Note

AIDS IN THE WORKPLACE: HOW SHOULD CORPORATE AMERICA COPE?

I. INTRODUCTION

Acquired Immune Deficiency Syndrome (AIDS) is an infectious disease caused by the HIV/LAV virus.[1] The disease alters the structure and organization of the human immune system, thus rendering the body incapable of defending itself against infection.[2] The first United States case was documented in 1981,[3] and by March 1987 more than 31,982 cases had been reported and 18,462 deaths had been attributed to AIDS.[4] One legal commentator has divided victims of AIDS-related discrimination into five identifiable classes: (I) those who are members of groups which are thought to be "at risk" of contracting AIDS;[5] (II) those who have been exposed to the virus but who display no physical symptoms (including persons reacting positively to serum blood tests); (III) those who display symptoms

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1. Selwyn, *What is Now Known, II. Epidemiology*, HOSP. PRAC., June 15, 1986, at 127 [hereinafter Selwyn, *What is Now Known*].

2. *See* Sulfas, *AIDS in the Workplace*, FOCUS, Mar. 12, 1986, at 22. *See generally* J. BAKER, A.I.D.S.—EVERYTHING YOU MUST KNOW ABOUT ACQUIRED IMMUNE DEFICIENCY SYNDROME (1983) [hereinafter BAKER, EVERYTHING] (general discussion of disease, symptomology and effects in layman's terms); A. FETTNER & W. CHECK, THE TRUTH ABOUT AIDS—EVOLUTION OF AN EPIDEMIC 247 (1984) [hereinafter FETTNER & CHECK, THE TRUTH] (glossary of terms); M. FROMER, AIDS 33-66 (1983) (discussion of epidemiology); K. MAYER & H. PIZER, THE AIDS FACT BOOK 12-24 (1983) (discussion of immunity system); F. SIEGAL & M. SIEGAL, AIDS, THE MEDICAL MYSTERY 214-42 (1983) (selected extracts from MORTALITY AND MORBIDITY WEEKLY tracing the history of the disease); Selwyn, *What is Now Known*, *supra* note 1, at 127-63 (in-depth discussion of epidemiology); PUBLIC HEALTH SERV., U.S. DEP'T HEALTH & HUMAN SERVS., *Facts About Aids* (Aug. 1985) [hereinafter *Facts About Aids*] (public service information AIDS pamphlet).

3. CENTERS FOR DISEASE CONTROL, U.S. DEP'T HEALTH & HUMAN SERVS., *Pneumocystis Pneumonia—Los Angeles*, 30 MORBIDITY & MORTALITY WEEKLY REP. 250 (June 5, 1981).

4. Center for Disease Control, AIDS Weekly Surveillance Report—United States AIDS Program, Center for Infectious Diseases, Mar. 9, 1987, at 5.

5. *See Facts About AIDS*, *supra* note 2, at 1. Among reported cases of AIDS, 73% of victims have been homosexual or bisexual males, 17% current or past intravenous drug users, 1% persons with blood disorders, 1% heterosexual contacts with an AIDS victim, and 2% persons who have received infected blood or blood product during a transfusion. *Id.*

characterized as "warning signs"[6] that the syndrome may develop (i.e., AIDS-Related Complex, also known as ARC or pre-AIDS); (IV) those who have contracted an opportunistic infection[7] indicating development of the syndrome but who do not require hospitalization and are physically able to work; and (V) those who have contracted multiple infections and are so weakened that they are substantially incapacitated.[8]

Persons in the first four groups are generally targeted for discriminatory employment practices.[9] Although currently there is no medical or scientific evidence indicating that AIDS can be transmitted by casual physical contact, by airborne transmissions, or by contact with objects recently touched by an AIDS victim,[10] massive fear of

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6. BAKER, EVERYTHING, *supra* note 2, at 9. Recognized symptoms include extreme fatigue, low grade fever, night sweats, chills, rapid weight loss for no apparent reason, swollen lymph glands in neck, underarms, or groin area, white spots or unusual blemishes in mouth, persistent or dry cough, shortness of breath, persistent or recurrent itching in anal area, diarrhea, cuts and infections that do not heal normally, and skin blotches or bumps (raised or flat, usually purple, pink or blue in color). *Id.*

7. *See* FETTNER & CHECK, THE TRUTH, *supra* note 2, at 256. An opportunistic infection is any infection that is caused by a microorganism generally found within the environment but that causes disease only in persons whose immune systems are lacking. These infections are often the immediate cause of death in AIDS patients, though the underlying cause is the immune deficiency. *Id. See also* Langone, *AIDS*, DISCOVER, Dec. 1985, *reprinted in AIDS in the Workplace—Easing Employees' Fears*, NAT'L SAFETY & HEALTH NEWS, Feb. 1986, at 27-30 [hereinafter *Easing Employees' Fears*]. Some of the opportunistic infections commonly known to strike AIDS victims are: (1) pneumocystis carinii (a lung infection caused by parasites), (2) Kaposi's sarcoma (a skin cancer), (3) candidiasis (a fungal condition that affects the mouth and esophagus), (4) cryptococcosis (a fungal infection that can result in meningitis), (5) cytomegalovirus (a fungal infection which causes colitis and meningitis), (6) atypical microbacterial infections (such as M. avium, which attacks bone marrow and the liver), (7) chronic herpes simplex (a virus that causes ulcerating anal and oral herpes), (8) cryptosporidiosis (an organism that causes severe and prolonged diarrhea), and (9) toxoplasmosis (protozoa that infect brain and lungs). *Id.* at 30.

8. *See* Leonard, *Employment Discrimination Against Persons With AIDS*, 10 U. DAYTON L. REV. 681, 682 (1985) [hereinafter Leonard, *Discrimination*] (Leonard originally presented four categories of victims; this typology has since been revised to include five categories); Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11, 20 (1986) [hereinafter Leonard, *Revisited*] (Leonard revised typology to include five categories of victims).

9. *See* Leonard, *Discrimination*, *supra* note 8, at 682.

10. Center for Disease Control, U.S. Dep't. Health & Human Servs., *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenophy-Associated Virus in the Workplace*, 34 MORBIDITY & MORTALITY WEEKLY REP. 681, 681-82 (Nov. 15, 1985) [hereinafter *Recommendations*].

contagion has prompted employers to terminate the employment of AIDS victims.[11] Fear of contagion affects not only the AIDS victims themselves but co-workers as well.[12]

May employees who carry the AIDS virus be terminated from their jobs? May they be separated from the general employee population? May employees who refuse to work with a co-worker who has AIDS be disciplined? Employers face serious difficulties in answering these questions. How should corporate America respond to this crisis? In what way can a private employer cope most effectively, without exposure to potential liability to both AIDS victims and their co-workers? Is education the key? The purpose of this note is to address these and other questions which private employers must face in the wake of the AIDS crisis.[13]

II. STATUTORY PROTECTION

Despite the fatal nature of the disease, and regardless of its communicability, AIDS victims may be protected under state and federal employment discrimination laws. While there is a dearth of case law, and certainly no unanimity of opinion, legal commentators generally agree that AIDS qualifies as a "handicap" under the Rehabilitation Act of 1973,[14] as well as under most state handicap

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11. Roth, *Many Firms Fire Aids Victims, Citing Health Risks to Co-Workers*, Wall St. J., Aug. 12, 1985, section 2, at 21, col. 4 [hereinafter Roth, *Firms Fire Victims*]. *See* Flaherty, *A Legal Emergency Brewing Over Aids*, Nat'l L.J., July 9, 1984, at 1, 44, cols. 3, 4 (discussing Case v. County of Tulare, No. 111532 (Tulare County Superior Court)) (hairdresser filed suit for $60 million against former employer for terminating him on the false belief he had AIDS and against county officials for disclosing medical information without his consent); *Aids Job Discrimination Case Filed Under New Virginia Handicap Bias Law*, [Current Developments] Daily Lab. Rep. (BNA) No. 31, at A-6 (Feb. 14, 1986) (discussing Goodfellow v. Quinn Patent Drawing Serv., Inc., Chancery No. 16662) (Alexandria, Va. Cir. Ct.) (employee terminated after disclosing to employer he had AIDS filed suit alleging violations of state law prohibiting handicap discrimination)); Wilson, *From AIDS to Z: A Primer for Legal Issues Concerning AIDS, Drugs, and Alcohol in the Workplace*, 2 LAB. LAW. 631, 634 n.13 (1986) (noting settlement of *Goodfellow* and settlement terms). *See also infra* notes 63-92 and accompanying text (examples of other cases involving employment discrimination against AIDS victims).

12. *See infra* notes 171-76 and accompanying text (nurses at hospital insisted on donning protective clothing before treating AIDS patients).

13. The scope of this article is limited to a discussion of the employment status of employees infected with AIDS, the rights and duties of the employer, and the rights of the non-infected co-workers. Specifically excluded are issues regarding prospective employees, testing procedures, patient rights, public accommodation, libel/slander, and other collateral issues.

14. 29 U.S.C. §§ 701-796(i) (1982).

discrimination laws.[15] In the majority of jurisdictions which have considered this issue, it appears that those who have AIDS or AIDS-related conditions may be protected against discrimination in employment as long as no medical or other legitimate reason for imposing limitations on them exists.

Generally, the "employment at will" doctrine is recognized as the governing principle in employment issues.[16] This doctrine is, however, tempered both by public policy considerations and by state and federal laws prohibiting employment discrimination.[17] As a result, federal and state employment laws are regarded as the primary source of protection for an AIDS victim,[18] although there is no national regulatory scheme governing handicap legislation.[19] Most cases alleging employment discrimination by AIDS victims have been brought either under the Rehabilitation Act[20] or under state handicap discrimination statutes.[21] The Rehabilitation Act applies to federal employers and to private employers who are federal contractors, or who accept federal financial assistance. However, the Act may still be relevant to private employers in at least one context.[22] Most states have passed statutes prohibiting discrimination by private employers against the disabled or handicapped,[23] and some of those statutes seem to be modeled on the Rehabilitation Act.[24] Many states have

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15. Smith, Schoomaker & Kleinman, *High Court Eyed for Guidance on AIDS as Handicap*, Legal Times, June 30, 1986, at 35, col. 1 [hereinafter Smith, *High Court Guidance*].

16. *See* Leonard, *Discrimination*, *supra* note 8, at 689. The "employment at will" doctrine is premised on the theory that an individual does not have any legal right to continued employment; theoretically, employment may be denied or discontinued for any reason or no reason provided there are no specific statutory prohibitions. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *See, e.g.*, Shuttleworth v. Broward County, 649 F. Supp. 35 (S.D. Fla. 1986) (employee, discharged after contracting AIDS, alleged discrimination under the Rehabilitation Act of 1973).

21. *See supra* note 11 and accompanying text. *See also infra* notes 63-92 and accompanying text (actions brought pursuant to state statutes). For a current compilation of state handicap statutes, see Fair Emp. Prac. Man. 8A Lab. Rel. Rep. (BNA).

22. *See* 29 U.S.C. §§ 793, 794 (1982).

23. *See* Fair Emp. Prac. Man. 8A Lab. Rel. Rep. (BNA) (current compilation of state handicap statutes).

24. *See* Memorandum of Legal Advice of Mar. 4, 1986 from Handsel B. Minyard, Phila. City Solicitor to Dr. Leah Gaskin-White, Director, Phila. Human Relations Comm'n, *reprinted in AIDS is a Handicap Under Philadelphia's Fair Practices*

adopted handicap legislation employing the same or a similar definition of the term handicapped as is used in the Rehabilitation Act.[25] There are some indications that the intent of some of those legislatures was to model the state statute after the Act, and, therefore, the federal interpretation of those words may be persuasive in evaluating the state statute.[26]

Section 501 of the Rehabilitation Act of 1973 specifically requires federal agencies to take affirmative action to hire the handicapped.[27] Section 503 imposes an obligation on federal contractors to hire and promote the handicapped.[28] Section 504 prohibits discrimination

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Act, [2 New Developments] Empl. Prac. Guide (CCH) ¶ 5027 (July 1986). The opinion letter stated that the definition of handicap contained in the Philadelphia Fair Practices Act extends to AIDS. In reaching that conclusion, it was stated that "[t]he language which is used to define 'handicap' . . . is modeled upon the relevant state statute which in turn is based upon the Federal Rehabilitation Act." *Id.* "It has been held that the interpretation of a municipality's discrimination ordinance is controlled by corresponding provisions in state law . . . which in turn are based upon federal law and guidelines." *Id.* ¶ 5027 n.4.

25. *See, e.g.*, COLO. REV. STAT. § 24-34-301(4) (1982) (excludes mental handicaps); FLA. STAT. § 760.22(5) (Supp. 1986) (employment discrimination statute does not define the term handicap, but it is defined in the Fair Housing Act and was held applicable to employment discrimination issues by Florida Commission on Human Relations in *Shuttleworth*, FCHR No. 85-0624 (Dec. 11, 1985), Daily Lab. Rep. (BNA) No. 242, at E-1 (Dec. 17, 1986)); GA. CODE ANN. § 34-6A-2(3) (1982) (excludes drug and alcohol addiction and does not expressly cover those perceived as impaired); LA. REV. STAT. ANN. § 46:2253(1) (West 1982); MASS. GEN. LAWS ANN. ch. 151B, § 1(17) (West Supp. 1986); MINN. STAT. ANN. § 363.01(25) (West Supp. 1986); N.C. GEN. STAT. § 168A-3(4) (Supp. 1985); OKLA. STAT. ANN. tit. 25, § 1301(4) (West Supp. 1987); OR. REV. STAT. § 659.400(2) (1985); R.I. GEN. LAWS § 28-5-7 (1986); UTAH CODE ANN. § 34-35-2(14) (Supp. 1986) (does not expressly cover those perceived as impaired); VT. STAT. ANN. tit. 21, § 495(d)(5) (Supp. 1986); VA. CODE § 51.01-3 (Supp. 1986); W. VA. CODE § 5-11-3(t) (Supp. 1986) (does not expressly cover those perceived as impaired).

26. *See supra* note 24 and accompanying text (Philadelphia's Fair Practices Act). *Accord Shuttleworth* [Full Text] Daily Lab. Rep. (BNA) No. 242, at E-2 (citing as persuasive Arline v. School Bd. of Nassau County, 772 F.2d 759 (11th Cir. 1985), *aff'd*, 107 S. Ct. 1123 (1987), *reh'g denied*, No. 85-1277 (U.S. Apr. 20, 1987).

27. 29 U.S.C. § 791 (1982). This provision authorizes the institution of an Interagency Committee on Handicapped Employees, affirmative action program plans in federal agencies, and assistance to state agencies desiring to initiate programs to assist the handicapped in employment. *Id.*

28. *Id.* § 793. This section provides in pertinent part:

> Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title.

against an "otherwise qualified handicapped individual" solely on the basis of handicap in programs receiving federal financial assistance as well as by federal agencies.[29] The application of the Rehabilitation Act is substantially limited by the phrase "otherwise qualified handicapped individual."[30] This phrase was defined to mean a person "who is able to meet all of a program's requirements in spite of his handicap."[31] Thus, the Act generally will not apply to those whose handicaps prevent them from *physically* performing the job. The determination of whether handicap discrimination statutes cover AIDS turns upon whether communicable diseases were intended to be within the statute's purview. The wording of the definition "handicapped" used in the statute may indicate legislative intent. The Rehabilitation Act defines a handicapped person as "any person who i) has a physical or mental impairment which substantially limits one or more major life activities, ii) has a record of such an impairment, or iii) is regarded as having such an impairment."[32] The "substantially limited"requirement is satisfied when a person is likely to experience difficulty in securing, retaining or advancing in employment because of a physical or mental condition.[33]

A recent Eleventh Circuit Court of Appeals decision has interpreted the language used in the federal Rehabilitation Act to include communicable diseases. In *Arline v. School Board of Nassau County*,[34] a school teacher was discharged from her job because of tuberculosis.[35] She had been employed as an elementary school teacher for thirteen years when she experienced a relapse of tuberculosis which she had contracted as a child.[36] She suffered two more relapses within two years, and was then discharged.[37] The Eleventh Circuit found that

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29. *Id.* § 794. This section provides in pertinent part:
No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

30. *Id.*

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

32. 29 U.S.C. § 706(7)(B) (1982).

33. 41 C.F.R. § 60-741.2 (1985).

34. 772 F.2d 759 (11th Cir. 1985), *aff'd*, 107 S. Ct. 1123 (1987), *reh'g denied*, No. 85-1277 (U.S. Apr. 20, 1987).

35. *Id.* at 760.

36. *Id.*

37. *Id.*

because tuberculosis affects respiration and impairs breathing it affects a major life activity.[38] Of greater interest, the court found that the definitional language of handicap "in every respect supports a conclusion that persons with contagious diseases are within the coverage of Section 504."[39]

Partially in response to *Arline*, the Department of Justice recently issued an advisory opinion asserting that although section 504 of the Rehabilitation Act covers the disabling effects of a contagious disease, "an individual's ability to transmit the disease cannot be considered a handicap because the ability to transmit does not have an adverse impact on the employee's physical or mental condition."[40] Under this interpretation, employers could discharge an AIDS victim based on fear of contagion. Immediately after the issuance of this advisory opinion, the American Medical Association filed an amicus brief in the Supreme Court appeal of *Arline*, asserting that the Department of Justice's stance was based on an irrational fear of contagion rather than on reasonable medical judgment.[41] The United States Supreme Court granted the Solicitor General's motion to participate in oral argument as *amicus curiae* and for divided argument in *Arline*.[42] At oral argument, Solicitor General Charles Fried contended that an employment decision based on fear of contagion does not constitute bias against the handicapped.[43] However, Arline's

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38. *Id.* at 764.

39. *Id.* The court remanded the case to determine whether the risks of contagion precluded the plaintiff from being "otherwise qualified," and if so, whether reasonable accommodation could be made. *Id.* at 765. *See also supra* note 31 and accompanying text (definition of "otherwise qualified handicapped individual").

40. Cooper, *Memo from Ass't Atty. Gen. Cooper on Application of Section 504 of Rehabilitation Act to Persons with AIDS*, Daily Lab. Rep. (BNA) No. 122, at D-1 (June 25, 1986) [hereinafter Cooper, *Memo*]. *See Disabling Effects of AIDS are Protected by Rehabilitation Act but Ability to Transmit the Disease is Not*, [2 New Developments] Empl. Prac. Guide (CCH) ¶ 5028 (July 1986) (excerpts of Memorandum by U.S. Dept. of Justice Legal Counsel, Ass't Atty. Gen. Charles Cooper, for Ronald E. Robertson, General Counsel, Dep't Health & Human Servs.). For an in-depth discussion and analysis of the Cooper Memorandum, see Leonard, *Revisited*, *supra* note 8, at 29-36 and accompanying notes.

41. *See Department of Justice Policy on AIDS is Wrong, American Medical Association Says*, 24 Gov't Emp. Rel. Rep. (BNA) No. 1173, at 1023 (July 28, 1986).

42. Arline v. School Bd. of Nassau County, 55 U.S.L.W. 3312 (U.S. Sept. 24, 1986). The Court denied a similar motion by the American Public Health Association. Arline v. School Bd. of Nassau County, 107 S. Ct. 394 (1986).

43. *Supreme Court Hears Debate on Application of Rehabilitation Act to Contagious Diseases*, [Current Developments] Daily Lab. Rep. (BNA) No. 233, at A-5 (Dec. 4, 1986).

counsel argued that the school board and the government were seeking a per se approach that would preclude the fact-based case-by-case inquiry intended by Congress,[44] conceding that a person who is in fact contagious should not be permitted to teach, but pointing out that, in this case, the facts did not support a finding that Arline was contagious. Arline therefore asked the Court to affirm the Eleventh Circuit's remand for further fact finding.[45]

On March 3, 1987, the United States Supreme Court affirmed the Court of Appeals' holding that tuberculosis may be a protected handicap under section 504.[46] The holding itself was narrow. The court specifically noted that it did not reach the question of whether a carrier of a contagious disease such as AIDS could be considered physically impaired, or whether such a person could be considered, solely on the basis of contagiousness, to be a handicapped person within the meaning of the Act.[47] However, the Court clearly stated that the contagious effects of a disease cannot be meaningfully distinguished from the physical effects.[48]

> It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment. . . . Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to insure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others . . . . Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness . . . . The Act is carefully structured to replace such reflexive actions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of "handicapped individual" is broad, but only those who are both handicapped *and* otherwise qualified are eligible for relief. The fact that some persons who have contagious diseases may pose a serious health threat to others under certain circum-

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44. *Id.*
45. *Id.*
46. *Arline*, 107 S. Ct. at 1132.
47. *Id.* at 1128 n.7.
48. *Id.* at 1128.

> stances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of the medical evidence . . . [r]ather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent.[49]

The Court further concluded that the fact that a person who has a record of physical impairments is also contagious is not sufficient to remove that person from coverage under section 504.[50]

The *Arline* decision may be persuasive precedent in those jurisdictions which have not yet taken a position on protection of AIDS victims in the workplace. The decision is relevant to state employment practices even though it specifically deals with federal legislation. First, since tuberculosis victims can be held to be protected under the Rehabilitation Act, it is likely that because of the similar categorization of the diseases as communicable, AIDS victims in federal employment will likewise be protected. Second, the decision may be persuasive in those jurisdictions in which handicap discrimination statutes are modeled after the Rehabilitation Act.[51]

Legal commentators suggest that the resolution of *Arline* will have a major impact on the protection of AIDS victims in the workplace.[52] Medical knowledge indicates that tuberculosis is far more infectious than AIDS in that it can be spread through airborne transmissions.[53] Although AIDS is communicable, medical authorities have indicated that there are only four known ways through which the AIDS virus can be transmitted,[54] all of which suggest that it is

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49. *Id.* at 1129-30 (footnotes omitted).

50. *Id.* at 1130.

51. *See supra* notes 20-26 and accompanying text. *Accord Shuttleworth*, [Full Text] Daily Lab. Rep. (BNA) No. 242, at E-2 (citing *Arline* as persuasive).

52. *See* Smith, *High Court Guidance*, *supra* note 15, at 35.

53. *Id.*

54. *See Easing Employees' Fears*, *supra* note 7, at 31. Transmission of the AIDS virus has been documented through (1) sexual contact in which there is an exchange of blood or semen including vaginal or anal intercourse, or oral sex where semen is ingested, (2) the sharing of intravenous drug needles, which allows the blood from one infected user to be passed on the needle to another user, (3) blood transfusions, where the transfused blood or blood product is infected, and (4) interuterine transmission from an infected mother to an unborn baby through the blood supply. *Id. Accord Raytheon Co.*, Cal. Fair Empl. & Housing Comm'n, No.

a bloodborne or sexually transmitted disease. The Department of Health has publicly asserted that the syndrome cannot be spread through casual contact or airborne transmission.[55]

Some courts have accepted the assertion that AIDS cannot be spread by casual contact. In *LaRocca v. Dalsheim*,[56] an action by inmates seeking to enjoin the formation or maintenance of a central AIDS program at a New York prison and also seeking removal of all AIDS patients from the prison, the court stated that adequate precautions had already been taken and declined to order removal of AIDS victims.[57] The court did, however, order that each prisoner be given a copy of the AIDS informational brochure prepared by the State Department of Health in order to allay fears of contagion.[58] The court appeared to accept the conclusion of the expert medical testimony and documentation presented at the hearing that AIDS is not communicable by means other than sexual contact or through the blood.[59] Also supporting acceptance of the current medical conclusions regarding the means of communicability of AIDS is an unreported arbitration decision in which it was determined that an airline could not lay off a flight attendant diagnosed as an AIDS victim absent a physical examination to determine the employee's fitness to work.[60] The argument that a person infected with AIDS was a per se health threat to other employees was rejected.[61]

FEP 83-84, L1-031p, L-33676, 87-04 (Feb. 4, 1987) [Full Text] Daily Lab. Rep. (BNA) No. 29, at E-1 (Feb. 13, 1987) (finding of fact #11). *See also* Findings of Fact #34, 35. *Id.* at E-3, 4 (transmission not possible through casual contact).

55. *Recommendations*, *supra* note 10, at 681-82. Generally, recommendations advise against testing, and against placing restrictions on AIDS victims. *Id.* at 681-86. Although the guidelines have no legal effect, they are instrumental in assisting employers in assessing the current state of the law.

56. 120 Misc. 2d 697, 467 N.Y.S.2d 302 (N.Y. Sup. Ct. 1983). *See* District 27 Community School Bd. v. Board of Educ., 130 Misc. 2d 398, 502 N.Y.S.2d 325 (Sup. Ct. 1978) (automatic exclusion of AIDS-infected children from public schools may violate § 504 of the Rehabilitation Act); New York State Ass'n for Retarded Children, Inc. v. Carey, 466 F. Supp. 479 (E.D.N.Y.), *aff'd*, 612 F.2d 644 (2d Cir. 1979) (violative of § 504 to segregate retarded school children with hepatitis B from general school population; it is not clear whether basis of finding of a handicap was medical condition or mental retardation).

57. *LaRocca*, 120 Misc. 2d at 699, 467 N.Y.S.2d at 304.

58. *Id.* at 705, 467 N.Y.S.2d at 310.

59. *Id.* at 702, 467 N.Y.S.2d at 307.

60. *See* Leonard, *Discrimination*, *supra* note 8, at 688 n.32. *See also Newsbrief*, THE ADVOCATE, Mar. 5, 1985, at 20; Guilfoy, *United Employee Reinstated*, Gay Community News (Boston), Feb. 16, 1985, at 3, col. 1.

61. *See* Leonard, *Discrimination*, *supra* note 8, at 688 n.32.

In *Shuttleworth v. Broward County*,[62] the first employment-related AIDS decision, the complainant was discharged from his position as a county Administrative and Management Intern which he had held for more than one year.[63] His employer informed him of his termination by letter, specifying the reason for his dismissal as his diagnosis of AIDS.[64] Shuttleworth asserted that his disease was a protected handicap under Florida law, that it did not affect his job performance, and that, in fact, he had been recommended for a two-step merit increase just prior to his termination.[65] The county contended that AIDS did not qualify as a handicap under Florida law.[66] Further, the county argued that medical knowledge is rapidly changing and that although today medical experts believe that the disease is not communicable through casual contact, that conclusion may change as more information is uncovered.[67] Nevertheless, the Investigatory Report recommended that current medical knowledge be determinative:

> Respondents, in addressing their position relative to the last aspect of complainant's illness alludes to the continously evolving nature of the facts and information relative to AIDS as contributing significantly to the decision to terminate Complainant. While Respondents' concern is understandable, this concern cannot be allowed to stand as justification for denying an individual a livelihood particularly when such revelations may not be forthcoming tomorrow or the next day as forwarded by Respondent, but next year or several years away. Respondent, not being proficient on the subject of AIDS, *must rely on the medical and scientific communities expertise when contemplating decisions such as the one at issue here.* While AIDS has only received serious scrutiny since 1981, the theories relative to how it is and how it is not transmitted have remained constant during the last few years.[68]

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62. Shuttleworth v. Broward County, 649 F. Supp. 35 (S.D. Fla. 1986).

63. Investigatory Report, *Shuttleworth*, [Full Text] Daily Lab. Rep. No. 242, at E-2 (Dec. 17, 1985).

64. *Id.* at E-3.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at E-5 (emphasis added). *See also Arline*, 107 S. Ct. at 1131, *reh'g denied*, No. 85-1277 (U.S. Apr. 20, 1987) ("courts should normally defer to the reasonable medical judgments of public health officials").

In December 1985, the Florida Human Relations Commission held that AIDS is a handicap within the meaning of the Florida Human Rights Act.[69] Moreover, the Commission determined that there was reasonable cause to believe that Shuttleworth had been terminated as a result of his handicap, and that his termination was therefore the result of an unlawful employment practice.[70] The Commission reaffirmed this decision in April 1986 without comment.[71] Shuttleworth also filed a complaint in federal court alleging discrimination under section 504 of the Rehabilitation Act of 1973.[72] Denying the defendant's motions for summary judgment, the court ruled that the claim could proceed in federal court.[73]

In a recent decision, the California Fair Employment and Housing Commission recognized that medical evidence fully supported the conclusion that AIDS was not communicable through casual daily contact.[74] In December 1983, John Chadbourne, after learning that he had AIDS, asked for and was granted sick leave from his position as a quality control analyst with Raytheon Corporation. About one month later, Chadbourne asked to return to work, but Raytheon refused. The company expressed concern that Chadbourne's return to work would present a health threat to other employees. John Chadbourne died at age 36, in January 1985. His estate sued for both back pay and compensatory damages, alleging that the company violated state fair employment practices.[75] The Commission held that AIDS was a physical handicap under the applicable California statute:[76]

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69. *Shuttleworth*, Daily Lab. Rep. No. 242, at E-1.

70. *Id.* at E-2.

71. *Florida Agency Reaffirms Decision on Victim of AIDS*, [Current Developments] Daily Lab. Rep. (BNA) No. 72, at A-3 (Apr. 15, 1986).

72. Shuttleworth v. Broward County, 649 F. Supp. 35 (S.D. Fla. 1986).

73. *Id.*

74. Department Fair Employment & Hous. v. Raytheon Co., Cal. Fair Employment & Hous. Comm'n, No. FEP 83-84, L1-031p, L-33676, 87-04 (Feb. 5, 1987), [Full Text] Daily Lab. Rep. (BNA) No. 29, at E-1 (Feb. 13, 1987).

75. Findings of Fact, *Raytheon Co.*, Daily Lab. Rep. (BNA) No. 29, at E-1, E-2. *See also* Roth, *Firms Fire Victims*, *supra* note 11, at 21, col. 4 (noting claim); *Oral Arguments Concluded in First AIDS Handicap Case in California*, [Current Developments] Daily Lab. Rep. (BNA) No. 21, A-2 (Jan. 31, 1986) (oral argument in *Raytheon* noted).

76. *Raytheon*, Daily Lab. Rep. (BNA) No. 29, at E-4. *See* CAL. GOV'T CODE § 12926(h) (Supp. 1986). This statute has been judicially interpreted to include "any physical condition of the body that has a disabling effect" or that "makes achievement unusually difficult." The term "physically handicapped" includes not only persons with conditions which are currently disabling, but also persons whose conditions may handicap them in the future. American Nat'l Ins. Co. v. Fair

> [T]here can be no doubt that AIDS does constitute a physical handicap. It is plainly a physical condition of the body. And while AIDS did not impair Chadbourne's physical ability to do his job until long after he was first excluded from it by respondent, there was not simply a possibility but a tragic certainty that the condition would at some time in the future seriously impair his physical ability and ultimately kill him. AIDS thus falls squarely within the physical handicap coverage of the Act.[77]

The Commission rejected the argument that AIDS should be excluded from coverage because of its communicable nature:

> Nothing in the language of the statute or its legislative history . . . remotely supports such an exclusion. To the contrary, the Legislature's provision of an affirmative defense based on danger to other persons makes clear its intent that a physical condition's communicable nature—or any other source of "danger" to others—be considered not when deciding whether the condition is a "physical handicap" but only later, in determining whether the potential for communicability justifies discrimination against a person because of that handicap.[78]

In the final determination, the Commission ruled that Raytheon's failure to permit Chadbourne to return to work constituted employment discrimination on the basis of handicap, in violation of the California statute.[79]

In the first AIDS case litigated since the issuance of the Department of Justice's advisory opinion, the Superior Court of Massachusetts denied a motion to dismiss and ruled that an employment discrimination claim based on AIDS could proceed to trial.[80] The plaintiff, Paul Cronan, alleged that his employer, the New England Telephone Company, and its employees invaded his privacy and discriminated against him on the basis of his physical handicap.[81]

Employment & Hous. Comm'n, 32 Cal. 3d 603, 609-10, 651 P.2d 1151, 1155, 186 Cal. Rptr. 345, 349 (1982).

77. *Raytheon*, Daily Lab. Rep. (BNA) No. 29, at E-5, E-6.

78. *Id.* at E-5.

79. *Id.*

80. Cronan v. New England Tel. Co., No. 80332 (Suffolk Co. Mass. Aug. 15, 1986) [Full Text] Daily Lab. Rep. (BNA) No. 179, at D-1 (Sept. 16, 1986).

81. *Id.*

After Cronan had been granted time off from work on several occasions for medical appointments, his immediate supervisor asked him to disclose the nature of his illness.[82] Assured that the information would be kept confidential, Cronan advised him that he had been diagnosed as having AIDS Related Complex (ARC).[83] Cronan's medical diagnosis was divulged to supervisors who in large group meetings informed all employees who had contact with Cronan.[84] Cronan subsequently received threats from co-workers; he alleged that he did not return to work because he feared for his well-being, and because the threats and violation of his privacy caused extreme stress which aggravated his physical condition.[85] Cronan approached company representatives about returning to work but his efforts were unsuccessful.[86] In reference to the employment discrimination claim, the defendants argued that neither AIDS nor ARC is a protected handicap under Massachusetts law and, in the alternative, that even if they are handicaps the accommodation which Cronan requested exceeded that to which he was entitled.[87] The Massachusetts court noted that the Massachusetts Commission Against Discrimination (MCAD) had concluded that AIDS is a protected handicap under the state statute[88] and stated that because the "primary responsibility to determine the scope of the statute has been entrusted to MCAD," deference should be given to its opinion.[89] The court noted that the Department of Justice opinion interpreted language which was vir-

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82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at D-2.
88. *Id. See* MASS. GEN. LAWS ANN. ch. 151B, § 1(16)-(17) (West Supp. 1986) (language very similar to that of § 504 of the Rehabilitation Act). "The term 'qualified handicapped person' means a handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap." *Id.* § 1(16). *Compare with* Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979) (interpretation of phrase "otherwise qualified handicapped individual" as applied to Federal Rehabilitation Act by United States Supreme Court). *See* MASS. GEN. LAWS ANN. 151B, § 1(17). "The term 'handicapped person' means any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment, or is regarded as having such impairment." *Id. Compare with* 29 U.S.C. § 706(7) (definition of handicapped person in Federal Rehabilitation Act). *See also supra* notes 26-28 and accompanying text (discussing federal definitions).
89. *Cronan*, Daily Lab. Rep. (BNA) No. 179, at D-2, D-3.

tually identical to that of the Massachusetts statute,[90] but concluded that AIDS was a protected handicap under state law and that the case should be permitted to proceed to trial.[91] Significantly, shortly after the release of this decision, the parties settled out of court.[92]

A number of jurisdictions have passed legislation concerning AIDS.[93] Other jurisdictions have issued informal or formal opinions indicating that their legislation was meant to include protection of AIDS victims.[94] Counsel of the Maine Human Rights Commission has testified that AIDS constitutes a handicap under the Maine Human Rights Act.[95] The Massachusetts Commission Against Discrimination has announced that Massachusetts laws prohibiting discrimination against the handicapped have been interpreted to protect AIDS victims, as well as those who are perceived to be afflicted with AIDS.[96] The New Jersey Division on Civil Rights has announced that the statutory prohibition against handicap discrimination prohibits employers from testing for AIDS, or from taking any adverse

90. Cooper, *Memo*, *supra* note 40, at D-1.

91. *Cronan*, Daily Lab. Rep. (BNA) No. 179, at D-4.

92. *Employee with AIDS Returned to Job Under Out-of-Court Settlement of Suit*, [Current Developments] Daily Lab. Rep. (BNA) No. 204, at A-2 (Oct. 22, 1986) [hereinafter *Settlement*]. *See infra* notes 197-200 and accompanying text (terms of settlement).

93. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 199.21(f) (Supp. 1986) (prohibiting employers or insurers from testing a person's blood for AIDS without his written consent, and further prohibiting utilization of results for determination of insurability or suitability of employment); FLA. STAT. ANN. § 381.606(5) (West 1986) (prohibits unconsented disclosure of results of tests for contagious diseases and further prohibits use of test results for purposes of insurability or employment discharge); WIS. STAT. ANN. § 146.025 (West Supp. 1986) (AIDS tests may not be required as a condition of employment, or insurability, and employer may not discipline or discharge employee based on outcome of test). Additionally, some cities and municipalities have passed local ordinances specifically prohibiting employment discrimination on the basis of AIDS. *See* LOS ANGELES MUNICIPAL CODE, ch. III, art. 5.8, §§ 45.80-45.93 (1984); SAN FRANCISCO MUNICIPAL CODE, pt. 2, ch. VIII, art. 38, §§ 3801-3816 (1985); WEST HOLLYWOOD ORDINANCE No. 77 (1985).

94. *See infra* notes 95-99 and accompanying text (various ways states classify AIDS as a handicap).

95. *See AIDS Constitutes a Physical Handicap Under Maine's Human Rights Act*, [2 New Developments] Empl. Prac. Guide (CCH) ¶ 5023 (June 1986) (testimony of Commission Counsel, Maine Human Rights Commission, Mar. 17, 1986).

96. *See AIDS Discrimination Prohibited in Massachusetts*, [2 New Developments] Empl. Prac. Guide (CCH) ¶ 5025 (June 1986) (Aids Policy of the Massachusetts Commission Against Discrimination, Jan. 1986). *See also Cronan*, Daily Lab. Rep. No. 179, at D-1 (upholding Commission's interpretation of handicap statute as applicable to AIDS); *supra* notes 80-92 and accompanying text (full discussion of *Cronan*).

action against an AIDS victim unless the employee is unable to perform his job without danger to himself or his co-workers.[97] In a formal announcement in August 1983, the General Counsel of the New York State Division of Human Rights stated that AIDS should be considered a medical condition under the Human Rights Law's definition of disability.[98] In Oregon, the Civil Rights Division has issued an opinion letter indicating that the statutory ban on job discrimination because of physical or mental handicap protects AIDS victims.[99] In Wisconsin, a complaint was filed by the Racine Education Association alleging that the work policy unilaterally adopted by the Racine Unified School District violated state handicap laws.[100] The policy would prohibit teachers from continuing employment in a school setting if they were infected with AIDS.[101] In an initial determination, the Equal Rights Division ruled that AIDS was a handicap under state law, and that there was probable cause to believe that discrimination occurred by passage of the policy in question.[102] In Florida, the ruling in *Shuttleworth* indicates that AIDS is a protected handicap under Florida state laws.[103] Citing *Arline* the Florida Commission stated:

> Based upon the plain meaning of the term "handicap" and the medical evidence presented, an individual with acquired immune deficiency syndrome is within the coverage of the

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97. *See Aids-afflicted Persons Considered "Handicapped" in New Jersey*, [2 New Developments] Empl. Prac. Guide (CCH) ¶ 5026 (July 1986) (New Jersey Division on Civil Rights Announcement: Aids Discrimination and Mandatory Testing). In light of the current state of medical knowledge it is unlikely that an employer can prove that AIDS presents any threat to co-workers. *Accord Shuttleworth*, Daily Lab. Rep. (BNA) No. 242, at E-1 (intimate, rather than casual, contact required for transmission); *Cronan*, Daily Lab. Rep. (BNA) No. 179, at D-1.

98. *New York Div. on Human Rights: Policy Statement on Aids-Based Discrimination*, 8A Lab. Rel. Rep. (BNA) 455:308 (Dec. 1985).

99. *Employment Discrimination Based on AIDS Prohibited, Oregon Commissioner States*, [2 New Developments] Empl. Prac. Guide (CCH) ¶ 5020 (Mar. 13, 1986) (Oregon Bureau of Labor and Industries, Commissioner Mary Roberts' Opinion Letter to Attorney James M. Campbell).

100. Racine Educ. Ass'n, Wis. Lab. & Human Relations Comm'n, Equal Rights Div., No. 865029 (Apr. 30, 1986), [Full Text] Daily Lab. Rep. (BNA) No. 98, at E-1 (May 21, 1986).

101. *See id.* at E-2 (quoting Racine Unified School District Board Policy No. 5151, adopted Nov. 18, 1985).

102. *Id.* at E-1, E-2.

103. *See* Investigatory Report, *Shuttleworth*, Daily Lab. Rep. No. 242, at E-6 (July 24, 1985).

> Human Rights Act of 1977 in that such individual "does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties."[104]

In these jurisdictions, employers have some guidelines. In most other states the law is far less clear, making it difficult for employers to assess their problem using reliable criteria. State statutes are diverse, using many variations from definitions of the Rehabilitation Act.[105] Some contain no definition of handicapped.[106] One specifically excludes handicap coverage for disability by virtue of an "illness."[107] Differing interpretations of similar language and different factual situations may also produce disparate results.[108]

The prevailing view, however, is to protect AIDS victims as handicapped.[109] *Arline* may provide impetus for the states to follow the federal lead.[110] It seems that, minimally, the issue of whether

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104. *Shuttleworth*, Daily Lab. Rep. (BNA) No. 242, at E-1 (Dec. 11, 1985).

105. *See, e.g.*, HAWAII REV. STAT. § 378-1 (Supp. 1984) (defining physical handicap as "a substantial physical impairment where such handicap is verified by medical finding and appears reasonably certain to continue throughout the lifetime of the individual without substantial improvement").

106. Jurisdictions with no statutory definition of handicap or disability include Nevada and Tennessee.

107. N.H. REV. STAT. ANN. § 354-A:3 (XIII) (1984).

108. *See* Leonard, *Discrimination*, *supra* note 8, at 690 (coverage of AIDS by state handicap statutes cannot be assumed). *See also* GA. CODE ANN. § 34-6A-3(b)(2) (1982) (specifically excluding coverage of persons with communicable diseases from statute); KY. REV. STAT. ANN. § 207.140(2)(c) (Baldwin 1985) (similar). Several other states have no statutes protecting the handicapped (i.e., Delaware, Puerto Rico, and the Virgin Islands). Despite the lack of legislation, Delaware has issued directives requiring affirmative action for the handicapped in state employment. *See* Executive Order No. 74 (Sept. 25, 1979) (issued by Governor Pierre S. DuPont), *amended by* Executive Order No. 81 (Jan. 31, 1980) (Governor DuPont). Other states only protect handicapped persons in the public employment sector and have no regulations binding upon private employers. *See* ALA. CODE § 21-7-8 (1984); ARK. STAT. ANN. § 82-2901 (Supp. 1985); IDAHO CODE § 56-707(1) (Supp. 1986) (including employment supported in whole or in part by public funds); MISS. CODE ANN. § 43-6-15 (1972). In these jurisdictions, an employer may have more leeway in terminating an AIDS victim.

109. *See supra* notes 62-104 and accompanying text.

110. *See generally Arline*, 107 S. Ct. 1123, *reh'g denied*, No. 85-1277 (U.S. Apr. 20, 1987). However, the questions certified for appeal in *Arline* were extremely narrow and referred specifically to the Rehabilitation Act and its coverage of tuberculosis. For a discussion of the issues certified for appeal, see 106 S. Ct. 1633 (1986). Although the holding in *Arline* was narrow, there is still an indication that AIDS victims may be protected. *See, e.g.*, *Arline*, 107 S. Ct. at 1128 n.8. *But cf. id.* at 1128 n.7 (distinguishing AIDS and tuberculosis). Clearly, comparisons can be made between AIDS and tuberculosis which suggest a similar finding for AIDS.

AIDS is covered under state handicap statutes should be addressed on a case-by-case basis, taking into consideration the specific language of the statute in question, the articulated legislative intent of that statute, the health of the individual employee, and the current state of medical knowledge regarding the contagiousness and means of transmission of the virus.[111] The health status of the AIDS victim may be the determinative factor. Virtually all jurisdictions permit a disabled employee to be placed on sick leave or terminated if he cannot perform the physical requirements of the job.[112] Although coverage by a state statute cannot be initially assumed,

> [a]ll of the statutes share the underlying concept that persons whose physical abilities are impaired should not be deprived of work which they are capable of performing, and that each individual job applicant or current employee should be judged on the basis of his or her present ability to meet the bona fide physical requirements of a job. *Given this underlying policy, discrimination against persons with AIDS should be presumed to come within the statutory protection of most juris-*

See Recommendations, *supra* note 10, at 683. First, as previously noted, while tuberculosis can be aerially transmitted, AIDS cannot be transmitted aerially according to present medical documentation. *Id.* Thus, arguably, it is less contagious than tuberculosis. Second, a number of jurisdictions have already declared that AIDS is a protected handicap through informal or formal advisory opinions based on their state laws. These advisory opinions are relevant because courts generally take guidance from the construction given by the state agency entrusted with the statute's enforcement. *See Arline*, 772 F.2d at 763; *Cronan*, Daily Lab. Rep. (BNA) No. 177, at D-4; *supra* notes 62-104 and accompanying text (state decisions concerning protection under applicable statutes).

111. *See* Leonard, *Discrimination*, *supra* note 8, at 702. *See also Arline*, 107 S. Ct. at 1131.

> [T]his inquiry should include [findings of] facts, based on reasonable medical judgments given the state of medical knowledge about a) the nature of the risk (how the disease is transmitted), b) the duration of the risk (how long is the carrier infectious), c) the severity of the risk (what is the potential harm to third parties), d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Id. (citing Brief for the American Medical Association as Amicus Curiae at 19) (citations omitted).

112. *See* Leonard, *Discrimination*, *supra* note 8, at 693-94. *See, e.g.*, ALASKA STAT. § 18.80.220 (a)(1) (1962) (discrimination permitted if reasonable demands of position require distinction based on handicap); ARK. STAT. ANN. § 82-2901 (Supp. 1985) (state employment not required to be on same terms when handicap prevents performance of work involved); TENN. CODE ANN. § 8-50-103(a) (Supp. 1986). (discrimination, including firing, permitted when handicap impairs performance of work).

dictions unless the express wording of the statute would contradict such a presumption.[113]

III. EMPLOYER DEFENSES

Should it be determined that AIDS does constitute a handicap under a given state or federal statute, an employer may raise various defenses to a discrimination charge. Some jurisdictions permit discrimination against the handicapped if there is a bona fide occupational qualification (BFOQ),[114] or a business necessity exception.[115] These statutory exceptions are, however, often accompanied by interpretive regulations which preclude justifications such as increased costs to the employer.[116] Other jurisdictions extend coverage to disabled persons who are able to perform their jobs with "reasonable accommodation."[117] In this context, reasonable accommodation may

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113. *See* Leonard, *Discrimination*, *supra* note 8, at 695-96 (emphasis added).

114. ARIZ. REV. STAT. ANN. § 41-1463(F)(1) (1985); CAL. GOV'T CODE § 12940 (West 1987); CONN. GEN. STAT. ANN. § 46a-60(a)(1) (West 1986); HAWAII REV. STAT. 378-3(2) (Supp. 1984); ILL. ANN. STAT. ch. 68, ¶ 2-104A (Smith-Hurd Supp. 1986); ME. REV. STAT. ANN. tit. 5, § 4572(1) (1964); MD. ANN. CODE art. 49B § 16(g)(1) (1986); MASS. GEN. LAWS ANN. ch. 151B § 4(2) (West Supp.1986); MINN. STAT. ANN. § 363.03(1)(2) (West Supp. 1987); MONT. CODE ANN. § 49-2-3D3(1) (1985); NEB. REV. STAT. § 48-1108(1) (1984); NEV. REV. STAT. § 613:350(2) (1986); N.H. REV. STAT. ANN. § 354-A:8(I) (1984); N.J. STAT. ANN. § 10:5-2.1 (1986); N.M. STAT. ANN. § 28-1-7(A) (1978); 1985 OHIO LEGIS. BULL. § 4112.02(E) (Anderson 1985); OKLA. STAT. ANN. tit. 25 § 1302(A)(1) (West 1987); UTAH CODE ANN. § 34-35-6(2)(a) (Supp. 1986); VT. STAT. ANN. tit. 21, § 495(a) (Supp. 1986); WASH. REV. CODE ANN. § 49.60.180(1) (Supp. 1987); W. VA. CODE § 5-11-9 (Supp. 1986). *See also* MO. REV. STAT. § 213.055(1), (3) (Supp. 1987) (BFOQ permits discrimination in advertising or applications but not in hiring or discharge).

115. *See, e.g.*, KAN. STAT. ANN. § 44-1009(a)(1) (1981) (discrimination based on a physical handicap is not unlawful if based on a valid business motive). But note that some jurisdictions hold that a business necessity exception cannot be justified by the preference of co-workers, employees, customers or any other person. D.C. CODE ANN. § 1-2503(a) (1981).

116. Leonard, *Discrimination*, *supra* note 8, at 694.

117. ARIZ. REV. STAT. ANN. § 41-1463(B)(3) (1985); COLO. REV. STAT. § 24-34-402(1)(a) (1982); GA. CODE ANN. § 45-19-22(4) (Supp. 1986); MICH. STAT. ANN. § 3.550 (102)(2) (Callaghan 1985); MINN. STAT. ANN. § 363.03(1)(6) (West Supp. 1987); N.C. GEN. STAT. § 168A-5(a)(1), 3(9)(a), (10)(a) (Supp. 1985); OR. REV. STAT. § 659-425(1)(a) (1985); VT. STAT. ANN. tit. 21, §§ 495(a)(1), (d)(6), (12) (Supp. 1986); WIS. STAT. ANN. § 111.34(1)(b) (Supp. 1986). Reasonable accommodation generally refers to the employer's obligation to modify working conditions to prevent a person who is otherwise able to perform his job adequately from being hindered by job related obstacles. *See, e.g.*, N.C. GEN. STAT. § 168A-3(10) (Supp. 1985) (defining reasonable accommodation as making reasonable physical changes

require restructuring or rearranging work schedules to permit medical treatment and therapy. Beyond these changes, how much more must the employer do before accommodating a handicapped employee is deemed to impose undue hardship? Courts have recognized "that not every handicapped individual can be integrated into every aspect of society in a cost-efficient manner."[118] It is still unclear, however, what measures an employer must take with respect to AIDS victims. There are two areas to which an employer argument that reasonable accommodation is not possible without undue hardship may be addressed: (1) accommodation of the AIDS victim's physical limitations and (2) the extent to which employer accommodation is necessary to protect other persons coming into contact with the AIDS victim.[119]

It seems unlikely that an employer will be successful arguing undue hardship concerning an AIDS victim who is classified in Category I, II, III, or IV.[120] In these categories the employee is probably healthy enough to continue working.[121] Clearly, if the employee is physically able to perform the job, the employer has little recourse but to make reasonable accommodations in those jurisdictions so requiring.[122] Final determination of the issue will depend on the nature of the position in question and the degree of the employee's failing health.[123]

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in the workplace, and making reasonable changes in the duties of the job). It imposes an affirmative duty on the employer to accommodate the disabled employee unless accommodation would constitute undue hardship to the employer. *Id.* (statute specifically provides that any changes costing less than five percent of the employee's annual salary shall be presumed not to be an undue hardship). *See* Cronan v. New England Tel. Co., Daily Lab. Rep. (BNA) No. 179, at D-3 (Mass. Super. Aug. 15, 1986) (court addressed the issue of reasonable accommodation and stated that it was a factual issue which could not be decided on a motion to dismiss but that the employer must show that the accommodation requested would impose an undue hardship to the employer's business).

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

119. This second aspect may also be raised by the employer as a fear of contagion defense. In the interest of continuity and cohesiveness, and because the arguments are equally applicable in either context, the discussion here addresses both situations.

120. *See supra* note 8 and accompanying text (description of categories).

121. A discussion of reasonable accommodation is not pertinent to persons falling within Category V as those employees will be physically unable to work at all. *See supra* note 8 and accompanying text (description of Category V).

122. *See supra* note 117 (states requiring reasonable accommodation).

123. *See Medical Screening of Employees for AIDS Called Legally Risky*, [Current Developments] Daily Lab. Rep. (BNA) No. 56, at A-5, A-6 (Mar. 24, 1986) (if employee's attendance becomes so erratic as to affect ability to perform a job, medical leave may be justified).

The argument that economic burdens, such as increased cost of health benefits, increased absenteeism and increased cost of life insurance policies constitute undue hardship has been rejected by some courts.[124] In *Chrysler Outboard Corp.*,[125] the employer refused to hire a victim of acute lymphatic leukemia, asserting that the employee had a high risk of infection (due to his depressed immune system) and a potentially high rate of absenteeism.[126] The Commission held that the affliction was a protected handicap and that the employer had presented no evidence that the employee was unable to perform the job.[127] In some jurisdictions, cost justifications are expressly rejected by statute.[128] It seems that in most cases that employer will not be able to successfully raise an undue hardship defense. Although reasonableness appears to be the key,[129] public policy is an important balancing factor. Public policy considerations suggest that the employer should bear the cost of providing employment opportunities for the handicapped.[130] What is reasonable to one employer in one situation may be totally unreasonable in another situation to another employer:

> While legitimate physical qualifications may be essential to the performance of certain jobs, both that determination and the determination of whether accommodation is possible are fact-specific issues. The court is obligated to scrutinize the evidence before determining whether the defendant's justifications reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice.[131]

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124. *See Chrysler Outboard Corp.*, 14 Fair Empl. Prac. Cas. (BNA) 344 (Dane Co. Wis. Cir. Ct. 1976) (Wisconsin statute permits some discrimination in insurance coverage). *See also* State Div. of Human Rights v. Xerox Corp., 65 N.Y.2d 213, 480 N.E.2d 695, 491 N.Y.S.2d 106 (1985).

125. 14 Fair Empl. Prac. Cas. (BNA) 344 (Dane Co. Wis. Cir. Ct. 1976).

126. *Id.*

127. *Id.* at 345.

128. *See, e.g.*, PA. STAT. ANN. tit. 43, § 954(p) (Purdon 1986) (uninsurability or increased cost of insurance is not a valid reason to permit discrimination on basis of "job related" handicap).

129. *See Medical Screening of Employees for Aids Called Legally Risky*, [Current Developments] Daily Lab. Rep. (BNA) No. 56, at A-6 (Mar. 24, 1986).

130. *See* Leonard, *Discrimination*, *supra* note 8, at 699 (need to provide work opportunities for disabled).

131. *Arline*, 772 F.2d at 764-65 (citation omitted).

To be successful, an employer would probably have to show both that the employee is unable to perform his job adequately because of his condition and that retention of such an employee would be unduly burdensome to the employer, or that reasonable accommodation (in those jurisdictions so requiring) would be a patent hardship to the employer.

It is also unlikely that the employer can succeed using the fear of contagion defense. The test articulated in *Shuttleworth*[132] would require a fear of contagion argument to be supported by "convincing evidence that the AIDS victim is a threat to others."[133] As previously discussed, medical knowledge indicates that the AIDS virus is not transmitted through daily casual contact, but is transmitted by an exchange of body fluids.[134] Although the antibody has been detected in saliva, tears, and breast milk, there are currently no cases reporting transmission of the virus through those fluids.[135] With the possible exception of certain professions such as specific groups of health care workers, there are few professions in which an exchange of body fluids is a requisite part of the job. Even in the health care industry, where employees perform invasive procedures, it was recently concluded that no additional guidelines were necessary to protect workers from the HIV virus.[136] Researchers specifically recommend against placing any restrictions on the AIDS victims working in the personal and food service industries.[137] In a recent health care industry case, a registered nurse filed a complaint charging Charlotte Memorial Hospital with handicap discrimination under section 504 of the Rehabilitation Act.[138] The director of the United States Department of Health and Human Services, Office of Civil Rights, testified before a congressional subcommittee that the hospital had forced the nurse to take a medical leave of absence because supervisors thought he had AIDS.[139] The Office of Human Rights stated it would not release

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132. Daily Lab. Rep. (BNA) No. 242, at E-1.

133. *Id.*

134. *See Recommendations*, *supra* note 10, at 682.

135. *Id. See Raytheon*, Daily Lab. Rep. (BNA) No. 29, at E-4.

136. *See Recommendations for Preventing Transmission of Infection with Human T-Lymphotorphic Virus Type III/Lymphadenophy-Associated Virus During Intrusive Procedures*, 35 MORBIDITY & MORTALITY WEEKLY REP. 221 (1986).

137. *Recommendations*, *supra* note 10, at 682.

138. *First Bias Found that Aids is a Handicap Under Vocational Act*, 24 Gov't Emp. Rel. Rep. (BNA) No. 1176, at 1112 (discussing *In re* Charlotte Memorial Hosp., No. 04-84-3096 (region IV, Aug. 5, 1986)).

139. *Id.*

details of the case but gave testimony to the effect that the hospital's actions had been found to be discriminatory and that a warning letter had been sent to the hospital.[140]

In *Raytheon*, the Commission recongized that to establish the fear of contagion defense, the respondent/employer must show, by a preponderance of the evidence, that the infected person "would have posed significantly greater danger to his co-workers than a person performing his job without AIDS."[141] The employer argued that because of the uncertainty and fear associated with AIDS, the burden of proof should shift to the employee to establish the lack of present danger.[142] The Commission rejected that proposal:

> We are highly sensitive to the critical need to protect co-workers and others from contracting AIDS. And we are acutely aware that the devastating effects of this condition and widespread lack of knowledge about it have produced deep anxieties, and considerable hysteria, about the disease and those who suffer from it. But neither ignorance and fear nor the serious consequences of AIDS justify our departure from the carefully developed rules and procedures that govern our physical handicap cases. Those rules have served well in the past to protect both the health and safety of other persons and the civil rights of the disabled and they will do so in this case as well. Our task here, therefore, is to determine carefully and objectively whether the evidence in the record before us demonstrates that there would in fact have been danger to Chadbourne's co-workers, under the standard stated above, had he returned to work.[143]

It therefore appears that a fear of contagion defense must fail in any jurisdiction adopting the *Shuttleworth-Raytheon* test because current medical knowledge will not support an argument that the AIDS victim is a threat to co-workers.

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140. *Id.* Another branch of Health and Human Services, the Public Health Department, has repudiated this decision in light of the opinion issued by the Department of Justice. *Id.*

141. *Raytheon*, Daily Lab. Rep. (BNA) No. 29, at E-5. *See supra* notes 74-79 and accompanying text (facts of *Raytheon*).

142. *Raytheon*, Daily Lab. Rep. (BNA) No. 29, at E-5.

143. *Id.*

Another defense that an employer may assert is futility.[144] The gravamen of this claim is that it is futile for the employer to invest time and money in training and education of an employee who will probably soon die.[145] The success of this defense will be greatly influenced by public policy considerations. Mere potential to become unproductive at some unknown later time due to illness will not suffice,[146] since it is the intent of most handicap discrimination statutes to protect the handicapped from this very type of arbitrary discriminatory treatment.[147] Additionally, the release of an experimental drug, azidothymidine, which is believed to stabilize the condition of AIDS victims,[148] makes this argument even less persuasive because if the victim becomes stabilized, he may be physically able to continue working.

An employer may assert that he has terminated an infected employee for the employee's own medical benefit, the "altruistic" defense.[149] To succeed, however, the employer would have to establish that the work environment itself aggravated the employee's condition.[150] If this can be proved, the employer may then be required to make reasonable accommodations for the employee.[151] In either case, the employee will prevail unless reasonable accommodation would be so impractical as to cause undue hardship to the employer.[152]

There appears to be no strong defense that an employer may raise when charged with wrongful discharge of an AIDS victim. The employer, however, may decide to balance the cost of firing the AIDS victim against other liabilities that may result from retaining him. In light of *Raytheon*, however, risking a wrongful discharge action may be a dangerous position for the employer.[153] In *Raytheon*,

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144. *See* Leonard, *Discrimination*, *supra* note 8, at 700.

145. *Id.*

146. *See, e.g.*, *Chrysler Outboard Corp.*, 14 Fair Empl. Prac. Cas. (BNA) 344 (Wis. Cir. Ct., Dane Co., 1979) (anticipated high rate of absenteeism does not justify refusal to hire).

147. *See supra* note 117 and accompanying text (discussing reasonable accommodation).

148. *See* Drake, *From Lab to Patient: The Story of the New AIDS Drug*, Phila. Inquirer, Sept. 21, 1986, at A-1, col. 1.

149. *See* Leonard, *Discrimination*, *supra* note 8, at 701.

150. *Id.*

151. *Id.*

152. *See supra* notes 120-31 and accompanying text (discussing reasonable accommodation).

153. *Raytheon*, Daily Lab. Rep. (BNA) No. 29, at E-4. *See supra* notes 74-79 and accompanying text (facts of *Raytheon*).

although the Commission did not award compensatory or punitive damages, it clearly indicated that it would not hesitate to do so in the future where appropriate:

> We wish to emphasize, however, 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 is issued. We will, of course, review each such case in light of the evidence in its own record, as we have done here. But the evidence we have seen to date indicates strongly that the state of affairs that existed in early 1984 ceased to exist soon after, and we will therefore look with growing skepticism upon employer claims that they were legitimately, if mistakely, uncertain about the casual transmissibility of AIDS in the workplace.[154]

The Commission further addressed the problem of employer failure to comply:

> We are hopeful that our decision here will have the effect of deterring employers in the future from excluding—, and, in the present, from continuing to exclude—persons with AIDS from jobs involving casual co-worker contact of the kind involved in this case. We are concerned, however, that this deterrent effect may for a few employers be undermined by the knowledge that, since those with AIDS are likely to die within a relatively short time, an employer who excludes such individuals from the workplace may have limited liability for back pay. In addition, there remains an important sense in which the injury done by unlawful discrimination against an employee with AIDS can never be fully redressed if he or she dies before the case is decided and relief is granted.[155]

In conclusion, the Commission urged the government agencies handling such cases to pursue preliminary injunctive relief to enforce

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154. *Raytheon*, Daily Lab. Rep. (BNA) No. 29, at E-8. Mr. Chadbourne, the employee, was awarded a stipulated amount of back pay as damages. *Id.*

155. *Id.*

the statute.[156] However, the employer may be faced with numerous other problems involving non-infected employees if he permits the AIDS victim to continue working.

IV. EMPLOYER LIABILITY TO CO-WORKERS

If the AIDS virus is ultimately determined to be communicable via airborne transmission or other casual contact, can another employee who contracts the disease hold the employer liable? Under the federal Occupational Safety and Health Act (OSHA)[157] or its state counterpart, as well as under traditional master-servant principles,[158] an employer has a duty to maintain a safe and healthful working environment. Under master-servant theory, if the employer knew or should have known that an employee had AIDS and failed to take adequate precautions to prevent contagion, a breach of duty would be established.[159]

However, an employer could probably defend such an action on a number of grounds. First, if the employee is covered by a worker's compensation act, statutory compensation would be his sole remedy,[160] although in some states, the injury lies outside the scope of worker's compensation statutes if it was intentionally inflicted by the employer.[161] In that case, the employee would have to show that the employer knew that AIDS was communicable through daily contact, and intentionally placed the employee in a position that would result in infection. In light of current medical knowledge, this would be difficult to prove. Second, even if the employee is not covered by a worker's compensation act and the employee is permitted to bring a negligence action, an employer could defend on the ground that he had an affirmative obligation not to discriminate against AIDS victims. Third, the employer could argue that the then-current state of medical knowledge indicated that the virus could not be transmitted through daily casual contact.[162] If an employer did not know or have reason to know that the virus could in fact be transmitted casually, it is unlikely that any breach of duty would be found.

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156. *Id.*
157. 29 U.S.C. §§ 651-678 (1982).
158. *See* W. PROSSER & W. KEETON, THE LAW OF TORTS 569 (5th ed. 1984).
159. *Id.* at 575.
160. *Id.* at 574.
161. *Id.* at 576.
162. *See Recommendations*, *supra* note 10, at 681.

An action brought under OSHA,[163] however, might be more difficult to defend. Under OSHA, an employer may not discipline or take discriminatory action against an employee who refuses to perform his job because of a reasonable fear of serious injury.[164] Case law suggests that public policy requires that an employee be protected against discrimination for asserting a good faith complaint about working conditions which he reasonably believes to be hazardous to his health even when no OSHA standard is specifically violated.[165]

Of equal concern to employers is the possibility that any work stoppage by fearful employees may be construed as a "protected concerted activity" under the National Labor Relations Act (NLRA)[166] or a state counterpart. Under the NLRA, workers have a right to engage in "concerted activities" in order to protect themselves against reasonably perceived abnormally dangerous conditions.[167] However, employees refusing to work must sustain the burden of showing that they had a reasonable good faith perception[168] that they were exposed to a hazardous working condition.[169] If the employees can satisfy these burdens, such a work stoppage will not be considered a strike.[170] In a recent development, a group of nurses at a San Francisco hospital insisted on donning protective clothing prior to treating any AIDS patients.[171] The hospital refused to permit this, and shortly

163. 29 U.S.C. §§ 651-678.

164. *Id.* § 660(c)(1).

165. *See generally* Hentzel v. Singer Co., 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982) (employee who protested that smoking in workplace was hazardous to his health and was subsequently fired by employer was permitted to bring a common law action for retaliatory dismissal even though no OSHA standard prohibited smoking in the workplace).

166. National Management Labor Relations Act of 1947, 29 U.S.C. §§ 141-187 (1982).

167. *Id.* § 157.

168. *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 14-17 (1962).

169. *See* Daniel Construction Co., 267 NLRB 1213, 1221 (1983).

170. 29 U.S.C. § 143.

171. Hearing Officer's Findings of Fact, Conclusions and Recommendation, Bernales, Cal. Dep't Public Health, Div. Lab. Standards Enforcement, No. 11-17001-1, at 3-4 (Sept. 6, 1985); Hearing Officer's Findings of Fact, Conclusions and Recommendation, Watson, Cal. Dep't Public Health, Div. Lab. Standards Enforcement, No. 11-17001-2, at 2-4 (Sept. 6, 1985); Hearing Officer's Findings of Fact, Conclusions and Recommendation, Suelen, Cal. Dep't Public Health, Div. Lab. Standards Enforcement, No. 11-17001-3, at 2-4 (Sept. 6, 1985); Hearing Officer's Findings of Fact, Conclusions and Recommendation, Banaag, Cal. Dep't Public Health, Div. Lab. Standards Enforcement No. 11-17001-4, at 3-4 (Sept. 6, 1985).

thereafter transferred the complaining nurses to day work from evening shift.[172] The nurses filed a complaint alleging that the change in their work schedules was made in retaliation for asserting their right to protect themselves against the possibility of infection and that they were treated discriminatorily because of their insistence on wearing protective garments.[173] In separate findings of fact, conclusions and recommendations, the Hearing Officer found that the nurses' insistence on protective clothing was a protected expression of concern for their health, but that there was no discrimination as there was no evidence that the shift change was related to the nurse's insistence on wearing protective clothing.[174] It was further recommended that the hospital was justified in changing the nurses' shifts for educational purposes.[175] The Commissioner dismissed their claims of discrimination.[176]

The NLRA further requires employers to bargain with a union over any changes in the terms of employment.[177] In *Racine Education Association*,[178] when the school board instituted an AIDS policy which affected the teacher's union, the Human Relations Commission ordered the district to bargain with the union over the policy.[179]

Employers who discriminate against AIDS victims are probably inviting lawsuits, and while it is at least possible in some jurisdictions that employers may ultimately prevail, such suits will be both time-consuming and costly. Nevertheless, retention of an AIDS victim

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172. Hearing Officer's Findings of Fact, Conclusions and Recommendation, *Bernales*, No. 11-17001-1, at 3-4; *Watson*, No. 11-17001-2, at 2-4; *Suelen*, No. 11-17001-3, at 2-4; *Banaag*, No. 11-17001-4, at 3-4.

173. *See supra* note 172.

174. *Id.*

175. *Id.*

176. *Bernales*, Cal. Dep't Public Health, Div. Lab. Standards Enforcement, No. 11-17001-1 (Sept. 9, 1985); *Watson*, Cal. Dep't Public Health, Div. Lab. Standards Enforcement, No. 11-17001-2 (Sept. 9, 1985); *Suelen*, Cal. Dep't Public Health, Div. Lab. Standards Enforcement, No. 11-17001-3 (Sept. 9, 1985); *Banaag*, Cal. Dep't Public Health, Div. Lab. Standards Enforcement, No. 11-17001-4 (Sept. 9, 1985).

177. 29 U.S.C. § 158(a)(5).

178. Racine Educ. Ass'n, Wis. Lab. & Human Relations Comm'n, Equal Rights Div., No. 8650279 (Apr. 30, 1986) [Full Text] Daily Lab. Rep. (BNA) No. 98, at E-1 (May 21, 1986).

179. *Racine*, Daily Lab. Rep. (BNA) No. 98, at E-1 (May 21, 1986). *See supra* notes 100-02 and accompanying notes (facts and general discussion of *Racine*).

may place the employer at risk of other liabilities for exposing non-infected employees to the AIDS virus.

V. CORPORATE POLICY

Since fear of contagion seems to be the ultimate problem, education may provide the solution to the employer's dilemma. An employee who is well educated regarding the means of transmission of AIDS will be hard pressed to sustain the burden of showing that his refusal to work with an infected co-worker was based on a reasonable good faith perception of a hazardous working condition.[180] Education of employees can also assuage fear in the workplace and lessen the potential for work conflicts. It is not being suggested that the education policy in any way raises the inference that AIDS victims should be protected as a class outside the context of "handicapped," as this in itself may pose problems with victims of other diseases who are not afforded such specific protection. AIDS victims should be treated in accordance with the policies established for any other handicap. It appears, however, that the development of corporate AIDS policies can be extremely beneficial to the employer, provided the employer takes care not to afford special rights to AIDS victims that are not afforded to other classes of handicapped persons.

It has been suggested that an AIDS education program should be initiated by the federal government through the development of a training manual for employers by the government.[181] The program would be free or of minimal cost to employers, the gravity of the problem justifying the additional governmental cost of instituting such a program.[182] An advantage of this approach is that media response would probably be immediate if such a program was implemented by the government rather than by private employers.[183] Moreover, such involvement by any governmental entity would probably generate public service announcements and advertisements which would have a diverse and wide audience.[184] The combined efforts of government and media to establish an AIDS educational program

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180. *See supra* notes 158-65 & 167-68 and accompanying text (elements necessary for employee to sustain burden of proof).

181. Comment, *AIDS and Employment: An Epidemic Strikes the Workplace and the Law*, 8 WHITTIER L. REV. 651, 677-78 (1986).

182. *Id.* at 677.

183. *See id.* at 678.

184. *Id.* at 678 n.134.

would be substantially more far-reaching than would efforts by private employers.

On the other hand, the efforts made by private employers might be still more effective because directed toward and personalized for a specific group of persons, their own employees. A privately instituted educational program may be better suited to the particular environment for which it is developed, and create a greater impact on the group to which it is directed. Undeniably, the general public needs to be educated regarding AIDS and its ability to be transmitted. However, the most important aspect of an educational program in the corporate environment is the maintenance of a work environment free from stoppages and other problems caused by employees who are AIDS victims as well as by co-workers who are required to work with AIDS victims.

Regardless of whether a statewide or federally funded program is put into effect, individual employers should utilize some type of educational program geared to their own work environment. Several companies have been lauded for their innovative development of corporate AIDS education programs.[185] Among the leaders is Wells Fargo and Company,[186] which permits the patient to continue to work provided two physicians certify that he is physically capable.[187] Co-workers are given briefing sessions which are designed to assist them in accepting the returning employee, as well as to ease the transition of the AIDS victim.[188] The company vice-president has indicated that the company's intention is to treat AIDS like any other disease.[189] The corporate policy is to assure AIDS victims that the company is concerned about their well-being, to assure co-workers that the company is concerned about their safety, and to educate all employees about the disease itself.[190] Employees are shown videotapes and participate in question and answer sessions with health officials.[191] Other than special educational programs, the company treats AIDS

185. *See* Pave, *Fear and Loathing in the Workplace: What Managers Can Do About AIDS*, BUS. WK., Nov. 25, 1985, at 126 [hereinafter Pave, *What Managers Can Do*].

186. *Id.*

187. *Id.*

188. *Id.*; *Four Concerns Show a Variety of Ways to Treat a Valued Employee With a Terrifying Disease*, Wall St. J., Oct. 18, 1985, at 10, col. 2 [hereinafter *Valued Employee*].

189. *Valued Employee*, *supra* note 188, at 10, col. 4.

190. *Id.*; Pave, *What Managers Can Do*, *supra* note 185, at 126, col. 3.

191. *See Valued Employee*, *supra* note 188, at 10, col. 4.

victims no differently than it treats other employees with disabilities.[192] International Business Machines makes counseling services available to both AIDS victims and to co-workers.[193] The company has a "catastrophic illness" policy, which it has applied to AIDS cases among employees.[194] Crocker National Bank invites the Public Health Service to conduct classes for co-workers each time an employee is diagnosed as an AIDS victim.[195] The chief administrator of Time, Inc. has sent a memorandum to all department heads instructing them that the company is to treat AIDS as any other disability.[196] Education played a part in the settlement of the *Cronan* case,[197] reached shortly after the court denied defendant's motion to dismiss.[198] Part of the settlement award included an agreement by New England Telephone Company to provide an AIDS education program to all employees who would be working at Cronan's new work site.[199] Medical personnel were called in to explain to employees that AIDS could not be transmitted through casual workplace contact.[200]

Most recently, in *Raytheon*, the Commission ordered not only the posting of advisory materials[201] which clearly inform employees

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192. *Id.*

193. Pave, *What Managers Can Do*, *supra* note 185, at 126, col. 3.

194. *Id.*

195. *See* McKenna & Maryn, *California Banks Taking First Steps to Cope with AIDS*, Am. Banker, Sept. 18, 1985, at 26, col. 2.

196. *See Aids Costs, Employers and Insurers Have Reasons to Fear Expensive Epidemic*, Wall St. J., Oct. 18, 1985, at 1, col. 6.

197. Daily Lab. Rep. No. 179, at D-1. *See supra* notes 80-92 and accompanying text (facts and general discussion of *Cronan*).

198. *Settlement*, *supra* note 92, at A-2.

199. *Id.* at A-3.

200. *Id.*

201. *Raytheon*, Daily Lab. Rep. (BNA) No. 29, at E-8. The notice reads in part:

STATE LAW PROHIBITS EMPLOYMENT DISCRIMINATION BECAUSE OF AIDS

AIDS is a Physical handicap under the California Fair Employment and Housing Act. That law prohibits employment discrimination because of any physical handicap whether real or perceived.

Under these rules, unlawful discrimination may have occurred if an employer takes any of the following actions because a person has AIDS, or because the employer thinks the person has AIDS or might contact AIDS in the future:

—REFUSAL TO HIRE an applicant

—TERMINATION of an employee

of their rights, but also ordered that training sessions on AIDS be conducted for all employees:

> [R]espondent shall conduct training sessions on AIDS for its employees . . . . This training may take any form that is sufficient to educate respondent's employees effectively and may cover any aspect of AIDS that is relevant . . . . At a minimum, however, the training must inform respondent's employees clearly and accurately about the nature and causes of AIDS, the means by which it can and cannot be transmitted, and the rights of employees with AIDS under the Fair Employment and Housing Act. Respondent shall conduct this training during employees' regular work hours, in a manner sufficient to permit all of its . . . employees to attend without undue burden, regardless of shift. Employees shall suffer no loss of status or benefits as a result of attending the training and shall be compensated for the time spent in training at their normal rate of pay.[202]

Because of the uncertainty and fear surrounding AIDS, education of employees is necessary to maintain a productive work environment. Consideration of the following corporate program for developing an AIDS policy is suggested.[203] First, there must be a strong corporate commitment to development of and adherence to a responsible policy on AIDS.[204] The program should include a

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—REFUSAL TO REINSTATE an employee after medical leave

—TERMINATION OR REDUCTION OF BENEFITS

—ALTERATION OF WORKING CONDITIONS OR DUTIES against the wishes of an employee

—ANY OTHER ADVERSE CHANGE in the terms or conditions of an employee's job YOU HAVE THE RIGHT TO COMPLAIN ABOUT DISCRIMINATION BECAUSE OF AIDS . . . .

Id. at E-9. *See supra* notes 74-79 and accompanying text (facts of *Raytheon*).

202. *Raytheon*, Daily Lab. Rep. (BNA) No. 29, at E-9.

203. Recommendations made by Victor Schachter, a partner in the San Francisco firm of Schachter, Kristoff, Ross, Sprague & Curiale.

204. *See Special Report Six Point Corporate Aids Policy*, Job Safety & Health (BNA) No. 216, at 4 (Mar. 11, 1986) [hereinafter *AIDS Policy*].

statement of philosophy and policy on AIDS, which will guide management in handling AIDS cases,[205] and ensure that all management personnel are viewing the problem from the same perspective.[206] Of equal importance, the company's initiative in developing such a program will help convince AIDS-infected employees that the company is responsive to their problems. The company should try to integrate the AIDS policy into an employee "wellness" program and educate the employee about AIDS in the context of that program.[207] It is here that the employer should take care not to raise AIDS to a special protected class outside the context of any other handicap. At a minimum, an employee should know how AIDS and other health problems will be treated under employee benefit plans.[208] Additionally, the company should offer management training regarding issues of employment discrimination and employee job actions.[209] All supervisors should know how to respond, or whom to contact for guidance if a problem should arise. Lastly, the corporate policy should address such issues as confidentiality of medical information, privacy rights of the employee, and implementation of crisis intervention programs.[210] Each employee should know who has access to his medical records, and what right to privacy he possesses. Moreover, employees should be informed of available counseling and where it can be obtained.

An example of such a policy is currently being implemented by Bank of America.[211] Originally, Bank of America reviewed AIDS cases on an individual basis.[212] In 1985 it set up a task force to develop a written corporate policy concerning employees who became

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205. *Id.* (policy statement may simply explain AIDS will be treated as other disabling conditions or may set forth complex outline of employer response to particular issues).

206. *Id.* (corporate commitment ensures senior management has same understanding of AIDS policy as supervisors and managers implementing it).

207. *Id.*

208. *Id.* (raising questions to be considered).

209. *Id.* (AIDS jokes contribute to a discriminatory atmosphere; refusal to work with AIDS patients through job actions protected under National Labor Relations Act as concerted activities).

210. *Id.* (crisis intervention program may address problems arising when employees first learn they have AIDS or when co-employees refuse to work with an AIDS patient).

211. *See Revolution in Delivery System Predicted During Corporate Cost Management Meeting*, 13 Pens. Rep. (BNA) No. 49, at 2033.

212. *Id.* at 2034 (review on an individual basis continued for two years subsequent to bank's discovery of its first known case of AIDS in 1983).

victims of catastrophic illnesses, their families, and their co-workers.[213] Under the policy all employees are informed of the bank's position on the legal issues. Managers are responsible for ensuring an employee's privacy rights. Employees are permitted to continue working as long as feasible, provided they have physician approval.[214] Self-help groups and family support groups were formed as a part of the educational and informational network.[215] The employee benefit plan was redesigned to cover alternative care services.[216] Bank of America also set up training programs for managers and persons involved with personnel relations.[217] The bank's employee newsletter is used as an educational tool, disseminating information to employees. Managers arrange mandatory meetings with their employees for purposes of information and education. The company also obtained films, brochures, and other educational materials that could be borrowed by company employees desiring further information. Speakers are invited to give presentations to employees at specific work sites following a report of the disease.[218] The program is so successful that Bank of America approached fifteen major employers in the San Francisco area and offered to assist in developing a work site education program.[219] These efforts resulted in the production of an educational film on AIDS, an AIDS manual and sample policies to be distributed to other employers.[220]

A small business could implement a variation of such a policy, even if it is simply to inform employees of how the employer will respond to an employee contracting a communicable disease. A potential AIDS victim, his co-workers, and his supervisors should all know what to expect from the company if and when tragedy strikes.[221] The employer, on the other hand, will be more able to cope with the problem if a company policy has been well thought out in advance, and the supervisors are well-versed on how to handle

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213. *Id.* (task force developed a policy covering all life-threatening diseases finding similar employee reaction to cancer and other diseases as to AIDS).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* (training and education programs informed the personnel staff and managers about diseases and company policies related to disability and sick leave).

218. *Id.*

219. *Id.*

220. *Id.*

221. *See AIDS Policy*, *supra* note 204, at 4 (corporate policies dealing with AIDS should be adopted before a crisis arises).

the situation. It is suggested that many lawsuits are prompted by thoughtless responses and irresponsible actions that could have been precluded if the supervisor had been properly trained to handle the problem. In light of the pandemic proportions of AIDS and the likelihood that most large corporate employers will have to address this problem in some respect, the cost of implementing such a program is well justified.

VI. CONCLUSION

The AIDS epidemic has created a flood of unanswered legal questions. Many of these questions specifically relate to employment issues, placing an enormous burden on employers. The current legal trend is to consider AIDS to be a handicap under most state handicap discrimination legislation, and despite the Department of Justice Opinion,[222] it seems probable that AIDS victims will be protected under the Federal Rehabilitation Act. Terminating or placing special restrictions on AIDS victims, particularly if such restrictions are judged unnecessary by the medical community, will likely give rise to costly, time-consuming lawsuits. Regardless of the ultimate outcome of such suits, they will probably affect the public perception of the company involved, as well as the production and morale of the employees within the company. Until case law more definitively establishes the applicable guidelines, employers would be well-advised to follow the familiar path, and treat AIDS as they would treat any other long-term illness or disability. In the interim, education programs for the patient, management, and co-workers should serve to reduce fear of contagion in the workplace and to minimize potential problems without unduly subjecting the employer to civil liability.

Theresa E. Loscalzo

222. Cooper, *Memo*, *supra* note 40 (disabling effects of AIDS qualify as handicaps but communicability may not qualify as a handicap under definition in Rehabilitation Act, 29 U.S.C. § 706(7)(B)).