

AIDS: The Arbitrator's Role in the Post-Panic Period

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I. INTRODUCTION

This paper will explore the impact of Acquired Immune Deficiency Syndrome (AIDS) on the arbitrator's resolution of workplace grievances. The principal question is whether arbitrators should develop new standards for use in AIDS related cases. The short answer is no. The traditional standards developed for analogous non-AIDS related disputes will serve the arbitrator equally well in an AIDS case. The most basic advice is appropriate here: "if it isn't broken, don't fix it."

A study of the AIDS epidemic from a scientific perspective does not seem to reveal any unique workplace issues. AIDS is a blood borne fatal disease¹ which health authorities maintain is extremely difficult to contract in the normal employment setting.² In a workplace where employees or customers are not exposed to the blood or bodily fluids of infected workers, AIDS seems little different than ailments such as cancer, diabetes or heart disease. These conditions which may also be fatal to the "infected" worker, can cause debilitation and thus raise safety concerns; but they pose no direct threat of infection to others. Where exposure to bodily fluids is present in the workplace, AIDS seems little different than other infectious diseases which pose a threat to co-worker safety.

What seems to separate AIDS from all other medical conditions is its complex social and political baggage. The popular perceptions surrounding AIDS often overshadow the purely factual issues. As a consequence, there are calls for an "AIDS approach" to medical research, a "new" approval process for experimental drugs and "fundamental premises" unique to the arbitration of AIDS related employment disputes.³ Proponents argue that the infectious nature of AIDS coupled with its fatal course make it a unique and unparalleled social problem. However, at least in the arbitration arena, the tools at hand are more than adequate to resolve AIDS related controversies.

An extensive examination of society's response to the AIDS epidemic

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1. See discussion *infra* part III.

2. For purposes of this discussion, a "normal" work setting is one where employees and customers do not come into contact with the bodily fluids of others. In work settings where such contact is common, (legalized prostitution, health care and emergency services), the risk of contracting AIDS can be extremely high. See *infra* Appendix B for a list of articles discussing AIDS issues in the health care context.

3. See *infra* note 100.

is beyond the scope of this Article. However, in a case involving AIDS, the arbitrator can expect the parties to brief him or her on the "facts" surrounding the disease.⁴ Given the complexity of the scientific evidence and the divergence of opposing views, an arbitrator who wants to make an intelligent, factual decision needs to have a basic understanding of the historical and scientific issues which can shape an AIDS related dispute.

Though this is ostensibly an Article concerning arbitration, the initial discussion is devoted to basic background material on AIDS. While this material could have been relegated to an appendix, an understanding of the basic facts⁵ concerning AIDS is essential to the later discussion. The discussion is divided into five sub-topics: the social history of AIDS; the medical facts most relevant to AIDS workplace issues; the arbitrator's role; the possible sources of external law and public policy; and, finally, common AIDS related workplace issues with suggested solutions under each arbitration model.

II. AIDS: A BRIEF HISTORICAL EXAMINATION

In 1979 a physician at New York University Hospital treated two young men in succession for a rare skin cancer which normally attacked elderly men of Mediterranean origin.⁶ The doctor noted that both men were homosexual but drew no conclusion from that fact.⁷ On June 5, 1981, the Federal Center for Disease Control (CDC) first reported its analysis of a previously unidentified condition. This condition, which had apparently destroyed the immune systems of five healthy homosexual men, was later identified as Acquired Immune Deficiency Syndrome, or "AIDS".⁸

To date, the primary "high risk" groups in the United States have been

4. Arbitrators are being increasingly called upon to make decisions where the parties' contractual obligations turn on medical evidence. The arbitrator's ignorance of medicine and the medical facts upon which a particular case may turn can constitute a serious impediment to the decision making process. See Arnold M. Zack & Norma W. Zack, *Arbitrators and Medical Evidence*, 39 ARB. J., (Sept. 1984, at 6). Andrea Wilson, *Medical Evidence in Arbitration: Aspects and Dilemmas*, 39 ARB. J. Sept., 1984, at 11.

5. As in many areas of endeavor, what passes for "facts" are those things agreed upon by a majority of scientists working in the field. While a majority of scientific opinion does not ensure a "fact" is "reality," it is the best that one can do at any given moment.

6. The cancer, Kaposi's sarcoma, frequently afflicts AIDS patients. See *infra* note 32.

7. Thomas R. Mendicino, Note, *Characterization and Disease: Homosexuals and the Threat of Aids*, 66 N.C. L. REV. 226, 230 (1987).

8. Jana Howard Carey & Megan M. Arthur, *The Developing Law on AIDS in the Workplace*, 46 MD. L. REV. 284, 284 (1987).

homosexual and bisexual males,⁹ male and female intravenous drug abusers,¹⁰ male and female Haitians,¹¹ and recipients of blood products.¹² Though the spread of AIDS outside these groups has been limited,¹³ fear engendered by the devastating nature of the disease brought unresolved social issues relating to these groups to the surface.¹⁴

Some segments of society have taken the position that infected members of high risk groups are only reaping what they have sown by their own behavior.¹⁵ There has been a resurgence of anti-homosexual rhetoric more reminiscent of revival tent meetings than political discourse.¹⁶ Hunting for, and apparently finding, homosexuals under

9. Researchers firmly established the link between the incidence of AIDS and homosexual activity early in 1982. Although the Center for Disease Control initially used the terms Kaposi's sarcoma and PCP, (the two rare conditions whose increased frequency had alerted the scientific community), the perception of the disease's relationship to homosexual activity was reflected by popular usage of the acronym GRID--Gay-Related Immune Deficiency. Mendicino, *supra* note 7, at 230-31.

10. *Id.*

11.

In 1982, researchers first identified recent Haitian immigrants to the United States as a high risk group for AIDS. An immediate controversy accusing the CDC of racial and socio-economic bias surrounded the classification of an entire nationality as a risk group. However, the lack of any identifiable behavioral characteristics precluded inclusion of many of the Haitian cases in any of the existing risk categories. Haitian authorities asserted that there was no scientific basis to classify a nationality as being at risk for AIDS. The CDC prevailed by arguing that proper epidemiological evaluation required the creation of the category because the empirical subjects denied participating in any previously classified risk behavior while the incidence of AIDS cases per population unit was much higher in the American Haitian community than in the population of the United States as a whole.

Mendicino, *supra* note 7, at 232 (footnotes omitted).

12. *Id.* at 231.

13. See Stephen Margolis, *The AIDS Epidemic: Reality Versus Myth*, 72 JUDICATURE 58, 59 (1988).

14. One commentator has attempted to explain the widespread social "panic response" to AIDS as a function of five social taboos. The writer believes it is the fear implicit in societal taboos relating to sex, social stigma, helplessness, mental illness and death which inhibits society's ability to deal effectively with AIDS. David I. Shulman, *AIDS Discrimination: Its Nature, Meaning and Function*, 12 NOVA L. REV. 1113, 1115-17 (1988).

15. Representative Dornan of California makes it clear that he is convinced the majority of AIDS infected people have no one but themselves to blame for their illness and that these "homosexuals" have shown their inherent immorality by joining the pro-abortion movement to secure fetal tissue for AIDS research. 135 CONG. REC. H2029-01 (daily ed. May 3, 1990) (statement by Rep. Dornan).

16.

[O]n May 1, 1987, an aide to Reverend Jerry Falwell disclosed that the Moral Majority was going to purchase broadcasting time to "expose the myths and the cover-up of the facts about the AIDS epidemic." In a related letter, Reverend Falwell attributed the "original spawn" of the AIDS epidemic to homosexuals and alleged that "powerful militant homosexuals" have extended their "wretched [political] influence" to extract a "cover-up" about the disease and to prohibit public health officials from "doing what needs to be done" - mandatory testing and quarantine - to halt the spread of the "gay plague."

every bed, one elected official even characterized the recently passed Americans With Disabilities Act as a "last ditch attempt of the remorseless sodomy lobby to achieve its national agenda before the impending decimation of AIDS destroys its political clout."¹⁷

Other high risk groups have fared little better than members of the homosexual community. Some commentators have argued that the impact of poverty and minority status on the "America" one perceives is nowhere more obvious than in the cases of people with AIDS. The focus of most early organized education campaigns was on the predominantly white middle class homosexual community,¹⁸ ignoring the ravages of the disease in minority communities.¹⁹ The continued spread of AIDS in minority communities may reflect a reluctance to confront the underlying behavioral patterns which promote the spread of the disease rather than any societal bias.²⁰ However, whatever the cause of the epidemic in their communities, minority group members have tended to suffer more and die faster than their white, middle class counterparts.²¹

Mendicino, *supra* note 7, at 238.

17. 135 CONG. REC. H6440-01 (daily ed. Oct. 2, 1989) (statement of Rep. Burton).

18.

[T]he city of San Francisco lost almost \$3 million in state funds and private grants because of a lack of minority involvement in its AIDS education planning. The San Francisco experience is not unique.

The Chicago Department of Public Health has been criticized for neglecting Hispanics. The ACLU and a coalition of minority organizations have filed a lawsuit against Los Angeles County for failing to provide minority AIDS education. So, too, the Philadelphia AIDS Task Force has been publicly criticized for not networking outside its white gay base. AIDS Foundation/Houston has been attacked for racist fund raising activities.

Eugene M. Harrington, *A Fatal Bias: AIDS and Minorities*, 14 HUM. RTS. 34, 37 (1987) (published by the Section of Individual Rights and Responsibilities, American Bar Association).

19. *See id.*

20.

The original assumption that AIDS was a gay disease forced denial in many segments of the minority communities. Thus, just recently when AIDS experts asked to speak to churches in the San Francisco Baptist Ministers Conference, a group representing predominantly black congregations, their request was denied.

The acceptance of AIDS, in effect, means accepting drug abuse, prostitution, homosexuality and bisexuality in the black and Hispanic communities. Thus, societies that are stigmatized because of racism must accept the existence of a disease whose transmittal embraces conduct usually unacceptable at best and illegal at worst.

Harrington, *supra* note 18, at 36.

21.

The average life expectancy for a minority PWA [people with AIDS] is 19 weeks; for a white PWA it is two years. . . . Black and Hispanic PWAs have less access to adequate health care, their nutrition is more unbalanced, their health insurance is less effective or non-existent, and the ability to perceive themselves at-risk and thus protect themselves and their partners are

The possible re-emergence of race and other anti-minority group prejudices in the context of the AIDS debate presents difficult questions for an arbitrator. Is the terminated or disciplined employee being singled out simply because he/she has been exposed to the AIDS virus or for engaging in high risk activity? Has the adverse action been taken because the employer (and other employees) believe the exposed employee poses a real health danger or simply because the exposed employee belongs to a sub-group whose members are otherwise traditionally prejudiced against? What will be the impact on the labor relations system if the employer and other employees are permitted to use the risk of AIDS exposure as a rationale for discriminating against members of a despised sub-group? Finally, is it the arbitrator's job to peer under the surface of the grievance to see if discriminatory motives lie at the heart of the adverse action?²² While these "social" issues can be ignored, their implicit resolution by an arbitrator will have legal and systemic implications which may extend far beyond the given case.

III. AIDS: A BRIEF CLINICAL EXAMINATION

The Human Immunodeficiency Virus (HIV), the cause of AIDS,²³ is

obviously less. This, in turn, means that medical intervention comes much later and is probably of a poorer quality.

Id. at 37.

22. One could argue that the grievant and his or her union are free to assert that the adverse action was in fact motivated by impermissible prejudice against the grievant's racial or ethnic subgroup or the grievant's sexual orientation. Similar assertions are common under Title VII and could be resolved in the same manner as allegations of "pretext" in Title VII cases. See generally BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 597-603 (2d ed. 1983). One could also argue that the traditional analysis used in "mixed motive" cases might be appropriate here. However, there seems little place for these approaches in the arbitration of an AIDS dispute. Allegations of pretext or mixed motive are possible only when the employer seeks to take adverse action based on conjecture or generalizations. The arbitrator who requires the employer to establish that the adverse action was predicated on the established consequences of the particular grievant's own AIDS related medical condition can base his or her decision on that evidence without fear of "hidden motivations." The key will be whether the arbitrator knows enough about AIDS to distinguish between conjecture and medical "fact."

23.

The cause of AIDS derives from a member of a family of viruses known as retroviruses. Such viruses are prevalent in certain species of animals, but have only recently been described in human beings. In 1983, a previously unknown retrovirus later named as LAV (lymphadenopathy-associated virus), HTLV-III (human T-cell lymphotropic virus type III), or ARV (AIDS-associated retrovirus), was identified as the cause of AIDS. These early isolates of retroviruses were later recognized to be closely related; and a single name, Human Immunodeficiency Virus (HIV), was proposed for them and for subsequently isolated and related viruses. (footnotes omitted)

Rosalind M. Kendellen, *Aids: A Clinical Statement*, 126 N.J. LAW. 14 (1989).

now estimated to infect up to two million people in the United States and millions more in other countries.²⁴ It has been estimated that 365,000 new AIDS cases will have been reported in the United States by 1992.²⁵ The virus is thought to be transmitted by intimate sexual contact, the sharing of contaminated needles, or, less commonly, by percutaneous inoculation with infectious blood or blood products.²⁶ While AIDS is thus communicable, there is apparently no evidence that AIDS can be transmitted by casual contact²⁷ or, as has been suggested by some,²⁸ by blood sucking insects.²⁹

There is to date no effective treatment for the underlying acquired

24. *Id.*

25. *Id.*

26. C. EVERETT KOOP, U.S. DEP'T HEALTH HUM. SERVICES, THE SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 5, 19-20 (1986).

27.

Although HIV has been occasionally found in the tears and in saliva of infected individuals, the concentration and amount of virus, its viability, the lack of effective transmission and the lack of any reported cases of transmission by these means, all negate the importance of these fluids in the course of the AIDS epidemic. The fear of casual contact—handshaking, food preparation and handling and the normal interactions of the workplace—has become a significant issue. There have been nine scientific studies which completely discount the role of casual and normal human interaction as a means of HIV transmission. In addition, there have not been any "casual contact" cases reported among the relatives and friends of the 60,000 reported AIDS cases.

Margolis, *supra* note 13, at 61 (footnote omitted).

28. Consider the comments Representative Burton of Indiana made on the floor of the U.S. House of Representatives on Thursday June 9, 1988. Rep. Burton sharply criticized the position of the Surgeon General that AIDS was not transmitted by insects and demanded a mandatory nationwide AIDS testing program to identify and track infected individuals.

29.

Mosquitoes have been discounted as agents for HIV transmission to humans. Belle Glade, Florida, a small town approximately 40 miles west of West Palm Beach, had the highest incidence in the United States of reported AIDS, 564 per 100,000 population. A series of medical and epidemiological studies were initiated involving more than a thousand people residing in Belle Glade, which showed that only black residents of Belle Glade and persons born in Haiti demonstrated antibodies to the AIDS virus, in a ratio of 1.3 to 1, male to female. No children, or adults above the age of 60 were found to be seropositive for the AIDS virus antibody. The comprehensive study demonstrated a localization of HIV infection in tightly defined neighborhoods, specifically among the squalid living conditions of the black residents of Belle Glade, many of whom were employed as migrant farm workers. HIV infection was shown to be associated with sexually active lifestyles, prostitution and/or being born in Haiti, where heterosexual transmission of the virus has been demonstrated. Among men specifically, infection was associated with homosexual activity and intravenous drug abuse.

Margolis, *supra* note 13, at 61-62.

immune deficiency.³⁰ As a consequence, most AIDS patients die from overwhelming infections within two to three years of the initial appearance of symptoms. In fact, the principal manifestations of AIDS can be either an opportunistic infection³¹ or cancers such as Kaposi's sarcoma.³²

In addition to these infections and malignancies, there is evidence that the vast majority of adult AIDS patients suffer damage to the noncentral nervous system or AIDS related dementia.³³ This data suggests that the range of AIDS related neurologic and neuropsychiatric impairment may extend beyond that of AIDS itself.³⁴ Even more disturbing is evidence

30.

Since HIV appears to cause persistent lifelong infection, it must be approached as a member of a class of viruses for which successful treatment may be most difficult to find. In general, infectious viral agents remain a major health threat. Yet, they are difficult to treat because they are intracellular pathogens, replicating within the cells of their chosen host, and thus they compromise the activities and health of the host cells. As a member of the family of retroviruses, HIV represents a type of viral pathogen whose therapy has not been previously researched in humans.

Kendellen, *supra* note 23, at 16.

31.

There is a typical grouping of clinical infectious syndromes and opportunistic infections in AIDS patients. Many AIDS patients experience malaise, fevers, anorexia, and weight loss for weeks, months, or years prior to the documentation of their initial opportunistic infection. These symptoms are nonspecific. AIDS patients may initially develop localized dermatomal herpes zoster (shingles) or oral candidiasis (thrush). Extension of oral candidiasis can lead to esophageal erosions, complaints of difficulty in swallowing, and a burning sensation behind the sternum. Both primary and recurrent Herpes simplex virus infections appear as painful vesicular lesions in oral, genital, and perineal areas.

ABE M. MACHER, in 1 ENCYCLOPEDIA OF SCIENCE AND TECHNOLOGY, ACQUIRED IMMUNE DEFICIENCY SYNDROME (6th ed. 1987).

32.

Kaposi's sarcoma is a vascular tumor of endothelial cell origin and appears as firm red or violet nodules involving the skin and mucous membranes; lesions are often multiple and may involve any portion of the skin or any mucous membrane; body surfaces may eventually be covered by these multifocal tumors. Some patients develop life-threatening visceral involvement due to massive tumor infiltration of the lung or gastrointestinal tract; since they are vascular tumors, bleeding is not uncommon.

Id. See also Alvin E. Friedman-Kien ET AL., *Disseminated Kaposi's sarcoma in homosexual men*, 96 ANNALS INTERNAL MED. 693-700 (1982).

33.

As many as 90 percent of patients dying from HIV-related conditions have abnormalities of the nervous system at postmortem examination; the majority of patients have some clinical manifestation of neurologic disease during their lifetime. Of the HIV-related neurologic complications, dementia is among the most severe and disabling.

Kendellen, *supra* note 23, at 15 (footnote omitted).

34.

It has been estimated that between 30 percent and 60 percent of AIDS patients will manifest a characteristic dementia syndrome, which has been designated AIDS dementia complex (ADC); that 10 percent of patients may

that central nervous system involvement by the HIV virus may begin early in the course of infection and cause mild cognitive defects in seropositive individuals who exhibit no other outward signs of disease.³⁵

For the purpose of analysis it is useful to separate those who have been exposed to AIDS³⁶ into three groups. First, there are those who test positive for exposure to the virus but show no clinical manifestations of the disease.³⁷ These people may never develop AIDS Related Complex

present with neurological symptoms before developing any signs of AIDS; and that perhaps an even larger number of infected individuals may show persistent evidence of neurologic impairment in the absence of an actual diagnosis of AIDS. The AIDS dementia complex . . . is often marked by initially subtle cognitive or behavioral dysfunction occurring over weeks to months. Patients initially report memory loss, difficulty in concentrating, social withdrawal, and lethargy. Those early signs may often be attributed to depression and may be ignored until they eventually progress to more dramatic deficits involving severe dementia and psychomotor retardation.

Nicholas Hentoff, Note, *The Rehabilitation Act's Otherwise Qualified Requirement and the Aids Virus: Protecting the Public from Aids-Related Health and Safety Hazards*, 30 ARIZ. L. REV. 571, 620 (1988) (quoting Selwyn, *AIDS. What is Known. III Clinical Aspects*, 21 HOSPITAL PRACTICE 123-24 (1986)) (emphasis omitted).

35. *Id.*

36.

The earliest indications that HIV has been transmitted to an individual are either the isolation of HIV from that person or the detection of antibodies to the virus in the person's blood. The new appearance of antibodies, known as seroconversion, appears to predate any detectable immunologic defects (i.e., decrease in the number of T4 cells); but within five years of seroconversion evidence of immunologic defects occurs in more than 90 percent of individuals. Six to eight weeks is the typical time between transmission of the virus and seroconversion. In some reported instances, individuals have remained seronegative for many months, although they were infected as evidenced by cultivation of the virus in the blood. A very high proportion of individuals who are seropositive for HIV antibodies will ultimately develop AIDS.

Kendellen, *supra* note 23, at 15 (footnotes omitted).

37.

A person infected with the AIDS virus will be detectable through testing for the production of antibodies to the human immunodeficiency virus in 6 to 12 weeks from the time of infection. A very small percentage of HIV-infected people have been reported to have their antibodies not measurable for as long as 12 months from the time of infection.

The HIV-infected person may or may not progress to ARC and/or AIDS. Approximately 30-50 per cent of homosexual/bisexual men infected with HIV have been diagnosed with AIDS. The incubation period (the time from infection with the virus to the diagnosis of AIDS) has been shown to vary significantly. The mean time has been reported for transfusion recipients to be as short as 2 years, for children (0-5 years of age), 5.5 years, for elderly patients (60 years and older) and for adults (5-59 years of age), 8.23 years. Preliminary results are demonstrating shorter incubation periods for male intravenous drug abusers and even shorter incubation times for infected females.

Margolis, *supra* note 13, at 60-61 (footnotes omitted).

(ARC) or AIDS, but can pass the infection to others.³⁸ Second, there are HIV infected people who suffer from physical symptoms related to AIDS but have not experienced the severe medical complications which characterize AIDS. These patients, suffering from what is now called ARC,³⁹ begin to experience loss of appetite, weight loss, fever, night sweats, skin rashes, diarrhea, tiredness, lack of resistance to infection, or swollen lymph nodes.⁴⁰ Lastly, some patients who have AIDS suffer from a severe degradation of the body's immune system which renders the patient vulnerable to infection by bacteria, protozoa, fungi, and other viruses or malignancies. These infections, which may lead to such life-threatening illnesses as pneumonia, meningitis, and cancer, are the cause of death for most AIDS patients.⁴¹

As a practical matter, arbitrators are more likely to face cases involving employees suffering from ARC and AIDS, rather than those who are infected but asymptomatic. Setting aside the possibility of AIDS Related Dementia, persons who are seropositive for the AIDS antibody but are experiencing no physical signs of disease will for the most part be indistinguishable from the larger employee group. While adverse actions based on mere seropositivity are possible, given the position of public health authorities, justification for such actions will be extremely hard for the employer to articulate.

IV. THE ROLE OF THE ARBITRATOR

The comments that follow are intended as a brief outline of the relevant principles governing the conduct of arbitration in the private labor relations context. As such, they present the basic picture without which the substantive discussion concerning the impact of AIDS on that process would not be possible. However, lengthy discussions of philosophically

38.

Even though the person infected with HIV may not be aware of that fact, either because of not being tested or not yet having measurable antibodies, they can transmit the virus. In fact, the person infected with the AIDS virus, the person who is analyzed as HIV-antibody positive, the person with ARC and the person with AIDS can all transmit the virus via their blood, semen and/or vaginal discharges throughout their lifetime.

Id. at 60.

39. It is unclear whether persons with ARC will invariably develop AIDS, but the evidence seems to indicate that this may be so. *Id.*

40. KOOP, *supra* note 26. For a more technical definition of ARC, see Robert R. Redfield, ET AL., *Heterosexually Acquired HTLV-III/LAV Disease (AIDS-Related Complex and AIDS)*, 254 J.A.M.A. 2094 (Oct. 18, 1985). See also Janine M. Jason, et al., *HTLV-III/LAV Antibody and Immune Status of Household Contacts and Sexual Partners of Persons With Hemophilia*, 255 J.A.M.A. 212 (Jan. 10, 1986).

41. KOOP, *supra* note 26, at 11-12.

"hot" topics, such as the propriety of applying external law to the arbitral process⁴² or the appropriate limits of the public policy exception,⁴³ are beyond the scope of this paper.

Contractual dispute resolution in the United States private labor relations model normally encompasses at least three elements. First, within their collective bargaining agreement, the contracting parties, employer and union, establish a grievance procedure where disagreements concerning the terms of that agreement are sent for resolution.⁴⁴ Next, when a grievance arises under the terms of the contract, the parties process the disagreement through the basic grievance machinery and attempt to resolve it to their mutual satisfaction.⁴⁵ Lastly, if the parties are unable to agree on a "correct" resolution of the dispute and the topic is one which the parties have agreed will be subject to arbitration, then the dispute can be submitted to a neutral party⁴⁶ who will interpret the contractual language for the parties and render a decision.

Arbitration plays a unique role in the process just described. In *Textile Workers Union of America v. Lincoln Mills of Alabama*,⁴⁷ the United States Supreme Court set the stage for the current system of dispute resolution by defining a forum for the enforcement of the provisions of collective bargaining agreements. In the so-called Steel Workers Trilogy,⁴⁸ the court recognized the central position of the arbitration process within the labor relations model by severely limiting

42. See generally Robert G. Howlett, *The Arbitrator, the NLRB, and the Courts*, in PROCEEDINGS OF THE 20TH ANNUAL MEETING 67 (Nat'l Acad. of Arbitrators, BNA Books, 1967); Richard Mittenthal, *The Role of Law in Arbitration*, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION, PROCEEDINGS OF THE 21ST ANNUAL MEETING 42 (Nat'l Acad. of Arbitrators, BNA Books, 1968).

43. See generally Mary A. Bedikian, *Riding on the Horns of a Dilemma: The Law of Contract v. Public Policy in the Enforcement of Labor Arbitral Awards*, 1988 DET. C.L. REV. 693; Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHI.-KENT L. REV. 3 (1989); Timothy J. Heinsz, *Judicial Review of Labor Arbitration Awards: The Enterprise Wheel Goes Around and Around*, 52 MO. L. REV. 243 (1987); Amanda J. Berlowe, Comment, *Judicial Deference to Grievance Arbitration in the Private Sector: Saving Grace in the Search for a Well-Defined Public Policy Exception*, 42 U. MIAMI L.REV. 767 (1988); James M. Magee, Note, *The Public Policy Exception to Judicial Deferral of Labor Arbitration Awards - How Far Should Expansion Go?*, 39 S.C. L. REV. 465 (1988).

44. In the federal sector the opportunity for binding arbitration is required to be in every collective bargaining agreement. See 5 U.S.C. § 7121(b)(3)(C) (1988).

45. Douglas E. Ray, *Protecting the Parties' Bargain After Misco: Court Review of Labor Arbitration Awards*, 64 IND. L.J. 1, 2 n.2 (1988).

46. This fact finder can be an independent arbitrator hired to hear a particular controversy, an arbitrator who has been hired to hear all the disputes which arise under the agreement, or a multi-person panel made up of representatives of each party and an outside arbitrator.

47. 353 U.S. 448 (1957).

48. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

the scope of judicial review of arbitral decisions.⁴⁹

The Supreme Court's treatment of arbitration reflected the Court's view of the parties' contractual relationship and the importance of the collective bargaining agreement to the maintenance of labor peace.⁵⁰ The labor relations environment is characterized by extensive daily interaction between the contracting parties. The level and nature of this interaction may be shaped as much by the political and economic strengths of the parties as it is by their purely legal rights under the contract. In addition, whatever their disagreements may be, the parties to these contracts are bound in a relationship whose continuing nature, imposed by law, is quite different from that created by other contracts.⁵¹ The resolution of these disagreements by arbitration is intended to obviate the need to resort to the traditional but more disruptive dispute resolution weapons: slowdowns, strikes, lockouts and litigation.⁵²

Arbitration can be viewed purely as a contractual enforcement mechanism. By contracting for binding arbitration, the parties have decided to have an arbitrator act as "contract reader."⁵³ The arbitrator's function is to tell the parties what a fair interpretation of their agreement mandates in a particular case. As discussed at length below, that opinion,

49. The Trilogy cases stand for three basic propositions which have elevated labor arbitration to the central position it now enjoys: (1) judicial review is limited to whether a particular grievance is arbitrable; (2) there is a presumption that a dispute between the parties concerning their rights under the contract is arbitrable; and (3) an arbitrator's award must draw its essence from the collective bargaining agreement. Bedikian, *supra* note 43, at 699.

50.

In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

51. Note the Supreme Court's language in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1969):

While the principle of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract . . . The collective agreement covers the whole employment relationship. It calls into being a new common law . . . It is not in any real sense the simple product of a consensual relationship.

52. In *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 566 (1960), Justice Douglas noted the policy preference for the use of arbitration in § 203(d) of The Labor Management Relations Act, 1947: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

53. Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1160-61 (1977).

to be valid, must "draw its essence"⁵⁴ from the contractual terms to which the parties have agreed.⁵⁵ Similarly, when one of the parties seeks court enforcement of an arbitral award, the court's role should be to ensure the parties have received the benefit of their bargain,⁵⁶ and not whether, in the court's opinion, some abstract notion of industrial justice has been achieved. Unfortunately, result-oriented interpretations of the substance and "penumbra" of collective bargaining agreements can and do provide fertile ground for both arbitral and judicial mischief.

The arbitration community has wrestled for decades with the "correct" placement of arbitral parameters. Two primary schools of thought have developed with a somewhat indecisive middle group encamped between the two.⁵⁷ One school has argued for a "four corners" approach to contract interpretation. The second has urged the application of external law to contract interpretation. The middle group would permit the application of external law when "required" to understand the parties' contractual dispute.

Under the four corners model, the arbitrator looks for the answer to the dispute⁵⁸ within the four corners of the parties' agreement without recourse to external laws or standards not explicitly incorporated by reference⁵⁹ or otherwise submitted for consideration by the parties.⁶⁰ The

54. In the third Trilogy case, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) the Supreme Court noted the contractual basis for the arbitrator's power:

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

55. *Id.*

56. *See supra* note 42.

57. *See generally* Bedikian, *supra* note 43.

58. For the purposes of this paper the words "he", "him", and "his" are intended to be gender neutral, not a reflection that the arbitrator referred to is male.

59. One commentator has described four types of clauses which can be used by the parties to incorporate external law. In the first, "global incorporation," the parties use general language which obliges them to behave in accordance with the law. In the second, "particular incorporation", the parties' clause brings specific statutes or laws within the collective bargaining agreement. In the third and fourth types, "deleter" and "conformer" clauses, the parties agree that clauses which conflict with external law shall either be deleted (leaving the rest of the contract intact), or amended to conform with external law (leaving the rest of the contract intact). *See* James Oldham, *Arbitration and Relentless Legalization in the Workplace*, in *ARBITRATION 1990 NEW PERSPECTIVES ON OLD ISSUES, PROCEEDINGS OF THE FORTY-THIRD ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS* (Gladys W. Gruenberg ed., Nat'l Acad. of Arbitrators), 1990.

parties get the benefit of their bargain - no more, no less. Unfortunately, while this model comports with a strictly contractual view of the labor relations environment, it can result in arbitration awards that would violate the dictates of external law. Some commentators view such a possibility as an unacceptable weakness in the model.⁶¹

To the proponent of the "four corners" school of thought this "problem" reflects the basic contractual nature of a process in which arbitration is simply one component. An award which is arguably unenforceable as violative of external law gives the parties what they contracted for. Simply put, the arbitrator's job is to tell the parties what their agreement entitles them to claim and not to help them garner what they failed to bargain for. If the parties' agreement does not entitle them to an enforceable award, then they do not get one. Far from reflecting a failure in the arbitral process, the arbitrator's award enhances the collective bargaining relationship by showing the parties that their agreement contains an unenforceable provision which they may want to address when the collective bargaining agreement is renegotiated.

The opposing camp urges the application of external law as the most productive approach.⁶² Under this view, the arbitrator is employed to assist the parties in the management of their collective bargaining relationship. This school of arbitrators rejects the idea that an award which simply forces the parties to engage in costly and protracted litigation on the issue of enforceability could possibly be what the parties bargained for. Proponents of the external law view argue further that all contracts should be viewed as consistent with the regulatory environment in which they were created. Therefore, recourse to external law is not only permissible, it is essential to a "correct" reading of the parties' bargain.⁶³ Finally, an enforceable award promotes "labor peace" by resolving the issues between the parties without recourse to the courts.

It could be argued that the amendment labor contracts to incorporate external law reflects a tendency towards paternalism which is completely inappropriate in an ongoing contractual relationship. Like parents who step in whenever their children have difficulties, an arbitrator who incorporates external law removes the parties' incentive to learn from their mistakes. In the case of a collective bargaining agreement, the parties need to learn to bargain more carefully over the terms of their

60. Richard Mittenhal, *Why Arbitrators Do Not Apply External Law*, in LABOR ARBITRATION, A PRACTICAL GUIDE FOR ADVOCATES 287 (Max Zimnay ET AL. eds., 1990).

61. Robert G. Howlett, *Why Arbitrators Apply External Law*, in LABOR ARBITRATION, A PRACTICAL GUIDE FOR ADVOCATES 257 (Max Zimnay ET AL. eds., 1990).

62. *Id.*

63. This view of contracts was criticized by Professor Mittenhal as highly artificial in that it assumes that everyone knows the law and everyone makes his contracts with reference to that law. Mittenhal, *supra* note 60, at 287.

relationship. In response, one might argue that this approach assumes that the parties did not implicitly include applicable external law. If that assumption is incorrect, then an arbitrator who applies external law is giving the parties the benefit of their bargain and at the same time preserving labor peace in the process.

Is the arbitrator's award really final? Regardless of the view taken as to the application of external law, parties who receive arbitration awards in which they disagree can and often do refuse to abide by them.⁶⁴ The "winning" party is then forced to sue for enforcement. When this happens, the courts are injected into the labor relations process, a result the parties were presumably trying to avoid by adopting arbitration in the first place. Depending upon one's perspective, this judicial intrusion either undercuts the labor relations model by compromising the virtues of cheapness, swiftness and finality promised by arbitration, or enhances it, and arbitration as a part of that model, by ensuring that arbitral awards adhere to the larger societal interests which form the underpinnings of lasting labor peace. Whatever the perspective, litigation of arbitral awards is a reality which will not go away. What can the parties expect of the judiciary?

The Supreme Court has severely restricted the judiciary's role in the review of arbitral awards. However, there are two exceptions to the principle of arbitral finality. The first exception, which is that the arbitrator's award is fatally flawed because it does not draw "its essence" from the collective bargaining agreement the parties asked him to interpret, is a relatively narrow one. The basic rule seems simple. A court is bound to enforce the award and is not entitled to review the merits of the contract dispute unless the arbitrator's decision is not based upon the terms of the collective bargaining agreement.⁶⁵ This rule applies even when the basis for the arbitrator's decision may be ambiguous,⁶⁶ or even incorrect. So long as an arbitrator's decision arguably applied the contract and can be viewed as within the scope of his authority, then the fact that the court is convinced that the arbitrator committed serious interpretive errors still does not permit the court to overturn the arbitrator's decision.⁶⁷

64. In addition to cases where finality is tested by a party's efforts to have the arbitration award overturned, there are cases where the grievant is free to ignore the arbitration decision and "re-litigate" the grievance as a violation of his or her independent rights. The most common cases where these rights arise involve alleged Title VII violations. See generally Michele Hoyman & Lamont E. Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of Gardner-Denver*, 39 ARB. J. (Sept. 1984, at 49).

65. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

66. *W. R. Grace & Co. v. Local Union 759, International Union of Rubber Workers*, 461 U.S. 757, 764 (1983).

67. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987).

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The parameters of the second exception, which is a court's traditional power to refuse to enforce a contract that violates "public policy," are less certain. In its decision in *W. R. Grace & Co. v. Local Union 759, International Union of Rubber Workers*, the Supreme Court acknowledged these inherent equitable powers:

If the contract as interpreted by the arbitrator violates some explicit public policy, we are obliged to refrain from enforcing it. Such a public policy, however, must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.⁶⁸

In *United Paperworkers International Union v. Misco, Inc.*,⁶⁹ the Supreme Court reversed the Court of Appeals for the Fifth Circuit which had held that an arbitration award reinstating a worker accused of drug use violated public policy. The Court stated, "[w]e explicitly held in *W. R. Grace* that a formulation of public policy based only on 'general considerations of supposed public interests' is not the sort that permits a court to set aside an arbitration award."⁷⁰ While this language narrows the scope of potential judicial activism, the precise source of acceptable "public policy" remains cloudy. However, it seems clear that, at a minimum, arbitration awards which require the parties to violate established law will be refused enforcement by the courts.

V. SOURCES OF EXTERNAL LAW AND PUBLIC POLICY

The preceding discussion above suggested that external law may shape the benefit of the parties' bargain regardless of the model an arbitrator chooses to follow. If the arbitrator believes review of external law is required, then the award will be written to incorporate the principles and direction therein.⁷¹ If the arbitrator is a proponent of the "four corners"

68. *W. R. Grace & Co. v. Local Union 759, International Union of Rubber Workers*, 461 U.S. 757 (1983).

69. 484 U.S. 29, 36 (1987).

70. *Id.*

71. *But see Roadmaster Corp. v. Prod. & Maintenance Employees' Local 504*, 655 F. Supp. 1460, 1465 (S.D. Ill. 1987), *aff'd*, 851 F.2d 886 (7th Cir. 1988), where the court vacated part of an arbitration award because the arbitrator incorporated § 8(d) of the NLRA. The arbitrator ruled against the employer citing its failure to offer to bargain with the union prior to the contract's termination and, on that specific basis, ordered the contract extended for a year. Quite understandably, the union supported the arbitrator's action urging that the contract included all applicable law in existence at the time the contract was made. In the absence of any contractual clauses incorporating external law or authorization for the arbitrator to do so, the court refused to enforce the award. The Court held that the arbitrator's decision was a reflection of his own views of the law rather than his opinion of the proper interpretation of the contract. As such, it exceeded the jurisdiction granted by the

rule, then the award may direct the parties to take action in violation of external law. However, in the latter case, the losing party can be expected to challenge the award on the ground that it contravenes public policy.⁷² The challenging party will argue that the award should be refused judicial enforcement because it directs a violation of established law. Therefore, those inclined to contingency planning should identify potential sources of established law which may be used to attack an award if it "goes to the other side."

Given this reality, it is important to review briefly the possible sources of external law or public policy which may have an impact on an AIDS-related arbitration award. The discussion will focus first on court interpretations of the Vocational Rehabilitation Act of 1973 and on the extent to which the Act protects an AIDS-infected employee from adverse employer action. Next, the discussion will focus on protections state rehabilitation statutes afford an AIDS-infected employee. Finally, to what extent does the Americans With Disabilities Act restrict actions based upon the AIDS infection?

Section 504 of the Vocational Rehabilitation Act of 1973⁷³ prohibits discrimination against any "otherwise qualified" handicapped person⁷⁴

parties and was thus unenforceable.

72. In the former case, the losing party may argue the arbitrator exceeded the parties' submission by an impermissible incorporation of external law. *See supra* note 71.

73. 29 U.S.C. §§ 701-93 (1973).

74. In 1974 Congress expanded the definition of "handicapped individual" for use in § 504 to include:

any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B). As the Supreme Court noted in *School Bd. v. Arline*, "The amended definition reflected Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but from "archaic attitudes and laws" and from "the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps." S.Rep. No. 93-1297 p. 50 (1974), U.S. Code Cong. & Admin. News 1974, 6400.

School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 279 (1987). The reach of this amendment was underscored by the Court in Footnote 4:

This subsection includes within the protection of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause (A) in the new definition.

Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped. *Id.* at 37-39, 63-64; *see also* 120 CONG. REC. 30531 (1974) (statement of Sen. Cranston).

Id. n.4.

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solely on the basis of that handicap by any employer which receives federal funds.⁷⁵ While it is clear that § 504 does protect persons suffering from contagious disease,⁷⁶ the protections afforded by § 504 are limited. A handicapped person is only "otherwise qualified" if he can perform the essential functions of the job in spite of his handicap.⁷⁷ Covered employers and program administrators are required to make a reasonable

75. Section 503 requires employers receiving federal contracts or subcontracts in excess of \$2,500.00 to take affirmative action to employ and advance qualified handicapped people in employment and § 504 of the Rehabilitation Act provides that "[n]o otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 504 (1987).

76. The Supreme Court spoke directly to this point in *School Bd. v. Arline*, a case brought under § 504 involving a teacher with recurrent tuberculosis:

The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of "handicapped individual" is broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief. The fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent. We conclude that the fact that a person with a record of a physical impairment is also contagious does not suffice to remove that person from coverage under § 504.

School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 285 (1987).

77. To decide whether a given person is "otherwise qualified for" within the meaning of the Act will require the court to make an individualized inquiry with appropriate findings of fact. As the Supreme Court noted in *School Bd. v. Arline*,

such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks. In the context of the employment of a person handicapped with a contagious disease, we agree with amicus American Medical Association that this inquiry should include:

Findings of facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Id. at 280.

accommodation for an employee or applicant.⁷⁸ However, reasonable accommodation does not require the employer to make fundamental alterations in a job for a disabled employee who cannot perform the tasks required by the job he was hired to fill.⁷⁹ In addition, a worker who poses a significant risk of communicating an infectious disease to others in the workplace will not be "otherwise qualified" if reasonable accommodation will not eliminate that risk.⁸⁰ Whether the employer can rely on his own "expert" to resolve the issue remains an open question.⁸¹

There has been a great deal of discussion concerning the application of § 504 to people who are infected with the AIDS virus; most writers are coming down on the side of coverage.⁸² While the Supreme Court has not issued an opinion on this issue,⁸³ the Ninth Circuit has held that AIDS is a handicap within the meaning of § 504.⁸⁴ It is sufficient for the purposes of this discussion to note that discharges or adverse actions against an AIDS-infected employee may violate § 504. The parties, as well as the arbitrator, should recognize that resolution of this issue in a particular

78. In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. 45 C.F.R. § 84.3(k) (1985). When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions. *Id.* at 281.

79. As the Supreme Court noted in *School Bd. v. Arline*:

Accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on a grantee, *Southeastern Community College v. Davis*, supra, at 412, 99 S. Ct., at 2370, or requires "a fundamental alteration in the nature of [the] program" *id.*, at 410. See 45 C.F.R. § 84.12(c) (1985) (listing factors to consider in determining whether accommodation would cause undue hardship); 45 C.F.R. pt. 84, App. A, p. 315 (1985) ("where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination"); *Davis*, supra, at 410-413, 99 S. Ct., at 2369-2370; *Alexander v. Choate*, 469 U.S., at 299-301, and n. 19, 105 S.Ct., at 720, and n. 19; *Strathie v. Department of Transportation*, supra, at 231; *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979).

Id. at 281 n.17.

80. *Id.* at 280 n.16.

81. The issue was reserved by the Court in *School Board v. Arline*: "This case does not present, and we do not address, the question whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied." *Id.* at 288 n.18.

82. See *infra* appendix A for a listing of articles commenting on the application of § 504 to AIDS related employment disputes.

83. The court reserves this issue in *School Board v. Arline*: "This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act." *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 281 n.7 (1987).

84. *Chalk v. United States Dist. Court, Cent. Dist. of Cal.*, 832 F.2d 1158 (9th Cir. 1987).

case will be fact specific. Key elements will be the status of the employer, the ability of the employee to perform the tasks for which he was hired, the actual danger to other employees, and the ability of the employer to accommodate the employee in a way which sufficiently protects others from disease or injury.⁸⁵

State and local governments have reacted to the AIDS epidemic in a number of ways. There have been efforts to enact criminal laws restricting behavior which can spread the disease,⁸⁶ to amend existing laws to include testing for AIDS⁸⁷ and to re-examine the state's power to quarantine its citizens.⁸⁸ On the other hand, forty-five states have civil rights laws which provide protection against discrimination based upon a handicap. Of these, thirty-three have either specific rulings or informal indications from state enforcement agencies that people infected with AIDS are protected from discrimination by state civil rights laws.⁸⁹ Several large cities have passed similar protections.⁹⁰

85. In the case of AIDS, the critical question may NOT be whether the employee can infect other employees with the HIV virus. The real question may be whether the employee poses a danger due to an opportunistic infection which IS communicable by casual contact. Additional questions are posed by the onset of AIDS Related Dementia, the impact of which may pose the danger of catastrophic loss in some work environments. See generally Nicholas Hentoff, *The Rehabilitation Act's Otherwise Qualified Requirement and the AIDS Virus: Protecting the Public From AIDS-Related Health and Safety Hazards*, 30 ARIZ. L. REV. 571 (1988). See also *infra* note 124 and accompanying text.

86. See generally Cheney C. Joseph, Jr., *Criminal Procedure*, 48 LA. L. REV. 257 (1987); Major Eugene R. Milhizer, *AIDS Update*, 27-50-195 ARMY LAW. 29 (1989); Major Eugene R. Milhizer, *Legality of the 'Safe-Sex' Order to Soldiers Having AIDS*, 27-50-192 ARMY LAW. 4 (1988); David Robinson, Jr., *AIDS and the Criminal Law: Traditional Approaches and a New Statutory Proposal*, 14 HOFSTRA L. REV. 91 (1985); Marvin E. Schechter, *AIDS: How the Disease is Being Criminalized*, 3 CRIM. JUST. 6 (1988); Gene Schultz, *AIDS: Public Health and the Criminal Law*, VII ST. LOUIS U. PUB. L. REV. 65 (1988); Barbara Shelley, *Maternal Substance Abuse: The Next Step in the Protection of Fetal Rights?*, 92 DICK. L. REV. 691 (1988); Carlton D. Stansbury, *Deadly and Dangerous Weapons and Aids: The Moore Analysis is Likely to be Dangerous*, 74 IOWA L. REV. 951 (1989); John A. Washington, *Preventive Detention: Dangerous Until Proven Innocent*, 38 CATH. U.L. REV. 271 (1988); Melissa Wells-Petry, *Anatomy of an AIDS Case: Deadly Disease as an Aspect of Deadly Crime*, 27-50-181 ARMY LAW. 17 (1988).

87. See Katherine S. Spaht, *Revision of the Law of Marriage: One Baby Step Forward*, 48 LA. L. REV. 1131 (1988) (notes the new requirement for AIDS testing before marriage).

88. See generally Edward A. Fallon, *Preserving the Public Health: A Proposal to Quarantine Recalcitrant AIDS Carriers*, 68 B. U. L. REV. 441 (1988); Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017 (1989); Deborah J. Merritt, *Communicable Disease and Constitutional Law: Controlling AIDS*, 61 N.Y.U. L. REV. 739 (1986); Wendy E. Parmet, *AIDS and Quarantine: the Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53 (1985).

89. EPIDEMIC OF FEAR, A GUIDE TO THE LEGAL PROBLEMS OF PEOPLE WITH AIDS, (LAMBDA Legal Defense Fund (1990)).

90. A San Francisco ordinance, effective December 20, 1985, prohibits discrimination based on the fact that a person has or is perceived to have AIDS. This prohibition extends to employment, housing, public accommodations, educational institutions, and city facilities. SAN FRANCISCO, CAL., ORDINANCE NO. 49,985 (Dec. 20, 1985), reprinted in 3 EMBL. PRAC. GUIDE (CCH) ¶ 20,950B (Dec. 1985). On August 16, 1985, a Los Angeles public ordinance prohibiting employment discrimination against persons perceived to have AIDS and persons with AIDS or AIDS-related conditions became effective. LOS ANGELES, CAL.,

Lastly, the parties ought to consider the provisions of the Americans With Disability Act of 1990. Though most of its provisions are not binding until July 1992, the Act will initially cover all private employers with 25 or more employees.⁹¹ The sweeping nature of several of its provisions ensures the Act will exert a major impact on the United States workplace.

On its face, the basic prohibition of the Act seems simple and not much broader than that of the Vocational Rehabilitation Act of 1973:⁹²

SEC. 102. DISCRIMINATION.

(a) GENERAL RULE. -- No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.⁹³

MUNICIPAL CODE ch. 4, art. 5.8 (1985). Mayor W. Wilson Goode of Philadelphia issued an Executive Order on April 15, 1986, prohibiting discrimination against persons with AIDS for the purposes of employment and service. The order was based on new medical information that AIDS is not communicable by casual contact and on a city solicitor's opinion that determined AIDS to be a handicap. On December 11, 1986, the City Council of Austin, Texas passed a broad ordinance banning AIDS discrimination in employment, housing, and public accommodations. The ordinance extends protection to persons with AIDS and ARC as well as to individuals who are seropositive or who are perceived to be at risk of contracting the disease. Jana H. Carey & Megan M. Arthur, *The Developing Law of AIDS in the Workplace*, 46 MD. L. REV. 284, 304 n.104 (1987).

91. The Americans With Disability Act provides at Title I, § 101.(5)(A):

(5) EMPLOYER.

(A) IN GENERAL.--The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) EXCEPTIONS.--The term "employer" does not include--

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

42 U.S.C.A. § 12112(a) (West 1990).

92. "No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794 (a).

93. 42 U.S.C.A. § 12112(a) (West 1990).

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The Act uses much the same language as the Vocational Rehabilitation Act of 1973: protections are extended to all "qualified individual(s)"⁹⁴ with a disability⁹⁵ as that term is defined by the Act. Concepts such as "reasonable accommodation" and "undue hardship,"⁹⁶ familiar under the Vocational Rehabilitation Act of 1973, appear in this new Act as well and

94.

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

42 U.S.C.A. § 12111(8) (West 1990).

95. "§ 12102(2) DISABILITY.—The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment."

42 U.S.C.A. § 12102(2) (West 1990).

This language is modified by that of § 12211, which purports to expressly exclude a number of "conditions" from the expansive definition of disability:

(a) **HOMOSEXUALITY AND BISEXUALITY.**—For purposes of the definition of "disability" in section 12102(2), homosexuality and bisexuality are not impairments and as such are not disabilities under this Act.

(b) **CERTAIN CONDITIONS.**—Under this Act, the term "disability" shall not include—

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

42 U.S.C.A. § 12211 (West 1990). However, when these sections are read together, the statute's definition of disability raises more questions than it answers. What does § 12102(2)(c), as modified, really mean? While the act requires the employee/ applicant to prove he was discriminated against because he was "regarded" as having an impairment, (as did the Rehabilitation Act of 1973), how does the "AIDS related" employee/applicant do this? Assume an applicant is a homosexual who is refused a job on that basis. A claim under the ADA seems barred by § 12211. What if, despite the express language of § 12211, the applicant sues under the ADA and asserts he was discriminated against not because he is a homosexual, but because employers (and societ 95. y,) regard all homosexuals as AIDS carriers. Does he now have a disability claim under § 12102(2) which can get to the trier of fact? Recognizing the controversy concerning AIDS and the widespread discrimination against members of high risk groups, how does the employer rebut such an assertion? Given the sociology of AIDS, are the exclusions under § 12211 merely a prescription for litigation?

96. See 42 U.S.C.A. § 12111-12 (West 1990) for the definitions of these terms under the Americans With Disabilities Act (ADA). While these concepts were originally developed in cases involving the accommodation of religious practices, protections are much broader under the ADA. For a review of "reasonable accommodation" and "undue hardship" in the resolution of religious practice grievances, see I. B. Helburn & John R. Hill, *The Arbitration of Religious Practice Grievances*, 39 ARB. J. (June 1984, at 3).

their definitions reflect the parameters that were worked out in litigation under the older statute.⁹⁷ However, the term "discriminate" has been defined in an extremely broad manner and arguably includes people who have no disability at all.⁹⁸ As such, the Act could be a source for argument to a large number of grievants who do not get the answer they want from the arbitrator.⁹⁹

VI. EXPECTED DISPUTES AND SUGGESTED SOLUTIONS UNDER THE TWO MOST COMMON ARBITRATION MODELS

This section will identify the AIDS-related situations that an arbitrator should expect to encounter and will suggest potential solutions. In an effort to resist the temptation to "take sides" in a dispute over the propriety of applying external law in arbitration decisions, this Article will pose solutions from the point of view of both arbitration models. Published arbitration decisions concerning AIDS issues are few.¹⁰⁰ As a

97. Note, however, that reasonable accommodation under the Americans With Disabilities Act includes "job restructuring, part-time or modified work schedules and reassignment to a vacant position," things never required under the Rehabilitation Act of 1973. 42 U.S.C.A. § 12111(9)(B) (West 1990). If a person must have their job restructured, made part time, or even request re-assignment to function, can the person really be said to be "otherwise qualified" for the job for which he was hired? At what point does the "restructured" job become a "new" job; part of a privately funded welfare system created by the legislature to provide income and benefits for the disabled employee?

98. According to the Act, activities which are "discrimination" include: "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;" 42 U.S.C.A. § 12112(b)(4) (West 1990).

What makes this provision interesting is that it identifies, as discriminatory, acts against persons who are arguably excluded from the basic protections of § 12112. To come within the prohibition of that section, a person has to be a "qualified individual *with a disability*." Is this just a restatement of § 12102(c)? If it is not, who would fit under this section and not under the umbrella of § 12102(2)? See *supra* note 95 for a discussion of §§ 12102(2) and 12211.

99. In this context, I intend "source of positive law/public policy" to refer to grounds for appealing the arbitrator's decision in the courts. However, the Americans With Disabilities Act could also change the parties' rights and obligations under contracts which contain incorporation clauses. See *supra* note 59 for a brief discussion of the various types of incorporation clauses used in collective bargaining agreements.

100. See Vern E. Hauck, *AIDS and Arbitration*, 1990 LAB. L. J. 293. In the only published article devoted to this topic, Professor Hauck argues that arbitrators "support the fundamental premise that most AIDS victims can and should continue to work until they are no longer able to meet reasonable performance standards." Professor Hauck's discussion is limited to eleven arbitration decisions. Four of these decisions dealt with the discharge of AIDS victims and seven dealt with disputes premised on employee/employer fears of AIDS. Unfortunately, Professor Hauck's description of these decisions is somewhat misleading. For example, in his discussion of *Nursing Home v. Union*, 88 Lab. Arb. (BNA) 681 (1987) (Sedwick, Arb.), Professor Hauck informs the reader that the discharge of the AIDS infected nursing-home worker was overturned. *Id.* at 279. While this may be so, what Arbitrator Sedwick really did was place the employee on suspension until "he no longer had a communicable disease." *Nursing Home v. Union*, 88 Lab. Arb. (BNA) 681, 682 (1987). (Which, absent a sudden and unexpected medical breakthrough, would never occur.) What

consequence, the discussion will focus on non-AIDS disability decisions where it is necessary to indicate the positions taken by arbitrators in the past on such issues.

A. *Absenteeism*

AIDS, like any other illness, can result in lost production time for the employer. Traditional sick leave can accommodate the normal doctor's visits which may be required by the HIV seropositive employee. However, if that employee progresses to ARC or AIDS itself, the employer can expect substantial absences as the employee's symptoms become more severe.¹⁰¹ What standards should the arbitrator apply if an employer discharges an employee due to AIDS-related absences?

Historically, a majority of arbitrators have adhered to the view that discharge is warranted for chronic, excessive absenteeism even where such absences are caused by the employee's illness.¹⁰² This view has usually been predicated on the contractual implementation of "no fault" absence provisions which the majority of arbitrators have found to be "reasonable in principle."¹⁰³ Recent decisions have upheld discharges in absenteeism cases involving industrial injuries,¹⁰⁴ alcoholism,¹⁰⁵

the grievant really got was the payment of medical bills which should have been covered while he was placed on medical leave and the right to purchase medical insurance while on suspension. An examination of the other discharge cases reveals the arbitrators' decisions were based upon more traditional "good cause" principles rather than adherence to Professor Hauck's "fundamental premise." For a more general discussion on AIDS issues in the workplace see Robert E. Stein, *AIDS in the Workplace, Opportunities for Cooperation*, in PROCEEDINGS OF NEW YORK UNIVERSITY, FORTY-SECOND ANNUAL CONFERENCE ON LABOR, (Bruno Stein ed.), 1989, at 12-1; and Robert E. Stein, *Strategies for Dealing With AIDS Disputes in the Workplace*, 42 ARB. J. (Sept: 1987, at 21).

101. See *supra* notes 36-41, and accompanying text.

102. Howard Block & Richard Mittenthal, *Arbitration and the Absent Employee*, in PROCEEDINGS OF THE 37TH ANNUAL MEETING 1984, at 90-91.

103. *Id.* at 99-101.

104. See *T. Marzetti Co. v. Teamsters Local 284*, 91 Lab. Arb. (BNA) 154 (1988) (Sharpe, Arb.), in which Arbitrator Calvin William Sharpe found the Grievant's excessive-absenteeism discharge, (in which industrial-injury absences accounted for six of 10.5 points that triggered action) did not violate public policy. This decision was reached despite existence of a state industrial commission resolution which interpreted state law to require absentee control programs to exclude absences resulting from work-related injuries. The decision noted the state commission was not authorized to interpret state law, that the commission resolution would not constitute "legal precedent," and that state courts had not ruled against such discharges. *Id.* at 155. See also *North River Energy Co. v. United Mine Workers of Am.*, Dist. 20, 88 Lab. Arb. (BNA) 447 (1987) (Witney, Arb.), where Arbitrator Witney upheld the employer's application of the contractual "excessive excused absences" program to employee who had been continuously off work and collecting worker's compensation for 15 months following an on-the-job back injury. Factors in the arbitrator's decision were the opinions of two neurosurgeons who had agreed that employee was fit for work, the fact that the state had discontinued the grievant's worker's compensation benefits on the basis of the neurosurgeons' findings, the fact the employee's absences for excused personal illness during the next two months were six times workplace average, and the employer's warning to the grievant that he might be placed in the excessive excused absence program. *Id.*

depression,¹⁰⁶ tendency to injury,¹⁰⁷ and drug use.¹⁰⁸ However, a failure to follow proper procedures has resulted in reinstatement in similar cases.¹⁰⁹

Arbitrators seem to be applying a rough balancing test in absenteeism cases. On one side are the interests of the ill or injured employee; on the other, the interests of the employer to have some degree of control over the number of employees who will be present on any given production day. In general, if the employee can not come to work with regularity, then his discharge will be upheld regardless of the reason for the absenteeism. Although some consideration is given for periods of

105. See *Michigan Dep't of Social Servs. v. Michigan State Employees Assoc.*, 84 Lab. Arb. (BNA) 1030 (1985) (Borland, Arb.). Arbitrator Borland upheld the discharge of an alcoholic who refused to enroll in a hospital in-patient program for treatment and also refused supervisors' extended efforts to facilitate his treatment. The employee was discharged despite the fact that there were no performance problems cited on days that he actually worked. The employer's rationale, accepted by the arbitrator was that the employee's ability to perform in a consistent manner throughout his employment had become tenuous and sporadic. *Id.*

106. In *Safeway Stores Inc. v. United Food and Commercial Workers Local 775*, 94 Lab. Arb. (BNA) 851 (1990) (Staudohar, Arb.), Arbitrator Staudohar upheld the discharge of an employee whose leave of absence exceeded permissible 18 months. In this case the employee had stopped working because he was ill with depression. The reports of three psychiatrists had not given full clearance for return to work. See also *Internal Revenue Service v. Nat'l Treasury Employees Union*, Chapter 222, 85 Lab. Arb. (BNA) 212 (1985) (Shieber, Arb.). Arbitrator Shieber sustained the discharge of a grievant whose absence was due to her "major depressive reaction." Arbitrator Shieber held that the grievant's removal would enable the agency to fill the position with a dependable employee who is available for work and thereby contributes to the ability of agency efficiently to accomplish its mission. *Id.*

107. In *Mead Paper, Chilapaco Mill v. United Paperworkers Int'l, Local 988*, 91 Lab. Arb. (BNA) 52 (1988) (Curry, Arb.), Arbitrator Curry upheld the discharge of an "accident-prone" employee. Arbitrator Curry agreed that the employee was unsuitable for work in paper mill as he had suffered 10 times more injuries than similarly situated co-workers, his accident and illness-related absences comprised almost one quarter of his 18 years of employment, and pattern was likely to continue. *Id.* See also *Roadway Express, Inc. v. Teamsters, Local 100*, 87 Lab. Arb. (BNA) 465 (1986) (Chapman, Arb.), in which Arbitrator Chapman allowed the employer in a discharge action to submit evidence of excessive workers' compensation claims to justify the discharge based on employee's "overall work record including attendance and injuries." Arbitrator Curry noted that neither state law nor collective bargaining contract barred such evidence and the employee had shown no past practice of exclusion by grievance panels at local, state, or regional level. The arbitrator held that the disputed evidence would permit the grievance panel to determine whether employee was capable of performing job effectively as any other employee. *Id.*

108. See *Bi-State Dev. Agency v. Amalgamated Transit Union Division 788*, 88 Lab. Arb. (BNA) 854 (1987) (Brazil, Arb.).

109. See *Pacific Bell v. Communications Workers of America*, 91 Lab. Arb. (BNA) 653 (1988) (Kaufman, Arb.). Arbitrator Kaufman reinstated a diabetic employee who had three periods of disability absence during her five years of employment. Arbitrator Kaufman decided the employee was discharged improperly under attendance plan which provided that three or more disability absences within six years were unacceptable. *Id.* (Employer failed to investigate fully and consider the "likelihood" of future reliable service and the employer failed to obtain a current medical opinion concerning whether the grievant's diabetes was under control.) See also *Weyerhaeuser Co. v. Teamsters Local 503*, 88 Lab. Arb. (BNA) 270 (1987) (Kapsch, Arb.). Arbitrator Kapsch vacated the excessive absenteeism motivated discharge for six months on condition that the grievant, (who had good record over 26 years except for absences due to acute depression and treatment) continue medical treatment and accept re-employment to his former position or any other position he was otherwise qualified to perform.

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absenteeism which are due to work related injury, even those cases result in discharge when the employee fails to "recover" in a reasonable time.¹¹⁰

For the arbitrator who is restricted to the terms of the collective bargaining agreement, there is no need to apply a different standard in cases where the reason for "excessive" absenteeism is an AIDS-related illness. The arbitrator should treat the AIDS-related absence as he would any absence arising under the collective bargaining agreement. Under a "no-fault" absenteeism policy, the AIDS sufferer is no better or worse off than any other ill or injured employee. Given the progressive nature of the disease, discharge in the case of an AIDS patient is inevitable. In this respect, the plight of the AIDS-infected employee is most analogous to that of employees stricken with degenerative diseases such as multiple sclerosis, severe rheumatoid arthritis, diabetes, or emphysema.

For the arbitrator who believes incorporation of external law is required, the decision is less clear. As discussed above,¹¹¹ the Vocational Rehabilitation Act of 1973, state and local "disability" statutes, and the Americans With Disabilities Act contain provisions which may restrict the discharge of an employee who begins to experience AIDS-related absences. The arbitrator who seeks to follow external law, either to insulate the decision from reversal on public policy grounds or to "save the parties" from future litigation, should conduct an inquiry into the precise nature of the absences and whether "reasonable accommodation" would result in their technical cessation. If accommodation would eliminate absences, a prudent view of the law suggests the employee should be retained.

As a practical matter the infected employee's absences will continue. What will change is their characterization under the collective bargaining agreement. With "reasonable accommodation" (either job restructuring or the institution of a flexible schedule) the impact of the absences on the employer's operation will be lessened and the final day of reckoning postponed.¹¹²

B. Refusal to Work (Health and Safety)

Employees who feel their working conditions pose an unreasonable risk of harm may have the right under federal law to refuse to perform

110. See *North River Energy Co. v. United Mine Workers of Am.*, Dist. 20, 88 Lab. Arb. (BNA) 447 (1987) (Witney, Arb.).

111. See *supra* notes 73-98 and accompanying text.

112. See K. Dow Scott & G. Stephen Taylor, *An Analysis of Absenteeism Cases Taken to Arbitration: 1975-1981*, 38 ARB. J. (Sept. 1983, at 64, 68).

that work.¹¹³ However, the employee must, in good faith, reasonably believe the task assigned poses a real danger of death or serious injury otherwise the "disobedience" is unprotected.¹¹⁴ Employees who refuse to work under such circumstances bear the burden of showing, by "ascertainable, objective evidence," that conditions exist which justify the refusal to work.¹¹⁵ A review of reported arbitral decisions since 1945 indicates this is a difficult burden indeed. In the majority of cases involving refusals to work for reasons of health and safety from 1945 through 1985, the employees' grievances were denied by the arbitrator.¹¹⁶ In cases involving disease and disability from 1945 through 1985, the grievances were denied in over ninety-percent of the cases.¹¹⁷

Given the controversy surrounding the AIDS epidemic,¹¹⁸ it is not surprising that there have been instances where employees have filed grievances in connection with tasks which they believe put them at risk of infection.¹¹⁹ However, the reported cases indicate that establishing the

113. This "right" can be derived from two sources: the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 and § 502 of the Labor-Management Relations Act, 29 U.S.C. § 143. Robert C. Lombar, *AIDS in the Workplace: Selected Legal Issues*, 350 PRAC. L. INST. 103 (1988).

114. The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 establishes two employer duties: A specific duty under § 654(a)(2) to comply with all occupational safety and health standards promulgated by the government; and a general duty under 29 U.S.C. § 654(a)(1) (the "general duty clause") to furnish employment and a place of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm." Employees who in good faith reasonably believe the task assigned poses a real danger of death or serious injury may, after first seeking correction of the health hazard from the employer, refuse to subject themselves to the risk. Under these circumstances, OSHA prohibits an employer from taking any adverse action against such an employee. Gombar, *supra* note 113. For a review of arbitration standards in OSHA related grievances see Beth A. Wolfson, *Arbitration and OSHA*, 38 ARB. J. (Sept. 1983, at 12).

115. Section 502 of the Labor-Management Relations Act, 29 U.S.C. § 143, which permits employees acting in good faith to refuse to work under "abnormally dangerous conditions." In order to be protected for a work refusal predicated on § 502 of the LMRA however, the employees must be able to demonstrate by "ascertainable, objective evidence" that they were or were about to be exposed to "abnormally dangerous conditions." *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974).

116. James A. Gross & Patricia A. Greenfield, *Arbitral Value Judgements in Health and Safety Disputes, Management Rights Over Workers' Rights*, 34 BUFF. L. REV. 645 app., at 689 (1985).

117. *Id.* See also Terry L. Leap, ET AL., *Health and Job Safety: An Analysis of Arbitration Decisions*, 41 ARB. J. (Sept. 1986, at 41), (devoted primarily to health related job safety issues).

118. See *supra* notes 14-21 and accompanying text.

119. See *State of Delaware, Dep't of Corrections v. AFSCME, L-1726 Council 81 Delaware Public Employees*, 86 Lab. Arb. (BNA) 849 (1986) (Gill, Arb.). Arbitrator Gill found the employer had violated a contract provision requiring notification to union and prison guards of inmates who had, or were "medically suspected" of having communicable disease when it refused to disclose names of inmates who had tested "positive" for AIDS. This decision reflected an accommodation to the fears of employees rather than any finding that the asymptomatic tested prisoners posed a real danger to bargaining unit members. See *State of Minnesota, Dep't of Corrections v. American Federation of State, County and Municipal Employees, Council 6*, 85 Lab. Arb. (BNA) 1185 (1985) (Gallagher, Arb.), in which Arbitrator Gallagher reinstated a guard who had refused to obey an order to conduct pat search of inmates because of fear of AIDS contamination. The arbitrator found the

"reasonable belief" that the task poses real danger of death or serious injury is no easier in the AIDS context than it has been generally. The decisions of arbitrators in these few reported AIDS cases reflects their insistence, in keeping with the standards noted above, that the grievant make a showing of objective proof that AIDS is generally communicable by the kinds of casual conduct which occur in the workplace.¹²⁰ Given the current position of medical authorities,¹²¹ and the apparent deference of the courts to that position,¹²² it is difficult to imagine how an employee in the

discharge overly harsh given the atmosphere of panic created in part by the warden's pronouncements and the failure to provide AIDS education which might have dispelled the employee's "unreasonable" apprehension. See *Veterans Administration Medical Center v. American Federation of Gov't Employees, Local 2547*, 94 Lab. Arb. (BNA) 169 (1990) (Murphy, Arb.). Arbitrator Murphy denied demands by night maintenance employees (who cleaned federal medical-center room in which AIDS-causing human immunodeficiency virus was kept and HIV research was conducted) for environmental differential pay allowed by federal regulations for duties involving either "high degree hazard," (eight-percent differential) or "low degree hazard" (four-percent). The arbitrator noted that the work was not performed "with or in close proximity to micro-organisms" so as to involve "potential personal injury," or "potential for personal injury." *Id.*

120. If an employee does contract disease in the workplace, the employer may find himself liable. However, most state worker's compensation statutes exclude disease unrelated to the employee's particular occupation. Under these circumstances the employer whose worker contracts AIDS on the job may be liable under traditional tort law with its more generous compensation levels. On the other hand, the employee's predisposition or vulnerability may be a defense. In *Anderson v. General Motors Corp.*, 442 A.2d 1359 (Del. 1982), the Industrial Accident Board denied a claim for occupational disease benefits. The state Supreme Court held that claimant failed to establish by substantial competent evidence that his ailment, allergic rhinitis, resulted from the peculiar nature of his employment at automobile assembly facility rather than from his own peculiar predisposition. *Id.* In *Esposito v. N.Y.S. Willowbrook State School*, 38 A.D.2d 985, 329 N.Y.S.2d 355 (1972), the state Supreme Court, Appellate Division, held that award for disability resulting from occupational disease could not be sustained where claimant, who allegedly contracted hepatitis while employed as food service worker at state school for mentally retarded, was employed at school for only a day and a half, there was no proof that claimant came in contact with a particular patient or patients suffering from infectious hepatitis and only competent evidence that any patient was suffering from disease was hospital director's letter stating that such disease was endemic at school. In *McCarthy v. State Dep't of Social and Health Services*, 730 P.2d 681 (Wash. 1986), an employee who alleged that her employment required her to work in office environment in which she was regularly exposed to tobacco smoke and that as a result of her exposure to tobacco smoke she developed obstructive lung disease leading to her terminating her employment stated claim for negligence if employee's disease was not occupational disease within exclusive coverage of Industrial Insurance Act. However, exclusive remedy provisions of Industrial Insurance Act generally bar private causes of action only when particular disease is within coverage provisions of Act.

121. See *supra* notes 26-29 and accompanying text.

122. In its discussion of the implementation of the Rehabilitation Act of 1973, the Supreme Court noted:

such a[n] [medical] inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks In the context of the employment of a person handicapped with a contagious disease, we agree with amicus American Medical Association that this inquiry should include: "[Findings of] facts, based on *reasonable medical judgments given the state of medical knowledge*, (emphasis added) about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious),

average workplace¹²³ could justify a refusal to work with an HIV positive co-worker based on a fear of HIV infection.

Fellow employees could assert that the continued employment of an AIDS-infected worker presents a "real danger of death or serious injury" due to the presence of his opportunistic infections and not necessarily the AIDS virus itself. Unlike the HIV virus, it could be argued that these infections may be transmitted by casual contact.¹²⁴ However, this approach adds nothing to the debate. The arbitrator who follows the traditional principles discussed above should not confront novel issues. If an AIDS-infected employee can be shown to present a real danger to the workplace, either because of the danger of AIDS transmission or the danger of opportunistic infection, then a grievance by a co-worker should be sustained. If the fear of danger is based upon misconception or can be removed by reasonable accommodation instituted by the employer, then the grievance should be denied. While the consideration of opportunistic infections might change the focus of the factual inquiry, it does not change the analysis. In these cases, where the refusal to work will be based upon federal law, the parties can be expected to invite the arbitrator to consider the applicable federal law in his decision. Consequently, a discussion of decisions under the two arbitral models is unnecessary.

C. Discharge (Health and Safety)

Although a seropositive employee's normal workplace activities are unlikely to result in the spread of the HIV infection to others,¹²⁵ the impact of the disease as it progresses in an infected individual can raise safety issues for the employer. The most troublesome of these issues, as it relates to the individual worker, is the unforeseeable impact of ARC.

(c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm."

School Bd. v. Arline, 480 U.S. 273, 287-88 (1987).

123. See *supra* note 2 (concerning workplaces characterized by exposure to blood or other bodily fluids).

124. Opportunistic microorganisms (which may be bacteria, fungi, parasites, or viruses) may cause infections exclusively in "compromised hosts" (for example, certain species of *Bacillus*), or may cause infections more frequently or more severely in compromised than in "normal" hosts. Alexander V. Graevenitz, OPPORTUNISTIC INFECTION, in 12 ENCYCLOPEDIA OF SCIENCE AND TECHNOLOGY (6th ed. 1987).

125. This discussion necessarily excludes the unique problems posed by the health-care environment. However, even there the analysis should be the same: (a) Does the employee's condition present a threat to his co-workers or to clients? (b) Can the threat be eliminated by steps short of discharge? (c) Do the steps necessary to eliminate the threat constitute an unreasonable burden on the workplace? Given the invasive procedures conducted by health care providers, there is a very real danger of worker and client infection. See *infra* appendix B for a list of articles which address this issue.

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As noted above, the symptoms of ARC can range from minor forgetfulness to severe dementia and psychomotor retardation.¹²⁶ The uncertain development of undiagnosed but potentially progressive mental defects has led some to argue that even asymptomatic individuals who are seropositive for the HIV virus should be banned from certain professions in the interests of public safety.¹²⁷ This concern for safety would theoretically support similar restrictions in non-public, but inherently dangerous, occupations where even mild cognitive disorders might pose a risk of serious injury. However, despite the general concern, there is also scientific authority for the contrary view: asymptomatic individuals who are seropositive for the HIV virus will not suffer from mental disturbances before suffering from AIDS itself.¹²⁸

Given the conflicting nature of the scientific evidence, the arbitrator should treat a discharge for suspected or anticipated AIDS related dementia in the same way he would treat any other discharge or adverse action involving allegations of mental disease. Traditionally, whether the arbitrator confines himself to the four corners of the contract, (using some version of "just cause" as his standard,) or incorporates external law, the arbitrator's analysis has been centered on the actual condition of the

126. See *supra* notes 33-34 and accompanying text.

127.

There is thus a well documented medical likelihood that large numbers of those infected with the AIDS virus are subject to central nervous system dysfunction, that the cause of the dysfunction is difficult to detect and often misdiagnosed until it reaches a more serious stage, and that this dysfunction can occur in asymptomatic carriers of the virus entirely independent of any damage to the immune system associated with a diagnosis of AIDS. These findings have an impact on a wide range of employees infected with the AIDS virus who may not be "otherwise qualified" because of the risk [sic] that they will sustain damage to their central nervous system resulting in varying forms of mental deficiency and brain dysfunction that might place others in danger and prevent them from performing the "essential functions" of their jobs.

The employees that such a risk would most immediately impact are those whose jobs entail significant responsibility for the safety of others: bus drivers, airline pilots, air traffic controllers, police officers, elevator and fire inspectors, as well as a host of other jobs where an employee's mental deficiency or brain dysfunction could threaten the safety of others. There are many other jobs, which require complex abstracting ability or rapid information processing, where the asymptomatic carrier of the AIDS virus would not be otherwise qualified for employment under the "business necessity and safe performance" defense provided by the Department of Labor's regulations interpreting section 504 of the Rehabilitation Act.

Nicholas Hentoff, *The Rehabilitation Act's Otherwise Qualified Requirement and the AIDS Virus: Protecting the Public from AIDS-Related Health and Safety Hazards*, 30 ARIZ. L. REV. 571, 621 (1988) (footnotes omitted).

128. THE WORLD HEALTH ORGANIZATION, STATEMENT ON NEUROPSYCHOLOGICAL ASPECTS OF HIV INFECTION (March 13, 1988), *quoted in* Hentoff, *supra* note 127 at 618 n.248.

grievant.¹²⁹ "Evidence" consisting solely of unsupported generalizations, made without consideration of the particular condition of the grievant, has been rejected in favor of more particularized proof. If an employer can establish that the grievant is suffering from a mental defect which prevents job performance, and that reasonable accommodation will not permit the employee to perform that job, then the discharge should be sustained. A failure of proof as to the grievant dictates reinstatement.¹³⁰

There is no reason this mode of analysis should not apply in an AIDS case in the same manner as it does in any other case involving allegations of mental defect. Those who call for presumptive disqualification of HIV positive employees implicitly argue that the HIV-free employee is, by definition, free from physical or mental imbalances. However, no one would argue that the employer who ignores such deterioration in any employee does so at the employee's own peril. If the employer detects forgetfulness, emotional or physical disturbances, or any other "odd" behavior, that behavior should be investigated. Whether the employer determines the unacceptable behavior is due to clinical depression, drug abuse, alcoholism, physical disease or transitory personal problems, the traditional arbitration standard in a discharge case remains how such behavior detracts from the worker's ability to do the job. There seems to be no good reason to forge a new standard for workers who are HIV positive.

129. For example, consider *Sacramento Municipal Utility Dist. v. Int'l Brotherhood of Electrical Workers, Local 1245, AFL-CIO*, 91 Lab. Arb. (BNA) 1073 (1988) (Conception, Arb.), where the discharge of a building maintenance sub-foreman was upheld. The employee exhibited erratic behavior, wild mood shifts and used prescription tranquilizer drugs chronically. *Id.* at 1074. A psychiatrist diagnosed grievant as "manic depressive with immature personal features" and concluded that his emotional instability "would preclude him from his work at the nuclear power plant." *Id.* Oddly, the union in this case presented no countervailing expert opinion despite the fact that the diagnosis would prevent grievant from obtaining necessary security clearance. *Id.* at 1075. For a case showing reinstatement, see *East Ohio Gas Co. v. Natural Gas Workers Union, Local 555*, 91 Lab. Arb. (BNA) 366 (1988) (Dworkin, Arb.). Arbitrator Dworkin held the non-disciplinary discharge of employee who could not perform regular duties because of acute anxiety depression was arbitrary. *Id.* The employer had discharged the grievant based on medical evidence two months old and expert witness testified that anxiety-depression patients often respond quickly to treatment. *Id.* Significantly, this decision was not made under a "just cause" standard but under the more difficult (for the employee,) standard of "reasonable or arbitrary" action under contractual management-rights clause. *Id.*

130. The use of generalizations or "group guilt" unrelated to the particular grievant has been rejected as inherently unfair in the discipline area. Marvin Hill, Jr. & Diana Beck, *Some Thoughts on Just Cause and Group Discipline*, 41 ARB. J. (June 1986, at 59). The same philosophical rationale would seem to apply in the cases involving AIDS related discharges based solely on attenuated medical generalizations.

D. Discharge (Inability to Perform)

What standard should the arbitrator apply if the employer discharges an HIV-positive employee who the employer alleges is no longer able to perform the job for which he was hired? In a published arbitration decision directly on point, Arbitrator Sid Braufman described the standard:

Whether the grievant suffers from some form of AIDS or from some other disease or illness, should be immaterial so far as his employment status is concerned. What is really crucial, in my view, is whether or not, despite his health problem, the grievant is truly capable of doing his job. If he is, then he should be permitted to return to work promptly provided of course, that such return poses no additional health threat either to the grievant or to his co-workers.¹³¹

Arbitrator Braufman directed that the discharge be converted to an involuntary, unpaid medical leave of absence and ordered the parties to have the grievant examined by a physician who specialized in AIDS. Arbitrator Braufman further ordered the parties to inform the selected AIDS specialist of the regular duties of the grievant's position so he could certify whether the grievant was fit to perform the full range of those duties without jeopardizing himself or his co-workers. Arbitrator Braufman further noted that

[i]f the specialist finds and certifies, however, that the grievant is not fit to perform the full range of his duties, then the grievant shall continue on involuntary medical or disability leave, subject to the terms and conditions of the pertinent provisions of the labor agreement and/or the customary practice of the parties.¹³²

The standard enunciated by Arbitrator Braufman faithfully tracks the standard used by other arbitrators in non-AIDS related discharge cases. Employers who wish to discharge or take other adverse action against an employee¹³³ bear the burden of establishing that the employee cannot

131. *In re The Bucklers, Inc. v. Local 517-S, Prod. Serv. and Sales Dist. Council, AFL-CIO*, 90 Lab. Arb. (BNA) 937, 939 (1987) (Braufman, Arb.).

132. *Id.* at 939.

133. For similar analysis in a reassignment case, see *Hamilton County Sheriff v. Fraternal Order of Police, Ohio Labor Consultant, Inc.*, 90 Lab. Arb. (BNA) 1012 (1988) (Loeb, Arb.). In this case, an exemplary seven-year road-patrol officer with medically controlled seizure disorder was reassigned to clerk duties following on-duty seizure. *Id.* Arbitrator Loeb rejected as "arbitrary" a county demand for a medical guarantee against future seizures. *Id.* Key factors were the county's knowledge of disorder at time of hire, the fact that the officer's condition had not deteriorated during employment, and, most importantly, the fact that three physicians, including one chosen by county, determined the

perform the job for which he was hired.¹³⁴ Arbitrators require the employer to establish the grievant's disability through recent medical examinations which in turn consider the requirements of the grievant's job.¹³⁵

Will recourse to external law result in a different decision than that rendered by an arbitrator who confines himself to the four corners of the collective bargaining agreement? In this area the answer may be yes. As noted above, both the Rehabilitation Act of 1973 and the recently passed Americans With Disabilities Act require an employer to make "reasonable accommodation" for the grievant's disability.¹³⁶ What constitutes reasonable accommodation will be determined by a factual inquiry in each case. However, it is at least clear from the cases that the employer is not required to assign the employee to a new job or fundamentally change the work process to design a job the grievant can do.¹³⁷ An arbitrator who incorporates federal law may require an employer to take specific steps before a discharge will be upheld,¹³⁸ even though such steps were not required under the strict language of the collective bargaining agreement.

grievant was medically fit to perform all patrol-officer duties. *Id.*

134. See *City of Ithaca v. CSEA*, 94 Lab. Arb. (BNA) 747 (1990) (Miller, Arb.). Arbitrator Miller found the city sanitation department improperly discharged garbage collector who had 50-pound lifting restriction, despite contention that it had fulfilled duty to accommodate grievant by assigning him temporarily to recycling job until disability was determined to be permanent. Arbitrator Miller rejected the city's position that permanent assignment to the recycling job would mean creation of a new position, specifically finding that the garbage collection and recycling jobs were intermingled. *Id.* As grievant was qualified and able to perform all functions of the related (substantially equivalent) recycling job, his discharge was improper. *Id.* See also *East Ohio Gas Co. v. Natural Gas Workers Union, Local 555*, 91 Lab. Arb. (BNA) 366 (1988) (Dworkin, Arb.).

135. See *supra* note 109.

136. See *supra* note 79 and accompanying text.

137. See, e.g., *Lamott v. Apple Valley Health Care Center, Inc.*, 465 N.W.2d 585 (Minn. App. 1991) (Nursing Home failed to reasonably accommodate victim of cerebral hemorrhage when it assigned her to new duties with which she was unfamiliar and gave her no guidance.); *Coffman v. W. Va. Bd. of Regents*, 386 S.E.2d 1 (W.Va. 1988) (a decision under the West Virginia human rights statute where the court held the law did not require the employer to assign a custodian to different job he could perform); *Rancour v. Detroit Edison Co.*, 388 N.W.2d 336 (Mich. App. 1986) (a decision under Michigan handicap law holding the employer is not required to place an injured employee who cannot perform original job into new job).

138. See *Department of Health and Human Servs., Social Security Admin. v. American Fed'n of Gov't Employees, Local 1395*, 87 Lab. Arb. (BNA) 1026 (1986) (Wolff, Arb.). Arbitrator Wolff held the agency improperly discharged an employee for poor performance several months after he returned to work from approved absence for hospitalization and treatment of alcoholism. Critical to the arbitrator's decision was the employer's failure to conduct a formal evaluation, including the "fitness for duty" examination required by law and contract, to determine whether employee's continued under-performance was attributable to alcoholism, to anxiety and depression-producing "white knuckle sobriety" experienced by some recovering alcoholics, or to some other health problem. *Id.* Also noted was the agency's obligation, under the law, regulation and other mandates to act as a 'model employer' (29 C.F.R. 1613.703 (1978)) and to make reasonable accommodations to the grievant's disease and handicap (29 C.F.R. 1613.704 (1978)). *Id.* Failure to do so constituted prohibited discrimination. *Id.*

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Whether a decision under the "four corners" model will be reversed as a violation of state or federal handicap statutes will depend entirely upon whether the collective bargaining agreement is interpreted in a manner that is consistent with the principles embodied in such statutes. Even if the precise statutory language is absent from the collective bargaining agreement, "reasonable accommodation" as described by federal and state law could be reached by an arbitrator using a traditional interpretation of the "just cause" provision contained in that agreement. Such an interpretation would insulate the arbitrator's decision from reversal on public policy grounds while eliminating the need to expressly invoke external law. However, unless the arbitrator's use of the statutory standard is purely accidental, then this "discovery" of the proper interpretation of the just cause provision seems to be merely a thinly disguised incorporation of external law. If an arbitrator must take this approach to produce an enforceable solution in this regulated environment, then does he have an affirmative duty to tell the parties that they have a contractual problem which they must address at the bargaining table?

The Americans With Disabilities Act's focus on individual rights and its enforcement mechanisms mirror those of Title VII. If awards which violate a grievant's rights face almost certain reversal on public policy grounds, will this new, pervasive regulation force traditionalists within the arbitration community to specifically incorporate external law when dealing with AIDS and other disability related grievances? Again, the short answer seems to be no. First, the basic standards in the new law have been part of many workplaces for almost two decades under the terms of the Vocational Rehabilitation Act of 1973. Secondly, the new Act's restrictions will take time to absorb. Consequently, there is no reason to believe that they will not ultimately become part of the "law of the shop" in much the same way as EEO restrictions and principles have during the past two decades. To the extent that parties wish to ensure subsequent awards embody these principals, they are free to do so when they draft their collective bargaining agreement or set the limits of their arbitrator's jurisdiction.

Under either model, the fact that the grievant suffers from AIDS versus another disability does not appear to trigger additional factors to consider in reaching a decision. Therefore, the arbitrator should decide these cases by reference to the traditional principles, which developed in the context of other disability related discharges.

E. Testing

Concerns about AIDS have prompted some employers to implement testing programs under the management rights provisions of their

collective bargaining agreements.¹³⁹ The justification for the imposition of such testing policies is generally a rough identification of the nature of AIDS (i.e., a communicable disease), coupled with the consequences of infection which invariably result in death. As noted above, this analysis ignores the overwhelming opinion of the worldwide scientific community regarding the nature of the threat of infection due to casual contact.¹⁴⁰

Arbitrators faced with discharges resulting from employee refusals to comply with employer demands for medical testing have applied a rather simple test. If the employer cannot articulate a rational reason for the original demand which brings it within the terms of the collective bargaining agreement, then the employee is reinstated.¹⁴¹ Employer demands for AIDS testing would clearly be subject to this same traditional standard.

Unless the employer can establish a legitimate, work-related reason to test his employees, the imposition of such a program, as well as the discharge of employees who refuse to comply, should be overturned. Given the scientific facts concerning AIDS, it is unclear what that work-related reason could be in the average work place.¹⁴² In the typical case, adherence to traditional standards would dictate reinstatement for the employee who was discharged for refusing to take an AIDS test.

139. See *J. Sterling Morton High School v. Morton Council Teachers Union*, Local 571, 89 Lab. Arb. (BNA) 521 (1987) (Whitney, Arb.). Arbitrator Whitney held the School Board's adoption of testing policy permitting school board to require employees whom it reasonably suspects of having "highly contagious disease" to be examined by board-appointed physician and/or to take sick or health leave violated the collective bargaining contract and Illinois law. *Id.* The arbitrator specifically found the policy was enacted solely in response to the AIDS epidemic and was based on the "unsupported assumption" that AIDS is highly contagious and represents a "clear and present danger" within the school setting. *Id.*

140. See *supra* notes 27-29 and accompanying text.

141. See *Laclede Gas Co. v. Oil Workers Int'l*, Local 5-6, 89 Lab. Arb. (BNA) 398 (1987) (Mikrut, Arb.). Arbitrator Mikrut reinstated an employee who refused to retake a drug test after he had tested positive for marijuana, where he had completed employee assistance program and was subject to random drug-screening pursuant to company procedure for qualifying truck drivers under federal regulations. Just cause did not exist to discharge employee where the employer's procedure did not address discipline for refusal to take test. *Id.* See also *Gulf Atlantic Distrib. Serv. v. Local 315, Retail Stove Union*, 88 Lab. Arb. (BNA) 475 (1986) (Williams, Arb.). Arbitrator Williams found that just cause did not exist for "insubordination" discharge of employee who refused to submit to physical examination ordered after two polygraph tests, to which employee had voluntarily submitted in employer's investigation of missing merchandise, allegedly showed marked physiological changes. Key factors for the arbitrator were the fact the order was not directly related to the grievant's job, that there was no substantial evidence that employee might have injurious disease or that he was incapable of performing job without endangering himself and/or others. *Id.*

142. While there seems little justification for AIDS related testing in the normal work environment, there may be justification for such testing in some settings. See *infra* appendix B for a list of articles which discuss the need for AIDS related information in the health care environment.

F. Refusal to Promote

What should an arbitrator do in a case where the grievant has been denied a promotion based upon his AIDS-related condition? Assume an HIV positive grievant has been denied advancement on the basis of the HIV condition. The hypothetical employer asserts that the position applied for requires extensive training and would place the grievant in charge of long term projects. The employer does not wish to "waste" the training on a presumptively terminal employee and wants to select an applicant who will "be around" to supervise the conclusion of his or her long-term commitments. The employer may argue that due to the HIV infection, the grievant is an extremely poor risk on both counts. What then should be the arbitrator's decision?

First, the arbitrator should determine whether the HIV positive grievant is physically capable of performing the duties of the desired position now. In the case of a seropositive but asymptomatic grievant the answer should be yes. If the grievant's condition has progressed to ARC or if the grievant is suffering from "full blown" AIDS, then the answer may be no. There is no new "AIDS" analysis needed at this stage. An employer should be required to list the physical requirements of the job (i.e., place, time, and duty) and establish why the grievant cannot fulfill those requirements. If the grievant cannot at that time perform the duties even with reasonable accommodation, then the arbitrator should resolve the grievance in the employer's favor.

The employer's objections, however, are related to suppositions concerning the grievant's expected future capabilities and not his present performance. The question confronting an arbitrator is whether to uphold an adverse action based on such employer predictions. In most cases the answer should be no.

As noted above,¹⁴³ there is currently no way to predict how long it will take a seropositive grievant to develop ARC or AIDS, or even whether he will develop those conditions. Such an employee is no more "likely" to die in the foreseeable future than any other employee. A grievant who has developed ARC will experience minor health problems, but may not develop AIDS. There is simply no way to predict the course of the ARC grievant's condition or whether the ailments associated with ARC will materially interfere with his ability to perform the job in question. Given the facts espoused by medical authorities, the hypothetical employer's belief in the grievant's impending demise does not appear to be particularly well founded.

The average arbitrator would not sustain refusal by an employer to

143. See *supra* notes 36-41 and accompanying text.

promote men after they reach fifty because they have an increased risk of heart attack. Nor would most arbitrators permit employers to discriminate against married women of child-bearing age simply because they could potentially become pregnant. The same sort of analysis should be applied in most AIDS cases. The arbitrator should look to the employer for proof that the grievant will not be able to fulfill the requirements of the job. Absent such proof, the grievant should prevail.¹⁴⁴

The discussion above may not apply to people who have developed "full-blown" AIDS. People with "full-blown" symptoms of AIDS often experience bouts of extreme illness and accordingly would probably require considerable accommodation from their employers to perform normal duties. Because the life expectancy of an AIDS-infected person is between eighteen months to two years, the employer's decision to exclude such a person from a lengthy or demanding training program could be justified. The analysis, however, is unchanged. The arbitrator should still require the employer to present sufficient medical evidence to establish the grievant should be excluded from consideration for promotion or training. In the cases of a grievant suffering from "full blown" AIDS, the evidence indicates such decisions may very well go to the employer.

VII. CONCLUSION

Despite the political and social undercurrents which continue to characterize discussions of Acquired Immune Deficiency Syndrome, an examination of the facts now available suggests that these should not be difficult cases for arbitrators. Certainly the social issues discussed are as relevant to the arbitrator faced with an AIDS-related controversy as they are to the parties whose perceptions of these issues will ultimately shape a dispute. However, the arbitrator who desires to reach a decision based upon the facts rather than the conflicting fears of the parties needs to come to the hearing with a clear understanding of the real issues.

There is no evidence Acquired Immune Deficiency Syndrome can be transmitted by casual contact. This renders the infection of an employee factually irrelevant to others with whom he has such contact. Under the

144. See *Hamilton County Sheriff v. Fraternal Order of Police*, 90 Lab. Arb. (BNA) 1012 (1988) (Loeb, Arb.). Arbitrator Loeb found the employer had improperly reassigned a police officer to clerk duties after medical treatment related to his epilepsy. (The employer had ignored medical evidence that the grievant's condition was medically controlled and had demanded a "guarantee" against future seizures.) For comparison, see the decisions in the following cases where adverse employment actions involving "disabled" applicants were found to violate state discrimination laws: *Dairy Equip. Co. v. Wisc. Dep't of Indus., Labor and Human Relations*, 15 Empl. Prac. Dec. ¶ 8052 (1977) (only one functioning kidney); *Chrysler Outboard Corp. v. Dep't of Indus., Labor and Human Relations*, 14 F.E.P. Cases 344 (1976) (acute lymphocytic leukemia in remission).

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circumstances, the traditional principles applied by arbitrators in cases involving less emotionally charged physical disabilities can and should be applied by arbitrators in cases involving AIDS.

Arbitrators should recognize that there are both federal and state laws which restrict employer discretion in the hiring and firing of persons classified as "disabled." Infectious diseases such as AIDS have been found to constitute disabilities under those laws. An arbitration decision which concerns a discharge or other adverse action against an HIV-infected employee will likely fall within the parameters of these restrictions.

An arbitrator who follows the traditional "four corners" model, needs to recognize that decisions involving AIDS-related disputes, like all decisions involving disabilities, are issued within an increasingly regulated environment. These laws expand the possibility of later courtroom challenges on public policy grounds. Under the circumstances, parties seeking to avoid further litigation ought to consider requesting the incorporation of external discrimination law, even if their only reason for doing so would be to make it clear that the principles embodied in such laws were honored.

The arbitrator who regularly incorporates external law in his decisions should become familiar with the state and federal statutes which will govern the dispute if it moves from arbitration to trial courts. A clear enunciation of the factors and standards established by those laws should insure that all AIDS-related arbitration decisions result in an enforceable award which reflects an accurate view of the facts.

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