Employment Discrimination against Persons with AIDS

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by Arthur S. Leonard

I. Introduction

Acquired Immune Deficiency Syndrome (AIDS), a condition which renders the human immune system incapable of defending against certain unusual fatal illnesses, was first diagnosed as a distinct disease entity in 1981. By April, 1985, the United States Centers for Disease Control (CDC) had reported almost 10,000 cases of the most severe form of this condition in the United States. Informed observers speculate that up to ten times as many people suffer from milder forms of the syndrome, and an undetermined portion of those will develop the full, usually fatal, syndrome. Because the mortality rate for persons with CDC-defined AIDS is very high, the progress of the disease is disfiguring and painful, and the means by which the disease is transmitted have remained mysterious, public fear surrounding AIDS victims has produced a legal crisis as well as a health crisis.

2. As of September 24, 1984, the CDC had counted 6,122 cases of AIDS. N.Y. Native, Oct. 8, 1984, at 17. By October 22, 1984, the CDC count had reached 6,517, an increase of almost 400 cases in one month. N.Y. Native, Nov. 5, 1984, at 16. (The New York Native is a biweekly newspaper serving the New York City metropolitan gay and lesbian community. Unlike the "mainstream" press in this area, which has provided only sporadic reporting on AIDS, the Native has published the latest CDC statistics, interviews with scientists engaged in AIDS research, and lengthy columns by doctors and other scientific experts reporting and analyzing new developments, in virtually every issue since the AIDS epidemic began to receive notice in the gay community.) In February 1985, as controversy developed over a blood test for antibodies to HTLV-III virus, the CDC reported that its AIDS case count had passed eight thousand. Altman, U.S. Delays Licensing Blood Test to Detect AIDS, N.Y. Times, Feb. 15, 1985, at B16, col. 3. On April 8, 1985, the CDC reported that the count had reached 9,405. N.Y. Native, April 22, 1985, at 13.

3. Gay Men's Health Crisis, Inc., Health Letter No. 4, at 1 (Aug. 1984) [hereinafter cited as GMHC-4]. Gay Men's Health Crisis, Inc., is a nonprofit organization formed in 1982 by gay men in New York City concerned with the lack of attention paid to the growing medical crisis of AIDS by the government and the medical research establishment. Among its activities of patient services, counseling, testifying before agencies on AIDS-related issues, and public education, GMHC publishes newsletters written by scientific professionals reporting and explaining the latest information about AIDS. GMHC publications are a major source of information for anybody researching the current status of the AIDS epidemic.

4. According to the CDC, as of September 24, 1984, 45% of the confirmed cases of AIDS had resulted in death. N.Y. Native, Nov. 5, 1984, at 16. As of February 11, 1985, the CDC reported a mortality rate of approximately 48%. Sullivan, Blood Center Fears Impact of AIDS Test, N.Y. Times, Feb. 14, 1985, at B1, col. 5.

5. The legal crisis surrounding AIDS involves many areas of the law. A legal guide published by Lambda Legal Defense and Education Fund, Inc., to assist attorneys in working with people who have AIDS, covers such diverse issues as legal rights to services (hospita care, ambulance transport, and funeral arrangements), confidentiality of medical records, medical powers of attorney, estate
One of the manifestations of these fears is employment discrimination against persons with AIDS, persons perceived as having AIDS, and persons who are members of publicly identified "risk groups"—gay males, intravenous drug abusers, Haitians, and hemophiliacs. Pro bono legal assistance groups have been formed in the three urban centers with the largest number of AIDS cases—New York City, San Francisco, and Los Angeles. Their experience has included a number of cases in which employers, either upon their own motion or at the behest of coworkers, have taken adverse action, including termination of employment, against such persons. The question whether legal protection against such discrimination exists has not been litigated to an appellate level in any jurisdiction, and a variety of legal forums have been explored in attempts to resolve these cases. For example, some administrative agencies in New York which enforce statutes prohibiting discrimination on the basis of physical disability or handicap have made initial determinations that persons with AIDS may be protected under the New York statutes and administrative regulations. Rapid administrative investigation of such charges has resulted in satisfactory settlements of some cases. Experience has shown that when employers are provided with the facts about AIDS and are convinced that discrimination against persons with AIDS may be unlawful, they are usually willing to negotiate a settlement that respects the rights of the person with AIDS.

The purpose of this article is two-fold: first, to present clearly the facts about AIDS as they relate to employment rights, and, second, to demonstrate the degree to which laws forbidding employment discrimination on the basis of physical disability or handicap provide protection for persons with AIDS.

II. AIDS—A Brief Description

The body fights off infection by a series of complicated processes which are collectively called the immune system. The internal processes of the immune system include three stages: first, the identification of foreign agents that have entered the body; second, the formation of antibodies capable of rendering the foreign agents harmless; and third, the regulation of production of these antibodies when the foreign agents are detected. Current theories about AIDS center on the process of regulation of the production of antibodies. Many scientists now believe that a viral agent, perhaps in combination with, or in

5. (cont.)
the presence of one or more as yet unidentified "cofactors," attacks and destroys certain cells (called T-helper lymphocytes) whose normal function is to signal for the production of certain antibodies. As a result, the organs of the immune system which produce these antibodies are not activated, and the foreign agents proceed unhindered to damage the body in a variety of ways.

As defined by the Centers for Disease Control (CDC), the full AIDS syndrome occurs when the number of T-helper lymphocytes are so reduced that certain "opportunistic infections" associated with the syndrome occur. Among these infections are Kaposi's sarcoma, a rare skin cancer, and pneumocystis carinii pneumonia, an uncommon lung ailment. While many persons with AIDS who have developed these "opportunistic infections" require extensive hospitalization, some (especially those who have Kaposi's sarcoma or less serious infections and are receiving and responding to therapy) are treated on an outpatient basis and are physically capable of working.

Preliminary studies indicate that large numbers of individuals in the "risk group" populations may have been exposed to the viral agents associated with AIDS but have not developed any symptoms of the syndrome. A subgroup of those exposed, consisting of perhaps ten times the number of those who have CDC-defined AIDS, have developed some physical symptoms which have been interpreted as warning signs of the possible onset of the syndrome. These symptoms include lymphadenopathy (swollen lymph nodes), weight loss, abnormal fatigue, night sweats, and a clinically observable decrease in the production of T-helper lymphocytes in their blood. Some individuals with these "warning" symptoms will go on to develop CDC-defined AIDS—others will not. Although the severity of the "warning" symptoms and their impact on the physical capabilities of those individuals experiencing them varies with each individual, many exhibiting these symptoms are physically capable of working.

It is hypothesized that the viral agent is transmitted through blood contact as a result of sexual intercourse, blood transfusions, or shared use of needles by drug users. It is also hypothesized that other body fluids, such as sweat and saliva, may act as transmission agents, but the strongest case is made for blood transmission. Public health officials have asserted that current theories about the AIDS syndrome and its epidemiology would not be consistent with transmission by casual contact of the sort that occurs in a typical workplace (i.e., that AIDS is not spread by mere touching or airborne transmission of the virus). The tentative identification of a particular virus as a cause of AIDS has led to intensive research in two directions: first, researchers have sought to develop tests which will detect the virus or evidence of its presence (past or present) in the blood and, second, researchers seek to create a vaccine that can trigger production of antibodies for the virus which render it harmless before it can attack the body's T-helper lymphocytes.

CDC licensed several tests for screening blood donations in March of 1985, amid controversy over their accuracy and the interpretation of their results. If these tests prove effective, transmission through blood transfusions (a very small percentage of the known cases of AIDS) can be eliminated by screening donated blood to detect the virus. If a vaccine is discovered (a development which may not occur soon), those who have not yet been exposed to the virus can be protected against future infection through its administration. However, if present estimates of the proportion of the population already exposed to the virus are correct, neither a blood test nor a vaccine would have an immediate, substantial impact on the number of new cases of AIDS in the absence of some effective method of preventing full development of the syndrome in those already infected. In fact, the nature of AIDS indicates that an effective treatment for those who have developed the syndrome will require a major breakthrough in medical research—a

13. For a more technical explanation of the physiology of AIDS, see Comment, supra note 1, at 722-23. On August 3, 1984, the CDC reported that its researchers had succeeded in causing a version of AIDS in research primates using the HTLV-III virus, thus providing evidence that the virus is a probable cause of the disease in humans. GMHC-4, supra note 3, at 6.

14. Foege, supra note 1; Good, supra note 9. For a more detailed treatment of the various opportunistic infections associated with the syndrome, see Armstrong, Viral Infections; Loursa, Bacterial and Myotic Infections; Cahill, Parasitic Infections; Safai, Kaposi's Sarcoma, all in The AIDS EPIDEMIC (K. Cahill ed. 1983). The CDC surveillance definition for AIDS can be found in L. Mass, MEDICAL ANSWERS ABOUT AIDS 3-4 (GMHC 1984), and in LAMBEDA, supra note 5, at C-1.

15. See supra text accompanying note 6.

16. GMHC-4, supra note 3. See also D'Eramo, AIDS Crisis Worse Than Ever, N.Y. Times, Oct. 8, 1984, at C1, 1; D'Eramo, supra note 12.

17. See supra text accompanying note 6.


19. K. Mayer & H. Pizer, supra note 18, at 36-40; Foege, supra note 1, at 14-16.


25. In remarks delivered at a February 8, 1985, symposium in New York City, Dr. Luc Montagnier opined that an effective vaccine would be impossible to develop due to wide genetic variations observed in different strains of the suspected virus. Beldekas, supra note 12. Dr. Montagnier's pessimistic view was echoed at an international conference of AIDS researchers in Atlanta, Georgia, during April of 1985. Scott, Prevention Seen as Only Hope for AIDS, Wash. Blade, Apr. 19, 1985, at 1.

26. Dr. James Curran, director of the AIDS program at CDC, has stated that as many as 200,000 people may have already been exposed to the suspected virus and that AIDS would probably be the major cause of death for gay men through the end of the century. In a newspaper interview dated September 24, 1984, Dr. Curran stated: "In spite of the good intentions and continuing efforts of the gay community and the scientific sector, we should not expect scientific technology to rescue us from AIDS in the next few years, although eventually technology may help conquer the disease." D'Eramo, supra note 16.
method of stimulating the manufacture of new T-helper lymphocytes or a method of artificially simulating the function of these lymphocytes. Consequently, the heavily publicized announcement of identification of a virus associated with AIDS does not ensure that the problems of discrimination against persons with AIDS will disappear quickly, because there will probably be many thousands of additional cases.

III. AIDS in the Workplace

Persons infected with the so-called “AIDS virus” do not present a uniform profile in terms of their physical condition and suitability for employment. Current descriptions of the disease and its course indicate that there are four categories of such individuals, each of which may present different issues in the workplace:

(I) Those who have been exposed to the virus but who display no physical symptoms (a category whose known members may increase dramatically as the blood tests licensed by CDC come into general use);

(II) Those who display symptoms characterized as “warning” symptoms that AIDS may develop;

(III) Those who have contracted an opportunistic infection indicating development of the syndrome but who do not require hospitalization and are physically able to work;

(IV) Those who have contracted multiple infections or require extended hospitalization, or who have been so weakened by such infections and the syndrome that they are relatively immobile.

Discrimination in the workplace is primarily experienced by members of the first three categories. It is unlikely that an individual in category IV would be capable of performing continued work. Those in the second and third categories are the individuals who are presently encountering the most serious discrimination problems. In addition, those in the first category, once identified, may well encounter discrimination similar to those in categories II and III. Indeed, some of the cases handled by the pro bono legal panels involved persons who may have been in category I (or who may not even have been exposed to the virus), and have suffered employment discrimination because they were perceived as presenting a problem as members of a “risk group” who had sought medical assistance. Those in the second and third categories are the individuals who are presently encountering the most serious discrimination problems. In addition, those in the first category, once identified, may well encounter discrimination similar to those in categories II and III. Indeed, some of the cases handled by the pro bono legal panels involved persons who may have been in category I (or who may not even have been exposed to the virus), and have suffered employment discrimination because they were perceived as presenting a problem as members of a “risk group” who had sought medical assistance or were known associates of individuals with AIDS.

The key aspects of AIDS relevant to the concerns of employers, fellow employees, and business customers center on infectiousness and physical ability. While questions about infectiousness may not yet be answered definitively, it appears that under normal workplace conditions infectiousness is not a real problem. During the early history of the AIDS epidemic, it was sometimes suggested that persons infected with AIDS should not be employed in food preparation or serving, or in other occupations where a personal service may require physical contact with customers. While such suggestions might have had some surface plausibility when virtually nothing was known about how AIDS might be transmitted, current views about the epidemiology of AIDS suggest that they reflect undue panic, as there is apparently no solid evidence of anyone contracting AIDS through food or external physical contact.

The issues surrounding physical ability are complicated by the unpredictable progress of the disease. Someone infected with the virus may appear perfectly healthy and suddenly develop skin lesions characteristic of Kaposi’s sarcoma. Others may exhibit many of the debilitating “warning” symptoms, such as fatigue and weight loss, which impact upon the physical ability to perform work, without developing an opportunistic infection. It seems clear, however, that some proportion of those in categories I, II, and III are fully capable of working, and, both psychologically and financially, need to keep working as long as they are physically able to do so. The AIDS literature does not suggest that the physical exertion of working necessarily provokes a worsening of the disease. Although it might seem that a person with a compromised immune system would be more likely to contract infections if he or she came into contact with large numbers of people, such would not necessarially provokes a worsening of the disease. Although it might seem that a person with a compromised immune system would be more likely to contract infections if he or she came into contact with large numbers of people, such would not necessar-
ily be the case if the physiological conditions that lead to opportunistic infections when the immune system is compromised are either so ubiquitous that only total isolation from human contact would prevent infection or if the person with AIDS (or indeed, a large proportion of the pertinent "risk group" populations) has these triggering conditions in his or her system anyway, awaiting the opportunity to develop in the absence of immune function. The opportunistic infections associated with AIDS have previously been observed in persons whose immune systems were compromised by immuno-suppressive medical treatment or other illnesses, suggesting that they are not something “caught” from the surrounding environment, but rather something generated from physiological conditions normally found in the body, but harmless in the presence of an adequately functioning immune system. Consequently, in the absence of better evidence that workplace exertion and exposure present a serious risk either to the person with AIDS or coworkers and customers, persons with AIDS who are physically able to work should be treated in the same way as others with physical disabilities who are, despite those disabilities, physically capable of performing a job.

IV. Handicap Discrimination Laws—Applicability to AIDS

American law presumes that the employment relationship in the private sector is "at will" unless the employer's discretion to terminate the relationship has been abridged by contract, statute, or, in some jurisdictions, public policy. Due to constitutional due process guarantees restricting the government when it is acting as an employer, and to federal and state civil service laws and regulations restricting discharge to some approximation of "just cause" similar to that found in private sector collective bargaining agreements, public sector employees have somewhat more job security. Federal and state legislation against employment discrimination in both sectors provides a major exception to the "at will" principle, and prohibitions of discrimination on the basis of physical disability or handicap have become a prominent feature of such laws in recent years. Federal and state statutes against employment discrimination are conveniently collected in Lab. Rel. Rep. (BNA), Fair Empl. Prac. Manual, vol. 8A, and Empl. Prac. Guide (CCH), vol. 3. Jurisdictions which apparently do not have laws forbidding discrimination against handicapped persons are Arizona, Arkansas, Idaho, Mississippi, and South Dakota. Legislation pending in Virginia and Wyoming as of April 1985, may change the compositions of these lists and other categories based on statute terminology.

35. (cont.) discrimination against handicapped persons by programs receiving federal financial assistance. Id. § 794. In Consolidated Rail Corp. v. Datrone, 104 S. Ct. 1298 (1984), the Supreme Court held that § 504 of the Rehabilitation Act of 1973 applied to all federal financial assistance, not just to that specifically aimed at creating jobs in the programs assisted. In a contemporaneous, consistent decision, the Fifth Circuit Court of Appeals held that receipt of Medicare and Medicaid funds by hospitals made them subject to the nondiscrimination policies of § 504. United States v. Baylor Univ. Medical Center, 736 F.2d 1039 (5th Cir. 1984), cert. denied, 105 S. Ct. 958 (1985). Subsequently, airlines using airports that were constructed and operated with federal financial assistance have been held subject to the act. Paralyzed Veterans of America v. Civil Aeronautics Bd., 752 F.2d 694 (D.C. Cir. 1985). Section 501 of the Rehabilitation Act of 1973 imposes the same nondiscrimination policies on "departments, agencies, and instrumentalities" of the federal executive branch, including the postal service. See Prewitt v. United States Postal Serv., 662 F.2d 292 (5th Cir. 1981). State laws pertaining to employment discrimination are conveniently collected in Lab. Rel. Rep. (BNA), Fair Empl. Prac. Manual, vol. 8A, and Empl. Prac. Guide (CCH), vol. 3. Jurisdictions which apparently do not have laws forbidding discrimination against handicapped persons are Arizona, Arkansas, Idaho, Mississippi, and South Dakota. Legislation pending in Virginia and Wyoming as of April 1985, may change the compositions of these lists and other categories based on statute terminology.


38. New Hampshire defines "handicap" as a "handicap, other than illness, unrelated to a person's ability to perform a particular job." N.H. Rev. Stat. Ann. § 354-A:3(xiii) (1984). However the administrative rules promulgated under the statute, H.U.M. § 405.1, define "illness" as a "short term, temporary medical condition." This definition arguably would not include AIDS, because it is more correctly classified under the administrative definition of "handicap" as a "permanent, long term, or chronic physical or mental impairment which substantially limits one or more major life activities." If the New Hampshire courts look to the administrative definitions as authoritative, AIDS may be covered despite the statutory exclusion of coverage for illness.

Rehabilitation Act, and ten of the thirteen jurisdictions, also expressly extend coverage to those not presently disabled but who have "a record of such impairment" or are "regarded as having such an impairment." Some jurisdictions go on to define "major life activities" in terms of physical actions typical of a normal, healthy existence, emphasizing use of the senses, locomotion, and rational thought, but these "list" definitions (which do not mention "immune function" as a major life activity) are, from their context, clearly not meant to be exhaustive or exclusive. Some of the laws further define "impairment" in terms of various organs and body systems, and such definitions usually include reference to the hemic (blood) and lymphatic systems, i.e., the central organs of the immune function. Persons with AIDS would appear to be within the "impairment" category because the ability to fight infection and preserve health is logically a "major life function," albeit less visible than walking, talking, or lifting. AIDS is certainly an "impairment" of that function, especially when infection and preserve health is logically a "major life function." More specifically, individuals suffering from either discrimination because of medical treatment or from a general perception of them as "AIDS risks" would be covered in those jurisdictions which extend the definition to include individuals with a record of disability or who are regarded as having a disability.

Six jurisdictions have enacted some variation of a basic definition which covers "anatomical, physiological or neurological disability, infirmity, malformation, or disfigurement which is caused by injury, birth defect, or illness." Coverage of persons with AIDS under this definition seems likely as the syndrome of suppressed immune function is clearly a physiological disability or infirmity caused by an illness. Three jurisdictions have definitions which include the above, albeit less visible than walking, talking, or lifting. AIDS is certainly an "impairment" of that function, especially when infection and preserve health is logically a "major life function." Such an impairment is certainly an "impairment" of that function, especially when infection and preserve health is logically a "major life function." However, the statutory "clinical" definition of "impairment" includes those organs central to the immune function. More specifically, individuals suffering from either discrimination because of medical treatment or from a general perception of them as "AIDS risks" would be covered in those jurisdictions which extend the definition to include individuals with a record of disability or who are regarded as having a disability.

43. (cont.)


40. Of those jurisdictions listed in supra note 39, Georgia, Utah, and West Virginia do not mention protection for those with a record of disability or those regarded as disabled, and Georgia specifically excludes coverage for individuals with communicable diseases.

See supra note 37 and accompanying text. Some other states which do not use the federal definition of handicap do incorporate these concepts of extended coverage into their statutes or regulations. See, e.g., WIS. STAT. ANN. § 113.14(1) (West Supp. 1984).


42. See, e.g., R.I. GEN. LAWS § 28-5-6(H)(i) (Supp. 1984).

43. In this regard, it is significant that some state courts have found that protection extends to people with a record of a disability, or who are regarded as having a disability, even though their state statutes do not expressly provide for such coverage, on the theory that such individuals are suffering discrimination because of prejudice against the disabled—the prohibited motivation under the statute. See Comment, supra note 34, at 541-48. For a discussion of the logical bases for extending coverage to perceived disabilities, see Note, Cancer as a Protected Handicap in Illinois, 60 CHI. L. REV. 715 (1984).

44. ALASKA STAT. § 18.80.300 (1984); see, e.g., ME. REV. STAT. ANN. tit. 5, § 4553 (1977); MD. ANN. CODE art. 49(b), § 15(a) (1979); MONT. CODE ANN. § 49-2-101(16) (1983); NEB. REV. STAT. § 48-1102(0) (1987); N.J. STAT. ANN. § 10-5-5(q) (West Supp. 1984-1985).


46. IND. CODE § 22-9-1-3(q) (1976); IOWA CODE ANN. § 601A.2(11) (1975); KAN. STAT. ANN. § 44-1002(j) (1981); M-O. 378-1 (Supp. 1985); MICH. COMP. LAWS ANN. § 37.1103(b)(i) (West Supp. 1984) ("handicap" means "a determinable physical . . . characteristic of an individual . . . which may result from disease . . . which . . . is unrelated to the individual's ability to perform the duties of a particular job or position, or is unrelated to the individual's qualifications for employment or promotion."); N.Y. EXEC. LAW § 292(21) (McKinney 1982 & Supp. 1984) ("handicap" means "physical . . . impairment resulting from . . . physiological . . . conditions which prevent the exercise of a normal bodily function or is demonstrated by medically accepted clinical or laboratory diagnostic techniques . . . ."); OHIO REV. CODE ANN. § 4112.01(13) (Page 1980 & Supp. 1984) ("handicap" means "a medically diagnosable, abnormal condition which is expected to continue for a considerable length of time . . . which can reasonably be expected to limit the person's functional ability . . . or any limitation due to weakness and significantly decreased endurance . . . ."); S.C. CODE ANN. § 2-7-35 (LAW CO-OP. 1983) (essentially similar to Hawaii statute); TEX. HUM. RES. CODE ANN. § 121.002(4) (Vernon 1980) ("handicapped person' means a person who has a . . . physical handicap, including . . . hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health impairment which requires special education or related services."); WIS. STAT. ANN. § 11.32(3)(a) (West Supp. 1984) (a person has a physical handicap if he "has a physical . . . impairment which makes achievement unusually difficult or limits the capacity to work . . . ."); WASH. ADMIN. CODE R. § 166-22-040 ("a person will be considered to be handicapped . . . if he or she is discriminated against because of the condition and the condition is abnormal.").

46. Those states with no statutory definition of "handicap" or "disability" include: Florida, Nevada, North Carolina, Tennessee, and Virginia.

47. Of those states with no statutory definition of "handicap" or "disability," the simplest, most wide-ranging definition is found in the state of Washington's Administrative Code: "... for enforcement purposes, a person will be considered handicapped . . . if he or she is discriminated against because of the condition and the condition is abnormal." Perhaps the simplest, most wide-ranging definition is found in the state of Washington's Administrative Code: "... for enforcement purposes, a person will be considered handicapped . . . if he or she is discriminated against because of the condition and the condition is abnormal." These laws are very new and there is little case law explicating
the definitions of coverage.51 Most case law supports the assertion that a condition such as AIDS is a "disability" or "handicap" of the type covered by these laws, although none of the cases discuss a condition exactly like AIDS.52

Virtually all of the jurisdictions provide that discrimination against the disabled is lawful if the physical requirements of the job cannot be performed by the individual; however, the phrasing of these exceptions varies widely, producing different tests in different jurisdictions. The federal Rehabilitation Act's phrase, "otherwise qualified handicapped individual,"53 clearly connotes that a person who can perform the requirements of the job, despite his disability, must be treated equally with others who have no physical disability. Some statutes, however, speak in terms of the disability having to be "unrelated" to actual job requirements in order for coverage to apply—54—a formulation which, if literally applied, would remove coverage from a large proportion of otherwise qualified disabled persons. Some state enforcement agencies and courts have interpreted these laws in their official guidelines or rules to mean that the individual is protected unless his or her disability substantially affects his or her ability to do the job.55 Such an agency interpretation was rejected by the Court of Appeals of New York, prompting a subsequent amendment of the New York Human Rights law to overrule the court and reinstate the agency's original interpretation.56 In light of the New York experience, one cannot assume that such "softening" administrative interpretations of restrictive statutory language will be authoritative in jurisdictions where the courts have not yet passed on their validity.

Many jurisdictions subject handicap discrimination plaintiffs to the same "bona fide occupational qualification" test applicable to cases of sex or age discrimination.57 This statutory test is frequently accompanied by regulatory interpretations which rule out various "business justifications" that employers have sometimes asserted, such as coworker or customer preferences or increased costs to the employer.58 Some jurisdictions extend coverage to disabled individuals who can perform the job with reasonable accommodations by the employer.59 Many of these laws specify that employers need not employ the disabled in situations where such employment would threaten the health or the safety of the disabled employees, coworkers, customers, or the general public.60

Despite significant variations in language between jurisdictions, some general observations can be made about potential protection from employment discrimination for persons with AIDS. The question of discrimination against persons who contract disabling infectious illnesses seems not to have been directly considered by many state legislatures; however, those which have considered it have occasionally expressed opposi-


53. 29 U.S.C. § 794 (1982); see also Southeastern Community College v. David, 442 U.S. 397, 406 (1979) (otherwise qualified person is "one who is able to meet all of a program's requirements in spite of his handicap.").

tion to extending protection.61 Most statutes which mention disease or illness do so in an apparent effort to establish that a physical impairment caused by an illness can be the basis for protection in the same manner as a defect caused by genetics or injuries.62 In those states the language employed is consistent with an interpretation that impairment due to an ongoing illness is covered—although that interpretation may not be an "exact fit" with the tone of the statute—so long as other requirements of the statute (that the individual be otherwise qualified, not present a significant safety hazard to others) are met. All 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 jurisdictions unless the express working of the statute would contradict such a presumption. Likewise, a person with CDC-defined AIDS should fall within the scope of the statutory definitions which require "impaired life activities" or "limitations upon physical ability" because AIDS impairs the "essential life function" of the immune system, limiting the ability of the body to fight infection and preserve health, and causing physical debilitation that affects strength and endurance.

Persons who do not have CDC-defined AIDS, and who thus may not technically be considered "disabled," but who are subject to discrimination because they belong to "risk groups" or have milder symptoms indicative of possible development of the syndrome, should also be protected in those jurisdictions which accept the concept of protection for persons "regarded" or "perceived" as being handicapped.63 Thus, if an individual is discharged or refused employment because he or she is a member of an AIDS risk group who has developed lymphadenopathy (swollen lymph glands), that person should be statutorily protected because the motivation of the employer is the same unlawful motivation as that expressly condemned by the statute: animus against a class of individuals which is the same unlawful motivation as that expressly condemned by the statute: animus against a class of individuals which is the same unlawful motivation as that expressly condemned by the statute: animus against a class of individuals which is the same unlawful motivation as that expressly condemned by the statute. Similarly, a person with lymphadenopathy (swollen lymph glands), that person should or she is a member of an AIDS risk group who has developed the syndrome, should also be protected in those jurisdictions which accept the concept of protection for persons "regarded" or "perceived" as being handicapped.63 Thus, if an individual is discharged or refused employment because he or she is a member of an AIDS risk group who has developed lymphadenopathy (swollen lymph glands), that person should be statutorily protected because the motivation of the employer is the same unlawful motivation as that expressly condemned by the statute: animus against a class of individuals which is the same unlawful motivation as that expressly condemned by the statute: animus against a class of individuals which is the same unlawful motivation as that expressly condemned by the statute: animus against a class of individuals which is the same unlawful motivation as that expressly condemned by the statute: animus against a class of individuals which is the same unlawful motivation as that expressly condemned by the statute. 


63. See supra note 35. The most widely used definition of "handicap..." that contained in the Federal Rehabilitation Act, expressly provides protection for those regarded as being handicapped. 29 U.S.C. § 706(7)(B) (1982). Several other jurisdictions, as noted above, have incorporated this concept in their administrative regulations, or guidelines. See Comment, supra note 34, at 541-42. Some courts, as noted, have adopted the concept as an interpretation of a statute which does not expressly include it. Id. at 542-48. See Note, supra note 43.

V. Employer Defenses

Determining that the antidiscrimination laws apply to persons with AIDS does not end the inquiry. There are affirmative defenses that may be raised by employers, some of which may have a strong appeal to "neutral" decisionmakers. Because CDC-defined AIDS is at present apparently incurable and frequently fatal,64 and because the mechanism of transmission is not definitely established, fear of the disease may be as great a motivating factor as malice or dislike for those afflicted or perceived as afflicted with the syndrome. This fear may, to the extent it appears genuine or justified, infect the decision-making process.65

The foremost affirmative defense in an AIDS case is fear of contagion.66 Unfortunately, in the short time since laws against disability discrimination have been passed, there has been virtually no case law involving infectious conditions.67 As a result, any predictions as to how decisionmakers will deal with this defense will have to be based more on logic and

64. N.Y. Native, Oct. 8, 1984, at 17; id., Nov. 5, 1984, at 16.

65. A startling illustration of the fears generated by publicity about AIDS is provided by an incident in a New York City trial court on October 23, 1984. A man diagnosed as having AIDS was standing trial for a murder committed prior to his diagnosis. The judge had called upon the City Health Commissioner to appear personally to assure court personnel and jurors that they were not endangered by the defendant's presence in the courtroom. The defendant wore a surgical mask. Despite the health official's statement to those in the courtroom that "AIDS was not transmitted through the air and that they did not have to be concerned about being in the same courtroom with the defendant," half of the prospective jurors asked to be excused, and court officers insisted on wearing masks and surgical gloves. The judge denied defense counsel's request that the officers be ordered to remove their protective paraphernalia to avoid prejudicing the jury. The president of the court officers' union was quoted as fearing for the health of the officers because "germs are spreading all over the court." Shenon, Court Officers Wear Masks and Gloves at Trial of a Defendant with AIDS, N.Y. Times, Oct. 24, 1984, at B1, col. 1. See also 3 Emp. Rel. Weekly (BNA), April 1, 1985, at 387.

66. This defense is illustrated by the case of Todd Shuttleworth, a 31-year-old Floridian with AIDS, who was discharged from a public sector clerical job after his employer learned of the diagnosis. The employer stated in justification of the discharge: "The doctor could not tell us that there was absolutely no chance that Todd might transmit the disease to others; we couldn't get that 100 percent guarantee. We just couldn't take the chance of anything happening to fellow employees or anyone else visiting the office. Anyone who has AIDS usually dies—it's not just the case of infecting someone with a disease that is curable." Shuttleworth, who was physically able to work despite his AIDS infection, countered that several of his coworkers were permitted to smoke in the office even though doctors could not assure that exposure to smoke would not cause lung cancer, suggesting a double standard existed. The Weekly News (Miami, Fla.), Sept. 26, 1984, at 3; 3 Emp. Rel. Weekly (BNA), supra note 65. Similar justifications have been offered by employers in New York City cases handled by the New York Pro Bono Panel. Shebar interview, supra note 10.

67. A review of published decisions in BNA and CCH reporters revealed no cases in which infection or contagion was an issue.
analogy than actual precedent. If AIDS presents a significant threat of infection to coworkers or customers of the employer, it would seem well-established, by virtue of cases focusing on safety issues in the workplace, that the affirmative defense would prevail. Indeed, two state antidiscrimination statutes expressly exclude from coverage individuals with "communicable diseases," apparently without regard for how the diseases might be transmitted in the workplace. Many state statutes, or accompanying administrative interpretations, recognize the safety of the individual employee, coworkers, customers, and the public at large as a legitimate concern. However, medical facts concerning AIDS indicate that the infection issue may turn on questions not yet answerable—in particular the question of when an individual is contagious. If, by the time opportunistic infections appear, the virus has run its course and destroyed the body's T-helper lymphocytes, then it is possible that category III individuals are not sources of contagion, even though they may exhibit physical symptoms (such as skin lesions) that frighten others. If the AIDS virus is transmissible during its incubation period, when there are no apparent physical symptoms, then category I individuals would appear most vulnerable to the contagion defense, although the epidemiology of the disease suggests that such individuals will not present any danger to others by virtue of casual contact in the workplace.

The most difficult case concerns category II individuals, who are presently experiencing significant discrimination. Unfortunately, it is not known whether persons exhibiting the "warning" symptoms are infectious. However, the question of whether an individual is infectious should not be as important with respect to job discrimination as the question of how an individual is infectious. If the disease is only transmissible through types of physical contact which would not occur in the performance of the job, then discrimination against the individual based on fear of infection is logically unjustified even when the individual is technically "infectious" for the disease. Thus far, public health authorities have taken the view that AIDS is not transmissible through the sort of casual, nonintimate contact characteristic of most work situations.

Another affirmative defense which might be raised is expense to the employer occasioned by health coverage costs and employee absenteeism. If an employee in category I progresses to category II, it is likely that the employee's attendance record at work will suffer. Category III employees will almost certainly have to miss periods of work due to required treatment or occasional episodes of serious infection requiring bedrest or hospitalization. Furthermore, if an employee claims coverage under an employee health benefit plan for the extensive treatments required for opportunistic infections, the employer's insurance premium rates may be raised to reflect the increased claims under the employer's policy. However, statutes, regulations, and cases have usually rejected the arguments of employers that employees who had the potential for incurring such expenses or inconvenience due to their disability were not protected from discrimination. The antidiscrimination legislation represents a policy decision that employers must bear some of society's cost in providing work opportunities for the disabled. The decision to extend legal protection against discrimination must be held to have been made with the realization that some additional costs would be imposed on employers, because it could reasonably be expected that disabled persons may, through no fault of their own, have occasional attendance problems not experienced by other employees, or may occasionally make larger claims on employee health coverage systems than nondisabled employees. The question is one of reasonableness. If a category II or category III employee's attendance is so sporadic that he or she could not accurately be characterized as a regular, full-time employee, and the employer needs to have regular, full-time coverage on the job, then medical leave might be justifiable on attendance grounds. However, by analogy to existing case law refusing to recognize such a defense with respect to other disabilities, adverse action based on a prediction that a category I, II, or III employee will become an unreasonable economic burden on the employer would not be permissible.

Affirmative defenses to civil rights legislation based upon nonacceptance of members of the protected class by coworkers or customers have been rejected in race and sex discrimination cases. However, these defenses are worth mentioning here because fear generated by AIDS has created public uncertainty about the safety of employing persons with AIDS as restaurant workers, hairdressers, or health care workers. Some cases of discrimination have been encountered in which the motivation of the employer was stated as fear that customers would stay away, or that coworkers had refused or would refuse

68. See e.g., Bucyrus-Erie Co. v. Wisconsin, 90 Wis. 2d 408, 419-22, 280 N.W.2d 142, 147-49 (1979); Amtrak, 31 Empl. Prac. Dec. (CCH) ¶ 33,420.
70. See supra note 60 and accompanying text.
71. Studies to detect the presence of HTLV-III in saliva were reported in October 1984, to have revealed none of the virus present in individuals who had CDC-defined AIDS. However, the virus was present in the saliva of eight of 18 of the individuals who had so-called "pre-AIDS" symptoms or close contact with individuals who had AIDS. With regard to these studies, National Institutes of Health researcher Dr. Robert C. Gallo stated: "There is not yet clear-cut epidemiological evidence that the virus is transmitted by saliva to cause AIDS, yet this now has to be considered. The question remains open whether saliva is a significant means of transmission. It is there and has to be studied but I don't think saliva is a major route of transmission of AIDS in humans." N.Y. Times, Oct. 9, 1984, at C1, C5, col. 1.
72. See supra note 21. In the only reported judicial opinion which considered transmission of AIDS, a trial judge in New York was convinced by expert testimony that AIDS was not transmitted by casual contact. LaRocca v. Dalsheim, 120 Misc. 2d 697, 703, 467 N.Y.S.2d 302, 307 (Sup. Ct. 1983). A labor arbitrator, considering expert medical testimony in an employee discharge case, reached the same conclusion. Guillot, supra note 31.
75. LAMBDA, supra note 5, at 1-4; Flaherty, supra note 5.
to work in proximity to persons with AIDS. Assuming rejection of the contagion defense, this separate defense should carry no weight, since the coworker and customer rejections are based on the same prejudices and misinformation that would be unlawful if they directly motivated the employer’s decision to discriminate. It may seem unfair to place the burden on the employer to educate the public, but this burden has been placed on employers with respect to race and sex discrimination, and it has been held in both instances that the underlying statutory purpose to eliminate discrimination in employment cannot give way to the uninformed prejudices of the market place. Several state laws against disability discrimination have been construed by enforcement agencies to forbid discrimination based upon rejection or disapproval by coworkers, customers, or the public.

The futility defense may also be raised by employers, who would contend that it is pointless to invest training in an employee or applicant with AIDS because the disease is fatal and the individual will not be employable long enough to justify the investment. While it is true that AIDS (although not necessarily all the opportunistic infections associated with the syndrome) is at present apparently untreatable and frequently fatal, and that it can be presumed with fair probability that category IV individuals will probably die from the disease within a few years of diagnosis, new developments in research and treatment are now occurring quickly enough to offer hope that category III individuals may not invariably die. Current evidence also suggests that a significant portion of category I and category II individuals may never develop the full AIDS syndrome.

Consequently, discrimination against employees or job applicants based on the futility argument must be viewed with considerable skepticism in cases involving category I and category II employees, and at least with a demand for more individualized scrutiny of the particular case with respect to category III employees. An individual who is receiving successful treatment for skin lesions, and, generally, is otherwise healthy and able to work, should not be denied employment on the mere possibility that development of a later opportunistic infection may curtail his working ability.

Finally, employers may advance the “altruistic” defense that they are concerned for the employee’s own health, which would be endangered by working. This defense, which is articulated in several state statutes and regulations, requires particularized analysis in each case, depending upon the requirements of the job and the physical condition of the employee in question. In the absence of evidence that working is an endangerment to the coworker and customer rejections are based on the same prejudices and misinformation that would be unlawful if they directly motivated the employer’s decision to discriminate.

A review of these defenses and the arguments which may be raised in response to them illustrates that the question whether a particular person with AIDS is entitled to redress for discriminatory discharge, reassignment, or refusal to hire cannot be easily answered in the abstract. The answer in each case will depend on a wide variety of factors, including the particular statutory coverage applicable to the job, the nature of the job, the present state of the employee’s physical condition, and the present state of knowledge about AIDS. It is reasonable to conclude that in most states with disability discrimination laws, as well as in employment under federal contracts or in programs receiving federal financial assistance (most ubiquitously, state and local government agencies, hospitals, and schools), protection against discrimination should extend to employees in categories I, II, or III who are physically able to work at jobs which do not require intimate physical contact with coworkers or customers and which do not involve close, continuous contact with infectious individuals suffering from communicable diseases transmissible by casual physical contact or respiration. As AIDS research progresses, the protection afforded by present laws will necessarily be adjusted to reflect new information about the disease’s transmissibility and the factors bearing upon its progress in infected individuals.

VI. Conclusion

The AIDS crisis presents a significant challenge to civil rights attorneys who are presented with clients whose particular problem may not appear to be directly contemplated by the existing statutory scheme in many jurisdictions. The unusual disease at issue does not always fit neatly into the framework of present disability law, and members of some of the “risk groups” involved (such as homosexuals and intravenous drug

76. See cases cited supra note 74.
77. These constructions are sometimes contained in express regulations or guidelines published by the agencies, and sometimes in the text of the law itself. See, e.g., D.C. CODE ANN. § 1-2303(a) (1981); Me. COMM. REGS. § 3.08(B); Mont. COMM. RULES §§ 24.9, 1404; N.J. COMM. RULES OF PRACTICE, § 13.11-1.5; Ohio ADMIN. CODE § 4112-5-08(D)(2)(c)(i) (1980); Or. COMM. RULES § 839-06-250; Wash. ADMIN. CODE § 162-22-040; W. VA. COMM. RULES § 4.06.
78. Scott, supra note 25, at 10.
79. See supra note 16 and accompanying text.
81. However, some agencies expressly forbid present discrimination against an employee on the basis that a present non-disqualifying impairment may become disqualifying in the future. See, e.g., W. Va. COMM. RULES, § 4.05.
83. Title VII expressly provides that observance of bona fide seniority systems, such as those which may be contained in collective bargaining agreements, is not a violation of the civil rights law. 42 U.S.C. § 2000e-2(h) (1982); Hardison, 432 U.S. at 81-83. No similar provision is contained in the federal Rehabilitation Act. 29 U.S.C. §§ 701-96 (1982).
abusers) may not themselves be members of protected classes under existing civil rights laws in many jurisdictions. This latter problem is illustrated by cases in which employees have been subjected to discharge when their sexual orientation or drug use was first discovered by their employer in connection with a diagnosis of AIDS. The employee may have no redress if the stated reason for termination is sexual orientation or drug use unless the employee's job is covered by statutory protection on those bases. However, most cases to date have centered on the disease itself as the provocation for the discrimination, and innovative use of the existing statutory framework should provide significant protection for many employees who suffer discrimination as a result of the AIDS crisis.


85. Most evidence that this occurs is anecdotal. However, in cases involving military personnel subject to immediate discharge under military regulations if their homosexuality is revealed, a diagnosis of AIDS has led to immediate loss of employment and denial of employment-related disability benefits. See AIDS Legal Guide, supra note 5, at 50-56; Comment, supra note 1, at 733.
The Sentencing Project
of the National Council on Crime and Delinquency

The Sentencing Project is a program of the National Council on Crime and Delinquency and is housed in the Council’s Washington, D.C., office.

The Sentencing Project provides technical assistance to public defenders, assigned counsel administrators, or others motivated to reduce the use of incarceration and to constructively assist defendants at sentencing. The Project assists defense counsel in eight localities in their efforts to serve the public interest by proposing carefully constructed alternative sentencing plans with which courts can decrease their reliance upon prison and long-term jail sentences as a form of punishment, thereby reducing prison and jail overcrowding and costs.

To accomplish its objectives, the Sentencing Project:

- has awarded technical assistance grants to state public defender offices, local public defenders, or criminal justice programs in the states of Connecticut, Florida, Michigan, Missouri, New Mexico, Rhode Island, and Tennessee;
- is assisting public defenders or assigned counsel in each of the selected localities to obtain adequate funding for alternative sentencing programs;
- is helping defense attorneys and public officials in each of the selected localities to plan comprehensive and effective alternative sentencing programs;
- provides administrative and skills training to defense attorneys, alternative sentencing workers, and those who will operate new or existing programs in the selected localities;
- is designing monitoring and evaluation programs by which defense lawyers and public officials can measure the effectiveness of alternative sentencing programs in their jurisdictions; and
- serves as a repository and a distribution center for case materials, law review articles, and commentary about corrections, sentencing practices, and the defense attorney’s role at sentencing.

The Sentencing Project brings to its work information and training resources from well-respected sentencing reform organizations such as the National Center on Institutions and Alternatives in Alexandria, Virginia, and the National Institute for Sentencing Alternatives at Brandeis University, Waltham, Massachusetts. It draws upon the experience of its Director, staff of the National Council on Crime and Delinquency, and staff in alternative sentencing programs now working with defense attorneys in such cities as Washington, D.C.; West Palm Beach, Florida; New York City, New York; Fayetteville, North Carolina; Portland, Oregon; and Nashville, Tennessee.

Malcolm C. Young, a former defense attorney from Chicago, directs the Sentencing Project. Until 1984, Mr. Young directed the National Legal Aid and Defender Association’s Alternative Sentencing/Sentencing Advocacy Project, which fostered seven defense-based alternative sentencing programs over three years.

The Sentencing Project is supported by a grant from the Edna McConnell Clark Foundation. For more information, contact the Sentencing Project, 2025 Eye St., Suite 501, Washington, DC 20006, (202) 463-8348.