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# AIDS, the Doctrine of Maintenance and Cure, and Maritime Employment Discrimination: Charting a Course Between Scylla and Charybdis

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## COMMENT

# AIDS, THE DOCTRINE OF MAINTENANCE AND CURE, AND MARITIME EMPLOYMENT DISCRIMINATION: CHARTING A COURSE BETWEEN SCYLLA AND CHARYBDIS

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## I. INTRODUCTION

Acquired Immune Deficiency Syndrome (AIDS) is one of the most devastating health problems the world has ever faced. Approximately 10 million people worldwide carry the AIDS virus—the Human Immuno-deficiency Virus (HIV)—and an estimated 2 million more have full-blown cases of AIDS.<sup>1</sup> In the United States, local and state health centers had reported 230,181 cases of AIDS as of August 1992.<sup>2</sup> In 1991 alone, the National Centers for Infectious Diseases reported 45,506 new cases of AIDS.<sup>3</sup>

Given the prevalence of the disease and the costs associated with treatment,<sup>4</sup> the issue of AIDS in the workplace is a growing concern. In the private U.S. maritime industry, AIDS is of special concern.<sup>5</sup> First, the industry is in troubled economic times.<sup>6</sup> The

1. Marsha F. Goldsmith, *Physicians at AMA Amsterdam News Seminar Offer Panoramic View of Their Varied Roles in Pandemic*, 268 J. AM. MED. ASS'N 1237, 1237 (1992) [hereinafter Goldsmith, *Amsterdam News Seminar*]. One medical study predicts that in the next three years, 3.8 million people will develop AIDS, and an additional 6.9 million persons will be infected. Marsha F. Goldsmith, *Critical Moment at Hand in HIV/AIDS Pandemic: New Global Strategy to Arrest Its Spread Proposed*, 268 J. AM. MED. ASS'N 445, 445 (1992) [hereinafter Goldsmith, *Critical Moment*].

2. Marsha F. Goldsmith, *Specific HIV-Related Problems of Women Gain More Attention at a Price—Affecting More Women*, 268 J. AM. MED. ASS'N 1814, 1816 (1992) [hereinafter Goldsmith, *Affecting More Women*].

3. National Center for Infectious Diseases, *Acquired Immunodeficiency Syndrome—1991*, 268 J. AM. MED. ASS'N 713, 713 (1992). This figure is up 5% from 1990 when local, state, and territorial health departments reported 43,352 new cases. *Id.*

4. Cornelis A. Rietneijer et al., *Cost of Care for Patients with Human Immunodeficiency Virus Infection: Patterns of Utilization and Charges in a Public Health Care System*, 153 ARCHIVES INTERNAL MED. 219, available in LEXIS, Genmed Library, JNLS File (estimating lifetime costs for AIDS treatments as ranging from \$35,000 to \$90,000; annual costs for patients with AIDS-related complex as \$4913 per year).

The cost for one year's treatment of azidothymidine (AZT) is about \$2500. Goldsmith, *Critical Moment*, *supra* note 1, at 446.

5. In fact, a sailor was the first reported victim of AIDS. Mike Woods, *Kinky Sex? Nuclear Fallout? How Did AIDS Really Begin?*, OTTAWA CITIZEN, July 19, 1992, at B5; *Study Traces AIDS Death Back to '59*, CHICAGO TRIBUNE, July 6, 1990, at 3.

Three publications have previously dealt with the AIDS crisis as it affects the maritime industry: Judith A. Mellman, *AIDS, the American Seaman and the Law of Personal In-*

additional burdens of treating seamen with AIDS may only serve to batter an industry that is already foundering under the United States's strict laws regarding labor relations and benefits for seamen.<sup>7</sup> Forcing shipowners to absorb these increased costs of medical benefits may worsen the situation.<sup>8</sup> Second, while the AIDS epidemic threatens to strike all segments of society, seamen, as a group, may suffer from AIDS at a rate that far exceeds the national average.<sup>9</sup>

The uncertainty surrounding a shipowner's liability for a sea-

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jury, 13 TUL. MAR. L.J. 101 (1988); THE FLORIDA BAR, AIDS, PUBLIC HEALTH AND MARITIME LAW SEMINAR (Feb. 27, 1989) (Collection of the seminar's lecture outlines and program); Paul A. Londynsky, *Maritime Law and the AIDS Crisis: Storm Clouds on the Horizon*, 1 U.S.F. MAR. L.J. 173 (1989).

6. CLINTON H. WHITEHUST, THE U.S. SHIPBUILDING INDUSTRY 192-93 (1986) (commenting that "the United States is moving inexorably toward a nationalized maritime industry.").

Statistics indicate that the U.S. maritime industry has declined since 1960. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1991, at 1094-1104 (111th ed. 1991). Since 1960, the percentage of U.S. registered vessels with a capacity of 100 tons or more has decreased, while the gross tonnage shipped by U.S. vessels has also decreased. *Id.* at 1102. Despite this decrease in the U.S. shipping industry's capacity, the tonnage of cargo imported into and exported from the United States has increased. *Id.* at 1094. These statistics show the growing reliance of the United States on foreign flagged vessels.

In the cruise industry, foreign dependence is even greater. For instance, 98% of the cruise ships visiting or operating out of U.S. ports are foreign registered. Michael M. Phillips, *Coast Guard Defends Cruise Ship Safety*, States News Serv., May 29, 1991, available in LEXIS, Nexis Library, Omni File. Because cruise ships require far larger crews than cargo vessels and because U.S. laws and regulations make wages and benefits for crew members more expensive, the number of American-flagged cruise ships has dropped to two. See Michael Doan, *Raising the "Scuttled" U.S. Merchant Fleet*, U.S. NEWS & WORLD REP., July 19, 1982, at 43 ("A prime reason [for the U.S. fleet's inability to compete with foreign fleets] is wages."); Shirley Slater & Harry Basch, *Cruise Views: Convenience Is Sometimes Foreign on Vessels*, L.A. TIMES, Nov. 11, 1990, at L12 (noting that American Hawaii Cruises owns the only two large, ocean-going U.S.-flagged cruise ships).

Indeed, the world shipping industry has a less than optimistic prognosis. DANIEL TODD, THE WORLD SHIPBUILDING INDUSTRY 356 (1985).

7. See Slater & Basch, *supra* note 6, at L12.

8. Cf. Doan, *supra* note 6, at 43.

9. Mellman, *supra* note 5, at 107 ("Seamen tend to be uneducated, are less likely to be concerned with their health, and seldom form stable marital unions.") (citing M. SHERAR, SHIPPING OUT: A SOCIOLOGICAL STUDY OF THE AMERICAN MERCHANT SEAMAN 19-57 (1973)); see also John Otis, *Honduras—AIDS*, UPI, Mar. 27, 1992, available in LEXIS, Nexis Library, UPI File (reporting that AIDS has spread especially quickly in Honduran port towns); Nikola Antonov, *Anti-AIDS Drive Slows Spread of Disease in Bulgaria*, RUETER LIBR. REP., Dec. 1, 1991, available in LEXIS, Nexis Library, Omni File (reporting that sailors contracted AIDS before other groups in Bulgaria); Richard Woodman, *Early Treatment Slows AIDS Growth*, Press Association Newsfile, Nov. 10, 1991, available in LEXIS, Nexis Library, Omni File (noting that "sailors are particularly at risk from AIDS"); Kenya Bans American Blood, Xinhua General Overseas News Service, June 17, 1989, available in LEXIS, Nexis Library, Omni File (reporting that Kenya banned American sailors from donating blood, fearing AIDS contamination).

man with AIDS under the doctrine of maintenance and cure<sup>10</sup> may lead to two practices in marine employment. First, employers may attempt to inquire into the HIV status of applicants before hiring. Because the employer does not fully understand the extent of its liability under maintenance and cure, the employer may attempt to avoid the problem by not hiring HIV-positive individuals. Both federal<sup>11</sup> and state<sup>12</sup> legislation, however, prohibit employment discrimination against handicapped persons, and most existing legislation has defined persons with AIDS as handicapped,<sup>13</sup> entitling them to protection. Additionally, many statutes have broadly defined a "handicap" so as to extend antidiscrimination protection to healthy, but HIV-positive, individuals.<sup>14</sup> Therefore, employers who refuse to hire HIV-positive employees merely because of their status may be violating federal or state laws by discriminating against handicapped persons.

The second result of the uncertainty surrounding the application of the maintenance and cure doctrine to HIV-infected seamen is that both the employer and employee avoid the courts. Neither party has the incentive to litigate. Seamen with AIDS may be in such states of weakened health that they have little incentive to begin landmark litigation that, very possibly, may outlive them. Because such persons have immediate needs for money, they have great incentives to settle their claims out of court. Shipowners fear going to court because of their potential liability under the doctrine of maintenance and cure. Costs for treating AIDS patients are great, and shipowners fear that judicial precedent will establish liability and force them to bear these costs. This desire to avoid litigation prevents the development of a body of caselaw that would define the extent of the duties and liabilities under the doctrine. Effectively, this is a self-perpetuating problem because the development of caselaw is necessary to dispel the uncertainty, but it is the uncertainty which precludes the development of caselaw.

This Comment seeks to help the employer chart a course between a legal Scylla and Charybdis by informing the shipowner/employer and the seaman/employee of their rights and obligations

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10. The doctrine of maintenance and cure requires shipowners to pay for the lodging and medical expenses of sick and injured seamen. See *infra* parts III.C, V.A.

11. See *infra* part IV.B-C.

12. See *infra* part IV.D.

13. See *infra* part IV.B.-D.

14. See *infra* part IV.B.-D.

under U.S. law. By providing much needed analysis, this Comment will help each party to make an informed decision that comports with traditional maritime principles. This Comment argues that the most cost effective solution for the employer is not to discriminate against an HIV-positive seaman, but to employ the individual. If the employer discriminates, liability is guaranteed, but if the employer hires the individual, then liability is only a risk, not a certainty. Because an understanding of the nature of the disease is essential to making informed decisions regarding employment of an infected person, Part II of this Comment provides general information about HIV and AIDS. Parts III and IV provide background information regarding the doctrine of maintenance and cure and the federal and state antidiscrimination laws, respectively. Part V discusses these doctrines and policies as they influence the employer's decision. Finally, Part VI concludes that an informed employer will decide that hiring HIV-infected seamen is a better course than discriminating against them.

## II. BACKGROUND INFORMATION ON THE AIDS VIRUS

The AIDS virus attacks the T-helper lymphocyte cells that normally help produce "natural killer cells" to fight viruses.<sup>15</sup> The destruction of healthy T-helper cells so weakens the infected person's immune system that the person becomes susceptible to previously innocuous infections.<sup>16</sup> These infections are "opportunistic"<sup>17</sup> because they take advantage of a weakened immune system. But for the presence of the HIV-virus, the infection could not successfully attack the person's body.

The Center for Disease Control (CDC) defines AIDS as the presence of the HIV virus plus the diagnosis of one or more opportunistic infections.<sup>18</sup> This definition is circular because it defines

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15. Charles Marwick, "Molecular Level" View Gives Immune System Clues, 253 J. AM. MED. ASS'N 3371, 3371-73 (1985).

16. *Id.*

17. Catherine Macek, *Acquired Immunodeficiency Syndrome Cause(s) Still Elusive*, 248 J. AM. MED. ASS'N 1423 (1982), available in LEXIS, Genmed Library, JNLS File. The most common opportunistic diseases are *Kaposi's sarcoma* (KS)—a skin cancer, and *pneumocystis carinii pneumonia* (PCP)—a type of pneumonia. *Id.*

18. Centers for Disease Control, *1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents*, 269 J. AM. MED. ASS'N 729 (1993) [hereinafter *Revised Definition for AIDS*]. AIDS victims often suffer from multiple opportunistic infections. See *id.* The revised definition emphasizes the "clinical importance of the CD4 T-lymphocyte count in the categorization of HIV-related clinical

AIDS to mean HIV-positive plus the presence of an "AIDS-defining illness." Hence, the CDC can drastically affect the number of AIDS cases by merely expanding its list of "AIDS-defining illnesses."<sup>19</sup>

Persons who are HIV-positive are often classified into three categories: (1) those who are seropositive, but without any symptoms of AIDS; (2) those with AIDS-related complications (ARC); and (3) those with active cases of AIDS.<sup>20</sup> The first group of persons can function completely normally as they show no symptoms of the disease. Persons with ARC can function relatively normally, suffering only from symptoms like diarrhea, fatigue, night sweats, and enlarged lymph nodes.<sup>21</sup> Persons with AIDS suffer from more severe symptoms that vary with the opportunistic diseases.

Today, the consensus of the medical community is that all HIV-positive individuals will develop AIDS and that the only real difference between individuals is the rate at which the virus ravishes their immune systems.<sup>22</sup> The distinction between HIV-posi-

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conditions." *Id.* Though this revised system replaces the 1986 definition, it retains the 23 clinical conditions previously designated and adds three more to the list. *Id.*

19. Prior to the approval of the 1993 revised definition of AIDS, James Curran, M.D., Acting Director for the CDC's Division of HIV/AIDS, said that "if the definition [of AIDS] were changed tomorrow [to include a CD4 count below 200 cells/microliter], more than 20,000 new cases of AIDS would be recognized." Goldsmith, *Affecting More Women*, *supra* note 2, at 1816 (quoting James Curran).

20. Marilou M. King, *AIDS: Employer and Employee Rights*, 9 J.L. & MED. 587, 588 (1988). Generally, a "seropositive" result to an HIV test means that a person's blood tested positive for HIV antibodies. Marc J. Sicklick & Arye Rubinstein, *A Medical Review of AIDS*, 14 HOFSTRA L. REV. 5, 5 (1985). Current test methodologies check for the presence of HIV antibodies, not for the presence of the virus itself. See Taunya Lovell Banks & Roger R. McFadden, *Rush to Judgment: HIV Test Reliability and Screening*, 23 TULSA L.J. 1, 4 (1987). "A person who tests positive is presumed to be infected with the virus." *Id.* at 5. Technically, seropositivity only means that an individual has been exposed to the virus, not that the individual has the virus. *Id.* Furthermore, a person's immune system could possibly destroy the virus before it has the opportunity to attack, and hence the presence of antibodies would indicate a "protective effect." See A. Bodner et al., *Screening Test for HTLV-III (AIDS Agent) Antibodies*, 253 J. AM. MED. ASS'N, 225, 225 (1985) (suggesting that "it is possible that some of the [HIV] antibod[ies] could have neutralizing or protective effects"). The predominant view of the medical community, however, is that most seropositive persons are actual carriers. See Banks & McFadden, *supra*, at 24.

For a thorough discussion of current HIV testing procedures, see Banks & McFadden, *supra*; see also Update: *Serologic Testing for Antibody to Human Immunodeficiency Virus*, 259 J. AM. MED. ASS'N 653 (1988).

21. King, *supra* note 20, at 588 (citing MEMBERSHIP PUBLICATION DIVISION, AMERICAN MANAGEMENT ASSOCIATION, *AIDS: THE NEW WORKPLACE ISSUES* 115 (1988)).

22. The United States has raised the average life expectancy from the diagnosis of AIDS to death from 6 months to more than 3.5 years. Goldsmith, *Amsterdam News Seminar*, *supra* note 1, at 1245-46. Some individuals may survive for as long as ten years. See

tive and AIDS, however, may still be useful in the employment setting because it may help courts decide if an individual is "qualified for employment."

One other aspect of HIV that is of great importance to the employment environment is the methods of HIV transmission. Current research indicates that there are only three ways to transmit HIV: (1) through transfer of body fluids during sexual intercourse; (2) through blood transfer (for example, through blood transfusions or sharing of drug needles); and (3) through maternal-fetal transmission.<sup>23</sup> Though research has proven the presence of the virus in saliva, the medical community does not believe saliva can infect another with HIV.<sup>24</sup> People do not transmit the virus through ordinary daily contact in the work place, for example by shaking hands or using the same bathroom facilities.<sup>25</sup> Thus, while HIV is contagious, the risk of transmission in the workplace is minimal if one takes proper precautions.<sup>26</sup>

### III. TRADITIONAL MARITIME REMEDIES

Seamen, historically, have enjoyed access to remedies not available to other workers. Traditional maritime law affords seamen causes of action for unseaworthiness and for maintenance and cure. In addition, the Jones Act<sup>27</sup> provides an additional remedy for seamen in U.S. courts.<sup>28</sup>

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David J. Solomon & Andrew J. Hogan, *HIV Infection Treatment Costs Under Medicaid in Michigan*, 107 PUB. HEALTH REP. 461 (1992), available in LEXIS, Genmed Library, JNLS File ("median period of 9.2 years for seropositive adults to develop the AIDS stage of the disease"); Theresa J. Jordan et al., *Isoniazid as Preventive Therapy in HIV-Infected Intravenous Drug Abusers: A Decision Analysis*, 265 J. AM. MED. ASS'N 2987 (1991) (mean incubation period of 8.2 years).

23. See Thomas R. O'Brien et al., *Human Immunodeficiency Virus Type 2 Infection in the United States; Epidemiology, Diagnosis, and Public Health Implications*, 267 J. AM. MED. ASS'N 2775, 2775 (1992); C. Everett Koop, *You Won't Get AIDS from Insects—Or a Kiss*, 103 PUB. HEALTH REP. 331, 331 (1988).

24. Sicklick & Rubinstein, *supra* note 20, at 7; Koop, *supra* note 23, at 331.

25. Koop, *supra* note 23, at 331.

26. See, e.g., *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus During Invasive Procedures*, 35 MORBIDITY & MORTALITY WKLY. REP. 221, 222-23 (1986) (choosing not to prohibit the participation of HIV-infected health care workers in invasive practices and calling the risk "negligible" if workers follow guidelines).

27. Jones Act, ch. 153, § 20, 38 Stat. 1185 (1920) (current version at 46 U.S.C. App. § 688 (1988)).

28. For a discussion of foreign seamen's rights in U.S. courts, see Paul H. Dué, *Rights of Foreign Seamen in U.S. Courts--The Law into the '80's*, 7 MAR. LAW. 265 (1982) (explain-



The traditional maritime remedies reflect a policy of protectionism for seamen. In *Harden v. Gordon*,<sup>29</sup> Justice Story summarized the reasons for protecting seamen:

Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of sickness; and if liable to be so applied, the great motives for good behaviour might be ordinarily taken away by pledging their future as well as past wages for the redemption of the debt. . . . The master will watch over their health with vigilance and fidelity. He will take the best methods, as well to prevent diseases, as to ensure a speedy recovery from them. He will never be tempted to abandon the sick to their forlorn fate; but his duty, combining with the interest of his owner, will lead him to succor their distress, and shed a cheering kindness over the anxious hours of suffering and despondency. Beyond this is the great public policy of preserving this important class of citizens for the commercial service and maritime defence of the nation. Every act of legislation which secures their healths, increases their comforts, and administers to their infirmities, binds them more strongly to their country . . . .<sup>30</sup>

Courts generally apply these policies liberally to protect seamen. For example, the Supreme Court has dictated that courts resolve all ambiguities and doubts in favor of seamen,<sup>31</sup> and courts have also labelled seamen as the "wards of the courts."<sup>32</sup> One must consider these policies when determining the scope of traditional maritime remedies.

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ing that the Jones Act provides a remedy for any seaman, either foreign or domestic, who has substantial contacts with the United States).

29. 11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6,047).

30. *Id.* at 483.

31. *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 735 n.15 (1943) ("[The] tendency to confine the scope of the [shipowner's] obligation [to seamen] is consonant neither with the liberality which courts of admiralty traditionally have displayed toward seamen, who are their wards, nor with the dictates of sound maritime policy.") (citations omitted).

32. *Boulton v. Moore*, 14 F. 922, 926 (C.C.N.D. Ill. 1883).

### A. *Unseaworthiness*

Shipowners have an affirmative duty to keep their vessels free of unnecessary hazards.<sup>33</sup> General maritime law enforces this duty by giving seamen the cause of action of unseaworthiness.<sup>34</sup> The absence of an opportunity for the shipowner to correct or even become aware of an unsafe condition aboard the vessel does not constitute a defense.<sup>35</sup> To grant a damage award for unseaworthiness, a court need only find that some part of the vessel was not reasonably fit for its intended use and thereby caused an injury.<sup>36</sup> A shipowner has no absolute duty to provide a completely safe ship—only a reasonably safe one.<sup>37</sup>

### B. *Jones Act Negligence*

The Jones Act provides a claim when the shipowner's negligence causes injury to a seaman.<sup>38</sup> Like the doctrine of unseaworthiness, only seamen may recover under the Jones Act.<sup>39</sup> The seaman need only prove the slightest bit of negligence to establish a claim under the Jones Act.<sup>40</sup>

Though providing the seaman with powerful remedies and requiring the shipowner to maintain a very high standard of care, both unseaworthiness and the Jones Act require some fault, actual or implied, on the part of the shipowner. These remedies generally may not lend themselves to AIDS cases because a seaman with AIDS may have great difficulty proving any negligence on the part

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33. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960); *see also Italia Societa per Azioni de Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964) (holding that the duty of seaworthiness requires shipowner "to furnish a vessel and appurtenances reasonably fit for their intended use").

34. *The Osceola*, 189 U.S. 158 (1903).

35. 362 U.S. at 549-50 ("[S]hipowner's actual or constructive knowledge of the unseaworthy condition is not essential" for the shipowner to be liable.).

36. *Id.*

37. *Id.* at 550.

38. Jones Act, ch. 153, § 20, 38 Stat. 1185 (1920) (current version at 46 U.S.C. App. § 688 (1988)).

39. *See, e.g.*, David W. Robertson, *A New Approach to Determining Seaman Status*, 64 *TEX. L. REV.* 79, 85 (1985).

40. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957) (holding that there was sufficient evidence to support jury finding that shipowner was negligent for failing to furnish the ship with an ice cream scoop and therefore liable for injuries sustained by the ship's baker when his hand slipped on a knife which he was using to chip the frozen ice cream); *Spinks v. Standard Oil Co.*, 507 F.2d 216, 223 (5th Cir. 1975) ("even the slightest negligence suffices").

of the shipowner. While a seaman might become infected with the AIDS virus because of an unreasonable condition of the ship or the shipowner's negligence,<sup>41</sup> the shipowner can generally take measures to avoid the injury, the claim, or both.

For example, congressional legislation requires that certain shipowners outfit their ships with specific equipment. The owner of a ship of more than 75 tons must provide both a medicine and slop chest for the crew.<sup>42</sup> The medicine chest must contain enumerated medical items,<sup>43</sup> and the slop chest must contain supplies of disposable or consumable items such as clothing and tobacco.<sup>44</sup> The law requires the master of the vessel to offer these items to the crew as needed for no more than ten percent over the wholesale cost.<sup>45</sup> A failure to provide an adequately stocked medicine or slop chest can lead to fines and civil liability.<sup>46</sup> In the future, courts might find that a shipowner who fails to provide prophylactics such as condoms in either the medicine or slop chest, has violated the statute. Here again, however, the shipowner can avoid liability by providing a well-equipped medicine and slop chest which will prevent injuries and resulting claims, and help the shipowner defend against those claims by showing compliance with the statute.

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41. One possible way that the shipowner would be liable under either the Jones Act or the doctrine of unseaworthiness is where the shipowner negligently stocks contaminated blood aboard ship. Supplying contaminated blood is negligent because the blood would not be reasonably fit for its intended purpose. See, e.g., *Italia Societa per Azioni de Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964) (holding that the duty of seaworthiness requires shipowner "to furnish a vessel and appurtenances reasonably fit for their intended use").

The failure to properly train and instruct the master and crew can also render a ship unseaworthy. See *In re Liberty Shipping Corp.*, 509 F.2d 1249 (9th Cir. 1975) (sustaining a lower court's finding that failure to properly train the crew to use fire equipment made the ship unseaworthy); *Complaint of Ta Chi Navigation (Panama) Corp.*, 504 F. Supp. 209 (S.D.N.Y. 1980) ("term 'seaworthiness' . . . means the reasonable fitness of the ship for her intended use[,] encompassing not only the ship herself but those who man her"), *rev'd on other grounds*, 677 F.2d 225 (2d Cir. 1982). In the context of AIDS, if a shipowner fails to adequately educate the crew regarding the dangers of AIDS or fails to warn the crew regarding the dangers of a port which the shipowner knows to be of high risk, a seaman could arguably have a Jones Act claim.

42. 46 U.S.C. §§ 11,102(a), 11,103 (1988).

43. 46 U.S.C. § 11,103 (1988).

44. 46 U.S.C. § 11,103(a) (1988).

45. 46 U.S.C. § 11,103 (1988).

46. See *Joshua Henty Corp. v. Clavel*, 189 F.2d 37 (9th Cir. 1951).

### C. Maintenance and Cure

Unlike unseaworthiness and the Jones Act, maintenance and cure subjects the shipowner to liability for the health of the crew without regard to fault, thus giving the shipowner a lesser opportunity to avoid liability.<sup>47</sup> "[L]ogically and historically the duty of maintenance and cure derives from a seaman's dependence on his ship, not from his disability, *not from anyone's fault.*"<sup>48</sup> Maintenance requires the shipowner to provide food and lodging for ill or injured seamen, while cure requires the shipowner to provide necessary medical services.<sup>49</sup> The duty to pay both maintenance and cure lasts until the seaman reaches the point of maximum medical recovery.<sup>50</sup> Injuries or illnesses contracted on land while a seaman is in the service of the ship may also impose a duty upon the shipowner to pay maintenance and cure.<sup>51</sup> Thus, an HIV-positive seaman may have a valid cause of action against a shipowner despite the shipowner's complete lack of fault.<sup>52</sup> The doctrine of maintenance and cure provides a powerful remedy because it creates a maritime lien of the highest priority<sup>53</sup> and imposes on the shipowner an obligation which does not terminate, even during the pendency of the shipowner's bankruptcy proceedings.<sup>54</sup>

This liability, considered in light of the AIDS epidemic, threatens to place a tremendous burden on U.S. shipowners. The doctrine may require them, alone, to pay the substantial medical costs of AIDS as it affects the maritime industry.<sup>55</sup>

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47. Shipowners can always reduce their risk of liability under maintenance and cure by ensuring that the crew is healthy. Education and proper medical, hygienic, and prophylactic supplies can benefit both the seamen and shipowners, thus reducing health risks for the industry as a whole.

48. *Farrell v. United States*, 336 U.S. 511, 515 (1949) (construing *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 730 (1943)).

49. *Calmer S.S. Corp. v. Taylor*, 303 U.S. 525, 528 (1938).

50. *E.g.*, *id.* at 530; *Vaughn v. Atkinson*, 369 U.S. 527, 531 (1962).

51. *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943).

52. *See Brown v. State of Alaska*, 816 P.2d 1368, 1371 (Alaska 1991) (citing G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 6-6 (2d ed. 1975)).

53. *The Osceola*, 189 U.S. 158 (1903); *Fredelos v. Merritt-Chapman & Scott Corp.*, 447 F.2d 435, 438-39 (5th Cir. 1971) (noting that "wages and maintenance and cure are entitled to the two highest categories of lien priority").

54. *See In re Sea Ray Marine Servs., Inc.*, 105 B.R. 12 (Bankr. E.D. La. 1989).

55. Formerly, the United States Public Health Service hospitals provided medical services to seamen at no cost to either shipowners or seamen. JOHN J. HANLON & GEORGE E. PICKETT, *PUBLIC HEALTH: ADMINISTRATION AND PRACTICE* 34-36 (8th ed. 1984). Congress eliminated these medical services through the Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, § 987, 95 Stat. 357, 603 (1981) (codified as amended at 42 U.S.C. § 248(b) (1988)).

## IV. EMPLOYMENT DISCRIMINATION

For many HIV-positive sailors, the traditional remedy of maintenance and cure will not address what may become their most prevalent legal problem—employment discrimination.<sup>56</sup> Shipowners, unsure about the limit of their liability for the maintenance and cure of an infected crew member, may inquire into the seaman's HIV status before hiring. Shipowners may believe that they have a special need to know an individual's HIV status. These shipowners may attempt to take advantage of an exception to liability under the doctrine of maintenance and cure which denies recovery to a seaman who lies about a pre-existing condition and then seeks maintenance and cure for the treatment of that condition.<sup>57</sup>

A. *The Applicability of Federal Antidiscrimination Laws to Seamen*

Article III of the Constitution extends the judicial power of the United States "to all Cases of admiralty and maritime Jurisdiction."<sup>58</sup> Pursuant to this provision, Congress enacted the Judiciary Act of 1789 which granted federal district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."<sup>59</sup> Thus, the Judiciary Act of 1789 allows a plaintiff to bring a maritime claim in either state or federal court.

A seaman's contract for employment is a maritime contract

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For a brief summary of the history of the Public Health Service hospitals, see note 228.

56. At least one shipowner has dismissed a seaman solely on the basis of his HIV status. See Tracy Reddick, *Act-Up Protests HIV*, ST. PETERSBURG TIMES, Sept. 15, 1992, Community Times Section, at 1.

57. *Quiming v. International Pac. Enters., Ltd.*, 773 F. Supp 230, 235 (D. Haw. 1990); *Gray v. Bernuth, Lembecke Co.*, 88 F. Supp. 586, 587-88 (E.D. Pa. 1949). *But see* *Ahmed v. United States*, 177 F.2d 898 (2d Cir. 1949) (holding that a seaman's failure to disclose his prior hospitalization for tuberculosis did not preclude recovery for maintenance and cure where seaman had a good faith belief that he was well enough to perform his duties); *Lindquist v. Dilkes*, 127 F.2d 21 (3d Cir. 1942) (holding that a seaman's failure to disclose that he had an enlarged prostate did not preclude recovery for maintenance and cure after hypertrophy of the prostate subsequently disabled him).

58. U.S. CONST. art. III § 2.

59. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76 (1789) (current version at 28 U.S.C. § 1331, 1652 (1990)).

within the federal maritime jurisdiction.<sup>60</sup> However, this does not necessarily mean that federal employment laws governs maritime employment contracts. The seminal case for analyzing which maritime contracts are governed by federal, rather than state, law is *Wilburn Boat Co. v. Fireman's Insurance Co.*<sup>61</sup>

### 1. Analytical Framework

In *Wilburn Boat*, the insured had breached a warranty to use a vessel solely for private pleasure by engaging in the commercial carriage of passengers.<sup>62</sup> When the insured placed a claim for damages due to the destruction of the vessel by fire, the insurer refused to pay, claiming that the breach of warranty voided the policy.<sup>63</sup> The district court reasoned that because marine insurance contracts are within admiralty jurisdiction, federal admiralty law governed the validity of the warranties.<sup>64</sup> The court of appeals affirmed, but the Supreme Court reversed:

Since the insurance policy here sued on is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction. But it does not follow, as the courts below seemed to think, that every term in every maritime contract can only be controlled by some federally defined admiralty rule. In the field of maritime contracts as in that of maritime torts, the National Government has left much regulatory power in the States. . . . [T]his state regulatory power, exercised with federal consent or acquiescence, has always been particularly broad in relation to insurance companies and the contracts they make.

Congress has not taken over the regulation of marine insurance contracts and has not dealt with the effect of marine insurance warranties at all; hence there is no possible question here of conflict between state law and any federal statute. But this

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60. The English High Court of the Admiralty has adjudicated wage disputes arising out of maritime employment contracts from very early times. See e.g., *The Courtney*, 1810 Edw. Adm. 239. The U.S. district courts have never doubted their jurisdiction over maritime contracts. E.g., *De Lovio v. Boit*, 7 F. Cas. 418, 444 (C.C.D. Mass. 1815) (No. 3776) (where Justice Story declared "without the slightest hesitation . . . that [admiralty and maritime jurisdiction] comprehends all maritime contracts" including "contracts for maritime service"); *Babbel v. Gardner and The Catherine*, Bee's Adm. Rep. 87 (D.S.C. 1796) (suit for wages under employment contract).

61. 348 U.S. 310 (1954).

62. *Id.* at 311.

63. *Id.*

64. *Id.* at 312-13.

does not answer the questions presented, since in the absence of controlling Acts of Congress this Court has fashioned a large part of the existing rules that govern admiralty. And States can no more override such judicial rules validly fashioned than they can override Acts of Congress. Consequently the crucial questions in this case narrow down to these: (1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one?<sup>65</sup>

The Court went on to hold that there was no judicially established rule of federal maritime law governing warranties in maritime contracts, and it declined to establish one.<sup>66</sup> The Court remanded the case for the application of the relevant state law.<sup>67</sup>

The analysis set forth in *Wilburn Boat* can be summarized in a two prong test:<sup>68</sup>

(1) Has Congress taken over the regulation of marine insurance contracts? If so, to what extent has Congress preempted state regulations in the area?

(2) If there is no controlling act of Congress, is there a judicially established federal admiralty rule of law governing the issue? If not, should the courts fashion one? Note that this prong is reached only if the answer to the first one is negative.

## 2. Marine Employment Contracts and Federal Preemption

To determine if federal law applies to marine employment contracts, the first step is to see whether Congress has overtaken the regulation of marine employment contracts. Certainly, Congress has passed legislation which regulates employment discrimination: Congress has enacted both the Rehabilitation Act of 1973<sup>69</sup> and the Americans with Disabilities Act of 1990.<sup>70</sup>

The two acts reflect a congressional intent to increase employment opportunities for the handicapped. With the Rehabilitation Act, Congress "determined that it would require [employers] to bear the costs of providing employment for the handicapped as a

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65. *Id.* at 313-14 (citations and footnotes omitted).

66. *Id.* at 316-21.

67. *Id.* at 321.

68. *Id.*

69. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394 (current version at 29 U.S.C. § 794 (1988)).

70. Americans with Disabilities Act of 1990, 42 U.S.C. § 12,101 (Supp. II 1990).

*quid pro quo* for the receipt of federal funds.”<sup>71</sup> The ADA, however, is not so limited in its scope:<sup>72</sup> it requires all employers with more than 15 employees to bear the costs of providing employment for handicapped persons.<sup>73</sup> Thus, taken collectively, these acts demonstrate a congressional intent to stop discrimination against handicapped persons and to place the costs of employing handicapped individuals on the employer.

To exempt marine employment contracts from coverage of these acts would be inconsistent with the congressional policy behind them. Considering that Congress provides subsidies to U.S. ship owners to encourage the building of more ships<sup>74</sup> and considering Congress’s *quid pro quo* approach discussed above, the conclusion that federal antidiscrimination statutes govern marine employment contracts seems especially appropriate.

### 3. Preemption Analysis

The answer to the first question being affirmative, the issue becomes whether and to what extent the federal legislation preempts state antidiscrimination laws. “In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress.”<sup>75</sup>

Of course, a congressional intent to preempt may be express or implied. When acting pursuant to the Constitution, Congress has the power to preempt state law in express terms.<sup>76</sup> Additionally, a court may reasonably infer a congressional intent to preempt state laws in three situations: (1) When the scheme of federal regulation in a particular area is so comprehensive and pervasive that it makes “reasonable the inference that Congress ‘left no room’ for

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71. Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 633 n.13 (1984).

72. See *Ellenwood v. Exxon Shipping Co.*, Nos. 92-1473, 92-1474, 1993 U.S. App. LEXIS 362, at \*19 n.9 (1st. Cir. Jan. 14, 1993) (noting that the ADA has a “far more comprehensive reach” than the Rehabilitation Act).

73. Currently the ADA applies to all employers who have at least 25 employees, but after July 26, 1994, it will apply to all employers who have 15 or more employees. 42 U.S.C. § 12,111 (5)(A) (Supp. II 1990); 42 U.S.C. § 12,111 note (Supp. II 1990) (Effective Date).

74. See *infra* note 122.

75. *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 280 (1987) (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983); *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

76. *E.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).



supplementary state regulation";<sup>77</sup> (2) when the subject matter "demand[s] exclusive federal regulation in order to achieve uniformity vital to national interests";<sup>78</sup> or (3) when Congress does not completely displace state regulation, but compliance with both state and federal regulations is a "physical impossibility"<sup>79</sup> or the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objects of Congress."<sup>80</sup>

The ADA contains explicit language regarding preemption. It provides that courts should not construe the ADA

to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.<sup>81</sup>

Thus, with respect to the ADA, Congress has expressly chosen not to preempt state law provided the state law provides greater or equal protection than the ADA.

Unlike the ADA, the Rehabilitation Act contains no provision that expresses a congressional intent for either preemption or non-preemption.<sup>82</sup> Thus, the Rehabilitation Act will not preempt state statutes unless a congressional intent for preemption can be inferred. Because the Act contains explicit limitations on the scope of its application,<sup>83</sup> one cannot reasonably conclude that Congress left "no room" for state regulation.<sup>84</sup> Furthermore, preventing dis-

77. *California Federal*, 479 U.S. at 281 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

78. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963).

79. *Id.* at 142-43.

80. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

81. 42 U.S.C. § 12201 (b) (Supp. II 1990).

82. *Ellenwood v. Exxon Shipping Co.*, Nos. 92-1473, 92-1474, 1993 U.S. App. LEXIS 362, at \*19 n.9 (1st. Cir. Jan. 14, 1993).

83. See *infra* text accompanying notes 119-24.

84. See *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987); see also, e.g., *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 444-48 (1960) (holding that federal inspections laws designed to protect against the perils of maritime navigation did not so preempt the field as to leave no room for local regulation).

Note that in *Ellenwood v. Exxon Shipping Co.*, Nos. 92-1473, 92-1474, 1993 U.S. App. LEXIS 362, at \*10-13 (1st Cir. Jan. 14, 1993), Exxon argued that "while Congress has not fully occupied the field of handicap discrimination, . . . it has 'left no room for supplementary state regulation.'" *Id.* at \*10 (citations omitted). In support of its argument, Exxon pointed to language in the legislative history behind the Rehabilitation Act:

"It is intended that sections 503 and 504 be administered in such a manner that a consistent, uniform, and effective Federal approach to discrimination

crimination against the handicapped does not demand exclusive federal regulation, nor does it require uniform regulation vital to national interests.<sup>85</sup> The ADA expressly states a willingness to tolerate state legislation, and while the 1990 act "can have no effect on our view of Congressional intent in 1973, it is a particularly pertinent example of Congress's historical practice of allowing overlapping remedies for employment discrimination."<sup>86</sup> Thus, it would seem unreasonable to infer a Congressional intent for the Rehabilitation Act to preempt state antidiscrimination laws. The more logical conclusion is that Congress intended the states to assist in the elimination of discrimination against handicapped persons.<sup>87</sup>

There may be, however, a conflict between state and federal laws.<sup>88</sup> "[W]here Congress has not entirely displaced state regula-

against handicapped persons would result. Thus, Federal agencies and departments should cooperate in developing standards and policies so that there is a uniform, consistent Federal approach to these sections."

*Id.* at \*11 (quoting S. REP. No. 1297, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6391). Section 503 requires that any contract with the federal government in excess of \$2500 must include a provision obligating the federal contractor to "take affirmative action to employ and advance in employment qualified individuals with handicaps." 29 U.S.C. § 793(a) (1988).

The court of appeals pointed out that section 503 must be read in the context of the Senate report which went on to say:

"The Secretary of the Department of Health, Education, and Welfare, because of that Department's experience in dealing with handicapped persons and with the elimination of discrimination in other areas, should assume responsibility for coordinating the section 504 enforcement effort and for establishing a coordinating mechanism with the Secretary of the Department of Labor to ensure a consistent approach to the implementation of sections 503 and 504."

*Ellenwood*, 1993 U.S. App. LEXIS 362, at \*12 (quoting S. REP. No. 1297, *supra*, reprinted in 1974 U.S.C.C.A.N. 6373, 6391).

The court of appeals rejected Exxon's argument and concluded that "Congress was calling for a more uniform and consistent 'Federal approach to discrimination against handicapped persons'; nothing in the passage indicates that it was seeking to eliminate any role for the state." *Ellenwood*, 1993 U.S. App. LEXIS 362, at \*12 (quoting S. REP. No. 1297, *supra*, reprinted in 1974 U.S.C.C.A.N. 6373, 6391) (citations omitted) (emphasis deleted). The court of appeals noted that its decision was consistent with that in *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474, 1482 (7th Cir. 1985) (noting that Congress was insisting on coordination when it required "the two responsible agencies were not to work at cross purposes or to duplicate each other's efforts").

85. See *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963).

86. *Ellenwood*, 1993 U.S. App. LEXIS 362, at \*19.

87. See *Smith v. Lake City Nursing Home*, 771 F. Supp. 985, 987 (D. Minn. 1991) (holding that although a Minnesota Workers' Compensation Act "provides some relief against an injured employee, Section 504 of the Rehabilitation Act creates a supplemental remedy for discrimination").

88. As discussed *infra* notes 119-24, the application of the Rehabilitation Act turns on whether the employer receives federal funds while that of the ADA turns on the number of employees. States should have the opportunity to regulate those employers not governed by

tion in a specific area, state law is preempted to the extent that it actually conflicts with federal law."<sup>89</sup> A conflict analysis would depend upon the state law and the issues involved. For purposes of this Comment, it is sufficient to note Congress's willingness to tolerate and its possible endorsement of state law in the area of antidiscrimination.

### *B. The Rehabilitation Act of 1973*

Section 504 of the Rehabilitation Act of 1973 currently provides:

No otherwise qualified individual with handicaps . . . shall, solely by reason of her or 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 . . . .<sup>90</sup>

The Rehabilitation Act defines a handicapped individual as one:

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.<sup>91</sup>

Congress, however, amended the Act in 1987 to exclude protection for any individual:

who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.<sup>92</sup>

The Department of Health and Human Services promulgated regulations to carry out provisions of the Act.<sup>93</sup> These regulations define a "physical or mental impairment" to include "any physio-

either of these acts. Of course, the states can also have concurrent jurisdiction, and if the states provide greater protection for the employees, they should be able to regulate even those employers governed by the federal acts. *See supra* text accompanying note 81.

89. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation Comm'n*, 461 U.S. 190, 204 (1983).

90. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794(a) (1988)).

91. 29 U.S.C. § 706(8)(B) (Supp. II 1990).

92. 29 U.S.C. § 706(8)(D) (Supp. II 1990).

93. *See* 45 C.F.R. § 84 (1991) (promulgated pursuant to 29 U.S.C. § 794(a) (1988)).

logical disorder or condition . . . affecting one or more of the following body systems: neurological; . . . respiratory; . . . hemic and lymphatic; skin; and endocrine."<sup>94</sup> The regulations also define "major life activities" to include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>95</sup>

The Rehabilitation Act protects only those handicapped persons who are "otherwise qualified" for the job.<sup>96</sup> The regulations provide that one is "otherwise qualified" if, with reasonable accommodation, one can perform the essential functions of the job.<sup>97</sup>

Though the Act does not specifically address HIV, an individual with AIDS is "handicapped" under the Rehabilitation Act because HIV is a "physiological disorder or condition" that affects the "hemic and lymphatic" systems. In addition, it is likely that one of the "AIDS-defining" illnesses will also affect more than one of the body systems listed.<sup>98</sup> The effects on these body systems often "substantially limit" one or more "major life activities"—especially one's ability to "care for one's self."<sup>99</sup> Furthermore, a seropositive individual who does not display any of the symptoms of AIDS may qualify as handicapped because others may "regard[ ] [the infected person] as having such an impairment."<sup>100</sup> In most cases, neither an individual with AIDS nor one who is seropositive should fall within the "threat to health or safety" exclusion from protection because, though HIV is contagious, the risk of transmission through ordinary daily contact is negligible and avoidable.<sup>101</sup>

The seminal case dealing with the threat to health and safety

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94. 45 C.F.R. § 84.3(j)(2)(i) (1991).

95. 45 C.F.R. § 84.3(j)(2)(ii) (1991).

96. 29 U.S.C. § 794(a) (1988).

97. 45 C.F.R. § 84.3(k)(1) (1991).

98. For example, PCP can affect the respiratory, sight, and skin systems; KS affects the skin system; and Cytomegalovirus (CMV) retinitis affects the visual system. Linda Wasserman & Parvis Haghghi, *Optic and Ophthalmic Pneumocystosis in Acquired Immunodeficiency Syndrome; Report of a Case and Review of the Literature*, 116 ARCH. PATHOL. LAB. MED. 500 (1992), available in LEXIS, Genmed Library, JNLS File.

99. For example, PCP will affect one's ability to walk because it reduces oxygen intake; PCP and severe cases of KS can affect one's ability to work; and CMV retinitis can eventually cause blindness. *Id.*

100. See 29 U.S.C. § 706(8)(B)(iii) (Supp. II 1990).

101. For a discussion on methods and risks of HIV transmission, see *supra* text accompanying notes 23-26.

exclusion is *School Board of Nassau County v. Arline*.<sup>102</sup> There, the Supreme Court held that a teacher fired after her third relapse of tuberculosis was a handicapped person protected by § 504 of the Rehabilitation Act.<sup>103</sup> The Court determined that the teacher suffered from a physical impairment that substantially limited one or more of her "major life activities."<sup>104</sup> The school board argued that it dismissed the teacher because of the risk that she might transmit the disease to students. The Court held that "discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others."<sup>105</sup> For determining when a disease falls within the exclusion for protection, the court endorsed the view of the American Medical Association in stating that the relevant inquiry should include:

facts, based on reasonable medical judgements 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 transferred and will cause varying degrees of harm.<sup>106</sup>

Though the Court explicitly refused to address the question of whether a person with AIDS is "physically impaired" within the meaning of § 504,<sup>107</sup> the Court's analysis is equally applicable to AIDS.<sup>108</sup> Other courts facing the issue consistently hold that a person with AIDS is handicapped and within the protection of the Rehabilitation Act.<sup>109</sup> Commentators also concur.<sup>110</sup>

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102. 480 U.S. 273 (1987).

103. *Id.* at 276-77.

104. *Id.* at 281.

105. *Id.* at 284.

106. *Id.* at 288 (quoting Brief for the American Medical Association as *Amicus Curiae* at 19, *Arline* (No. 85-1277)). These inquiries will be factually dependent.

107. *Id.* at 287.

108. The policy of the Rehabilitation Act is unchanged: "to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitude or the ignorance of others." *Arline*, 480 U.S. at 284. Because the risk of transmitting HIV in ordinary daily contact is negligible, *see supra* note 26 and accompanying text, there is no reason to think the Supreme Court would not have reached the same conclusion in *Arline* if the teacher had been HIV-positive instead of having tuberculosis.

109. *See e.g.*, *Chalk v. United States Dist. Court*, 840 F.2d 701 (9th Cir. 1988) (class-

C. *The Americans with Disabilities Act of 1990*

The Americans with Disabilities Act<sup>111</sup> provides that no employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."<sup>112</sup> The Act defines a disabled person as one who (1) has a "physical or mental impairment that substantially limits one or more of the major life activities of such individual"<sup>113</sup> (2) has a "record of such impairment;"<sup>114</sup> or (3) is "regarded as having such impairment."<sup>115</sup>

The ADA provides basically the same substantive protection as the Rehabilitation Act. Both acts utilize similar three prong tests for defining a disability; they define "physical or mental impairments" in similar manners, and they both extend protection for persons who are "regarded" as handicapped.<sup>116</sup> Both acts also require that the disability affect one or more "major life activities."<sup>117</sup> The ADA, however, more specifically defines activities in which the employer may not discriminate: "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."<sup>118</sup>

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room teacher with AIDS considered handicapped under § 504); *Local 1812, American Fed'n of Gov't Employees v. Department of State*, 662 F. Supp. 50, 54 (D.D.C. 1987) ("[p]ersons who carry HIV may be deemed handicapped in one or both of two ways"—actual physical impairment or perceived impairment); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 381 (C.D. Cal. 1987) (child with AIDS is handicapped under § 504); *District 27 Community Sch. Bd. v. Board of Educ.*, 502 N.Y.S.2d 325 (Sup. Ct. 1986) (holding that children with AIDS are handicapped within meaning of the Rehabilitation Act).

110. See, e.g., Tracy Jackson Smith, *AIDS and the Law: Protecting the HIV-Infected Employee from Discrimination*, 57 TENN. L. REV. 539, 573 (1990) (arguing that *Arline* "clearly supports the conclusion that a symptomatic carrier of HIV is an 'individual with a disability'"); James F. Baxley, *Rehabilitating AIDS-Based Employment Discrimination: HIV Infection as a Handicap Under the Vocational Rehabilitation Act of 1973*, 19 SERON HALL L. REV. 23, 37-38 (1989).

111. 42 U.S.C. § 12,101 (Supp. II 1990).

112. 42 U.S.C. § 12,112(a) (Supp. II 1990). The ADA adopted the same substantive standards as the implementing regulations of the Rehabilitation Act.

113. 42 U.S.C. § 12,102(2)(A) (Supp. II 1990).

114. 42 U.S.C. § 12,102(2)(B) (Supp. II 1990).

115. 42 U.S.C. § 12,102(2)(C) (Supp. II 1990).

116. 29 U.S.C. § 706(8)(B) (Supp. II 1990); 42 U.S.C. § 12,102(2) (Supp. II 1990).

117. 29 U.S.C. § 706(8)(B) (Supp. II 1990); 42 U.S.C. § 12,102(2)(A) (Supp. II 1990).

118. 42 U.S.C. § 12,112(a) (Supp. II 1990).

The greatest difference between the Rehabilitation Act and the ADA is in the scope of their application. The ADA currently applies to all employers who have at least 25 employees.<sup>119</sup> After July 26, 1994, it will apply to all employers who have at least 15 employees.<sup>120</sup> In contrast, the Rehabilitation Act applies only to those employers who receive "[f]ederal financial assistance."<sup>121</sup> Though they are different in scope, both acts are problematic in their application to the shipping industry. First, not all shipowners receive federal funds,<sup>122</sup> and so the Rehabilitation Act does not apply to all shipowners. The ADA may have greater application to the U.S. shipping industry, but there are still many employers who fall outside the scope of the Act because they have fewer than 15 employees.<sup>123</sup> In addition, as ships become more technologically advanced, crew sizes decrease.<sup>124</sup> Hence, there may be a trend for employers to fall outside the scope of the ADA.

#### D. State Protection for Employees

State antidiscrimination laws may also offer protection to seamen. State laws may apply when federal laws do not reach an employment relationship, or they may apply coextensively with federal laws. A survey of state laws reveals that seamen can expect inconsistent treatment in various states.

Nearly every state and the District of Columbia have enacted statutes that prohibit discrimination against handicapped persons.<sup>125</sup> Most states consider AIDS discrimination a violation of

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119. 42 U.S.C. § 12,111 (5)(A) (Supp. II 1990).

120. 42 U.S.C. § 12,111 (5)(A) (Supp. II 1990); 42 U.S.C. § 12,111 note (Supp. II 1990) (Effective Date).

121. 29 U.S.C. § 794(a) (1988).

122. Congress provides subsidies to operators of U.S. merchant vessels to encourage them to build more ships. See Thomas W. Lippman, *Build-Aboard Ship Subsidies Plan Advances*, WASH. POST, Dec. 11, 1982, at D10; Michael Wines, *Congress Pulls a Prop Supporting U.S. Shipbuilding Industry*, 14 NAT'L J. 2143, 2143 (1982) ("Since 1936, America's sickly merchant marine has been buoyed by an elaborate network of federal programs, all aimed at funnelling business to the U.S. firms that build ships and the U.S. companies that sail them."); Doan, *supra* note 6, at 43 ("Now that Congress has authorized firms to buy vessels abroad without losing operating subsidies, U.S. shippers have been quick to respond [by signing up for federal subsidies].").

123. See 42 U.S.C. § 12,111(5)(A) (Supp. II 1990).

124. MICHAEL MARSHALL, *OCEAN TRADERS* 184 (1990).

125. See Arthur S. Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681, 689-96 (1985).

their statutes,<sup>126</sup> including the major maritime states: Florida,<sup>127</sup> New York,<sup>128</sup> Massachusetts,<sup>129</sup> Maryland,<sup>130</sup> California,<sup>131</sup> Connecticut, Maine, New Jersey, Illinois, Michigan, and Washington.<sup>132</sup> A few states, including Texas and North Carolina, have refused to recognize AIDS as a handicap under their laws.<sup>133</sup> Georgia has a statutory provision that excludes contagious diseases from protection, but it is not clear that this exclusion will apply to AIDS.<sup>134</sup>

While most states prohibit discrimination against employees with AIDS, the treatment is far from uniform. The states are also not uniform with respect to their treatment of seropositive individuals. Thus, we cannot depend on the states to provide comprehensive protection "to ensure that infected individuals have equal access to opportunities for basic necessities such as private employment."<sup>135</sup>

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126. See Brent L. Wilson & Karen L. Wingo, *AIDS in the Workplace: Handicap Discrimination Laws and Related Statutes*, 9 J. LEGAL MED. 573, 579 (1988) (reporting that according to a survey in 1987, 34 states considered AIDS discrimination a violation of their handicap laws).

127. See *Shuttleworth v. Broward County*, 639 F. Supp. 654 (S.D. Fla. 1986) (holding that AIDS discrimination suits may be brought under both the Florida Human Rights Act, FLA. STAT. ch. 760 (1992), and Article I, § 2 of the Florida Constitution).

128. See *People v. 49 W. 12th St. Tenants Corp.*, No. 83-43604 (N.Y. Sup. Ct. Oct 7, 1983).

129. *Cronan v. New England Tel. Co.*, 41 Fair Empl. Prac. Cas. (BNA) ¶ 1273 (Mass. Super. Ct. 1986).

130. *Maryland Rights Agency Adds HIV Infection to Definition*, Daily Labor Rep. (BNA) No. 77, at A-12 (Apr. 21, 1988).

131. *Raytheon Co. v. Fair Employment and Housing Comm'n*, 212 Cal. App. 3d 1242 (Cal. Ct. App. 1989) (holding AIDS is a physical handicap under both state and federal law).

132. Note, *AIDS and Employment Discrimination: Should AIDS be Considered a Handicap?*, 33 WAYNE L. REV. 1095, 1105 n.81 (1987) (listing Connecticut, Maine, New Jersey, Illinois, Michigan, and Washington as regarding AIDS discrimination violative of state statutes); see also Robert Pear, *States' AIDS Discrimination Laws Reject Justice Department Stand*, N.Y. TIMES, Sept. 17, 1986, at A20.

133. *Hilton v. Southwestern Bell Tel. Co.*, 936 F.2d 823 (5th Cir. 1991) (ruling that the Texas statute, TEX. HUM. RES. CODE ANN. § 121. (West 1993), does not recognize AIDS-infected individuals as handicapped), cert. denied, 112 S. Ct. 913 (1992); *Burgess v. Your House of Raleigh, Inc.*, 388 S.E.2d 134 (N.C. 1990) (holding that a North Carolina statute does not protect an HIV-positive individual who does not have any physical or mental impairments).

134. See GA. CODE ANN. §34-6A-2(3) (Michie 1982) (excluding contagious diseases).

135. Edward E. Hollowell & James E. Eldridge, *Subsistence, Equal Opportunity, and the Individual Diagnosed with HIV*, 9 J. LEGAL MED. 561, 568 (1988).



## V. THE SHIPOWNER'S DILEMMA

The shipowner/employer faces a "Hobson's choice" when deciding whether to hire an HIV-positive seaman. The law may force an employer who hires a seaman to provide maintenance and cure should the seaman become ill while in the employ of the ship. Alternatively, the employer may decide to discriminate against the individual and face liability under federal or state antidiscrimination laws. A thorough understanding of HIV, AIDS, and potential liabilities can help the shipowner chart a course between this legal Scylla and Charybdis.

A. *Doctrinal Analysis of Maintenance and Cure*

Because no caselaw exists that specifically applies the doctrine of maintenance and cure to AIDS,<sup>136</sup> a doctrinal analysis of maintenance and cure is necessary to understand how courts might treat the issue. The maritime community had expected an avalanche of AIDS cases,<sup>137</sup> but this has not yet occurred.

In *Aguilar v. Standard Oil Company*<sup>138</sup> the Supreme Court noted that the shipowner's duty to pay maintenance and cure was among the "most pervasive" of all and that courts should not narrowly confine the duty through restrictive definitions.<sup>139</sup> Justice Rutledge wrote for a unanimous court:

Created thus with the contract of employment, the liability, . . . in no sense, is predicated on the fault or negligence of the shipowner. Whether by traditional standards he is or is not responsible for the injury or sickness, he is liable for the expense of curing it as an incident of the marine employer-employee relationship. So broad is the shipowner's obligation, that negligence or acts short of culpable misconduct on the seaman's part will not relieve him of the responsibility. Conceptions of contributory negligence, the fellow-servant doctrine, and assumption of the risk have no place in the liability or defense against it. Only some willful misbehavior or deliberate act of indiscretion suffices

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136. The authors searched the following online databases: LEXIS, Admiralty (Mega File, AMC File), GenFed (Mega File); Westlaw, Maritime (FMRT-CS, FMRT-FMC, WTH-MRT).

137. Mellman, *supra* note 5 at 118.

138. 318 U.S. 724 (1943).

139. *Id.* at 730.

to deprive the seaman of his protection.<sup>140</sup>

Justice Rutledge's discussion on this traditional maritime doctrine comports with society's growing dependency upon the employer for health insurance.<sup>141</sup>

An employer has three potential defenses against a claim for maintenance and cure. First, an employer may assert that the seaman has engaged in willful misconduct. Second, the employer may argue that the seaman was not injured in the course of the ship's service. Third, the employer may argue that the disease is incurable and thus, that the employee can no longer collect maintenance and cure.<sup>142</sup>

### 1. Willful Misconduct

A seaman need only show contraction or manifestation of a disease during the course of employment to establish a prima facie claim for maintenance and cure.<sup>143</sup> Willful misconduct on the part of the seaman, however, will rebut the claim, provided that the misconduct caused the particular illness or injury for which the seaman seeks recovery.<sup>144</sup> Since willful misconduct constitutes a defense to maintenance and cure, the shipowner has the burden of proof.<sup>145</sup>

Lower courts have variously defined willful misconduct. In

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140. *Id.* at 730-31 (citations and footnotes omitted).

141. Traditionally shipowners have a high duty to protect seamen because by their nature, seamen are isolated from the rest of the world. *Cf.* HANLON & PICKET, *supra* note 55, at 33. Seamen are often away from the traditional support and risk sharing institutions such as family, church, and community. Communities and church groups used to share the burdens of a crisis, but today, individuals rely more on employer-provided health insurance, especially since family size has shrunk, church attendance has fallen, and communities have become less cohesive. Thus, the growing dependency on the employer for health insurance may reflect that the rest of society is, in a metaphorical sense, "dropping the pilot."

142. *See infra* part V.A.3.

143. *See* Farrell v. United States, 336 U.S. 511, 516 (1949); Musgrave v. Bronx Towing Line, Inc., 219 F. Supp. 918, 921 (S.D.N.Y. 1963); *see also* Gore v. Maritime Overseas Corp., 256 F. Supp. 104 (E.D. Pa. 1966) (shipowner held liable for seaman's back condition that arose during the seaman's employment where the cause was unknown).

144. *Farrell*, 336 U.S. at 516; *see also* Zambrano v. Moore-McCormack Line, 131 F.2d 537 (2d Cir. 1942).

145. *Vandinter v. American S.S. Co.*, 387 F. Supp. 989, 990 (W.D.N.Y. 1975) ("defendant [shipowner] has failed to carry its burden of proving that the plaintiff was guilty of such willful disobedience of orders"); *Gulledge v. United States*, 337 F. Supp. 1108, 1112 (E.D. Pa. 1972) ("Once plaintiff showed that his injuries occurred while in the service of defendant's vessel, to defeat recovery for maintenance and cure, the burden was on defendant to prove that plaintiff was guilty of gross misconduct.").

*Koistinen v. American Export Lines, Inc.*,<sup>146</sup> the court held that a seaman could recover maintenance and cure for injuries sustained when he jumped out of the second story window of a brothel to avoid being beaten by the madam's body guard.<sup>147</sup> The *Koistinen* court specifically found that the seaman had not committed willful misconduct,<sup>148</sup> but another court, in a nearly identical case found that the seaman had committed willful misconduct.<sup>149</sup>

Some courts have held that a failure to report a preexisting medical condition constitutes willful misconduct when such information might have caused the shipowner not to hire the seaman.<sup>150</sup> This defense, however, may not be available when a seaman fails to disclose his or her HIV-positive status. Persons with AIDS are protected as handicapped under federal and state laws, and therefore, employers may not discriminate against such persons unless their handicaps renders them incapable of performing the requisite duties of the job.<sup>151</sup> If a seaman were to disclose his or her HIV status, the employer could not use the information in its employment decisions.<sup>152</sup> Furthermore, mere HIV positivity does indicate that one is incapable of fulfilling the duties of a job.<sup>153</sup> If the employer cannot use the information as a basis to not hire the seaman, and if the information is not indicative of the employee's ability to perform the job, then the refusal to reveal the information should not serve as a defense for willful misconduct.

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146. 194 Misc. 942 (N.Y. City Ct. 1948).

147. *Id.* at 943-44. In the words of the court, Koistinen was tossed between the horns of a most dire dilemma, to wit, the man in the doorway and the window, the plaintiff eyeing the one with the duller point, elected the latter means of egress undoubtedly at the time laboring under the supposition that he was about to be used as roughly as the other man in a badger game . . . ." *Id.*

148. *Id.* at 946-47. "Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection." *Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724, 731 (1943).

149. *Matthews v. Gulf & South American S.S. Co., Inc.*, 339 F.2d 702, 702 (5th Cir. 1964).

150. *See, e.g., Tawada v. United States*, 162 F.2d 615 (9th Cir. 1947); *Ward v. American President Lines*, 95 F. Supp. 609 (N.D. Cal. 1951). *But see Ahmed v. United States*, 177 F.2d 898 (2d Cir. 1949) (seaman with tuberculosis given relief despite his failure to report that he had received treatment four months prior to accepting the job).

151. *See supra* parts IV.B-D.

152. *See infra* part V.C. Inquiry into an employee's HIV status would, therefore, constitute strong evidence of discriminatory intent. *See Wilson & Wingo, supra* note 126, at 579.

153. *See supra* part II.

Courts have often used vice<sup>154</sup> as the yardstick of willful misconduct. For example, courts have denied maintenance and cure for injuries resulting solely from a seaman's intoxication on the grounds that the seaman's willful misconduct caused the injuries.<sup>155</sup> Similarly, some courts have refused maintenance and cure for venereal disease, invariably citing a reluctance to encourage vice.<sup>156</sup>

Courts must exercise caution when using vice as the measure of willful misconduct, because two of the principal methods for transmitting HIV relate to vice.<sup>157</sup> A seaman could contract HIV through sex or through sharing needles while using intravenous drugs. A shipowner who could show that the seaman contracted the virus through either of these two examples might escape liability. Unlike venereal diseases such as syphilis or herpes, the symptoms of AIDS do not appear for years,<sup>158</sup> and testing may not detect the virus for months or even years.<sup>159</sup> Therefore, a shipowner will have great difficulty proving that the seaman contracted the disease through any specific activity. Indeed, even the seaman may not know the method of contraction. Unless the shipowner carries its burden of proving willful misconduct, a finder of fact should not deny maintenance and cure.

Furthermore, shipowners cannot assert the defense of willful misconduct in all cases of vice. Willful misconduct "contemplates the intentional doing of something *with the knowledge that it is likely to result in serious injuries*, or with reckless disregard of its probable consequences."<sup>160</sup> In *Garay v. Carnival Cruise Line, Inc.*,<sup>161</sup> seamen on board the ship commonly drank to excess while the master of the vessel turned a blind eye. When a seaman's intoxication led to injury and the shipowner asserted the defense of willful misconduct, the court nonetheless awarded the seaman

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154. Vice is defined as immoral conduct, practice, or habit. BLACK'S LAW DICTIONARY 1566 (6th ed. 1990).

155. *Barlow v. Pan Atlantic S.S. Corp.*, 101 F.2d 697, 698 (2d Cir. 1939); *The S.S. Berwindglen*, 88 F.2d 125, 127 (1st Cir. 1937); *Lortie v. American-Hawaiian S.S. Co.*, 78 F.2d 819, 821 (9th Cir. 1935); *Victoria v. Luckenbach Steamship Co.*, 141 F. Supp. 149 (S.D.N.Y. 1956).

156. See *Ressler v. States Marine Lines, Inc.*, 517 F.2d 579 (2d Cir. 1975), *cert. denied*, 423 U.S. 894 (1975); *Zambrano v. Moore-McCormack Line*, 131 F.2d 537 (2d Cir. 1942).

157. See *supra* notes 23-26 and accompanying text.

158. See *supra* note 22 and accompanying text.

159. See generally *Banks & McFadden*, *supra* note 20.

160. BLACK'S LAW DICTIONARY 1600 (6th ed. 1990) (emphasis added).

161. 904 F.2d 1527 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1072 (1991).

maintenance and cure.<sup>162</sup> The court reasoned that the seaman had not committed willful misconduct because the shipowner had neither warned the seamen of the dangers of intoxication nor prohibited it.<sup>163</sup> Thus, shipowners cannot escape their obligation to pay maintenance and cure when the shipowner knows that the crew regularly engages in a dangerous practice but takes no action to either warn of the dangers or to prohibit the activity.

Because of the isolated nature of sea duty, courts cannot reasonably expect seamen to be as fully aware of the dangers of certain types of behavior as a land-locked person would be.<sup>164</sup> Where a shipowner fails to provide AIDS education and fails to prohibit high-risk behavior, courts might deny the shipowner the defense of willful misconduct. Shipowners, however, can shore up their defense by providing AIDS education<sup>165</sup> and by establishing rules prohibiting risky behavior while in the service of the ship.<sup>166</sup> Indeed, AIDS education would help reduce the risk of transmitting HIV and help the employer avoid liability. Additionally, courts may look more favorably upon those shipowners who take measures to educate and protect seamen who have been said to be endowed with "invincible ignorance."<sup>167</sup>

## 2. In the Service of the Ship

A seaman seeking maintenance and cure must prove that the injury arose, or alternatively that the illness manifested itself, dur-

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162. *Id.* at 1532.

163. *Id.* at 1531 ("Where the crew is permitted to drink, even to the point of drunkenness, and the ships's captain and officers are aware that crew members have been, are, and will be drunk on board, and the ship does not prohibit such behavior on the part of the crew, we cannot say that a seaman who indulges in intoxicating liquors is engaging in 'willful misconduct' that is 'positively vicious' or the deliberate disobedience of orders.").

164. Seamen do not have access to the media's coverage of AIDS or the education offered to land-locked society because of the transient and isolated nature of their work. *Cf. HANLON & PICKET, supra* note 55, at 33.

165. Given the special care which shipowners must exercise for their employees, see *supra* notes 29-32 and accompanying text, perhaps shipowners have a special duty to educate seamen on how to avoid contracting HIV and to inform them of those ports which have a reputation of high risk activities or which are located in an areas known to have significant levels of HIV infection.

166. For example, the shipowner could prohibit the use of intravenous drugs while in the service of the ship.

167. Allen R. Kelley, *AIDS and Crewman, Passengers and Shoreside Employees—Defendant's Perspective*, in AIDS, PUBLIC HEALTH AND MARITIME LAW SEMINAR, *supra* note 5.

ing the seaman's service of the ship.<sup>168</sup> Absent willful misconduct, a seaman who can prove that the contraction of the virus occurred while in the employ of the ship should have little difficulty recovering maintenance and cure. The doctrine does not require the seaman to be physically aboard the vessel at the time of the injury or illness because courts consider the seaman to be "in the service of the ship" when ashore, even on liberty, provided the seaman is subject to the master's recall.<sup>169</sup>

Where a seaman contracts an illness during employment on a ship but the illness does not manifest itself until after a seaman leaves the ship's employ,<sup>170</sup> the seaman can nonetheless collect maintenance and cure from the shipowner.<sup>171</sup> A seaman, however, who seeks maintenance and cure for HIV treatment after leaving the employ of a ship must prove contraction of the virus occurred during the employment period. Given the difficulties of proving when the virus was contracted, the employer may be able to escape liability. Moreover, the employer may have an easier time asserting the defense of willful misconduct because the plaintiff must present the circumstances surrounding contraction of the virus.

A more difficult situation arises when a prior illness manifests or re-manifests itself during the seaman's service with the ship. If the seaman can show that the prior condition became aggravated during the service of the ship, the seaman can recover maintenance and cure.<sup>172</sup> In the case of HIV, an infected seaman would have to prove that some injury, condition, or extraordinary occurrence dur-

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168. *Farrell v. United States*, 336 U.S. 511, 516 (1949).

169. *Id.*

170. For a broad discussion of when the shipowner may be liable for injuries that seamen receive while on shore leave or vacation, see Herbert Chemside, Annotation, *Seamen Who Become Sick or Injured on Shore Leave as "In Service of Ship" for Purposes of Maintenance and Cure*, 33 A.L.R. FED. 535 (1991).

171. See *Murphy v. American Barge Line Co.*, 169 F.2d 61 (3d Cir. 1948); *Loverich v. Warner Co.*, 118 F.2d 690 (3d Cir. 1941); *Morris v. United States*, 3 F.2d 588 (2d Cir. 1924); *The W.H. Hoodless*, 38 F. Supp. 432 (E.D. Pa. 1941); see also *De Zon v. American President Lines*, 318 U.S. 660 (1943); *Calmer S.S. Corp. v. Taylor*, 303 U.S. 525 (1938) (holding that a seaman's discharge does not terminate the right to maintenance and cure which should extend for a reasonable time after discharge). But see *Lambos v. The Tammerlane*, 47 F. 822 (N.D. Cal. 1891) (duty to pay maintenance and cure terminates with employment).

172. See *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959) (action for maintenance and cure, Jones Act, and alternatively for breach of duty of unseaworthiness); *Evans v. Schneider Transp. Co.*, 250 F.2d 710, 712 (2d Cir. 1957); *Rey v. Colonial Nav. Co.*, 116 F.2d 580, 583 (2d Cir. 1941) ("If a seaman falls sick while in service, the shipowner is responsible for maintenance and cure, even though the germs of the disease were in his system when he joined the ship.") (citing *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525 (1938)).

ing service with the ship aggravated or hastened the onset of AIDS-related symptoms.<sup>173</sup>

When shipowners deny maintenance and cure, they do so at their own peril. If, in hindsight, a court decides that the shipowner unjustly denied maintenance and cure, the seaman becomes entitled to compensatory damages and in some cases, punitive damages as well.<sup>174</sup> In light of these sanctions, shipowners should pay claims until the seaman stabilizes and until an adequate investigation has been completed. A shipowner who conducts an inadequate investigation is also liable for punitive damages.<sup>175</sup>

### 3. Maximum Medical Cure

Once a court finds the seaman is entitled to maintenance and cure, it must determine the scope of the remedy. In doing so, the court must determine for which treatments the shipowner must pay and how long it must continue payments.

The shipowner's duty to pay maintenance and cure for chronic or incurable illnesses does not extend indefinitely.<sup>176</sup> The duty ends when medical authorities diagnose the affliction as incurable,<sup>177</sup> regardless of whether the injured seaman will continue to require periodic examinations and treatments for life.<sup>178</sup> The Supreme Court announced in *Farrell v. United States*,<sup>179</sup> that a shipowner's duty of payment ends at the point when the seaman's condition reaches maximum medical cure.<sup>180</sup>

The dissent in *Farrell* expressed concern for seamen, who though suffering from debilitating and incurable illnesses, would need further treatment:

[T]he injuries of seamen arising out of the service were made a

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173. Cf. *Sentilles*, 361 U.S. 107 (seaman's tuberculosis reactivated when the seaman washed against the ship's rail in heavy seas). Note that where the work conditions do not contribute to the onset of symptoms, courts may deny recovery. See, e.g., *Miller v. Lykes Bros.-Ripley S.S. Co.*, 98 F.2d 185 (5th Cir. 1938); *Brown v. Dravo Corp.*, 157 F. Supp. 265 (W.D. Pa. 1957).

174. *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir. 1987); *Holmes v. J. Ray McDermott & Co., Inc.*, 734 F.2d 1110 (5th Cir. 1984).

175. *Holmes*, 734 F.2d at 1118.

176. E.g., *Farrell v. United States*, 336 U.S. 511, 515 (1949); *The W.H. Hoodless*, 38 F. Supp. 432 (E.D. Pa. 1941).

177. *Farrell*, 336 U.S. at 517.

178. *Lindgren v. Shepard S.S. Co.*, 108 F.2d 806, 807 (2d Cir. 1940).

179. 336 U.S. 511 (1949).

180. *Id.* at 513.

charge against the enterprise to the extent at least of maintenance and cure. Their maintenance and cure was indeed part of the cost of the business. It is nonetheless a legitimate cost though the expense continues beyond the time when a maximum cure has been effected.<sup>181</sup>

Despite this concern, the Court refrained from imposing the burden of open-ended medical care on shipowners. The Court's value judgment, however, was weighted by the knowledge that the burden of continuing treatments would not fall upon the seaman alone. At the time of the *Farrell* decision, there were federally-funded Public Health Service Hospitals that absorbed much of the costs of treating injured and ill seamen.<sup>182</sup> The amount and extent of the damages awarded to injured plaintiffs often reflected this fact.<sup>183</sup> In 1981, Congress abolished these hospitals,<sup>184</sup> and thus today, the courts must reconsider the values underlying the doctrine which now places the cost of paying for AIDS treatment on the seaman.

In 1975 the Supreme Court reiterated the *Farrell* standard in *Vella v. Ford Motor Co.*<sup>185</sup> the duty to pay "maintenance and cure continues until such time as the incapacity is declared to be permanent."<sup>186</sup> Before Congress abolished the Public Health Service Hospitals, some courts criticized the harshness of the *Farrell* rule.<sup>187</sup> Given that the Supreme Court has not confronted the rule since 1975, and given that the harshness of the rule has increased significantly with the changes in the health system, the Supreme Court may re-evaluate the equities and announce a modified rule when it has the opportunity. Unless and until the Supreme Court modifies the *Farrell* standard, a seaman must work within the doc-

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181. *Id.* at 524 (Douglas, J., dissenting) (footnote deleted).

182. See *supra* note 55; see also *infra* note 228.

183. *Calmer S.S. Corp. v. Taylor*, 303 U.S. 525, 531 (1938) ("[C]ourts take cognizance of the marine hospital service where seamen may be treated at minimum expense, in some cases without expense, and they limit recovery to the expense of such maintenance and cure as is not at the disposal of the seamen through recourse to that service.").

184. See *supra* note 55.

185. 421 U.S. 1 (1975).

186. *Id.* at 5.

187. *Cox v. Dravo Corp.*, 517 F.2d 620, 627 (3d Cir. 1975) (noting that although "[i]t may be sound social policy that vessel and cargo be required to insure against the cost of palliative or preventive care and for maintenance of [incurably ill] seamen," courts must apply the Supreme Court rule announced in *Farrell*); *Desmond v. United States*, 217 F.2d 948, 950 (2d Cir. 1954) (Judge Frank wrote, "The writer of this opinion thinks the ruling unduly harsh; but what he thinks is immaterial (unless, perhaps, it induces the Supreme Court to change the doctrine it has adopted).").



trine as it stands.

Within the context of HIV, the application of this concept is uncertain. AIDS has two aspects: (1) the virus assaults the immune system; and (2) opportunistic infections take advantage of a weakened immune system. Each opportunistic infection has its own etiology, treatment, and prognosis. Courts could apply the concept of maximum medical cure to both the infection of HIV and the opportunistic infections. Therefore, the law would require a shipowner to pay maintenance and cure for an opportunistic infection only until that infection reaches a point beyond which further improvement is not possible. For example, a bout of pneumonia is not incurable, though in a particular case, the patient may have a poor prognosis.<sup>188</sup> If applicable to opportunistic infections, the doctrine of maintenance and cure would require the shipowner to pay for medical treatment until the seaman recovered from the pneumonia, but would not require payment for the continued treatment of HIV if further improvement was not possible.<sup>189</sup>

Allowing the doctrine to distinguish between the virus and the opportunistic infections provides seamen with limited recovery and treatment. This approach also furthers the two general principles that guide courts in making maritime rules: insuring the well-being of seamen and encouraging maritime commerce.<sup>190</sup> The seaman obtains relief to combat the immediate health threat, which may provide time to prepare for coping with the infection. Furthermore, this approach is not unduly burdensome on the shipowner because its liability is limited to treatment of immediate health risks.<sup>191</sup>

When applying the doctrine of maintenance and cure to HIV, the critical issue is whether the disease is incurable, or in other words, whether there is no effective treatment. Because there is some dissension among the medical community over whether HIV positivity will always end in AIDS, the issue of curability may very well come down to a battle of experts with the finder of fact decid-

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188. A poor prognosis will not relieve the shipowner of the duty to pay maintenance and cure for treatment of a beneficial and curative nature. See *infra* note 195 and accompanying text.

189. If the Court abandons the harsh rule in *Farrell*, then distinguishing between HIV and opportunistic infections becomes unnecessary.

190. See, e.g., *Harden v. Gordon*, 11 F. Cas. 480, 483 (C.C.D. Me. 1823) (No. 6,047).

191. Of course, if the seaman leaves the employment of the ship and then develops an opportunistic infection, the distinction between HIV and opportunistic infections becomes irrelevant. The rule of incurability would preclude recovery for the HIV infection, and the service of the ship doctrine would preclude recovery for the opportunistic infection.

ing if a qualified treatment exists for HIV.<sup>192</sup> Some courts have ruled that where extensive controversy exists among medical experts, courts should decide the issue in favor of seamen.<sup>193</sup> Though the dissension in the medical field may not amount to extensive controversy, there is room for discretion, and policy strongly suggests exercising this discretion in favor of the seamen.

Courts must constantly monitor the state of medical knowledge in deciding whether there is an effective treatment for AIDS, especially now when scientists are actively engaged in extensive research and are, as of late, showing some progress.<sup>194</sup> The Supreme Court has intimated that a seaman who has reached maximum medical cure might in the future be entitled to additional benefits if a curative treatment becomes available.<sup>195</sup>

### B. Doctrinal Analysis of Antidiscrimination Acts

The reasonable implication of § 504 of the Rehabilitation Act is that Congress "determined that it would require [employers] to bear the costs of providing employment for the handicapped."<sup>196</sup>

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192. *Breese v. AWI, Inc.*, 823 F.2d 100, 104 (5th Cir. 1987) (holding that the question of when a seaman reaches maximum medical cure is a medical one, not a legal one); *Mroz v. Dravo Corp.*, 293 F. Supp. 499, 508 (W.D. Penn. 1968) ("whether such help was palliative or curative was for the jury to determine").

193. *Vaughan v. Atkinson*, 369 U.S. 527, 532 (1962) ("When there are ambiguities and doubts [about the shipowner's liability for maintenance and cure] they are resolved in favor of the seaman."); see also *Johnson v. Marlin Drilling Co.*, 893 F.2d 77, 79 (5th Cir. 1990) ("[T]ermination of the seaman's right to maintenance should be based on an unequivocal medical determination.") (construing *Tullos v. Resource Drilling Inc.*, 750 F.2d 380, 388 (5th Cir. 1985)).

194. John Abell, *Nascent AIDS Therapy Stokes Hopes—and Cautions*, REUTER LIBR. REP., February 19, 1993, available in LEXIS, Nexis Library, Omni File (reporting that researchers have developed a treatment, effective in a test tube, but unproven in humans). Whether an infected person would need to take this medication for life in order to suppress the virus or whether the medication would cure the disease is not clear. Any seaman with HIV who could show improvement in his or her medical condition due to a new treatment might have a claim to maintenance and cure though it could take years to determine if the treatment does, in fact, lead to a cure.

195. *Farrell v. United States*, 336 U.S. 511, 519 (1949) ("The Government does not contend that if Farrell receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such treatment and for maintenance while receiving it.").

196. *United States Dept. of Transp. v. Paralyzed Veterans*, 477 U.S. 597, 605 (1986) (quoting *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 633 n.13 (1984)); see also Robert A. Kushen, *Asymptomatic Infection with the AIDS Virus as a Handicap Under the Rehabilitation Act of 1973*, 88 COLUM. L. REV. 563, 567 (1988) (arguing that Congress intended employers to bear the greater than normal risks of high health care costs associated with handicapped individuals).

Therefore, an employer cannot refuse to hire a handicapped person on the economic grounds that the costs of hiring the person places an undue burden on the employer. Instead, the employer must show that the individual is not "otherwise qualified," for example by showing that the employee poses a severe risk to other employees.<sup>197</sup> In short, the employer's increase in insurance costs are not relevant to an individual's ability to perform a job.

To allow an employer to discriminate against seropositive persons because of the fear that the increases in health costs may drive it out of business would emasculate both the Rehabilitation Act and the ADA. It would contradict the congressional decision that employers should bear such costs. Of course, Congress exempted small employers from the ADA,<sup>198</sup> and one might argue that these small employers have an affirmative defense. Most states, however, make no such exemption from their antidiscrimination statutes. These state laws would then preclude small employers from discriminating.

Furthermore, to allow affirmative defenses based on the anticipated increases in health costs would open the door for the employer to discriminate against other costly illnesses such as cancer.<sup>199</sup> One critical distinction, however, exists between asymptomatic HIV infection and other costly catastrophic illnesses: the ability to test for HIV gives employers the unique opportunity to screen out this group of individuals who pose increased health risks.<sup>200</sup>

An employer cannot base the refusal to hire on the grounds that an HIV-positive individual will experience excessive absenteeism and decreased productivity. While excessive absenteeism and decreased productivity are of course valid grounds for dismissal, these factors should not influence the hiring decision unless the job requires extensive training and an expectation of a long employment term.<sup>201</sup> Current medical evidence suggests that fears of absenteeism and lower productivity are extremely speculative. Re-

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197. 29 C.F.R. §32.14(a) (1992) (job qualifications must be "consistent with business necessity and safe performance"); see also *supra* text accompanying notes 92-97.

198. Congress gave a grace period to businesses that employed between 15 and 25 workers. The ADA will not apply to these employers until 1994. 42 U.S.C. § 12,111(5)(A) (Supp. II 1990); 42 U.S.C. § 12,111 note (Supp. II 1990) (Effective Date).

199. Kushen, *supra* note 196, at 577.

200. *Id.* at 578 n.84.

201. Good health might be a "business necessity" for foreign service employees given a lengthy assignment in an undeveloped country.

search shows that the time between contraction of HIV and the onset of symptoms can vary between 4.6 to 9.6 years.<sup>202</sup> During this time, the employee may test positive and still be "otherwise qualified" to perform the demands of the job. Therefore, seropositivity bears little relation to such an individual's productivity.

Even after the infected individual begins to show symptoms, the employee is likely to experience cyclic periods of "normal" and "bad" health.<sup>203</sup> There is no medical reason that the employee cannot work during the periods of good health. Commentators propose that the employer treat all but the worst cases of cyclic "bad health" as other temporary disabilities, such as pregnancy, by placing the disabled individual on temporary leave.<sup>204</sup> This conclusion comports with federal requirements that an employer make reasonable accommodations for a handicapped individual.<sup>205</sup> Thus, it would seem that the employer may effectively utilize the services of these seamen during the "normal health" periods provided that the voyages are not lengthy.

Assuming that the employer must grant temporary leave to AIDS patients, the employer's obligation would not continue indefinitely. Because the HIV infection is degenerative, the employee will suffer from a deteriorating physical condition and hence, may eventually become unable to perform some or all of the duties of the job. At this point, the employer can show that the seaman is not "otherwise qualified" to perform the job and that the burden of accommodation will cause undue hardship on the employer. Under federal statutes and most state statutes, such a refusal to hire or a decision to terminate the employment of an HIV-positive

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202. See Solomon & Hogan, *supra* note 22 ("median period of 9.2 years for seropositive adults to develop the AIDS stage of the disease"); Jordan et al., *supra* note 22 (mean incubation period of 8.2 years); Nancy Mueller, *The Epidemiology of the Human Immunodeficiency Virus Infection*, 14 *LAW, MED. & HEALTH CARE*, 250, 254 (1986) (mean latency period between infection and onset of symptoms is 4.5 years); MARTIN GUNDERSON ET AL., AIDS: TESTING AND PRIVACY 16 (1989) (most people infected with HIV remain symptomless for at least eight years); Elliott J. Millenson, *AIDS Tests: Do It Yourself? FDA's No-Home-Testing Policy is Endangering Everyone*, *WASH. POST*, Aug. 27, 1989, at C-5 ("median time between infection and the onset of symptoms is 9.6 years, according to a recent University of California at San Francisco study").

203. Arthur S. Leonard, *AIDS and Employment Law Revisted*, 14 *HOFSTRA L. REV.* 11, 35 (1985).

204. *Id.*

205. Reasonable accommodations include shifting work hours, reducing schedules and allowing rest periods. While at sea, many forms of accommodation will not be available to the employer because of the nature of the maritime workplace. Many accommodations that seem "reasonable" on land may be "unreasonable" at sea.

individual would not constitute discrimination against the handicapped. Requiring the employee to be "qualified" to perform the job's tasks mitigates the apparent harshness of the rule that would grant AIDS patients temporary leave.

### C. *Testing for HIV in the Workplace*

Given the current state of testing capabilities, HIV testing serves no legitimate purpose for most employment positions.<sup>206</sup> The results of HIV testing are often inconclusive. A seronegative test result only indicates that a particular blood sample contained no HIV antibodies at the time of the test.<sup>207</sup> A negative result is inconclusive. One who tests negative may indeed be HIV-free; may have been exposed to the virus but the person's immune system has not yet produced sufficient antibodies for the test to detect; or may in fact carry the virus, but the test failed to detect it. A positive test result is also inconclusive. A positive test result may indicate that one has the AIDS virus; that one's body has successfully attacked and destroyed the virus; or that the test is inaccurate and has falsely indicated seropositivity.<sup>208</sup> Thus, HIV testing serves little purpose in the workplace—and may indeed give a person a false sense of security by indicating that one does not carry the virus.

Some argue that HIV testing does serve a purpose in employment positions where there is a legitimate health risk to others.<sup>209</sup> In such cases, seropositivity may be relevant to employment. The medical community, however, adopts a different approach. Leading

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206. Testing required by federal or state governments poses many constitutional objections because the Fourth and Fourteenth Amendments protect "the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). Testing is an invasion of individual privacy, both physically because testing requires drawing blood and emotionally because testing may reveal details of one's personal lifestyle which are beyond any legitimate employment interest. Privacy is a right protected by the "penumbras" of the Fourth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), and the government cannot invade the right of privacy without sufficient reason. *See, e.g., Anonymous Fireman v. City of Willoughby*, 779 F. Supp. 402 (N.D. Ohio 1991) (upholding the right of local government to test firefighters because of potential risk of transmission due to common injuries). Because the Fourth and Fourteenth Amendments protect individuals only from invasions by federal and state governments, respectively, these Amendments do not protect against invasions of privacy by private employers.

207. *See supra* note 20.

208. *See supra* note 20; *see generally* Banks & McFadden, *supra* note 20.

209. HIV testing might play an important and useful role in preventing HIV transmission among "actor[s] in pornographic productions" and among sex therapists acting as surrogates with their patients. Leonard, *supra* note 203, at 43 n.143.

medical researchers have refused to issue recommendations to remove infected medical personnel from jobs involving "invasive procedures."<sup>210</sup> Instead, hospitals and doctors have adopted procedures that eliminate—or at least reduce to a negligible level—the risk of transmitting viruses.<sup>211</sup> This policy is equivalent to treating all medical personnel and all patients as HIV carriers. After all, there is no absolute way to prove that someone is truly HIV-negative. The approach of the medical community is more logical than the use of HIV testing because adopting "safe" procedures reduces the risk of transmission, while testing alone does little to prevent the transmission of the virus.

Some employers may see HIV testing as a way to eliminate high health risks from the workplace. Regardless of the motivation, HIV testing fails miserably as a means of predicting complications in the workplace. Seronegativity does not mean HIV free, and seropositivity is not highly predictive of *when* an individual will suffer from ARC or AIDS.<sup>212</sup> Thus, while HIV testing may ultimately reduce certain health risks, it is neither a practical nor efficient means of doing so.

Limited legislation is available to protect employees against unscrupulous employers. At the federal level, the EEOC has promulgated guidelines which prohibit employers from asking job applicants certain non-job-related questions; ignoring these guidelines leaves the employer at risk for charges of unlawful discrimination in hiring.<sup>213</sup> In addition, some states, including Florida,<sup>214</sup> California,<sup>215</sup> Massachusetts,<sup>216</sup> and Wisconsin,<sup>217</sup> have enacted legislation which restricts employers in their use of HIV testing in hiring. Such legislation defines the outer limits for testing and provides only *limited protection* for individuals—without regard to HIV status.

Given the limited and inconclusive medical information which HIV testing provides, it is illogical and illegitimate to allow HIV testing in the workplace. The medical community has adopted a

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210. See *supra* note 26.

211. See *supra* note 26 and accompanying text.

212. See *supra* notes 22, 202.

213. Uniform Guidelines on EEOC Employee Selection Procedure, 29 C.F.R. § 1607 (1992).

214. FLA. STAT. ANN. § 381.004 (West Supp. 1993).

215. CAL. HEALTH & SAFETY CODE § 119.20-119.25 (West 1990 & Supp. 1993).

216. MASS. GEN. LAWS ANN. ch. 111, § 70F (West 1992).

217. WIS. STAT. ANN. §103.15 (West 1988 & Supp. 1992).

more logical policy: utilize procedures that reduce the risk of virus transmission to a negligible level. Furthermore, HIV testing may promote illegitimate practices. Testing provides information with which an employer can discriminate, a practice that contravenes the policy of the federal government, as well as that of many states.

#### D. *The Employer's Decision*

The shipowner/employer has many factors to consider when deciding whether to hire an HIV-positive applicant. An employer who chooses to hire the individual may be liable for maintenance and cure, subject to the limitations described above, if the applicant does indeed become ill while serving the ship. Furthermore, the employer's failure to pay the employee's maintenance and cure may result in the court imposing punitive damages.<sup>218</sup> These damages may be significant, especially considering that courts are traditionally very protective of seamen and that the employer refused to pay money that it was legally obligated to pay, at a time when the seaman had urgent medical needs.

An employer may discriminate against an HIV-positive individual, but not without costs. Such discrimination will likely violate federal or state laws and may result in compensatory damages for mental anguish and punitive damages.<sup>219</sup>

Though most employers are unable to utilize pre-employment testing of HIV status, for those who do, maintaining confidentiality of an individual's HIV-status is problematic. Regardless of how the employer learned the information, maintaining this confidentiality

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218. See Michael Reese Davis, *Punitive Damages for Maintenance and Cure: Is it How Much You Pay or How You Pay It—Harper v. Zapata Off-Shore Co.*, 104 MAR. LAW. 103 (1985). Because the duty to pay maintenance and cure is absolute, courts impose punitive damages to make examples out of those shipowners who fail to live up to this duty. *Id.*

219. Antidiscrimination statutes also provide for back pay in the case of wrongful discharge. See, e.g., *Cain v. Hyatt*, 734 F. Supp. 671 (E.D. Pa. 1990) (awarding a wrongfully-discharged attorney, who reported his HIV status to his employer, \$42,888 in backpay, \$65,000 for mental anguish, and \$50,000 in punitive damages under the Pennsylvania Human Rights Relations Act); *Club Swamp Annex v. White*, 561 N.Y.S.2d 609 (Sup. Ct. 1990) (awarding back pay and \$5,000 in compensatory damages for mental anguish to waiter diagnosed with ARC); see also *Jury Awards Waiter Back Pay in First AIDS Bias Verdict in Texas*, Daily Lab. Rep. (BNA) No. 104, at A-9 (May 30, 1990) (reporting a jury award of \$60,000 in back pay to waiter discharged because of HIV and citing *Gardner v. Rainbow Lodge, Inc.*, CA No. H-88-1705 (S.D. Tex. 1990)).

also poses financial risks for employers.<sup>220</sup> In *Shuttleworth v. Broward County*,<sup>221</sup> a county budget analyst sued his employer for violating his constitutional right of privacy.<sup>222</sup> Though the parties settled out of court and did not disclose the settlement amount, it has been reported to be nearly \$200,000.<sup>223</sup> Some state statutes impose civil and criminal liability for wrongful disclosure of HIV test results.<sup>224</sup> Thus, an employer must exercise extreme caution with information regarding an employee's HIV status.

Another source of employee protection—the collective bargaining agreement—may limit an employer's actions. Collective bargaining agreements<sup>225</sup> may offer protection for covered employees because most agreements require “just cause” to dismiss an employee.<sup>226</sup> Mere HIV positivity does not constitute “just cause” to dismiss an employee who is “otherwise qualified” to perform the requirements of a job. Hence, a shipowner could not dismiss a seaman because of that seaman's HIV status, provided a collective bargaining agreement with a “just cause” provision protects the seaman.<sup>227</sup>

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220. See *Discrimination, Confidentiality Suits Pose Biggest AIDS Risks*, 9 HOSP. RISK MGMT. 13 (1987).

221. 639 F. Supp. 654 (S.D. Fla. 1986).

222. *Id.* The Florida Constitution includes a right to privacy. FLA. CONST. art. I § 23.

223. Patricia A. Curylo, *AIDS and Employment Discrimination: Should AIDS Be Considered a Handicap?*, 33 WAYNE L. REV. 1095, 1103 n.65. (1987).

224. See, e.g., CAL. HEALTH & SAFETY CODE § 199.21 (imposing civil and criminal liability for wrongful disclosure of HIV test results); see also *Woods v. White*, 689 F. Supp. 874 (W.D. Wis. 1988) (holding that prison inmate retains constitutional right to privacy though incarcerated and that prison officials are not immune from liability for their disclosure to non-medical persons that certain inmates had AIDS).

225. Collective bargaining agreements cover an estimated one fifth of the civilian workforce. Leonard, *supra* note 203, at 36 n.116.

226. For an analysis of “just cause” terminations, see Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of “Just Cause” in Employee Discipline Cases*, 1985 DUKE L.J. 594, 610-12.

227. It would also be possible for the collective bargaining units to negotiate directly for the protection of HIV-infected employees. “Section 8(d) of the [National Labor Relations Act] provides that the employer and the employee representative are obligated to bargain ‘with respect to wages, hours, and other terms and conditions of employment.’” *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 852 (5th Cir. 1986). Though the act does not define “other terms and conditions of employment,” “substantial jurisprudence” considers health and safety issues to be mandatory bargaining terms. *Id.* at 852 n.1. Because health and safety issues are mandatory bargaining terms, an employer must negotiate with the employees' bargaining agent on these terms. The act, however, does not require that the parties reach an agreement; it only requires that they bargain in good faith. See, e.g., *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) (“the Act requires bargaining, not agreement”).

The uncertainty surrounding the application of maintenance and cure to seamen with



An employer may choose to implement an AIDS education and prevention program. By teaching seamen about AIDS and the risks of its transmission, the shipowner can reduce future exposure to actions based on maintenance and cure, unseaworthiness and Jones act negligence. Education will reduce not only the number of future lawsuits, but can also reduce the number of infections. All involved will thus benefit.

## VI. CONCLUSION

Because our public health systems evolved out of the maritime industry and its need to care for seaman,<sup>228</sup> it is ironic that at a time when we face one of the worst epidemics in our history, the public health system cannot adequately support those very individuals for whom Congress originally created the system. For decades, the government provided hospitals for the care of merchant seamen,<sup>229</sup> but in 1981, on the brink of the AIDS crisis, Congress eliminated these hospitals.<sup>230</sup> Under traditional maritime principles, there can be little doubt that the shipowners, not the seamen, should fill the void in health care left by the elimination of maritime hospitals. Courts have long recognized that seamen need special protection, and therefore, courts generally hold maritime employers to a greater standard of care as to their employees than land-based employers. Furthermore, antidiscrimination statutes demonstrate a congressional intent that the employer, not the em-

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AIDS coupled with the fact that the employer is only obligated to negotiate—and not to reach an agreement—makes such negotiations unlikely in the maritime industry, at least for now.

228. From the birth of the United States, maritime trade was one of this country's greatest resources. HANLON & PICKETT, *supra* note 55, at 33. While farmers and merchants "had firm roots in their respective communities," the seaman had no permanent abode nor permanent route. *Id.* When seamen became ill, they had no where to turn. They were not eligible for benefits, and local authorities refused to assume the responsibility of treatment because they did not pay any local or state taxes. Furthermore, the seamen were underpaid and their wages were often quickly spent at the many taverns and brothels that thrived near the ports. *Id.* The young American Congress recognized the necessity to protect the seamen and proposed a bill at its very first session. The Marine Hospital Service Act, however, was not actually adopted until June 1798. *Id.* at 34. This act represented the first attempt of the federal government to deal with public health issues at a national level, and the Act ultimately led to the establishment of the American Public Health Association. *Id.* at 34-35. In 1902, Congress renamed the Marine Hospital Service as the Public Health and Marine Hospital Service and placed it under the direction of the Surgeon General. Congress again changed the name in 1912 to the U.S. Public Health Service. *Id.* at 36.

229. *Id.* at 34-36.

230. *Id.*

ployee, should bear the costs of hiring handicapped employees. To implement this policy, Congress enacted the Rehabilitation Act and the Americans with Disabilities Act. It is, therefore, only fitting that these acts apply to shipowners and other marine employers.

General maritime law and Congressional legislation<sup>231</sup> have given an employer a tough decision: hire an HIV-infected seaman or face liability for discrimination. Without a thorough understanding of HIV, AIDS, and the extent of liability under maintenance and cure, an employer may choose to discriminate. An informed employer, however, should decide otherwise. The more cost effective solution for the employer is not to discriminate against an "otherwise qualified" seaman who is HIV-positive, but to employ the individual. Discrimination in violation of a federal or state statute will undoubtedly lead to the employer's liability. But if the employer hires the individual, then liability is only a risk, not a certainty. It is entirely possible that the employer may benefit from a productive employee without incurring any additional costs.

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231. While antidiscrimination statutes are a step in the right direction, they do not address the problem of AIDS directly. We must treat the AIDS crisis as we would treat any natural disaster: with an effective management plan. We must deal with this national crisis on a national level. Our President must develop a national plan that can mobilize all branches of government to effectively manage this disaster. This plan must provide health care for AIDS victims, social services for the victims and their families, and educational programs that teach all persons—from grade school children to adults—how to prevent the spread of AIDS. However, preventing the transmission of AIDS does not amount to a cure. This national plan must finance much-needed research to find an effective treatment and vaccine for the HIV virus. Finally, our government must play a more active role to prevent discrimination against HIV-positive victims in the workplace. While Congress has taken some steps toward that goal, the antidiscrimination statutes in and of themselves are not enough. The nation needs a comprehensive plan.

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