The Americans with Disabilities Act: New Challenges in Airline Hiring Practices

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THE AMERICANS WITH Disabilities Act of 1990 (ADA) is one of the more significant pieces of civil rights legislation this century. The ADA attempts to remove discriminatory barriers that millions of Americans face each day in employment, public accommodation, and transportation. In a speech accompanying the signing of the ADA, President George Bush stated, "[a]s the Declaration of Independence has been a beacon for people all over the world seeking freedom, it is my hope that the Americans with Disabilities Act will likewise come to be a model for the choices and opportunities of future generations around the world." The ADA fills gaping holes in other federal legislation designed to protect the disabled from discrimination. Very few employers are beyond the ADA's reach. Accordingly, the broad sweep of the ADA

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2 White House Briefing, Federal News Service (Nov. 22, 1991). President Bush's press secretary, Marlin Fitzwater, stated that the ADA is "one of the most important civil rights acts of this century...[/I]t is a dramatic piece of legislation that brings millions of Americans under the protection of the civil rights laws."
5 For example, the Rehabilitation Act, 29 U.S.C. §§ 793-94c (1988) applies only to employers and state or federal agencies that receive federal funding. The ADA, however, covers a much larger number of employers and will thus provide equal employment opportunities to millions more disabled Americans. 42 U.S.C. § 12,111(2) (Supp. III 1991) (defining covered entity).
6 42 U.S.C. § 12,111(5)(A) (Supp. III 1991) defines employer as a:
   - person engaged in an industry affecting commerce who has 15 or
will present new challenges to the airline industry's hiring practices.\textsuperscript{7}

Concerned with the tremendous barriers facing the disabled worker, Congress set out to develop comprehensive legislation aimed at setting a national mandate to prevent unjust discrimination against the disabled in the workforce.\textsuperscript{8} A poll conducted by Louis Harris Associates revealed that of the estimated forty-three million disabled Americans, two-thirds of those between the ages of sixteen and sixty-four are not working.\textsuperscript{9} Two-thirds of the group of nonworking disabled state that they would work...
The publication of the Equal Employment Opportunity Commission (EEOC) regulations subsequently promulgated by the Equal Employment Opportunity Commission (EEOC). Part I also discusses issues surrounding disabled workers and the risk of harm and defines which disabilities are covered by the ADA. Part II applies the ADA to current airline employment practices for pilots and flight attendants, focusing on medical examinations and the Human Immunodeficiency Virus (HIV). Part III summarizes the ADA's legal requirements.

I. OVERVIEW OF THE ADA

Title I of the ADA sets out the legal requirements and the scope of the ADA for employment purposes. Stated generally, this title of the ADA prohibits a covered entity from discriminating against a qualified individual with a disability in the job application process, the hiring, the

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10 Id.
12 42 U.S.C. § 12,111(2) (Supp. III 1991) (defining the term "covered entity" as an employer, employment agency, labor organization, or joint labor-management committee). Id. Section 12,111(5)(A) defines employer. The ADA defines two classes of employers. The first phase of the ADA, effective two years after the effective date of the ADA (July 26, 1992), includes employers who employ 25 or more employees "for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." Id. The second phase, effective July 26, 1994, lowers the number of employees to 15. 29 C.F.R. § 1630.2(e) (1993).
13 42 U.S.C. § 12,111(8) (Supp. III 1991). This section defines "qualified indi-
advancement, or the discharge of employees, and in other aspects of employment. An important inquiry in determining discrimination is an employer's failure to make reasonable accommodations for the disabled employee. The term "reasonable accommodations" includes modification of existing facilities to allow access and use by disabled individuals. Additionally, the employer may be required to redefine or modify job responsibilities.

Congress provided for the implementation of the ADA, and attempted to quiet the fears of increased ADA litigation, by specifically adopting, wherever consistent, current standards developed under the Rehabilitation Act. The Rehabilitation Act first adopted the concept of reasonable accommodations.

The first issue under the ADA analysis is whether an individual has a disability as defined in the Act or in regulations promulgated by the EEOC. The second issue is whether that individual can perform the essential functions of the position. If the individual cannot perform the individual with a disability" as "an individual with a disability who, with or without reasonable accommodations, can perform the essential functions of the employment position that such individual holds or desires." Additionally, this section considers the employer's estimation of essential job functions, and considers written job descriptions as evidence of this estimation.

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14 Id. § 12,112(a).
15 Id. § 12,111(9).
18 This goal has to date failed. The EEOC reported that ADA filings have exceeded initial projections and are growing at a steady rate. BNA Daily Labor Report, Current Developments Section (Mar. 29, 1993). In addition, ADA cases now account for approximately 13% of the EEOC's caseload. Id.
essential functions, the final inquiry is whether the employer can provide reasonable accommodations.

A. Determining Disabilities under the ADA

Congress used the term disabled individual in the ADA instead of handicapped individual, which was used in the Rehabilitation Act. This change in terminology represents Congressional intent to destroy stereotypical and emotional barriers that face the disabled and the choice of disability groups.\(^{20}\) The two terms have essentially the same meaning under each statute, but Congress made the change to signal a change in attitude toward the disabled.\(^{21}\) In keeping with its policy to mirror the Rehabilitation Act whenever possible, Congress adopted its definition for disability, although the ADA contains slightly different phraseology.\(^{22}\) Under the ADA, the term disability covers a broad range of physical and mental impairments.\(^{23}\)

In order to satisfy the statutory requirement of an individual with a disability, an individual must satisfy one part of a three element test: (1) “a physical or mental impairment that substantially limits one or more of the major

\(^{20}\) H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 50-51, reprinted in 1990 U.S.C.C.A.N. 303, 332-33. Further, the ADA protects from discrimination persons who associate with individuals who have a disability. 42 U.S.C. § 12,112(b)(4) (Supp. III 1991) (defining discrimination as "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association"). Congress discovered that family members of the disabled often experience discrimination and confinement similar to that of the disabled. H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 61, reprinted in 1990 U.S.C.C.A.N. 303, 343-44. The ADA prohibits uninformed or biased assumptions concerning ability to perform the job. Id. The ADA, however, does not require employers to provide reasonable accommodations for the family member. 1990 U.S.C.C.A.N. at 343-44. Additionally, if the employee fails to adequately perform a job because of the disabled relation, the employer may dismiss the employee. Id.


\(^{22}\) See 29 C.F.R. § 1630 app. (1993) (explaining § 1630.2(g)).

life activities of such individual;"24 (2) "a record of such impairment;"25 or (3) "being regarded as having such an impairment."26 This determination requires a fact-specific inquiry into the nature of the individual's disability. Temporary afflictions such as broken bones, strained muscles, or nonchronic diseases fail the substantially limiting test and do not qualify as disabilities.27

An employer's evaluation of a physical or mental impairment under the first part of the test is conducted without consideration of the effect of mitigating devices such as hearing aids and prosthetic devices.28 Normal physical characteristics, such as height or weight, which are not the result of psychological disorders do not qualify as disabilities.29 If an individual is limited in one or more major life activities, defined as "activities that the average person in the general population can perform with little or no difficulty," the ADA considers that person a disabled individual.30 Whether the disability substantially limits the disabled depends on more than the name attached to the affliction. Employers must engage in a case-by-case inquiry to determine the actual effect on the individual.31

The second element of the definition of disability is satisfied by producing medical, educational, or other records that show a history of an impairment substantially limiting a major life activity.32 This section of the test protects an

25 Id. § 12,102(2)(B).
26 Id. § 12,102(2)(A)-(C).
28 Id.
29 Id.
30 Id. See 29 C.F.R. § 1630.2(i) for examples of major life activities. The list includes walking, talking, motor skills, breathing, learning, and working. Id.
31 29 C.F.R. § 1630 app. (1993). Some disabilities, such as complications from AIDS, are inherently limiting to major life activities. Id. Factors to consider include, but are not limited to, the following: "(1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment." Id.
32 Id. Individuals classified as disabled under statutes with differing definitions of disabled, however, do not necessarily qualify as disabled under the ADA. Id.
individual exhibiting a long history of a limiting disability from discrimination.

The third part of the test is the broadest and protects individuals from prejudice and bias that employers may have toward a certain disability. If the individual is perceived by others to have a substantially limiting disability when in fact the disability only partially limits the person's major life activity, that condition is considered to be a disability under the ADA. The individual may satisfy the third part of the test if the individual does not have an impairment but is regarded as having one.

B. Reasonable Accommodations Under the Rehabilitation Act of 1973

This section of the comment discusses reasonable accommodations under the Rehabilitation Act and examines case law from that statute focusing on the specific requirements of reasonable accommodations under the ADA.

Section 504 of the Rehabilitation Act of 1973 introduced the legal concept of reasonable accommodations to American labor law. Since 1973, the courts have developed a significant body of case law that outlines the requirements of reasonable accommodations. Because the ADA specifically adopts section 504 case law, this comment section discusses the major cases under the Rehabilitation Act, and develops the modern theory of reasonable accommodation.

The Rehabilitation Act requires an employer to make reasonable accommodations in the work place that allow otherwise qualified employees to perform essential job

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35 Id.
34 Id. For example, if an employer reassigns an individual with a controlled high blood pressure to a less strenuous position because of unsubstantiated fears of heart attack, the employer is considered to have regarded that person as disabled. Additionally, an employer who discriminates against a disfigured or scarred employee because of fears of negative customer reactions has regarded the employee as disabled and has acted improperly. Id.

functions. The goal of section 504 is to provide equal opportunity to handicapped employees and to destroy surmountable barriers that face disabled workers on the job. It is important to understand that the statutory requirement to provide reasonable accommodations is not equivalent to an affirmative action program.

Regulations promulgated under the Rehabilitation Act provide examples of the types of reasonable accommodations contemplated under the ADA. These include the modification of facilities and the restructuring of work requirements to provide accessibility to handicapped persons. The regulations indicate that the list was not intended to be exhaustive and only provides examples of possible accommodations. An employer is not required to accommodate a handicapped worker if the required changes would impose an undue hardship on the employer. EEOC regulations require employers to consider several factors, which are set forth in the regulations, to determine whether an accommodation would pose an undue hardship. This determination requires a specific inquiry based on the individual facts and circumstances that surround each case.

This requirement illustrates the goal of reasonable accommodations: to ensure equal opportunity to the disabled rather than requiring employers to develop affirmative action programs. In contrast, affirmative ac-

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56 Id.
58 Id. § 1613.704(b). Changing work requirements is a broad term that includes the following: "job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions." Id.
59 Id. § 1613.704.
61 29 C.F.R. § 1613.704(c) (1993). Factors that an employer must consider are: (1) the size of the employer's business, including number of employees, types of facilities, and overall budget; (2) the composition and structure of the work force; and (3) the requirements of the proposed accommodation, and its total cost. Id.
tion would require employers to actively seek out and increase the numbers of disabled employees, set lower threshold testing requirements for the group, or to dedicate a specified number of positions to disabled employees. The reasonable accommodations requirement provides equal opportunity to the disabled while encouraging employers to remove existing and future barriers to disabled workers. Employers are to evaluate a disabled worker in relation only to the essential functions of the position sought. If the worker is unable to perform the essential functions of the position, the employer must then determine whether reasonable accommodations would allow that disabled worker to perform these functions. Reasonable accommodations are defined as those which do not impose an undue hardship. Employers are not required to change the essential nature of the job in order to hire disabled workers.

Employers may choose a nondisabled worker over a disabled one for legitimate reasons unrelated to the disability facing the disabled worker. For example, if two candidates for a secretarial job have different typing speeds, the employer is free to choose the applicant with the higher typing speed if higher typing speed is an essential function of the job. If a hearing-impaired applicant

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44 The Supreme Court addressed this confusing distinction in Alexander v. Choate, 469 U.S. 287, 300 (1985), by stating that affirmative action refers "to a remedial policy for the victims of past discrimination, while [reasonable accommodations] relates to the elimination of existing obstacles against the handicapped." Id. at 300 n.20.

45 29 C.F.R. § 1630.2(m) (1993); see id. § 1630.2(n) (for determination of essential functions).

46 See Strathie v. Department of Transp., 716 F.2d 227, 230 (3d Cir. 1983) (finding an accommodation unreasonable if the employer must change the essential function of the position or if the accommodation imposes undue costs).


48 Id.
and a candidate without a disability with the same typing speed apply for the job, however, the employer may not discriminate against the hearing-impaired individual solely because a reasonable accommodation may be required to enable the disabled individual to perform the job.\textsuperscript{49}

The Supreme Court first addressed the issue of reasonable accommodations in \textit{Southeastern Community College v. Davis}.\textsuperscript{50} In that case a nursing program denied admission to Davis, a hearing impaired nursing candidate. The Court determined that the candidate failed to meet all the requirements of the position because her hearing disorder prevented her from effectively communicating with instructors and patients.\textsuperscript{51} In reaching its decision, the Court determined that the regulations did not require the college to make extensive and costly modifications to its program in order to benefit Davis.\textsuperscript{52} Additionally, the Court stated that “[s]ection 504 does not refer at all to affirmative action,” and that failure to make accommodations, by itself, does not indicate discrimination.\textsuperscript{53} The Court noted, however, that “situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.”\textsuperscript{54}

In \textit{Alexander v. Choate}\textsuperscript{55} the Court again addressed the issue of reasonable accommodations. Acknowledging criticism of the Court’s failure to clarify the differences between affirmative action and reasonable accommodations in \textit{Davis}, the \textit{Alexander} Court helped clarify the dis-

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\item \textsuperscript{49} Id.; see also 29 C.F.R. § 1630.9 (1993).
\item \textsuperscript{50} 442 U.S. 397 (1979).
\item \textsuperscript{51} Id. at 407.
\item \textsuperscript{52} Id. at 410-11. The Court acknowledged the difficulty of determining the distinction between a discriminatory refusal to provide accommodations and a legal right to do so. \textit{Id.} at 412. As technology advances, however, it will be possible to provide accommodations to greater numbers of otherwise qualified individuals without imposing excessive costs and administrative burdens upon employers. \textit{Id.}
\item \textsuperscript{53} Id. at 410-12.
\item \textsuperscript{54} Id. at 412-13.
\item \textsuperscript{55} 469 U.S. 287 (1985).
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Affirmative action refers to "'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial' or that would constitute 'fundamental [alterations] in the nature of a program,' rather than to those changes that would be reasonable accommodations." The decision in *Alexander* helps clarify the important distinctions between an affirmative action and an equal opportunity program and aids in the implementation of the ADA.

In *School Board v. Arline* the Court provided further guidance on the duty to provide reasonable accommodations. The Court reinforced its previous holdings in *Davis* and *Alexander*, and clarified that the requirement of reasonable accommodations is not affirmative action:

Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies.

This decision sharpened the distinction between affirmative action and the affirmative obligation to provide reasonable accommodations. By the Supreme Court's own admission, the distinction is not always clear, but the concept of reasonable accommodations is an important element in achieving the goals of the ADA by removing the barriers to employment that face otherwise qualified disabled Americans.

### C. Reasonable Accommodations under the ADA

This section will examine the legal obligations under

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56 *Id.* at 300 n.20; see Donald J. Olenick, Note, *Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern*, 80 COLUM. L. REV. 171, 185-86 (1980).
57 *Alexander*, 469 U.S. at 300 (citations omitted).
59 *Id.* at 289 n.19.
the ADA by determining when an employer must provide reasonable accommodations. The section then discusses the undue burden analysis of the ADA. Finally, the section examines how to determine the essential functions of the position.

The requirements of reasonable accommodations as set forth above carry over to the ADA.\(^6^1\) The legislative history of the ADA clarifies Congressional intent that the ADA adopt the existing standards for reasonable accommodations developed under the Rehabilitation Act.\(^6^2\) Ambiguities that existed under the Rehabilitation Act, however, are also carried over.\(^6^3\)

The ADA obligates employers to determine whether a reasonable accommodation would allow an otherwise qualified disabled employee to perform a job.\(^6^4\) An employer's failure to make this determination or refusal to provide reasonable accommodations is considered illegal discriminatory behavior under the ADA.\(^6^5\) The ADA provides two exceptions to the reasonable accommodations requirement. The first exception is that unless the employee is a qualified individual with a disability as defined by the ADA, employers need not consider reasonable accommodations.\(^6^6\) The second is that an employer is not required to provide accommodations that would result in undue hardship to the employer.\(^6^7\)

\(^6^1\) See supra notes 35-43 and accompanying text.


\(^6^6\) 42 U.S.C. § 12,112(b)(5)(A) (Supp. III 1991). The ADA defines qualified individual with a disability as "an individual with a disability who, with or without reasonable accommodations, can perform the essential functions of the employment position that such individual holds or desires." Id. § 12,111(8).

\(^6^7\) Id. § 12,112(b)(5)(A).
1. When are Reasonable Accommodations Required?

The ADA does not explicitly define reasonable accommodations; rather the statute provides examples of the types of accommodations an employer must consider. Modeled after the Rehabilitation Act, the ADA requires employers to improve accessibility and usability of facilities through modification, to make changes in the nature of a job, and to provide devices to enable disabled workers to perform the essential functions of a job. Because the statutory requirements are not exhaustive, employers must perform highly individualized and fact specific inquiries into the nature and types of accommodations that a particular disabled worker may require.

Examples of required job restructuring or alteration of an essential job function include modifying work hours or computerizing records normally maintained manually. The EEOC considers reassignment of an employee from one position to another an option of last resort. Reas-

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68 Id. § 12,111(9).
69 Id. § 12,111(9)(A)-(B). The ADA states that: "reasonable accommodations" may include making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

70 Congress stated that the statutory list of reasonable accommodations was not a complete one. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 62, reprinted in 1990 U.S.C.C.A.N. 303, 344. Instead, the list is: intended to provided general guidance about the nature of the obligation. Furthermore, the list is not meant to suggest that employers must follow all the actions listed in each particular case. Rather, the decision as to what reasonable accommodation is appropriate is one which must be determined based on the particular facts of the individual case. This fact specific, case-by-case approach to providing reasonable accommodations is generally consistent with interpretations of this phrase under . . . the Rehabilitation Act.

72 Id.
assignment is generally required only for current employees.\textsuperscript{73} If reassignment is required, employers cannot force employees to accept reassignment to undesirable positions or facilities.\textsuperscript{74}

2. The Undue Burden Analysis

When drafting the ADA, Congress recognized the potentially high costs of accommodating disabled workers and intended that private employers bear the costs of providing equal opportunity to disabled workers.\textsuperscript{75} The undue hardship limitation, however, contains two exceptions to providing an accommodation in anticipation of financial difficulties that employers may experience.\textsuperscript{76} These two exceptions are: (1) undue burden analysis; and (2) the essential functions inquiry.

In order to determine whether a given accommodation imposes an undue hardship, employers may look to congressional intent, regulations written by the EEOC, and guidance from the Rehabilitation Act.\textsuperscript{77} An accommodation will pose an undue financial hardship if five factors are satisfied. These factors are as follows: (1) the cost of the accommodation taking into account outside funding and tax deductions; (2) the total financial resources of the

\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{76} Originally, Congress considered a much stricter standard: an unreasonable accommodation was one that threatened the continued existence of an employer's business. See Bonnie P. Tucker, The Americans with Disabilities Act: An Overview, 1989 U. ILL. L. Rev. 923, 927. Congress adopted the current definition of undue hardship as a result of protests from the private sector. Id. The legislative history states that an undue hardship is "an action that is unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program." H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 67, reprinted in 1990 U.S.C.C.A.N. 330, 349. Congress explicitly rejected the lesser standard required under Title VII accommodations for religious beliefs adopted in TWA v. Hardison, 432 U.S. 65 (1977) (holding that accommodations that require more than a de minimus cost are not required). 1990 U.S.C.C.A.N. at 350.
facility including the total number of employees and the effect of the facilities resources; (3) the complete resources of the company taking into account the overall size of the business and the total number of facilities operated by the company; (4) the type of operation of the company considering the size and structure of its workforce and the geographical relationship between its facilities; and (5) the effect of the accommodation on the individual facility including any potential impairment to employees performing their duties. The factors focus on the individual employer’s ability to bear the costs of the accommodation and avoid generic requirements of reasonable accommodations. Under this individualized, case-by-case determination, an accommodation that is reasonable for one employer may prove to be an undue hardship for another.

Nelson v. Thornburgh, a case decided under the Rehabilitation Act, explains the undue hardship analysis. In Nelson a blind Department of Public Welfare (DPW) employee brought a class action suit against the state of Pennsylvania under the Rehabilitation Act, alleging discriminatory action for failure to provide sighted readers as an accommodation. Before bringing the suit Nelson paid for the readers with funding received from social security benefits. The court analyzed four proposed accommodations: transposing forms into braille; printing manuals in braille; providing mini-computers to translate braille; and providing readers. The court determined that DPW failed to carry the burden of proving that Nelson’s proposed accommodation presented an undue hardship. The court applied the five factor test and con-

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81 Id. at 375.
82 Id. at 380.
cluded that the cost of hiring readers was modest.\textsuperscript{83} The court compared the cost of readers to the department's $300 million budget, the fact that many other employees could benefit from the program, and noted that DPW could implement the program with little disruption to present services.\textsuperscript{84} The court therefore concluded that the readers were a reasonable accommodation.\textsuperscript{85}

To successfully challenge the duty to provide accommodations under the undue hardship exception, the employer must show that the costs of accommodations would threaten the business's ability to maintain current production.\textsuperscript{86} The employer cannot rely solely on increased budgetary problems.\textsuperscript{87} Unfortunately, employers are provided little guidance to determine whether a given accommodation imposes an undue hardship.\textsuperscript{88} This potentially costly and time-consuming endeavor to individually determine each potential accommodation, represents one of the more difficult aspects of implementing the ADA. Employers must carefully consider the factors in light of each individual situation and rely as much as possible on guidance from Congress and decisions from the Rehabilitation Act.

\textsuperscript{83} Id.
\textsuperscript{84} Id. The court acknowledged the budget problems plaguing the state and conceded that an additional financial burden would be imposed with the decision. Id. The court, however, also recognized Congress's intent to provide equal opportunities to disabled workers. Id. The court believed that the social costs of not providing employment opportunities to the disabled far outweighed the burdens imposed by the required reasonable accommodations. Id.
\textsuperscript{85} Id.
\textsuperscript{86} Nelson, 567 F. Supp. at 380; see also 29 C.F.R. § 1630 app. (1993).
\textsuperscript{87} 29 C.F.R. § 1630 app. (1993).
\textsuperscript{88} An additional difficulty arises in the area of health benefit plans. Although the ADA places prohibitions on medical examinations, those restrictions do not apply to health insurers when classifying risks. 42 U.S.C. § 12,112(d) (Supp. III 1991). Accordingly, the ADA may require an employer to hire a disabled worker who is refused coverage under the employer's health benefits insurance program, thereby forcing the employer to cover the additional medical insurance costs or consent to increased rates. 29 C.F.R. §§ 1630.5, 1630.16(f) app. (1993). The issue of whether inflated medical insurance rates present an undue hardship is unresolved. Rubenstein, supra note 63, at 1.
3. Determining Essential Functions of the Position

The second limitation to the duty of providing reasonable accommodations is that the disabled employee must be capable of performing the essential functions of the position, with or without reasonable accommodations.\(^8\) The essential function limitation is consistent with the congressional mandate to provide equal opportunity to the disabled.\(^9\) Essential functions are defined as those "job tasks that are fundamental and not marginal."\(^9\) Employers must consider whether an employee can perform the essential functions at the time of request or application. Employers, however, may not discriminate based on potential future disabilities.\(^9\)

The EEOC has provided guidance to employers in determining essential job functions in the form of a list of factors that find a function essential if:

- the reason the position exists is to perform that function,
- the limited number of employees available among whom the performance of that job function can be distributed . . . [or] the function may be so highly specialized that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.\(^9\)

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\(^9\) See supra notes 43-60 and accompanying text discussing the distinction between affirmative action and reasonable accommodation.

\(^9\) H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 55, reprinted in 1990 U.S.C.C.A.N. 303, 337. Congress adopted this definition to "ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, i.e., non-marginal functions of the job in question." Id. For example, a policy that requires employees to hold drivers licenses, if driving is not part of the job, is a marginal requirement, and employers cannot exclude a disabled worker who could otherwise perform the essential functions. Id. However, Congress clearly stated its intent to allow employers to hire qualified workers, so long as employers fairly consider qualified disabled individuals. Id.


\(^9\) 29 C.F.R. § 1630.2(n) (1993); see also 42 U.S.C. § 12,112(a)-(b) (Supp. III 1991). When considering a job applicant, an employer could accommodate a disabled worker by reassigning marginal or nonessential job functions to other employees. 29 C.F.R. § 1630 app. (1993). The employer is not, however, required to reallocate essential functions of the job. Id. For example, the EEOC hypothesized that the ADA would not require an employer to provide a sighted reader to a
Regulations issued pursuant to the Rehabilitation Act and cases decided under that Act provide additional insight into the procedure for determining whether a function is an essential one. Additional factors under the ADA include the following: the employer's judgment of the essential nature of the function based on evidence such as written job descriptions; the amount of time required to perform the function; and past and current experiences of employees performing the same function. The initial inquiry requires the employer to determine whether employees actually perform the suggested essential function. An illusory or paper only written description will not provide sufficient justification for the definition of an activity as an essential function.

An employer must then determine whether modifying the job description changes the basic nature of the job. Under the Rehabilitation Act, the obligation to provide opportunities to the handicapped does not require employers to alter the essential nature of their business.

visually impaired security guard, since checking identification cards and other activities that require vision are essential functions. If required to provide such an accommodation, the reader assistant, rather than the disabled security guard, would be performing the essential nature of the position. Employers must determine essential functions on a case-by-case basis, and employers may use all relevant evidence in making this determination. However, the regulations instruct the courts to place more weight on the factors listed. This presents another difficulty with the ADA. Because of the loose requirements outlined by Congress and the EEOC, the remaining uncertainty will prove costly and impose risks of litigation.

96 See Southeastern Community College, 442 U.S. at 410. In that case, accommodating a hearing-impaired student would fundamentally alter the nature of Southeastern's training program and, therefore, refusal to modify is not required. Id. at 397. The strict standard set in Southeastern required Davis to qualify "all of a program's requirements in spite of this handicap." Id. at 405. The Court imposed this strict standard because of the unique physical and safety standards expected in the nursing profession. Id. at 397, 413.
The ADA, however, requires a highly individualized and fact-specific inquiry on a case-by-case basis. Employers may discover therefore that the ADA may require more changes in job functions than were required under the Rehabilitation Act.

The ADA does not require employers to develop written job descriptions for each position. Because courts are required to defer to employers’ job requirements if the description represents an accurate portrayal of the essential functions, the ADA encourages employers to develop written descriptions. The Sixth Circuit addressed the issue of the weight afforded an employer's written job description under the Rehabilitation Act in *Hall v. United States Postal Service.* As a result of a back injury, Hall requested reassignment from her letter carrier position to that of a distribution clerk. The written job description for the distribution clerk position required heavy lifting and frequent bending and kneeling. The employer found Hall medically unsuitable for the job during the application process because she could not perform the lifting requirements. The Sixth Circuit rejected the district court's conclusion that the employer's job description controlled. Instead, the court determined that a highly fact specific determination must be conducted by the court to decide whether the written descriptions accurately reflect the actual requirements of the job. The Sixth Circuit also noted that the district court had failed to determine

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99 See Arline, 480 U.S. at 287-89 (remanding the case for a specific inquiry into Arline's contagious disease).
100 29 C.F.R. § 1630.2 app. (1993). The EEOC stated that "the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards." Id. If an employer establishes defined production rates, additional justification will not be required, if the employer proves that the standards are actually imposed on its workers. Id. If, however, the disabled employee alleges that the employer chose a particular numerical standard in order to discriminate against the applicant, the employer must present a nondiscriminatory justification. Id.
101 857 F.2d 1073 (6th Cir. 1988).
102 Id. at 1079.
103 Id.
whether reasonable accommodations would permit Hall to perform the function.\textsuperscript{104} The court remanded the case to the district court with instructions to make a specific inquiry into the essential nature of the lifting requirement and to determine whether a reasonable accommodation existed.\textsuperscript{105}

In \textit{Nelson v. Thornburgh}\textsuperscript{106} the court determined that a visually impaired social worker who performed his job with the aid of sighted readers was qualified to perform the essential functions of the job if the State provided reasonable accommodations.\textsuperscript{107} The accommodation of providing a sighted reader did not require reassignment of an essential function and was therefore reasonable.\textsuperscript{108} The State did not hire the social worker for his seeing ability, rather for other skills including client counseling and processing. In this case, the court determined that the essential function of the job was not vision, but instead the ability to determine whether clients qualified for federal and state benefits.\textsuperscript{109}

\textbf{D. Disabled Workers and the Risk of Harm Under the ADA}

Concerns about risks that disabled individuals may impose upon third parties have been found to present legitimate considerations in today's world of widespread tort litigation. This is particularly the case in the airline industry where safety is of paramount concern because accidents may result in large scale catastrophes.\textsuperscript{110} Congress considered these questions when developing the ADA. A direct threat to others is a defense to alleged discrimina-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{104} Id.  
\item \textsuperscript{105} Id. at 1080.  
\item \textsuperscript{106} 567 F. Supp. 369 (E.D. Pa. 1983).  
\item \textsuperscript{107} Id. at 379.  
\item \textsuperscript{108} Id.  
\item \textsuperscript{109} Id. at 372.  
\item \textsuperscript{110} See 49 U.S.C. $\S$ 1421(b) (1988) (stating the airline's statutory duty to operate with the highest degree of safety).  
\end{itemize}
\end{footnotesize}
tion under the premise of legitimate business necessity.\textsuperscript{111} Although safety considerations are a part of business necessity and therefore a defense to discrimination, the inquiry requires a highly individualized and fact-specific study, conducted on a case-by-case basis.\textsuperscript{112}

The EEOC has also promulgated regulations addressing this issue under the ADA.\textsuperscript{113} These regulations provide that under the rubric of a business necessity, employers may establish qualification standards that "include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace."\textsuperscript{114} The ADA does not require airlines to hire a visually impaired pilot or a flight attendant confined to a wheelchair because of the unnecessary risk of harm. The ADA does place limitations, however, upon an employer's ability to test or screen for disabilities in the pre-offer context.\textsuperscript{115} As a result, employers must consider the actual threat to third parties and avoid stereotypes and misconceptions of an individuals disability.\textsuperscript{116} The ADA direct threat standard is defined as a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."\textsuperscript{117} By adopting the direct threat standard Congress meant to


\textsuperscript{112} Id.; see also Bryan P. Neal, Comment, The Proper Standard for Risk of Future Injury Under the Americans with Disabilities Act: Risk to Self or Risk to Others, 46 SMU L. Rev. 483 (1992).

\textsuperscript{113} 29 C.F.R. § 1630.2(r) (1993). A "direct threat" is defined as:

[A] significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job.

Id.

\textsuperscript{114} Id. § 1630.15(b)(2).

\textsuperscript{115} See 42 U.S.C. § 12,112(d) (Supp. III 1991) and discussion infra part II.A.


eliminate determinations that an employee was a danger to others which were not based on "objective evidence about the individual involved." An "elevated risk of injury" which is not based on "actual proof of a significant risk to others" is therefore insufficient to satisfy the direct threat test. This standard represents Congress's intent to remove discriminatory barriers based on fears and stereotypes lacking an objective and factual basis. The direct threat test requires employers to conduct highly individualized and fact-specific inquiries into the nature of an individual's disabilities, as well as the objective, individualized threat of harm to third parties. If, after an objective evaluation an employer determines that an individual will pose a significant, direct threat to others, the employer must then consider whether reasonable accommodations will minimize that risk.

In addition, the ADA provides that the significant, direct threat must be to others, not to the employee.

Additionally, the regulation sets forth the following factors to evaluate a direct risk:

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.


Thus, an employer may not base hiring decisions on paternalistic views of what is best for the employee. Instead the employee, if otherwise capable of performing the job and not a significant risk to others, is entitled to decide what is in her own best interests. Overprotection of the disabled based on misinformation is perhaps the greatest barrier standing between the disabled and equal opportunities in society. Congress explicitly stated that disabled Americans “continually encounter various forms of discrimination, including . . . overprotective rules and policies.”

Cases interpreting the Rehabilitation Act provide additional guidance in this area. In Mantolete v. Bolger a job applicant suffering from epilepsy alleged discriminatory hiring practices by the United States Postal Service (USPS). Fearing that Mantolete’s disability would pose a risk to others, the USPS had refused to hire her. The Ninth Circuit held that an objective evaluation of the potential threat based on the individual’s past medical and work history was required. The court rejected the employer’s conclusion that a risk to others existed because

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125 767 F.2d 1416 (9th Cir. 1985).

126 Id. at 1422.
the employer based the determination solely on medical reports and the subjective beliefs of the employer.\textsuperscript{127} The court rejected the lesser test of elevated risk and required that the employer show "a reasonable probability of substantial harm."\textsuperscript{128}

In \textit{School Board v. Arline}\textsuperscript{129} the Supreme Court applied the stricter standard ultimately adopted by Congress in the ADA.\textsuperscript{130} In this case the Court found that Arline, infected with the highly contagious disease of tuberculosis, satisfied the requirements of a disabled individual. The court further found that although her disease posed a significant health threat to others, her employer was still required to determine whether reasonable accommodations would lessen that threat.\textsuperscript{131} The Court adopted the significant and direct threat standard, thus strengthening the employer's duty to make individualized findings of fact for each disabled individual.\textsuperscript{132}

Employers are permitted to consider safety related issues when hiring and retaining disabled workers under the ADA. Employers must scrutinize specific evidence on a case-by-case basis, however, to determine whether the individual will pose a significant and direct threat to others. This requirement furthers the goal of opening the doors of employment to disabled individuals by casting aside prejudices and preconceived notions that may cause employers not to hire the disabled.

In conclusion, employers must carefully determine and

\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} 480 U.S. 273 (1986).
\textsuperscript{130} Id. at 287 n.16. \textit{But see} Doe v. Region 13 Mental Health — Mental Retardation Comm'n, 704 F.2d 1402 (5th Cir. 1983). In Doe the court adopted a rational basis test to evaluate the perceived risk. \textit{Id.} at 1409-10. The Supreme Court and the ADA explicitly reject this standard.
\textsuperscript{131} Id. at 287-88.
\textsuperscript{132} Id. at 287. In a relevant part of the opinion the Court stated that an individualized inquiry "is essential if \textsection 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks." \textit{Id.}
document essential functions for each job position because the courts rely on written job descriptions in determining the essential functions of a position. The ADA requires a highly individualized and fact specific inquiry into each individual’s ability to perform essential job functions according to the employer’s ability to provide reasonable accommodations. Finally, although the ADA imposes high standards, an employer is not required to hire or retain unqualified individuals.

II. APPLICATION OF THE ADA TO THE AIRLINE INDUSTRY

This section applies the provisions of the ADA to the airline industry. First, this section evaluates the legal requirements of medical examinations and applies these standards to both pilots and flight attendants. The section then discusses the employment issues concerning the human immunodeficiency virus (HIV) for flight attendants and pilots.

The airline industry is not specifically exempted from the employment provisions of the ADA. It is difficult to predict the exact changes that the ADA will impose on the industry. Six months after the effective date of the ADA, the contours and requirements of the ADA remain unclear for virtually every category of American business.

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133 The legislative history expresses Congress’s intent to exclude the airline industry from the public access provisions of Titles II and III. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 1, at 36, reprinted in 1990 U.S.C.C.A.N. 267, 280. Congress excluded the airline industry from these provisions in order to avoid statutory overlap with the Air Carrier Access Act, 49 U.S.C. § 1374(c)(1) (1988), which requires the airlines to make airplanes and airports accessible to the disabled. Id.


A. MEDICAL EXAMINATIONS

New standards are now applicable to applicant and employee medical examinations. This section first describes existing hiring practices in the airline industry and then presents the likely ADA modifications to those practices. In addition, this section examines the ways in which HIV-related illnesses challenge the airline industry.

The physical and psychological capacity of applicants for airline pilot positions are critical hiring criteria for commercial airlines. Airline pilot hiring is also affected by the legislative requirement that airlines operate with "the highest possible degree" of care and safety.\(^{136}\) It is currently uncertain whether the courts will give the airlines the same broad discretion to determine hiring policies under the ADA as they did under the Age Discrimination in Employment Act of 1967.\(^{137}\) The ADA imposes new restrictions on medical examinations that will affect pilot and flight attendant hiring procedures.\(^{138}\)

1. Pilots

All commercial airline pilots must initially qualify for a Class I flight certificate from a certified Federal Air Surgeon.\(^{139}\) In addition to this minimum FAA requirement, each airline normally establishes additional hiring criteria and medical qualifications for its candidate pilots. Pilot hiring procedures of the airlines have included procedures that now would violate the provisions of the ADA.


\(^{139}\) 14 C.F.R. § 67.1-.31 (1993); see also 49 U.S.C. app. § 1422(a) (1988) (empowering the Secretary of Transportation to issue airman certificates). 14 C.F.R § 67.1-.31 contains the minimum physical standards for pilots in the areas of vision, equilibrium, mental, neurological, cardiovascular, and other general medical conditions. 14 C.F.R § 67.13-.31 (1993). Additionally, the FAA vested sole authority in the Federal Air Surgeon to determine whether an airman is medically qualified. See Foster v. United States, 923 F.2d 765, 768 (9th Cir. 1991).
Robinson v. American Airlines, Inc.\textsuperscript{140} provides an example of one hiring procedure for airline pilots. In Robinson the court reviewed the American Airlines (American) pilot hiring procedures and ruled that the procedures were consistent with the Airline Deregulation Act of 1978.\textsuperscript{141} American employed a three-phase process to consider new pilots. Phase I included an interview and physical examination.\textsuperscript{142} Applicants were required to satisfy all of American's phase I requirements in order to advance to phase II.

Phase II consisted of a comprehensive medical examination, including a personality test, additional interviews, and flight simulator testing. American rated all phase II applicants on a scale of one to five based on the medical criterion. Only those applicants who received a rating of four or five were selected for participation in phase III. Phase III included additional interviews and skill testing. American offered permanent positions only to those candidates who successfully completed all three phases of the process.

In addition to the three-phase application process, American's hiring policy included an age thirty guideline that discouraged the hiring of new pilots over the age of thirty.\textsuperscript{143} American claimed that this guideline was in response to the Federal Aviation Administration's (FAA) policy of mandatory retirement at age sixty.\textsuperscript{144} American argued that in order to fulfill its statutory duty to provide

\textsuperscript{140} 908 F.2d 1020 (D.C. Cir. 1990).
\textsuperscript{141} 49 U.S.C. app. § 1552 (1988). The Airline Deregulation Act is not directly relevant to this comment. This case is included to present the hiring procedures of American Airlines. These procedures will later be compared to the requirements of the ADA.
\textsuperscript{142} Robinson, 908 F.2d at 1022. The examination tested the prospective pilot's blood pressure, height, weight, and other physical characteristics. \textit{Id.}
\textsuperscript{144} 14 C.F.R. § 121.383(c) (1993). The court upheld the age 60 rule in O'Donnell v. Shaffer, 491 F.2d 59 (D.C. Cir. 1974).
the highest degree of safety, the intensive training program requires an average of sixteen years to attain a Captain position. The airline also argued that if it were forced to hire middle-aged pilots the experience level of older pilots would decrease, thereby compromising passenger safety. The court accepted American's reasoning and upheld the guideline as a bona fide occupational qualification (BFOQ).

The court noted that American's hiring policies were typical in the airline industry.

The next section scrutinizes the provisions of the ADA regarding medical examinations. The ADA states that "a covered entity shall not conduct a [preemployment] medical examination... of a job applicant [to determine] whether such applicant is an individual with a disability" unless "an offer of employment has been made to a job applicant." Section 12111(d)(3) allows employers to extend conditional offers to job applicants based on the results of a medical examination if the employer satisfies

147 Murnane, 482 F. Supp. at 147.
148 The ADA permits an employer to maintain a drug and alcohol-free workplace. 42 U.S.C. § 12,114 (Supp. III 1991). The following is a general overview of the ADA's drug and alcohol policy: (1) The ADA does not consider a test for illegal drug use a medical examination; (2) A person currently using illegal drugs is not an "individual with a disability" under the ADA; (3) Prohibition of drug and alcohol use is not a violation of the ADA; (4) Testing for illegal drug use is allowed under the ADA; (5) The ADA prohibits discriminating against a rehabilitated drug addict; (6) The term "individual with a disability" includes a person who is an alcoholic; (7) An employer may discipline, discharge, or deny employment to an alcoholic whose alcohol use impairs job performance; (8) Employees using drugs or alcohol may be required to satisfy the same performance standards as those set for other employees. Id. § 12,114(a)-(d).
three conditions. First, the employer must subject all incoming employees to the examination "regardless of disability." Second, the employer must keep all medical information confidential. Third, the employer cannot use the results of the examination inconsistently with the ADA. Additionally, employers can require post-employment medical examinations to determine an employee's ability to perform job-related functions, as long as the results are used consistently with the ADA.

Little doubt exists that physical and psychological fitness are necessary requirements for all airline pilots. Courts have traditionally granted airlines and other travel industries great discretion in determining policies intended to assure passenger safety.

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151 Id.
152 Id. § 12,112(d)(3)(A). The ADA allows employers to classify groups of employees and require medical examinations only for certain groups. 29 C.F.R. § 1630.14(b) app. (1993); see also EQUAL OPPORTUNITY EMPLOYMENT COMMISSION, TECHNICAL ASSISTANCE MANUAL FOR THE AMERICANS WITH DISABILITIES ACT § VI-3 (1992) [hereinafter TECHNICAL MANUAL]. For example, the ADA would permit an airline to limit the medical examination requirement to pilots, if the airline included all pilots. Philip L. Gordon, The Job Application Process After the Americans with Disabilities Act, 18 EMPL. REL. L.J. 185, 189 (1992).
155 29 C.F.R. § 1630.14(c) (1993). Medical inquiries for employees "must be job related and consistent with business necessity." TECHNICAL MANUAL, supra note 152, § VI-12. Additionally, "the scope of the examination must also be job-related." Id. The ADA permits employer-sponsored "wellness" and health screening programs providing that: (1) Program participation is voluntary; (2) All information obtained is kept confidential according to requirements of the ADA; and (3) The employer does not use the information for discriminatory purposes. Id. § VI-15.
157 See Himburg v. NTSB, 930 F.2d 33 (10th Cir. 1991); Kirkendall v. Busey, 922 F.2d 654, 657 (11th Cir. 1991); Baker v. FAA, 917 F.2d 318, 319 (7th Cir. 1990), cert. denied, 499 U.S. 936 (1991); Meik v. NTSB, 710 F.2d 584, 585 (9th Cir. 1983).
can Airlines, Inc., for example, the court held that an airline "is free to impose more stringent requirements" than the minimum requirements promulgated by the FAA. The court noted that American implemented the more stringent physical requirements to reduce the risk of pilot incapacitation during flight. The court found that American had therefore acted consistently with the statutory obligation to operate with its "highest possible degree of care." In Murnane v. American Airlines, Inc. the court stated that "the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated most safely." The court refused to substitute its judgment for that of the airline "in a cause presenting safety as the critical element." The court noted that safe is not sufficient for the passenger who expects the safest possible airline service.

Because airline safety remains a critical concern of both the government and the private air carriers, the rationale followed in these cases will arguably carry over to the ADA. Two unique characteristics of the ADA, however, require extra attention from the airline industry. The first is the ADA's focus upon the individual in order to eliminate broad stereotypes of the disabled. Therefore, under the ADA, before rejecting a candidate pilot's application on the basis of a direct threat to the safety of others, an airline must perform an individualized fact specific inquiry into the circumstances of that particular individual. The airline must document a significant current risk to

159 Id. at 1023.
160 Id.
161 Id. (emphasis added).
163 Id. at 101.
164 Id.
165 Id.
166 The EEOC stated that airlines can comply with the medical testing required by the FAA and not violate the ADA. TECHNICAL MANUAL, supra note 152, § VI-5, 6.
167 Id. § IV-11.
others based on concrete medical evidence,\textsuperscript{168} evaluate the individual pilot's physical and mental conditions,\textsuperscript{169} and, most importantly, determine if a reasonable accommodation will reduce the direct threat.\textsuperscript{170} Thus, if the airlines justify their procedures with a passenger safety rationale, they must rely on established medical evidence and perform individualized inquiries.\textsuperscript{171}

The second limitation centers on the ADA's requirement that an employer base a risk to others on a current risk and not a speculative future risk.\textsuperscript{172} This requirement may present difficulties if, under pre-ADA policies, an airline routinely rejected candidates with deteriorating physical conditions which were satisfactory at the time of testing. In this situation, the candidate pilot does not represent a direct threat at the time of testing. The pilot will only cross the significant risk threshold outlined by the EEOC in the future as the pilot's physical condition deteriorates.\textsuperscript{173} A candidate pilot in this situation may suc-

\textsuperscript{168} Id. Employers must "identify the specific behavior that would pose the 'direct threat'" if the perceived risk arises from psychological disabilities. Id. Sources of objective evidence include: information from the individual; experience of the individual in prior employment situations; and documentation from experts in the disability area or from doctors who have direct knowledge of the individual's condition. Id. \S IV-12.

\textsuperscript{169} Id. \S IV-11-12. Employers must base the direct threat analysis on "objec-
tive, factual evidence related to that individual's present ability to safely perform the essential functions of a job. It cannot be based on unfounded assumptions, fears, or stereotypes about the nature or effect of a disability or of disability gener-
ally." Id. (emphasis in original).

\textsuperscript{170} See supra notes 110-32 and accompanying text.

\textsuperscript{171} In Murnane v. American Airlines, Inc., 667 F.2d 98, 101-02 (D.C. Cir. 1981), American conceded the economic benefit of hiring younger pilots who would serve for a longer period of time as a Captain. The court, however, concluded that the collateral economic effect derived from the policy was an insufficient rea-
son to declare the policy invalid when compared to the substantial safety benefits derived from the policy. Id. at 101 n.6. In the ADA context, any collateral bene-
fits incidental to hiring nondisabled pilots are arguably not a factor when evaluat-
ing the reasonableness of an employment policy decision.

\textsuperscript{172} 29 C.F.R. \S 1630.2(r) app. (1993). The risk can only be considered when it poses a significant risk, i.e., high probability of substantial harm; a speculative or remote risk is insufficient.

\textsuperscript{173} TECHNICAL MANUAL, supra note 152, \S IV-11. The EEOC guideline cited an example of a deteriorating back condition that may worsen over time as an insuffi-
cient "indication of imminent potential harm." Id.
cessfully argue that the airline could provide a reasonable accommodation by allowing frequent medical checks to monitor the condition. Accordingly, if an airline rejects a disabled pilot candidate, the airline must document both the medical theories relied upon as well as the individual symptoms of the pilot. Additionally, all medical hiring policies should contain references to safety considerations.

The hiring policies outlined in *Robinson* and *Murnane* raise several issues under the current interpretations of the ADA. First, the three-phase process may violate the ADA’s blanket prohibition on preemployment medical testing since American conducts the medical and psychological examinations before extending offers. The prohibition on preemployment testing will clearly affect the competitive hiring policy implemented at American. Instead of factoring the results of medical examinations into the competitive analysis, the ADA may require American to postpone medical testing until after extending a conditional offer to pilots. American may have to limit its preemployment testing to areas such as flying skills and other nonmedical job requirements.

The second issue relates to American’s policy of imposing medical requirements above those required by the FAA. In *Robinson* the court granted broad discretion to the airline in choosing the safest policies for the protection of its passengers. The court based this finding on a safety rationale. Under the ADA, however, unsubstantiated claims of a threat to third persons are insufficient. Instead, to comply with the ADA, American should document the precise medical rationale behind the heightened requirements. The ADA requires employers to avoid stereotypes by basing hiring decisions on the

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174 See supra notes 140-47 and 162-65 and accompanying text.
177 Id.
178 Id.
179 TECHNICAL MANUAL, supra note 152, § IV-10.
facts and not the myths of hiring the disabled.\textsuperscript{180} While airlines may still cite physical condition as a critical consideration in hiring decisions, the ADA requires the airlines to consider all the facts and focus on the individual.\textsuperscript{181} Pilots play a critical role in airline safety, and the courts will arguably allow the airlines considerable discretion in establishing pilot testing requirements intended to maximize safety.

2. Flight Attendants

Courts may view employment restrictions on flight attendants under a narrower standard than the broad discretion allowed in pilot hiring. Flight attendants play a role in passenger safety only in the event of an accident. Pilot responsibility for safety, however, begins before the flight departs, and does not end until after all the passengers deplane.

The airlines in the \textit{Murnane} case relied upon the sixteen-year training period for a Captain to justify hiring only younger pilots.\textsuperscript{182} This argument would fail if applied to flight attendants under the ADA. First, the responsibilities of a flight attendant are not parallel to those of a pilot. In addition to providing for the safety of the

\textsuperscript{180} See supra notes 8-10 and accompanying text. The Fifth Circuit, in the case that set the framework for the age 40 BFOQ under the ADEA, summarized its rationale for granting broad discretion to the busing industry. \textit{Usery v. Tamiami Trail Tours, Inc.}, 531 F.2d 224, 238 (5th Cir. 1976).

[T]he employer must be afforded substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb. The employer must of course show a reasonable basis for its assessment of risk of injury/death. But it cannot be expected to establish this to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound. Priceless as is a single life in our concept of the value of human life and our undoubted unwillingness ever to approve a practice which might kill one, but not, say, twenty, we think the safety factor should be evaluated in terms of the possibility... of injury/death.

\textit{Id.}

\textsuperscript{181} See supra note 70 and accompanying text.

passengers, flight attendants also perform a service function - serving meals and drinks, and providing for passenger comfort. Flight attendants act more often in the service role than in the safety function. Additionally, the training period of a flight attendant is dramatically shorter than the pilot training program.\textsuperscript{183}

Second, the FAA has neither promulgated strict medical requirements nor regulated flight attendants in the manner that it has pilots.\textsuperscript{184} The scarcity of federally mandated rules demonstrates that the FAA is less concerned with flight attendant regulations than with pilot regulations.\textsuperscript{185} One important FAA regulation sets the minimum number of flight attendants on a given type of aircraft based on an evacuation requirement.\textsuperscript{186} This requirement, however, is only a minimum requirement, and the airlines inevitably provide additional flight attendants to promote efficient passenger service.\textsuperscript{187}

\textsuperscript{183} The safety advantages achieved by training flight attendants to handle emergency situations are not meant to be underemphasized nor are the contributions of flight attendants in exigent circumstances intended to be derided. Rather, this discussion highlights the differing ADA legal requirements between pilots and flight attendants.


\textsuperscript{185} Perhaps one explanation for this difference is that the FAA attributed 90\% of all airline accidents to pilot error. Murnane v. American Airlines, Inc., 482 F. Supp. 135, 147 (D.D.C. 1979), aff'd, 667 F.2d 98 (D.C. Cir. 1981), cert. denied, 456 U.S. 915 (1982). Instead of federally mandated requirements, each airline establishes independent hiring requirements for flight attendants. For example, the Fourth Circuit's opinion in Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 365 n.2 (4th Cir. 1980), cert. denied, 450 U.S. 965 (1981), included a description of the physical activities, emergency duties, and working conditions of Eastern's flight attendants. The physical activity list included lifting, prolonged standing, bending, and kneeling. \textit{Id.} In an emergency situation, flight attendants are required to lift out emergency exit windows, handle a 120-pound life raft, assist passengers in evacuation, and handle psychological reactions to hijacking. \textit{Id.} The working conditions list was far more extensive and more typical of everyday flight attendant duties. These duties included providing extra care to passengers, enduring pressurized cabins, working long hours, dealing with temperature extremes, handling light to severe turbulence, and complying with irregular work schedules. \textit{Id.}

\textsuperscript{186} 14 C.F.R. § 121.391 (1993). The regulation requires the flight crew to evacuate the airplane in less than 90 seconds. \textit{Id.} § 135 app. A.

\textsuperscript{187} 14 C.F.R. § 121.391 (1993) requires air carriers to provide a minimum of one flight attendant per 50 passenger seats.
Although the safety burdens placed on flight attendants are considerably less than those burdens facing pilots, certain characteristics are arguably essential functions of the flight attendant’s job description. For example, in case of an emergency airplane evacuation, flight attendants are often required to open the over-wing emergency exits. This function generally requires the flight attendant to operate the release levers on the door, remove the door from its hinged position, lift the door over a row of seats, and place the door in the seat row behind the emergency exit. Accordingly, flight attendants, in order to perform this task, should, for example, possess a moderate level of strength and not suffer from back problems that prevent lifting heavy objects.

An airline should comply with the following ADA procedures if the airline requires flight attendants to lift heavy objects. First, the airline’s position description should define the ability to lift heavy objects as an essential function in a written job description and define the type, weight, and expected duration of the lifting requirement. Second, the ADA permits the airline to administer a pre-offer agility test to determine physical qualifications for essential job functions. The ADA distinguishes between a pre-offer agility test and the prohibited pre-offer medical examination on the grounds that the former does not require a medical diagnosis. Third, the airline can extend a conditional offer to the candidate flight attendant and, only at this time, perform additional medical testing to determine whether the appli-

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188 Although the seat back instruction card explains the emergency exit door operation, passengers are often uninformed on the operation of the doors or are unable to provide effective assistance. See Burwell, 633 F.2d at 366 (“During eight emergencies since 1954 flight attendants were required and did in fact perform practically all of the emergency procedures”); see also Harriss, 437 F. Supp. at 421.

189 An emergency exit door weighs between 75 and 100 pounds. Harriss, 437 F. Supp. at 421.

190 See supra notes 89-109 and accompanying text; Technical Manual, supra note 152, § II-19.


192 Id.
cant can adequately perform the essential job functions.\textsuperscript{198}

Finally, and most importantly, the airline must determine whether an applicant who fails the agility or medical test could safely perform the job with a reasonable accommodation.\textsuperscript{194} The direct threat analysis that applies to pilots will arguably fail in the flight attendant context because the risk of substantial harm is too remote and speculative.

\section*{B. Human Immunodeficiency Virus: Hiring and Communicable Diseases}

A presidential committee has determined that widespread discrimination exists against those infected with HIV.\textsuperscript{195} This discrimination may have serious repercussions on the worldwide effort to control the spread of the disease.\textsuperscript{196} Accordingly, Congress explicitly defined persons infected with the HIV virus and those suffering from AIDS as disabled under the ADA.\textsuperscript{197}

\subsection*{1. Flight Attendants}

It is clear that an airline could not refuse to hire a flight attendant infected with HIV by relying on a public health rationale since it is unlikely that infection could result.\textsuperscript{198}

\begin{footnotesize}
\textsuperscript{193} See supra notes 89-103 and accompanying text.
\textsuperscript{194} See supra notes 61-67 and accompanying text.
\textsuperscript{196} 1990 U.S.C.C.A.N. at 313; see also AIDS Conferees Face the Scourge, 10,000 Global Experts Meet to Assess Fight Against HIV, Chi. Trib., July 19, 1992, at C21.
\textsuperscript{198} Technical Manual, supra note 152, § IV-11 (stating that "it is medically established that [HIV] can only be transmitted through sexual contact, use of infected needles, or other entry into a person's blood stream").
\end{footnotesize}
Congress provides for the removal of otherwise qualified disabled individuals from food-handling jobs in limited situations.\textsuperscript{199} Persons with communicable diseases included on an annual list published by the Secretary of Health and Human Services can be barred from food-handling jobs.\textsuperscript{200} The Department of Health and Human Services, however, does not include AIDS on the list of diseases transmittable through food.\textsuperscript{201} If the possibility of the spread of infectious diseases existed, the airline could provide reasonable accommodations to lessen the risk of infection by isolating infected flight attendants from all food-handling positions. In addition, the statutory duty to provide safe air service is directed toward air safety issues and not toward traditional public health issues.\textsuperscript{202}

2. Pilots

Although the ADA may bar an airline from denying employment to an HIV-infected flight attendant, the airline could arguably rely on the rationale used in \textit{Murnane v. American Airlines, Inc.}\textsuperscript{203} to exclude an HIV-infected candidate pilot. The airline would first rely on the statutory duty to use the highest degree of care for the safety of its passengers.\textsuperscript{204} Courts have traditionally given air carriers great latitude in determining the procedures to provide safe air transport, and the airlines could rely on the deferential language of courts as a starting point. Second, the

\begin{itemize}
\item \textsuperscript{199} See 42 U.S.C. § 12,113(d)(2) (Supp. III 1991); 29 C.F.R. § 1630.16(e) app. (1993).
\item \textsuperscript{200} 42 U.S.C. § 12,113(d)(2) (Supp. III 1991). Additionally, courts are deferential to local and municipal ordinances for removing infected persons from food-handling jobs if reasonable accommodations are unavailable. \textit{Id.} If local laws are unclear, the employer can rely on the direct threat standard. See supra part I.C.
\item \textsuperscript{201} See Diseases Transmitted Through the Food Supply, 56 Fed. Reg. 40,897 (1991).
\item \textsuperscript{203} See, e.g., Doe v. Department of Transp., 412 F.2d 674, 677 (8th Cir. 1969) (recognizing the focus on safety in § 1421).
\item \textsuperscript{204} 49 U.S.C. § 1421(b) (1988).
\end{itemize}
airline should document the intensive training program implemented to maximize safety and minimize pilot error. Documentation adds to the airline's claim that the adopted procedures are both necessary and the safest possible. Third, relying on medical facts detailing the life expectancy of an AIDS/HIV patient and citing the long and intensive training period required to become fully proficient as an airplane pilot, the airline would argue that pilots infected with the HIV virus will die sooner than expected, thereby lowering the average experience level in the cockpit. Consequently, the risk to passengers will increase because of decreased pilot experience level. The success of this type of argument will largely depend on how the courts interpret case law from the Age Discrimination in Employment Act, and how much deference the courts will grant the airlines when the safety of passengers is at stake.

IV. CONCLUSION

It is clear that the ADA will have a sweeping effect on airline employment practices. The definition of disability is sufficiently broad to include many classes of individuals. In fact, the ADA may be broad enough to include many classes of individuals not commonly considered disabled. It may take several years before the full breadth of the ADA is recognized. Equally poignant is the fact that the airline industry is within the grasp of the ADA. The legal requirements of the ADA coupled with its expansive legislative goals will arguably have a dramatic effect on candidate pilot and flight attendant hiring considerations.

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205 One apparent weakness in this argument is that because the potential number of pilots infected with AIDS is dramatically less than the number of pilots who inevitably age, the cumulative effect of employing only a few pilots with HIV is considerably lower.