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Florida's Omnibus AIDS Act of 1988

Robert Craig Waters

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ARTICLES

FLORIDA'S OMNIBUS AIDS ACT OF 1988†

ROBERT CRAIG WATERS

In response to the growing fears and sometimes irrational attitudes associated with the deadly disease AIDS, the 1988 Florida Legislature passed the Omnibus AIDS Act, affecting twelve substantive areas of law. In this Article, the author examines each of these areas, suggests the most likely interpretation the courts will accord the new provisions, and makes recommendations to correct oversights and inconsistencies in existing laws.

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FLORIDA'S OMNIBUS AIDS ACT OF 1988†

ROBERT CRAIG WATERS*

“[T]he AIDS epidemic carries the potential to be the greatest natural tragedy in human history”¹

IN 1988 the Florida Legislature faced a grim fact: Florida never has experienced a force as potentially devastating² as the deadly and

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The views expressed in this Article are entirely those of the author and do not reflect the views of any other individual or institution.

This Article is dedicated to the 3,649 Floridians who had died of AIDS by the time this Article was completed.

1. W. MASTERS, V. JOHNSON & R. KOLODNY, CRISIS: HETEROSEXUAL BEHAVIOR IN THE AGE OF AIDS 11 (1988) (emphasis added) [hereinafter MASTERS & JOHNSON].

2. Florida currently ranks third highest in the cumulative numbers of deaths caused by AIDS. Staff of Fla. H.R. Comm. on Health Care, PCB for HC 88-07 (1988) Staff Analysis 1 (Apr. 13, 1988) (on file with committee) [hereinafter Health Care Analysis]. This ranking encompasses all AIDS cases reported since June 1981. New York and California ranked first and second, respectively, on April 25, 1988, in terms of cumulative AIDS-related deaths. CENTERS FOR DISEASE CONTROL, AIDS WEEKLY SURVEILLANCE REPORT, Apr. 25, 1988, at 2 (copy on file, Florida State University Law Review) [hereinafter CDC REPORT]. However, California, New York, and New Jersey rank first through third, respectively, in terms of active AIDS cases, with Florida ranking fourth. *Id.* Every American state reports active AIDS cases. *Id.* Some medical researchers now contend that AIDS is a far more serious health threat than earlier reports suggested. They estimate that by the year 2000, unless a vaccine or other effective therapy is developed, there will be a cumulative total of five million full-blown cases of AIDS in the United States alone, with a worldwide total of 25 million. MASTERS & JOHNSON, *supra* note 1, at 15. Even by 1991, Masters and Johnson estimate that a staggering 500,000 cases of AIDS in the United States with more than 300,000 deaths attributed to the disease. *Id.*

incurable viral disease, AIDS.³ The Legislature conservatively estimated that 210,000⁴ Floridians—almost two percent of the population—were infected with the causative agent, human immunodeficiency virus (HIV),⁵ by early 1988. Moreover, the number of full-blown AIDS cases is expected to increase almost 800% by 1991 to a total of 32,000.⁶ At least one legislator predicts that as many as 200,000 Floridians will die of AIDS-related illnesses within eight years, requiring an annual state appropriation of up to a billion dollars by the 1990s.⁷

There is little doubt that people are frightened.⁸ Fear of the disease in Florida already has promoted ill-conceived

3. "AIDS" means acquired immunodeficiency syndrome, a complex of diseases and infections generally believed to be caused by infection with the human immunodeficiency virus (HIV). See MASTERS & JOHNSON, *supra* note 1, at 179-84. A minority of researchers contend that AIDS either is not caused by HIV or that HIV is only a cofactor. See Campbell, *Medical Aspects of AIDS-Related Litigation*, in AIDS PRACTICE MANUAL: A LEGAL AND EDUCATIONAL GUIDE II-9 n.12 (1988). This possibility, however, has been rejected by the National Academy of Sciences. NATIONAL ACADEMY OF SCIENCES, CONFRONTING AIDS: UPDATE 1988, at 2 (1988) [hereinafter AIDS UPDATE 1988]. The Reagan administration's Presidential Commission on the Human Immunodeficiency Virus Epidemic has argued that the term "AIDS" is obsolete and should be replaced with the term "HIV infection." REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC xvii (1988) [hereinafter PRESIDENTIAL COMMISSION REPORT]. Because of the legal distinctions involved, this Article will use the term "AIDS" to mean the syndrome of diseases classified as "full-blown AIDS" by the Centers for Disease Control; "AIDS-related complex" or "ARC" to mean HIV infection accompanied by illness attributable to the virus but technically not qualifying as AIDS; and "HIV infection" to mean asymptomatic infection with HIV. See *id.* at 8.

4. At least one legislator argued that the figure more realistically is about 400,000 Floridians currently infected with HIV. Fla. H.R., Comm. on Health Care, transcript of hearing at 19 (Apr. 13, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Frederick Lippman, Dem., Hollywood).

5. HIV, the biological agent responsible for AIDS, is synonymous with lymphadenopathy-associated virus (LAV) and human T-cell lymphotropic virus type three (HTLV-III), both earlier names given to it by researchers. Campbell, *supra* note 3, at II-9 n.12. The term HIV has been adopted by the Centers for Disease Control upon recommendation of the Assistant Secretary for Health, Department of Health & Human Services. *HIV Infection Codes*, 36 CENTERS FOR DISEASE CONTROL: MORBIDITY & MORTALITY WEEKLY REPORT S-7, at 1-S (Supp. Dec. 25, 1987) [hereinafter *Infection Codes*].

6. Health Care Analysis, *supra* note 2, at 1. The cost of caring for each AIDS patient is estimated at between \$50,000 and \$150,000. Fla. H.R., Comm. on Health Care, transcript of hearing at 3 (Apr. 13, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Frankel).

7. Fla. H.R., Comm. on Health Care, transcript of proceedings at 19-20 (Apr. 13, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Lippman); *id.* at 10-11 (May 11, 1988) (comments of Rep. Lippman). The Legislature also estimated that one of nine men and one of 75 women in Florida between the ages of 30 and 39 currently are infected with HIV. *Id.*, transcript of proceeding at 2-3 (Apr. 13, 1988) (comments of Rep. Lois Frankel, Dem., West Palm Beach).

8. See Eisenberg, *The Genesis of Fear: AIDS and the Public's Response to Science*, 14 LAW MED. & HEALTH CARE 243, 245 (1986).

quarantines⁹ and violence against HIV-infected schoolchildren.¹⁰ AIDS-induced discrimination threatens to force thousands of people onto the public dole as employment, health services, insurance and housing are denied them.¹¹ The judicial system itself has strained to respond to an onrush of new AIDS-related issues, often with ill-suited legal doctrines and precedents. Foreseeing chaos and hysteria,¹² the Legislature resolved in 1988 to address the full range of legal issues raised by the unparalleled tragedy now beginning to unfold in Florida.¹³ What emerged from the 1988 Regular Session was a sweeping reform contained in the Omnibus AIDS Act of 1988 (Omnibus AIDS Act).¹⁴ This broad series of

9. See, e.g., *Brooks v. State*, 519 So. 2d 1156, 1156 (Fla. 5th DCA 1988) (local judge reversed for ordering HIV-infected grand-theft defendant to serve additional 24 months under community control "to protect the public from the spread of the disease"); *Quarantine Indication of 'Hysteria'*, Pensacola News J., June 12, 1987, at 1A, col. 2 (detailing quarantine of a 14-year-old in a county mental health hospital). The Pensacola quarantine itself was sternly criticized by state officials. See *infra* notes 334, 336 and accompanying text.

10. *Rays Giving Up, Leaving Town*, Sarasota Herald Tribune, Aug. 30, 1987, at 1A, col. 5 (detailing arsonists' attack on home of HIV-infected schoolchildren). See *Ray v. School Dist.*, 666 F. Supp. 1524 (M.D. Fla. 1987) (lawsuit involving same children). The incident involving the Ray children in Arcadia, Florida, was cited as one of the reasons why new AIDS-related legislation was needed. See Fla. H.R., Comm. on Health Care, transcript of hearing at 4 (Apr. 13, 1988) (copy on file, *Florida State University Law Review*) (comments of Rep. Frankel). A number of authors have addressed the legal problems of HIV-infected schoolchildren. See generally Rothstein, *Children with AIDS: A Need for a Clear Policy and Procedure for Public Education*, 12 NOVA L. REV. 1259 (1988); Schwarz & Schaffer, *AIDS in the Classroom*, 14 HOFSTRA L. REV. 163 (1985); Comment, *Enforcing the Right to a Public Education for Children Afflicted with AIDS*, 36 EMORY L.J. 603 (1987); Comment, *Protecting Children with AIDS Against Arbitrary Exclusion From School*, 74 CALIF. L. REV. 1373 (1986); Comment, *AIDS: Do Children with AIDS Have a Right to Attend School?*, 13 PEPPERDINE L. REV. 1041 (1986).

11. See South Fla. Blood Serv., Inc., v. Rasmussen, 467 So. 2d 798, 802 (Fla. 3d DCA 1985), approved, 500 So. 2d 533 (Fla. 1987) ("AIDS, or a suspicion of AIDS, can lead to discrimination in employment, education, housing and even medical treatment."); Fla. H.R., Comm. on Health Care, transcript of proceeding at 61 (Apr. 28, 1988) (transcript on file, *Florida State University Law Review*) (comments of Gary Clarke of HRS) (at Miami's Jackson Memorial Hospital, 60% of costs generated by AIDS patients were paid from state tax revenues or local property taxes because patients had no insurance or were indigent); PRESIDENTIAL COMMISSION REPORT, *supra* note 3, at xviii ("Fear has led to discrimination against persons known to be infected.").

12. The hysteria and misinformation about AIDS have permeated American society, fed by an unfounded fear that the disease may be contracted even through casual contact. See Freedman, *Wrong Without Remedy*, A.B.A. J., June 1, 1986, at 36, 37-40. Evangelist Moody Adams contends that the United States itself may be destroyed by AIDS and other diseases, which he believes are the product of immorality and sin. M. ADAMS, *AIDS: YOU JUST THINK YOU'RE SAFE* 23-27 (1986).

13. The 1988 Legislature did not attempt to address the problem of future appropriations necessary to deal with the geometric increase in AIDS cases expected over the next few years. Under the 1988 legislation, the problem of future appropriation will be studied, and reports will be made to future Legislatures. See *infra* note 490 and accompanying text.

14. Ch. 88-380, 1988 Fla. Laws 1996 (codified at scattered sections of FLA. STAT. (Supp. 1988)). The Omnibus AIDS Act was not provided an official name in the legislation itself. Committee Substitute for House Bill 1519 (Second Engrossed) (approved July 6, 1988) is the bill that became chapter 88-380.

enactments will touch virtually every area of legal practice and will push the state into the forefront of jurisdictions responding comprehensively to the threat posed by HIV.¹⁵ One legislator, openly worrying about the public hysteria over AIDS, indicated that the Omnibus AIDS Act brings to Florida an abrupt philosophic change meant to prepare the state for the tens of thousands of deaths expected from HIV infection in the 1990s.¹⁶ This ominous prediction is fully consistent with the forecast that up to 500,000 deaths will occur nationwide in four years.¹⁷

In preparation for this disaster, the Omnibus AIDS Act and related legislation revise and supplement no less than twelve major substantive areas of Florida law, by: (1) outlawing certain forms of discrimination against people believed to be HIV infected and by creating new causes of action to enforce these rights;¹⁸ (2) declaring that HIV-related information about prior occupants is not a material fact in real estate transactions;¹⁹ (3) placing new limits on the use of HIV-related information in insurance underwriting;²⁰ (4) providing new procedures for isolating individuals suspected of contributing to the spread of HIV;²¹ (5) creating new criminal sanctions for those who knowingly pass HIV to others;²² (6) laying down new legal standards for AIDS

15. For an overview of how states have responded to AIDS, see generally INTERGOVERNMENTAL HEALTH POLICY PROJECT OF THE GEORGE WASHINGTON UNIVERSITY, *AIDS: A PUBLIC HEALTH CHALLENGE* (1987) (3 vols.); *The Shaping of AIDS Law*, NAT'L L.J., Aug. 1, 1988, at 1, col. 1.

16. Fla. H.R., Comm. on Health Care, transcript of hearing at 19 (Apr. 13, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Lippman).

17. PRESIDENTIAL COMMISSION REPORT, *supra* note 3, at xvii.

18. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2029 (codified at FLA. STAT. § 760.50 (Supp. 1988)).

19. *Id.* § 46, 1988 Fla. Laws at 2031 (codified at FLA. STAT. § 689.25 (Supp. 1988)).

20. *Id.* § 47, 1988 Fla. Laws at 2031-34 (codified at FLA. STAT. § 627.429 (Supp. 1988)); *id.* § 48, 1988 Fla. Laws at 2034-35 (codified at FLA. STAT. § 627.411(f) (Supp. 1988)); *id.* § 49, 1988 Fla. Laws at 2035 (codified at FLA. STAT. § 627.6265 (Supp. 1988)); *id.* § 50 (codified at FLA. STAT. § 627.6646 (Supp. 1988)); *id.* § 51, 1988 Fla. Laws at 2035-37 (codified at FLA. STAT. § 641.3007 (Supp. 1988)); *id.* § 52, 1988 Fla. Laws at 2037-38 (codified at FLA. STAT. § 641.31(b)(6) (Supp. 1988)).

21. *Id.* § 29, 1988 Fla. Laws at 2017-18 (amending FLA. STAT. § 384.27 (1987)); *id.* § 30, 1988 Fla. Laws at 2018-19 (amending FLA. STAT. § 384.28 (1987)); *id.* § 31, 1988 Fla. Laws at 2019-21 (codified at FLA. STAT. § 384.281 (Supp. 1988)); *id.* § 32, 1988 Fla. Laws at 2021 (codified at FLA. STAT. § 384.282 (Supp. 1988)); *id.* § 33 (codified at FLA. STAT. § 384.283 (Supp. 1988)); *id.* § 34 (codified at FLA. STAT. § 384.284 (Supp. 1988)); *id.* § 35, 1988 Fla. Laws at 2021-22 (codified at FLA. STAT. § 384.285 (Supp. 1988)); *id.* § 36, 1988 Fla. Laws at 2022 (codified at FLA. STAT. § 384.286 (Supp. 1988)); *id.* § 37, 1988 Fla. Laws at 2022-23 (codified at FLA. STAT. § 384.288 (Supp. 1988)); *id.* § 38, 1988 Fla. Laws at 2023 (codified at FLA. STAT. § 384.34 (Supp. 1988)).

22. *Id.* § 27, 1988 Fla. Laws at 2016 (amending FLA. STAT. § 384.24 (1987)); *id.* § 44, 1988 Fla. Laws at 2028-29 (amending FLA. STAT. § 796.08 (1987)).

testing, counseling and confidentiality;²³ (7) providing new standards for HIV-related drugs, home tests, and therapies;²⁴ (8) setting new guidelines for dealing with AIDS in the state's prisons and jails;²⁵ (9) creating a massive statewide educational program;²⁶ (10) establishing new standards for donating human blood and tissue;²⁷ (11) providing for new epidemiological research and planning;²⁸ and (12) coordinating local patient-care delivery systems.²⁹

This Article examines how the 1988 AIDS legislation will affect each of these areas and in what ways it departs from preexisting law. It draws extensively from transcripts of legislative hearings and debates to determine actual legislative intent. Using settled rules of statutory construction as its framework for analysis,³⁰ the Article suggests the most likely interpretation that courts will accord the major com-

23. *Id.* § 21, 1988 Fla. Laws at 2008-13 (codified at FLA. STAT. § 381.609 (Supp. 1988)).

24. *See infra* notes 433-40 and accompanying text.

25. *See infra* notes 441-52 and accompanying text.

26. *See infra* notes 453-62 and accompanying text.

27. *See infra* notes 463-84 and accompanying text.

28. *See infra* notes 485-90 and accompanying text.

29. *See infra* notes 491-504 and accompanying text.

30. This Article rests on several premises that will be used as a framework for analysis. These premises generally deal with (1) the methods of determining actual legislative intent behind a statute, where it exists, and (2) the methods of construing a new statute in the absence of any clear intent. Initially, this Article will presume, as do the courts, that clear statements of legislative intent must serve as the "pole star" of construction. *See, e.g.,* Carawan v. State, 515 So. 2d 161 (Fla. 1987); Wakulla County v. Davis, 395 So. 2d 540, 543 (Fla. 1981). To this end, the language of the new statutes will be examined to determine if intent is stated clearly. If so, this intent will be considered definitive. *See S.R.G. Corp. v. Department of Revenue*, 365 So. 2d 687, 689 (Fla. 1978). But where the statutory language is ambiguous or contradictory, the author will draw extensively from transcripts of committee and floor debates in which provisions of the bills were discussed, as well as relevant staff documents. If clear statements of intent exist in these sources, they will be considered definitive, with greatest weight given to statements of chairmen of the committees responsible for drafting the language in question. *See Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 467 (1921) (statements of chairmen of committee drafting bill treated as supplemental records).

Where the intent cannot be determined from any source or is unclear, this Article will employ the general rules of statutory construction accepted by the Florida courts. It will presume, first, that general public policy or purpose evident upon the face of the statutes or other sources will serve as the guide of statutory construction in the absence of any express intent. *Weiss v. Leonardy*, 160 Fla. 570, 36 So. 2d 184 (1948); *In re Ruff's Estate*, 159 Fla. 777, 32 So. 2d 840 (1947); *Scarborough v. Newsome*, 150 Fla. 220, 7 So. 2d 321 (1942).

Second, where a new statute is inconsistent with another statute, a construction will be favored that gives effect to both as much as possible in light of the overall intent or policy expressed by the Legislature. *State v. Brown*, 530 So. 2d 51, 52 (Fla. 1988); *Carawan v. State*, 515 So. 2d 161 (Fla. 1987); *Wakulla County v. Davis*, 395 So. 2d 540, 542 (Fla. 1981). However, where one of the inconsistent statutes is general and the other is specific, the latter will be construed as an exception to the former. *Adams v. Culver*, 111 So. 2d 665 (Fla. 1959).

Third, where two statutes address the same or a similar concern, they will be read *in pari materia* to harmonize them with the central expression of legislative policy. *O'Donovan v. Wilkins*, 24 Fla. 281, 4 So. 789, 793 (1888); *Heirs of Bryan v. Dennis*, 4 Fla. 445 (1852).

ponents of Florida's new AIDS legislation. Also it discusses oversights and errors in the Omnibus AIDS Act and suggests how they might be corrected.

I. THE NONDISCRIMINATION PROVISIONS

Without a doubt, the most far-reaching sections of the Omnibus AIDS Act are those dealing with nondiscrimination.³¹ As signed by the Governor, the Omnibus AIDS Act had two significant effects in this area. First, it left undisturbed *Shuttleworth v. Broward County Office of Budget and Management Policy*,³² which forbids AIDS-related discrimination in the workplace, despite some limited efforts to overrule that decision legislatively during the 1988 session.³³ Second, the Omnibus AIDS Act added five major new AIDS-related civil rights provisions to state law, along with general provisions providing for their enforcement. These five new laws, read in tandem with *Shuttleworth*, may prove to be the most extensive civil rights protections yet provided by a state to people with HIV-related infections.

A. HIV Nondiscrimination Before the Omnibus AIDS Act: Shuttleworth

Prior to the 1988 legislative session, the entire body of Florida law governing discrimination based specifically on HIV infection consisted of *Shuttleworth*. In that decision the Florida Commission on Human Relations (Commission), relying on the Florida Human Rights Act of 1977 (Human Rights Act),³⁴ held that full-blown AIDS is a handicap

31. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2029-31 (codified at FLA. STAT. § 760.50 (Supp. 1988)).

32. FCHR No. 85-0624 (Fla. Comm'n on Human Relations, Dec. 11, 1985). A copy of this unpublished decision is reproduced as an Appendix to this Article. The decision, and an investigative report that accompanied it, are on file at the Florida Commission on Human Relations in Tallahassee, Florida. See also *Shuttleworth v. Broward County*, 639 F. Supp. 654 (S.D. Fla. 1986) (federal lawsuit involving same issues).

33. See Fla. H.R., transcript of proceedings at 2-5 (May 11, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Tom Woodruff, Repub., St. Petersburg, 1976-1988, in floor debate).

34. FLA. STAT. §§ 760.01-.10 (1987). The statute provides in pertinent part:

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap or marital status.

Id. § 760.10(1). The statute applies to any employer having 15 or more workers during 20 or more weeks during the current or preceding calendar year. *Id.* § 760.02(b).

under state law.³⁵ The Commission then ruled that the Broward County Office of Budget and Management Policy failed to give a legally sufficient excuse for dismissing a worker, Todd Shuttleworth, after learning that he suffered from full-blown AIDS. The employer had argued that dismissal was proper because of uncertainty over whether Shuttleworth's employment might cause harm to others or himself. Relying partly on analogous federal case law, the Commission ruled that the employer had not established that freedom from AIDS was a bona fide occupational qualification (BFOQ).³⁶

The question *Shuttleworth* did not answer, however, was whether anything less than full-blown AIDS could constitute a handicap in Florida: (1) AIDS-Related Complex (ARC); (2) symptomless HIV-infection;³⁷ (3) the mere perception or belief that a person has HIV infection; and (4) the preemptive dismissal of a worker believed to be susceptible to AIDS or HIV infection. Since *Shuttleworth*, neither the Commission nor the Florida courts have had occasion to publish an opinion addressing these concerns.

1. Defining "Handicap" Under Shuttleworth

The answer depends significantly on the working definition of "handicap" set forth in *Shuttleworth*, which is a simple one derived from *Webster's Third International Dictionary*:³⁸ "Handicap" connotes a condition that prevents normal functioning in some way: "A person with a handicap does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties."³⁹ The Com-

35. Commentators generally have found this result in harmony both with federal law and the law of other jurisdictions. See, e.g., Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11, 21-36 (1985) (discussing approaches in various jurisdictions, under various laws); Comment, *AIDS and Employment Discrimination Under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons with Disabilities Act*, 20 U. RICH. L. REV. 425, 445-48 (1986) (discussing Virginia law). See generally Carey & Arthur, *The Developing Law on AIDS in the Workplace*, 46 MD. L. REV. 284 (1987).

36. *Shuttleworth v. Broward County Office of Budget & Management Policy*, FCHR No. 85-0624, slip op. at 5-6 (Fla. Comm'n on Human Relations, Dec. 11, 1985).

37. The Presidential Commission contends that both ARC and asymptomatic HIV infection should be regarded as the same disease as AIDS, and that it is misleading to think of HIV infection only in terms of full-fledged AIDS. PRESIDENTIAL COMMISSION REPORT, *supra* note 3, at xvii.

38. The precise definition is "a disadvantage that makes achievement unusually difficult; esp.: a physical disability that limits the capacity to work." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1027 (1961).

39. *Shuttleworth v. Broward County Office of Budget & Management Policy*, FCHR No. 85-0624, slip op. at 2 (Fla. Comm'n on Human Relations, Dec. 11, 1985) (quoting Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Washington State Human Rights Comm'n, 87 Wash. 2d 802, 809, 557 P.2d 307, 310 (1976)). *Accord* Lanham v. Seamless Hosp. Prod., 8 Fla. Admin. L. Rep. 4703, 4709 (1986).

mission has insisted upon this definition as "a meaning in accordance with common usage."⁴⁰ It simultaneously has eschewed attempts to import into the meaning of "handicap" precise definitions and nuances found in analogous state or federal law,⁴¹ such as the detailed definition in the Florida Fair Housing Act (Fair Housing Act)⁴² or the one used in the federal Rehabilitation Act.⁴³ Since the term "handicap" is undefined in the Human Rights Act, the Commission has left itself considerable leeway to develop its own common law definition. Nor has any Florida court had cause to review the Commission's actions in this regard.

The broad definition in *Shuttleworth* leaves open what action the Commission is likely to take in cases involving less than full-blown AIDS. However, there are hints as to what the results might be. In deciding *Shuttleworth*, the Commission expressly relied on court decisions from other jurisdictions involving similar statutes that had failed to define the term "handicap."

One of these decisions,⁴⁴ *Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. Department of Industry, Labor and Human Relations*,⁴⁵ held that a congenital disease, asthma, can constitute a handicap because it can "make achievement unusually difficult."⁴⁶ Moreover, it relied on an analogous state statute defining a "handicapped person" as one suffering any "physical or mental defect or infirmity whether congenital or acquired by accident, injury or disease."⁴⁷ The Wisconsin court thus extended its definition beyond congenital diseases to include diseases that are acquired.

Despite the Commission's heavy reliance on dictionary definitions and common usage, it has followed the Wisconsin court's lead by drawing from more elaborate definitions of "handicap" found elsewhere in the law. For instance, *Shuttleworth* itself cited the Eleventh Circuit Court of Appeals' opinion in *Arline v. School Board*,⁴⁸ which held that tuberculosis infection was a handicap under the federal Rehabilitation Act.⁴⁹ In *Arline*, which was affirmed on review by the

40. *Lanham*, 8 Fla. Admin. L. Rep. at 4705.

41. *Id.*

42. FLA. STAT. § 760.22(5) (1987).

43. 29 U.S.C.A. § 706(7)(b) (West Supp. 1987).

44. The other two are *Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Washington State Human Rights Comm'n*, 87 Wash. 2d 802, 557 P.2d 307 (1976), and *State v. Turner*, 3 Ohio App. 2d 5, 209 N.E.2d 475 (Ct. App. 1965).

45. 62 Wis. 2d 392, 215 N.W.2d 443 (1974).

46. *Id.* at 398, 215 N.W.2d at 446.

47. *Id.* (citing Wis. STAT. § 55.01(3)(a) (1973)).

48. 772 F.2d 759 (11th Cir. 1985), *aff'd*, 107 S. Ct. 1123 (1987).

49. *Id.* at 764.

United States Supreme Court,⁵⁰ the Eleventh Circuit held that a "handicap" is any "physical or mental impairment which substantially limits . . . major life activities," and thus includes acquired diseases.⁵¹ Moreover, the circuit court in *Arline* concluded that "handicap" includes any record of such an impairment and the perception of such an impairment.⁵²

Shuttleworth's partial reliance on *Arline* strongly suggests that the Commission is amenable to considering by way of analogy the definition of "handicap" found elsewhere in the law. Although the Commission has rejected every attempt to read other statutory definitions directly into the Human Rights Act,⁵³ it has not blinded itself to those other definitions.

Thus, the Commission may be willing to consider as relevant authority part of the definition of handicap found in the Fair Housing Act. There, "handicap" means "[a] person has a physical impairment which subsequently limits one or more major life activities, or he has a record of having, or is regarded as having, such physical impairment."⁵⁴ A second provision provides that mental retardation also is a handicap.⁵⁵ Since this definition closely tracks the language of *Arline*, it harmonizes with the Commission's reliance on the Eleventh Circuit's opinion. It is conceivable that the Commission will continue at least to measure its "common usage" definition of "handicap" against the language employed both in *Arline* and the Fair Housing Act.

Another factor suggesting this result is that the Fair Housing Act is related in purpose to the Human Rights Act. Both address the same concern—discrimination based on handicap. Thus it is likely that the Commission and a reviewing court will read the Human Rights Act *in pari materia* with the Fair Housing Act, despite the fact that the former preceded the latter in time. Accepted rules of statutory construction support this conclusion.

For instance, the Florida courts consistently have held that statutes relating to the same or a similar purpose should be construed in harmony even though not enacted at the same time.⁵⁶ This especially is

50. *School Bd. v. Arline*, 107 S. Ct. 1123 (1987).

51. *Id.* at 1126-32.

52. *Id.* at 1126-27. See generally Wasson, *Aids Discrimination under Federal, State and Local Law After Arline*, 15 FLA. ST. U.L. REV. 221 (1987).

53. *E.g.*, *Lanham v. Seamless Hosp. Prod.*, 8 Fla. Admin. L. Rep. 4703, 4705-06 (1986).

54. FLA. STAT. § 760.22(5)(a) (1987).

55. *Id.* § 760.22(5)(b).

56. *Wakulla County v. Davis*, 395 So. 2d 540 (Fla. 1981); *Sanders v. State*, 46 So. 2d 491 (Fla. 1950); *O'Donovan v. Wilkins*, 24 Fla. 281, 4 So. 789 (1888); *Heirs of Bryan v. Dennis*, 4 Fla. 445 (1852).

true where, as here, an understanding of one may help to interpret the other,⁵⁷ and the two statutes are part of a system of related provisions expressing a single central legislative policy.⁵⁸ Since both the Human Rights Act and Fair Housing Act are designed to prevent discrimination against the handicapped, it is reasonable to construe the meaning of the term "handicap" so that a similar result is achieved under both acts. The ambiguity created when the Human Rights Act failed to define "handicap" should be resolved consistent with the definition plainly expressed in the subsequent enactment of the Fair Housing Act.⁵⁹

The broad interpretation of "handicap" is underscored by the statement of purpose contained in the Human Rights Act where the Legislature stated that the Human Rights Act was to be liberally construed⁶⁰ "to secure for all individuals within the state freedom from discrimination because of . . . handicap . . . and thereby make available to the state their full productive capacities."⁶¹ The evil to be remedied by the Human Rights Act is any discrimination resulting from otherwise capable workers being denied the opportunity to be productive.⁶² This policy applies with obvious vigor to the huge number of able-bodied people in Florida who are infected with HIV.

2. *Extending "Handicap" to Other HIV-Related Discrimination*

The discussion thus far suggests that under Florida law prior to the Omnibus AIDS Act of 1988, the term "handicap" should be broadly construed in the context of HIV-related discrimination. The next problem is to explore the breadth of this construction. Applying "handicap" to HIV-related discrimination is difficult because of the unique problems associated with HIV. Physically, HIV may be manifested in various ways which the scientific world is struggling to understand. Emotionally, the lack of scientific understanding has led to the spread of fear throughout society, which itself has created problems of discrimination. Thus, we need to determine whether "handi-

57. *Goldstein v. Acme Concrete Corp.*, 103 So. 2d 202 (Fla. 1958).

58. *Stewart v. Mack*, 66 So. 2d 811 (Fla. 1953); *Paggett v. Thompson*, 158 Fla. 138, 27 So. 2d 909 (1946); *State ex rel. Jacksonville Gas Co. v. Lewis*, 125 Fla. 816, 170 So. 306 (1936); *Central Truck Lines, Inc. v. Railroad Comm'n*, 118 Fla. 526, 160 So. 22 (1935).

59. *See Doggett v. Walter*, 15 Fla. 355 (1875).

60. FLA. STAT. § 760.01(3) (1987).

61. *Id.* § 760.01(2).

62. This generally is the same conclusion reached by the Presidential Commission that studied the HIV epidemic. PRESIDENTIAL COMMISSION REPORT, *supra* note 3, at 119-20.

cap" applies to these various physical and emotional manifestations of HIV-related discrimination.

(a) *People with ARC*

The analysis outlined above suggests that the Commission could have concluded that ARC was a "handicap" under the *Shuttleworth* definition. ARC consists of a debilitating complex of illnesses not actually resulting in the many opportunistic infections that characterize full-blown AIDS. Symptoms include uncontrollable weight loss, night sweats, and a general wasting of the body.⁶³ Death frequently results, even in cases that never convert to full-blown AIDS.⁶⁴

Even under the more restrictive view of the *Shuttleworth* definition, a person with ARC still "does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties."⁶⁵ Therefore it seems that a person with ARC is handicapped within the meaning of *Shuttleworth* and is entitled to all the protections of the Human Rights Act as it existed before 1988. This conclusion is underscored by the recent expansion of the Centers for Disease Control's "Case Definition" of AIDS to include many symptoms and illnesses previously categorized as ARC, provided that the patient also tests consistently positive for the HIV antibody.⁶⁶

(b) *Asymptomatic HIV Infection*

Whether asymptomatic HIV infection falls within the *Shuttleworth* definition is less clear. As is now generally known, a person may be infected with HIV for many years without suffering any symptoms. Such a person presently may not have a less than normal use of sensory, mental and physical faculties.

Nevertheless, the authority upon which *Shuttleworth* relied, and the express policy of the Human Rights Act, strongly suggest that HIV infection itself constitutes a handicap.⁶⁷ HIV infection means that a person in question is highly likely to die prematurely, perhaps within only a few years. In this sense, HIV infection is no different than the

63. MASTERS & JOHNSON, *supra* note 1, at 39.

64. *Id.*

65. See *supra* note 39 and accompanying text.

66. *Revision of the CDC Surveillance Case Definition for Acquired Immunodeficiency Syndrome*, 36 CENTERS FOR DISEASE CONTROL: MORBIDITY & MORTALITY WEEKLY REPORT 1S, 4S-5S (Supp. Aug. 14, 1987) [hereinafter *CDC Case Definition*].

67. This conclusion is supported by similar analyses of the analogous Rehabilitation Act. See Note, *Asymptomatic Infection with the AIDS Virus as a Handicap under the Rehabilitation Act of 1973*, 88 COLUM. L. REV. 563 (1988).

early stages of cancer or any other terminal illness that at first causes no untoward symptoms. Knowledge of impending premature death alone certainly could constitute a significant loss of one's normal physical and mental faculties.

Moreover, as the Wisconsin court suggested, a handicap can be any acquired disease that makes achievement unusually difficult or otherwise interferes with normal functioning.⁶⁸ Imminent death significantly limits achievement and normal functioning. Moreover, people known to be infected with HIV frequently have suffered severe ostracism and discrimination. The result is no less disastrous than if imposed upon a person suffering from any other disease, such as tuberculosis. Drawing from the analysis in *Arline*, the Commission might conclude that HIV infection alone constitutes a handicap because of the effect this knowledge has on others.

By the same token, the law itself imposes significant limitations upon people with communicable diseases. For example, prior to the 1988 legislation, it was a crime in Florida for an HIV-infected person who knew of his or her status to have sex with another person, including a spouse, without first informing that person of the presence of the disease.⁶⁹ No similar restrictions are applied to uninfected people, except to the limited extent that the sexual battery,⁷⁰ unnatural acts,⁷¹ adultery⁷² or cohabitation⁷³ statutes dictate. Likewise, the presence of a communicable disease, including AIDS or ARC, must be reported to state officials.⁷⁴ Even prior to the 1988 legislation, the state had the authority to seize the person in question, force that person to undergo testing or treatment, and isolate him or her upon proper court order.⁷⁵

These legal and social disabilities illustrate how a person infected with HIV suffers from a limitation upon normal physical functioning. Thus, it seems likely that even a restrictive interpretation of the *Shuttleworth* definition of "handicap," prior to the 1988 legislation, included asymptomatic HIV infection. This conclusion also is supported by drawing an analogy from the definition included in the Fair Housing Act, which states that a handicap is any "physical impairment

68. This also is the dictionary definition. See *supra* note 38.

69. See FLA. STAT. § 384.24 (1987). Indeed, any caring person who knew he or she was HIV infected voluntarily must restrict sexual activities to prevent the infection of others.

70. See FLA. STAT. §§ 794.011-.05 (1987).

71. *Id.* § 800.02.

72. *Id.* § 798.01.

73. *Id.* § 798.02.

74. *Id.* § 384.25.

75. *Id.* §§ 384.27-.28.

which substantially limits one or more major life activities.”⁷⁶ HIV infection, which limits life itself, meets this test.

(c) *Perception of HIV Infection*

More troublesome is the question of whether a person is “handicapped” if others merely perceive him or her to be HIV infected when in fact this information is not true. At first blush, the literal definition of “handicap” in *Shuttleworth* implies that the impairment constituting a handicap must be actual. That is, it must have a measurable physical manifestation, as ARC and HIV infection clearly do. If this is the proper interpretation of *Shuttleworth*, then a perception of HIV infection standing alone would not be a handicap.

However, an analysis of this kind views the issue of handicap entirely from the standpoint of the person suffering discrimination. This is not necessarily the proper analysis, as the United States Supreme Court suggested in *School Board v. Arline*.⁷⁷ The Human Rights Act itself forbids “discriminat[ion] . . . because of . . . handicap.”⁷⁸ Strictly read, this language does not require that the purported handicap be actual—only that it be the reason for the discrimination. That is, the employer need only believe it to be true. If sufficient proof exists to show that the discriminatory act occurred because of an alleged handicap, it may be irrelevant whether the handicap actually existed.

One purpose of the Human Rights Act is to outlaw discriminatory acts that occur because of certain kinds of information.⁷⁹ The evil to be remedied consists of the use of this information to make employment decisions, resulting in a needless loss of “productive capacities” explicitly protected by the Human Rights Act.⁸⁰ Requiring that the information be true effectively excuses discrimination because the employer was in error, while proscribing it when the employer was not. This approach could lead to absurd results. For instance, if an employer believed a worker was Jewish and fired him or her wholly on that basis, it would seem utterly contrary to the purposes of the

76. *Id.* § 760.22(5)(a).

77. 107 S. Ct. 1130 (1987). The Court noted that the analogous federal Rehabilitation Act of 1973 prohibited discrimination “on the basis of mythology” about any perceived handicap. It further suggested that the effect of a perceived impairment on others is as relevant to the determination of handicap as the physical effects of an impairment on the individual in question. *Id.* at 1129 n.10.

78. FLA. STAT. § 760.10(1)(a) (1987) (emphasis added).

79. *See id.* § 760.01.

80. *Id.* § 760.01(2).

religious nondiscrimination laws⁸¹ to permit the dismissal simply because the worker was Catholic and the employer was wrong. The firing was not caused any less because of religion and does not result in any less of a loss of productive capacity.

By the same token, allowing an employer to discriminate based on the perception of HIV infection is no less "because of . . . handicap"⁸² if the infection is nonexistent. The employer still has used information—however erroneous it may be—in a way the Legislature has forbidden, resulting in a needless loss of the worker's productive capacity. Under this analysis the question of handicap must be viewed through the employer's eyes. If the employer acts upon information as though it were true, the employer has violated the intent of the Human Rights Act. Similarly, if the Commission considered by analogy the definition contained in the Fair Housing Act, it likely would conclude that a person "regarded as having"⁸³ a physical impairment is handicapped.⁸⁴

Nevertheless, the Commission has strongly suggested that it will not consider itself bound by any definition other than the one derived from "common usage." Despite the arguments to the contrary, it is uncertain whether the Commission prior to 1988 would have ruled that the perception of HIV infection standing alone constitutes a handicap under *Shuttleworth*.

(d) *The Possibility of Future HIV Infection*

The most troublesome question prior to passage of the 1988 legislation was whether an employer lawfully could discriminate based on the possibility of future HIV infection or disease. In most instances this would involve actions against people thought to be in a high risk group, such as people married to spouses with AIDS.

If the Commission were to rule that the perception of HIV infection does not meet the *Shuttleworth* definition, then the perception that one may become infected in the future cannot also be a handicap. However, if the perception of present infection is construed to be a handicap, the Commission for practical reasons might extend *Shuttleworth* to forbid preemptive discrimination, too. Otherwise, employers easily could mask discriminatory motives by saying they did not believe a particular employee was HIV infected, but only that such in-

81. The Human Rights Act also forbids discrimination "because of . . . religion." *Id.* § 760.10(1)(a).

82. *Id.* § 760.10(1)(a).

83. *Id.* § 760.22(5)(a).

84. See *supra* notes 56-59 and accompanying text.

fection was likely to occur later. Discrimination of this type is no less "because of . . . handicap" simply because the handicap is viewed as imminent and not current.

The long latency period of HIV—extending an average of four-and-a-half-years⁸⁵—also favors this conclusion. A belief that a person may discover HIV infection in the future is little more than saying he or she may be HIV infected now.

However, it is unclear whether *Shuttleworth* would have led to such a result since discrimination based on perception does not clearly fall within the *Shuttleworth* definition of "handicap." The question remaining is whether the Omnibus AIDS Act has removed these uncertainties.

B. *The Omnibus AIDS Act: Codifying and Supplementing Shuttleworth*

One of the most significant aspects of the Omnibus AIDS Act was something it did not do: change *Shuttleworth*. Although legislative silence on this subject is susceptible of many interpretations, the legislative history of the Omnibus AIDS Act indicates that the Legislature made a conscious decision not to alter *Shuttleworth*, and in fact supplemented it with an entire new body of related civil rights provisions. It is apparent that the 1988 Legislature imbued state law with two new AIDS-related policies, in light of which *Shuttleworth* must now be read. These policies and the totality of Florida's AIDS-specific discrimination laws almost certainly will have a sweep far broader than that implied by *Shuttleworth* alone.

From the beginning, *Shuttleworth* figured prominently in the evolution of the Omnibus AIDS Act during the 1988 legislative session. Representative Lois Frankel,⁸⁶ Chairwoman of the House Task Force on AIDS, made *Shuttleworth* the starting point of the initial House nondiscrimination provisions of which her task force was the primary author. With only one major change, these draft provisions ultimately became the final version signed into law on July 6, 1988, by Governor Martinez.⁸⁷

The Senate Select Committee on AIDS initially proposed a limited nondiscrimination provision. But at the urging of the Select Committee Chairman, Senator William Myers,⁸⁸ the Senate Commerce Com-

85. Mueller, *The Epidemiology of the Human Immunodeficiency Virus Infection*, 14 LAW MED. & HEALTH CARE 250, 254 (1986).

86. Dem., West Palm Beach.

87. Ch. 88-380, 1988 Fla. Laws 1996, 2038.

88. Repub., Hobe Sound.

mittee removed it before the Senate bill reached the floor. Senator Myers indicated that the deletion was meant to leave the law as it then existed.⁸⁹ This statement corroborated Senator Myers' earlier representations to the Commerce Committee that the deletion also would put the Senate in a position to bargain with the House.⁹⁰ Thus, the House bill largely framed the entire discussion of nondiscrimination policy.

The House Task Force draft contained the following pertinent nondiscrimination provisions which embodied and extended *Shuttleworth*:

A person may not discriminate against an otherwise qualified individual in employment . . . on the basis of the fact that such individual is, or is regarded as being, infected with Human Immunodeficiency Virus.

. . . .

For the purposes of defining an unlawful employment practice under §§ 760.01-760.10 [the Human Rights Act] for an employer, employment agency, labor organization, or joint labor-management committee, the term handicap shall include Human Immunodeficiency Virus infection or the perception of such infection.⁹¹

The staff analysis and committee debate accompanying the draft indicate that the purpose of these two provisions was to codify *Shuttleworth* and confirm that HIV infection and the perception of such

89. Senator Myers said:

There was a section in the bill that was taken out in—in Commerce, which had to do with—with discrimination in employment. And even though it was rather mild—it only mentioned the public law which makes—which states that AIDS is a disability—and there is nothing in Florida law at the present time other than some human rights statutes that does that—this was taken out in Commerce, and it is out, although in the original House bill there were three or four pages on this. And this will be a subject, and has been a subject, of our informal conference [with House delegates].

Fla. S., transcript of proceedings, at 5 (May 31, 1988) (transcript on file, *Florida State University Law Review*) (comments of Sen. Myers).

90. Senator Myers stated:

The reason that—that I do that [take out the nondiscrimination provisions] is because all of the talk and all of the holdup with the bill in the Senate has revolved around discrimination. And so what I have done is with that amendment just taken the—even the issue of the federal law out of that particular bill. That will be a conference issue, I'm sure. And—but the thing is that I think in order for us to get into the posture which is most comfortable to the Senate would be to take that out.

Fla. S., Comm. on Commerce, transcript of hearing at 19-20 (May 26, 1988) (transcript on file, *Florida State University Law Review*) (comments of Sen. Myers).

91. Fla. H.R. Comm. on Health Care, PCB for HC 88-07, §§ 72, 74 (draft of Apr. 13, 1988).

infection were included within the meaning of the word "handicap."⁹² Additionally, the first clause quoted above also extended *Shuttleworth* to all employers, not merely those having fifteen or more employees during certain periods of the year. During discussions in the April 13 Health Care Committee meeting, Representative Frankel stated that these provisions would not change the Human Relation Commission's definition of "handicap," but would codify the Commission's public testimony that *Shuttleworth* extended to both HIV infection and the perception of HIV infection.⁹³

These provisions, however, were deleted from the compromise bill during closed-door informal negotiations in the final days of the 1988 session.⁹⁴ The 1988 Legislature's attitude toward *Shuttleworth* thus hinges on the meaning accorded this deletion.

While deletion of a provision from a pending bill sometimes may indicate disapproval of its subject matter,⁹⁵ here the entire course of the Omnibus AIDS Act's evolution in the 1988 session suggests the contrary. The final compromise bill shows that the House acquiesced to many of the Senate demands on quarantine law, AIDS-related education, testing, and confidentiality.⁹⁶ In turn, the Senate acquiesced to all of the nondiscrimination provisions except those designed to codify

92. See Staff of Fla. H.R. Comm. on Health Care, PCB for HC 88-07 (1988) Staff Analysis 10 (2d rev. Apr. 13, 1988) (on file with committee). Health Care Analyst Tom Cooper indicated that the purpose of these provisions was not to overrule the Human Relations Commission or in any way indicate that *Shuttleworth* was erroneous, but to codify what generally was perceived as *Shuttleworth's* essential holding:

Section 66 . . . is an addition. It would add to the definition of the Florida Human Rights Act and the Fair Housing Act, it would add the definition of "handicap"—HIV infection. This is now, there, or at least based on the previous cases and the way they currently interpret, uh, the law—uh, is consistent with that interpretation.

Fla. H.R., Comm. on Health Care, transcript of hearing at 13 (Apr. 7, 1988) (transcript on file, *Florida State University Law Review*) (comments of Staff Analyst Tom Cooper).

93. Representative Frankel stated:

[W]e heard extensive testimony from the Human Rights Commission on this point. There is presently both federal and state law which have been determined by case law including Supreme Court opinion, that AIDS is to be considered a handicap. What has not yet been determined, although we have—we were told that most likely the— the Human Rights Commission would determine that HIV would also be in that category. And it was our feeling that certainly we should extend the same protections to a person with HIV as we extend to a person with AIDS in regards to discrimination. And we—we decided to put that in the law now so that the point would be clarified and would avoid further litigation on that particular point.

Fla. H.R., Comm. on Health Care, transcript of hearing at 17-18 (Apr. 13, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Frankel).

94. Compare Fla. CS for HB 1519 (1988) (First Engrossed) with Fla. CS for HB 1519 (1988) (Second Engrossed).

95. See *Mayo v. American Agric'l Chem. Co.*, 101 Fla. 279, 133 So. 885 (1931).

96. Compare ch. 88-380, 1988 Fla. Laws 1996 (to be codified at scattered sections of FLA. STAT.) with Fla. CS for HB 1519 (1988) and with Fla. CS for SB 1083 (1988).

Shuttleworth and extend it to employers having fewer than fifteen workers.

There is no indication the Legislature ever intended to disapprove *Shuttleworth*. An effort to overrule *Shuttleworth* in the House failed on a voice vote despite ardent debate by Representative Tom Woodruff.⁹⁷ The subsequent vote of 108 to 9 in favor of the initial House bill⁹⁸ indicated overwhelming support in that chamber for the essential holding of *Shuttleworth*, which was embodied in the bill. The House's subsequent acquiescence to the Senate position thus cannot be construed as anything more than a concurrence with the Senate decision to be silent on *Shuttleworth*, thereby refusing to extend it to employers with fewer than fifteen employees.

To interpret the deletion of these provisions as a sign of legislative disapproval of *Shuttleworth* would be inconsistent with other nondiscrimination provisions adopted by both the House and the Senate. For instance, the final version of the bill expressly declared that "[a]ny person with Acquired Immune Deficiency Syndrome, Acquired Immune Deficiency Syndrome Related Complex, or Human Immunodeficiency Virus shall have every protection made available to handicapped persons under sections 760.20-760.37, Florida Statutes, [the Florida] Fair Housing Act."⁹⁹ This provision effectively defined HIV infection and its related illnesses as a "handicap" under the Fair Housing Act. Reading that Act *in pari materia* with the Human Rights Act, which *Shuttleworth* interpreted, leads to the conclusion that the Omnibus AIDS Act supported *Shuttleworth's* approach to construing "handicap."

Three other rules of statutory construction also support this conclusion. First, the construction placed on a statute by the agency authorized to administer it is entitled to great weight¹⁰⁰ unless clearly unlawful or in conflict with the plain intent of the statute.¹⁰¹ Thus, the Commission's interpretation of the Human Rights Act, which is consistent with the policy embodied in chapter 760, and which is certainly not unlawful, is highly persuasive of its meaning.

Second, when the Legislature clearly has considered a construction placed on a particular statute and then did not alter the statute, this

97. Repub., St. Petersburg, 1976-1988.

98. FLA. H.R. JOUR. 408 (Reg. Sess. May 11, 1988).

99. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2029 (to be codified at FLA. STAT. § 760.50 (Supp. 1988)).

100. Public Employees Relations Comm'n v. Dade County Police Benevolent Ass'n, 467 So. 2d 987 (Fla. 1987); Greyhound Lines, Inc. v. Yarborough, 275 So. 2d 1 (Fla. 1973).

101. McKinney v. State, 83 So. 2d 875 (Fla. 1955); Volunteer State Life Ins. Co. v. Larson, 147 Fla. 118, 2 So. 2d 386 (1941).

constitutes some evidence that the construction is acceptable to the Legislature.¹⁰² Here, the 1988 Legislature did not choose to alter the Commission's construction of the Human Rights Act despite Representative Woodruff's plea to do so.

Third, in dealing with an ambiguous provision such as the undefined term "handicap," the overall policies and purposes deducible from related statutes should be used to guide construction.¹⁰³ The legislative history bears ample evidence of two new AIDS-related policies underlying the Omnibus AIDS Act's nondiscrimination provisions, in light of which *Shuttleworth* now must be read.

1. *Policies Underlying the Nondiscrimination Provisions*

The first of these new AIDS-related policies is that people with HIV infection should be allowed to remain productive members of society for as long as possible since society is not served by depriving them of their livelihood. Second, an atmosphere of trust and rationality must be created so that people at risk for HIV infection will want to be tested voluntarily without fear of reprisal. For these reasons, the primary drafters of the Omnibus AIDS Act's nondiscrimination provisions stated that Florida must prohibit all manifestations of AIDS-related discrimination.

In a meeting of the House Health Care Committee on April 13, 1988, Representative Frankel elaborated the first of these policies. After hearing Representative Frederick Lippman¹⁰⁴ predict that as many as 200,000 Floridians may die of AIDS within the next eight years, requiring annual state expenditures of as much as a billion dollars in the 1990s,¹⁰⁵ Representative Frankel agreed with this forecast and stated:

[A] person with HIV infection can live many many years . . . some people will live far more than nine years without any symptoms. And for those people, we need to allow them to stay productive citizens. And if we eliminate from the mainstream of society people who are able-bodied and able to be productive, we will increase our burden much more than we have to. Because we will have on welfare people not only who are sick, but people who are perfectly well. And that's

102. *Johnson v. State*, 91 So. 2d 185 (Fla. 1956); *White v. Johnson*, 59 So. 2d 532 (Fla. 1952). See *Alstate Constr. Co. v. Durkin*, 345 U.S. 13 (1953).

103. *Weiss v. Leonardy*, 160 Fla. 570, 36 So. 2d 184 (1948); *In re Ruff's Estate*, 159 Fla. 777, 32 So. 2d 840 (1947); *Scarborough v. Newsome*, 150 Fla. 220, 7 So. 2d 321 (1942).

104. Dem., Hollywood.

105. Fla. H.R., Comm. on Health Care, transcript of hearing at 19-20 (Apr. 13, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Lippman).

why these antidiscrimination provisions and these insurance provisions are so important, not only for the humanity angle of this bill, but for sheer economic survival of our community.¹⁰⁶

This statement was reiterated throughout other hearings and debates.¹⁰⁷

During the same meeting, Representative Frankel also elaborated the second of the state's new AIDS-related policies: to create an atmosphere of trust and rationality in which people will want to be tested voluntarily.¹⁰⁸ Without that atmosphere, people likely to have

106. *Id.* at 20-21 (comments of Rep. Frankel).

107. For example, Representative Frankel told the full House:

And we cannot afford to take out of the workplace the million and a half Americans who are presently infected [with] the virus. Because if we take them out of the workplace, then who's going to take care of them and their family. We don't have the resources to put a million and a half Americans who are able to work on welfare.

Fla. H.R., transcript of debate at 8 (May 11, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Frankel). See also Fla. S., Comm. on Commerce, transcript of hearing at 4 (May 26, 1988) (transcript on file, *Florida State University Law Review*) (testimony of Rep. Frankel):

Our medical doctors, our scientists, our researchers tell us that many of these people can live healthy and productive [lives] for many many years before they ever get AIDS. Or they may never get AIDS. They could for seven, nine, ten years. We cannot afford to take these people out of the work force. We can't allow a—for a million and a half Americans to be put on welfare just because they have HIV infection. We don't have the government resources to take people—care of all those people on welfare, to take care of their families, to take care of their medical bills, for non—not only for AIDS related diseases—but for non-AIDS-related diseases. And so it is—it is to the best public policy both for the state and for private industry that we keep people as productive as long as possible.

Id. At the same hearing, Representative Frankel continued:

And you want to keep those people in society and productive for as long as possible. And so I think what—what we attempt to do in our bill, we very well balance both the rights of individuals and the rights of the public. And that's why we have in our bill requirements that prohibit discrimination in employment and housing and use of public accommodations, and require a reasonableness in insurance.

Id. at 5-6.

108. Representative Frankel said:

Another policy consideration which developed during testimony is that it is a very important step in the fight against AIDS for HIV carriers to know if they are infected. Although there's no cure, we want HIV carriers to know if they're infected because we want them to act responsible. And we believe that the overwhelming majority of Americans who are infected, if they know they're infected, will act responsibly, will not want to harm people that they love. And so—and therefore we wanted to create an atmosphere to encourage people to be tested. And we realize that it is impossible to have a mandatory testing program for every American, and that we must encourage individuals who believe they may be at risk to voluntarily take an HIV test. And therefore we felt it would be wrong—and it would be against good public policy—to create an atmosphere of distrust, irrationality, or punitive sanctions, because we believe it would force the disease underground.

Fla. H.R., Comm. on Health Care, transcript of hearing at 5-6 (Apr. 13, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Frankel).

been exposed to AIDS would refuse to be tested and the disease would be driven underground and become uncontrollable.¹⁰⁹ Similar comments were reiterated throughout the hearings on the House bill.¹¹⁰ This policy also is consistent with the recommendations of the Presidential Commission studying the HIV epidemic.¹¹¹

Nothing in the legislative history indicates that the deletion from the compromise bill of the provisions which would have codified, clarified and extended *Shuttleworth* constituted a rejection of these two policies. During the final House and Senate votes approving the Omnibus AIDS Act, neither of the two primary sponsors of the bill suggested anything to the contrary. Indeed, Representative Frankel indicated in the final House debate on June 3 that the policies remained unchanged by the compromise:

Yesterday the—the chairman of the White House AIDS commission issued the Presidential AIDS Commission Task Force Report and their top priority was to call for *antidiscrimination and protection for all AIDS and HIV patients*. And they said that the only way that they believe that we can stop the spread of HIV infection in the United States is through strong antidiscrimination laws. . . . *We have taken their recommendations and it—they are consistent with the provisions within our bill.*¹¹²

109. *Id.* Representative Frankel also presented a hypothetical situation in which a person, injured in an automobile accident in 1984, is told that he received a blood transfusion potentially infected with HIV. In the hypothetical, the doctor informs the person that he should be tested for HIV infection, but that if he is positive he could lose his housing and his job; he could be denied governmental services and public accommodations; his name would be put on a list kept by the state; and likely he would be arrested and detained so the state could determine whether he should be quarantined. For this reason, Representative Frankel said, "We call for the protection of HIV carrier from discrimination in employment, housing, public accommodation and governmental services." *Id.* at 6-7.

110. *E.g.*, Fla. H.R., Comm. on Health Care, Subcomm. on Health Regulation, transcript of hearing at 3 (Apr. 11, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Frankel) ("our bill tries to create this atmosphere of rationality and reasonableness"); Fla. H.R., transcript of debate at 4 (May 10, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Frankel) ("we have . . . tried to create an atmosphere in this state which will encourage people to be voluntarily be tested"); Fla. S., Comm. on Commerce, transcript of hearing at 5 (May 26, 1988) (transcript on file, *Florida State University Law Review*) (testimony of Rep. Frankel) ("if we send the message out to the 200,000 people in this state who are potentially infected about—about this disease—that you're going to lose everything you have by knowing you are infected, we will send this disease underground"); Fla. H.R., transcript of debate at 11-12 (May 11, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Abrams) (nondiscrimination provisions necessary to encourage testing).

111. PRESIDENTIAL COMMISSION REPORT, *supra* note 3, at 75.

112. Fla. H.R., transcript of proceedings at 5 (June 3, 1988) (transcript on file, *Florida State University Law Review*) (statements of Rep. Frankel) (emphasis added). In the final Senate de-

The Presidential Commission made the following specific recommendation for state nondiscrimination issues:

If not now the case, states should amend their disability laws to prohibit discrimination against persons with disabilities, including persons with HIV infection who are asymptomatic or symptomatic, and persons with AIDS, in public and private settings including employment, housing, public accommodations, and governmental services.¹¹³

Thus, Representative Frankel's final report on the House-Senate compromise indicates that the nondiscrimination policies embodied in the Omnibus AIDS Act remained very broad in scope.

The only reasonable conclusion is that by deleting the nondiscrimination provisions relating to employment, the Legislature did not intend either to overrule *Shuttleworth* or to extend its reach to cover businesses with fewer than fifteen workers. By refusing to redefine the term "handicap" to exclude HIV infection or its related diseases, the Legislature left the Commission's position on this question unchanged.

Indeed, the Omnibus AIDS Act is incoherent if *Shuttleworth* is not viewed as part of Florida law. Without *Shuttleworth*, the Omnibus AIDS Act could be interpreted to prohibit discrimination in every area of life except one of the most crucial: employment. As Representative Frankel noted, no one will volunteer for testing unless he or she does not fear the loss of a job;¹¹⁴ nor can the state afford to place on the public dole the scores of thousands of otherwise healthy people who will become infected with HIV by the 1990s in Florida.¹¹⁵ The policies underlying the nondiscrimination provisions cannot be achieved unless *Shuttleworth* is viewed as the keystone of the nondiscrimination provisions and is read broadly with those policies in mind.

bate on June 6, Senator Myers made a cryptic and technically inaccurate reference to the antidiscrimination provisions: "Discrimination language was very carefully crafted so not to have the effect on business and in—when it comes to employees, there is just notes as to testing as a prerequisite for the job." Fla. S., transcript of proceedings at 3 (June 6, 1988) (transcript on file, *Florida State University Law Review*) (comments of Sen. Myers). Actually, at least two other provisions of the Act will impact significantly upon business: those relating to programs receiving state financial assistance and to information derived from test results. See *infra* notes 155-83, 210-27 and accompanying text.

113. PRESIDENTIAL COMMISSION REPORT, *supra* note 3, at 124.

114. See *supra* note 108 and accompanying text. This conclusion also is reached by the Presidential Commission. PRESIDENTIAL COMMISSION REPORT, *supra* note 3, at 119-20.

115. See *supra* note 107.

2. *The Omnibus AIDS Act as Remedial Legislation*

Underscoring the vitality of these nondiscrimination policies is the clearly remedial nature of both the Omnibus AIDS Act and the Human Rights Act.¹¹⁶ Their separate nondiscrimination provisions are designed to protect people afflicted with handicaps caused by HIV infection or related illness. Additionally, the Omnibus AIDS Act and *Shuttleworth* provide specific remedies to that class, either by way of a complaint with the Human Relations Commission or a civil action in the courts. Taken as a whole, the nondiscrimination provisions of the Omnibus AIDS Act constitute a package of remedial legislation intended to be an AIDS-specific supplement to the Human Rights Act as interpreted in *Shuttleworth*. Both Acts must be read together to deal with the questions of AIDS-related employment discrimination.

Florida law dictates that remedial legislation must be interpreted liberally¹¹⁷ to achieve its underlying purposes.¹¹⁸ Indeed, the rule that statutes in derogation of the common law should be strictly construed does not apply to remedial legislation. In such legislation, the intention of the Legislature should be given effect whenever it can be ascertained.¹¹⁹ Applying these principles to the Omnibus AIDS Act, which embodies *Shuttleworth*, it becomes apparent that "handicap" must be viewed broadly to prohibit all forms of AIDS-related discrimination.¹²⁰

First, there can be no question after the Omnibus AIDS Act that "handicap" under *Shuttleworth* will be applied to ARC. Even the special commission appointed by the Reagan administration concluded that ARC must be considered one-in-the-same with AIDS.¹²¹

Second, the intent underlying the nondiscrimination provisions is to prohibit discrimination based on asymptomatic HIV infection. The entire thrust of the policies underlying the Omnibus AIDS Act is aimed most particularly at this group. The clear policy of Florida is to encourage people at risk both to learn and be honest about their HIV infection status, and to allow them to remain a productive part of society for as long as possible. These policies cannot be achieved unless *Shuttleworth* is applied to asymptomatic carriers of HIV. Like-

116. As to the Human Rights Act, see *supra* notes 60-62 and accompanying text.

117. *Stern v. Miller*, 348 So. 2d 303 (Fla. 1977); *State ex rel. Cooper v. Coleman*, 138 Fla. 520, 189 So. 691 (1939).

118. *Neville v. Leamington Hotel Corp.*, 47 So. 2d 8 (Fla. 1950).

119. *Nolan v. Moore*, 81 Fla. 594, 88 So. 601 (1920); *Hadley v. Tallahassee*, 67 Fla. 436, 65 So. 545 (1914); *Jacksonville Elec. Co. v. Bowden*, 54 Fla. 461, 45 So. 755 (1907).

120. This is consistent with the express remedial purpose of the Human Rights Act. See *supra* notes 60-62 and accompanying text.

121. PRESIDENTIAL COMMISSION REPORT, *supra* note 3, at xvii.

wise, the Presidential Commission concluded that asymptomatic HIV infection realistically cannot be separated from the related illnesses associated with AIDS and ARC.¹²²

Third, to achieve the policies of the Omnibus AIDS Act, “handicap” under *Shuttleworth* should apply to discrimination based on the perception of HIV infection. If actual HIV infection is not a valid basis for discrimination, then perceived HIV infection also should not be. The state cannot create an environment of trust and rationality except by outlawing the discriminatory use of AIDS-related information, even if that information is untrue. The act of discrimination must be viewed from the employer’s eyes—not in terms of the worker’s objective status. This position is supported by the analysis of the United States Supreme Court in *School Board v. Arline*.¹²³

Finally, in light of the Omnibus AIDS Act, *Shuttleworth* also should be interpreted to prohibit the preemptive discrimination against people perceived to be at risk. To permit discrimination based on the belief that a worker will contract HIV in the future would permit employers to do in advance what they could not do later. The effect would be no less contrary to the policies underlying the Omnibus AIDS Act as firing a person with HIV infection. Allowing preemptive dismissal would breed distrust, discourage voluntary testing and deprive workers of their livelihood for the very reasons the non-discrimination provisions were designed to forbid. Therefore, in light of the policies underlying the Omnibus AIDS Act, the *Shuttleworth* definition of “handicap” should now include AIDS, ARC, HIV infection and the perception of present or future HIV infection.

C. *Applying Florida’s Nondiscrimination Provisions to Housing and Federal Law*

In implementing its new AIDS-related policies, the Legislature promulgated a series of new civil rights enactments. The first of these explicitly requires that the term “handicap” be construed to include HIV infection and its related diseases under Florida’s Fair Housing Act and the federal Rehabilitation Act of 1973.¹²⁴ This provision appeared abruptly in the House and Senate compromise bill during the closing days of the session, and essentially was a shortened version of

122. *Id.*

123. 107 S. Ct. 1123, 1129 (1987) (employment decisions about actual or perceived handicaps should be based on medically sound judgments, not myths).

124. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2029 (codified at FLA. STAT. § 760.50 (Supp. 1988)). The initial Senate bill also stated that HIV infection and its related diseases would be considered a handicap under the Florida Human Rights Act. Fla. SB 1083, § 28 (1988).

the sole nondiscrimination provision that had appeared in the first draft of the Senate bill, authored by Senator Myers.¹²⁵

1. *Florida's Fair Housing Act*

The Fair Housing Act prohibits discriminatory acts relating to the sale or rental of dwellings, terms of a sale or rental, advertisements for sale or rental, opening dwellings for inspection in hopes of sale or rental, inducing another to sell or rent,¹²⁶ providing real estate brokerage services,¹²⁷ or financing the sale or improvement of a dwelling.¹²⁸ Among the prohibited acts is discrimination based on "handicap." The statute provides that a person is handicapped if that person has "a physical impairment which substantially limits one or more major life activities, or he has a record of having, or is regarded as having, such physical impairment."¹²⁹

There has been no administrative case law construing this prohibition on handicap discrimination. Moreover, only a single decision of the Commission has even considered the import of the statute's definition of handicap, and then only to note in dicta that it did not include mental handicaps.¹³⁰

The Omnibus AIDS Act provides that "[a]ny person with Acquired Immune Deficiency Syndrome, Acquired Immune Deficiency Syndrome Related Complex, or Human Immunodeficiency Virus shall have every protection made available to handicapped persons under [Florida's Fair Housing Act]."¹³¹ The only reasonable interpretation is that "handicap" under the Fair Housing Act has been extended to include AIDS, ARC, and HIV. While it is possible to interpret this provision to mean that such people will not be entitled to these protections unless they are independently available under the Fair Housing Act, such an interpretation would render the language mere surplusage.

The perception of HIV-related infection also should be regarded as a physical impairment protected under the Fair Housing Act. Section 760.22(5)(a), Florida Statutes, which provides the basic definition of handicap, specifies that a person is handicapped if he or she "is re-

125. Fla. SB 1083, § 28, at 35, lines 19-29 (1988).

126. FLA. STAT § 760.23 (1987).

127. *Id.* § 760.24.

128. *Id.* § 760.25.

129. *Id.* § 760.22(5)(a).

130. *Thomas v. Floridin Co.*, 8 Fla. Admin. L. Rep. 5457, 5459 (Fla. Comm'n on Human Relations, Sept. 10, 1986).

131. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2029 (codified at FLA. STAT. § 760.50(1) (Supp. 1988)).

garded as having, such physical impairment.”¹³² This self-evident meaning should require that the perception of HIV infection, ARC or AIDS be treated as a handicap.

For the same reason, discrimination based on the possibility of future HIV infection or disease also should be regarded as a handicap under the Fair Housing Act.

The provision extending the Fair Housing Act’s definition of “handicap” was spliced onto a section of the Omnibus AIDS Act that provides new civil remedies.¹³³ In the original Senate draft from which this provision derived, no such remedy section existed.¹³⁴ Thus it is unclear exactly how the new civil remedies relate to the extended definition of “handicap” under the Fair Housing Act, and no legislative history addresses this point.

It is possible that the Legislature did not intend to create any new housing-related remedies. However, the remedy section explicitly provides that “[a]ny person aggrieved by a violation of this section shall have a right of action in the circuit court and may recover [certain specified remedies] for each violation.”¹³⁵ It makes no distinction between the various subsections, and does not exclude the section extending the definition of “handicap” under the Fair Housing Act.

To say that no specific cause of action is created for housing-related discrimination is to give no effect to the remedy section as it is applied in this context. Such a result violates an established rule of statutory construction in which the court always will favor an interpretation of two statutes that gives effect to both.¹³⁶ Therefore, it is reasonable to conclude that the Legislature created a new and separate cause of action for housing discrimination arising from HIV infection and disease or the perception thereof.

The effect is to allow plaintiffs to bypass the Commission altogether and file an action directly in circuit court, notwithstanding the Fair Housing Act’s normal administrative procedure.¹³⁷ Thus, for HIV-related housing discrimination, an aggrieved party effectively is given two alternative remedies: (1) the new civil cause of action,¹³⁸ or

132. FLA. STAT. § 760.22(5)(a) (1987).

133. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2029 (codified at FLA. STAT. § 760.50 (Supp. 1988)).

134. Fla. SB 1083, § 28, at 35, lines 19-29 (1988).

135. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2029 (codified at FLA. STAT. § 770.50 (Supp. 1988)).

136. *Carawan v. State*, 515 So. 2d 161 (Fla. 1987).

137. See FLA. STAT. § 760.34 (1987).

138. See ch. 88-380, § 45, 1988 Fla. Laws 1996, 2029 (codified at FLA. STAT. § 760.50 (Supp. 1988)).

(2) a complaint filed with the Commission.¹³⁹ Although this means that HIV-related discrimination is accorded special status as a cause of action, such a result is consistent with the remedial purposes of the Omnibus AIDS Act and is the only way of giving effect to the two provisions of the statute cited above.

2. *The Federal Rehabilitation Act of 1973*

The Omnibus AIDS Act provides in vague fashion that “[a]ny person with Acquired Immune Deficiency Syndrome, Acquired Immune Deficiency Syndrome Related Complex, or Human Immunodeficiency Virus shall have every protection made available to handicapped persons under” section 504 of the federal Rehabilitation Act of 1973.¹⁴⁰ Section 504 provides that

[n]o otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination *under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.*¹⁴¹

Thus, the federal protections incorporated by the Omnibus AIDS Act apply exclusively to employees of the specified entities. In effect, the Legislature has interposed its own interpretation of the Rehabilitation Act by attempting to regulate HIV-related discrimination only as it affects employees of federal executive agencies, postal workers, and recipients of federal financial aid. This conclusion is reinforced by the Legislature’s decision not to make reference to other provisions of the Rehabilitation Act, such as Section 503, which is applicable to certain public contractors.

The Florida Legislature manifestly has no authority to regulate employment practices of federal executive agencies or the Postal Service, to dictate the meaning of a federal statute, or to place conditions on a federal grant without Congressional authorization. This fact was apparent to those who drafted this provision. Its author, Senator Myers, told the Senate Commerce Committee that the language was meaningless. Asking that it be deleted from the first Senate draft of the bill,

139. See FLA. STAT. § 760.34 (1987).

140. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2029 (codified at FLA STAT. 760.55 (Supp. 1988)).

141. 29 U.S.C. § 794 (Supp. IV 1986) (emphasis added).

Senator Myers said, "I mean, it doesn't really say anything other than there is a federal law."¹⁴²

A few commentators have proposed viewing this provision as a circuitous attempt to prohibit job-related discrimination against anyone with HIV-related infections, thus extending *Shuttleworth* to small businesses.¹⁴³ However, this is not what the statute says. The Legislature easily could have made such an intent evident had it wished to do so, without attempting to incorporate federal law. Moreover, such a broad construction is contradicted by Senator Myers' statement and is directly contrary to the Legislature's last-minute decision, discussed above, not to extend *Shuttleworth* to businesses with fewer than fifteen workers.

For these reasons, this portion of the Omnibus AIDS Act appears to be meaningless surplusage, a result plainly intended by its author. Although the courts will favor an interpretation that gives effect to a statute or renders it constitutional, no such interpretation appears reasonable here.

D. Discrimination Based on HIV Tests

The second nondiscrimination provision in the Act,¹⁴⁴ derived almost word-for-word from the initial House Task Force proposal,¹⁴⁵ prohibits a wide range of potential employment practices relating to HIV testing. Although *Shuttleworth* almost certainly prohibited similar kinds of discrimination, this fact does not mean these provisions are mere surplusage. First, unlike *Shuttleworth* and the Human Rights Act from which it is derived, the new testing provisions apply to all employers, not just those with fifteen or more workers. Thus, they will affect small businesses not previously falling under state handicap antidiscrimination law. It is apparent that the Legislature hoped to root out a practice that it found intolerable even in small businesses.

142. Fla. S., Comm. on Commerce, transcript of hearing at 20 (May 26, 1988) (transcript on file, *Florida State University Law Review*) (comments of Sen. Myers). The evident meaning of Senator Myers' statement was confirmed by the Omnibus AIDS Act's primary sponsor, Representative Frankel. She indicated in an interview after the 1988 session that the clause alluding to the Rehabilitation Act "probably has no legal effect" and that it was added only at the insistence of the Senate. Interview with Rep. Lois Frankel, June 21, 1988, transcribed notes at 2 (transcript on file, *Florida State University Law Review*).

143. See Barford & Wiley, *AIDS Discrimination in Florida: Further Restrictions on Employers' Rights*, FLA. BAR J., Oct. 1988, at 45, 46-47; McHugh, *AIDS in the Workplace: Policy, Practice and Procedure*, 18 STETSON L. REV. 35, 62 (1988).

144. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2029 (codified at FLA. STAT. § 760.50 (Supp. 1988)).

145. Fla. H.R., Comm. on Health Care, PCB for HC 88-07, § 65(3), at 48-49 (draft of Apr. 7, 1988).

Second, the intent underlying these provisions, read in light of their remedial purpose, indicates that they were meant to outlaw most types of discrimination resulting from HIV testing and the information derived from those tests. The purpose, already elaborated above,¹⁴⁶ is to create an environment in which people at risk will be willing to undergo voluntary testing without fear of reprisal and to allow people with HIV infection to remain productive for as long as possible.

1. *Requiring Work-Related HIV Tests*

The first operative provision of the testing subsection provides: "No person may require an individual to take a Human Immunodeficiency Virus related test as a condition of hiring, promotion, or continued employment, unless the absence of Human Immunodeficiency Virus infection is a bona fide occupational qualification [BFOQ] for the job in question."¹⁴⁷ The plain effect of this language is to make it unlawful for an employer to require an HIV test in making employment decisions except where the BFOQ exception applies.

One problem in construction is the term "no person" in the opening clause. Although the term could be interpreted to mean a natural person, it seems unlikely that a court would reach this result. The legislative history itself indicates the contrary. In the April 13 meeting of the Health Care Committee, Representative Charles T. Canady¹⁴⁸ asked Representative Frankel whether this provision excluded any artificial entities. Representative Frankel responded that it did not.¹⁴⁹ Moreover, considering this provision *in pari materia* with the Human Rights Act and Fair Housing Act, the term should be read broadly to include artificial entities and legal agents.¹⁵⁰

Such a conclusion is consistent with the purposes underlying this provision. First, by prohibiting any employer from requiring tests as a condition precedent to job-related decisions, the new legislation will encourage an environment of trust and rationality in the workplace. Second, it will prevent employers from engaging in efforts to weed out

146. See *supra* notes 107-10 and accompanying text.

147. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2029-30 (codified at FLA. STAT. § 760.50(2)(a) (Supp. 1988)).

148. Dem., Lakeland.

149. Fla. H.R., Comm. on Health Care, transcript of hearing at 13-14 (Apr. 13, 1988) (transcript on file, *Florida State University Law Review*).

150. This would include any individual, association, corporation, joint apprenticeship committee, joint-stock company, labor union, legal representative, mutual company, partnership, receiver, trust, bankruptcy trustee, unincorporated organization, legal or commercial entity, and any governmental entity or agency. Compare FLA. STAT. § 760.02(5) (1987) with *id.* § 760.22(6). *Accord id.* § 1.01(3).

HIV infected workers, thus allowing such people to remain productive for as long as possible.

Finally, the statute elaborates a BFOQ exception¹⁵¹ aimed specifically at those instances in which an employer seeks to require HIV-related testing. This exception by its own terms applies only to "Human Immunodeficiency Virus-related testing" and requires that the person asserting the BFOQ exception has the burden of proving: (1) the test is necessary to ascertain whether an employee is currently able to perform in a reasonable manner job-related duties *or* poses a significant risk of transmitting HIV to others; and (2) no reasonable means of accommodation are available short of requiring the test.¹⁵² Although the term "BFOQ" is taken from a similar exception in Title VII of the Civil Rights Act of 1964 (Civil Rights Act),¹⁵³ the two are strikingly different in their language.¹⁵⁴ Thus, the case law interpreting the federal BFOQ should not be considered persuasive in interpreting the state BFOQ as it relates to employment-related HIV testing.

2. *Discrimination Based on the Results of HIV Tests*

The second operative provision of this section provides that most employment decisions may not be made on the basis of the results of an HIV test:

No person may fail or refuse to hire or discharge any individual in any way which would deprive or tend to deprive that individual of employment opportunities or adversely affect his status as an employee, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment on the basis of the results of a Human Immunodeficiency Virus-related test, unless the absence of Human Immunodeficiency Virus infection is a bona fide occupational qualification of the job in question.¹⁵⁵

The phrase "on the basis of results of a Human Immunodeficiency Virus-related test" presents three major problems of construction.

151. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2029-30 (codified at FLA. STAT. § 760.50(2) (Supp. 1988)).

152. *Id.*

153. 42 U.S.C. § 2000e-2(e) (Supp. III 1985).

154. The federal BFOQ exception allows discriminatory treatment of protected classes of people if the employer can prove there is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise." *Id.* It does not deal specifically with either testing for diseases or the likelihood of transmitting such a disease to others.

155. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2030 (codified at FLA. STAT. § 760.50(3)(d) (Supp. 1988)).

First, what is a "Human Immunodeficiency Virus-related test?" Second, what degree of causal relationship must exist between the test and the discriminatory act? And third, can an employer discriminate based solely on the fact that a worker has taken a test without learning its results?

As to the first question, it is significant that the Omnibus AIDS Act did not use the term "serologic test," as is done elsewhere in the Florida Statutes.¹⁵⁶ Although it is possible to conclude that this provision of the Omnibus AIDS Act was intended to apply only to serologic tests, nothing in the legislative history supports this limited construction. The plain language of the statute should be regarded as definitive, and this provision should be interpreted to apply to any medical test, whether serologic or otherwise. This conclusion is supported by the fact that, under the guidelines of the Centers for Disease Control (CDC), AIDS can be diagnosed only through a series of medical tests that need not always include the serologic test for HIV antibody.¹⁵⁷ Indeed, the CDC reports that in major urban areas hard-hit by the disease, less than seven percent of all AIDS cases are diagnosed using the serologic test.¹⁵⁸ Confining this provision specifically to the serologic test would limit the protections in a way that is inconsistent with the legislative intent.

This provision of the Omnibus AIDS Act requires some nexus between the result of an HIV-related test and the employer's discriminatory act. However, the Omnibus AIDS Act does not specify how closely related the discriminatory act must be to the test result. This provision could be read broadly to cover any discriminatory act related to HIV because HIV and its related illness cannot be diagnosed absent testing. Most information about a person's HIV status originates from an HIV-related test, even when the person has developed full-blown AIDS. Opportunistic infections themselves can be diagnosed as AIDS-related only through proper medical tests.¹⁵⁹ Even

156. *E.g.*, FLA. STAT. § 381.606(5) (1987).

157. *CDC Case Definition*, *supra* note 66, at 4S-6S.

158. The urban areas are New York and San Francisco, which together account for a third of all AIDS cases nationwide. *Id.* at 7S.

159. Herman, *AIDS: Malpractice and Transmission Liability*, 58 U. COLO. L. REV. 63, 64-66 (1986); *CDC Case Definition*, *supra* note 66, at 4S-8S. The CDC Case Definition of AIDS, considered legally definitive, involves a complicated five-step procedure that necessitates a number of tests. First, the physician must rule out any other diseases known to cause immunosuppression. These include a number of cancers such as Hodgkin's disease, certain forms of lymphoma, certain forms of leukemia, multiple myeloma, and cancers that primarily attack components of the immune system. In addition, the physician must rule out any congenital defect in the immune system and determine whether the patient has taken drugs, such as steroids,

Pneumocystis carinii pneumonia, the most common opportunistic infection,¹⁶⁰ cannot be distinguished from other types of pneumonia without the use of specific tests.¹⁶¹

A broad interpretation of this provision, however, could lead to far-reaching results inconsistent with the intent of the Legislature. This provision of the Omnibus AIDS Act applies to all employers, whereas *Shuttleworth*, which construed the Human Rights Act, applies only to employers with fifteen or more employees. Reading this provision with *Shuttleworth* could extend *Shuttleworth's* holding to employers with fewer than fifteen workers, thus bringing even small businesses under the full force of the state's AIDS-specific nondiscrimination laws. The House-Senate compromise reached in the final

that tend to suppress the immune system. *Id.* at 4S-5S.

Second, if all these causes are ruled out, a diagnosis of AIDS is warranted if the patient exhibits one of the twelve "indicator" diseases of which the most common are *Pneumocystis carinii* pneumonia and Kaposi's sarcoma. The CDC recommends that these "indicator" diseases can be definitely diagnosed only after tissue samples are taken and examined under a microscope, while certain other secondary "indicator" infections can be diagnosed only by culturing them in a laboratory. *Id.* at 4S, 10S-12S (app. I & II).

Third, where none of these twelve diseases exist, the physician still may diagnose AIDS if the patient has consistently tested positive for the presence of HIV antibody and also exhibits one of a long list of diseases now known to be caused by HIV-related immunosuppression. These include tuberculosis affecting organs other than the lungs, histoplasmosis, "HIV dementia," "HIV wasting syndrome," *Salmonella* infection of the bloodstream, lymphomas, certain severe bacterial infections and some rare forms of chronic diarrhea. Again, these infections can only be definitively diagnosed by microscopic analysis of tissue samples or laboratory culturing. *Id.* at 5S-6S, 10S-12S (app. I & II).

Fourth, where the patient's ill health or the absence of adequate laboratory facilities will not permit the usual diagnostic tests, the physician can diagnose AIDS where there are repeatedly positive HIV tests and presumptive evidence of one of the seven most serious "indicator" diseases. *Id.* at 5S-6S, 13S-14S (app. III). "Presumptive evidence" means evidence obtained from tests or examinations not considered "definitive" by the CDC. *Compare id.* at 10S-12S (app. I & II) with *id.* at 13S-14S (app. III).

Fifth, even where the patient consistently tests negative for HIV antibodies, the physician may diagnose AIDS in two special circumstances, provided the physician has ruled out all other causes of immunosuppression. First, the physician may diagnose AIDS if definitive clinical evidence (i.e. microscopic analysis of tissue samples) clearly shows the presence of *Pneumocystis carinii* pneumonia, which occurs almost exclusively in people with AIDS. Second, the physician may diagnose AIDS if he or she clinically establishes the presence of any of the other eleven indicator diseases combined with a T-lymphocyte count in a blood sample of less than 400, which indicates severe immunosuppression. *Id.* at 6S, 10S-12S (app. I & II).

It is obvious from this Case Definition that AIDS cannot be diagnosed without some form of testing. Thus, no one can know a person has AIDS, as that term is defined under the law, without some testing.

160. See MASTERS & JOHNSON, *supra* note 1, at 180-81.

161. Herman, *supra* note 159, at 65. See CDC Case Definition, *supra* note 66, at 13S (pneumocystis is diagnosed only after chest X-ray, arterial blood gas analysis, and examination of lungs for bacterial infection).

days of the 1988 session indicates that this result was not intended.¹⁶²

Another reasonable construction of this nondiscrimination provision is possible. The Legislature may not have intended this law to govern a small employer's reaction to visible symptoms of illness. Instead, it might have intended only to prohibit the employment-related use of information that was or, assuming it's truth, could only derive from an HIV-related test.¹⁶³ Such a construction is reasonable because the primary effect of the testing provisions is to bring small businesses under at least a few of the restrictions encompassed within *Shuttleworth*. The Legislature may have made a conscious decision that, while larger businesses having fifteen or more workers during portions of the calendar year should be put to a very strict standard, the burden on businesses with fewer than fifteen workers should be diminished.

162. See *supra* notes 95-98 and accompanying text. This problem was the subject of a brief and cryptic exchange in the final House debate on June 3 between Representatives Frankel and Woodruff, which casts some light on the subject:

REP. WOODRUFF: But as I understand . . . your intent in relating to the employment that this particular area is only as to testing or tests, and is not to be interpreted beyond testing or tests.

REP. FRANKEL: Or the use of those tests.

REP. WOODRUFF: Correct.

REP. FRANKEL: Yes.

Fla. H.R., transcript of proceedings at 7 (June 3, 1988) (transcript on file, *Florida State University Law Review*). These comments may have referred to an earlier objection Representative Woodruff had raised about the testing provisions:

So I would suggest to all the employers in this room that this bill, while well intended in this provision, is technically drawn wrong and you should adopt my amendment to strike this provision of the bill, because otherwise while you may not be able to test people for AIDS virus, if they have AIDS that doesn't require a test, you wouldn't be able to fire them if this provision of the bill comes into play.

Id. at 4-5. This comment is technically inaccurate, since "AIDS" as defined by the CDC cannot be diagnosed without testing. See *supra* note 159.

163. Several consequences flow from such construction. First, a patient alleging discrimination based on full-blown AIDS or ARC symptoms would have to prove that the employer acted specifically on the basis of medical test results. The employer could successfully defend by establishing that he or she acted purely on the basis of visible symptoms of the disease, such as opportunistic infections or absenteeism. Second, an asymptomatic HIV carrier could not be discriminated against based entirely on his or her infection without violating this provision. Since symptomless HIV infection can only be detected by testing, the employer's actions in such circumstances always must be based on an HIV-related test result. Third, discrimination based wholly on the mere perception of HIV infection also must constitute a violation of this provision. Such information, if true, could only be derived from an HIV-related test, viewing the discriminatory act from the eyes of the employer. Finally, preemptive discrimination against persons perceived as likely to contract HIV infection also must be considered unlawful. Because of the long incubation period of the disease, such actions effectively are the same as discriminating based on a present perception. Such information, if true, could only be derived from an HIV-related test.

However, such a construction seems directly contrary to the two explicit purposes that authors of the Omnibus AIDS Act consistently identified as their guiding principles.¹⁶⁴ If small businesses are permitted to discriminate against qualified people with overt symptoms of AIDS or ARC, those people will not be allowed to remain productive citizens for as long as possible. Indeed, they are likely to be reduced to poverty and become public wards, a result Representative Frankel stated is directly contrary to the purpose of the Omnibus AIDS Act. Nor will this practice create an atmosphere of trust and rationality in which people at risk can be tested voluntarily without fear of reprisal. A person considering testing may decide ignorance is better than risking a positive test result, which could cause a pretextual dismissal or other discrimination.

An exception in this provision states that an employer should not be allowed to engage in a test-related discriminatory act "unless the absence of [HIV] infection is a bona fide occupational qualification."¹⁶⁵ This language suggests that the underlying intent was to forbid discrimination based on the belief a person is HIV infected, which can be learned *only* through testing. Such construction renders the testing provisions as expansive as *Shuttleworth*, but it reconciles the statute with the purposes consistently advocated by its authors.¹⁶⁶

Thus, an obvious tension exists between the fundamental purposes of the testing provisions and the events surrounding the final House-Senate compromise. While a court might be justified in adopting either interpretation elaborated above, a better alternative may be a hybrid of the two. That is, a court might interpret the testing provisions liberally to achieve their purposes, but also interpret the BFOQ exception broadly, in a manner consistent with that employed in analogous federal case law, allowing an employer to take some action disproportionately affecting HIV-infected workers.¹⁶⁷

The result would be to forbid discrimination against people with AIDS, ARC, HIV infection or the perception of any of these. How-

164. See *supra* notes 107-10 and accompanying text.

165. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2029-30 (codified at FLA. STAT. § 760.50(2)(b) (Supp. 1988)).

166. See *supra* notes 105-15 and accompanying text.

167. *E.g.*, *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1546-47 (11th Cir. 1984). Representative Frankel indicated during the February 29, 1988, AIDS Task Force meeting that the BFOQ was analogous to that contained in Title VII of the Civil Rights Act of 1964. She stated:

That would mean that, unless they could show that you're not having it—that, that for you to do the job, you have to be HIV-infection free. They'd have to show that it was a—a reasonably—a reasonable relationship to the job, just as they do in—under Title VII now.

Fla. H.R., Comm. on Health Care, transcript of hearing at 38 (Feb. 29, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Frankel).

ever, the employer could defend a suit by showing that the employee's overt symptoms justified the action taken. Evidence of pretextual discrimination would vitiate the defense. The employer would be required to show that it treated the HIV-infected individual no differently than it would have treated any other individual suffering an illness or condition of similar magnitude. This construction would give effect to the Legislature's eleventh-hour decision not to bring small businesses under the full scope of *Shuttleworth*,¹⁶⁸ but also would honor the purposes underlying the nondiscrimination provisions.

Reading the BFOQ exception expansively may seem contrary to the elements of BFOQ set forth in the testing provisions. However, it is apparent from the language of the BFOQ "definition" provided in the Omnibus AIDS Act that it applies only to those instances in which an employer actually requires that a test be taken—the first testing provision.¹⁶⁹ The employer asserting a BFOQ must prove that a "test is necessary" to ascertain job performance and that no reasonable means of accommodation exists "short of requiring the test."¹⁷⁰

This language plainly is inapplicable to the second testing provision which forbids discrimination only "on the basis of the results of a . . . test"¹⁷¹ and does not deal with requiring testing in the workplace. A court accordingly would be free, and indeed would be required, to define BFOQ differently for the second testing provision.

Since the BFOQ language of the second testing provision is derived from Title VII of the federal Civil Rights Act,¹⁷² a Florida court would be justified in interpreting the BFOQ exception of the second testing provision in a manner consistent with analogous federal case law. The federal judiciary has developed a three-part framework for analysis of the BFOQ question.

168. See *supra* notes 96-98 and accompanying text.

169. The introductory sentence of the BFOQ "definition" states that:

A person who asserts that a bona fide occupational qualification exists for [HIV]-related testing shall have the burden of proving that:

1. The Human Immunodeficiency Virus-related test is necessary to ascertain whether an employee is currently able to perform in a reasonable manner the duties of the particular job or whether an employee will present a significant risk of transmitting Human Immunodeficiency Virus infection to other persons in the course of normal work activities; and
2. There exists no means of reasonable accommodation short of requiring the test.

Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2030 (codified at FLA. STAT. § 760.50(c) (Supp. 1988)) (emphasis added).

170. *Id.* See *supra* notes 151-54 and accompanying text.

171. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2030 (codified at FLA. STAT. § 760.50(2)(b) (Supp. 1988)).

172. See *supra* note 153 and accompanying text.

First, if the employer has engaged in a facially discriminatory act against a person of the protected class, the employer must prove that the members of that class lack characteristics “reasonably necessary to the normal operation of that particular business or enterprise.”¹⁷³ In the context of HIV infections, an employer is forbidden from adopting policies that facially discriminate against people solely because of their infections unless the BFOQ, as defined in the federal case law, could be proved. An employer could not adopt a policy of firing people with AIDS, ARC or HIV infection without showing that the absence of these infections and illnesses are reasonably necessary to normal business operations.

Second, when an employer adopts what on its face is a neutral policy that disparately impacts the protected class, the affected people may challenge it as a mere “pretext” for unlawful discrimination.¹⁷⁴ The employer then may defend a suit by articulating a legitimate and nondiscriminatory reason for its actions. At this point, the burden of proof shifts back to the employee to demonstrate that the proffered reason was not the real one.¹⁷⁵ Thus, an employer lawfully could maintain policies that might result in disparate treatment of people with AIDS, ARC or HIV infection, such as a policy against excessive absenteeism due to illness. But the policy would have to be applied equally to all workers suffering any type of illness, not merely those with HIV-related illnesses. If such a policy applied only to workers with HIV illnesses, it would constitute an impermissible pretext.¹⁷⁶

Third, a facially neutral policy that results in a “disproportionate impact” on members of the protected class also will be considered presumptively unlawful.¹⁷⁷ However, once a plaintiff has shown disproportionate impact, the employer can defend by showing a “business necessity.”¹⁷⁸ That is, there must be an “overriding legitimate business purpose such that the practice is necessary to the *safe* and efficient operation of the business.”¹⁷⁹ Nevertheless, affected members of the protected class may rebut the employer’s business necessity defense by showing acceptable alternative policies that would better accomplish the business purpose in question, or would accomplish it with less adverse impact on the protected class.¹⁸⁰ In the context of

173. *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1547 (11th Cir. 1984).

174. *Id.*

175. *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981).

176. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-07 (1972).

177. *Hayes*, 726 F.2d at 1547.

178. *Id.*

179. *Wright v. Olin Corp.*, 697 F.2d 1172, 1188 (4th Cir. 1981) (quoting *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971)).

180. *Hayes*, 726 F.2d at 1543.

HIV-related infections, a policy against excessive absenteeism due to illness would have a disproportionate impact on people with AIDS or ARC. An employer, however, could establish a business necessity defense by showing that no other reasonable alternative existed for the safe and efficient operation of the business.

Reading this federal analytic framework into the BFOQ exception of the second testing provision harmonizes the apparent contradiction between the Omnibus AIDS Act's underlying policies and the legislative history from the 1988 session's final days. It permits small businesses a greater degree of latitude in dealing with AIDS-related concerns while offering significant protection to people with HIV-related illnesses. In this way, the policies of encouraging voluntary testing and permitting people with AIDS to remain productive will be advanced.¹⁸¹

The 1989 Legislature should consider either modifying its BFOQ definition to apply explicitly to both of the testing provisions of the Omnibus AIDS Act, or it should indicate that BFOQ does indeed have a different meaning in each of them.¹⁸²

The second problem of construction presented by this provision is whether an employer legally can discriminate based on knowledge that

181. This construction is consistent with the effect Representative Frankel said was intended when the BFOQ exception was extensively discussed in the February 29, 1988, AIDS Task Force meeting. There, she said:

[I]f we're going to prohibit discrimination, which I believe that we should, uh, we have—I think that it is good policy to take into consideration that there may [be] that one time or that one instance—although I quite frankly can't think of one—but there may be that instance where it would be reasonable and in the interest of public health that a person be denied a particular job because of HIV infection.

Fla. H.R., Comm. on Health Care, transcript of hearing at 43 (Feb. 29, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Frankel). See also Fla. S., Comm. on Commerce, transcript of hearing at 12 (May 26, 1988) (transcript on file, *Florida State University Law Review*) (Rep. Frankel indicated that, at least with regard to small businesses, factors such as business necessity may be taken into account.).

182. For the sake of simplicity, the former would seem the better option. The Omnibus AIDS Act should define a BFOQ in the following manner:

For purposes of this section, a bona fide occupational qualification exists when:

1. The plaintiff actually was infected with Human Immunodeficiency Virus at any time material to the complaint; and
2. The absence of Human Immunodeficiency Virus infection is necessary for the plaintiff to perform in a reasonable manner the duties of the particular job, or the plaintiff will present a significant risk of transmitting Human Immunodeficiency Virus infection to other persons in the course of normal work activities; and
3. There exists no means of reasonable accommodation short of requiring that the plaintiff be free of Human Immunodeficiency Virus infection.

The employer should have the burden of proving each element. Finally, if the Legislature intends to exempt businesses with less than 15 workers from the testing provisions, it should do so explicitly, and not by vague references in the legislative history.

a worker has taken a test when test results are unknown to the employer. Read literally, the Omnibus AIDS Act does not prohibit such actions because the statute only outlaws discrimination based on "the results of a[n HIV-] related test."¹⁸³

However, since the policies underlying the Omnibus AIDS Act are to encourage voluntary testing and to allow HIV-infected people to remain productive, this provision should be construed broadly to prohibit such discrimination. Workers at risk for infection will be discouraged from taking an HIV test if the employer can fire them upon learning that they were tested. The policies underlying the Omnibus AIDS Act thus dictate that this provision be read broadly, beyond the literal meaning of its words. However, the 1989 Legislature should take action to correct its oversight by expressly outlawing discrimination based on the employer's knowledge that a worker has taken an HIV-related test.

E. Discrimination in Housing, Accommodations and Governmental Services

The third new civil rights provision is a sweeping prohibition against certain discriminatory acts outside the workplace. The provision provides: "A person may not discriminate against an otherwise qualified individual in housing, public accommodations, or governmental services on the basis of the fact that such individual is, or is regarded as being, infected with Human Immunodeficiency Virus."¹⁸⁴ This section presents several problems for construction, chiefly in the failure to define terms such as "person" and "otherwise qualified."

As previously noted, the term "person" could be read restrictively to include only "natural persons" and not artificial entities.¹⁸⁵ However, such a construction is contrary to the legislative history,¹⁸⁶ to traditional rules of statutory construction,¹⁸⁷ and to the remedial purposes of the Omnibus AIDS Act,¹⁸⁸ and would subvert its underlying policies.¹⁸⁹ It seems most likely that a court would construe the term liberally, *in pari materia* with the broad definitions of "person" pro-

183. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2030 (codified at FLA. STAT. § 760.50(2)(b) (Supp. 1988)).

184. *Id.* (codified at FLA. STAT. § 760.50(3)(a) (Supp. 1988)).

185. *See supra* notes 148-50 and accompanying text.

186. *See supra* note 150 and accompanying text.

187. *See* FLA. STAT. § 1.01(3) (1987) (defining the word "person" to include artificial entities for purposes of statutory construction).

188. *See supra* notes 116-20 and accompanying text.

189. *See supra* notes 105-15 and accompanying text.

vided in the Human Rights Act and Fair Housing Act, which include artificial entities.¹⁹⁰

The term "otherwise qualified handicapped individual" is taken from section 504 of the Rehabilitation Act.¹⁹¹ Thus, Florida courts are likely to consider federal case law on this question persuasive. The United States Supreme Court has defined the term to mean "one who is able to meet all of a program's requirements in spite of his handicap."¹⁹² Thus, a person or entity would be allowed legally to discriminate if a person's handicap or other condition made it impossible to meet the program's requirements; but it would be unlawful if the handicap or other condition had no such effect.

The Omnibus AIDS Act adds a special condition to the meaning of the term "otherwise qualified" that requires a slightly broader interpretation than the prior federal law suggests. It mandates that the person asserting that an individual is not otherwise qualified must carry the burden of proving that no reasonable accommodation could be made to prevent the likelihood of exposing others to "a significant possibility of being infected with [HIV]."¹⁹³ This statutory addition effectively means that a person is not otherwise qualified if (1) HIV-related symptoms or other conditions impair the ability to meet program requirements, *or* (2) the HIV infection is likely to be communicated to others despite any available reasonable means of accommodation.

1. *Discrimination in Housing*

The term "housing," while not particularly vague, should be read *in pari materia* with the definition of "dwelling" contained in the Fair Housing Act. Under this definition, "dwelling" includes any building or structure designed for occupancy by one or more families or single individuals, and any vacant land offered for sale or lease to construct such a building or structure.¹⁹⁴ It is reasonable to interpret the term "housing" in this way because the same actions prohibited under this provision of the Omnibus AIDS Act in most cases will be similarly prohibited under the Fair Housing Act.

Based on this definition of "housing," the Omnibus AIDS Act overlaps protections afforded under the Fair Housing Act. A person

190. See *supra* notes 56-59. Compare FLA. STAT. § 760.02(5) (1987) with *id.* § 760.22(6).

191. 29 U.S.C.A. § 794 (West Supp. 1987).

192. Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).

193. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2030 (codified at FLA. STAT. § 760.50(3)(c) (Supp. 1988)).

194. FLA. STAT. § 760.22(3)-(4) (1987).

alleging AIDS-related discrimination in housing could pursue relief either with the Human Relations Commission or in court. Moreover, the protections afforded in this area will be broad. The express language of this provision forbids discrimination based on any HIV infection or the perception thereof. This prohibition also should include discrimination based on the perception that a person is likely to develop an HIV-related infection in the future. The Omnibus AIDS Act essentially provides the broadest possible protections in housing cases.

2. *Discrimination in Public Accommodations*

Perhaps the most troublesome of the undefined terms is "public accommodations." While there is authority from other jurisdictions that this term only includes lodging facilities and establishments serving food and drink for consideration,¹⁹⁵ the common law of Florida has given it a broader meaning. The Supreme Court of Florida has stated that "public accommodations" also may be places of amusement available for a consideration, such as theaters, swimming pools,¹⁹⁶ and bath houses.¹⁹⁷ Thus it seems likely that the courts will construe the term to include virtually any facility available for a consideration that provides lodging, food and drink, or amusement.

Using Florida's broad definition of "public accommodation," a cause of action would exist whenever a person is excluded from any place of lodging, a food or drink establishment, or a place of amusement because of HIV-related infection or the perception that a person has such infection now or will have it in the future.

One apparent oversight in the Omnibus AIDS Act, however, is that it does not expressly prohibit discrimination by emergency services, such as ambulances. Although some emergency services will fall under the prohibition of discrimination in governmental services because they are provided by public agencies,¹⁹⁸ not all will. While the courts might construe the term "public accommodations" to include emergency services, the Legislature should expressly outlaw such discrimination in the 1989 "AIDS glitch bill,"¹⁹⁹ either by defining "public accommodations" to include it or by adding a separate substantive provision.

195. *E.g.*, *People ex rel. McShane v. Keller*, 96 Misc. 92, 161 N.Y.S. 132, 138 (Ct. Gen. Sess. 1916).

196. *Central Theatres v. Wilkinson*, 18 So. 2d 755, 756 (Fla. 1944) (en banc).

197. *Turlington v. Tampa Elec. Co.*, 62 Fla. 398, 56 So. 696 (1911) (bathhouse and beach facilities available for consideration).

198. *See infra* notes 200-09 and accompanying text.

199. Major legislation such as the Omnibus AIDS Act usually is followed in the succeeding year with a "glitch bill" that corrects errors and oversights in the previous bill.

3. *Discrimination in Governmental Services*

The term "governmental services" should be accorded its plain meaning: any service provided by a governmental entity, whether for a price or not. Case law from the district courts of appeal indicates that the term includes at least police protection, sanitary improvements, lights, water, electricity, sewerage, paved streets and "other municipal conveniences."²⁰⁰ The Florida Supreme Court has indicated that the term includes at least police, fire and health protection, sewerage, water, and garbage service.²⁰¹ One district court opinion states that providing water is a governmental service, and implies that health measures and zoning ordinances also are closely related to such services.²⁰² If "governmental services" includes any service that a governmental entity provides, then in addition to those services listed above, it should encompass education in a public school, public transportation, other services provided by governmental entities, and public health services available to qualified individuals.

In the area of entitlements, the legislative history indicates that while state agencies effectively must blind themselves to a person's HIV status, people with HIV infection will not be accorded special status. In the House Health Care Committee meeting on April 13, Representative C. Fred Jones²⁰³ asked whether this provision might require the state to fund a massive program to provide the drug Azidothymidine (AZT) and free hospice care to HIV-infected people. Representative Frankel indicated that it would not.²⁰⁴ Thus, people with AIDS will be entitled to receive only benefits for which they would be otherwise qualified. Under the Omnibus AIDS Act's restrictive definition, "otherwise qualified" means that a person can meet program requirements *and* does not pose a significant possibility of infecting others with HIV through participation in the program in question despite available means of reasonable accommodation.²⁰⁵

Because "governmental services" has a broad meaning, this section of the Omnibus AIDS Act effectively will permit a person to sue governmental agencies. A cause of action would exist whenever the agency discriminates in the provision of services based on a person's

200. *Johnson v. Town of Suwannee River*, 336 So. 2d 122, 124 (Fla. 1st DCA 1976); *State ex rel. Tropical Audubon Soc'y, Inc. v. City of Islandia*, 224 So. 2d 427, 429 (Fla. 3d DCA 1969).

201. *Gillete v. City of Tampa*, 57 So. 2d 27, 29 (Fla. 1952) (en banc).

202. *Moviematic Indus. v. Board of County Comm'rs*, 349 So. 2d 667, 668-69 (Fla. 3d DCA 1977).

203. *Dem., Auburndale*.

204. Fla. H.R., Comm. on Health Care, transcript of hearing at 11-12 (Apr. 13, 1988) (transcript on file, *Florida State University Law Review*) (comments of Reps. Frankel and Jones).

205. See *supra* notes 191-93 and accompanying text.

HIV-related infections or the perception of them. As noted above, this probably would include discrimination based on a belief that a person is likely to be diagnosed as HIV infected at some future time.

It is important to note that such a lawsuit falls within the state's absolute waiver of sovereign immunity.²⁰⁶ However, a limited form of "governmental immunity" remains in Florida, based partly on the state constitution's separation of powers provision.²⁰⁷ In general, lawsuits are barred if the cause arises from "discretionary" governmental activities, but not if the governmental act in question is considered "operational." The distinction between the two never has been drawn with precision by the Supreme Court of Florida, but involves a general balancing of various factors. They include determining that the act involved basic policy, was aimed at achieving that policy, required a high level of expertise, and rested on valid legal authority.²⁰⁸ Lawsuits against governmental agencies will be dismissed unless they involve "operational" functions.²⁰⁹

F. Discrimination by Entities Receiving State Financial Assistance

The Omnibus AIDS Act states: "A person or other entity receiving or benefiting from state financial assistance may not discriminate against an otherwise qualified individual on the basis of the fact that such individual is, or is regarded as being, infected with Human Immunodeficiency Virus."²¹⁰ This provision, like that outlawing discrimination in housing, accommodations and governmental services, applies broadly to any discriminatory act based on either actual knowledge or belief that a person is HIV infected or will become HIV infected. This is in keeping with the underlying purposes of encouraging voluntary testing and keeping HIV-infected people a part of the work force as long as possible.²¹¹

Only two problems of construction are posed by this section that are not illuminated by any of the legislative history. Again, the term

206. *Id.* See FLA. STAT. § 768.28 (1987).

207. FLA. CONST. art. II, § 3. See also *Avallone v. Board of County Comm'rs*, 493 So. 2d 1002, 1005 (Fla. 1986); *Trianaon Park Condominium v. City of Hialeah*, 468 So. 2d 912, 917 (Fla. 1985); *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1022 (Fla. 1979).

208. See *Commercial Carrier*, 371 So. 2d at 1019 (adopting *Evangelical United Brethren Church v. State*, 67 Wash. 2d 246, 255, 407 P.2d 440, 445 (1965)). See also *id.* at 1021-22 (adopting *Johnson v. State*, 69 Cal. 2d 782, 794-95, 447 P.2d 352, 360-61, 73 Cal. Rptr. 240, 248-49 (1968)).

209. *Id.* at 1021-22.

210. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2030 (codified at FLA. STAT. § 760.50(3)(b) (Supp. 1988)).

211. See *supra* notes 107-10 and accompanying text.

"otherwise qualified" is not fully defined, but should be interpreted to mean that (1) a person's HIV-related symptoms or other conditions do not impair the ability to meet program requirements, *and* (2) the person's HIV infection is not likely to be communicated to others in the setting in question despite reasonable means of accommodation.²¹² This is in harmony with analogous federal case law and the explicit statutory requirement contained in the Omnibus AIDS Act.

The other problem of construction is the undefined term "state financial assistance." Since this term essentially tracks similar language in the federal Rehabilitation Act,²¹³ it is likely that Florida courts will look to federal precedent on this question for guidance.

Several conclusions can be derived from the federal authority. First, the term "financial assistance" means a subsidy²¹⁴ or grant to a definite recipient.²¹⁵ It is not enough that an entity merely benefits from a program financed by public funds, unless the entity directly receives a part of those funds. For example, the United States Supreme Court has held that there is no "financial assistance" to airlines merely because federal funds support the nation's air traffic control system, since this program has many beneficiaries but no recipients.²¹⁶ Thus, the Omnibus AIDS Act probably cannot be read to create a cause of action against entities benefiting from state-funded programs where those entities do not actually receive state money or have no discretion over how it will be used.

Second, government contracts generally do not constitute a "subsidy" under federal law and thus would not bring the contractor under section 504 of the Rehabilitation Act.²¹⁷ It appears that this provision of the Omnibus AIDS Act will not apply to those people entering into contracts with the State of Florida. However, in some instances it may be possible to structure a state contract so that, in addition to contractual payments, the contractor also is receiving what amounts to a state subsidy. In such instances Florida courts may en-

212. See *supra* notes 191-93 and accompanying text.

213. 29 U.S.C.A. § 794 (West Supp. 1987).

214. "A grant of money made by government in aid of the promoters of any enterprise, work, or improvement in which the government desires to participate, or which is considered a proper subject for government aid, because such purpose is likely to be of benefit to the public." BLACK'S LAW DICTIONARY 1280 (5th ed. 1979).

215. United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597 (1986); Hingson v. Pacific Northwestern Airlines, 743 F.2d 1408, 1414-15 (9th Cir. 1984); Martin v. Delaware Law School of Widener Univ., 625 F. Supp. 1288, 1302 (D. Del. 1985); Rogers v. Frito-Lay, Inc., 433 F. Supp. 200 (N.D. Tex. 1977), *aff'd*, 611 F.2d 1074 (5th Cir. 1980), *cert. denied*, 449 U.S. 889 (1980).

216. *Paralyzed Veterans*, 477 U.S. at 612.

217. *Cf. Bellamy v. Roadway Express, Inc.*, 668 F. Supp. 615, 618 (N.D. Ohio 1987).

certain suits brought under this section of the Omnibus AIDS Act, since failure to do so would create a loophole inconsistent with the legislative intent.

Third, beneficial tax treatment does not constitute a subsidy, whether accomplished by tax credits²¹⁸ or exemptions.²¹⁹ It thus is unlikely that any entity receiving only favorable state tax treatment falls under this provision of the Omnibus AIDS Act.

Finally, there is an important difference between the language of the federal Rehabilitation Act and this provision of the Omnibus AIDS Act. Prior to the Civil Rights Restoration Act of 1987,²²⁰ the Rehabilitation Act only applied to "any program or activity receiving Federal financial assistance."²²¹ The Omnibus AIDS Act, however, explicitly applies to "[a] person or other entity receiving or benefiting from state financial assistance."²²²

The Rehabilitation Act focuses more narrowly on particular programs while the Omnibus AIDS Act looks more broadly at the overall entity or person. This language indicates that so long as the person or entity is receiving state financial assistance, liability would exist for a discriminatory act even if the particular program in question did not directly receive state financial assistance. The Omnibus AIDS Act should not be limited only to the program that has engaged in a discriminatory act, but the overall institution or entity.

The Omnibus AIDS Act does not limit the application of this section only to nongovernmental persons or entities. The language is broad and unqualified, and should be construed to apply equally to any governmental entity subsidized with public funds. This construction is compelled by reading the Omnibus AIDS Act in tandem with the state's waiver of sovereign immunity.²²³

The waiver of sovereign immunity declares that any agency or subdivision of the state may be held liable for actions in tort "under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state."²²⁴ It further specifies that agencies and

218. Chaplin v. Consolidated Edison Co., 628 F. Supp. 143, 145-46 (S.D.N.Y. 1986).

219. Martin v. Delaware Law School of Widener Univ., 625 F. Supp. 1288, 1302 (D. Del. 1985).

220. 29 U.S.C.A. § 794 (West Supp. 1988).

221. Compare *id.* with *id.* (West Supp. 1987) (quoted language is the same, but the term "program or activity" has been expansively redefined).

222. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2030 (codified at FLA. STAT. § 760.50(3)(b) (Supp. 1988)).

223. FLA. STAT. § 768.28 (1987).

224. *Id.* § 768.28(1).

subdivisions include all the branches of government, "independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties or municipalities."²²⁵ Since this provision of the Omnibus AIDS Act applies to "persons," it is reasonable to conclude that it also applies to all the entities described in the waiver of immunity.²²⁶

Another significant feature of the provision banning discrimination by state-subsidized entities is that, because it is not limited to particular kinds of discriminatory acts, it applies equally to employment, participation in programs, or anything for which a person can become qualified.²²⁷ This section is one of the most sweeping of the new anti-discrimination provisions. It both codifies and extends the holding of *Shuttleworth* as applied to such entities.

Moreover, it effectively prevents every governmental agency or state-supported entity or person from engaging in any other kind of discriminatory act based on knowledge or perception of HIV infection. By enacting this provision, the Legislature has indicated that the policies underlying the nondiscrimination provisions are so important that neither the state nor those it subsidizes may engage in discrimination based on HIV-related concerns.

G. *Discrimination Against Health Care Workers*

The Omnibus AIDS Act provides that:

No person may fail or refuse to hire or discharge any individual, segregate or classify any individual in any way which would deprive or tend to deprive that individual of employment opportunities or adversely affect his or her status as an employee, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment on the basis of the fact that the individual is a licenced health care professional who treats or provides patient care to persons with Human Immunodeficiency Virus.²²⁸

The plain language of this section prohibits all forms of employment-related discrimination against health care professionals. Although the term "health care professional" is undefined, it probably should be

225. *Id.* § 768.28(2).

226. For a summary of Florida governmental immunity law, see *supra* notes 206-09 and accompanying text.

227. See ch. 88-380, § 45, 1988 Fla. Laws 1996, 2030 (codified at FLA. STAT. § 760.50(3)(b) (Supp. 1988)).

228. *Id.* (codified at FLA. STAT. § 760.50(3)(d) (Supp. 1988)).

given a plain-language meaning, i.e., any licensed worker who treats or is perceived as treating one or more persons with HIV infection or its related illnesses.

One problem with this provision, however, is the use of the word "professional." At common law the term meant only doctors, lawyers, teachers and clergy.²²⁹ This definition was not intended by the Legislature since it effectively would extend protection only to doctors.

The Florida Supreme Court recently modified the term "professional" to mean a person practicing a vocation that requires at a minimum a four-year college degree.²³⁰ However, this definition also is problematic in that some health care workers can be licensed without a four-year degree,²³¹ and may not fall within this definition. Such a result conflicts with the legislative intent, which is to protect all licensed health care workers who treat AIDS patients.²³²

The term "professional" should be construed to mean "professional or worker." That is, the protections of this provision should extend to any health care worker whose job requires a license from the state, whether or not the license requires a four-year degree. The 1989 Legislature should take action to ensure that all health care workers are covered by this section, which could be achieved by specifying that the protection also applies to "licensed health care workers."

Finally, this provision of the Omnibus AIDS Act applies to employment discrimination—not to other forms of discrimination. Thus, it would be permissible to discriminate in the leasing of office space to health care workers,²³³ but not in the employment decisions made in that office, if those decisions were based on HIV-related concerns. The 1989 Legislature should extend the protections afforded by this section to all other matters important to the establishment and operation of health care facilities treating HIV-infected patients.²³⁴

229. See *Pierce v. AALL Ins., Inc.*, 531 So. 2d 84, 87 (Fla. 1988).

230. *Id.*

231. For instance, midwives may be licensed with only two or three years of training. FLA. STAT. § 467.009 (1987).

232. The Legislature did not have the benefit of the *Pierce* definition of the term "professional" when it passed the Omnibus AIDS Act because *Pierce* was not published until July 14, 1988, more than a month after the 1988 session ended.

233. This issue arose, for instance, in *Seitzman v. Hudson River Assoc.*, 126 A.D.2d 211, 513 N.Y.S.2d 148 (App. Div. 1987).

234. This could be achieved by adding a new section to read:

No person may fail or refuse to sell, rent, lease or transfer, or fail or refuse to offer for sale, rent lease or transfer, any interest or estate in real property solely on the fact or belief that the potential transferee is the agent of, or is, a licensed health care worker who will or may use the real property in question in the treatment of persons infected with Human Immunodeficiency Virus.

H. Enforcement Provisions

Although the holding in *Shuttleworth* remains enforceable only under the administrative procedure set forth in the Human Rights Act,²³⁵ each of the new HIV-related nondiscrimination provisions can be enforced by a civil action brought directly in circuit court.²³⁶ Each alleged violation of any of the provisions constitutes a separate act supporting a separate claim for damages.²³⁷

On the question of damages, the plaintiff has several options. First he or she can sue for liquidated damages of \$1,000 per violation, or \$5,000 where the discriminatory act was intentionally or recklessly committed.²³⁸ Second, he or she can sue for actual damages if they are in excess of the appropriate liquidated amount.²³⁹ In addition, the prevailing plaintiff is entitled to reasonable attorney's fees and such other relief as the court may deem proper, without limit, including an injunction.²⁴⁰ Under this last provision, it appears that punitive damages also will be available in appropriate cases.

Finally, the Omnibus AIDS Act specifies that remedies provided in the nondiscrimination section are to be *in addition to* any other damages available under applicable law.²⁴¹ Thus, the nondiscrimination section is not to be deemed the exclusive remedy available at law for people alleging HIV-related discrimination. For example, a plaintiff simultaneously could pursue relief under the handicap clause of the Florida Constitution,²⁴² the Human Rights Act,²⁴³ the Fair Housing Act²⁴⁴ and the Omnibus AIDS Act, if the facts warranted it.

II. HIV INFECTION AS A NON-MATERIAL FACT IN REAL ESTATE TRANSACTIONS

In a separate civil rights provision, the Omnibus AIDS Act provides that the fact that an occupant of real property is infected with HIV or diagnosed with AIDS "is not a material fact that must be disclosed in a real estate transaction."²⁴⁵ This section further specifies that no

235. FLA. STAT. § 760.10 (1987).

236. Ch. 88-380, § 45, 1988 Fla. Laws 1996, 2030-31 (codified at FLA. STAT. § 760.50(4)(a) (Supp. 1988)).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* (codified at FLA. STAT. § 760.50(4)(b) (Supp. 1988)).

242. FLA. CONST. art I, § 2.

243. FLA. STAT. §§ 760.01-.10 (1987).

244. *Id.* §§ 760.20-.37.

245. Ch. 88-380, § 46, 1988 Fla. Laws 1996, 2031 (codified at FLA. STAT. § 689.25(1) (Supp. 1988)).

cause of action arises for failure to disclose such information to the transferee of the property.²⁴⁶

This section did not appear in either the original House or Senate drafts. It seems to have been a reaction to events in Texas, where attorneys had advised the state board of realtors that they must disclose a prior occupant's HIV infection to potential transferees.²⁴⁷ Although not actually a part of the new nondiscrimination provisions and not enforceable under them, this provision probably should be read as resting on the same fundamental policies.²⁴⁸

Finally, one potential objection to this section is that it may violate Florida's constitutional guarantee of access to the courts.²⁴⁹ Interpreting this guarantee, the Florida Supreme Court has held that the Legislature has only limited authority to abolish a preexisting cause of action.²⁵⁰ However, this objection appears meritless in this instance. This section of the Omnibus AIDS Act does not abolish an entire cause of action: it merely declares that there can be no injury for non-disclosure of specific HIV-related information in real estate transactions. Since this conclusion is supported by all available scientific evidence,²⁵¹ the courts most likely will uphold this section as a valid exercise of the Legislature's authority to prohibit unfair discrimination.

III. INSURANCE

The next major group of nondiscrimination provisions added to Florida law in 1988 deals with insurance.²⁵² Prior to the Omnibus AIDS Act, Florida law placed no restriction on the use of HIV-related information in life and health insurance underwriting. Pursuant to its authority to regulate the insurance industry, the Florida Department of Insurance on January 28, 1988, approved new rules forbidding

246. *Id.* (codified at FLA. STAT. § 689.25(2) (Supp. 1988)).

247. Taylor, *Is Having AIDS a 'Material Fact'?*, Nat'l L.J., Mar. 28, 1988, at 3, col. 1.

248. See *supra* notes 104-11 and accompanying text.

249. FLA. CONST. art. I, § 21.

250. *E.g.*, Kluger v. White, 281 So. 2d 1 (Fla. 1973).

251. HIV cannot be casually transmitted, but must actually be introduced into the body of a person for infection to occur. This can be by an exchange of fluids during sex, intravenous drug use or from mother to infant. AIDS UPDATE 1988, *supra* note 3, at 42-44. Accord ch. 88-380, § 1, 1988 Fla. Laws 1996, 1998 (codified at FLA. STAT. § 381.607 (Supp. 1988)).

252. Ch. 88-380, § 47, 1988 Fla. Laws 1996, 1031 (codified at FLA. STAT. § 627.429 (Supp. 1988)); *id.* § 48, 1988 Fla. Laws at 3034 (codified at FLA. STAT. § 627.411 (Supp. 1988)); *id.* § 49, 1988 Fla. Laws at 2035 (codified at FLA. STAT. § 627.6265 (Supp. 1988)); *id.* § 50, 1988 Fla. Laws at 2035 (codified at FLA. STAT. § 627.6646 (Supp. 1988)); *id.* § 51, 1988 Fla. Laws at 2035 (codified at FLA. STAT. § 641.3007) (Supp. 1988)); *id.* § 52, 1988 Fla. Laws at 2037 (amending FLA. STAT. § 641.31(3)(b) (1987)).

many forms of HIV-related discrimination.²⁵³ However, these rules effectively were rendered moot by the Omnibus AIDS Act and now are awaiting repeal and replacement by the agency.²⁵⁴

Using these rules as a starting point, the 1988 Legislature made a conscious decision to impose severe limits on discriminatory practices, and adopted a substantial addition to state insurance law. With some notable exceptions, it forbids the use of information about a person's HIV status or sexual orientation in underwriting life and health insurance policies.

The policies underlying the insurance sections are the same as those underlying other nondiscrimination provisions. Throughout the 1988 session, the primary drafters of these provisions stated that they are meant to create an environment in which people will not be afraid to be honest about their HIV status, and to allow people to remain productive in society for as long as possible. One method of accomplishing these goals is by forbidding insurers from discriminating against HIV-related infections in ways not done for other serious illnesses.

As Representative Frankel noted, the loss of insurance and employment will only turn HIV-infected people into public wards.²⁵⁵ With tens of thousands of Floridians expected to become HIV infected by the 1990s,²⁵⁶ the Legislature must find the most acceptable method of distributing the overall cost equitably among society. One method is by requiring that HIV infection be treated for insurance purposes the same as any other major illness, thus preventing at least some of the ill from becoming destitute and seeking state assistance. The Legislature said that "The purpose of this section is to prohibit unfair practices in the indemnity of life and health insurance with respect to exposure to the Human Immunodeficiency Virus infection and related matters, and thereby reduce the possibility that a person may suffer unfair discrimination when purchasing life and health insurance."²⁵⁷ A substantially similar statement of purpose is contained in a separate provision dealing with health maintenance organizations.²⁵⁸

These statements and their legislative history will guide statutory construction. On that basis, it appears that the insurance provisions

253. FLA. ADMIN. CODE R. 4-76 (Jan. 28, 1988). Because these rules are now moot, they will likely be repealed by the Department of Insurance.

254. Memorandum from Cynthia Fuller, Fla. Dep't of Ins., to Craig Waters (Aug. 1, 1988) (copy on file, *Florida State University Law Review*).

255. See *supra* notes 106-07 and accompanying text.

256. See *supra* notes 4-7 and accompanying text.

257. Ch. 88-380, § 47, 1988 Fla. Laws 1996, 2035 (codified at FLA. STAT. § 627.429(1) (Supp. 1988)).

258. *Id.* § 51, 1988 Fla. Laws at 2035 (codified at FLA. STAT. § 641.3109(1) (Supp. 1988)).

have the same broad and remedial purposes that underlie the nondiscrimination provisions, and they should be construed liberally to achieve these purposes.²⁵⁹

A. *Life and Health Insurance Policies*

The Omnibus AIDS Act includes several new provisions regarding life and health insurance policies. These provisions restrict the use of HIV-related tests and prohibit consideration of sexual orientation in underwriting policies, impose confidentiality requirements, limit the use of exclusion clauses, and forbid cancellation or nonrenewal of policies because the insured has been diagnosed or treated for HIV-related illnesses.

1. *HIV-Related Testing*

The Omnibus AIDS Act imposes new restrictions on the use of HIV-related tests in underwriting any life and health insurance policy and multiple employer welfare arrangements (MEWAs).²⁶⁰ Insurers are allowed to require HIV testing only in two instances: (1) when “based on the person’s current medical condition or medical history;” or (2) when testing is “triggered by threshold coverage amounts which apply to all persons within the risk class.”²⁶¹

The first of these categories is somewhat vague, presenting a problem for statutory construction. Under the broad phrases “medical condition” and “medical history,” insurers could decide to test a person based on any medical condition found in that person’s medical history, whether or not it is a likely indicator of HIV infection. Such an interpretation would condone the use of pretexts in requiring HIV-related tests, rendering this provision meaningless. This construction should not be favored since the courts are required to presume that every provision of a statute has a purpose, if possible.²⁶²

It seems more likely that the Legislature only intended to permit this kind of testing when a medical condition or the medical history discloses a factor likely to indicate exposure to HIV. For instance, a history of infection with other sexually transmissible diseases or a prior diagnosis of Kaposi’s sarcoma or *Pneumocystis carinii* pneumonia would indicate a likelihood of exposure to HIV.

259. See *supra* notes 104-15 and accompanying text.

260. See FLA. STAT. § 624.437 (1987).

261. Ch. 88-380, § 47, 1988 Fla. Laws 1996, 2032 (codified at FLA. STAT. § 627.429(4)(d) (Supp. 1988)).

262. *Vocelle v. Knight Bros. Paper Co.*, 118 So. 2d 664, 667 (Fla. 1st DCA 1960).

The second category is also somewhat vague, especially the phrase "all persons within the risk class." However, the apparent meaning of this provision is that an insurer can require HIV tests only if every person applying for the specific amount and type of coverage in question is required to take such tests. This construction of the statute is consistent with the legislative purpose, as it requires every similarly situated person to be treated the same way without regard to possible HIV infection.

The Omnibus AIDS Act specifies that the insurer may only use tests deemed to be "reliable predictors of risk."²⁶³ This term means that the test is recommended by the CDC or by the federal Food and Drug Administration.²⁶⁴ However, if the test used indicates a positive result, the insurer still must follow any recommended protocol for follow-up testing. Under current medical practice, this would mean that a positive test result from the widely used and relatively inexpensive Enzyme-Linked Immunosorbent Assay (ELISA) test must be followed up with another ELISA test; and if this second test is positive, an additional more expensive test called the Western blot is recommended.²⁶⁵

The Act also specifies certain procedures that must be followed whenever an insurer tests for HIV exposure. Prior to testing, the insurer must disclose its intent to test for HIV infection or for any specific illness related to such infection.²⁶⁶ The person seeking insurance must execute a written informed consent form that includes a "fair explanation of the test, including its purpose, potential uses, and limitations, and the meaning of its results and the right to confidential treatment of information."²⁶⁷ An insurer obtains a conclusive presumption of informed consent if it uses a form approved by the Department of Insurance.²⁶⁸

Results must be communicated to a person testing positive by a physician designated by the applicant or, if none, by the Department

263. Ch. 88-380, § 47, 1988 Fla. Laws 1996, 3032 (codified at FLA. STAT. § 627.429(4)(a) (Supp. 1988)).

264. *Id.*

265. MASTERS & JOHNSON, *supra* note 1, at 42-43.

266. Ch. 88-380, § 47, 1988 Fla. Laws 1996, 2032 (codified at FLA. STAT. § 627.429(4)(b) (Supp. 1988)).

267. *Id.*

268. *Id.* The term "the department" is not defined in this section, but it must refer to the Department of Insurance. This conclusion is supported by the fact that the same section specifically refers to the "Department of Health & Rehabilitative Services" by its full name. Since the only two agencies logically involved in this question are these two, the undefined term should be construed to mean the Department of Insurance.

of Health and Rehabilitative Services.²⁶⁹ The designee then must provide: (1) face-to-face counseling with the applicant regarding the meaning of the test results, the possible need for additional testing, and the need to eliminate behaviors that may spread HIV to others; (2) the availability of nearby health-care services, including mental health care and social and support services; (3) the benefits of notifying prior sexual partners and others who may have been exposed to HIV by the applicant; and (4) the availability of public assistance to help locate such people.²⁷⁰

2. *Sexual Orientation*

The Act expressly forbids the consideration of a person's sexual orientation in the underwriting process or in determining whether an applicant will be tested for HIV infection.²⁷¹ To this end, the following factors may not be considered if they are meant to determine sexual orientation: marital status, living arrangements, occupation, gender, designation of beneficiary, zip code or any other territorial classification.²⁷²

Since the term "sexual orientation" is not defined in the Omnibus AIDS Act it presents a problem of construction, since it is possible to construe it broadly to encompass a wide range of activities relating to gender identity or sexuality. Since the Legislature's evident purpose is to prevent discrimination against those believed to be homosexual or bisexual, two groups generally perceived to be at high risk for HIV infection, the Omnibus AIDS Act must preclude favorable treatment for those believed to be heterosexual.

By prohibiting the use of information from which sexual orientation might be inferred,²⁷³ the Omnibus AIDS Act forbids insurers from even conjecturing on this question, making the perception of sexual orientation equally impermissible in insurance-related decisions. Therefore "sexual orientation" should mean the fact or perception that a person is oriented toward men, women, or both in matters of personal intimacy. Such a construction is consistent with the stated legislative purpose of preventing unfair discrimination against those suspected of carrying HIV.

269. *Id.* § 47, 1988 Fla. Laws at 3032 (codified at FLA. STAT. § 627.429(4)(c) (Supp. 1988)).

270. *Id.* (codified at FLA. STAT. § 627.429(4)(c)(1)-(4) (Supp. 1988)).

271. *Id.* (codified at FLA. STAT. § 627.429(4)(d) (Supp. 1988)).

272. *Id.*

273. *See id.*

3. *Inquiries About Knowledge of HIV Exposure*

The Act allows insurers to ask applicants if they have tested positive for exposure to HIV or have been diagnosed with either AIDS, ARC or any other HIV-related infection.²⁷⁴ However, insurers are not permitted to ask whether a person has taken a test or has tested negative for HIV exposure or any HIV-related illness.²⁷⁵ The apparent purpose was to allow insurers to obtain information about preexisting conditions known to the applicant, but to forbid them from eliciting information tending to show that a person feared he or she was at risk for HIV infection.

4. *Confidentiality and Industry Data Banks*

Under the insurance provisions, insurers are required to keep all HIV-related information they obtain about applicants in strictest confidence.²⁷⁶ Such information cannot be disclosed outside the insurance company, insurance affiliates, agents or reinsurers, except to the person who has been tested.²⁷⁷ Moreover, specific test results cannot be given to industry data banks in any form that would permit the identity of the individual or the specific test results to be known.²⁷⁸

5. *Forbidden Practices*

No health insurance policy can exclude or limit coverage for exposure to HIV infection or any related illness "except as provided in a preexisting condition clause."²⁷⁹ The exception presents a problem for construction, in that a preexisting condition conceivably could include an undiscovered asymptomatic preexisting condition; and a preexisting condition clause conceivably could be written so as to deny coverage if the insured had any reason to believe he or she had been exposed to HIV.

This interpretation, however, would allow the exception to swallow the rule and would render the insurance provisions meaningless by permitting insurance companies to deny coverage for HIV infection in ways not applicable to other illnesses. Thus, to give effect to this provision, the preexisting condition must have been known or manifest to

274. *Id.* (codified at FLA. STAT. § 627.429(4)(e) (Supp. 1988)).

275. *Id.*

276. *Id.* (codified at FLA. STAT. § 627.429(f) (Supp. 1988)).

277. *Id.*

278. *Id.*

279. *Id.* (codified at FLA. STAT. § 627.429(5)(b) (Supp. 1988)).

the insured.²⁸⁰ The Legislature clearly did not intend to permit insurers to disallow coverage for a preexisting, albeit asymptomatic, HIV infection where the insured had little or no reason to believe that he or she was infected.²⁸¹ The 1989 Legislature should take action to define the term "preexisting condition" so that it cannot be expansively construed.

(a) *Group Policies*

The Omnibus AIDS Act significantly limits the types of exclusions that can be included in group insurance policies. It forbids insurers from excluding coverage of an eligible individual in a group policy "because of a positive test result for exposure to the HIV infection or a specific sickness or medical condition derived from such exposure."²⁸² It is irrelevant whether the test or illness occurred before or after the policy went into force. However, the statute expressly provides that this restriction will not apply "to individuals applying for coverage where individual underwriting is otherwise allowed by law."²⁸³

(b) *Individual Policies*

At the urging of insurers, the Senate inserted a provision allowing individual policies to contain a limited exclusion clause dealing with HIV-related illnesses.²⁸⁴ The effect is that individual policies may exclude coverage for AIDS or ARC if objective manifestations of AIDS or ARC, as those terms are defined by the CDC, are first exhibited

280. This conclusion is consistent with prior case law. *E.g.*, *American Sun Life Ins. Co. v. Remig*, 482 So. 2d 435, 436 (Fla. 5th DCA 1985); *Preferred Risk Life Ins. Co. v. Sande*, 421 So. 2d 566, 568-69 (Fla. 5th DCA 1982). However, these cases hinged at least in part on insurance contract language.

281. The comments of Representative Frankel, quoted *supra*, note 107, support this conclusion. Moreover, the Omnibus AIDS Act clearly prohibits certain inquiries of the insured designed to determine whether he or she might be at risk for HIV exposure, such as questions about sexual orientation and whether the individual has tested negative. Ch. 88-380, § 47, 1988 Fla. Laws 1996, 2033 (codified at FLA. STAT. § 627.429(5)(a) (Supp. 1988)).

282. Ch. 88-380, § 47, 1988 Fla. Laws 1996, 2033 (codified at FLA. STAT. § 627.429(5)(a) (Supp. 1988)).

283. *Id.*

284. The provision was added into the bill on the floor of the Senate on May 31, 1988, by Senator Myers, who expressly noted that this was the Golden Rule provision. Fla. S., transcript of proceedings at 15-16 (May 31, 1988) (transcript on file, *Florida State University Law Review*) (comments of Sen. Myers). It was so named because the provision was first suggested by a representative of the Golden Rule Insurance Co. on April 7. Fla. H.R., Comm. on Health Care, transcript of hearing at 45-47 (Apr. 7, 1988) (transcript on file, *Florida State University Law Review*) (comments of Marla Randolph Stevens).

within a year of the policy taking effect.²⁸⁵ The exclusion will not apply if the insured merely learns he or she is HIV-infected.²⁸⁶ Moreover, the manifestations of AIDS or ARC must be "objective" and can be established only by the "opinion of a legally qualified physician."²⁸⁷

One problem with this provision is its requirement that the manifestations must be in keeping with CDC definitions of AIDS and ARC. ARC especially is a problem, since the CDC has not defined it.²⁸⁸ The CDC might not do so, since many symptoms previously considered to fall under ARC are included in the 1987 revised Case Definition of AIDS.²⁸⁹ Thus, the reference to ARC in this provision is meaningless, since the term is incapable of definition under the statute's own terms.

Furthermore, the CDC definition of AIDS is quite complicated, usually involving numerous tests and the elimination of other potential explanations for immune deficiency.²⁹⁰ In some instances, the CDC does not permit diagnosis of AIDS if an individual happens to develop certain AIDS-associated symptoms that are improperly diagnosed and confirmed. Therefore, a person may develop "objective manifestations" that nevertheless would not presently qualify as AIDS under the CDC definition. However, since the statute in question does not specify when the CDC definition must be met,²⁹¹ any manifestations appearing within the first year probably can be confirmed *at a later date*. It would be irrelevant that confirmation of AIDS occurred after the year limitation expired, so long as the manifestations first were observed by the physician within the first year.

Policies containing this exclusion also must meet certain conditions. First, the insurer may not require a test for HIV infection as a condition of issuing the policy.²⁹² This limitation was included because at least one insurance company stated that without the exclusion it would begin testing everyone applying for individual policies.²⁹³ Second, the exclusion clause must be set forth separately, with an appropriate caption, placed conspicuously on the policy data page, and

285. Ch. 88-380, § 47, 1988 Fla. Laws 1996, 2034 (codified at FLA. STAT. § 627.429(5)(d) (Supp. 1988)).

286. *Id.*

287. *Id.*

288. See Fla. S., Comm. on HRS, transcript of hearing at 14-16 (May 3, 1988) (transcript on file, *Florida State University Law Review*) (comments of Gary Clarke of HRS).

289. See *supra* note 159.

290. *Id.*

291. Ch. 88-380, § 47, 1988 Fla. Laws 1996, 2034 (codified at FLA. STAT. § 627.429(5)(d) (Supp. 1988)).

292. *Id.* (codified at FLA. STAT. § 627.429(5)(a) (Supp. 1988)).

293. Fla. H.R., Comm. on Health Care, transcript of hearing at 46 (Apr. 7, 1988) (transcript on file, *Florida State University Law Review*) (comments of Marla Randolph Stevens).

must contain a statement that the exclusion will lapse if the insurer fails to assert it within two years of the policy taking effect.²⁹⁴ Third, if the exclusion is to be applied, the insurer must give notice to the insured within ninety days of learning of the latter's HIV-related condition.²⁹⁵ Otherwise, the insurer will be barred from asserting the exclusion.²⁹⁶ Finally, the policy must cover all AIDS- and ARC-related conditions that objectively manifest themselves more than a year after the policy takes effect.²⁹⁷

One problem of construction posed by this section arises from the requirement that objective manifestation be determined by "a legally qualified physician."²⁹⁸ The Omnibus AIDS Act does not specify what happens if the opinion of one physician is challenged by that of another. To prevent potential abuse, the courts should treat this as they would any disputed factual question. That is, the question of whether an objective manifestation of AIDS or ARC occurred would be a question of fact to be resolved by the fact finder. Thus, where one physician says that such an objective manifestation occurred, that opinion will not be conclusive where another physician says it did not.

(c) *Life Insurance Policies*

Life insurance policies may not exclude coverage based on death either directly or indirectly caused by HIV infection or related illnesses.²⁹⁹ However, insurers are permitted to exclude coverage for pre-existing conditions.³⁰⁰ The term "preexisting condition" should not be construed to mean an unknown, unmanifested preexisting condition; nor should it be construed to permit insurers to disallow coverage based on the likelihood that the insured has been exposed, though currently asymptomatic.³⁰¹ Thus, the policy would not cover death because of HIV-related illnesses that occurred within the specified exclusion period after the policy took effect, provided the insured knew he or she was HIV infected. Finally, this provision does not apply to policies insuring for accidents only.³⁰²

294. Ch. 88-380, § 47, 1988 Fla. Laws 1996, 2034 (codified at FLA. STAT. § 627.429(5)(d)(2) (Supp. 1988)).

295. *Id.* (codified at FLA. STAT. § 627.429(5)(d)(3) (Supp. 1988)).

296. *Id.*

297. *Id.* (codified at FLA. STAT. § 627.429(5)(d)(4) (Supp. 1988)).

298. *Id.* (codified at FLA. STAT. § 627.429(5)(d) (Supp. 1988)).

299. *Id.* (codified at FLA. STAT. § 627.429(5)(c) (Supp. 1988)).

300. *Id.*

301. See *supra* notes 279-81 and accompanying text.

302. Ch. 88-380, § 47, 1988 Fla. Laws 1996, 2033 (codified at FLA. STAT. § 627.429(5)(b) (Supp. 1988)).

(d) Limiting Benefits Payable for HIV-Related Illnesses

In a provision relating to the kinds of insurance forms that can be approved for use in Florida, the Omnibus AIDS Act forbids any clause that excludes coverage for HIV infection or AIDS or that treats these illnesses differently from other sicknesses or medical conditions.³⁰³ This section is inconsistent with the exception for individual policies noted above.³⁰⁴ However, in such cases, Florida courts generally construe the specific statute to be an exception to the more general one.³⁰⁵ Thus, this provision should apply in all instances except where an individual policy excludes coverage for HIV-related illnesses when a person objectively manifests AIDS or ARC within a year of coverage.

(e) Cancellation and Nonrenewal Based on HIV Infection

In its final major restriction on insurance policies, the Omnibus AIDS Act forbids the cancellation or nonrenewal of a policy because of the diagnosis or treatment of HIV-related illnesses.³⁰⁶ The Legislature added this restriction both to the portion of the insurance code dealing with health insurance policies³⁰⁷ and to the portion dealing with group or blanket health insurance policies.³⁰⁸ The legislative history indicates that this provision was patterned after a similar law adopted by the West Virginia Legislature.³⁰⁹

B. Health Maintenance Organizations

In a separate section of the Omnibus AIDS Act, the Legislature placed virtually the same limitations on HMOs that now apply to health and life insurance policies and MEWAs.³¹⁰ The only major divergence is that there is no provision for HMOs under any circum-

303. *Id.* § 48, 1988 Fla. Laws at 2035 (amending FLA. STAT. § 627.411(1)(f) (1987)).

304. *See id.* § 47, 1988 Fla. Laws at 2033-34 (codified at FLA. STAT. § 627.429(5) (Supp. 1988)).

305. *See supra* note 30.

306. Ch. 88-380, § 49, 1988 Fla. Laws 1996, 2035 (codified at FLA. STAT. § 627.6265 (Supp. 1988)); *id.* (codified at FLA. STAT. § 627.6646 (Supp. 1988)).

307. FLA. STAT. §§ 627.6057-.6498 (1987).

308. *Id.* §§ 627.651-.6698.

309. House Staff Analyst Tom Cooper stated: "Section[s] 47 and 48 [are] patterned after a law that was passed in West Virginia, which prohibits the canceling or non-renewal of insurance policies, health insurance policies of any insured because of a diagnosis of HIV or AIDS." Fla. H.R., Comm. on Health Care, transcript of hearing at 68 (Feb. 29, 1988) (transcript on file, *Florida State University Law Review*) (comments of Tom Cooper).

310. Ch. 88-380, § 51, 1988 Fla. Laws 1996, 2035-37 (codified at FLA. STAT. § 641.3109 (Supp. 1988)); *id.* § 52, 1988 Fla. Laws at 2037-38 (amending FLA. STAT. § 641.31 (1987)).

stance to exclude coverage where the insured objectively manifests symptoms of AIDS or ARC within a year of coverage.³¹¹

The section on HMOs, however, includes a garbled sentence in the provision dealing with HIV-related testing. It provides that “no health maintenance organization shall *only* utilize medical tests which are reliable predictors of risk.”³¹² In the original House draft, the sentence read “health maintenance organizations may only utilize medical tests which are reliable predictors of risk.”³¹³ The sentence became inexplicably garbled during the House-Senate compromise.

However, this provision should be read *in pari materia* with the section dealing with health and life insurance and MEWAs,³¹⁴ and the favored construction should be to ignore the word “no,” changing the phrase “health maintenance organization” to the plural. The sentence should read “health maintenance organizations shall only utilize medical tests which are reliable predictors of risk.”

IV. THE QUARANTINE AND ISOLATION PROVISIONS

Even before the opening day of the 1988 session, the most controversial components of the Omnibus AIDS Act proved to be those dealing with quarantine and isolation.³¹⁵ One lobbyist noted that the press focused almost exclusively on the quarantine issue in reports on early drafts of the Omnibus AIDS Act.³¹⁶ The Governor called for an

311. This is the Golden Rule provision. See *supra* notes 284-87 and accompanying text.

312. Ch. 88-380, § 51, 1988 Fla. Laws 1996, 2036 (codified at FLA. STAT. § 627.6646(4)(a) (Supp. 1988)) (emphasis added).

313. Fla. CS for HB 1519, § 95, at 88-89 (1988) (First Engrossed).

314. See ch. 88-380, § 47, 1988 Fla. Laws 1996, 2031 (codified at FLA. STAT. § 627.429 (Supp. 1988)).

315. The wording of preexisting law indicates that the terms “quarantine” and “isolation” as used in this context have special meanings. “Quarantine” means making certain places off limits, while “isolation” refers to ordering a person to remain in a certain location, so that disease will not be spread. See Fla. H.R., Comm. on Health Care, transcript of hearing at 49 (Feb. 29, 1988) (transcript on file, *Florida State University Law Review*) (comments of Tom Cooper) (“Quarantine is an action that is taken against a place, not a person.”). The Omnibus AIDS Act replaces the term “made off limits” for “quarantined” and deletes all other references to “quarantine.” However, this Article will continue to use the term “quarantine” to refer to the act of making a place off limits.

316. Lobbyist Charlene Carres, representing the American Civil Liberties Union and the Florida Task Force, stated:

I just wanted to make one—one comment on—the idea that there is an omnibus AIDS bill this year, coming up. And that’s been a problem that was created by the publicity that—that started in like mid-January on the fact that Florida is considering some sort of horrible quarantine bill that’s going to round up gay people. That’s the way this idea has been presented in the press all the way from *The New York Times* to the *Tallahassee Democrat* this morning.

Fla. H.R., Comm. on Health Care, transcript of hearing at 89 (Feb. 29, 1988) (transcript on file, *Florida State University Law Review*) (comments of Charlene Carres).

overhauled AIDS-related quarantine system in his opening address to the Legislature on April 5, 1988, prompting some criticism from lobbyists and legislators.³¹⁷ The Governor asked for the refurbishing of a state tuberculosis hospital at Lantana in which up to twenty-six individuals with sexually transmissible diseases could be isolated.³¹⁸

Reacting to the Governor's statements, spokesmen for civil liberties groups strongly urged the Legislature to abandon quarantine altogether because of its potential for abuse.³¹⁹ They often cited a 1987 case in Pensacola, Florida, in which a juvenile judge summarily confined a fourteen-year-old boy infected with HIV to a county mental health unit because of his infection and perceived promiscuity.³²⁰ However, proponents of quarantine argued that the incident in Pensacola only pointed out the need for reform of state statutes, not their abolition.³²¹ Legislators embraced reform over abolition with near unanimity.³²² The issue became not whether there would be a quarantine law, but its form and constitutionality.³²³ Both House and Senate

317. See Fla. H.R., Comm. on Health Care, transcript of hearing at 37-39 (Feb. 29, 1988) (comments of Charlene Carres); *id.* at 41 (comments of Rep. Gordon); *id.* at 42 (comments of Rep. Frankel). See also *Should We Quarantine Those Who Spread AIDS?*, Miami Herald, Apr. 10, 1988, at 1C, cols. 1-4 (guest articles by Gov. Bob Martinez and Rep. Lois Frankel).

318. See *Should We Quarantine Those Who Spread AIDS?*, *supra* note 317, at 1C, cols. 1-4.

319. Prior to the session and the governor's opening-day remarks, South Florida gay activist Bob Kunst stated that "'quarantine' . . . is a scare word and that will move the entire process backwards in terms of anyone out there cooperating on any level, from testing on down. This is not the way to trade off whatever you need to pass. This is absolutely the worst thing you could do." Fla. H.R., Comm. on Health Care, transcript of hearing at 82-83 (Feb. 29, 1988) (transcript on file, *Florida State University Law Review*) (testimony of Bob Kunst).

320. *Quarantine Indication of 'Hysteria'*, Pensacola News J., June 12, 1987, at 1A, col. 2 (detailing quarantine of a 14-year-old in a county mental health hospital).

321. See *infra* notes 334-36.

322. See generally Fla. H.R., Comm. on Health Care, transcript of hearing (Apr. 7, 1988) (transcript on file, *Florida State University Law Review*) (comments of various representatives).

323. Florida has recognized the validity of quarantine measures. *Moore v. Armstrong*, 149 So. 2d 36 (Fla. 1963); *Moore v. Draper*, 57 So. 2d 648 (Fla. 1952); *Varholy v. Sweat*, 153 Fla. 571, 15 So. 2d 267 (1943). Legal and medical commentators, however, almost uniformly argue that quarantine is useless against a "slow" retrovirus like HIV, which manifests no symptoms in the host for many years. MASTERS & JOHNSON, *supra* note 1, at 176; Curran, Clark & Gostin, *AIDS: Legal and Policy Implications of the Application of Traditional Disease Control Measures*, 15 LAW MED. & HEALTH CARE 27, 33 (1987); Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 87-90 (1985); Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1292 (1986); Note, *AIDS Quarantine in England and the United States*, 10 HASTINGS INT'L & COMP. L. REV. 113, 156-57 (1986); Note, *Recent Developments: Public Health and Employment Issues Generated by the AIDS Crisis*, 25 WASHBURN L.J. 505, 534 (1986). For a general history of quarantine, see Petteway, *Compulsory Quarantine and Treatment of Persons Infected with Venereal Diseases*, 18 FLA. L.J. 13 (1944); Cowles, *State Quarantine Laws and the Federal Constitution*, 25 AM. L. REV. 45 (1889). However, the Presidential Commission has endorsed a limited isolation procedure for people who refuse to stop infecting others. PRESIDENTIAL COMMISSION REPORT, *supra* note 3, at 77.

and the state's health administrators played a substantial role in resolving that issue.

A. General Legislative History

The compromise reached on the quarantine and isolation provisions supplemented a prior reform of state law that was only two years old. In 1986, as part of its massive overhaul of the state's health services programs,³²⁴ the Legislature enacted the Control of Sexually Transmissible Disease Act of 1986 (1986 Act).³²⁵ The 1986 Act superseded a 1919 quarantine statute³²⁶ that rested on the flimsiest of constitutional footings.³²⁷ Indeed, the 1919 statute as later amended purported to allow local health officials or their deputies to confine persons suspected of having venereal disease without a court hearing,³²⁸ but apparently the 1919 quarantine statute was seldom used in this way.³²⁹

Perhaps hoping to correct the 1919 statute's constitutional inadequacies,³³⁰ the 1986 Legislature enacted a new quarantine and isolation provision that provided for a court hearing and a standard of proof. Specifically, the Department of Health and Rehabilitative Services (HRS) was authorized to petition a court for an isolation or quarantine order. To obtain the order, HRS had to show by clear and convincing evidence that a substantial threat to the public health existed and that no less restrictive alternative existed other than quarantine or isolation.³³¹ At the same time, the 1986 Act provided that a person suspected of being infected with a sexually transmissible disease could be coercively examined and treated upon a court warrant.³³² The De-

324. Ch. 86-220, 1986 Fla. Laws 1603 (codified at scattered sections of FLA. STAT. (Supp. 1986)).

325. FLA. STAT. §§ 384.21-.34 (1987).

326. See ch. 7829, Laws of Fla. (1919).

327. Generally it is conceded that the state has the power to quarantine. See Gray, *The Parameters of Mandatory Public Health Measures and the AIDS Epidemic*, 20 SUFFOLK U.L. REV. 505, 510-16 (1986) (discussing court opinions that generally uphold quarantines).

328. See FLA. STAT. §§ 384.14-.17 (1985).

329. Gary Clarke of HRS indicated that he knew of no instance in recent years in which an isolation order was obtained except the incident in Pensacola, Florida. Fla. H.R., Comm. on Health Care, transcript of hearing at 50 (Feb. 29, 1988) (transcript on file, *Florida State University Law Review*) (comments of Gary Clarke).

330. The 1919 statute, taken literally, probably would have been held unconstitutional even under state law. See, e.g., *In re Beverly*, 342 So. 2d 481 (Fla. 1977) (civil commitment proceedings must operate under the clear and convincing standard of proof, which necessarily entails a court hearing).

331. FLA. STAT. § 384.28 (1987).

332. *Id.* This power apparently never was tested in any court proceeding. During the 1988 Legislature, administrators from HRS indicated that it was used perhaps only five times a year to detain, examine and treat people carrying venereal diseases such as syphilis. Fla. H.R., Comm. on Health Care, transcript of hearing at 50 (Feb. 29, 1988) (transcript on file, *Florida State University Law Review*) (comments of Gary Clarke).

partment could obtain the warrant by showing, with a preponderance of the evidence, that a threat to public health existed.³³³

The 1986 Act's first application in the case of the fourteen-year-old Pensacola, Florida, boy created a controversy reported in the media nationwide.³³⁴ Indeed, HRS administrators in Tallahassee found themselves in the embarrassing position of countermanding their own local officers and requesting the Pensacola court to dissolve its isolation order against the boy.³³⁵ The Pensacola case taught HRS that something more was needed to restrain the acts of local officials and to keep Florida's AIDS-related health programs from being overridden by controversy.³³⁶

For its answer, HRS turned to a package of additions to the 1986 Act lumped under a general heading of "due process."³³⁷ In early February 1988, HRS released a draft of legislation it proposed for the upcoming session containing its new "due process" requirements.³³⁸ The centerpiece of the draft³³⁹ was an extensive series of additions to the 1986 Act. With technical modifications and the addition of several other procedural safeguards, the HRS quarantine and isolation proposal ultimately became a part of the Omnibus AIDS Act as signed into law.

333. FLA. STAT. § 384.28 (1987).

334. See *Quarantine Indication of 'Hysteria'*, Pensacola News J., June 12, 1987, at 1A, col. 2. Gary Clarke, HRS spokesman, suggested that the incident in Pensacola was one of several in which local officials erroneously applied the short-term hold procedures to cases that should have been treated under an isolation order. Clarke stated:

What's turned out in a couple of cases around the state, either proposed or actual, is the examination and treatment language which we were intending to be short-term has actually been used for proposed long-term hospitalization. And really, in order to clarify our intent, which was to use a higher standard when confinement was for a longer period of time, we recommended doing both. The other thing that we considered is that, when it becomes—when it comes to trial or becomes a hearing—is the clear and convincing standard and preponderance—it's very difficult to say which is which. And we felt that at least as a department we should be held to that higher burden.

Fla. H.R., Comm. on Health Care, transcript of hearing at 48 (Feb. 29, 1988) (transcript on file, *Florida State University Law Review*) (comments of Gary Clarke).

335. See *Sexually Active Youth with AIDS Escapes Parental Custody*, Tallahassee Democrat, June 12, 1988, at 7D, col. 1.

336. Fla. H.R., Comm. on Health Care, transcript of hearing at 50-51 (Feb. 29, 1988) (transcript on file, *Florida State University Law Review*) (comments of Gary Clarke of HRS).

337. See *id.* at 65 (Apr. 7, 1988) (comments of Gary Clarke).

338. Fla. Dep't of HRS, Comprehensive Legislation Related To: Acquired Immune Deficiency Syndrome (draft of Feb. 1988) (draft on file, *Florida State University Law Review*).

339. The draft also included an educational program, authorization for patient care networks and some modifications to criminal code provisions dealing with sexual acts. It contained no nondiscrimination provisions nor any of the extensive testing and confidentiality restrictions found in the Omnibus AIDS Act signed by the governor, essentially additions by the House. Compare *id.* with Fla. C.S. for H.B. 1519 (1988) (First Engrossed).

Legislators repeatedly noted that these would be of very limited application in Florida. Explaining the bill to the full House on May 10, Representative Frankel argued that the isolation provisions were to be reserved for "those extreme cases, where those persons who, despite our best attempts to . . . give them education and counseling—We do allow . . . with . . . much due process, a procedure . . . for isolation for short periods of time."³⁴⁰ In an interview shortly after the session ended, Representative Frankel argued that the behavior resulting in an isolation order would have to reach such a level as to be virtually chargeable as a criminal offense.³⁴¹

During committee hearings early in the session, Representative Elaine Gordon,³⁴² one of the House bill's primary sponsors, stated that the isolation provisions must not be used to isolate individuals simply because of sexual orientation, intravenous drug abuse, or even for any behavior that did not pose a "wanton threat to the public."³⁴³ An HRS representative, Gary Clarke, agreed and added that isolation would only be appropriate in "very limited, egregious, notorious cases."³⁴⁴ This conclusion is reinforced by other legislative history³⁴⁵ and the language added to the state's sexually transmissible diseases law by the Omnibus AIDS Act.

B. Isolation and Examination of Individuals

The Omnibus AIDS Act provides that HRS will bear a greater burden of proof when seeking the isolation or compulsory examination of persons carrying sexually transmissible diseases.

340. Fla. H.R., transcript of proceedings at 5 (May 10, 1988) (transcript on file, *Florida State University Law Review*).

341. Interview with Rep. Frankel (June 21, 1988) (notes on file, *Florida State University Law Review*).

342. Dem., North Miami.

343. Fla. H.R., Comm. on Health Care, transcript of hearing at 41 (Apr. 7, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Gordon).

344. *Id.* at 61 (comments of Gary Clarke).

345. During the House AIDS Task Force meeting on April 7, Representative Frankel stated: [W]e do recognize there's going to be a small segment, and a very small segment, of our society who—uh—we call noncompliant carriers. *They're criminals*. There is a criminal element in every area of life. And for those people we do have a provision in our bill to treat them in a just and fair way, and with due process, but recognizing that there will be some people who conventional means cannot be controlled. But we don't emphasize that part of our bill, because anybody who believes that locking up 20 prostitutes is going to solve the AIDS problem is quite mistaken, because I can assure you that the million and a half people who are infected in this country are not prostitutes. Fla. H.R., Comm. on Health Care, transcript of hearing at 3-4 (Apr. 7, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Frankel) (emphasis added).

1. *Compulsory Isolation*

One new element of proof is imposed on compulsory isolation petitions. In addition to proving a significant threat to public health and no less restrictive means other than isolation, HRS must now show the court:

That the person with the sexually transmissible disease has been counseled about the disease, about the significant threat the disease poses to other members of the public, and about methods to minimize the risk to the public and despite such counseling indicates an intent to expose the public to infection from the sexually transmissible disease.³⁴⁶

This provision requires HRS to attempt noncoercive intervention and counseling prior to seeking an isolation order, and requires HRS to present proof that the individual actually intends to engage in behavior likely to transmit the disease, which will be virtually impossible in all but a few cases.

To further protect civil liberties, the Legislature added a number of procedural requirements. The isolation hearing must be held no earlier than seventy-two hours after the individual has received written notification, and HRS must submit a list of the proposed actions HRS intends to take and the reasons for each one. The individual, whose real name may not be used during the proceedings, also must be provided an attorney at the state's expense if he or she is unable to afford one. At the hearing, the individual has a right to be present, to cross-examine witnesses and to present evidence. Finally, each isolation order can last no longer than 120 days, or a shorter time if HRS or the court determines that the individual no longer poses a threat to the community. The individual subject to isolation has an explicit right to petition for the length of time to be less than the full 120 days.³⁴⁷

2. *Compulsory Examination and Treatment*

The Omnibus AIDS Act substantially modifies HRS's statutory authorization to conduct compulsory examinations and treatment of people suspected of carrying sexually transmissible diseases.³⁴⁸ Most importantly, the Legislature raised HRS's burden of proof for obtain-

346. Ch. 88-380, § 30, 1988 Fla. Laws 1996, 2018 (codified at FLA. STAT. § 384.28(2)(b) (Supp. 1988)).

347. *Id.* (codified at FLA. STAT. § 348.28(4) (Supp. 1988)).

348. *Id.* § 29, 1988 Fla. Laws at 2017-18 (codified at FLA. STAT. § 384.27 (Supp. 1988)).

ing a compulsory examination order to require clear and convincing evidence that a threat to the public health and welfare exists.³⁴⁹

Tracking some of the language applicable to isolation orders, the Omnibus AIDS Act also requires that a court hearing be held in which the suspected individual has at least seventy-two hours advance notice.³⁵⁰ HRS must provide a list of actions it proposes to take and a reason for each one, and the state must provide an attorney if the individual is unable to afford one. At the hearing, the individual cannot be identified by his or her real name,³⁵¹ and has the right to attend, to cross-examine witnesses, and to present evidence.³⁵² In issuing a compulsory examination order, the court is authorized to order a specific course of treatment and counseling if the disease is capable of being rendered noncommunicable.³⁵³

However, the compulsory examination section is likely to have only limited application to AIDS-related matters. Qualifying language states that when a disease is incurable or cannot be treated in any way except hospitalization, HRS must seek an isolation order, although it may still request that a person be examined first.³⁵⁴ This proviso strongly suggests that when HRS knows a person is infected with HIV, which presently is incurable, it cannot request a compulsory examination order at all, but must request isolation.

3. *Prehearing Detention*

The Omnibus AIDS Act grants HRS a power it previously lacked: the ability upon an *ex parte* court order to detain an individual prior to an isolation or examination hearing.³⁵⁵ However, this addition to the law is extremely limited in scope. HRS must submit evidence to a court that the individual actually is infected with a sexually transmissible disease, poses an immediate and substantial threat to the public, evinces an intentional disregard for the health of others, and refuses to act in a manner that will not place others at risk.³⁵⁶

Additionally, HRS must show that the individual will leave the jurisdiction before a hearing could be held under either the isolation or examination provisions and will continue to expose the public to the risk of a sexually transmissible disease before the hearing can be

349. *Id.* (codified at FLA. STAT. § 384.27(3) (Supp. 1988)).

350. *Id.* (codified at FLA. STAT. § 384.27(4)(a) (Supp. 1988)).

351. *Id.* § 32, 1988 Fla. Laws at 2021 (codified at FLA. STAT. § 384.282 (Supp. 1988)).

352. *Id.* § 29, 1988 Fla. Laws at 2017 (codified at FLA. STAT. § 384.27(4) (Supp. 1988)).

353. *Id.* (codified at FLA. STAT. § 384.27(6) (Supp. 1988)).

354. *Id.*

355. *Id.* § 31, 1988 Fla. Laws at 2019-21 (codified at FLA. STAT. § 384.281(1) (Supp. 1988)).

356. *Id.* (codified at FLA. STAT. § 284.281(1)(a)-(c) (Supp. 1988)).

held.³⁵⁷ The court is forbidden to enter a pretrial detention order unless HRS has requested either an isolation or examination hearing and is likely to prevail on the merits at that hearing, has shown that a substantial danger to the public health will exist until the hearing date, and that no other reasonable alternative exists to reduce the threat.³⁵⁸

In keeping with its new "due process" policy, the Omnibus AIDS Act added other procedural safeguards. Most importantly, the detention order itself is good for no longer than three days,³⁵⁹ the same notice HRS must give in either an examination or isolation hearing. Second, the individual who will be detained has a specific right to bail, a bail hearing within twenty-four hours of detention, an attorney to represent him or her at the hearing, and a right to present witnesses and evidence and to cross-examine all witnesses.³⁶⁰ Third, the individual must be identified pseudonymously in the proceedings and related documents.³⁶¹ Finally, there is a right to habeas corpus relief in all prehearing detention cases.³⁶²

4. *Constitutional Concerns*

It is likely that the addition of new "due process" elements, especially the high standard of proof, will render the isolation provisions constitutional. Both the Florida³⁶³ and United States³⁶⁴ Supreme Courts have indicated that a standard of proof by clear and convincing evidence meets general constitutional requirements in analogous proceedings. However, even if the isolation provisions are upheld, they may produce other troubling constitutional questions.

One of the most important questions is whether the state will be entitled, in subsequent or collateral criminal proceedings, to use any information obtained during compulsory examination against the individual. The likely answer is that it will not. In the case of *In re Beverly*,³⁶⁵ the Supreme Court of Florida stated that following a civil commitment proceeding for incompetency, "any admissions, information or evidence divulged by the person being examined" must be

357. *Id.* (codified at FLA. STAT. § 384.281(1)(d)(2)-(3) (Supp. 1988)).

358. *Id.* (codified at FLA. STAT. § 384.281(2) (Supp. 1988)).

359. *Id.* (codified at FLA. STAT. § 384.281(6) (Supp. 1988)).

360. *Id.* (codified at FLA. STAT. § 384.281(4) (Supp. 1988)).

361. *Id.* § 32, 1988 Fla. Laws at 2021 (codified at FLA. STAT. § 384.282 (Supp. 1988)).

362. *Id.* (codified at FLA. STAT. § 384.281(5) (Supp. 1988)). This right, however, is guaranteed by the Florida Constitution and thus would exist with or without this provision. See FLA. CONST. art. I, § 13.

363. *In re Beverly*, 342 So. 2d 481 (Fla. 1977).

364. *Addington v. Texas*, 441 U.S. 418 (1979).

365. 342 So. 2d 481 (Fla. 1977).

excluded from related criminal proceedings. No reason appears why the same requirement will not be enforced when the civil commitment is in the nature of a quarantine.

Another question is whether the isolation statute itself is simply a criminal sanction disguised as civil commitment. Under the isolation statute, the state is proscribing conduct that necessarily will constitute a knowing violation of other HIV-related criminal provisions.³⁶⁶ Yet instead of being put to the protections surrounding a criminal trial, such as the requirement of proof beyond a reasonable doubt and the right to a jury trial, the state need only meet the lesser "clear and convincing" standard before a judge. Since the conduct in question usually can be considered criminal if the state wishes, a person facing an isolation petition could argue that his or her right to due process,³⁶⁷ pretrial release upon reasonable terms,³⁶⁸ a jury trial,³⁶⁹ or prosecution only upon the filing of a sworn information³⁷⁰ are being denied.

Nevertheless, the isolation statute conceivably falls within the state's *parens patriae* power which allows it to confine individuals who are under legal disabilities.³⁷¹ The Supreme Court of Florida indicated that under civil commitment statutes this power includes authority to confine persons found to be dangerous to themselves or others.³⁷² Because the isolation statute could be interpreted not as a penal statute, but as one providing for mandatory treatment and counseling, the courts also may view it as falling within the state's public health powers. For these reasons, it seems likely that the isolation statute will be upheld, provided it is not administered in a penal manner.³⁷³

However, where the state's actions reveal a penal motive, and not a desire to treat and counsel, the isolation and treatment provisions will assume all the attributes of a criminal statute and should be regarded

366. See *infra* notes 378-97 and accompanying text. For a person to be apprehended under the isolation provisions, the state must present evidence that the individual has engaged in behavior likely to transmit the virus despite counseling of the dangerousness of this activity to others. Ch. 88-380, § 30, 1988 Fla. Laws 1996, 2018 (codified at FLA. STAT. § 384.28(2)(b) (Supp. 1988)). In most instances, this type of evidence will be sufficient to support probable cause under one of the HIV-related criminal provisions. See *infra* notes 378-97 and accompanying text.

367. See U.S. CONST. amends. V, XIV; FLA. CONST. art. I, § 9.

368. U.S. CONST. amends. V, XIV; FLA. CONST. art. I, § 14.

369. FLA. CONST. art. I, § 16.

370. *Id.* § 15.

371. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972).

372. *In re Beverly*, 342 So. 2d 481 (Fla. 1977).

373. This conclusion is consistent with dicta from the United States Supreme Court. See *Robinson v. California*, 370 U.S. 660, 666 (1962) (sequestration may be justified for compulsory treatment of one infected with venereal disease).

as such. This would require the courts to declare the statute unconstitutional as applied to the particular individual since the constitutional rigors required of criminal proceedings cannot be met under this provision.

C. Quarantine of Places

One area of preexisting law concerning sexually transmissible diseases that was left substantially unchanged in the 1986 Act deals with quarantine of places.³⁷⁴ None of the due process safeguards added into the Omnibus AIDS Act apply to quarantine orders since each by their own terms apply only to the isolation of people.³⁷⁵ As a result, there is only the preexisting requirement of proof by clear and convincing evidence that (a) there is a significant amount of sexual activity occurring in the place that is likely to transmit the sexually transmissible disease; and (b) no other reasonable means of correcting the problem exists.³⁷⁶ However, because quarantine of places inevitably will involve property interests, general due process requirements and the heavy burden of proof placed on the state will dictate that HRS must provide notice prior to the required hearing before a circuit court.³⁷⁷

V. CRIMINAL PROVISIONS

As part of the 1986 Act, the Legislature for the first time enacted a statute specifically making it a criminal offense for an HIV-infected person to engage in sexual intercourse with another person.³⁷⁸ The statute had problems. For one thing, it failed to define the broad term "sexual intercourse" and thus theoretically left open the possibility of

374. FLA. STAT. § 384.28 (1987).

375. See Ch. 88-380, § 30, 1988 Fla. Laws 1996, 2018-19 (codified at FLA. STAT. § 384.28 (Supp. 1988)).

376. *Id.* (codified at FLA. STAT. § 384.28(2) (Supp. 1988)). There has been no reported litigation in Florida involving the closure of adult establishments because of a belief that HIV was being spread there. The issue has come up elsewhere, however. See *Suburban Video, Inc. v. City of Delafield*, 694 F. Supp. 585 (E.D. Wis. 1988); *Doe v. City of Minneapolis*, 693 F. Supp. 774 (D. Minn. 1988); *Broadway Books, Inc. v. Roberts*, 642 F. Supp. 486 (E.D. Tenn. 1986); *City of New York v. New Saint Mark's Baths*, 130 Misc. 2d 911, 497 N.Y.S.2d 979 (Sup. Ct.), *order aff'd*, 122 A.D.2d 747, 505 N.Y.S.2d 1015 (Sup. Ct. App. Div. 1986); *Treants Enters., Inc. v. Onslow County*, 83 N.C. App. 345, 350 S.E.2d 365 (Ct. App. 1986), *aff'd*, 320 N.C. 776, 360 S.E.2d 783 (1987).

377. For a discussion of the law applicable to this issue, see generally Rabin, *The AIDS Epidemic and Gay Bathhouses: A Constitutional Analysis*, 10 J. HEALTH POLITICS, POLICY & L. 729 (1986); Note, *Preventing the Spread of AIDS by Restricting Sexual Conduct in Gay Bathhouses: A Constitutional Analysis*, 15 GOLDEN GATE U.L. REV. 301 (1985). See also Note, *Zoning and the First Amendment: A Municipality's Power to Control Adult Use Establishments*, 55 UMKC L. REV. 263 (1987).

378. FLA. STAT. § 384.24 (1987).

conviction for sexual acts unlikely to transmit HIV to another person.³⁷⁹ Additionally, the statute only required an infected person to inform his or her partner of the HIV infection—but it did not require that the partner consent.³⁸⁰ At least in theory, no crime would have occurred under the 1986 Act if the defendant revealed the fact of HIV infection and then raped the sexual partner.³⁸¹

A. *Failure to Notify Sexual Partners of HIV Infection*

Newspaper articles brought to the forefront a controversy about people deliberately spreading HIV.³⁸² The 1988 Legislature responded by revisiting the 1986 criminal sanction. However, it confined its revision of the 1986 Act to two minor adjustments: it updated the statute to reflect the new international name given the AIDS virus (HIV), and it added a consent requirement.³⁸³ Thus, a defendant no longer could escape prosecution by informing the victim of his or her HIV infection prior to committing sexual battery.³⁸⁴

The broad term “sexual intercourse” remained in the Omnibus AIDS Act. As a result, it is still possible for a defendant to be prosecuted for sexual acts unlikely to transmit HIV. As noted by scientists, one potential justification for this is that any sexual act with an infected person carries some risk that HIV will be transmitted.³⁸⁵ Under this theory, the statute criminalizes exposing another person to this risk without consent, which may be a valid state objective given the state’s broad health-related powers.

The problem with this theory is that if the sexual act was unlikely to transmit HIV and otherwise was not a crime, then the statute actually criminalizes the status of being HIV infected. Since status crimes generally are unconstitutional,³⁸⁶ the statute may be unenforceable to the extent it criminalizes that status. The courts likely will be called upon to determine whether the Legislature can criminalize exposing someone to a slight or moderate risk of becoming HIV infected.

B. *Prostitution and Procuring*

The Omnibus AIDS Act added an entirely new criminal sanction aimed at prostitutes who know that they are HIV infected. Any per-

379. *Id.*

380. *Id.*

381. *Id.*

382. *E.g., Judge Ups Bail for Prostitute Linked to AIDS*, Tampa Tribune, May 13, 1988, at B1, col. 4; *Prostitute with AIDS Is Freed*, Tallahassee Democrat, May 21, 1988, at B14, col. 1.

383. Ch. 88-380, § 27, 1988 Fla. Laws 1996, 2016 (amending FLA. STAT. § 384.24 (1987)).

384. *Id.*

385. MASTERS & JOHNSON, *supra* note 1, at 20-26.

386. *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

son committing an act of prostitution after testing positive for HIV infection, who knows that he or she is infectious, could be found guilty of a first-degree misdemeanor.³⁸⁷ The sexual act must be of a type likely to transmit HIV to others.³⁸⁸ This offense is independent of the crime of prostitution, which can be charged separately.³⁸⁹

Recognizing that procurers of prostitutes also are a likely vector of HIV, the Omnibus AIDS Act provided an equivalent penalty as a first-degree misdemeanor³⁹⁰ for those who purchase the services of prostitutes.³⁹¹ The procurer must know of his or her HIV infection and the likelihood of transmission to others. Like its counterpart, the statute requires that the sexual act be of a kind likely to transmit the infection.³⁹²

C. *Abolition of the "Year and a Day Rule"*

One of the least discussed and potentially most far-reaching of the AIDS-related criminal reforms of the 1988 session was the abolition of the common law "year and a day rule."³⁹³ Under this rule, a person could not be prosecuted for any form of homicide if the victim did not die within a year and a day of the injury.³⁹⁴ None of the legislative history indicates that a conscious link was made between abolition of the rule and the prosecution of AIDS-related crimes.

However, the abolition of the rule makes it easier for people infected with HIV to be prosecuted for homicides or attempted homicides.³⁹⁵ By knowingly engaging in any act likely to transmit the virus, the infected person may have committed a future murder. If by chance the "victim" dies before the "assailant," the latter could be prosecuted for homicide even if the death occurred some years removed.

387. Ch. 88-380, § 44, 1988 Fla. Laws 1996, 2029 (amending FLA. STAT. § 796.08(4) (1987)).

388. *Id.*

389. *Id.*

390. *Id.* (amending FLA. STAT. § 760.08(6) (1987)).

391. *Id.*

392. *Id.*

393. Ch. 88-39, 1988 Fla. Laws 276, 276-77 (codified at FLA. STAT. § 782.035 (Supp. 1988)). This provision took effect immediately upon being signed into law on May 18, 1988, and applies to any injury inflicted on or after the effective date. *Id.* §§ 2-3, 1988 Fla. Laws at 277.

394. The rule originally came into Florida law as part of the common law of England, which was adopted as the common law of Florida upon statehood in 1845. See *Roberson v. State*, 42 Fla. 212, 28 So. 427 (1900).

395. This possibility is suggested in Field & Sullivan, *AIDS and the Criminal Law*, 15 LAW MED. & HEALTH CARE 46, 48 (1987).

This reform is likely to be a fertile source of litigation as courts deal with the vexing problem of causation.³⁹⁶ For instance, it may be possible to show that the “victim” actually was at risk for HIV infection and may not have gotten the disease from the “assailant.” The requirement of proof beyond a reasonable doubt would render the state’s case impossible in such instances. Because of such problems, homicide and attempted homicide charges should be reserved only for the most serious and deliberate cases, such as injecting HIV-contaminated fluids into another person’s bloodstream.

D. *Knowingly Donating Infected Blood or Tissue*

Responding to fears of infection in donated blood and human tissue, the 1988 Legislature created another new criminal offense. This provision makes it a third-degree felony to knowingly donate infected blood or other human tissue after the donor has been informed that he or she may communicate the disease to others.³⁹⁷ It is likely that a person charged under this section also could be charged with murder or attempted murder based partly on the abrogation of the year and a day rule.

VI. TESTING AND CONFIDENTIALITY PROVISIONS

The 1988 Legislature enacted a broad series of new measures requiring strict confidentiality for test results.³⁹⁸ These provisions, combined with the nondiscrimination provisions, were designed to create an environment in which people with HIV-related disorders will not fear reprisal if they take a test.³⁹⁹ Indeed, the Omnibus AIDS Act prefaced its testing and confidentiality provisions with a statement of legislative intent indicating that “the public health will be served by facilitating informed, voluntary, and confidential use of tests designed to detect Human Immunodeficiency Virus infection.”⁴⁰⁰

A. *General History*

Prior to 1988, Florida law contained only two testing and confidentiality provisions specifically applicable to HIV infection. In 1985, the

396. For a general discussion of this problem, see *id.* at 48; Robinson, *AIDS and the Criminal Law: Traditional Approaches and a New Statutory Proposal*, 14 *HOFSTRA L. REV.* 91, 96-97 (1985).

397. Ch. 88-380, § 22, 1988 Fla. Laws 1996, 2015 (codified at FLA. STAT. § 381.6105(10)(b) (Supp. 1988)).

398. *Id.* § 21, 1988 Fla. Laws at 2008 (codified at FLA. STAT. § 381.609 (Supp. 1988)).

399. See *supra* notes 108-11 and accompanying text.

400. Ch. 88-380, § 21, 1988 Fla. Laws 1996, 2008 (codified at FLA. STAT. § 381.609(1) (Supp. 1988)).

Legislature enacted a statute authorizing the establishment of confidential alternative testing sites.⁴⁰¹ The purpose was to encourage voluntary HIV testing by permitting people to remain anonymous. The Legislature specified that all test results obtained at the alternative sites would remain confidential, with any breach punishable as a first-degree misdemeanor.⁴⁰² Moreover, any results of such tests could not be used to determine suitability for employment or for insurance underwriting.⁴⁰³

The second relevant portion of the 1986 Act specified confidentiality for all HRS records concerning sexually transmissible diseases.⁴⁰⁴ Specifically, they would be exempt from public disclosure laws and not subject to subpoena except in certain narrow circumstances. These exceptions include release by consent for emergencies to protect the health or life of a named party, or in instances of child abuse.⁴⁰⁵ Finally, the 1986 Act prohibited the examination of any HRS employee in any proceeding about the existence of records or other information relating to persons examined or treated for sexually transmissible diseases.⁴⁰⁶

B. Registration of Testing Services

In 1988, the Legislature extended the general principles of its prior law to private parties who perform HIV-related tests. The first provision concerns the registration of private testing services. No person can conduct or hold himself out as conducting an HIV testing service without first being registered with HRS.⁴⁰⁷

A long list of requirements precedes registration. A testing facility must have a testing director with a minimum number of contact hours in HIV-related matters, employ a licensed physician who supervises all medical care, provide pretest counseling about the meaning of HIV tests, corroborate all positive tests before confronting the patient with the results, and provide personal post-test counseling by people with a minimum level of training.⁴⁰⁸ During legislative hearings, legislators

401. FLA. STAT. § 381.606(2) (1987).

402. *Id.* § 381.606(4)(a).

403. *Id.* § 381.606(5).

404. *Id.* § 384.29.

405. *Id.* § 384.29.

406. *Id.* § 384.29(3).

407. Ch. 88-380, § 21, 1988 Fla. Laws 1996, 2011 (codified at FLA. STAT. § 381.609(4) (Supp. 1988)).

408. *Id.*

emphasized the need for post-test counseling as one of the most important components of the registration requirements.⁴⁰⁹

C. *Informed Consent*

Testing facilities must obtain informed consent prior to administering an HIV test.⁴¹⁰ Informed consent consists of an explanation of the test's purposes, potential uses, limitations and meaning, followed by either oral or written consent.⁴¹¹ Where the consent is oral, there must be documentation in the patient's medical record that the test was explained and consent obtained.⁴¹²

Although the Omnibus AIDS Act does not create a civil cause of action for failure to obtain informed consent, it is likely that such a cause can be inferred from it. Such a conclusion is reinforced by reading the Omnibus AIDS Act in tandem with the Florida Medical Consent Law (Consent Law)⁴¹³ and the common law of Florida.

Generally, performing a medical procedure without informed consent can constitute assault, battery or negligence, and is actionable as such.⁴¹⁴ However, the Consent Law bars recovery in tort for medical procedures performed by a practitioner without adequate consent where (1) some form of consent was obtained under accepted standards *and* a reasonable individual would have understood the procedure, its alternatives and risks from the information actually provided; or (2) the patient reasonably would have undergone the procedure had he or she been advised of the risks and alternatives.⁴¹⁵

The first of these exceptions may be interpreted as a "substantial compliance" provision. Reading it together with the Omnibus AIDS Act, it is likely that physicians who substantially comply with the informed consent provision will be protected by the Consent Law. The second of the Consent Law's exceptions, however, is unlikely to apply in the context of HIV testing since it implies some sort of necessity for the procedure. An HIV test is seldom necessary, even in many emergency situations, since health care workers generally can protect themselves from HIV infection by assuming that every patient is infected. As a result, the failure to obtain informed consent that substantially

409. *E.g.*, Fla. S., Comm. on Commerce, transcript of hearing at 3 (May 26, 1988) (transcript on file, *Florida State University Law Review*) (testimony of Rep. Frankel).

410. Ch. 88-380, § 21, 1988 Fla. Laws 1996, 2008-09 (codified at FLA. STAT. § 381.609(2)(a)-(b) (Supp. 1988)).

411. *Id.*

412. *Id.*

413. FLA. STAT. § 768.46 (1987).

414. *Brown v. Wood*, 202 So. 2d 125, 130 (Fla. 2d DCA 1967).

415. FLA. STAT. § 768.46 (1987).

complies with the terms of the Omnibus AIDS Act may subject the person to an action in tort, even in an emergency situation.⁴¹⁶

D. *Disclosing Test Results and Counseling*

The Omnibus AIDS Act imposes on all testing facilities a duty of confirming every positive test result *before* disclosing it to the patient.⁴¹⁷ Again, no civil cause of action is created for failure to do so, but one may be inferred by the courts. This particularly may be true where serious harm results, such as if the patient commits suicide. Under such circumstances, an action for malpractice might be entertained by the courts based on failure to follow the statutory procedure and the foreseeability of the harm.

Similarly, the Omnibus AIDS Act imposes several specific requirements for post-test counseling that may be interpreted as a standard of care in a malpractice claim. First, the counseling must be face-to-face. Second, the counselor must disclose both the meaning of the test and the need for additional testing. Third, the patient must be told of measures to prevent transmission of HIV infection to others. Fourth, the counselor must provide information on appropriate health care services available in the area, including those for mental health. And fifth, the patient must be told of the benefits of locating those people he or she may have infected and the availability of state resources to assist in this pursuit.⁴¹⁸

E. *Confidentiality*

The Omnibus AIDS Act extends sweeping confidentiality protections to all information obtained from any HIV test performed in Florida.⁴¹⁹ None of this information may be disclosed or compelled to be disclosed,⁴²⁰ and an intentional violation of confidentiality constitutes a second-degree misdemeanor.⁴²¹ Additionally, it is likely that a

416. Representatives of the Florida Medical Association have argued to the contrary. *AIDS-Law Glitch Nullifies Consent Clause, Medical Leaders Say*, Tallahassee Democrat, Aug. 1, 1988, at 1C, col.1. However, their arguments overlook the fact that the Consent Law does not bar recovery for failure to obtain informed consent, but merely specifies two narrow instances in which recovery will not be allowed. It thus seems likely that the courts will reject the Association's interpretation.

417. Ch. 88-380, § 21, 1988 Fla. Laws 1996, 2009 (codified at FLA. STAT. § 381.609(2)(d) (Supp. 1988)).

418. *Id.* (codified at FLA. STAT. § 381.609(2)(e) (Supp. 1988)).

419. *Id.* (codified at FLA. STAT. § 381.609(2)(f) (Supp. 1988)).

420. *Id.*

421. *Id.* (codified at FLA. STAT. § 381.609(5)(b) (Supp. 1988)).

violation of confidentiality could create a civil cause of action predicated on invasion of privacy.⁴²²

The exceptions to confidentiality include release to the patient or an authorized representative, and communication between health care providers on a consulting basis.⁴²³ A court order compelling the release of the records can be obtained if the person seeking the test results can show a compelling need that cannot be accommodated by any other means.⁴²⁴ In assessing "compelling need," the court must weigh the need for disclosure against the privacy interests at stake and the public interest in guaranteeing confidentiality as a means to encourage voluntary testing.⁴²⁵

In all court proceedings in which the release of test results is at issue, pseudonyms must be substituted for the true names of the test subjects.⁴²⁶ The test subjects also must be afforded an opportunity to participate in the proceedings, which must be in camera unless they agree otherwise.⁴²⁷ Whenever the court determines that test results should be released, it must impose appropriate prohibitions of future disclosure and attach a statement noting that further disclosure is a violation of state law.⁴²⁸

F. *The Spousal Exception*

The Omnibus AIDS Act recognizes one major exception to the guarantee of confidentiality. A medical practitioner cannot be held criminally or civilly liable for disclosing confidential information if (a) a patient has tested positive for HIV infection and discloses the identity of a spouse; (b) the practitioner recommends that the patient notify his or her spouse of the positive test and refrain from engaging in behavior likely to transmit the virus, and the patient refuses; and (c) "a perceived civil duty or the ethical guidelines of the profession"

422. See, e.g., *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944); *Cape Publications, Inc. v. Hitchner*, 514 So. 2d 1136 (Fla. 5th DCA 1987).

423. Ch. 88-380, § 21, 1988 Fla. Laws 1996, 2008-10 (codified at FLA. STAT. § 381.609(2)(f)(3)-(4) (Supp. 1988)).

424. *Id.* (codified at FLA. STAT. § 381.609(f)(9) (Supp. 1988)).

425. *Id.* The Omnibus AIDS Act also provides that this balancing test "shall not apply to blood bank donor records." While this creates a statutory exception to the exception, the Supreme Court of Florida's holding in *Rasmussen v. South Florida Blood Services, Inc.*, 500 So. 2d 533 (Fla. 1987), still appears to apply. There is no indication that the Legislature intended to overrule *Rasmussen*, which essentially requires a balancing test in determining whether access to blood bank records will be allowed. *Id.* at 537-38.

426. Ch. 88-380, § 21, 1988 Fla. Laws 1996, 2010 (codified at FLA. STAT. § 381.609(2)(f)(9)(b) (Supp. 1988)).

427. *Id.* (codified at FLA. STAT. § 381.609(2)(f)(9)(d) (Supp. 1988)).

428. *Id.* (codified at FLA. STAT. § 381.609(2)(f)(9)(e) (Supp. 1988)).

calls for the practitioner reasonably and in good faith to notify the spouse.⁴²⁹ However, a practitioner cannot be held liable in a civil or criminal context for failure to disclose HIV-related information to a spouse.⁴³⁰ Thus, in the context of AIDS cases, this provision attempts to partially abrogate the duty to warn, recognized by Florida common law.⁴³¹

These provisions raise several problems that may render them of minimal value to practitioners. First, they do not specify what happens if the patient does not disclose the identity of the spouse, but the practitioner learns this information elsewhere. Such a practitioner would not fall within the immunity, although he or she still would be under no obligation to disclose the information to the spouse. Second, the Omnibus AIDS Act grants immunity only for warning a spouse—not an extramarital lover. As a result, a significant number of people who may be put at risk cannot be warned unless the practitioner is willing to risk a lawsuit.⁴³² Third and most importantly, the Omnibus AIDS Act specifies that in disclosing HIV-related information, the practitioner must be acting under a “perceived” civil duty or according to ethical guidelines. However, the very next provision states that a practitioner never can be held liable for the failure to warn, and seems to indicate that no civil duty or legally enforceable ethical obligation ever can exist in Florida. It is possible that a practitioner still might resort to statements contained in an ethical code of the profession, but this in itself would be problematic since many such codes hold practitioners to a high standard of confidentiality.

Thus, the “shield provision” may do little more than create a defense that can be raised if a physician is sued for disclosing HIV-related information to a spouse. A jury still may be called upon to decide whether the practitioner actually acted upon a “perceived” civil or ethical duty.

VII. DRUGS, HOME TESTS, AND THERAPIES FOR HIV INFECTION

In several straightforward provisions, the Omnibus AIDS Act and related legislation deal with problems that may arise when drugs,

429. *Id.* § 43, 1988 Fla. Laws at 2027-28 (codified at FLA. STAT. § 455.2416 (Supp. 1988)).

430. *Id.* (codified at FLA. STAT. § 455.2416(2) (Supp. 1988)). The term “practitioner” includes only those professionals regulated by the Division of Medical Quality Assurance. *Id.*

431. *See Hofmann v. Blackmon*, 241 So. 2d 752, 753 (Fla. 4th DCA 1970), *cert. denied*, 245 So. 2d 257 (Fla. 1971).

432. The legislative history indicates that legislators were concerned with the difficulty of determining the identity of extramarital lovers and the potential liability that physicians might incur in trying to do so. For instance, Representative Frankel stated: “I don’t want us to be put in—either doctors—or somebody in a judgment position. That type of—there’s really a liability problem there. And I think it’s much easier to determine if someone is a spouse” Fla. H.R., Comm. on Health Care, transcript of hearing at 31 (Feb. 29, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Frankel).

home tests and therapies are offered to the consumer for HIV-related concerns. The Omnibus AIDS Act specifically prohibits the sale, delivery or advertisement of HIV home-testing⁴³³ or the advertisement of any drug or device represented as having an effect on HIV infection or its related illnesses and disorders.⁴³⁴ Both of these provisions were added to the Florida Drug and Cosmetic Act.

Although these provisions raise obvious first amendment problems, nevertheless the courts may be willing to sustain them as a valid exercise of police and health-related powers. Such a conclusion is bolstered by *Posadas de Puerto Rico Association v. Tourism Co. of Puerto Rico*,⁴³⁵ in which the United States Supreme Court held that even truthful advertisement may be curtailed under some circumstances. Many advertisements related to HIV-related infections may raise unjustified hopes among the infected, and almost certainly will fall within the state's power to regulate untruthful commercial information. Similarly, the ban on HIV home-testing kits most likely will be sustained because of the possible unreliability of such tests and the severe consequences that could be caused when a person receives a positive test without adequate counseling.

In related legislation,⁴³⁶ the Legislature approved a technical re-drafting of Florida's investigational drug statute.⁴³⁷ Although not explicitly concerned with HIV, this statute may be of increasing significance in years ahead as more experimental therapies are developed for HIV-related infections. Under the investigational drug statute, a person with appropriate scientific training can apply for permission to use a new or experimental drug on a limited intrastate basis even if it has not been approved for such use by the federal Food and Drug Administration (FDA).⁴³⁸ The licensing process, established by the Legislature in 1982, is supervised by the Pharmacy Program Office of HRS in Tallahassee and administered by the Florida Drug and Cosmetic Technical Review Panel⁴³⁹ appointed by the Secretary of HRS.

433. Ch. 88-380, § 24, 1988 Fla. Laws 1996, 2016 (codified at FLA. STAT. § 499.005(12) (Supp. 1988)). This prohibition on home test kits is not supported by some scientific authority. The National Institute of Sciences, for instance, has recommended that so long as accuracy can be ensured, home test kits might encourage some people to be tested who otherwise would not. AIDS UPDATE 1988, *supra* note 3, at 79-80.

434. Ch. 88-380, § 25, 1988 Fla. Laws 1996, 2016 (codified at FLA. STAT. § 499.0054(6)(dd) (Supp. 1988)).

435. 478 U.S. 328 (1986).

436. Fla. CS for SB 212 (1988).

437. Ch. 88-159, § 3, 1988 Fla. Laws 861, 863 (codified at FLA. STAT. § 499.003 (Supp. 1988)).

438. The statute is implemented by FLA. ADMIN. CODE R. 10D-45.0375 (1986).

439. FLA. STAT. § 499.02 (1987).

The technical rewrite of the statute left the investigational drug statute substantially unchanged. It remains similar to a California statute,⁴⁴⁰ which has been used to provide AIDS patients with drugs or particular therapies not yet approved by the FDA. However, it should be noted that the FDA's authority to intervene in this area remains substantial, since it is empowered to regulate any drugs involved in interstate commerce.

VIII. HIV IN PRISONS AND JAILS

Generally eschewing mandatory testing as a method of controlling HIV, the Omnibus AIDS Act nevertheless incorporated two provisions that permit mandatory testing in some limited circumstances. Both apply exclusively to inmates in state or local facilities.⁴⁴¹ The Omnibus AIDS Act also specifically provides the Department of Corrections (DOC) authority to adopt policies for segregating infected inmates.

The first of the mandatory testing provisions allows DOC, pursuant to guidelines recognized by the CDC and recommendations of the Correctional Medical Authority, to test any inmate who has engaged in any behavior placing him or her at "high risk."⁴⁴² Such behavior will include sexual contact with another person, an altercation involving exposure to bodily fluids, the use of intravenous drugs, tattooing and any other activity medically known to transmit the virus.⁴⁴³ The results of the test become a part of the inmate's medical file, accessible only according to agency rule.⁴⁴⁴

The second of the mandatory testing provisions authorizes city and county jails to adopt their own mandatory testing policies.⁴⁴⁵ Such policies must be developed in consultation with the facility's medical provider and must be consistent with CDC and Correctional Medical Authority guidelines.⁴⁴⁶ There is no requirement that the inmate must have engaged in a high-risk behavior, although local facilities are free to adopt such a requirement on their own.⁴⁴⁷ The Omnibus AIDS Act

440. See CAL. HEALTH & SAFETY CODE ANN. §§ 26678-26679.5 (Deering Supp. 1988). Texas apparently permits a similar licensing. See TEX. REV. CIV. STAT. ANN. art. 4476-14(4)(b)(3) (Ver-non Supp. 1988).

441. Prior to the Omnibus AIDS Act, only HRS was explicitly authorized to test inmates. See FLA. STAT. § 384.32(1) (1987).

442. Ch. 88-380, § 12, 1988 Fla. Laws 1996, 2003 (codified at FLA. STAT. § 945.35(3) (Supp. 1988)).

443. *Id.*

444. *Id.* (codified at FLA. STAT. § 945.35(4) (Supp. 1988)).

445. *Id.* § 13, 1988 Fla. Laws at 2003 (codified at FLA. STAT. § 951.27(1) (Supp. 1988)).

446. *Id.*

447. See *id.*

specifies that information obtained from these tests will be confidential, exempt from the public records disclosure laws and may not be disclosed to unauthorized people.⁴⁴⁸

An obvious problem posed by these mandatory testing provisions is whether they authorize unlawful searches. At least one court has found that a mandatory testing policy applied to state health workers⁴⁴⁹ violated the fourth amendment. However, this Nebraska case probably is inapposite because it did not involve inmates and was not applied specifically to people known to have engaged in high-risk behavior. The special risks of prison life and the potential liability to inmates who are negligently or recklessly exposed to HIV may justify limited mandatory testing policies.

The Omnibus AIDS Act authorizes DOC to adopt policies for segregating HIV-infected inmates.⁴⁵⁰ Those policies may include matters relating to housing, physical contact, dining, recreation and exercise hours or locations.⁴⁵¹ However, any policies must be consistent with the guidelines of the CDC and the Correctional Medical Authority.⁴⁵²

IX. EDUCATIONAL PROGRAMS

Potentially the most important policy-related provisions of the Omnibus AIDS Act are those establishing a massive new statewide education program. These include authorization for HRS to establish general educational programs aimed at the public, including high risk groups;⁴⁵³ mandatory continuing education programs for certain licensed professions;⁴⁵⁴ annual educational handouts to all state workers;⁴⁵⁵ new educational standards for law enforcement officers;⁴⁵⁶ inmate education;⁴⁵⁷ required high school instruction on HIV;⁴⁵⁸ au-

448. *Id.*

449. *Glover v. Eastern Neb. Community Office of Retardation*, 686 F. Supp. 243 (D. Neb. 1988).

450. *See* ch. 88-380, § 12, 1988 Fla. Laws 1996, 2003 (codified at FLA. STAT. § 945.35(5) (Supp. 1988)).

451. *Id.*

452. *Id.*

453. *Id.* § 2, 1988 Fla. Laws at 1998 (codified at FLA. STAT. § 381.608 (Supp. 1988)).

454. *Id.* § 3, 1988 Fla. Laws at 1999 (codified at FLA. STAT. § 381.041 (Supp. 1988)); *id.* § 4, 1988 Fla. Laws at 2000 (codified at FLA. STAT. § 455.2226 (Supp. 1988)); *id.* § 5, 1988 Fla. Laws at 2001 (codified at FLA. STAT. § 455.227(1)(g) (Supp. 1988)); *id.* § 6, 1988 Fla. Laws at 1943 (codified at FLA. STAT. § 381.44 (Supp. 1988)); *id.* § 7, 1988 Fla. Laws at 2001-02 (codified at FLA. STAT. § 455.2227 (Supp. 1988)); *id.* § 8, 1988 Fla. Laws at 2002 (codified at FLA. STAT. § 381.043 (Supp. 1988)).

455. *Id.* § 10, 1988 Fla. Laws at 2002 (codified at FLA. STAT. § 110.1125 (Supp. 1988)).

456. *Id.* § 11, 1988 Fla. Laws at 2002 (codified at FLA. STAT. § 943.172 (Supp. 1988)).

457. *Id.* § 12, 1988 Fla. Laws at 2002-03 (codified at FLA. STAT. § 945.35 (Supp. 1988)).

458. *Id.* § 14, 1988 Fla. Laws at 2004-05 (codified at FLA. STAT. § 232.246 (Supp. 1988)).

thorization for other educational programs in any grade-level, provided sexual abstinence is taught as a standard of behavior;⁴⁵⁹ and mandatory college-level orientation programs on HIV infection and discussion of the subject in college and university handbooks.⁴⁶⁰

The legislative history indicates that education is a centerpiece of the Omnibus AIDS Act, since prevention is currently the best method of fighting the disease.⁴⁶¹ However, these provisions were substantially diluted in dickering between House and Senate in the final days of the session. The House wanted to mandate educational programs in virtually every regulated profession, while the Senate wanted to require such programs only among health care professionals. The final compromise generally was derived from the early Senate position.⁴⁶²

X. DONATION OF BLOOD AND TISSUE

Perhaps no industry has been so significantly and seriously hurt by the HIV epidemic as blood and human tissue banks. From the earliest days of the epidemic, it became apparent to scientists that the then-unknown agent causing AIDS probably was blood-borne, like hepatitis B.⁴⁶³ This theory proved to be tragically correct, with more than 1,500 cases of transfusion-related AIDS reported in the United States.⁴⁶⁴ While routine screening quickly was adopted as an industry standard after the development of the ELISA test,⁴⁶⁵ such testing had not been mandated by Florida law prior to the 1988 legislative session. Nor had Florida imposed any standards relating to informed consent, counseling and other procedures associated with donations. The Omnibus AIDS Act for the first time imposed such standards.⁴⁶⁶

A. Informed Consent

All donated blood and tissue must be tested prior to use in humans, but the donor must execute a written informed consent.⁴⁶⁷ The consent

459. *Id.* § 15, 1988 Fla. Laws at 2005 (codified at FLA. STAT. § 233.0672 (Supp. 1988)).

460. *Id.* § 18, 1988 Fla. Laws at 2007 (codified at FLA. STAT. § 240.2097 (Supp. 1988)); *id.* § 19, 1988 Fla. Laws at 2007-08 (codified at FLA. STAT. § 240.3191 (Supp. 1988)); *id.* § 20, 1988 Fla. Laws at 2008 (codified at FLA. STAT. § 240.3192 (Supp. 1988)).

461. *E.g.*, Fla. H.R., transcript of proceedings at 3-4 (May 10, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Frankel); Fla. H.R., Comm. on Health Care, transcript of hearing at 4-5 (Apr. 13, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Frankel).

462. Because of space considerations, this Article will not discuss in detail the educational provisions.

463. AIDS UPDATE 1988, *supra* note 3, at 33.

464. *Id.* at 34.

465. *Id.*

466. Ch. 88-380, § 22, 1988 Fla. Laws 1996, 2013 (codified at FLA. STAT. § 381.6105 (Supp. 1988)).

467. *Id.* (codified at FLA. STAT. § 381.6105(1) (Supp. 1988)).

must include a fair explanation of the procedures to be followed, the meaning of any test results and a description of the confidential nature of the results. If the person refuses consent, he or she may not be accepted as a donor.⁴⁶⁸

There are two exceptions. First, written informed consent is not required where the blood or tissue is received "from an out-of-state blood bank."⁴⁶⁹ The Omnibus AIDS Act does not specify what is to occur if the facility sending the blood or tissue actually is not a blood bank but some other health care facility. Presumably, the exemption extends to any facility sending into Florida "blood, plasma, organ[s], skin, or other human tissue,"⁴⁷⁰ since these are the items specified in the Omnibus AIDS Act itself. Second, written informed consent need not be obtained where the blood or tissue is referred by another health care provider or facility for testing.⁴⁷¹ In those circumstances, the one making the referral would be obligated to obtain informed consent.

B. Testing and Disinfection Procedures

The Omnibus AIDS Act further provides that "[n]o person shall collect any blood, organ, skin, or other human tissue from one human being and hold it for, or actually perform, any implantation, transplantation, transfusion, grafting, or any other method of transfer to another human being" without doing one of two things.⁴⁷² The person must either perform a test to determine whether HIV and other communicable diseases specified by HRS rule are present, or the person must perform any procedure approved by HRS for destroying infectious agents that might be present in the blood or tissue.⁴⁷³

One exception to the testing procedures is provided for cases of emergency. Transplants, implants, or transfusions of human tissue, can occur without testing provided the recipient has given informed consent.⁴⁷⁴ Although this exception is silent on disinfection procedures, a separate provision states that blood or tissue that is known to be infected can be used in a lifesaving procedure with the recipient's informed consent.⁴⁷⁵ Thus, it seems likely that a court would construe these provisions *in pari materia* to mean that disinfection procedures need not be conducted if the recipient waives them after informed

468. *Id.*

469. *Id.* (codified at FLA. STAT. § 381.6105(2) (Supp. 1988)).

470. *Id.*

471. *Id.*

472. *Id.* (codified at FLA. STAT. § 381.6105(3) (Supp. 1988)).

473. *Id.*

474. *Id.*

475. *Id.* (codified at FLA. STAT. § 381.6105(4)(2) (Supp. 1988)).

consent. In any event, this provision will have no application to HIV-infected blood or tissue unless and until a disinfecting procedure is developed.

As for the disposal of infected blood and tissue, the Omnibus AIDS Act authorizes HRS to develop agency rules governing proper disposal procedures.⁴⁷⁶ Blood or tissue must be rendered noncommunicable or destroyed.⁴⁷⁷ The only exceptions are where the blood or tissue are labeled as HIV-infected and are used for research or in a lifesaving medical procedure after the recipient gives informed consent.⁴⁷⁸ Violation of any of these testing requirements is a misdemeanor of the first degree.⁴⁷⁹

C. Informing Seropositive Donors

When blood or tissue tests positive for HIV infection, the testing facility must inform the donor.⁴⁸⁰ Notice of abnormal test results must be sent to the donor by certified mail, and must offer to discuss the nature and significance of the result either in person or by phone.⁴⁸¹ If the donor fails to respond within thirty days, the facility may send the actual test results along with other required information to the donor, by certified mail.⁴⁸²

Whether communicating in person or in writing, the facility must provide the following specific information: (1) the meaning of the test results; (2) measures for preventing HIV transmission; (3) the availability of local health, mental health and social support services; (4) the benefits of locating and counseling people whom the donor may have infected; and (5) the availability of services to help locate such people.⁴⁸³ The facility must hold test results under strict confidence, as provided in the testing and confidentiality provisions of the Omnibus AIDS Act.⁴⁸⁴

XI. EPIDEMIOLOGICAL RESEARCH AND PLANNING

As the first step in an effort to come to grips with the extent of HIV infection in Florida, the Omnibus AIDS Act authorizes HRS to begin

476. *Id.* (codified at FLA. STAT. § 381.6105(4) (Supp. 1988)).

477. *Id.*

478. *Id.*

479. *Id.* (codified at FLA. STAT. § 381.6105(10)(a) (Supp. 1988)).

480. *Id.* (codified at FLA. STAT. § 381.6105(5) (Supp. 1988)).

481. *Id.* (codified at FLA. STAT. § 381.6105(6)(a) (Supp. 1988)).

482. *Id.* (codified at FLA. STAT. § 381.6105(6)(b) (Supp. 1988)).

483. *Id.* (codified at FLA. STAT. § 381.6105(5) (Supp. 1988)).

484. *Id.* (codified at FLA. STAT. § 381.6105(8) (Supp. 1988)).

an extensive epidemiological study⁴⁸⁵ and by July 1, 1989, to begin requiring that cases of HIV infection be reported in a way that will not identify the infected people.⁴⁸⁶ The Legislature provided that any studies may not duplicate other national studies and must be designed to provide insight into Florida's experience with HIV.⁴⁸⁷ Emphasis must be placed on practical applications and disease control.⁴⁸⁸

The Omnibus AIDS Act specifically authorizes local health councils and the Statewide Health Council to study the HIV epidemic and participate in determining methods of controlling it;⁴⁸⁹ and it requires the Social Services Estimating Conference to begin estimating the potential economic impact AIDS will have on total state health expenditures.⁴⁹⁰

XII. PATIENT CARE NETWORKS

To increase local support services available to people with HIV-related diseases, the Legislature authorized HRS to establish local "Patient Care Networks" wherever the numbers of AIDS patients are sufficient.⁴⁹¹ The Department is given rulemaking authority to set up the networks, taking into account "natural trade areas and centers of medical excellence that specialize in" AIDS treatment.⁴⁹² Each network must include representation by people infected with HIV, health care providers, business interests, HRS and local governments.⁴⁹³ Once each year, beginning in April 1989, each network must report to HRS its recommendations for patient care.⁴⁹⁴

XIII. CONCLUSIONS

It is a curious characteristic of the AIDS epidemic that it renders inadequate the most comfortable of notions, legal doctrines being no exception. Florida's quarantine statutes, for instance, might never have been reexamined had HIV infection not appeared in this coun-

485. *Id.* § 23, 1988 Fla. Laws at 2015 (codified at FLA. STAT. § 381.614 (Supp. 1988)).

486. *Id.* § 28, 1988 Fla. Laws at 2016-17 (amending FLA. STAT. § 384.25(2) (1987)). This authorization is permissive, not mandatory. *Id.* Under prior law, reporting rules were limited to "physician reporting" of AIDS and ARC cases. *See* FLA. STAT. § 384.25(2) (1987).

487. Ch. 88-380, § 23, 1988 Fla. Laws 1996, 2015 (codified at FLA. STAT. § 381.614(1) (Supp. 1988)).

488. *Id.* (codified at FLA. STAT. § 381.614(2) (Supp. 1988)).

489. *Id.* § 40, 1988 Fla. Laws at 2023 (amending FLA. STAT. § 381.703 (1987)).

490. *Id.* § 41, 1988 Fla. Laws at 2027.

491. *Id.* § 39, 1988 Fla. Laws at 2023 (codified at FLA. STAT. § 381.612 (Supp. 1988)).

492. *Id.*

493. *Id.*

494. *Id.*

try.⁴⁹⁵ Nor is it likely that the state seriously would have considered cloaking all information about a particular disease with strict guarantees of confidentiality. Certainly no one seriously would have considered providing special statutory civil rights to people infected by the influenza and polio epidemics earlier in this century. Yet AIDS itself is something quite different from anything ever experienced by American society or jurisprudence.

While this nation has encountered incurable diseases before, it has never experienced one that at first appeared exclusively among minorities perceived as living beyond the limits of respectability.⁴⁹⁶ This, perhaps, is the single factor that has made AIDS such a troubling problem. Society's own best and cherished moral scruples may have blinded a large number of people to the wholesale tragedy that now looms.

Certainly the temptation was there, and frequently was indulged by prominent people,⁴⁹⁷ to regard AIDS as something that was deserved by those who contracted it—something that arose from immorality, a contagion that usually did not strike "innocents."⁴⁹⁸ If illness can be a metaphor, as Susan Sontag has argued,⁴⁹⁹ then AIDS to many people was the stigmatic symbol of lifestyles found to be distasteful.⁵⁰⁰ In retrospect, AIDS was not the reason for a new hatred; it was an excuse for one that already existed.

Yet the comfortable notion that AIDS will leave alone the mainstream of society has proven horribly wrong. This is not merely to say

495. The fact that the 1988 Legislature officially removed the word "quarantine" from the Sexually Transmissible Disease Act shows squeamishness over the concept. At one point in a committee hearing, Gary Clarke of HRS consistently referred to the concept as "the 'Q' word." Fla. H.R., Comm. on Health Care, transcript of proceedings at 61-65 (Apr. 7, 1988) (transcript on file, *Florida State University Law Review*) (comments of Gary Clarke). Indeed, "quarantine" as it will be applied to HIV carriers is not quarantine in the classical sense at all, since it will not be applied to all infected people but only those who engage in dangerous behavior. Thus the new quarantine statute is more akin to civil commitment or criminal sanctions than to quarantine.

496. See Banks & McFadden, *Rush to Judgment: HIV Test Reliability and Screening*, 23 TULSA L.J. 1, 1-2 nn.1 & 4 (1987) (discussing moral indignation toward gay people). There are parallels, however, between AIDS and the incidence of syphilis during the Victorian era. See AIDS UPDATE 1988, *supra* note 3, at 27-29. Nevertheless, the National Academy of Sciences concedes that the social vulnerability of early high-risk groups "entails unique considerations for public health officials." *Id.* at 61.

497. See Brandt, *AIDS: From Social History to Social Policy*, 14 LAW MED. & HEALTH CARE 231, 235 (1986) (recounting several such statements).

498. See *id.*

499. S. SONTAG, *ILLNESS AS METAPHOR* (1978).

500. See Eisenberg, *The Genesis of Fear: AIDS and the Public's Response to Science*, 14 LAW MED. & HEALTH CARE 243, 245 (1986) (discussing the symbolic significance of AIDS and the fear it engenders); Dolgin, *AIDS: Social Meanings and Legal Ramifications*, 14 HOFSTRA L. REV. 193, 195-202 (1985) (discussing social symbolism of AIDS).

that the disease will spread beyond its initial minority victims, which it is doing already.⁵⁰¹ It is also to say that fate of minorities, even despised ones, is a crucial factor in the overall health of a society. Florida's Legislature estimates that between two and four percent of the state's current population is infected with HIV—as many as 400,000 people. As many as 200,000 of these may die by the 1990s,⁵⁰² requiring astronomical expenditures by the state. State officials believe that one in nine of all male Floridians between the ages of 30 and 39 currently are infected with the virus.⁵⁰³ One legislator grimly predicted that in the next decade, a major part of this state's health resources will be devoted to opening and maintaining a huge network of state AIDS hospitals.⁵⁰⁴

Anyone who believes that so much illness and death can occur without disrupting everything of value in society is macabrely mistaken. It does not matter who the victims are or how they acquired the disease; the death and the suffering still will rob Florida of resources, deprive it of productive workers, eliminate tax revenues, obliterate some of its most creative minds,⁵⁰⁵ and force a reappraisal of the way government is operated. To separate people with AIDS into groups of "innocents" and those who are not does little but reveal an incredible ignorance of what is upon us all, since everyone will be diminished by what will happen if AIDS is not eradicated.⁵⁰⁶

Faced with a disease such as this, a hard hit society like Florida's really only has two choices. It can eschew its constitutional heritage, drastically curtail its civil liberties, institute mandatory testing and attempt to segregate infected people from the rest of society. Or it can offer to accept those people, extend civil protections to them, make sure they can provide for themselves, and create an atmosphere in which the stigma attached to AIDS no longer exists, at least in a legal sense.

501. For a general discussion and prediction of the spread of HIV into mainstream groups, see MASTERS & JOHNSON, *supra* note 1. See also Graham, *AIDS Now Menaces Everyone*, Tallahassee Democrat, July 12, 1988, at 7A, col. 1.

502. See *supra* note 7 and accompanying text.

503. Fla. H.R., Comm. on Health Care, transcript of hearing at 12 (Apr. 13, 1988) (transcript on file, *Florida State University Law Review*) (comments of Rep. Frankel).

504. *Id.* at 15 (Apr. 13, 1988) (comments of Rep. Gordon); *id.* at 34 (Apr. 28, 1988) (comments of Rep. Gordon). See also *id.* at 6 (Apr. 7, 1988) (comments of Rep. Gordon).

505. See *The Face of AIDS*, NEWSWEEK, Aug. 10, 1987, at 22-23.

506. The Presidential Commission studying the HIV epidemic placed on the frontispiece of its report the famous quotation of John Donne:

No man is an Iland, intire of itselfe . . .
Any man's death diminishes me,
because I am involved in Mankinde.

PRESIDENTIAL COMMISSION REPORT, *supra* note 3, at iv.

For the former option, the cost would be bankrupting, and not merely in terms of the loss of a two century tradition of civil liberties. Providing a single ELISA test for Floridians would cost as much as \$132 million,⁵⁰⁷ and generally it is conceded that retesting is necessary at frequent intervals.⁵⁰⁸ Likewise, housing as many as 400,000 infected people in state quarantine camps simply is not fiscally possible.

As a society of limited resources, Florida really only has one choice. And it is the choice generally approved by the 1988 Legislature when it adopted the Omnibus AIDS Act. With all its deficiencies and imprecise language, it constitutes one of the most responsible pieces of legislation yet produced in Florida. Legislators who felt qualms about voting for the bill nevertheless indicated that its unprecedented non-discrimination and confidentiality provisions were the best hope Florida has in fighting the spread of HIV,⁵⁰⁹ a conclusion also reached by the Reagan administration's Presidential Commission on the Human Immunodeficiency Virus Epidemic.⁵¹⁰ Logic itself dictates the same conclusion.

If fear and distrust prevail, AIDS cannot be stopped. Those infected will be driven into a secretive existence, and the disease along with them. Eradication of the virus will be impossible because few will be frank about their infection if doing so means losing whatever liberty and property HIV has not yet taken from them. Thus, the question AIDS poses to this and every other state is whether our society can comprehend that the harm suffered by minorities, even despised ones, is harm to society itself. This disease, if it is properly a metaphor for anything, embodies the irrational fear and hatred that have allowed it to spread unchecked simply because its initial victim's lifestyles were distasteful to some.⁵¹¹

507. The cost of a single ELISA test in May 1988 was estimated at \$11, with the confirmatory Western Blot test costing \$30.80. Letter from Paula Tully, Public Information Specialist, Fla. Dep't. of Corr., to R.C. Waters (May 19, 1988) (discussing cost of HIV testing to state agencies) (transcript on file, *Florida State University Law Review*).

508. The CDC recommends rescreening every six weeks. *Id.*

509. Fla. H.R., transcript of proceedings at 12-14 (May 11, 1988) (transcript on file, *Florida State University Law Review*) (comments of Reps. Thomas Drage, Jr., Repub., Orlando, and Javier Souto, Repub., Miami).

510. PRESIDENTIAL COMMISSION REPORT, *supra* note 3, at 119-31.

511. For a detailed journalistic treatment of this phenomenon, see R. SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE AND THE AIDS EPIDEMIC* (1987). See also Nickens, *AIDS, Race, and the Law: The Social Construction of Disease*, 12 NOVA L. REV. 1179, 1186-88 (1988) (generally concluding that the disease was allowed to spread unchecked because of the dislike of the minority communities in which it first appeared); Schram, *AIDS Prevention—Too Little, Too Late*, 12 NOVA L. REV. 1253, 1255 (1988) (concluding that the early perception of AIDS as a "gay disease" led to "tremendous reluctance to fund prevention programs").

It is time to realize, as the Omnibus AIDS Act implicitly does, that this attitude is more deadly than the virus itself. In such an environment the virus can do nothing but thrive. When future Legislatures address the legal problems caused by AIDS, as they inevitably must, the philosophy underlying the Omnibus AIDS Act should serve as the starting point of every debate and every proposal. In the last analysis, it is the only rational choice.

APPENDIX

STATE OF FLORIDA
Florida Commission on Human Relations

FCHR No. 85-0624

MR. TODD F. SHUTTLEWORTH
Complainant
c/o Larry Corman, Esquire
2310 One Financial Plaza
Fort Lauderdale, Florida 33394BROWARD COUNTY OFFICE OF BUDGET
AND MANAGEMENT POLICY
Respondent
Janet Lander, Assistant General Counsel
115 South Andrews Avenue, Suite 423
Fort Lauderdale, Florida 33301DETERMINATION: CAUSE

MR. TODD F. SHUTTLEWORTH filed a Complaint of Discrimination alleging that BROWARD COUNTY OFFICE OF BUDGET AND MANAGEMENT POLICY discriminated against him on the basis of his handicap (acquired immune deficiency syndrome) in violation of the Human Rights Act of 1977, as amended, Sections 760.01-760.10, Florida Statutes (1983).¹ An investigation of this matter has been conducted and shows the following:

1. Complainant is a person within the meaning of Section 760.02(5), Florida Statutes.

2. Complainant is an individual within the meaning of Section 760.10(1), Florida Statutes, by reason of his medical condition. Complainant's medical condition, acquired immune deficiency syndrome, falls within this Commission's interpretation of the term "handicap". See, e.g., *Fenesy v. GTE Data Services, Inc.*, FCHR Case No. 79-214, DOAH Case No. 80-473, FCHR Order No. 81-0442, 3 FALR 1764-A (FCHR August 11, 1981), which held:

Since this statute does not indicate a different connotation, the term "handicap" should be given a meaning accorded by common usage.

1. All statutory references are to Florida Statutes (1983), and all rule references are to the Florida Administrative Code.

See, Gauden v. Kirk, 47 So.2d. 567 (Fla. 1950). In construing similar statutes, courts of three other states have resorted to the definition of "handicap" contained in Webster's Third International Dictionary. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co. v. Washington State Human Rights Commission*, 577 P.2d 307 (Wash. 1976), *State v. Turner*, 209 N.E. 2d 475 (Ohio 1965), *Chicago, Milwaukee, St. Paul and Pacific Railroad v. Department of Industry, Labor and Human Relations*, 215 N.W. 2d 443 (Wis. 1974). Generally "handicap" connotes a condition that prevents normal functioning in some way: "A person with a handicap does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties." *Chicago, Milwaukee, St. Paul and Pacific Railroad Co. v. Washington State Human Relations Commission, supra*.

Based upon the plain meaning of the term "handicap" and the medical evidence presented, an individual with acquired immune deficiency syndrome is within the coverage of the Human Rights Act of 1977 in that such individual "does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties." *Accord Arline v. School Board of Nassau County*, 772 F.2d 759 (11th Cir. 1985), which held that an individual with a chronic contagious disease, tuberculosis, is within the coverage of Section 504 of the Rehabilitation Act of 1973.

3. Respondent is an employer within the meaning of Section 760.02(6), Florida Statutes.

4. The Complaint of Discrimination was timely filed. Section 760.10, Fla. Stat.; Rule 22T-9.01(2).

5. On September 13, 1984, Complainant was terminated from his position of Administrative and Management Intern. He was initially employed by Respondent on May 16, 1983. It is undisputed that Complainant's work performance was satisfactory or above during this employment.

6. Respondent's articulated reason for discharging Complainant was because he contracted acquired immune deficiency syndrome (AIDS). The action was taken "due to a lack of knowledge as to the severity and communicable aspect of the disease in consideration of protecting the Complainant, other county employees and the public."

7. In defense of its articulated reason, Respondent asserts that it cannot screen all persons who may come into contact with Complainant in the course of his employment. Respondent asserts that it cannot assume the risk of allowing even one person to unwittingly contract AIDS because of Complainant's presence at the work site.

8. Respondent based this statement in substantial part on an article entitled *AIDS-Information and Procedural Guidelines for Providing*

Health and Social Services to Persons with AIDS (HRS July 1984). It provides in pertinent part that while the consensus of the medical community holds that intimate, as opposed to casual, contact is the key to transmission of AIDS, the following persons are known to be in a high risk category and should avoid any exposure to AIDS patients: persons receiving large-dose steroid drugs on a daily basis; persons with known immune deficiency diseases; persons receiving chemotherapy who have not achieved hematologic recovery; persons receiving any immunosuppressive medication; and persons who are pregnant.

9. The risk cited above, however, does not emanate from all individuals with AIDS but only from those individuals with easily transmissible opportunistic infections.

10. Respondent has not shown that Complainant had an easily transmissible opportunistic infection when it made the decision to terminate Complainant's employment.

11. In addition, Complainant worked in a private office which was enclosed by a floor to ceiling wall on one side and by five feet high partitions on the other three sides.

12. State of Florida, Department of Health and Rehabilitative Services (HRS) advises in its recommended procedures for outpatients that AIDS outpatients may use common waiting areas and bathroom facilities.

13. HRS recommends that its employees who have AIDS and are directly involved in patient care be transferred to non-patient care positions or be evaluated on a case-by-case basis to determine whether the employees are free from transmissible infections and are not unduly susceptible to infections so that the employees might be retained in a patient care position.

14. Section 760.10, Florida Statutes, provides in pertinent part:

“(1) It is an unlawful employment practice for an employer:

(a) To discharge . . . any individual . . . because of such individual's . . . handicap. . . .

* * *

(8) Notwithstanding any other provision of this section, it is not an unlawful employment practice under ss. 760.01 - 760.10 for an employer . . . to:

(a) Take or fail to take any action on the basis of . . . handicap . . . in those certain instances in which . . . absence of a particular

handicap . . . is a bona fide occupational qualification reasonably necessary for the performance of the particular employment to which such action or inaction is related.

15. The Florida courts in interpreting the term "bona fide occupational qualification" have held that the defense of risk of future injury must be substantial. *School Board of Pinellas County v. Rateau*, 449 So.2d 839 (Fla. 1st DCA 1984). Similarly, this Commission has held that the evidence must support a conclusion that the employer had a reasonable basis for its assessment of the risk of injury or death to establish the bona fide occupational qualification. *Hatfield v. H & D Packaging, Inc.*, FCHR Case No. 81-0870, FCHR Order No. 82-022, 4 FALR 1110-A (April 18, 1982). *Accord Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985).

16. Respondent failed to show that there was a substantial risk of future injury or a reasonable basis for its assessment of the risk of injury to Complainant, other employees or the public by retaining Complainant in its employ.

17. I am mindful of the serious and important concerns of the employer, the other employees and the public. Based upon my review of this case, I do not find that Respondent was acting in bad faith when it made the decision to terminate Complainant; nevertheless, there is an absence of evidence to show with any reasonable probability that AIDS can be transmitted by casual contact that commonly occurs in the workplace.

Pursuant to the authority delegated to me by Rules 22T-6.04(2)(e) and 22T-9.02, it is my determination that there is reasonable cause to believe that an unlawful employment practice has occurred in that:

A. Complainant has shown a prima facie violation of the Human Rights Act of 1977, as amended; and

B. Respondent has articulated, but failed to substantiate, legitimate, nondiscriminatory reasons for the actions complained of.²

DATED: 12/11, 1985
Tallahassee, Florida

Donald A. Griffin
Executive Director
Florida Commission on Human Relations

2. In so holding, I specifically refrain from resolving issues involving employment decisions to reassign or alter the working conditions of employees with AIDS or decisions involving employees with transmissible infections.

