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## AIDS and Employment Discrimination under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons with Disabilities Act

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## AIDS AND EMPLOYMENT DISCRIMINATION UNDER THE FEDERAL REHABILITATION ACT OF 1973 AND VIRGINIA'S RIGHTS OF PERSONS WITH DISABILITIES ACT

Acquired Immune Deficiency Syndrome (AIDS) is a fatal illness that attacks the immune system, rendering it incapable of defending the body from a variety of rare infections. In the United States, the syndrome was first observed in 1979 in isolated cases in major metropolitan areas.<sup>1</sup> At that time, it affected a limited group of people, mainly homosexual men and drug abusers.<sup>2</sup> Faced with a deadly illness whose cause and mode of transmission were unknown, the public understandably reacted with fear. Many AIDS victims were shunned from schools,<sup>3</sup> workplaces,<sup>4</sup> housing,<sup>5</sup> courts,<sup>6</sup> and medical facilities.<sup>7</sup>

As the syndrome spread and entered the general population, public outcry arose; an enormous amount of research funds and effort was chan-

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1. For an account of the disease as it was first recognized in the United States, see A. FETTNER & W. CHECK, *THE TRUTH ABOUT AIDS* 11-41 (1984); see also *Acquired Immune Deficiency Syndrome (AIDS)—Update*, 1985 WEEKLY EPIDEMIOLOGICAL REC. 199, 200 (before May 1983, 47% of adults with AIDS were New York residents) [hereinafter cited as *AIDS—Update*].

2. A. FETTNER & W. CHECK, *supra* note 1, at 228.

3. In states where no guidelines have been issued by state health officials, children with AIDS have been barred from the classroom by school officials. See *Richmond News Leader*, Aug. 30, 1985, at 2, col. 2 (children in Conn. and N.J. barred). Several states have issued guidelines recommending the decision be made on a case-by-case basis. See, e.g., *Naples Daily News*, Sept. 16, 1985, at 5B (Fla.); *N.Y. Times*, Sept. 8, 1985, at 1, col. 4 (N.Y.); *N.Y. Times*, Sept. 6, 1985, at B7, col. 3 (Mass.). Even where the state policy is to admit children with AIDS, school officials can decide otherwise. See, e.g., *The AIDS Issue Hits the Schools*, *TIME*, Sept. 9, 1985, at 61 (Indiana student barred from classroom despite health officials' contrary recommendation).

In Virginia, persons suffering from contagious diseases are excluded from public schools by VA. CODE ANN. § 22.1-272 (Repl. Vol. 1985). A 1985 Attorney General Opinion indicates that the local school superintendent, after considering qualified medical advice, may decide whether § 22.1-272 encompasses AIDS. The opinion recognizes that this approach may result in a lack of uniformity throughout the various school districts. — Op. Att'y Gen. Va. — (Oct. 28, 1985) (letter to James B. Kenley, Comm'r, Dep't Health).

4. See *infra* notes 58-59 and accompanying text.

5. See *N.Y. Times*, Aug. 8, 1985, at E5, col. 1 (City of Queens, N.Y., canceled plans to house homeless AIDS victims in nursing home after protest by city residents); *Richmond News Leader*, Aug. 31, 1985, at 3, col. 3 (Roman Catholic official's plans to shelter AIDS patients in vacant convent abandoned due to neighborhood response).

6. See *Richmond News Leader*, Sept. 6, 1985, at 13, col. 1 (charges against alleged bicycle thief dropped rather than have him enter courtroom); see also *N.Y. Times*, Aug. 8, 1985, at E5, col. 3 (14 prospective jurors asked to be excused when told defendant had "pre-AIDS").

7. See *Nat'l L.J.*, July 9, 1984, at 1, col. 3 (gay client refused service by dentist; paramedics refused to touch heart attack victim feared to have AIDS).

neled into investigation of the syndrome.<sup>8</sup> In a relatively short period of time much was learned. The mode of transmission was determined, and the causative agent (HTLV-111) was discovered.<sup>9</sup> Unfortunately, the knowledge of the medical community has not been adequately conveyed to the general public, and AIDS is often viewed as a "mysterious force." Precautions have been carried to an extreme in some cases, resulting in unnecessary restrictions on the lives of those already impaired by the disease. These restrictions have consequently yielded much litigation to define the rights of individuals with AIDS.

The purpose of this comment is to: (1) summarize the available medical information and thereby facilitate an understanding of the syndrome; (2) discuss the application of the federal and Virginia handicap anti-discrimination statutes to persons with AIDS; and (3) illustrate that the extent of legal protection from discrimination for an AIDS victim will depend upon a careful weighing of various factors.

AIDS affects its victims differently, and as a result, legal issues will vary between individuals. This comment will discuss affected persons in terms of the following categories:

I. Persons with the most severe manifestations of AIDS.

II. Persons having an illness caused by HTLV-111 infection that is not severe enough to meet the Centers for Disease Control's (CDC) case definition.<sup>10</sup>

III. Persons who are asymptomatic but have virologic ("virus positive") or serologic ("antibody positive") evidence of an HTLV-111 infection.

IV. Persons who have no HTLV-111 infection but, due to their association with a known risk group, suffer discrimination based on others' fears of AIDS.

## I. ACQUIRED IMMUNE DEFICIENCY SYNDROME

### A. *The Immune System*

AIDS is the clinical manifestation of an immune system dysfunction caused by infection with a newly discovered virus, human T-lymphotropic virus type 111 (HTLV-111).<sup>11</sup> The immune system works through

8. Government funding for AIDS research has risen from \$5.5. million in 1982 to \$234 million in 1986. *AIDS Research Funding Increased by Congress*, Am. Med. News, Jan. 10, 1986, at 9, col. 1; see, e.g., 50 Fed. Reg. 30,295 (1985) (availability of funds for risk factor research); *id.* at 25,325 (availability of funds for epidemiological research); *id.* at 9909 (availability of funds to set up alternate blood screening sites).

9. See *infra* notes 11, 25-29, and accompanying text.

10. See *infra* notes 19-24, 36.

11. Sarngadharan, Popovic, Bruch, Schupback & Gallo, *Antibodies Reactive with Human*

a complicated process by which certain white blood cells, B-cells and T-cells, are able to recognize and destroy foreign substances (antigens) that enter the blood.<sup>12</sup> When a healthy B-cell comes in contact with an antigen, it attaches to the antigen and eventually produces a "memory" cell (or antibody) that will multiply.<sup>13</sup> These antibodies lie in wait and attack entering antigens of the same type.<sup>14</sup>

There are two types of T-cells involved in this process. When familiar antigens enter the blood, T-helper cells remind B-cells that they already have these antibody capabilities and cause the B-cells to immediately begin production.<sup>15</sup> T-suppressor cells limit B-cell activity to prevent overproduction of the antibodies and confine B-cell response to attacking only harmful antigens.<sup>16</sup>

When HTLV-111 infects these cells, chaos results. Affected T-helper cells cannot "remember" substances to which B-cells have antibody capabilities<sup>17</sup> and thus will not trigger B-cells to secrete those antibodies. Affected B-cells cannot by themselves recognize antigens.<sup>18</sup>

The resulting inability of the body's immune system to recognize and produce antibodies to ward off viral and fungal invasions results in a broad range of clinical abnormalities. Severe symptoms include pneumocystic carinii pneumonia (an uncommon form of pneumonia),<sup>19</sup> Kaposi's sarcoma (a rare form of skin cancer),<sup>20</sup> gastrointestinal disorders,<sup>21</sup> neuro-

*T-Lymphotropic Retroviruses (HTLV-111) in the Serum of Patients with AIDS*, 224 SCIENCE 506 (1984). See *Provisional Public Health Service Inter-Agency Recommendations for Screening Donated Blood and Plasm for Antibody to the Virus Causing Acquired Immunodeficiency Syndrome*, 34 MMWR 1 (1985) (The Morbidity and Mortality Weekly Report is the official publication of the Centers for Disease Control.) [hereinafter cited as *PHS Screening Recommendations*]. This virus has been given several names: human T-lymphotrophic virus type 111 (HTLV-111), AIDS-associated retrovirus (ARV), and lymphadenopathy-associated virus (LAV). *Id.*

12. A. FETTNER & W. CHECK, *supra* note 1, at 44.

13. *Id.*

14. *Id.*

15. See Kalish & Schlossman, *The T4 Lymphocyte in AIDS*, NEW ENG. J. MED., July 11, 1985, at 112.

16. A. FETTNER & W. CHECK, *supra* note 1, at 45.

17. *Id.* at 47.

18. *Id.* In some patients, antibodies are produced to the patient's own blood components, such as the platelets, resulting in severe bleeding problems. This is thought to be another result of B-cell derangement. *Id.*

19. Wofsy, *Pneumocystis carinii Pneumonia*, 19 FRONTIERS RADIATION THERAPY AND ONCOLOGY 74 (1985); *Revision of the Case Definition of Acquired Immunodeficiency Syndrome for National Reporting—United States*, 34 MMWR 373 (1985) [hereinafter cited as *Revised Case Definition*].

20. Volberding, *The Problem of Kaposi's Sarcoma in AIDS*, 19 FRONTIERS RADIATION THERAPY AND ONCOLOGY 91 (1984); *Revised Case Definition, supra* note 19, at 374.

21. Altman, *Gastrointestinal Cryptosporidiosis and Cytomegalovirus Enterocolitis*, 19 FRONTIERS RADIATION THERAPY & ONCOLOGY 88 (1985); see also, Zar, Geiseler & Brown,

logical infection and brain lesions,<sup>22</sup> and numerous other opportunistic infections and tumors.<sup>23</sup> A vaccine against HTLV-111 has not been developed, and it is questionable if one would be protective.<sup>24</sup>

### B. *The Nature of HTLV-111*

HTLV-111 is a fragile virus.<sup>25</sup> In order for it to survive from one host to another, it must be transmitted via body fluid.<sup>26</sup> HTLV-111 has been isolated from blood, semen, saliva, and tears, although transmission through saliva or tears has never been documented.<sup>27</sup> All research indicates that infection is possible only through direct contact with the virus.<sup>28</sup> It must enter through a mucus membrane or a break in the skin. This occurs most commonly through intimate sexual contact, sharing contaminated needles, and transfusion of infected blood and blood products.<sup>29</sup> Authori-

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*Asymptomatic Carriage of Cryptosporidium in the Stool of a Patient with Acquired Immunodeficiency Syndrome*, 151 J. INFECTIOUS DISEASES 195 (1985) (asymptomatic carriers of cryptosporidium in homosexual AIDS patients may result in transmission of severe untreatable disease).

22. Goldwater, Synek, Koelmeyer & Scott, *Structures Resembling Scrapie-Associated Fibrils in AIDS Encephalopathy*, THE LANCET, Aug. 24, 1985, at 447; Jordon, Navia, Petito, Eun-Sook Cho, & Price, *Neurological Syndromes Complicating AIDS*, 19 FRONTIERS RADIATION THERAPY & ONCOLOGY 82 (1985).

23. See Busch, *Overview of Infectious Diseases and Other Nonmalignant Conditions in the Acquired Immune Deficiency Syndrome*, 19 FRONTIERS RADIATION THERAPY & ONCOLOGY 52 (1985); *Revised Case Definition*, supra note 19, at 373; see also Moskowitz, Hensley, Chan & Adams, *Immediate Causes of Death in Acquired Immuno-deficiency Syndrome*, 109 ARCHIVES PATHOLOGY & LABORATORY MED. 735 (1985) [hereinafter cited as *Causes of Death*].

24. A vaccine is not likely to be developed for at least five years. The biggest problem with developing an effective vaccine is that the outer layer of the virus, usually the basis for a vaccine, mutates over time. N.Y. Times, Oct. 1, 1985, at C1, col. 1. Once a vaccine is developed, additional time will be needed for testing, and even then the cost of wide-scale immunization is likely to be prohibitive.

25. Council of Dental Therapeutics, Am. Dental Ass'n, *Facts About AIDS for Dental Professionals*, reprinted in AM. LAW INST. AM. BAR ASS'N COMM. CONTINUING PROF. EDUC., AIDS AND THE LAW 132, 134 (1986).

26. *Preventing Transmission of HTLV-111 in the Workplace*, 86 EPIDEMIOLOGY BULL., Feb. 1986, at 2 [hereinafter cited as *Preventing Transmission*]; see also PHS *Screening Recommendations*, supra note 11, at 2.

27. *Education and Foster Care of Children Infected with Human T-Lymphotropic Virus Type 111/Lymphadenopathy-Associated Virus*, 34 MMWR 517 (1985) [hereinafter cited as *Children Infected with HTLV-111*]; see also Johnson, *AIDS Infection Control Precautions*, 19 FRONTIERS RADIATION THERAPY & ONCOLOGY 160 (1985) (dishes used by AIDS patients need not be disposable, but should be sanitized by adequate water temperature in dishwasher).

28. See *Children Infected with HTLV-111*, supra note 27, at 519.

29. PHS *Screening Recommendations*, supra note 11, at 2. Infants are infected with the virus by their infected mothers. Transmission occurs in utero, during birth, and possibly by ingestion of breast milk. *Children Infected with HTLV-111*, supra note 27, at 518; see also *Another Pathway for the AIDS Virus?* MED. WORLD NEWS May 27, 1985, at 67 (transmis-

ties stress that transmission has never been documented through casual contact such as drinking from the same container,<sup>30</sup> sharing gum or food,<sup>31</sup> handling lab specimens,<sup>32</sup> or by casual person-to-person contact in the home, schools, day care, or the workplace.<sup>33</sup> Of all AIDS cases reported to the CDC, no family members of these patients have contracted the syndrome, other than sexual partners or children born to infected mothers.<sup>34</sup>

### C. Range of Symptoms

HTLV-111 affects its victims differently. Some become acutely ill and never recover. Others have milder symptoms, temporarily recover, and then become ill again. The syndrome is like some types of cancer in that symptoms can go into remission for some victims, permitting them to lead relatively normal lives for months at a time.<sup>35</sup>

AIDS, by definition the most severe manifestation of the syndrome,<sup>36</sup> is

sion via breast milk).

30. *Approach to Victims of AIDS Becoming Discrimination Issue*, [Apr.] GOV'T EMPLOYEE REL. REP. (BNA) No. 1107, at 474 (Apr. 12, 1985) [hereinafter cited as *Approach to Victims*].

31. *PHS Screening Recommendations*, *supra* note 11, at 2; N.Y. Times, Sept. 11, 1985, at B3, col. 1.

32. *Update: Prospective Evaluation of Health-Care Workers Exposed via the Parenteral or Mucous-Membrane Route to Blood or Body Fluids from Patients with Acquired Immunodeficiency Syndrome—United States*, 34 MMWR 101 (1985). Health authorities suggest wearing gloves as a precaution, as a cut on the hand theoretically poses risks of transmission. A study of 361 health care workers who have been exposed to HTLV-111 through parenteral or mucus membrane contact shows that none have contracted the disease. Considering that 60% of the workers have been observed for less than 12 months and the long incubation period for AIDS, however, it is likely that some of these workers will develop the syndrome. *Id.*

33. *Children Infected with HTLV-111*, *supra* note 27, at 519; see also *Preventing Transmission*, *supra* note 26, at 2.

34. *Children Infected with HTLV-111*, *supra* note 27. One case of child-to-parent transmission has been reported. The parent had extensive contact with the body fluids of her sick child. She did not wear gloves and often did not wash her hands after contact with blood, waste, or feeding tubes. *Study: AIDS Not Spread by Casual Contact*, Am. Med. News, Feb., 21, 1986, at 25, col. 1.

35. See N.Y. Times, Sept. 11, 1985, at B-3, col. 1. Researchers are unsure why the virus affects people in different ways. It is suggested that, since HTLV-111 infects the T-helper cells, and more of these cells are in the blood in the presence of other infections, susceptibility to HTLV-111 increases in the presence of other infections. Kalish & Schlossman, *supra* note 15, at 113; see also Friedland, Harris, Butkus-Small, Shine, Moll, Darrow & Klein, *Intravenous Drug Abusers and the Acquired Innunodeficiency Syndrome (AIDS)*, 145 ARCHIVES INTERNAL MED. 1413 (1985) (differences in host susceptibility may be of great significance) [hereinafter cited as *Drug Abusers and AIDS*]. The general health of an individual probably affects manifestations of AIDS after the virus is acquired. *Causes of Death*, *supra* note 23, at 737-38.

36. Statistics collected by the CDC only reflect the severe syndrome—milder disease asso-

fatal. More than seventy-five percent of patients diagnosed as having AIDS before January 1983 have died.<sup>37</sup> There is no cure; while treatment may prolong the life of an AIDS patient, treatment is often impossible.<sup>38</sup>

AIDS-related complex (ARC) is a milder syndrome associated with HTLV-111 infection.<sup>39</sup> Symptoms include swollen lymph nodes (lymphadenopathy), fever, weight loss, fatigue, and night sweats.<sup>40</sup> Due to the slow, progressive nature of HTLV-111, it is impossible to predict how many people with ARC will eventually develop AIDS,<sup>41</sup> but evidence indicates that some will not progress to that stage.

A person can also fall within a third category as an asymptomatic carrier of the virus,<sup>42</sup> either with<sup>43</sup> or without<sup>44</sup> detectable antibodies to HTLV-111. It is important to note that there is a difference between being HTLV-111 exposed and falling within category I (having "AIDS") or II (having "ARC"). A person may test virus-positive (have HTLV-111 detectable in his blood) or antibody-positive (have a positive serologic test result for antibody to HTLV-111) without having "AIDS" or "ARC." As with the progression from an ARC to an AIDS condition, it is not yet known what percentage of those in category III will develop AIDS or ARC.<sup>45</sup>

#### D. *Scope of the Syndrome*

Populations at risk<sup>46</sup> of contracting AIDS are: homosexual and bisexual

ciated with HTLV-111 infection is not reported nationally. *Revised Case Definition, supra* note 19, at 373.

37. See *AIDS-Update, supra* note 1, at 199.

38. Drugs used for treatment often cause complications. See, e.g., Zar, Geiseler & Brown, *supra* note 21, at 195. Many patients also have opportunistic infections with no known treatment. *Causes of Death, supra* note 23, at 738 (42% of patients in study died of untreatable diseases).

39. *Revised Case Definition, supra* note 19, at 373.

40. Kalish & Schlossman, *supra* note 15, at 112.

41. Studies indicate that not everyone with ARC will develop AIDS. Mathur-Wagh & Mildvan, *Prodromal Syndromes in AIDS*, 437 ANNALS N.Y. ACAD. SCI. 184 (1984) (persistent generalized lymphadenopathy in the absence of wasting may be endpoint, with potential for reversibility); see also Haverkos & Drotman, *The Epidemiology of the Acquired Immunodeficiency Syndrome*, 19 FRONTIERS RADIATION THERAPY & ONCOLOGY 8, 12 (1985) (not all patients with ARC have immunodeficiency).

42. *Children Infected with HTLV-111, supra* note 27, at 520.

43. *Progress on AIDS Slow as Research and Cases Escalate*, MED. WORLD NEWS, Nov. 12, 1984, at 30.

44. Salahuddin, Markham, Redfield, Essex, Groopman, Sarngadharan, McLane, Sliski & Gallo, *HTLV-111 in Symptom-Free Seronegative Persons*, THE LANCET, Dec. 22-29, 1984, at 1418; see also Page, *Correspondence*, NEW ENG. J. MED., Aug. 22, 1985, at 516 (transmission may occur through antibody-negative, HTLV-111 carrier blood donors).

45. Brenner, *Correspondence*, NEW ENG. J. MED., Aug. 22, 1985, at 516.

46. This risk group was defined for purposes of screening blood donors. *Prevention of*

men (seventy-two percent of total AIDS victims),<sup>47</sup> intravenous drug abusers (seventeen percent),<sup>48</sup> hemophiliacs and other blood product recipients (two percent),<sup>49</sup> and heterosexual contacts of persons with AIDS or at risk for AIDS (one percent).<sup>50</sup> Others who have contracted AIDS include pediatric victims (who contracted the virus in utero from infected mothers), Haitian immigrants to the United States,<sup>51</sup> persons who have had sexual contact with prostitutes,<sup>52</sup> and persons with no identified risk.<sup>53</sup>

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*Acquired Immune Deficiency Syndrome (AIDS); Report of Inter-Agency Recommendations*, 32 MMWR 101 (1983). This list has been expanded in subsequent MMWR issues.

47. See AIDS Surveillance Rep. from Casey W. Riley, Supervisor, Sexually Transmitted Diseases (STD) Program, Va. Dep't of Health to All STD Employees, Sept. 18, 1985 [hereinafter cited as Va. Surveillance Rep.]. For purposes of screening blood donors, this group includes "any man who has had sex with another man since 1977" and applies "to men who may have had only a single contact." *Update: Revised Public Health Service Definition of Persons Who Should Refrain From Donating Blood and Plasma—United States*, 34 MMWR 547 (1985).

48. See Va. Surveillance Rep., *supra* note 47.

49. See *Update: Acquired Immune Deficiency Syndrome—United States*, 34 MMWR 245 (1985). "Although blood establishments are now voluntarily testing blood for antibody to HTLV-111, FDA believes that the possibility of transmitting the causative agent of AIDS by blood transfusions will be reduced but not eliminated." 50 Fed. Reg. 35,460 (to be codified at 21 C.F.R. § 606.121(c)(9)) (requirement that blood container label state, "This product may transmit the agent of hepatitis" changed to "This product may transmit infectious agents").

In January 1985, the U.S. Public Health Service recommended screening blood by the ELISA test (and at times with the Western blot technique) as soon as the test kits were marketed. Recommendations included informing donors of positive test results. *PHS Screening Recommendations*, *supra* note 11, at 2. Test kits were licensed in March 1985. *Id.* The recommendation to inform donors of positive test results resulted in criticism by many who feared that persons at risk for AIDS will donate blood in order to determine their antibody status. Since the test is not 100% accurate, it is feared that some of these people will have false negative results and will infect the blood supply. *Screening for HTLV-111 Antibodies—A Government Blunder?*, J.S.C. MED. A., April 1985, at 242. In response to this fear, the FDA has made funds available to establish alternate test sites. 50 Fed. Reg. 9909 (1985). In Virginia (as on the national level) screening blood donations for HTLV-111 antibody is not statutorily mandated. It is done as a standard procedure by blood collection centers to insure a safe blood supply and limit liability.

50. Va. Surveillance Rep., *supra* note 47.

51. This group is now in the other, unknown group for purposes of CDC reporting due to evidence that the usual modes of transmission were responsible for the high rate of AIDS in this group. *Update: Acquired Immunodeficiency Syndrome—United States*, 34 MMWR 245, 247 (1985). Va. Surveillance Rep., *supra* note 47.

52. *Heterosexual Transmission of Human T-Lymphotropic Virus Type 111/Lymphadenopathy-Associated Virus*, 34 MMWR 561 (1985) [hereinafter cited as *Heterosexual Transmission*]; see also Clumeck, Van de Perre, Carael, Rouvroy & Nzaramba, *Heterosexual Promiscuity Among African Patients with AIDS*, NEW ENG. J. MED., July 18, 1985, at 182 (noting that in Africa AIDS is more common among the heterosexual population); *Heterosexual AIDS Transmission*, MED. WORLD NEWS, Jan. 28, 1985, at 17. The PHS has made research grants available to study this risk factor. 50 Fed. Reg. 30,295 (1985).

53. Va. Surveillance Rep., *supra* note 47.



To describe the proliferation of the virus in terms of the numbers of people it has infected would be of limited benefit because the victim count increases daily,<sup>54</sup> and the CDC, in maintaining the national figures, counts only AIDS victims (those suffering from the most severe manifestations of HTLV-111 infection). Victims with ARC and positive test results are excluded from the CDC's figures.<sup>55</sup> The CDC has estimated that, in addition to the reported cases, there are between 600,000 and 1.2 million people<sup>56</sup> who would test antibody positive. It is estimated that thirty to forty-five percent of these people will eventually develop ARC or AIDS.<sup>57</sup> Therefore, the prominence of the syndrome is far greater than the numbers indicate.

#### E. *Effect of the Syndrome on the Workforce*

Both AIDS victims and healthy homosexual men have been denied employment or discharged due to employers' fears of AIDS.<sup>58</sup> Various human rights organizations, including the ACLU, Lambda Legal Defense and Education Fund (New York based), and Bay Area Lawyers for Individual Freedom (San Francisco based), have handled numerous complaints of employment discrimination against those who have or are feared to have AIDS.<sup>59</sup>

Because litigation of employment discrimination based on AIDS is such a recent development, most cases not settled out of court are still pending. None have reached the appellate level or have been reported. A promising theory of recovery for these individuals is the assertion that AIDS is a disability within the meaning of state or federal fair employment laws. In fact, a confidential legal memorandum drafted by attorneys in the civil rights division of the United States Department of Justice tentatively concluded that individuals suffering from AIDS and related conditions are "handicapped individuals" entitled to protection under the Rehabilitation Act of 1973.<sup>60</sup> This comment will address the application

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54. The number of cases reported to the CDC was 13,061 as of Sept. 20, 1985. *Heterosexual Transmission*, *supra* note 52, at 561. It increased to almost 18,000 cases by March, 1986. J. AM. MED. ASSOC., Mar. 14, 1986, at 1233. In Virginia, 141 cases were reported as of Sept. 26, 1985. Va. Surveillance Rep., *supra* note 47.

55. *Revised Case Definition*, *supra* note 19, at 373.

56. N.Y. Times, Sept. 11, 1985, at 133, col. 1.

57. J. Slaff & J. Brubaker, *The AIDS Epidemic: How You Can Protect Yourself and Your Family, Why You Must*, reprinted in AIDS AND THE LAW, *supra* note 25, at 124.

58. See, e.g., Blodgett, *Et al.*, STUDENT LAWYER, Jan. 1984, at 8 (Columbia University teacher with AIDS was re-hired after obtaining legal counsel; gay flight attendant thought to have AIDS was fired by United Airlines); Nat'l L.J., July 9, 1984, at 1, col. 3 (male hair-dresser falsely thought to have AIDS fired, male nurse with "pre-AIDS" fired, insurance salesman with AIDS fired).

59. Nat'l L.J., July 25, 1983, at 3, col. 1.

60. Pear, *Aids Victims Gain in Fight on Rights*, N.Y. Times, June 8, 1986, § 1, at 1, col. 5.

of two such statutes to employment discrimination based on AIDS.

## II. THE REHABILITATION ACT OF 1973

In recognition of the special needs of handicapped Americans<sup>61</sup> and the inadequacy of constitutional protection from discrimination,<sup>62</sup> Congress enacted the Rehabilitation Act of 1973.<sup>63</sup> In addition to establishing a Rehabilitation Services Administration to implement a revised vocational rehabilitation scheme and authorize federal grants for research and training, the Act created employment rights for handicapped persons.

Section 501 mandates affirmative action program plans for the hiring and promotion of handicapped individuals in federal agencies.<sup>64</sup> Section 505 provides similarly for parties operating under federal procurement contracts.<sup>65</sup> Section 504 states: "No *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. . . ."<sup>66</sup>

To establish a *prima facie* case<sup>67</sup> of section 504 discrimination, a claimant must prove: (1) he is handicapped; (2) he is otherwise qualified; (3) the discrimination is based solely on his handicap; and (4) the program or activity in which he is employed<sup>68</sup> (5) receives federal financial assistance.

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61. Senator Dole stated, "Along with [the] great potential there is a great need for understanding—of the problems the handicapped face—of the assistance they require to fulfill their potential—and of priorities for the limited resources available to attain this goal. Each person has the common needs of all people . . . . But beyond these basic needs, handicapped people have special requirements to enable them to maximize their potentials for individual, social, and professional development. 119 CONG. REC. 24,589 (1973).

62. *See, e.g.,* Kruse v. Campbell, 431 F. Supp. 180 (E.D. Va.), *vacated and remanded*, 434 U.S. 808 (1977) (district court's decision based on equal protection violation remanded to decide on basis of Rehabilitation Act § 504). For an overview of limitations of constitutional claims, see Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DEPAUL L. REV. 953, 954-55 (1978).

63. Pub. L. No. 93-112, § 2, 87 Stat. 357 (1973) (codified as amended at 29 U.S.C. §§ 701-96 (1982)).

64. *Id.* § 791(b).

65. *Id.* § 793.

66. *Id.* § 794 (emphasis added).

67. This list is based on the statutory language of § 504. (The later two elements will not be addressed in this comment, as proving them involves no issue unique to a plaintiff with AIDS.) *See* Jasany v. United States Postal Service, 755 F.2d 1244, 1249 n.5 (6th Cir. 1985) (*prima facie* case established by a showing that plaintiff is an otherwise qualified handicapped person and was rejected under circumstances that inferred that the rejection was based solely upon his handicap).

68. "Program or activity" was restrictively defined in *Grove City College v. Bell*, 465 U.S. 555 (1984).

### A. *The Meaning of "Handicap"*

The 1974 amendments to the Rehabilitation Act<sup>69</sup> changed the definition of handicapped individual, significantly enlarging the protected class.<sup>70</sup> The Act now covers "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment."<sup>71</sup> The Department of Health and Human Services (HHS), charged with implementing section 504, broadly defines "physical impairment" and "major life activities." Physical impairment is defined as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genitourinary; hemic and lymphatic; skin; and endocrine . . ."<sup>72</sup> Major life activities are defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>73</sup>

The scope of the Act has rarely been restricted. In 1978, Congress amended the definition of a handicapped individual and excluded alcoholics and drug abusers. The exclusion only applies, however, when an individual's current substance abuse impairs his performance on the job or constitutes a threat to the safety of others.<sup>74</sup>

The only court-imposed limitation to date is that the condition must not be temporary.<sup>75</sup> It need not be a "traditional" handicap.<sup>76</sup> By the terms of the Act, it need not even exist, as long as a condition is perceived by the employer to exist and this perception results in discrimination.<sup>77</sup>

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69. Pub. L. No. 93-516, §§ 100-11, 88 Stat. 1617 (1974) (codified in scattered sections at 29 U.S.C. §§ 701-96 (1982)).

70. Pub. L. No. 93-112, § 7(6), 89 Stat. 355 (1973) gives the old definition. A handicapped individual was defined as anyone who "(A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and III of this Act." *Id.*

71. 29 U.S.C. § 706(7)(B) (1982).

72. 45 C.F.R. § 84.3(j)(2)(i)(a) (1985).

73. *Id.* § 84.3(j)(2)(ii) (emphasis added); see *infra* text accompanying note 85.

74. Pub. L. No. 95-602, 92 Stat. 2955 (1978).

75. See *Stevens v. Stubbs*, 576 F. Supp. 1409 (N.D. Ga. 1983) (transitory illness is not a handicapping condition).

76. See, e.g., *Doe v. United States Postal Service*, 37 FAIR EMPL. PRAC. CAS. (BNA) 1867 (D.D.C. 1985) (transsexualism is a protected handicap under § 504).

77. 29 U.S.C. § 706(7)(B)(iii) (1982). This provision gives protection to those individuals in AIDS category IV, who are perceived by their employer to be carriers of the virus, but in fact are not. It could also give protection to a person suffering from a transitory illness—otherwise not covered. See *supra* note 75.

## 1. Contagious Disease as a Handicap

The contagious nature of a disease does not preclude it from coverage under the Act. The only reported case<sup>78</sup> addressing this issue, *Arline v. School Board*,<sup>79</sup> was brought under section 504 when a third grade teacher was fired because she had tuberculosis. Arline contracted tuberculosis as a child. The disease went into remission. After thirteen years of teaching, Arline suffered three relapses in two years and was dismissed from her job.

Resolving the case required the court to construe the meaning of "handicapped individual." Since tuberculosis impairs respiratory and other major body systems and limits major life activities, it was found to be within section 504 coverage. The court noted that even when not directly suffering the effects of tuberculosis (as when the disease was in remission), Arline was within coverage because she "has a record of such an impairment" and "is regarded as having such an impairment."<sup>80</sup> The Eleventh Circuit reasoned as follows:

When a fact pattern falls so neatly within the statutory and regulatory framework, and when coverage would so clearly serve to promote Congress' intent to reduce instances of unthinking and unnecessary discrimination against those who are the focus of the statute's concern, we would be hard pressed to find an exemption without further legislative direction.<sup>81</sup>

Relying on the 1978 Amendments, the court found that legislation directed inclusion of contagious diseases: "Congress' failure to exclude contagious diseases from coverage when it specifically excluded alcoholism and drug abuse implies that it harbored no similar disapproval about them."<sup>82</sup> The court concluded that tuberculosis is a covered handicap.

## 2. AIDS as a Handicap

A recent confidential legal opinion drafted by attorneys in the Justice Department has tentatively determined that AIDS and related conditions fall under the scope of the Rehabilitation Act.<sup>83</sup> The strong comparisons between AIDS and tuberculosis support this position, and the judicial treatment of tuberculosis under the Act is likely to be a precursor of judicial treatment of AIDS discrimination.

Like tuberculosis, AIDS is a disease which, in terms of HTLV-111 in-

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78. See also *New York Ass'n for Retarded Children v. Carey*, 596 F.2d 27 (2d Cir. 1979) (addressing hepatitis B, though the covered condition was mental retardation).

79. 772 F.2d 759 (11th Cir. 1985).

80. *Id.*, quoting 45 C.F.R. § 84.3(j)(2)(iii) and (iv) (1985).

81. *Arline*, 772 F.2d at 764.

82. *Id.*

83. *Pear*, *supra* note 60.

fection alone or in combination with opportunistic infections, neatly fits into the definition of physical impairment. In terms of the categories noted in the introduction, persons in categories I and II (having severe or mild symptoms) have a physiologic disorder, often causing cosmetic disfigurement (Kaposi's sarcoma), that affects the skin or the neurological, respiratory, reproductive, digestive, genito-urinary, hemic and lymphatic, and endocrine systems of the body. Those in category III (asymptomatic, but having some evidence of HTLV-111 infection) are physically impaired to a lesser extent, but probably meet the definition nonetheless as their "condition" is "affecting" the hemic system.<sup>84</sup>

Although seemingly or truly healthy, those in categories III and IV are probably covered by the Act solely by virtue of the discrimination. The definition of "handicapped person" includes one who has an impairment "that substantially limits major life activities" which, by definition, include working.<sup>85</sup> This limitation may be simply "a result of the attitudes of others toward such impairment" or because an employee is believed to have an impairment when he in fact does not.<sup>86</sup>

## B. Factors that Determine "Otherwise Qualified"

### 1. Necessary Physical Requirements

After proving the existence of a handicap, a person seeking section 504 protection must prove that he is "otherwise qualified" for the job. In *Southeastern Community College v. Davis*,<sup>87</sup> the Supreme Court held "[a]n otherwise qualified person is one who is able to meet all of a program's requirements *in spite of his handicap*."<sup>88</sup> Agreeing with regulations promulgated by the Department of Health, Education and Welfare,<sup>89</sup> the Court denied coverage to someone otherwise qualified *except*

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84. 45 C.F.R. § 84.3 (j)(2)(i)(A) (1985).

85. *Id.* § 84.3 (j)(2)(iv). The employee may be required to show that his "AIDS-status" affects his employability generally, not just his ability to do a particular job. One court suggested several factors to be considered in determining whether an impairment substantially limited an individual's employment potential. The court included the number and type of jobs from which the person was disqualified and his job expectations and training. *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980) (case brought under § 503).

86. "The [Rehabilitation Act] also covers people who 'regarded as' having such impairment, whether correctly or not. For this reason, the [confidential Justice Department opinion] suggests that people with antibodies to the AIDS virus, but no symptoms of the disease, may be protected by the law as well." Pear, *supra* note 60.

87. 442 U.S. 397 (1979).

88. *Id.* at 406 (emphasis added).

89. The Department of Health, Education & Welfare (HEW) was charged by the Executive with coordinating the issuance of regulations under the Act. Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1976). HEW was reorganized into the Department of Health & Human Services (HHS) and the Department of Education. The regulations promulgated by HEW

for a handicap and held that a handicapped person may be required to meet "necessary physical qualifications."<sup>90</sup>

While the Supreme Court's definition of an "otherwise qualified person" has not produced uniform results in the lower courts,<sup>91</sup> the success of a section 504 claim will largely depend on one determination—what is a *necessary* physical qualification? This of course must depend upon the duties of the job in question.

In *Davis*, the Court found that the nursing program to which Ms. Davis sought admission could require its students to possess a requisite level of hearing ability for the safety of hospital patients and staff, much the same as a bus driver could be required to pass an eye examination.<sup>92</sup>

In *Arline*, the court did not assume that having a contagious disease would preclude an elementary school teacher from having the necessary physical qualifications for the job. The case was remanded for a determination of, among other things, whether being free of tuberculosis was a necessary physical qualification for her employment.

## 2. Otherwise Qualified Employees with AIDS

Discrimination against someone with AIDS, rather than a "typical" physical handicap, is usually not based upon a physical qualification needed to perform employment duties that they cannot meet, but upon fear of the disease. The question arises as to whether an employer who is subject to section 504 may lawfully inquire into an employee's "AIDS status," claiming the existence of a necessary physical requirement.

A blood test to screen for antibodies to HTLV-111 is available.<sup>93</sup> However, in most cases, use of such a test will violate HHS's regulations regarding employment criteria<sup>94</sup> and pre-employment tests and inquiries<sup>95</sup>

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are now found at 45 C.F.R. pt. 84 (1985) (HHS) and 34 C.F.R. pt. 104 (1985) (The Department of Education). The HHS regulations are referred to frequently throughout this article because they are the most comprehensive.

90. *Davis*, 442 U.S. at 407 (emphasis added).

91. *Compare Doe v. N.Y.U.* 666 F.2d 761 (2d Cir. 1981) (plaintiff must show that despite her handicap she is qualified) *with Prewill v. United State Postal Service*, 662 F.2d 292 (5th Cir. 1981) (burden on employer to prove qualifications are job-related).

92. "Under . . . a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be 'otherwise qualified' for the job of driving. Clearly, such a result was not intended by Congress." *Davis*, 442 U.S. at 407 n.7 (quoting 45 C.F.R. pt. 84, app. a, at 405 (1978)).

93. On March 2, 1985, the FDA licensed an ELISA test to detect the HTLV-111 antibodies, to be used to screen blood donors. This test is not intended as a general screening device or as a diagnostic test for AIDS. 50 Fed. Reg. 9909 (1985).

94. A recipient may not use an employment test or other criteria that tends to screen out handicapped persons unless it is shown to be job-related. 45 C.F.R. § 84.13(a) (1985).

95. A recipient may not question an applicant as to his status as a handicapped person.

which must be job-related to be lawful. Similarly, the Court in *Davis* held that physical employment requirements must be reasonable.<sup>96</sup>

A test for evidence of HTLV-111 would be job-related for professions where the employee's duties were such that he would be expected to come into transmission-related contact with a customer/patient. When the employee is exposed to broken skin or mucus membrane through invasive procedures (primarily health care professionals) there is a theoretical risk of transmission; thus a screening test could be a legitimate, job-related safety precaution.

Imposing such a test on these employees could meet the *Davis* reasonableness requirement. Although not a single case of AIDS or ARC has been traced to a practitioner in a health care setting,<sup>97</sup> the possibilities can be illustrated by observing transmission of a similar virus. CDC guidelines for health care workers compare transmission of HTLV-111 to that of hepatitis B virus (HBV).<sup>98</sup> It is presumed that the suggested precautions will be as effective in preventing the spread of HTLV-111 as HBV.<sup>99</sup> However, HBV transmission to these workers still occurs occasionally,<sup>100</sup> and patients have been infected with HBV from their practitioners.<sup>101</sup>

An argument can be made that analogies should not be drawn between HTLV-111 and HBV because HTLV-111 is less infectious than HBV—it is harder to transmit and easier to kill.<sup>102</sup> However, they are both blood borne viruses.<sup>103</sup> Thus it would be *reasonable* to base decisions regarding

*Id.* § 84.14(a). Pre-employment physicals are permitted provided that they are given to all entering employees and are used in accordance with the requirements of this part. *Id.* § 84.14(c).

96. *Davis*, 442 U.S. at 407.

97. *Preventing Transmission*, *supra* note 26, at 6.

98. *Acquired Immunodeficiency Syndrome (AIDS): Precautions for Health Care Workers*, 32 MMWR 450 (1983); see also *Perspectives on the Control of Viral Hepatitis, Type B*, 25 MMWR 1 (1976).

99. See Lohiya, Lohiya, Caires & Reesal, *Occupational Exposure to Hepatitis B Virus*, 26 J. OCCUPATIONAL MED. 189 (1984) (disease incidence lower than expected and vaccination unwarranted) [hereinafter cited as *Occupational Exposure*]; Williams, Weber, Cullen & Kane, *Hepatitis B Transmission in School Contacts of Retarded HBsAg Carrier Students*, 103 J. PEDIATRICS 192 (1983).

100. *Occupational Exposure*, *supra* note 95, at 191.

101. *Hepatitis B Among Dental Patients—Indiana*, 34 MMWR 73 (1985) (dentist who was HBV carrier infected between 7 and 9 patients in 9 months, resulting in two fatalities); *Hepatitis B Transmission From Surgeon Reported*, Am. Med. News, Feb. 21, 1986, at 10, col. 1 (surgeon who was HBV carrier infected six patients; similar outbreaks observed in Eng., Minn., Miss., and La.).

102. *Preventing Transmission*, *supra* note 26, at 2. The confidential legal opinion drafted by the Justice Department notes that "a person who poses a genuine threat to the health or safety of others may, for that reason, be unqualified for a particular job or benefit." The report notes, however, that "such cases should be rare because 'AIDS is not readily communicable, and not spread by casual contact.'" Pear *supra* note 60, at 30, col. 2.

103. *Id.*

HTLV-111 screening on what is known about HBV.

For jobs not involving invasive contact, employment decisions based on screening tests or questionnaires are neither reasonable nor job-related. Absent invasive contact, there is no known danger of spreading the virus. While increased media coverage of the syndrome has instilled fear in the public, the response of the courts must be fact-based. Forcing employers to accept facts regarding a specific group of people and discontinue discriminatory practices has been the role of the courts in other areas of civil rights litigation,<sup>104</sup> and it is equally appropriate in this context.

### 3. Accommodating an Employee with AIDS

The HHS regulations define a "qualified handicapped person" as "a handicapped person who, *with reasonable accommodation*, can perform the essential functions of the job in question."<sup>105</sup> Accommodation is mandated unless undue hardship would be imposed on program operation.<sup>106</sup> The degree and type of accommodation called for, however, must be made on a case-by-case basis after consideration of various factors.<sup>107</sup> Depending on the agency involved, accommodation may require the employer to bear significant cost and to accept minor inconvenience, as long as the employee is able to perform the essential functions of the job.<sup>108</sup>

Obviously a person in category IV should be as able to meet any physical requirement and perform essential duties as any member of the general population. Most persons in category I pose no realistic chance of maintaining employment. By CDC definition, people in this category are likely to be too ill to attempt to work or to meet the minimum physical qualifications to carry out the essential duties of the job.<sup>109</sup> They are not, however, more likely to transmit the virus as their health deteriorates.<sup>110</sup>

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104. While courts recognize bona fide occupational qualification (BFOQ) exceptions, that defense is an extremely narrow one. *See, e.g., Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969) (sex was not a BFOQ for switchman position); *Aaron v. Davis*, 414 F. Supp. 453 (E.D. Ark. 1976) (age was not a BFOQ for firefighter). *See generally* 3 LARSON, EMPLOYMENT DISCRIMINATION § 100.15 (1984); *cf infra* note 131.

105. 45 C.F.R. § 84.3(k)(1) (1985) (emphasis added).

106. *Id.* § 84.12(a).

107. Factors include size of the recipient's program (including number of employees, facilities, and size of budget), the type of the recipient's operation (including structure of the workforce), and the nature and cost of the needed accommodation. *Id.* § 84.12(c).

108. *See e.g.,* 28 C.F.R. § 42.511 (1985) (Dep't of Justice regulations). The head of each agency is directed to promulgate regulations to carry out the Act. 29 U.S.C. § 794 (1982).

109. A person who suffered discrimination while in AIDS category II or III and who later developed the full syndrome could maintain an action even after he became too ill to work. The employee's death would not moot the case if intentional discrimination was alleged. *See Consolidated Rail Corp. v. Darrone*, 104 S. Ct. 1284 (1984) (§ 504 authorizes a plaintiff to bring an equitable action for backpay where intentional discrimination is alleged.)

110. Gapen, *AIDS Quarantine Plan Postponed in Texas*, Am. Med. News, Feb. 21, 1986,



Therefore, the requirement of accommodation will be of greatest importance to persons in categories II and III. Most people in category III will not experience discrimination because both the individual and his employer are unaware of the condition. It is estimated that ninety to ninety-nine percent of the 1 to 1.5 million infected or antibody-positive persons are unaware of their condition.<sup>111</sup>

Once revealed through blood screening (or voluntary disclosure) and if the employee's duties involve transmission-related contact, *Arline* indicates that reasonable accommodation includes transfer to a position that does not require such contact. The *Arline* court remanded the case with instructions to determine if the risk of transmission to the students precluded Arline from being otherwise qualified for her job and, *if so*, whether reasonable accommodation could be made for her in that position, in a position teaching older (less susceptible) children, or in some other type of position.<sup>112</sup>

A court's position on the matter of reasonable accommodation will be crucial to the plaintiff with AIDS bringing suit under section 504. The court in *Arline* acknowledged that "whether a disease is contagious is not as outcome determinative as *how* it is contagious, and indicated that accommodation must be considered in determining if an employee is "otherwise qualified."<sup>113</sup>

Persons in category II can benefit the most from section 504 protection, because they are most likely to be recognized as having AIDS while still able to work. These people need to be able to continue as productive members of society, both psychologically<sup>114</sup> and financially.<sup>115</sup> Some may experience extreme fatigue and require a reduced work schedule. Some of them will develop CDC-defined AIDS, as their symptoms progress; therefore, a foreseeable consequence is a need for time off for medical care. Since approved accommodations include modified work schedules,<sup>116</sup> these people should be allowed to continue working as long as they are able and their performance is adequate.

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at 24, col. 1.

111. J. Slaff & J. Brubaker, *supra* note 57, at 128.

112. *Arline v. School Bd.*, 772 F.2d 759, 765 (11th Cir. 1985).

113. *Id.*

114. See Wellisesh, *U.C.L.A. Psychological Study of AIDS*, 19 *FRONTIERS OF RADIATION THERAPY & ONCOLOGY* 155 (1985) (study of AIDS patients showed that impaired vocational functioning resulted in severe feelings of loss).

115. One patient with relatively mild symptoms of AIDS reported medical bills of more than \$11,000 for diagnostic tests alone. A. FETTNER AND W. CHECK *supra* note 1, at 200. The CDC estimates that it costs between \$40,000 to \$140,000 to treat each patient. Richmond News Leader, Sept. 6, 1985, at 13, col. 1.

116. 45 C.F.R. § 84.12(b) (1985); see also UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, HANDBOOK ON REASONABLE ACCOMMODATION 6 (1980).

C. *A Proposed Test to Review Alleged Employer Discrimination*

The employer of a person with a contagious disease must examine all the facts and alternatives available to determine whether the risk of contagion justifies dismissal. In *Arline*, the court indicated that the employer who chooses dismissal must be able to show that the "justifications reflect a well informed judgment grounded in a careful and open minded weighing of the risks and alternatives, . . . [not] simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice."<sup>117</sup> This weighing is highly subjective, and the court gave little guidance in making such a determination.

Because the factors to be considered will vary with each case, this type of analysis lends itself to an algebraic formula similar to that developed by Judge Learned Hand in *United States v. Carrell Towing Co.*<sup>118</sup> Using this theory, an employer's handicap-based discrimination would be lawful only when the *burden* of denying employment on the employee and society (viewed in light of Congress' purpose in enacting the Rehabilitation Act) is less than the *probability* that harm will result multiplied by the *degree* of harm. (Burden is less than probability times degree).

In cases involving discrimination on the basis of AIDS, the burden of denying these individuals employment is heavy, both on the AIDS victim, who is physically able to work but now has no means of support, and upon a society which has historically valued individual ability over characterization on the basis of an immutable quality. The probability that harm will result is a function of mode of transmission, the type of contact involved in the particular job, possible accommodations, and the effectiveness and enforceability of the accommodations. The degree of harm if the virus is transmitted is death but the degree of harm from someone in category IV (no HTLV-111 infection) is zero.

The outcome of each case should largely depend upon the probability that harm will result, primarily determined by the type of contact involved. Thus, where duties create a potential for contact with a mucus membrane or broken skin, the probability of transmission (still very slight)<sup>119</sup> multiplied by the likelihood that death will result if transmis-

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117. *Arline v. School Bd.*, 772 F.2d at 765 (11th Cir. 1985).

118. 159 F.2d 169, *reh'g denied*, 160 F.2d 482 (2d Cir. 1947). In assessing liability of a barge owner after the barge broke away from moorings, Judge Hand stated that the owner's duty was a function of the probability of harm, the gravity of such harm, and the burden of adequate precautions. *Id.*

119. There must be a means for the virus to exit the carrier's body, such as a cut on the hand. Such a cut or other similar condition is likely to be noticed by the worker, who will likely be wearing surgical gloves. However, in professions where sharp instruments are routinely used in employment duties, it is easy to imagine a situation where an accidental needle-stick or slip of a scalpel could result in contaminating blood spill. See *Preventing Transmission*, *supra* note 26, at 6.

sion occurs should outweigh policy considerations of the Rehabilitation Act. At this point, accommodation should be considered. The probability of transmission that is attributable to the employment can be reduced to zero if a transfer to another position is possible. Where contact is of a casual nature and offers no greater probability of virus exposure than in non-employment situations, the possibility of transmission is too remote to outweigh the purposes of the Act.

#### D. *Discrimination Based Solely upon Handicap*

##### 1. Employer Defenses

The requirement that discrimination be based solely on handicap<sup>120</sup> opens the door to employer defenses. The obvious and perhaps most persuasive defense in AIDS litigation is fear of contagion. That defense, however, even if proven, is not dispositive. In *New York Association for Retarded Children v. Carey*,<sup>121</sup> the school board sought to segregate a group of mentally retarded children from classrooms because they were carriers of HBV. The court stated, "[t]here has never been any definite proof that the disease can be communicated by non-parenteral routes such as saliva. Even assuming that there were, the activities that occur in classroom settings were not shown to pose any significant risk that the disease would be transmitted from one child to another."<sup>122</sup> Thus, after considering the mode of transmission of HBV and the type of contact involved in the classroom, the court concluded that the detrimental effects on the children<sup>123</sup> outweighed the remote possibility of transmission.<sup>124</sup> This defense also failed in *Arline*,<sup>125</sup> as the court indicated that proof of contagion was not dispositive, but other factors, most importantly how transmission occurs, must be addressed.<sup>126</sup>

It is important to recognize that a person with AIDS could develop a

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120. 29 U.S.C. § 794 (1982).

121. 612 F.2d 644 (2d Cir. 1979); see *supra* note 77. Discrimination in educational settings is analogous to employment discrimination as they are both covered by § 504 as activities receiving federal funds.

122. *Id.* at 650.

123. Segregation of the children would limit their participation in school-wide activities and reinforce the stigma already attached to them by their handicap status. *Id.* at 650-51.

124. It could be asserted that AIDS cases are distinguished from *Caréy* in that hepatitis B does not have the high fatality rate of AIDS. This argument should fail as the fatality rate for hepatitis is 1-10%, *Perspective on the Control of Viral Hepatitis, Type B*, 25 MMWR 1 (1976). In addition, while a person may recover from this disease, it remains a life-threatening illness, often resulting in permanent liver damage. *Id.*

125. *Arline v. School Bd.*, 772 F.2d at 765 (11th Cir. 1985).

126. *Id.* The only reported case to date addressing the issue of fear of AIDS transmission occurred in the context of prisoner litigation. In an opinion relying heavily upon medical evidence, the court found that AIDS was not transmitted by casual contact. See *LaRocca v. Dalsheim*, 120 Misc. 2d 697, 467 N.Y.S.2d 302 (N.Y. Sup. Ct. 1983).

separate infectious disease that could be contagious in the workplace. Most AIDS related illnesses are caused by microbes that do not usually affect people with functioning immune systems.<sup>127</sup> However, if someone with AIDS concurrently develops TB or any other airborne, infectious disease, he should be required to show that neither the HTLV-111 virus nor the secondary infection are contagious in the context of his particular employment setting.

The requirement that discrimination must have been based solely on handicap also allows the employer to assert the defense that an employee was fired because he is homosexual, not because he has AIDS. Since homosexuality does not have protected status in most jurisdictions, ordinarily an employer is free to discriminate against this group.<sup>128</sup> This defense, however, will not always be successful. In several jurisdictions, it is illegal to make employment decisions based on an employee's sexual preference.<sup>129</sup> In these states, an employer who makes this argument could thus find himself facing two statutory violations. In addition, proving that AIDS was not the motivating factor behind the discriminatory behavior could be difficult for the employer. Once the employee has established the prima facie case, the burden is on the employer to establish this defense.<sup>130</sup> If the employee denies being homosexual and the employer's only evidence is the employee's positive HTLV-111 test, this employer defense is likely to be unpersuasive. AIDS is not conclusive of sexual preference; as time passes and AIDS is increasingly observed in the heterosexual population of this country, the link will become even more tenuous.<sup>131</sup>

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127. Williams, *Tuberculosis Rise Among AIDS Patients Raises Concern About Wider TB Infection*, Wall St. J., Mar. 13, 1986, at 53, col. 3. The rate of tuberculosis in this country has begun to increase in the risk groups associated with AIDS. A connection between the two diseases is suspected, but more research is needed to determine whether this development is more than a coincidence. *Id.*

128. Title VII does not protect homosexuals from employment discrimination based upon their sexual preference. *See, e.g., DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1975). In addition, "homosexuals" are not a "suspect class" entitled to equal protection under the Constitution. *See, e.g., Brown v. Sibley*, 650 F.2d 760, 765-66 (5th Cir. 1981).

129. These jurisdictions are Calif., D.C., N.Y., Pa., and Wis. *See* D.C. CODE ANN. § 1-2512 (1981); WIS. STAT. ANN. § 111.31 (West Cum. Supp. 1985); Cal. Exec. Order No. B-54-79 (1979), *reprinted in* 8A LAB. REL. REP. (BNA) 453:853 (1985); N.Y. Exec. Order No. 28 (1983), *reprinted in* 8A LAB. REL. REP. (BNA) 455:3071 (1985); Pa. Exec. Order No. 1975-5 (1978), *reprinted in* 8A Lab. Rel. Rep. (BNA) 457:831 (1985).

130. "Once a prima facie case has been presented, the burden shifts to the defendant employer to demonstrate that challenged criteria are job related and required by business necessity, and that reasonable accommodation is not possible." *Jasany v. United States Postal Service*, 755 F.2d 1244, 1249-50 (6th Cir. 1985).

131. The notion that AIDS is purely a homosexual disease is fictitious idea based upon an historical fluke. AIDS is currently concentrated in the homosexual population in this coun-

Another realistic concern that is likely to surface in future litigation is the defense of economic hardship. Many employers who rely on the goodwill of their clientele, regardless of their degree of sympathy with AIDS sufferers, would no doubt choose excluding the individual with AIDS over suffering economic repercussions from wary customers. The courts, however, have not accepted this defense in other areas of civil rights litigation.<sup>132</sup> While it may seem unfair for employers to bear the expense of educating the public, to hold to the contrary would allow the irrational fears of the public to defeat the purposes of the Rehabilitation Act.

Another defense relies on speculation regarding the employee's future health. This ostensibly altruistic argument is based on the employer's assertion that the employee's duties will worsen his health. This defense, however, will likely fail in most cases—not for lack of legal merit<sup>133</sup> but for lack of factual basis. It is believed that persons with AIDS develop opportunistic infections not from exposure to others, but from their bodies' inability to control the pathogens that are common inhabitants of the human body.<sup>134</sup> However, a health care worker with HTLV-111 infection is at an increased risk when taking care of patients with infectious diseases; therefore, appropriate precautions should be taken.<sup>135</sup> Also at risk are workers who are required to be inoculated with live-virus vaccines.<sup>136</sup>

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try because this was one of the first groups exposed to the virus when it entered the United States. Transmission was facilitated because gay men, on the average, have larger numbers of different sexual partners. See A. FETTNER & W. CHEEK, *supra* note 1, at 72. However, the virus is equally transmissible via heterosexual intercourse, as illustrated in countries where the virus does not correspond with sexual preference. See *supra* note 52. It is inevitable, absent widely publicized "safe-sex" education, that HTLV-111 will continue to be spread by unknowing carriers in the heterosexual population. See J. Slaff & J. Brubaker, *supra* note 57 at 128.

It bears mentioning in any article on this subject that education is the key to preventing the spread of this virus. Sexual transmission is the means of exposure for the majority of people. Since the incubation period for the virus is so long, it is impossible to say how many heterosexuals are infected today. Those in a strictly monogamous relationship where neither partner is infected need not fear sexual exposure. A sexually active person can reduce his or her risk of virus exposure by reducing the number of partners (since promiscuity is a great risk factor) and by guarding against exchanging body fluids during sexual activity. *Id.*

132. See, e.g., *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179 (7th Cir. 1982) (employer may not refuse to hire someone because customers do not like applicant's race); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) (client's refusal to deal with a female director does not justify refusal to hire female applicant).

133. See *Bentivegna v. United States Dept. of Labor*, 694 F.2d 619 (9th Cir. 1982) (The Court noted that any qualification based on risk of future injury must be examined with special care, since almost all handicapped persons are at greater risk from work-related injuries.); cf. *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980) (suit brought under § 503; speculative risks of future injury and costs were insufficient; employer must show present job performance is affected).

134. See *Altman*, *supra* note 21, at 88, *Busch*, *supra* note 23, at 53.

135. *Preventing Transmission*, *supra* note 26, at 6.

136. *Id.*

In these occupations this altruistic defense may provide a more compelling argument.

## 2. Effect on Employee Benefits

A valid concern of the employer, indirectly based on concerns of employee's health, is the rising cost of providing group health care insurance. While regulations prohibit employers from providing separate benefits or services,<sup>137</sup> a recent Supreme Court decision may protect the employer in this area. In *Alexander v. Choate*,<sup>138</sup> the Court held that a state may place durational limits on inpatient coverage in state medicaid plans, despite the resulting disproportionate impact on the handicapped. As long as the handicapped have equal access to the benefit and the limitation is neutral on its face, there is no section 504 violation.<sup>139</sup> It may be argued, based on this decision, that employers may put neutral ceilings on benefit packages in order to avoid bearing the health care burden of those with AIDS. If this becomes accepted practice, however, employers should have less motivation to bar from the workplace those with AIDS who are otherwise qualified.

### III. VIRGINIA RIGHTS OF PERSONS WITH DISABILITIES

#### A. *The Virginia Act*

The majority of states have laws prohibiting handicap-based discrimination in employment.<sup>140</sup> In 1985, Virginia enacted a statutory scheme giving disabled persons protection from employment discrimination in

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137. See, e.g., 45 C.F.R. § 84.4(b)(iv) (1985).

138. 105 S. Ct. 712 (1985).

139. *Id.*

140. Every state except Delaware has some type of handicap anti-discrimination employment law. A status table of current state laws is conveniently located at 8A LAB. REL. REP. (BNA) 451: 102-04 (1985). To date, several cities in California have specifically targeted AIDS victims as deserving of protection from discrimination: San Francisco, Los Angeles, West Hollywood and Hayward. Staver, *Panic, Hysteria Overrule Reason in Workplace Response to AIDS*, Am. Med. News, Jan. 10, 1986, at 1, col. 1; see, e.g. LOS ANGELES, CAL., CODE ch. 3, art. 5.8, § 45.80-.93 (1985).

This prohibition covers rental housing (except where owner occupied), business establishments (except blood, sperm, or organ donor facilities), city services, educational institutions and employment. Exception is made in the employment context for the bona fide occupational qualification (BFOQ) where the employer can prove that discrimination is a necessary result of a BFOQ and that there is no less discriminatory means of satisfying the occupational qualification. *Id.* at § 45.82(B); see also *supra* note 104.

To cite a specific disease in this context ordinarily would not be sound practice; assuming this group is deserving of protection, state handicap laws should encompass the condition. However, Los Angeles enacted this ordinance as an emergency provision, as that city has a disproportionate number of AIDS victims. Since the beginning of 1985, AIDS has killed an average of one person a day. Richmond News Leader, Aug. 15, 1985, at 2, col. 1.

the private and public sector.<sup>141</sup> In the short time since the Rights of Persons With Disabilities Act was passed, there have been no reported decisions under it and no regulations promulgated pursuant to it. Consequently, any prediction on how the courts will apply the Virginia Act to those with AIDS must be based solely on an examination of statutory language.

Section 51.01-40 prohibits discrimination under any program or activity if it receives state funding or is operated by a state agency. It mandates that regulations promulgated to implement this section be consistent with those imposed under the federal Rehabilitation Act.<sup>142</sup> While the federal Act covers only government-funded employers, the Virginia Act's coverage is broader in the sense that section 51.01-41 applies to all employers in the commonwealth not covered by the federal Act or section 51.01-40.<sup>143</sup>

### B. *Virginia Employees with AIDS*

Under section 51.01-40, only an AIDS victim employed by a state agency or a program receiving state financial assistance is entitled to protection similar to that provided by the federal Act. Since the regulations under section 51.01-40 cannot contradict those under the federal Act,<sup>144</sup> application of this section to an employee with AIDS should be consistent

141. VA. CODE ANN. §§ 51.01-40 to -46 (Cum. Supp. 1985).

142. *Id.* § 51.01-40.

143. That section provides that:

(A) No employer shall discriminate in employment or promotion practices against an otherwise qualified person with a disability solely because of such disability . . . (C) An employer shall make reasonable accommodation to the known physical and mental impairments of an otherwise qualified person with a disability, if necessary to assist such person in performing a particular job, when the employer can demonstrate that the accommodation would injure an undue burden on the employer.

*Id.* § 51.01-41.

Section 51.01-3 defines relevant terms:

(A)"Otherwise qualified person with a disability means a person with a disability who is:

(1) For the purposes of § 51.01-41, *qualified without accommodation* to perform the duties of a particular job or position; . . .

(B)"Person with a disability" means any person who has a physical or mental impairment which substantially limits one or more of his major life activities or has a record of such impairment and which: (1) For purposes of § 51.01-41 is unrelated to the individual's ability to perform the duties of a particular job or position, or is *unrelated to the individual's qualifications for employment or promotion*; . . .

(C)"Physical impairment" means any physical condition, anatomic loss or corrective disfigurement which is caused by bodily injury, bith defect, or illness.

*Id.* § 51.01-3 (emphasis supplied).

144. *Id.* § 51.01-40.

with results on the federal level, as previously discussed.

However, section 51.01-41, covering employees of private employers, is much less protective of the handicapped than the laws covering employers funded by the commonwealth or the federal government. Although the terms are somewhat similar, there are crucial differences that will adversely affect those with AIDS who suffer discrimination.

Under section 51.01-41, AIDS categories I through III fit the definition of disability (the state equivalent of handicap) because each is a "physical condition . . . which is caused by . . . illness."<sup>145</sup> The commonwealth's definition of a "person with a disability," however, is more exclusive than the federal equivalent. It does not include a person who is *regarded* as having an impairment, but only those who are actually impaired or have a record of impairment. Ironically, this means that a person in category IV (having no evidence of HTLV-111 infection but, due to association with a risk group, suffering discrimination based on AIDS-phobia) is not protected by this section. Although allowing such discrimination seems to defy logic, it is not prohibited under the current definition.

Section 51.01-41(d) allows an employer to take personnel action pertaining to an applicant or employee who, due to his disability, "is unable to adequately perform his duties, or *cannot* perform such duties in a manner which would not endanger his health or safety or the health or safety of others."<sup>146</sup> The first part of this provision is similar to the federal Act, which limits coverage to those who "can perform the essential functions of the job in question."<sup>147</sup> The second part of this provision, however, is much less protective of the handicapped employee than the similar federal provision which only excludes substance abusers who cannot safely perform their duties. That second part of the provision should not impact adversely on most employees with AIDS. As discussed earlier, all research indicates that transmission of HTLV-111 requires a type of contact usually not found (or allowed) in most professions.<sup>148</sup>

The most crucial difference from the federal Act is the commonwealth's treatment of accommodation.<sup>149</sup> Federal regulations define a qualified handicapped person as one "who, *with* reasonable accommodation, can perform the essential functions of the job in question."<sup>150</sup> The Virginia Act, however, defines such a person as one who is "qualified *without* ac-

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145. *Id.* § 51.01-3; *see supra* note 135.

146. *Id.* § 51.01-41(D) (emphasis supplied). Use of the term "cannot" appears to be a reflection on the nature of the disability, contrasted with "does not," which would relate to the performance of a specific individual.

147. 45 C.F.R. § 84.3(k)(1) (1985).

148. Pub. L. No. 95-602, 92 Stat. 2955 (1978).

149. The exceptions are professions requiring invasive procedures, as discussed *supra* text accompanying notes 93-97, 114.

150. 45 C.F.R. § 84.3 (k)(1) (1985) (emphasis added).



accommodation to perform the duties of a particular job or position."<sup>151</sup>

To illustrate this difference, assume that a dental clinic imposed the physical requirement that all dentists must pass an HTLV-111 screening test. Such a test would be reasonable since the duties of a dentist involve invasive contact. At what point is the question of accommodation addressed for the dentist with a positive test result? In the federal context, accommodation is one element in deciding whether a person with a positive test result can still be otherwise qualified. The dentist will assert (quite correctly in most instances)<sup>152</sup> that wearing gloves is an accommodation that will entirely eliminate transmission-related contact with his patients, enabling him to safely perform "the essential functions of the job."

Conversely, under the Virginia Act's coverage of private employers, accommodation is expressly excluded in the determination of who is otherwise qualified. In subsection 51.01-41(c), accommodation is addressed after a person is deemed qualified.<sup>153</sup> Under this subsection, a positive test result will preclude the dentist from ever reaching subsection 51.04-41(c). He is not otherwise qualified because he cannot meet a reasonable physical requirement, and accommodation is never addressed.

Despite Virginia's conservative approach, most employees (or applicants) with AIDS who are well enough to adequately perform required duties are protected by the state's Act. Most people with AIDS can be "otherwise qualified." Inhabitation by the virus alone does not render the body incapable of "performing the duties of a particular job"<sup>154</sup> safely, unless it is one of the few that require transmission-related contact. These jobs trigger the need for accommodation, not required by Virginia's Act. The majority of positions could be safely filled, without risk of contagion, even by someone with CDC-defined AIDS. In this context, only when the syndrome's symptoms make adequate performance impossible could an employer justifiably dismiss such a worker.

#### IV. CONCLUSION

Employment discrimination against AIDS victims presents a unique challenge to legal professionals. There can be no single, correct behavior model for employers to follow. Significant variables are numerous, including the effects of the syndrome on the individual, the type of contact in the workplace, and the extent of accommodation required or possible in a

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151. VA. CODE ANN. § 51.01-3 (Cum. Supp. 1985) (emphasis added).

152. This is assuming that the chance of a dentist sustaining a bleeding, accidental injury, while his hand is in his patient's mouth, and at a time when the patient's mouth has sustained a break in the membrane, is too remote to consider.

153. See *supra* note 140.

154. *Id.*

particular setting. Whether existing handicap statutes offer protection from discrimination to an individual with AIDS will have to be determined on a case-by-case basis after considering these variables. In many cases, employers must suppress a knee-jerk reaction and make an educated, rational determination. This provides the flexibility necessary to protect society when being "AIDS-free" is a legitimate, job-related qualification, without overly restricting the lives of those already limited by the syndrome.

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