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AIDS: Legal, Public, and Pastoral Implications

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AIDS: LEGAL, PUBLIC, AND PASTORAL IMPLICATIONS

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The public health crises occasioned by acquired immune deficiency syndrome ("AIDS") has created a variety of legal issues impacting all areas of society. In particular, counselors to the dioceses must be prepared to answer AIDS questions in the context of employment, health care, education and the clergy. AIDS is a relatively new phenomenon to society and thus to the courts. The case law and statutes to date have dealt with AIDS almost exclusively with regard to the workplace and school attendance. There are, of course, significant questions beyond the scope of this Article as to the application of the current case law and statutes discussed herein to the various activities and functions of a diocese and other Church-affiliated institutions including schools and hospitals. The purpose of this Article, however, is to review the principal court decisions, statutes and collateral legal issues involving AIDS primarily in the employment context, thus providing counselors to the dioceses and Church-affiliated institutions with a legal framework within which to analyze and formulate responses to questions about AIDS, regardless of the context.

An important caveat should be noted at the outset of this review: the body of law that has been developed regarding AIDS issues rests almost entirely on present medical knowledge surrounding the contagiousness of the HIV virus and the four ways in which it is transmitted: (1) through intimate sexual contact; (2) through abuse of IV drug devices; (3) through transfusions; and (4) through the birthing process.[1] Therefore, if medical

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[1] Guidelines issued by the federal Center for Disease Control ("CDC") have pronounced that AIDS cannot be transmitted through "casual contact" in the workplace or elsewhere.

opinion begins to significantly vary on the modes of transmission, the current legal conclusions on AIDS-related issues will also change. Consequently, practitioners must remain alert to developments in the medical community about AIDS to ensure that any legal advice on AIDS issues is based on the most current medical knowledge.

Several well-defined legal theories have been interpreted to provide protection to AIDS victims in the employment context, each of which is discussed below: handicap discrimination, sexual orientation discrimination, and privacy rights. Additionally, the courts have begun to grapple with the claims of co-employees who may have safety concerns from working with AIDS victims. Because of the conflicting considerations confronting employers, the advantages and disadvantages of formulating an AIDS policy are also discussed.

Handicap Discrimination

Federal, state, and local laws prohibit discrimination against handicapped individuals in a variety of contexts. These laws primarily provide protection against employment discrimination, although some of the laws extend protection against discrimination in the delivery of services or benefits of various programs.

Title V of the Federal Rehabilitation Act of 1973 obligates certain employers not to discriminate against qualified handicapped persons.[2] Specifically, section 503 of the Act requires nonexempt federal government contractors or subcontractors to take affirmative action to recruit and employ qualified handicapped individuals.[3] Additionally, covered employers are required to accommodate qualified handicapped applicants and employees, unless such accommodation would cause unreasonable hardship.[4] Even broader protection beyond the employment context is provided by section 504 of the Act, which prohibits discrimination against any qualified handicapped person by any recipient of federal financial assistance.[5]

Recent CDC guidelines, published August 21, 1987, recommend the use of "universal blood and body fluid precautions" to minimize the risk of transmission of the AIDS virus from patients to health care workers since medical history and examination cannot reliably identify all patients with the AIDS virus or other blood-borne pathogens. The federal Occupational Safety and Health Administration has announced that it will adopt these CDC guidelines. Daily Lab. Rep. (BNA) No. 163, at A-11 (Aug. 25, 1987).

[2] 29 U.S.C. §§ 791-94 (1982 & Supp. IV 1986).

[3] *Id.* § 793.

[4] 41 C.F.R. § 60-741.6(d) (1988).

[5] 29 U.S.C. § 794 (1982 & Supp. IV 1986). The definition of "handicap" under the Rehabilitation Act includes any "physical or mental impairment which substantially limits one or more of [a] person's major life activities." 29 U.S.C. § 706(8)(B) (Supp. IV 1986). The statute also expressly extends coverage to those not presently disabled but who have "a record

Although AIDS is not specifically identified by the Federal Rehabilitation Act and most state handicap discrimination laws as a covered handicap, most courts and agencies which have considered the issue have concluded that AIDS is a covered handicap.[6] The leading decision dealing with individuals suffering from a contagious disease is *School Board of Nassau County v. Arline*.[7] Gene Arline was an elementary school teacher who had been removed from the classroom by the school district because she had tuberculosis, a highly contagious disease. In affirming the Eleventh Circuit's holding that the Rehabilitation Act protects those individuals with chronic contagious diseases such as tuberculosis, the Supreme Court used a three part analysis: (1) is the individual handicapped because one or more of the individual's major life functions are impaired by the condition?; (2) does the individual have a record of impairment?; and (3) is the individual regarded as being handicapped? Further, the Court rejected an argument of the United States Justice Department, based on an earlier interpretation by the Department, that an employer's fear of contagion may serve as a legitimate basis for discharge of a handicapped person.

While the Court found Arline to be handicapped, it also held that once such a determination is made, an individualized inquiry must follow to decide if a person handicapped by a contagious disease is "otherwise

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of such impairment" or are "regarded as having such an impairment." *Id.* Regulations issued to interpret section 504 define "physical impairment" as follows:

> [A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following bodily systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine . . . .

45 C.F.R. § 84.3(j)(2)(i)(A) (1987).

[6] *See, e.g.*, California—CAL. GOV'T CODE § 12940(a) (West Supp. 1989); Raytheon Co. v. California Fair Employment & Hous. Comm'n, 46 Fair Empl. Prac. Cas. (BNA) 1089 (Cal. Super. Ct. 1988); District of Columbia—D.C. CODE ANN. §§ 1-2512(a)(1), 1-2502(23) (1987); Ross v. Gama Shoes, Inc., 23 Empl. Prac. Dec. (CCH) ¶ 31,150 (D.C. 1980); Florida—FLA. STAT. ANN. § 760.01 (West 1986); Shuttelworth v. Broward County Office of Budget & Management Policy, F.C.H.H.R. No. 85-0624, Daily Lab. Rep. (BNA) No. 242 (Dec. 11, 1985), *aff'd*, Daily Lab. Rep. (BNA) No. 72 (Apr. 7, 1986); Massachusetts—Cronan v. New England Tel. Co., 1 Indiv. Empl. Cas. (BNA) 658 (Mass. 1986); New York—N.Y. EXEC. LAW § 296(1)(a) (McKinney 1982); People v. 49 W. 12th St. Tenants' Corp., N.Y.L.J., Oct. 17, 1983, at 1, col. 1 (Sup. Ct. New York County 1983) (preliminary injunction granted barring eviction of tenant doctor who treated AIDS patients). Many state fair employment practices agencies, for example in California, Maryland, and Massachusetts, hold that persons who have AIDS are protected under handicap laws. Many states will also accept AIDS-related bias complaints under their laws prohibiting handicap discrimination. *See* Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681, 689-96 (1985).

[7] 480 U.S. 273 (1987).

qualified" to perform his or her job.[8] Among the facts to be considered are: (1) how the disease is transmitted; (2) the duration of the risk; (3) the potential harm to third parties; and (4) the probabilities that the disease will be transmitted and will cause varying degrees of harm.[9] An evaluation must then be made whether the employer can reasonably accommodate the handicapped individual. The Court, however, noted a limitation to this test by stating 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."[10] The Court in a footnote also declined specifically to consider the issue of whether an individual with 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.[11]

Because the Court avoided the AIDS issue, many questions remain unanswered. Those questions include whether AIDS causes physical impairment within the meaning of the Act, and whether an individual with AIDS Related Complex ("ARC"), or who tests seropositive for the HIV virus and is merely contagious without any physical effects is "handicapped." Subsequent to *Arline*, many lower courts and administrative agencies have ruled that individuals who manifest symptoms of AIDS or who have ARC are handicapped within the meaning of federal and state laws.[12] The courts and administrative agencies, however, are split on the issue of whether those individuals who merely test seropositive for the HIV virus should be considered handicapped. Nevertheless, because an individual with the HIV virus may develop AIDS, and thus suffer from impairment of a "major life activity," the better view is to treat an individual testing seropositive as covered under the handicap discrimination laws.

Several recent cases involving AIDS have been decided under the Rehabilitation Act. In a post-*Arline* decision, the Ninth Circuit Court of Appeals recently directed a California district court to enter an injunction to restore to the classroom a teacher with AIDS who had been removed to an administrative position.[13] On appeal, the court ruled that (1) the teacher was handicapped within the meaning of the Act, and (2) the

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[8] *Id.* at 287.

[9] *Id.* at 288.

[10] *Id.* at 287 n.16.

[11] *Id.* at 282 n.7.

[12] *See, e.g.*, Chalk v. District Court, 840 F.2d 701 (9th Cir. 1988); Raytheon Co. v. California Fair Employment & Hous. Comm'n, 46 Fair Empl. Prac. Cas. (BNA) 1089 (Cal. Super. Ct. 1988).

[13] *Chalk*, 840 F.2d at 712.

teacher was "otherwise qualified" because, based on the evidence presented at trial, no risk of transmitting the disease existed.[14] Similarly, in a pre-*Arline* case, a California district court held that AIDS is a handicap under section 504 of the Act and granted a motion for a preliminary injunction filed on behalf of a child with AIDS who was barred from kindergarten after he bit a classmate.[15] The school was ordered to readmit the child to class because the court found, despite the evidence, that the school had not demonstrated that there was a risk of transmission of the virus by virtue of the child's presence in the classroom.[16]

SEXUAL ORIENTATION DISCRIMINATION

A number of jurisdictions prohibit discrimination on the basis of sexual orientation.[17] For example, the New York City Council in 1986 passed a "gay rights" bill prohibiting discrimination on the basis of sexual orientation covering, *inter alia*, employment and housing.

A substantial percentage—currently at least sixty-six percent—of persons who have AIDS or who are at risk of developing the disease are homosexual or bisexual men. To date, less than five percent of all known AIDS victims are heterosexual males who are intravenous drug users. Because of the high incidence of AIDS among homosexuals, employer attempts to adopt a policy for requiring AIDS testing and exclusion for seropositive results could be challenged as discriminatory on the basis of sexual orientation. Such challenges would be based on the well-known "adverse impact" theory of discrimination, *i.e.*, that a neutral employer

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[14] The issue of whether the teacher was handicapped within the meaning of the Act was not contested on appeal. *Chalk*, 840 F.2d at 705 n.6.

[15] *See* Thomas v. Atascadero Unified School Dist., 662 F. Supp. 376 (C.D. Cal. 1986).

[16] However, if the child in *Atascadero* had a proclivity for biting, there would seem to be a genuine issue as to the risk of transmission not usually present in either the school or workplace setting. *But cf.* Local 1812 Am. Fed'n Gov't Employees v. United States Dep't of State, 662 F. Supp. 50 (D.D.C. 1987). The *American Federation* court upheld a State Department decision to expand its medical fitness program for all foreign service employees seeking positions abroad to include blood testing for infection by the AIDS virus. *Id.* The court found that HIV-infected personnel would be at significant risk by service at certain posts where medical care would be unavailable or inadequate to cope with the illnesses associated with HIV infection, ARC, or AIDS. *Id.*

[17] *See, e.g.*, D.C. CODE ANN. § 1-2512(a)(1) (1987); CAL. POLICE CODE art. 33 (West 1986) (San Francisco). San Francisco also requires that all contracts with the city contain a nondiscrimination clause, including a prohibition on sexual orientation discrimination. This requirement has been upheld. *See* Alioto's Fish Co. v. Human Rights Comm'n, 120 Cal. App. 3d 594, 174 Cal. Rptr. 763 (1981), *cert. denied*, 455 U.S. 944 (1982). Public employers in California should note that their state constitution's equal protection clause has been interpreted as prohibiting arbitrary bias against any identifiable class or group within society, including homosexuals. Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

policy applicable to all employees or applicants nevertheless affects a protected group in a disproportionately harsh manner. A policy concerning AIDS, or even contagious diseases generally, likely would affect homosexual males at a significantly greater rate than it would affect others.

On the other hand, the risk of liability for sexual orientation discrimination from adoption and use of a well conceived contagious disease policy seems fairly remote. A somewhat greater risk is that such a policy might be deemed to violate handicap discrimination laws. The risk appears minimal enough, however, that employers may consider adoption of such a policy to avoid acting arbitrarily as each problem is confronted.[18]

TORT CLAIMS BY AIDS VICTIMS

Due to the sensitive nature of an individual's status as an "AIDS victim," such information should not be disseminated without the individual's consent or by compulsion of law. The unauthorized release of such information can lead to suits against the disclosing party for defamation and invasion of privacy. These claims frequently arise in the employment context when applicants or employees are wrongfully accused of having AIDS or unfairly made the subject of derogatory comments regarding their lifestyle or job performance. It is defamation *per se* in most states to accuse one falsely of having a "loathsome disease."

Whether truth would be available as a defense in a situation when an individual has merely tested seropositive for the virus is not clear due to the uncertainty of the medical evidence as to the probability that the individual will develop symptoms of the disease.

Issues of privacy and the confidentiality of medical records may be a concern in dealing with the problem of a person who has AIDS or is suspected of having AIDS. These issues frequently arise in the health care and education settings. A clear delineation of applicable policy on disclosure of medical records is required to prevent claims in this area.

Another tort claim which is unique to employment situations is "wrongful discharge." A claim for wrongful discharge can arise if an employee who has AIDS but wishes to and is able to work is terminated or, more likely, if an employee is discharged because he or she is unfairly perceived to be a threat to co-workers. A wrongful discharge suit also could be brought by co-workers terminated for refusing to work with an

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[18] Several jurisdictions have acted to provide express protection for AIDS victims. For example, Wisconsin has given the state epidemiologists final authority to decide whether blood screening is appropriate for employers and insurers. California prohibits employers, among others, from testing people for exposure to AIDS without written consent, and also limits the exposure of test results. CAL. HEALTH & SAFETY CODE § 199.20 (West 1989). The results of such tests may not be used to determine suitability for employment or insurability. *Id.* § 199.21.

AIDS employee. The latter should be defensible based on the medical evidence that casual workplace contact should not provide the basis for transmission of the virus. To lessen the likelihood of co-worker problems leading to these claims, employers are encouraged to develop educational programs for all employees and to develop policies for properly responding to problems that may arise because an employee develops AIDS, ARC or tests seropositive.

ACTIONS BY CO-WORKERS

The rights of co-workers further complicate the analysis of dealing with AIDS victims in the workplace. In certain circumstances, federal and state labor laws and occupational safety and health laws may provide protection to employees who refuse to work with an AIDS victim.

Currently, a split of legal opinion exists whether employees who protest working with an AIDS victim, or someone from whom they fear exposure to the disease, are protected from employer discipline for engaging in concerted activities under the National Labor Relations Act ("NLRA").[19] Under section 7 of the NLRA, employees may engage in protected concerted activities involving wages, hours, working conditions, or other matters of "mutual aid or protection."[20] For example, the action of a single individual may satisfy the statutory requirement for concerted activity when he or she speaks or acts on behalf of others or addresses matters covered by a collective bargaining agreement.[21] Note, however, that in certain circumstances, the NLRA may not extend to employment situations involving Church-sponsored schools or members of the clergy who may also be employees of the Church.[22]

The National Labor Relations Board ("NLRB") has vacillated in the area of concerted activity that involves matters of employee safety. It has held that safety complaints made by one individual without any indica-

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[19] 29 U.S.C. §§ 151-68 (1982 & Supp. IV 1986).

[20] 29 U.S.C. § 157 (1982).

[21] JMC Transport, Inc. v. NLRB, 776 F.2d 612, 617 (6th Cir. 1985).

[22] NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (NLRB lacked jurisdiction over teachers of church-operated school because of first amendment considerations arising from teachers' "critical and unique role in fulfilling the mission of a church-operated school"); Jewish Day School of Greater Wash., Inc., 283 N.L.R.B. 106 (1987) (NLRB declined to assert jurisdiction over schools "whose purpose and function in substantial part is the propagation of a religious faith"). *But cf.* Hanna Boys Center, 284 N.L.R.B. 121 (1987) (NLRB held that child care workers at Catholic residential school were entitled to unionize). The NLRB in *Hanna* found that it had jurisdiction because, unlike teachers who have a " 'critical and unique role' in fulfilling the mission of a church-operated school," the child care workers were not teachers since their only involvement in religious activity was in taking the boys to chapel, overseeing their homework (including religious studies), and seeing that prayers were said. *Id.*

tion of employee support would be protected absent any evidence that co-workers have disavowed support.[23] More recently, however, the NLRB sought evidence of affirmative co-workers' support before it would recognize an activity as concerted.[24]

Even employees engaged in concerted activity may lose that protection under certain circumstances.[25] For example, an employee who engages in activity in an abusive manner or who continues to raise complaints long after the issues are resolved is no longer engaged in "protected activity."[26] It may be strongly argued that employees who engage in a concerted refusal to work with an AIDS-afflicted co-worker because of a supposed risk of becoming infected are acting so unreasonably that their concerted activity is unprotected.[27]

Besides the NLRA, employees protesting matters of health and safety may also find protection under federal and state occupational safety and health statutes. The Federal Occupational Safety and Health Act ("OSHA") specifically prohibits employers from discriminating against employees who exercise their rights under the Act, including the right to protest unsafe working conditions.[28]

An employee may refuse to work under OSHA if, in good faith, he or she believes an assigned task involves an unreasonable risk of serious injury or death. In order to justify a refusal to work, the employee should have attempted previously to have the employer correct the allegedly unsafe condition. The employee must show that his or her fear regarding the condition is one with which the "reasonable person" would agree. Finally, an employee may only refuse to work in the face of an allegedly hazardous condition if time would not allow the use of the normal enforcement mechanism provided under the Act.[29] The burden of proof that the employer violated the nondiscrimination provision is on the government, which would represent the employee's interests in an action under OSHA.[30]

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[23] Alleluia Cushion Co., 221 N.L.R.B. 999 (1975).

[24] Meyers Indus., 268 N.L.R.B. 493 (1984), *remanded sub nom.* Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1984), *cert. denied sub nom.* Meyers Indus. v. Prill, 474 U.S. 948 (1985). *But see* Ewing v. NLRB, 768 F.2d 51 (2d Cir. 1985) (rejecting Board's *Meyers* decision).

[25] NLRB v. City Disposal Sys., 465 U.S. 822 (1984).

[26] Good Samaritan Hosp., 265 N.L.R.B. 618 (1982); Lutheran Social Serv. of Minn., Inc., 250 N.L.R.B. 35 (1980).

[27] In any event, an employer faced with a concerted refusal to work with an AIDS-infected co-worker could hire replacements to perform the work of the protestors. Although the employer could hire replacements, if the co-workers' concerted refusal was a lawful, protected activity the employer could not discharge or otherwise discipline the involved employees.

[28] 29 U.S.C. § 660(c) (1982).

[29] *See* Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980).

[30] A number of states have enacted occupational safety and health acts that are similar to the federal Act. For example, California prohibits discrimination against employees who

Whether OSHA protects the AIDS victim's co-employees has yet to be decided. The considerations noted above in connection with the NLRA would also be applicable here. An employer thus arguably runs a risk of violating OSHA's nondiscrimination clause if it reacts adversly to an employee's protesting the presence of AIDS victims in the workplace. The better view, under current medical opinion that no risk of infection is present in the normal workplace, should render the co-employee's protest unreasonable and unprotected. However, this remains to be decided.

OSHA also requires the issuance of workplace standards designed to prevent workplace illness or injury. At present, no workable standards have been issued to address AIDS or other communicable diseases. An emergency petition was filed with the Occupational Safety and Health Administration ("Administration") in February 1987, seeking a communicable disease standard for use in the health care industry, but the Administration has not issued its own guidelines.

The Administration has recently announced several steps it will take to protect health care workers from the dangers of blood-borne infectious diseases such as AIDS and Hepatitis B. In addition to enforcing the CDC guidelines, the Administration will examine work practices at target hospitals and undertake an extensive educational effort aimed at health care workers.

An employer may be able to protect itself from sanction for disciplining or discharging an employee based on current medical standards and safety procedures. In a recent decision, the California Labor Commission rejected a safety complaint by four nurses at San Francisco General Hospital. The nurses, who worked the night shift, had asked to be allowed to wear masks, gloves and gowns when treating AIDS patients, even though hospital policy provided that such protective gear was not necessary in most cases. They alleged that subsequent to their complaints regarding the wearing of protective gear, they were discriminatorily transferred to the day shift for developmental training. In rejecting their claims brought under the state OSHA, the Labor Commission held that the hospital policy was consistent with the latest infection control procedures suggested by the scientific community and the CDC, and the hospital thus could demand employee compliance with its procedures.[31]

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protest unsafe working conditions. *See* CAL. LAB. CODE § 6310 (West 1989). Many states also recognize the common law duty of an employer to provide a safe and healthy working environment for their employees. Thus, it is possible that employers could be sued by employees who contend they were exposed to AIDS on the job.

[31] Bernales v. City & County of San Francisco, Nos. 11-17001-1, 11-17001-2, 11-17001-3, 11-17001-4 (Cal. Lab. Comm'r Sept. 9, 1985).

Formulating an AIDS Policy for the Workplace

Until more is known about AIDS, no particular course of action may be taken by employers without some attendant risks and costs. Nonetheless, employers should begin to develop policies regarding the treatment of AIDS victims in their employ and should consider taking action, first to assess, and then to seek to minimize various risks. Of foremost importance to any employer is the education of employees with respect to AIDS and the current state of medical knowledge concerning the disease. Preparation of pamphlets regarding AIDS, handouts discussing in lay terms pertinent medical information, and meetings or seminars may tend to alleviate many of the concerns that employees have. There are a number of sources for such materials and for speakers, including state and local health departments and various hospitals.

Flexibility, practicality and innovation are also very important in dealing with AIDS issues. For example, depending upon the nature of a job, it may be possible for an employee with AIDS to work at home. Such a compromise would allow the employee to continue to be of productive value, offset the cost of the illness to the employer, and benefit the sick employee by reducing his or her exposure to others' illnesses.

Employers may want to consider instituting a contagious disease policy with paid leave. Such a policy should include a requirement that employees on leave due to AIDS or other possibly contagious diseases provide medical certification of their fitness to return to work, both from their own doctors and the employer's medical advisor if requested. In particular, employers should ascertain whether the AIDS-afflicted employee places co-workers at risk of AIDS or any of the other opportunistic diseases associated with AIDS and should learn whether the AIDS victim may be at risk of illness from exposure to co-workers.

Employers should further check with their insurance carriers to determine whether their coverage extends to AIDS victims. If so, they should maintain such coverage for their work force. If not, however, they should consider informing applicants of this so that applicants may make informed decisions whether to accept employment and provide for separate coverage.

Employers should remain cognizant, however, that any affirmative statements or written policies may be construed by a court as contractually obligating an employer to follow those policies. Thus, careful planning and drafting of any AIDS policy is necessary to avoid a situation in which an employer is bound to follow a policy that subsequently becomes economically or otherwise detrimental to the employer.

Conclusion

It is important to remember that as the medical research on AIDS

evolves, and new information about the disease is disclosed, the rights and obligations of AIDS victims in relation to employers, co-employees, health care providers and educators will change. This ebb and flow of rights and obligations is likely to continue until a cure for AIDS is discovered and, consequently, will necessitate continued education of everyone who must deal with AIDS victims and extreme flexibility to accommodate the changing legal climate surrounding AIDS.