NOTE

DUALING CAUSATION AND THE RIGHTS OF EMPLOYEES
WITH HIV UNDER § 504 OF THE REHABILITATION ACT

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"[S]ociety's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment... The [Rehabilitation] Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments."  

I. INTRODUCTION

The Rehabilitation Act of 1973 was the first federal statute to safeguard the rights of people with disabilities. Congress enacted § 504 of the Rehabilitation Act to prohibit federal grantees from engaging in disability-based discrimination and to facilitate the integration of people with disabilities into mainstream society. Three decades into the domestic response to HIV/AIDS, myths and fears about the disease persist, and
courts' interpretations of the Rehabilitation Act undermine the act's ability to eradicate them. In particular, courts that require employees to prove their disability was the sole cause of their adverse treatment under § 504 of the act eviscerate the act's protections for workers with HIV. However, as this Note argues, the Rehabilitation Act can be a strong tool for challenging workplace discrimination against employees with HIV if courts adopt a motivating-factor causation standard for § 504 employment discrimination claims.

Although Congress passed the Rehabilitation Act prior to the domestic HIV/AIDS epidemic, courts and federal agencies responsible for administering the act have widely recognized that § 504 prohibits discrimination against people with HIV. In 1990, Congress passed the Americans with Disabilities Act (ADA), which expanded protections for people with disabilities to the private sector. The ADA prohibits discrimination against people with disabilities in public and private employment (Title I), public services and transportation (Title II), and private accommodations and services open to the public (Title III).

Advocates for people with HIV welcomed the ADA's passage, but judicial interpretation of its provisions has caused ironic and unintended consequences. As courts began deciding employment discrimination cases under Title I of the ADA, they had occasion to distinguish between Title I's causation standard and the causation standard in § 504 of the

Note refers to all individuals who have tested positive for HIV as a people with HIV irrespective of whether their condition has progressed to AIDS.


7. See, e.g., Bragdon v. Abbott, 524 U.S. 624, 631–33 (1998) (holding that respondent’s HIV infection constituted a disability, on the grounds that it was a “physical impairment”); see also Liza Conyers et al., A Comparison of Equal Employment Opportunity Commission Case Resolution Patterns of People with HIV/AIDS and Other Disabilities, 22 J. VOCATIONAL REHABILITATION 171, 171–72 (2005) (explaining how “early recognition of the legal status of people with HIV under the Rehabilitation Act was essential because this set the precedent for the legal interpretations of the ADA.”).


9. See also Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir. 2003) (discussing the various ADA Titles and the range of discrimination they guard against).

Rehabilitation Act. The Rehabilitation Act and ADA define disability identically. However, § 504 and the ADA employ different causation language—§ 504 prohibits discrimination "solely by reason of" disability whereas Title I of the ADA prohibits discrimination "on the basis of" disability. Courts have contrasted the causation language of § 504 with that of Title I and concluded that Congress intended Title I to afford

11. Under the ADA and Rehabilitation Act, a person with a disability is a person who has "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." Americans with Disabilities Act (ADA), 42 U.S.C. § 12102 (2006); Rehabilitation Act, 29 U.S.C. § 705(20)(B) (2006) (incorporating the ADA's definition of disability). After passage of the ADA, courts and scholars debated whether the ADA's definition of disability protected people with asymptomatic HIV. See David W. Webber & Lawrence O. Gostin, Discrimination Based on HIV/AIDS and Other Health Conditions: "Disability" as Defined Under Federal and State Law, 3 J. HEALTH CARE L. & POL'Y 266, 276-77 (2000). The Supreme Court reduced debate on the issue in Bragdon v. Abbott when it held that a woman living with asymptomatic HIV was disabled because HIV substantially limited her major life activity of reproduction. Bragdon v. Abbott, 524 U.S. 624, 641 (1998). The Court, however, refrained from holding that HIV is a per se disability. Id. at 642. Moreover, in two subsequent decisions, the Court held that treatments reducing the impact of a person's disability must be considered when determining whether an impairment constitutes a disability, Sutton v. United Airlines, Inc., 527 U.S. 471, 482 (1999), and that the ADA established a "demanding standard for qualifying as disabled." Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002).

In response to what they viewed as the Supreme Court's misinterpretation of the term disability, Congress passed the ADA Amendments Act of 2008 (ADAAA). See H.R. REP. No. 110-730, pt. 1, at 1 (2008) ("[W]hile Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of handicap under the Rehabilitation Act of 1973, that expectation has not been fulfilled . . . ."). The ADAAA significantly advances the argument that HIV is a disability. The text directs courts to construe the definition of disability "in favor of broad coverage," ADA Amendments Act of 2008 (ADAAA), 42 U.S.C. § 12102(4)(A) (Supp. II 2008); and functions of the immune and reproductive systems are included in a non-exhaustive statutory list of major life activities that a disability may substantially limit. Id. § 12102(2)(B). It also prohibits courts from considering mitigating measures such as medication when determining whether a person's impairment substantially limits major life activities. Id. § 12102(4)(E)(i)(I). Potentially, advocates could use this provision to argue that people with HIV who are asymptomatic because of treatment are nevertheless disabled. Furthermore, the ADAAA explicitly grants the EEOC enforcement authority over the definitions of disability in Title I. Id. § 12116. The EEOC's proposed rule for implementing § 12102 lists HIV as an "impairment that will consistently meet the definition of disability." Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 74 Fed. Reg. 48431, 48441 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630.2(j)(5)).


13. Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a) (2006) (Title I). Title II prohibits discrimination "by reason of disability." Id. § 12182(a). Title III prohibits discrimination "on the basis of disability." Id. § 12182(a). In 2008, Congress replaced "because of the disability of such individual" with "on the basis of disability" in Title I.
plaintiffs greater protection than § 504. Despite this discrepancy, the
Supreme Court has never interpreted § 504's causation standard, and
only a handful of opinions closely examine whether a distinction actually
exists between it and Title I's causation standard. Courts' restricted inter-
pretation of the term disability partially explains this scant treatment be-
cause holding that a given plaintiff fails to qualify as disabled renders the
causation inquiry unnecessary. In the coming years however, the causal connection between an em-
ployee’s disability and her adverse treatment will likely play a greater
role in disability discrimination claims. The ADA Amendments Act
(ADAAA) of 2008 instructs courts to focus on whether conduct consti-
tutes discrimination rather than whether an impairment constitutes a dis-
ability. This directive coupled with the fact that plaintiffs often assert
§ 504 and Title I claims in tandem will likely compel courts to more closely examine the difference, if any, between the causation standards of § 504 and Title I. Because employers are more likely to escape liability under a sole-cause causation standard than a motivating-factor causation standard, advocates for disabled workers must be prepared to argue that courts should apply Title I's motivating-factor standard to § 504 claims.

A causation standard that holds employers liable for discriminatory conduct under § 504 is necessary to protect the rights of employees with HIV and achieve equality for all people with disabilities. Although Title I protects the rights of many disabled employees, an effective § 504 claim is a vital component of the overall legislative scheme to eradicate disability based discrimination because it provides remedies for workers to whom the ADA does not apply. Narrowly interpreting § 504's causation standard limits the effectiveness—and according to one scholar, has resulted in the demise—of § 504 as a tool for holding employers liable for discrimination against employees with disabilities.

To eliminate employers' reflexive reactions toward employees with HIV, courts must adopt Title I's motivating-factor causation standard for employment discrimination claims under § 504. Part II of this Note discusses the invidious nature and pervasiveness of discrimination against workers with HIV. Part III introduces the anti-discrimination mandates of § 504 of the Rehabilitation Act and Title I of the ADA and identifies the necessity of § 504 for employees with disabilities. Part IV compares the causation standards under § 504 and Title I and explains employer liability under Title I's motivating-factor causation standard compared to employer liability under § 504's sole-cause standard. Finally, Part V argues that § 504 possesses two causation standards—Title I's motivating-factor standard for employment discrimination claims and a sole-cause standard for all other claims. It maintains that the text of § 504 and the purpose of the Rehabilitation Act compel this conclusion. Part VI summarizes the arguments of Parts II–V and emphasizes the importance of providing people with HIV strong tools to combat workplace discrimination.

17. See Part III.B. of this Note.
II. Employment Discrimination Against People with HIV

People living with HIV continue to face pervasive barriers to amenities, services, and benefits that many Americans take for granted.\(^\text{19}\) Discrimination against people with HIV is similar to discrimination against people with other kinds of impairments—stereotypes and misconceptions about the nature of the impairment fuel discriminatory actions and policies.\(^\text{20}\) However, people living with HIV suffer particularly invidious forms of discrimination because the public associates HIV infection and transmission with homosexuality, intravenous drug use, and sex workers.\(^\text{21}\) In addition to being a modern-day scarlet letter, HIV is contagious and can be fatal, which increases people’s apprehension toward individuals with the illness.\(^\text{22}\) Society’s moral judgments and fears about HIV give rise to discrimination against workers with the condition and prevent them from enjoying equal employment opportunities.\(^\text{23}\)

Participation in the workforce benefits people with HIV and society, yet workplace discrimination against HIV positive workers is widespread. Studies have demonstrated that “employment can play an essential role in helping people with chronic illnesses such as HIV...to sustain their emotional and economic wellbeing.”\(^\text{24}\) Employment for people with chronic illnesses also benefits the national economy because it allows

\(^{19}\) See Liza Conyers et al., A Comparison of Equal Employment Opportunity Commission Case Resolution Patterns of People with HIV/AIDS and Other Disabilities, 22 J. Vocational Rehabilitation 171, 172 (2005) (discussing the stigma associated with having HIV/AIDS, including the results of a survey showing that “one-fifth of the participants still feared people with HIV/AIDS and one-sixth expressed disgust toward these individuals”).


\(^{22}\) “Persons living with HIV/AIDS have to endure not only archaic attitudes that they present a health threat, but also moral disapproval of their behavior.” Id. Due to the combination of fear and moral disapproval, workplace discrimination against those diagnosed with HIV is considerably greater than discrimination against other disability groups. See Liza Conyers et al., Workplace Discrimination and HIV/AIDS: The National EEOC ADA Research Project, 25 Work 37, 37 (2005).


\(^{24}\) Liza Conyers & K.B. Boomer, Factors Associated with Disclosure of HIV/AIDS to Employers Among Individuals Who Use Job Accommodations and Those Who Do Not, 22 J. Vocational Rehabilitation 189, 189 (2005) (presenting findings of an investigatory research study involving the job accommodation patterns associated with the disclosure of an employee’s HIV status to an employer).
those individuals to contribute to, rather than draw from, unemployment and social welfare programs. Fortunately, improved treatments for HIV have made it possible for people living with the condition to enter the workforce in greater numbers and continue working for decades after diagnosis. Despite these advances, evidence suggests discrimination against workers with HIV is particularly prevalent and conspicuous. Workers with HIV face greater instances of employment discrimination than people with other kinds of disabilities. Specifically, employees with HIV are more likely than employees with other disabilities to experience workplace harassment and discrimination in the terms and conditions of employment, demotion, discharge, and job assignment.

The facts of two recent cases typify the discrimination that employees with HIV might encounter. In 2008, the Transportation Security Administration (TSA) rejected Michael Lamarre’s application for a position as a Transposition Security Officer (TSO) after learning that he had HIV. Lamarre had been living healthily with HIV for over twenty years and

25. See id. at 189–90; David W. Webber & Lawrence O. Gostin, Discrimination Based on HIV/AIDS and Other Health Conditions: “Disability” as Defined Under Federal and State Law, 3 J. HEALTH CARE L. & POL'Y 266, 270 (2000) (“By rendering talented individuals unemployable or uninsurable or by impairing their ability to secure housing or receive health care or other services, discrimination tears at the social and economic fabric of the nation.”).


27. Id.

28. See id. People living with HIV are not the only ones who bear the consequences of HIV-based discrimination. Fear of discrimination and the stigma associated with HIV negatively affect people’s desires to get tested, seek medical care, and disclose their status to sexual partners and people with whom they share needles. David W. Webber & Lawrence O. Gostin, Discrimination Based on HIV/AIDS and Other Health Conditions: “Disability” as Defined Under Federal and State Law, 3 J. HEALTH CARE L. & POL'Y 266, 270–71 (2000).

29. Liza Conyers et al., Workplace Discrimination and HIV/AIDS: The National EEOC ADA Research Project, 25 WORK 37, 42–46 (2005). Researchers examined allegations of employment discrimination filed with the EEOC and compared the charges of people with HIV to those of people with other physical, sensory, or neurological impairments. Id. at 38. In the fifteen areas for which there was sufficient data, the researchers found that a significantly higher proportion of complaints filed by people with HIV had merit. Id. at 43. Complaints alleging HIV-based discrimination in demotion or job assignment and the terms and conditions of employment were two times more likely to have merit than other disability complaints. Id. at 43–44. HIV-based allegations of discharge were one and one half times more likely to have merit. Id. at 45.

30. Letter from Comprehensive Health Servs., Transp. Sec. Admin., to Michael Lamarre 1 (Apr. 28, 2009), available at http://www.aclu.org/files/pdfs/hiv/medical_letter.pdf. Comprehensive Health Services cited the fact that TSOs often perform physically demanding tasks and are therefore required to be medically capable in order to ensure the safety and security of the public. Id.
had successfully completed an in-person interview with the TSA.\footnote{31} Lamarre's treating physician provided assurances that he was "fully qualified and able to perform the baggage screening duties of a TSO, and there [was] no basis to exclude HIV-positive applicants from this position."\footnote{32} Nevertheless, the TSA determined that Lamarre's asymptomatic HIV would not allow him to perform the position "safely, effectively, and efficiently" and disqualified his application.\footnote{33} The TSA's only justification for its action was a perfunctory reference to the agency's medical guidelines.\footnote{34}

In reality, current treatments and precautions allow many people with HIV to safely work in a variety of environments.\footnote{35} However, rather than conduct an individualized inquiry into applicants' capabilities and limitations, employers often rely on stereotypes and misinformation about the effects of HIV to disqualify workers like Lamarre. Such ill-informed and outdated perceptions about the limitations of workers with HIV combined with the social stigma surrounding the illness causes employers to adopt policies and make determinations that unreasonably exclude peo-
ple with the condition from positions they are fully capable of safely performing.36

HIV positive workers also face more pernicious forms of discrimination. James Tiesinga was working as a staff pathologist at Dianon Systems, Inc. (Dianon) when his employer offered him a promotion to direct a new facility.37 Shortly before Tiesinga was scheduled to begin the new position, he revealed to a coworker that he was HIV positive.38 The coworker allegedly began harassing Tiesinga.39 She forbade him from entering the transcription room where she worked, although Tiesinga’s job required him to perform duties there.40 The coworker allegedly began handling papers Tiesinga touched “using only her fingertips, as if the papers were transfer agents for his HIV infection.”41 Although all staff pathologists shared a common inbox in the transcription room, the coworker mounted a new inbox for Tiesinga near the door of the room to keep him from physically entering.42 Tiesinga reported his coworker’s behavior to his supervisors on several occasions to no avail.43

One day, when the coworker came to Tiesinga’s office to confront him about his continued use of the common inbox, Tiesinga shut his office

36. See, e.g., Holiday v. City of Chattanooga, 206 F.3d 637, 644 (6th Cir. 2000) (citing Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 193 (3d Cir. 1999)). In Holiday, the City of Chattanooga denied employment to an HIV positive police officer after the officer voluntarily disclosed his status during a pre-employment medical examination. Id. at 641. After the plaintiff made the disclosure, the doctor that administered the exam reported him to be medically incapable of performing the requisite job functions. Id. Holiday had passed the written exam and physical agility test, but the City concluded that he was not physically fit to be a police officer based on his HIV status. Id. at 640–41, 644. The Sixth Circuit Court of Appeals reversed the district court’s grant of summary judgment for the City. Id. at 648. In doing so, the court held that the Rehabilitation Act and ADA required the City to evaluate Holiday “based on his actual abilities and the relevant medical evidence, and to be protected from discrimination founded on fear, ignorance or misconceptions.” Id.


38. Id. ¶ 11.

39. Id. ¶¶ 11–22. Tiesinga claimed that the coworker purposefully made his job difficult; not only by delaying necessary reports, but by threatening other coworkers with discipline should they speak with him at any time. Id. ¶ 16. Tiesinga’s coworker allegedly threatened to terminate employees who communicated with him. Id. ¶ 17.

40. Id. ¶ 12.

41. Id. ¶ 13.


Later, a supervisor called Tiesinga to his office to discuss Tiesinga's behavior toward his coworker. At that time, the supervisor allegedly told Tiesinga that Dianon no longer considered him "director material." At a meeting with his supervisor and a human resources official the following day, Tiesinga revealed his HIV status and argued that it was the reason his coworker had been harassing him. Upon this disclosure, the human resources official advised Tiesinga that Dianon was placing him on paid suspension while they contemplated additional disciplinary action. These events caused Tiesinga severe emotional distress and ultimately led him to resign from Dianon. The foregoing facts illustrate the conclusion studies have reached: individuals with HIV commonly experience harassment in the workplace because of the high level of stigma associated with the condition.
To prevent fear and prejudice from foreclosing employment opportunities for workers with HIV, our nation’s laws must discourage these backward attitudes.\textsuperscript{51} Workers with HIV have primarily relied on the Rehabilitation Act and ADA as federal tools to combat employment discrimination.\textsuperscript{52} Nevertheless, scholars and commentators have largely ignored the Rehabilitation Act since Congress passed the ADA.\textsuperscript{53} The Rehabilitation Act’s low profile is troubling given the statute’s advantages over the ADA for certain workers.

III. COMPARING § 504 OF THE REHABILITATION ACT WITH TITLE I OF THE ADA

Both § 504 of the Rehabilitation Act and Title I of the ADA prohibit disability-based discrimination. Courts often treat the Rehabilitation Act and the ADA as coextensive because they employ identical definitions of disability and have evolved from and with each other over the years, but § 504 and Title I are not wholly duplicative.\textsuperscript{54} Legal and policy considerations favor the Rehabilitation Act’s scope, procedures, and remedies.

A. Prohibited Discrimination

Congress included § 504 in the Rehabilitation Act’s scheme for funding, coordinating, and evaluating state and federal rehabilitation programs for people with disabilities.\textsuperscript{55} As initially enacted, § 504 stated that “[n]o otherwise qualified handicapped individual in the United States... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any

\begin{footnotes}
\footnote{See Holiday v. City of Chattanooga, 206 F.3d 637, 647 (6th Cir. 2000) (recognizing that workers with HIV have a particular need for statutory protection).}
\footnote{See Katie Eyer, Note, Rehabilitation Act Redux, 23 YALE L. & POL’Y REV. 271, 271–73 (2005) (discussing how the Rehabilitation Act and § 504 provide an integrated approach to disability discrimination claims).}
\footnote{See id. at 271–72 (commenting on the small amount of academic review of the Rehabilitation Act); see generally Betsy Ginsberg, Out with the New, In with the Old: The Importance of Section 504 of the Rehabilitation Act to Prisoners with Disabilities, 36 FORDHAM URB. L.J. 713 (2008) (advocating for a resurgence in the understanding and use of § 504 claims).}
\footnote{See, e.g., Boose v. Tri-Cnty. Metro. Transp. Dist., 587 F.3d 997, 1001 n.5 (9th Cir. 2009). For further discussion on the evolution of the acts, see Part V.B. of this Note.}
\end{footnotes}
program or activity receiving federal financial assistance." Later amendments to the section extended the prohibition to "any program or activity conducted by any Executive agency or by the United States Postal Service." Importantly, § 504 prohibits discrimination agency-wide, not simply to the program or activity that is federally financed. Although § 504 did not specifically reference employment discrimination when Congress enacted it, the section unquestionably prohibits it.

The ADA expanded the aims of the Rehabilitation Act. The fact that § 504 applied only to recipients of federal funding limited the section's ability to prevent disability-based discrimination. Thus, in 1990, Congress passed the ADA to expand the Rehabilitation Act's anti-discrimination mandate to the private sector. The ADA prevents discrimination against people with disabilities in public and private employment, public services and transportation, and private accommodations open to the public.

Title I of the ADA specifically addresses employment discrimination. Section 12112 of Title I states, "[n]o covered entity shall discriminate


58. See Rehabilitation Act of 1973, 29 U.S.C. § 794(b) (2006) (defining program or activity broadly to include "all of the operations of" an entity receiving federal funds); Katie Eyer, Note, Rehabilitation Act Redux, 23 YALE L. & POL'Y REV. 271, 283 (2005) (stating that any state entity receiving federal funds is subject to § 504 liability).


62. See Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir. 2003) (defining the scope of the ADA with respect to the Rehabilitation Act and highlighting the extended protection into the private sector).
against a qualified individual on the basis of disability 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.” Although the ADA provides broad protections for workers with disabilities, it does not supplant the Rehabilitation Act’s protections. Section 504 remains a necessary and preferable remedy for certain plaintiffs.

B. Section 504: A Necessary and Preferable Remedy

i. Scope of Covered Employers

Section 504 provides a federal remedy against discriminatory employers that the ADA does not reach. Title I of the ADA applies to public and private employers with more than fourteen employees but excludes the federal government from its ambit. It therefore provides a remedy for aggrieved employees whose employers does not receive federal funds. The broad scope of Title I, however, does not undercut § 504’s importance. Under § 504, the size of an employer’s workforce is irrelevant. Additionally, some jurisdictions allow federal employees to sue


65. See Katie Eyer, Note, Rehabilitation Act Redux, 23 Yale L. & Pol’y Rev. 271, 282 (2005) (“The limitation of the applicability of the Rehabilitation Act to entities receiving federal funds is by far its most salient difference from the ADA, and was one of the primary constraints of the Act that advocates felt necessitated the passage of a broader statute.”).

the federal government under § 504.  Consequently, employees who have no remedy under the ADA may only find relief in § 504.

ii. Procedural Requirements for Filing a Claim

Section 504 also presents fewer procedural hurdles than Title I. Title I incorporates the procedures of Title VII of the Civil Rights Act of 1964. As a consequence, the ADA requires a plaintiff to exhaust administrative remedies prior to filing a Title I claim in court. If a plaintiff fails to file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days of the discriminatory conduct or does not receive a right-to-sue letter from the EEOC, she cannot take advantage of Title I's protections.

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67. See Bradley v. England, 502 F. Supp. 2d 259, 267 (D.R.I. 2007) (noting that the Fifth, Sixth, and Eighth Circuits allow federal employees to sue the federal government under § 504). In Bradley the district court pointed out that although there is a disagreement among the circuit courts, the First Circuit has yet to rule on the question. Id.; accord Pinkerton v. Spellings, 529 F.3d 513, 515 (5th Cir. 2008) (per curiam) (“Under our precedent, federal employees may bring disability discrimination claims against the Government under either § 501 or § 504 of the Rehabilitation Act.”).

68. See, e.g., Shrader v. Fred A. Ray, P.C., 296 F.3d 968, 975 (10th Cir. 2002). In Shrader, the plaintiff sued her employer under § 504 for terminating her based on her disability. Id. at 970. Her employer argued the Rehabilitation Act was inapplicable to the situation because the ADA's minimum employee requirement operated as a bar to recovery for the plaintiff. Id. The Tenth Circuit held that § 504 did not incorporate Title I's scope with respect to covered entities. Id. at 974. Because the employer waived the issue of whether it was a beneficiary of federal funding, the Tenth Circuit reversed the district court's grant of summary judgment for the employer. Id. at 975.

69. Americans with Disabilities Act (ADA), 42 U.S.C. § 12117 (2006) (incorporating the procedures of § 2000e-5 into the enforcement provision of the ADA). Section 2000e-5 is one of the several provisions of the Civil Rights Act of 1964 that are incorporated into Title I of the ADA. Id. Section 2000e-5 mandates that a “charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred” with the EEOC. 42 U.S.C. § 2000e-5(e)(1) (2006). This section also extends the filing period to three hundred days if a complaint has first been filed with a state or local agency. Id. If the state or local agency terminates the proceedings, the complainant has thirty days from the time notice is received to file a claim under the ADA.
Section 504's procedural scheme is more generous. Section 504 incorporates the procedures of Title VI of the Civil Rights Act of 1964. Because § 504 does not incorporate Title VII's procedural provisions, courts have concluded that plaintiffs do not need to seek or exhaust administrative remedies prior to filing a claim in court. Furthermore, neither § 504 nor Title VI specifies a statute of limitations for filing claims. Rather than adopt Title I's narrow filing window, most circuits apply statutes of limitations ranging from one to three years to § 504 claims. Although a plaintiff may have a cognizable claim under both § 504 and Title I, she may prefer or be forced to file under § 504 because of its procedural advantages over Title I.

iii. Remedies

Certain plaintiffs may also prefer § 504's remedial scheme. Section 504 entitles plaintiffs to injunctive relief and compensatory damages, but they cannot recover punitive damages even for intentional discrimination.

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Id.; see also Gordon v. District of Columbia, 605 F. Supp. 2d 239, 244 (D.D.C. 2009) (barring plaintiff's discrimination claims that occurred more than 180 days prior to the date that she filed her complaint with the EEOC); Stone v. Dep't of Aviation, 453 F.3d 1271, 1276 (10th Cir. 2006) (explaining that without a right-to-sue letter, a court may dismiss the plaintiff's claim); Parry v. Mohawk Motors, Inc., 236 F.3d 299, 309 (6th Cir. 2000) (expressing leniency when the parties or the court waives the requirement.)


73. See Freed v. Consol. Rail Corp., 201 F.3d 188, 192 (3d Cir. 2000) (listing cases supporting the position that when plaintiffs sue private entities solely under § 504, they do not have to exhaust administrative remedies); Smith v. Barton, 914 F.2d 1330, 1338 (9th Cir. 1990) (explaining that Title VI's administrative remedies do not provide individual plaintiffs adequate relief, therefore, plaintiffs are not required to exhaust them). However, federal employees suing the federal government under § 504 do have to exhaust administrative remedies. Freed v. Consol. Rail Corp., 201 F.3d 188, 192-93 (3d Cir. 2000).


75. See, e.g., Morse v. Univ. of Vt., 973 F.2d 122, 126-27 (2d Cir. 1992) (explaining that because § 504 prohibits bias in the same vein as § 1983, the statute of limitations adopted for personal injury actions applies to § 504 claims); Stewart v. District of Columbia, Civil Action No. 04-1444, 2006 WL 626921, at *10 (mem. op.) (D.D.C. Mar. 12, 2006) (listing circuits in which courts have applied state personal injury statutes of limitations ranging from one to three years to § 504 claims); see Katie Eyer, Note, Rehabilitation Act Redux, 23 YALE L. & POL'Y REV. 271, 290 (2005) ("[T]he statute of limitations that accompanies § 504 claims often significantly exceeds that afforded Title I plaintiffs.").

76. See Rehabilitation Act of 1973, 29 U.S.C. § 794a(a)(2) (2006); Barnes v. Gorman, 536 U.S. 181, 189 (2002) (holding that punitive damages are not available in private suits under Title VI and therefore are unavailable under § 504). Although § 504 incorporates
At first glance, plaintiffs suing private employers might consider Title I's remedial scheme more desirable. Under Title I, plaintiffs who prove intentional discrimination are entitled to punitive damages in addition to injunctive and compensatory relief. On the other hand, the maximum damage award a plaintiff can ever recover under Title I is $300,000, whereas § 504 has no damage caps.

Perhaps most importantly, state employees have a private cause of action for monetary damages against state employers that violate § 504. The remedies and procedures available under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, the Supreme Court has resisted and warned against relying on Title VI to interpret the substantive rights of § 504 plaintiffs. See Consol. Rail Corp., v. Darrone, 465 U.S. 624, 361–62 (1984) (refusing to limit § 504's scope to recipients of federal funding with a primary objective of promoting employment even though Title VI contains this limitation); Alexander v. Choate, 469 U.S. 287, 293 n.7 (1985) (recognizing that Congress modeled § 504 after Title VI, but pointing out that "too facile an assimilation of Title VI law to § 504 must be resisted").

In Barnes, the Court analogized the principles underlying employer liability in § 504 to contract law. Barnes, 536 U.S. at 186–87. Because employer punitive damages are generally not available to remedy breach of contract, the Court reasoned that § 504 similarly precludes them. Id. at 188–89.


77. 42 U.S.C. § 1981a(a)(1)–(2) (2006) (providing, however, that punitive damages are not available in a disability discrimination case where the employer made a good faith effort to accommodate the plaintiff's disability).

78. Id. § 1981a(b)(3) (providing that the sum of compensatory and punitive damages cannot exceed $50,000 to $300,000 depending on the size of the employer); see Katie Eyer, Note, Rehabilitation Act Redux, 23 Yale L. & Pol'y Rev. 271, 290 (2005). Either party has the right to demand a jury trial when recovery of compensatory or punitive relief is requested. 42 U.S.C. § 1981a(c)(1) (2006). However the court is prohibited from informing the jury of the relevant damage caps. Id. § 1981a(c)(2). Recovery limitations apply to each party requesting relief. Id. § 1981a(b)(3).

79. See 42 U.S.C. § 2000d-7 (2006) (abrogating state sovereign immunity for violations of § 504 of the Rehabilitation Act). Courts have held that § 504 conditions receipt of federal funding on an entities' adherence to § 504's anti-discrimination mandate, and therefore, states waive their sovereign immunity against damage awards under § 504 when they accept federal funding. See, e.g., Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 284–85 (5th Cir. 2005) (en banc) ("Louisiana clearly had Eleventh Amendment immunity to waive at the time that it accepted the federal funds and expressly obligated itself to comply with the dictates of the Rehabilitation Act . . . ."); Pugliese v. Dillenberg, 346 F.3d 937, 937 (9th Cir. 2006).
The Supreme Court has held that the Eleventh Amendment bars such action under Title I. For state employees, this difference is pivotal. A large proportion of state agencies receive federal funds, and § 504's prohibition extends to all activities of the agency receiving the funds. Consequently, most state employees could sue for monetary relief under § 504. In sum, § 504 provides the only federal remedy for aggrieved employees of small businesses and the only compensatory remedy for state employees. For other plaintiffs, it provides a more generous procedural and remedial framework than Title I. Section 504's scope and structure also accomplishes important policy aims.

iv. Public Policy

From a policy perspective, § 504 strikes an effective balance between the need to protect the substantive rights of disabled employees and the economic consequences of liability to employers. The section provides a broad anti-discrimination mandate, but it allows entities to decide whether the benefit of federal funding outweighs the cost of potential liability. Only after an employer chooses to accept federal funds must it comply with § 504's mandate and accompanying penalties. Section 504

2003) (per curium); Koslow v. Pennsylvania, 302 F.3d 161, 171 (3d Cir. 2002). States do not unilaterally waive sovereign immunity if they accept federal funds for a specific department. Id. Individual states have discretion as to whether they accept federal funding or not, and are only waiving their immunity under the Eleventh Amendment for disability claims for the agency or department where the money is accepted. Id. In order to preserve immunity under the Rehabilitation Act for individual departments or programs, states need only decline federal financial assistance for those specific entities. Id.

80. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 363–64, 374 (2001) (holding that the text of 42 U.S.C. § 12202 did not validly abrogate Alabama’s sovereign immunity because Congress's attempt to subject states to private suit under Title I exceeded Congress's § 5 powers).


82. See Lane v. Pena, 518 U.S. 187, 196 (1996) (stating that it is not irrational to waive the government’s immunity against liability while preserving its immunity against monetary damages); Alexander v. Choate, 469 U.S. 287, 299 (1985) (“Any interpretation of § 504 must therefore be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds.”).

83. See Shrader v. Fred A. Ray, M.D., P.C., 296 F.3d 968, 974 (10th Cir. 2002) (explaining that the Rehabilitation Act strikes a different balance than that of the one struck in the ADA, which only covers employers with more than fifteen employees). In Shrader, differences between the amount of coverage given by the ADA compared to the Rehabilitation Act were highlighted to show that the employer’s interpretation of the Rehabilitation Act was incomplete. Id. Under the Rehabilitation Act, the number of employees is immaterial to whether an employer is considered a “program or activity” that falls within
further balances competing considerations by prohibiting punitive damages and shielding the federal government from any monetary awards.84 It thereby holds federal grantees liable for discriminatory conduct without being a windfall provision for plaintiffs. These policy considerations coupled with § 504’s legal advantages argue for the section’s continued vitality. Courts, however, threaten to undermine the section’s protections for employees by narrowly interpreting its causation standard.

IV. DEFENDANT LIABILITY AND DUELING CAUSATION UNDER § 504 AND TITLE I

Courts have primarily recognized three forms of disability-based employment discrimination under § 504 and Title I: disparate treatment, disparate impact, and failure to accommodate.85 Employees with HIV experience all three forms;86 however claims involving disparate treatment are especially common.87 Disparate treatment claims arise when an

the ambit of the Act. Id. at 971. Instead, the Act assigns liability on the basis of whether any part of the entity receives federal funding or engages in particular enumerated activities. Id. at 973.

84. See Part III.B.iii. of this Note.


86. Additionally, employees with HIV are subject to harassment and experience violations of their privacy when coworkers disclose their status to third parties. See Flowers v. S. Reg’l Physician Serv. 247 F.3d 229, 232 (5th Cir. 2001). The plaintiff in Flowers and her supervisor, Hallmark, were close colleagues before Hallmark learned of Flowers’s HIV status but “almost immediately after Hallmark discovered Flowers’s condition, Hallmark would no longer go to lunch with Flowers and ceased socializing with her.” Id. at 236. Moreover, Hallmark began intercepting Flowers’s telephone calls, eavesdropping on her conversations, and hovering around Flowers’s desk.” Id. Several courts have recognized these forms of discrimination as prohibited under Title I and § 504. See id. at 232; Fleming v. State Univ. of N.Y., 502 F. Supp. 2d 324, 334–37 (E.D.N.Y. 2007) (noting that few courts have addressed the issue but holding that § 504 incorporates Title I’s prohibition against disclosure of confidential medical information). Concerns surrounding disclosure of one’s status to an employer affect the employment decisions of people living with HIV. Liza Conyers & K.B. Boomer, Factors Associated with Disclosure of HIV/AIDS to Employers Among Individuals Who Use Job Accommodations and Those Who Do Not, 22 J. VOCATIONAL REHABILITATION 189, 190 (2005). For further discussion, see generally Caroline Palmer & Lynn Mickelson, Falling Through the Cracks: The Unique Circumstances of HIV Disease Under Recent Americans with Disabilities Act Caselaw and Emerging Privacy Policies, 21 LAW. & INEQ. 219 (2003).

employer treats a person with a disability differently than a person without a disability in the hiring, firing, or terms and conditions of employment. The causation plays a central role in disparate treatment claims. The causation standard a statute employs determines the kind of conduct for which an employer is legally liable.

Generally, to succeed in a disparate treatment disability discrimination claim, a plaintiff must prove 1) a person with a disability; 2) otherwise qualified to perform the requirements of the job she seeks (with or without accommodation); and 3) that her disability caused her adverse treatment. The third element implicates causation. Because causation is an essential element of the claim, the plaintiff carries the ultimate burden of persuasion and must present sufficient evidence that her employer's consideration of her disability caused her employer to treat her differently than other non-disabled employees. Consequently, the standard of causation that courts


91. See, e.g., Giordano v. City of N.Y., 274 F.3d 740, 747 (2d Cir. 2001); Wernick v. Fed. Reserve Bank of N.Y., 91 F.3d 379, 383 (2d Cir. 1996) (stating that “with respect to Rehabilitation Act claims ... the employer is a recipient of Federal financial assistance” (citing Heilweil v. Mount Sinai Hosp., 32 F.3d 718, 722 (2d Cir. 1994)). In order to make out a claim, the employee must also be able to show that the employer had knowledge of the disability. Jones v. Potter, 488 F.3d 397, 404 (6th Cir. 2007) (citing Macy v. Hopkins Cnty. Sch. Bd. of Educ., 484 F.3d 357, 363 n.2 (6th Cir. 2007)). However, both § 504 and Title I include people perceived as disabled within the definition of people with disabilities. Rehabilitation Act of 1973, 29 U.S.C. § 705(20)(B) (2006) (incorporating the ADA’s definition of disability); Americans with Disabilities Act (ADA), 42 U.S.C. § 12102(1)(C) (2006). Therefore, an HIV positive employee may not have to reveal her HIV status to bring a discrimination claim under the statutes as long as she can show that her employer perceived her as having HIV. See Doe v. Kohn, Nast & Graf, P.C., 862 F. Supp. 1310, 1322 (E.D. Pa. 1994) (holding that rumors that plaintiff had HIV and a letter from plaintiff’s doctor, which plaintiff’s employer intercepted, raised a genuine issue of material fact as to whether employer regarded employee as HIV positive). Kohn, Nast & Graf, P.C. illustrates that even people who have not disclosed their status are subject to discrimination because others may perceive them as HIV positive. See id. at 1314–15. See Part IV.B. of this Note for further discussion about the first two elements of a disability discrimination claim.

92. See Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (“The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.”); see also Cheryl L. Anderson, What is “Because of Disability” Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine, 27 BERKELEY J. EMP. & LAB. L.
apply in disability discrimination claims significantly affects plaintiffs’ success.

The anti-discrimination principle in § 504 and Title I are similar, but they are not the same.93 Section 504 prohibits discrimination “solely by reason of her or his disability,”94 whereas Title I prohibits discrimination “on the basis of disability.”95 Not surprisingly, courts have held that the linguistic difference between § 504 and Title I has substantive consequences.

A. Discrimination “on the basis of” Disability

In the context of employment discrimination, the vast majority of circuits have held that Title I’s “on the basis of” language requires plaintiffs to demonstrate that their disability “made a difference”—or was a motivating factor—in their treatment.96 Disparate treatment cases under the ADA are generally decided under two frameworks: pretext and mixed-motive.97 Both frameworks require proof that a person’s disability

323, 335–36 (2006) (“[R]egardless of whether the pretext or mixed-motive approach is used, . . . [i]f the plaintiff fails to provide sufficient probative evidence of unlawful motivation, his claim fails.”).

93. See Part III.A. of this Note.


96. See Pinkerton v. Spellings, 529 F.3d 513, 518–19, 519 n.30 (5th Cir. 2008); see also Head v. Glacier Nw. Inc., 413 F.3d 1053, 1065 (9th Cir. 2005) (adopting a “motivating-factor” standard for Title I claims because in “everyday usage, ‘because of’ conveys the idea of a factor that made a difference in the outcome,”’ (citing McNely v. Ocala Star-Banner Corp., 99 F.3d at 1073–74 (10th Cir. 1996)). But see Jones v. Potter, 488 F.3d 397, 403 (reaffirming that the Sixth Circuit is in the minority by requiring Title I plaintiffs to prove that their adverse treatment was “solely by reason” of their disability).

97. See Cheryl L. Anderson, What is “Because of Disability” Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine, 27 BERKELEY J. EMP. & LAB. L. 323, 334 (2006); Martin J. Katz, Unifying Disparate Treatment (Really), 59 HASTINGS L.J. 643, 646–47 (2008) (discussing the pretext and mixed-motive model, but also identifying a third framework under the 1991 Civil Rights Act, which holds employers liable under the mixed-motive framework but limits damages if the defendant can show it would have taken the same action had it not considered the prohibited characteristic). These models come from Title VII race and sex discrimination cases and courts heavily rely on them to analyze disability discrimination claims. Martin J. Katz, Unifying Disparate Treatment (Really), 59 HASTINGS L.J. 643, 646–47 (2008). To determine which framework applies, courts analyze whether the plaintiff has direct evidence or indirect evidence. Id. at 647. However, due to an unclear definition of direct evidence, the application of the frameworks has been inconsistent. Id. See Cheryl L. Anderson, What is “Because of Disability” Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine, 27 BERKELEY J. EMP. & LAB. L. 323, 330 (2006). Courts apply the pretext framework when a plaintiff lacks direct evidence of discrimination but may be able to prove discrimination indirectly through circumstantial evi-
caused her adverse treatment. Under the pretext framework, a plaintiff raises the presumption of liability by establishing a prima facie case of discrimination, generally composed of the elements listed above. In ADA cases, a plaintiff can establish the causation element of the prima facie case by presenting evidence that her disability played a motivating role in her employer's decision. The employer may then attack this presumption by producing evidence of a legitimate reason for the adverse treatment. Once the employer produces a non-discriminatory reason for its actions, the employee must prove that her disability nevertheless motivated the employer. She can do this by presenting evidence sufficient to prove that the proffered non-discriminatory reason is pretextual or not worthy of credence. She may also meet this burden by producing evidence that would allow a reasonable jury to infer that her disability was a motivating factor in her adverse treatment. Thus, the pretext model implicates causation when the employee is establishing her prima facie case and when she tries to defeat the employer's legitimate reason for her adverse treatment.

Under the mixed-motive model, a plaintiff must prove that her employer considered her disability when treating her adversely, but she does not have to prove causation.
not have to prove that her disability was the only cause of her adverse treatment. An employer's conduct or statements that specifically communicate discriminatory animus generally suffice as evidence to prove discriminatory motive. Under the mixed-motive framework, the employer is still entitled to a partial defense if the employee demonstrates discriminatory intent. If the employer can prove that it would have made the same decision without considering the employee's disability, the plaintiff can only receive injunctive relief and attorney's fees.

Causation lies at the heart of the mixed-motive model, as a plaintiff must demonstrate that "his or her disability was a 'motivating factor' in the decision made, 'even though other factors also motivated' the employer's decision."

104. See Ostrowski v. Atl. Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992) (demonstrating how the burden-shifting framework of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) is applied an age discrimination claim). If the plaintiff can prove by a preponderance of the evidence that he encountered discrimination motivated at least in part by his disability, then the burden of proof will shift to the defendant who must prove by a preponderance of the evidence that it would have taken the same action notwithstanding the disability. Id. The evidence required to trigger the shift of burden under Price Waterhouse must be more than merely statistical in nature and must be directly related to the prohibited act. Id. at 183.

105. 42 U.S.C. § 2000e-2(m) (2006) (prohibiting employers from considering factors such as race, sex, or national origin in employment decisions); see Martin J. Katz, Unifying Disparate Treatment (Really), 59 HASTINGS L.J. 643, 646 (2008). The Supreme Court first enunciated the mixed-motive framework in the Title VII sex-discrimination case Price Waterhouse, 490 U.S. at 245–48. In that case, the plurality declined to apply the pretext framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v Burdine, 450 U.S. 248 (1981), because doing so would have required the plaintiff to pretend that her adverse treatment stemmed from a single discriminatory motive when, in fact, her discrimination stemmed from a combination of legitimate and illegitimate considerations. Price Waterhouse, 490 U.S. at 247. The plurality viewed the employer's burden as an affirmative defense requiring the employer to prove it would have made the same decision regardless of the prohibited motivation. Id. After the Supreme Court's decision in Price Waterhouse, Congress codified the mixed-motive framework in 42 U.S.C. § 2000e-2(m) (2006), but limited plaintiff's relief if the employer could show that it would have made the same decision without considering the protected characteristic. 42 U.S.C. § 2000e-5(g)(2)(B) (2006); see Martin J. Katz, Unifying Disparate Treatment (Really), 59 HASTINGS L.J. 643, 646–47 (2008) (explaining the "three distinct frameworks for proving disparate treatment").

106. See 42 U.S.C. §§ 2000e-2(m), e-5(g)(2)(B). Because Title I incorporates the remedies of 42 U.S.C. § 2000e-5, courts have applied the mixed-motive framework to Title I cases. See, e.g., Pedigo v. P.A.M. Transp., Inc., 60 F.3d 1300, 1301 (8th Cir. 1995) (confirming that the mixed-motive model is available for plaintiff's pursuing a Title I cause of action).

107. Pedigo v. P.A.M. Transp., Inc., 60 F.3d 1300, 1301 (8th Cir. 1995) (quoting 42 U.S.C. § 2000e-2(m)). In 2009, the Supreme Court held that a mixed-motive jury instruction is never appropriate in a discrimination claim brought under the Age Discrimination in Employment Act of 1967 (ADEA) because Congress did not extend Title VII's "moti-
Under both the pretext and mixed-motive models, an employer is liable for disability discrimination even if the employee's disability was not the sole cause of the employer's actions. These models recognize the

tivating-factor" language to age discrimination, and the Supreme Court has never held that Price Waterhouse and its progeny applied to ADEA cases. Gross v. FBL Fin. Servs. 129 S.Ct. 2343, 2348–49 (2009). The Court held that to "establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." Id. Employers can escape liability under a but-for causation standard if they considered an employee's protected characteristic in making an adverse employment decision but would have made the same decision without considering the protected characteristic. Id. at 2349. Critics of the but-for standard argue that it forces plaintiffs to guess at the role that their protected characteristic played in their employer's decision-making process, which is particularly difficult when more than one sufficient cause for an employee's adverse treatment may exist. See Martin J. Katz, Gross Disunity, 114 PENN. ST. L. REV. 857, 881–83 (2010) (illustrating the difficulty of proving causation under a but-for standard for a plaintiff). According to the but-for standard, the plaintiff has to disprove every non-discriminatory reason established by the employer. Id. at 882.

Although Gross was an ADEA case, courts and commentators have observed that the holding jeopardizes precedent that applies a mixed-motive standard to Title I cases. See Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961–62 (7th Cir. 2010) (analogizing the ADEA and the ADA and holding that because Title I does not incorporate § 2000e-2(m), Gross precludes the use of the mixed-motive standard for ADA claims); Leigh A. Van Ostrand, Note, A Close Look at the ADEA Mixed-Motives Claims and Gross v. FBL Financial Services, Inc., 78 FORDHAM L. REV. 399, 443 (2009) (positing that Gross may also prohibit the use of the mixed-motive standard in ADA claims).

Although the mixed-motive standard for Title I claims looks tenuous after Gross, Title I cross-references the remedies available for Title VII mixed-motive claims, whereas the ADEA does not. See Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010). There is evidence in the legislative history of the Civil Rights Act of 1991 and the ADA that Congress intended the mixed-motive standard to apply to ADA claims. See Leigh A. Van Ostrand, Note, A Close Look at the ADEA Mixed-Motives Claims and Gross v. FBL Fin. Servs., Inc., 78 FORDHAM L. REV. 399 (2009) and Part V.A.iii. of this Note for a discussion of why Congress refused to remove "solely" from § 504(a) when it added § 504(d).

Gross specifically disapproved of shifting the burden of persuasion from the plaintiff to the defendant after the plaintiff presented evidence of discrimination. Gross v. FBL Fin. Servs. 129 S.Ct. 2343, 2352 (2009). Gross did not, however, address precedent analyzing claims using the pretext framework under which the burden of persuasion always lies with the plaintiff. Therefore, it is not clear that Gross affects pretext precedent. See Leigh A. Van Ostrand, Note, A Close Look at the ADEA Mixed-Motives Claims and Gross v. FBL Financial Services, Inc., 78 FORDHAM L. REV. 399, 444–45 (2009).

108. See Pinkerton v. Spellings, 529 F.3d 513, 519 & n.30 (5th Cir. 2008) (generally listing cases that have adopted a motivating-factor standard); Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1032–33 (7th Cir. 1999) (discussing the appropriate interpretation of "because of" in the prima facie case of discrimination and adopting the motivating-factor standard); Fields v. N.Y. State Office of Mental Retardation & Dev. Disabilities, 115 F.3d 116, 120 (2d Cir. 1997) (noting "that the plaintiff had to prove that an impermissible reason, even though not the only reason for an adverse employment decision, was a 'substantial' or 'motivating' factor").
complexity of employer/employee relationships and that numerous factors may influence how employers treat their employees. The ADA holds employers liable whenever they allow an employee’s disability to adversely affect the employee’s treatment.¹⁰⁹

Recall the facts of Tiesinga’s complaint. If he could prove his allegations, a reasonable jury might conclude that Tiesinga’s supervisor placed him on leave because Tiesinga 1) shut the door in his coworker’s face, 2) was HIV positive, or 3) a combination of the two. Even if Tiesinga’s unprofessional behavior contributed to his supervisor’s decision, Tiesinga’s employer would be liable under Title I if a reasonable jury could conclude that Tiesinga’s HIV status played a role in his employer’s decision to place him on leave.¹¹０ Under § 504, however, Tiesinga’s case would likely have a different result. Because § 504 contains the term “solely,” courts have held that it demands a stricter causation standard than Title I.¹¹¹

¹⁰⁹ See Head v. Glacier Nw. Inc., 413 F.3d 1053, 1065–66 (9th Cir. 2005) (vacating jury’s verdict on grounds of prejudice because jury charge recited a sole causation standard and not the appropriate “motivating factor” standard).

¹¹０ Cf. id. at 1066 (“[A] jury could have found that [the plaintiff] was fired for violating the equipment abuse policy, because of his perceived disability, or both. Under the correct causation standard, the second or third of these findings should have meant liability for Glacier.”).

¹¹¹ See, e.g., Soledad v. U.S. Dep’t of Treasury, 304 F.3d 500, 505 (5th Cir. 2002) (evaluating the difference between the ADA and Rehabilitation Act standards in regard to employment discrimination grievances). In Soledad, the court found that the relevant inquiry pertaining to the Rehabilitation Act causation standard is if the discrimination occurred “solely because of” the individual’s disability. Id. The Fifth Circuit has indicated the stricter causation standard might also apply by analogy to hostile work environment claims advanced under the Rehabilitation Act. Id. at 506; Berkey v. Henderson, 120 F. Supp. 2d 1189, 1191 n.1 (8th Cir. 2000) (referencing two prior Eighth Circuit decisions interpreting the difference between the ADA and the Rehabilitation Act); Sedor v. Frank, 42 F.3d 741, 746 (2d Cir. 1994) (concluding that the Rehabilitation Act claim must be denied because of a disabled employee’s failure to prove that his discharge from the Postal Service was wholly because of his disability). In Sedor, the trial court found that the U.S. Postal Service did not dismiss plaintiff solely by reason of his disability because the employee had failed to provide notice and documentation for his absences in contravention of the Service’s policies. Id. at 747. The employee argued that his learning disability prevented him from understanding the Service’s policies. Id. at 746. The Second Circuit held that if “the employer can show that its decision was motivated at least in part by a factor other than the plaintiff’s disability, the Rehabilitation Act claim must be rejected.” Id. The circuit court concluded that the trial court did not clearly err in finding the employee’s disability did not interfere with his ability to comply with the Service’s policies. Id. at 747. Therefore, the Service did not dismiss the employee exclusively by reason of his disability in violation of the Rehabilitation Act. Id.
B. Discrimination "solely by reason of" Disability

The Supreme Court has never interpreted the meaning of "solely" in § 504 of the Rehabilitation Act, but the vast majority of lower federal courts have held that it requires plaintiffs to prove that their disability was the exclusive cause of their adverse treatment. The Second, Fifth, and Eleventh Circuits have explicitly held that Title I's motivating-factor standard does not apply to § 504 employment discrimination claims. Their decisions reflect the sentiment expressed in Sedor v. Frank: If the employer can show that its decision was motivated at least in part by a factor other than the plaintiff's disability, the Rehabilitation Act claim must be rejected.

Courts generally analyze § 504 disparate treatment claims under the pretext proof model. Establishing a prima facie case of discrimination under the pretext model is not meant to be onerous. However, many courts apply the sole-cause standard to the prima facie case. Thus, if a

113. See Pinkerton, 529 F.3d at 516, 519; Ellis v. England, 432 F.3d 1321, 1326 (11th Cir. 2005); Parker v. Columbia Pictures Indus., 204 F.3d 326, 337 (2d Cir. 2000).
114. 42 F.3d 741 (2d Cir. 1994).
115. Id. at 746. Other circuits have noted the linguistic distinction between § 504 and Title I has substantive legal weight but have not engaged in thorough comparisons between the sections. See, e.g., Kim v. Potter, 460 F. Supp. 2d 1194, 1199 n.5 (D. Haw. 2006) (noting that "the ADA requires a plaintiff to prove that his disability was a motivating factor in the challenged action, whereas the Rehabilitation Act requires a plaintiff to prove that he was discriminated against solely on the basis of his disability," but granting defendant's motion for summary judgment because plaintiff did not demonstrate that he was disabled); Foster v. Arthur Andersen, LLP., 168 F.3d 1029, 1033 n.7 (7th Cir. 1999) (noting that § 504 is unhelpful in interpreting Title I's causation standard because it prohibits discrimination against a person "solely by reason of her or his disability."); Berkey v. Henderson, 120 F. Supp. 2d 1189, 1191 n.1 (S.D. Iowa 2000) (quoting Amir v. St. Louis Univ., 184 F.3d 1017, 1029 n.5 (8th Cir. 1999)). Amir v. St. Louis University was an education discrimination case brought under the public accommodations section of Title III of the ADA and § 504. Amir v. St. Louis Univ., 184 F.3d 1017, 1021 (8th Cir. 1999). As discussed in Part V.B. of this Note, courts engage in mistaken reasoning when they rely on non-employment cases to interpret § 504's causation standard for employment discrimination claims.
118. See, e.g., Basso v. Potter, 596 F. Supp. 2d 324, 332 (D. Conn. 2009) (stating that plaintiff must prove that he suffered an adverse employment action solely because of his
plaintiff cannot prove that his disability was the only factor that motivated his employer’s actions, his claim cannot overcome a motion for summary judgment.\(^{119}\) Even when courts do not apply the sole-cause standard to the prima facie case, they nevertheless require plaintiffs to ultimately prove that their employers treated them adversely solely on the basis of their disability.\(^{120}\)

The Fifth Circuit revealed the consequences of the sole-cause standard in *Soledad v. United States Department of Treasury*.\(^{121}\) The plaintiff in *Soledad* brought a claim against his employer for disability-based workplace harassment under § 504. The jury found in favor of the plaintiff under the instruction that he could succeed if he proved “by a preponderance of the evidence that . . . [h]is disability was a motivating factor in Defendant’s treatment” of him.\(^{122}\) The court of appeals held that the district court issued an erroneous jury instruction because § 504 required the plaintiff to prove he was discriminated against solely because of his disability.\(^{123}\) The Fifth Circuit remanded the claim to the district court, and questioned whether the plaintiff’s evidence sufficiently proved discrimination under the sole-cause standard.\(^{124}\) Similarly, in *Severino v. North Fort Meyers Fire Control District*,\(^{125}\) an HIV positive firefighter sued his


\(^{119}\) See, e.g., Montgomery v. Potter, No. 2:04CV162, 2006 WL 559240, at *5 (N.D. Miss. March 6, 2006) (granting employer’s motion for summary judgment because plaintiff asserted that his employer discriminated against him on the basis of his disability and race, thereby defeating his ability to establish a prima facie case of disability discrimination under § 504).

\(^{120}\) See, e.g., Smith v. Barton, 914 F.2d 1330, 1340 (9th Cir. 1990). In *Smith*, the magistrate judge granted summary judgment to the employer because the blind plaintiffs did not show that their employer treated them adversely—solely by reason of their blindness—and therefore failed to establish a prima facie case of discrimination. *Id.* at 1333. The Ninth Circuit reversed, holding that the plaintiffs could establish a prima facie case of discrimination by showing that the employer treated them adversely “under circumstances indicating discrimination on the basis of an impermissible factor.” *Id.* at 1340 (quoting Doe v. N.Y. Univ., 666 F.2d 761, 776 (2d Cir. 1981)). The court found the plaintiffs still carried the ultimate burden of proving that they were excluded from the position they sought solely on the basis of their disability. *Id.* at 1338, 1340.

\(^{121}\) 304 F. 3d 500, 505 (5th Cir. 2002) (establishing that although the “because of” standard may have been proper under the ADA, the district court was correct in holding that the Rehabilitation Act requires a stricter causation standard). Part V.A.i. of this Note offers a critique of the court’s opinion.

\(^{122}\) *Id.* at 503.

\(^{123}\) *Id.* at 505.

\(^{124}\) *Id.*

\(^{125}\) 935 F.2d 1179 (11th Cir. 1991).
employer after it reassigned him to light duty and later terminated him. The Eleventh Circuit Court of Appeals acknowledged that the appellant's HIV played a role in his adverse treatment, but upheld the trial court's judgment against the plaintiff because his employer did not dismiss him "solely on the basis of being handicapped."

Circuits requiring plaintiffs to prove their disability was the exclusive cause of their adverse treatment shield employers with discriminatory motives from liability. Recall plaintiffs Lamarre and Tiesinga. If Lamarre proves that he is disabled and otherwise qualified for the TSA position, he could succeed in his § 504 claim because the facts of the complaint suggested Lamarre's HIV was the only reason the TSA prevented him from advancing in the application process. Tiesinga's claim, on the other hand, will most certainly fail under the sole-cause standard. Even if Tiesinga establishes that his HIV played a role in his adverse treatment, his employer can escape liability if it can prove that Tiesinga's unprofessional behavior partially motivated its decision to place Tiesinga on leave.

126. Id. at 1180.
127. Id. at 1182. Severino predates both the ADA and § 504(d), discussed in Part V.A. of this Note. The dissent in Severino argued that § 504 required legitimate reasons for dismissal to outweigh illegitimate disability-based reasons. Id. at 1184.
128. Cf. Doe v. District of Columbia, 796 F. Supp. 559 (D.D.C. 1992) (illustrating the process of a successful § 504 cause of action in a jurisdiction allowing such suits). In Doe, the D.C. fire department extended an offer of employment to the plaintiff after he passed written and physical examinations to become a firefighter. Id. at 564. When the plaintiff voluntarily revealed that he had HIV, the department told him not to report for duty and never informed Doe that it had withdrawn its offer of employment. Id. at 565, 570. Doe sued the city under § 504. Id. at 560. The district court concluded that Doe qualified as a person with a disability. Id. at 567. Based on testimony from doctors, it further found that Doe was otherwise qualified to be a firefighter and did not pose a threat to the health or safety of others. Id. at 569. A captain at the fire department testified that if Doe had never revealed his status, the fire department would have had no reason to prevent him from reporting to work. Id. at 565. This led the court to conclude that the fire department discriminated against Doe solely on the basis of his disability. Id. at 570. Because the city did not rebut Doe's prima facie case of discrimination, the court concluded that its conduct violated § 504 of the Rehabilitation Act. Id. at 570–71.

The conclusion that Lamarre could succeed in his § 504 claim assumes the D.C. Circuit allows federal employees to bring claims under § 504. In actuality, the circuit requires federal employees to bring claims against federal agencies under § 501 of the Rehabilitation Act. Taylor v. Small, 350 F.3d 1286, 1291 (D.C. Cir. 2003) (finding that § 504 of the Rehabilitation Act does not provide an alternative avenue of relief for aggrieved individuals).

129. See Sedor v. Frank, 42 F.3d 741, 746 (2d Cir. 1994) (establishing that the evidence was insufficient to determine that a former Postal Service employee was terminated wholly because of his disability).
coworker's face.\textsuperscript{130} He therefore faces the nearly insurmountable task of proving that his disability was the \textit{only} reason for his adverse treatment.\textsuperscript{131}

The sole-cause standard unquestionably insulates employers with discriminatory motives from liability.\textsuperscript{132} The actual impact of the restrictive standard is difficult to quantify because courts have widely dismissed plaintiffs' Title I and § 504 claims for failing to establish the first two elements of a claim—that the plaintiff is disabled and otherwise qualified for the position.\textsuperscript{133} However, the ADA Amendments Act (ADAAA) of

\begin{itemize}
\item 133. \textit{See, e.g.}, Sutton \textit{v. United Airlines}, Inc., 527 U.S. 471, 475, 488-89 (1999) (holding that severe myopia, rendering plaintiffs effectively blind when uncorrected, did not qualify as a disability under the ADA because plaintiffs corrected the condition with glasses), \textit{superseded by statute}, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat 3553; Myers \textit{v. Hose}, 50 F.3d 278, 282–83 (4th Cir. 1995) (affirming the district court's grant of summary judgment against the employee because employee's hypertension and diabetes prevented him from safely performing the duties of his job and rendered him unqualified for the position because his employer could not reasonably accommodate him); Smith \textit{v. Barton}, 914 F.2d 1330, 1339 (9th Cir. 1990) (explaining that courts have not had occasion to address the standards for proving intentional discrimination because cases have turned on whether an individual is otherwise qualified). The otherwise qualified element also implicates causation in that an employer may admit that it fired or refused to hire a plaintiff because of the plaintiff's disability but can nevertheless assert that the plaintiff's disability renders him unqualified for the position. Smith \textit{v. Barton}, 914 F.2d 1330, 1340 (9th Cir. 1990).

In \textit{Arline}, the court advised district courts to conduct an individualized inquiry into whether a disabled employee is otherwise qualified for the position. Sch. Bd. of Nassau Cnty \textit{v. Arline}, 480 U.S. 273, 287 (1987). In conducting this inquiry, "courts normally should defer to the reasonable medical judgments of public health officials," and evaluate "whether the employer could reasonably accommodate the employee." \textit{Id.} at 288. Thus, even if an employee is treated adversely because of his disability, the adverse treatment is excusable if a court concludes that the disability renders the employee unqualified for the position. \textit{See, e.g.}, Zillyette \textit{v. Capital One Fin. Corp.}, 1 F. Supp. 2d 1435, 1442-43 (M.D. Fla. 1998) (holding that even though employee's HIV was the cause of his absences, the employee's need for absences rendered him unqualified for the position from which he was discharged).

The "otherwise qualified" prong is a significant barrier for HIV positive employees working or seeking work in the healthcare sector. In \textit{Arline}, a § 504 case, the court advised that a "person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." 480 U.S. 273, 287 n.16 (1987). Similarly, Title I of the ADA provides a defense to employers that deny jobs or benefits to individuals who pose a "direct threat" to the health and safety of others in the workplace when reasonable accom-
2008 favors a broad definition of disability.134 If plaintiffs can more easily demonstrate that they are disabled, courts that have not previously considered whether Title I and § 504 have different causation will likely be forced to do so. Whether these courts adopt the sole-cause standard or apply Title I’s motivating-factor causation standard to § 504 employment discrimination claims will determine disabled employees’ future ability to use § 504 as a tool to combat workplace discrimination.

V. TITLE I’S MOTIVATING-FACTOR STANDARD APPLIES TO § 504 EMPLOYMENT DISCRIMINATING CLAIMS

The 1992 amendments to § 504 established two causation standards within the section and require courts to apply Title I’s motivating-factor standard to § 504 employment discrimination claims. Courts that have adopted a stricter causation standard for § 504 than for Title I rely on the textual difference between the sections, but they ultimately misunderstand § 504’s liability scheme. They violate well accepted rules of statutory construction that require them to give effect to every clause of a statute. These courts further ignore § 504’s role in accomplishing the Rehabilitation Act’s purpose.135 Due consideration of § 504’s text and purpose requires courts to apply Title I’s motivating-factor standard to § 504 employment discrimination claims.


A. Dual Causation and the 1992 Amendments to § 504

The 1992 amendments to § 504 created a dual causation scheme and two liability standards within the section. As discussed in Part III, § 504 made no specific reference to employment discrimination when Congress enacted it in 1973. Rather the section's prohibition against discrimination applied generally to "any program or activity receiving Federal financial assistance." This is significant because although § 504 is widely understood as prohibiting employment discrimination, it is also used to challenge discrimination in a range of sectors including education, health services, and public accommodations. Thus, when Congress enacted § 504, the "solely by reason of" causation standard applied to all claims brought under the section. In 1992, however, Congress amended the Rehabilitation Act to align it with the ADA. As part of the amendment process, Congress added subpart (d) to § 504. The section's original "solely by reason of" anti-discrimination language is now in § 504(a) and § 504(d) specifically addresses employment discrimination.

Subpart (d) of § 504 requires courts to apply Title I's motivating-factor standard to § 504 employment discrimination claims. It states, "[t]he standards used to determine whether this section has been violated in a
A complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990." Subpart (d) therefore specifies that courts shall evaluate employer conduct in § 504 discrimination claims using the same liability standard they apply in Title I discrimination claims. In other words, subpart (d) supersedes subpart (a) and directs courts to apply Title I's motivating-factor standard to § 504 employment discrimination claims. The legislative record supports this position. Senator Harkin, who introduced the Senate bill adding subpart (d), explained that "[i]ncorporating the ADA standards into the Rehabilitation Act will assure that there will be consistent, equitable treatment for both individuals with disabilities and business under the two laws."

By adding subpart (d), Congress created two different causation standards for § 504 claims—Title I's motivating-factor standard applies to employment claims, and subpart (a)'s sole-cause standard applies to non-employment claims. In Powell v. City of Pittsfield, the District Court of Massachusetts agreed with this interpretation. The court expressly considered whether the ADA and § 504 have different causation standards for employment discrimination claims and held that the same standard governs both acts. The court explained that Congress left "solely" out of the ADA because it disapproved of § 504's requirement that employees prove discrimination "solely by reason of" their disability. The court endorsed applying the sole-cause standard to non-employment claims; however, subpart (d) required it to apply Title I's causation standard in Powell because the plaintiff alleged employment discrimination.

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144. See Price Waterhouse v. Hopkins, 490 U.S. 228, 237 (1989) ("The specification of the standard of causation under Title VII is a decision about the kind of conduct that violates that statute.").
145. See Powell v. City of Pittsfield, 221 F. Supp. 2d 119, 149 (D. Mass. 2002) (explaining that subpart (d) means an employer is liable for discrimination if an employee's disability caused his adverse treatment "in whole or in part").
146. 138 Cong. Rec. 31523, 1992 WL 259551 (1992) (statement of Sen. Harkin). The Senate passed the Rehabilitation Act Amendments of 1992 with bipartisan support. Id. The senators responsible for crafting the Bill believed that using the language of the ADA would promote consistency and understanding by employers and employees alike. Id.
148. See id. at 149.
149. See id. The court came to this conclusion not long after the First Circuit Court of Appeals briefly noted in Oliveras-Sifre v. Puerto Rico Department of Health, 214 F.3d 23, 25 & n.2 (1st Cir. 2000), that the causation standards under § 504 and Title I are the same.
151. Id. at 149.
ability under § 504 by showing that his adverse treatment was “in whole or in part because of [his] disability.” As the Powell court recognized, courts presented with § 504 employment discrimination claims must look to subpart (d) for the section’s causation standard.

i. The Textual Inconsistency of Denying Dual Causation

To hold that § 504 requires plaintiffs to meet the sole-cause standard for employment discrimination claims, courts must ignore subpart (d) and defy the most basic canons of statutory interpretation. Yet most courts do just that. Unlike Powell v. City of Pittsfield, numerous § 504 employment discrimination decisions reference only subpart (a) when analyzing the elements of a claim. In Sedor v. Frank, the Second Circuit reviewed a district court’s finding that the plaintiff “was not discharged solely by reason of his disability.”

Citing subpart (a) for the elements of an employment discrimination claim, the Second Circuit stated that “[i]n order to prevail on a claim under this section, a plaintiff must establish . . . that she is being excluded from the position solely by reason of her handicap.” The court referred to the 1992 amendments to § 504, but failed to acknowledge the effect of subpart (d) on the section’s causation standard. Similarly, in Ellis v. England, the Eleventh Circuit Court of Appeals cited subpart (d) for the proposition that Title I cases serve as precedent for § 504 cases. Yet, the court ignored the substantive effect of subpart (d) when it cited only subpart (a) for the position that “[i]t is not enough for a plaintiff to demonstrate that an adverse employment action was based partly on his disability. Rather, under the Rehabilitation Act, a plaintiff must prove that he suffered an adverse employment action ‘solely by reason of’ his handicap.”

152. Id. at 148 (citing Equal Emp’t Opportunity Comm’n v. Amego, Inc. 110 F.3d 135, 141 n.2 (1st Cir. 1997)).

153. See e.g., Verna v. Public Health Trust, 539 F. Supp. 2d 1340, 1362 (S.D. Fla. 2008) (citing subpart (a) for the elements of a prima facie case under § 504 and explaining that because the employee could not demonstrate that her disability was the sole cause of her termination, her § 504 claim could not succeed); Jeseritz v. Potter, 282 F.3d 542, 546 (8th Cir. 2002) (inserting “solely” into the standard for liability articulated in a Title I case after citing subpart (a) for the elements of a discrimination claim under § 504).

154. 42 F.3d 741 (2d Cir. 1994).

155. Id. at 746.

156. Id. (emphasis added).

157. See id. at 745-46 (citing subpart (a) “as amended, without substantive change from version in effect in early 1988” for § 504’s “solely by reason of” causation standard).

158. 432 F.3d 1321 (11th Cir. 2005).

159. Id. at 1326.

160. Id. (citations omitted).
The Fifth Circuit defended the sole-cause standard because "[a] provision must be considered in its context and the more specific provision within a statute prevails."¹⁶¹ In the court's view, "solely by reason of" in § 504(a) is more specific than the language in § 504(d).¹⁶² Thus, Title I's causation standard does not apply to § 504 employment discrimination claims.¹⁶³ The Fifth Circuit has it backwards. Subpart (a) addresses the gamut of claims that plaintiffs can bring under the section, whereas subpart (d) singles out employment discrimination claims. Because it applies only to employment discrimination claims, subpart (d) is the more specific provision. To hold that employees must demonstrate that their disability was the sole cause of their discrimination, courts interpreting § 504 must ignore subpart (d).¹⁶⁴

ii. The Substantive Inconsistency of Denying Dual Causation

Ignoring the effect of subpart (d) not only defies rules of statutory construction, it tolerates inconsistent treatment of employers and employees under the Rehabilitation Act. When Congress passed the Rehabilitation Act, it enacted § 501 alongside § 504.¹⁶⁵ Despite identical language, courts have held that federal employees bringing disability discrimination claims under § 501 of the Rehabilitation Act may prove discrimination under a motivating-factor standard.

At the time of its enactment, § 501 required the federal government to develop affirmative action plans for employing people with disabilities.¹⁶⁶ From the start, § 501 dealt exclusively with employment. Congress added remedies to the section in 1978, and courts have since recognized that federal employees may sue the federal government for disability discrimination under the section.¹⁶⁷ Unlike § 504, § 501 does not contain its own

¹⁶¹. Soledad v. U.S. Dep't of Treasury, 304 F. 3d 500, 505 (5th Cir. 2002).
¹⁶². Id.
¹⁶³. See id.
¹⁶⁴. The fact that the Fifth Circuit can ignore the text of subpart (d) but in the same breath use textual arguments to conclude that "solely by reason of" applies to § 504 employment discrimination claims undermines the court's position.
¹⁶⁶. Rehabilitation Act of 1973, 29 U.S.C. 791(b) (2006) ("Each department, agency, and instrumentality (including the United States Postal Service and the Postal Regulatory Commission) in the executive branch and the Smithsonian Institution shall, . . . submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, instrumentality, or Institution.").
causation language, but when Congress amended the Rehabilitation Act in 1992, it added subpart (g) to § 501. Subpart (g) provides “[t]he standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990.” Despite the substantive identity between § 501(g) and § 504(d), courts have concluded that federal employees bringing § 501 claims need only prove that their disability was a motivating factor in their adverse treatment.

171. See Pinkerton v. Spellings, 529 F.3d 513, 516 n.14 (5th Cir. 2008) (per curiam) (listing cases that have applied a “less stringent causation standard” to § 501 claims). It appears that the explicit differentiation between causation under § 504 and § 501 is primarily limited to the Fifth Circuit. Compare Lopez v. Kempthorne, 684 F. Supp. 2d 827, 864–67 (S.D. Tex. 2010) (explaining that under the McDonnell framework after an employer presents a legitimate reason for discrimination the employee must “offer sufficient evidence to raise [a] genuine issue of material fact as to whether that articulated reason is [a] mere pretext for discrimination, or one reason and [a] motivating factor for [the] decision.”), and Florence v. Runyon, 990 F. Supp. 2d 485, 494 (N.D. Tex. 1997) (emphasis added) (quoting Grimes v. Tex. Dep't of Mental Health and Mental Retardation, 102 F.3d 137, 143 (5th Cir. 1996)) (“[A] plaintiff can avoid summary judgment if the evidence, taken as a whole: (1) creates a fact issue as to whether each of the employer’s stated reasons was not what actually motivated the employer and (2) creates a reasonable inference that [a prohibited factor] was a determinative factor in the actions of which plaintiff complains.”), with Kim v. Potter, 460 F. Supp. 2d 1194, 1198 & n.5 (D. Haw. 2006) (stating that § 501 requires a plaintiff to prove discrimination “solely by reason of his disability” whereas the ADA requires only that the disability be a “motivating factor”). But see Womanchild v. Nicholson, No. C06-1823RAJ, 2008 WL 714091, at *3 (W.D. Wash. March 13, 2008) (alteration in original) (concluding that a § 501 plaintiff need only prove “that her disability was a ‘motivating factor’ behind [her] discrimination.”).
To reach this conclusion, the Fifth Circuit reasoned that § 504(a)'s "solely by reason of" language overrode the ADA's causation standard.172 Because § 501 "does not contain [causation] language overriding the ADA standards . . . the ADA causation standard incorporated by § 501(g) governs claims under § 501."173 This conclusion is illogical and inequitable. It allows employers to escape liability under § 504 for the same discriminatory conduct for which they are liable under § 501.

Consider again the facts alleged in Tiesinga's complaint. Assume that a reasonable jury could conclude that Tiesinga's adverse treatment resulted from his conduct toward his co-worker and his employer's discomfort with his HIV status. Following the Fifth Circuit's reasoning, if Tiesinga worked for the federal government, the employer's decision to place Tiesinga on leave would violate § 501. However, the same decision would not violate § 504 because more than one factor motivated the employer's decision. This conclusion is particularly illogical in light of the fact that both § 504(d) and § 501(g) state that Title I's standards should be used to determine whether employer conduct is discriminatory.174

The Fifth Circuit has nevertheless argued that § 501 and § 504 employment claims have different causation standards because the sections possess different remedies.175 This argument fails because it conflates the rights and liabilities that § 501 and § 504 create with the remedies they provide.176 As discussed above,177 § 504 plaintiffs cannot recover mone-

172. See Pinkerton, 529 F.3d at 519 ("conclud[ing] that the ADA does not require 'sole causation'" and holding instead that "[t]he proper causation standard under the ADA is a 'motivating factor' test").

173. Id. at 516–17. The court recognized that district courts around the country have applied different causation standards to § 501. Id. at 516. At the time of this writing, Pinkerton had no negative citing references, and at least one district court outside the Fifth Circuit has cited it for the proposition that § 501 and § 504 contain different causation standards. See Womanchild v. Nicholson, No. C06-1823, 2008 WL 714091, at *3 (W.D. Wash. March 13, 2008) (alteration in original) (indicating that there is a circuit split between the First and Ninth Circuits regarding the appropriate section of the Rehabilitation Act to apply when considering disability discrimination claims).


175. Pinkerton, 529 F.3d at 517.

176. See Martin J. Katz, Unifying Disparate Treatment (Really), 59 Hastings L.J. 643, 658 (2008) (explaining the rationale for requiring different standards for liability and damages). A motivating-factor standard for damages could result in a windfall for plaintiffs who may be compensated for harm not attributable to discriminatory motives; thus it makes the most sense to apply a motivating-factor standard to liability because "a defendant who engages in such discriminatory decision-making should not be relieved from all penalties merely because he also considered a non-protected factor." Id. The purpose of engaging in disparate treatment law is to prevent employers from committing discriminatory practices because such actions are damaging to the plaintiffs and to society. Id. By
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Tary damages from the federal government. Conversely, § 501 effectively waives the government’s sovereign immunity against monetary damage awards. However, the Supreme Court made clear in Lane v. Pena that “Congress is free to waive the Federal Government’s sovereign immunity against liability without waiving its immunity from monetary damage awards.” In other words, the remedies that Congress makes available for violating a statute do not impact the statute’s liability standard. That § 501 and § 504 provide different remedies for plaintiffs who successfully prove discrimination therefore says nothing about liability under the sections. Looking to remedies to determine whether conduct is discriminatory puts the cart before the horse.

Sections 501 and 504 both incorporate Title I’s standards for determining whether employer conduct violates the section. They therefore possess the same causation standard. Holding otherwise leads to the illogical conclusion that conduct constituting discrimination under § 501 does not constitute discrimination under § 504. Recognizing that § 504 contains a different causation standard for employment discrimination than it does for other kinds of discrimination squares § 504 with § 501 and ensures that the Rehabilitation Act treats all employers and employees equally. At the same time, § 504’s dual causation scheme acknowledges that different causation standards may be appropriate for qualitatively different conduct.

iii. Why Congress Did Not Remove “Solely” from § 504

Many non-employment disability discrimination claims do not implicate causation in the same way as employment claims, which explains why Congress did not remove “solely” from § 504(a) when it added § 504(d). Title I of the ADA recognizes that discriminatory animus may motivate

imposing liability through a motivating-factor standard, employers are more likely to be held accountable for their discriminatory actions. Id.

177. See Part III.B.iii. of this Note.
178. See Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 363–64, 374 (2001) and accompanying text in Part III.B.iii. of this Note for a discussion of remedies under § 504.
181. Id. at 196 (emphasis added) (waiving immunity as to one type of damages does not require waiving immunity for other types of damages).
an employer's treatment of disabled employees. It therefore prohibits disparate treatment of employees with disabilities on the basis of their disability. To succeed in a disparate treatment claim plaintiffs must establish a causal connection between their disability and their adverse treatment. Congress removed "solely" from the ADA because it recognized that the complexity of employer/employee relationships makes the sole-cause standard untenable and leads to absurd results in workplace disparate treatment claims.

Like Title I, § 504 also bars disparate treatment in the workplace. However, unlike Title I, § 504 does not apply exclusively to employers. Section 504 allows people with disabilities to sue any federal grantee that denies them equal access to services and programs by failing to accommodate their disabilities. In fact, the belief that benign neglect rather than


184. See id.

185. See Katharine T. Bartlett, Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination, 95 Va. L. Rev. 1893, 1920–23 (2009) (explaining how courts use language suggesting plaintiffs must prove discriminatory intent, but that the intent requirement is better understood as requiring plaintiffs to establish a causal link between their protected characteristic and their adverse treatment).

186. See H.R. Rep. No. 101-485, pt. 2, at 85 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 368. To explain why Congress deleted "solely" from the ADA's causation standard, the House Committee on Education and Labor offered the hypothetical of a black, disabled job applicant who is not hired: "In this case, the employer did not refuse to hire the individual solely on the basis of his disability—the employer refused to hire him because of his disability and because he was black. Although the applicant might have a claim of race discrimination under Title VII of the Civil Rights Act, it could be argued that he would not have a claim under section 504 because the failure to hire was not based solely on his disability." Id. Such a result, the Committee argued, is absurd. Id. Yet a court in the Northern District of Mississippi endorsed this absurd conclusion as a necessary consequence of § 504's causation standard in Montgomery v. Potter, No. 2:04CV162, 2006 WL 559240, *5 (N.D. Miss. March 6, 2006) (holding that because the plaintiff alleged racial discrimination as well as disability discrimination, his complaint defeated his § 504 claim). The paradox that the sole-cause standard forces upon workers is particularly damaging to people with HIV because data suggests that the interaction between ethnic minority status and HIV/AIDS leads to more pervasive levels of employment discrimination. See Liza Conyers et al., Workplace Discrimination and HIV/AIDS: The National EEOC ADA Research Project, 25 Work 37, 44 (2005).


188. See, e.g., Henrietta D. v. Giuliani, 119 F. Supp. 2d 181, 184 (E.D.N.Y. 2000) (involving a class action in which residents with HIV and AIDS sued the City of New York under Title II of the ADA and § 504 for failure to provide meaningful access to public services and benefits). Reasonably accommodating disabled individuals is not a statutory requirement of § 504, but it has been a staple of the federal regulations implementing the section as recognized in Alexander v. Choate, 469 U.S. 287, 301 n.21 (1985).
outright prejudice prevented individuals with disabilities from equal access to everyday activities largely motivated Congress to pass § 504.189

Causation is generally not central to claims against providers of public services and accommodations, such as hospitals, grocery stores, and schools, for failing to accommodate people with disabilities, or, if it is, a stricter causation standard is less likely to impact defendant liability.190

For example, in Bennett-Nelson v. Louisiana Board of Regents,191 a state university did not regularly provide hearing impaired students with interpreters in spite of the students’ requests.192 The students sued their university for failing to accommodate their disabilities as required by Title II of the ADA and § 504 of the Rehabilitation Act.193 The court observed that § 504 required discrimination to be “solely by reason” of disability whereas Title II did not, but it did not find the distinction material. Whether the university failed to provide the requested accommodations in whole or in part because of discriminatory motives was inconsequential.194 Rather, the university violated both § 504 and Title II if the accommodation that the plaintiffs requested was reasonable and the university nevertheless failed to provide it.195

Had the plaintiffs in Bennett-Nelson been non-disabled, they would not have suffered adverse treatment. Thus, practically speaking, the university discriminated against plaintiffs “solely by reason” of their disabilities. However, as the court pointed out, liability turned on whether the school

189. Alexander, 469 U.S. at 295 (reviewing the legislatively history and debates of Congress where officials expressed the view that discrimination against disabled individuals was out of ignorance and not personal animus and noting that a primary purpose of the Act was to eliminate architectural obstacles for the handicapped).

190. See Betsy Ginsberg, Out with the New, in with the Old, 36 Fordham Urb. L.J. 713, 738–39 (2008) (explaining that the difference in causation standards between § 504(a) and Title II may not impact the success of prisoner’s claims under § 504 because “relatively few Title II claims are premised on a disparate treatment theory, and when they are, the result would generally not differ based on which statute’s causation standard applied”). The reasonable accommodation requirement recognizes that not all discrimination against people with disabilities results from intentional discrimination, but rather seeks to cure discrimination caused by indifference directed toward the special needs of people with disabilities. See Henrietta D. v. Giuliani, 119 F. Supp. 2d 181, 206–07 (E.D.N.Y. 2000).

191. 431 F.3d 448 (5th Cir. 2005).

192. Id. at 450.

193. Id. Title II of the ADA prohibits state and local instrumentalities from discriminating against individuals on the basis of disability. Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131–12132 (Supp. II 2008).

194. Id. at 455 (5th Cir. 2005); see also Cercpac v. Health and Hosp. Corp., 147 F.3d 165, 167 (2d Cir. 1998) (noting that although § 504 and Title II possessed different causation standards, the difference did not affect the disposition of the case where disabled children sued a medical service provider for violating Title II and § 504 by failing to provide them “equal access to health care services”).

violated its obligation to provide a reasonable accommodation irrespective of its motivations. Consequently, the court did not need to examine whether a causal relationship existed between the defendant’s motives and plaintiffs’ adverse treatment.

As discussed in Part IV.B, a sole-cause standard may be fatal to the disparate treatment claims of disabled employees. However, outside the employment context, § 504(a)’s “solely by reason of” language actually reflects the fact that society’s indifference to the needs of people with disabilities is frequently the only reason many disabled individuals do not enjoy equal opportunities. Given that people with disabilities face different forms of discrimination depending on the context, it makes sense that Congress would leave “solely” in § 504(a) but adopt Title I’s motivating-factor standard for employment discrimination claims. The motivating-factor standard more accurately reflects the complex nature of employer decision-making. That § 504 incorporates Title I’s causation standard for employment discrimination claims is also consistent with Congress’s repeated efforts to ensure that the Rehabilitation Act and ADA accomplish the shared purpose of eliminating discrimination against people with disabilities.

B. The Sole-Cause Standard Undermines the Shared Purpose of the Rehabilitation Act and ADA

Affording employers that discriminate against disabled employees a more forgiving causation standard under § 504 than under Title I convenes the shared purpose of the Rehabilitation Act and the ADA. Both acts express a national commitment to end discrimination against people with disabilities and ensure that people with disabilities have equal access

196. Id. at 455.

197. Despite § 504(d)’s mandate that courts treat employment discrimination claims differently than other claims, courts continue to rely on non-employment decisions to analyze employment discrimination claims. In Berkey v. Henderson, a former postal worker sued the U.S. Postal Service for employment discrimination under § 504. Berkey v. Henderson, 120 F. Supp. 2d 1189 (S.D. Iowa 2000). The Southern District Court of Iowa noted that an “important difference” between the ADA and the Rehabilitation Act is “the Rehabilitation Act’s requirement that a person’s disability ‘serve as the sole impetus for a defendant’s adverse action against the plaintiff.’” Id. at 1191 n.1. Yet the court cited Amir v. St. Louis University, 184 F.3d 1017, 1029 n.5 (8th Cir. 1999) for this proposition. Id. Amir involved a medical student with obsessive compulsive disorder who brought a discrimination claim against his university under Title III of the ADA when the university refused to alter its degree requirements in order to allow the student to continue his studies. Id. at 1027–28. The Berkey court obviously erred when it relied on a non-employment case to identify § 504’s causation standard for an employment discrimination claim because § 504 does not mandate applying Title I’s standards to non-employment cases.

to the opportunities, privileges, and benefits that people without disabilities enjoy. 199 Section 504 and Title I are enforcement mechanisms necessary to effectuate the purpose of the Rehabilitation Act and the ADA in the workplace.

Section 504 influenced the development of the ADA, which, in turn, influenced amendments to the Rehabilitation Act. When Congress enacted the Rehabilitation Act in 1973, the primary focal points were to “increase federal support for vocational rehabilitation” 200 and “promote and expand employment opportunities in the public and private sectors


Although the DOJ adopted the regulations before Congress added subpart (d) to § 504, they illuminate subpart (d)’s meaning. Subpart (d) requires that the standards used to determine whether conduct violates Title I be used to determine whether conduct violates § 504. The DOJ’s “on the basis of” language is identical to the causation standard found in Title I and the regulations the EEOC adopted to implement it. Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a) (Supp. II 2008). Compare Discrimination Prohibited, 29 C.F.R. § 1630.4 (2009) (asserting in order to promote equal employment, it is illegal to discriminate against qualified persons with disabilities), with Discrimination Prohibited, 34 C.F.R. § 104.11(b) (2009) (promulgating that programs that are given federal financial assistance may not discriminate against a qualified handicapped person with regard to employment), and Discrimination Prohibited, 45 C.F.R. § 84.11(b) (2009) (declaring that discrimination based on a disability is prohibited in programs that obtain federal financial assistance). The DOJ regulations thereby communicate that § 504 shares Title I’s causation standard for purposes of employment discrimination claims.

Courts need not defer to the regulations in order to recognize that they argue for interpreting § 504 and Title I consistently. Together with § 504’s text and purpose, the DOJ regulations lend persuasive authority to the position that Title I’s motivating-factor standard applies to § 504 employment discrimination claims.

for handicapped individuals."  

Section 504 provided the mechanism to enforce the act’s mandate. Congress recognized § 504’s important role in reducing workplace discrimination and drafted Title I to reflect § 504’s general framework. After it passed the ADA, Congress sought to align the Rehabilitation Act’s protections with the ADA’s expanded aims. The 1992 amendments to the Rehabilitation Act communicate this intent. In amending the “Findings, Purpose, and Policy” section of the Rehabilitation Act, the Senate Committee on Labor and Human Resources stated:

The statement of purpose and policy is a reaffirmation of the precepts of the Americans with Disabilities Act, which has been referred to as the 20th century emancipation proclamation for individuals with disabilities. It is the Committee’s intent that these principles guide the policies, practices, and procedures developed under all titles of the [Rehabilitation] Act.

As the legislative record indicates, the addition of subpart (d) to § 504 is a direct result of Congress’s desire to harmonize the aims of the Rehabilitation Act and the ADA with respect to employment.

Courts that require employees bringing § 504 claims to demonstrate that their disability was the only factor causing their adverse treatment contravene the shared purpose of § 504 and Title I. The Eleventh Circuit rejected the sole-cause standard for Title I claims because it indulges

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203. See H.R. REP. No. 101-485, pt. 2, at 71 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 353 (“As in section 504, the ADA adopts a framework for employment selection procedures which is designed to assure that persons with disabilities are not excluded from job opportunities unless they are actually unable to do the job.”).


205. See 138 CONG. REC. 31523, 1992 WL 259551 (1992) (statement of Sen. Harkin) (stating that the incorporation of the ADA standards into the Rehabilitation Act ensures consistent and equitable treatment). Furthermore, Senator Harkin explained how utilizing the ADA standard helps to achieve the goal of the Rehabilitation Act of promoting independent living and increased societal involvement of the disabled. Id. The ADA language reflects the “philosophy of inclusion and respect for the dignity of the individual” prominent in the stated purpose and goals of the Rehabilitation Act. Id.; Powell v. City of Pittsfield, 221 F. Supp. 2d 119, 149 (D. Mass. 2002) (recalling how “Congress voiced its disapproval of a literal reliance on the word ‘solely’ in the Rehabilitation Act, and approved of court decisions rejecting what it termed the ‘absurd’ interpretation of the Rehabilitation Act”).
rather than eliminates discrimination. This reasoning applies with equal force to employment discrimination under § 504—a sole-cause standard tolerates employer's "reflexive reactions" and "accumulated myths and fears" about people with disabilities. By allowing employers to consider a person's disability when making adverse employment decisions, the sole-cause standard exposes people with disabilities to invidious attitudes and actions and undermines the Rehabilitation Act's ability to provide equal opportunities to workers with disabilities. The sole-cause standard is particularly damaging to the rights of employees with HIV because they are disproportionately vulnerable to society's prejudices.

Section 504 does not compel courts to construe it in a manner that ignores its text and undermines its purpose. Rather, the section protects people with disabilities from different forms of discrimination by establishing two causation standards. Section 504(d) instructs courts to interpret employment discrimination claims using Title I's motivating factor standard, whereas § 504(a) instructs courts to interpret non-employment claims using the sole-cause standard. This reading of § 504 gives full effect to subparts (a) and (d) and maximizes the section's ability to serve as a tool for eradicating discrimination against people with disabilities.

VI. Conclusion

Stable employment benefits the wellbeing of people with HIV and our nation. Congress intended § 504 of the Rehabilitation Act to hold employers liable for allowing their fears and misunderstandings about people with disabilities to influence their employment decisions, yet people with HIV continue to face invidious attitudes and prejudice in the workplace.

To date, the vast majority of courts require plaintiffs bringing § 504 employment discrimination claims to prove that their disability was the sole cause of their adverse treatment. This causation standard presents an insurmountable barrier to many plaintiffs bringing disparate treatment claims under § 504. Conversely, courts apply a motivating-factor causation standard to employment discrimination claims under Title I of the ADA. Under the motivating-factor standard, employers are liable if an employee's disability played a role in the employee's adverse treatment, even if it was not the exclusive cause. The motivating-factor standard

207. See id. at 1076.
better reflects the complex nature of employment decisions and better protects the rights of disabled workers.

Few courts have thoroughly examined whether § 504 and Title I contain different causation standards. In the wake of the ADAAA, however, courts will begin to examine the causal requirements of § 504 and Title I more closely. Courts that have specifically held that § 504 precludes Title I's motivating-factor standard have set dangerous precedent that threatens the vitality of § 504 as a tool for eliminating employment decisions based on prejudice and fear. These courts tolerate discrimination against disabled workers when doing so contradicts § 504's text and basic purpose.

The 1992 Amendments to § 504 created two causation standards within the section. Subpart (d) of § 504, a product of the 1992 amendments, compels courts to use Title I's motivating-factor causation standard to determine liability in § 504 employment discrimination claims. Subpart (a) of § 504 requires courts to apply the sole-cause standard to all non-employment discrimination claims brought under the section. This dual causation scheme gives robust meaning to every part of the section and ensures that workers with disabilities are not denied employment opportunities because of employers' ignorance and prejudiced attitudes. To adequately protect employees with HIV, courts must embrace § 504's dual causation scheme and adopt Title I's motivating-factor standard for determining employer liability in § 504 employment discrimination claims.