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Elizabeth Pendo

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## IDENTIFYING (WITH) DISABILITY: USING FILM TO TEACH EMPLOYMENT DISCRIMINATION

ELIZABETH PENDO\*

### INTRODUCTION

On the first day of class, I tell my Disability Law students that my objective is simple—I want to change the way they see the world. Teaching, writing, and working in disability rights has done that for me, and I want to continue to share that experience with my students. Integrating film into the classroom is one way to invite that change. When used properly, film can enhance coverage and discussion of substantive legal concepts and important policy issues surrounding employment of people with disabilities.<sup>1</sup> That result is especially important to my objective, because employment and other issues critical to the lives of people with disabilities often go unnoticed and unaddressed by people without disabilities.

As many have noted, despite the prohibitions against discrimination in the workplace contained in the American with Disabilities Act of 1990 (ADA),<sup>2</sup> there has been little progress toward the goal of equal employment of people with disabilities.<sup>3</sup> One reason for this outcome might be that the enactment of

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1. I have used films in several classes and, like others, have written positively about the experience. See Elizabeth A. Pendo, *Telling Stories About Health Insurance: Using New Films in the Classroom*, 5 HOUS. J. HEALTH L. & POL’Y 269, 285 (2005).

2. 42 U.S.C. §§ 12101–12213 (2006). The ADA was amended in 2008. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 29 U.S.C., 42 U.S.C.).

3. *What’s Changed in 20 Years Since ADA Passage*, NPR (July 28, 2010, 1:00 PM), <http://www.npr.org/templates/story/story.php?storyId=128825580>; see also *The Employment Situation—July 2013*, BUREAU OF LABOR STAT. 1, Table A-6 (Aug. 2, 2013, 8:30 AM), [http://www.bls.gov/news.release/archives/empsit\\_08022013.pdf](http://www.bls.gov/news.release/archives/empsit_08022013.pdf) (unemployment rate for persons with disabilities was 13%, compared to 7.4% of those without a disability). Not only are people

the ADA has done a good job at decreasing physical barriers but has not done enough to change discriminatory attitudes towards disabilities.<sup>4</sup> Building on a prior article about using film to teach health law,<sup>5</sup> this Essay is intended to share my experience using the film *Philadelphia* as a method of enhancing coverage and discussion of the employment provisions of the ADA and to provide an opportunity for recognition of, and identification with, the experiences of people with disabilities.

### I. CHOOSING PHILADELPHIA

There are many films that depict or address the issue of disability in some fashion. There are also many purposes for which one might choose to use one or more of these films in a disability law course, including: to examine representations of disability, positive or negative, and how those representations are reflected or reinforced in the law; to illustrate current or historical experiences of people with disabilities in order to measure the law's effectiveness (or ineffectiveness); and to uncover the history of the disability rights movement in the United States and its deep connections to other civil rights movements. As for the last of these, one of the biggest challenges is getting students to see employment discrimination against people with disabilities as deeply related to employment discrimination on the basis of race or gender. In past years, I have used documentary films in my Disability Law course for that purpose, including: *Music Within*,<sup>6</sup> *Murderball*,<sup>7</sup> *My Country*,<sup>8</sup> and *Lives Worth Living*.<sup>9</sup>

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with disabilities having a more difficult time seeking employment, but also those who are employed typically have jobs with lower earnings than their colleagues without disabilities. *Workers with a Disability Less Likely to be Employed, More likely to Hold Jobs with Lower Earnings, Census Bureau Report*, U.S. CENSUS BUREAU (Mar. 14, 2013), [http://www.census.gov/newsroom/releases/archives/american\\_community\\_survey\\_acs/cb13-47.html](http://www.census.gov/newsroom/releases/archives/american_community_survey_acs/cb13-47.html).

4. See, e.g., Randall M. Howe, *The Limits of Law: Eliminating Discrimination Requires Attitude Adjustment*, 47 ARIZ. ATT'Y, Apr. 2011, at 24, 26–28, available at <http://www.Azattorneymag-digital.com/azattorneymag/201104/#pg1>.

5. Pendo, *supra* note 1, at 285. For legal and policy analysis of the issues raised by the films, see Elizabeth A. Pendo, *Images of Health Insurance in Popular Film: The Dissolving Critique*, 37 J. HEALTH L. 267 (2004).

6. MUSIC WITHIN (Articulus Entertainment, Quorum Entertainment & The Music Within LLC 2007) (documenting the story of Richard Pimentel, who lost his hearing during the Vietnam War and returned to become an activist and participant in the creation of the Americans with Disabilities Act).

7. MURDERBALL (Paramount Pictures, MTV Films, Participant Productions, A&E IndieFilms & EAT Films 2005) (documenting athletes who play full-contract rugby in wheelchairs—a game they call “Murderball”—in order to compete in the Paralympic Games in Athens, Greece).

8. MY COUNTRY (ADA 1996), available at <http://www.ada.gov/videogallery.htm> (documenting symphony conductor and polio survivor James DePreist's profile of three people

Recently, however, I chose a new challenge—to illustrate that the lives and life experiences of many people with disabilities are invisible to many in the non-disabled community, a key insight of disability studies. I find philosopher Anita Silvers's concept of "experiential accessibility" helpful in this regard. Specifically, she suggests that people without disabilities often are unable to access, acknowledge, or appreciate the experiences of people with disabilities:

In general, the compulsion to dismiss the disabled as abnormal—that is, as being in a state unthinkable for oneself—renders all appeals to such criteria as what one would wish done were one in the other person's place ineffective where persons with disabilities are concerned.<sup>10</sup>

As I have written previously, "There is . . . considerable evidence that suggests that people without disabilities are unable to identify with people with disabilities, including empirical evidence indicating that people without disabilities significantly and unreasonably devalue the lives of people with disabilities."<sup>11</sup> The disparity between the judgments of people with and people without disabilities about the lives of people with disabilities has real and destructive potential.<sup>12</sup> Students interested in labor and employment law should understand that a failure of identification has real life consequences for people with disabilities in the workplace.

With the goal of increasing recognition and acknowledgement of the lives and experiences of people with disabilities, and in the context of disability-based employment discrimination in particular, I wanted to utilize a film that would help create experiential accessibility by facilitating student identification. I chose the 1993 film *Philadelphia*.<sup>13</sup>

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with disabilities whose lives have been shaped by the struggle for equal rights, drawing parallels between racial barriers and the barriers faced by people with disabilities).

9. LIVES WORTH LIVING (Independent Television Service & Storyline Motion Pictures 2011) (documenting the story of the disability rights movement, including interviews with its leaders).

10. Anita Silvers, *Reconciling Equality to Difference: Caring for People with Disabilities*, 10 HYPATIA (SPECIAL ISSUE) 30, 36 (1995).

11. See Elizabeth A. Pendo, *Substantially Limited Justice?: The Possibilities and Limits of a New Rawlsian Analysis of Disability-Based Discrimination*, 77 ST. JOHN'S L. REV. 225, 266–67 (2003).

12. *Id.* at 269.

13. PHILADELPHIA (TriStar Pictures & Clinica Estetico 1993). Sources for finding other films for classroom use include: Archive of Articles, PICTURING JUSTICE, <http://www.usfca.edu/pj/> (last visited Aug. 21, 2013); and THE INTERNET MOVIE DATABASE, <http://www.imdb.com> (last visited Aug. 19, 2013) (searchable by term). Sources for finding films or clips for classroom on labor and employment law issues include: WORKPLACE PROF BLOG, [http://lawprofessors.typepad.com/laborprof\\_blog/](http://lawprofessors.typepad.com/laborprof_blog/) (last visited Aug. 21, 2013) (search "film clips"); and THAT'S WHAT SHE SAID, <http://blogs.hrhero.com/thatswhatsheisaid/> (last visited Aug. 21, 2013) (searchable by labor & employment law topic).

Loosely based on the case of Geoffrey Bowers, an attorney who died of AIDS in 1987,<sup>14</sup> *Philadelphia* begins with Andrew Beckett, played by Tom Hanks, as a talented big-law attorney with the conservative Philadelphia firm Wyatt Wheeler. Early on in the film, Andrew discovers he has contracted HIV.<sup>15</sup> Andrew's law firm, impressed with his recent work, and unaware of his medical condition (or his sexual orientation), decides to assign Andrew to a case involving the firm's most important client. Shortly thereafter, the managing partners learn of Andrew's disease due to lesions associated with AIDS visibly appearing on his face. The law firm quickly terminates Andrew on what he believes is a "trumped-up charge of incompetence."<sup>16</sup>

Andrew believes he was fired for being sick and for being a gay man with AIDS. Unhappy with his firing, Andrew decides to take a stand and to sue his former law firm. However, the only lawyer willing to represent him is Joe Miller, played by Denzel Washington, a homophobic ambulance chaser, who agrees to represent Andrew because of his case's potential for both money and exposure.<sup>17</sup> As the trial goes on, however, Joe comes to feel that discrimination against people with HIV/AIDS is no different than the racial discrimination he has battled himself. As acclaimed movie critic Roger Ebert described of this transformation in his review of the film:

[I]t's obvious that at some point the scales will fall from the eyes of the Washington character, and he'll realize that his prejudices against homosexuals are wrong; he'll be able to see the Hank's character as a fellow human worthy of affection and respect. . . . But *Philadelphia* doesn't handle that transitional scene with lame dialogue or soppy extrusions of sincerity. Instead, in a brilliant and original scene, Hanks plays an aria from his favorite opera, one he identifies with in his dying state. Washington isn't an opera fan, but as the music plays and Hanks talks over it, passionately explaining it, Washington undergoes a conversion of the soul. What he sees, finally, is a man who loves life and does not want to leave it. And then the action cuts to Washington's home, late at night, as he stares sleeplessly into the darkness, and we understand what he is feeling.<sup>18</sup>

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14. Mireya Navarro, *Vindicating a Lawyer with AIDS, Years Too Late; Bias Battle Over Dismissal Proves Costly Not Only to Worker, but to Law Firm*, N.Y. TIMES, Jan. 21, 1994, available at <http://www.nytimes.com/1994/01/21/nyregion/vindicating-lawyer-with-aids-years-too-late-bias-battle-over-dismissal-proves.html>.

15. HIV is the human immunodeficiency virus and can lead to acquired immune deficiency syndrome, or AIDS. *HIV/AIDS Basics*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/resources/qa/definitions.htm> (last modified Nov. 6, 2006).

16. Janet Maslin, *Review/Film: Philadelphia; Tom Hanks as an AIDS Victim Who Fights the Establishment*, N.Y. TIMES, Dec. 22, 1993, available at <http://www.nytimes.com/1993/12/22/movies/review-film-philadelphia-tom-hanks-aids-victim-who-fights-establishment.html>.

17. *Id.*

18. Robert Ebert, *Practicing Safe Moviemaking—Despite Conservative Approach, 'Philadelphia' Is Potent*, CHI. SUN-TIMES, Jan. 14, 1994, at 35.

Ultimately, at the end of a lengthy trial, the jury finds the law firm liable for discriminating against Andrew, awarding him significant damages. During the course of the long trial, however, Andrew's health declines, and the film eventually ends with his family and friends, including Joe, gathering at his wake. Childhood photos and home movies play over the soundtrack, again inviting the audience to see Andrew as a beloved partner, son, brother and friend—or, as Ebert put it, “[A] fellow human worthy of affection and respect.”<sup>19</sup>

## II. USING *PHILADELPHIA*: SELECTED DISCUSSION QUESTIONS

I ask students to see the entire film outside of class after we have covered the materials in the casebook on disability-based discrimination in employment. I put a copy on reserve in the library so students can watch the film on their own, and I provide discussion questions similar to those outlined below in order to get students to think about the issues as they watch the film.

### A. *Definition of Disability and Standing Issues*

*Discussion Questions:* Based on the facts in the film, was Andrew Beckett “disabled” within the meaning of the ADA? Based on the facts of the film, was Andrew a “qualified individual with a disability”? What is Andrew's best argument? What is Wyatt Wheeler's best argument?

*Analysis:* Although the ADA is based on Title VII of the Civil Rights Act of 1964<sup>20</sup> (Title VII), which prohibits discrimination on the basis of race, national origin, sex, and religion, its protections do not apply to everyone—only those who meet the statutory definition of “disabled.” The ADA defines “disability” to mean: (1) “a physical or mental impairment that substantially limits one or more of the major life activities of such individual;” (2) “a record of such an impairment;” or (3) “being regarded as having such an impairment.”<sup>21</sup> After the passage of the ADA, the U.S. Supreme Court narrowly interpreted the term “disability.”<sup>22</sup> In response to these rulings, Congress passed the ADA Amendments Act of 2008 (ADAAA), which made clear that the definition of disability was to be interpreted broadly.<sup>23</sup>

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19. *Id.*

20. 42 U.S.C. § 2000e (2006).

21. *See id.* § 12102(2) (2006).

22. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (finding courts are allowed to consider mitigating measures such as medicines and other devices in determining whether an individual is substantially limited in a major life activity); Toyota Motor Mfg., Ky. Inc. v. Williams, 534 U.S. 184, 198 (2002) (finding an individual must show that his or her impairments prevent or severely restrict an ability to perform activities of central importance to most people's daily lives).

23. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3554.

In *Philadelphia*, the audience knows that Andrew is HIV-positive and, at the beginning of the film, (apparently) asymptomatic. Although *Philadelphia* was released five years prior to the Supreme Court's decision in *Bragdon v. Abbott*,<sup>24</sup> the question provides an opportunity to analyze the Court's holding that asymptomatic HIV is a "disability" within the meaning of the ADA because it represents an impairment to the major life activity of reproduction.<sup>25</sup> Students can also examine how the question would be analyzed under the ADAAA, pursuant to which people with HIV/AIDS can demonstrate that they are disabled simply by showing that their unmedicated HIV/AIDS substantially limits the functions of their immune system.<sup>26</sup>

As the movie progresses, so does Andrew's illness. And, while not all illnesses or impairments progress as his did, the movie does demonstrate that disability is not a static status. Indeed, the ADAAA protects people who suffer from episodic impairments, even when those impairments are in remission, so long as "it would substantially limit a major life activity when active."<sup>27</sup> Students may also discuss the progressive nature of Andrew's disability in the context of the ADA's provision that no employer "shall discriminate against a *qualified individual with a disability* because of the disability of such individual in regard to job application procedures . . . ."<sup>28</sup> At what point, if any, does Andrew cease to be qualified, and why? It is helpful to flesh this out because disability and qualification are often conflated in the case law.

#### B. *Employer's Duty of Non-Discrimination*

*Discussion Question:* As a private employer, what are Wyatt Wheeler's obligations under Title I of the ADA? What is Beckett's best claim against Wyatt Wheeler?

*Analysis:* Title I of the ADA provides that no employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or

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24. *Bragdon v. Abbott*, 524 U.S. 624 (1998).

25. *Id.* at 638. In that case, an HIV-positive patient sued her dentist under the ADA for his refusal to treat her in his office. *Id.* at 628–29. The Court established that her HIV-positive status was an impairment, and that it substantially limited her ability to reproduce because of the risk to her partner and child. *Id.* at 639–40. The Court also found reproduction is a major life activity because it is central to the life process itself. *Id.* at 639.

26. ADAAA, § 3, 122 Stat. at 3555; Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(j)(3)(iii) (2012).

27. ADAAA, § 4(a), 122 Stat. at 3556; 29 C.F.R. § 1630.2(j)(1)(vii).

28. 42 U.S.C. § 12112(a) (2006) (emphasis added). The ADA defines the term "qualified individual with a disability" as any "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires [to hold]." *Id.* § 12111(8).

discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>29</sup>

There is little direct evidence of discrimination available to Andrew and Joe. As noted by one commentator:

Employment lawyers live in a world in which a court or jury must determine whether an adverse job action was motivated by discrimination or a legitimate, non-discriminatory reason. There are hardly ever any direct-evidence cases. Philadelphia is a good example of the hard work necessary to piece together the ‘footprints in the snow’ indirect evidence needed to prove discriminatory motive.<sup>30</sup>

In discussing this question, many students focus on scenes such as when Andrew is summoned to a meeting with the managing partners of his law firm.<sup>31</sup> After a managing partner tells Andrew he is not only a friend to the law firm, but family, the managing partners inform him a kind of “stupor” has come around him lately. Further, they find he has an attitude problem. One managing partner states, “Let me put it this way Andy. Your place in the future in this firm is no longer secure. We feel it isn’t fair to keep you here when your prospects are limited.”<sup>32</sup> Andrew is shocked to hear the news, calling it preposterous, especially with it coming directly after receiving a major case. The managing partners defend their decision, stating his supposed mistake on the major case could have been catastrophic for the firm.

In addition to those traditional forms of discrimination based on the provisions of Title VII, Title I of the ADA contains an additional form of discrimination—“not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business . . . .”<sup>33</sup> Although *Philadelphia* is a stronger example of the former, more “traditional” type of discrimination, there is an opportunity to discuss the reasonable accommodation requirement, which many believe will become more prominent as a result of the ADA’s broadening of standing.<sup>34</sup>

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29. *Id.* § 12112(a).

30. Alan L. Rupe, *What I Learned at the Movies*, *Litigation News*, A.B.A., [http://apps.americanbar.org/litigation/litigationnews/practice\\_areas/employment-movies.html](http://apps.americanbar.org/litigation/litigationnews/practice_areas/employment-movies.html) (last visited Aug. 19, 2013).

31. PHILADELPHIA, *supra* note 13.

32. *Id.*

33. 42 U.S.C. § 12112(b)(5)(A).

34. *See, e.g.*, Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1123 (2010).



### C. Medical inquiries and Examinations

*Discussion Questions:* Although this did not occur in the film, could Wyatt Wheeler require applicants to take a medical examination? Could Wyatt Wheeler make medical inquiries of its applicants? What about its employees? Explain.

*Analysis:* The ADA restricts an employer's ability to make disability-related inquiries<sup>35</sup> and conduct medical examinations.<sup>36</sup> According to the Equal Employment Opportunity Commission (EEOC), a medical examination is a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual's physical or mental impairments or health, and may include vision tests; blood, urine, and breath analyses; blood pressure screening and cholesterol testing; and diagnostic procedures, such as x-rays, CAT scans, and MRIs.<sup>37</sup>

The ADA creates three categories of medical inquiries and examinations by employers: those made pre-offer, post-offer, and during employment.<sup>38</sup> Before an offer is made, an employer is generally prohibited from asking disability-related questions or requiring a medical examination whether or not relevant to the job.<sup>39</sup> After an offer is made, the employer can request a medical examination as a condition of starting work.<sup>40</sup> At this point, an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.<sup>41</sup> During employment, an employer may request medical information and require medical examinations that are "job-related and consistent with business necessity,"<sup>42</sup> meaning an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct

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35. According to the United States Equal Employment Opportunity Commission (EEOC), "a 'disability-related question' is a question (or series of questions) that is likely to elicit information about a disability," including questions concerning genetic information. *EEOC Notice Number 915.002: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, EEOC (July 27, 2000), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> [hereinafter *Disability-Related Inquiries and Medical Examinations*].

36. According to the EEOC, a "'medical examination' is a procedure or test that seeks information about an individual's physical or mental impairment or health." *Id.*

37. *Id.*

38. 42 U.S.C. § 12112(d)(2)-(4).

39. *Id.* § 12112(d)(2)(A).

40. *Id.* § 12112(d)(3).

41. *Id.* § 12112(d)(3)(A).

42. *Id.* § 12112(d)(4)(A).

threat due to a medical condition.”<sup>43</sup> At all times, the information must be treated as a confidential medical record, and it may not be used as a basis for prohibited discrimination.<sup>44</sup>

Although it would be unusual for an employer like Wyatt Wheeler to request examinations of all attorneys after offers are made, it is permissible as long as the results are not used to unlawfully screen out, for example, attorneys who are HIV-positive. Once the attorney started, it would be difficult for Wyatt Wheeler to show that a medical examination such as an HIV test was “job-related and consistent with business necessity.”<sup>45</sup>

If Wyatt Wheeler was inquiring about genetic information, it would also be constrained by the Genetic Information Nondiscrimination Act of 2008 (GINA).<sup>46</sup> With limited exceptions, GINA prohibits employers from requesting, requiring, or purchasing genetic information (defined as information about an individual’s genetic tests, genetic tests of a family member, or family medical history) at any time, and also prohibits discrimination on the basis of genetic information.<sup>47</sup> According to the EEOC, employers are no longer permitted to obtain any genetic information, including family medical history, from post-offer applicants.<sup>48</sup> However, if an employee submits to a medical examination and signs an authorization for the release of his or her medical records, the employer could incidentally acquire genetic information contained in the medical record, as currently there is no consistent, reliable method for segregating genetic information from general medical information.<sup>49</sup>

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43. *Disability-Related Inquiries and Medical Examinations*, *supra* note 35.

44. See H.R. REP. NO. 101-485, pt. 2, at 75 (1990) (stating that the covered entity must maintain medical records in a confidential manner and may not be used to limit health insurance eligibility or preventing advancement); *Disability-Related Inquiries and Medical Examinations*, *supra* note 35 (asserting that medical information should be treated confidentially and shared with supervisors or managers only in limited circumstances).

45. See *The Americans with Disabilities Act: A Primer for Small Business*, U.S. EQUAL OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/publications/adahandbook.cfm#hiring> (last visited Aug. 12, 2013) [hereinafter *A Primer for Small Business*] (“You can’t withdraw an offer to an HIV-positive applicant because you are concerned about customer and client reactions or because you assume that anyone with HIV infection will be unable to work long and stressful hours.”).

46. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881.

47. *Id.* § 202, 122 Stat. at 907-908; Genetic Information and Nondiscrimination Act of 2008, 29 C.F.R. § 1635.8(a)-(b).

48. Regulations Under the Genetic Information Nondiscrimination Act of 2008, 75 Fed. Reg. 3376, 3390 (Nov. 9, 2010) (to be codified at 29 C.F.R. pt. 1635).

49. Mark A. Rothstein, *GINA, the ADA and Genetic Discrimination in Employment*, 36 J.L. MED. & ETHICS 837, 837-38 (2008).

#### D. Defenses

*Discussion Questions:* Although no defenses were presented explicitly in the film, what affirmative defenses could Wyatt Wheeler raise? Identify and analyze all possible defenses, and the likelihood of success for each.

*Analysis:* At trial, Wyatt Wheeler appeared to claim that its actions were motivated by Andrew's poor performance and unrelated to his illness or disability as required by the ADA. However, some scenes suggest other motivations, at least for one of the partners. For example, one scene opens with the managing partners watching a live NBA game in their luxurious suite.<sup>50</sup> As they are entertaining basketball great Julius Irving, Joe interrupts the fun by serving the managing partners with the wrongful termination lawsuit. As the managing partners are walking out of the arena, they talk strategy on how to defend the lawsuit. A managing partner, Bob, suggests making a fair settlement offer to put this "tragic business" in the past. However, another partner, Charles, disagrees, stating:

Bob, Andy brought AIDS into our offices, into our men's room. He brought AIDS to our annual goddamn family picnic.... Bob, we gave him Highline. Did Andrew Beckett say, "I might not be able to serve our client to the best of my ability?" He said nothing. And now, disregarding the trust and affection I conferred upon him, Andrew Beckett proposes to haul me into court, to sling accusations at me, to call me a bigot in full view of the entire Philadelphia judicial establishment. My God!<sup>51</sup>

A direct threat defense—meaning a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation—appears weak.<sup>52</sup> Direct threat determinations must be based on objective, factual evidence of the individual's present ability to safely perform the job, including the best recent medical evidence on likelihood of harm.<sup>53</sup> The harm must be serious and likely to occur, not remote and speculative.<sup>54</sup> The reactions such as in the scene above appear to be based more in disgust or fear of social contagion, rather than a fear of actual risk of transmission of HIV. Moreover,

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50. PHILADELPHIA, *supra* note 13.

51. PHILADELPHIA, *supra* note 13.

52. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(r) (1998).

53. *Id.*

54. *Id.*; see also *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 306 (3d Cir. 2007); *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/facts/performance-conduct.html> (last visited Aug. 25, 2013) (stating that the employer must have "a reasonable belief, based on objective evidence, that an employee is unable to perform an essential function or will pose a 'direct threat' because of a medical condition.").

concerns that colleagues or clients might react negatively based on Andrew's HIV-positive status do not alone form the basis for a defense.<sup>55</sup>

### E. Damages

*Discussion Questions:* Near the end of the film, the jury awards Andrew \$143,000 in back pay, \$100,000 for mental anguish, and \$4.782 million in punitive damages.<sup>56</sup> Could these damages be awarded under the ADA? Identify and analyze all possible categories of damages, and the extent to, or the conditions under, which each type may be granted.

*Analysis:* Remedies available under the ADA include back pay, reinstatement, attorneys' fees and costs, expert witness fees, future economic loss, compensatory damages for pain and suffering, and punitive damages (excluding Title I retaliation claims).<sup>57</sup> Notwithstanding the award of \$4.782 million in the film, punitive damages are not available unless the employer's conduct is shown to be motivated by an evil motive or intent, or when it involves reckless or callous indifference to the federally-protected rights of others.<sup>58</sup>

I also use this as an occasion to compare ADA remedies with remedies available under state law, such as the Missouri Human Rights Act (MHRA),<sup>59</sup> which includes, among other things, actual and punitive damages, and attorneys' fees.<sup>60</sup>

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55. *A Primer for Small Business*, *supra* note 45.

56. PHILADELPHIA, *supra* note 13.

57. 42 U.S.C. § 12117 (2006).

58. *See* AMERICANS WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL § 7:442 (C. Angela Van Etten ed., 1997) (stating that “[a] jury may be allowed to assess such damages when the employer's conduct is shown to be motivated by an evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.”).

59. MO. REV. STAT. §§ 213.010–213.137 (2011); *see also id.* § 191.665 (The HIV discrimination law specifically prohibits employers from discriminating on the basis of HIV infection.); *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 665 (Mo. banc 2009) (the MHRA defines discrimination to include “any unfair treatment based on race, color, religion, national origin, ancestry, sex, age as it relates to employment . . . .” As opposed to the ADA, nothing in the MHRA “requires a plaintiff to prove that discrimination was a substantial or determining factor in an employment decision; if consideration of age, disability, or other protected characteristics *contributed* to the unfair treatment, that is sufficient.”); *Medley v. Valentine Radford Commc'ns. Inc.*, 173 S.W.3d 315, 320 (Mo. Ct. App. W.D. 2005) (stating further, the MHRA makes the question of whether the job can be performed with or without reasonable accommodation a part of the test to determine whether an employee is disabled).

60. MO. REV. STAT. § 213.111.2 (2011). *See* James L. Buckwalter, *Availability and Scope of Punitive Damages Under State Employment Discrimination Law*, 81 A.L.R. 367 (5th ed., 2000) (offering a comprehensive look on how states deal with punitive damages).

## CONCLUSION

Released nearly twenty years ago (and more than ten years after HIV/AIDS was first clinically observed<sup>61</sup>), *Philadelphia* was one of the first mainstream films to deal with HIV/AIDS and homophobia. Although one of its stars, Tom Hanks, opined that the movie was “bound to be controversial in certain circles,”<sup>62</sup> it was widely viewed and well-received, winning two Oscars<sup>63</sup> (with Tom Hanks winning the award for “Best Actor”) and grossing over \$200 million worldwide.<sup>64</sup> Using *Philadelphia* to teach disability law helps to dramatize and personalize issues of discrimination for people with disabilities in a way that studying cases alone often cannot do. The film helps the doctrines “come alive” for students by providing an opportunity for a deeper understanding of the lived experience of discrimination, as well as a basis for identification with people with disabilities. Lastly, and perhaps due to the passage of time, it appears easier to students to recognize the stigma surrounding and discrimination against Andrew as a gay man, who is HIV-positive, and to ask themselves to imagine who this movie would be about today.

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61. *Global HIV/AIDS Epidemic: A Timeline of Key Milestones*, THE HENRY J. KAISER FAMILY FOUND., <http://kaiserfamilyfoundation.files.wordpress.com/2008/08/global-hiv-aids-time-line-050313.pdf> (last visited Aug. 25, 2013). In 1981, the U.S. Centers for Disease Control and Prevention (CDC) first reported cases of rare pneumonia in young gay men, later determined to be AIDS. *Id.* The first mainstream news coverage of the disease began the same year. *Id.* In 1982, the term Acquired Immune Deficiency Syndrome (AIDS) was formally established by the CDC. *Id.* In 1983, through the work of Dr. Luc Montagnier and Dr. Robert Gallo, it was discovered that HIV causes AIDS. *Id.*

62. LAT, *Tom Hanks' 'Philadelphia story'*, NEW STRAITS TIMES, Dec. 28, 1993, at 27.

63. *Philadelphia*, IMDB, <http://www.imdb.com/title/tt0107818/> (last visited Aug. 25, 2013); *Awards for Philadelphia*, IMDB, [http://www.imdb.com/title/tt0107818/awards?ref\\_=tt\\_ql\\_4](http://www.imdb.com/title/tt0107818/awards?ref_=tt_ql_4) (last visited Aug. 25, 2013).

64. *Box Office/Business for Philadelphia*, IMDB, [http://www.imdb.com/title/tt0107818/business?ref\\_=tt\\_ql\\_dt\\_4](http://www.imdb.com/title/tt0107818/business?ref_=tt_ql_dt_4) (last visited Aug. 25, 2013).