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Employing the Alcoholic Under the Americans With Disabilities Act of 1990

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NOTES

EMPLOYING THE ALCOHOLIC UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990

The Americans with Disabilities Act of 1990[1] (ADA) has been described as the most sweeping civil rights legislation since the Civil War era.[2] In passing the ADA, Congress recognized the need to provide legal redress for those individuals who experience discrimination on the basis of a disability,[3] as well as the need to ensure "equality of opportunity, full participation, independent living and economic self-sufficiency" to the handicapped.[4] The Act focuses in large part on the elimination of employment discrimination.[5] Although the potential costs to employers of complying with the ADA may be substantial, proponents of the bill argue that "bringing millions of unemployed individuals into the productive, and taxpaying, workforce" will more than offset these costs.[6]

Congress modeled the employment provisions of the ADA on sections of the Rehabilitation Act of 1973 dealing with employment[7] and on regulations promulgated by the Department of Health and Human Services (HHS) under that Act.[8]

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1. Pub. L. No. 101-336, 104 Stat. 327 (to be codified at 42 U.S.C. §§ 12,101-213).

2. 135 CONG. REC. S10,714 (daily ed. Sept. 7, 1989) (statement of Sen. Hatch).

3. 42 U.S.C.A. § 12,101(a)(4) (West Supp. 1991).

4. *Id.* § 12,101(a)(8).

5. *Id.* §§ 12,111-117. The ADA also contains provisions regarding public services, *id.* §§ 12,131-165, public accommodations and services operated by private entities, *id.* §§ 12,181-189, and telecommunications services, 47 U.S.C.A. §§ 225, 611 (West Supp. 1991).

6. John P. Furfaro & Maury B. Josehson, *Proposed Disabilities Act and the Employer*, N.Y. L.J., Aug. 29, 1989, at 3, 6. This assumption by necessity is predicated on an expanding work force and a growing economy. All commentators do not agree with this vision of the future, and indeed some members of Congress expressed concern regarding the costs the ADA may impose on private employers. *See, e.g.*, 135 CONG. REC. S10,782 (daily ed. Sept. 8, 1989) (remarks of Sen. Humphrey) ("I am . . . concerned with the enormous hidden costs of this legislation."); 136 CONG. REC. E2943 (daily ed. Sept. 21, 1990) (remarks of Rep. Dannemeyer) ("Congress has not been kind to the owners and operators of small businesses across America.").

7. Pub. L. No. 93-112 §§ 501, 503-504, 87 Stat. 355, 390-91, 393-94 (codified as amended at 29 U.S.C. §§ 791, 793-794 (1988)). Section 794 provides in pertinent part:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving

Provisions of the Rehabilitation Act concerning employment apply to the federal government,[9] federal contractors,[10] and to those entities receiving federal grants or assistance.[11] Under the Rehabilitation Act, alcoholism constitutes a protected class of disability.[12] The ADA extends many of the requirements developed under

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> Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Id. § 794(a).

8. 45 C.F.R. § 84 & app. A (1990). These regulations implement § 504 of the Rehabilitation Act, which pertains to federal grantees. The Department of Labor promulgated regulations pursuant to § 503, pertaining to federal contractors. *See* 41 C.F.R. §§ 60-741.4 to .6 & apps. B, C (1990). The Equal Employment Opportunity Commission (EEOC) was responsible for drafting regulations implementing § 501, pertaining to the federal government in its capacity as employer. *See* 29 C.F.R. §§ 1613.701-.709 (1991). These regulations interpret the broadly worded mandates of the Rehabilitation Act. In the absence of explicit congressional direction, the responsible drafting agencies chose to employ principles of equal treatment first articulated under the civil rights statutes. For a detailed discussion of this process of drafting by analogy, see Mark F. Engebretson, Note, *Administrative Action to End Discrimination Based on Handicap: HEW's Section 504 Regulation*, 16 HARV. J. ON LEGIS. 59 (1979).

9. 29 U.S.C. § 791.

10. *Id.* § 793.

11. *Id.* § 794. For a comprehensive overview of *state* laws governing substance abusers in the workplace, see Morgan, Lewis & Bockius, *State-by-State Drug and Alcohol Testing Survey*, 33 WM. & MARY L. REV. 189 (1991).

12. For a thorough discussion of the history of the application of the Rehabilitation Act to alcoholics, see Marjorie S. Bertman, Comment, *Section 504 of the Rehabilitation Act of 1973: Protection Against Employment Discrimination for Alcoholics and Drug Addicts*, 28 AM. U. L. REV. 507 (1978-79). The author states: "The issue of inclusion of addicts in the definition of 'handicapped persons' received considerable attention throughout the rulemaking process." *Id.* at 511. Prior to signing proposed draft regulations explicitly including alcoholics and addicts as protected individuals, therefore, then secretary of Health, Education and Welfare (HEW) Joseph Califano sought an opinion from Attorney General Griffin Bell to determine whether Congress intended to include addicts and alcoholics under the terms of the legislation. *Id.* at 512. Based on the legislative history of the Rehabilitation Act, the Attorney General concluded that Congress did intend to include addicts and alcoholics in the definition of handicapped. *Id.* The Attorney General's interpretation, however, was not binding on either the HEW or the courts. *Id.* at 514-15. Moreover, ambiguities in the House Report's treatment of addicts raised some question as to their status under the Act. *Id.* at 515.

In 1978, Congress ended the dispute by passing amendments to the Act clearly stating that qualified alcoholics and addicts would receive protection from discrimination. *Id.* at 515-16. Congress limited the inclusion of addicts and alcoholics as protected classes in the following manner:

> For purposes of sections 793 and 794 as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

29 U.S.C. § 706(7)(B), *amended by* 29 U.S.C.A. § 706(8)(B)(v) (West Supp. 1991).

the Rehabilitation Act to the private employer,[13] including protection of alcoholics as handicapped individuals.[14]

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13. ADA employment provisions become effective two years after enactment. Pub. L. No. 101-336, § 108, 104 Stat. 337, provided for an effective date 24 months after its enactment on July 26, 1990. The first two years these provisions are effective, they extend to business entities employing 25 or more employees for 20 or more calendar weeks per year; thereafter the provisions extend to business entities employing 15 or more employees, 20 or more weeks per year. 42 U.S.C.A. § 12,111(5)(A) (West Supp. 1991). The employment provisions of the Act do not apply to the United States or Indian tribes, *id.* § 12,111(5)(B)(i), or to bona fide private membership clubs, *id.* § 12,111(5)(B)(ii).

14. *See* 42 U.S.C.A. § 12,114. In the Analysis section of the regulations implementing Title I of the ADA, the EEOC commented that disabled employees "includ[e] those disabled by alcoholism or drug addiction." Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726, 35,733 (1991) [hereinafter ADA Employment Regulations]. The protections Congress has afforded alcoholics under the ADA, however, are not unlimited. *See infra* notes 101-02 and accompanying text.

Neither Congress nor the implementing regulations have provided a definitive list of disabilities that will afford an individual the protections of the ADA. As defined in the ADA, a "disability" is "(A) a physical or mental impairment that substantially limits one or more of the major life activitites of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C.A. § 12,102(2). This language parallels almost exactly the language of the Rehabilitation Act of 1973. *See* 29 U.S.C. § 706(8)(B). HHS regulations implementing the Rehabilitation Act define "physical or mental impairments" as

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. § 84.3(j)(2)(i) (1990).

The Rehabilitation Act thus provides a broad definition of "disability." The legislation requires the courts to make a case-by-case analysis to determine if the Act applies to a given individual. The courts should require each alcoholic plaintiff to establish one of the three qualifying criteria, as is required of other petitioners. Courts considering claims of discrimination by alcoholics under the Rehabilitation Act, however, very often do not explicitly analyze whether a particular claimant has established eligibility under one of the three criteria. Instead, they apparently rely on what amounts to a per se definition of alcoholic-as-handicapped. *See, e.g.*, Traynor v. Turnage, 485 U.S. 535, 555 (1988) ("It is beyond dispute that petitioners, as alcoholics, were handicapped individuals covered by the Act.") (Blackmun, J., concurring in part and dissenting in part); Fuller v. Frank, 916 F.2d 558, 561 (9th Cir. 1990) ("Alcoholism is a covered handicap under this section [of the Rehabilitation Act]."); Crewe v. United States Office of Personnel Management, 834 F.2d 140, 141-42 (8th Cir. 1987) ("At the outset there can be little doubt that alcoholism is a handicap for the purposes of the Act. The Attorney General of the United States has so concluded . . . and the federal courts have concurred.").

The adoption of a per se definition of alcoholic-as-handicapped most likely resulted from the legal resolution of the debate over whether alcoholics should be covered by the Act at all, that is, from the Attorney General's specific conclusion that alcoholics were covered by the Act, 43 Fed. Reg. 2137 (1978), and the 1978 Amendments to the Act clarifying the conditions under which alcoholics would *not* qualify for coverage under the Act and which

Although Congress has explicitly stated that alcoholics qualify for handicapped status,[15] the practical ramifications of this classification continue to generate debate.[16] Continued uncertainty over the appropriate status of the alcoholic in our society reflects our inability to resolve the question of whether alcoholism is the result of a moral flaw or is merely a disease.[17]

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by negative inference indicated that alcoholics were generally covered by the Act, *see* Pub. L. No. 95-602, 92 Stat. 2955 (amending 29 U.S.C. § 706(7)(b)).

The limited commentary on alcoholics in the ADA and the implementing regulations does nothing to forestall such a per se view of alcoholic-as-handicapped. Neither the ADA nor the regulations emphasize that alcoholics, as any other claimants, must demonstrate on an individual basis that they are eligible for coverage under the Act under one of the three qualifying criteria. For a discussion of the application of the three criteria to alcoholics, see *infra* note 103 and accompanying text.

15. *See supra* note 12.

16. When Congress debated the ADA, several members expressed great concern regarding the continued inclusion of alcoholics as a protected class and the possible detrimental effects of this decision on employers. *See, e.g.*, 135 CONG. REC. S10,777 (daily ed. Sept. 8, 1989) (exchange between Sen. Coats and Sen. Harkin).

17. The foundation of the controversy over coverage of alcoholics as disabled is the disagreement in our society over the nature of alcoholism: is alcoholism voluntary, that is "willful misconduct," or involuntary, that is, a disease? If it is a voluntary condition, should society at large be responsible for its negative effects? If it is a disease like any other, however, should Congress deny alcoholics the benefits it extends to other individuals with handicapping conditions? The plurality and dissenting opinions in *Traynor*, 485 U.S. 535, illustrate nicely this ongoing debate. The petitioners in *Traynor* were alcoholics who did not use their G.I. Bill educational assistance benefits within the specified time limitations. *Id.* at 538. Veterans Administration (V.A.) regulations provided that an extension of the time limit was available if a veteran was unable to use the benefits due to " 'a physical or mental disability which was not the result of [his] own willful misconduct.' " *Id.* at 545 (quoting Pub. L. No. 95-202, Tit. II, § 203(a)(1), 91 Stat. 1429 (codified at 38 U.S.C. § 1662(a)(1) (1988))). The petitioners, however, were unable to take advantage of this extension because V.A. regulations defined primary alcoholism (that which is unrelated to an underlying psychiatric disorder) as willful misconduct. *Id.* at 546-47. The question was thus presented to the Court whether the V.A. had discriminated against the petitioners in violation of the Rehabilitation Act by denying them benefits on the basis of their handicap. In a plurality opinion, the Court found that § 504 of the Rehabilitation Act was not violated by the V.A.'s characterization of alcoholism as willful misconduct for the purpose of determining eligibility for extended educational benefits. *Id.* at 550-52.

In the view of the plurality, "[the petitioners] are not, in the words of § 504, denied benefits 'solely by reason of [their] handicap,' but because they engaged with some degree of willfulness in the conduct that caused them to become disabled." *Id.* at 549-50. The plurality also stressed that there is " 'a substantial body of medical literature that . . . contests the proposition that alcoholism is a disease, much less that it is a disease for which the victim bears no responsibility.' " *Id.* at 550 (quoting McKelvey v. Turnage, 792 F.2d 194, 200-01 (D.C. Cir. 1986)). Four members of the Court thus found a means to distinguish primary alcoholics from other disabled individuals, to wit, by assigning them fault for their disability.

In the view of Justice Blackmun, writing in dissent, "[I]t is not at all evident that an absolute correlation exists between the condition of primary alcoholism and . . . willful

This uncertainty, moreover, reflects the contradictions inherent in a legal system that tolerates the social use of some drugs[18] while penalizing the use of others. The use of alcohol has long enjoyed a special status in our legal system and individuals often are not held fully accountable for actions taken while under the influence of alcohol.[19] The legal system

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misconduct . . . ." *Id.* at 560 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun further noted that "[r]ecent medical research indicates that the causes of primary alcoholism are varied and complex, only some of which conceivably could be attributed to a veteran's will." *Id.* at 563 (footnotes omitted). For example, alcoholism might be due to genetic predisposition in the form of an inability to properly metabolize alcohol or psychological components that do not rise to the level of psychiatric disorders. *Id.* at 563-64 & nn.6, 8. Justice Blackmun was thus more willing to endorse the "disease model" of alcoholism.

The range of behaviors that can, depending on the view of the speaker, be defined as alcoholic behavior exacerbates the definitional problem. "[A]lcohol abuse reflects a multidetermined continuum of drinking behaviors whose determinants are differently weighted for different people and include culture, habits, social mores, and genes." GEORGE E. VAILLANT, THE NATURAL HISTORY OF ALCOHOLISM 17 (1983). Quantity and frequency of alcohol consumption cannot by themselves define alcoholism, *id.* at 21-22, nor can a single symptom define it, *id.* at 22. Alcoholics may exhibit a multitude of drinking behaviors, including near-constant inebriation, isolated evening drinking, binge drinking with extended periods of abstinence, or what others might believe to be controlled social drinking. *See id.* at 22-23. Moreover, genetically different types of alcoholism may exist, each of which produces a different form of the condition. *Traynor*, 485 U.S. at 563 (Blackmun, J. concurring in part and dissenting in part).

The lines between social drinking, occasional or temporary problems with alcohol (which would not bring an individual under the terms of either Act), and alcoholism that is a disabling impairment (which would bring an individual within the scope of the Acts) thus are not and perhaps cannot be defined clearly. The American Medical Association and American Psychiatric Association, for example, submitted amicus briefs to the Supreme Court in *Traynor* indicating that a "diagnosis of alcoholism as primary or secondary may depend as much on the nature of the facility in which the diagnosis is made as it does on the alcoholic's true clinical history." *Id.* at 563 n.5.

18. For example, alcohol and tobacco.

19. In the criminal law of the early 19th century, courts began to formulate the doctrine under which they considered evidence of intoxication to negate intent when intent was an element of the crime charged. People v. Hood, 462 P.2d 370, 377 n.5 (Cal. 1969). To limit the operation of the doctrine and achieve a compromise between conflicting feelings of sympathy and reprobation for the intoxicated offender, later courts drew a distinction between so-called specific intent and general intent crimes, allowing evidence of intoxication to serve an exculpatory purpose in the former cases. *Id.* at 377. In fact, some claim that the distinction between specific and general intent crimes evolved as a judicial response to the problem of the intoxicated defendant. *See id.*; Jerome Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045, 1048 (1944).

Many believe, however, that becoming intoxicated is itself blameworthy and that courts should not allow a defense of intoxication. The commentary to the Proposed Official Draft of the Model Penal Code (1962) summarizes this belief when it states:

> [A]wareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general

thus reflects our social ambivalence regarding the use of alcohol. When the use of alcohol turns into abuse, such ambivalence inevitably results in the presentation of incomplete and at times incoherent "solutions."

Under the terms of the ADA, a current abuser of illegal drugs does not fall within the definition of a handicapped individual.[20] An active alcoholic, however, may receive the protections of the ADA.[21] Although an employer may take steps to ensure an alcohol-free workplace and may hold all employees to uniform standards for employment or job performance,[22] the employer must also provide whatever accommodation is due and reasonable to make an alcoholic employee qualified for the position.[23]

To the extent that the behaviors constituting alcoholism may vary from one individual to the next,[24] so also might the

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> equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk. Becoming so drunk as to destroy temporarily the actor's powers of perception and of judgment is conduct which plainly has no affirmative social value to counterbalance the potential danger. The actor's moral culpability lies in engaging in such conduct. Added to this are the impressive difficulties posed in litigating the foresight of any particular actor at the time when he imbibes and the relative rarity of cases where intoxication really does engender unawareness as distinguished from imprudence. These considerations lead us to propose, on balance, that the Code declare that unawareness of a risk of which the actor would have been aware had he been sober be declared immaterial.

MODEL PENAL CODE § 2.08 cmt. 4, at 9 (Tent. Draft No. 9, 1959).

20. 42 U.S.C.A. § 12,114(a) (West Supp. 1991).

21. *See id.* An alcoholic must, however, like any other handicapped individual, be qualified for the position in question. *Id.* § 12,111(8). The reader should compare the definitions and exceptions Congress used in the ADA with those it used in the Rehabilitation Act of 1973 regarding the use of alcohol and drugs. The Rehabilitation Act provides:

> For purposes of sections 793 and 794 of this title as such sections relate to employment, [handicapped individual] does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

29 U.S.C. § 706(7)(B) (1988), *amended by* 29 U.S.C.A. § 706(8)(B)(v) (West Supp. 1991). In comparison to the Rehabilitation Act, the ADA is strangely silent on the subject of alcohol use. *See* 42 U.S.C.A. § 12,114. Although entitled "Illegal Use of Drugs and Alcohol," the section contains no reference to the use of alcohol as a criterion delimiting those covered by the Act. The ADA does refer to alcohol in a section authorizing employers to maintain an alcohol-free workplace and to establish uniform qualification standards for employment or job performance. *Id.* § 12,114(c).

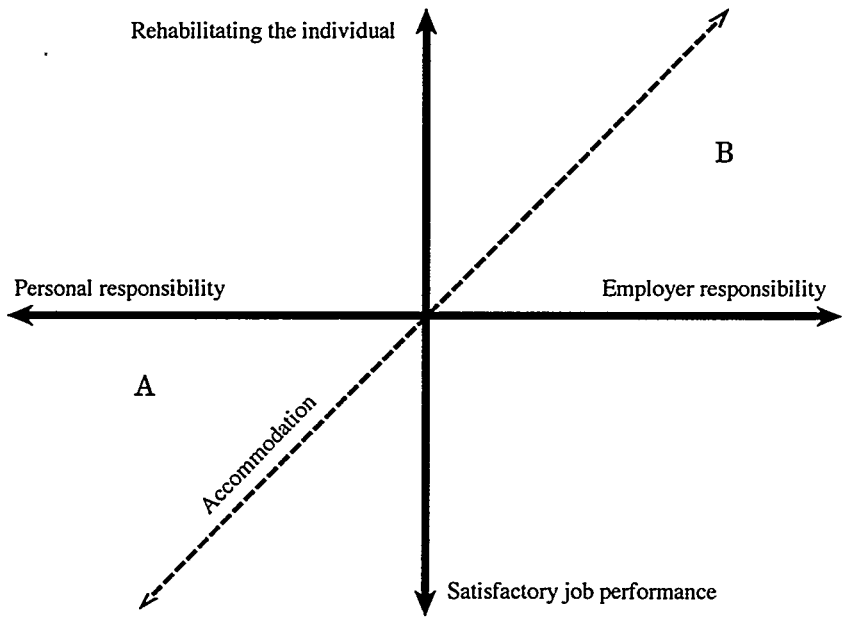
22. 42 U.S.C.A. § 12,114(c).

23. *Id.* § 12,112(a), (b)(5)(A)-(B).

24. *See supra* note 17.

adjustments or services required to reasonably accommodate an alcoholic vary from case to case. What a court deems reasonable will further vary according to the court's view of who is ultimately responsible for the alcoholic—his employer or himself[25]—and its view of the purpose of accommodation. For example, a court with an expansive view might see accommodation as a means to rehabilitate the individual, thus allowing the individual to perform satisfactorily;[26] a court with a more narrow focus might see accommodation as limited solely to allowing the individual to perform satisfactorily the job in question.[27]

Each of these considerations exists not just in one or the other forms, but rather as a dynamic continuum:



25. For a thoughtful discussion of the extent to which the responsibilities that normally lie with employees are, to an increasing extent, being given to employers, see Janet M. Spencer, *The Developing Notion of Employer Responsibility for the Alcoholic, Drug-Addicted or Mentally Ill Employee: An Examination Under Federal and State Employment Statutes and Arbitration Decisions*, 53 ST. JOHN'S L. REV. 659 (1979).

26. Courts considering claims by alcoholics under the Rehabilitation Act have often taken this approach. *See infra* notes 162-65 and accompanying text.

27. This Note argues that this more narrow focus is the appropriate standard under the ADA. If the more expansive view is adopted, the numbers of alcoholic employees seeking accommodation will be the only limit to the range of possible accommodations. Alcoholism encompasses a range of behaviors, *see supra* note 17; accommodation of the alcoholic necessarily will vary according to the symptomology and treatment needs of the individual.

A matrix of *possible* accommodation, therefore, can be constructed that reflects the interaction of policy determinations regarding (1) responsibility for the alcoholic and (2) the purpose of accommodation.[28]

Nowhere in the ADA does Congress define the parameters of accommodating alcoholic employees, nor does Congress state the relationship between accommodating alcoholic employees in order to make them qualified and holding them to performance standards that also apply to nonalcoholic employees. The implementing regulations do not clarify these issues. The resolution of these issues by necessity implicates the additional question of who shall bear the economic burden of rehabilitating the alcoholic.

The stated purposes of the ADA and the actual provisions of the law fail to address in any meaningful way the balance that society must strike between pursuing efforts to integrate the alcoholic into the workforce and promoting efficiency in the workplace as a means of ensuring the economic productivity of the enterprise. Estimates of the number of alcoholics employed in the United States range from six to ten percent of any employee population.[29] One survey calculated lost revenue as a result of alcoholic workers at over fifty billion dollars annually.[30] One commentator estimated that, as a result of absenteeism, accidents, medical bills, and lack of production, each alcoholic employee represents a minimum cost to his employer of one-quarter of his annual salary.[31] If the courts, in interpreting the ADA and its implementing regulations, extend a duty of nondiscrimination to the private employer comparable to the duty

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28. When an employer is given responsibility for his alcoholic employees' alcoholism and the purpose of accommodation is deemed to be rehabilitating the alcoholic (rather than allowing the alcoholic to do a particular job in spite of his handicap), reasonable accommodation will likely be broad in scope (for example, extended leave of absence for treatment), and would fall within quadrant B of the graph. Where an alcoholic worker is given personal responsibility for his disability and the purpose of accommodation is deemed to be allowing the alcoholic to do a particular job irrespective of continued abuse of alcohol, accommodation will be much more limited (for example, scheduling work hours around Alcoholics Anonymous (AA) meetings), and would fall within quadrant A of the graph.

29. *See* Spencer, *supra* note 25, at 662.

30. NATIONAL INST. ON ALCOHOL ABUSE & ALCOHOLISM, U.S. DEP'T OF HEALTH & HUMAN SERVS., SIXTH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH 22 (1987).

31. Spencer, *supra* note 25, at 663. A recent study conducted for McDonnell Douglas Corporation found that over a five-year period employees with alcohol or drug-related problems were absent 113 days more than the average employee and claimed $23,000 more in medical expenses. Their dependents filed claims averaging $37,000 more than the average family. William C. Symonds et al., *Is Business Bungling its Battle with Booze?*, BUS. WK., Mar. 25, 1991, at 76, 77.

established under the Rehabilitation Act[32] vis-à-vis the alcoholic, these costs may rise. In addition to the economic burden the private employer must bear in complying with the terms of the ADA, he must now bear the risk of litigation and its associated costs.[33] These costs could be enormous burdens to the employer. Moreover, if the courts focus on accommodation rather than on uniform performance standards, they likely will place an inappropriate burden on the private employer.

Much of the language of the ADA mirrors the language of regulations implementing the Rehabilitation Act of 1973.[34] The EEOC has stated that case law developed under the Rehabilitation Act is relevant to construing and enforcing the ADA.[35] This Note nevertheless argues that the two pieces of legislation are contextually and philosophically distinct. Consequently, the standards that the courts developed under the Rehabilitation Act regarding the duty of employers toward alcoholic employees in large part are inapplicable under the ADA. This Note first reviews the legislative and regulatory drafting process that has resulted in implementing agencies using nearly identical language when different ends are sought. It then distinguishes the two Acts as they apply to alcoholics and their employers. The Note then argues that the courts should limit the granting of disabled status to alcoholics under the ADA. It also proposes means by which courts might clarify the responsibilities of both employer and employee once an alcoholic establishes disabled status. Finally, this Note argues that courts ruling on claims under the ADA should not impose accommodation requirements on employers of alcoholics equivalent to those the courts have imposed under the Rehabilitation Act.

DRAFTING LEGISLATION: THE PRICE OF ANALOGY

The regulations implementing section 504 of the Rehabilitation Act provided most of the language for the employment provisions

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32. The EEOC specifically stated in the Overview of the ADA implementing regulations that in developing those regulations the agency was "guided by the [Rehabilitation Act] regulations and the case law interpreting those regulations." ADA Employment Regulations, 56 Fed. Reg. 35,726, (1991) (to be codified at 29 C.F.R. Part 1630). This implies that in general, standards developed under the Rehabilitation Act would be appropriately extended to the ADA.

33. One commentator described the ADA as the "lawyers' employment act," asserting that the Act is "[s]o [v]ague [t]hat [i]t [w]ill [s]pawn [c]ountless [l]awsuits." *Lawyers' Employment Act*, L.A. DAILY J., Oct. 26, 1989, at 6.

34. *See supra* note 14.

35. *See supra* note 32.

of the ADA.[36] Section 504 itself contains only a broad mandate for nondiscrimination.[37] Unlike other sections of the Rehabilitation Act, section 504 provides no implementing details.[38] The responsibility for giving substance to the legislation, therefore, fell to the Department of Health, Education, and Welfare (HEW), the predecessor to the HHS, when Congress gave that agency responsibility for drafting the implementing regulations. In drafting those regulations, HEW relied on its experience in enforcing statutes barring race and sex discrimination.[39] HEW also copied standards used in the employment regulations issued by the Department of Labor under section 503 of the Rehabilitation Act.[40]

Congress continued this process of "drafting by analogy"[41] with the ADA. The Rehabilitation Act regulations primarily speak to the needs of the physically handicapped, as do the ADA regulations.[42] Despite extensive congressional debate over the alcoholic's status,[43] the ADA gives only the most limited guidance

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36. *Compare* 45 C.F.R. §§ 84.11-.15 (1990) *with* Americans with Disabilities Act, 42 U.S.C.A. §§ 12,111-117 (West Supp. 1991).

37. Section 504 of the Rehabilitation Act provides:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794 (1988).

38. In § 503, for example, which forbids discrimination against the handicapped by government contractors, Congress included a detailed explanation of the implementing regulations it desired. Congress assigned the responsibility for drafting the regulations to the Executive branch and mandated that the regulations be prepared within 90 days of enactment. 29 U.S.C. § 793(a). Congress specified that the regulations were to establish a complaint procedure within the Department of Labor and to authorize waiver of the nondiscrimination requirements of § 503 if in the "national interest." *Id.* § 793(c).

39. Engebretson, *supra* note 8, at 75.

40. *See* 45 C.F.R. pt. 84, app. A, 359, 365 (1990).

41. Engebretson, *supra* note 8, at 59.

42. The official analyses of both sets of regulations provide detailed examples of the "reasonable accommodations" that would be appropriate to certain handicaps. All of the examples given pertain to the physically disabled. *See* 45 C.F.R. pt. 84, app. A, 365-66; ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,747-48 (1991) (to be codified at 29 C.F.R. § 1630.9 app.). Although commentators have devoted much attention to the accommodation requirement vis-à-vis the alcoholic, and alcoholics often base litigation on an employer's failure to accommodate, the very idea of "accommodation" may not be well suited to the alcoholic employee. Michael W. Forcier, *Employment Discrimination Against Alcoholics and Drug Addicts: The Federal Response*, 11 CONTEMP. DRUG PROBS. 39, 45 (1982).

43. *See, e.g.*, 135 CONG. REC. S10,782-85 (daily ed. Sept. 8, 1989) (containing debate of Sen. Armstrong, Sen. Harkin, and Sen. Humphrey).

regarding the treatment alcoholics should receive under the Act.[44] The ADA regulations also fail to provide such guidance.[45] Any further clarification of the Act regarding the status of alcoholics, the duty of accommodation, and the limits of undue hardship, therefore, must come from the courts.

The texts of the Rehabilitation Act, the ADA, and the regulations promulgated under those Acts, do not completely define an employer's duty to any handicapped employee.[46] The regulations instead encourage individualized application of the Acts' protections to each handicapped person.[47] The goal of affording each individual the maximum protections possible is laudable. Furthermore, only a flexible approach such as that contained in the open-ended language of the Rehabilitation Act and the ADA is likely to result in achieving this goal. In the case of the alcoholic employee, however, the result of striving toward the goal of maximizing individual protection while attempting to apply standards developed primarily for the physically handicapped has been confusion in the courts.[48]

Given the broad scope of the ADA,[49] it is imperative that the courts clearly define the responsibilities of both employers and alcoholic employees. The employer, who will likely bear the burden of proving that his actions are nondiscriminatory[50] and

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44. *See* 42 U.S.C.A. § 12,114(c) (West Supp. 1991).

45. ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,738-39 (to be codified at 29 C.F.R. § 1630.16(b)(1), (2), (4)).

46. Kathryn W. Tate, *The Federal Employer's Duties Under the Rehabilitation Act: Does Reasonable Accommodation or Affirmative Action Include Reassignment?*, 67 TEX. L. REV. 781, 796 (1989).

47. *See infra* note 77.

48. *See, e.g.*, cases cited *infra* note 170.

49. The employment provisions of the ADA will extend to the (very) small employer. *See supra* note 13 (discussing the relatively small number of employees necessary to bring an employer under the authority of the ADA).

50. This assumption is based on the procedures established under the Rehabilitation Act. Under § 504 of the Rehabilitation Act, a plaintiff establishes a prima facie case of discrimination by showing that he is a handicapped person under the Act and that an employer denied him employment or advancement under circumstances that support the inference that the employer's decision was based on his handicap. The burden then shifts to the employer to show that its actions were nondiscriminatory or that the handicap is relevant to the position in question. The employee then bears the burden of showing by a preponderance of the evidence that he is qualified despite the handicap, and that if accommodated he is at least as qualified as others who were accepted or promoted. Doe v. New York Univ., 666 F.2d 761, 776-77 (2d Cir. 1981); Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1387 (10th Cir. 1981).

As applied to the alcoholic employee whose alcoholism does affect performance but who would otherwise be qualified for the position, these burdens will often result in a

who in any event must bear the risk of litigation under the ADA, is particularly entitled to such clarification.

If the courts are to achieve consistency in their application of the law, they must recognize the distinctions between the requirements of the Rehabilitation Act and the ADA and appropriately limit the employer's duty to accommodate the alcoholic. Other issues the courts should address include the alcoholic employee's role in formally establishing his disabled status under the ADA, the parameters of undue hardship, and appropriate burdens of proof for such litigants under the Act. Clarification of these matters would ultimately lessen the burden on the courts and would provide certainty to both employer and employee regarding their rights and duties under the ADA.

DISTINGUISHING THE STATUS OF THE EMPLOYER UNDER THE REHABILITATION ACT AND THE ADA

The ADA and the Rehabilitation Act employ definitions of "disability" that are nearly identical.[51] To qualify for handicapped status, both Acts require that an individual suffer an impairment that substantially limits a major life activity, have a history of such an impairment, or be erroneously regarded as suffering such an impairment.[52] Title I of the ADA 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."[53] A qualified individual is one who "with or without reasonable accommodation, can perform the essential functions of the employment position."[54] The concept of "reasonable accommodation," there-

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finding that an employer's adverse employment decisions were based on the handicap. For example, in Crewe v. United States Office of Personnel Management, 834 F.2d 140 (8th Cir. 1987), the claimant possessed the educational requirements for the position and was thus considered qualified even though alcoholism seriously impaired her performance. The court found that "Crewe's handicap entered into the employment decision [to not hire the applicant] and that her handicap was relevant to a valid employment criterion." *Id.* at 143. The court thus defined the issue as whether the employer could reasonably accommodate Crewe's handicap. *Id.* at 143 & n.6.

51. *Compare* 42 U.S.C.A. § 12,102(2) (West Supp. 1991) *with* 29 U.S.C. § 706(8)(B) (1988).

52. The Rehabilitation Act and ADA regulations provide the following definition of major life activities: "functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1613.702(c) (1990); 45 C.F.R. § 84.3(j)(2)(ii) (1990); ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,735 (1991) (to be codified at 29 C.F.R. § 1630.2(h)(2)(i)).

53. 42 U.S.C.A. § 12,112(a).

54. *Id.* § 12,111(8). Congress did not define reasonable accommodation but did suggest

fore, largely defines the parameters of discrimination under the ADA. The concept of "undue hardship," in turn, limits reasonable accommodation. If accommodation of the handicapped individual represents an undue hardship to the employer, the employer is not liable under the ADA.[55]

The Department of Labor originally developed the concepts of reasonable accommodation and undue hardship to implement the Rehabilitation Act.[56] HEW also adopted these concepts when it promulgated regulations implementing the Rehabilitation Act.[57] Congress adopted these concepts and used the HEW language virtually without change in the ADA.[58] This similarity in terms initially leads one to assume that in passing the ADA Congress merely extended the requirements of the Rehabilitation Act to a new employer group. Distinctions exist between the two Acts, however, demonstrating that Congress did not intend to place identical burdens on federal and private employers.

In passing the Rehabilitation Act, Congress intended to make the federal government a model employer.[59] The Rehabilitation

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guidelines, including:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
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> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id. § 12,111(9).

55. *Id.* § 12,112(b)(5)(A). The ADA defines "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of [certain] factors." *Id.* § 12,111(10)(A). Those factors include:

> (i) the nature and cost of the accommodation needed under this Act;
>
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the work force of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Id. § 12,111(10)(B).

56. The Department of Labor used the concepts in regulations implementing § 503 of the Rehabilitation Act. *See* 41 C.F.R. § 60-741.6(d) (1991).

57. 45 C.F.R. § 84.12(a) (1990). HEW was implementing § 504 of the Rehabilitation Act. *See id.* § 84.1.

58. *Compare id.* § 84.12 *with* 42 U.S.C.A. § 12,112(b)(5)(A) (West Supp. 1991).

59. Tate, *supra* note 46, at 785. To this end, the Rehabilitation Act imposes a duty of

Act makes a distinction between the federal government as employer and the federal grantee as employer; it imposes a duty of affirmative action on the former that it does not impose on the latter.[60] This distinction implies that the federal employer owes a heightened duty to the handicapped employee.

The courts, however, generally have failed to recognize that the Rehabilitation Act imposes a duty of affirmative action on the federal government that it does not impose on the private employer.[61] In interpreting the ADA, the courts must recognize this distinction. They should also recognize that the two Acts do not necessarily impose equal accommodation duties on federal and private employers.[62] As a result, the courts should employ different analyses of undue hardship under the two Acts.

Significantly, the Rehabilitation Act is not the only piece of federal legislation that governs the responsibilities of the federal government as the employer of an alcoholic. The Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970[63] (the Hughes Act) and other legislation mandates that the federal government provide referral, counseling, and treatment to alcoholic employees.[64] The Hughes Act

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affirmative action on both the federal government as employer and federal contractors. 29 U.S.C. §§ 791(b), 793(a) (West Supp. 1991). A recent analysis of the federal government's conduct during 10 years under the Rehabilitation Act, however, shows that the government has been lax in enforcing the Act and that it has not aggressively pursued such "affirmative action." Bonnie P. Tucker, *Section 504 of the Rehabilitation Act After Ten Years of Enforcement: The Past and the Future*, 1989 U. ILL. L. REV. 845, 848-78.

60. *Compare* 29 U.S.C. § 791(b) (stating that "[e]ach department, agency, and instrumentality . . . in the executive branch shall . . . submit . . . an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps") *and* § 793(a) (stating that "the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with handicaps") *with* § 794(a) (containing a general rule of nondiscrimination but no requirement of affirmative action).

61. Tate, *supra* note 46, at 789 & n.33. *But see* Crewe v. United States Office of Personnel Management, 834 F.2d 140, 141-42 (8th Cir. 1987) (explaining that the Rehabilitation Act was intended to make the federal government a model employer and thus imposed a duty of affirmative action on the federal employer).

62. *See infra* notes 170-76 and accompanying text.

63. Pub. L. No. 91-616, 84 Stat. 1848 (codified as amended at 42 U.S.C. §§ 4541-4594 (1988)).

64. *See* 42 U.S.C. § 4542. According to the House Report adopted by both Houses to accompany the Hughes Act:

> The legislation gives a clear mandate to the Civil Service Commission to develop policies and services for the prevention and treatment of alcohol abuse and alcoholism among Federal civilian employees which are consistent with the purposes and intent of the act. The alcoholic employee, like any other employee suffering from a disease, will now be provided with an

provides a context for applying the provisions of the Rehabilitation Act governing the federal employer that differs from the context for other employers. The Rehabilitation and Hughes Acts together impose a heightened level of responsibility for the alcoholic employee. Congress imposed that responsibility on the federal government under the Rehabilitation Act but did not extend it to the private sector under the ADA.[65]

The Rehabilitation Act, moreover, imposes a duty not to discriminate on the private employer only if the employer receives federal funds or assistance.[66] At least one commentator has argued that the quid pro quo Congress envisioned was that, in exchange for federal funds, grantees would provide benefits to the handicapped.[67] The ADA contemplates no such exchange of benefits. Arguably, this distinction implies that Congress envisioned a heightened duty for federal grantees that it did not envision for private employers.

In drafting the ADA, Congress adopted a general rule of nondiscrimination but did not take the additional step of imposing a duty of affirmative action on the private employer.[68] The terms

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opportunity for treatment instead of being summarily discharged.
H.R. REP. No. 91-1663, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 5719, 5727.

65. Even in the context of federal employment, however, Congress never intended to protect all current alcohol abusers. Butler v. Thornburgh, 900 F.2d 871, 873 (5th Cir.), *cert. denied*, 111 S. Ct. 555 (1990). The Hughes Act provides that "[n]o person may be denied or deprived of Federal Civilian employment . . . solely on the grounds of prior alcohol abuse or prior alcoholism," 42 U.S.C. § 290dd-1(b)(1), but makes unequivocal exceptions for employees whose work involves national security, *id.* § 290dd-1(b)(2) (specifying exceptions for the Central Intelligence Agency, the Federal Bureau of Investigation, and the National Security Agency, as well as any other agency involved in the national security), and for employees whose performance falls below acceptable levels, *id.* § 290dd-1(c) (providing "[t]his section shall not be construed to prohibit the dismissal from employment of a Federal civilian employee who cannot properly function in his employment").

The courts have not been consistent in their interpretation of the Hughes Act. *See, e.g.*, Whitlock v. Donovan, 598 F. Supp. 126, 131 (D.D.C. 1984) ("the legislative history [of the Hughes Act] indicates that dismissal was intended to apply only to employees who refused treatment [for alcoholism] altogether or who had repeatedly failed in treatment"), *aff'd without opinion*, 790 F.2d 964 (D.C. Cir. 1986). In *Butler*, 900 F.2d at 874 n.1, the circuit court pointed out that the legislative history, on which the district court relied in *Whitlock*, was in fact the history of an earlier version of the bill that the Senate offered, and that the bill promulgated into law "expressly deleted any reference to an alcoholic employee's failure to accept appropriate treatment." *Id.* The Fifth Circuit concluded that the District of Columbia federal courts had "misapprehended the law and incorrectly read a firm choice provision into the Hughes Act for alcoholic employees." *Id.*

66. 29 U.S.C. § 794 (1988).

67. Tucker, *supra* note 59, at 891.

68. *See* 42 U.S.C.A. § 12,112(a) (West Supp. 1991).

of the ADA, therefore, are most analogous to section 504 of the Rehabilitation Act, which applies to federal grantees. Neither the ADA nor section 504 imposes a duty of affirmative action and neither assumes that every employer will be or even should be a model employer. Neither the ADA nor section 504 requires that private employers institute and maintain occupational rehabilitation or referral programs.[69] Section 504 and the ADA are not perfect parallels, however, because as indicated above, the ADA envisions no exchange of benefits between the private employer and the federal government.[70]

Although Congress did not intend that each employer would become a "model" employer, it did expect that all employers would reasonably and fairly assess the abilities of the disabled employee and applicant, and provide equal opportunity to those individuals who were qualified to perform the essential functions of the job. Congress did not say that an employer must hire the disabled or that an employer could not select a more qualified individual before a disabled individual.[71] Nothing in the legislative history indicates that in passing the ADA, Congress contemplated a basic change in the merit-based system that has been the norm of the American experience. Indeed, one senator stated, "We do not seek a change in the American political and economic contract, only an extension to bring more Americans under the protections of rights that should be afforded to all."[72]

Before a court seeks to extrapolate from case law developed under the Rehabilitation Act in ruling on questions presented under the ADA, it should first distinguish carefully the underpinnings of the two Acts. Such a comparison will make it clear that Congress did not mandate, and indeed did not intend, that each employer should be a "model" employer. In any event, the

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69. At least one commentator has argued that an employer who does maintain such programs may be more able to demonstrate compliance with his statutory obligations toward an alcoholic employee whom he is seeking to discharge. *See* Spencer, *supra* note 25, at 677, *cited in* Forcier, *supra* note 42, at 45 & n.14.

70. ADA provisions governing employment apply to private employers regardless of whether they receive federal funding or contracts.

71. The EEOC was careful to point out in the ADA regulations that the ADA "is not intended to limit the ability of covered entities to choose and maintain a qualified workforce." ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,746 (1991) (to be codified at 29 C.F.R. § 1630.4 app.).

72. 135 CONG. REC. S10,711 (daily ed. Sept. 7, 1989) (remarks of Sen. Harkin); *see also* 136 CONG. REC. E1915 (daily ed. June 13, 1990) (remarks of Rep. Hoyer) ("A basic principle underlying this title is that employment decisions must be made on the basis of merit . . . .").

current state of the economy may require careful assessment of private employers' duties under the ADA, especially if the assumptions that underlie the ADA—that is, that the labor market and the economy are expanding—are not accurate.[73]

Under the ADA, the courts should allow reasonable accommodation and undue hardship to operate in the balanced and pragmatic manner that Congress intended.[74] To accomplish this goal in the case of alcoholic claimants, the courts must reconsider the meaning of reasonable accommodation and undue hardship. The courts should also modify the burdens of proof and persuasion they adopted under the Rehabilitation Act and thereby adjust the responsibilities of employer and alcoholic employee.

"DISABLED" VS. "QUALIFIED": WHAT STATUS FOR THE ALCOHOLIC?

To qualify for the special protections afforded by the Rehabilitation Act and the ADA, an individual must first demonstrate that he: (1) suffers an impairment that substantially limits one or more of the major life activities of that individual; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.[75] In the case of alcoholics, the life function impaired is generally the ability to retain and perform work.[76] A tension exists between the stated requirements for disabled status, which demand case-by-case analysis, and the nearly per se definition of alcoholism as a handicap the federal government and courts adopted under the Rehabilitation Act.[77] This approach to

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73. *See supra* note 6 and accompanying text.

74. As to the alcoholic employee, Congress clearly intended that common sense should guide both the employer in making hiring and promotion decisions and the courts in applying the ADA. *See* 136 CONG. REC. H2636 (daily ed. May 22, 1990) (remarks of Rep. Chandler).

75. 42 U.S.C.A. § 12,102(2)(A)-(C) (West Supp. 1991); Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B) (1988).

76. Such an impairment presents a "bootstrapping" problem: when individuals do not qualify for particular jobs, they suffer an impairment of a major life function—working—and the law therefore appears to categorize those individuals as handicapped. For a discussion of this dilemma, see Anna P. Engh, Note, *The Rehabilitation Act of 1973: Focusing the Definition of a Handicapped Individual*, 30 WM. & MARY L. REV. 149, 169-72 (1988).

77. Generally, a claimant must demonstrate a handicap on a case-by-case basis. Congress purposefully did not provide a definitive list of handicapping conditions, preferring instead to provide general guidance on the nature of impairment that would qualify as a handicap. As explained by the EEOC:

> The ADA and [the regulations], like the Rehabilitation Act of 1973, do not

alcoholism resulted implicitly from the stigma that attaches to alcoholism. If one presumes the existence of social stigma, a known alcoholic would always qualify for handicapped status as one "who is regarded as having such an impairment [of a major life function]."[78] A per se definition of alcoholic-as-handicapped, therefore, begs the question whether an alcoholic claimant must prove that he is regarded by *this* employer as "having such an impairment," or whether society's generalized prejudice is sufficient to allow him to qualify for preferred status under the Act. If alcoholic claimants need never prove actual discrimination based on an employer's perception of an impairment, but may instead rely on stereotypical views held by society at large, alcoholics will always qualify for coverage under the ADA. For example, imagine an alcoholic employee whose performance is in fact not impaired, and whose employer does not perceive him as suffering from a "major life impairment." If the courts accept a per se definition of alcoholic-as-handicapped, the ADA would still protect this individual.

Such a result is inappropriate given Congress' goal of enhancing employment of the genuinely handicapped. Courts should therefore analyze the facts underlying discrimination claims in *all* cases. Courts engaging in such analysis will then be able to distinguish true discrimination from an employer's insistence that the alcoholic adhere to a common standard.

When a claimant bases his argument not on generalized stigma nor the prejudice of a particular employer, but rather on actual impairment of his own ability to work, a court then must deal with the problem of bootstrapping:[79] if an individual's ability to

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> attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,741 (to be codified at 29 C.F.R. pt. 1630.2(j) app.); *see also supra* note 14 (discussing the history of the definition of alcoholism as a handicap under the Rehabilitation Act). By requiring a case-by-case determination, Congress intended to make the laws more flexible in accommodating the unique needs of individuals and more likely in application to reflect congressional intent.

78. 42 U.S.C.A. § 12,102(2)(C).

79. *See supra* note 76. Courts encounter the bootstrapping problem in cases of handicap discrimination involving nonalcoholics as well. The Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987), rejected the argument of the Solicitor General that including a condition that impaired only the ability to work in the definition

perform a job is impaired, may he properly claim the protections of a law designed to allow qualified individuals to obtain employment?[80]

Identifying the Alcoholic

Determining whether an individual suffers from alcoholism is often not a simple matter.[81] The law, therefore, should not hold employers responsible for the knowledge that an employee is an alcoholic. The employee should bear the burden of informing the employer about his alcoholism before that employee has a claim to disabled status under the ADA.[82] As with other disabilities,

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of handicapped was to make "'a totally circular argument which lifts itself by its bootstraps.'" *Id.* at 283 n.10 (quoting Tr. of Oral Arg. at 15-16). The Court reasoned that the argument is not circular in that "Congress plainly intended the Act to cover persons with . . . impairment[s] (whether actual, past, or perceived) that substantially limited one's ability to work." *Id.* The Court's reasoning, of course, does not make the inclusion any less circular.

One possible means of escaping the circle is to distinguish between cases in which the individual is somehow incapable of working or would present a danger to others on the job and those in which the fears or prejudices of the employer prevent the individual from working. An example of the latter situation which would constitute improper handicap discrimination is the case in which a woman "crippled by arthritis" was denied a job not because she could not do the work but because college trustees thought "'normal students shouldn't see her.'" 118 CONG. REC. 36,761 (1972) (remarks of Sen. Mondale) (quoting Brian Anderson, *Handicapped Tell of Discrimination in Finding Jobs and Getting Insurance*, MINNEAPOLIS TRIB.).

Courts could thus distinguish between the alcoholic who is incapable of full performance and the alcoholic who is prevented from performing due to the prejudices of others. Drawing such a line might also solve the problem of determining what constitutes reasonable accommodation of the alcoholic. When an employer prevents the alcoholic from performing, courts should impose a duty to accommodate on the employer. When the alcoholic is incapable of performing, however, courts should deem the alcoholic unqualified for the position.

80. For a detailed discussion of this problem, see *infra* notes 94-103 and accompanying text.

81. *See supra* note 17.

82. At least one court has held that under disability laws, employers have a duty to accord some form of job security only to alcoholics who are "self-referrals." *See* Butler v. Thornburgh, 900 F.2d 871, 877 (5th Cir.), *cert. denied*, 111 S. Ct. 555 (1990). Before an employer has a duty to accommodate a disabled employee, the employer should have clear knowledge of the employee's status. Only when the employer is fully apprised of the employee's condition can the employer adequately consider the accommodation the employee requires. Moreover, requiring alcoholics to identify themselves to their employers is consistent with the ADA regulations, which state that employers may invite disabled individuals to identify themselves under certain circumstances. ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,732, 35,750 (1991) (to be codified at 29 C.F.R. § 1630.14(a) & app.). The courts, however, certainly should not apply such a procedural requirement in cases in which employers discriminate on the basis of an erroneous belief that the employee is an alcoholic. *See* 42 U.S.C.A. § 12,102(2)(C) (stating that an individual may qualify for protection if he "is erroneously regarded as suffering an impairment that substantially limits a major life activity").

the alcoholic should have the burden of establishing that he is or was impaired within the meaning of the ADA, rather than being allowed to rely on a per se definition of alcoholic-as-handicapped.[83] Courts should require an individual seeking the protections of the ADA to offer proof of actual disability, including a medical determination of alcoholism and an assessment of the level of impairment the individual suffers. Courts should further require proof from the individual that he qualifies for the position.[84] Requiring such proof would eliminate litigation when the individual in fact is unable to currently perform job tasks adequately.[85]

An individual should not qualify for handicapped status on the basis of occasional or "light" use of alcohol, or a temporary impairment, unless the individual can demonstrate that the employer discriminated against the employee under the erroneous belief that he suffered from a substantial impairment by virtue of alcoholism.[86] Similarly, the employee who suffers from alcoholism but whose alcoholism does not affect job performance should not have a claim based on handicap discrimination unless he can show discrimination due to an erroneous belief or prejudice on the part of the employer.[87]

If an employee claims that he was discriminated against because his employer erroneously believed that the employee suffered from alcoholism, or because the employer erroneously believed that the employee's alcoholism impaired his work performance, the employee should have the burden of establishing a prima facie case that (1) the employer held such a belief and (2) the belief resulted in discrimination against the employee. Once an alcoholic claimant establishes a prima facie case, the burden of persuasion that the employer held no such erroneous

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83. *See supra* note 77 and accompanying text.

84. The courts should require the alcoholic employee to show only that he is nominally qualified for the position. Such a requirement is in accord with 42 U.S.C.A. § 12,111(8) (West Supp. 1991), which defines a qualified individual as one who can perform the essential functions of the position. Once a claimant establishes his qualification and ability to perform, the employer could defend with a showing that he hired, promoted, or otherwise favored other, more qualified individuals.

85. To qualify for disabled status under the ADA an individual must show not only an impairment of a major life function but also that he is otherwise qualified for the position. *See* 42 U.S.C.A. § 12.111(8) (West Supp. 1991).

86. *See supra* note 79.

87. *See supra* note 79.

belief, or that the employer did not discriminate as a result of any such belief, should shift to the employer.[88]

Many commentators argue that alcoholics applying for jobs are confronted with an impossible dilemma: revealing their problems with alcohol may invite the possibility of discriminatory action on the part of the employer,[89] while not revealing their problems "runs contrary to the honest behavior advocated in therapy, and further entrenches stigmatization" of alcoholism.[90] If one accepts that the alcoholic's acknowledgement of his disease is the essential element of his cure,[91] then placing responsibility with the employee for identifying himself as an alcoholic is necessarily in the best interest of the employee. To the extent that society currently exerts pressure on recovered alcoholics to keep their history a secret, that pressure serves to hide the fact that many alcoholics do recover.[92] Distorting the statistics currently available on rehabilitation only emphasizes the fact that some individuals do not recover, which serves to entrench further the belief that alcoholics seldom recover.[93] Such a pattern can only reinforce discrimination in the marketplace.

Qualifications for Employment

When considering claims under the Rehabilitation Act, the courts generally glossed over the difficulties involved in determining whether a particular alcoholic claimant was handicapped under the Act.[94] Instead, courts focused only on whether the alcoholic claimant was otherwise qualified.[95] This approach does

88. This procedure would be consistent with the burdens of proof established under the Rehabilitation Act. *See supra* note 50.

89. *See, e.g.*, Forcier, *supra* note 42, at 51.

90. *Id.* (discussing the pressures brought on recovered alcoholics to keep their condition a secret, and noting that suppressing information on rehabilitation only focuses attention on those who have failed to recover).

91. Rodgers v. Lehman, 869 F.2d 253, 259 (4th Cir. 1989).

92. Forcier, *supra* note 42, at 51.

93. *Id.*

94. *See supra* note 14.

95. *See, e.g.*, Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1231 n.8 (7th Cir. 1980) (performing no individual analysis of the claimant's status as a handicapped individual, the court stated that "during all times relevant to this suit plaintiff was an alcoholic. . . . Individuals with current problems or histories of alcoholism . . . qualify as 'handicapped individuals' under [the Act] unless their addiction or prior use can be shown to prevent successful performance of their jobs.").

not avoid definitional problems, however, in that inherent difficulties exist in determining the point at which alcoholism affects job performance. In any event, one cannot easily reconcile the notions of providing reasonable accommodation of a condition that impairs the ability to work and of holding an employee to a uniform standard of performance—a point the courts have rarely addressed.[96]

Under the 1978 Amendments to the Rehabilitation Act,[97] Congress clarified that those who currently use drugs or alcohol and, as a result, cannot perform the essential functions of their jobs or who constitute a danger to others or to property are not handicapped within the meaning of the Act.[98] This limitation falls short of denying active alcoholics handicapped status. It does, however, provide an elaboration of the requirement that a handicapped individual be otherwise qualified for the position in question.[99] Unfortunately, the courts and the responsible agencies have not yet offered a definitive interpretation of "otherwise qualified."[100]

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96. For a possible solution to these difficulties, see *supra* note 79.

97. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (codified in scattered sections of 29 U.S.C.).

98. 29 U.S.C.A. § 706(8)(C)(v) (West Supp. 1991) (formerly codified at 29 U.S.C. § 706(8)(B) (1988)). This limitation applies only to §§ 503 and 504 of the Rehabilitation Act, which apply to federal contractors and federal grantees, respectively. The exclusion does not apply under § 501, which governs the federal government as employer. Crewe v. United States Office of Personnel Management, 834 F.2d 140, 142 (8th Cir. 1987).

99. The legislative history of the Amendments shows that Congress left the scope of the Act virtually unchanged. Congress passed the Amendments in response to employers' apprehensions, but the limitations Congress defined were "implicit in the act's limitation and in [the requirement] limiting protection to persons who would perform the essential functions of the job." 124 CONG. REC. 37,510 (1978) (remarks of Sen. Williams).

100. Neither the Rehabilitation Act nor the ADA contains a detailed definition of the term "qualified." A handicapped individual is qualified if "with or without reasonable accommodation" he can perform the essential functions of the job. 42 U.S.C.A. § 12,111(8) (West Supp. 1991); *cf.* 45 C.F.R. § 84.3(k)(1) (1989) (stating that a qualified handicapped person is one "who, with reasonable accommodation, can perform the essential functions of the job in question"). The ADA regulations specify that determining whether an individual is qualified is a two-part process: the employer must first determine if an employee possesses the "appropriate educational background, employment experience, skills, licenses, etc.," and then determine if the individual can perform the essential functions of the job. ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,743 (1991) (to be codified at 29 C.F.R. § 1630.2(m) app.). Some courts considering claims under the Rehabilitation Act implicitly based their findings regarding the claimants' qualifications solely on educational background and training. *See, e.g.*, *Crewe*, 834 F.2d at 142-43 (finding the claimant qualified on the basis of her education; based on claimant's history of failed rehabilitation efforts, however, employer could not reasonably accommodate).

Under the more detailed terms of the ADA, an employer may hold alcoholic employees to the same performance standard as other employees and require that employees not use alcohol or be under the influence of alcohol at the workplace.[101] This standard is arguably stricter than the standard under the Rehabilitation Act,[102] despite the fact that the ADA does not exclude current alcoholics whose performance is impaired from the definition of disabled individuals. By providing that an employer may hold an alcoholic employee to a uniform standard, Congress emphasized the requirement that a handicapped individual be fully and competitively qualified for the position. The implicit requirement that an active alcoholic prove not only that he is disabled under the law but also that he is qualified competitively for the position presents a logical conundrum that Congress and the courts have yet to resolve.[103]

Setting Standards: Absenteeism and Quality Control

The ADA defines a qualified individual as one who with or without reasonable accommodation can perform the essential functions of the job.[104] The regulations thus define qualifications in terms of current performance and not merely in terms of education and training. An individual can be an active alcoholic and still perform satisfactorily on the job.[105] A definition of

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101. 42 U.S.C.A. § 12,114(c)(1), (2), (4).

102. One also might argue, however, that Congress failed to limit precisely those conditions under which alcoholics would fall within the ADA's definition of disabled.

103. The only means to resolve this apparent conflict is to accept a per se definition of alcoholism as a handicapping condition. Such a definition, however, is contrary to congressional intent in passing the Rehabilitation Act and the ADA, both of which require a case-by-case assessment of the individual in the particular context. *See supra* note 14. Logically, alcoholics can prove themselves qualified to perform a given job in only three circumstances: (1) active alcoholism, but no impairment of work performance; (2) status as a recovering alcoholic, but no impairment of work performance; and (3) an erroneous belief on the part of the employer that the individual suffers an impairment due to alcoholism. The first and second of these options should require that a court find the individual in question not handicapped. When no impairment of work performance nor any physically debilitating condition related to alcoholism exists, the alcoholic is in fact not disabled, given that the definition of disability requires an impairment of a major life function. Nevertheless, both the Rehabilitation Act and the ADA include alcoholics in the class of protected individuals. *See supra* notes 12, 14.

104. 42 U.S.C.A. § 12,111(8).

105. Whitaker v. Board of Higher Educ., 461 F. Supp. 99 (E.D.N.Y. 1978). In *Whitaker*, the plaintiff, a professor, contended that he was denied tenure solely because of his alcoholism. He did not deny being an alcoholic but did deny that his alcoholism interfered with his ability to perform the job. *Id.* at 106.

"qualified" based solely on job tasks, however, is underinclusive in that it fails to address the problem of absenteeism.[106] Can an employee who does not perform due to absence be qualified for a given position? If excessive absence is a valid criterion for deeming an individual unqualified, how then is an employer to define "excessive"? The possibilities of job restructuring and reassignment as a means of reasonable accommodation[107] also raise the question of whether an employee is qualified for a given position. An employer may have to consider not only the employee's actual performance in a particular job but also his potential performance in a variety of jobs. Restructuring may become so extreme as to indicate that the employee was in fact not qualified and that the employer could not reasonably accommodate him.[108]

The regulations promulgated under the ADA state that an employer may hold an alcoholic employee to the same performance standard imposed on all other employees.[109] This provision

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106. Absenteeism is very often the reason for negative employer action against the alcoholic employee. *See, e.g.*, Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989). The petitioner in *Rodgers* was an alcoholic whose alcoholism was characterized by binge drinking and blackouts. *Rodgers*, 869 F.2d at 255. Although he exhibited no overt signs of alcoholism while on the job, in 1978 he took 404 hours of leave, and in the first 10 months of 1979, he took 387 hours of leave. *Id.* at 254-55. The district court found that Rodgers had refused to enroll in a treatment program, even after his supervisor had agreed to adjust his work schedule to accommodate such a program. *Id.* at 255. Rodgers also refused reassignment to a less stressful job. *Id.* As a result of his continued absences, Rodgers' employer instituted progressive discipline and ultimately discharged him. *Id.* at 254-56.

In another case, Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980), the court noted that the employer had failed to show that the plaintiff's alcoholism prevented him from successfully performing the job. *Id.* at 1231 n.8. The facts of the case show that Simpson's employer suspended him without pay for a three-day absence resulting from Simpson's alcoholism. The employer reinstated Simpson and notified him that future unexcused absences would be cause for dismissal. Three months later, the employer dismissed Simpson because of three additional unexcused absences resulting from Simpson's alcoholism. The court indicated that a showing that Simpson's absences exceeded normal leave allowances would be sufficient to prove impaired job performance. *Id.*

107. The ADA lists "job restructuring, part-time or modified work schedules, reassignment to a vacant position, . . . and other similar accommodations" in the definition of reasonable accommodation. 42 U.S.C.A. § 12,111(9)(B). Courts could interpret this section as requiring these accommodations only when they are also available to other employees. For an argument that these methods should be deemed reasonable means of accommodating the handicapped individual in all cases, see Tate, *supra* note 46, at 833-43.

108. The ADA seems to refer to the qualifications of an individual for one particular job. *See* 42 U.S.C.A. § 12,111(8). The section of the ADA concerning reasonable accommodation, however, specifically refers to job restructuring and reassignment as possible means of accommodation. *See id.* § 12,111(9)(B).

109. ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,739 (1991) (to be codified at 29 C.F.R. § 1630.16(b)(4)).

in the law does not truly clarify the role that qualifications may play in an employer's decisionmaking nor the limits the ADA has set on the employer's right to an efficient workforce. The articulation of such limits by necessity encompasses not only legal but also philosophical and political issues.[110] No matter how difficult, such an endeavor is necessary to provide a starting point for ongoing political debate and revision of the law.[111] Ideally, the courts should recognize that an employer is entitled to the most efficient workforce he can assemble.[112] Emphasizing merit in the workplace is not at odds with the congressional mandate to eliminate unfair and unnecessary discrimination against the handicapped. Certainly, emphasizing merit is fully in accord with congressional intent regarding coverage of the alcoholic under the ADA.[113] The ADA regulations provide that an employer may defend against a charge of discriminatory conduct with a showing that his actions were "job-related and consistent with business necessity."[114] Selecting the best qualified and most productive worker for a given position or advancement is always consistent with business necessity.

Significantly, the ADA already allows the employer to act to the detriment of the employee because of the employee's on-the-

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110. Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 HARV. L. REV. 997, 999 (1984).

111. *See id.* at 999, 1014. In commenting on § 504 of the Rehabilitation Act, the author stated:

> The inconsistent application of section 504 to employment disputes, however, is more properly regarded as the product of an unresolved conflict . . . about the meaning of discrimination and the measures we, as a society, will undertake to alleviate it.
>
> The critical failing of section 504 is not that it reflects ambivalence about fundamental value choices, but rather that it represents a wholesale refusal to confront those choices. The provision's indeterminate language devolves responsibility for policy choice on courts and administrative agencies and leaves them to make ad hoc selections from among competing conceptions of discrimination. These tribunals, therefore, make the actual decisions about what constitutes discrimination against the handicapped. As a result of this congressional default, handicapped persons and their actual or potential employers remain without meaningful legal guidelines for interaction.

Id. at 999 (footnotes omitted).

112. Alternatively, the courts should clearly state that employers are expected to tolerate a "zone of marginal incapacity." *See id.* at 1011.

113. The ADA provides that an employer may "hold an employee . . . who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the . . . alcoholism of such employee." 42 U.S.C.A. § 12,114(c)(4) (West Supp. 1991).

114. ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,738 (1991) (to be codified at 29 C.F.R. § 1630.15(b)(1),(c)).

job use of alcohol.[115] What Congress and the EEOC did not address, however, is the more usual case of absenteeism, secondary illness, and poor performance as a result of off-the-job use of alcohol.[116] These problems result in both direct costs to the employer[117] and negative effects on other employees.[118] The courts could address these problems either in the context of establishing whether an alcoholic is "otherwise qualified" for the position in question[119] or in terms of undue hardship—that is, business necessity and the employer's right to hold an alcoholic employee to a uniform performance standard.

Hiring the most productive employee available in order to remain competitive or to advance in a particular market is always consistent with business necessity in a market economy. The concepts of productivity and quality control, therefore, are inherently contained in the notions of the fundamental nature of the business, essential job functions, and business necessity. The courts, therefore, could clarify the relationship between essential job functions and business necessity in the following manner:

> An employee who is able to perform the essential functions of a given job is one who is nominally qualified. The require-

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115. 42 U.S.C.A. § 12,114(c)(1)-(3). In addition to holding an alcoholic employee to the same qualification standard as other employees, an employer:

> (1) may prohibit . . . the use of alcohol at the workplace by all employees;
> (2) may require that employees shall not be under the influence of alcohol . . . at the workplace; [and]
> (3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*).

Id.

116. *See supra* notes 29-31, 104-06 and accompanying text.

117. For example, loss of worktime, insurance costs, and inefficiency. *See* Spencer, *supra* note 25, at 662-63.

118. For example, the implicit requirement of increased hours when colleagues do not perform their jobs and the attendant effect on employee morale. *See infra* note 236 and accompanying text. Absenteeism thus also results in increased costs to the employer in the form of overtime.

119. Such an analysis, for example, would be in accord with the analysis of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987). In *Arline*, the Court considered whether a teacher found to suffer a physical disability from tuberculosis was, if contagious, "otherwise qualified" so as to fall within the protections of the Rehabilitation Act. The Court focused on whether, despite her disability, the petitioner was qualified for the position, rather than on whether accommodation of the disability would be an undue hardship on her employer. The Court held that such a determination was a finding of fact, which must be made on a case-by-case basis. *Id.* at 287. The factors to be considered by courts ruling on such questions include the potential of harm to third parties. *Id.* at 288. A court could thus make a factual determination of whether an alcoholic was otherwise qualified for a position based on his work history and current condition, including his effect on co-workers.

ment that an employer shall not discriminate against a qualified individual with a disability does not mean that the employer must hire or promote any handicapped individual who is only nominally qualified. Balancing the duty of nondiscrimination under the Act with the necessities of normal business requires only that the employer not base hiring, promotion, or other employment decisions on prejudice, stereotypes, or unfounded fear, or upon an unwillingness to accommodate the employee's disability. An adequate inquiry into the hardship imposed by any proposed accommodation of the disabled individual therefore does not include an inquiry into the relative qualifications of the disabled individual and any other applicant or employee. Once an employer accommodates a disabled individual or demonstrates an ability to do so, the hiring or promotion of that individual may be exclusively merit-based, i.e., based upon the employee's overall contribution to the workplace. An employer may, as a result, reject any employee in order to promote the efficiency of the workplace.[120]

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120. Regulations that apply to the Office of Personnel Management (OPM) contain similar concepts. *See* 5 C.F.R. § 731.201 (1990). According to the OPM regulations, one may consider a variety of specific factors in determining whether an applicant will promote the efficiency of the service:

> (b) *Specific factors.* Among the reasons which may be used in making a determination . . . any of the following reasons may be considered a basis for disqualification:
> (1) Delinquency or misconduct in prior employment;
> (2) Criminal, dishonest, infamous or notoriously disgraceful conduct;
> (3) Intentional false statement or deception or fraud in examination or appointment;
> (4) Refusal to furnish testimony as required by § 5.4 of this chapter;
> (5) Habitual use of intoxicating beverages to excess;
> (6) Abuse of narcotics, drugs, or other controlled substances;
> (7) Reasonable doubt as to the loyalty of the person involved to the Government of the United States; or
> (8) Any statutory disqualification which makes the individual unfit for the service.
> (c) *Additional considerations.* In making its determination ... OPM shall consider the following additional factors to the extent that these factors are deemed pertinent to the individual case:
> (1) The kind of position for which the person is applying or in which the person is employed, including its sensitivity;
> (2) The nature and seriousness of the conduct;
> (3) The circumstances surrounding the conduct;
> (4) The recency of the conduct;
> (5) The age of the applicant or appointee at the time of the conduct;
> (6) Contributing social or environmental conditions;
> (7) The absence or presence of rehabilitation or efforts toward rehabilitation.

Id. § 731.202(b), (c).

The line between a lawful refusal to extend affirmative action and illegal discrimination against a disabled individual may not always be clear.[121] Analysis such as that proposed above would help ensure that adjudicators appreciate the distinction between the two.

If the courts are to strike an appropriate balance between the needs of the employer and the rights of the alcoholic employee, they should consider the effects of absenteeism and poor performance on other employees and, ultimately, the business entity. Courts, therefore, should recognize that attendance on the job is an essential job function in all cases.[122] Courts could, for example, make explicit the implicit message of the Court of Appeals for the Seventh Circuit in *Simpson v. Reynolds Metals Co.*,[123] and presume that any employee exceeding acceptable absentee levels is unqualified.[124] Moreover, the courts should not require an employer to extend a leave of absence to an alcoholic for the purpose of treatment if the employer would not normally grant an extended leave of absence to a nonalcoholic employee suffering from an illness.[125] If the employee can maintain performance standards while undergoing outpatient treatment, the employer should of course accommodate the treatment.[126]

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121. *See* Southeastern Community College v. Davis, 442 U.S. 397, 412 (1979).

122. The ADA states:

> For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C.A. § 12,111(8) (West Supp. 1991).

123. 629 F.2d 1226 (7th Cir. 1980).

124. *See id.* at 1231 n.8. The court stated, "Although we think it might have been possible to do so, defendant has not shown that plaintiff's alcoholism prevented his successful performance of his job. It is not clear on the record before us that plaintiff's absences exceeded his allowable sick leave or the leave limitations for non-alcoholic workers." *Id.*

125. Limiting the employer's responsibility in this manner appears to contradict the guidance provided by the EEOC in the ADA regulations. The explanation to the regulations states, "[A]ccomodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment . . . ." ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,744 (1991) (to be codified at 29 C.F.R. § 1630.2(o) app.). Courts, however, could distinguish treatment requiring an extended absence from those resulting in occasional absences (for example, in-patient treatment for alcoholism lasting several months as opposed to periodic dialysis for the kidney patient).

126. *See* 42 U.S.C.A. § 12,111(9)(B). Ideally, the EEOC would have provided detailed guidance to the employers of alcoholics in the ADA regulations. The agency could have required, for example, that when treatment for alcoholism required an extended leave of absence, an employer's termination actions be "nonprejudicial." The agency could have

The courts should also recognize an employer's right to condition continued employment on notification of anticipated absence and on proper documentation of illnesses that result in absences. Alcoholic employees who do not comply with an employer's notification and documentation requirements should be deemed presumptively unqualified and therefore not protected by the ADA. The courts should not hold an employer responsible for the alcoholic's rehabilitation in terms of confronting the alcoholic or providing a " 'firm choice' between treatment and discipline."[127]

The prospect of treatment for alcoholism raises the issue of when an alcoholic can legitimately claim to be recovered or to have successfully completed a treatment program.[128] If an individual claims handicapped status as a recovered or recovering alcoholic and has a work history indicating inadequate performance due to alcoholism,[129] the courts should not allow that indi-

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required an employer to give the employee preferential status for rehire when and if appropriate positions became available with the employer. Such an approach would have had the advantage of providing the employer with a reasonably reliable workforce while giving the alcoholic employee the incentive to seek treatment, knowing that he would have preferential status for rehire when he could demonstrate rehabilitation.

127. *See, e.g.*, Rodgers v. Lehman, 869 F.2d 253, 259 (4th Cir. 1989). To assume that an employee rarely encounters employment difficulties when work performance is within acceptable limits is logical. Most often, employers fire or discipline alcoholic employees for misconduct or work impairment. *See* Spencer, *supra* note 25, at 691-92 & n.118. Employers hold nonhandicapped employees accountable for these behaviors. The ADA explicitly states that employers may hold alcoholic employees to the same performance standard as other employees. 42 U.S.C.A. § 12,114(c)(4). Placing responsibility for his own rehabilitation on the alcoholic employee may also be the most pragmatic approach; some evidence suggests that making the employee responsible for rehabilitation is a more effective means of ensuring rehabilitation than making the employer responsible. *See* Spencer, *supra* note 25, at 700 n.139.

128. The ADA provides that although individuals who are current users of illegal drugs do not qualify for the protections of the Act, that exclusion shall not be construed to exclude an individual who:

> (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
> (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; . . . except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

42 U.S.C.A. § 12,114(b). Although this section of the ADA is entitled "Illegal Use of Drugs and Alcohol," all of its terms refer to the illegal use of drugs alone. Only by implication does it refer to participation in alcohol treatment programs.

129. The ADA extends coverage to individuals with a history of a handicapping condition. 42 U.S.C.A. § 12,102(2)(B).

vidual to base a discrimination claim on an employer's reasonable preemployment inquiries regarding the employee's recovery or the employer's efforts to obtain assurances that the employee will be able to perform adequately.[130]

If an employee claims rehabilitation but subsequently suffers a relapse accompanied by inadequate job performance, courts should presume that dismissal is reasonable.[131] Furthermore, when an individual seeking employment has a negative work history due to alcoholism as well as a history of repeated treatment without sustained, long-term recovery, such facts should serve to create a legal presumption that the individual is unqualified.[132]

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130. Spencer, *supra* note 25, at 674. Such an inquiry is "job-related and consistent with business necessity," pursuant to 42 U.S.C.A. § 12,112(c)(4)(A) of the ADA. Regulations under the Rehabilitation Act provide that employers may properly consider "past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance" of alcoholics, as well as other applicants. 45 C.F.R. pt. 84, app. A, 359, 361 (1990). Courts should adopt these standards. When an employee has such a work history, the employee should bear the burden of demonstrating rehabilitation and his potential for improved performance. *See* Crewe v. United States Office of Personnel Management, 834 F.2d 140, 143 (8th Cir. 1987).

In balancing the interests of employer and alcoholic employee, the most difficult factual scenario a court might encounter would be the situation in which insufficient time has elapsed since rehabilitation for an alcoholic worker to establish a record of adequate job performance. To enable the worker to pursue a productive career but not limit the employer's ability to hire the most qualified individual, the law ideally would allow the employer to institute a probationary period during which the employer's financial liability was limited. Workmens' compensation laws, for example, make the employer financially responsible, irrespective of fault, for an employee's job-connected injuries and illnesses that result in an inability to work. The employer thus has an interest in eliminating from the workforce employees whose problems, such as alcoholism, could make the employees more susceptible to accidents. Spencer, *supra* note 25, at 711-12.

A probationary period could serve to insulate the employer from liability attached to workmens' compensation, the employee's requalification for disability benefits, and other benefits. Were employers authorized to institute such a probationary period, they would be protected from financial liability even while providing the worker with an opportunity to establish a record of adequate job performance.

Were such a probationary period permissible under the law, an employee's successful completion of the probationary period could trigger retroactive entitlement to benefits the employer withheld. The nature of the industry as well as the overall size of the business would be appropriate factors in determining the duration of the probationary period. As with essential job functions, an employer's written commitment to a certain probationary period, prepared before advertising or interviewing applicants for a job, could serve as rebuttable proof of the appropriate duration. *See* 42 U.S.C.A. § 12,111(8).

131. *See Rodgers*, 869 F.2d at 259. The court imposed such a standard and commented, "Only in a rare case, such as where a recovering alcoholic has had a single relapse after a prolonged period of abstinence, can this presumption be rebutted." *Id.*

132. *See Crewe*, 834 F.2d at 140. The plaintiff had been an alcoholic for over 20 years and had repeatedly undergone treatment for alcoholism, always without long-term success. The government rejected her employment application on the grounds that she would not

Impact on Others: The Safety Defense

Whether a handicapped individual is qualified for a job also can depend on the impact his presence has on others. Under the Rehabilitation Act, courts endorsed the "safety defense," in which an employer or program administrator could show that a handicapped individual could not perform the essential functions of a job safely[133] and therefore was not qualified for the position.[134] The courts analyzed this defense from two perspectives: (1) the perspective of the individual employee, that is, whether the handicapped individual could perform the essential functions of the job without endangering himself[135] and (2) the perspective of the employee's colleagues and any others affected by the employee's conduct, that is, whether the individual could perform the essential functions of the job without endangering others.[136] Implicitly, the safety defense allows an employer to consider the effect the handicapped individual's presence has on other employees as a qualification standard.[137] The ADA makes the safety

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promote the efficiency of the service. The court, "[h]aving determined that Crewe's handicap entered into the employment decision and that her handicap was relevant to a valid employment criterion," held that the issue was whether the employer could reasonably have accommodated Crewe's handicap. *Id.* at 143. Even though abundant evidence existed that Crewe's condition negatively affected her job performance, the court was concerned with the employer's duty to accommodate. It found that "Crewe's past rehabilitative efforts are relevant to the facial possibility of accommodation" and that the plaintiff had not met the burden of showing possible accommodation. *Id.* Although the court's argument in *Crewe* centered on accommodation, such a fact pattern more appropriately presents the question of whether the applicant was qualified for the position.

133. Courts first recognized the safety defense under the Rehabilitation Act. *See, e.g.*, Southeastern Community College v. Davis, 442 U.S. 397, 403 (1979) (affirming the district court's holding that the petitioner's hearing loss " 'actually prevents her from safely performing in both her training program and proposed profession' " and that " 'otherwise qualified, can only be read to mean otherwise able to function sufficiently in the position sought in spite of the handicap.' " (quoting Southeastern Community College v. Davis, 424 F. Supp. 1341, 1345 (1976))). In this case the Court appeared to equate sufficient performance with safe performance.

Congress later incorporated the safety defense into the provisions of the Rehabilitation Act pertaining to alcoholics and drug abusers. The 1978 Amendments to the Rehabilitation Act exclude from the definition of a handicapped individual those individuals "whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment . . . would constitute a direct threat to property or the safety of others." 29 U.S.C. § 706(8)(B) (1988).

The ADA provides that an employer may require that an employee "not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C.A. § 12,113(b). The ADA defines a direct threat as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C.A. § 12,111(3).

134. *See Southeastern Community College*, 442 U.S. at 406-07.

135. *See, e.g.*, Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 622-23 (9th

defense explicitly available.[138] The plain language of the statute

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Cir. 1982) (holding that the city could not prohibit diabetic from working as building repairer due to concern for his personal health and safety as a result of potential injury); Kampmeier v. Nyquist, 553 F.2d 296, 299-300 (2d Cir. 1977) (upholding school district's refusal to permit students with vision in only one eye to participate in contact sports due to risk of injury to children's eyesight). The ADA makes no reference to self-endangerment as a valid employment criterion. *See supra* note 133. The ADA regulations, however, extend the defense to situations in which the employee constitutes a danger to himself. *Cf. infra* notes 137-41 and accompanying text.

136. *See, e.g.*, Strathie v. Department of Transp., 716 F.2d 227, 232-33 (3d Cir. 1983) (rejecting Department of Transportation's claim that to allow hearing-impaired person to serve as school bus driver would constitute undue safety risk to others). A situation possibly may arise in which a court must consider whether a handicapped person's performance in a job or program would constitute a health or safety risk to *both* the handicapped individual and others. *See, e.g.*, Doe v. New York Univ., 666 F.2d 761, 777 (2d Cir. 1981) (upholding medical school's decision to reject student with a history of mental illness, reasoning that the student might be a threat to her own safety and that of others). In the case of the alcoholic employee, Congress has emphasized the threat the handicapped employee might pose to others. *See supra* note 133, 139.

137. The Supreme Court considered this question at length in School Board of Nassau County v. Arline, 480 U.S. 273 (1987), which concerned the status under the Rehabilitation Act of an individual with contagious tuberculosis. The School Board argued that Congress intended the Act to protect individuals with diminished physical or mental capabilities but not those with conditions that threatened the health, and therefore the performance, of others. In the School Board's view, if the employer chose to fire or not to hire the employee *not* on the basis of the employee's handicap, but on the basis of potential impact on others, a plaintiff could not challenge that decision under the terms of the Act. The Court responded that "[i]t would be unfair to allow an employer to seize upon the distinction between the effects of a [handicap] on others and the effects of a [handicap on the individual] and use that distinction to justify discriminatory treatment." *Id.* at 282. Nevertheless, the Court allowed that an individual might not be "otherwise qualified" as a result of being a threat to the safety of others. *Id.* at 287-88. According to the Court, the severity of the threat and the probability of the harm must be demonstrated on a case-by-case basis. *Id.* at 288. The Court based its finding on the legislative history of § 504, stating that "Congress' desire to prohibit discrimination based on the effects a person's handicap may have on others was evident from the inception of the Act." *Id.* at 282-83 n.9.

After the *Arline* decision, Congress implicitly repudiated the Court's justification for its holding by enacting the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (relevant portion codified in part at 29 U.S.C. § 706 (1988)), which included a provision mandating that:

> [f]or the purpose of sections 503 and 504, as such sections relate to employment, [the term "individual with a handicap"] does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

Id. § 9, 102 Stat. at 31-32.

This provision takes the contagious individual outside the scope of the Rehabilitation Act. It therefore eliminates the need for the employer to conduct the detailed and delicate balancing that is required to determine whether an individual is otherwise qualified, whether reasonable accommodation would allow the individual to become otherwise qualified, and whether making such accommodation would be an undue hardship on the

limits the availability of the defense to situations in which the alcoholic's presence constitutes a threat to the physical safety of others.[139] The implementing regulations, however, extend the defense to situations in which the handicapped individual poses a "risk of substantial harm" to his own safety or that of others.[140] In fulfilling its congressional mandate, the EEOC has thus endorsed assessing the impact of the handicapped individual's presence on other employees in determining if that individual is qualified.[141]

The ADA regulations address other impacts resulting from the disabled employee's presence on the remainder of the workforce as a component of undue hardship, rather than in terms of qualification standards.[142] A showing of negative impact, such as poor workforce morale and lowered performance, can serve as a defense to a charge of discrimination under the Act.[143] Apparently the ability to perform one's job safely is always an essential function, that is, a qualification standard, although the ability to contribute to the efficient functioning of the work unit is not an essential function but may represent an undue hardship. The distinction between qualification standards and hardship to the employer, however, is in reality of limited importance in that both safety and productivity concerns serve as a defense to a charge of discrimination, for which the employer bears the burden of proof. The courts, therefore, should recognize that both safety and productivity/morale issues implicate the concept of the fun-

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employer. Congress thus clearly intends any consideration of the handicapped individual's status to include consideration of the effect a person's handicap may have on others, at least as to their health and safety.

138. 42 U.S.C.A. § 12,113(b) (West Supp. 1991).

139. The ADA states: "The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id.*

140. ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,730, 35,736 (1991) (to be codified at 29 C.F.R. § 1630.2(r)).

141. Under the Rehabilitation Act, courts devised various tests to determine whether employment criteria based on a concern for others are valid under § 504. *See, e.g.*, Strathie v. Department of Transp., 716 F.2d 227, 232 (3d Cir. 1983) (rejecting the Department of Transportation's contention that criteria were legitimate if they fostered the goal of eliminating all possible risk and holding that employment criteria may prevent only "appreciable risks"); Doe v. New York Univ., 666 F.2d 761, 777 (2d Cir. 1981) (holding that although one must show a "significant risk of harm" to render a handicapped individual not otherwise qualified, "any appreciable risk" would satisfy that requirement).

142. *See* ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,736 (to be codified at 29 C.F.R. § 1630.2(p)(2)(v)).

143. *See infra* notes 233-42 and accompanying text.

damental nature of employment and thus undue hardship.[144]

REASONABLE ACCOMMODATION: WHAT ARE THE EMPLOYER'S RESPONSIBILITIES TO THE ALCOHOLIC EMPLOYEE?

The employment provisions of the ADA apply if a disabled individual "*with or without reasonable accommodation*, can perform the essential functions of the employment position."[145] The ADA, however, requires employers to make "reasonable accommodations [only] to the *known* physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee."[146] At the same time it requires employers to accommodate disabled individuals, the ADA generally prohibits employers from making preemployment inquiries of applicants regarding the applicants' disability status[147] and limits the accommodation due on the basis of the employers' awareness of the need for accommodation. These inherent contradictions in the ADA take on special significance in the case of "hidden handicaps" such as alcoholism.[148] Congress and the agencies responsible for the rulemaking process have not defined the parameters of reasonable accommodation in the case of an alcoholic,[149] implicitly leaving this responsibility to the courts.

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144. *See infra* notes 195-200 and accompanying text.

145. 42 U.S.C.A. § 12,111(8) (West Supp. 1991) (emphasis added). By comparison, the Rehabilitation Act regulations provide that an individual is qualified if "with reasonable accommodation, [he] can perform the essential functions of the job in question." 45 C.F.R. § 84.3(k)(1) (1990).

146. 42 U.S.C.A. § 12,112(b)(5)(A) (emphasis added).

147. *Id.* § 12,112(c)(2)(A).

148. For a detailed discussion of the special problems associated with hidden handicaps such as alcoholism, drug abuse, and mental illness, see Jane M. Nold, Comment, *Hidden Handicaps: Protection of Alcoholics, Drug Addicts, and the Mentally Ill Against Employment Discrimination Under the Rehabilitation Act of 1973 and the Wisconsin Fair Employment Act*, 1983 WIS. L. REV. 725. The author states that these handicaps: "present a number of unique problems for employers. First, they are 'hidden handicaps' which, unlike many physical handicaps, are not readily apparent to the employer on a day-to-day basis. Second, 'the point at which acceptable behavior becomes a disease or handicap is a matter of great controversy.' " *Id.* at 725-26 (quoting Bertman, *supra* note 12, at 522).

149. Current administrative regulations do not define the term "reasonable accommodation" as it applies to the alcoholic, and the examples of reasonable accommodation the legislation and accompanying regulations give apply to the physically handicapped. *See supra* note 42. Even members of Congress admit confusion on this issue. *See, e.g.*, 135 CONG. REC. S10,783 (daily ed. Sept. 8, 1989) (remarks of Sen. Humphrey) ("What are employers expected to do to accommodate alcoholics . . . ? This Senator has no idea, and I doubt that other Senators do either.").

Identifying the Needed Accommodation

The ADA regulations do not assign the ultimate responsibility for determining exactly what accommodations an employer could or should make for a disabled worker.[150] Instead, the regulations suggest that employer and employee take a flexible approach to determining the needed accommodation.[151] This pragmatic approach to planning and employment decisions unfortunately, does nothing to clarify the burdens of proof once an individual makes a claim of disability discrimination. Under the Rehabilitation Act, the courts at times assigned to the employer the responsibility for identifying the needed accommodation,[152] but at other times allowed this responsibility to fall to the handicapped employee.[153] In cases involving alcoholic claimants, the courts themselves often determined the appropriate means of accommodation.[154] Most appropriately this burden would fall on the alcoholic claimant.

Because of the hidden nature of the alcoholic's disability, the employer may have no reason to know of the employee's claim of handicapped status unless the employee takes responsibility for informing the employer.[155] Similarly, one cannot assume that an employer will grasp the intricacies of the accommodation required in a particular case, especially if the law precludes the

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150. The regulations clearly indicate that the employer is responsible for evaluating the options for accommodations in order to determine whether they would be effective and whether they would impose an undue hardship. ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,737, 35,748 (1991) (to be codified at 29 C.F.R. § 1630.9 app.). The employee, however, generally bears the initial responsibility for informing the employer of the need for accommodation. *Id.*

151. The official explanation of the ADA regulations states that "the employer *must* make a reasonable effort to determine the appropriate accommodation." *Id.* at 35,748 (emphasis added). Nevertheless, the explanation goes on to say, "The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability." *Id.*

152. *See, e.g.*, Rodgers v. Lehman, 869 F.2d 253, 259 (4th Cir. 1989) (accepting internal agency quidelines on accommodation of alcoholic employees as the proper standard in all cases). For a thorough discussion of this matter, see Tate, *supra* note 46, at 804 & n.118.

153. *See, e.g.*, Crewe v. United States Office of Personnel Management, 834 F.2d 140, 143 (8th Cir. 1987) (ruling "[p]laintiff bears the initial burden of proof showing that reasonable accommodation is possible"); *see also* Tate, *supra* note 46, at 804 & n.119 (discussing individuals handicapped with conditions other than alcoholism).

154. The most extreme example of this tendency is contained in *Rodgers*, 869 F.2d 253, in which the court legislated a standard of conduct for federal employers of alcoholics under § 501 of the Rehabilitation Act. *Id.* at 259. The court's action effectively eliminated the case-by-case analysis and accommodation that Congress envisioned and imposed a complex program of accommodation in all cases. The Ninth Circuit adopted the *Rodgers* "rule" in Fuller v. Frank, 916 F.2d 558, 561-62 (9th Cir. 1990).

155. *See supra* note 148 and accompanying text.

employer from making a preemployment inquiry regarding the employee's handicapped status.[156] The alcoholic employee should therefore bear the burdens of acquainting the employer with the nature and extent of his handicap and identifying the accommodation he requires. The employer, in turn, should bear the burden of assessing whether the requested accommodation would create an undue hardship.

This division of responsibility would have the effect of requiring the party with the greatest access to pertinent evidence to bear the burden of persuasion. The employee is in the best position to know his or her own limits and to provide the appropriate medical assessment. Correspondingly, the employer is in the best position to study the job in question and analyze its various components and their relationship to each other and to the business as a whole.

Requiring the handicapped individual rather than the employer to propose the necessary accommodation will tend to ensure that the parties arrive at the most appropriate and effective means of accommodation. The issue of assigning responsibility for identifying the needed accommodation was implicitly raised in *Wynne v. Tufts University School of Medicine*.[157] In *Wynne*, the petitioner suffered from dyslexia; as a result of his condition he experienced academic difficulties that ultimately led to his dismissal from the Tufts medical school.[158] Although the school had taken some steps to accommodate Wynne's handicap, it had not provided the accommodation Wynne specifically requested.[159] Wynne argued that the accommodation he proposed would be effective, whereas the medical school's attempts at accommodation had not been.[160] In requiring Tufts to demonstrate that it had considered Wynne's suggested accommodation and had rejected it on the basis of legitimate academic requirements,[161] the court implicitly endorsed

156. *See* 42 U.S.C.A. § 12,112(c)(2) (West Supp. 1991).

157. 932 F.2d 19 (1st Cir. 1991) (making claim under § 504 of the Rehabilitation Act).

158. *Id.* at 20-22.

159. The medical school designed a special study program for Wynne's second year which included tutoring for all subjects he had previously failed, utilizing note-takers in his classes, and working with an adult learning skills tutor to improve his study techniques. *Id.* at 21. What the school did not do was respond favorably to Wynne's specific request that he be allowed to take an individualized test rather than the standard multiple-choice tests normally employed by the school. *Id.* at 22. This failure to accommodate Wynne's specific request, and to properly document the reasons for not doing so, raised a question of fact as to whether Tufts had made a professional, academic judgment that accommodation was not possible. *Id.* at 27-28.

160. *Id.* at 22.

161. *Id.* at 27-28.

the view that the claimant is in the best position to propose the needed accommodation.

In *Rodgers v. Lehman*,[162] the Court of Appeals for the Fourth Circuit gave responsibility to the employer for identifying the employee's alcoholism and confronting the employee on that issue.[163] Such a requirement necessarily places the burden for identifying the needed accommodation on the employer. In the court's view, termination of employment was impermissible until the employer had provided the employee with a "firm choice" between treatment and discipline[164] and further had provided the employee with "some opportunity for failure."[165] The court thus defined reasonable accommodation to include tolerating a period of time during which the employee did not perform adequately. The court nevertheless noted that "[petitioner] was treated so leniently (until the time of his discharge) that he was able to continue to deny his alcoholism."[166] The court's dicta in *Rodgers* underscores the dilemma of the employer who is responsible for identifying and accommodating the employee's alcoholism: the law requires an employer to act while denying him access to complete information. Under these conditions, the claimant or court will always be able to second guess an employer's choices.[167]

If the law places the burden of defining the nature of reasonable accommodation on the employer, the question will always arise whether the employer might have done more. The law would thus create a neat catch-22 in which the employer's actions were always subject to legal challenge. No safe harbor would exist for the employer as long as a claimant or court could posit an alternative accommodation. In drafting the ADA regulations, the EEOC addressed this difficulty in part when it stated, "The accommodation . . . does not have to be the 'best' accommodation possible, so long as it is sufficient to meet the job-related needs

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162. 869 F.2d 253 (4th Cir. 1989) (making claim under § 501 of the Rehabilitation Act).

163. *Id.* at 259.

164. *Id.*

165. *Id.* The "opportunities" the court envisioned included both in-patient and out-patient treatment, relapse while in treatment, failure to continue with treatment, failure to participate in treatment, relapse subsequent to treatment, and job-related misconduct. *Id.*

166. *Id.* at 260.

167. Even when accommodation immediately results in acceptable job performance, an employer who is made responsible for devising the accommodation will suffer the inconvenience, administrative burden, and possible costs implicit in the "start-up" time required to assess and accommodate the alcoholic.

of the individual being accommodated."[168] An employer might, however, propose an accommodation that turns out to be insufficient to meet the job-related needs of the individual. Under such circumstances, the employer would continue to bear the risk of having failed to accommodate the disabled individual. If the claimant is explicitly responsible for proposing the needed accommodation, however, the employer may properly limit his efforts to identifying any special job-related requirements bearing upon the nature of the accommodation and determining whether the proposed accommodation is an undue hardship.[169] Identifying possible reasonable accommodations is theoretically limitless and should not be the burden of the employer. Once an employee requests a specific accommodation, the employer may rightfully be charged with determining whether that accommodation presents an undue hardship.

What Accommodation of Alcoholics is Reasonable?

In the context of federal employment, the courts often have stated that "reasonable accommodation" of the alcoholic employee encompasses a leave of absence for treatment.[170] Other requirements that courts have imposed on the federal employer include identifying the employee's problems with alcohol, interviewing the employee, informing the employee of available counseling services, and providing a " 'firm choice' between treatment and discipline."[171] Arguably, these rulings were responsive to the requirements of the Hughes Act[172] and internal policies adopted pursuant to the Hughes Act rather than the Rehabilitation Act. Although the Hughes Act and the Rehabilitation Act operate in

168. ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,748 (1991) (to be codified at 29 C.F.R. § 1630.9 app.).

169. Assigning responsibilities in such a way does not, of course, negate the possibility of an employer voluntarily making an alternative proposal. If more than one reasonable method exists for accommodating an individual, a court could properly find that the employer was free to choose its preferred method. *Id.* at 35,748-49.

170. *See, e.g., Rodgers*, 869 F.2d at 253 (denying an alcoholic employee the opportunity to undergo inpatient treatment prior to discharge violated the Department of the Navy's responsibility under the Rehabilitation Act). *But see* Fisher v. Walters, No. 85C1201, 1988 U.S. Dist. LEXIS 647, at *8-9 (N.D. Ill. Jan. 25, 1988) (ruling Veterans Administration not required to grant liberal leave of absence without pay in order to reasonably accommodate petitioner).

171. *Rodgers*, 869 F.2d at 259; *accord* Fuller v. Frank, 916 F.2d 558, 562 (9th Cir. 1990) (adopting the rule of *Rodgers*).

172. Pub. L. No. 91-616, 84 Stat. 1848 (1970) (codified as amended at 42 U.S.C. §§ 4541-4594 (1988)).

concert to make the federal government a model employer,[173] courts should not confuse their requirements.

In imposing these extensive requirements on federal employers, the courts articulated a standard that favored treatment and the possibility of future rehabilitation for the alcoholic. This balance gave no apparent consideration to any hardship on the employer. Moreover, the duties imposed on federal employers under the Rehabilitation Act may extend to handicapped employees who cannot demonstrate that they are qualified for their positions.[174] A court adopting such standards under the ADA thus would be acting completely inconsistently with congressional intent.[175] The ADA requires only that the employer create conditions that will allow the alcoholic currently to perform the essential functions of the job.[176] The courts therefore can and must distinguish between federal employers and private employers in ruling on disability discrimination claims.

No matter who the employer may be, allowing an employee to place responsibility for his alcoholism outside himself is not necessarily in the best interest of that employee.[177] Congress nevertheless erected a system of laws governing federal employment under which it implicitly gave the employer responsibility for the employee's alcoholism. This system requires the federal employer to strike a balance between obtaining appropriate treat-

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173. *See supra* notes 59, 63-65 and accompanying text.

174. *See* Crewe v. United States Office of Personnel Management, 834 F.2d 140, 142 (8th Cir. 1987) (finding that because § 501 of the Rehabilitation Act does not use the term "qualified," the protections of the Act extend even to individuals who are so impaired by alcohol that they cannot perform their essential duties).

175. Both the Rehabilitation Act and the ADA have the purpose of providing employment opportunities to qualified handicapped individuals. Their purpose is not to make an employee's rehabilitation from alcoholism the responsibility of the employer. The Hughes Act imposes duties only on the federal employer. The Hughes Act, however, does encourage private industry to develop prevention, treatment, and rehabilitation programs. 42 U.S.C. § 290dd-1(a)(1) (1988).

176. *See* 42 U.S.C.A. § 12,111(8) (West Supp. 1991).

177. Labor arbitrators note a recurring pattern in which discharge precipitates rehabilitation on the part of alcoholic employees:

> Despite the exercise of progressive discipline by the employer, the alcoholic employee fails to respond to warnings, supervisors, and other forms of discipline. When he finally exhausts the patience of the employer, he is discharged.
>
> During the crisis of discharge while waiting for an arbitration hearing, he seems to pull himself together. He cooperates with those treating him, allows himself to be hospitalized, and may join Alcoholics Anonymous. By the time of the hearing his Union can point to his progress toward recovery. Authorities testify optimistically as to his prognosis.

Pacific Northwest Bell Tel. Co., 66 Lab. Arb. (BNA) 965, 972 (1976) (Harter, Arb.).

ment opportunities for the alcoholic employee and creating negative consequences for continued misconduct.[178] The plain language and the legislative history of the ADA, however, show that in the context of private employment the employee is responsible for his own alcoholism.[179] The only balance an employer need strike is between reasonable accommodation of an employee who is fully capable of performing the essential functions of the position and undue hardship on the employer.[180] This balance places the legitimate business requirements of the employer in the forefront. If properly applied by the courts, it should also provide a test of the effectiveness—for both the employer and employee—of giving the alcoholic employee responsibility for identifying and coming to terms with his illness.

The ADA regulations emphasize what accommodation of a disabled individual is *not* required: extensive individual or personalized assistance.[181] The regulations distinguish between job-related and personal assistance in the following manner:

> [I]f an adjustment or modification is job-related, e.g., specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation.

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178. *See Rodgers*, 869 F.2d at 253, 259. The court delineated factors to be balanced, including the need for a "continuum of treatment" allowing for the realistic possibility for failure on the one hand and, on the other, effective treatment and the needs of the workplace. In trying to define the balance that should be struck, the court commented that "[e]xcessive sensitivity is no more conducive to a cure than is undue rigor, and in the final analysis 'reasonable accommodation' is the establishment of a process which embodies a proper balance between the two." *Id.* This balance put slight, if any, weight on the needs of the employer—which the court merely mentioned in passing—and focused almost exclusively on the consequences to the employee.

179. *See, e.g.*, 136 CONG. REC. H2637 (daily ed. May 22, 1990) (statement of Rep. Hoyer) ("The use of alcohol on the job is not covered by any protections in the ADA. We made that very clear and careful. It is not covered, so that there is no fear . . . that we are imposing on an employer . . . someone who is abusing alcohol . . . that impacts on their performance."); *id.* at E1916 (daily ed. June 13, 1990) (remarks of Rep. Hoyer) (analyzing Department of Transportation regulations under which action may be taken against individuals who are "currently impaired on the job from alcohol use and finding them consistent with the ADA"). The ADA itself provides that an employer "may hold an employee . . . who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the . . . alcoholism of such employee." 42 U.S.C.A. § 12,114(c)(4).

180. These minimum requirements are implicit in the provision that an employer may hold a handicapped employee to a uniform performance standard. *See* 42 U.S.C.A. §§ 12,111(10), 12,114(c)(4).

181. *See* ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,747 (1991) (to be codified at 29 C.F.R. § 1630.9 app.).

> On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide.[182]

In the case of alcoholic employees, this regulation standing alone[183] arguably eliminates any duty on the part of the employer to diagnose the employee's alcoholism, provide treatment, or direct the employee to seek treatment.

Placing such a burden on private employers under the ADA would be inappropriate, moreover, because even the medical community has not agreed upon the definition of alcoholism or a definitive means of diagnosing it.[184] From a strictly pragmatic point of view, such a requirement may be an unrealistic one. As one commentator noted, "While employees with physical handicaps may be easily accommodated with a one-time alteration in the work environment, the employee with a 'hidden handicap' [such as alcoholism] may require accommodations that the employer is neither aware of nor equipped to provide without a psychiatrist's or therapist's assistance."[185] Successful rehabilitation may in fact require an extended leave of absence from the workplace. One cannot assume, however, that the costs and inconvenience of granting a leave of absence, especially for a small business concern, are reasonable. From a philosophical standpoint, the courts should perhaps not require even the very large private employer to assume such a burden.[186]

Irrespective of the employer's size, the ADA requires with certainty only one thing: that the employer make an individualized assessment of the needs of the disabled individual and provide reasonable accommodation when such accommodation does *not* constitute an undue burden and when it *will* enable the

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182. *Id.*

183. That is, operating in isolation and not in conjunction with the Hughes Act and other directives governing personnel procedure.

184. *See supra* note 17 and accompanying text.

185. Nold, *supra* note 148, at 743 (citations omitted). The ADA regulations specify that the "employer would not be expected to accommodate disabilities *of which it is unaware.*" ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,748 (1991) (to be codified at 29 C.F.R. § 1630.9 app.) (emphasis added).

186. Imposing such a burden on the employer reflects an attitude that the employer, and not the employee, is responsible for the employee's behavior. For a discussion of the evolution of this idea, see Spencer, *supra* note 25. Employer responsibility for the employee may be supportable from a pragmatic if not a philosophical view. An employer who provides rehabilitation programs to alcoholic employees may find such programs less costly than the employment of untreated workers. *Id.* at 665 & n.13.

individual to perform the essential functions of the job.[187] The employer need not provide the best accommodation possible; in other words, the accommodation offered need not provide the greatest possible advantage to the employee.[188] Rather, the employer need provide only an accommodation that will enable the individual to perform the essential functions of the job.[189] Given the possible range of circumstances encompassed by the need to accommodate an alcoholic employee,[190] the courts should not formulate hard and fast rules governing accommodation of the alcoholic. Courts should instead engage in the individualized assessment Congress intended,[191] with the goal of enabling the individual to perform currently the job in question.

The employer bears the burden of considering exactly what accommodation the handicapped employee requires and of determining whether such accommodation constitutes an undue hardship.[192] The ADA regulations specify, however, that "[i]n general, . . . it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed."[193] The courts reasonably may construe these requirements as imposing on the alcoholic employee the burden of identifying the needed accommodation. The employer would then be obligated to assess fairly the employee's proposal and to determine if the accommodation constitutes an undue burden. Even under this formulation, the employer remains responsible for determining what accommodation is appropriate[194] and bears the risk of failing to make reasonable accommodation of a disabled individual. Because courts analyze the employer's accommodation efforts ex post facto, the courts must establish the parameters of undue hardship in accommodating the alcoholic employee in order to limit the employer's risk.

UNDUE HARDSHIP: THE LIMIT ON THE EMPLOYER'S DUTY TO ACCOMMODATE

The concept of undue hardship limits the extent of an employer's duty to accommodate a handicapped employee. The ADA

187. *See* 42 U.S.C.A. § 12,112(b)(5)(A) (West Supp. 1991).

188. ADA Employment Regulations, 56 Fed. Reg. at 35,748 (to be codified at 29 C.F.R. § 1630.9 app.).

189. *Id.*

190. *See supra* notes 24-27 and accompanying text.

191. *See supra* note 77 and accompanying text.

192. ADA Employment Regulations, 56 Fed. Reg. at 35,748 (to be codified at 29 C.F.R. § 1630.9 app.).

193. *Id.*

194. *Id.*

excuses an employer from complying with the Act's terms when a particular accommodation represents an undue hardship to the employer.[195] According to the ADA, " 'undue hardship' means an action requiring significant difficulty or expense, when considered in light of [specific] factors."[196] These factors include the cost of accommodation and the financial resources, size, and nature of the business.[197] The factors indicate that an employer should measure undue hardship primarily on the basis of expense.[198] The ADA regulations specify, however, that "the concept of undue hardship is not limited to financial difficulty."[199] Rather, undue hardship encompasses "any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."[200]

Many of the provisions of the ADA reflect the concept of "fundamental alteration of the business," although the ADA does not contain this specific language.[201] The list of factors an employer may consider in analyzing undue hardship, for example,

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195. 42 U.S.C.A. § 12,112(b)(5)(A) (West Supp. 1991). Undue hardship is thus a defense to a charge of discrimination under the ADA. The employer bears the burden of proof of showing that the possible accommodation represents an undue hardship. *See* ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,752 (1991) (to be codified at 29 C.F.R. § 1630.15(d) app.) (providing guidance on the evidence an employer must offer to demonstrate undue hardship).

196. 42 U.S.C.A. § 12,111(10)(A); *see supra* note 55.

197. 42 U.S.C.A. § 12,111(10)(B).

198. The employer's ability to bear the burden of a particular accommodation rather than the actual cost of the accommodation defines the limit of the employer's duty. *See id.* § 12,111(10)(B)(ii), (iii). The Rehabilitation Act regulations allow courts to allocate the weight of nearly identical factors as they see fit, and courts may emphasize or even ignore one or more of the factors in a given case. *See, e.g.*, 45 C.F.R. pt. 84, app. A, 359, 366 (1990) ("The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation."). The ADA regulations do not comment on the weight the factors should receive.

199. ADA Employment Regulations, 56 Fed. Reg. at 35,744 (to be codified at 29 C.F.R. § 1630.2(p) app.).

200. *Id.*

201. In defining undue hardship, the ADA regulations refer to "any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would *fundamentally alter the nature or operation of the business.*" *Id.* at 35,744 (to be codified at 29 C.F.R. § 1630.2(p)) (emphasis added). The terms of the ADA provide that, in addition to financial considerations, the following are also factors for consideration: "[T]he type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity." 42 U.S.C.A. § 12,111(10)(B)(iv) (West Supp. 1991). These provisions speak to both the nature of the business and the independence of a given office or unit, that is, whether the unit should be considered as an entity unto itself or a part of a greater whole.

includes not only the impact of a proposed accommodation on expenses and resources,[202] but also "the impact otherwise . . . upon the operation of the facility."[203] Several provisions of the ADA explicitly allow the employer to use standards or criteria that are job-related and consistent with "business necessity" even when their use will result in screening out individuals with disabilities.[204]

The expansive definition of undue hardship contained in the ADA regulations comports with the undue hardship analysis the Supreme Court employed when presented with a handicap discrimination claim involving access to postsecondary education programs.[205] The Court defined undue hardship to include an accommodation that results in a fundamental alteration in the nature of the program.[206] According to this theory, if the only accommodation that will render an applicant qualified results in a change in the essential nature of the program itself, then the law again excuses the entity from accommodating the handicapped individual.[207] The Court's approach necessarily emphasized the essential components of the program as defined by the program's administrator. One can draw an analogy, therefore, between the "fundamental nature" of an educational program and the "essential functions" of a job.[208] Under the terms of the ADA, "consideration shall be given to the employer's judgment as to what functions of a job are essential."[209] If the accommodation

202. 42 U.S.C.A. § 12,111(10)(B)(ii).

203. *Id.*

204. The ADA makes allowances for consideration of business necessity in the case of qualification standards, employment tests, or other selection criteria, *id.* at §§ 12,112(b)(6), 12,113(a); medical examinations and inquiries of employees may properly be a basis for determining if an employee is an individual with a disability, or the nature or severity of a disability, if the examination or inquiry is job-related and consistent with business necessity, *id.* at § 12,112(c)(4)(A).

205. *See* Southeastern Community College v. Davis, 442 U.S. 397 (1979).

206. *Id.* at 413.

207. For example, in *Southeastern Community College*, a severely hearing-impaired individual applied for entrance to nursing school. *Id.* at 400-01. Although deeming the applicant qualified to participate in the academic portions of the program, the Supreme Court held that without the close, personal supervision of a nursing instructor, the applicant would be unable to complete the clinical portions of the program. *Id.* at 409. The Court held that the school could accommodate the applicant only by eliminating completely the clinical portions of the program. *Id.* at 410. The Court ruled that such an accommodation was a fundamental alteration of the program, and, as such, an undue hardship. *Id.* at 413-14.

208. *See* 42 U.S.C.A. § 12,111(8) (West Supp. 1991) (defining a "qualified individual with a disability" as one who, "with or without reasonable accommodation, can perform the *essential functions of the employment position*" (emphasis added)).

209. *Id.*

sought will fundamentally alter an essential job element, then the courts should deem the accommodation an undue burden on the employer.[210]

Alcoholics making claims under the Rehabilitation Act often have argued that their employers failed to accommodate them by not providing a leave of absence for treatment.[211] Some courts have imposed a further duty on the federal employer to recognize a drinking problem and to confront the employee about that problem.[212] By giving their stamp of approval to these accommodations, the courts in question implicitly found them not to be undue hardships. One could, however, define all these forms of accommodation as fundamental alterations in essential job functions or the nature of private employment.[213] Employees are expected to be present at their jobs, and this expectation is fundamental to every form of employment. The law generally does not require employers to serve as psychological counselors or diagnosticians to their employees, and experts often caution them against doing so.[214]

Even assuming that a model employer would take responsibility for what society has traditionally defined as the employee's personal problems, Congress' purpose in passing the ADA was not to make each employer a model employer.[215] Moreover Congress envisioned no quid pro quo under the ADA as it did under the Rehabilitation Act.[216] The definition of undue hardship contained in the ADA regulations is consistent with the traditional analysis of discrimination, which promotes the view that "employment should be regarded as a means to employer-defined ends in a competitive market rather than as an end in itself."[217]

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210. This conclusion is supported in the legislative history of the ADA: "As outlined in the committee report, no action on the part of an employer that is 'unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program' is required . . . ." 135 CONG. REC. S10,735 (daily ed. Sept. 7, 1989) (remarks of Sen. Harkin).

211. *See supra* note 170 and accompanying text.

212. *See supra* note 171 and accompanying text.

213. Because this Note treated absenteeism at length in the discussion of qualification standards, the concept will receive relatively little attention here. *See supra* notes 104-127 and accompanying text (discussing in detail absenteeism as it relates to qualification standards). Qualification standards, reasonable accommodation, and undue hardship are, of course, interrelated concepts, and consideration of one necessarily implicates the others.

214. *See, e.g.*, William C. Symonds & Peter Coy, *How to Confront—and Help—an Alcoholic Employee*, BUS. WK., Mar. 25, 1991, at 78 (reporting that managers should "not even . . . mention drinking, let alone diagnose alcoholism").

215. *See supra* notes 68-72 and accompanying text.

216. *See supra* notes 66-67 and accompanying text.

217. Note, *supra* note 110, at 1005.

Under this view, the demands of productivity and quality control necessarily limit the employer's responsibility to accommodate the handicapped individual. The ADA's concept of "essential job functions,"[218] however, arguably indicates "a zone of marginal incapacity that an employer must either tolerate or accommodate."[219] The ADA thus embodies conflicting views: on the one hand, it appears to create a preference for employees who can perform only the essential functions of the job; on the other, it emphasizes the right of the employer to act consistently with business necessity and to hold employees to uniform performance standards. The legislative history of the ADA makes clear that Congress intended to emphasize the employer's traditional right to the best qualified workforce available.[220]

The notion of essential job functions thus does not represent a limit on the employer's ability to hire or promote the most productive worker but rather represents a limit on the employer's duty to accommodate the disabled worker.[221] The courts, therefore, should adjust the standard for undue hardship under the ADA and not mechanically follow case law developed under the Rehabilitation Act. In mandating deference to the employer's definition of essential job functions, Congress already has acknowledged the need for altered standards in the realm of private employment. Given the special problems those with hidden handicaps present, courts should reconsider the definition of undue hardship under the ADA.

Misconduct

Many of the cases litigated under the Rehabilitation Act reflected a pattern of egregious misconduct on the part of an alcoholic employee or an extensive period of extremely poor performance, followed by discharge and a claim of handicap discrimination.[222] In some instances courts considering claims

218. 42 U.S.C.A. § 12,111(8) (West Supp. 1991).

219. Note, *supra* note 110, at 1011.

220. *See supra* notes 71-72 and accompanying text.

221. *See supra* notes 187-89 and accompanying text.

222. *See, e.g.*, Crewe v. United States Office of Personnel Management, 834 F.2d 140 (8th Cir. 1987) (denying former federal employee reemployment because of history of alcoholism that seriously impacted job performance; plaintiff provided no evidence of rehabilitation and claimed that refusal to hire her was discrimination solely on the basis of a handicap); Hicks v. Frank, No. 88C4216, 1990 U.S. Dist. LEXIS 7253, at *4-6 (N.D. Ill. June 7, 1990) (a "recovering alcoholic" appeared drunk on the job and threatened his

under the Rehabilitation Act seemed to ignore totally the misconduct. These courts apparently considered only whether the claimant's disability was somehow *involved* in his discharge in determining if the claimant could make a prima facie case of discrimination.[223] If the reasons for discharge somehow related to the employee's alcoholism, these courts implicitly found that the employer had a duty to tolerate misconduct or inadequate performance for some period of time during which the employer was to promote rehabilitation options.[224] Such an analysis fails to distinguish between discharge or other disciplinary action for drunkenness, associated misconduct, or poor performance—all of which indicate an individual is unqualified for the position or that the employer is suffering an undue hardship—and discharge for alcoholism.

Employers discharge or discipline employees for many reasons, among them absenteeism, tardiness, loafing, early quitting, sleeping on the job, assault and fighting among employees, insubordination, threat or assault of a management representative, abusive language to supervisors, dishonesty, theft, negligence, damage to or loss of machinery or materials, incompetence or low productivity, refusal to work overtime, abusive behavior toward clients, and other misconduct.[225] In the case of an alcoholic employee, discharge for any of these reasons may also be related to alcoholism.[226] At times "the employee's troubles are so intertwined with his job performance that it is difficult to separate them."[227] In such a situation to claim that an employer discharged or disciplined the employee on the basis of the handicap would

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supervisor; he then claimed discharge was solely on the basis of his handicap). The majority of discharged alcoholic employees are discharged as the result of a dramatic incident rather than a continual pattern of subtle misbehavior. Spencer, *supra* note 25, at 692 n.118.

223. *See, e.g.*, Butler v. Thornburgh, 900 F.2d 871 (5th Cir. 1990) (holding that an FBI agent was qualified to make a claim under the Rehabilitation Act despite incidents in which he drunkenly crashed an FBI vehicle and forgot where he had left his Bureau vehicle while drunk); *Hicks*, 1990 U.S. Dist. LEXIS 7253 (deciding a genuine issue of material fact existed with respect to whether plaintiff was discharged solely because of his handicap, despite evidence that plaintiff had appeared drunk on the job, was unfit to do his job safely, and had threatened a supervisor).

224. *See, e.g.*, Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989) (holding that reasonable accommodation of the alcoholic includes permitting some opportunity for failure); *Hicks*, 1990 U.S. Dist. LEXIS 7253 (noting with disfavor the fact that plaintiff's voluntary entry into a treatment program was not considered in his favor, even though plaintiff had allegedly appeared drunk on the job).

225. Spencer, *supra* note 25, at 692 n.118.

226. *Id.* at 692.

227. *Id.*

be unrealistic. The employee's "inability to perform a proper day's work or his misconduct" is the true basis for the employer's action.[228]

The ADA explicitly provides that an employer may hold an alcoholic employee to a uniform performance standard.[229] A claimant may file suit only on the basis of disability discrimination when an employer's negative employment action was based on the claimant's handicap[230] or the need to accommodate that handicap.[231] Discharge or other discipline based on misconduct, poor performance, or excessive absences, even when related to alcoholism, is not in response to the handicap itself or an unfounded prejudice or stereotype. Such employment actions are a response to inadequate job performance. Under the ADA, the courts should not require employers to tolerate behavior on the part of alcoholic employees that they would not tolerate in other employees. Each business, therefore, should be governed by its internal policies. The courts should require an employer to prove only that he acted in conformity with prior personnel actions involving nonalcoholic employees or in accordance with preexisting personnel policy, and that such policies are uniformly enforced. The courts may also properly require employers to show that their policies do not have the effect of denying only alcoholics meaningful access to employment possibilities.[232]

Impact on Others: Employee Morale and Unit Functioning

Employee morale and overall unit functioning are additional factors that received no explicit attention in either the Rehabilitation Act or the ADA, but for which the EEOC established guidelines in the ADA regulations.[233] According to the official explanation of the regulations, "the impact of an accommodation

228. *Id.*

229. 42 U.S.C.A. § 12,114(c)(4) (West Supp. 1991) (stating that an employer "may hold an employee . . . who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the . . . alcoholism of such employee.").

230. ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,736 (1991) (to be codified at 29 C.F.R. § 1630.4).

231. *Id.* at 35,737 (to be codified at 29 C.F.R. § 1630.9(b)).

232. For example, a business policy governing behavior during nonworking hours might serve to discriminate against an alcoholic employee. Generally, "the employee's behavior away from his job is not a legitimate concern of his employer." Spencer, *supra* note 25, at 687.

233. *See* ADA Employment Regulations, 56 Fed. Reg. at 35,736 (to be codified at 29 C.F.R. § 1630.2(p)(2)(v)).

on the ability of other employees to perform their duties is one of the factors to be considered when determining whether the accommodation would impose an undue hardship on [an employer]."[234] Nevertheless, "a negative effect on morale, by itself, is not sufficient to meet the undue hardship standard."[235]

An alcoholic's absenteeism often results in low morale in that portion of the workforce that is implicitly required to make up for the deficiencies of the alcoholic.[236] In ruling on discrimination claims, courts should consider the overall impact of an individual's presence in the workforce, such as the effect on employee morale and allocation of work assignments, as well as any deficiencies in the alcoholic's performance. Standing alone, any one of these factors may be insufficient for a finding of undue hardship. Congress, however, did not require isolated consideration of each factor. Under the ADA, Congress' deference to "business necessity" justifies giving consideration to the efficient operation of the entire work unit, not just the ability of disabled individuals to perform their jobs when reasonably accommodated.[237]

Given congressional intent and the broad scope of the ADA, undue hardship should encompass not only adverse effects on the health or safety of others but also on workplace morale and overall unit functioning. In defining the parameters of the "safety defense," courts have grappled with the question of when employment criteria based on a concern for others are valid.[238] The standards these courts devised for determining the propriety of an employer's policies should extend to effects that are not safety related, such as employee morale and productivity. Especially pertinent is the standard the Court of Appeals for the Ninth Circuit adopted in *Bentivegna v. United States Department of Labor*.[239] The court stated that it must examine under a "rigorous scrutiny" standard whether a job decision related to "business necessity."[240]

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234. *Id.* at 35,733.

235. *Id.*

236. *See, e.g.*, Rodgers v. Lehman, 869 F.2d 253, 257 (4th Cir. 1989) (requiring other workers to work overtime whenever claimant was absent from work created morale problems); Fisher v. Walters, No. 85C1201, 1988 U.S. Dist. LEXIS 647, at *4 (N.D. Ill. Jan. 25, 1988) (having to make up for claimant's repeated absences "disgruntled" other employees).

237. *See* 42 U.S.C.A. § 12,113(a) (West Supp. 1991).

238. *See supra* notes 133-41 and accompanying text.

239. 694 F.2d 619 (9th Cir. 1982).

240. *Id.* at 621-22. The court was applying a Department of Labor regulation requiring that "job qualifications 'which would tend to exclude handicapped individuals because of their handicap . . . [be] related to the specific job [at issue] and . . . consistent with business necessity and safe performance.' " *Id.* at 621 (quoting 29 C.F.R. § 32.14 (1982)).

A rigorous scrutiny standard would properly balance Congressionally mandated deference to business necessity with the EEOC's specification that effects on employee morale are insufficient in themselves to constitute an undue hardship on the employer. Under this standard, mere speculation that an employee might interfere with unit functioning would not support a defense of undue hardship.[241] The standard would require a showing that the employee's behavior was harmful to the smooth operation of the business.[242]

Behavior On- and Off-the-Job: Relations with the Public

Although an employer generally does not have a legitimate concern with his employees' behavior away from the job,[243] situations arise in which this behavior can adversely affect a business.[244] For example, "[T]he company's reputation for safety or for the reliability of its product may be harmed by the continued employment of a troubled individual."[245] An employee's behavior while on the job, if the job involves contact with the public, can also have such negative effects. The courts should therefore allow the employer to mount an undue hardship defense to a claim of discrimination when the company's relations with the public are adversely affected by the alcoholic's presence. As in the case of employee morale, the application of a rigorous scrutiny standard to such defenses is appropriate.[246]

Scope of Undue Hardship Analysis

The impact of an unproductive or disruptive employee is, of course, most keenly felt within a limited area—most often the office or unit in question. If the courts employ a broad scope in analyzing undue hardship and focus on overall size of a business

241. Such an approach is consistent with the ADA regulations governing the threat to health and safety posed by an employee's presence in the workforce. The regulations state, "a speculative or remote risk is insufficient [to entitle the employer to discharge the employee]." ADA Employment Regulations, 56 Fed. Reg. 35,726, 35,745 (1991) (to be codified at 29 C.F.R. § 1630.2(r) app.).

242. Such a requirement is in line with current arbitration trends. *See* Spencer, *supra* note 25, at 688 & n.104.

243. *Id.* at 687.

244. *Id.*

245. *Id.* at 687-88.

246. *See supra* notes 233-42 and accompanying text.

rather than the functioning of a particular office or subdivision, the analysis may distort the true impact of an unproductive employee. Although a broad scope for an economic analysis of undue hardship is appropriate, the courts should adopt a flexible approach to determining the appropriate scope for analysis of other factors.[247] The nature of the accommodation requested by the employee, or of the hardship claimed by the employer, should determine scope. A broad scope is appropriate, for example, in determining whether reassignment would constitute an undue hardship. A more limited scope may be appropriate when an employee requests job restructuring. When an employer claims negative effects on unit functioning or productivity, the courts should appropriately limit their analysis to the work unit directly affected.

CONCLUSION

The Americans with Disabilities Act of 1990, although modeled on the Rehabilitation Act of 1973 and its implementing regulations, should be carefully differentiated from that Act. The courts should distinguish the legal contexts in which the two Acts operate, as well as the congressional intent behind each Act. Courts must recognize that as a result of these considerations, rulings on disability claims under the Rehabilitation Act involving alcoholics do not necessarily have precedential value under the ADA.

The need for a well considered and balanced approach to the status of the alcoholic under the ADA is particularly pressing. Congress did not resolve the controversy over granting the alcoholic disabled status merely by including in the ADA sections governing employment of alcoholics. Neither Congress nor the EEOC has provided specific guidance on the proper balance

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247. One can find authority for such an approach in the ADA, which states:

> In determining whether an accommodation would impose an undue hardship [an employer may consider]
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> . . . .
>
> (iv) the type of operation or operations of the covered entity, including the composition, *structure, and functions* of the workforce of such entity; the geographic *separateness, administrative, or fiscal relationship* of the facility or facilities in question to the covered entity.

42 U.S.C.A. § 12,111(10)(B) (West Supp. 1991) (emphasis added).

between reasonable accommodation of alcoholic employees and undue hardship on employers or the role that qualifications must play in that balance. Congress, however, has made clear its intention that courts give the legitimate business needs of an employer the most weight in that balance. The courts now have the duty to give substance to the congressional plan by delineating the responsibilities of both employers and alcoholic employees under the ADA.

Alcoholic employees should have the responsibility of notifying their employers of their condition in order to qualify for handicapped status under the ADA. Given the often hidden nature of the alcoholic's disability and the delicate balance between alcoholic and nonalcoholic behaviors, the courts must not interpret the ADA as placing with the employer the responsibility for "diagnosing" the alcoholic's problem. Placing the responsibility on the alcoholic employee of identifying himself will assign the burden to the party with the greatest access to information; it could also serve to facilitate the alcoholic's recovery.

The alcoholic claimant should bear the burden of establishing an actual or perceived impairment of a major life activity, as the ADA requires. The courts should not continue to employ a per se definition of alcoholic-as-handicapped. They should perform the individualized analysis of disabled status that Congress envisioned. Only in this manner can the courts begin to make the distinction between true discrimination and the application of nondiscriminatory employment criteria. Once an individual has made a claim to disabled status, the individual should have the responsibility of identifying any accommodations required in his particular case. The claimant should also provide the medical and other information pertinent to his request for accommodation. Employers are properly responsible for identifying any special job requirements bearing on the issue of accommodation and for determining if a proposed accommodation will constitute an undue hardship. Dividing these responsibilities in this manner places the appropriate burdens on the party with the greatest access to information and provides an equitable division of responsibilities between employer and employee.

The courts also should recognize that employers are entitled to make reasonable inquiries regarding an alcoholic's work history and to obtain assurances of adequate rehabilitation in order to determine the worker's qualifications. To this end, the courts should attempt to clarify the circumstances under which an alcoholic can legitimately claim to be rehabilitated. The courts

should also address the issue of relapse and the conditions under which an alcoholic can no longer claim to fall within the protections of the ADA.

The courts should distinguish between employment actions based on employee misconduct, even when a disability is involved, and employment actions based on that disability. The courts also should recognize that an essential element of every job is that the employee be present to do the job. An employee, therefore, is unqualified when his alcoholism occasions excessive absences from the job, whether these absences are due to primary alcoholism or to secondary illness.

In analyzing undue hardship, the courts should consider the effects of the individual's alcoholism on other employees and the functioning of the work unit as a whole, as well as the business' relations with the public. The courts should consider effects that are intangible, such as employee morale and productivity, as well as effects that are quantifiable, such as overtime pay and medical costs, in analyzing undue hardship. When considering such factors, the courts should employ a scope of analysis appropriate to the factor being considered.

If the courts clarify these points in a consistent manner, they will move toward establishing clearly when alcoholics are qualified for disabled status and when employers suffer an undue hardship. In doing so, they will provide predictability for employer and employee, and ultimately lessen the burden on the courts. Consistent rulings on all of these points, however, are still unlikely to quiet all debate on the appropriate status for alcoholics in our society. Nevertheless, only by adhering to the balance Congress intended to strike between employers' and alcoholics' interests can the courts provide a basis for the further refinement of the law.

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