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HOSPITALS AND AIDS DISCRIMINATION: APPLICABILITY OF FEDERAL DISCRIMINATION LAWS TO HCWS AND STAFF PHYSICIANS

Scenario (1): a doctor performs emergency surgery on a patient
Scenario (2): a health care worker (HCW) prepares a blood transfusion
Scenario (3): a nurse assists a doctor during a surgical procedure

In any of these situations an accidental slip of a scalpel or other sharp instrument could bring about the possibility of blood-to-blood contact among hospital personnel or between hospital personnel and patients. If any one of these HCWs is afflicted with Acquired Immunodeficiency Syndrome (AIDS),[1] the theoretical possibility of transmitting the virus is of immediate concern.[2]

Since the emergence of HIV infection, the epidemic has understandably been at the forefront of concern for hospitals. While hospitals battle with issues relating to their patients with HIV infection,[3] they must also take care not to ignore the problems of their HIV infected staff and employees. In September of 1988, when the Centers for Disease Control (CDC) reported 61,929 adult AIDS cases, 5.1% (or 3,182) of the afflicted individuals were

1. On June 24, 1989 the Presidential Commission on the Human Immunodeficiency Virus Epidemic stated that "[t]he term 'AIDS' is obsolete." The Commission report suggested that the term HIV infection "more correctly defines the problem." PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, XVII (Jun. 24, 1988).

For the purposes of this Comment when it is necessary to make a distinction, the term "AIDS" will refer to the full-blown AIDS syndrome (*see infra* notes 11-13) and the CDC's definition of AIDS (*see infra* note 15); the term ARC will refer to AIDS Related Complex (*see infra* note 18); the term HIV seropositivity will refer to those individuals who test positive for antibodies but are asymptomatic (*see infra* note 16).

2. Although, to date, no such cases have been reported, the Centers for Disease Control (CDC) recognizes this possibility. Centers for Disease Control, *Recommendations for Prevention of HIV Transmission in Health-Care Settings*, 36 MORBIDITY & MORTALITY WEEKLY REP. 15 (1987) [hereinafter *Recommendations*].

3. *See* Note, *Between A Rock and a Hard Place: AIDS and the Conflicting Physician's Duty of Preventing Disease Transmission and Safeguarding Confidentiality*, 76 GEO. L.J. 169 (1987) for a discussion of issues relating to medical practitioners' duties to third party contacts of AIDS-afflicted individuals, HCWS who work with infected patients, and issues relating to the testing of hospital patients.

HCWs.[4]

This Comment will focus on the applicability of discrimination legislation to hospital-employed HCWs and physicians with hospital staff privileges. In recent years there has been much discussion regarding the problem of discrimination against HIV infected individuals in the employment context in general.[5] Hospitals, as employers, share many of the same concerns as other employers with respect to their workers with AIDS.[6] This Comment will show that despite the obvious risks that arise in the health care environment, under section 504 of the Vocational Rehabilitation and Other Services Act of 1973 (section 504)[7] HIV-infected HCWs will be classified as "qualified individuals"[8] and are thus entitled to protection under the Act. This Comment will also compare section 504 with the proposed Americans With Disabilities Act (hereinafter ADA).[9] The added protection under the proposed law and its implications for HIV-infected HCWs will be discussed. Because these Acts were drafted for the purpose of protecting handicapped individuals, this Comment will also discuss the public policy considerations that led to the proposal of the ADA and that have broadened the scope of section 504 to define HIV infected individuals as "handicapped."

The special concerns of hospitals in connection with HIV discrimination center around safety. This Comment will discuss the hospital's interest in

4. Centers for Disease Control, *Guidelines for Prevention of Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Health-Care and Public Safety Workers*, 38 MORBIDITY & MORTALITY WEEKLY REP. 6 (1989). This figure is comparable to the percentage of HCWS in the workforce at 5.7%. Centers for Disease Control, *Update: Acquired Immunodeficiency Syndrome and Human Immunodeficiency Virus Infection among Health Care Workers*, 37 MORBIDITY & MORTALITY WEEKLY REP. 229 (1988).

5. *See* Leonard, *Employment Discrimination Against Persons With AIDS*, 10 U. DAYTON L. REV. 681 (1986); Henry, *AIDS in the Workplace*, in AIDS AND THE LAW 41 (W. Dornette ed. 1987); Note, *Asymptomatic Infection With The AIDS Virus As A Handicap Under The Rehabilitation Act of 1973*, 88 COLUM. L. REV. 563 (1988) [hereinafter Note].

6. Employers may be tempted to discriminate against HIV infected employees because they believe that:

(a) the worker is contagious and can spread AIDS or the other infectious diseases with which he is often afflicted, or

(b) co-workers and clients may refuse to work or to do business with the employer because of the presence of the afflicted worker.

See Henry, *supra* note 5. For a discussion of these issues in the health care environment, see *infra* notes 73-90 and accompanying text.

Employers, in general, may also be concerned with whether they can legally screen employees for seropositivity. Other issues arising with regard to testing employees involve the employer's ability to disclose the results of test and/or take action (e.g. termination or forced leave) once the results are known. *Focus is on Employment Issues at New York AIDS Conference*, 23 Gov't Empl. Rel. Rep. (BNA) 1613 (Nov. 11, 1985) [hereinafter *Focus*].

7. 29 U.S.C. § 794 (1988).

8. *Id.*

9. S. 933, 101st Cong., 1st Sess. (1989).

preventing transmission both from HCW to patient and among HCWs, as well as the possible liability that may result under such circumstances. An analysis of the CDC's recommendations for safety in the health care environment will follow. This Comment will conclude that it is very likely hospitals implementing these guidelines are maintaining safe health care facilities for the purposes of defending a cause of action brought by a patient or employee alleging contamination by an infected HCW.

Finally, this Comment will examine the ability of staff physicians who are not hospital employees to find protection under legislation that protects "employees." Although no cases have arisen under section 504 in this context, this Comment will examine the viability of a cause of action under section 504 by analogy to Title VII of the Civil Rights Act of 1964.[10] Because the Rehabilitation Act was passed with the express purpose of preventing discrimination against handicapped individuals, this Comment will conclude that it is likely these physicians will probably be protected by this law as well.

I. HIV INFECTION: EPIDEMIOLOGY AND INCIDENCE

Persons afflicted with HIV infection, because of their depressed immune systems, are susceptible to a number of opportunistic infections. Currently, the medical knowledge of the disease is based on the theory that the presence of the HTLV-III/LAV virus in an individual's blood stream causes the destruction of the body's T-helper cells.[11] These T-cells are white blood cells that activate the production of disease-fighting antibodies.[12] Therefore, because these cells have been destroyed, the immune system is unable to receive the signal to produce the antibodies that would effectively fight infection. Thus, the body is left vulnerable to foreign agents which the normal person can effectively defend.[13] Rather than dying of "AIDS," persons with the disease suffer from opportunistic illnesses such as pneumocystic

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10. 42 U.S.C. § 2000e-2 (1988).

11. Leonard, *supra* note 5, at 684. *See also* Green, *The Transmission of AIDS* in AIDS AND THE LAW, A GUIDE FOR THE PUBLIC 29 (H. Dalton ed. 1987).

The AIDS virus, a retrovirus, is distinctive from most human viruses by virtue of its molecular structure. Unlike most organisms, retroviruses carry no DNA and instead have RNA as their genetic material. Some retroviruses, including the AIDS virus, carry an enzyme that allows them to transfer their genetic information from RNA into DNA. The virus is then capable of taking that DNA and transferring it into the cells of the "infected host." Thus, from a molecular biological perspective, the AIDS virus "creates new genes in the body of its victims." Osborn, *The AIDS Epidemic: Discovery of a New Disease* in AIDS AND THE LAW, A GUIDE FOR THE PUBLIC 17 (H. Dalton ed. 1987).

12. Leonard, *supra* note 5, at 684.

13. *Id.*

carinii pneumonia and Kaposi's sarcoma. These diseases, although they are prevalent among AIDS patients, are rare in the unafflicted population.[14]

The CDC's revised definition of AIDS is based primarily on evidence of "indicator diseases" and secondarily on the status of laboratory evidence of HIV infection.[15] Although blood tests such as the Enzyme-Linked Immunosorbent Assay (ELISA) test can detect the HIV antibody, a positive test does not indicate that the patient has or will develop the full-blown AIDS syndrome.[16] Individuals, then, may be seropositive and yet may not fit the CDC's definition of AIDS.[17] Another group of individuals who do not fit the revised definition of AIDS are those afflicted with AIDS Related Complex (ARC). These individuals exhibit milder symptoms than those with the full-blown AIDS syndrome and are similar to the seropositive individuals because ARC does not necessarily predict future AIDS status.[18]

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14. *Id. See* Centers for Disease Control, *Update: Acquired Immunodeficiency Syndrome—United States*, 35 MORBIDITY & MORTALITY WEEKLY REP. 17-21 (1986). Pneumocystis carinii pneumonia is a rare nonbacterial pneumonia and Kaposi's sarcoma is a rare form of cancer characterized by plaque-like lesions on the skin or mucous membranes. *See* Centers for Disease Control, *Revision of the CDC Surveillance Case Definition for Acquired Immunodeficiency Syndrome*, 36 MORBIDITY & MORTALITY WEEKLY REP. 13S (1987) [hereinafter *Revision of the CDC Surveillance*].

15. The CDC defines AIDS by reference to the presence of the HTLV-III virus and the positive diagnosis of diseases associated with the virus. Note, *supra* note 5, at 563 n.1; Rothstein, *Screening Workers for AIDS*, in AIDS AND THE LAW, A GUIDE FOR THE PUBLIC 130 (H. Dalton ed. 1987).

The revised definition of AIDS is organized into 3 parts: (1) Where HIV antibody tests are not performed or give inconclusive results and no other disease or genetic syndrome is the cause of immunodeficiency, then an individual fitting the description of any of the 12 diseases (including pneumocystis carinii pneumonia and Kaposi's Sarcoma) listed (in part IB of this issue) is diagnosed as having AIDS; (2) Regardless of the results of the HIV antibody test, if the individual is definitely diagnosed with any of the 12 diseases listed in part IIA or is presumptively diagnosed with any of the 7 conditions specified in part IIB, it is indicative of AIDS; (3) If the individual has a negative antibody test, he does not have AIDS unless there is no other cause of his immunodeficiency and the patient has been definitively diagnosed as having pneumocysitis pneumonia or any disease specified in part IIB and has a T-helper count of less than 400/mm3. *Revision of the CDC Surveillance*, *supra* note 14, at 4S.

16. *See* Centers for Disease Control, *Public Health Service Guidelines for Counseling and Antibody Testing To Prevent HIV Infection and AIDS*, 36 MORBIDITY & MORTALITY WEEKLY REP. 509 (1987). A positive antibody test indicates that the patient has been infected with the AIDS virus. Individuals may not demonstrate symptoms or clinical evidence of infection for years. *See also* Rothstein, *supra* note 15, at 130 (for an in-depth description of the AIDS antibody tests and their accuracy).

17. Rothstein, *Medical Screening of Workers: Genetics, AIDS, and Beyond*, 2 LAB. LAW. 675, 681 (1986). It has been estimated that only about 25 - 50% of seropositive individuals develop AIDS within 5 - 10 years of contracting the virus. Rothstein, *supra* note 15, at 131 (citing INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES, CONFRONTING AIDS 91 (1986)).

18. Rothstein, *supra* note 15, at 131. Victims of ARC are characterized by symptoms such as enlarged lymph nodes, shingles, weight loss, persistent fever, night sweats, persistent

The CDC reports that because transmission is known only to occur via "sexual contact, parenteral exposure to infected blood or blood components, and perinatal transmission from mother to neonate,"[19] the persons at risk include "homosexual and bisexual men, intravenous (IV) drug abusers, persons transfused with contaminated blood or blood products [and], heterosexual contacts of persons with HTLV-III/LAV infection."[20]

Since 1981, when HIV infection was first recognized, the disease has become pandemic.[21] The figures are startling as the incidence of the disease continues to rise at alarming rates. As of December 31, 1988, the CDC reported a total number of 82,764 AIDS cases in the United States.[22] Moreover, the CDC estimates that by 1992, a total of 365,000 people will be diagnosed with AIDS.[23] Thus, as the incidence of the disease continues to rise in the future, more and more Americans are likely to be directly affected by HIV infection.

II. Origin of Public Policy dealing with HIV Infection

Throughout the centuries, the threat of infectious disease has struck a chord of fear, not only with the public at large, but also with those individuals who have taken on the responsibility of caring for the afflicted.[24]

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dry cough or diarrhea and compromised immune function. Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11, 18 n.38 (1985). *See* Henry, *supra* note 5, at 34 ("It is believed that between 5 and 20 percent of the persons with ARC will eventually develop AIDS."). *See also infra* notes 48-50, 77-82 and accompanying text for a discussion as to whether seropositive and ARC afflicted individuals will be defined as handicapped under section 504.

19. Centers for Disease Control, *Summary: Recommendations for Preventing Transmission of Infection with Human T-Lymphadenopathy-Associated Virus in the Workplace*, 34 MORBIDITY & MORTALITY WEEKLY REP. 681, 682 (1985) [hereinafter *Summary*].

20. *Id.*

21. Centers for Disease Control, *Acquired Immunodeficiency Syndrome (AIDS): Precautions for Health Care Workers and Allied Professionals*, 32 MORBIDITY & MORTALITY WEEKLY REP. 450 (1983). However, the CDC reports that although "[t]he number of AIDS cases reported each year continues to increase, . . . the rate of increase has steadily declined except in 1987, when the revision of the case definition resulted in an increase in reported cases." Centers for Disease Control, *Update: Acquired Immunodeficiency Syndrome — United States, 1981-1988*, 38 MORBIDITY & MORTALITY WEEKLY REP. 229 (1989) [hereinafter *Update*].

22. *Update*, *supra* note 21, at 229.

23. Centers for Disease Control, *AIDS and Human Immunodeficiency Virus Infection in the United States: 1988 Update*, 38 MORBIDITY & MORTALITY WEEKLY REP. 5, 6 (1989).

24. Guy de Chauliac, a surgeon during the time of black death, wrote about physicians' fears during that catastrophe stating: "[f]or self-preservation there was nothing better to do than flee the region before becoming infected . . . no one could approach or even see a patient without taking the disease." Wallis, *You Haven't Heard Anything Yet*, TIME, Feb. 16, 1987, at 50, 54. *See also* B. TUCHMAN, A DISTANT MIRROR, THE CALAMITOUS 14TH CENTURY

Although the public almost always fears those afflicted with newly discovered diseases,[25] the fear associated with HIV infection has its origin in a number of sources. When HIV infection first emerged on the American scene, it was popularly regarded by the general public as "the gay plague."[26] Much of the animosity towards HIV infected individuals originated from the fact that victims were nearly always either homosexual, bisexual or IV drug users.[27] Thus, to many, the AIDS victims were getting what they deserved.[28] The prejudice against homosexuals was compounded by ignorance regarding the transmissibility of the disease. As the public learned of the nearly certain mortality rate of the disease, a diagnosis became a death sentence and the prejudice against the afflicted grew.[29] As a result, individuals were often rejected by their family, friends and, in some cases, the health care institutions that were supposed to provide them with medical attention.[30]

(1988) (for a discussion of the Black Plague and an analysis of the community reaction to the disease).

25. "[S]ociety generally has reacted very poorly to epidemics." Henry, *supra* note 5, at 32.

26. *See* Wallis, *The Big Chill: Fear of AIDS*, TIME, Feb. 16, 1987, at 50. "At first AIDS seemed an affliction of drug addicts and especially homosexuals, 'a gay disease.' " *Id.*

27. As of September 12, 1988, 89% of AIDS victims are either homosexual, bisexual or IV drug uses. *AIDS Weekly Surveillance Report*, U.S. AIDS PROGRAM, CENTERS FOR INFECTIOUS DISEASE, (Sept. 12, 1988).

28. Evidence of this school of thought is prevalent, especially with conservative religious groups. Bob Grant, chairman of the Christian Voice lobbying organization, explained, "[i]nitially most traditional-value types saw AIDS as a natural cause and effect. . . . People with unsafe and immoral behavior were reaping its results." Stanley, *AIDS Becomes a Political Issue*, TIME, Mar. 23, 1987, at 24 [hereinafter *AIDS Becomes*]. AIDS has also been perceived as a punishment handed down from God. Wallis, *supra* note 26, at 51. *See also* McAuliffe, *AIDS at the Dawn of Fear*, 102 U.S. NEWS & WORLD REP., Jan. 12, 1987, at 60, 62 ("members of the religious right . . . see AIDS as God's rough justice for the sin of homosexuality.").

29. Sullivan, *Blood Center Fear Impact of AIDS Test*, N.Y. Times, Feb. 14, 1985, at B1, col. 5. The New York City Commission on Human Rights reported an increase in the number of discrimination claims brought by homosexuals. According to the Commission, the increase in prejudice against homosexuals is due at least in part to the HIV epidemic. Leonard, *supra* note 5, at 683, n.8.

30. "Many medical professionals are refusing to treat people with AIDS, even though current medical studies indicate that the occupational risk of transmission of the Human Immunodeficiency Virus (HIV) is minimal." Banks, *The Right to Medical Treatment* in AIDS AND THE LAW, A GUIDE TO THE PUBLIC 175 (H. Dalton ed. 1987).

The risk of transmitting infection from surgeon to patient cannot be determined exactly. However, because Hepatitis B is spread by similar modes of transmission, it has been used as the basis for a comparison in estimating the risk of transmission for HIV infection. Based on these calculations, it has been estimated that seroconversion in the operating room can occur on a range between 1 per 143,000 cases to 1 per 478 cases. Comment, *The AIDS Project: Creating a Public Health Policy—Rights and Obligations of Health Care Workers*, 48 MD. L. REV. 106, 117 n.85 (1989) [hereinafter Comment].

Therefore, the policy behind issues relating to the HIV epidemic is much different than that for other serious life-threatening diseases.[31] Rather than being treated as a medical issue, AIDS was treated primarily as a civil rights and political issue.[32] Therefore, AIDS policy discussions have been focused toward protecting the gay community and HIV infected persons, in general, from discrimination.[33]

III. HIV INFECTION: THE REHABILITATION ACT AND APPLICABLE CASE LAW

The applicability of discrimination legislation to HIV infected individuals can be traced to a recent Supreme Court case. In *School Bd. of Nassau County v. Arline*,[34] the Supreme Court was presented with the issue of whether persons with contagious diseases were protected under section 504 of the Rehabilitation Act of 1973.[35] Section 504 of the Act provides that "[n]o otherwise qualified handicapped individual 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."[36] In *Arline*, the plaintiff, a grade school teacher, was afflicted with recurrent tuberculosis (TB). The school board, acting upon the belief that Ms. Arline could infect her students with the disease, relieved her of her position. She brought suit under section 504 claiming that she was a handicapped individual and that the school board owed her a duty of reasonable accommodation. According to the Act, a handicapped individual is one who "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities (ii) has a record of such impairment or (iii) is regarded as having such an impairment."[37] The Court, based on medical testimony, held that TB affected Ms. Arline's respiratory system to such an extent that she did in fact have a physical impairment.[38] The Court found that her hospitalization, as a result of this condition, was "more than sufficient to establish"

31. However, "[a]s a society, we have not had to address any epidemics of major infectious diseases since polio. This good fortune means that we lack recent social and political experience in dealing with such problems." Brandt, *A Historical Perspective* in AIDS AND THE LAW, A GUIDE FOR THE PUBLIC 42 (H. Dalton ed. 1987).

32. *AIDS Becomes*, *supra* note 28.

33. *Id.*

34. 480 U.S. 273 (1987).

35. Section 504 is part of Title V of the Rehabilitation Act of 1973.

36. 29 U.S.C. § 794 (1988).

37. 29 U.S.C. § 706(7)(*B*) (1982).

38. School Bd. of Nassau County v. Arline, 480 U.S. 273, 281 (1987).

that Ms. Arline had been limited in a major life activity.[39]

The language of section 504 only protects "otherwise qualified" handicapped individuals. The Department of Health and Human Services regulations, pursuant to the Act, define a "qualified handicapped person" as one who, "with reasonable accommodation, can perform the essential functions of the job."[40] Because the statute imposed on the employer an affirmative duty to provide the reasonable accommodation to the handicapped employee, the Court remanded the case to the district court for a determination of whether Ms. Arline was otherwise qualified and whether reasonable accommodation was possible.[41] To assist the lower court in its decision of whether Ms. Arline was "otherwise qualified," the Court implemented guidelines based on criteria recommended by the American Medical Association (AMA):

> (a) the nature of the risk (how the disease is transmitted),
> (b) the duration of the risk (how long is the carrier infectious),
> (c) the severity of the risk (what is the potential harm to third parties), and
> (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.[42]

Furthermore, the Court acknowledged the relevance that this decision would carry for victims of HIV infected persons.[43] Because the question was not before the Court, the Court did not rule on the issue of whether an individual who only tested seropositive for TB and whose "handicap" would be contagiousness, would be deemed "handicapped" for the purposes of section 504. However, the statute provides that in addition to those who suffer from a physical or mental impairment, those who are "regarded as having such an impairment" are also handicapped.[44] The Court, in *Arline*, explained the policy reasons underlying this provision:

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39. *Id.*

40. 45 C.F.R. § 84.3(*k*)(l) (1987).

41. *Arline*, 480 U.S. at 289.

42. *Id.* at 288.

43. *Id.* at 282 n.7.

44. At the time of the *Arline* decision, the Justice department's official position was that persons with AIDS should not be covered by federal discrimination laws at all. The Department of Justice opinion stated that an employer's fear of contagion in the workplace should be a legitimate defense for discriminatory employment practice. *Charge of Bias Based on AIDS Filed Against Florida Hospital*, 185 Daily Lab. Rep. (BNA) at A-3 (Sept. 24, 1986) [hereinafter *Charge*].

On September 27, 1988, the Department formally reversed its position. Today, the Department supports the protection of persons with AIDS, as well as HIV-seropositive individuals, under the Act. Marcus, *Justice Dept. Reverses Stance on AIDS Bias*, Wash. Post, Oct. 7, 1988, at A1, col. 1.

> Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious. The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgment.[45]

These concerns for protecting handicapped individuals as well as those who are regarded as being handicapped are compatible with the prevalent civil rights interest in protecting persons with HIV infection and the gay community from discrimination.[46]

In general, the application of the Court's decision is readily apparent to persons with AIDS or ARC. As Ms. Arline was considered to be handicapped because she suffered a physical impairment to her lungs, it is undeniable that the damage an AIDS or ARC afflicted individual sustains to his or her immune and hemic system is likewise considered to be a physical impairment.[47] Although not specifically addressed in *Arline*, today individuals who test seropositive (but who do not exhibit the manifest symptoms of AIDS) or who have ARC will probably be protected under section 504.[48] These individuals are "regarded as having an impairment" because of the "general perception" of them as AIDS carriers.[49] Thus, individuals who are

45. *Arline*, 480 U.S. at 284, 285.

46. Many of the cases of discrimination against HIV infected individuals stem from fear of contagion. *See AIDS Cases Prompt a Host of Law Suits*, Wall St. J., Oct. 7, 1987, at 37, col. 3 (cited in Note, *supra* note 5, at 573).

47. Physical impairment refers to "any physiological disorder or condition . . . affecting one or more of the following body systems . . . respiratory . . . hemic and lymphatic." 45 C.F.R. § 84.3(*j*)(2)(*i*) (1988). *See also* Doe v. Dolton Elementary School Dist., 694 F. Supp 440 (N.D. Ill. 1988); Thomas v. Atascadero Unified School District., 662 F. Supp. 376 (C.D. Cal. 1987); Ray v. Dist. of Desoto County, 666 F. Supp. 1524 (M.D. Fla. 1987). *See also* Note, *supra* note 5, at 572 (citing the AMA's amicus curiae memorandum for *Ray*, for the principle that individuals who are seropositive but manifest no symptoms of AIDS or ARC will be considered to be impaired for the purposes of section 504: "viral infection is quite clearly a physical 'impairment' in the ordinary sense of the word.").

48. *See* Leonard, *AIDS in the Workplace* in AIDS AND THE LAW A GUIDE TO THE PUBLIC 111-12 (H. Dalton ed. 1987); Henry, *supra* note 5, at 42 (citing Cronan v. New England Tel.& Telegraph Co., 41 Fair Empl. Prac. Case (BNA) 1268, 1273 (D. Mass. Apr. 11, 1986)). The court found under a state discrimination statute that "a handicapped person [who was barred from returning to work] solely on the employer's erroneous perception of him as someone who is contagious to coworkers" qualified as being "regarded as having an impairment." *Cf. supra* note 44 and accompanying text.

49. Leonard, *supra* note 5, at 691.

seropositive and have no other impairments are also "generally perceived" as having AIDS although they do not meet the CDC definition of AIDS. They, too, will most likely be protected under section 504 as handicapped individuals.[50] Therefore, when interpreting the Act to apply to HIV-seropositive individuals, both a construction of the language and an examination of the underlying policy considerations will result in the classification of such persons as "being regarded as having a physical or mental impairment."

Once "physical impairment" has been established, in order to fulfil the rest of the statutory definition of handicap, the afflicted employee must demonstrate that he or she has a substantial limitation to a major life activity. The HHS regulations specify employment as one of the "major life activities."[51] The flexibility of this requirement is demonstrated in *Doe v. Dolton Elementary School Dist.*[52] In this case, the court determined that a student with HIV infection was "substantially impaired in his ability to interact with others, e.g., to attend public school."[53] The court found that "[s]uch interaction is a major life activity."[54] Thus, once an individual has shown that he is "physically impaired" and that he is "substantially limited" in his ability to retain or procure employment, he will fulfil the threshold requirement as a "handicapped individual" under section 504.

After it has been determined that an individual is handicapped, the pertinent questions that arise are whether the individual is "otherwise qualified" and whether he can be "reasonably accommodated." On remand, the district court in *Airline* utilized the AMA standards and found that Ms. Arline was, in fact, "otherwise qualified" to teach because she could perform the essential functions of the job.[55] The district court first evaluated the nature and duration of the risk. The court concluded that TB is difficult to trans-

50. Such an interpretation has been found to be consistent with the intent of section 504 and the HHS regulations which do not limit the definition of handicap to the conditions listed in the statute. Note, *supra* note 5, at 571. *See, e.g.*, Ray v. School District of DeSoto County, 666 F. Supp. 1524 (M.D. Fla. 1987) (where three boys who tested seropositive for AIDS could not be prohibited from attending school).

51. Major life activities also include communication, ambulation, selfcare, socialization, vocational training, transportation, adapting to housing, caring for oneself, performing manual tasks, walking, hearing, speaking, breathing and learning. 41 C.F.R. § 60-741.54, App. A (1989); 45 C.F.R. § 84.3.(*j*)(2)(i-ii) (1988).

52. 694 F. Supp. 440 (N.D. Ill. 1988).

53. *Id.* at 444.

54. *Id.* A number of other courts have found that HIV-infected individuals would qualify as handicapped. *See* Thomas v. Atascadero Unified School Dist., 662 F. Supp. 376 (C.D. Cal 1987); *Ray*, 666 F. Supp. at 1524; District 27 Community School Bd. v. Board of Educ., 130 Misc. 2d 398, 502 N.Y.S. 2d 325 (N.Y. Sup. Ct. 1986).

55. Arline v. School Bd. of Nassau County, 692 F. Supp. 1286 (M.D. Fla. 1988).

mit[56] and used the fact that Ms. Arline's own family had never been infected as evidence that the risk of transmission was small.[57] Therefore, based on these facts, the court found that Ms. Arline's infection did not pose a significant risk to her students.

The court next looked at the severity of the risk. The court found that because there is a cure for TB, infected individuals who are treated early are not likely to be afflicted with permanent physical harm. Thus, the court held that the risk was not severe.[58] Finally, the court considered the probability of transmission and harm. Because of the limited time that Arline spent with her students, the fact that she had been on medication, and the fact that no one in her own family had ever tested positive for the disease, the court found that "the probability that she would transmit the disease to anyone was so extremely small as to not exist."[59]

In *Doe v. Dolton Elementary School Dist.*,[60] the court applied the AMA factors to an HIV infected school child and found that there was no significant risk of transmission. The court stated that "[i]nfection with the Human Immunodeficiency Virus (HIV-I) does not present a hazard to others in the school or workplace (except in a hospital setting)."[61] However, a more careful analysis of the safety precautions in the hospital environment and the AMA factors will show that in most circumstances a HCW will be otherwise qualified for the purposes of section 504.

IV. HIV INFECTED HCWs AS "OTHERWISE QUALIFIED HANDICAPPED PERSONS" UNDER SECTION 504

In the event that a HCW is denied employment or is terminated from his or her present position, to maintain a cause of action under section 504

56. *Id.* at 1291, 1287. Tuberculosis is spread by the cough of an infected person. Although TB germs are expelled into the air this way, 99.9% of these germs will die immediately. *Id.* at 1287. If the surviving .1% are inhaled by an uninfected person, the germ can settle in the distal portion of the person's lungs. *Id.* at 1287-88. It is only here that the organism can multiply. In most cases, the body's immune system can destroy the germ, but occasionally the organism does multiply. Even in those cases where the TB germ does multiply, only about 5% of these people will ever experience progression of the infection to the point where they become ill. *Id.* at 1288.

57. *Id.* at 1291. Incidence of infection has been shown to be positively related to the amount of time one is exposed to an infectious individual. Therefore, it is reasonable to expect much higher rates of transmission to occur among family members than among coworkers.

58. *Id.*

59. *Id.* at 1292.

60. 694 F. Supp. 440, 445.

61. *Id. But see* Local 1812, American Fed. of Gov't Employees v. United States Dep't of State, 662 F. Supp. 50 (D.D.C. 1987) (where HIV infected employees were not otherwise qualified for overseas duty because of the potential problems with medical care abroad).

against an employer the HCW will first have to prove that he or she is handicapped. Second, the HCW must show that he or she is otherwise qualified. Finally, the HCW must prove that the denial of employment was the result of his or her handicap. Once this is established the burden shifts to the employer to rebut the inference that the employer acted in a discriminatory manner.[62]

The HHS regulations provided that an "otherwise" qualified handicapped person is one "who [is] qualified except for rather than in spite of [his or her] handicap" and who can "with reasonable accommodation perform the essential functions of the job in question."[63] As a means of clarification, in 1988 Congress enacted the Civil Rights Restoration Act[64] and further excepted from the definition of handicapped:

> [a]n individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.[65]

Thus, a determination of "otherwise qualified" for a HCW would hinge upon the AMA factors and whether his AIDS, ARC, or HIV seropositivity status posed a "direct threat to the health and safety of other individuals." The Court in *Arline* instructs courts making these determinations to "defer to the reasonable judgments of public health officials."[66]

An analysis of the AMA factors will demonstrate that in nearly all situations HIV infected HCWS should be otherwise qualified for the purpose of section 504. In *Chalk v. United States Dist. Court Cent. Dist. of Calif.*,[67] the Department of Education assigned a teacher who was diagnosed with HIV infection to an administrative position. The department refused to allow him to teach students in the classroom. The lower court, following the *Arline* decision, evaluated the teacher's case using the AMA factors. The district court judge determined that "the duration of the risk was long and the severity was 'catastrophic,' but that scientifically established methods of transmission were unlikely to occur and that the probability of harm was

62. Broadus, *Arline: The Application of the Rehabilitation Act of 1973 to Communicable Disease*, 39 LAB. L. J. 273, 279 (1988) (citing Pushkin v. Univ. of Col., 658 F.2d 1372 (10th Cir. 1981)); Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985); Doe v. New York Univ., 666 F.2d 761 (2nd Cir. 1981); Dexler v. Tisch, 660 F. Supp. 1418 (D. Conn. 1987).

63. 45 C.F.R. § 84.3(*k*)(1987). *See supra* text accompanying note 40.

64. Pub. L. No. 100-259, 102 Stat. 28 (1988).

65. Id. at 31-32, 1985 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.).

66. School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987). (The CDC and AMA are "public health officials.").

67. 840 F.2d 701 (9th Cir. 1988).

minimal."[68] However, the judge went on to state that although he believed that the risk was small, there was not enough evidence about AIDS that insured complete certainty that the disease would not transmitted.[69]

On appeal, the court pointed out the error of the district court: As "[l]ittle in science can be proved with complete certainty . . . Section 504 does not require such a test."[70] The court referred to the *Arline* opinion in which the Supreme Court stated that exclusion is only allowable if "significant risk of communicating an infectious disease to others" exists.[71] Thus, in referring to the current medical knowledge of the disease, the *Chalk* court, as well as the courts in *Thomas, Ray* and *District 27 Community School Bd.* found that the transmission of AIDS in a classroom setting was not significant or was merely a "theoretical possibility."[72]

Although these cases all involved classroom settings, a similar analysis can be made for the health care environment. Because transmission of HTLV-III/LAV from HCWS to patients is not known to have ever occurred before,[73] it is highly improbable that a court will be able to successfully hold that an HIV-infected HCW poses a "direct threat to the health and safety" of patients or to co-workers. In addition, although HTLV-III/LAV is transmissible via blood-to-blood contact, the CDC has issued guidelines[74] maintaining that the risk of transmission is only prevalent where both "a high degree of trauma to the patient that would provide a portal of entry for the virus (e.g., during invasive procedures)"[75] and contact with "blood or serous fluid from the infected HCW to the open tissue of a patient, as could occur if the HCW sustains a needle stick or scalpel injury during an invasive proce-

68. *Id.* at 707.

69. *Id.*

70. *Id.* at 707.

71. *Id.* at 708 (citing School Bd. of Nassau County v. Arline, 480 U.S. 273, 286 n.16 (1987).

72. *Id.*; Thomas v. Atascadero Unified School Dist., 662 F. Supp. 376, 380 (C.D. Cal. 1987); Ray v, School Dist. of DeSoto County, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987); District 27 Community School Board v. Bd. of Educ., 130 Misc. 2d 398, 408, 502 N.Y.S. 2d 325, 335-7 (N.Y. Sup. Ct. 1986).

73. *Recommendations, supra* note 2, at 15 (1987). Although one AIDS-infected surgeon operated on 400 patients over a 5 year period, to date none of his patients have tested positive for HIV infection. Green, *supra* note 11, at 38.

74. The CDC guidelines, known as "the universal precautions" are procedures designed to decrease the risk of transmitting infectious disease in the health care environment. Although, at the time of this writing, the CDC guidelines are not "law," OSHA has issued a proposed rule and notice of hearing that follows the CDC recommendations. *See also infra* note 124 and accompanying text; Occupational Exposure to Bloodborne Pathogens, 54 Fed. Reg. 23,042 (proposed May 30, 1989); Gostin, *Hospitals, Health Care Professionals and AIDS: The "Right to Know" the Health Status of Professionals and Patients,"* 48 MD. L. REV. 12, 26 (1989).

75. *Summary, supra* note 19, at 691.

dure."[76] Further, the CDC recommends that HCWs "who do not perform invasive procedures need not be restricted from work unless they have evidence of other infection or illness for which any HCW should be restricted."[77] Thus, those individuals who are merely seropositive for HIV and do not participate in invasive procedures will probably always be found to be "otherwise qualified" for protection under the Act.[78]

Because the regulations require the employer to provide reasonable accommodation for handicapped employees, those individuals with ARC and those individuals who are seropositive and perform invasive procedures will likely fall into the purview of statutory protection. The CDC precautions recommend that hospitals require all HCWs, "regardless of whether they perform invasive procedures" to wear gloves at all times where direct contact with body fluids or nonintact skin may occur.[79] The CDC suggests that all HCWs to use "appropriate barrier precautions" including gloves, protective eyewear, face shields, gowns and aprons (during invasive procedures) to reduce the possibility of contact with blood and other bodily fluids.[80] At present, according to the current state of medical knowledge, these precautions are belived to vitiate the risk of transmission of HIV infection in the health care environment both from HCW to patient and among HCWs. Thus, upon evaluation, a court will likely find that a hospital must institute these precautions in order to "reasonably accommodate" an afflicted em-

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76. *Id.*

77. *Id.* HIV-infected HCWs who do not perform invasive procedures should only be removed from "direct patient care" if they refuse to abide by the CDC guidelines. *See also* Comment, *supra* note 30, at 122.

78. This question has arisen in the health care environment. On September 11, 1986, James Kautz, a surgical technician, filed a complaint against his employer Humana Hospital in Orlando, Florida. Kautz, who tested positive for HIV infection, was told by the hospital's personnel director that he would be terminated if he did not either resign or take medical leave. Although he did not have any health problems, Kautz took medical leave from his position. The complaint against Humana alleged that the hospital discriminated against Kautz by "perceiving" him as being handicapped and incapable of performing the duties of his job. Kautz, as of September 1986, was employed by a California hospital. *Charge, supra* note 44. Applying the preceding analysis, it should be determined that Humana Hospital's policy for dealing with seropositive employees illegally discriminates against otherwise qualified handicapped individuals. *See also infra* note 81, where a hospital that had denied staff privileges to a physician with AIDS reversed its position. Ben Wolf, an attorney with the American Civil Liberties Union, stated that the hospital which had "initially tak[en] action which would fuel irrational fears and harm the public health, ha[d] now recognized that discrimination against people with AIDS is unwarranted." *AIDS-Infected Doctor, Hospital Sign Consent Decree Restoring Privileges*, 26 Gov't Emp. Rel. Rep. (BNA) 411 (Mar. 14, 1988) (hereinafter *AIDS-Infected Doctor*).

79. *Summary, supra* note 19, at 691.

80. *Recommendations, supra* note 2, at 7.

ployee.[81] At this point, seropositive HCWs who perform invasive procedures as well as HCWs who manifest symptoms of ARC or AIDS (but do not presently suffer from any other opportunistic infections) would be "otherwise qualified" because they would probably pose neither a "significant risk" of transmitting the disease nor a "direct threat to the health or safety of others."[82]

Hospitals would then be justified in excluding only a limited group of infected HCWs. The CDC recommends that those individuals who have "exudative lesions or weeping dermatitis should refrain from all direct patient care and from handling patient-care equipment until the condition resolves."[83] Thus, a hospital probably could not legally exclude such individuals from employment. For these individuals, a temporary suspension from this type of duty would be a suitable accommodation under the Act.[84] Accommodation is not reasonable when it causes "undue financial and administrative burden" or if it requires a "fundamental alteration in the nature of the program."[85]

Therefore, the question of protection under the Act will probably arise only with regard to those individuals who suffer from the full-blown AIDS syndrome. Because the CDC maintains that the hospital should make an individual assessment of each afflicted HCW, the questions involved with

81. In March of last year, a suit by an AIDS-afflicted physician who had been denied staff privileges at Cook County Hospital was settled by a consent decree. The agreement provided that the doctor would comply with the CDC recommendations. In addition, the doctor was required to wear two pairs of gloves during certain specified invasive procedures and would refrain from performing 3 other particular procedures. Finally, the agreement stated that the hospital would "*reasonably accommodate* [the doctor's] physical and mental limitations by modifying or adjusting his duties and responsibilities to the extent possible to permit him to continue to engage in as many of his job duties as he can competently perform." *AIDS-Infected Doctor, supra* note 78 (emphasis added).

82. *See* Doe v. Cook County, No. 87 C. 6888 (N.D. Ill. Feb. 24, 1988), reported in *AIDS-Infected Doctor, supra* note 78 (where, pursuant to a consent decree, an AIDS-afflicted physician's staff privileges were reinstated and the agreement provided that the hospital could make changes in the doctor's duties if he were ever to "pose a significant health risk to himself or others."). But note the AMA maintains that seropositive HCWs have "an ethical obligation to voluntarily withdraw from performing invasive procedures." Comment, *supra* note 30, at 119 n.94, 124 (citing *Ethical Issues Involved in Growing AIDS Crisis*, 259 J. A.M.A. 1360, 1361 (1988)).

83. *Summary, supra* note 19, at 691.

84. Reasonable accommodation includes modification of work schedules, including part-time employment and job restructuring. *See* 45 C.F.R. § 84.3 (App. A) (1987).

85. School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n.17 (1987) (citing Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979)). *C.f.* Dexler v. Tisch, 660 F. Supp. 1418 (D. Conn. 1987), where a postal worker who suffered from achondroplastic dwarfism could not be reasonably accommodated. The court found that bringing a step stool into this working environment would be a safety hazard both to Dexler and to his coworkers, would lower efficiency and would thus be unduly financially burdensome.

decision making on the part of the hospital become very complex.[86] While these individuals may or may not be considered a "direct threat to health and safety of others" or a "significant risk of transmitting the disease," it may not be necessary for a court to make such a determination. The Civil Rights Restoration Act also exempts from the definition of handicapped those individuals whose disease renders them "unable to perform the duties of the job in question."[87] An individual who suffers from the full-blown AIDS syndrome will likely be too ill to work most of the time.[88] This individual will often times be afflicted with one or more other opportunistic diseases to which he is susceptible. Either as a function of his physical incapacitation or because of his infectiousness as a result of these other opportunistic illnesses, this HCW will probably fail to satisfy the definition of handicapped under the "unable to perform the duties of the job" requirement.

Thus, with the possible exception of those individuals who suffer from the full-blown AIDS syndrome, all HCWs who have AIDS, ARC or are HIV-seropositive should, in most cases, be found to be "otherwise qualified." Because the CDC recommendations are to be implemented with respect to all HCWs regardless of HIV-status, the precautions suggested should be held to be "reasonable accommodation." A court would probably not be justified in concluding that these procedures amount to "a fundamental alteration in the nature of the program" nor that they are "unduly financially burdensome." In addition, it is notable that in the interests of safety, taking such precautions are in the hospital's best interest.[89] It is highly unlikely that any hospital would refuse to implement these procedures. Thus, by including HIV-infected HCWs within the definition of "otherwise qualified handicapped individuals," courts will be implementing the congressional intent to vitiate discrimination based on "pernicious mythologies" or "irrational fear."[90]

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86. Comment, *supra* note 30, at 120.

87. Pub. L. No. 100-259, 1988 U.S. CODE CONG. & ADMIN. NEWS. (102 Stat.) 31-32 .

88. However, if an individual who suffers from the full-blown AIDS syndrome is not too ill to work, and is not afflicted with any other contagious diseases, he will probably be found to be otherwise qualified. Individuals who can be reasonably accommodated under such circumstances will also be found to be otherwise qualified.

89. Hospitals have an obligation to their patients to protect them from acquiring infections in the hospital. Kelly, *Overview of Health Care Issues*, in AIDS AND THE LAW 245 (W. Dornette ed. 1987) (citing Harris v. Huey P. Long Hosp. 378 So. 2d. 383 (La. 1979)).

90. Chalk v. United States Dist. Court Cent. Dist. of California, 840 F.2d 701, 711 (9th Cir. 1988) (citing School Bd. of Nassau County v. Arline, 480 U.S. 273, 284, 285 n.12 (1987)).

V. The ADA: A Proposal For Increased Protection Against Discrimination

A. *Overview of the ADA: Proposed Changes in Federal Protection For Disabled Employees*

On May 9, 1989, the Americans With Disabilities Act (ADA)[91] was introduced in the Senate. Although the Act was not passed by the 101st Congress, it is discussed here because the proposed law, if enacted, would extend the scope of protection against employment discrimination for disabled Americans to the private sector.[92] Moreover, for individuals whose handicap is HIV infection, the legislative history of the proposed Act indicates that the statutory definition of "disabled" would include individuals who have AIDS, ARC, and who are asymptomatic seropositive.[93]

The ADA, as drafted was intended "to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities[94]. . . [and] to provide enforceable standards [for] addressing discrimination against individuals with [handicaps]."[95] Although section 504 demonstrated congressional intent "to prevent discrimination against and expand employment opportunities for handicapped individuals,"[96] the stated purpose of the ADA reflected its more affirmative approach of dealing with discrimination.

As proposed the Act addressed discrimination in a number of contexts and prohibited employment discrimination.[97] This general prohibition is, not surprisingly, very similar to proposed section 504. Furthermore, many

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91. S. 933, 101st Cong., 1st Sess. (1989). When this comment went to print, the Act had been refered to the Senate Committee on Labor and Human Resources of the 101st Congress in second session. The House was also considering a similar Act.

92. S. 933, 101st Cong., 1st Sess. (1989). *C.f.* section 504 discussed *supra* which applies only to programs which receive federal funds. 29 U.S.C. § 794 (1988). *See generally* Leonard, *AIDS Employment and Unemployment*, 49 OHIO ST. L.J. 929, 942-43 (1989) (for a discussion of proposed legislation which would extend protection of federal discrimination laws to individuals affected with HIV).

93. S. REP. NO. 116, 101st Cong., 1st Sess. 22 (1989). The committee and subcommittee both heard testimony from the Presidential Commission on the Human Immunodeficiency Virus Epidemic. *Id.* at 6. This information, as well as testimony from representatives of other groups of disabled Americans, supported the Committees' decision to expand the application of federal discrimination legislation.

94. *Id.* at 2. The Committee explains that the term "disability" rather than the term "handicap" is used within the text of the Act to reflect a more "up-to-date" use of "currently accepted terminology." *Id.* at 21.

95. *Id.* at 2.

96. 29 U.S.C. § 701(8) (1982).

97. S. 933, 101st Cong., 1st Sess. § 102 (1989). The ADA also prohibits discrimination against disabled individuals by Public Services and Public Accommodations and Services operated by private entities.

of the definitions relevant to section 504 have been incorporated in whole or in part throughout the proposed Act.[98] The significance of the ADA as proposed, is that it would have extended the coverage of the Act to private sector employers[99] and not limited coverage to programs receiving federal financial assistance.[100]

B. The Proposed Mandate

The ADA, if passed, would have prohibited employers (and other "covered entities")[101] from discriminating "against a qualified individual with a disability in regard to . . . the hiring or discharge of employees."[102] Under the proposed ADA, the definition of a qualified individual with a disability is almost identical to the definition of an "otherwise qualified handicapped individual under section 504."[103] Furthermore, the ADA would have incorporated the HHS regulations defining "otherwise qualified" into its definition of "qualified individual."[104] Therefore without the protection of the ADA, although a disabled individual can show the elements required by section 504 to prove discrimination, if the action was taken by a private sector employer the employee will not be able to bring suit under section 504. If the ADA had become law, however, an individual could have brought a cause of action under federal discrimination laws by meeting substantially the same test required by section 504.[105] Thus an HIV-infected HCW who is an otherwise qualified handicapped individual under section 504, would also be found to be a qualified individual with a disability for the

98. S. REP. NO. 116. 101st Cong., 1st Sess. at 2 (1989). These definitions have been discussed in previous sections with respect to section 504.

99. *See* S. 933, 101st Cong., 1st Sess. § 101(4) (1989) (limitations on the term "employer").

100. 29 U.S.C. § 794 (1988).

101. S. 933, 101st Cong., 1st Sess. § 101(2) (1989). Covered entities include employment agencies, labor organizations and joint labor committees.

102. S. 933, 101st Cong., 1st Sess. § 102 (1989). *C.f.* the statutory prohibition of section 504, see *supra* note 36 and accompanying text.

103. 29 U.S.C. § 706(7)(*B*)(1988); S. 933, 101st Cong., 1st Sess. § 3(2) (1989). "The term 'disability' means, with respect to an individual-

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

(B) a record of such an impairment; or

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

104. S. 933, 101st Cong., 1st Sess. § 101(7) (1989). A qualified individual with a disability "means an individual with a disability, who with or without reasonable accommodation, can perform the essential functions of the employment position." *Cf.* 45 C.F.R. § 84.3(*k*) (1987), *supra* note 40.

105. Today, these individuals are limited to bringing their claims under the appropriate state law in their jurisdiction.

purposes of Title I of the ADA. Thus, the proposed law substantially increases the number of individuals who may bring suit against their employers.

Title I of the ADA as proposed specifically stated that covered entities may not discriminate against a qualified disabled individuals with respect to a job application or the hiring or discharge of employees.[106] The proposed Act lists eight examples of "discrimination." Although most of these provisions of the Act prohibit the use of tests or selection criteria that would screen out disabled individuals, one section imposes an affirmative duty on the employer to make reasonable accommodation for a disabled applicant or employee.[107] Here, the ADA again appears to mirror the judicial interpretations of section 504.[108] Both the ADA and section 504 define reasonable accommodation as modifications that do not cause undue hardship to the operation of the employer's business.[109] The ADA, however, went a step further and set out factors that an employer should consider when determining whether an activity constitutes an undue hardship.[110] Thus, the employer's duty to provide a reasonable accommodation, under the ADA is substantially the same as an employer's obligation under the provisions of section 504. In the hospital context, the analysis of reasonable accommodation under the ADA would be identical to the analysis under section 504.[111]

C. HIV Infection Under the ADA

Although the text of the ADA does not specifically address infectious diseases such as HIV-infection, the legislative history of the Act indicates the way in which the Senate intended HIV-infected individuals to be treated. The issue at these hearings was a public policy interest in eliminating discrimination based on irrational fears and myths about disabled individuals.[112] The senate report cited a statement made by Admiral James Watkins[113] that "discrimination against individuals with HIV infection is

106. S. 933, 101st Cong., 1st Sess. § 102(*a*) (1989).

107. *Id.* at § 102(5).

108. *See* 45 C.F.R. § 84.3(*k*) (1987), *supra* notes 40 and 63 and accompanying text.

109. S. 933, 101st Cong., 1st Sess. § 102(5) (1989). *See supra* note 84 (citing *Southeastern Community College* and *Arline*).

110. S. 933, 101st Cong., 1st Sess. § 101(9)(*B*) (1989). The proposed act requires the employer to consider, among other things, the size of the business, the nature and type of business, and the nature and cost of the accommodation.

111. *See supra* notes 79-85 and accompanying text.

112. The senate report cited the Supreme Court's opinion in *Arline*: *See supra* note 45 and accompanying text.

113. Admiral Watkins is the former chairman of the President's Commission of the Human Immunodeficiency Virus Epidemic.

widespread."[114] Because the purpose of the ADA was to end discrimination against disabled individuals, the inclusion of this comment in the senate report indicates that the Senate intended for HIV-infected individuals to be protected as "disabled" individuals under the Act. Furthermore, the senate report, again citing the presidential commission, stated that, "[a]ll persons with symptomatic or asymptomatic HIV infection should clearly be included as persons with disabilities who are covered by antidiscrimination protections of this legislation."[115] Thus, it is clear that the Senate, consistent with the public policy objectives that are relevant to HIV discrimination, intended for individuals who have AIDS, ARC or are merely seropositive to be protected under the ADA as proposed.

Under the proposed ADA, employers would, however retain the power of discretion. They would not be under a duty to "prefer applicants with disabilities over other applicants on the basis of disability."[116] Furthermore, the legislative history of the proposed Act indicates that the Senate intended for the provisions of the Civil Rights Restoration Act[117] to be applicable to the ADA as well. The senate report specifically states that "[i]t is also acceptable to deny employment to an applicant or to fire an employee with a disability on the basis that the individual poses a direct threat to the health or safety of others."[118] Therefore, as is true for section 504, because implementation of the CDC universal precautions is believed to significantly decrease the likelihood of transmitting the virus, only very few (if any) HIV-infected HCWs will pose "a direct threat to health and safety."[119] The senate report goes on to state that in any case where an employer wishes to remove or refuse to hire a disabled individual, "the employer must identify the specific risk that the individual would pose."[120] Further, if the employer is concerned that the person poses a "significant risk to the health and safety of others," the employer must further show that no reasonable accommodation is available to remove the risk.[121] Thus, the analysis under Title I of the ADA would be substantially the same as the analysis under section 504. The law would require that the hospital, whether public or private, make an individualized assessment of the infected HCW and identify the particular risk posed by the individual. The hospital, then, would have to show that no reasonable accommodation is available that would remove the risk. Because

114. S. REP. No. 116, 101st Cong., 1st Sess. 8 (1989).
115. *Id.* at 19.
116. *Id.* at 26-27.
117. *See supra* notes 64-65 and accompanying text.
118. S. REP. No. 116, 101st Cong., 1st Sess., 27 (1989).
119. *See supra* notes 79-82.
120. S. REP. No. 116, 101st Cong., 1st Sess. 27 (1989).
121. *Id.*

of the availability of methods that can decrease the risk of transmission in the health care environment, it will be difficult to show that HIV-infected HCWs pose a direct threat to health and safety.[122]

VI. Safety in the Hospital Environment: Possibility of Liability

Safety in the health care environment is undeniably a paramount concern for hospitals. The question that naturally arises in the context of HIV-infected HCWs is that of hospital liability within the context of patient and co-worker safety. Generally, the hospital's duty to its patients requires the implementation of "reasonable rules and standards."[123] Should the CDC recommendations become regarded as an accepted standard of care, injuries to patients proximately caused by the failure to follow these regulations may result in liability to hospitals.[124] However, the mere fact that a hospital, exercising its own judgment, summarily decides that HIV-infected employees pose a safety risk will not justify discrimination. The Supreme Court, while recognizing the importance of safety in the workplace, held in *Western Airlines v. Criswell*,[125] that "even in cases involving public safety" the court may not give complete deference to an employer's assessment.[126] The judicial decisions dealing with section 504 and infectious diseases have been clear in recognizing that "community fear . . . and the possibility of lawsuits . . . as real as they may be cannot be allowed to vitiate the rights"[127] of these individuals. Thus, while hospitals may fear liability stemming from the pos-

122. *See supra* notes 73-78 and accompanying text.

123. Standards are based on hospital bylaws, rules and regulations and Accreditation Standards of the Joint Commission on Accreditation of Hospitals. Trail, *Hospital Liability and the Staff Privileges Dilemma*, 37 BAYLOR L. REV. 315, 326 (1985) (citing Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d. 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966)) for the principle that violation of a rule may be evidence of a breach of a standard of care for the purpose of imposing liability on a hospital.).

124. Because the CDC's universal precautions are recommendations, it has been stated that at present they are not a recognized standard of care. Failure to implement the CDC precautions could be used as evidence of "voluntary standards" of an "association" of which the hospital "was not a member . . . [it] would not automatically establish a standard practice." Macher, *The Medical Background*, in AIDS AND THE LAW 24 (W. Dornette ed. 1987). *See generally*, Hermann, *Hospital Liability and AIDS Treatment: The Need for a National Standard of Care*, 20 U.C. DAVIS L. REV. 441 (Spring 1987). But note, a proposed rule has been issued by the Department of Labor and OSHA incorporating much of the substance of the CDC guidelines into regulations. *See supra* note 74.

125. 472 U.S. 400 (1985) (claim brought by a pilot under the Age Discrimination in Employment Act (ADEA)).

126. *Id.* at 423.

127. Chalk v. United States Dist. Court, Cent. Dist. of California, 840 F.2d 701, 711 (9th Cir. 1988) (citing New York Ass'n for Retarded Children v. Carey, 466 F. Supp. 479, 485 (E.D.N.Y. 1978), *aff'd.* 612 F.2d 644 (2d Cir. 1979)).

sible injury to patients from infected HCWs, these fears should not justify discrimination.[128] Hospitals should still be required to make an individual assessment of each HCW's health and examine the utility of reasonable accommodation in every case.[129]

Like other employers, the hospital's duty to its employees, is controlled by the Occupational Safety and Health Act (OSH Act).[130] Under the Act, the hospital is under a duty to provide its employees with a workplace which is "free from recognized hazards that are causing or are likely to cause death or serious physical harm."[131] If a hospital implements the CDC guidelines, it is unlikely that non-infected HCWs will be able to refuse to work with an AIDS, ARC, or HIV-seropositive co-worker. The OSH Act and the National Labor Relations Act (NLRA) protect workers from being forced to work in an environment where they have a "reasonable apprehension of serious injury and no less burdensome alternative exists" or under "abnormally dangerous conditions."[132] Employers with employees who fall under protection of these statutes may not take action against them for their refusal to work.[133] However, based on the current medical knowledge of the disease, a hospital following the CDC guidelines would not be seen as providing an "abnormally dangerous" working environment and a HCW would not be justifed in the belief that death or serious harm will come to him as a result of working with an infected HCW.[134] These circumstances would once again demonstrate the courts' desire to dispel the "accumulated myths and fears"[135] regarding HIV infection.

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128. *See supra* note 89.

129. The employer must make a careful analysis of the handicapped employee and his position in order to demonstrate that his decision was not based on stereotype or prejudice. *Broadus, supra* note 62, at 275 (citing Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985)).

130. Occupational Safety and Health Act (OSH Act) 29 U.S.C. §§ 651-678 (1982).

131. 29 U.S.C. § 654 (1982).

132. 29 U.S.C. § 660(*c*); National Labor Relations Act (NLRA), 29 U.S.C. § 141 (1982).

133. Michael S. Cecere, at a conference entitled "AIDS: Legal Aspects of a Medical Crisis," stated that workers in this kind of situation would not be protected under OSH Act because AIDS is not transmitted "through conduct [i.e. intimate conduct] one expects to occur in the workplace." *Focus, supra* note 6, at 1615. *But c.f.* Arthur S. Leonard stated at the same conference that the result of such action on the part of workers would turn on the reasonableness of the employee's actions, that is "whether [a] good faith belief [that he is in danger of contracting AIDS] exists when an employee is acting on rumor, hearsay and ignorance." *Focus, supra* note 6, at 1615.

134. The CDC recommendations can be used as evidence of voluntary standards. It is also important to note here that a HCW who contracts AIDS as a result of working with an infected hospital-employee could probably maintain a negligence action against the hospital if the hospital was not implementing the CDC guidelines. *State Labor Law Developments*, 2 LAB. L. 382, 390 (1986).

135. School Bd. of Nassau County v. Arline, 480 U.S. 273, 284-85 (1987).

VII. STAFF PRIVILEGES: APPLICABILITY OF SECTION 504

Traditionally, the hospital's role in the medical career of a physician was limited to providing a place for his practice.[136] Thus, the ability of a doctor to practice medicine was dependent on his ability to acquire staff privileges at a hospital. Early on, courts recognized the importance of staff privileges, but placed the power of the decision making process in the hospital board.[137] In 1927, the Supreme Court held that a license to practice medicine did not bestow upon a doctor a constitutional right to staff privileges at a hospital.[138]

Currently, it is unclear whether physicians who have AIDS, ARC or are HIV-seropositive and are not employed by a hospital but who, by virtue of staff privileges, are affiliated with a hospital are protected under federal discrimination laws.[139] Upon a careful examination, however, it seems likely that doctors who are otherwise qualified will fall into the purview of statutory protection. Although physicians who experience employment discrimination can bring suit under Title VII, ADEA, or the Rehabilitation Act, most of the cases that have come to bar have been brought pursuant to Title VII.[140] Because the underlying philosophy of the Rehabilitation Act is similar to Title VII,[141] an examination of these cases will reveal that circumstances giving rise to a Title VII claim will probably support maintenance of a section 504 action for claims of staff privileges discrimination.[142] Decisions regarding the applicability of the law to staff physicians will focus primarily on the nature of the physician-hospital employment relationship.[143]

136. Trail, *supra* note 123, at 316.

137. *See* Annotation, *Exclusion of or Discrimination Against Physician or Surgeon By Hospital*, 37 A.L.R. 3d. 645 (1971).

138. Hayman v. Gavleston, 273 U.S. 414 (1927).

139. Hartstein, *EEO Issues in the Health-Care Field: A Roundup of Recent Developments*, 12 EMPLOYEE REL. L.J. 241, 258 (1986). *See also supra* notes 78, 81, and 82 (describing Doe v. Cook County, No. 87 C 6888 (N.D. Ill Feb. 24, 1988), where an action by an AIDS-afflicted physician who was denied staff privileges was settled by a consent decree.)

140. *See* Comment, *supra* note 30, at 124.

141. Broadus, *supra* note 62, at 275.

142. *See* Hishon v. King & Spalding, 467 U.S. 69, 74 (1984); EEOC v. Zippo, 713 F.2d 32, 38 (3rd Cir. 1983); Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338, 1340-42 (D.C. Cir. 1973); Amro v. St. Luke's Hosp., 39 Fair Empl. Prac. Cas. (BNA) 1574 (E.D. Pa. 1986); Pao v. Holy Redeemer Hosp., 547 F. Supp. 484, 484 (E.D. Pa. 1982).

Also, note that the analysis that follows regarding section 504 cases would probably be equally applicable to ADA cases, if that act was ever to become law.

143. In the past, this analysis also required a determination of the public or private nature of the hospital. Traditionally, the issue of whether hospital decisions regarding staff privileges are subject to judicial review has hinged on the characterization of the hospital as a public or private institution. While the decisions of private hospitals have been left to the discretion of the hospital governing boards. Annotation, *supra* note 137, at 645. However, today the trend of the courts has been toward "equating public and private institutions." A. SOUTHWICK, THE LAW OF HOSPITAL AND HEALTH CARE ADMINISTRATION 378 (1978). Thus, the dis-

Because in many cases, doctors who have staff privileges are not "employees" of the hospital where they practice, the applicability of employment discrimination legislation is at issue.[144] In general, due to the public policy considerations involved in such cases, the courts have been fairly flexible in finding an employment relationship in these situations..

In *Sibley Memorial Hosp. v. Wilson*,[145] the court interpreted Title VII as extending beyond the bounds of an ordinary employment relationship. In that case, a male nurse filed a claim based on sex discrimination. The nurse, a member of a nurse's registry organization, was referred to care for certain patients. However, the hospital refused to allow him to care for female patients. Although he had no employment relationship with the hospital, the court found that Title VII had a broader scope than the confines of the ordinary employment relationship.[146] Rather than prohibiting discrimination against employees, Title VII uses the word "individuals" and the court therefore felt justified in refraining from "restrict[ing the] references in the Act to 'any individual' as comprehending only an employee of an employer."[147] Because the goal of the Act is to provide "equality of employment opportunities," the court found that Congress sought to prohibit discrimination in employment where "[c]ontrol over access to the job market may reside."[148] Similarly, in actions under section 504, a court will look to the purpose of that Act. Because the congressional intent under section 504 is "to prevent discrimination against and expand employment opportunities for handicapped individuals,"[149] a similar justification could be employed in these cases. Thus, courts will probably be flexible in finding an employment relationship in section 504 cases as well. In addition, section 504, like Title VII, is not limited in its language to the employment context. The Act prohibit discrimination against "qualified handicapped *individu-*

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tinction between public and private institutions is no longer as important to the analysis as it once had been. *See* United States v. Baylor Univ. Med. Ctr., 736 F.2d 1039 (5th Cir. 1984), *cert denied* 107 S.Ct. 958 (1985); Northeast Georgia Radiological Associates v. Tidwell, 670 F.2d 507 (5th Cir. 1982); Jackson v. Norton's Children's Hosp., 487 F.2d 503 (2d Cir. 1973); Sosa v. Bd. of Managers of Val Verde Memorial Hosp., 437 F.2d 173, 177 (5th Cir. 1971); Bello v. South Shore Hosp., 384 Mass. 770, 429 N.E.2d 1011, 1014 (1981); Sams v. Ohio Valley Gen. Hosp. Ass'n., 149 W. Va. 229, 140 S.E.2d 457 (1965).

144. Hartstein, *supra* note 139, at 257. *See also* A. SOUTHWICK, *supra* note 143. "In general, a staff physician with no closer relationship to the hospital corporation than having the privilege of treating his private patients who are hospitalized there, is not an employee of the institution." Under these circumstances the staff physician is an independent contractor.

145. 488 F.2d 1338 (D.C. Cir. 1973).

146. *Id.* at 1341.

147. *Id.*

148. *Id.* at 1340-41.

149. 29 U.S.C. § 701(8).

als."[150] Thus, because the two Acts are similarly worded and have consistent goals, judicial interpretations of section 504 are likely to be similar to those of Title VII and will thus allow for enough flexibility to encompass more than the traditional employer-employee relationship.

In *Amro v. St. Luke's Hosp.*,[151] the court dealt directly with staff privileges and discrimination. The court pointed out that the provision of Title VII pertaining to unlawful employment practices only prohibits employers from taking such discriminatory actions. In that case, the plaintiff, Dr. Amro, had brought a Title VII claim on the theory that he was denied staff privileges because of his Palestinian national origin. The court implemented a "hybrid test" to determine whether an employment relationship existed. The court, using the factors set out by *EEOC v. Zippo*,[152] considered the "economic realities" of the relationship as well as:

> (1) the kind of occupation, with reference to whether the work is usually done under the direction of supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the 'employer' or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the 'employer'; (9) whether the worker accumulates retirement benefits; (10) whether the 'employer' pays social security taxes; and (11) the intention of the parties.[153]

Upon analysis, the court found that "the only factor which suggests an employer-employee relationship is the fact that the doctor utilizes the hospital's equipment and works in the hospital."[154] In finding that a doctor with staff privileges could not be characterized as an employee of the hospital, the court pointed to the fact that such doctors are not salaried,[155] do not receive

150. "The term 'individual' implies that it is not necessary for a person to have a direct employment relationship to receive protection" under section 504. Comment, *supra* note 30, at 1242-45.

151. 39 Fair Empl. Prac. Cas. (BNA) 1574 (1986).

152. 713 F.2d 32, 37 (3rd. Cir. 1983).

153. *Amro*, 39 Fair Empl. Prac. Cas. (BNA) at 1576 (quoting *Zippo*, 713 F.2d at 37 quoting from Spirides v. Reinhardt, 613 F.2d 826, 832 (D.C. Cir. 1979)).

154. *Amro*, 39 Fair Empl. Prac. Cas. (BNA) at 1576.

155. Salary arrangements between hospitals and doctors are becoming more frequent. Where such arrangements exist the hospital may be liable for the physician's negligence under the doctrine of respondeat superior. Thus, it is likely that salary arrangement may provide courts with a route to find an employment relationship. SOUTHWICK, *supra* note 143, at 378.

any kind of compensation in the form of retirement benefits or vacation plans, and that the hospital does not supervise the work of staff physicians.[156]

The court, however, did manage to find an employment relationship in this case. Noting that Title VII protects individuals in the "terms, conditions, or privileges of employment," the court looked to the fact that Amro had established, as a surgical resident of St. Luke's, "a prior contractual relationship" with the hospital.[157] Thus, relying on the Supreme Court's decision in *Hishon v. King & Spalding*,[158] the court concluded that at St. Luke's, consideration for staff privileges was a fringe benefit of employment.[159] Although his resident contract did not provide for such, the relationship had been established and Dr. Amro qualified for protection under Title VII.[160]

Because Title VII and section 504 have similar language and are supported by compatible policies, the analysis for actions under section 504 should be quite similar to these cases. Thus, absent a prior contractual relationship, courts using this "hybrid test" may decline to find an employment relationship for doctors with hospital staff privileges. However, should a court decide to follow the example developed in *Pao v. Holy Redeemer Hosp.*,[161] there is a greater likelihood that an employment relationship will be found. In that case, a Chinese doctor brought suit under Title VII on the theory that he was denied staff privileges on the basis of his Chinese ethnic background.[162] The court, rather than applying the hybrid test, looked only at the economic control that the hospital had over the doctor's practice.[163] The court found that because the hospital had influence over the physician's ability find prospective patients hospital's control over his access to other employment opportunities was significant.[164] Therefore, an employment relationship existed and the hospital could not discriminate against the physician.

156. *Amro*, 39 Fair Empl. Prac. Cas. (BNA) at 1576.

157. *Id.* at 1577. As a surgical resident, Dr. Amro had made several one-year employment contracts with St. Luke's Hospital.

158. 467 U.S. 69 (1984).

159. Dr. Amro was the first resident "in the history of the hospital" who was denied the opportunity to apply for staff privileges at the end of his residency. *Amro*, 39 Fair Emp. Prac. Cas. (BNA) at 1577.

160. *Id.*

161. 547 F. Supp. 484 (E.D. Pa. 1982).

162. *Id.* at 488.

163. *Id.* at 494.

164. *Id.*

VII. CONCLUSION

Over the next several years, as the incidence of HIV infection continues to rise, employment issues in the hospital environment will become even more crucial. The public policy interest in protecting persons with HIV infection as "disabled" will be taken into account in cases arising with respect to HIV infected individuals and employment discrimination. The legislative intent of section 504 indicates that the goal of the law is to dispel the public's unwarranted fear and belief in myths with respect to disabled persons. The cases discussed above have shown that courts are willing to interpret section 504 to include seropositive, ARC-afflicted and AIDS-individuals within the purview of protection. Furthermore, the legislative history of the proposed ADA demonstrates that the Senate favors legislation which would protect these individuals. This policy demonstrates an effort to curb the prejudice based on hysteria and fear that has been associated with HIV infection.

It appears that the implementation of CDC recommended guidelines will, in most cases protect hospitals from liability and section 504 will protect infected HCWs from discrimination. For the hospital, proper maintenance of the guidelines should vitiate any possibility of transmission in the health care environment. The hospital thus should be found to have implemented reasonable rules and standards to preclude liability in the event that the disease is spread via HCW to patient. In addition, hospitals should similarly be found to have maintained a safe workplace should transmission occur among HCWs. For infected HCWs, section 504 affords considerable job security. It is fairly certain that a seropositive, ARC or AIDS afflicted HCW is "handicapped" for the purposes of the statute. Because the risk of transmission is "merely theoretical" and is further decreased by the implementation of the CDC recommendations, it is highly unlikely that, excepting those individuals with full-blown AIDS who are unable to work, an infected HCW will be found to be "otherwise qualified."

Because section 504 is directed at employers, infected staff physicians may have a more difficult time finding protection under the Act. Although, their condition would not prevent these doctors from being "otherwise qualified," because of their employment relationship with the hospitals, maintenance of such a cause of action would depend on the test that the court chooses to implement. The public policy considerations surrounding the issue will very likely influence the courts' decisions. Because the goal of the Act is to provide opportunity to the handicapped and because the public policy regarding HIV infection has been focused towards removing the obstacles of discrimi-

nation for the afflicted, courts will likely extend the purview of the employment relationship in this context.

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