g.*, Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130, 1137 (S.D. Iowa 1984) (concluding that the employer could accommodate the handicapped individual with minimal cost or administrative burden).

70. This factor includes the composition and structure of the workforce. *See Davis*, 442 U.S. at 413-14; *cf.* 29 C.F.R. 1613.704(c) (1991) (applying same factors in E.E.O.C. legislation).

71. Significant factors in assessing the size of the employer include the number of employees and locations and the size of the employer's budget. 29 C.F.R. 1613.704(c).

72. The E.E.O.C. regulation states: "An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program." 29 C.F.R. § 1613.704(a). *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 308 (5th Cir. 1981) (applying E.E.O.C. regulation).

73. *See, e.g., Fitzgerald*, 589 F. Supp. at 1138 (holding that the school board failed to accommodate a handicapped applicant when it imposed a driving requirement).

employee's handicap.[74] The two inquiries are interrelated because where an individual is not "otherwise qualified" to perform a job, a court typically will conclude that an employment decision was not based "solely" on the individual's handicap.[75]

The "otherwise qualified" and "reasonable accommodation" inquiries also are closely linked. For instance, if the employee cannot perform a job's duties with an accommodation, she is not "otherwise qualified" to perform her job "in spite" of her handicap.[76] In sum, the elements constituting a prima facie case of handicap discrimination are significantly interrelated. The *Severino* court illustrates this interrelationship with its muddled analysis of Section 504's causation and accommodation requirements.

B. *Contagious Disease as a Handicap*

In *School Board v. Arline*,[77] the Supreme Court recognized a contagious disease as a "handicap" within the meaning of Section 504. In addition to the four elements of a Section 504 prima facie claim, the Court enumerated other significant factors to consider in determining whether an employee was "otherwise qualified" in cases involving employees with contagious diseases.[78] The Court insisted that employers base decisions on an individualized investigation of these factors.[79] Otherwise, an adverse employment decision such as termination would be "on the basis" of an individual's handicap in violation of Section 504.[80]

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74. Employers usually attack the "otherwise qualified" and causation elements of an employee's prima facie case because of their fact-specific nature and statutory ambiguity. The "otherwise qualified" requirement under Section 504 has what one court called, "a paradoxical quality." Brennan v. Stewart, 834 F.2d 1248, 1261 (5th Cir. 1988). This court reasoned, "[the term] refers to a person that has the abilities or characteristics sought by the [employer], . . . yet cannot refer to those already capable of meeting all the requirements." *Id.* Otherwise, the court concluded, no reasonable requirement could ever violate Section 504 no matter how easy it would be to accommodate those individuals who could not fulfill a particular job requirement. *Id.*

75. *See* Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1385 (10th Cir. 1981).

76. *See* Daubert v. United States Postal Serv., 733 F.2d 1367, 1372 (10th Cir. 1984) (holding that postal worker who could not perform the caddying work due to back injuries was not "otherwise qualified" to perform her job) (relying on Southeastern Community College v. Davis, 442 U.S. 397 (1979)).

77. 480 U.S. 273 (1987), *reh'g denied*, 481 U.S. 1024 (1987). For a detailed analysis of *Arline*'s impact, see generally Michael J. Pankow, Note, *AIDS and the Rehabilitation Act After School Board of Nassau County v. Arline*, 21 CREIGHTON L. REV. 943 (1988); Robert P. Wasson, Jr., *AIDS Discrimination Under Federal, State, and Local Law After Arline*, 15 FLA. ST. U. L. REV. 221 (1987).

78. *Arline*, 480 U.S. at 287-88.

79. *Id.*

80. *Id.*

In *Arline*, a terminated elementary school teacher suffering from tuberculosis brought an action against the school board under Section 504.[81] The employer conceded that it had fired the teacher because of her recurring tuberculosis.[82] The district court found that she was not a "handicapped individual" within the meaning of the Act, concluding that persons suffering from contagious diseases are not handicapped.[83] The district court further decided that even if she was handicapped within the meaning of the Act, she was not "otherwise qualified" to teach in an elementary school because of her contagious disease.[84] The appellate court reversed, ruling that tuberculosis qualified as a handicap and remanded for further findings on the "otherwise qualified" issue.[85]

The Supreme Court affirmed the appellate court on two grounds. The Court first concluded that tuberculosis is a handicap within the meaning of Section 504 because it resulted in the impairment of Ms. Arline's respiratory system[86] and, in turn, affected her ability to teach.[87] The Court specifically rejected the employer's argument that tuberculosis was not covered by the Act because it was contagious and posed a serious health threat to the children.[88] Second, the Court found the effect a person's impairment has on others significant in determining whether the impairment qualifies as a handicap.[89] The Court further recognized that even diseases *perceived* as contagious are handicaps within the meaning of Section 504 because of the "public fear and misapprehension" associated with contagiousness.[90] The Court did not, however, address the question of whether AIDS or HIV infection qualified as a handicap under Section 504 solely on the

81. *Id.* at 276-77.

82. *Id.* at 281.

83. Arline v. School Board, 772 F.2d 759, 761-62 (11th Cir. 1985).

84. *Id.*

85. *Id.* at 759.

86. *Arline*, 480 U.S. at 281 (citing H.E.W. regulations). Thus, her condition satisfied the "physical impairment" requirement of the Act.

Although AIDS obviously results in severe physical impairment, some legal commentators contend that mere HIV-positive status is arguably not covered under the Act since no physical impairment occurs during the early stages of infection. *See* Mitchell, *supra* note 58, at 671; *see also supra* text accompanying note 58.

87. The Court found Ms. Arline's major life activities impaired by her recurring tuberculosis-related hospitalizations. *Arline*, 480 U.S. at 279-81.

88. *Id.* at 281-82 (refusing to distinguish between the disease's contagious as opposed to physical effects).

89. *Id.* at 283 n.10. Under this reasoning, HIV infection or AIDS qualifies as a "handicap" within the meaning of Section 504 because of the public's misconception that both are highly contagious handicaps a carrier's ability to obtain or maintain employment. *See* Mitchell, *supra* note 58, at 665.

90. *Arline*, 480 U.S. at 284.

basis of contagiousness.[91]

1. *ARLINE*'S INDIVIDUALIZED INQUIRY REQUIREMENT

The Supreme Court next addressed the remaining question of whether Ms. Arline was "otherwise qualified" for the job of school teacher *in spite* of her handicap.[92] The Supreme Court set forth four basic factors for courts to consider in determining whether an individual suffering from a contagious disease is "otherwise qualified" to perform a job: (1) the nature of the risks associated with having the employee continue working; (2) the duration of those risks; (3) the severity of the risks; and (4) the probability that the disease will be transmitted causing varying degrees of harm.[93] The Court chose these factors to ensure that the employer base its decision whether an employee with a contagious disease is "otherwise qualified" on reasoned and medically sound information, rather than on stereotypes, prejudices, and unfounded fears.[94] These factors allow employers to consider such legitimate concerns as avoiding exposing others to "significant" health and safety risks.[95] The Court found the district court's findings inadequate as to the "otherwise qualified" issue and remanded the case to the district court.[96] The Court stressed that the district court *must* conduct an individualized inquiry and make appropriate findings of fact, based upon reasonable medical judgments, on the factors enumerated.[97]

Under *Arline*, an employer is prohibited from treating all individuals with a particular handicap as a homogeneous group. Instead, an employer must individually assess each handicapped individual's capabilities.[98] If a reasonable accommodation is available, then an

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91. *Id.* at 282 n.7.

92. *Id.* at 287.

93. *Id.* at 288 (quoting Brief for American Medical Association as *Amicus Curiae* at 19).

94. *See id.* at 287. In a later Supreme Court decision construing Section 504, Justice Blackmun stated that *Arline* prohibits employers from "rel[ying] on generalizations, even 'reasonable' ones." Traynor v. Turnage, 485 U.S. 535, 560-61 (1988) (Blackmun, J., concurring in part, dissenting in part).

95. *Arline*, 480 U.S. at 287. The ADA reflects the same concern for the safety of others by listing as a defense to an ADA claim that an individual "pose[s] a direct threat to the health or safety of other individuals in the workplace." *See* 42 U.S.C. § 12113(b) (1991). The term "direct threat" is defined in the statute as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* § 12111(3).

96. *Arline*, 480 U.S. at 288-89.

97. *Id.* at 287-88. The Court also advised lower courts to defer to the reasonable medical judgments of public health officials in resolving this issue. *Id.*

98. *See Traynor*, 485 U.S. at 554-55 (Blackmun, J., concurring in part, dissenting in part) (applying School Bd. v. Arline, 480 U.S. at 285-86).

employee suffering from a contagious disease is "otherwise qualified" to perform the job at issue.

C. *Federal Court Decisions Applying Section 504 to AIDS and Other Contagious Diseases*

Several courts applying *Arline*'s analysis have recognized AIDS, HIV infection, and other contagious diseases as handicaps under Section 504.[99] These courts have reasoned that the public's perception of contagiousness is what makes the disease a handicap.[100] Whether the Supreme Court will reach the same conclusion remains to be determined.

Several courts have adopted *Arline's* individualized inquiry requirement in determining whether an individual suffering from a contagious disease is "otherwise qualified." For example, the Eleventh Circuit remanded a case to the trial court to determine whether a dentist with hepatitis could safely resume practicing dentistry without posing a threat to others and was thus "otherwise qualified" under Section 504.[101] After reviewing current medical data, a California federal court ruled that the remote possibility of HIV transmission from the tears, saliva or urine of a child with AIDS did not disqualify the child from attending school.[102] Another court found that a university had not improperly founded its decision to dismiss a dental student with AIDS on stereotypes. Instead, the court found that the university's decision was based on current medical knowledge of the potential risk of HIV transmission, should the student be allowed to participate in the dental program.[103] This risk, the court concluded, resulted in the student not being "otherwise qualified" to participate in the dental program."[104]

By contrast, a state court recently concluded that *all* HIV-infected persons were not "otherwise qualified" to perform worldwide foreign service duty due to the lack of medical care available in cer-

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99. *E.g.*, Lussier v. Dugger, 904 F.2d 661, 668 (11th Cir. 1990) (hepatitis deemed to be handicap under Section 504); Martinez v. School Bd., 861 F.2d 1502, 1506 (11th Cir. 1988) (recognizing AIDS as a handicap); *see also* Thomas v. Atascadero Unified School Dist., 662 F. Supp. 376 (C.D. Cal. 1987) (child with AIDS was "handicapped person" under Section 504); Local 1812 v. Department of State, 662 F. Supp. 50, 54 (D.D.C. 1987) (AIDS deemed a handicap protected under Section 504).

100. *Local 1812*, 662 F. Supp. at 54.

101. *Lussier*, 904 F.2d at 669.

102. *See Martinez*, 861 F.2d at 1502; *see also Thomas*, 662 F. Supp. at 382 (although AIDS-infected child had previously bitten a classmate, court ruled that the child could attend regular kindergarten classes).

103. Doe v. Washington Univ., 780 F. Supp. 628, 632-35 (E.D. Mo. 1991).

104. *Id.* at 634.

tain countries.[105] While this court did not apply *Arline's* individualized inquiry requirement, most courts have faithfully applied the requirement. *Arline* has thus generated a case-by-case analysis of each individual's physical condition to determine whether that individual is "otherwise qualified."

Courts similarly have applied the accommodation requirement on a case-by-case basis. For example, in *Fitzgerald v. Green Valley Education Agency*,[106] the court examined the business of an employer that imposed a bus-driving requirement on a prospective handicapped teacher. The bus-driving requirement would have made it impossible for the applicant, who suffered from cerebral palsy and epilepsy, to be considered for the teaching position.[107] The court suggested three possible alternatives available to the employer. First, the court suggested that the school board eliminate the need for the prospective teacher to drive the school bus by assuming its legal responsibility for transporting students.[108] Second, the court recommended that the school board place the handicapped applicant in a district where transportation duty was not required.[109] Third, the school board could hire an independent carrier to transport students.[110] The court considered these options reasonable accommodations under the *Arline* standard.[111]

While the *Fitzgerald* court's suggested accommodations may appear extreme, other courts have required similar workplace accommodations. For example, courts have required employers to allow hearing-aid users to continue as bus drivers despite employer prohibitions to the contrary,[112] to hire readers for blind employees,[113] and to modify architectural barriers as accommodations.[114] By comparison, other courts have not required an accommodation where the individual's handicap posed a safety risk to herself or others.[115] The outcome of an accommodation inquiry after *Arline* largely depends on

105. *Local 1812*, 662 F. Supp. at 54.

106. 589 F. Supp. 1130 (S.D. Iowa 1984) (handicapped teacher sued school board under Section 504 for failing to interview him for a teaching position because of his inability to obtain a bus driver's permit).

107. *Id.* at 1135-36.

108. *Id.* at 1137.

109. *Id.*

110. *Id.*

111. *Id.*

112. Strathie v. Department of Transp., 716 F.2d 227 (3d Cir. 1983).

113. Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1983), *cert. denied*, 469 U.S. 1188 (1985).

114. Prewitt v. United States Postal Serv., 662 F.2d 292 (5th Cir. 1981).

115. *See, e.g.*, Dexler v. Tisch, 660 F. Supp. 1418 (D.C. Conn. 1987) (holding that plaintiff suffering from dwarfism was not qualified for position as a distribution clerk at post office and

what factors a court considers critical in balancing the respective workplace interests.

In *Arline*, the Supreme Court failed to provide guidance for determining whether an employer's decision was made "on the basis of" or "solely" because of a handicap. This lack of guidance has caused considerable conflict among the courts as to whether "solely on the basis of" should be interpreted narrowly to mean that an employee must show that the *sole* reason for an employment decision was the employee's handicap; or broadly, to mean that an employee must simply show that "but for" her handicap a particular employment decision would not have been made.[116] Because each interpretation poses a different evidentiary burden, the likelihood of success under Section 504 depends on which causation analysis a court adopts. *Severino*'s majority and dissenting opinions illustrate the different interpretations of Section 504's causation requirement.

In conclusion, courts following *Arline*'s framework have developed competing interpretations of the causation requirement under a Section 504 claim. In contrast to other Section 504 contagious disease cases, *Severino* applied *Arline*'s analysis to an employee allegedly terminated because he refused to perform the light duties assigned as an accommodation, rather than because of his of HIV-positive status.

III. *SEVERINO V. NORTH FORT MYERS FIRE CONTROL DISTRICT*—THE ELEVENTH CIRCUIT REDEFINES AN EMPLOYEE'S PRIMA FACIE CASE UNDER SECTION 504

Mr. Severino had been a firefighter since 1987 with the North Fort Myers Fire Control District.[117] After donating blood, he received notification from the blood bank that he was HIV-positive.[118] Without providing any details, his doctor told him that he should not perform firefighter rescue duties.[119] Consequently, Mr. Severino ten-

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that possible accommodations were not reasonable inasmuch as they could endanger the plaintiff and co-workers as well as reduce efficiency).

116. *Compare* Ross v. Beaumont Hosp., 678 F. Supp. 680, 682-83 (E.D. Mich. 1988), *appeal dismissed without opinion*, 844 F.2d 789 (6th Cir. 1988) (applying a "but for" causation standard) *with* Assa'Ad-Faltas v. Virginia, 738 F. Supp. 982, 987 (E.D. Va. 1989), *aff'd*, 902 F.2d 1564 (4th Cir. 1990) (interpreting the term "solely on the basis" as requiring employee to show that handicap was the sole reason for dismissal) *and* Norcross v. Sneed, 755 F.2d 113, 117 n.5 (8th Cir. 1985) (court applied a narrow causation standard in suit by legally blind librarian against school district).

117. Severino v. North Fort Myers Fire Control Dist., 935 F.2d 1179, 1180 (11th Cir. 1991).

118. *Id.*

119. *Id.*

dered his resignation to the Fire Chief.[120] After consulting with legal counsel,[121] the Fire Chief reassigned Mr. Severino to light duty which included maintaining fire hydrants, running errands, and delivering trash to the dump.[122] Mr. Severino complained that the light duty assignments were "demeaning."[123]

Mr. Severino subsequently gathered information about AIDS, presented it to the Fire Chief, and requested regular duty assignment.[124] Simultaneously, he refused to continue performing the light duty assignments.[125] As a result, the Fire Chief put him on an involuntary ninety-day medical leave with pay.[126] When Mr. Severino demanded that he be informed of his rights, the Fire Chief did not respond to his demand.[127] The Fire Chief never permitted Mr. Severino to return to "full line" duty, and fired him when he would not accept the light duty mandated to him.[128]

Mr. Severino subsequently filed an action[129] seeking declaratory and injunctive relief as well as an award of compensatory and punitive damages under Section 504. At the bench trial, Mr. Severino asserted that the fire department violated his federal statutory rights as well as his state and federal constitutional rights[130] on three grounds: (1)

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120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*; *see* Appellant's Reply Brief at 7, *Severino* (No. 90-3227).
128. *Id.* His letter of termination stated:

> We have thoroughly investigated all the facts surrounding your employment with the District. It is clear that once you announced that you had a communicable disease, you informed the District that on advise of your physician, you could not continue to perform the normal duties of a firefighter.
>
> As you are aware, the District had no obligation to do so, but let you draw firefighter pay while performing functions such as fire hydrant maintanence, [sic] dispatching and various maintanence [sic] duties.
>
> It is equally clear, after performing these functions for a limited time, that you declined to perform them in the future. Specifically you refused to paint fire hydrants or to make trips to the dump . . . .
>
> Due to the fact you have refused or resisted performing the only job functions that exist within the District, you leave me no alternative but to terminate your employment . . . .

Letter from Dan R. Labelle, North Fort Myers Fire District Acting Chief, to Paul Severino, Plaintiff (May 11, 1988) (on record as Plaintiff's Exhibit 9, Case No. 88-142).

129. *Severino*, 935 F.2d at 1181. Mr. Severino sued the fire district as well as members of the North Fort Myers Fire Control Commission, in their official and personal capacities, and Donald Brown, the Fire Chief, personally and in his official capacity. *Id.*

130. Mr. Severino also asserted due process and equal protection violations under 42 U.S.C. § 1983. The district court granted summary judgment in favor of the fire department on the

reassigning him to light duty, (2) requiring him to take involuntary medical leave, and (3) dismissing him shortly afterward.[131]

The district court concluded that Mr. Severino failed to state a prima facie case under Section 504 because his employer did not terminate him "solely on the basis" of his HIV infection.[132] Instead, the court found that Mr. Severino was terminated because he refused to perform the light duties assigned to him as an accommodation.[133] Accordingly, the court ruled that the fire department did not discriminate against Mr. Severino under Section 504.[134]

On appeal, Mr. Severino argued that the district court erroneously applied Section 504's causation and intent standards.[135] Moreover, he contended that the district court's findings were clearly erroneous as to his conduct, as well as the motivation of the fire department in making the adverse employment decisions.[136]

IV. AN ANALYSIS OF *SEVERINO*

A. *The Causation Requirement of Section 504—What Is the Proper Standard?*

The court of appeals found that Mr. Severino had not met the causation element of Section 504 because he failed to show discrimination "solely on the basis" of his handicap.[137] According to the court, Mr. Severino was terminated because he refused to perform the reassigned duties, rather than because of his HIV-positive status.[138] Thus, the court reasoned, his termination was not improperly based solely on his HIV status.[139]

In her dissent, Judge Kravitch criticized the majority for departing from the customary "but for" causation analysis applicable to Section 504 cases.[140] She stressed that "solely by reason of her or his handicap" does not mean that an employer can simply articulate *any*

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due process claim. *Id.* Significantly, Mr. Severino asked to appeal his termination within the fire department, but his request was denied. Appellant's Reply Brief at 8, *Severino* (No. 90-3227).

131. *Severino*, 935 F.2d at 1181.

132. *Id.*

133. *Id.*

134. *Id.*

135. Appellant's Initial Brief at 37-40, *Severino* (No. 90-3227).

136. *Severino*, 935 F.2d at 1180-81. Severino also argued that the district court had erroneously granted summary judgment in favor of the fire department on his state and federal due process claims. *See* Appellant's Initial Brief at 45, *Severino* (No. 90-3227).

137. *Severino*, 935 F.2d at 1183.

138. *Id.*

139. *Id.*

140. *Id.* (Kravitch, C.J., dissenting).

reason for discriminatory behavior other than the handicap in order to defeat Section 504's causation element.[141] She cited several cases where courts had found handicap discrimination if the employer discriminated merely "on the basis of" an employee's handicap.[142] This standard is analogous to the traditional "but for" tort causation standard. Under this standard, an employee has only to establish that "but for" her handicap a particular adverse employment decision would not have been made by an employer.[143]

The dissent correctly criticized the court for requiring Mr. Severino to show that the *sole* reason for his termination was his handicap.[144] Such a narrow causation standard is almost impossible to meet. Rejecting this interpretation of Section 504's causation requirement, one court noted "it would be a rare case indeed in which a hostile discriminatory purpose or subjective intent to discriminate *solely* on the basis of handicap could be shown."[145] Hence, this literal reading of Section 504's causation requirement significantly increased Mr. Severino's evidentiary burden because it required him to show that his dismissal was based on *no reason other* than his HIV-infected status.

The court should have further inquired into the motive underlying Mr. Severino's reassignment. By failing to take this step, the court engaged in circular reasoning and allowed the employer to punish the employee for refusing to perform the light duties without probing whether such duties were properly assigned. Section 504 prohibits *any* discrimination or denial of a benefit to an employee because of a handicap.[146] If the court had questioned the employer's decision to place Mr. Severino on light duty, it would have found the necessary causation element, based on the court's own findings that the employer "did things too late" to ensure the assignment was not made on the basis of Severino's handicap.[147]

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141. *Id.*

142. *Id. But see* Assa'Ad-Faltas v. Virginia, 738 F. Supp. 982, 987 (E.D. Va. 1989), *aff'd*, 902 F.2d 1564 (4th Cir. 1990) (interpreting Section 504's causation element as requiring employee to show that employer's *sole* reason for dismissal was handicap).

143. *Cf.* Ross v. Beaumont Hosp., 678 F. Supp. 680, 682-84 (E.D. Mich. 1988) (deciding that because employer's evidence showed that several nurses and patients had complained about a handicapped physician's abrasive behavior, physician was not terminated "because of" her handicap).

144. *Severino*, 935 F.2d at 1183 (Kravitch, C.J., dissenting).

145. Pushkin v. Regent of Univ. of Colo., 658 F.2d 1372, 1385 (10th Cir. 1981) (emphasis added). The *Pushkin* court also refused to apply a rational basis test to determine whether the plaintiff was discriminated against based on his handicap. *Id.* at 1383-84.

146. *See* 29 U.S.C. § 794(a) (1991).

147. *See* Appellant's Initial Brief at 20, *Severino* (No. 90-3227) (citing to bench trial record).

Arguably, the mere fact that Mr. Severino was required to take a light duty assignment or no job at all was an adverse employment decision based solely on his handicap in violation of Section 504. The court should have found Section 504 liability on this adverse employment decision alone. Alternatively, the court should have found the fire department liable by refusing Mr. Severino's request to return to regular duty. The court should not have allowed the fire department to assert the defense of "insubordination" to rebut Section 504 liability because this reason was based on an improper consideration of the handicap itself.[148]

B. *The Court Applies an Improper Intent Standard*

The dissent also pointed out that the district court erroneously required the plaintiff to show intentional discrimination even though intent is not an element under Section 504.[149] The dissent recognized, as have other courts, that handicap discrimination usually results from "benign neglect" rather than "invidious discrimination."[150] Under the dissent's view, the fire department could be liable for negligent discrimination under the Act.

The majority's intent standard would prove fatal to many handicapped individual's cases because most employers will not admit to intentional discrimination. In Mr. Severino's case, however, the employer's admission that Mr. Severino was assigned to light duty merely because of his HIV-status revealed sufficient intent to discriminate, and should have satisfied even this tougher standard. Thus, Mr. Severino should have prevailed under either an intentional or negligent discrimination model.

C. *Application of* Arline*'s Framework to* Severino

In assessing Mr. Severino's arguments, the majority found it significant that Mr. Severino had volunteered to resign and that he had told a friend that he was "going to sue the hell out of somebody."[151]

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148. At least one court has required that an employer base its reason for denying a handicapped individual a benefit on something other than consideration of the handicap itself. *See, e.g., Pushkin*, 658 F.2d at 1374.

149. *Severino*, 935 F.2d at 1184; *see also* Alexander v. Choate, 469 U.S. 287, 296-97 (1985) (refusing to construe Section 504 as requiring discriminatory intent).

150. *Severino*, 935 F.2d at 1185; *see also Alexander*, 469 U.S. at 296 (noting that "discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus"); Pushkin v. Regent of Univ. of Colo., 658 F.2d 1372, 1385 (10th Cir. 1981) (noting that handicap discrimination "usually results from more invidious . . . elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons.").

151. *Severino*, 935 F.2d at 1180-81.

The majority emphasized the district court's characterization of Mr. Severino as an "aggressive, distrustful, and a lawsuit-promoting person."[152] The court found that these alleged attributes justified Mr. Severino's termination on the grounds of insubordination.[153]

Judge Kravitch disapproved of the majority's reliance on such irrelevant factors.[154] She noted that the fire department introduced no medical testimony to support certain of the district court's findings, such as the finding that AIDS affected Mr. Severino's memory, rendering him less credible.[155] The dissent further criticized the court for not recognizing the fire department's failure to follow its policy of not terminating an employee without first giving the employee a written reprimand after the employee's third offense.[156] The dissent suggested that this deviation from the fire department's well-established policy undermined the employer's testimony.[157] Judge Kravitch accepted Mr. Severino's argument that he changed his position once he became aware of his rights, and therefore found Mr. Severino's offer to resign irrelevant in determining whether he was discriminated against.[158]

Although the fire department presented evidence that Mr. Severino had exhibited "insubordination" problems prior to his disclosure, the facts clearly reveal that Mr. Severino's problems began only after his reassignment to light duties. One of the department's fire chiefs even testified at trial that he was completely satisfied with Mr. Severino's performance as a firefighter prior to his disclosure.[159] Because retaliation against an employee for filing a Section 504 claim is actionable under the Act, Mr. Severino's termination due to his refusal to perform duties illegally assigned would also be prohibited under Sec-

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152. *Id.* In fact, in its appellate brief, the fire department characterized Mr. Severino as having a pre-existing personality disorder which caused him to have feelings of paranoia, delusions, and other manifestations of stress and emotional problems. Appellee's Brief at 4-5, *Severino* (No. 90-3227).

153. *Severino*, 935 F.2d at 1180-81. Notably, the court accepted the fire department's argument that Mr. Severino's personality led to his termination rather than his HIV-positive status without requiring the department to show that Mr. Severino had past problems. *See* Appellees' Brief at 4-5, *Severino*, (No. 90-3227).

154. *Severino*, 935 F.2d at 1186 (Kravitch, C.J., dissenting).

155. *Id.* at 1183 n.1.

156. *Id.* at 1186.

157. *Id.* at 1185-86.

158. *Id.* at 1185. This argument also has been made in the Title VII context. *See* East v. Romine, 518 F.2d 332, 340 (5th Cir. 1975) (finding that an employer's refusal to hire a woman welder because she was perceived as "disputatious" and had filed numerous complaints about gender-based discrimination was an unlawful employment practice); Appellant's Reply Brief at 7, *Severino* (No. 90-3227).

159. *See* Appellant's Reply Brief at 3, *Severino* (No. 90-3227).

tion 504.[160] If a hostile relationship had developed between Mr. Severino and the fire department, the court could have awarded future damages as a remedy rather than reinstatement.[161]

D. *Validity of the Fire Department's "Light Duty" Assignment*

The *Severino* court sanctioned the fire department's decision to place Mr. Severino on light duty without inquiring whether this action was either necessary or reasonable.[162] The court did not focus on the nature of Mr. Severino's light duties at all.[163] Instead, the court, in conclusory fashion, found that the modified duties were reasonable.[164] The *Severino* majority based its conclusion partly on the premise that an employee must show that he was discriminated against "solely" on the basis of his handicap.[165] To support its decision, the court stated that Mr. Severino could have avoided termination merely by performing the light duties assigned to him.[166] The court ignored the fact that handicapped individuals have the right to a *meaningful* as well as a *reasonable* accommodation.

Other employers have assigned employees to "light duty" as an accommodation.[167] The fire department, however, had several options in accommodating Mr. Severino's perceived handicap. For example, the department could have limited his "high risk" duties while allowing him to continue performing his regular firefighter duties. Duties such as driving the fire truck and assisting with putting out fires do not pose a risk to co-workers or the public.[168] Considering the limited modes of HIV transmission, the fire department should not have limited his duties so drastically at such an early stage of his disease. As Mr. Severino's disease advanced to AIDS-Related

160. *See* Hoyt v. St. Mary's Rehab. Ctr., 711 F.2d 864 (8th Cir. 1983); *cf. Romine*, 518 F.2d at 340 (noting that conduct of an employee complaining about discriminatory treatment is irrelevant in determining whether there is discrimination under Title VII). The ADA similarly prohibits employers from retaliating against or coercing employees exercising their rights under the Act. *See* 42 U.S.C. § 12203 (a)-(b) (1991).

161. Ross v. Beaumont Hosp., 678 F. Supp. 680, 682 (E.D. Mich. 1988) (noting that where a disharmonious or hostile employment relationship has developed, a court may properly award future damages as an alternative to reinstatement).

162. *Severino*, 935 F.2d at 1182-83.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *See, e.g.*, Daubert v. United States Postal Serv., 733 F.2d 1367, 1367 (10th Cir. 1984) (postal worker assigned to light duty because back injuries precluded her from carrying postal bags).

168. *See supra* note 10 and accompanying text.

Complex ("ARC")[169] or AIDS, other kinds of accommodations might have become necessary. At a later stage of the disease, the "light duty" assignment might have been "reasonable" if the disease's weakening effects affected Mr. Severino's ability to perform his regular firefighter duties. The light duty assignment at the asymptomatic stage of his illness was thus improper. Furthermore, the fire department's argument that it assigned Mr. Severino to light duty in good faith or to be helpful should not have defeated Mr. Severino's Section 504 case.[170]

More importantly, the court did not engage in the individualized inquiry required by *Arline*. It found proper the Fire Chief's refusal to accept a doctor's letter submitted by Mr. Severino, which stated that Mr. Severino could safely perform his firefighter and rescue duties.[171] The fire department proclaimed an interest in ensuring the safety of other employees and the public from the dangers of AIDS.[172] Yet it offered no evidence that the HIV virus had ever been transmitted by a firefighter or any other employee performing similar tasks. Furthermore, the fire department consulted no public health authority, nor did it perform a neutral medical inquiry in making its employment decisions relating to Mr. Severino.[173] The fire department should have based its decision to alter Mr. Severino's duties following his HIV-positive disclosure on sound criteria, not unfounded fears of risk.[174] Mere HIV infection is not a permissible ground for assuming that Mr. Severino could not perform his functions as a firefighter.[175] Additionally, Mr. Severino did not have to disprove every possibility of harm to the public.[176]

The individualized inquiry required under *Arline* would have

169. AIDS-Related Complex is the catchall name given to a multitude of ailments resulting from infection with the HIV virus but not yet reaching full-blown AIDS. *See* Dianne Harris, *AIDS We'll All Pay*, MONEY, Nov. 1987, at 109.

170. *See* Pushkin v. Regent of Univ. of Colo., 658 F.2d 1372, 1372 (stating that there is no "good faith" defense to a Section 504 case); Recanzone v. Washoe County Sch. Dist., 696 F. Supp. 1372, 1377 (D. Nev. 1988) (finding an award of compensatory damages for emotional distress and humiliation appropriate where employer's thoughtless neglect resulted in discriminatory actions against handicapped employees).

171. *Severino*, 935 F.2d at 1182; *see also* Appellant's Reply Brief at 8, *Severino* (No. 90-3227) (Chief Brown testified that the letter was "not good enough" because he believed that there was a theoretical risk of transmission of the HIV virus if Mr. Severino performed rescue duties).

172. *See Severino*, 935 F.2d at 1182.

173. Appellant's Reply Brief at 5, *Severino* (No. 90-3227).

174. *See id.* at 5-6.

175. *See* Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979) ("[M]ere possession of handicap is not a permissible ground for assuming an inability to function in a particular context.").

176. *Cf.* Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988) (teacher with

protected Mr. Severino from being terminated for failing to perform the light duty tasks. At a minimum, the fire department should have been required to show it had a valid concern for the safety and general welfare of the public because of his HIV-positive condition.[177] Experts' assessments of the risks of HIV transmission in the workplace would cast serious doubts on any such argument made by the fire department.[178] An assessment of Mr. Severino's health based upon reasoned and sound medical judgments would have revealed that Mr. Severino could safely continue to perform the regular duties of a firefighter. Even though the majority acknowledged that Mr. Severino's handicap played a role in Mr. Severino's reassignment and subsequent dismissal, it did not require the fire department to justify the permanent reassignment of Mr. Severino.[179]

More importantly, the court ignored the crux of the issue—that Section 504 was designed to prevent *all* workplace discrimination on the basis of handicap. A handicapped individual should not have to "choose" between a menial job or no job at all unless the employer can show that its employment decision is medically justified. Section 504's basic purpose is to ensure that handicapped individuals are not denied jobs because of prejudice, irrational fear, and ignorance.[180] Contrary to this policy, the *Severino* court allowed an employer to discriminate against a handicapped employee based on speculative fears as to the risk of transmission of AIDS from a firefighter to the public and co-workers. The court's decision allows an employer to avoid liability simply by assigning a handicapped employee a meaningless job as an "accommodation." *Severino* thus stands for the proposition that HIV-infected employees can be forced to accept demeaning jobs or face termination for refusing to perform the new duties assigned, even though the assignment was not medically justified.

V. CONCLUSION

The significance of *Severino* lies in its policy implications. First, employees fearing retaliation will be more reluctant to test for the

AIDS not required to refute every theoretical possibility of harm to obtain injunction reinstating him to classroom duties).

177. *See Arline*, 480 U.S. at 283; Ross v. Beaumont Hosp., 678 F. Supp. 680, 683-84 (E.D. Mich. 1988) (concluding that physician's narcolepsy posed a safety risk to the hospital's patients where employer demonstrated that the physician had fallen asleep during a surgical procedure).

178. *See* Mitchell, *supra* note 58, at 650-51.

179. *Severino*, 935 F.2d at 1182.

180. *Arline*, 480 U.S. at 283 n.10.

HIV virus as well as to inform their employers of the results. Second, under the guise of preventing the spread of AIDS, employers can avoid Section 504 constraints by assigning handicapped employees meaningless tasks and then firing them for refusing to perform these duties. Fairness, as well as Section 504, demand that employers not discriminate against the 43 million handicapped individuals in the United States[181] because of their handicaps. *Severino* reduces that principle to little more than empty sentiment, signaling a disturbing trend in handicap discrimination law.

Severino's holding reflects the current public fear of AIDS. By leaping energetically into the fray, however, the majority seriously eroded handicapped employees' protection under Section 504. The consequence of the court's overreaction may be that HIV-infected workers will join the ranks of the jobless because of prejudice and an unwillingness to recognize that AIDS is an epidemic that requires compassion—not banishment.[182]

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181. See 42 U.S.C. § 12101(a)(1) (1990).

182. *See* 42 U.S.C. § 12101(a)(3) (noting that census data, national polls, and other studies reveal that persons with disabilities occupy an inferior status in our society).