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NOTE

AIDS IN THE WORKPLACE: DISCRIMINATION BY IGNORANCE

*"The only thing we have to fear is fear itself."
Franklin Delano Roosevelt.¹*

INTRODUCTION

The impact of acquired immune deficiency syndrome (AIDS) has been devastating throughout the last ten years. By the end of the 1980s, the United States Public Health Centers for Disease Control (CDC) had received reports of approximately 65,000 AIDS cases and 35,000 AIDS-related deaths.² As many as 1.0 million to 1.5 million Americans were infected with the virus.³ Estimates indicate that every year well over 300,000 new AIDS cases will be reported to the CDC.⁴

AIDS is no longer a disease that most often affects high-risk groups of homosexuals and intravenous (IV) drug users.⁵ The number of hetero-

¹ Franklin D. Roosevelt, First Inaugural Address (March 4, 1933).

² Thomas C. Quinn, *Perspectives in the AIDS Epidemic: The Experiences Within the United States*, 23 BULL. PAN AM. HEALTH ORG. 9, 9 (1989) (citing epidemic number of AIDS cases reported during 1980s).

³ Alan R. Lifson, *Do Alternative Methods for Transmission Exist?*, 259 JAMA 1353, 1355 (1988); see Robert J. Blendon & Karen Donelan, *Discrimination Against People with AIDS: The Public's Perspective*, 319 NEW ENG. J. MED. 1022, 1025 (1988) (one in every 200 Americans is infected with AIDS virus).

⁴ Cf. Quinn, *supra* note 2, at 9-10 ("The number of AIDS cases projected through 1992 using the methods of extrapolation and back calculation are 310,000 and 380,000 respectively.").

⁵ See Harry W. Haverkos & Robert Edelman, *The Epidemiology of Acquired Immuno-deficiency Syndrome Among Heterosexuals*, 260 JAMA 1922, 1922-29 (1988) (discussing

sexual cases of AIDS reported to the CDC doubles every fourteen to sixteen months.⁶ Unfortunately, public fears and misconceptions have increased and have led to harsh discriminatory practices affecting education, employment, health care, and housing.⁷ The myths and fears surrounding AIDS have been as damaging to the afflicted as the disease itself.⁸

Although a survey indicated that by 1988 less than fifty lawsuits had been filed regarding AIDS discrimination in the workplace, a drastic increase in litigation should occur in the years to come.⁹ Statutory and judicial responses on employment and related benefits protection have been shaped by the efforts of AIDS activists and civil-liberties groups.¹⁰ Moreover, the availability of new drugs and treatments will afford AIDS victims the opportunity to prolong their lives and to remain in the workplace despite the contagious yet controllable disease.¹¹ Thus, balancing the interests and rights of AIDS victims, their co-workers, and employers will constitute a definite challenge for the 1990s.¹²

This Note will address some of the issues related to AIDS discrimination in the workplace. First, it will explore the medical characteristics of the disease, including methods of transmission and available treatments. Second, it will discuss the legal issues implicated by the classification of AIDS as a handicap. Third, it will enumerate various forms of statutory protection and their impact on victims, co-workers, and employers. Finally, this Note will suggest the need for public education and employment policies to effectively assist courts and legislators in battling

heterosexual transmission of AIDS in United States, Africa and Haiti).

⁶ *Id.* at 1927. Of the adult-afflicted AIDS cases reported to CDC, 63% were homosexual or bisexual men, 19% IV drug users, 7% homosexual men who were also IV drug users, 4% heterosexuals, 3% blood transfusion recipients, 1% hemophiliacs, and 3% individuals for whom the risk factor information was incomplete. See Quinn, *supra* note 2, at 9. Among the child cases, 77% were born to a parent with AIDS or at risk for AIDS, 13% were blood transfusion recipients, 6% hemophiliacs, and 4% children for whom the risk factor information was incomplete. *Id.*

⁷ Larry Gostin, *A Decade of a Maturing Epidemic: An Assessment and Direction for Future Public Policy*, 16 AM. J.L. & MED. 1, 19 (1990).

⁸ See *id.* at 20. "Society's accumulated myths and fears about disability and disease are just as handicapping as are the physical limitations that flow from actual impairment. Few aspects of handicap give rise to the same level of public fear and misapprehension as contagiousness." *Id.* (quoting *School Bd. v. Arline*, 480 U.S. 273, 284 (1987)).

⁹ Thamer E. Temple, *Employers Prepare: Hope for AIDS Victims Means Conflict in Your Workplace*, 41 LAB. L.J. 694, 694-95 (1990). Until recently, AIDS victims have not survived long enough to bring a lawsuit. New drugs, however, have dramatically increased the life expectancy of AIDS patients. *Id.*

¹⁰ Arthur S. Leonard, *AIDS, Employment and Unemployment*, 49 OHIO ST. L.J. 929, 930 (1988).

¹¹ *Id.*; see Temple, *supra* note 9, at 695.

¹² Temple, *supra* note 9, at 695.

AIDS discrimination.

I. MEDICAL BACKGROUND

AIDS is the final stage of a gradual deterioration of the immune system which begins with the contraction of the human immunodeficiency virus (HIV).¹³ The virus is composed of core, transmembrane, and envelope proteins¹⁴ which attack the normal function of white blood cells which are essential to the human body's immune system.¹⁵ Although the actual symptoms of the disease may not develop for a long period of time,¹⁶ the infected individual, while remaining healthy, is still capable of transmitting the virus.¹⁷

Commonly, infected individuals are classified into three categories: (1) those with an asymptomatic infection; (2) those with AIDS-related complex (ARC); and (3) those with AIDS.¹⁸ Symptoms of ARC include: loss of appetite, weight loss, fever, night sweats, skin rashes, diarrhea, fatigue, lack of resistance to infection, and swollen lymph nodes.¹⁹ In cases of fully developed clinical AIDS, HIV has fatally destroyed the body's immune system, leaving infected patients vulnerable to the so-called "opportunistic diseases"²⁰ which eventually cause their death.²¹

HIV is transmitted primarily in three ways: (1) by sexual contact with an infected person; (2) by parenteral exposure to infected blood, e.g.

¹³ Jerry V. McMartin, *AIDS (HIV) and Insurance: Discrimination Against HIV-Infected Individuals*, 1990 WL 357778 at *6. HIV has also been named human t-lymphotropic virus type III (HLTV-III) and lymphadenopathy-associated virus (LAV). C. EVERETT KOOP, U.S. DEP'T OF HEALTH & HUMAN SERVS., SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 9 (1987) [hereinafter SURGEON].

¹⁴ Steven L. Becker, *Epidemiology and Pathogenesis of HIV Infection: Approaching the Second Decade*, 80 J. AM. PODIATRIC MED. ASS'N 3, 3 (1990).

¹⁵ McMartin, *supra* note 13, at 1.

¹⁶ SURGEON, *supra* note 13, at 12.

¹⁷ *Id.* at 10.

¹⁸ McMartin, *supra* note 13, at 1-2. The CDC has adopted a more accurate medical classification of HIV-infected patients. This new system divides patients into four groups: Group I consists of those with transient, mononucleosis-like symptoms, such as swollen glands, fatigue and fever; Group II consists of those with blood and lymphatic systems' abnormalities, but with no debilitating symptoms; Group III consists of those with serious but not yet fatal symptoms, such as persistent swollen lymph nodes; and Group IV, divided into five subgroups, is characterized by the contraction of the so-called "opportunistic diseases" which subsequently cause death. *Id.*

¹⁹ SURGEON, *supra* note 13, at 11.

²⁰ *Id.* at 11-12. The most common types of "opportunistic diseases" associated with AIDS are: pneumocystis carinii pneumonia (PCP), which manifests itself with symptoms of persistent cough, fever, and difficulty breathing; Kaposi's sarcoma, manifested by the appearance of multiple purplish blotches and bumps on the skin; cryptococcal meningitis; and toxoplasmosis. *Id.*

²¹ McMartin, *supra* note 13, at 2.

sharing of needles among IV drug users; and (3) by perinatal contact from an infected mother to her newborn child.²² There is no evidence that the virus may be transmitted through casual contact or through activities such as sharing food, cups, razors, toothbrushes, or even kissing.²³

Nonparenteral exposure to infected blood, primarily in the health care setting, has also been recognized as a highly unlikely but possible means for transmission.²⁴ For example, it has been confirmed that a Florida dentist transmitted AIDS to at least one of his patients. Preliminary reports by the American Dental Association indicated that the virus was probably transmitted from a hand cut directly into the patient's mouth.²⁵ Although cuts and nicks are common during surgical or dental procedures, the risk of infection, as in all nonparenteral exposures, is minimal.²⁶

The two major diagnostic tests for AIDS are the enzyme-linked immunosorbent assay (ELISA) and the Western Blot tests.²⁷ Both determine the presence of HIV antibodies, not the actual presence of HIV.²⁸ Because of its low cost and ease of performance, the ELISA test is the most widely used.²⁹ Unfortunately, it also produces a relatively high rate of false-positive results.³⁰ Therefore, to ensure reliability, doctors recommend the performance of two ELISA tests followed by a final confirmation with a Western Blot test.³¹

Currently, there is no cure or vaccine for AIDS.³² Drugs such as azidothymidine (AZT), 2' 3'-dideoxycytidine (ddC), and interferon-a have been fairly successful in prolonging lives.³³ However, these drugs are far from ideal.³⁴ They have many contraindications and are overwhelmingly

²² *Id.* at 9; Lifson, *supra* note 3, at 1353.

²³ SURGEON, *supra* note 13, at 13. Although HIV has been found in tears and saliva, no instances of transmission have been reported. *Id.*; accord Lifson, *supra* note 3, at 1353. A variety of studies indicate there is no scientific support that AIDS may be transmitted through saliva, tears, urine, insects, or merely casual contact. *Id.*

²⁴ Lifson, *supra* note 3, at 1353.

²⁵ See Lawrence K. Altman, *U.S. Experts Try to Estimate AIDS Infections by Doctors*, N.Y. TIMES, Feb. 7, 1991 at A22.

²⁶ See *id.* The CDC estimates that the risk of AIDS infection to a single patient ranges from 1 in 41,667 to 1 in 416,667, during surgery, and 1 in 263,158 to 1 in 2,631,579 during a dental procedure. *Id.*

²⁷ McMartin, *supra* note 13, at 2-3.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See Gostin, *supra* note 7, at 8 n.24.

³² See H. Jaffe, *The Medical Facts About AIDS*, in AIDS AND THE COURTS 23 (1990).

³³ Temple, *supra* note 9, at 695.

³⁴ See Karen Klinger, *Drug Switch Benefits Some With AIDS Virus*, UNITED PRESS INTERNATIONAL, August 26, 1992, at 24 (discussing pros and cons of AIDS drugs).

expensive.³⁵ Nevertheless, drugs such as AZT may transform AIDS "from a deadly epidemic into a chronic, manageable disease."³⁶

II. AIDS AND HANDICAP EMPLOYMENT DISCRIMINATION

A. AIDS as a Handicap

Federal, state, and local laws protect the handicapped against discrimination in education, housing, and employment.³⁷ Thus, when considering AIDS discrimination, the threshold question is whether AIDS may be regarded as a handicap.³⁸

In *School Board v. Arline*,³⁹ the United States Supreme Court ruled that an elementary school teacher who had been dismissed because of recurrent tuberculosis (a contagious disease) was a handicapped person within the meaning of section 504 of the Rehabilitation Act of 1973.⁴⁰ The Court held that so long as the individual was "otherwise qualified" the fact that his physical impairment was also contagious did not exclude him from the benefits of section 504.⁴¹

Whether an individual with a contagious disease is otherwise qualified will depend on reasonable medical judgments of the nature, method, severity, and risk of transmission of the ailment.⁴² According to the court, handicapped individuals must be protected "from deprivations based on prejudice, stereotyping, or unfounded fears, while giving appropriate weight to such legitimate concerns . . . as avoiding exposure to others."⁴³ Thus, an employee who does not pose a "significant risk" of communicating a disease will be an otherwise qualified handicapped person protected by federal anti-discrimination statutes.⁴⁴

³⁵ See Marsha F. Goldsmith, *Critical Moment at Hand in HIV/AIDS Pandemic, New Global Strategy to Arrest Its Spread is Proposed*, 268 JAMA 445-46 (1992) (noting one year of AZT treatment costs about \$2500).

³⁶ Temple, *supra* note 9, at 695.

³⁷ See LAURA F. ROTHSTEIN, *RIGHTS OF PHYSICALLY HANDICAPPED PERSONS* (1984 & Supp. 1991).

³⁸ Temple, *supra* note 9, at 695-96.

³⁹ 480 U.S. 273 (1987).

⁴⁰ *Id.* at 289. Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded . . . , be denied . . . , or be subject to discrimination under any program or activity receiving federal financial assistance." 29 U.S.C. § 794 (1988). See *infra* notes 88-116 and accompanying text.

⁴¹ *Arline*, 480 U.S. at 285-86.

⁴² *Id.* at 287-88 (quoting Brief for American Medical Association as *Amicus Curiae* 19).

⁴³ *Id.* at 287.

⁴⁴ See *id.* at 287 n.16. The Supreme Court remanded the case to the district court to determine whether the respondent was otherwise qualified in accordance with the decision. *Id.* at 289. On remand, a Florida district court found that Gene Arline was otherwise qualified to

The Supreme Court in *Arline* specifically stated that it was not considering whether an individual with AIDS would be regarded as handicapped.⁴⁵ Most commentators and subsequent judicial decisions, however, have found AIDS to be a handicap by following the same analysis as the one used in *Arline*.⁴⁶

The most significant judicial application of *Arline* in the AIDS and employment sphere occurred in the Ninth Circuit's decision of *Chalk v. United States District Court*.⁴⁷ In *Chalk*, the circuit court reversed the lower court's decision and granted a preliminary injunction to a California teacher with AIDS who had been reassigned to administrative duties outside his original classroom assignment.⁴⁸ The court held that the teacher was not required to disprove every theoretical possibility of AIDS transmission, and that the fears and apprehensions of various members of the school community were not sufficient grounds to deny the injunction.⁴⁹

Vincent L. Chalk, the petitioner, was a certified teacher of hearing impaired students in Orange County, California.⁵⁰ When he was diagnosed with AIDS, the county's Department of Education transferred him out of the classroom and into a more secluded administrative position. Chalk then filed an action in the United States District Court for the Central District of California⁵¹ based on section 504 of the Rehabilitation Act,⁵² seeking a preliminary and permanent injunction. The motion was denied and Chalk appealed.⁵³

The Ninth Circuit, following the Supreme Court's decision in *Arline* and after reviewing the extensive medical evidence submitted,⁵⁴ stated that "there [was] no evidence in the relevant medical literature that

perform the duties of a teacher and was entitled to reinstatement and back pay. See *Arline v. School Bd.*, 692 F. Supp. 1286, 1292 (M.D. Fla. 1988).

⁴⁵ *Arline*, 480 U.S. at 282 n.7.

⁴⁶ ROTHSTEIN, *supra* note 37, at 11 (Supp. 1991); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1987) (holding children with AIDS are protected); *Parents v. Coker*, 676 F. Supp. 1072 (E.D. Okla. 1987) (classifying children with AIDS as handicapped); *Austin v. New England Tel. Co.* 644 F. Supp. 763 (D.Mass. 1986) (classifying employee with AIDS-related complex as handicapped).

⁴⁷ 840 F.2d 701 (9th Cir. 1988).

⁴⁸ *Id.* at 703.

⁴⁹ *Id.* at 709, 711.

⁵⁰ *Id.* at 703.

⁵¹ *Id.*

⁵² 29 U.S.C. § 794; see *supra* note 40.

⁵³ *Chalk*, 840 F.2d at 703.

⁵⁴ *Id.* at 706-07. Chalk submitted over 100 articles from prestigious medical journals and the declarations of five AIDS experts, including two Los Angeles' public health officials. *Id.* Additionally, the American Medical Association (AMA) submitted an amicus brief in Chalk's support. *Id.*

demonstrate[d] any appreciable risk of transmitting the AIDS virus under the circumstances likely to occur in the ordinary school setting."⁵⁵ Absent a 'significant risk' of communicating the infectious disease to others, the teacher could not be lawfully excluded from his employment in the classroom.⁵⁶ Additionally, the court held that the district court had improperly placed the burden of proof on Chalk.⁵⁷ He was not required to disprove every possible theory regarding the transmission and contagiousness of the disease; rather it was up to the employer to show, through objective medical evidence, that there was in fact a significant risk of transmission.⁵⁸

The court acknowledged that Chalk's deprivation from his original employment was not only a substantial emotional and psychological injury, but also an immediate one.⁵⁹ The court explained:

Studies and statistics of etiology and terminus of AIDS show that although the time during which such a person may be quick and productive varies, the virus is fatal in all recorded cases. Presently, Chalk is fully qualified and able to return to work; but his ability to do so will surely be affected in time. A delay, even if only a few months, pending trial represents precious, productive time irretrievably lost to him.⁶⁰

Chalk, therefore, would not have been adequately compensated by a post-trial monetary award alone.⁶¹ Accordingly, the court granted the preliminary injunction returning Chalk to his original classroom assignment.

Finally, although the circuit court recognized the concerns and apprehensions of some of the members of the school community,⁶² it refused to be guided by "pernicious mythologies" and "irrational fears," which directly infringed upon Chalk's fundamental rights.⁶³ Nevertheless, after granting the injunction, the court remanded the case back to the district court noting that the latter would be in the best position, guided by expert medical opinions, to monitor and determine what reasonable procedures would give assurance to the school, the community, and the court that no substantial risk of harm to others would be subsequently created

⁵⁵ *Id.* at 707 (emphasis in original) (quoting amicus brief of AMA, 28).

⁵⁶ *Id.* at 707-08 (emphasis added) (quoting *Arline*, 480 U.S. at 287 n.16).

⁵⁷ *Id.* at 707.

⁵⁸ *Chalk*, 840 F.2d at 707-09.

⁵⁹ *Id.* at 709-10.

⁶⁰ *Id.* at 710.

⁶¹ *Id.*

⁶² *Id.* at 711 n.14. Not all members of the school were against Chalk's going back to the classroom. *Id.* The mothers of five of his students actually joined the amicus brief of the Disability Rights Educational and Defense Fund in his support. *Id.* In fact, upon his return to teaching following the circuit court's decision, Chalk was greeted with hugs and gifts. *Id.*

⁶³ *Chalk*, 840 F.2d at 711.

by Chalk's continued employment in the classroom setting.⁶⁴

Numerous federal and state courts have since followed *Arline* and *Chalk* in addressing issues arising from AIDS.⁶⁵ The treatment of the disease as a handicap, particularly in the workplace, has become a valuable asset in combating related discrimination. Today, not only can an HIV carrier keep his job,⁶⁶ but the employer must also provide reasonable accommodations to ensure that he does.⁶⁷ Accommodations are not considered reasonable if they impose "undue financial and administrative burdens" on the employer, or require a "fundamental alteration in the nature of the [work] program."⁶⁸

The judicial treatment of AIDS as a handicap depends totally on the validity of the premise that HIV carriers do not pose a significant risk of transmission to others.⁶⁹ Therefore, if the medical profession were to determine otherwise, the current approach would no longer be valid.⁷⁰ Moreover, the employer then would have no choice, under the Occupational Safety and Health Act (OSHA),⁷¹ but to dismiss the HIV-infected employee in order to provide "a place of employment free from recognized hazards that are causing or are likely to cause death or serious

⁶⁴ *Id.*

⁶⁵ See, e.g., *Martinez v. School Bd.*, 861 F.2d 1502 (11th Cir. 1988) (holding remote theoretical possibility of AIDS transmission from tears, saliva, and urine from mentally retarded child did not support classroom segregation); *Cain v. Hyatt*, 734 F. Supp. 671 (E.D. Pa. 1990) (stating AIDS is handicap); *Shuttleworth v. Broward County*, 639 F. Supp. 654 (S.D. Fla. 1986) (noting fired AIDS employee may bring action under Rehabilitation Act, civil rights law, Florida Human Rights Act, and state constitution); *Benjamin R. v. Orkin Exterminating Co.*, 390 S.E.2d 814 (W. Va. 1990) (finding person with HIV has handicap within meaning of West Virginia Human Rights Law); *Raytheon Co. v. California Fair Employment & Hous. Comm'n*, 261 Cal. Rptr. 197 (1989) (holding AIDS is handicap under Fair Employment & Housing Act); cf. *Leckelt v. Board of Commr's*, 909 F.2d 820 (5th Cir. 1990) (determining nurse not discriminated against solely because perception he was infected with AIDS). But see *Doe v. Garrett*, 903 F.2d 1455 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1102 (1991) (concluding Rehabilitation Act does not apply to member of Armed Forces with AIDS); *Burgess v. Your House of Raleigh, Inc.*, 388 S.E.2d 134 (N.C. 1990) (finding person with HIV but asymptomatic of AIDS not entitled to protection under North Carolina Handicapped Persons Protection Act).

⁶⁶ Gender-neutral terms are utilized in this paper whenever possible. At all other times, for simplicity sake and ease of reading, mention of a masculine term shall refer to both genders.

⁶⁷ See *Arline*, 480 U.S. at 287-89 & 287 nn.16-17; *Chalk*, 840 F.2d at 705.

⁶⁸ *Arline*, 480 U.S. at 287 n.17 (quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979)).

⁶⁹ See *Chalk*, 840 F.2d at 707-08 (indicating removal of teacher from classroom permissible if significant risk of transmission).

⁷⁰ See *Chalk*, 840 F.2d at 707-08; cf. *Arline*, 480 U.S. at 292 (Rehnquist, C.J. dissenting) (stating Congress never contemplated that person posing health threat be considered handicapped).

⁷¹ 29 U.S.C. §§ 651-58 (1988).

physical harm to his [other] employees."⁷²

Today, the mere presence of an employee with AIDS in a normal working environment will not justify any plausible action under OSHA.⁷³ Medical evidence clearly indicates that the transmission of the virus through normal day-to-day activities is in essence an inherent impossibility.⁷⁴ However, as the immune system of an HIV-infected individual deteriorates, he may contract diseases and infections which may themselves be communicable and harmful to others in a workplace setting.⁷⁵ As a result, his co-workers might be able to compel the employer, under the provisions of OSHA, to discharge the HIV-infected employee now that the latter has lost his judicial and statutory handicapped protection.

B. Statutory Protection

Federal, state, and local statutes provide protection for the handicapped in many areas, including employment.⁷⁶ The Constitution, the Rehabilitation Act of 1973,⁷⁷ Title VII of the Civil Rights Act of 1964,⁷⁸ the Employee Retirement Income Security Act (ERISA),⁷⁹ and several comparable state and local laws are of particular significance when dealing with AIDS discrimination in the workplace.

The Constitution may be used as protection against handicap employment discrimination.⁸⁰ The Due Process Clause and the Equal Protection Clause of the Fifth and Fourteenth Amendments provide limitations on the power of the government to discriminate. In certain cases, these limitations may even be extended to private employers who assume a closely related public function.⁸¹

However, even when a government action results in discrimination,

⁷² 29 U.S.C. § 654(a)(1).

⁷³ Debra A. Abbott, Comment, *Workplace Exposure to AIDS*, 48 Md. L. Rev. 212, 237 (1989) ("In supporting non-risk occupations where there is no exposure to bodily fluids or blood, it is unlikely that an employer would be held to have violated the duty to provide a safe workplace simply by employing a person with AIDS.").

⁷⁴ See *supra* notes 22-24 and accompanying text (discussing limited methods of transmission); cf. *Chalk*, 840 F.2d at 707 (one medical witness stated there was small probability of methods of transmission not yet clearly established). But see *supra* notes 25-26 and accompanying text (explaining that dentists and surgeons may be transmitting AIDS to their patients).

⁷⁵ See *Chalk*, 840 F.2d at 711.

⁷⁶ See generally ROTHSTEIN, *supra* note 37.

⁷⁷ 29 U.S.C. §§ 790-96 (1988).

⁷⁸ 42 U.S.C. § 2000e (1988).

⁷⁹ 29 U.S.C. §§ 1001-1145 (1988).

⁸⁰ ROTHSTEIN, *supra* note 37, at 111.

⁸¹ *Id.*; see, e.g., *Evans v. Newton*, 382 U.S. 296 (1966) (holding private park may not exclude blacks); *Marsh v. Alabama*, 326 U.S. 501 (1946) (binding private company that operated small town to due process clause).

complicated—and not yet fully-decided—issues make it difficult to enforce handicap employment rights on constitutional grounds.⁸² For example, it is not clear whether handicapped individuals should be considered a quasi-suspect class, whether there is a fundamental right to employment in all cases, whether the standard for judicial review should be one of intermediate scrutiny, or whether there is always a property interest attached to employment.⁸³ Thus, it is submitted that it is impractical to rely solely upon the Constitution to provide protection for the handicapped.

On the other hand, the Rehabilitation Act of 1973⁸⁴ has been successfully used in all types of handicap discrimination actions, including those dealing directly with AIDS.⁸⁵ In fact, in 1988, following *Arline*,⁸⁶ Congress amended the definition of "handicap" in the Rehabilitation Act to include otherwise qualified individuals with contagious or infectious diseases not directly harmful to others.⁸⁷

For the purposes of this Note, the most significant parts of the Rehabilitation Act are sections 501,⁸⁸ 503,⁸⁹ and 504.⁹⁰ Section 501 establishes the Interagency Committee of Handicapped Employees which reviews the adequacy of hiring, placement, and advancement of handicapped individuals within the federal government, and insures that all special handicap needs are met.⁹¹ To meet its objectives, section 501 mandates affirmative action programs in all federal agencies.⁹² Additionally, while section 501 recognizes a private right of action for aggrieved handicapped individuals, it is applicable only after all administrative remedies and procedures have been completely exhausted.⁹³

⁸² ROTHSTEIN, *supra* note 37, at 110, 112-13.

⁸³ See *id.* at 111-13 (giving more complete discussion of cases on these constitutional issues).

⁸⁴ 29 U.S.C. §§ 790-96.

⁸⁵ See *supra* note 70; see also *supra* notes 39-68 and accompanying text.

⁸⁶ 480 U.S. 273 (1987).

⁸⁷ Act of Mar. 22, 1988, Pub. L. No. 100-259, 1988 U.S.C.C.A.N. (102 Stat.) 31-32 (codified as amended at 29 U.S.C. § 706(8)(d)). The Act states in pertinent part:

[S]uch term 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.

Id.

⁸⁸ 29 U.S.C. § 791.

⁸⁹ *Id.* § 793.

⁹⁰ *Id.* § 794.

⁹¹ *Id.* § 791(a).

⁹² *Id.* § 791(b) (stating program shall be updated and reviewed annually).

⁹³ *Id.* § 794a(a)(1) (stating that in fashioning a remedy, court may consider reasonableness of cost of workplace accommodation and availability of alternative relief).

Section 503 of the Rehabilitation Act requires that any employer contracting for more than \$2500 with a federal department or agency "shall take affirmative action to employ and advance" qualified handicapped individuals.⁹⁴ Although not specifically stated in the statute, the implementing regulations compel these contractors to treat their handicapped workers without discrimination and to make reasonable accommodations to meet their physical and mental needs.⁹⁵ Courts however, do not always allow judicial remedies under section 503, at least until all the administrative avenues have been exhausted.⁹⁶

Finally, the most comprehensive and far-reaching section of the Rehabilitation Act is section 504.⁹⁷ This section specifically prohibits discrimination against qualified handicapped individuals in any program or activity receiving total or partial federal financial assistance.⁹⁸ More importantly, courts have found the existence of an implied private right of action under section 504 separately from any of the administrative remedies expressly provided for in the statute.⁹⁹ In fact, section 504 has been the basis for challenging the majority of handicap discrimination practices, particularly where AIDS and other contagious diseases are concerned.¹⁰⁰

In extreme cases, discrimination against HIV-infected individuals in the workplace may also constitute a violation of Title VII of the Civil Rights Act of 1964.¹⁰¹ Title VII makes it unlawful for an employer to discriminate against an employee because of race, color, religion, sex, or national origin.¹⁰² As studies indicate that AIDS is more prevalent among men and ethnic minority groups, specifically blacks and hispanics,¹⁰³ AIDS employment discrimination may cause a disparate impact on these groups. While discrimination of this nature could be actionable under Title VII,¹⁰⁴ the Supreme Court has in recent years made it extremely diffi-

⁹⁴ *Id.* § 793(a). The section also applies to any subcontract in excess of \$2500. *Id.*

⁹⁵ 41 C.F.R. §§ 60-741.4(a), 741.6(d) (1991). An accommodation is reasonable when it does not cause undue economic or business hardship to the employer. *See* 45 C.F.R. § 84.12(c) (1991) (listing factors to consider).

⁹⁶ *See, e.g., Philip Morris, Inc. v. Block*, 755 F.2d 368 (4th Cir. 1985) (all administrative remedies must be exhausted before private right of action exits).

⁹⁷ 29 U.S.C. § 794.

⁹⁸ *Id.* § 794(a). Section 504 is not limited to employment alone. *See id.* § 794(b). Moreover, if any part of a program or activity receives federal financial assistance, the whole program or activity is subject to § 504. *Id.*; *see* Pub. L. No. 100-259, 1988 U.S.C.C.A.N. (102 Stat.) 31.

⁹⁹ *See* ROTHSTEIN, *supra* note 37, at 133.

¹⁰⁰ *See, e.g., Arline*, 480 U.S. at 273; *Chalk*, 840 F.2d at 701; *see also supra* note 65 (listing cases challenging AIDS discrimination under § 504).

¹⁰¹ 42 U.S.C. § 2000e.

¹⁰² *Id.* §§ 2000e-2(a)(1)-(2).

¹⁰³ *See Haverkos & Edelman, supra* note 5, at 1923-24.

¹⁰⁴ *See Temple, supra* note 9, at 696; *Leonard, supra* note 10, at 962.

cult for a plaintiff to bring a successful action under Title VII. The difficulty arises because, as a matter of law, the employee must first establish a prima facie case and then carry the burden of persuasion at *all* times throughout the trial.¹⁰⁵

The Employee Retirement Income Security Act (ERISA) also protects HIV-infected employees.¹⁰⁶ Its continuation coverage sections afford an alternative for AIDS patients faced with possible termination of personal or family health care benefits when they become too sick to continue working.¹⁰⁷ Additionally, ERISA has a nondiscrimination requirement which prohibits any action by an employer to exclude or limit HIV-infected employees from their group health plan.¹⁰⁸

ERISA continuation coverage provisions require all employers with twenty or more employees to continue to provide group health coverage to anyone who loses his job for up to eighteen months, until he is covered under a new plan, or becomes eligible for medicare.¹⁰⁹ Employers, however, may require the former employee to pay up to 102% of the applicable premiums.¹¹⁰ For some AIDS patients and their families, this requirement may be economically impossible, particularly during the last stages of the disease.

Prior to its amendment, ERISA's continuation coverage sections left a six month gap of noncoverage because medicare eligibility does not start for a disabled person below the retirement age for at least two years.¹¹¹ As a result, indigent HIV-infected and other disabled individuals had to rely for those six months on the public welfare system. In 1989, Congress bridged the gap by amending ERISA to provide continuation coverage for up to twenty-nine months for employees who were disabled at the time of their termination.¹¹² Under this new provision, however, the employer may now charge the former employee up to 150% of the applicable premium for the period exceeding the original eighteen months.¹¹³ Again, the cost may be more than what an AIDS patient and his family can afford.

¹⁰⁵ See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (holding if plaintiff establishes prima facie case, employer has burden to show substantial justification for challenged practice).

¹⁰⁶ See Leonard, *supra* note 10, at 947-53.

¹⁰⁷ See 29 U.S.C. §§ 1161-68 (1988).

¹⁰⁸ See *id.* § 1140.

¹⁰⁹ *Id.* §§ 1161(b), 1162(2)(A)(i), (D).

¹¹⁰ *Id.* § 1162(3)(A). If the former employee fails to pay, the coverage is terminated. *Id.* § 1162(2)(C). Premiums, however, may be made in monthly installments rather than in a lump sum. *Id.* § 1162(3)(B).

¹¹¹ 42 U.S.C. § 1395(c) (1988).

¹¹² Act of Dec. 19, 1989, Pub. L. No. 101-239, 1989 U.S.C.C.A.N. (103 Stat.) 2296 (codified as amended at 29 U.S.C. § 1162(2)(A)(v)).

¹¹³ 29 U.S.C. § 1162(3)(B).

The nondiscrimination section of ERISA prohibits any action by an employer to reduce or deprive an employee of a benefit to which he would be entitled under an employee benefit plan.¹¹⁴ Thus, an employer may not, because of the high cost of AIDS health care, exclude or limit the benefits of an HIV-infected employee in order to save money. Additionally, this section expressly provides for a private right of action for the affected employee.¹¹⁵ Therefore, an AIDS aggrieved employee could not only sue for damages in federal court, but also obtain a preliminary injunction similar to the one obtained by the petitioner in *Chalk* under section 504 of the Rehabilitation Act.¹¹⁶

In recent years, some state and local jurisdictions have also enacted statutes dealing specifically with AIDS discrimination.¹¹⁷ These laws, however, varied in scope from jurisdiction to jurisdiction thereby causing an outcry by AIDS activists¹¹⁸ prior to Congress' enactment of the Americans with Disabilities Act of 1990.¹¹⁹

C. *The Americans with Disabilities Act of 1990*

The Americans with Disabilities Act of 1990 (A.D.A.)¹²⁰ is the most significant and far-reaching measure ever enacted for the protection of the handicapped.¹²¹ Congress recognized the unfair and unnecessary discrimination against individuals with disabilities.¹²² Thus Congress assumed responsibility for the enforcement of a clear, comprehensive, and sweeping anti-discrimination statute, directly affecting over forty-three million Americans.¹²³

The legislative history of the A.D.A. clearly indicates Congressional concerns regarding the devastating effects of handicap discrimination and the urgent need for a national solution. For example, when considering

¹¹⁴ *Id.* § 1140; *see also id.* § 1002(3) (defining employee benefit plan to include employee welfare plans and employee pension plans).

¹¹⁵ *Id.* § 1132. An employee may bring a civil action to enjoin any unlawful practice, to obtain equitable relief, to redress such violations, or to enforce the provisions of the statute. *Id.*

¹¹⁶ *See Leonard, supra* note 10, at 953 & n.183.

¹¹⁷ *Leonard, supra* note 10, at 939-40; *see, e.g.,* COLO. REV. STAT. § 25.4.1401 (1992); D.C. CODE ANN. § 35.221 (1992); N.Y. PUB. HEALTH LAW § 2781 (McKinney 1992); R.I. GEN. LAWS § 23.6.10 (1991).

¹¹⁸ *See infra* pt. IIC.

¹¹⁹ *See Leonard, supra* note 10, at 940-41 & n.90.

¹²⁰ Act of July 26, 1990, Pub. L. No. 101-336, 1990 U.S.C.C.A.N. (104 Stat.) 327-77 (codified at 42 U.S.C. 12101-213) [hereinafter any remaining references will cite to the specific section of the A.D.A.]. Although President Bush signed the A.D.A. into law on July 26, 1990, §§ 108, 231, 246 and 310 were not effective until 1992. *See infra* note 125.

¹²¹ ROTHSTEIN, *supra* note 37, at 178 (Supp. 1990). Gostin, *supra* note 7, at 20.

¹²² *See* A.D.A. §§ 2(a), (b).

¹²³ *See id.*

AIDS discrimination, the House Report of the Education and Labor Committee quoted testimony of Admiral James Watkins, former chairperson of the President's Commission on the Human Immunodeficiency Virus Epidemic, stating:

As long as discrimination occurs, and no strong national policy with rapid and effective remedies against discrimination is established, individuals who are infected with HIV will be reluctant to come forward for testing, counseling, and care. This fear of potential discrimination . . . will undermine our efforts to contain the [AIDS] epidemic and will leave HIV-infected individuals isolated and alone.¹²⁴

The A.D.A. deals with discrimination in employment, public services, public accommodations, and telecommunications.¹²⁵ Title I of the A.D.A. deals with employment. In contrast with the pertinent sections of the Rehabilitation Act, Title I affects all employers with fifteen or more employees, regardless of whether they are public or private, who contract with the government, or receive any kind of federal assistance.¹²⁶ Under this title, the employer will be unable to discriminate against any qualified individual with a disability in any "job application procedures, hiring advancement or discharge, employee compensation, job training, and other terms, conditions and privileges of employment."¹²⁷ Anyone who can perform the essential functions of his job, with or without reasonable accommodations, will be considered a qualified individual.¹²⁸

The A.D.A. expressly provides that an individual will not be qualified if he poses a direct threat to the safety of others in the workplace.¹²⁹ The determination of whether an employee poses a direct threat is based on reasonable and objective medical judgment, and the most current medical knowledge.¹³⁰ Factors to consider are the duration of the risk, the nature and severity of the harm, and the likelihood of occurrence.¹³¹

¹²⁴ H.R. REP. No. 485(II), 101st Cong., 2d Sess., pt.2, at 313 (1990), (quoting testimony before *House Subcomm. on the Handicapped*, S. Hrng. 926, 100th Cong., at 40 (Sept. 27, 1988)), *reprinted in*, 1990 U.S.C.C.A.N. 303, 313.

¹²⁵ See A.D.A. §§ 101-08, 201-46, 301-10, 401-02. Although President Bush signed the A.D.A. into law on July 26, 1990, see Statement by President George Bush upon signing S. 999, 26 Weekly Comp. Pres. Doc. 1165 (July 30, 1990), *reprinted in*, 1990 U.S.C.C.A.N. (104 Stat.) 601-02, a majority of the provisions did not become effective until 1992. See A.D.A. §§ 108, 231, 231, 246, 310.

¹²⁶ See A.D.A. § 101(5)(a). Employers with 25 or more employees will be affected by the Act starting on July 26, 1992. Employers with 15 to 25 employees will not be affected until July 26, 1994. *Id.* §§ 101(5)(a), 108.

¹²⁷ *Id.* § 102(a).

¹²⁸ *Id.* § 101(8). Reasonable accommodation is that which an employer may provide without undue hardship. See *id.* § 101(10) (listing factors to consider for undue hardship).

¹²⁹ A.D.A. § 103(b).

¹³⁰ 29 C.F.R. § 1630(2)(r).

¹³¹ *Id.*

In view of today's medical findings, HIV-infected individuals should be—at least initially—protected by the employment provisions of the A.D.A.¹³² However, once the disease starts to progress and the immune system deteriorates, the individual may contract other diseases which may pose a substantial risk to others. Thereafter, the employee would no longer be protected by the A.D.A.¹³³

Congress has viewed the contamination of food as a distinct problem.¹³⁴ The A.D.A. specifically mandates the Secretary of Health and Human Services to provide an annual list of all communicable and infectious diseases that may be transmitted through food handling.¹³⁵ If reasonable accommodations cannot eliminate the risk of transmission, an employer will then be permitted to exclude an individual with any of the listed diseases from any work involving food handling.¹³⁶ If the individual, however, is already a current employee, the employer must attempt to reassign the employee to another position, and not to resort to his immediate termination.¹³⁷

Some commentators and legislators have expressed dissatisfaction as to applicability of the A.D.A. to AIDS in food handling situations. For example, Hon. Chuck Douglas of the Judiciary Committee contends that because of the public fear of AIDS many would refuse to patronize restaurants that are known to employ an individual infected with the virus.¹³⁸ As a result, in his opinion, food establishments would be literally forced out of business.¹³⁹

Unfortunately, like many others, Mr. Douglas fails to appreciate the aim of the ADA. The objective is not to encourage and allow AIDS discrimination, but to educate the public and dispel the myths. Unnecessary discrimination and prejudice against those with disabilities costs Americans billions of dollars in "expenses resulting from dependency and nonproductivity."¹⁴⁰

¹³² See Thomas H. Barnard, *The American Disabilities Act: Nightmare for Employers and Dream for Lawyers?*, 64 ST. JOHN'S L. REV. 229, 240-41 (1990).

¹³³ See *Chalk v. United States Dist. Court*, 840 F.2d at 701, 706 n.8 (9th Cir. 1988).

¹³⁴ A.D.A. § 103(d).

¹³⁵ *Id.* § 103(d)(1).

¹³⁶ *Id.* §§ 103(d)(2), (3).

¹³⁷ 29 C.F.R. § 1630.16(e)(1) (1990).

¹³⁸ *Dissenting Views of Hon. Chuck Douglas*, H.R. REP. NO. 485, 101st Cong., 2d Sess., pt.3, at 94 (1990), reprinted in, 1990 U.S.C.C.A.N. 509, 511 ("With over 600,000 establishments in this country all you need to do is go down the street.").

¹³⁹ *Id.*

¹⁴⁰ A.D.A. § 2(a)(9).

III. DEVELOPMENT OF AN AIDS POLICY IN THE WORKPLACE

Given the fears and misconceptions surrounding the HIV epidemic, statutory and judicial responses are insufficient to fully eliminate discrimination in the workplace. Any comprehensive approach to the problem must include a well developed employer's AIDS policy consisting of education, counseling, referrals, and benefits assistance.¹⁴¹

Surveys indicate that one out of every four people would refuse to work alongside someone infected with HIV.¹⁴² The same number believe that employers should have a right to fire an employee for that reason alone.¹⁴³ Therefore, any employer who wishes to deal realistically with AIDS discrimination must first institute an in-house educational program about the disease.¹⁴⁴ The program should include counseling for those with and without the disease.¹⁴⁵ After the program is in place, no employee should or will be able to sustain a valid reason for refusing to work with an HIV-infected co-worker.¹⁴⁶

The employer's policy must expressly include a statement of nondiscriminatory practices and equal opportunity.¹⁴⁷ Referrals and assistance for health management, sick leaves, and other benefits should also be provided.¹⁴⁸ Finally, to ensure privacy, the employer should keep all personnel-medical information strictly confidential.¹⁴⁹

A well-conceived AIDS policy will help an employer avoid unnecessary litigation, particularly discrimination suits.¹⁵⁰ Furthermore, in the long run, it will help provide a better working environment and promote the company's image and productivity.¹⁵¹

¹⁴¹ See Temple, *supra* note 9, at 698-99; Lorynn A. Cone, *AIDS and HIV Infection in the Workplace*, 13 MENTAL AND PHYSICAL DISABILITY L. REP. 70, 83-84 (1989).

¹⁴² Blendon & Donelan, *supra* note 3, at 1023.

¹⁴³ *Id.* Although the numbers are declining, many Americans have mistaken views regarding HIV infection. The beliefs include that AIDS may be contracted by being coughed at, drinking from a fountain, sitting on a toilet seat, sharing a telephone, handling money, or even by just touching someone who has the virus. *Id.*

¹⁴⁴ Georgena K. Roussos, Note, *Protections Against HIV-Based Employment Discrimination in the United States and Australia*, 13 HASTINGS INT'L & COMP. L. REV. 609, 679-80; see also Temple, *supra* note 9, at 698-99; Cone, *supra* note 141, at 83-84.

¹⁴⁵ Temple, *supra* note 9, at 699; Cone, *supra* note 141, at 80.

¹⁴⁶ *Id.* at 698-99.

¹⁴⁷ *Id.* at 699.

¹⁴⁸ Cone, *supra* note 141, at 83-84.

¹⁴⁹ *Id.* at 80 & n.68; see also *Plowman v. U.S. Dep't of the Army*, 698 F. Supp. 627 (E.D. Va. 1988) (civilian army employee's constitutional and common law rights violated when employer disclosed HIV test results). Some states like California, Florida, Maine, and Texas have enacted statutes where an employer cannot obtain AIDS test results without the employee's written consent. Abbott, *supra* note 73, at 243.

¹⁵⁰ See Temple, *supra* note 9, at 698-99.

¹⁵¹ *Id.* at 699.

CONCLUSION

The emotional impact surrounding the AIDS epidemic has left its victims not only coping with a devastating and fatal disease, but fighting many unwarranted forms of discrimination. Federal, state, and local statutes, bolstered by the judicial treatment of AIDS as a handicap, have been extremely helpful in battling AIDS discrimination, particularly in the workplace. However, much is yet to be done. Public fears, misconceptions, and ignorance are very much alive and at the base of discrimination.

In the workplace, one solution will be for every employer to institute a comprehensive in-house AIDS policy of education, counseling, and assistance. In the alternative, employers will—and probably should—face the consequences of troublesome working environments and costly discrimination suits.

HIV-infected individuals face the fear of death day in and day out. They need our public support, awareness and understanding. They should not have to rely on an impersonal and slow judicial and legislative process to gain acceptance and protect their rights. For the rest of us, "[t]he only thing we have to fear is fear itself."¹⁵²

Jorge Pedreira

¹⁵² Roosevelt, *supra* note 1.

