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AIDS DISCRIMINATION UNDER FEDERAL, STATE, AND LOCAL LAW AFTER *ARLINE*

ROBERT P. WASSON, JR.*

In School Board v. Arline, the United States Supreme Court determined that people who suffer from tuberculosis can be protected from employment discrimination by the Rehabilitation Act of 1973. Arline is certain to affect people afflicted with AIDS-related disorders who suffer discrimination. In this Article, Professor Wasson examines the Arline decision and the effect it will have on AIDS-related discrimination. Also, he examines provisions of the United States Constitution, acts of Congress, state law, and municipal ordinances, all of which might provide alternative measures of protection for those who suffer AIDS-related discrimination.

THIS PAST term the United States Supreme Court decided *School Board v. Arline*.¹ In *Arline*, a public elementary school teacher was fired from her job following her third relapse of tuberculosis,² a contagious, infectious, communicable disease. She sued for reinstatement and back pay under the Rehabilitation Act of 1973 (hereafter "the Act"), the major enactment of Congress to address handicap discrimination.³ The Court held that a person afflicted with tuberculosis was a "handicapped individual" within the meaning of the Act.⁴ It said that although Mrs. Arline was a "handicapped individual," it was necessary to consider whether she was "otherwise qualified" within the meaning of the Act, despite her contagious disease, so that she could be reinstated to her position.⁵ Further, the Court said that to determine whether Mrs. Arline was "otherwise qualified," the trial court, on remand, would have to base its decision on medical factors and scientific knowledge.⁶ The Court concluded "that the fact that a person with a record of physical impairment is also contagious does not suffice to

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1. 107 S. Ct. 1123 (1987).
2. *Id.* at 1125.
3. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 357 (codified as amended at 29 U.S.C. §§ 701-96 (1982)).
4. 107 S. Ct. at 1127.
5. *Id.* at 1130-31.
6. *Id.* at 1131.

remove that person from coverage under [the Act]."⁷ However, because the Court in *Arline* specifically declined to address the impact of its decision on people who carry contagious diseases, such as Acquired Immune Deficiency Syndrome (AIDS), but without manifesting symptoms,⁸ it is necessary to examine both the nature of AIDS-related disorders and the Act to determine the extent to which *Arline* should help people with AIDS-related disorders fight discrimination.

In this Article the author begins by distinguishing people with AIDS from people with AIDS-related complex, and from people who have been merely exposed to the AIDS virus. He then analyzes relevant provisions of the Act and applies it to each of the three groups of people with AIDS-related disorders. The author suggests that the Act, fairly read, generally would protect from discrimination people with AIDS-related disorders. The author then highlights actual cases of discrimination against people with AIDS-related disorders to underscore the need for remedial action. Then, the author examines the *Arline* case, concluding that the Court's express refusal to apply its analysis to carriers of contagious diseases such as AIDS makes the application of *Arline* problematic and demonstrates the need to consider other federal statutes, constitutional provisions and state and local remedies as alternative theories of recovery.

I. THE NATURE OF AIDS-RELATED DISORDERS

The cause of AIDS⁹ is a retrovirus,¹⁰ formerly identified as the human T-cell lymphotropic virus type III (HTLV-III) or as

7. *Id.* at 1130.

8. *Id.* at 1128 n.7.

9. The term "acquired" refers to the fact that the disorder is neither inherited nor explained by an underlying illness. The term "immune deficiency" refers to the fact common to all who suffer from the disorder, that is, an inability of the body to defend itself from foreign agents and infections. The term "syndrome" refers to the fact that persons with the disorder are subject to one or more specific diseases as a result of the body's weakened immune system. See generally FLORIDA DEP'T OF HEALTH AND REHABILITATIVE SERVICES, PAMPHLET ON AIDS, HRSP 150-3 (Sept. 1, 1985) at 2; Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681, 684 (1985).

10. Retroviruses are distinguished from other viruses by their chromosome structure and mode of replication. See Laurence, *The Immune System in AIDS*, SCI. AM., Dec. 1985, at 88; NIH Conference—*The Acquired Immunodeficiency Syndrome: An Update*, 102 ANNALS INTERNAL MED. 800, 807 (1985) [hereinafter *NIH Conference*]; Memorandum from Assistant Attorney General Cooper on Application of Section 504 of Rehabilitation Act to Persons with AIDS, reported in [May-June] Daily Lab. Rep. (BNA) No. 122, at D-2 n.8 (June 25, 1986) [hereinafter *DOJ Memorandum*] (on file, Florida State University Law Review).

lymphadenopathy-associated virus (LAV). By international agreement, medical scientists now refer to it as HIV.¹¹ The virus inhibits the body's ability to resist diseases by infecting white blood cells, called T-lymphocytes, which are an integral part of the human immune system.¹² As a result, the immune systems of these patients are "characterized by functional defects in virtually all limbs of the immune system."¹³ Due to these defects in the immune system, people with AIDS are vulnerable to a variety of opportunistic infections and malignant conditions that generally do not afflict people without AIDS. These defects in the immune system lead to a progressive weakening of the patient, and eventually resulting in death.¹⁴

The major routes of transmission of HIV infection are through blood, blood products, and semen.¹⁵ This is evinced by the groups

11. *NIH Conference*, *supra* note 10, at 800 & 806. In May 1984, American researchers reported identifying the AIDS virus as a member of a family of viruses known as human T-lymphotropic retroviruses, or HTLV. See Gallo, Salahuddin, Popovic, Shearer, Kaplan, Haynes, Palker, Redfield, Oleske, Safar, White, Foster and Markham, *Isolation of Cytopathic Retroviruses (HTLV-III) from Patients with AIDS and at Risk for AIDS*, 224 *Sci.* 500 (1984). Somewhat earlier, French researchers isolated from AIDS patients a lymphadenopathy virus, designated LAV. See Barre-Sinoussi, Chermann, Rey, Nugeyre, Chamaret, Gruest, Dauguet, Axler-Blin, Vezinet-Brun, Rouzioux, Rozenbaum & Montagnier, *Isolation of a T-Lymphotropic Retrovirus from a Patient at Risk for Acquired Immunodeficiency Syndrome*, 220 *Sci.* 868 (1983). See generally *Council Report: The Acquired Immune Deficiency Syndrome (AIDS)*, 252 *J.A.M.A.* 2037, 2038 (1984) [hereinafter *Council Report*]. The designation "human immunodeficiency virus" (HIV) has been accepted by a subcommittee of the International Committee for the Taxonomy of viruses as the appropriate name for the retrovirus. *Update: Acquired Immunodeficiency Syndrome—United States*, 35 *CENTERS FOR DISEASE CONTROL: MORBIDITY & MORTALITY WEEKLY REPORT (MMWR)* 758 (Dec. 12, 1986). More recently, researchers identified a third agent called AIDS-related virus, or ARV, which is also fundamentally the same as the other two viruses. Osborn, *The AIDS Epidemic: An Overview of the Science*, 2 *ISSUES Sci. & TECH.* 40, 48 (Winter 1986).

12. *DOJ Memorandum*, *supra* note 10, at D-2.

13. *NIH Conference*, *supra* note 10, at 809. See also Lane, Depper, Greene, Whalen, Waldmann & Fauci, *Qualitative Analysis of Immune Function in Patients with the Acquired Immunodeficiency Syndrome*, 313 *NEW ENG. J. MED.* 79, 82 (1985).

14. See Pear, *State's AIDS Discrimination Laws Reject Justice Department's Stand*, *N.Y. Times*, Sept. 17, 1986, at A20, col. 1 ("No one has been known to recover from AIDS"); Altman, *40,000 AIDS Cases Seen in City by '91*, *N.Y. Times*, July 31, 1986, at A13, col. 1 ("There is no effective treatment for AIDS, which destroys the body's [immunity system] and eventually proves fatal."). See also *NIH Conference*, *supra* note 10, at 802 ("No patient who has unequivocal acquired immunodeficiency syndrome has yet been cured of this invariably fatal disease."); *Council Report*, *supra* note 11, at 2041 ("At present, there are no cases of AIDS in which the immune system has been reported to have recovered.").

15. Friedland, Saltzman, Rogers, Kahl, Lesser, Mayers & Klein, *Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis*, 314 *N. ENG. J. MED.* 344 (1986) ("HTLV-III/LAV has been isolated from peripheral blood in both symptomatic and asymptomatic cases of infections.

in the United States that are at an increased risk of infection with the virus. The high risk groups include homosexual and bisexual men with multiple sexual partners; intravenous drug abusers among whom sharing of needles is common; recipients of transfusions of blood and blood products; hemophiliacs; sexual partners of those in the foregoing groups; and children born to mothers who have AIDS.¹⁶ The government estimates that 1 million - 1.5 million

Transmission also appears to occur by means of intimate sexual contact, both homosexual and heterosexual, and the virus has been isolated from semen.”) (footnotes omitted); *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace*, 34 MMWR 682 (1985) [hereinafter *Workplace Recommendations*] (“HTLV-III/LAV is transmitted through sexual contact, parenteral exposure to infected blood or blood components, and perinatal transmission from mother to neonate.”); Resnick, Veren, Salahuddin, Tondreau & Markham, *Stability and Inactivation of HTLV-III/LAV Under Clinical and Laboratory Environments*, 255 J.A.M.A. 1887 (1986) (“The HTLV-III/LAV is transmitted primarily by sexual contact and through blood or blood products in vivo . . .”). See also *Heterosexual Transmission of Human T-lymphotropic Virus Type III/Lymphadenopathy-Associated Virus*, 34 MMWR 561, 562 (Sept. 20, 1985) [hereinafter *Heterosexual Transmission*] (suggesting that female-to-male transmission of HTLV-III/LAV (HIV) may be less efficient than male-to-male transmission and that the relatively small proportion of women among infected persons might account for the small number of cases of heterosexual transmission of AIDS); Altman, *40,000 AIDS Cases Seen in City by '91*, N.Y. Times, July 31, 1986, at A13, col. 2 (“a continuing study at Montefiore Hospital . . . showed that 63 percent of steady heterosexual partners of individuals who had AIDS or an associated condition called AIDS-related complex remained free of infection with the AIDS virus”).

16. With respect to homosexual and bisexual men with multiple sexual partners, see *Update: Acquired Immunodeficiency Syndrome—United States*, 35 MMWR 17, 18 (1986) [hereinafter *Update*] (“A total of . . . (94%) [of] AIDS patients can be placed in groups that suggest a possible means of disease acquisition: men with homosexual or bisexual orientation who have histories of using intravenous (IV) drugs (8% of cases); homosexual or bisexual men who are not known IV users (65%); heterosexual IV drug users (17%); persons with hemophilia (1%); heterosexual sex partners of persons with AIDS or at risk for AIDS (1%); and recipients of transfused blood or blood components (2%). The remaining . . . [6%] have not been classified by recognized risk factors for AIDS.”). See also Friedland, *supra* note 15, at 344; *Workplace Recommendations*, *supra* note 15, at 682; Sande, *Transmission of AIDS: The Case against Casual Contagion*, 314 NEW ENG. J. MED. 380 (1986) (“[T]he disease has remained confined largely to the high-risk groups (homosexual men, intravenous drug users, patients with hemophilia and persons who received transfusions before blood screening was introduced, and the offspring and sexual partners of members of these groups), and the distribution of cases among these groups has been remarkably constant throughout the epidemic. In only 5 percent of [the] cases is the mode of transmission unknown. Thus, there is no evidence that the disease is spreading to other populations.”). But, recent data indicate that it is increasingly inaccurate to stereotype people with AIDS as gay white males because of: (1) the sharing of hypodermic needles among intravenous drug users; (2) greater susceptibility among blacks and Hispanics; and (3) an increasing amount of heterosexual transmission among those groups. See, e.g., N.Y. Times, Aug. 2, 1987, at A26 col. 1 (“White homosexual men still make up the largest share—49 percent—of the nation’s diagnosed AIDS cases as of July 20, [1987]. But blacks and Hispanic people make up 39 percent of all cases, even though they account for only 17 percent of the nation’s total adult population.”). With respect to intravenous drug abusers who share needles, see *Update*, *supra*, at 18;

people have been exposed to the HIV virus in the United States.¹⁷ Of the 38,000 people who have been diagnosed as having AIDS, more than 21,000 have died,¹⁸ and an estimated 1,000 - 1,200 new cases of AIDS are diagnosed each month.¹⁹ Indeed, it is estimated that by the end of 1991, 179,000 to 270,000 Americans will have died of AIDS.²⁰

The United States Centers for Disease Control (CDC) has established three conditions that must be met before it will recognize a person who has been diagnosed with AIDS as actually having the disorder.²¹ These conditions are: (1) the presence of one or more opportunistic diseases that are at least moderately indicative of an underlying immunodeficiency; (2) the absence of all known underlying causes for that deficiency other than HIV infection; and (3) the absence of all other known causes for reduced resistance to opportunistic diseases other than HIV infection.²² One must meet

Friedland, *supra* note 15, at 344; Sande, *supra*, at 380; and *Heterosexual Transmission*, *supra* note 15, at 561. With respect to recipients of blood and blood products, see *Update*, *supra* at 18; Friedland, *supra* note 15, at 344; Sande, *supra* at 380; and *Heterosexual Transmission*, *supra* note 15, at 561. With respect to hemophiliacs, see *Update*, *supra* at 18; Friedland, *supra* note 15, at 344; Sande, *supra*, at 380; and *Heterosexual Transmission*, *supra* note 15, at 561. With respect to sexual partners of those in "high risk" groups, see *Update*, *supra*, at 18; Friedland, *supra* note 15, at 344; Sande, *supra*, at 380; and *Heterosexual Transmission*, *supra* note 15, at 561. And, with respect to children born to mothers who have AIDS, see *Update*, *supra*; at 18; Friedland, *supra* note 15, at 344; Sande, *supra*, at 380; and *Heterosexual Transmission*, *supra* note 15, at 561.

17. Pear, *States' AIDS Discrimination Laws Reject Justice Department's Stand*, N.Y. Times, Sept. 17, 1986, at A20, col. 1 ("The Government says that a million to 1.5 million people have already been infected with the AIDS virus . . .").

18. *Reagan Names New York Cardinal, Homosexual Doctor to AIDS Panel*, 2 AIDS Pol'y & L. (BNA) No. 14, at 3 (July 29, 1987) ("As of July 13, 1987, 38,312 cases of AIDS have been diagnosed in the U.S., with 21,720 deaths, according to the Centers for Disease Control.")

19. Sullivan, *City Data Show Rise in AIDS is Leveling Off*, N.Y. Times, Mar. 21, 1986, at B1, col. 1 (Officials from the National Centers for Disease Control said "the agency was reporting about 1,000 to 1,200 new cases each month.")

20. Pear, *States' AIDS Discrimination Laws Reject Justice Department's Stand*, N.Y. Times, Sept 17, 1986, at A20, col. 1 ("The Government says . . . that there will be a total of 270,000 cases [of AIDS] by the end of 1991."); Boffey, *Federal Efforts on AIDS Criticized as Gravely Weak*, N.Y. Times, Oct. 30, 1986, at A18, col. 1 ("AIDS will continue to spread rapidly in the United States, with the cumulative death toll rising to more than 179,000 by the end of 1991 . . . 'Beginning in 1990,' warned Dr. Frank Press, president of the [National] Academy [of Sciences], 'we will lose as many Americans each year to AIDS as we lost in the entire Vietnam War.' About 58,00 Americans died in that war.")

21. The Case Definition of AIDS Used by CDC for National Reporting, (CDC-REPORTABLE AIDS), UNITED STATES CENTERS FOR DISEASE CONTROL, August 1, 1985 [hereinafter CDC-REPORTABLE AIDS] (on file, *Florida State University Law Review*).

22. See *id.* at 1-2 for a list of diseases at least moderately indicative of underlying cellular immunodeficiency. See also *id.* at 3, where the CDC identifies diseases considered indica-

each of these three criteria to be classified by the CDC as a person with AIDS.

In addition to these criteria, a person is not regarded by the CDC as a person with AIDS unless he or she tests "seropositive" or HIV positive.²³ However, the CDC's definition is so restrictive that even when a person who tests seropositive displays a number of symptoms characteristic of the disease, he or she will not satisfy the CDC's definition of a person with AIDS absent affliction with one or more of the opportunistic diseases that take advantage of the suppressed immune system.²⁴ Furthermore, even where a person is so afflicted, he or she still will not satisfy the CDC's definition absent manifestation of a number of symptoms characteristic of the disease.²⁵

Because the CDC's definition of AIDS cases is so restrictive, there exists a second group of people with AIDS-related disorders whose members do not meet the criteria for CDC-defined AIDS, but who manifest some—but not all—of the symptoms of AIDS. People in this group are said to have AIDS-related complex, or ARC.²⁶ Formerly called pre-AIDS,²⁷ ARC has no uniform defini-

tive of AIDS, even where the opportunistic diseases are not present, if the patient has tested positive for HIV.

23. *Id.* at 1. Seropositive refers to a patient who is generating antibodies to the AIDS virus. See *Provisional Public Health Service Inter-Agency Recommendations for Screening Donated Blood and Plasma for Antibody to the Virus Causing Acquired Immunodeficiency Syndrome*, 34 MMWR 1 (1985) [hereinafter *Screening Recommendations*]. A single positive test for antibodies is of course not conclusive as to infection with the virus because of the possibility of a "false positive" response. See also *Workplace Recommendations*, *supra* note 15, at 691. Nevertheless,

[a] single negative test for HTLV-III/LAV may be applied . . . if it is an antibody test by ELISA, immunofluorescent, or Western Blot methods, because such tests are very sensitive. Viral cultures are less sensitive but more specific, and so may be relied on if positive but not negative. If multiple antibody tests have inconsistent results, the result applied to the case definition should be that of the majority. A positive culture, however, would overrule negative antibody tests.

CDC-REPORTABLE AIDS, *supra* note 21, at 1.

24. See *Update: Acquired Immunodeficiency Syndrome (AIDS)—United States*, 32 MMWR 389 (1983). See also Friedland, *supra* note 15, at 344 (utilizing the CDC definition).

25. CDC-REPORTABLE AIDS, *supra* note 21.

26. See *DOJ Memorandum*, *supra* note 10, at D-3. See also *NIH Conference*, *supra* note 10, at 801 (Among some of the symptoms associated with ARC are: "generalized lymphadenopathy, unintentional weight loss, fever, chronic diarrhea, malaise and lethargy, lymphopenia, leukopenia, anemia, idiopathic thrombocytopenia, immunologic abnormalities characteristic of acquired immunodeficiency syndrome, and oral thrush."). But see Friedland, *supra* note 15, at 344 (defining ARC in adult patients as "the presence of (1) unexplained generalized lymphadenopathy . . . or unexplained oral candidiasis . . . and (2) two laboratory abnormalities—a low absolute number of helper T cells and a low T-helper/T-suppressor . . . ratio").

tion,²⁸ and the term has not been formally endorsed by the CDC.²⁹ The medical prognosis for people with ARC is unknown. "Current literature suggests that between ten and thirty percent of those with ARC will develop AIDS."³⁰

The third and final group of people who test seropositive with AIDS-related disorders consists of people who are identified through medical tests as generating antibodies to the AIDS virus.³¹ A seropositive test result indicates that the person has been exposed to the virus.³² However, a positive test result does not predict whether a person who tests seropositive will develop ARC or AIDS, or will ever be capable of transmitting either disorder to any other person. More simply, these people might carry the AIDS virus without manifesting any AIDS-related affliction.³³

II. DISCRIMINATION SUFFERED BY PEOPLE WITH AIDS-RELATED DISORDERS

It is not uncommon for people with AIDS to be fired once it is discovered that they have the disorder. In California, for example, an employee of a multinational corporation was fired after he allegedly contracted AIDS.³⁴ Similar firings have occurred with respect to a Florida county employee,³⁵ a Maryland computer operator,³⁶ a

27. Medical experts disapprove of the once-popular term "pre-AIDS" because there is not as yet any way to predict which people with ARC will develop AIDS. See *NIH Conference*, *supra* note 10, at 800; *Council Report*, *supra* note 11 at 2037; *DOJ Memorandum*, *supra* note 10, at 9.

28. *DOJ Memorandum*, *supra* note 10, at D-3.

29. *Id.*

30. HOLT, AIDS FROM THE EMPLOYEE [PERSON WITH AIDS'] PERSPECTIVE (1985) (unpublished manuscript) (on file, *Florida State University*).

31. See *Screening Recommendations*, *supra* note 23, at 1; *Workplace Recommendations*, *supra* note 15, at 684.

32. HOLT, *supra* note 30, at 5.

33. See *DOJ Memorandum*, *supra* note 10, at D-2 n.7 (A February 1985 analysis of six studies suggested that 400,000 people in the United States may then have been infected with the AIDS virus and that 4% to 19% of those so exposed would develop AIDS.). See also Boffey, *AIDS in the Future: Experts say deaths will climb sharply*, N.Y. Times, Jan. 14, 1986, at C1, col. 3 (A more recent study suggests that the percentage of people who test seropositive and later develop AIDS may be as high as 34%). See generally Schatz, *The AIDS Insurance Crisis: Underwriting or Overreaching*, 100 HARV. L. REV. 1782 (1987), for an excellent discussion of the inadequacies of HIV testing and the potential for discrimination that it creates.

34. *Eastman Kodak Sued for Firing Worker with AIDS*, 1 AIDS Pol'y & L. (BNA) No. 6, at 2 (Apr. 9, 1986).

35. Florida Comm'n on Human Relations, FCHR No. 85-0624 (Dec. 11, 1985), *reprinted in* 2 Empl. Prac. Guide (CCH) (Empl. Prac. Dec.) ¶ 5014 ("An employer violated the state

Virginia draftsman employed at his company for twelve years,³⁷ and a Virginia doctor who operated a walk-in clinic.³⁸ Other discrimination has occurred in the form of job reassignment, physical isolation, and restrictions on familial relationships. In Illinois, for example, a flight attendant who had AIDS was reassigned from flight duty to an office job because flight duty involved food handling.³⁹ Similarly, a fourteen-year-old hemophiliac in Indiana who contracted AIDS through a blood transfusion was involved in a running battle to be admitted to his local public junior high school.⁴⁰ In New York City, some forty sanitation workers refused to work out of the same garage as a co-worker who was diagnosed with AIDS.⁴¹ In New Jersey, a judge ruled that a father who had AIDS should not be barred on that basis from having visitation rights with his child.⁴² One can only speculate about the extent to which the fear of AIDS contagion will further complicate custody and visitation issues between parents undergoing a divorce.⁴³

law prohibiting discrimination in employment because of handicap when it discharged one of its employees for contracting AIDS.”).

36. *Computer Firm Sued Over Hiring*, 1 AIDS Pol’y & L. (BNA) No. 16, at 4 (Aug. 27, 1986) (“A computer operator fired by Electronic Data Systems Corp. filed suit against the Texas-based firm August 14, charging that he was wrongfully terminated by a Maryland facility because he has AIDS.”).

37. *Draftsman Files First Washington-Area Case*, 1 AIDS Pol’y & L. (BNA) No. 3, at 7 (Feb. 26, 1986) (The plaintiff, “who had worked for the company for more than 12 years, was diagnosed with AIDS in the summer of 1985 when he was hospitalized for pneumonia. He told his employer of the diagnosis and was fired when he returned to work.”).

38. *Virginia Doctor’s Suit Settled*, 1 AIDS Pol’y & L. (BNA) No. 15, at 3 (Aug. 13, 1986) (A doctor, who had his contract as an operator of a walk-in clinic terminated after he was diagnosed as having AIDS, filed suit against the Missouri-based employer, charging breach of contract as well as handicap discrimination.).

39. *Settlement Sought in Airlines Case*, 1 AIDS Pol’y & L. (BNA) No. 13, at 6 (July 16, 1986).

40. *Two Students Resume Classes; One Barred*, 1 AIDS Pol’y & L. (BNA) No. 3, at 6, 7 (Feb. 26, 1986) (Ryan White, a 14-year-old hemophiliac with AIDS, returned to class Feb. 21, but was barred from class again on the same day by a county circuit court judge.); *White Returns to School After Injunction Lifted*, 1 AIDS Pol’y & L. (BNA) No. 7, at 6 (Apr. 23, 1986) (Ryan White returned to school after dismissal of a preliminary injunction that barred him from classes because he is inflicted with the AIDS virus.).

41. *Sanitation Workers Refuse to Work with Colleague*, 1 AIDS Pol’y & L. (BNA) No. 12, at 7 (July 2, 1986) (“Some 40 New York City sanitation workers refused on June 23 to work out of the same garage as as colleague diagnosed with AIDS. The New York Sanitation Department suspended the workers without pay. However, they returned to the job the following day, after the person with AIDS volunteered to be transferred to a solitary night watchman’s job.”).

42. 1 AIDS Pol’y & L. (BNA) No. 10, at 6 (June 4, 1986).

43. *See Court Vacates Ruling on Test for Gay Father*, 1 AIDS Pol’y & L. (BNA) No. 11, at 2 (June 18, 1986). (The judge vacated a ruling that a divorced gay father must undergo an

People with ARC and those who merely test seropositive also have been subjected to discrimination. In Florida, for example, the father of seven-year-old Haitian triplets, who were diagnosed as having ARC, charged the Dade County School Board with discrimination and asked that the children be admitted to a normal classroom setting.⁴⁴ Similarly, a Louisiana hospital was sued for handicap discrimination by a former employee who was fired after he refused to submit to blood tests to determine whether he was seropositive.⁴⁵ A Texas medical center was charged with violating the Rehabilitation Act after it fired a cafeteria worker who tested seropositive.⁴⁶

In addition to actual incidents of discrimination against people with AIDS-related disorders, an hysteria surrounds the disorder which appears to justify irrational and unfounded discrimination. A 1986 California referendum question would have declared AIDS "an infectious, contagious and communicable disease" and would have subjected people with AIDS, ARC, or who tested seropositive, to quarantine and isolation.⁴⁷ The Illinois Legislature passed sev-

HTLV-III/LAV (HIV) test before he can have overnight visitation rights with his two children).

44. *Suit Seeks Class Attendance for Triplets with ARC*, 1 AIDS Pol'y & L. (BNA) No. 15, at 4 (Aug. 13, 1986).

45. *Justice Ruling Seen Challenged*, 1 AIDS Pol'y & L. (BNA) No. 19, at 4 (Oct. 8, 1986). See also *Louisiana Lawsuit Challenges Discharge*, 1 AIDS Pol'y & L. (BNA) No. 1, at 8 (Jan. 29, 1986).

46. *AIDS-as-Disability Debate Fueled by Bias Case*, 1 AIDS Pol'y & L. (BNA) No. 3, at 3 (Feb. 26, 1986). See also *Labor Department Accepts Four AIDS Bias Charges*, 1 AIDS Pol'y & L. (BNA) No. 5, at 2, 3 (Mar. 26, 1986) ("The Department of Labor will investigate four complaints of AIDS-based employment discrimination that have been filed against two Dallas-based companies [one of the employees had AIDS, the other three had confirmed positive HTLV-III/LAV (HIV) antibody tests] All four of the employees are still receiving pay and benefits, but none are allowed to come to work, according to their attorney."); *Board Rebuffs Union on Barring Students*, 1 AIDS Pol'y & L. (BNA) No. 4, at 8 (Mar. 12, 1986) ("A school district in South Florida [Broward County] rejected on March 6 a union request that a retarded student who is positive for antibodies to the HTLV-III/LAV virus be removed from school."). See also N.Y. Times, June 12, 1987, at B4, col. 3 (A 14-year-old Pensacola boy, who has been exposed to AIDS, has been placed in a psychiatric hospital.); N.Y. Times, June 16, 1987, at B9, col. 5 (quarantine lifted in the case of the 14-year-old Pensacola boy).

47. *Californians to Vote on Adding AIDS to Disease List*, 1 AIDS Pol'y & L. (BNA) No. 11, at 4 (July 2, 1986). The referendum question was defeated by a vote of 71% to 29%. *California's Proposition 64 Overwhelmingly Rejected by Voters*, 1 AIDS Pol'y & L. (BNA) No. 21, at 1 (Nov. 5, 1986). However, moves are underway to place the identical referendum back on the ballot. *In Brief*, 2 AIDS Pol'y & L. (BNA) No. 14, at 8 (July 29, 1987). See also *Attorney Urges Campaign Against State Bill*, 1 AIDS Pol'y & L. (BNA) No. 11, at 4 (June 18, 1986) (The Louisiana Legislature proposed legislation that "allows the head of the state health department to apply to any judge of any civil jurisdiction including municipal court judges and parish court judges to get an arrest warrant for a person who has a contagious

enteen AIDS-related bills which await the governor's signature. These bills would, among other things, require HIV testing for all applicants for marriage licenses, all hospital admittees between the ages of thirty-four and fifty-five, and all inmates at the time of intake, during routine medical checkups and sixty days prior to release.⁴⁸ The Georgia State Board of Education has adopted a rule to require mandatory HIV testing of secondary school teachers and pupils who are suspected of having AIDS.⁴⁹ And in Massachusetts, a telephone company lineman, who was fired after disclosing to his supervisor that he had ARC, "never returned to work after co-workers threatened to lynch him if he attempt[ed] to reclaim his job."⁵⁰

Discrimination suffered by people with AIDS, ARC and who test seropositive (collectively referred to as AIDS-related disorders) primarily is due to two factors. They are: (1) the fact that most of the affected people belong to socially ostracized classes;⁵¹ and (2) the hysteria surrounding the fear of possibly catching an incurable and fatal disease through casual social contact.⁵² Since the great

disease with no provision for any hearing or any release or any bond or any of the other things we're used to, for instance, in the mental health field."). This measure passed the Louisiana House of Representatives but failed on a floor vote in the Senate. *Marriage License Tests Approved in Louisiana*, 2 AIDS Pol'y & L. (BNA) No. 14, at 8 (July 29, 1987).

48. *Governor Getting Pressure Over 17 AIDS-Related Bills*, 2 AIDS Pol'y & L. (BNA) No. 14, at 3 (July 29, 1987).

49. *Georgia Education Board Approves Mandatory Tests*, 2 AIDS Pol'y & L. (BNA) No. 11, at 3 (June 17, 1987).

50. *Court Rules AIDS Handicap Under Massachusetts Law*, 1 AIDS Pol'y & L. (BNA) No. 18, at 2 (Sept. 24, 1986). See also *AIDS Victim's Colleagues Walk Out*, N.Y. Times, Oct. 23, 1986, at A24, col. 1 (A man's return to work leads to a walkout by most of his co-workers).

51. Mills, Wofsy & Mills, *The Acquired Immunodeficiency Syndrome: Infection Control and Public Health Law*, 314 N. ENG. J. MED. 14, 931 (Apr. 3, 1986) [hereinafter Mills] ("AIDS occurs most often in populations frequently ostracized—homosexual men and intravenous drug users."). See also *Education and Foster Care of Children Infected with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus*, 34 MMWR 517, 518 (1986) [hereinafter *Education and Foster Care*] ("The diagnosis of AIDS or associated illnesses . . . may evoke suspicion of life styles that may not be acceptable to some persons.").

52. See Sande, *supra* note 16, at 380:

[P]eople reacted to the fact that AIDS is caused by a virus with a hysteria reminiscent of another viral infection—the polio epidemic of the early 1950's The recognition of an asymptomatic-carrier state amplified the fear of sexual contagion in our society, and that fear was further intensified by reports of widespread transmission of the AIDS virus by heterosexual activity in Africa Probably the most sensational information, and perhaps the most misleading, was that the virus has been isolated from saliva and then from tears. This suggested to the public that the disease might be spread by food handlers, by kissing or shaking hands, or even by contact with fomites. The media did little to dispel these no-

weight of medical and scientific evidence establishes that AIDS-related disorders are communicated only through the intravenous transfer of blood and blood products, or through intimate sexual contact, all discrimination involving casual social contact with people who have AIDS-related disorders is unjustified.⁵³ This conclu-

tions; on the contrary, the public was led to believe that AIDS was a highly contagious disease . . . Responses have been varied, including calls for quarantine, mass screening of all potentially infected persons, expulsion from military service of all antibody-positive personnel, and exclusion of infected children from schools. In some cases refusal to care for AIDS patients has been condoned.

53. See *HTLV-III/LAV Agent Summary Statement*, 35 MMWR 540 (1986) ("As of Aug. 15, 1986 no cases of [AIDS] that meet the CDC case definition and can be attributed to an inadvertent laboratory exposure have been reported in laboratory workers."); *Acquired Immunodeficiency Syndrome in Correctional Facilities: A Report of the National Institute of Justice and the American Correctional Association*, 35 MMWR 195, 198 (1986) ("The apparent lack of reported AIDS cases among correctional staff as a result of contact with inmates is consistent with previous findings that the risk of HTLV-III/LAV transmission in occupational settings is extremely low and does not appear to result from casual contact."); Friedland, *supra* note 15, at 344, said that "[e]xcept for sexual partners and children born to infected mothers, none of the family members in more than 12,000 cases reported to the Centers for Disease Control (CDC) are known to have contracted AIDS (CDC: unpublished data)." Also:

In this study, despite prolonged and close contact with patients with AIDS or AIDS-related complex, 100 of 101 household contacts did not contract HTLV-III/LAV infection [and this one case involved a five-year-old child whose mother had AIDS and who appears to have acquired the disorder by perinatal transmission since he had signs and symptoms of HTLV-III/LAV infection since infancy]. . . . We conclude that nonsexual household contacts of patients with AIDS or AIDS-related complex with oral candidiasis are at minimal or no risk for horizontal transmission of HTLV-III/LAV infection (95 percent confidence interval, 0 to 2 percent) This study supports the view that transmission of the infection requires injection of blood or blood products or intimate sexual contact, and that longstanding household exposure to patients with AIDS is associated with little or no risk of transmission of HTLV-III/LAV infection.

Id. at 347-48. See also *The Acquired Immunodeficiency Syndrome*, 252 J.A.M.A. 2037, 2042 (1984) ("Patients with AIDS are not a danger to the general hospital community; there is no evidence of transmission via casual skin contact or airborne spread via respiratory droplets."). Also worth note are the following passages:

Over 1750 health care workers with intense exposure to patients with AIDS have been studied for evidence of antibody to the AIDS virus. Of the workers not otherwise members of high-risk groups . . . less than 0.1 percent were found to be antibody positive. In our institution (San Francisco General Hospital), more than 300 health care workers with intense and sustained exposure to patients with AIDS for nearly four years have been studied; all are antibody negative, with the exception of 14 of 50 homosexual male hospital workers Can the disease be contracted by an accidental needle stick with a needle contaminated by blood from a patient with AIDS? Probably yes, but with an extremely low frequency (less than 0.5 percent).

Sande, *supra* note 16, at 381.

Studies of nonsexual household contacts of AIDS patients indicates that casual contact with saliva and tears does not result in transmission of infection. Spread

sion leads to the question of whether there are means under federal, state, or local law to remedy the resulting discrimination.

III. THE REHABILITATION ACT OF 1973

Examination of whether federal law provides a remedy against discrimination for people with AIDS-related disorders begins with the Rehabilitation Act of 1973.⁵⁴ Congress passed the Act to prevent discrimination against the handicapped.⁵⁵ Congress recognized that a large number of handicapped people who were capable of working were unemployed due to myths and stereotypes that

of infection to household contacts of infected persons has not been detected when the household contacts have not been sex partners or have not been infants of infected mothers. The kind of nonsexual person-to-person contact that generally occurs among workers and clients or consumers in the workplace does not pose a risk for transmission of HTLV-III/LAV.

Workplace Recommendations, *supra* note 15, at 682. See also *Education and Foster Care*, *supra* note 51, at 519 ("Based on current evidence, casual person-to-person contact as would occur among schoolchildren appears to pose no risk."). See also *No HIV Transmission Found Among Medical Personnel*, 2 AIDS Pol'y & L. (BNA) No. 13, at 3 (July 15, 1987). But see *N.Y. Times*, May 20, 1987, at A1, col. 3 (Three health workers found to be infected by blood of AIDS patients but in all three cases the health worker either sustained prolonged exposure to blood or the blood entered the mouth or an open sore).

54. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-96 (1982)).

55. Congress originally defined a "handicapped individual" as "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to Title I and III of this Act." *Id.* at § 7(6). But Congress concluded:

That definition has proven to be troublesome in its application to provisions of the Act such as sections 503 and 504 because of its orientation toward employment and its relation to vocational rehabilitation services. It was clearly the intent of the Congress in adopting section 503 (affirmative action) and section 504 (non-discrimination) that the term 'handicapped individual' in those sections was not to be narrowly limited to employment (in the case of section 504), nor to the individual's potential benefit from vocational rehabilitation services under titles I and III.

S. REP. NO. 93-1297, 93d Cong., 2d Sess. 38, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6388 [hereinafter S. REP. NO. 93-1297]. Accordingly,

[t]he amended definition eliminates any reference to employment and takes cognizance of the fact that handicapped persons are discriminated against in a number of ways. First, they are discriminated against when they are, in fact, handicapped . . . Second, they are discriminated against because they are classified or labeled, correctly or incorrectly, as handicapped . . . Third, they are discriminated against if they are regarded as handicapped, regardless of whether they are in fact handicapped.

Id. at 6389.

they could not be integrated into society,⁵⁶ and that extra costs were incurred in accommodating their needs.⁵⁷ Section 503 of the Act prohibits discrimination against handicapped people by those who contract with the federal government.⁵⁸ Section 504 of the Act

56. Comment, *Section 504 of the Rehabilitation Act: Analyzing Employment Discrimination Claims*, 132 U. PA. L. REV. 867, 869 (1984) [hereinafter *Analyzing Employment Discrimination Claims*] ("Congress noted that in many instances discrimination, and not a deficiency of training, prevented handicapped individuals from finding and retaining meaningful employment. Employers' stereotyped assumptions concerning the limitations of handicapped individuals contributed to handicapped Americans' being an oppressed and hidden minority."). See Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501, 1513 (1973); Note, *Accommodating the Handicapped: Rehabilitating Section 504 after Southeastern*, 80 COLUM. L. REV. 171, 173 (1980) [hereinafter *Accommodating the Handicapped*] (The Rehabilitation Act of 1973 . . . was thus meant to enable handicapped persons to achieve their full productive capability, foster their self-sufficiency and independence, and integrate them into the community."). Also, "[m]any employers do not believe that handicapped persons can perform jobs adequately. Blanket refusals to hire persons with some or any disability are common among employers." *Id.* at n.9.

57. Fear of higher costs through architectural modifications or higher insurance premiums is a major factor inhibiting employers from accepting disabled applicants. Such fears however are often unsubstantiated. See Note, *Equal Protection and the Disabled: A Proposal*, 10 COLUM. J.L. & SOC. PROB. 457, 485 (1974). The handicapped person is "all too often excluded from schools and educational programs, barred from employment or [is] underemployed because of archaic attitudes and laws, denied access to transportation, buildings, and housing because of architectural barriers and lack of planning, and [is] discriminated against by public laws." S. REP. NO. 93-1297, *supra* note 54, at 6400.

[T]he American people are simply unfamiliar with and [are] insensitive to difficulties confronted [by] individuals with handicaps. The public lacks adequate knowledge about the potential of these individuals to contribute significantly to society. Too often we automatically make the assumption that nothing can be done It is against the basic tenets of the scientific process to make an assumption of no hope and no help. No less should be true of public policy. In the case of individuals with handicaps, making this assumption all too often has resulted in the violation of their basic rights as human beings and has condemned them to live useless lives.

Id.

58. Section 503 of the Rehabilitation Act of 1973, Pub. L. No. 112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 793 (1982 & Supp. 1985)). Except as otherwise indicated, references will be made to the relevant portion of the Rehabilitation Act Sections and not to the United States Code. Section 503 of the Act states:

(a) Any contract in excess of \$2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. The provisions of this section shall apply to any subcontract in excess of \$2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.

prohibits discrimination against handicapped people by all organizations that receive federal financial assistance.⁵⁹ The Department of Labor and the Department of Health and Human Services have responsibility for enforcing these provisions.⁶⁰ The regulations of these two departments should be read together when implementing the definition of a "handicapped individual," and are central to determining whether people with AIDS-related disorders come within the scope of that definition.⁶¹

Determination of whether people with AIDS-related disorders come within the coverage of the Act requires an examination of section 504. Included in this analysis are the applicable regulations and judicial decisions. Section 504 of the Act provides: "No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."⁶² Therefore, a section 504 plaintiff must satisfy each of five requisite elements:

- (1)handicapped individual
- (2)solely by reason of handicap
- (3)otherwise qualified
- (4)excluded from the participation in, be denied the benefits of, or be subjected to discrimination
- (5)program or activity receiving federal financial assistance.

59. Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794 (1982)).

60. The Department of Labor was directed by Executive Order to adopt regulations to implement section 503. See Exec. Order No. 11,758, 3a C.F.R. 116 (1974) (empowering the Secretary of the Department of Labor to issue regulations under section 503 of the Rehabilitation Act applicable to all federal agencies). Similarly, the Department of Health, Education, and Welfare was directed to adopt regulations to implement section 504. See Exec. Order No. 11,914 3 C.F.R. 117 (1976) (empowering the Secretary of Health, Education, and Welfare to issue regulations under section 504 of the Rehabilitation Act applicable to all federal agencies. Upon its creation, the Department of Health and Human Services assumed the responsibilities of the Department of Health, Education and Welfare over section 504. The Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 669 (codified at 20 U.S.C. §§ 3401-3510 (1982)).

61. When Congress enacted the new definition of handicapped individual it stated: It is intended that sections 503 and 504 be administered in such a manner that a consistent, uniform, and effective Federal approach to discrimination 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.

S. REP. NO. 93-1297, *supra* note 54, at 6391.

62. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 793 (1982)).

In this Article the author will examine the first element, "handicapped individual," the second element, "solely by reason of handicap," and the third element, "otherwise qualified," respectively. Elements four and five shall be assumed for the purposes of this discussion.⁶³

A. *Handicapped Individual*

The first element, "handicapped individual," has not been the subject of extensive judicial interpretation.⁶⁴ This may be because, in most suits brought under the Act, the defendant concedes the handicap.⁶⁵ Nevertheless, in the few cases in which the definition

63. With respect to the fifth element, the focus of inquiry is whether the defendant was a recipient of federal funds, directly or indirectly. See *Grove City College v. Bell*, 465 U.S. 555 (1984). At issue was the applicability of provisions of Title IX of the Education Amendments of 1972, which prohibited sex discrimination in any educational program or activity receiving federal financial assistance. The Court rejected the argument that the statute applied only to *direct* recipients of federal financial assistance. "There is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the Federal Government are subject to regulation." *Id.* at 564. It is enough that the defendant has benefitted in some way from federal financial assistance that was received by another. *United States Dep't of Transp. v. Paralyzed Veterans of America*, 106 S. Ct. 2705, 2712 (1986): "The statute covers those who receive the aid, but does not extend as far as those who benefit from it." The key word is "receive" because the receipt of federal funds operates as a *quid pro quo* that justifies imposition of the duties and obligations contained in the Rehabilitation Act. As the Court in *Paralyzed Veterans* explained:

Congress limited the scope of section 504 to those who actually "receive" federal financial assistance because it sought to impose section 504 coverage as a form of contractual cost of the recipient's agreement to accept the federal funds. "Congress apparently determined that it would require contractors and grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds" Under the program specific statutes, Title VI, Title IX, and section 504, Congress enters into an arrangement in on the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision. . . . By limiting coverage to recipients, Congress imposes the obligations of section 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to "receive" federal funds.

Id. at 2711.

64. See Note, *AIDS: Does it Qualify as a "Handicap" Under the Rehabilitation Act of 1973?*, 61 *NOTRE DAME L. REV.* 572, 587 (1986) [hereinafter *AIDS as Handicap*].

65. *Id.* at 587 n.93. See *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985) (epilepsy); *Norcross v. Sneed*, 755 F.2d 113 (8th Cir. 1985) (congenital visual impairment); *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619 (9th Cir. 1982) (diabetes); *Doe v. New York Univ.*, 666 F.2d 761 (2d Cir. 1981) (severe mental illness); *Simon v. St. Louis County*, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982) (paraplegic); *Carty v. Carlin*, 623 F. Supp. 1181 (D. Md. 1985) (heart attack, nervous breakdown, hernia); *Bento v. I.T.O. Corp.*, 599 F. Supp. 731 (D.R.I. 1984) (heart bypass surgery); *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F. Supp. 1130 (S.D. Iowa 1984) (nocturnal epilepsy, dyslexia, cerebral palsy); *Klein v. Albro*, No. 81-CV-1288 (N.D.N.Y. Oct. 1, 1982) (muscular dystrophy)

of a "handicapped individual" was contested, the term has been interpreted broadly.⁶⁶ The Act defines handicapped individual as "any individual 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."⁶⁷ Notwithstanding the fact that Congress intended that the section be given broad scope, this definition needs further elaboration because such terms as "physical or mental impairment," "substantially limits," and "major life activities," are ambiguous.⁶⁸ These ambiguities may be removed by examining how those terms have been applied in previous judicial opinions to non-AIDS-related disorders. This will demonstrate that extending the scope of "handicapped individual" to people with AIDS-related disorders is consistent with the legislative scheme.

(available on LEXIS, Genfed library, Dist. file); *Longoria v. Harris*, 554 F. Supp. 102 (S.D. Tex. 1982) (amputee); *Bey v. Bolger*, 540 F. Supp. 910 (E.D. Pa. 1982) (record of physical impairment, cardiac disease); *Doe v. Syracuse School Dist.*, 508 F. Supp. 333 (N.D.N.Y. 1981) (history of prior nervous breakdown); *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809 (E.D. Pa. 1977) (epilepsy).

66. See *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1098 (D. Haw. 1980), *vacated and remanded*, *E.E. Black, Ltd. v. Donovan*, 26 Fair Empl. Prac. Cas. (BNA) 1183 (D. Haw. 1981) ("Congress wanted the statute to have broad coverage and effect."). For examples of some unusual conditions that have qualified, see, e.g., *Fynes v. Weinberger*, C.A. 85-0427 (E.D. Pa. July 22, 1985) (asbestosis) (available on LEXIS, Genfed Library, Dist. file); *Boyd v. United States Postal Serv.*, 32 Fair Empl. Prac. Cas. (BNA) 1217, 1221 (Wash. 1983) (For the purpose of discussion, court assumes that post-traumatic stress disorder suffered by a Vietnam War era veteran is a handicap.); *Vickers v. Veterans' Admin.*, 549 F. Supp. 85 (W.D. Wash. 1982) (unusual sensitivity to tobacco smoke which made employee incapable of working in anything other than a smoke-free environment); *Daubert v. United States Postal Service*, 31 Fair Empl. Prac. Cas. (BNA) 459, 461 (D. Colo. 1982), *aff'd*, 733 F.2d 1367 (10th Cir. 1984) (back injury is a handicap).

67. 29 U.S.C. § 706(7)(B) (1982 & Supp. 1985).

68.

Clause (A) in the new definition eliminates any reference to employment and makes the definition applicable to the provision of Federally-assisted services and programs Clause (B) is intended to make clearer that the coverage of section 503 and 504 extends to persons who have recovered—in whole or in part—from a handicapping condition, such as mental or neurological illness, a heart attack, or cancer and to persons who were classified as handicapped (for example, as mentally ill or mentally retarded) but who may be discriminated against or otherwise be in need of the protection of sections 503 and 504 [Clause (C)] includes within the protection of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause (A) in the new definition.

S. REP. No. 1297, *supra* note 54, at 6389-90.

1. *Physical or Mental Impairment*

Section 504 of the Act defines a handicapped person as any individual who has a "physical or mental impairment." Such handicaps include:

(A) any *physiological disorder or condition*, cosmetic disfigurement, or anatomical loss *affecting* one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; *hemic and lymphatic*; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.⁶⁹

AIDS arguably is a physical impairment since it operates, in part, as a "physiological disorder or condition affecting" the "hemic and lymphatic" systems.⁷⁰ This analysis is supported by the liberal approach taken by the Department of Health and Human Services in its regulations that interpret the phrase, "physical or mental impairment."⁷¹ Accordingly, the department's analysis rejects efforts to limit the scope of the statute's protection to traditional handicaps.⁷² Furthermore, the department has determined that it is immaterial whether a specific handicap such as AIDS was recognized as a "physical impairment" at the time that Congress enacted the Rehabilitation Act.⁷³

2. *Substantially Limits*

The statute elaborates upon its definition by identifying a handicapped person as any individual who has a physical or mental im-

69. 45 C.F.R. § 84.3(j)(2)(i) (1985) (emphasis supplied).

70. *AIDS as Handicap*, *supra* note 64, at 583.

71. The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments "because of the difficulty of ensuring the comprehensiveness of any such list." 45 C.F.R. § 84 App. A subpart A(3) (1985).

72.

Comments suggested narrowing the definition in various ways. The most common recommendation was that only 'traditional' handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are commonly regarded as handicaps.

Id.

73. *AIDS as Handicap*, *supra* note 64, at 583-84.

pairment which "substantially limits . . . that individual."⁷⁴ The phrase "substantially limits" is neither defined in the Act nor in regulations promulgated under the Act by the Department of Health and Human Services.⁷⁵ The term is defined by the Department of Labor in its regulations to enforce section 503.⁷⁶ The Department of Labor's definition understandably is focused on, and is necessarily limited to, employment. Nevertheless, the term, especially when read in conjunction with the phrase "major life activity," appears to refer to the extent to which an impairment impacts upon the person.

Even though the term "handicap" has been given a liberal interpretation, not every environmental, cultural, or economic disadvantage will find protection under section 504.⁷⁷ Physical characteristics that are neither illnesses, disorders, nor deformities are not considered handicaps.⁷⁸ Even illnesses may be excluded if they are temporary.⁷⁹ Minor physical impairments do not qualify as handicaps, either.⁸⁰ And where only a few jobs are foreclosed to a

74. See 45 C.F.R. § 84 App. A subpart A(3) (1985) ("Several comments observed the lack of any definition in the proposed regulation of the phrase 'substantially limits.' The Department does not believe that a definition of this term is possible at this time."). See also *AIDS as Handicap*, *supra* note 64, at 584 n.77: "As one observer noted, 'The most significant restriction on the statutory definition of handicapped is the phrase 'substantially limits'; the precise meaning of this phrase remains unclear.'" (quoting from Comment, *Employment Rights of Handicapped Individuals: Statutory and Judicial Parameters*, 20 WM. & MARY L. REV. 291, 294 (1978)).

75. See *supra* notes 70, 74. See also *AIDS as Handicap*, *supra* note 64, at 584 n.77.

76. 41 C.F.R. § 60-741 App. subpart C (1985) (Office of Federal Contract Compliance Programs).

77. "Thus, environmental, cultural and economic disadvantage are not in themselves covered; nor are prison records, age, or homosexuality." 45 C.F.R. § 84 App. A (3). *But cf. id.*: "Of course, if a person who has any of those characteristics also has a physical or mental handicap, the person is included within the definition of handicapped person." See also *AIDS as Handicap*, *supra* note 64, at 583-84.

78. See *de la Torres v. Bolger*, 781 F.2d 1134, 1138 (5th Cir. 1986) (left-handedness "is a physical characteristic, not a chronic illness, a disorder or deformity, or a mental disability, or a condition affecting . . . health."); *Tudyman v. United Airlines*, 608 F. Supp. 739, 746 (C.D. Cal. 1984) (muscular build not an impairment even though plaintiff could not meet airline's weight requirements).

79. *Stevens v. Stubbs*, 576 F. Supp. 1409, 1414 (N.D. Ga. 1983) (transitory illness with no permanent effect on plaintiff's health is not an impairment).

80. *Jansany v. United States Postal Serv.*, 755 F.2d 1244, 1250 n.6 (6th Cir. 1985) (cross-eyes may be "so minor that [they do] not rise to the level of a physical impairment."). See also *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986):

The Rehabilitation Act assures that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps. It would debase this high purpose if the statutory protections to those truly handicapped could be claimed by anyone

handicapped person, it cannot be claimed that the handicap "substantially limits" the person's major life activities.⁸¹

Undoubtedly, AIDS "substantially limits" one's major life activities, for as one commentator stated:

Few impairments have as profound an impact on one's personal autonomy as does AIDS. When AIDS renders the body incapable of combatting disease, many, if not most, aspects of the victim's life are drastically altered. Due to the physically disabling effects of the disease and to the public stigma attached to contracting the disease, the victim's ability to function in society and at the workplace may be greatly hindered, *i.e.*, 'substantially limited.'⁸²

Therefore, AIDS appears to qualify under the Act as a "physical impairment" that "substantially limits" one's "major life activities." The disorder is neither minor nor temporary, and is not the result of environmental, cultural, or economic disadvantage. Instead, AIDS is progressive, degenerative, incurable and fatal.

3. *Major Life Activities*

The Act requires that a "handicapped individual" be not only one who has a "physical or mental impairment" which "substantially limits" but also that it affect such person's "major life activities." The phrase "major life activities" has been defined to mean "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and work-

whose disability was minor and whose relative severity of impairment was widely shared.

81. See *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1098 (D. Haw. 1980), *vacated and remanded sub nom.*, *E.E. Black, Ltd. v. Donovan*, 26 Fair Empl. Prac. Cas. (BNA) 1183 (D. Haw. 1981) (concluding that an impairment that interfered with an individual's ability to do a particular job, but did not significantly decrease that individual's ability to obtain satisfactory employment otherwise, was not substantially limiting within the meaning of the statute). See also *Salt Lake City Corp. v. Confer*, 674 P.2d 632, 636-37 (Utah 1983) ("*particular job for one particular employer cannot be a 'major life activity'*" (emphasis in original)). *Jansany*, 755 F.2d at 1249 ("Characteristics such as average height or strength that render an individual incapable of performing particular jobs are not covered by the statute because they are not *impairments*.") (emphasis in original) (footnote omitted); *Osterling v. Walters*, 760 F.2d 859 (8th Cir. 1985) (varicose veins not a handicap); *Tudyman v. United Airlines*, 608 F. Supp. 739, 745 (C.D. Cal. 1984) ("There is, however, no authority for the proposition that failure to qualify for a single job because of some impairment that a plaintiff would otherwise be qualified to perform constitutes being limited in a major life activity.").

82. *AIDS as Handicap*, *supra* note 64, at 585.

ing.”⁸³ A diagnosis of AIDS would appear to “substantially limit” one’s “major life activities”:

The extensive medical treatment an AIDS victim typically requires over the course of his disease shows that he will frequently be unable to care for himself. As the disease progresses, an AIDS victim’s capacity to work will invariably diminish. If the AIDS victim contracts a disease such as PCP, which attacks the respiratory system, breathing will be inhibited. The mere diagnosis of AIDS will, in most instances, profoundly affect the victim’s social interactions with other people.⁸⁴

Determining whether people with ARC meet the statutory definition of “handicapped individuals” is problematic, since no uniform definition of ARC exists.⁸⁵ Nevertheless, to the extent that such people suffer illnesses that “substantially limit” their ability to engage in “major life activities,” they would come within the scope of section 504. Even the United States Department of Justice, which has argued against bringing most people with AIDS-related disorders under section 504 of the Act, has acknowledged that, “if the effects of ARC do not render a particular individual handicapped, the individual may be protected [from discrimination] by section 504 if he can show that he suffered discrimination because he was regarded as suffering from the disabling effects of AIDS.”⁸⁶

People who test seropositive also may be determined to be “handicapped individuals,” thereby obtaining protection from discrimination. A person with a seropositive test result would qualify as a “handicapped individual” within the first element of section 504 to the extent that the basis for the discrimination is the per-

83. 45 C.F.R. § 84.3(j)(2)(ii) (1985).

84. *AIDS as Handicap*, *supra* note 64, at 585. Although the U.S. Department of Justice concedes that a person with AIDS qualifies as a “handicapped individual” under the first element of section 504, *DOJ Memorandum*, *supra* note 10, at D-7-8, it has taken the position that people with AIDS are discriminated against on the basis of an irrational fear of contagion, not “solely by reason of handicap” under the second element of section 504. *Id.* at D-10. Since the plaintiff has the burden of establishing each and every element of his claim under section 504, the Department’s argument, if accepted, would defeat a plaintiff’s section 504 action. *See, e.g.*, *Strathie v. Department of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983); *Doe v. New York Univ.*, 666 F.2d 761, 774-75 (2d Cir. 1981).

85. *See supra* notes 25-29 and accompanying text. *See also DOJ Memorandum*, *supra* note 10, at D-9 (“Persons suffering from ARC present a somewhat different question. Because of the definitional imprecision of this condition . . . it does not appear possible to set down a uniform rule for ARC patients”).

86. *DOJ Memorandum*, *supra* note 10, at D-9 n.71.

ception that the person was suffering from, or would soon suffer from, the disabling effects of AIDS, which is itself within the coverage of section 504.⁸⁷

B. Solely by Reason of Handicap

Even if people with AIDS-related disorders are "handicapped individuals" as defined by section 504, the discrimination must have resulted "solely by the reason of handicap" to come within the scope of the Act. Discrimination against people with AIDS-related disorders may arise out of a fear of contagion. This fear may be honest and sincere regardless of the absence of any medical or scientific data to justify it. Since under these circumstances, the discrimination does not result "solely by reason of handicap," the United States Department of Justice has argued that the fear of contagion immunizes conduct otherwise violative of section 504.⁸⁸ The argument is based on three assumptions: first, that Congress intended to extract the ability to transmit the contagious disease from the protection otherwise provided by section 504 to those who suffer from the disabling effects of a contagious disease; second, that people who have or are perceived to have the ability to transmit the disabling effects of a contagious disease suffer no "physical or mental impairment" as that term is used in regulations; and third, that the sincerity of a defendant's fear of contagion eliminates the need to present medical or scientific evidence to justify it. Each of these assumptions is examined in turn.

The validity of the assumption that Congress intended to eliminate from section 504 those who transmit a contagious disease without suffering from the disabling effects depends on Congressional intent, voiced either in express statutory language or persuasive legislative history.⁸⁹ There is no evidence that Congress intended to limit the Act in that manner. However, there is evidence to suggest that where Congress wished to exclude certain aspects of a disorder from the broad protection otherwise provided in section 504, it did so unequivocally.⁹⁰ Accordingly, when the Attorney

87. See *supra* notes 68-83 and accompanying text.

88. DOJ Memorandum, *supra* note 10, at D- 7-13.

89. See *supra* note 68.

90. See *Patsy v. Board of Regents*, 457 U.S. 496, 503-507 (1982) (In light of express language of section 1973 and intent of Congress to "throw open the doors of the United States courts" to individuals suffering from discrimination, policy considerations alone could not justify a judicially imposed exhaustion requirement). *Accord Monell v. Department of Social Serv.*, 436 U.S. 658, 695-701 (1978) (Among the factors to be considered in determin-

General of the United States issued an opinion that supported the inclusion of alcoholics and drug addicts in the definition of "handicapped individuals,"⁹¹ Congress sought to clarify its intent. Congress separated reformed alcoholics from others, and declared that reformed alcoholics could not be discriminated against either because they drank previously, or notwithstanding their nondrinker status, because they were still medically classified as alcoholic. By contrast, unreformed alcoholics whose present consumption of alcohol impairs or impedes their abilities, could "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination" without violating section 504.⁹²

The second assumption of the Department of Justice is that people who have or who are perceived to have the ability to transmit the disabling effects of a contagious disease suffer no "physical or mental impairment" because "the carrier's condition—the presence within his body of the active infectious agent—has no adverse physical consequences for him."⁹³ Assuming for the moment that there must be some physical manifestation to constitute an "impairment" as that term is used in section 504, the presence within a person of a deadly agent that may or may not be transmitted to another is a physical manifestation.⁹⁴ More importantly, to the ex-

ing whether the Court should reconsider or overrule prior precedent are: (1) whether the decisions in question misconstrued the statute as revealed in its legislative history, and (2) whether overruling those decisions would be consistent with more recent Congressional pronouncements). See also *TransAmerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) (The key to statutory construction is the language of the statute itself); *Department of Transp. v. Paralyzed Veterans of Am.*, 106 S. Ct. 2705 (1986); *Texas Indus., Inc. v. Radcliff Materials*, 451 U.S. 630, 639 (1981); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981) (look at statutory language, legislative history and prior judicial interpretations of statute).

91. 43 Op. Att'y Gen. 1, 2 (1977).

92. H. REP. NO. 95-1149, 95th Cong., 2d Sess. 1, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 7312, 7333-34 [hereinafter H. REP. NO. 95-1149]:

The committee emphasizes that an individual with a record of alcohol or drug abuse or who is regarded as being an individual who is an alcoholic or drug abuser may still be protected by the provisions of sections 503 and 504 if he or she is not in need of rehabilitation. This protects otherwise qualified self-reformed or rehabilitated alcoholics or drug abusers from unreasonable discrimination.

Id. at 7334. See also *id.* at 7413: "The conference substitute clarifies that only those active alcoholics or drug abusers who cannot perform the essential functions of a job in question or who present a danger to life and property are not covered by the employment provisions of sections 503 and 504."

93. See DOJ Memorandum, *supra* note 10, at D-8.

94. See *New York State Ass'n for Retarded Children v. Carey*, 466 F. Supp. 479 (E.D.N.Y. 1978), *aff'd*, 612 F.2d 644 (2d Cir. 1979) (restricting mentally retarded students affected with hepatitis B violated the Rehabilitation Act). See also *District 27 Community*

tent that the assumption interprets "impairment" to require some severe or significant physical manifestation, it is mistaken. Alcoholism and drug addiction are protected under the Act.⁹⁵ Similarly, "mental impairments" need not produce severe or significant physical consequences.⁹⁶ Even the subsidiary argument that AIDS-related disorders should be excluded from the Act because they were acquired through voluntary conduct is unavailing because where Congress wished to exclude voluntary conduct it did so explicitly.⁹⁷ Furthermore, it is unclear to what extent people with AIDS-related disorders acquired them through voluntary conduct. The children of AIDS patients, who were born with AIDS-related disorders, did nothing to bring about their disabling condition. People exposed to AIDS through blood transfusions, such as surgical patients and hemophiliacs, no more engaged in culpable, "voluntary" conduct to produce the injury than the innocent driver who is seriously injured in an automobile accident. The fact that alcoholism and drug addiction are covered under the statute itself belies the claim that Congress intended to exclude handicapping conditions that were acquired through voluntary, illegal or immoral conduct.

The third assumption of the Department of Justice is that the sincerity of a defendant's fear of contagion made unnecessary the need to establish its reasonableness based on medical or scientific data. By excusing discrimination against people with AIDS-related disorders based on an honest fear of contagion, the traditional basis for discrimination against handicapped individuals is perpetu-

School Bd. v. Board of Educ., 130 Misc. 2d 398, 502 N.Y.S. 2d 325 (1986) (Section 504 applied to uphold Board of Education's policy of not automatically excluding students with AIDS from classroom over opposition from community school board).

95. See 43 Op. Atty Gen. 1, 2 (1977).

96. See, e.g., 45 C.F.R. § 84.3(j)(2)(i)(B) (1985), which includes among the covered "physical or mental impairment[s]" such mental or psychological disorders as "mental retardation . . . emotional or mental illness, and specific learning disabilities."

97. Congress has excluded people whose own willful misconduct caused their injuries when it has chosen to do so. See *McKelvey v. Turnage*, 792 F.2d 194 (D.C. Cir. 1986), cert. granted *sub nom.*, *Traynor v. Turnage*, 107 S. Ct. 1368 (1987).

In 1977, Congress amended the [G.I. Bill] to extend the limitation period for those veterans who were unable to use their educational benefits during that period 'because of a physical or mental disability which was not the result of [their] own willful misconduct.' The 'willful misconduct' qualification was not a new concept; the same limitation was already contained in a number of previously enacted veterans benefit provisions.

Id. at 196 (citation omitted).

ated: that the handicapped represent too high a risk, either to themselves or to others, to be hired.⁹⁸

Section 504 case law establishes beyond peradventure that attempts to justify discrimination against the handicapped, based on the handicapped presenting an elevated risk, have been rejected unless based on scientific or medical data. In *Mantolite v. Bolger*,⁹⁹ an epileptic was denied a job with the United States Postal Service which would have required her to work with complex mail sorting equipment. The Postal Service feared that the plaintiff might suffer an epileptic seizure during which she might injure herself or others. The Ninth Circuit Court remanded, stating:

We agree . . . that, in some cases, a job requirement that screens out qualified handicapped individuals on the basis of possible future injury is necessary. However, we hold that in order to exclude such individuals, there must be a showing of a reasonable probability of substantial harm. Such a determination cannot be based merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports. The question is whether, in light of the individual's work history and medical history, employment of that individual would pose a reasonable probability of substantial harm.¹⁰⁰

The argument that discrimination against the handicapped is non-actionable if based on the elevated risk of harm to others, also has been rejected by the Third Circuit. In *Strathie v. Department of Transportation*,¹⁰¹ a trained school bus driver had his class four school bus license revoked after it was determined that his natural hearing ability, unassisted by a hearing aid, did not fall within the Department's standards. Strathie filed a class action to overturn the Department's rule. The Department defended its rule on the

98. For example, even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious. As the late Senator Humphrey noted, the "irrational fears or prejudice on the part of employers or fellow workers" often makes it difficult for former cancer patients to secure employment. 123 Cong. Rec. 13515 (1977). See also Feldman, *Wellness and Work*, in *PSYCHOLOGICAL STRESS AND CANCER* 173 (C. Cooper ed. 1984) (documenting job discrimination against recovered cancer patients); Sontag, *ILLNESS AS METAPHOR* 5-6 (1978) ("Any disease that is treated as a mystery and acutely enough feared will be felt to be morally, if not literally, contagious. Thus, a surprisingly large number of people with cancer find themselves being shunned by relatives and friends . . . as if cancer, like TB, were an infectious disease.").

99. 767 F.2d 1416 (9th Cir. 1985).

100. *Id.* at 1422.

101. 716 F.2d 227 (3rd Cir. 1983).

ground that it was "not only to provide for the safety of school bus passengers, but to ensure the highest level of safety."¹⁰² The court of appeals rejected the argument because the Department's regulations were legitimately concerned only with appreciable risks and not with every conceivable risk possible.¹⁰³

The Second Circuit also has rebuffed efforts to immunize otherwise unlawful discrimination on the basis of unreasonable fears that the handicapped present an elevated public risk. In *New York State Association for Retarded Children v. Carey*,¹⁰⁴ for example, the court held that section 504 prevented a board of education from excluding from its regular classrooms mentally retarded children who were thought to be carriers of hepatitis when the board was unable to demonstrate that the health hazard posed by the children was anything more than a remote possibility.

C. Otherwise Qualified

Even if it is determined that a person with an AIDS-related disorder is a "handicapped individual" within the first and second elements of section 504, it would still be necessary to establish that he or she was "otherwise qualified." That inquiry focuses on two aspects of the handicapped individual's condition: (1) whether the person meets the requirements of a particular program or activity; and (2) whether the person is capable of performing the work without endangering himself or herself or others.¹⁰⁵ Some courts have

102. *Id.* at 232.

103.

In our view, the essential nature of the program is to prevent any and all *appreciable* risks that a school bus driver will be unable to provide for the control over and safety of his passengers. For example, we note that the Department allows the granting of school bus driver's licenses to individuals who must wear eyeglasses in order to meet Department vision standards. If such a person's eyeglasses were to be removed, either voluntarily or involuntarily, while he was driving a school bus, he would certainly present a danger to the safety of his passengers. That such an individual is allowed to obtain a school bus driver's license indicates that the Department views some safety risks as too removed to justify the denial of a school bus driver's license.

Department of Transportation Regulations concerning other physical disabilities confirm our description of the essential purpose of the school bus driver licensing program. For example, several physical ailments will prevent an individual from obtaining such a license only if the ailment is likely to interfere with the ability to drive a school bus with safety."

Id. at 232 (citations omitted).

104. 466 F. Supp. 479 (E.D.N.Y. 1978), *aff'd*, 612 F.2d 644 (2d Cir. 1979).

105. *Strathie v. Department of Transp.*, 716 F.2d 227 (3d Cir. 1983) (A licensed school bus driver failed to meet regulations because hearing loss without the assistance of a hearing

placed primary reliance on the second aspect of the "otherwise qualified" element of section 504.¹⁰⁶ But the Supreme Court elucidated both aspects of the "otherwise qualified" element of section 504 in *Southeastern Community College v. Davis*,¹⁰⁷ where South-

aid fell below a set standard. Even though danger to others would result if driver's hearing aid became dislodged, the risk of that occurring was not appreciable.); *Mahoney v. Ortiz*, 645 F. Supp. 22 (S.D.N.Y. 1986) (police officer who had suffered two or more shoulder dislocations was not "otherwise qualified" under reasonable medical standards for police employment); *Pickut v. United States Air Force*, 24 M.S.P.B. 433 (1984) (police officer with the Air Force was not otherwise qualified where it was undisputed that he was unfit to carry a weapon because of his psychological condition); *Schmidt v. Bell*, 33 Fair Empl. Prac. Cas. (BNA) 839 (E.D. Pa. 1983) (Vietnam veteran who suffered from post-traumatic stress disorder was not otherwise qualified to be student loan officer, a stressful job); *Coleman v. Casey County Bd. of Educ.*, 510 F. Supp. 301 (W.D. Ky. 1980) (school bus driver who had one leg amputated was otherwise qualified to work despite a state law requiring bus drivers to have both legs); *Swann v. Walters*, 620 F. Supp. 741 (D.D.C. 1984) (paranoid schizophrenic not "otherwise qualified" for position that required security clearance).

106. See, e.g., *Mantoletto v. Bolger*, 767 F.2d 1416 (9th Cir. 1985) (epileptic could be otherwise qualified to be postal clerk); *Doe v. Region 13 Mental Health—Mental Retardation Comm'n*, 704 F.2d 1402 (5th Cir. 1983) (Although psychiatric worker had an exemplary work record and her attendance record was acceptable, evidence of her suicidal tendencies rendered her not "otherwise qualified"); *Doe v. New York Univ.*, 666 F.2d 761 (2d Cir. 1981) (first-year medical student not "otherwise qualified" where severe mental problems presented an unreasonable danger to herself and others); *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372 (10th Cir. 1981); *New York State Ass'n of Retarded Children v. Carey*, 612 F.2d 644 (2d Cir. 1979) (mentally retarded children who were carriers of hepatitis were otherwise qualified to be admitted to regular classrooms where it could not be demonstrated that the health hazard posed by the children was anything more than a remote possibility); *District 27 Community School Bd. v. Board of Educ.*, 130 Misc. 2d 398, 502 N.Y.S. 2d 325 (1986) (risk of contagion to other students sufficiently remote that students with AIDS were otherwise qualified to be admitted to regular classroom); *Carter v. United States Postal Serv.*, 23 M.S.P.B. 504 (1984). See also *Kelley v. Bechtel Power Corp.*, 633 F. Supp. 927 (S.D. Fla. 1986).

Although a "handicapped individual" must meet both aspects of the "otherwise qualified" element of section 504, some courts have placed primary emphasis on the first aspect of this element. See, e.g., *Norcross v. Sneed*, 573 F. Supp. 533 (W.D. Ark. 1983), *aff'd*, 755 F.2d 113 (8th Cir. 1985) (A legally blind woman was otherwise qualified to be a school librarian, even though playground and hall duty were within her job description, because librarians had never been required to perform these duties.); *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd without opinion*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985) (state ordered to provide readers for blind welfare workers so that they might be "otherwise qualified"); *Daubert v. United States Postal Serv.*, 733 F.2d 1367 (10th Cir. 1984) (postal clerk who had back problems was not "otherwise qualified"); *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983); *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619 (9th Cir. 1982); *Prewitt v. United States Postal Serv.*, 662 F.2d 292 (5th Cir. 1981); *Carmi v. Metropolitan St. Louis Sewer Dist.*, 471 F. Supp. 119 (E.D. Mo. 1979), *aff'd*, 620 F.2d 672 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980); *Coley v. United States Dep't of the Army*, 29 M.S.P.B. 101 (1985); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1098 (D. Haw. 1980), *vacated and remanded*, *E.E. Black, Ltd. v. Donovan*, 26 Fair Empl. Prac. Cas. (BNA) 1183 (D. Haw. 1981); *Caylor v. Alexander*, 29 Fair Empl. Prac. Cas. (BNA) 727 (M.D. Ala. 1981); *Guerriero v. Schultz*, 557 F. Supp. 511 (D.D.C. 1983).

107. 442 U.S. 397 (1979).

eastern refused to admit to its federally-funded nursing program a woman who could distinguish only "gross sounds" even with the assistance of a hearing aid. The Court found for Southeastern, saying that although there might be situations in which discrimination is found when a recipient of federal funds refused to make a reasonable accommodation for the handicapped,¹⁰⁸ generally there is no obligation to dispense with *bona fide* job requirements under section 504 of the Act.

Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.¹⁰⁹

The Court then considered the second aspect of the "otherwise qualified" requirement. Relying on the existence of probable dangers to others, the court concluded that Davis was *not* otherwise qualified to be a nurse because "the ability to understand speech without reliance on lipreading is necessary for patient safety during the clinical phase of the program."¹¹⁰

Southeastern cast doubt on the argument of the United States Department of Justice that discrimination against people with AIDS-related disorders, based on irrational fears of contagion, is not acceptable because it does not result "solely by reason of hand-

108. *Southeastern*, 442 U.S. at 412-13. Department of Health and Human Services regulations reflect the balance struck by the Supreme Court in *Southeastern* and define a "qualified handicapped person," in the context of employment, as one who, "with reasonable accommodation, can perform the essential functions of the job in question." See 45 C.F.R. § 84.3 (k)(1)(1985).

109. *Southeastern*, 442 U.S. at 405.

110. *Id.* at 407. The Court quoted from the district court findings that:

[I]n many situations such as an operation room intensive care unit, or post-natal care unit, all doctors and nurses wear surgical masks which would make lip reading impossible. Additionally, in many situations a Registered Nurse would be required to instantly follow the physician's instructions concerning procurement of various types of instruments and drugs where the physician would be unable to get the nurse's attention by other than vocal means Of particular concern to the court in this case is the potential of danger to future patients in such situations.

Id. at 403.

icap." First, the risk of contagion should be considered in determining whether a handicapped individual is "otherwise qualified" and not as an exception to the "solely by the reason of handicap" element of section 504. Second, the determination that contagion makes a person not "otherwise qualified" must be based on medical facts and scientific knowledge—not on irrational fears regardless of how sincerely they are held.

People with AIDS who are discriminated against by recipients of federal assistance should be able to obtain redress for such discrimination under section 504. They are "handicapped individuals" who are discriminated against "solely by reason of handicap." It may well be that a person with AIDS is not "otherwise qualified" to perform a particular job because of his heightened susceptibility to disease, excessive absences, or physical incapacity due to the ravages of the disorder itself. However, since the great weight of medical and scientific evidence suggests that AIDS is communicated to another only through the intravenous transfer of blood or blood products or through sexual contact,¹¹¹ it is likely that fears about the risk of contagion will never immunize discrimination that is otherwise actionable under section 504.

People with ARC also should be protected under the Rehabilitation Act since the risk of contagion presented by such people is as small as it is for people with AIDS. Furthermore, since the physical impact of ARC is less severe than that of AIDS, it is even less likely that people with ARC would be rendered not "otherwise qualified" due to a heightened susceptibility to illness. A similar result should follow with respect to people who test seropositive since they also present no greater risk of contagion. Furthermore, since those people manifest no symptoms of the disorder, they should manifest no heightened susceptibility to disease, illnesses or physical incapacity that would render them not "otherwise qualified."

Analysis of the Act establishes that it can be properly extended to protect people with AIDS-related disorders. This analysis is supported by an examination of the Supreme Court's decision last term in *School Board v. Arline*.¹¹²

111. See Sande, *supra* note 16, at 380.

112. 107 S. Ct. 1123 (1987).

IV. THE Arline CASE

Mrs. Arline, a public elementary school teacher, was fired after her third relapse of tuberculosis, a contagious, communicable disease¹¹³ from which doctors told her she had been cured twenty

113. The infectious agent in tuberculosis, mycobacterium tuberculosis (tubercle bacillus) is carried on airborne droplets which are produced when persons with pulmonary tuberculosis in and around their lungs sneeze, cough, or speak. Brief for American Medical Association as *Amicus Curiae* in Support of Petitioners at 4, School Board v. Arline, 107 S. Ct. 1123 [hereinafter Brief for AMA] (on file, *Florida State University Law Review*). See also AMERICAN THORACIC SOCIETY, DIAGNOSTIC STANDARDS AND CLASSIFICATION OF TUBERCULOSIS AND OTHER MYCOBACTERIAL DISEASES (14th ed., 1974) (on file, *Florida State University Law Review*); HARRISON, PRINCIPLES OF INTERNAL MEDICINE 625-33 (Braunwald, Isselbacher, Petersdorf, Wilson, Martin & Fauci, Eds., 11th ed. 1987); Merck & Co., THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 127, (14th ed. 1982). "These droplets dry out and become small flecks, called 'droplet nuclei,' which are light enough to remain floating in the air." Brief for the American Public Health Association, American Civil Liberties Union, American Nurses Association, and National Association of Protection and Advocacy Systems as *Amicus Curiae* at 6, School Board v. Arline, 107 S. Ct. 1123 [hereinafter Brief for APHA] (on file, *Florida State University Law Review*).

"The typical setting for infection is a closed room with poor ventilation. If the germs float out into the sunlight, they are quickly killed." Brief for APHA at 6 (quoting U.S. Pub. Health Serv., Centers for Disease Control, TUBERCULOSIS (undated) [hereinafter TUBERCULOSIS]). Although the body has many natural traps to filter out foreign elements such as the droplet nuclei, a person may become infected if the droplet nuclei ride the air deep into the lungs without being stopped. The newly infected host may not contract the disease tuberculosis.

Millions of Americans have tuberculosis infection, many of them infected years ago when the disease was more common. But only a small percentage of those infected develop the disease; only those with the disease can suffer any impairment (not all do); and only those with the disease in or around the lungs and can transmit the infection to other people, because only they can exhale tuberculosis bacteria.

Brief for AMA at 5. As the United States Centers for Disease Control has observed:

Though tubercle bacilli begin to multiply and spread, the body sets up a defense. Usually the defense is sufficient to stop the growth of the germs and further progression of the disease is halted for the rest of the person's life. This is possible because the germ will hibernate without ever causing disease, and the damage done seldom has any effect on the person's physical well-being. Sometimes, though, disease develops soon after a person becomes infected. This does not occur often, so the greatest danger is the long-term threat of tuberculosis infection. Infection from years earlier may progress to disease during periods of stress caused by other illnesses or physical or emotional hardship, but often for no apparent reason. When the disease develops, the infection can be spread to others.

Brief for APHA at 7 (quoting TUBERCULOSIS).

The initial symptoms of tuberculosis are usually loss of weight and strength, irregular appetite, and low grade fever. But as the disease progresses and becomes communicable, any or all of the following may develop: cough, thick mucus brought up from the lungs, blood-streaked sputum, chest pains, and breathing difficulties. Untreated, the disease may become debilitating, and in the past, tuberculosis was known as the "white plague" because it killed so many people. Even today tuberculosis can be deadly. Brief for APHA at 7-8. Of the 28,521 cases of tuberculosis reported in 1978 for the United States, 2,914 resulted in death.

years previously.¹¹⁴ She sued the school board in the District Court for the Middle District of Florida, alleging that susceptibility to tuberculosis was a handicap within the meaning of the Rehabilitation Act,¹¹⁵ and that the school board violated section 504 of the Act in dismissing her even though she was "otherwise qualified."¹¹⁶ The district court held, first, that Mrs. Arline was not handicapped under the Act.¹¹⁷ Second, the district court said that, "even assuming' that a person with a contagious disease could be deemed a

And in 1982, the most recent year for which statistics are available, there were 25,520 cases of tuberculosis resulting in 1,807 deaths. Brief for AMA at 4 (citing U.S. DEP'T OF HEALTH AND HUMAN SERVICES, TUBERCULOSIS IN THE UNITED STATES 1982)). Today, death results, in general, because: (1) the disease is diagnosed late in its development; (2) the person with tuberculosis has other illnesses or medical complications; or (3) the person with tuberculosis fails regularly to take appropriate medication. Brief for AMA at 4 (citing Davis, Carpenter, McAllister, Matthew, Bush & Ognibene, *Tuberculosis: Cause of Death in Antibiotic Era*, 88 CHEST 726 (1985)).

114. Mrs. Arline contracted tuberculosis in 1957 when she was fourteen. Brief for Respondent at 2, in *School Bd. v. Arline*, 107 S. Ct. 1123 [hereinafter Brief for Respondent] (copy of an early version of the brief, dated Sept. 18, 1986, on file, *Florida State University Law Review*). There are two medical tests used to determine whether a person infected with the tuberculosis germ is contagious. The classic method of diagnosis is by culturing the bacterium, which takes several weeks. The other method of diagnosing infection is by microscopic examination of a stained sputum smear to detect the number of bacilli present. Following the positive test in 1977, Mrs. Arline took sick leave from her teaching job, was successfully treated, and then returned to her classes. *Id.* at 2. However, in March of 1978, she again tested positive. When a November 1978 sputum test again showed positive results, Mrs. Arline was first placed on leave and then fired, not because she had done anything wrong, but because of the continued recurrence of tuberculosis. *Id.* at 2-3. See also *Arline*, 107 S. Ct. at 1125. Today, with treatment, over 90% of people with tuberculosis are relieved of symptoms and become noncommunicable within days or weeks. American Thoracic Society and the United States Centers for Disease Control, *Control of Tuberculosis*, 128 AM. REV. RESPIRATORY DISEASE 336, 340 (1983); Lester, *Treatment of Tuberculosis*, in PULMONARY DISEASES AND DISORDERS 1306-07 (1980). It is possible that Mrs. Arline is among the 10% of tuberculosis patients who cannot successfully be treated. It is also possible that she suffered her relapses because she failed regularly to take appropriate medication. Glassroth, Robins & Snider, *Tuberculosis in the 1980's*, 302 N. ENG. J. MED. 1441, 1446 (1980).

115. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 357 (codified as amended at 29 U.S.C. §§ 701-96 (1982)).

116. *Arline*, 107 S. Ct. at 1125. Mrs. Arline initially took an administrative appeal of her dismissal. *Id.* The Florida State Board of Education, which consists of the Governor and the Members of the Cabinet, adopted the findings of the hearing officer, rejected the school board's termination order, and ordered Mrs. Arline's reinstatement with back pay. Brief for Respondent, *supra* note 111, at 7. The school board then appealed to the state's First District Court of Appeal which reversed the reinstatement order. *Id.* Suit was then filed in federal court.

117. "The District Court held, however, that although there was '[n]o question that she [Arline] suffers a handicap,' Arline was nevertheless not 'a handicapped person under the terms of that statute.' (citation omitted) The court found it 'difficult . . . to conceive that Congress intended contagious diseases to be included with the definition of a handicapped person.'" 107 S. Ct. at 1125 (citation omitted).

handicapped person, Mrs. Arline was not 'qualified' to teach elementary school."¹¹⁸

The United States Court of Appeals for the Eleventh Circuit reversed the district court and held that "'persons with contagious diseases are within the coverage of section 504, and that Mrs. Arline's condition falls . . . neatly within the statutory and regulatory framework of the Act."¹¹⁹ The Eleventh Circuit Court remanded the case for the trial court to determine whether the risks of infection precluded Mrs. Arline from being "otherwise qualified" for her job and, if so, whether it was possible to make some reasonable accommodation for her in that teaching position or in some other position. The Supreme Court granted Mrs. Arline's motion to proceed *in forma pauperis* when the school board petitioned for a writ of certiorari to challenge the Eleventh Circuit Court's decision.¹²⁰

The Supreme Court made three holdings in *Arline*. First, after emphasizing the broad scope accorded to the Act, it held that the contagious infectious disease of tuberculosis constituted a handicap and that Arline was a "handicapped individual" within the meaning of section 504.¹²¹ Second, the risk of contagion should be considered in determining whether a "handicapped individual" is "otherwise qualified"—not as an exception to the "solely by reason of handicap" element of section 504. Third, it emphasized that since one of Congress' goals in the Act was to prohibit discrimination based on unreasonable fears and concerns, exclusion from participation in, or denial of benefits to, or discrimination against, those who have contagious diseases, is permissible only to the extent that it is based on medical knowledge and scientific fact. Each of these issues shall be examined in turn.

First, the Supreme Court discussed Congressional expansion in 1974 of the definition of "handicapped individual" to include not only those with physical and mental impairments, but also those with either a record of impairment or those who are perceived as suffering from an impairment. The Court said that the action reflected congressional "concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but from 'archaic attitudes and laws' and from the fact that the

118. *Id.*

119. *Id.*

120. *School Bd. v. Arline*, 106 S. Ct. 1633 (1986).

121. *Arline*, 107 S. Ct. at 1127-28.

American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps."¹²²

Second, the Court said that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual. It was for this reason that Congress extended coverage in the Act to those who are simply regarded as having a physical or mental impairment.¹²³

Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of section 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. By amending the definition of 'handicapped individual' to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.¹²⁴

Accordingly, the Court found that:

The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of 'handicapped individual' is broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief. The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were 'otherwise qualified.' Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent.¹²⁵

122. *Id.* at 1126.

123. 29 U.S.C. § 706(7)(B)(iii) (1982).

124. *Arline*, 107 S. Ct. at 1129. It is also appropriate for the Court to extend the protection of section 504 to those who are unreasonably regarded as being a health risk as Congress itself was aware of the discrimination suffered by epileptics and cancer patients based on irrational fears of contagion. *Id.* at 1129 n.13.

125. *Id.* at 1129-30 (emphasis in original).

Immunizing discrimination based on an unreasonable fear of contagion would gut the Act by removing the focus from whether the person who has, had, or is perceived as having a handicap was actually "otherwise qualified" to perform the job.¹²⁶

Although tuberculosis is a different infectious contagious disease from AIDS-related disorders, and although the Court in *Arline* specifically declined to apply its analysis to people who carry AIDS without physical or mental impairment, *Arline* is crucial to those who seek to redress discrimination against people with AIDS-related disorders. The Court discussed AIDS as follows:

The United States argues that it is possible for a person to be simply a carrier of a disease, that is, to be capable of spreading a disease without having a 'physical impairment' or suffering from any other symptoms associated with the disease. The United States contends that this [is] true in the case of some carriers of the Acquired Immune Deficiency Syndrome (AIDS) virus. From this premise the United States concludes that discrimination solely on the basis of contagiousness is never discrimination on the basis of handicap. The argument is misplaced in this case, because the handicap here, tuberculosis, gave rise both to a physical impairment *and* to contagiousness. This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.¹²⁷

Three points are worth noting. First, because *Arline* held that at least one contagious infectious disease came within the protection extended by the Act, the door is opened to the possibility that other contagious infectious diseases, such as AIDS-related disorders, will be similarly protected. Second, because *Arline* held that the risk of contagion from tuberculosis should be considered as part of the "otherwise qualified" element of section 504 and not as an exception to the "solely by reason of handicap" element of that section, it is probable that AIDS-related disorders will be treated similarly. Third, because *Arline* held that the determination of

126. *Id.*

127. *Id.* at 1128 n.7 (emphasis in original). Since AIDS and ARC give rise both to a physical impairment and to contagiousness, people with these diseases would only appear to be protected under section 504. It is only with respect to people who test seropositive that the protection provided by section 504 becomes problematic.

whether someone was "otherwise qualified" had to be based on scientific fact and medical knowledge, it is probable that people with AIDS-related disorders will receive similar treatment, and that the Department of Justice's view will be rejected in section 504 litigation. Since the great weight of medical and scientific evidence establishes that AIDS-related disorders are communicated only through the intravenous transfer of blood or blood products or intimate sexual contact,¹²⁸ it is doubtful that discrimination against people with AIDS-related disorders would ever be justified based on the casual social contact that occurs in employment, housing or public accommodations.

This author's analysis of the Rehabilitation Act and his examination of the *Arline* decision suggest strongly that a person with an AIDS-related disorder would come within the protection of section 504. Nevertheless, advocates for people with an AIDS-related disorder should consider alternative remedies to redress discrimination.

V. OTHER FEDERAL STATUTES AVAILABLE TO REDRESS DISCRIMINATION AGAINST PEOPLE WITH AIDS-RELATED DISORDERS

A. *Education for All Handicapped Children Act of 1975 (EAHCA)*

One federal action that may be of assistance to people with AIDS-related disorders is the Education for All Handicapped Children Act of 1975 (EAHCA).¹²⁹ EAHCA applies to children between the ages of five and eighteen who attend public schools and may, depending on the law of a particular state, extend both to pre-school educational programs and to secondary and post-secondary programs provided to adults under the age of twenty-one.¹³⁰ Unlike the Rehabilitation Act which prohibits recipients of federal funds from discriminating on the basis of handicap, EAHCA contains an

128. See Sande, *supra* note 16, at 380.

129. Pub. L. No. 94-142, 89 Stat. 774 (1975), and amendments (codified within 20 U.S.C. §§ 1401-1461 (1982 and Supp. 1985)) [hereinafter EAHCA]. See Bodine, *Opening the Schoolhouse Door for Children with AIDS: The Education for All Handicapped Children Act*, 13 B.C. ENVIR. AFF. L. REV. 583 (1986) (supporting the position that EAHCA is available to children with AIDS). But see Note, *Protecting Children with AIDS Against Arbitrary Exclusion from School*, 74 CALIF. L. REV. 1373 (1986) (suggesting that EAHCA is inappropriate to protect people with AIDS-related disorders from discrimination).

130. 20 U.S.C. § 1412(2)(B) (1982 & Supp. 1985).

affirmative mandate to provide support services pending the outcome of administrative challenges to discriminatory practices.¹³¹

The initial hurdle faced by those who seek protection under EAHCA is the absence of express congressional intent to include people suffering from contagious communicable diseases. However, examination of EAHCA's language reveals that it is sufficiently broad to include them. EAHCA defines "handicapped children" as: "[m]entally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or *other health impaired children*, or children with specific learning disabilities, who by reason thereof require special education and related services."¹³²

Children with AIDS come within the category of "other health impaired children" and qualify as "handicapped children" under EAHCA. Regulations of the Office of Special Education and Rehabilitative Services of the Department of Education (DOE), specifically include within the class of "other health impaired children" those who have tuberculosis.¹³³

131. First a state must implement a policy assuring equal education for handicapped children and must submit a plan of compliance to the Secretary of Education which includes, among other things, a timetable for implementation of notice requirements to interested parties and the general public prior to amendment of the plan of compliance. 20 U.S.C. § 1412(1),(2)(A),(C) and (E) (1982 & Supp. 1985). Second, a state must establish priorities for providing educational services by beginning first with those eligible handicapped persons who currently receive no education from the state. 20 U.S.C. § 1412(3) (1982 & Supp. 1985). Third, a state must offer special assistance to severely handicapped children who receive an inadequate education. *Id.* But most important, a state must establish procedures to assure that:

to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature of the severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily

20 U.S.C. § 1412(5)(B) (1982 & Supp. 1985).

For cases interpreting the purposes of EAHCA, see *Rabinowitz v. New Jersey State Bd. of Educ.*, 550 F. Supp. 481 (D.N.J. 1982); *Lang v. Braintree School Comm.*, 545 F. Supp. 1221 (D. Mass. 1982); *Gladys J. v. Pearland Ind. School Dist.*, 520 F. Supp. 869 (S.D. Tex. 1981). For an analysis of 20 U.S.C. § 1412(5), the so-called "Mainstreaming" provision, see Comment, *The Least Restrictive Environment Section of the Education for All Handicapped Children Act of 1975: A Legislative History and an Analysis*, 13 GONZ. L. REV. 717 (1978).

132. 20 U.S.C. § 1401(1) (1982 & Supp. 1985) (emphasis added).

133. DOE regulations define "other health impaired" children as:

(i) having an autistic condition which is manifested by severe communication and other developmental and educational problems; or (ii) having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, *tuberculosis*, rheumatic [sic] fever, nephritis, asthma, sickle cell anemia, he-

People with ARC would appear to qualify for protection within EAHCA for similar reasons. However, those who merely test seropositive arguably are not handicapped within EAHCA because no physical manifestation of the disorder's effects is present. EAHCA, unlike section 504 of the Rehabilitation Act, does not include people who are *perceived* to be handicapped. However, it has been argued that EAHCA is intended to reach health impairments that stigmatize a child, damage his psychological development, or adversely affect his educational performance. Since discrimination against children who test seropositive would produce this effect, they should be protected under EAHCA.¹³⁴

Most discrimination faced by AIDS-handicapped children involves the irrational belief that they present an unreasonable risk of contagion to others.¹³⁵ EAHCA may help children with AIDS-related disorders who face efforts to segregate them in the classroom or to exclude them from the classroom. EAHCA requires states to cooperate with the handicapped child and his or her parents in preparing an "individualized education plan" for the child.¹³⁶ The state also must provide an appeal mechanism that allows the child and his or her parents to challenge any classification or change under the "individualized education plan."¹³⁷ An "individualized education plan" that mandates the maximum feasible integration into the normal educational program should be drafted as soon as practicable following discovery that the child has an AIDS-related disorder. Two benefits are produced thereby. First, the creation of an "individualized education plan" creates an entitlement for the child. The school board would have to prove the validity of its reasons for changing the "individualized educational plan" that would segregate the child within the classroom or result in his dismissal.¹³⁸ Second, the status quo is preserved during the appeal process to protect the child.¹³⁹

When material changes in the individual plan are proposed, or when a complaint is lodged, the appeal process is activated.¹⁴⁰ In-

mophilia, epilepsy, lead poisoning, leukemia or diabetes, which adversely affects a child's educational performance.

34 C.F.R. § 300.5(b)(7) (1986) (emphasis supplied).

134. Bodine, *supra* note 129, at 616-18.

135. *Id.* at 583-86.

136. 20 U.S.C. §§ 1412(5),(7), and 1413 (1982 & Supp. 1985).

137. 20 U.S.C. § 1415 (1982 & Supp. 1985).

138. *Id.* §§ 1413-15.

139. *Id.* § 1415(e)(3).

140. *Id.* § 1415(b).

cluded within the appeals procedure is the right to an impartial hearing before a neutral examiner;¹⁴¹ the right to representation by counsel and experts;¹⁴² the right to subpoena, and to confront and cross-examine witnesses;¹⁴³ the right to a written transcript or electronic recording of the hearing;¹⁴⁴ and the right to written findings of fact and a decision as a basis for any subsequent appeal.¹⁴⁵ Appeals from this process are taken to the state educational agency review officer who must decide the matter based on an independent review of the facts.¹⁴⁶ Following review by the state agency, a party may bring a civil action in either state¹⁴⁷ or federal court.¹⁴⁸

EAHCA's mandate during the pendency of any appeal is particularly important to children with AIDS-related disorders. Since "almost every AIDS patient diagnosed as having an opportunistic infection dies within four years,"¹⁴⁹ and since litigation often is protracted, the aggrieved child who suffers AIDS-related segregation might die before he or she could get the courts to remedy irrational and unlawful conduct. Furthermore, the administrative scheme provided by EAHCA often will free the child with an AIDS-related disorder from expensive, protracted litigation.¹⁵⁰

B. *Employee Retirement Income Security Act of 1974 (ERISA)*

Another federal action that may be of assistance to victims of AIDS-related discrimination is the Employee Retirement Income Security Act of 1974 (ERISA).¹⁵¹ ERISA is a comprehensive law intended to protect the interest of participants¹⁵² and benefi-

141. *Id.* § 1415(b)(2).

142. *Id.* § 1415(d)(1).

143. *Id.* § 1415(d)(2).

144. *Id.* § 1415(d)(3).

145. *Id.* § 1415(d)(4).

146. *Id.* § 1415(c).

147. *Id.* § 1415(e)(2).

148. *Id.* § 1415(e)(4).

149. Laurence, *The Immune System in AIDS*, *Sci. Am.*, Dec. 1985, at 93. See generally Bodine, *supra* note 129, at 587.

150. Bodine, *supra* note 129, at 613-14.

151. Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001-1461 and in scattered sections of the Internal Revenue Service Code (1982 & Supp. 1985)).

152. 29 U.S.C. § 1002(2)(B)(7) (1982) defines participant as:

any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employers or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

ciaries¹⁵³ in employment benefit plans.¹⁵⁴ This is accomplished through the disclosure and reporting to participants and beneficiaries of financial and other information about such plans, and through the establishment of standards of conduct, responsibility, and obligation for fiduciaries of such plans.¹⁵⁵ Two ERISA sections relevant to people with AIDS-related disorders are sections 502¹⁵⁶ and 510.¹⁵⁷

Section 502 allows a participant or beneficiary to bring a civil action to recover benefits due under the terms of the plan.¹⁵⁸ It also allows him to enforce or to clarify rights benefits under the terms of the plan.¹⁵⁹ An action also may be brought to enjoin acts or practices that violate section 502 or the terms of the plan.¹⁶⁰ Conversely, an action may be brought to enforce provisions of either section 502 or of the plan itself.¹⁶¹ Thus, to the extent that a plan participant or beneficiary is treated differently from other participants with respect to either the amount, terms or conditions of his benefits under the plan, that person may have a cause of action under section 502. Ordinarily, a plan participant with an AIDS-related disorder would have to exhaust administrative remedies, or submit the claim to arbitration, either under the terms of the plan itself,¹⁶² or other applicable federal law.¹⁶³ But if the participant or beneficiary can show that resort to non-judicial forums would be futile (e.g., because the alternative non-judicial fact

153. 29 U.S.C. § 1002(8) (1982) defines beneficiary as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder."

154. 29 U.S.C. § 1101 (1982).

155. *Id.* § 1001(b).

156. Codified at 29 U.S.C. § 1132 (1982), "Civil enforcement."

157. Codified at 29 U.S.C. § 1140 (1982), "Interference with protected rights."

158. 29 U.S.C. § 1132(a)(1)(B) (1982).

159. *Id.*

160. *Id.* § 1132 (a)(3).

161. *Id.*

162. *See, e.g.,* *Jenkins v. Local 705 Int'l Bhd. of Teamsters Pension Plan*, 713 F.2d 247 (7th Cir. 1983); *Cowden v. Montgomery County Soc'y for Cancer Control*, 591 F. Supp. 740 (S.D. Ohio 1984); *Weeks v. Coca-Cola Bottling Co.*, 491 F. Supp. 1312 (E.D. Ark. 1980); *Scheider v. United States Steel Corp.*, 486 F. Supp. 211 (W.D. Pa. 1980); *Sample v. Monsanto Co.*, 485 F. Supp. 1018 (E.D. Mo. 1980); *Lucas v. Warner & Swasey Co.*, 475 F. Supp. 1071 (E.D. Pa. 1979); *Rhodes v. Aetna Life Ins. Co.*, 135 Mich. App. 735, 356 N.W.2d 247 (1984).

163. *See, e.g.,* *Air Line Pilots Ass'n Int'l v. Northwest Airlines, Inc.*, 444 F. Supp. 1138 (D.D.C. 1978), *aff'd in part and rev'd in part on other grounds*, 627 F.2d 272 (D.C. Cir. 1980) (ERISA does not preempt right of an arbitration panel to resolve a dispute arising out of application or interpretation of a pension plan set up in a bargaining agreement under the Railway Labor Act.).

finder is biased against claims raised by people with AIDS-related disorders), resort to the judicial remedy may be pursued directly.¹⁶⁴

In addition to ERISA's section 504, section 510 might help people with AIDS-related disorders. Section 510 provides, in relevant part, that, "[i]t shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan"¹⁶⁵ Terminating an employee to prevent vesting of pension or other benefits is prohibited.¹⁶⁶ It appears that sections of the National Labor Relations Act,¹⁶⁷ which protect employees who engage in concerted activities for mutual aid, would protect employees from discriminatory conduct that is also subject to challenge under section 510 of ERISA.¹⁶⁸

C. Civil Rights Act of 1871

In addition to the foregoing statutes, consideration should be given to filing suit under the Civil Rights Act of 1871.¹⁶⁹ This stat-

164. See *Lieske v. Morlock*, 570 F. Supp. 1426 (N.D. Ill. 1983); *Scheider v. United States Steel Corp.*, 486 F. Supp. 211 (W.D. Pa. 1980). Federal courts have jurisdiction without regard to the amount in controversy or the citizenship of the parties. 29 U.S.C. § 1132(f) (1982 & 1985 Supp.). Venue is proper either in the district where the plan is administered, where the alleged breach occurred, where a defendant resides, or where a defendant may be found. 29 U.S.C. § 1132(e)(2) (1982 & 1985 Supp.). Significantly, a court in its discretion may award a reasonable attorney's fee and the cost of the suit to a prevailing participant or beneficiary. 29 U.S.C. § 1132(g) (1982 & 1985 Supp.).

Nevertheless, ERISA has limited procedures and remedies, and there is no right to a jury trial. *Hollenbeck v. Falstaff Brewing Corp.*, 605 F. Supp. 421 (E.D. Mo.), *aff'd*, 780 F.2d 21 (8th Cir. 1985). Damages generally are limited. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). In *Pilot Life Ins. Co. v. Dedeaux*, 107 S. Ct. 1549 (1987), the Court foreclosed the option of filing state court lawsuits against insurers who provide long-term disability insurance through employers. According to Alice Philipson, a Berkeley, California, attorney specializing in AIDS law, and co-chair of the Bay Area Lawyers for Individual Freedom (BALIF) AIDS Panel, the consequences of *Pilot Life* are two-fold. First, elimination of the threat of punitive damages under state law will make it advantageous for insurers to "stonewall" claims. Second, these cases will no longer be economically viable for lawyers.

165. 29 U.S.C. § 1140 (1982).

166. *Id.* See *Kross v. Western Elec. Co.*, 701 F.2d 1238, 1241-42 (7th Cir. 1983). See also *Folz v. Marriott Corp.*, 594 F. Supp. 1007 (W.D. Mo. 1984).

167. 29 U.S.C. §§ 157, 158(a)(1) (1982).

168. Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11, 37-42 (1986). See also Leonard, *Employment Discrimination Against Persons With AIDS*, 10 DAYTON U.L. REV. 681, 698-99 (1985).

169. 42 U.S.C. § 1983 (1982 & Supp. 1985).

ute empowers a person to sue those who, under color or authority of any state statute, ordinance, regulation, or custom, violate rights guaranteed to such person under either the Constitution or federal statute.¹⁷⁰ It is immaterial that the statute violated was not directed to guaranteeing equal rights.¹⁷¹ Furthermore, a prevailing plaintiff may obtain attorneys fees.¹⁷²

VI. CIVIL ACTIONS UNDER THE UNITED STATES CONSTITUTION

Consideration should be given to filing suit under the United States Constitution to redress discrimination against people with AIDS-related disorders. The equal protection and due process clauses of the fourteenth amendment conceivably would reach actions of the state and those who act under its authority. A substantive due process claim might be filed under the fourteenth amendment. Similar actions also might be filed against the United States under the fifth amendment. Each of these possibilities is considered in turn.

A. *Equal Protection Under the Fourteenth Amendment*

The equal protection clause of the fourteenth amendment of the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."¹⁷³ Social or economic legislation is presumed to be valid and will be sustained if the classification drawn is rationally related to a legitimate state interest.¹⁷⁴ This is the so-called "rational basis" test employed in equal protection analysis. States are given wide leeway in these areas because the Constitution presumes that even improvident decisions eventually will be rectified by the demo-

170. *Id.*

171. *See* *Maine v. Thiboutot*, 448 U.S. 1 (1980). *Cf.* *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979) (28 U.S.C. § 1343(3), the jurisdictional statute for 28 U.S.C. § 1983, was not limited to statutes providing for equal rights).

172. 42 U.S.C. § 1988 (1982).

173. U.S. CONST. amend. XIV, § 1.

174. *See, e.g.*, *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1958) (challenge to imposition of Ohio ad valorem tax on non-resident's contents of warehouse); *Williamson v. Lee Optical*, 348 U.S. 483, 486-91 (1955) (challenge to Oklahoma Law subjecting opticians to a regulatory scheme for the dispensing of eyeglasses while exempting sellers of ready-to-wear eyeglasses); *American Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538, 541-42 (1949) (challenging right-to-work amendment to Arizona constitution). *See also* *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

cratic process.¹⁷⁵ By contrast, legislative classifications of "suspect classes" based on race, alienage or national origin are subject to "strict scrutiny" analysis because classification on those bases are seldom relevant to the achievement of any legitimate state interest.¹⁷⁶ It can be presumed that such classifications reflect prejudice and antipathy—a view that says that those in the burdened class are not as worthy or deserving as others.¹⁷⁷ Although this dichotomy in equal protection analysis has been criticized, and suggestions for "intermediate scrutiny" regarding "quasi-suspect" classes have been set forth,¹⁷⁸ the dichotomy remains.¹⁷⁹

Certain Supreme Court decisions make it unlikely that people with AIDS-related disorders would be able to use the equal protection clause to reach conduct that would not be reached under the Rehabilitation Act, EAHCA, or ERISA. First, in *City of Cleburne v. Cleburne Living Center, Inc.*,¹⁸⁰ the Court refused to apply intermediate scrutiny to the mentally retarded. Since the mentally retarded historically have been subjected to discrimination,¹⁸¹ and there is no suggestion that such discrimination is qualitatively different from that suffered by people with AIDS-related disorders, it is unlikely that people with AIDS will receive more favorable treatment from the Court. Furthermore, the Court relied on the Rehabilitation Act and other remedial statutes to argue that the mentally retarded are not "politically powerless in the sense that they have no ability to attract the attention of the lawmakers," and therefore, legislation affecting them need not be subjected to strict scrutiny analysis under the equal protection clause.¹⁸² A similar argument could be applied to people with AIDS-related disorders

175. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).

176. *Id.*

177. *Id.* at 440-41. Furthermore, because these "discrete and insular minorities," *United States v. Carolene Products*, 304 U.S. 144, 152-54 n.4 (1938), are seldom able to use the democratic process to rectify invidious discrimination, legislative classifications on such bases will be sustained only if they are suitably tailored to serve a compelling state interest. *City of Cleburne*, 473 U.S. at 440.

178. See, e.g., *City of Cleburne*, 473 U.S. at 432; *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting, joined by Douglas, J.) (criticizing "the Court's rigidified approach to equal protection analysis"). It appears that at least in some instances, the Court will apply "intermediate scrutiny" to require "that legislation burdening certain 'quasi-suspect' classes or impairing important, but not fundamental, rights be substantially related to an important state interest." Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1278 (1986).

179. *City of Cleburne*, 473 U.S. at 439-42.

180. 473 U.S. 432 (1985).

181. *Id.* at 461 (Marshall, J., concurring in part and dissenting in part).

182. *Id.* at 443-45.

who also have been able to redress some of the discrimination against them under state law.¹⁸³

In addition, it is abundantly clear that not all people with an AIDS-related disorder are gay men, although gay men comprise the largest group of people with AIDS-related disorders.¹⁸⁴ Accordingly, to the extent that legislative classifications based on sexual orientation do not compel any closer scrutiny than the rational basis test, any argument for heightened scrutiny for AIDS-related discrimination is likely to fail. The chance of getting a court to apply a heightened scrutiny standard was undercut by the Supreme Court's decision in *Bowers v. Hardwick*,¹⁸⁵ which categorically denies constitutional protection to acts of consensual homosexual sodomy. First, the Court held that a Georgia sodomy statute¹⁸⁶ did not violate the fundamental rights of homosexuals.¹⁸⁷ Second, it held that the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. Third, it held that the presumed belief of Georgia that homosexual sodomy was immoral and unacceptable provided a rational basis for Georgia's sodomy statute.

It could be argued that the interest of people with AIDS-related disorders to live as normal an existence as possible is so fundamental that it necessitates application of a heightened scrutiny standard. However, it is unlikely that this argument would succeed in light of *San Antonio Independent School District v. Rodriguez*.¹⁸⁸ There, the plaintiff class—consisting of children residing in poor school districts with a low property tax base—claimed that the Texas educational funding scheme based on local property taxes

183. *Id.* at 445. See, e.g., *Employment Discrimination Based on AIDS Ruled Unlawful in California*, 2 Empl. Prac. Guide (CCH) (Empl. Prac. Dec.) ¶ 5047 (1987); *Commission Declares that AIDS Fits Definition of Physical Handicap*, 2 Empl. Prac. Guide (CCH) (Empl. Prac. Dec.) ¶ 5044 (1986) (Colorado); *AIDS-Based Discrimination Prohibited by the D.C. Human Rights Act*, 2 Empl. Prac. Guide (CCH) (Empl. Prac. Dec.) ¶ 5046 (1986); *AIDS Constitutes a Physical Handicap Under Maine's Human Rights Act*, 2 Empl. Prac. Guide (CCH) (Empl. Prac. Dec.) ¶ 5023 (1986); *AIDS is a Handicap Under the Michigan Handicappers' Act*, 2 Empl. Prac. Guide (CCH) (Empl. Prac. Dec.) ¶ 5042 (1986); *Employment Discrimination Based on AIDS Prohibited, Oregon Commissioner States*, 2 Empl. Prac. Guide (CCH) (Empl. Prac. Dec.) ¶ 5020 (1986).

184. See *supra* note 16 and accompanying text.

185. 106 S. Ct. 2841 (1986).

186. Interestingly, the Georgia sodomy statute is *not* limited to homosexuals. "A person commits the offense of sodomy when he [sic] performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." GA. CODE ANN. § 16-6-2 (1984) (quoted in *Bowers*, 106 S. Ct. at 2842 n.1).

187. *Bowers*, 106 S. Ct. at 2843.

188. 411 U.S. 1 (1972).

violated the equal protection clause because it favored the affluent, resulting in substantial interdistrict disparities in per-pupil expenditures due to the disparity in property values among the districts. However, the Court held that education was not a fundamental right under the Constitution, applying the "rational basis" instead of the "strict scrutiny" test, to salvage the Texas funding scheme.

Cleburne involved the right of the mentally retarded to reside in a group home so that they could live outside of an institution. Since the Court refused to recognize that interest as fundamental, it is unlikely that people with AIDS-related disorders will receive different treatment when they use the equal protection clause to fight discrimination.

B. Procedural Due Process

The due process clause of the fourteenth amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."¹⁸⁹ Procedurally, the due process clause provides that where the power of government is used against an individual so as to deprive him of his interest in "life," "liberty," or "property," there is a right to fair procedures to determine the basis for and the legality of such action.¹⁹⁰ No due process right is due, constitutionally, unless the interest falls within those categories.¹⁹¹

Presently there are no indications that the government is contemplating action that would impact on the "life" interest of people with an AIDS-related disorder. Therefore, this Article shall focus on only the "liberty" and "property" interests. The "liberty" interest appears to be implicated whenever the government takes action which is designed to deprive an individual of the freedom to engage in some significant area of human activity.¹⁹² The most likely areas of conflict with respect to the "liberty" interest for people with AIDS-related disorders involve the termination or modification of professional licenses granted by the state, limits on

189. U.S. CONST. amend. XIV, § 1.

190. See, e.g., *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576-78 (1972).

191. *Paul v. Davis*, 424 U.S. 693, 710-12 (1976) (There was no state violation of the due process clause when a photograph of Davis bearing his name was erroneously included on a "flyer" of "active shoplifters" because damage to his reputation did not affect any "liberty" or "property" interests).

192. See generally Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977).

other important human activities, and quarantine of people with AIDS-related disorders. Each of these topics is examined in turn.

When a state grants an individual a license to engage in a profession, it must provide a procedure to determine that person's fitness should it seek to terminate the license.¹⁹³ Advocates for people with AIDS-related disorders who are involved in proceedings to terminate or modify a professional license should insist that any ruling be based on scientific fact and medical knowledge.¹⁹⁴

The "liberty" interest also is implicated whenever the government takes control of an important area of human activity and regulates who may engage in that activity. Thus, for example, because the government regulates who may drive an automobile, it must provide a hearing when it revokes a driver's license.¹⁹⁵ Even when the government has not established a licensing system to regulate an activity, a hearing must be granted if it revokes a person's privilege to engage in that activity. Therefore, if the government publicly identifies a person as a "drunkard," and, if under state law such posting forecloses that person's ability to purchase alcoholic beverages, a hearing first must be held.¹⁹⁶

The "liberty" interest also would be implicated were the state to attempt to quarantine people with AIDS-related disorders. All states and the District of Columbia have statutes that authorize the imposition of quarantine.¹⁹⁷ At least one state—Virginia—has

193. See, e.g., *In re Ruffalo*, 390 U.S. 544, 550, *modified*, 392 U.S. 919 (1968); *Dent v. West Virginia*, 129 U.S. 114 (1889). Statutes defining the terms for retaining a professional license often use specific criteria for license suspension so that they may give an individual a property interest or "entitlement" in the license. Thus, the New York licensing system for horse trainers created a property interest in licensed trainers that was protected by the due process clause. *Barry v. Barchi*, 443 U.S. 55, 64 (1979).

194. This approach is similar to that taken by the U.S. Supreme Court in *School Board v. Arline*, 107 S. Ct. 1123 (1987). See *supra* notes 111-126 and accompanying text. The approach also is similar to that taken under the Administrative Procedure Act of Massachusetts, MASS. GEN. LAWS ANN. ch. 30A, §§ 1-17 (West 1979 & Supp. 1987). The need for such an approach is illustrated by *Cook County Board Votes to Limit Doctor's Privileges*, 2 AIDS Pol'y & L. (BNA) No. 2, at 3 (Feb. 11, 1987), where the Cook County (Ill.) Board of Commissioners, in a closed session, voted to limit the staff privileges of a male Cook County Hospital staff physician who had contracted AIDS. This action violated the physicians' "liberty" interest absent proof that his condition presented a reasonable probability of harm either to himself or to his patients.

195. See *Bell v. Burson*, 402 U.S. 535, 539-40 (1971).

196. *Wisconsin v. Constantineau*, 400 U.S. 433, 434-37 (1971).

197. **Alabama:** ALA. CODE §§ 22-12-4, 12-12-12 (1984); **Alaska:** ALASKA STAT. § 18.15.136 (1986) (tuberculosis); **Arizona:** ARIZ. REV. STAT. ANN. § 36-714(B)(4) (1986) (tuberculosis); **Arkansas:** ARK. STAT. ANN. §§ 82-612, 624II (1976) (tuberculosis); **California:** CAL. HEALTH & SAFETY CODE § 3195 (West 1979); **Colorado:** COLO. REV. STAT. § 25-1-623 (1982); **Connecticut:** CONN. GEN. STAT. ANN. § 19a-26 (West 1986); **Delaware:** DEL. CODE

planned a quarantine program to isolate AIDS patients who continue to have sexual relations.¹⁹⁸ The possible impact of state quarantine statutes on people with AIDS-related disorders has been addressed extensively by legal commentators.¹⁹⁹ Attempts by any state to quarantine any person with an AIDS-related disorder should be challenged on the ground that it is overbroad, since all medical and scientific data establish that AIDS-related disorders are not transmitted through casual social contact.²⁰⁰

ANN. tit. 16, §§ 503, 505 (1983); **District of Columbia**: D.C. CODE ANN. § 6-119 (1981); **Florida**: FLA. STAT. § 384.28 (Supp. 1986) (sexually transmissible disease); **Georgia**: GA. CODE ANN. § 31-12-4 (1982); **Hawaii**: HAW. REV. STAT. § 325-8 (1985); **Idaho**: IDAHO CODE § 39-603 (1985) (venereal disease); **Illinois**: ILL. ANN. STAT. ch. 111½, para. 22 (Smith-Hurd 1977); **Indiana**: IND. CODE ANN. § 16-1-3-7 (Burns 1983); **Iowa**: IOWA CODE ANN. § 139.3 (West 1972); **Kansas**: KAN. STAT. ANN. § 65-126 (1985); **Kentucky**: KY. REV. STAT. ANN. § 214-020 (Baldwin 1982); **Louisiana**: LA. REV. STAT. ANN. § 40:5 (West 1977); **Maine**: ME. REV. STAT. ANN. tit. 22, § 454 (1980); **Maryland**: MD. HEALTH-GEN. CODE ANN. § 18-324 (1982 & Supp. 1986) (tuberculosis); **Massachusetts**: MASS. GEN. LAWS ANN. ch. 111, §§ 92-98 (West 1983) (isolation hospitals and tuberculosis treatment centers); **Michigan**: MICH. COMP. LAWS ANN. § 333.2251 (West 1980); **Minnesota**: MINN. STAT. ANN. § 145.05 (West 1970); **Mississippi**: MISS. CODE ANN. § 41-23-5 (Supp. 1986); **Montana**: MONT. CODE ANN. § 50-2-116(1985); **Nevada**: NEV. REV. STAT. § 439.210 (1979); **New Hampshire**: N.H. REV. STAT. ANN. § 141-C:11 (Supp. 1985); **New Jersey**: N.J. STAT. ANN. § 26:4-2 (West 1987); **New Mexico**: N.M. STAT. ANN. §§ 24-1-3,15 (1978); **New York**: N.Y. PUB. HEALTH LAW § 2100 (McKinney 1985); **North Carolina**: N.C. GEN. STAT. § 130A-145 (1986); **North Dakota**: N.D. CENT. CODE § 23-07-06 (1978); **Ohio**: OHIO REV. CODE ANN. § 3701.56 (Anderson 1980); **Oklahoma**: OKLA. STAT. ANN. tit. 63, § 1-504 (West 1984); **Oregon**: OR. REV. STAT. § 433.106 (1983); **Pennsylvania**: PA. STAT. ANN. tit. 35, §§ 521.7, 16 (Purdon 1977); **Rhode Island**: R.I. GEN. LAWS § 23-8-4 (1985); **South Carolina**: S.C. CODE ANN. § 44-1-80 (Law Co-op 1985); **South Dakota**: S.D. CODIFIED LAWS ANN. §§ 34-22-3,4 (1986); **Tennessee**: TENN. REV. CODE ANN. § 68-5-104 (1983); **Texas**: TEX. REV. CIV. STAT. ANN. art. 4419b-4.01 (Vernon Supp. 1987); **Utah**: UTAH CODE ANN. § 26-6-4 (1984); **Vermont**: VT. STAT. ANN. tit. 18, § 1004a (1982); **Virginia**: VA. CODE ANN. § 32.1-43 (1985); **Washington**: WASH. REV. CODE ANN. § 43.20.050 (Supp. 1987); **West Virginia**: W. VA. CODE § 16-3-1 (1985); **Wisconsin**: WIS. STAT. ANN. § 143.05 (West 1974 & Supp. 1986); **Wyoming**: WYO. STAT. § 35-4-103 (1977). See also **Missouri**: MO. ANN. STAT. §§ 192-020, 320 (Vernon 1983); **Nebraska**: NEB. REV. STAT. § 71-502 (1986).

Because many quarantine laws have not been applied for years to communicable disease cases, one cannot assume that they have been amended to reflect due process concerns. For example, in Texas, the Legislature repealed that state's antiquated communicable disease quarantine law and substituted one that provided for tough procedural due process protection. THE ADVOCATE, No. 477, at 15 col. 3 (July 21, 1987).

198. See Washington Post, Nov. 9, 1985, at D3, col.1.

199. See, e.g., Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53 (1985); Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1276-79, 1281-84 (1986); Note, *Protecting Children with AIDS Against Arbitrary Exclusion from School*, 74 CALIF. L. REV. 1373, 1375-81 (1986); Bodine, *supra* note 129, at 596-602.

200. See *supra* note 53 and accompanying text.

The "property" interest of the due process clause may be implicated in the context of government employment²⁰¹ or government benefits to which an individual may be entitled as a matter of state law.²⁰² Unless an employee has been granted a term of guaranteed employment, he or she will have no property right to continued employment in that position.²⁰³ An exception exists, however, if the method of termination or the publication of false information regarding termination might create a stigma or foreclose employment opportunities thereby affecting a "liberty" interest.²⁰⁴

C. Substantive Due Process

The doctrine of substantive due process had its genesis in natural law, but it is also reflected in the Declaration of Independence and the Constitution.²⁰⁵ It holds that although certain general rights were ceded to representative government in forming the Union, others are basic inalienable rights which inure to human beings and cannot be taken away.²⁰⁶ Legislation that abridges these basic rights is void because it deprives the affected people of due process of law.²⁰⁷

The modern era of substantive due process began with *Lochner v. New York*,²⁰⁸ and sharply declined with cases such as *Nebbia v.*

201. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972).

202. E.g., *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970) (welfare benefits); *Goss v. Lopez*, 419 U.S. 565, 573-74 (1975) (school attendance).

203. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

204. *Id.* at 572-75. In *Codd v. Velger*, 429 U.S. 624, 627-28 (1977) (per curiam), the Court held that the individual was not entitled to a reemployment hearing because he did not claim that the distributed information was false. It is problematic whether disclosing accurate but potentially devastating information about a person would be actionable. Only Justice Stevens appears to have advanced the position that the employee should have the right to contest whether the information justifies dismissal even if it is true. *Id.* at 631 (Stevens, J., dissenting). Consequently, disclosure that someone has an AIDS-related disorder may not be actionable, notwithstanding its impact.

205. E. CORWIN, *LIBERTY AGAINST GOVERNMENT* 10-57 (1980); B. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 9-45 (1976).

206. *Id.*

207. *Id.*

208. 198 U.S. 45, 52-58 (1905). The case involved a challenge to a New York statute limiting the number of hours that a baker could work. The Court struck the law as violative of the fourteenth amendment which the Court said guarantees the liberty to purchase or sell one's own labor. *Id.* at 53. The statute could not be sustained as a valid exercise of the state's police power because there was nothing inherently dangerous in the occupation of a baker (*cf.* *Holden v. Hardy*, 169 U.S. 366 (1898) (regarding work in mines and smelters)), or some infirmity in bakers that prevented them from asserting their rights and protecting their interest without the protecting arm of the state. *Lochner*, 198 U.S. at 57. Furthermore, the state could not point out any harm that inured in a baker who works in excess of the

*New York*²⁰⁹ and *West Coast Hotel, Co. v. Parrish*.²¹⁰ In post-*Lochner* cases such as *United States v. Carolene Products Co.*,²¹¹ the Court has held that such social and economic legislation is to be sustained by presuming the existence of those facts cited by the legislature in support thereof unless the presumption totally lacks any "rational basis within the knowledge and experience of the legislature."²¹²

The efficacy of the argument—that legislation affecting people with AIDS-related disorders should be subject to a substantive due process analysis—has been undercut by the Court's general rejection of the doctrine in the post-*Lochner* era. Additionally, the Court has indicated that to the extent that substantive due process remains available, it has been limited to privacy rights involving family, marriage and procreation.²¹³

D. *The Fifth Amendment's Due Process Clause*

Whereas the fourteenth amendment of the United States Constitution operates upon the states, the fifth amendment of the United States Constitution operates upon the federal government.²¹⁴ The fifth amendment's due process clause provides that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law." The clause includes procedural due process and substantive due process elements,²¹⁵ and the Supreme Court has held that the due process clause prohibits the federal government from denying equal protection of the laws.²¹⁶ Accordingly, the discussion of those topics in the context of the fourteenth amendment is applicable here and may be incorporated by reference.

limitation. The majority refused to accept the argument that the legislature might rationally have adopted the legislation to protect the health of the bakers.

209. 291 U.S. 502 (1934) (sustaining a state regulatory scheme for milk).

210. 300 U.S. 379 (1937) (sustaining state-imposed minimum wages for female employees).

211. 304 U.S. 144 (1938).

212. *Id.* at 152. *But see* *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

213. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2844 (1986).

214. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (fifth amendment applies only to federal government); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

215. *See, e.g.*, *Adair v. United States*, 208 U.S. 161 (1908).

216. *Davis v. Passman*, 442 U.S. 228, 234 (1979).

VII. STATE STATUTES THAT MAY HELP PEOPLE WITH AIDS-RELATED DISORDERS

It is difficult to make broad sweeping pronouncements about the efficacy of state anti-handicap statutes for people with an AIDS-related disorder.²¹⁷ First, at least one state has no statute that bars discrimination on the basis of handicap,²¹⁸ and other states limit the scope of statutory protection to only public employees.²¹⁹ Second, it appears that fewer than one half of the states with handicap discrimination statutes have had them interpreted in a judicial decision.²²⁰ Furthermore, although two states specifically exclude

217. State laws pertaining to employment discrimination are collected in Labor Relations Reporter, Fair Employment Practices Manual (BNA), Employment Practices Decisions (CCH), and Employment Practices Guide (CCH). Current developments as they affect people with AIDS-related disorders are collected in AIDS Policy & Law (BNA).

218. At this writing it appears that only Delaware lacks any statute that deals with discrimination against the handicapped. Arizona was in the same category until 1985 when it added handicap as an unlawful basis for employment discrimination, ARIZ. REV. STAT. ANN. § 41-1463 (1985). Wyoming was also in this category until 1985 when handicap was added to that state's Fair Employment Practices Act, WYO. STAT. § 27-9-105 (Supp. 1987).

219. **Alabama:** ALA. CODE 21 §§ 21-7-1 to 7-8 (1984); **Arkansas:** ARK. STAT. ANN. 29 § 82-2901 (Supp. 1985); **Idaho:** IDAHO CODE §§ 56-701, 707(1) (Supp. 1986); **Mississippi:** MISS. CODE ANN. § 43-6-15 (1981); **South Dakota:** S.D. CODIFIED LAWS ANN. § 20-13-1(15) (Supp. 1986). However, in some of these states, gubernatorial executive orders or actual statutes extend the nondiscrimination requirement to programs receiving state financial assistance. See, e.g., ARK. STAT. ANN. § 82-2901 (Supp. 1985); IDAHO CODE § 56-707 (Supp. 1986); Exec. Order No. 78-4, 3 Empl. Prac. Guide (CCH) (Empl. Prac. Dec.) ¶ 22,365 (Oct. 17, 1978) (issued by Idaho governor John V. Evans).

220. See **Alaska:** *Welsh v. Municipality of Anchorage*, 676 P.2d 602 (Alaska 1984); **California:** *American Nat'l Ins. Co. v. Fair Employment & Hous. Comm'n*, 34 Fair Empl. Prac. Cas. (BNA) 818 (Cal. 1982); **Colorado:** *Silverstein v. Sisters of Charity*, 43 Colo. App. 446, 614 P.2d 891 (1980); **Hawaii:** *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980) *vacated and remanded sub nom.*, *E.E. Black, Ltd. v. Donovan*, 26 Fair Empl. Prac. Cas. (BNA) 1183 (D. Haw. 1981); **Illinois:** *Kubic v. CNA Fin. Corp.*, 96 Ill. App. 3d 715, 422 N.E. 2d 1 (1981); **Iowa:** *Sommers v. Iowa Civil Rights Comm'n*, 33 Empl. Prac. Dec. (CCH) ¶ 34,260 (Iowa 1983); **Kansas:** *High v. Power Flame Div., Inc.*, 29 Empl. Prac. Dec. (CCH) ¶ 32,866 (Kan. Ct. App. 1982); **Massachusetts:** *Cronan v. New England Tel. Co.*, 41 F.E.P. Cases 1273 (Mass. Super. Ct. 1986); **Minnesota:** *Lewis v. Remmele Eng'g Inc.*, 314 N.W.2d 1 (Minn. 1981); **New Jersey:** *Andersen v. Exxon Co.*, 31 Empl. Prac. Dec. (CCH) ¶ 33,428 (N.J. 1982); **New York:** *Seitzman v. Hudson River Assoc.*, 126 A.D.2d 211, 513 N.Y.S.2d 148 (N.Y. App. Div. 1987); **Oregon:** *Pacific Motor Trucking Co. v. Bureau of Labor and Indus.*, 33 Empl. Prac. Dec. (CCH) ¶ 34,271 (Or. Ct. App. 1983); **Pennsylvania:** *National R.R. Passenger Corp. (Amtrak) v. Pennsylvania*, 31 Empl. Prac. Dec. (CCH) ¶ 33,420 (Pa. Commw. Ct. 1983); **Rhode Island:** *Providence Journal Co. v. Mason*, 116 R.I. 614, 359 A.2d 682 (1976); **Texas:** *Carter v. Gulf Oil Co.*, 699 S.W.2d 907 (Tex. Ct. App. 1985); **Utah:** *Salt Lake City Corp. v. Confer*, 674 P.2d 632 (Utah 1983); **Washington:** *Barnes v. Washington Natural Gas Co.*, 22 Wash. App. 576, 591 P.2d 461 (Wash. Ct. App. 1979); **Wisconsin:** *Bucyrus-Erie Co. v. Wisconsin*, 90 Wis. 2d 408, 280 N.W. 2d 142 (1979).

communicable disease as a basis for discrimination,²²¹ at least one state has interpreted its statute administratively to exclude "temporary" illnesses.²²² Nevertheless, some general statements can be made.

Twelve states have handicap discrimination statutes that are based in whole on the federal Rehabilitation Act. However, only nine of those states adopt language from the Act to protect people who have a record of such impairment or are regarded as having such an impairment.²²³ It appears that advocates in those jurisdictions will be in the best position to use the *Arline* case and the Rehabilitation Act arguments discussed previously in this Article to protect people with AIDS-related disorders from discrimination.²²⁴ The other three states do not protect people who either have a "record" of impairment or are "regarded" as having the same.²²⁵ Georgia specifically excludes contagious communicable diseases from statutory protection.²²⁶

Eight states and the District of Columbia have handicap discrimination statutes that, although not identical, have language that protects from discrimination people who have suffered any anatomical, physiological or neurological disability, infirmity, malformation, or disfigurement which is caused by injury, birth defect, or illness.²²⁷ People with AIDS and people with ARC would appear

221. **Georgia:** GA. CODE ANN. § 34-6A-3(b) (1982); **Kentucky:** KY. REV. STAT. ANN. § 207.140 (2)(c) (Michie/Bobbs/Merrill 1982).

222. New Hampshire administrative rules define "illness" as a "short term, temporary medical condition" under N.H. REV. STAT. ANN. § 354-A:3(xiii) (1984). This would appear not to include AIDS-related disorders since, by their very nature, they are permanent and, except for seropositive persons, are invariably fatal. N.H. CODE ADMIN. R. HUM 405.01 (1984).

223. See, e.g., **Colorado:** COLO. REV. STAT. § 24-34-301(4) (1982) (but does not include mental handicaps); **Louisiana:** LA. REV. STAT. ANN. § 46:2253(2) (West Supp. 1982); **Massachusetts:** MASS. GEN. LAWS ANN. ch 151B, § 1(17) (West Supp. 1987); **Minnesota:** MINN. STAT. ANN. § 363.01(25) (West Supp. 1987); **New Mexico:** N.M. STAT. ANN. § 28-1-2(k) (Supp. 1983); **Oklahoma:** OKLA. STAT. ANN. tit. 25 § 1301(4) (West. 1987); **Oregon:** OR. REV. STAT. § 659.400(2) (1983); **Rhode Island:** R.I. GEN. LAWS § 28-5-6(7) (1986); **Vermont:** VT. STAT. ANN. tit. 21 § 495d(5) (Supp. 1986).

224. See *supra* notes 56-125 and accompanying text.

225. **Utah:** UTAH CODE ANN. § 34-35-2(14) (Supp. 1987); **West Virginia:** W. VA. CODE § 5-11-3(t) (1987).

226. GA. CODE ANN. § 34-6A-3(b)(1)-(2) (1982).

227. **Alaska:** ALASKA STAT. § 18.80.300(11) (1986); **Connecticut:** CONN. GEN. STAT. ANN. § 46a-51(15) (West 1986); **District of Columbia:** D.C. CODE ANN. § 1-2502(23)(1981); **Illinois:** ILL. ANN. STAT. ch. 68, para. 1-103(I) (Smith-Hurd Supp. 1987); **Maine:** ME. REV. STAT. ANN. tit. 5, § 4553(7-A) (1979); **Maryland:** MD. ANN. CODE art. 49B, § 15(g) (1986); **Montana:** MONT. CODE ANN. § 49-2-101(16) (1985); **Nebraska:** NEB. REV. STAT. § 48-1102(8) (1984); **New Jersey:** N.J. STAT. ANN. § 10:5-5(q) (West Supp. 1987).

to fall under the statutory definition since they have physical manifestations of the illness. However, there are indications that people who merely test seropositive will also find in these statutes protection from discrimination.²²⁸ In addition to the eight states already mentioned, three states contain a similar, albeit truncated, version of the aforementioned standard and require only a "condition" which constitutes a substantial disability.²²⁹

Another group of states have definitions of handicap that are unique. Each concerns a medically verifiable health impairment which requires special services and appears to be reasonably certain to exist throughout the individual's lifetime. The statutes typically require that the disease does not interfere with the individual's job performance or qualifications, while recognizing that the disease may manifest itself through several possible physical impairments.²³⁰ It appears that people with AIDS or ARC would be

228. See, e.g., *D.C. Human Rights Office Plans Policy Statement*, 1 AIDS Pol'y & L. (BNA) No. 2, at 7 (Feb. 12, 1986) ("The provisions of the Human Rights Act regarding discrimination on the basis of handicap are applicable to discrimination against those suffering from AIDS as well as those 'regarded' as having the disease, whether correctly or incorrectly."). *Maine Law Bars Discrimination, Panel Says*, 1 AIDS Pol'y & L. (BNA) No. 6, at 6 (Apr. 9, 1986) ("The Maine Human Rights Commission said March 17 that state law banning handicap discrimination in employment, housing and public accommodations covered AIDS-based discrimination."). See also *AIDS Constitutes a Physical Handicap Under Maine's Human Rts. Act*, 2 Empl. Prac. Guide (CCH) ¶ 5023; Empl. Prac. Guide (CCH) ¶ 5026 (New Jersey Division of Civil Rights holds that persons with an AIDS-related disorder are protected under the Law Against Discrimination); see also *Refusal to Rent to Gays Said Barred by State Law*, 2 AIDS Pol'y & L. (BNA) No. 6, at 3 (Apr. 8, 1987) ("A New Jersey judge ruled March 12 that state handicap law bars a landlord's refusal to rent to homosexual because of a fear that the individuals may be at risk of developing AIDS.").

229. **Indiana:** IND. CODE ANN. § 22-9-1-3(q) (Burns 1986); **Iowa:** IOWA CODE ANN. § 601 A.2(11) (West 1975); **Kansas:** KAN. STAT. ANN. § 44-1002(j)(1986).

230. See generally **California:** Cal. Gov't Code § 12926(h) (West Supp. 1987); **Hawaii:** HAW. REV. STAT. § 378-1 (1985); **South Carolina:** S.C. CODE ANN. § 2-7-35 (Law Co-op. 1983) (see also 3 Empl. Prac. Guide (CCH) (Empl. Prac. Dec.) ¶ 27,106.06 (1983)); **Michigan:** MICH. COMP. LAWS ANN. § 37.1103(b)(i) (West 1985); **New York:** N.Y. EXEC. LAW § 292(21) (McKinney Supp. 1987); **Ohio:** Ohio Rev. Code Ann. § 4712.01(13) (Anderson 1980); **Texas:** TEX. HUMAN RES. CODE ANN. § 121.002(4) (Vernon 1980); **Washington:** Wash. Admin. Code § 49.60.010 - .030 (Supp. 1987); **Wisconsin:** WIS. STAT. ANN. § 11.32(8)(a) (West. Supp. 1984). See also **Pennsylvania:** 43 PA. STAT. ANN. tit. 43 § 954(f) (Purdon Supp. 1987), which uses the term "non-job related handicap or disability." The statute defines the phrase as "any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in."

protected in most of these states.²³¹ A similar result would follow with respect to people who test seropositive.²³²

Finally, there is a group of states, including Florida, in which the applicable state laws relating to handicap discrimination either do not define "handicap" or define "handicap" only in other statutes.²³³ Administrative²³⁴ and judicial interpretations indicate that protection would be provided by these statutes not only to people with AIDS and ARC, but also to people who test seropositive.

231. *California Commission Says Aids Is a Handicap Under State Law*, 2 AIDS Pol'y & L. (BNA) No. 3, at 1 (Feb 25, 1987) ("California's fair housing and employment law covers persons with AIDS, the state Fair Employment and Housing Commission ruled."); *Civil Rights Agency Rules AIDS Handicap in Michigan*, 1 AIDS Pol'y & L. (BNA) No. 17, at 4 (Sept. 10, 1986). See also *AIDS Is a Handicap Under the Michigan Handicappers' Act*, 2 Empl. Prac. Guide (CCH) (Empl. Prac. Dec.) ¶ 5042; *Michigan Judge Terms AIDS a Disability*, 2 AIDS Pol'y & L. (BNA) No. 7, at 6 (Apr. 22, 1987); Pear, *States' AIDS Discrimination Laws Reject Justice Department's Stand*, N.Y. Times, Sept. 17, 1986, at A20, col. 1 ("[T]he State Commissioner of Human Rights said that discrimination based on AIDS is prohibited by state law in employment, housing and police accommodations."); *Rights Commission Allowed to Proceed with Bias Charge*, 2 AIDS Pol'y & L. (BNA) No. 1, at 3 (Jan. 28, 1987) ("A New York State judge ruled Jan. 9 that the New York City Commission on Human Rights (CHR) may proceed with a complaint against a funeral home that allegedly discriminated against persons who died of AIDS."); *In Brief*, 2 AIDS Pol'y & L. (BNA) No. 6, at 10 (Apr. 8, 1987) ("The Ohio Civil Rights Commission considers AIDS a handicap . . . and it will investigate charges of discrimination 'under the commonly accepted legal standards which are applied' to other handicaps."); *AIDS Is A Handicap Under Philadelphia's Fair Practices Act*, 3 Empl. Prac. Guide (CCH) ¶ 5027; *Broad Anti-Bias Ordinance Approved by Austin Council*, 1 AIDS Pol'y & L. (BNA) No. 25, at 1 (Dec. 31, 1986); *AIDS Rules Drafted by Washington Rights Body*, 1 AIDS Pol'y & L. (BNA) No. 13, at 7 (July 16, 1986) ("The Washington State Human Rights Commission has proposed draft guidelines and policy for preventing discrimination related to AIDS . . . AIDS is considered a disability under the Washington State Law Against Discrimination."); *Challenge to School Policy Prompts State Action*, 1 AIDS Pol'y & L. (BNA) No. 4, at 5 (Mar. 12, 1986) ("[T]he (Wisconsin) state Department of Industrial, Labor, and Human Relations [ruled] that AIDS is a protected handicap under state law, and that employers who terminate workers with AIDS or those perceived to have AIDS may be violating state law provisions that prohibit discrimination on the basis of handicap or sexual orientation.").

232. See *supra* note 228 and accompanying text.

233. In Florida, The Human Rights Act of 1977, FLA. STAT. §§ 760.01-760.10 (1977), does not define "handicap." But the Fair Housing Act, FLA. STAT. §§ 760.20-760.37 (1985), does define a "handicapped person." See also **Nevada**: NEV. REV. STAT. § 613, 310 (1986); **North Carolina**: N.C. GEN. STAT. § 168-1 (1982); **Tennessee**: TENN. CODE ANN. § 47-17-102(b) (1984); **Virginia**: VA. CODE ANN. §§ 51.01-3, 51.01-42, 51.01-45 (1986).

234. See, e.g., *Shuttlesworth v. Broward County Office of Mgmt. & Budget Policy*, Florida Comm'n on Human Rights Relations, FCHR No. 85-0624, reprinted in 2 Empl. Prac. Guide (CCH) ¶ 5014 ("Based upon the plain meaning of the term 'handicap' and the medical evidence presented, an individual with [AIDS] is within the coverage of the Human Rights Act of 1977.").

VIII. LOCAL ORDINANCES MAY HELP PEOPLE WITH AIDS-RELATED DISORDERS: CALIFORNIA AS AN EXAMPLE

California cities have been in the forefront in enacting ordinances to bar discrimination on the basis of AIDS. Indeed, with the exception of Austin, Texas, no community outside of California has barred discrimination against people with AIDS-related disorders.²³⁵ San Francisco, Los Angeles and Berkeley have adopted such ordinances.²³⁶ A number of California counties also have adopted measures to bar discrimination against people with AIDS-related disorders.²³⁷ In light of the broad relief available under the San Francisco and Los Angeles ordinances, and the difficulty in getting legislation enacted to declare AIDS a handicap at the state level,²³⁸ many potential plaintiffs may be encouraged to use the lo-

235. See 5 EML. REL. BUL. No. 7, at 7 (March 1987) (Center for Employment Relations and Law, Florida State Univ. College of Law) ("Austin, Texas approved a broad ordinance banning AIDS-based discrimination in employment, housing and public accommodations. Austin is the first city outside California to outlaw AIDS-based discrimination."). *Accord*, *Broad Anti-Bias Ordinance Approved by Austin Council*, 1 AIDS Pol'y & L. (BNA) No. 25, at 1 (Dec. 31, 1986).

236. San Francisco, Cal., Ordinance No. 49985 (to be codified at SAN FRANCISCO, CAL. MUNICIPAL CODE pt. II, chap. VIII, art. 38, §§ 3801-3816) (reported in 3 Empl. Prac. Guide (CCH) (Empl. Prac. Dec.) ¶ 20,950B (Dec. 20, 1985)). The San Francisco ordinance, for example, authorizes an aggrieved party to file a request with the city's Human Rights Commission to have it "investigate and mediate his or her complaint under the provisions of the Administrative Code of the City and County of San Francisco." SAN FRANCISCO, CAL. MUNICIPAL CODE pt. II, chap. VIII, art. 38, § 3811. The ordinance also authorizes an aggrieved party to file a civil suit for legal or equitable relief without first filing a complaint with the Human Rights Commission. *Id.* Actual damages, damages in excess of actual damages up to and including treble damages, punitive damages where appropriate, costs and attorney's fees may be obtained. *Id.* at § 3810. And where liability has been found damages of at least \$1,000 must be imposed. *Id.*; Los Angeles, Cal. Ordinance No. 160289 (codified as LOS ANGELES, CAL. MUNICIPAL CODE ch. III, art. 5.8, §§ 45.80-45.93 (Aug. 16, 1985)) (reported in 3 Empl. Prac. Guide (CCH) (Empl. Prac. Dec.) ¶ 20,950A)). The Los Angeles ordinance is silent with respect to filing complaints with a city human rights commission. However, the ordinance authorizes an aggrieved party to file a civil action for legal and equitable relief. LOS ANGELES, CAL. MUNICIPAL CODE ch. III, art. 5.8, § 45.90. Furthermore, the ordinance authorizes a court to award a successful plaintiff actual damages, costs, attorney's fees, and punitive damages in appropriate cases. *Id.* at § 45.89. See also *Berkeley Bars Bias*, 1 AIDS Pol'y & L. (BNA) No. 5, at 6 (Mar. 26, 1986).

237. *In Brief*, 1 AIDS Pol'y & L. (BNA) No. 1, at 7 (Jan. 28, 1987) (Sonoma, San Francisco, San Mateo, Riverside, and San Luis Obispo counties).

238. *Bill That Would Term AIDS Handicap Reconsidered by California Assembly*, 1 AIDS Pol'y & L. (BNA) No. 10, at 1 (June 4, 1986) (the measure failed by one vote); *California Assembly Approves Bill Terming AIDS Handicap*, 1 AIDS Pol'y & L. (BNA) No. 11, at 2 (June 18, 1986); *Deukmejian Vetoes Handicap Law as 'Unnecessary' and 'Inappropriate'*, 1 AIDS Pol'y & L. (BNA) No. 19, at 1 (Oct. 8, 1986); *AIDS Bills Proliferate Before State Legislature*, 2 AIDS Pol'y & L. (BNA) No. 6, at 6 (Apr. 8, 1987) ("The major piece of legislation, called the AIDS Omnibus Bill (AB 87) . . . incorporates a controversial measure

cal ordinances. Furthermore, advocates for people with AIDS-related disorders outside of California may be encouraged to seek remedial legislation at the local level because of difficulties at the state level in getting remedial legislation enacted. Accordingly, it is appropriate to examine these California city ordinances.

The power and duties of local government units in California are quite broad.²³⁹ Nevertheless, there are indications that the California legislature has occupied the area of discrimination in housing and employment to the exclusion of any affirmative legislation by cities and counties. "[I]t is the intention of the Legislature to occupy the field of regulation of discrimination in employment and housing encompassed by the provisions of this part, exclusive of all

declaring AIDS to be a physical handicap for the purpose of prohibiting discrimination. Last year, [Assemblyman] Agnos twice introduced similar bills, but both were vetoed by the governor.").

239. The power and duties of local government units are addressed in article 11 of the California Constitution. Section 2(a) thereof authorizes the legislature to provide for the city powers: "The Legislature shall prescribe uniform procedure for city formation and provide for city powers." Article 11, section 7, applicable to counties and cities generally, authorizes them to adopt ordinances not in conflict with state law: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." For cities in general, a "conflict" is deemed to exist not only when an ordinance directly contradicts state law, but also when it duplicates state law. Comment, *Article 33 of the San Francisco Police Code: An Unconstitutional Exercise of Municipal Authority*, 17 U.S.F.L. REV. 525, 527 (1983) [hereinafter *Article 33*]. A conflict also will exist if the city authorizes that which the state prohibits, or prohibits that which the state authorizes. *Id.* at 527. However, California Constitution art. 11, section 5(a), provides in part that "city charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith." Also, it provides that cities operating under a charter may adopt ordinances of local application regardless of whether it addresses a matter already addressed by the state legislature. See *Bishop v. City of San Jose*, 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr 465 (1969). See also *DeYoung & Johnson, The Traffic Congestion Bottleneck: City Police Power, Municipal Affairs and Tax Solutions*, 10 U.C. DAVIS. L. REV. 207, 212 (1977); *Alioto's Fish Co. v. Human Rights Comm'n*, 120 Cal. App. 3d 594, 603, 174 Cal. Rptr. 763 (Cal. Ct. App. 1981), *cert. denied*, 455 U.S. 944 (1982); *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 704, 693 P.2d 261, 209 Cal. Rptr. 682 (1984), *aff'd*, 475 U.S. 260 (1985) ("In addition, charter cities have even greater authority; they have exclusive power to legislate over 'municipal affairs.'"); *Gates v. Municipal Court of Santa Clara County, San Jose Facility*, 135 Cal. App. 3d 309, 317, 185 Cal. Rptr. 330, 334 (Cal. Ct. App. 1982) ("If the subject matter or field of the legislation has been fully occupied by the state, there is no room for supplementary or complementary local legislation, even if the subject is otherwise one properly characterized as a 'municipal affair.'"). But even the ordinances of charter cities will fall when (1) the legislature occupies the field by full and complete regulations; (2) a subject matter which has only been partially covered by state legislation is deemed to be of "paramount state concern," or (3) a subject matter, only partially covered by state legislation, is of such nature that a local ordinance will adversely affect the transient citizens of the state. *Article 33, supra*, at 527.

other laws banning discrimination in city, city and county, county or other political subdivisions of the state."²⁴⁰

Indications that the California legislature intended to preempt local housing and employment ordinances are buttressed by *Alioto's Fish Co. v. Human Rights Commission*.²⁴¹ Fourteen Fisherman's Wharf restaurants, that leased their premises from the San Francisco Port Commission, challenged attempts by the Port Commission to insert into their respective leases employment non-discrimination provisions of the San Francisco Human Rights Ordinance and an affirmative action agreement. The court upheld the leases as an exercise by the city of its power to insert nondiscrimination terms in a contract—its contracting power. However, in dictum, the court stated that had the ordinance been an attempt to exert municipal police power, it would have fallen afoul of the law.²⁴² As one California labor law expert reviewing *Alioto's* said:

If the interpretation [in *Alioto's* of the FEHA Fair Employment and Housing Act] remains valid, then the local ordinances prohibiting AIDS-based discrimination in employment will not stand. Because, as seen above, it is virtually certain that discrimination on the basis of AIDS will be found to be discrimination in violation of FEHA, and because it is hard to conceive of a basis for these ordinances other than the local police power, they will likely be found to be invalid municipal legislation in a field preempted by the state.²⁴³

240. CAL. GOV'T CODE § 12993(c) (West 1980). In 1963, an opinion of the California Attorney General concluded that the California Fair Employment Practices Act and the Rumford Fair Housing Act preempted the entire field of labor and housing discrimination and that additional local regulation was precluded. 42 Op. Cal. Att'y Gen. 114 (1963). See also 60 Op. Cal. Att'y Gen. 44, 48 (1977). The Attorney General's opinion has been strengthened by section 12993(c) of the Fair Employment and Housing Act.

241. 120 Cal. App. 3d 594, 174 Cal Rptr. 763 (Cal. Ct. App. 1981).

242. *Alioto's*, 120 Cal. App. 3d at 605-606, 174 Cal Rptr. at 768-69.

243. Jonas, *AIDS and California Employment Law*, 4 *Lab. & Empl. Law News* 5 (Winter 1986) (official publication of the state bar of California Labor and Employment Law Section) (on file, *Florida State University Law Review*). See also *id.* at 6 n.10 ("In its opinion letter to Los Angeles City Council regarding the ordinance finally enacted there, the Los Angeles City Attorney's office concluded on the basis of *Alioto's* that the employment provisions of that city's ordinance are preempted by the FEHA."). Cf. *Article 33*, *supra* note 239 (indicating that the nondiscrimination provisions of Article 33 of the San Francisco Police Code relating to race, religion, color, ancestry, age, sex, disability and sexual orientation are invalid due to the legislative preemption of the field in the Fair Employment and Housing Act of 1980). See also *id.* at 544 n.97 (quoting letter from Donald J. Garibaldi, Deputy City Attorney, to Gilbert H. Boreman, Clerk of the Board (March 9, 1978), which "informed the Board that the City Attorney's office was 'withholding . . . approval of [article 33] as to legality' because 'there is no clear legal authority that a municipality is empowered to create [private] rights or remedies'").

In addition to the direct evidence of preemption in the field of employment and housing discrimination, there are indications that California state court precedent would invalidate the local ordinances barring AIDS-based discrimination.²⁴⁴ First, local ordinances fall if the matter regulated is one of statewide concern.²⁴⁵ Second, local ordinances fall if the matter regulated is one which demands uniform regulation throughout the state.²⁴⁶ Third, local ordinances fall because, "[w]hen there is a doubt, as to whether an attempted regulation relates to a municipal or to a state matter, or if it be the mixed concern of both, the doubt must be resolved in favor of the legislative authority of the state."²⁴⁷

Finally, and most significantly, there is substantial doubt as to whether California cities have authority to create private rights in favor of third parties.²⁴⁸ In light of the fact that counsel advised both the Los Angeles City Council and the San Francisco Board of Supervisors of the dubious constitutionality of their respective anti-AIDS discrimination ordinances,²⁴⁹ these elected bodies either concluded otherwise or adopted these ordinances for political expediency. In addition to California, there are municipal home rule

244. *Article 33, supra* note 239, at 543-47.

245. *Id.* at 529-30.

246. *Id.* at 530-31.

247. *Id.* at 532 (quoting *Abbott v. City of Los Angeles*, 53 Cal. 2d 674, 681, 349 P.2d 974, 979 3 Cal. Rptr. 158, 163 (1960)).

248. *Id.* at 543-47.

249. *Id.* at 529-30.

ordinances in Florida,²⁵⁰ New York,²⁵¹ and New Jersey.²⁵² Those

250. In Florida, for example, cities and counties have broad powers to adopt local ordinances. See FLA. CONST. art VIII, §§ 1(g), 2(b); FLA. STAT. § 166.011-411 (1985). Nevertheless, localities must be careful not to provide greater protection for people with AIDS-related disorders than is the case under state law. In *City of Miami Beach v. Rocio Corp.*, 404 So. 2d 1066 (Fla. 3d DCA 1981), *review denied*, 408 So. 2d 1092 (Fla. 1981), for example, the court enjoined a city from enforcing its ordinance regulating condominium conversions because it conflicted with the state Condominium Act. The state act forbade cancellation of tenant leases upon less than 120 days notice, while the city ordinance forbade cancellation of tenant leases upon less than 18 months notice. The court rejected the city's argument that its ordinance merely supplemented tenant protection already in the state as "without merit" because "[w]hen conduct permitted by state law is prohibited by local ordinance, citizens become hopelessly entangled in a web of government." *Id.* at 1071. Similarly, in *Edwards v. State*, 422 So. 2d 84 (Fla. 2d DCA 1982), a local ordinance that imposed penalties for possession of varying amounts of illegal drugs was challenged. Although local ordinances generally impose sanctions less severe than those imposed under state law, the court invalidated the ordinance to the extent that it conflicted with state law by removing the trial judge's discretion to withhold adjudication and order probation or participation in a drug rehabilitation program for those convicted of possessing small amounts of illegal drugs. *Id.* at 85-86.

Additionally, FLA. CONST. art. VIII, § 1(g), allows charter counties to establish ordinances of a regulatory nature. Consequently, advocates for people with AIDS-related disorders must consider the possibility that municipal ordinances might clash with county regulations.

251. Article IX, section 2, of the New York [State] Constitution addresses, among other matters, the home rule powers of local governments. N.Y. CONST. art. IX, § 2. Among the powers granted to localities is authorization to adopt ordinances for the "government, protection, order, conduct, safety, health and well-being of persons or property therein" not inconsistent with the provisions of the state constitution or any general law relating to these subjects. *Id.* at § 2(c)(ii)(10). These constitutional powers have been codified in article II, section 10 of the Municipal Home Rule Law (McKinney 1969 & Supp. 1987). It provides how ordinances may be adopted and how amendments to home rule charters may be enacted. Ordinances may be adopted by the legislative body of a locality by majority vote. *Id.* at § 20(i).

In addition to direct inconsistencies between a local ordinance and a state statutory provision, localities must also exercise concern for legislative preemption. Preemption occurs where the state has acted upon a subject such that it evidences a desire to exclude varying local regulations. See *People v. Cook*, 34 N.Y.2d 100, 356 N.Y.S.2d 259, 312 N.E.2d 452 (1974). A potential preemption problem might exist between local remedies for discrimination suffered by people with AIDS-related disorders, and the state Human Rights Law which among other matters, addresses discrimination on the basis of handicap. N.Y. EXEC. § 290-301 (McKinney 1982 & Supp. 1987). However, several opinions of the New York state attorney general indicate that state legislation in this area is not intended to preempt local laws on the subject. See, e.g., 1968 Op. N.Y. Atty. Gen. 98 (Aug. 1, 1968) (Legislation prohibiting discrimination in housing practices has not been preempted by the state. Local laws may be enacted provided they do not make illegal that which the state allows. The validity of the local laws is not affected by the fact that greater penalties are thereby imposed.).

The New York Commission on Human Rights already has extended that Act to include people with an AIDS-related disorder. Pear, *States' AIDS Discrimination Law Rejects Justice Department's Stand*, N.Y. Times, Sept. 17, 1986, at A20, col. 1. Accordingly, the potential for any sort of preemption problem is remote. Nevertheless, New York, either by legislative amendment or judicial fiat could declare that the Human Rights Law does not extend so far as to include persons with AIDS related disorders. In this situation, the failure of the

states combine to account for 75% of reported AIDS cases.²⁵³

IX. CONCLUSION

Although the Rehabilitation Act of 1973 remains the primary federal statute to remedy discrimination suffered by recipients of federal funds, ERISA and EAHCA may also be useful in appropriate circumstances. Because the Rehabilitation Act applies only to recipients of federal funds, and because it can at any time be amended to exclude from its scope people with AIDS-related disorders, it is necessary to consider alternative means of recovery under state and local law.

Practically all states have statutes to protect the handicapped from discrimination. These statutes should protect from discrimi-

legislature to extend protection to people with AIDS-related disorders would not preempt localities from providing such protection. See 1978 Op. N.Y. Atty. Gen. 115 (March 6, 1978) (Informal) (local legislation prohibiting discrimination in housing, employment and places of public accommodation on the basis of sexual preference has not been preempted by the state).

252. The New Jersey Constitution provides generally for the power of municipalities and counties. N.J. CONST. art. 4, ¶ 11 (municipalities and counties have powers not only expressly set forth in the constitution or laws of New Jersey, but also powers of fair or necessary implication or incident thereto *and* are not inconsistent with or prohibited by the state constitution or law). The powers of municipalities and counties has been expanded upon in the state's statutes. N.J. STAT. ANN. §§ 40:48-1 - 29 (West 1967 & Supp. 1987).

New Jersey has a civil rights act entitled the Law Against Discrimination. N.J. STAT. ANN. §§ 10:5-1 -38 (West 1976 & Supp. 1986). Section 5-4.1 bans discrimination on the basis of handicap. Since the New Jersey division on Civil Rights has held that people with AIDS-related disorders are protected under the handicap discrimination ban, 2 Empl. Prac. Guide (CCH) (Empl. Prac. Dec.) ¶ 5026, it could be argued that this statute preempts local ordinances.

A state statute will preempt a local ordinance where: (1) there is a conflict between the two in underlying policy or operational effect; (2) the state was intended, implicitly or expressly, to be exclusive in the field; (3) the subject matter reflects a need for uniformity; (4) the state regulatory scheme is so pervasive that it occupies the entire field. *Overlook Terrace Mgmt. Corp. v. Rent Control Bd.*, 71 N.J. 451, 366 A.2d 321 (1976). Since the Law Against Discrimination contains no express statement of legislative intent to occupy the field, and since § 10:5-10 of the Law Against Discrimination authorizes the mayor or chief executive officer of a municipality to appoint a local commission on civil rights, and § 10:5-14.2 thereof provides a mechanism under which local civil rights commissions are created, it is unlikely that preemption exceptions (2), (3) or (4) are applicable. See N.J. STAT. ANN. §§ 10:5-10, 10:5-14.2 (West 1976 & Supp. 1986). As a result of the New Jersey Division on Civil Rights' administrative interpretation that the Law Against Discrimination extends to people with AIDS-related disorders, local ordinances should be valid absent either a judicial determination or legislative amendment to the statute providing an administrative extension. Were either of these events to occur, the local ordinance would be invalid because it would conflict with the Law Against Discrimination.

253. *Council Report: The Acquired Immunodeficiency Syndrome*, 252 J.A.M.A. 2037, 2038 (Oct. 19, 1984).

nation people with AIDS-related disorders. Some state civil rights commissions have interpreted their respective civil rights laws to protect victims of AIDS-related discrimination. However, only in a few cases has the issue been litigated such that the agency's interpretation could be approved judicially.

Local civil rights ordinances might be helpful, but it is often difficult to determine the extent of the validity of municipal power, which is limited by state law. Notwithstanding the fact that the California attorney general has issued two opinions stating that the state legislature has preempted the field of discrimination in housing and employment, and notwithstanding similar opinions of counsel for the cities of Los Angeles and San Francisco, those two cities and other cities in California have enacted ordinances to provide compensation, punitive damages and attorneys fees for people who suffered AIDS-related discrimination. Accordingly, both the ordinances and the laws of the specific state involved must be thoroughly reviewed before one pursues relief under a local ordinance.

Despite the problematic nature of state and municipal civil rights laws, they must be used. The general trend among the states is to apply an analysis similar to that set forth in this Article and in *Arline* to evaluate AIDS-related discrimination claims on the basis of scientific fact and medical knowledge. Since AIDS is communicated to others only through intimate sexual contact or the transfer of blood products, it is expected that almost all discrimination against such people will be illegal.