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# AIDS and Employment Law Revisited Law, Social Policy, and Contagious Disease: A Symposium on Acquired Immune Deficiency Syndrome (AIDS)

Arthur S. Leonard  
*New York Law School*

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# AIDS and Employment: Bibliographic Resources

Arthur S. Leonard  
*Associate Professor*  
*New York Law School*

Doctors in America began to notice the new disease entity now named Acquired Immune Deficiency Syndrome (AIDS) early in 1981. As the numbers of reported cases multiplied and the new disease began to generate significant social consequences, it became evident that a wide variety of legal questions would require answers. The first published articles about AIDS, appearing mainly in bar association journals, were primarily anecdotal and speculative, raising questions about possible liability for transmission of AIDS, particularly liability of bloodbanks for tainted transfusions.<sup>1</sup>

The first attempt at an in-depth, wide-ranging treatment of AIDS legal issues was the *AIDS Legal Guide* published in 1984 by Lambda Legal Defense and Education Fund, Inc., a public-interest litigation organization headquartered in New York, which specializes in test case litigation on issues affecting the legal rights of lesbians and gay men. Under the general editorship of Abby R. Rubinfeld, Lambda's legal director, the *Guide* brought together chapters by attorneys working or consulting on a variety of AIDS-related issues, including patients' rights to services, immigration, military, and employment law issues. This first edition of the *Guide* also included a chapter on discrimination issues. That chapter, based on the early experiences of Lambda and of pro bono attorneys from the Bar Association for Human Rights of Greater New York, focused on the possible uses of federal and state handicap discrimination law in protecting employees and job applicants, tenants, and consumers affected by AIDS. The *Guide's* presentation of all these issues was from a perspective protective of the rights of persons with AIDS.

My article, *Employment Discrimination Against Persons with AIDS*,<sup>2</sup> provides an expanded treatment of the discrimination issues discussed in the brief chapter I contributed to the *Guide*. The article presents, in a law review format, a more thorough review of state handicap discrimination law. Apart from student notes and comments on is-

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1. See, e.g., Blodgett, et al., *STUDENT LAWYER* (Jan. 1984); Flaherty, *A Legal Emergency Brewing over AIDS*, 6 *NAT. L.J.* No. 44 (July 9, 1984).

2. 10 *U. DAYTON L. REV.* 681 (1985).

sues such as tort liability for transmission or public health law responses to the new epidemic,<sup>3</sup> this was the first formal law review article to discuss AIDS employment issues.

At the time the *Guide* was published, the so-called "AIDS test" (actually a blood test for antibodies to a virus believed to underlie the immune dysfunction characteristic of AIDS) did not exist, so the *Guide* did not deal with testing issues. The licensing of the blood test in March 1985 immediately generated a host of new employment issues which prompted my article *AIDS and Employment Law Revisited*.<sup>4</sup> That article is included in a symposium on AIDS published by the *Hofstra Law Review*.

By the summer of 1985, the number of reported cases from around the country (and the celebrity of some of the sufferers—most notably Rock Hudson), had generated widespread concern, and continuing legal education programs and management consulting groups began to take an interest in AIDS, especially as it related to employment law. I prepared for the American Management Association an updated summary of the legal issues for inclusion in a publication titled *AIDS: The Workplace Issues*, which was distributed to thousands of management officials beginning in December 1985.

The first major legal conference on AIDS was presented by Law Journal Seminars-Press at the Association of the Bar of the City of New York in October 1985. A resource book was published in connection with the program, incorporating several chapters from the 1984 *Lambda Guide* as well as speaking outlines from some of the participants.<sup>5</sup> The overwhelming response to the October program (about 300 registrants) led Law Journal Seminars to sponsor a series of such programs in major cities across the country. One of the principal speakers, Michael Cecere of Jackson, Lewis Schnitzler & Krupman, subsequently published a more formal presentation in collaboration with others from his firm.<sup>6</sup>

Other bar association and privately sponsored CLE programs followed, including nationwide satellite television broadcasts sponsored by the American Law Institute-American Bar Association, Bureau of National Affairs-Public Broadcasting Service, and Practising Law Institute. A revised chapter on employment discrimination for a contem-

3. Comment, *AIDS: A Legal Epidemic*, 17 AKRON L. REV. 717 (Spring 1984) (focusing on torts issues); Comment, *A New Reason to Regulate Homosexuality?*, 11 J. CONTEMP. L. 67 (1984).

4. 14 HOFSTRA L. REV. 11 (1985) (actual date of publication November 1986, see *id.* at 11 n.1; this issue of *Hofstra Law Review* contains seven articles on legal aspects of AIDS, in addition to medical overview and an introduction).

5. AIDS: LEGAL ASPECTS OF A MEDICAL CRISIS (Law Journal Seminars-Press 1985).

6. Cecere, Payson & Kaynard, *AIDS in the Workplace*, 22 TRIAL No. 12, 40 (Dec. 1986).

plated new edition of Lambda's *Guide*<sup>7</sup> was included in study materials published by ALI-ABA<sup>8</sup> and BNA-PBS,<sup>9</sup> and a newly updated outline was published by PLI<sup>10</sup> (later expanded and supplemented in connection with a major PLI AIDS program held in New York City and San Francisco later during 1986).<sup>11</sup> Several participants in these programs submitted outlines and study materials which were published in these coursebooks.

Meanwhile, during the latter part of 1985 and 1986, the employment law issues generated by AIDS began to receive more intensive scrutiny in bar journals and law reviews. Perhaps the most wide ranging general overview was contained in a two-part treatment by John Parry, editor of the *Mental & Physical Disability Law Reporter* (an American Bar Association publication), treating AIDS employment issues within the conceptual framework of handicap discrimination law.<sup>12</sup> Following up on Parry's articles, the *Mental & Physical Disability Law Reporter* has integrated litigation reports on AIDS into its regular format.<sup>13</sup> Also notable among practitioner-oriented treatments was an article by William Kandel in the *Employee Relations Law Journal*.<sup>14</sup>

Student law review staffs discovered AIDS with a vengeance during 1985, and the result was publication of several student pieces on AIDS employment issues during 1986.<sup>15</sup> Some of these were narrowly focused on issues such as whether persons with AIDS would be treated as pro-

7. The second edition of Lambda's *AIDS Legal Guide* is scheduled to appear during 1987. Preparing a revised edition of a seminal work in such a rapidly changing area has proven a difficult task. As soon as the draft for a chapter is completed, some new decision or event of importance occurs.

8. AIDS AND THE LAW (ALI-ABA Feb. 1986).

9. AIDS IN THE WORKPLACE (BNA Mar. 1986).

10. EMPLOYMENT PROBLEMS IN THE WORKPLACE (PLI) (Litigation Course Handbook Series No. 305, 1986).

11. Leonard & Tanenbaum, *AIDS and Employment Law*, 7 LEGAL NOTES & VIEWPOINTS Q. (PLI) No. 1, 45 (Nov. 1986).

12. Parry, *AIDS as a Handicapping Condition, Part I*, 9 MENTAL & PHYSICAL DISABILITY L. REP. 402 (Nov./Dec. 1985); *Part II*, 10 MENTAL & PHYSICAL DISABILITY L. REP. 2 (Jan./Feb. 1986).

13. See, e.g., 10 MENTAL & PHYSICAL DISABILITY L. REP. 395 (Sept./Oct. 1986).

14. *Current Developments in EEO—AIDS in the Work Place*, 11 EMP. REL. L.J. 678 (Spring 1986).

15. See, e.g., Comment, *AIDS and Employment: An Epidemic Strikes the Workplace and the Law*, 8 WHITTIER L. REV. 651 (1986); Comment, *AIDS, and Employment Discrimination Under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons with Disabilities Act*, 20 U. RICH. L. REV. 425 (1986); Comment, *AIDS: Does It Qualify as a "Handicap" Under the Rehabilitation Act of 1973?*, 61 NOTRE DAME L. REV. 572 (1986); Comment, *Educating Through the Law: The Los Angeles AIDS Discrimination Ordinances*, 33 UCLA L. REV. 1410 (1986); Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274 (1986); Note, *Recent Developments: Public Health and Employment Issues Generated by the AIDS Crisis*, 25 WASHBURN L.J. 505 (1986); *Recent Developments, Employment Discrimination Against AIDS Victims—Shuttleworth v. Broward County Office of Management & Budget*, 9 HARV. J. L. & PUB. POL'Y 739 (1986).

tected handicapped persons under civil rights laws. This issue heated up significantly after publication of a Justice Department memorandum in June 1986,<sup>16</sup> which placed a new twist on handicap discrimination law by contending that discrimination motivated by nonhandicapping aspects of a handicapping condition would not be forbidden by section 504 of the Federal Rehabilitation Act of 1973,<sup>17</sup> a view which has been implicitly rejected by several courts since the memorandum's release<sup>18</sup> and was effectively repudiated by the Supreme Court in *School Board of Nassau County v. Arline*,<sup>19</sup> decided March 3, 1987, a case likely to generate a new stream of comments and articles.

Another development of 1986 was a series of legal newsletters devoted solely to AIDS issues. Bureau of National Affairs began publishing the bi-weekly *AIDS Policy & Law* newsletter in January 1986, soon to be followed by University Publishing Group's three-part project incorporating a journal, litigation reporter, and reference collection. Late in 1985, Lambda Legal Defense & Education Fund began publishing a monthly AIDS Update for its cooperating attorneys, and this became available for general subscription during 1986. The National Lawyers Guild formed an AIDS Task Force and began publishing a quarterly newsletter. The monthly *Lesbian/Gay Law Notes* published by the Bar Association for Human Rights of Greater New York has provided regular coverage of AIDS legal issues from 1984 onward, with this coverage coalescing into a distinct section of the newsletter during 1986. The *Law Notes* also includes a monthly bibliography of new law review articles and resources on AIDS.

Another potential AIDS source that may emerge during 1987 is a Sourcebook edited by faculty and students of Yale Law School, containing contributed articles and a detailed bibliography. The project stems from a full-day conference on AIDS held at Yale in February 1986.

The bibliography that follows lists articles and publications bearing on AIDS and employment issues. Some useful materials will, no doubt, have been overlooked because this has become an important topic for treatment in a wide variety of bar journals and practitioner-oriented publications, but anyone searching for coverage of the major issues incorporating a variety of viewpoints should find help here. Following the

16. DAILY LABOR REP. (BNA) No. 122, at D1 (June 25, 1986).

17. 29 U.S.C.A. § 794 (1985).

18. See *Cronan v. New England Tel. Co.*, 41 Fair Empl. Prac. Cas. (BNA) \_\_\_\_\_ (Mass. Super. Ct., Suffolk Co. 1986); *Shuttleworth v. Broward County Office of Budget & Management Policy*, 41 Fair Empl. Prac. Cas. (BNA) 406 (S.D. Fla. 1986); *Thomas v. Atascadero Unified School District* (C.D. Cal., No. 886-609AHS(BY)), decided Nov. 17, 1986.

19. 107 S. Ct. 1123 (1987), *affg*, 772 F.2d 759 (11th Cir. 1985) (elementary school teachers with tuberculosis).

listing of articles and study materials is a list of sources for regular periodical coverage of AIDS legal issues.<sup>20</sup>

Perhaps the best sources of background reading on the medical aspects of AIDS are Kulstad (ed.), *AIDS: Papers from Science, 1982-1985* (American Association for the Advancement of Science, 1986) and Cole & Lundberg (eds.), *AIDS From the Beginning* (Journal of the American Medical Association, 1986). These books anthologize significant articles on AIDS appearing in *Science* and the *Journal of the American Medical Association*, leading research journals, and also contain summary articles specially prepared to place the research papers in historical context. Also, the symposium on AIDS published by the *Hofstra University Law Review*<sup>21</sup> contains a medical overview. Virtually any bound book on AIDS medical issues becomes quickly obsolete on account of the rapid pace of research discoveries, but facts relevant to the fundamental issues presented for the workplace (especially transmissibility of the suspected viral agent) have not changed significantly since the period covered by these publications.

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20. In addition to the periodicals noted below, the *BNA Daily Labor Report* has provided consistently excellent coverage of AIDS employment issues since the fall of 1985 and is in many instances the best source for administrative rulings otherwise unpublished.

21. 14 HOFSTRA L. REV. 5 (1985).

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- AIDS: LEGAL ASPECTS OF A MEDICAL CRISIS (Law Journal Seminars-Press, 1985) (111 8th Avenue, Suite 900, New York, New York 10011) (coursebook for the first continuing legal education program on AIDS, held in October 1985 in New York City).
- AIDS LEGAL GUIDE (Lambda Legal Defense & Education Fund, Rubenfield, ed., 1984) (666 Broadway, 12th Floor, New York, New York 10012) (early effort to provide information for litigators coping with the problems of persons with AIDS; new edition in preparation).
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\*Omitted from this listing are articles dealing with torts litigation, quarantine proposals and other public health issues which do not bear directly on employment law. However, I have included articles on rights of school children with AIDS because many of the same handicap discrimination law issues found in employment are covered in these articles. I maintain an ongoing bibliographical cumulation of all the law-related writing on AIDS that comes to my attention, and would be happy to provide a current printout to anybody who writes to me for the information at New York Law School, 57 Worth Street, New York, New York 10013.

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