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AIDS Virus in the Workplace: A Comparison of British and American Law Concerning the HIV-Infected Employee, The

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I. INTRODUCTION

Reflecting a global problem, employers within the United States and Great Britain[1] are often uncertain as to what, if anything, they should do concerning an employee infected with the HIV virus.[2] In

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1. For workplace restrictions concerning member states of the European Community other than Great Britain, *see* Dworkin & Steyger, *AIDS Victims in the European Community and the United States: Are They Protected from Unjustified Discrimination?*, 24 TEX. INT'L L.J. 295 (1989). *See infra* notes 180-90 and accompanying text for a discussion of the recent conclusions of the European Economic Community Council concerning the AIDS virus in the workplace.

2. The Times (London), Sept. 27, 1988, at 3, col. a. AIDS, or Acquired Immune Deficiency Syndrome, is a clinical manifestation of an immune system dysfunction caused by infection with a virus that scientists have named human immunodeficiency virus (HIV), previously known as KTLV-3 or LAV. HIV infection can lead to a broad spectrum of immunological abnormalities, referred to collectively as AIDS-related complex, or ARC. *See* INST. OF MEDICINE, NAT'L ACADEMY OF SCIENCE, MOBILIZING AGAINST AIDS: THE UNFINISHED STORY OF A VIRUS 19, 45-56 (1986) [hereinafter MOBILIZING AGAINST AIDS]. The principal cause of these abnormalities is the progressive destruction of T4 lymphocyte cells in the human immune system. *Id.* at 87. The destruction of the cell is particularly harmful, as it serves as

spite of this situation, or because of it, the infected employee is often faced with AIDS-related discrimination.[3] In September 1988, the Medicine and Law Committee of the Section on General Practice of the International Bar Association strongly urged employers not to treat the HIV-infected employee in a manner different from that of other employees.[4] This advice is shared by the United States Centers

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the co-ordinator for the human immune response system. *Id.* at 76.

In a leading AIDS-related discrimination case, Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988), the Ninth Circuit accepted into evidence more than 100 articles from leading medical journals and the testimony of five AIDS experts. *Id.* at 703. On the basis of the submitted testimony, the court of appeals concluded that:

> Those submissions reveal an overwhelming evidentiary consensus of medical and scientific opinion regarding the nature and transmission of AIDS. AIDS is caused by infection of the individual with HIV, a retrovirus that penetrates chromosomes of certain human cells that combat infection throughout the body. Individuals who become infected with HIV may remain without symptoms for an extended period of time. When the disease takes hold, however, a number of symptoms can occur, including swollen lymph nodes, fever, weight loss, fatigue and night sweats. Eventually, the virus destroys its host cells, thereby weakening the victim's immune system. When the immune system is in a compromised state, the victim becomes susceptible to a variety of so-called "opportunistic infections," many of which can prove fatal.

Id. at 706 (footnotes omitted).

The Centers for Disease Control has concluded that over 365,000 Americans will have developed AIDS by 1992, based on Public Health Service estimates that at least one million Americans are currently infected with HIV. *AIDS and Human Immunodeficiency Virus Infection in the United States: 1988 Update*, 38 MORBIDITY & MORTALITY WEEKLY REP. 1, 5-6 (1989). Within Great Britain, far fewer individuals are presently infected with the HIV virus. A total of 1,227 cases of AIDS or HIV infection were reported in the U.K. by the end of 1987. *See* PROBLEMS ASSOCIATED WITH AIDS, RESPONSE BY THE GOVERNMENT TO THE THIRD REPORT FROM THE SOCIAL SERVICES COMMITTEE SESSION 1986-87, Presented to Parliament by the Secretary of State for Social Services by Command of Her Majesty (CM 297) ¶ 1.1 (1988) [hereinafter BRITISH GOVERNMENT RESPONSE]. However, the British Medical Association estimates that by 1991 there could be 100,000 people infected with HIV and 10,000 deaths. Fin. Times, Nov. 11, 1987, at 12, col. e.

3. The term "AIDS-related discrimination" is used in this article to denote any and all acts directed toward individuals infected, or thought to be infected, with HIV, and done so solely as a result of a fear or lack of knowledge concerning their actual medical condition, or their assumed medical condition. It should be noted that the vast majority of employment related discrimination cases merely involve employees who have been diagnosed, or mistakenly identified, as carrying the AIDS virus, and who do not, otherwise, exhibit the various opportunistic infections associated with the clinical term AIDS. Once an individual has developed full-fledged AIDS symptoms, it is generally assumed that he is no longer in a condition to work.

4. *See generally* The Times (London), Sept. 27, 1988, at 3, col. a. The Committee issued a document entitled RESOLUTION ON AIDS IN THE WORKPLACE, *reprinted in* 14 INT'L LEGAL PRAC. 29 (1989). The resolution was adopted by the International Bar Association (IBA) Section on General Practice on October 2, 1989. The resolution states:

> 1. That all member States bring forward effective legal measures to ensure equal access to employment for persons with HIV.
>
> 2. That the IBA recognizes AIDS and HIV infection as a disability or handicap in respect of which legislation can be introduced to prohibit discrimination against HIV positive persons in housing, employment, public accommodation, granting of credit

for Disease Control[5] (CDC), which suggests that employment policies should reflect the conclusive scientific evidence that people infected with the AIDS virus do not pose a risk of transmission to co-workers through ordinary workplace contact.[6] The British Medical Association, likewise, has called on the British Government to prohibit job discrimination against the HIV-infected employee.[7]

This article will analyze and summarize relevant statutes and case law within the United States and Great Britain introduced and decided in response to employer discrimination against HIV-infected employees. The examination also focuses on various legislation enacted in both countries prior to the discovery of the AIDS virus which has subsequently been interpreted and expanded to address the AIDS virus in the workplace. The article concludes that the employer is increasingly under an obligation to treat the able-bodied HIV-infected employee no differently than the non-infected employee.

II. Apprehension Toward HIV-Infected Persons

> The person who has the disease shall wear torn clothes and let the hair of his head hang loose, and he shall cover his upper lip and cry 'unclean, unclean.' He shall remain unclean as long as he has the disease.[8]

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and delivery of services.

3. HIV testing as a condition of employment should be prohibited except where the absence of AIDS or HIV infection is a bona fide requirement of the job.

4. Employers should be encouraged to make reasonable workplace accommodation for persons with HIV infection.

5. Employers should be encouraged to put in place guidelines and educational programs for dealing with AIDS in the workplace.

Id.

5. The Centers for Disease Control (CDC) is a federal agency charged with protecting the public health by providing leadership and direction in the prevention and control of diseases. *See* 1987-88 United States Government Manual 298 (1987). The CDC is the central depository for AIDS reporting and research in the United States. Any citation of CDC authority is highly regarded by courts.

6. American Foundation for AIDS Research, AIDS Education: A Business Guide 4 (1988). *See also Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace*, 34 Morbidity & Mortality Weekly Rep. 681 (1985).

7. The Times (London), June 25, 1986, at 20, col. c.

8. *Leviticus* 13:45-46. The author is indebted to Inez de Beaufort in his paper entitled HIV-Infection and AIDS: Some Ethical Questions (*unpublished*, copy on file at the offices of *The Transnational Lawyer*) for this classical reference to the scourge of leprosy. It clearly has contemporary significance for the plight of the AIDS victim. The paper was originally presented at the IBA Conference, Section on General Practice, Medicine and Law Committee, in Buenos Aires, Argentina, Sept. 25-30, 1988.

The HIV-infected person, whom the odds overwhelmingly indicate will develop AIDS over the years,[9] is feared in countries throughout the world, irrespective of ideology.[10] In the German Federal Republic, a prominent physician has suggested that HIV-infected victims should be tattooed on their genitals to alert potential sexual partners.[11] The Soviet Union, a country which has recently experienced its first AIDS fatality (a prostitute),[12] provides another not-unusual example. The Soviet's leading AIDS expert, Vadim Pokrovski, was informed by sixteen young physicians that they "intend to do everything possible to hinder the search for a cure for this noble epidemic. We are convinced that AIDS will destroy all drug addicts, homosexuals and prostitutes in a short time. We are convinced that Hippocrates would have approved of our decision. Long live AIDS."[13] In Japan, many of the 460,000 people calling an AIDS hot-line were concerned that they might contract the HIV virus from overhead straps in subway cars.[14] The People's Republic of China has prohibited used clothing imports as a result of its AIDS phobia.[15]

Similarly, the fear of AIDS and the discrimination it engenders has pervaded all sectors of society in the United States and Great

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9. In Leckelt v. Board of Comm'rs Hosp. Dist. No. 1, 714 F. Supp. 1377 (E.D. La. 1989), the court admitted medical testimony which estimated that between 50% and 70% of all HIV-infected individuals will eventually develop AIDS symptoms. Some members of the medical community believe recent studies indicate that all infected individuals will eventually develop AIDS. *Id.* at 1380.

10. In Raytheon Co. v. Fair Empl. & Housing Comm'n, the California Superior Court noted that "any disease that is treated as a mystery and acutely enough feared will be felt morally, if not literally contagious. Thus a surprisingly large number of people with cancer find themselves being shunned by relatives and friends. . . ." Raytheon Co. v. Fair Empl. & Housing Comm'n, 46 Fair Empl. Prac. Cas. (BNA) 1089, 1091-92 (Apr. 22, 1988) (quoting S. SONTAG, AN ILLNESS AS A METAPHOR 6 (1978)). The decision of the Superior Court awarding relief to the employee's estate was subsequently affirmed by the California Court of Appeal, Second District, in Raytheon Co. v. Fair Empl. & Housing Comm'n, 212 Cal. App. 3d 1242, 261 Cal. Rptr. 197 (1989).

11. The Times (London), Aug. 18, 1986, at 5, col. h.

12. San Francisco Chron., Nov. 5, 1988, at A15, col. 5. The second fatality attributed to AIDS involved a four month old boy who was infected with HIV from his mother at birth. *Aidsweek*, San Francisco Chron., Nov. 13, 1988, at A8, col. 4. In 1988, the Soviet newspaper Sovyetskaya Rossiya quoted an official in the infectious diseases department of the Soviet Health Ministry who stated that there were 412 AIDS patients in the Soviet Union—329 of them foreign citizens and 83 Soviet. San Francisco Chron., Nov. 5, 1988, at A15, col. 5.

13. San Francisco Chron., Nov. 5, 1988, at A15, col. 5. In his remarks to the Fifth International Conference on AIDS held in Montreal on June 11, 1989, William Curran noted that "there is almost a total absence of legislation protecting the human rights" of AIDS-infected persons. *Aidsweek*, San Francisco Chron., June 11, 1989, at A2, col. 1. In particular, at least 18 countries allow quarantine of AIDS-positive persons, and at least 21 countries mandate testing of AIDS-suspected groups. *Id.*

14. N.Y. Times, Feb. 11, 1987, at A11, col. 1.

15. Int'l Herald Tribune, June 22, 1988, at 8, col. 6.

Britain. The cases are legion: In one of many similar cases, two brothers were banned from attending a Florida public school in 1988. The children's family received a $1.1 million settlement, but not before their house was destroyed by arson. The family was forced to leave the community because of this and other threats.[16] A Greenwich Village dental clinic was ordered to pay $47,000 to two men it refused to treat because they were infected with the AIDS virus.[17] Roman Catholic priests in Essex, England, were advised to use disposable spoons and rubber gloves when giving communion to AIDS sufferers.[18] Several funeral home operators in New York City refused to embalm the bodies of AIDS victims, forced their families to purchase expensive glass casket covers, and charged double or triple embalming fees for their services.[19] The manager of a London brasserie was awarded £8,000 after being unfairly dismissed for allowing customers to be interviewed by a television station for an AIDS program.[20]

Even courts have not been immune to the rise of AIDS-phobia in cases involving an HIV-infected litigant.[21] On at least one occasion, a court in the United States ordered an attorney to take the deposition of an HIV-infected litigant in spite of the counselor's fear of AIDS.[22] The court concluded that the attorney's fear was unsubstantiated

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16. N.Y. Times, Oct. 2, 1988, at L20, col. 3.
17. *Id.*, Sept. 29, 1988, at B4, col. 5.
18. The Times (London), Nov. 18, 1986, at 2, col. g.
19. N.Y. Times, May 22, 1989, at 41, col. 4.
20. The Times (London), Mar. 18, 1987, at 2, col. a.
21. Wiggins v. State, 315 Md. 232, 554 A.2d 356 (1989). The Maryland Court of Appeals reversed a trial court decision that security personnel were allowed to wear gloves while escorting an AIDS defendant in and out of the courtroom. In reversing the decision, the appellate court stated: "It is not far-fetched that the jury, observing the gloves, thought it better, in any event, that [the HIV-infected defendant] be withdrawn from public circulation and confined in an institution with others of his ilk." *Id.* at 362.

Compare State of Minnesota v. Santos, Case No. 17447 (St. Louis Co. Dist. Ct., Minn., 6th Dist., Jan. 25, 1988) (*unpublished*, copy of order on file at the offices of *The Transnational Lawyer*) (deputies allowed to wear rubber gloves since HIV-infected defendant previously spit on court personnel) *with In re* Peacock, 59 Bankr. 568, 569 (Bankr. S.D. Fla. 1986) (Centers for Disease Control advises court no special precautions recommended for courtroom proceedings involving participants with AIDS virus).

In Alabama, three judges refused to allow HIV-infected defendants to enter their respective courtrooms and required sentencing and entering of pleas to be conducted by telephone. *AIDS in the Courtroom: How the Judiciary is Dealing with the Problem*, 2 AIDS L. REP. 1, 3 (1989). A study by the Legal Aid Society of New York City concluded that trial delays occurred in two out of every five criminal cases where the defendant was suspected of being HIV-positive "because some court officers refused to retrieve them from holding cells." N.Y. Times, Apr. 16, 1989, at 35, col. 1.

22. MMB Assoc. v. Laturno, No. 85485/85 (N.Y. Civ. Ct., Dec. 10, 1985) (*unpublished*, copy of order on file at the offices of *The Transnational Lawyer*).

based on all available medical and scientific evidence.[23] The court noted, however, that the attorney could resort to using sterile surgical gowns, masks, hats and gloves while taking the deposition. The court was also willing to allow the attorney to send a less apprehensive associate to the deposition in his place.[24] In Great Britain, in similar fashion, an incarcerated AIDS victim appeared in court "wearing a face mask and with both wrists bandaged" and was brought into court by a separate route from that used by other prisoners.[25]

Surveys have also shown a widespread disparate treatment of infected employees by major corporate employers. In the winter of 1986-87, the National Gay Rights Advocates (NGRA) surveyed Fortune 1000 companies for corporate policies on the HIV-infected employee.[26] While most of the responding companies indicated having policies that prohibit employment discrimination against employees who tested HIV-positive,[27] there were also typical examples of AIDS-phobia. At the extreme, one anonymous response stated, "[w]e shoot gays—much less gays with AIDS."[28]

The fear of AIDS has been further exacerbated in the popular press by various conspiracy theories. In the *Weekly World News*, for example, one story stated that an anti-gay terrorist group was re-

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23. *Id.*
24. *Id.*
25. The Times (London), Jan. 10, 1987, at 3, col. d.
26. NAT'L GAY RIGHTS ADVOCATES, AMERICAN CORPORATE POLICY: AIDS AND EMPLOYMENT (1987). Less than 20% of those contacted responded. *Id.* at § 1.
27. *Id.* at § 2A. Of the 164 companies responding, 110 indicated having anti-discrimination policies. *Id.*
28. *Id.* at app. 1. The sample survey reprinted in Appendix 1 contained the following anonymous response:

> 1. Does your company have a policy which forbids employment discrimination against employees with AIDS or related conditions?
> Yes or No: "No"
> COMMENTS: "We shoot gays—much less gays with AIDS."
> 2. Does your company's employee medical plan cover AIDS-related medical expenses?
> Yes or No: "Yes"
> COMMENTS: "Just enough to defray the cost of the bullet."
> 3. Does your company require some or all employees or job applicants to take the AIDS antibody test as a condition for employment?
> COMMENTS: "No—we just watch how they react to women and other men, then make a decision."
> 4. Has your company developed a written policy on AIDS?
> Yes or No: "No"
> ADDITIONAL COMMENTS: "Any person contracting AIDS through homosexual activities will be 'terminated with extreme prejudice.' I refuse to lick this envelope."

Id.

sponsible for spreading the virus.[29] Within England, a prominent Harley Street physician opined that the virus was intentionally created by American scientists.[30]

There is, of course, much that is still unknown concerning details of the transmission of the HIV virus. Authorities, for example, disagree as to whether oral sex creates a high risk for the transmission of HIV.[31] However, there is no serious legal or medical disagreement with the conclusion that AIDS cannot be transmitted by saliva[32] or through biting.[33] Occasionally, a legislative body has statutorily summarized prevalent medical opinion. For example, the California legislature enacted section 1710.2 of the California Civil Code,[34] finding that medical evidence is "conclusive" that the HIV virus is transferred by sexual conduct with infected persons, exposure to contaminated blood or blood products, and by perinatal transmission, and that there is no risk of transmission by other means.[35] The widespread discrepancy among even the most knowledgeable authorities, coupled

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29. *See* remarks of Dr. David Henderson, Chief of Epidemiology at the National Institutes of Health, at the BNA Conference on Workplace Privacy and Wrongful Discharge, held on May 6, 1988, *cited in Medical Discussion on Risk of AIDS in Workplace*, 128 Lab. Rel. Rep. (BNA) 117 (May 23, 1988). The same issue of the Weekly World News also contained a story of a dog, dead for a year, who saved drowning twins. *Id.*

30. The Times (London), Oct. 27, 1986, at 20, col. h.

31. *Compare* City of New York v. St. Mark's Baths, 130 Misc. 2d 911, 497 N.Y.S.2d 979 (N.Y. Sup. Ct. 1986) (fellatio presents high risk for the transmission of AIDS) *and* Roth, *Aids: Medical Aspects and Policy Considerations*, 85 LAW SOCIETY'S GAZETTE 25, 26 (1988) ("Safer sex means kissing, rubbing, mutual masturbation. Oral sex may not be safe [sex].") *with* Lyman, Ascher & Levy, *Minimal Risk of Transmission of AIDS-Associated Retrovirus Infection by Oral-Genital Contact*, 255 J. AMER. MED. ASSOC. 1703 (1986) (no excess risk of infection from oral-genital contact). Oral-genital sex and kissing have not been documented as having resulted in AIDS transmission. *See* AIDS AND THE LAW 31 (H. Dalton, S. Burris & Yale AIDS Law Project eds. 1987).

32. No research to date indicates that transmission of HIV by saliva is a realistic possibility. Brief for the American Medical Association in Support of Appellant at 12, Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988) (No. 87-6418). In Great Britain, a physician's testimony concerning the possible transmission of AIDS by saliva was soundly rejected in X v. Y, [1988] 2 All E.R. 648, 655, as unsupported by medical evidence.

33. In United States v. Moore, 846 F.2d 1163, 1165 (8th Cir. 1988), a defendant prison inmate deliberately bit a guard with the intent to infect him with the AIDS virus. At trial, a doctor testified that the medical profession knew of no established instances in which a human bite has resulted in transmission of the AIDS virus to the inflicted person. *Id.* The only oft-cited medical opinion that AIDS may be transmitted through casual contact is the testimony of Dr. Steven Armentrout. Dr. Armentrout maintains that since the virus is present in many bodily secretions, then those bodily secretions are potential routes of infection. Dr. Armentrout's testimony has been rejected by various courts. *See* Racine Educ. Ass'n v. Racine Unified School Dist., Case No. 8650279, Wisconsin Department of Industry, Labor and Human Relations (1988) (*unpublished*, copy of decision on file at the offices of *The Transnational Lawyer*); Chalk v. United States Dist. Court, 840 F.2d 701, 707 (9th Cir. 1988); Ray v. School Dist. of DeSoto County, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987).

34. CAL. CIV. CODE § 1710.2 (West Supp. 1989).

35. *Id.* at § 1710.2(1)(c).

with the often sensationalist media, adds to the AIDS-phobia present within the workplace.

III. Employees at the Workplace Infected with the HIV Virus

Legislatures, administrative agencies, and legal authorities in both the United States and Great Britain have approached AIDS-related employment matters with great care, notwithstanding a somewhat irrational fear of AIDS by many sectors of the populous. AIDS-related legislation and case law within both countries has not yet provided a consistent, nor in many instances appropriate, response to the treatment of the HIV-infected employee. Within the United States, there is a myriad of federal, state, local, and administrative regulations, as well as a considerable amount of judge-made law. Within Great Britain, the judiciary is constrained in the role it can play by its historical reluctance to overturn parliamentary decisions, and local governments have had only a minimal impact on AIDS-related employment matters.[36]

The history of wrongful discharge in the United States and Great Britain provides an important backdrop to the current status of the HIV-infected employee. In both countries, the non-union, non-civil service employee had no protection against sudden discharge until the 1960's.[37] At that time, workers in the United States were granted protection against termination for discriminatory reasons such as age, race, sex, handicap, or pregnancy.[38] Great Britain, however, did not protect an employee from dismissal on racial or sexual discrimination

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36. A rare exception to the comprehensiveness or exclusivity of British unfair dismissal law can be seen in a decision by the Manchester City Council which made it a "disciplinary offense for staff to refuse employment because of AIDS-related reasons." The Times (London), Oct. 30, 1986, at 3, col. d. Furthermore, AIDS-infected workers would be protected from discharge "as long as they are medically fit." *Id.*

37. Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 J. L. Reform 207, 219 (1983) [hereinafter Bellace].

38. *See, e.g.*, Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1982)) (age); Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-718, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e, 2000e-1, to -17 (1982)) (race); Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56 (1963) (codified at 29 U.S.C. § 206(d) (1982)) (sex); Rehabilitation Act of 1973, Pub. L. No. 93-112, § 503, 87 Stat. 393 (1973) (codified as amended at 29 U.S.C. § 793 (1982)) (handicap); Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)) (pregnancy).

grounds until the 1970's,[39] and has yet to protect an employee who is dismissed for age discrimination.[40] In the 1970's, American judicial decisions[41] were rendered and British Parliamentary legislation[42] was enacted protecting the at-will employee from certain instances of arbitrary dismissal.

IV. UNITED STATES

The U.S. federal government, various states, and municipalities have all responded to employment-related problems of HIV-infected employees. While an employer remains free, in the absence of a relevant statute or ordinance, to terminate at will the HIV-infected employee, increasing protection against employment related discrimination can be discerned at the federal, state, and municipal levels.

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39. *See* Equal Pay Act, 1970, ch. 41, *reprinted in* 16 HALSBURY'S STATUTES OF ENGLAND AND WALES 187 (4th ed. 1986) (act to prevent discrimination against women relating to conditions & terms of employment); Sex Discrimination Act, 1975, ch. 65, *reprinted in* 6 HALSBURY'S STATUTES OF ENGLAND AND WALES 696 (4th ed. 1986) (prohibiting discrimination by employers on the basis of sex and establishing Equal Opportunity Commission); Race Relations Act, 1976, ch. 74, *reprinted in* 6 HALSBURY'S STATUTES OF ENGLAND AND WALES 765 (4th ed. 1986) (prohibiting discrimination on the basis of color, race, nationality, or ethnic or national origin).

40. Within Great Britain there is no protection of government workers over age 40. In fact, the government may put an upper age limit such as 45 for hiring, and still simultaneously claim that it is an equal opportunity employer. The Times (London), Oct. 1, 1987, at 39, col. c.

41. In 1973, an Indiana court carved out the first major exception to termination "at will" based on the right to assert a workman's compensation claim without fear of retaliatory discharge. *See* Frampton v. Cent. Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973). In the following year, a New Hampshire court emphasized that an employer could no longer terminate an employee in bad faith. *See* Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974). In 1977, a Massachusetts court concluded that employment contracts were subject to an implied-at-law covenant of good faith and fair dealing. *See* Fortune v. Nat'l Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977). Finally, in 1980, the California Court of Appeal suggested that employers may terminate an employee only for good cause. *See* Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). This "good cause" tortious remedy has recently been rejected by the California Supreme Court in Foley v. Interactive Data Corp., 47 Cal. 3d 354, 765 P.2d 373, 254 Cal. Rptr. 211 (1988). For a discussion of the implications of the *Foley* decision, *see* Levine, *Judicial Backpedaling: Putting the Brakes on California's Law of Wrongful Termination*, 20 PAC. L.J. 993 (1989).

42. *See* Industrial Relations Act, 1971, ch. 72, *reprinted in* 41 HALSBURY'S STATUTES OF ENGLAND AND WALES 2062 (3d ed. 1972) (right of employee not to be unfairly dismissed). The Industrial Relations Act was subsequently repealed by the Trade Union and Labour Relations Act, 1974, ch. 52, *reprinted in* 44 HALSBURY'S STATUTES OF ENGLAND AND WALES 1766 (3d ed. 1975), but the latter Act reenacted provisions relating to unfair dismissal. *Id. See also* Employment Protection Act, 1975, ch. 71, *reprinted in* 16 HALSBURY'S STATUTES OF ENGLAND AND WALES 291 (4th ed. 1986) (creating Advisory Conciliation & Arbitration Service to provide advice on matters concerned with industrial relations or employment policies, including procedures relating to termination of employment); Employment Protection (Consolidation) Act, 1978, ch. 44, *reprinted in* 16 HALSBURY'S STATUTES OF ENGLAND AND WALES 381 (4th ed. 1986) (consolidating statutes dealing with employment protection issues, including unfair dismissal).

A. *Federal*

Section 504 of the Federal Rehabilitation Act of 1973 provides protection from wrongful termination for certain handicapped employees.[43] Section 504 reads in pertinent part that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[44] Congress expanded the definition of the "handicapped individual" so as to preclude discrimination against those individuals who are considered to have an impairment but who exhibit no connected incapacity.[45]

In *School Board of Nassau County, Fla. v. Arline*,[46] the Supreme Court held that simply because an individual with a physical impairment is also contagious does not necessarily remove that person from the protection of the Rehabilitation Act.[47] *Arline* involved a school teacher who was discharged after contracting tuberculosis. The teacher sued the school authorities, claiming unlawful discrimination in violation of Section 504.[48] The issues before the Court were whether a person afflicted with the contagious disease of tuberculosis may be considered a "handicapped individual," and, if so, whether such an individual is "otherwise qualified" to teach elementary school.[49] The Court first concluded that a person suffering from the contagious disease of tuberculosis can be a handicapped person within the meaning of the Rehabilitation Act.[50] The Court noted that simply because some individuals pose a serious health threat to others in certain circumstances does not justify excluding from the coverage

43. Pub. L. No. 93-112, § 503, 87 Stat. 393 (1973) (codified as amended at 29 U.S.C. §§ 701-796 (1982).

44. *Id.* at § 794.

45. Southeastern Community College v. Davis, 442 U.S. 397, 405-06 n.6 (1979). Section 504 of the Rehabilitation Act has also been interpreted to protect transsexuals. In Doe v. United States Postal Serv., 37 Fair Empl. Prac. Cas. (BNA) 1867, 1869 (June 12, 1985), a transsexual was found to have a claim of handicap discrimination under the Rehabilitation Act of 1973. In Rezza v. United States Dep't of Justice, 698 F. Supp. 586, 588 (E.D. Pa. 1988), the FBI was unable to terminate one of its own agents who had squandered taxpayer funds at gambling tables, since the agent was a compulsive gambler and therefore was considered "handicapped" under the Rehabilitation Act of 1973. Pending congressional legislation may further broaden the scope of Section 504.

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

47. *Id.* at 285-86.

48. *Id.* at 276.

49. *Id.* at 289.

50. *Id.* at 285-86.

of the Act all individuals with actual or perceived contagious diseases.[51] "Such exclusion," noted the Court, "would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were 'otherwise qualified.'"[52]

Even though the Court found that the teacher's contagious condition could be protected under the Rehabilitation Act, the Court considered whether the teacher was "otherwise qualified" under her condition to carry out her duties.[53] On this point, the Court formulated the standard that "a person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk."[54] In applying this standard to the case at hand, the Court remanded the case to the District Court for an individualized inquiry based upon appropriate findings of fact.[55] "Such an inquiry is essential," concluded the Court, "if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns . . . as avoiding exposing others to significant health and safety risks."[56]

The Civil Rights Restoration Act of 1987[57] in effect codifies the *Arline* decision to protect persons with contagious diseases.[58] In establishing that the Rehabilitation Act does not protect contagious

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51. *Arline*, 480 U.S. at 285.
52. *Id.*
53. *Id.* at 287-88.
54. *Id.* at 287 n.16. The test for whether reasonable accommodation could be made to a person otherwise qualified involved four factors:
    (A) the nature of the risk;
    (B) the duration of the risk;
    (C) the severity of the risk; and
    (D) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Id. at 288.
55. *Id.* at 287.
56. *Airline*, 480 U.S. at 287.
57. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1681 (1982 & Supp. 1989)).
58. *Id.* The Civil Rights Restoration Act of 1987 amends the Rehabilitation Act of 1973 by adding the following language:

> For the purpose of sections 503 and 504, as such sections relate to employment, such term does not include an 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.

Id. at § 9.

individuals who constitute a "direct threat" to the health or safety of others, the amendment implicitly retains the Act's coverage of contagious individuals not posing such a threat. While the Supreme Court refused in *Arline* to consider the status of individuals infected with the AIDS virus,[59] it can reasonably be inferred from *Arline* that, given the currently available medical knowledge, an employer may not discriminate against persons suffering from AIDS-related conditions if they are otherwise qualified for the job. A more difficult question, which the Court specifically left unanswered, is whether persons who are merely carriers of HIV, without suffering the associated opportunistic infections, are physically impaired, or whether such persons are handicapped on the basis of contagiousness under the terms of the Rehabilitation Act.

The parameters of the Rehabilitation Act of 1973 are very limited as to the type of employees it protects. For example, it is applicable to certain contractors with the federal government, certain federal and other public employees, and governmental bodies and hospitals receiving Medicare monies.[60] A person aggrieved may file for relief either with the appropriate department of the federal government, or seek relief through a private cause of action. Nevertheless, it has now been established that an aggrieved person need not exhaust all administrative remedies prior to seeking judicial review of government action.[61] While administrative remedies ordinarily must be exhausted, an exception is noted where the adminstrative remedy is inadequate

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59. *Arline*, 480 U.S. at 282 n.7. Justice Brennan, writing for the majority, refused to reach the question of whether discrimination based solely on the contagiousness of an individual's affliction, in the absence of any physical impairment, constitutes discrimination on the basis of handicap as defined by the Rehabilitation Act. "This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act." *Id.*

60. The State Department may be exempt from Section 504 requirements. *See* Local 1812, Am. Fed'n of Gov't Employees v. State Dep't, 662 F. Supp. 50 (D.D.C. 1987). Exemption for the Job Corps is presently being challenged in Dorsey v. United States Dep't of Labor, No. 88-1898 (D.D.C. 1988). In Plowman v. United States Dep't of Army, 698 F. Supp. 627 (E.D. Va. 1988), the dismissal of a civilian by the Army was upheld when the employee tested HIV-positive, under circumstances where no contract existed between the civilian and the Army. The court expressed no opinion on the claim of wrongful termination by the civilian under Section 504 of the Rehabilitation Act of 1973. This claim is presently pending before the Equal Employment Opportunity Commission. The employee's lack of knowledge of or consent to the HIV test created no constitutional remedy, since the military supervisor was protected by a qualified immunity. *Id.*

61. Shuttleworth v. Broward Co., 639 F. Supp. 654 (S.D. Fla. 1986).

or where it would unreasonably delay the action and create irreparable injury.[62]

In *Chalk v. U. S. District Court*,[63] a teacher of hearing impaired students, diagnosed with HIV and subsequently transferred to an administrative position, sought a preliminary injunction directing his return to the classroom. The U.S. Court of Appeals for the Ninth Circuit ordered his reinstatement, pending a trial on the merits.[64] The Ninth Circuit concluded that the reasonable medical evidence indicated there was no significant risk of spreading the illness by casual contact with students.[65] The court cited *Arline* as holding that Section 504 of the Rehabilitation Act is fully applicable to individuals who suffer from contagious diseases.[66] The court noted that *Arline* concerned the question of central importance to Chalk's claim: to wit, under what circumstances may a person handicapped with a contagious disease be "otherwise qualified" within the meaning of Section 504. Applying the standard used in *Arline*, the Circuit Court found that a teacher handicapped with the AIDS virus is qualified to teach in a classroom because the overwhelming weight of medical evidence indicates that casual social contact between children and persons infected with HIV does not pose a significant risk of transmission.[67]

The court further found that given the fatal nature of the AIDS virus, the teacher would suffer irreparable injury by exclusion from the classroom, because a delay even for a few months would represent "precious, productive time, irretrievably lost to him."[68] Ultimately, the Ninth Circuit rejected the lower court's requirement that the teacher disprove every theoretical possibility of harm his condition might pose, given the evidentiary consensus of medical and scientific opinion supporting the teacher's claim that he posed no significant risk to students or co-workers.[69] The Ninth Circuit also rejected the lower court's conclusion that fear of others outweighed the teacher's injury in being excluded from the classroom, noting that to allow

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62. *Id.* at 657 (citing Panola Land Buyers Ass'n v. Shuman, 762 F.2d 1550, 1556 (11th Cir. 1985)).
63. 840 F.2d 701 (9th Cir. 1988).
64. *Id.* at 720.
65. *Id.* at 708. *See supra* note 2 for a discussion of the medical testimony and findings entered into evidence by the Ninth Circuit in *Chalk*.
66. *Id.* at 704.
67. *Id.* at 711.
68. *Chalk*, 840 F.2d at 710.
69. *Id.* at 707.

the court to base its decision on the fear and apprehension of others would frustrate the goal of Section 504.[70]

While the application of *Chalk* is necessarily limited to its Ninth Circuit origins, it must be acknowledged that the court's interpretation of the *Arline* decision and the applicability of the Rehabilitation Act to the protection of the HIV-infected employee is significant. That courts such as the Ninth Circuit are accepting established medical evidence that the AIDS virus does not normally constitute an infectious disease "of *significant* risk" to others in the workplace suggests that the HIV-infected employee will likely prevail on claims of employment discrimination when they remain otherwise qualified for their position.

In *Shuttleworth v. Broward County*,[71] a county budget analyst was fired from his job after being diagnosed with HIV. Among other causes of action,[72] Shuttleworth pled discrimination in violation of the Rehabilitation Act.[73] Shuttleworth had initiated an unsuccessful complaint with a Florida county Office of Equal Employment Opportunity. However, inasmuch as a subsequent appeal with the Florida Commission on Human Rights (FCHR) remained unresolved, defendants argued that such a failure to exhaust administrative remedies precluded a Rehabilitation Act suit.[74]

While the matter was ultimately settled out of court,[75] the procedural findings of the district court are noteworthy. First, the court rejected defendants' contention that a plaintiff must exhaust state and federal administrative remedies prior to instituting suit under the Rehabilitation Act.[76] The court interpreted the exceptions favorably to Shuttleworth on the basis that a FCHR decision on the administrative claim remained uncertain several years after its filing, and the

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70. *Id.* at 711.

71. 639 F. Supp. 654 (S.D. Fla. 1986).

72. *Shuttleworth* also involved the issues of Fourteenth Amendment Equal Protection, and violation of federal civil rights under 42 U.S.C. § 1983. *Id.* at 655-56. In addition, plaintiff alleged that defendants had violated various provisions of the Florida Constitution guaranteeing equal protection, procedural due process, and protection from discrimination on the basis of handicap. *Id.* at 656.

73. In the interests of expediting the case and for reasons of judicial economy, the court ultimately severed plaintiff's claims arising under Section 504 of the Rehabilitation Act of 1973 from the other causes of action since Section 504 does not allow for trial by jury. *Id.* at 661. *See also* Moore v. Warwick Pub. School Dist. No. 29, 794 F.2d 322 (8th Cir. 1986).

74. *Shuttleworth*, 639 F. Supp. at 656.

75. The terms of the settlement included Shuttleworth's reinstatement and the payment of $196,000. Telephone interview with Larry Corman, Esq., of the Boca Raton, Florida law firm of Hodgson, Russ, Andrews, Woods & Goodyear (Oct. 16, 1989).

76. *Shuttleworth*, 639 F. Supp. at 658.

future health of the plaintiff was unstable and uncertain.[77] The court also rejected defendants' argument that suit under the Rehabilitation Act precluded collateral claims of federal civil rights violations.[78] Unlike other statutes, such as the Education of the Handicapped Act,[79] which provide specific redress for discrimination based on handicap and, as such, have been interpreted not to allow collateral federal civil rights claims,[80] the court noted that the Rehabilitation Act simply prohibits discrimination without providing specific remedies.[81] Thus, the court concluded, a Rehabilitation Act claim should not preclude remedies available under the federal civil rights statutes.[82]

A discharged governmental employee will normally plead causes of action in addition to violations of the Rehabilitation Act, such as the Fourth and Fourteenth Amendment of the U.S. Constitution.[83] If there has been a mandatory test of the state employee, a Fourth

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77. *Id.*

78. *Id.*

79. Pub. L. 91-230, § 601, 84 Stat. 125 (1970) (codified as amended at 20 U.S.C. §§ 1400-1461 (1982)).

80. *See, e.g.*, Smith v. Robinson, 468 U.S. 992, 1016 (1984) (Supreme Court determined "Congress did not intend a handicapped child to be able to circumvent the requirements or supplement the remedies of the EHA by resort to the general antidiscrimination provision of § 504").

81. *Shuttleworth*, 639 F. Supp. at 659 (citing Smith v. Robinson, 468 U.S. 992, 1016 (1984)).

82. *See* Moore v. Warwick Pub. School Dist. No. 29, 794 F.2d 322 (8th Cir. 1986) (claims brought under Section 504 and Section 1983); Lutz v. Weld County School Dist. No. 6, 784 F.2d 340, 341 (10th Cir. 1986) (claims brought under Section 504 and Section 1983). *But see* Alexander v. Chicago Park Dist., 773 F.2d 850, 856 (7th Cir. 1985) (comprehensive enforcement provisions of Title VI preclude action under Section 1983).

83. The Fourteenth Amendment guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Often, gay plaintiffs will allege that they have been denied equal protection because of their sexual preference. In Doe v. Cook County, Ill., 24 Fair Empl. Prac. Cas. (BNA) 42 (N.D. Ill. Feb. 24, 1988), a federal court mandated that a physician receive hospital privileges in spite of his being HIV-infected. The consent decree was entered allowing the physician to continue working at the hospital. Plaintiff's complaint contained claims for relief under both Section 504 of the Rehabilitation Act of 1973 and the Equal Protection Clause of the Fourteenth Amendment. Plaintiff's Complaint at 9-10, Doe v. County of Cook, Ill., No. 87 C 6888 (N.D. Ill. Aug. 5, 1987) (*unpublished*, copy of complaint on file at the offices of *The Transnational Lawyer*). *See also* Shuttleworth v. Broward County, 639 F. Supp. 654 (S.D. Fla. 1986) (pleading, *inter alia*, 42 U.S.C. § 1983 and Fourteenth Amendment equal protection claims); Local 1812, Am. Fed'n of Gov't Employees v. United States Dept. of State, 662 F. Supp. 50 (D.D.C. 1987) (pleading, *inter alia*, Fourth Amendment unreasonable search and seizure, and Fifth Amendment due process and privacy claims); Plowman v. United States Dept. of the Army, 698 F. Supp. 627 (E.D. Va. 1988) (pleading Fourth Amendment unreasonable search and seizure claim); Leckelt v. Bd. of Comm'rs of Hosp. Dist. No. 1, 714 F. Supp. 1377 (E.D. La. 1989) (pleading Fourteenth Amendment equal protection claim).

Amendment cause of action almost always will be pled.[84] It is presently uncertain whether the Fourth Amendment protects government employees from mandatory HIV testing.[85] The United States Supreme Court recently declined to review a federal appeals court ruling that prohibited a Nebraska state agency from requiring employees to be tested for the AIDS virus.[86] The case, *Eastern Nebraska Community Office of Retardation v. Glover*,[87] was a class action suit by employees of a state mental health program who were required to submit blood for HIV testing. The Court of Appeals for the Eighth Circuit concluded that it was a violation of the employees' Fourth Amendment right against unreasonable search and seizure in light of the very remote risk of viral transmission by an infected employee.[88] While the Supreme Court's lack of comment on the case cannot be conclusively interpreted, it does suggest that Fourth Amendment claims may be upheld when government employees are required to submit to HIV testing.

Ultimately, the Rehabilitation Act, as interpreted by federal case law, has provided the HIV-infected employee with his most potent weapon in redressing employment discrimination. Yet, to date, no

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84. The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." U.S. CONST. amend. IV. These rights are triggered only if the conduct at issue infringes "an expectation of privacy that society is prepared to consider reasonable." O'Connor v. Ortega, 480 U.S. 709 (1987) (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)). The Fourth Amendment is enforceable as against the states through the Fourteenth Amendment and seeks to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." McDonell v. Hunter, 809 F.2d 1302, 1305 (8th Cir. 1987) (quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967)).

85. The ELISA test (enzyme-linked immunosorbent assay) is the most widely used initial test. It reveals only the presence of HIV antibodies. False negatives and positives are, therefore, possible. *See* MOBILIZING AGAINST AIDS, *supra* note 2, at 33-38. Two other available tests are RIPA (radioimmunoprecipitation assay) and the Western blot technique. The latter is the most accurate and the most expensive test, and is used to confirm ELISA positives.

86. N.Y. Times, Oct. 31, 1989, at A14, col. 6; San Francisco Chron., Oct. 31, 1989, at 2, col. 4. Prior to making its decision whether to hear the appeal, the Court solicited the opinion of the Bush administration. In response, the Solicitor General's Office advised the Court against taking the case, noting that no federal health testing requirement existed and that no case of a patient contracting HIV from an infected health care worker had ever been documented. N.Y. Times, Oct. 31, 1989, at A14, col. 6.

87. 686 F. Supp. 243 (D. Neb. 1988), *aff'd*, 867 F.2d 461 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 321 (1989).

88. Glover v. Eastern Nebraska Community Office of Retardation, 867 F.2d 461, 463 (8th Cir. 1989). *But see* Local 1812 v. U.S. Dept. of State, 662 F. Supp. 50 (D.D.C. 1987) (union representing foreign service employees denied injunction to ban expansion of Department of State employee medical fitness program to include mandatory HIV testing); Leckelt v. Board of Comm'rs Hosp. Dist. No. 1, 714 F. Supp. 1377 (E.D. La. 1989) (no violation of Section 504 of Rehabilitation Act of 1973 or Fourth Amendment where hospital terminated male nurse for refusal to submit to HIV-antibody test).

national uniform standard has evolved to aid employers and employees facing the impact of the AIDS virus in the workplace.

B. *States*

Even if there is no federal remedy for termination based on HIV infection, at least thirty-four states have either declared HIV-related discrimination to be improper, or have agreed to accept HIV-related discrimination complaints.[89] Some states, such as Iowa,[90] have now passed legislation prohibiting certain discriminatory practices against HIV-infected individuals.[91]

If a complainant is covered by a collective bargaining agreement, state anti-discriminatory laws ordinarily are not preempted by the federal court jurisdiction of the Labor Management Relations Act (LMRA).[92] In *Cronan v. New England Telephone*,[93] for example, a federal court in Massachusetts held that a state law claim based upon a breach of privacy was not preempted by Section 301 of the LMRA.[94] At issue in the case was an employee diagnosed with ARC who had been forced to reveal his condition to his supervisor. Although he was promised confidentiality, the employee was subsequently threatened with lynching after his co-workers were informed of his condition.[95] The employee brought a state court action against his employer for breach of privacy and discrimination. The defendant removed the case to federal court, arguing that plaintiff's discrimination and privacy complaints were covered by the terms of a collective bargaining agreement, and, therefore, were preempted by

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89. NATIONAL GAY RIGHTS ADVOCATES, A SURVEY OF 50 STATES 1 (1986), *reprinted in* EMPLOYMENT TESTING: A NATIONAL REPORTER ON POLYGRAPH, DRUG, AIDS, AND GENETIC TESTING app. C at A:28 (S. Hurd ed. 1987).

90. *See* IOWA CODE §§ 135I.1-4 (1988), concerning AIDS testing, confidentiality of medical records, and discrimination in insurance for AIDS victims.

91. The Rehabilitation Act of 1973 does not preempt state law concerning HIV-infection. *See* Raytheon Co. v. Fair Empl. & Housing Comm'n, 46 Fair Empl. Prac. Cas. (BNA) 1089, 1098 (April 22, 1988).

92. 29 U.S.C. §§ 141-187 (1982). Section 301 of the Act states that:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id.

93. 1 Indiv. Empl. Rts. Cas. (BNA) 658 (D. Mass. Apr. 11, 1986), 41 Fair Empl. Prac. Cas. (BNA) 1273 (Aug. 15, 1986).

94. *Id.* at 662.

95. *Id.* at 658.

Section 301 of the LMRA.[96] The court disagreed, however, and remanded the case to the state level.[97] In doing so, it held that the privacy claim asserted by plaintiff was not subject to the collective bargaining process, and, in fact, was independent of private agreements.[98] Accordingly, the plaintiff's claim was not preempted by the LMRA.

In addition to compensating for plaintiff's damages, the defendant may find himself liable for mental anguish, attorney's fees, and even exemplary damages. Furthermore, the court may order specific injunctive remedies, including the establishment of educational programs or modification of hiring policies. In a landmark California case based upon the termination of an employee testing HIV-positive, an administrative agency warned that punitive damages might be awarded in future cases of AIDS-related termination.[99] In *Department of Fair Employment and Housing v. Raytheon*[100] the California Fair Employment Housing Commission awarded the estate of an AIDS decedent back wages of $4,359 and attorney fees because decedent was terminated in spite of his ability to work.[101] The commissioners considered awarding punitive damages, but concluded that there was no malice, oppression, or fraud in evidence. "We wish to emphasize," the Commission noted, "that we may well take a very different view of this issue in similar cases that come before us in the future, particularly those in which the exclusion because of AIDS was imposed—or continues to be imposed—after the decision in this case

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96. *Id.*

97. *Id.* at 662. The matter was later settled out of court, with the provision that the employee be reinstated to a different facility from the one in which he had received co-worker threats. Telephone interview with David C. Casey, Esq., of the Boston firm of Peckham, Lobel, Casey & Tye (Nov. 20, 1989).

98. *Cronan*, 1 Indiv. Empl. Rts. Cas. at 662.

99. Dep't of Fair Empl. & Housing v. Raytheon Co., FEHC Dec. No. 87-12, Fair Employment & Housing Comm'n of the State of California (May 28, 1987) (*unpublished*, copy of decision on file at the offices the of *The Transnational Lawyer*). The Commission decision was subsequently reviewed by the Santa Barbara County Superior Court in Raytheon Co. v. Fair Empl. & Housing Comm'n, 46 Fair Empl. Prac. Cas. (BNA) 1089 (Ca. Super. Ct. Apr. 22, 1988), *aff'd*, 212 Cal. App. 3d 1242, 261 Cal. Rptr. 197 (1989).

100. Dep't of Fair Empl. & Housing v. Raytheon Co., FEHC Dec. No. 87-12 at 29.

101. The New York City Commission on Human Rights similarly affords relief to individuals who are discriminated against because of the HIV virus or the perception of having AIDS. In Whittacre v. The Northern Dispensary, Case No. AU00015021387, N.Y. City Comm'n on Human Rights (1988) (*unpublished*, copy of decision and order on file at the offices of *The Transnational Lawyer*), the Commission upheld a mental anguish award of $20,000 for a HIV-infected patient who was refused dental treatment. According to the Commission, "the standard of proof required to demonstrate mental anguish in discrimination cases is less stringent than that required in common law actions." *Id.* at 6.

is issued."[102] The commissioners further stated that, "[w]e will therefore look with growing skepticism upon employer claims that they were legitimately, if mistakenly, uncertain about the casual transmissibility of AIDS in the workplace."[103]

The Commission's findings were subsequently affirmed by the California Court of Appeal in no uncertain terms: "May an employer discharge an employee solely because he has been diagnosed as having Acquired Immune Deficiency Syndrome (AIDS)?", asked the court rhetorically at the outset of its opinion. "No," it responded unequivocally.[104] The case was recently settled, with the Raytheon Company being required not only to pay all back wages and attorneys' fees, but also to establish an "AIDS in the Workplace" training program for its employees.[105]

In *Racine Educational Ass'n v. Racine Unified School District*,[106] an administrative law judge found a school district health policy to be in violation of Wisconsin employment discrimination law. The policy provided that all school activities should encourage health standards that are in the best interest of all students.[107] In order to further this goal, the policy excluded from work district staff members testing positive to HIV or exhibiting symptoms of ARC.[108] These employees were to be placed on sick leave or leave of absence while a determination concerning further work assignments was made.[109] The administrative law judge concluded that such a policy was a facially discriminatory violation of Wisconsin statute and case law prohibiting certain "mixed motive" employment discharge policies.[110] The judge noted that the school district policy "was motivated in part by a desire to keep gays from teaching in Racine schools."[111]

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102. *Raytheon*, FEHC Dec. No. 87-12 at 24.
103. *Id.*
104. *Raytheon*, 212 Cal. App. 3d at 1243.
105. *Update*, NAT'L GAY RIGHTS ADVOCATES (Nov. 1989).
106. Racine Educ. Ass'n v. Racine Unified School Dist., Case No. 8650279, Wisconsin Department of Industry, Labor and Human Relations (1988) (*unpublished*, copy of decision on file at the offices of *The Transnational Lawyer*).
107. *Id.* at 4.
108. *Id.* For a description of ARC, *see supra* note 2.
109. *Id.*
110. *Id.*
111. *Racine*, Case No. 8650279 at 63. The district policy never went into effect. The only matter appealed was the award of attorney's fees. Even more startling is a requirement pursuant to the Illinois Human Rights Commission that a teacher, terminated from a private school because of having tested HIV-positive, be awarded not only back pay but also a flexible position with the private school. J.S. v. A Private School, Case No. 1988-CN2452, Ill. Human Rights Comm'n (Nov. 16, 1988) (*unpublished*, copy of decision on file at the offices of *The*

Even if there were no specific state statutory protections from discharge based on an employee testing HIV-positive, a discharged employee may have a cause of action based on state constitutional protection. In *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*,[112] drug testing of narcotics officers based in part on the "real health threat" of AIDS was held to be a violation of New Jersey state constitutional protection against unreasonable search and seizure.[113] In finding that drug testing was unconstitutional under the New Jersey constitution in the absence of reasonable individualized suspicion, the court noted that protections against unreasonable searches and seizures are often greater under state law than that required by the U.S. Supreme Court.[114] Accordingly, state constitutional protections may often provide the discharged employee with relief even in the absence of a federal remedy.

Assuming no federal or state remedy, there may be municipal ordinances either prohibiting HIV-related discrimination or restricting the employer's termination rights if the employee is terminated for AIDS-related reasons.[115] For example, the New York City Commission on Human Rights (NYCCHR) has jurisdiction over HIV discrimination complaints including those alleging employment discrimination, pursuant to New York City Administrative Code Title 8, Chapter 1.[116] In *Miller v. Ben Benson's Steak House*,[117] an administrative law judge concluded that a gay waiter, perceived by the employer to be infected with the HIV virus, was wrongfully terminated on that basis.[118] The significance of the judge's finding rests upon his validation of the less restrictive burden of proof of the

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Transnational Lawyer). In New York City, an attorney who alleged he was fired from the law firm of Baker & McKenzie for having tested HIV-positive and deprived of disability insurance, filed a complaint with the State Division of Human Rights. The agency issued a finding of probable cause. Galen, *How Firms Face AIDS*, Nat'l L.J., Mar. 23, 1987, at 33, col. 3.

112. 216 N.J. Super. 461, 524 A.2d 430 (N.J. Super. Ct. App. Div. 1987).

113. *Id.* at 438-39.

114. *Id.* at 439.

115. *See* BERKELEY, CAL. ORDINANCE NO. 5712 (1986); AUSTIN, TEX. ORDINANCE NO. 861211-V (1986). In Walsh v. Cicmanec, Case No. 608500 (S.D. Super. Ct. July 19, 1989) (*unpublished*, copies of stipulated final judgment and permanent injunction on file at the offices of *The Transnational Lawyer*), the first suit filed under San Diego's anti-AIDS discrimination ordinance, a chiropractor agreed to an out-of-court settlement mandating that he pay $5,000 to a rejected HIV-infected patient, and to an injunction mandating that the chiropractor treat otherwise acceptable HIV-infected patients. *Id.*

116. NEW YORK, N.Y. ADMIN. CODE, tit. 8, ch. 1, §§ 8-102, -108 (1986).

117. Complaint No. GA-00024030987-DN, City of New York Comm'n on Human Rights (*unpublished*, copy of recommended decision and order on file at the offices of *The Transnational Lawyer*).

118. *Id.* at 22.

New York City Code. The standard under the Code can be met if simply an inference can be made that termination was based even on a perceived handicap.[119] This contrasts with the more restrictive standard required in the federal context under Section 504 of the Rehabilitation Act, which requires a showing of adverse action taken "solely" on the basis of handicap.[120]

In many cases, it is not the employer who desires to terminate an HIV-positive employee. Rather, the termination is often the result of employee fears of becoming infected or of customers who do not want to be served by an employee infected with HIV. Two examples of employee fears which resulted in litigation illustrate the potential problems an employer faces at the workplace. In *In re Minnesota Department of Corrections*,[121] an arbitrator concluded that a prison guard could have been legitimately terminated for refusing to conduct a pat search of an inmate but for his reliance on the warden's unscientific information concerning HIV transmission.[122] The arbitrator based his decision partly on the inaccurate memorandum sent by the warden to inmates: "Do not share . . . toothbrushes, drags of cigarettes. . . . No one really knows all the ways AIDS is transmitted."[123] The warden, noted the arbitrator, was at least partly responsible for the guard's exaggerated fear of contracting the disease. In *Stepp v. Review Board of the Indiana Empl. Sec. Division*,[124] an employee refused to work on vials containing HIV-infected blood because "AIDS is God's plague on man, and performing the tests would go against God's will."[125] The court concluded that the employee, terminated for his refusal, had no relief pursuant to Indiana

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119. NEW YORK, N.Y. ADMIN. CODE, tit. 8, ch. 1, § 8-107(1)(a) (1986), establishes the standard that:

> It shall be an unlawful discriminatory practice . . . for an employer, because of the age, race, creed, color, national origin or sex of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

Id.

AIDS-based discrimination has been redressed on the basis of related Section 8-108 of the New York City Administrative Code, which provides that "the provisions . . . set forth in section 8-107 as unlawful discriminatory practices shall be construed to include an otherwise qualified person who is physically or mentally handicapped." *Id.* at § 8-108.

120. 29 U.S.C. § 794 (1987 & Supp. 1989) (amending Rehabilitation Act of 1973 § 504).

121. 85 Lab. Arb. (BNA) 1185 (1985).

122. *Id.* at 1189, 1190. However, the arbitrator declined to award back pay, "because granting the grievant such relief would reward his misconduct." *Id.*

123. *Id.* at 1189-90.

124. 521 N.E.2d 350 (Ind. Ct. App. 1988).

125. *Id.* at 352.

Occupational Safety and Health Administration (IOSHA) regulations, especially since the employer followed CDC guidelines. To succeed under an IOSHA claim, employees who refuse to work because of dangerous conditions must show that their fear is that of a reasonable person.[126] The IOSHA claim was denied in *Stepp* because the employer had provided accurate information on the disease and established that CDC guidelines had been observed.[127]

Assuming some statutory protection from arbitrary dismissal, it is also improbable that an employer can legally terminate an employee, such as a waiter, simply due to customer dislike of being served by an HIV-positive employee. In *Isbell v. Poor Richards, Inc.*,[128] a terminated waiter appealed his discharge on the grounds that the HIV virus could not be casually transmitted. Despite the lack of any health hazard, the employer argued that his business would be ruined if it were discovered that an HIV-infected waiter served food at his restaurant. Finding this reason insufficient, the waiter was awarded $50,700.[129] Upon a similar claim, the New York State Human Rights Commission ordered an establishment to pay a terminated waiter approximately $50,000.[130] The Commission rejected the proffered poor work performance defense since the waiter was terminated shortly after the employer learned of his ARC diagnosis.

Finally, if an employee is terminated on the basis of an alleged HIV infection, and should the allegation prove to be false, the employee may sue for defamation damages. In *Little v. Bryce*,[131] the Texas Court of Appeals allowed a defamation cause of action for a gay plaintiff erroneously accused by his employer and employer's agents of being infected with HIV. Moreover, even if the HIV charge were true, and was the result of any employer-mandated test, there may be a cause of action based on a violation of the employee's right to privacy should the information be revealed without the employee's consent.[132]

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126. Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980).

127. *Stepp*, 521 N.E.2d at 354.

128. Case No. EH-352-87, W. Va. Human Rights Comm'n (Jan. 15, 1988), *reported in* 24 Fair Empl. Prac. Cas. (BNA) 24 (Feb. 18, 1988).

129. *Update*, NAT'L GAY RIGHTS ADVOCATES (Feb. 1989).

130. *Update*, NAT'L GAY RIGHTS ADVOCATES (Mar. 1989).

131. Little v. Bryce, 733 S.W.2d 937 (Tex. Ct. App. 1987).

132. Saxton v. Vanzant, No. 86-Civ-59 (Fayette Co., Ohio, Ct. C. P., Mar. 7, 1986) (*unpublished*, copy of complaint on file at the offices of *The Transnational Lawyer*), involved an Ohio plaintiff who was named in an anonymous note as being infected with HIV. The plaintiff was fired from his job after the anonymous letter was sent to the Fayette County Health Commissioner, the employer having been subsequently informed by the health commissioner. The plaintiff sued for $1,500,000 in defamation damages, wrongful discharge, and breach of an employment contract spanning 22 years of employment. *Id.*

Absent a relevant statute or ordinance, a private employer is still free to terminate at will an employee testing HIV-positive.[133] Nevertheless, the United States federal government and many states and municipalities have now enacted legislation prohibiting termination based on HIV infection. What remains absent is the development of a national policy providing both uniform protection of the HIV-infected employee and guidance for the affected employer.

V. Great Britain

A. *Unfair Dismissal*

British law on the discharge of an employee testing HIV-positive is still unclear.[134] Unlike the myriad of statutes and regulations in the United States, however, Britons have one all-encompassing scheme to handle discharges of the at-will employee.[135] As a result of industrial strife in the 1960's, and the recommendations of the 1968 Royal Commission on Trade Unions and Employers' Associations report (the Donovan Commission),[136] Parliament passed the Industrial Relations Act.[137] The Act, along with subsequent legislation,[138] utilized industrial tribunals to decide questions of fact

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133. An HIV-infected employee might rely, however, on an employment manual for a cause of action based on the implied-in-fact exception to the termination at will rule. *See* King v. Electronic Data Systems Corp., No. 17039 (Montgomery Co., Md., Cir. Ct. Aug. 14, 1986) (*unpublished*, copy of complaint on file at the offices of *The Transnational Lawyer*) (corporate employment manual, outlining provisions for health benefits, leave, and disability benefits, constitutes an express written employment agreement). *See also Little*, 733 S.W.2d at 939, for strong criticism of the termination at will doctrine in the concurring opinion of Justice Levy. Justice Levy found that it was not unreasonable to read into an employment relationship an implied promise by the employer not to act arbitrarily in dealing with the employee. *Id.*

134. For a recent treatment of the AIDS virus and unfair dismissal in British employment law, *see* C. Southam & G. Howard, AIDS and Employment Law (1988).

135. Bellace, *supra* note 37, at 221.

136. The Royal Commission on Trade Unions and Employers' Associations, commonly known as the Donovan Commission, was created in response to a perceived need to improve the system of industrial relations. *See* Royal Comm'n on Trade Unions and Employers' Ass'ns 1965-1968, Report, Cmd. No. 3623, ¶ 526 (1968). *See also* Bellace, *supra* note 37, at 220.

137. Industrial Relations Act, 1971, ch. 72, *reprinted in* 41 Halsbury's Statutes of England and Wales 2062 (3d ed. 1972) (right of employee not to be unfairly dismissed). The Industrial Relations Act was subsequently repealed by the Trade Union and Labour Relations Act, 1974, ch. 52, *reprinted in* 44 Halsbury's Statutes of England and Wales 1766 (3d ed. 1975), but the latter Act reenacted provisions relating to unfair dismissal. *Id.*

138. *See, e.g.*, Employment Protection Act, 1975, ch. 71, *reprinted in* 16 Halsbury's Statutes of England and Wales 291 (4th ed. 1986) (creating Advisory Conciliation & Arbitration Service to provide advice on matters concerned with industrial relations or employment policies, including procedures relating to termination of employment); Employment

as to whether an employee, employed for a specific time period (which since 1985 has been two years)[139] was unfairly discharged. British unfair dismissal law has of course changed since the early 1970's, but an employee may no longer be terminated for no reason at all.[140] The present test is not whether the industrial tribunal would have found reasonable grounds to terminate an employee, but whether the employer, at the time of the termination, acted reasonably, given all the circumstances and knowledge available to him at that time.[141]

The major result of the Donovan Commission was the increased utilization of industrial tribunals for the resolution of termination cases. An industrial tribunal consists of a representative of an employer, an employee (usually a union representative), and a solicitor or barrister with seven years' experience. The hearing procedure, similar to American grievance arbitration, is under oath, with cross examination and questions from tribunal members. The employer usually presents his case first, with the employee having an equal opportunity to respond. Usually the tribunal, after private consultation, renders an immediate decision. Decisions may be appealed only on legal issues and not questions of fact. Should a decision be appealed, it would be to the Employment Appeal Tribunal (EAT), which consists of a judge and senior lay members. Any subsequent appeal is heard before the Court of Appeal, and, ultimately, before the House of Lords. Only about thirty-five percent of unfair dismissal cases actually appear before the industrial tribunal.[142] This is due largely to the Advisory Conciliation and Arbitration Service which resolves most unfair dismissal claims without litigation.[143]

Protection (Consolidation) Act, 1978, ch. 44, *reprinted in* 16 HALSBURY'S STATUTES OF ENGLAND AND WALES 381 (4th ed. 1986) (consolidating statutes dealing with employment protection issues, including unfair dismissal); and Employment Act, 1982, ch. 46, *reprinted in* 16 HALSBURY'S STATUTES OF ENGLAND AND WALES 691 (4th ed. 1986) (act to provide compensation for dismissals violating union membership agreement and to provide for awards by industrial tribunals).

139. *See infra* note 168 and accompanying text.

140. For example, the Employment Act, 1980, removed the statutory requirement that the employer prove the fairness of the dismissal. *See* Employment Act, 1980, *reprinted in* 16 HALSBURY'S STATUTES OF ENGLAND AND WALES 639 (4th ed. 1986) (amending law relating to workers, employers, trade unions and employers' associations, and repealing section 1A of Trade Union and Labour Relations Act, 1974).

141. *See* Polkey v. A.E. Dayton Services, Ltd., [1987] 3 All E.R. 974, 983-84.

142. Rico, *Implications from British Experience*, 8 INDUS. REL. L.J. 547, 554 (1986).

143. The Advisory Conciliation and Arbitration Service (ACAS) was established by the Employment Protection Act, 1975, ch. 71, *reprinted in* 16 HALSBURY'S STATUTES OF ENGLAND AND WALES 291 (4th ed. 1986) (creating Advisory Conciliation & Arbitration Service to provide advice on matters concerned with industrial relations or employment policies, including procedures relating to termination of employment). For information on the ACAS, *see* Levinson, *Let Conciliation Thrive*, 85 L. SOCIETY'S GAZETTE 20 (1988).

B. *Government Response to the HIV-Infected Employee*

The problem of an HIV-infected employee has not been of major concern to the British government until the last few years.[144] In November 1986, the government circulated a booklet, entitled "A.I.D.S. and Employment."[145] The booklet, distributed to 400,000 employers,[146] included a warning that people dismissed because they are suspected of being HIV carriers are entitled to appeal their case to an industrial tribunal. Employers were further informed that it would be unreasonable to refuse to hire an HIV-infected employee.[147]

In the pamphlet, the government encouraged AIDS education to counter the AIDS phobia of co-workers. In addition, the government advised that dismissing individuals infected with the virus, or thought to be infected with the virus, simply due to pressure from other employees, would likely expose the employer to claims for unfair dismissal. The language of the booklet stressed that since HIV may be transmitted only by direct contact with blood, semen, or other bodily fluids of an infected person, the employee generally should not be obligated to disclose his infection or to submit to medical tests for the virus. Similarly, the employer should avoid any action which could be "interpreted as an inquisition into an employee's personal lifestyle."[148]

In 1986, the Paymaster General and Minister for Employment informed employers that unnecessary fears about HIV-infected employees could lead to unwarranted discrimination in the workplace and the subsequent attempt by an HIV-infected employee to conceal the disease.[149] In December 1987, the government further warned that fear of worker reaction or strikes would not be a viable defense to an unfair dismissal action before an industrial tribunal.[150] The Department of Education and Science likewise issued a circular which

144. *See generally* Note, *AIDS Quarantine in England and the United States*, 10 HASTINGS INT'L & COMP. L. REV. 113 (1986) (background information on British public health concerns with AIDS).

145. DEPARTMENT OF EMPLOYMENT AND THE HEALTH AND SAFETY EXECUTIVE, CENTRAL OFFICE OF INFORMATION (1987) [hereinafter CENTRAL OFFICE OF INFORMATION].

146. The Times (London), Nov. 25, 1986, at 5, col. a. By 1988, over 3 million copies were distributed throughout Great Britain. *See* BRITISH GOVERNMENT RESPONSE, *supra* note 2, at 31, § 5.3.

147. CENTRAL OFFICE OF INFORMATION, *supra* note 145.

148. *Id.*

149. The Times (London), Nov. 25, 1986, at 5, col. a.

150. *Id.*, Dec. 2, 1987, at 3, col. d.

stated that, based on present evidence, there was "no risk" of an HIV-infected teacher infecting or being dangerous to a student.[151] Thus, as long as the teacher was able to perform his or her job, he or she should neither be refused employment nor dismissed.[152]

Besides termination of an HIV-infected person being "unfair," an AIDS-related dismissal or testing may violate the Sex Discrimination Act of 1975.[153] Olga Aiken of the Advisory Conciliation and Arbitration Service (ACAS) warned employees that if the employer insists on negative HIV tests, it would discriminate against men, since fewer men than women could pass the test.

> The employer will have to justify the requirement in business terms. As the infected person may have years of productive life ahead, this may be difficult.
>
> A [company] policy of avoiding the employment of high-risk groups is clearly discriminatory and doomed to failure. . . . It is even more difficult to operate a testing policy for existing staff.[154]

British employment experts also agree that a discrimination claim "might be considered viable" in situations of HIV testing since an infected male could prove that a condition of employment has been applied with which considerably fewer men than women can comply.[155] If the employee successfully proves this contention, the employer would bear the burden of demonstrating that the condition is justified.[156]

In one of the few reported decisions concerning HIV infection, *Buck v. The Letchworth Palace Ltd.*,[157] an employee, who had been

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151. *Id.*, Apr. 9, 1987, at 3, col. d.

152. *Id.* This is typical of the general approach of the British Government. *See* BRITISH GOVERNMENT RESPONSE, *supra* note 2, at 31, § 5.3, which states in pertinent part:

> The Government agrees . . . that HIV tests in relation to employment can be justified only if it can be proved that HIV infection will directly affect job performance. The majority of people with HIV infection who are at work are completely well and they and their employers will be unaware that they are infected. There is no indication that infection with HIV should be treated differently from any other infection or illness.

Id.

153. Aiken, *A Positive Response to AIDS in the Workplace*, 20 PERSONNEL MGMT. 52, 55 (1988). *See also* Fagan & Newell, *AIDS in Employment Law*, 137 NEW L.J. 752, 752 (1987).

154. Aiken, *supra* note 153, at 53. *See generally* The Times (London), May 2, 1988, at 3, col. a (AIDS test bias warning to employers by Olga Aiken).

155. Fagan & Newell, *supra* note 153, at 752.

156. *Id.*

157. Buck v. The Letchworth Palace, Ltd., Case No. 36488/86, Bedford I.T. (Apr. 7, 1987). *See* Fagan & Newell, *supra* note 153, at 754; Munyard, *AIDS, the Workplace, and the Law*, 15 EQUAL OPPORTUNITIES REV. 7, 11 (1987); Janner, *AIDS, HIV and Employment Legislation*, 56 SOCIAL WORK TODAY 17, 17 (1989).

convicted of a gay-related offense, was dismissed after fellow workers refused to continue working with him. "[The employees] viewed his behavior with disgust and they also feared that their shared toilet facilities might become contaminated with the AIDS virus."[158] The industrial tribunal concluded that the dismissal was fair, notwithstanding the overreaction of fellow employees and the lack of any proof of the disliked employee being infected with the virus.[159] The tribunal found that the publicity over the employee's alleged HIV infection had affected the other employees' response to their fellow employee's prior conviction.[160] The tribunal noted that the employees were overreacting, but found that the employer reasonably responded to their fears by dismissing the employee in question.[161] The tribunal did not believe the case was one of unreasonable prejudice.[162] The EAT subsequently reversed[163] the decision because the employer did not follow a proper procedure as mandated by the House of Lords in *Polkey v. A.E. Dayton, Ltd.*[164] At the very least, pursuant to *Polkey*, the employer should have conducted a reasonable investigation before termination.[165]

Several reasons for the paucity of AIDS-related claims before industrial tribunals include a potential claimant's fear of publicity and the negative health impact of increased stress from confrontation. The House of Commons Social Services Committee commented in 1987 that complainants fear the potential for adverse publicity and the discrimination it so often engenders if they admit to infection or to being a member of a high risk group.[166] The Committee also noted that HIV-infected complainants might further damage their immune systems by subjecting themselves to the stress of discrimination proceedings.[167] The Committee suggested that *in camera* hearings and a review of the qualifying time period for entitlement to statutory rights against dismissal might be beneficial in such cases.[168]

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158. Fagan & Newell, *supra* note 153, at 754.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. Aiken, *supra* note 153, at 52.
164. [1987] 3 All E.R. 974.
165. *Id.* at 984.
166. Fagan & Newell, *supra* note 153, at 754 (citing HOUSE OF COMMONS SOCIAL SERVICES COMMITTEE, PROBLEMS ASSOCIATED WITH AIDS ¶ 168 (1987)).
167. *Id.*
168. *Id.* This suggestion of *in camera* proceedings and the reduction of the two-year qualifying period were rejected by the British Government since "the Government does not consider that they [HIV-positive employees] should be treated any differently from other cases of unfair dismissal." BRITISH GOVERNMENT RESPONSE, *supra* note 2, at 31, § 5.2.

Within Great Britain, labor and management joined ACAS in circulating *AIDS in Employment*, the first joint publication of the Trade Union Congress and the Confederation of British Industry.[169] The pamphlet, besides sharing the need for accurate information in place of mythology about AIDS, also emphasized the need for infected workers to be protected from employment discrimination.[170]

As previously mentioned, the British Medical Association has favored a government ban against job discrimination concerning HIV-infected employees.[171] The BMA stated that otherwise employees would put off or decline testing to determine whether or not they are HIV-infected.[172] The Royal College of Nursing has also warned its members that they could be "struck" if they refused to treat patients with HIV.[173]

It should not be assumed, however, that all British governmental officials are enlightened in their attitude toward HIV. Mrs. Edwina Currie, the junior health minister of the Tory government, stated that "good Christian people" would not catch the disease. Youth abroad were urged by Mrs. Currie "to restrict romantic activity to holding hands," while businessmen were urged to take wives with them if going abroad and thus avoid catching the virus. In a speech before the Mersey Regional Health Authority, she summarized her analysis of AIDS: "Good Christian people who wouldn't dream of misbehaving will not catch AIDS."[174]

Often enlightened views of organization leadership are rejected by membership rank and file. For example, the British Medical Association recommendation against secret testing for HIV antibodies was rejected at the annual meeting of the Association.[175] A typical rationale behind the membership's decision to reject the leadership's advice was that of an anesthetist in London: "I feel that my life and those of my medical and nursing colleagues are more important than the future insurance or employment prospects of an infected individual."[176] This vote not only conflicts with government guide-

169. *See* The Times (London), Feb. 11, 1988, at 3, col. b.
170. *Id.*
171. *Id.*, June 25, 1986, at 20, col. c.
172. *Id.*
173. *Id.*, Sept. 25, 1986, at 3, col. d.
174. The Times (London), Feb. 13, 1987, at 2, col. c. Mrs. Currie, who is Jewish, later resigned from the government for a reason unrelated to her AIDS remarks.
175. *Id.*, July 3, 1987, at 3, col. a.
176. *Id.*

lines, but may even result in allegations of assault or battery if such unauthorized testing is effectuated.[177]

C. *European Economic Community Policy*

Finally, as Europe continues its progress toward the integration of 1992,[178] the British employer and the HIV-infected employee can turn to the policies of the European Economic Community (EEC) for additional guidance and protection. The Council of the European Communities (Council), together with the Ministers for Health of the EEC member states, recently issued its conclusions "concerning AIDS and the place of work."[179] Among its findings, the Council stated that HIV-infected employees pose no danger to their co-workers, and, hence, that there exist no grounds for screening potential employees for HIV antibodies.[180] For those employees who have tested positive to HIV but who exhibit no symptoms of the disease, the Council declared that they should be regarded as normal employees, fit for work, and that they should be under no obligation to notify their employers of their infection.[181] Moreover, should an employee's infection become known to other individuals in the firm, supervisors and management should take all measures possible to protect the individual from stigmatization and discrimination.[182] Finally, those employees suffering from symptoms of the disease should be treated on the same basis as employees afflicted with other serious illnesses affecting job performance.[183] If fitness is impaired, the duties or working hours of such employees should be adjusted to enable them to continue working as long as possible.[184]

While the Council's conclusions were introduced "merely to encourage firms to introduce education on AIDS and to promote

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177. *Id.*, July 4, 1987, at 3, col. c. Legal advisors to the Department of Health have taken the view that blood tests obtained without a patient's permission are unlawful. *Id. See also* The Times (London), July 3, 1987, at 1, col. e (doctors face legal hitch over AIDS test decision); Wacks, *Controlling AIDS, Some Legal Issues*, 138 NEW L.J. 254, 254 (1988) (British Medical Assoc'n practice of allowing AIDS testing without consent contradicts advice of WHO and British Government).

178. *See generally* Single European Act, 30 O.J. EUR. COMM. (No. L 169) 1 (1987) (adopting measures with aim of progressively establishing internal market without internal frontiers and in which free movement of goods, persons, services, and capital is ensured).

179. 32 O.J. EUR. COMM. (No. C 28) 1 (1989).

180. *Id.* at 3, ¶ III(7).

181. *Id.* at ¶ IV(8-9).

182. *Id.* at ¶ IV(10).

183. *Id.* at ¶ V(11).

184. 32 O.J. EUR. COMM. (No. C 28) 3, ¶ V(11) (1989).

humane treatment of employees infected by, or suffering from, AIDS,"[185] and, as such, are not binding on member states, the policies enumerated by the Council are significant for at least two reasons. First, they provide authoritative consensus among EEC member states that employers should play a "leading" role in disseminating AIDS education to their employees and in promoting the accepted view that the HIV-infected employee should be treated as a normal employee. Second, the Council's conclusions strongly suggest that member states, such as Great Britain, will be unsuccessful in citing the "public health" exception to the EEC's prohibition on the free movement of EEC workers when attempting to prevent the immigration of the HIV-infected individual. While one of the central goals of the EEC is the unrestricted movement of workers throughout its union,[186] member states have been granted the right to prevent the immigration of foreign nationals based on a threat to public health.[187] Traditionally, the exception has included individuals infected with syphilis, tuberculosis, or other contagious diseases.[188] While the AIDS virus is not specifically enumerated, a Member State could theoretically cite the exception's intent to prevent public health threats so as to legitimately prevent an HIV-infected individual from entering its territory. Given the Council's conclusions in its recent policy statement, however, it now seems unlikely that such a barrier imposed by a Member State would withstand EEC scrutiny.

In contrast to the clearly articulated policy of the EEC concerning the HIV-infected employee, British law on the subject remains unclear. While governmental policies have increasingly stressed the importance of workplace education and non-discrimination, legislative and judicial pronouncements have been both notably scarce and effectively contradictory.

VI. Immigration Restrictions

One of the first global responses to the AIDS crisis was the erection of border restrictions on HIV carriers by governments seeking to control the spread of the disease among their populations. Immigration restrictions based on HIV testing have become commonplace.[189]

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185. *Id.* at 2.
186. Treaty Establishing the European Economic Community, Mar. 25, 1957, 2 U.N.T.S. 294-97; 1-3 Common Mkt. Rep. (CCH) ¶ 100-5406.
187. *Id.*
188. O.J. Eur. Comm., Special Edition (No. 56) 119 (1963-64).
189. *Aidsweek*, San Francisco Chron., June 11, 1989, at A2, col. 1.

This development has significant consequences for both the employer and employee, as individuals traveling or being transferred internationally for business purposes can no longer assume their route will be unimpeded.

Currently, British policy reflects a refusal to grant entry into Great Britain to visitors known or suspected to be HIV-infected.[190] For example, an American airline steward was recently detained overnight at a London airport and put on a return flight to the United States once it was known he had been HIV-infected.[191] Similarly, none of the constitutional, statutory or common law rights established in the United States to protect employees who test HIV-positive from arbitrary termination would be applicable to attacks on immigration restrictions.[192]

A former Tory health minister urged the British government to avoid "horrendous" prospects by screening visitors for HIV, especially those from Tanzania, Uganda, and Zambia. The advice came close to provoking a diplomatic incident when the Tanzanian government expressed that it was "outraged and indignant" at the possibility of such screening.[193] The British Government seriously considered, but in the end rejected, HIV testing for at least two reasons. The government reasoned, first, that it would be illogical to screen African visitors and not visitors from the United States where there is a similarly serious epidemic of the virus. Second, screening would divert attention from the primary message of the government that AIDS is a sexually-transmitted disease.[194]

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190. The Times (London), Feb. 17, 1987, at 1, col. c.

191. *Id.* It is uncertain whether the steward was the first person denied entry on AIDS-related grounds. *Id.* The United States Department of State has also ordered HIV tests for the 27,000 service persons within Great Britain. *Id.*, Sept. 11, 1986, at 3, col. a. Some British employers, such as British Airways and Texaco, have instituted HIV screening for job applicants. Aiken, *supra* note 153, at 52.

192. Instructions concerning the admission of HIV-infected aliens into the United States were recently issued by the Immigration and Naturalization Service (INS). *News Release*, U.S. DEPT. OF JUSTICE (May 25, 1989). The instructions mandate that "with regard to temporary visitors for business, transit visa applicants, or those who are HIV positive but otherwise admissible, service officers are to continue to employ a balancing test on a case-by-case basis in determining whether discretion should be exercised positively. . . ." *Id. See infra* notes 189-92 and accompanying text for additional discussion of recent statutory enactments and case law concerning AIDS-related immigration restrictions.

193. The Times (London), Sept. 29, 1986, at 3, col. d.

194. *Id.*, Sept. 24, 1986, at 2, col. f. Professor Arie Zuckerman, London School of Hygiene and Tropical Medicine, also explained that since Great Britain already had 30,000-40,000 infected persons, "an additional contribution of a few infected foreigners is unlikely to be important." *Id.*, Nov. 21, 1986, at 3, col. a.

By 1988, the government further explained why it had concluded that screening international travelers was both impractical and ineffective in reducing the spread of the AIDS virus within Great Britain.

> . . . [T]he Government has no plans to introduce screening for travelers to the UK. The Government notes that the WHO and EC health ministers have taken the same view. Nonetheless, the Government understands that a number of other countries may be taking measures in this area, and it will be keeping the position under review.[195]

In the United States, the Senate, in 1987, unanimously passed an amendment by Senator Jesse Helms, which added the HIV virus to the list of "dangerous, contagious diseases" which bar entry into the United States for those seeking permanent residency status.[196] One perhaps unforeseen result was that typified by a Dutch national infected with HIV en route to a gay health conference in San Francisco.[197] The Dutch educator was detained by the INS and given the alternative of either returning to The Netherlands or remaining in jail pending a deportation hearing.[198] Perhaps as a result of pressure concerning this blanket exclusion, the INS, in June 1989, allowed a partial waiver to HIV-infected foreigners if, and only if, they entered the United States for business-related reasons, to visit relatives, or to attend a conference or obtain medical treatment.[199] What impact this exclusionary policy will have on future conferences in the United States is uncertain.[200] However, the International Red Cross recently withdrew from participation at the Fourth International Conference on AIDS to be held in San Francisco in 1990, reportedly because of U.S. policy barring entry to people with AIDS or the AIDS virus.[201]

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195. *See* BRITISH GOVERNMENT RESPONSE, *supra* note 2, at 32, ¶ 5.7.

196. Supplemental Appropriations Act of 1987, Pub. L. 100-71, § 518, 66 Stat. 182 (codified at 8 U.S.C. § 1182 (1987)). *See also* Medical Examination of Aliens, 42 C.F.R § 34 (1988).

197. Nat'l L.J., May 8, 1989, at 16, col. 3. *See also In the Matter of* Hans Paul Verhoef, File No. A28 522 388, United States Dep't of Justice, Executive Office for Immigration Review, Office of Immigration Judge (Apr. 7, 1989) (*unpublished*, copy of inclusion proceeding on file at the offices of *The Transnational Lawyer*).

198. Nat'l L.J., May 8, 1989, at 16, col. 3.

199. *Update*, NAT'L GAY RIGHTS ADVOCATES (July 1989). The 30-day period is now being litigated on grounds that it has no rational relationship to any legitimate government purpose. *Id.*

200. The World Health Organization has adopted a policy of refusing to hold meetings in countries which examine travelers for HIV infection. At present, these countries include South Africa, Cuba, and the Soviet Union. Nat'l L.J., May 8, 1989, at 16, col. 3.

201. *Aidsweek*, San Francisco Chron., Nov. 26, 1989, at A2, col. 1.

VI. Conclusion and Recommendations

An employer who tests for HIV or terminates an HIV-positive employee or succumbs to employee pressure against an alleged gay, is increasing the possibilities of successful litigation against her. What then should the employer do? First, and fundamentally, the employer should undertake efforts to educate her workforce that the AIDS virus is not spread through casual contact. More importantly, the HIV-infected employee should be treated no differently than other employees.

A. *Education and Counseling*

Reliance on general AIDS education, and counseling of HIV-infected employees concerning the AIDS virus, is not merely a platitude or an esoteric suggestion. In *Woelich v. Frito-Lay, Inc.*,[202] the New York City Commission on Human Rights approved settlement of an AIDS discrimination claim when the employer agreed to disseminate AIDS information pamphlets at the workplace.[203] Similarly, in the matter of *Shuttleworth*,[204] the claimant was transferred to a new location where, as part of his duties, he was to disseminate AIDS information at the workplace. In Great Britain, counseling of the HIV-infected employee was evaluated in *X v. Y and Others*[205] in which two physicians tested HIV-positive and received adverse publicity in the press about their condition.[206] The court concluded that counseling was the most important treatment available to HIV-infected individuals.[207] The court stated that counseling benefitted the patient by promoting a positive attitude toward the disability and by improving the quality of the patient's life.[208] The court further concluded that counseling benefitted society at large by advising the patient to avoid activities likely to put others at risk of infection.[209]

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202. No. SEPD 1309-85-6, New York City Comm'n on Human Rights (1986) (*unpublished*, copy of settlement on file at the offices of *The Transnational Lawyer*).

203. *Id. See also supra* note 105 and accompanying text concerning the settlement provision in Raytheon Company v. California Fair Employment & Housing Commission for an "AIDS in the Workplace" employee training program.

204. Shuttleworth v. Broward County, 639 F. Supp. 654 (S.D. Fla. 1986).

205. X v. Y, [1988] 2 All E.R. 648.

206. *Id.* at 652.

207. *Id.* at 651.

208. *Id.*

209. *Id.*

Employee education should preferably be in the form of written policies, including procedures to follow in case of a medical emergency.[210] Of course, no solution can guarantee employers total protection from liability. For example, in litigation based on negligent hiring, a woman sought $12,000,000 in damages from an airline because she was bitten by a ticket agent who tested HIV-positive.[211] The woman claimed the airline was negligent in failing to protect passengers and reckless in its investigation of the agent's background.[212] The education and counseling of employees, while not certain to prevent the claims of the client or customer, is a significant step an employer can take in limiting the potential for employee-generated discrimination of HIV-infected co-workers.

B. *Non-Discrimination*

Finally, treating HIV-infected employees the same as all other employees would be in conformity with the policies of the World Health Organization and the recommendations made by the Centers for Disease Control for work place practices. One area that should be closely examined is any requirement of testing for the presence of HIV. The British or American employer who tests for HIV is placed in a no-win position. Should the employee test positive, and should he be terminated on that basis, the British employer, as Ms. Aiken points out, would probably be found to have dismissed his employee unfairly. Aside from the liability an employer may incur from the imposition of testing itself, the employer may be liable if he does not protect the privacy rights of the tested employee. For example, where the test results are leaked, either within or outside the workplace, there might be cause for an action based on invasion

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210. On the need for a written personnel manual concerning AIDS and British law, *see* Pearl, *AIDS: An Overview of the Legal Implications*, 86 L. SOCIETY'S GAZETTE 26, 31 (1989). Every U.S. employer should also have a "what to do if" course of action as part of an AIDS-action plan to minimize liability. B.N.A. Conference, AIDS Action Plans, April 1989, 1 Indiv. Empl. Rts. Cas. (BNA) 4 (May 9, 1989).

211. *See* Jane Doe v. American Airlines, Inc., No. 86C7801 (N.D. Ill. Oct. 15, 1986) (*unpublished*, copies of petition for removal of cause, order, and petition to proceed under fictitious name at the offices of *The Transnational Lawyer*). The complaint alleged battery, negligent hiring, and intentional infliction of emotional distress. *Id.*

212. Although she did not test positive for HIV, a federal judge pressured the parties to accept a settlement of approximately $250,000. The case is also significant in that the attorney for the plaintiff had to request anonymity for his client, irrespective of the lack of statutory authority for anonymity in such a case. Telephone interview with Enrico J. Mirabelli, Esq., of the Chicago firm of Law Offices of Enrico J. Mirabelli and Assoc. (Nov. 20, 1989). This has now been remedied by statute. *See* ILL. REV. STAT. (1987) Ch. 110, para. 2-401(e) (upon application and good cause shown, parties may appear under fictitious name).

or privacy or on defamation. If the test results are positive and somehow leaked, the employer may also have to face the irrational attitudes of other employees. Moreover, mandatory testing detracts from what should be the employer's important role in counseling the HIV-infected employee and educating her workforce about the AIDS virus.