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AIDS, Employment and the Law

American Bar Association; AIDS Coordinating Committee

AIDS, EMPLOYMENT AND THE LAW [1]

Overview

Both employer [2] and employee [3] representatives who appeared before the Committee expressed deep concern for the rights of persons with HIV infection and for the rights and opinions of co-workers. There was near unanimity among witnesses who addressed labor and employment-related HIV issues that dissemination of accurate information and provision of educational opportunities for workers and employers would assist in preventing or minimizing potential workplace disputes. [4] Witnesses before the Committee also addressed current laws which protect people with handicaps from workplace discrimination.

Because there is no controlling precedent in many jurisdictions reaching the legal issues raised by AIDS and HIV infection in the workplace, many litigants will desire judicial resolution of their disputes. However, a number of witnesses expressed concern that a long dispute resolution process would pose a particular hardship for persons with AIDS or HIV-related illness for whom time is no longer a luxury. Indeed, one of the difficult challenges posed by the HIV crisis is the need to formulate a reasoned and responsible approach to the issue of HIV in the workplace, while at the same time remaining sensitive to the time constraints imposed by the disease.

Discussion

Generally, the scope of protection from workplace discrimination for people with contagious diseases is driven by an analysis

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1/ This article was first published as Chapter 11 (Employment) of AIDS: The Legal Issues (1988), a Discussion Draft of the American Bar Association, AIDS Coordinating Committee. It is reprinted here by permission. The entire document can be obtained from the American Bar Association in Chicago, Illinois.

2/ Testimony of Peter Spanos at 5.

3/ Testimony of Jordon Barab, AFSCME, at 145-46.

4/ Testimony of Peter Spanos at 22-33; testimony of Jordan Barab at 155; testimony of Arthur Leonard at 64.

of the risk of workplace transmission. Based upon current medical information regarding HIV transmission, CDC has issued a series of reports and recommendations regarding prevention of the spread of HIV. [5/] CDC's recommendations for handling the disease in the workplace are as follows:

> Other Workers Sharing The Same Work Environment. No known risk of transmission to co-workers, clients, or consumer exists from HTLV-III/LAV-infected workers in other settings (e.g., offices, schools, factories, construction sites). This infection is spread by sexual contact with infected persons, injection of contaminated blood or blood products, and by perinatal transmission. Workers known to be infected with HTLV-III/LAV should not be restricted from work solely based on this finding. Moreover, they should not be restricted from using telephones, office equipment, toilets, showers, eating facilities, and water fountains. Equipment contaminated with blood or other body fluids of any workers, regardless of HTLV-III/LAV infection status, should be cleaned with soap and water or a detergent. A disinfectant solution or a fresh solution of sodium hypochlorite (household bleach, see above) should be used to wipe the area after cleaning. [6/]

Thus, CDC has concluded that employees with HIV should not be excluded from the workplace based upon fear of HIV transmission.

5/ At the present time, there are three key reports from the standpoint of employment: (1) the November 15, 1985, Recommendations for Preventing Transmission of Infection in the Workplace; (2) the August 21, 1987, Recommendations for Prevention of HIV Transmission in Health-Care Settings; and (3) the January 29, 1988, Guidelines for Effective School Health Education to Prevent the Spread of AIDS.

6/ CDC Report, November 15, 1985, supra note 4. See also the Office of Personnel Management guidelines prohibiting adverse employment actions against HIV-infected persons because "'the kind of nonsexual person-to-person contact that generally occurs among workers and clients or consumers in the workplace does not pose a risk for transmission of [AIDS].'" OPM Guidelines, reprinted at 134 Cong. Rec. H1000-02 (Mar. 22, 1988).

Healthcare Workers

Based on experience with the transmission of Hepatitis B Virus (a blood-borne agent with considerably greater potential for communicability) and on medical evidence regarding the means by which HIV is transmitted, CDC also does not recommend that people with HIV be excluded from healthcare positions. CDC has also not recommended routine testing of healthcare workers -- even workers involved in invasive procedures. Rather, CDC has recommended individualized, case-by-case decision-making with respect to whether a particular healthcare worker known to have HIV should continue to perform patient care duties and invasion procedures. Some of the key excerpts of the CDC's recommendations are as follows:

> Adherence to recommendations in this document will minimize the risk of transmission of HIV and other blood-borne pathogens from healthcare workers to patients during invasive procedures. Since transmission of HIV from infected healthcare workers performing invasive procedures to their patients has not been reported and would be expected to occur only very rarely, if at all, the utility of routine testing of such healthcare workers to prevent transmission of HIV cannot be assessed. If consideration is given to developing a serologic (blood) testing program for healthcare workers who perform invasive procedures, the frequency of testing, as well as the issues of consent, confidentiality, and consequences of test results -- as previously outlined for testing programs for patients -- must be addressed.
>
> The question of whether workers infected with HIV -- especially those who perform invasive procedures -- can adequately and safely be allowed to perform patient care duties or whether their work assignments should be changed must be determined on an individual basis. These decisions should be made by the healthcare worker's personal physician(s) in conjunction with the medical directors and personnel health service staff of the employing institution or hospital. 7/

American Medical Association ("AMA") testimony before the Committee indicated that, under AMA guidelines, a distinction should

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7/ CDC Report, August 21, 1987, supra note 4.

be drawn between risk of HIV transmission from healthcare worker to patient and transmission from patient to worker:

> The AMA's position is very clear. Doctors must not refuse to treat patients because of their HIV status.
>
> The medical profession has a long position of treating patients without regard to their own health. AIDS is no exception.
>
> Finally, what is a doctor's obligation who is infected toward the patient? They are not to engage in activities that create a risk of transmission of the disease. 8/

Thus, according to the AMA, healthcare workers may be asked to risk a theoretical exposure to their own health, but they may not risk even a minimal exposure to the health of their patients. Of course, the rights of healthcare workers to practice in particular positions will be governed by applicable state and federal laws governing employment and regulating the medical profession.

Institutional and Correctional Workers

Testimony before the Committee also addressed the issue of workers in prisons and mental health institutions who interact daily with people with behavioral problems not encountered in the ordinary working environment. A union representative noted that workers are concerned about their own exposure to violence and unsanitary conditions in such institutions. 9/ It appears that the universal precautions recommended by CDC could reduce the risk of exposure to HIV from either violence or unsanitary conditions, and fears regarding such problems can often be allayed by providing the most up-to-date scientific information. Not all institutions, however, are providing workers with accurate information about HIV and training in universal precautions. 10/

8/ Testimony of Dr. David Orentlicher, AMA, at 107.

9/ Testimony of Jordan Barab at 151-52.

10/ Id. at 133-35.

Handicap Discrimination Laws

Federal and state laws that prohibit discrimination on the basis of handicap are the best vehicles currently in place to address HIV-related discrimination. Section 504 of the federal Rehabilitation Act of 1973 (the "Act") prohibits discrimination on the basis of handicap. [11] The Act applies to the federal government, federal contractors, and those entities receiving federal financial assistance. [12] Under the Act, such entities may not discriminate against an "otherwise qualified individual with handicaps". [13] Regulations implementing the Act explain that discrimination is prohibited against any employee or applicant "because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified". [14]

11/ Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, provides in 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 subjected to discrimination under any program or activity receiving federal financial assistance . . . .

12/ ABA policy supports federal legislation prohibiting HIV-related discrimination in both the public and private sectors. See Summary of Action of the House of Delegates, 1988 Mid-Year Meeting 26-27 (February 8-9, 1988) (ABA Report No. 115A). See generally Comment, Protection of AIDS Victims from Employment Discrimination Under the Rehabilitation Act, 1987 U. Ill. L. Rev. 355 (1987).

13/ A "handicapped individual" is defined in 29 U.S.C. Section 706(7)(B) as:

> Any person who (i) has a physical or mental impairment which substantially limits one or more of such a person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

14/ 41 C.F.R. Section 60-741.4(a). Regulations adopted by the Department of Health and Human Services (HHS) state that "physical or mental impairment" means:

(Footnote Continued)

Under the Rehabilitation Act, therefore, an otherwise qualified handicapped individual cannot be subjected to adverse treatment solely because of his or her handicap.[15] The Office of Federal Contract Compliance Programs (OFCCP) has indicated that AIDS fits the Act's definition of "handicap," and several cases of AIDS discrimination have been successfully brought under the statute.[16] In the public school setting, two federal district courts have held that children who test positive for HIV, without displaying any symptoms or parasitic diseases, fall within the Act's definition of handicapped persons[17] (see Chapter 13), and, in a challenge to a testing program for Department of State employees, a federal district court held that asymptomatic, HIV-infected individuals were covered under the Act.[18]

(Footnote Continued)

> (A) [A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs, respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 45 C.F.R. Section 84.3(j)(2(i) (1985).

Individuals with handicaps are "otherwise qualified" if, with reasonable accommodation, they can satisfy all the requirements for a position or services. See, discussion infra, at 162-63.

15/ Thus, a court first determines that a plaintiff is a handicapped individual under the Act and then that the plaintiff is "otherwise qualified" for the particular position at issue. Local 1812, AFGE v. United States Dep't of State, 662 F. Supp. 50 (D.D.C. 1987) (both Dept. of State and Local 1812 agreed that HIV infection was a handicap under Section 504).

16/ See, infra note 2.

17/ Thomas v. Atascadero Unified School Dist., 662 F. Supp. 376 (C.D. Cal. 1987); Ray v. School Dist. of Desoto County, 666 F. Supp. 1524 (M.D. Fla. 1987).

18/ Local 1812, AFGE v. United States Dept. of State, 662 F. Supp. 50 (D.D.C. 1987). Employers will probably not be able to assert as a defense to a charge of AIDS discrimination that a person with AIDS is

(Footnote Continued)

The fact that HIV infection is communicable does not remove it from the protection of the Act. As the Supreme Court made clear in School Board of Nassau County v. Arline, [19] communicable diseases can be protected handicaps under the Act. Under the "otherwise qualified" framework of the Act, courts analyze individual situations presented by people with contagious diseases to determine whether a significant risk of workplace transmission warrants the employer's actions.

The Arline Case

In School Board of Nassau County v. Arline, the United States Supreme Court considered the case of a teacher who was fired because she had tuberculosis that had reentered an infectious state. Writing for a seven Justice majority, Justice Brennan held that an individual with a contagious disease who manifested the symptoms of that disease was a handicapped person protected under the Rehabilitation Act, and that discrimination based on fear of contagiousness of the disease was actionable under the Act. [20]

In a footnote, the opinion majority noted that it was not deciding the issue of whether HIV-infected people are protected under

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(Footnote Continued)
not otherwise qualified for a position because their customers prefer dealing with people without AIDS. Such a defense has not been successfully asserted as a defense to other forms of discrimination. See, e.g., Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971).

19/ 107 S. Ct. 1123 (1987).

20/ In so holding, the Court explicitly rejected the reasoning of the United States Department of Justice, which had argued -- in a 1986 memo and in an amicus brief before the Court -- that discrimination based on fear of contagiousness of an impairment, as compared to discrimination based on the impairment itself, was not actionable. In testimony before the Committee, Assistant Attorney General Charles Cooper noted that the Supreme Court's opinion in Arline will necessarily govern on this point. Testimony of Charles Cooper, Asst. Attorney General, U.S. Justice Department, at 84-85. The Presidential Commission has called on the Justice Department to rescind its 1986 memorandum. See Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic 123 (June 24, 1988).

the Rehabilitation Act because the facts before it did not require it to reach that situation. [21] Both before and after the Supreme Court's decision in Arline, however, lower courts have held that people with AIDS, as well as those infected with HIV, are covered as individuals with handicaps, both under Section 504 of the Federal Rehabilitation Act and under state statutes. [22]

The fact that people with contagious diseases are protected under the Rehabilitation Act does not mean that an employer must disregard the fact that an applicant or current employee has a contagious disease. Section 504 also requires that an individual be "otherwise qualified" for a particular position. To be "otherwise qualified," individuals with a contagious disease must not pose a significant risk of transmitting the disease to others. If such a risk exists, and cannot be eliminated by reasonable accommodation, then that person is not "otherwise qualified" under the statute and is therefore not protected in the particular job. [23]

Indeed, Congress recently amended the Rehabilitation Act to make this clear. In the Civil Rights Restoration Act of 1988, which was passed by both Houses over the President's veto on March 22, 1988, Congress added a provision regarding individuals with contagious

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21/ The Court noted:

> This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness a handicapped person as defined by the Act. (emphasis added)

See supra note 18, at 1128 n. 7.

22/ See, e.g., Chalk v. United States Dist. Court of Cal., 840 F.2d 701 (9th Cir. 1988); Thomas v. Atascadero Unified School Dist., 662 F. Supp. 376 (C.D. Cal. 1987); Ray v. School Dist. of Desoto County, 666 F. Supp. 1524 (M.D. Fla. 1987); Cronan v. New England Tel. Co., 41 FEP 1273 (Mass. Sup. Ct. 1986) (suit under Mass. Fair Employment Practices Act); Local 1812, AFGE v. United States Dep't of State, 662 F. Supp. 50 (D.D.C. 1987) (both Dept. of State and Local 1812 agreed that HIV infection was a handicap under Section 504). See also AMA testimony before the committee.

23/ See Arline, supra note 18, at 1123, 1131 and see also supra note 17.

diseases and infections. This provision states that, for purposes of Sections 503 and 504 of the Rehabilitation Act (as such sections relate to employment), the term "individual with handicaps" does not include

> an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job. 24/

The discussion in the House of Representatives makes clear that the provision was viewed as essentially restating current law, but was thought necessary to allay the fears of employers who were reacting to the HIV crisis. As explained by Congressman Edwards, the floor manager in the House:

> This amendment is necessary solely to allay the fears of some employers who have misinterpreted the Arline decision as requiring them to take unwarranted risks in hiring individuals with contagious diseases and infections. This amendment therefore places the requirements of current law into statute. It does so by codifying the "otherwise qualified" framework for courts to utilize in these cases. . . .
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> The framework to be used was explained by the Supreme Court in School Board of Nassau County versus Arline. It requires a medical assessment of whether exclusion is necessitated by the degree of risk involved in the particular situation. 25/

Congressman Jeffords, the Republican sponsor, summarized the provision as follows:

> [This provision] provides that persons with contagious diseases and infections remain protected in their jobs under the Rehabilitation Act if they do not pose a direct threat to the health or safety of others and are able to perform the essential duties of their jobs. This determination would require a case-by-case analysis based on

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24/ S. 557, 100th Cong., 2d Sess.

25/ 134 Cong. Rec. H584 (March 2, 1988).

> reasonable medical judgments. In other words, there would have to be a determination that there is a significant risk of transmission of the disease or infection to others in the workplace, a risk which could not be eliminated by reasonable accommodation. With respect to persons with contagious diseases and infections, this amendment adopts an approach consistent with that taken in 1978, when Congress addressed the concerns of employers regarding the Rehabilitation Act's coverage of alcohol and drug abusers. [26]

Thus, this amendment should not change the current approach taken by the courts in cases of discrimination based on AIDS or HIV infection. A court will still have to determine whether an individual is "handicapped" under the traditional three-part definition of the statute, [27] and then decide whether the person is "otherwise qualified" for the particular position he or she seeks to hold. As various members of the House and Senate explained, an employee would remain qualified if there were no significant risk of transmission of a disease to others and there were no health problems that would disable the employee to the extent that he or she could not perform the essential duties of the job.

"Otherwise Qualified" Requirement

Once it has been determined that a person meets the Act's definition of a handicapped person, the analysis shifts to whether the person is "otherwise qualified" for the employment.

The Supreme Court's Arline opinion sets forth guidelines for this inquiry:

> [T]he District Court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if Section 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes or unfounded fear, while giving appropriate weight to such legitimate concerns of

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26/ 134 Cong. Rec. H571 (March 2, 1988).

27/ See supra note 12.

grantees as avoiding exposing others to significant health and safety risks. [28]

By footnote, the Court further clarified that:

> A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk. The Act would not require a school board to place a classroom teacher with active, contagious tuberculosis in a classroom with elementary school children. [29]

The Supreme Court added that courts engaging in this analysis normally should defer to the reasonable medical judgments of public health officials and consider such factors as duration and severity of condition, together with likelihood of transmission.

Based on these tests, every published case dealing with a person with AIDS or HIV infection has found the individual to be "otherwise qualified" under the Act, with the exception of a class action challenge to a routine testing program for overseas foreign service personnel. [30]

When the progress of a disease has reached the point where the employee can no longer report for work and perform substantial activities -- and the employee is therefore determined not to be "otherwise qualified" -- non-discrimination laws do not require that the employer maintain the employee on the payroll. However, employers are required to treat comparably all employees who have ceased to be able to work due to medical conditions. Thus, persons with AIDS or HIV may be entitled to short- or long-term disability benefits, maintenance of life or health insurance, and COBRA rights to continued health benefits. (See Chapter 9.)

28/ See Arline, supra note 18 at 1131.

29/ Id. at n. 16.

30/ See supra notes 17 and 18, and infra note 30. See also written testimony of AMA before the AIDS Coordinating Committee (Section 8: Individuals with HIV infection are generally otherwise qualified).

The "Reasonable Accommodation" Obligation

The Rehabilitation Act requires an employer to provide reasonable accommodation for handicapped workers. [31] State handicap discrimination laws have been similarly interpreted.

An analysis of reasonable accommodation for people with AIDS or HIV infection will draw on experience with other handicaps, such as heart conditions, amputated limbs, and blindness. What constitutes reasonable accommodation will vary depending upon the circumstances presented, including both the individual's condition and the job in question. Reasonable accommodation in the HIV context might encompass flexibility regarding working hours, time off for medical visits and treatment, and some restructuring of job duties. Reasonable accommodation might also entail the reassignment of duties if justified by the individual's condition and CDC guidelines.

However, it does not appear that an employer can comply with handicap discrimination laws by moving an HIV-infected individual from one job to another (even when there is no pay reduction) in order to deal with the anxieties of co-workers or customers. In Chalk v. Orange County Department of Education, [32] the school board reassigned a classroom teacher with AIDS to an administrative position coordinating grant applications. The District Court refused to grant the teacher a preliminary injunction against the reassignment. The Ninth Circuit Court of Appeals reversed the District Court and granted an injunction placing the teacher back in the classroom. [33] The court held that the overwhelming consensus of medical opinion supported the conclusion that the teacher could not transmit his disease on the job. Moreover, despite the fact that the teacher suffered no monetary loss in the reassignment, the court noted that he nevertheless suffered irreparable psychological and emotional injury by being denied contact with the children and being placed in an administrative job which he found distasteful.

31/ See 41 C.F.R. Section 60-741.6(d).

32/ Civ. 87-5169 WPG (S.D. Cal. 1987). Doe v. Orange Co.

33/ Chalk v. United States Dist. Court of Cal., 840 F.2d 701 (9th Cir. 1988).

State Law

Apart from the Rehabilitation Act, which applies only to federally funded programs, forty-two states and the District of Columbia have passed laws that prohibit private employers from discriminating against a person based on a handicap. [34/] An additional five states have laws prohibiting handicap discrimination by public employers. Although these laws differ in their definition of "handicapped person," and there have been only a few HIV discrimination cases decided under these laws, the current trend in judicial interpretation suggests that most state laws would prohibit employment discrimination against persons with AIDS and HIV infection.

In fact, a survey by the National Gay Rights Advocates, conducted in order to assess the applicability of state handicap laws to HIV, concluded that 33 states and the District of Columbia will accept HIV-related discrimination complaints or have already declared that their state statutes prohibit such discrimination. [35/] For example, in People v. 49 West 12th St. Tenants Corp., [36/] a New York court upheld the view that AIDS is a protected disability under the New York handicap discrimination law.

In addition, laws specifically prohibiting employment discrimination against people with HIV, or limiting employer testing for HIV, have been passed by California, Florida, Massachusetts and

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34/ ABA policy supports enactment of federal legislation prohibiting HIV-related discrimination in both the public and private sectors, see supra note 11.

35/ See, e.g., Department of Fair Employment and Hous. Comm'n. v. Raytheon Co., [Feb. 13, 1987] Daily Labor Rep. (BNA) No. 29, at E-1 (Cal. Fair Employment and Hous. Comm'n Feb. 5, 1987); Cronan v. New England Tel. Co., [Sept. 16, 1986] Daily Labor Rep. (BNA) No. 179, at D-1 (Mass. Super. Ct. Aug. 15, 1986); Shuttleworth v. Broward County, 2 Empl. Prac. Guide (CCH) Sec. 5014 (Feb. 1986). The survey was done by asking Human Rights Commissions whether their handicap discrimination laws would protect people with AIDS. Two Commissions reported they would not because their laws specifically excluded those with contagious diseases.

36/ No. 43604/83 (Sup. Ct., N.Y. Co. 1983) N.Y. L.J. Oct. 17, 1983, at 1.

Wisconsin, [37] and by various cities, including Washington, D.C., Austin, Texas, and Los Angeles, San Francisco, Berkeley, Oakland, San Jose and West Hollywood, California. (See Chapter 12.)

There are still several states that do not have handicap discrimination laws. Moreover, not all employers are covered by the federal handicap laws, which apply only to the government itself, to federal contractors, to most subcontractors to federal contractors, and to entities receiving federal financial assistance.

Distinguishing HIV-Related Discrimination From Other Discrimination

As the discussion above indicates, laws prohibiting employment discrimination focus on the ability of the individual to do the job in question. This is the only rational and relevant concern when the issue is race, sex, or national origin discrimination. However, prohibiting discrimination on the basis of HIV infection, or other fatal diseases raises other issues. Such laws may prohibit an employer from firing or refusing to hire a person with HIV even if the person may impose significant financial burdens on the company, and even though that person may not be able to perform the job in question for a long period of time. [38] Some employers, especially those with small businesses, claim that employee healthcare costs could force them out of business. However, recent trends to shift some of the burden of increased healthcare costs to employees may effect the distribution of costs associated with HIV. (See Chapter 9.)

37/ Cal. Health & Safety Code Sections 199, 20-199 (West Supp. 1986); Fla. Stat. Section 381.606 (West 1986), 3 Empl. Prac. Guide (CCH) at 21,880 (May 30, 1985); Mass. Gen. L., ch. 11, Section 70F (July 15, 1986); Wis. Stat. Section 103.15 (West 1988); 3 Empl. Prac Guide CCH at 29,130 (July 30, 1985).

38/ In some situations a person able to perform a job only for a short period of time may be deemed not otherwise qualified for the particular situation.

Applicability of Laws Prohibiting Discrimination on Account of Sex or Sexual Orientation

Federal Laws

Title VII of the Civil Rights Act of 1964 and most state anti-discrimination laws prohibit discrimination on the basis of "sex". Claims that this terminology also applies to discrimination based upon sexual orientation have generally been rejected.[39] Thus, claims seeking to protect "high risk" persons, on a sexual orientation theory of disparate impact discrimination, are not likely to succeed.[40] However, because many more males and minorities than females and white Caucasians, have been infected with HIV in the United States, a case will probably emerge in which it is alleged that categorically excluding all people with HIV is sexual and racial discrimination because it has a disparate impact on males and minorities.

National Origin Discrimination Against Haitians and Africans

In the early years of HIV publicity, Haitians were perceived to be a "high risk group".[41] While CDC no longer categorizes Haitians as such, there still may be a lingering public perception that Haitians are more likely to be HIV carriers. Further, recent medical reports indicate that HIV has been spreading rapidly in central Africa. Since the CDC findings to date do not provide a basis for excluding HIV-infected employees from the workplace, the belief -- whether accurate or inaccurate -- that persons of certain national origins are more apt to be HIV carriers is not a defense to an otherwise legitimate national origin discrimination claim under Title VII.

39/ See, e.g., DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979); Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979).

40/ Compare, New York City Transit Authority v. Beazer, 440 U.S. 568 (1979).

41/ The Committee prefers not to use the term "high risk group" since individual behavior and not group membership determines the risk of HIV infection.

State and Local Laws

A number of states and municipalities (e.g., Wisconsin and the District of Columbia) prohibit discrimination on the basis of sexual orientation. The exclusion of all persons who are, or are perceived to be, at "high risk" for HIV infection will probably violate such laws. Most, if not all, jurisdictions prohibiting discrimination on account of sexual orientation also have laws prohibiting handicap discrimination. In these jurisdictions, sexual orientation laws provide a second basis of potential liability for discrimination against persons with HIV.

A greater number of states have handicap discrimination laws than have sexual orientation laws. While not all persons in "high risk groups" have HIV, a member of a "high risk group" excluded from a job may have a plausible claim if he or she can prove that the discrimination occurred because he or she was perceived to be infected This is a cognizable basis for a claim under the federal non-discrimination handicap law and most state handicap laws. Thus, handicap non-discrimination laws will probably support the claim of a person in a "high risk group" who was discriminated against -- if he or she can prove that the discrimination was not based solely on sexual orientation, but rather on a perception of handicap.

HIV Testing

Fourth Amendment Objections to Mandatory Testing

Compulsory blood testing "plainly involves the broadly conceived reach of a search or seizure under the Fourth Amendment". 42/ Once a court determines that compulsory blood testing raises Fourth Amendment issues, it will then consider whether a particular application is reasonable under the Fourth Amendment.

In Glover v. Eastern Nebraska Community Office of Retardation, the United States District Court for the District of Nebraska, pursuant to jurisdiction under 28 U.S.C. Section 1331, held that the policy of a Nebraska State agency, which required certain employees in a community-based mental health setting to undergo mandatory testing for HIV and HBV (the virus of hepatitis B), violated the Fourth Amendment. The Court concluded that the state agency could not require such testing because while "pursuit of a safe work

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42/ Schmerber v. California, 384 U.S. 757, 767 (1966).

environment for employees and a safe training and living environment for all clients is a worthy one, the policy does not reasonably serve that purpose. There is simply no real basis to be concerned that clients are at risk of contracting the AIDS virus at the workplace." 43/

Section 504 Requirements

Regulations issued pursuant to Section 504 prohibit wide-ranging inquiries into an applicant's handicap status. These regulations apply to employer requests for HIV testing. Under the regulations, an employer "may not conduct a pre-employment medical examination or may not make pre-employment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap". 44/ An employer may, however, make pre-employment inquiries into "an applicant's ability to perform job-related functions". Id. An employer covered by the Act could not, therefore, require that an individual be tested for HIV unless that inquiry could be shown to be "job-related" under current CDC guidelines. 45/

The regulations also provide that an employer may condition an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, provided that such an examination is required of all new employees, regardless of handicap, and "the results of such an examination are used only in accordance with the requirements" of the Act. 46/ Thus, any action taken on the basis of any medical test, including HIV tests, must be

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43/ 46 Emp. Prac. Guide (CCH) Paragraph 37,909, at 51,727 (D. Neb. Mar. 29, 1988). The court noted that "[t]he medical evidence is overwhelming that the risk of transmission of the AIDS virus in the ENCOR workplace is trivial to the point of non-existence". Id.

44/ 45 C.F.R. Section 84.14(a) (1987).

45/ Although the regulations address pre-employment medical examinations, the argument has been made that the same standards exist with regard to medical examinations that are made a condition of continued employment. The argument is that it is irrational to forbid employers from conducting pre-employment medical examinations, but then to permit the same testing the day after employment commences as a condition of maintaining employment.

46/ 45 C.F.R. Section 84.14(c) (1987).

consistent with the Act's prohibition of discrimination against otherwise qualified handicapped individuals.

Various courts have applied these regulations in the context of medical examinations.[47] Some states have similar laws which limit an employer's ability to test for HIV. (See Chapter 7.)

Confidentiality

Given the negative public perception of AIDS and HIV infection, publication of reports that an individual has tested positive for HIV or has AIDS is potentially actionable as defamation or as an invasion of privacy.[48] (See Chapter 8.)

Truth is a defense to defamation, but it does not serve as a defense to a privacy claim. While employers might be able to argue successfully for a limited privilege of disclosure, the privilege will be dissipated and lost by wholesale communication. Given the CDC's conclusions regarding the minimal risk of HIV transmission in the workplace, it would be difficult for an employer to justify disclosing HIV-related information about an employee.

Indeed, an employer may risk liability by advising an employee's supervisor about the condition because, under current CDC guidelines, the supervisor may have no need to know of the condition. One rationale for such notification might be that it is in furtherance of the "reasonable accommodation" that might be necessary if and when the health and stamina of the employee declines.[49] This rationale,

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47/ See, e.g., Bentivegna v. United States Dep't of Labor, 694 F.2d 619 (9th Cir. 1982) (prohibiting inquiry of blood sugar levels of diabetics); Doe v. Syracuse Schools Dist., 508 F. Supp. 333 (N.D.N.Y. 1981) (prohibiting inquiry as to whether teacher had a record of physical or mental impairment).

48/ In a recent case, a California court granted an injunction against the implementation of a pre-employment drug-testing program because such a program may interfere with the California constitutional right to privacy. Wilkinson v. Times Mirror Books, No. 636361-3 (Cal. Super. Ct. 1988). Thus, if testing for drugs violates the right to privacy, testing for HIV would probably similarly invade the right to privacy in California.

49/ Under the Section 504 regulations, information obtained in (Footnote Continued)

however, applies only in the case of an employee with AIDS or ARC and may not apply in the case of an employee who is merely HIV positive and has yet to demonstrate any symptoms. Such disclosures may well require the employee's consent.

Other HIV Test-Related Liability

Given the CDC recommendations and the application of discrimination laws, it appears that employers who are uninformed about their employees' HIV status reduce the risk of liability for defamation and invasion of privacy claims. (See Chapter 8.) Moreover, an employer who tests employees for HIV -- if that were found to be legitimate -- assumes other potential liabilities. For example, if an employer erroneously advises an employee of a false positive test result (a situation that can easily arise if only a single ELISA test is performed), and the employee on further testing turns out to be HIV negative, an intentional or negligent infliction of emotional distress claim might well be brought.

Conversely, should the employer inadvertently fail to inform an employee of a positive test result (presumably after two ELISA tests and a corroborating Western Blot test is performed, in accord with CDC recommendations), the employer may be vulnerable to a negligence claim by the employee and possibly third parties. 50/

A claim for negligent or intentional infliction of emotional distress might also be brought against an employer who callously informs an employee that the employee is HIV positive without providing any counseling or support.

To the extent employers are concerned that a failure to test may render them liable to other employees or customers,

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(Footnote Continued)
accordance with the section governing allowable medical examinations must be collected and maintained on separate forms and must be accorded confidentiality as medical records. Disclosure is allowed only insofar as that "[s]upervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations". 45 C.F.R. Section 84.14(d)(1).

50/ See, e.g., Dornak v. Lafayette General Hosp., 399 So. 2d 168 (La. 1981) (duty to disclose TB); Wojcik v. Aluminum Co. of America, 18 Misc. 2d 740, 183 N.Y.S.2d 351 (Sup. Ct. N.Y. Co. 1959) (wife states claims against employer for failure to disclose TB).

Kozup v. Georgetown University, [51] suggests that adherence to CDC guidelines may bar any such claims. In that case, a federal district court granted summary judgment to a hospital and blood bank which provided HIV-tainted blood transfusions to a premature infant, holding that the defendants followed the procedures dictated by the medical information available at the time of the incident.

ERISA

Section 510 of ERISA [52] prohibits employer action against current employees to deprive them of benefits under ERISA-protected plans. Health insurance is clearly an ERISA-covered benefit. Unlike the handicap discrimination laws, which do not apply universally, ERISA applies to all employers who maintain employee benefit plans. Accordingly, an employer who is not otherwise prohibited from engaging in HIV-related discrimination may be prohibited from terminating a current HIV-positive employee for the purpose of avoiding medical care costs. [53]

Financial Risk to Self-Insured Employer

Since under ERISA an employer cannot terminate a person with HIV in order to avoid providing expensive insurance benefits, an employer must be prepared to deal with the cost should an employee become infected with HIV. (See Chapter 9.)

While the law of averages may make self-insurance a prudent risk for most medical conditions in even relatively small groups, an employer's actuarial assumptions may be inadequate to deal with the catastrophic cost of multiple cases of HIV. Therefore, those employers that do not have an insured health plan may be at financial risk.

51/ 663 F. Supp. 1048 (D.D.C. 1987).

52/ 29 U.S.C. Section 1140.

53/ See, e.g., Folz v. Marriott Corp., 594 F. Supp. 1007 (W.D. Mo. 1984); Kross v. Western Elec. Co., 701 F.2d 1238 (7th Cir. 1983); State Div. of Human Rights v. Xerox Corp., 65 N.Y.2d 213, 480 N.E.2d 695 (N.Y. 1985); Chrysler Outboard Corp. v. Wisconsin Dep't. of Indus. 4 DFEP Cases 344 (1976).

Options available to such employers include: (1) the purchase of "stop loss" insurance to cap exposure in a given employee's case (or to be applied generally); (2) policies with a lifetime or occurrence limitations on the dollar amount of care provided; (3) a waiting period for coverage to be effective, or (4) a uniformly enforced denial of coverage for pre-existing conditions. It is questionable whether setting employer caps or exclusions specific to HIV treatment (e.g., lower lifetime cap, denial of coverage or denial of reimbursement for experimental drugs such as AZT) are permissible if handicap discrimination laws apply. If such mechanisms are instituted after a case of HIV is diagnosed, ERISA problems are likely.

Unemployment Insurance, Workers Compensation, and Social Security

In his paper "AIDS in the Workplace," Professor Arthur Leonard, who testified as a witness before the ABA AIDS Coordinating Committee, offers a concise summary of HIV-related legal developments in Unemployment Insurance, Workers Compensation and Social Security laws and regulations, as follows:

> Employees who are discharged solely because of their medical condition at a time when they are physically able to work are undoubtedly eligible for unemployment insurance benefits, since their discharges could not be said to be for "just cause" or "misbehavior" on the job, the usual bases of disqualification after an involuntary termination of employment. The same should be true of individuals -- such as relatives or close friends of persons with AIDS -- who are not infected but who lose their jobs because of AIDS panic. Caring for persons with AIDS may also give rise to valid claims. In an unpublished 1985 decision, an administrative judge in California ruled that the life partner of a person with AIDS was eligible for unemployment benefits after he resigned his job in order to take care of his dying partner.
>
> Persons with AIDS are probably not entitled to Workers Compensation benefits. To be eligible, employees would have to prove that this illness resulted from work-related transmission of HIV. However, if knowledge about AIDS advances to the point of establishing cofactors for development of medical complications and such cofactors are shown to be work related, Workers Compensation might enter the picture. (emphasis in original)

Eligibility for Social Security Disability Insurance benefits for those actually diagnosed with AIDS has been provided for by special regulation, under which AIDS is considered presumptively disabling. In cases falling short of the CDC definition, proof of actual disability is still required of the applicant for benefits. The CDC is working on a surveillance definition for ARC, which may provide a basis for extending presumptive disability coverage further. 54/

Labor-Management Relations Law

An employer confronted by employees who refuse to work with a co-worker who has AIDS, or who is HIV positive faces a potentially difficult dilemma. The employee with AIDS or HIV may be protected against any adverse employment action by handicap discrimination laws, while the complaining employee theoretically may be protected against any adverse employment action by Section 7 of the National Labor Relations Act, 29 U.S.C. Section 7 ("NLRA"). As one witness who appeared before the Committee speculated, "Employers may face the prospect of employees claiming that they are engaging in protected concerted activity under Section 7 of the National Labor Relations Act, by refusing to work with AIDS sufferers." 55/ The same witness reported, however, that his review showed no reported cases involving workers who had invoked Section 7 based on fear of contracting HIV.

The Committee heard no testimony suggesting that refusal to work with infected individuals, or that employer punishments for such refusals, were significant workplace issues. Problems, it appears, are being resolved by education concerning the minimal risk of contracting HIV through the usual workplace exposures.

54/ Leonard, AIDS in the Workplace, in H. Dalton and S. Burris, AIDS and the Law (1987), at 119-20 (citations omitted).

55/ Written testimony of Peter Spanos at 6-7. Such fears could be generated or exacerbated by works such as the recent Masters & Johnson publication. W. Masters, V. Johnson & R. Koloday, Crisis Heterosexual Behavior In The Age of AIDS (1988). Although the book has been criticized by researchers, it is likely to contribute to public fear about HIV.

Concerted Activity Protection

Two statutes protect workers engaged in concerted activities regarding safety matters -- Section 7 of NLRA and Section 502 of the Labor Management Relations Act (LMRA). Section 7 provides in relevant part: "Employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." [56] Section 502 protects "quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees . . . ." [57]

The NLRB, in interpreting Section 7, has protected concerted employee action when the employees had a "genuine concern" over safety. A close reading of the reported cases by two employment experts who appeared before the AIDS Coordinating Committee led both to conclude that an employee's subjective good faith belief that a dangerous condition exists may be sufficient to invoke the protections of Section 7, whether or not there is or may be objective justification for the fear. [58] In other words, even in the absence of any scientific basis for concern, the employee's genuine or good faith fear of HIV could be deemed sufficient to find the concerted action protected under Section 7.

On the other hand, both witnesses conclude that reported cases interpreting Section 502 apply an objective standard. Specifically, in Gateway Coal Co. v. United Mine Workers, [59] the Supreme Court held that a condition must in fact be abnormally dangerous such that the employee can show "ascertainable objective evidence supporting the conclusion that an abnormally dangerous condition for work [exists]". [60] The NLRB, applying Gateway Coal, has adopted an objective test of "reasonableness" under Section 502. [61]

56/ 29 U.S.C. Section 157.

57/ 29 U.S.C. Section 143.

58/ Testimony of Peter Spanos at 7-9; Testimony of Arthur Leonard at 62-63.

59/ 414 U.S. 368 (1974).

60/ Id. at 387 (citation omitted).

61/ Written testimony of Peter Spanos at 9-10, citing

(Footnote Continued)

Application of the Occupational Safety and Health Act ("OSHA") produces a result similar to that reached under Section 502 of the LMRA. OSHA protects an employee's good faith refusal to work if "(1) a reasonable person would conclude that there is a real danger of death or serious injury in the situation, and (2) there is insufficient time to eliminate the danger through resort to regulatory enforcement channels (i.e., an OSHA complaint)". 62/

Both witnesses who addressed this issue before the AIDS Coordinating Committee testified that they preferred the "objective reasonableness" standard under the OSHA and Section 502 LMRA tests to the "good faith" standard under Section 7 of the NLRA. One witness concluded:

> In overall comment, while the courts may be sensitive to workers' genuine anxiety about co-workers with AIDS, I believe that where the employer provides the workers with accurate, current medical information, observes approved operating procedures, and offers the workers the opportunity to reconsider any work refusal, their continued refusal should be unprotected under Section 7, Section 502, OSHA regulations, or state law. Clearly, however, the conflicting standards will pose a serious dilemma for some employers. 63/

Such a case has not, as yet, actually been reported and may prove to be more theoretical than real. Furthermore, there may be little meaningful distinction in the application of these two tests to an HIV-related dispute. The analysis of cases in this area is often quite fact specific and the outcome may turn on the evaluation of the actual risk and the motivation of the workers.

Moreover, a national union safety and health representative testified that refusals to work with infected co-workers had occurred, but that all such situations in his experience had involved a lack of

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(Footnote Continued)
Daniel Construction Co., 1983 NLRB Dec. (CCH) Paragraph 15,763 (July 13, 1983); Johnson Stewart-Johnson Mining Co, 1982-83 NLRB (CCH) Paragraph 15,089 (Aug. 4, 1982).

62/ Testimony of Peter Spanos at 14-15, citing Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980).

63/ Id.

training. 64/ He further testified that if discipline were imposed, the union would protect both workers, if possible. However, in the event that such a position were impossible, the union, he believed, would take the part of the infected union member: "But luckily," he testified, "we haven't come to that yet." 65/

Immediately following the AIDS Coordinating Committee hearings, the United States District Court for the District of Nebraska recognized that workers with HIV pose no danger to their co-workers and therefore found that the imposition of mandatory HIV tests for public employees constituted an unreasonable search and seizure proscribed by the Fourth Amendment -- unreasonable because, in the court's words, "There is simply no real basis to be concerned that clients (co-workers) are at risk of contracting the AIDS virus at the workplace." 66/

The lack of cases in this area suggests that workplace HIV education and HIV-related collective bargaining provisions may be the best tools for preventing litigation over employee concern about working with HIV positive co-workers.

Summary of Salient Questions

Are all people with HIV, including those who are asymptomatic, protected under the federal Rehabilitation Act as part of the three-part definition of handicap which includes people with a physical or mental impairment that affects a major life activity, people with a record of such an impairment and people regarded as having such an impairment?

Are new laws needed to protect people with HIV from employment discrimination? 67/

64/ Testimony of Jordon Barab at 146.

65/ Id.

66/ See supra note 42, at E.4.

67/ See ABA policy on confidentiality of HIV test-related information and HIV-related discrimination, Summary of Action of the House of Delegates, 1988 Mid-Year Meeting, 26-27 (February 8-9, 1988) (ABA Report 115A).

Do employers need protection from the potentially high costs associated with employing people with HIV?

What is the extent of the reasonable accommodation obligation in the HIV context?

Is testing for HIV in the workplace ever justified as a "reasonable search" under the Fourth Amendment?

Does testing for HIV in the workplace always violate an employee's reasonable expectations of privacy?

Is testing for HIV in the workplace ever job-related?

Who in the workplace may have access to information regarding an employee's HIV status without invading that employee's reasonable expectation of privacy? [68/]

Does Section 7 of the NLRA protect the concerted activity of co-workers who refuse to work with a person with HIV infection, even if there is no objective justification for their refusal?

Should an employer's right to discipline any employee's concerted refusal to work be conditioned on the employer's provision of HIV-related education for workers?

Should an employer's right to discipline any employee's concerted refusal to work hinge on compliance with OSHA or CDC recommended HIV safeguards?

Should legislative action be taken to resolve the apparent conflict between Section 502 of the LMRA and Section 7 of the NLRA?

Conclusion

Because of the obviously central importance of employment in our society, the proper resolution of HIV issues in the employment context is singularly important, and our success in this area is critical to handling many other HIV-related problems.

68/ Id.