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AIDS and Employment Law Revisited

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If 1983 was the year AIDS (Acquired Immune Deficiency Syndrome) became a household word in the United States,1 1985 was the year the ramifications of AIDS hit the workplaces of America with full force. Although this medical condition was first identified as a distinct disease entity in 1981,2 and about seven thousand cases had been counted by the United States Centers for Disease Control (CDC) by the end of 1984,3 it was during 1985 that a new blood test for antibodies to the virus suspected of causing AIDS became generally available.4 It was also during 1985 that the number of cases and


4. D. ALTMAN, supra note 1, at 56-57.

their dispersion throughout the country became so widespread\(^6\) that employment lawyers became concerned with the legal issues surrounding AIDS in the workplace.\(^6\) Greater public exposure and discussion intensified these workplace problems because the public apparently did not believe the statements by public health officials that AIDS was not spread by casual contact.\(^7\)

The workplace problems took many different forms.\(^8\) Some em-

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5. By May 12, 1986, the CDC had counted 20,531 cases nationwide, with more than 13 cases in more than 46 of the states, and some cases in virtually all the states. New York State had about one-third of all the cases (6758). The growth of the epidemic can be shown from the following figures: In 1979, there were 11 cases which have been retrospectively confirmed by CDC, 47 cases in 1980, and 260 in 1981, when the CDC definition of AIDS was adopted. In 1982, CDC counted 994 cases, 2719 in 1983, 5331 in 1984, and, as of mid-December, more than 6200 in 1985. As of May 12, 1986, CDC attributed 11,163 deaths to AIDS, about 54% of the reported cases. *Cases of AIDS or African Swine Fever Virus?*, New York Native, June 2, 1986, at 9. For a graphic representation of the growth of the epidemic and projected future growth, see Curran & Morgan, *Acquired Immunodeficiency Syndrome: The Beginning, The Present, and The Future*, in AIDS FROM THE BEGINNING, supra note 1, at xxi-xxvi.


8. See N.Y. State Div. of Human Rights, AIDS Based Discrimination: A Summary of Reported Instances September 1983—October 1985 (Nov. 8, 1985). While many accounts of AIDS-based discrimination are purely anecdotal and undocumented, this report by the N.Y. State Division of Human Rights is based on actual allegations brought to the attention of the agency. Similar incidents are reported by the New York City Commission on Human Rights. D. Sencer & V. Botnick, supra note 6, at 42-44. Other workplace incidents are described in Skagen & Aberth, *Responding to AIDS in the Workplace*, in AIDS THE WORKPLACE ISSUES 11, 12-13 (American Management Association (1985)); Staver, *Panic, Hysteria Overrule Reason in Workplace Response to AIDS*, AM. MED. NEWS, Jan. 10, 1986, at 1, 43, and other newspaper and magazine reports too numerous to cite specifically. In a letter to members of the Lesbian and Gay Rights Subcommittee of the District of Columbia Bar, Jim Graham, Administrator of the Whitman-Walker Clinic, Inc., indicated that the Clinic had assisted persons with AIDS in obtaining legal help in 26 cases involving employment discrimination allegations. Letter from Jim Graham to the Lesbian and Gay Rights Subcommittee of the D.C.
Employers seized upon the availability of the new blood test in an attempt to remove seropositive individuals from their workforces, or to avoid hiring them. Some employers refused to hire members of AIDS "risk groups." In other workplaces, employees or their unions demanded that persons with AIDS be excluded, or they threatened to refuse to work if people suspected of carrying the AIDS virus were employed. Upon a diagnosis of AIDS, some employees were immediately suspended or discharged, or placed in isolated settings. Special pressures were experienced by employees in schools and food handling activities as some legislators demanded enactment of laws restricting seropositive individuals from working in such jobs.

Not surprisingly, the real world problems surrounding AIDS rapidly became legal problems. The American workplace is heavily

9. Seropositive individuals are those who test positive on a series of laboratory tests designed to confirm the presence in the blood of antibodies to a virus suspected of causing AIDS. The cheapest, most commonly available test is the Enzyme Linked Immunoabsorbent Assay (ELISA), a test that will almost always react positively to antibody presence as well as other blood factors and conditions. Confirmation of a positive result is normally sought with an additional test called a Western Blot, which is a more expensive, more difficult, and more precise test for presence of the antibody. Bayer & Oppenheimer, AIDS in the Work Place: The Ethical Ramifications, BUS. & HEALTH, Jan.-Feb. 1986, at 30-31.

10. Id. at 31-33; Staver, supra note 8, at 43.

11. To be fair to the labor movement, some unions have taken an active role in opposing AIDS-based discrimination and the use of antibody tests as a screening device for workers. See Teachers With AIDS Barred from Work in Racine, Wis.; Lawsuit Threatened, DAILY LAB. REP. (BNA) No. 225, at A-2 to A-3 (Nov. 21, 1985) (reporting that the Racine Education Association, which represents 1800 of the school district's 2200 employees, is seeking an order from the State Employee Relations Board directing the school district to bargain over its new policy of barring teachers, staff, and students with AIDS from working in or attending school, and is promising to file suit on behalf of any employee affected by the new policy); Racine Educ. Ass'n v. Racine United School Dist., Equal Rights Div. Case No. 50279 (Wis. Dep't Indus. Lab. Human Relations, Apr. 30, 1986) (available DAILY LAB. REP. (BNA) No. 98, at E-1 (May 21, 1986)); AFL-CIO Opposes AIDS Screening, Calls For More Federal Funding, DAILY LAB. REP. (BNA) No. 213, at A-7 to A-8 (Nov. 4, 1985) (reporting adoption of a resolution by the AFL-CIO at national convention opposing screening of workers for AIDS unless such screening is recommended by the Centers for Disease Control); 1986 LESBIAN/GAY LAW NOTES at 4 (reporting adoption by AFL-CIO Biennial Convention on Oct. 31, 1985 of resolution opposing use of HTLV-III antibody test to screen employees).


13. Bayer & Oppenheimer, supra note 9, at 31. See also 1985 LESBIAN/GAY LAW NOTES at 41 (reporting on proposals pending in Florida and New Jersey to require food service workers to be certified free of AIDS and other infectious diseases).
regulated by federal, state, and local governments. Although the common law rule governing the employment relationship is one marked by a "freedom of contract" ethos that leaves the parties to settle the terms of their relationship and presumes terminability at the will of either party for any or no reason, a complex web of employment regulation has grown up since the beginning of the twentieth century. Thus, it is normal today for employers, especially large corporate employers, to seek legal advice about any new workplace phenomenon. At the same time, employees who experience discrimination of any sort are likely to resort to legal remedies.

This Article is a sequel to one written during 1984. In that Article, I surveyed existing state and federal statutes restricting employment discrimination on the basis of physical handicap or disability, and tentatively concluded, in the absence of pertinent case law, that AIDS would be considered a "handicap" or "disability" under most of those laws. I concluded further that, given the epidemiology of the disease, employment discrimination against those who had AIDS or other disorders stemming from infection with the virus suspected of causing AIDS would probably be held unlawful in most jurisdictions. In the intervening year, some new legislation has been passed, and some cases have been decided which tend to confirm

14. See Federal Labor Laws (West 7th ed. 1986), an 809-page compilation of federal statutes regulating the workplace and employer-employee relations. A compilation of related rules, guidelines and regulations promulgated by federal enforcement agencies would be much longer. State and local regulation is also pervasive as indicated by a myriad of laws and regulations concerning wages and hours, health and safety, labor relations, child labor, fair employment practices, and the like.


16. This is evidenced by the mounting litigation over alleged "wrongful" dismissals, even in those jurisdictions where neither statute nor common law precedent give any apparent cause of action for such a suit. The New York City Commission on Human Rights has maintained an AIDS discrimination unit since 1983. D. Sencer & V. Botnick, supra, note 6, at 42.

17. Leonard, supra note 3.

18. Id. at 689-93.

19. Id. at 693-703.

20. See infra note 52.

my earlier conclusions. In addition, other workplace issues surrounding AIDS have surfaced. The purpose of this Article is to bring the employment discrimination law analysis up to date, to discuss some new legal theories on AIDS-based employment discrimination, and to explore other workplace legal issues raised by the AIDS phenomenon.

In such a discussion, the peculiar common law treatment of the American employment relationship is called into question. Indeed, the AIDS phenomenon brings into sharp focus some of the significant problem areas of American employment law, the most prominent of which is the "terminable at will" concept, which some argue is unsuited to a modern industrial society. Also drawn into question is the patchwork of regulatory statutes, which sometimes pull in op-

1. Memorandum issued a memorandum to the General Counsel of the Department of Health and Human Services, expressing opinions as to the applicability of § 504 of Rehabilitation Act, 29 U.S.C. § 794, to various types of AIDS-based discrimination. The memorandum, discussed in more detail infra, concluded in essence that the physical symptoms of AIDS and, probably, ARC, see infra note 38 and accompanying text, should be considered a handicap, but that discrimination against persons without physical symptoms or discrimination motivated by fear of contagion would not violate the federal law. Cooper, Memo from Assistant Attorney General Cooper on Application of Section 504 of Rehabilitation Act to Persons with AIDS, DAILY LAB. REP. (BNA) No. 122, at D-1 (June 25, 1986). See Pear, Rights Laws Offer Only Limited Help on AIDS, U.S. Rules, N.Y. Times, June 23, 1986, at A1, col. 2 [hereinafter cited as Pear, Rights Laws]. Shortly after the Cooper memorandum appeared, however, the Office of Civil Rights, U.S. Department of Health and Human Services, issued a finding of discrimination violative of § 504 in an AIDS case which appeared to give narrow effect to the Justice Department's ruling. See In re Charlotte Memorial Hosp., No. 04-84-3096 (Region IV, Aug. 5, 1986); Pear, U.S. Files First AIDS Discrimination Charge, N.Y. Times, Aug. 9, 1986, at 1, col. 3 [hereinafter cited as Pear, U.S. Files]. A federal district court in Florida overruled a motion to dismiss an AIDS discrimination claim by a public employee, which was based in the alternative on § 504 and constitutional rights, in a decision rendered July 8, 1986, and has set the case for trial. Shuttleworth v. Broward County, 41 Fair Empl. Prac. Cas. (BNA) 406 (S.D. Fla. July 8, 1986) (county clerical employee discharged after AIDS diagnosis).

22. The American common law context is peculiar in that no other major Western industrial nation provides so little in the way of job security to private sector employees. See Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 VA. L. REV. 481, 508-19 (1976).

23. The proliferation of scholarly criticism of the continued application of the "terminable at will" rule is such that existence of such criticism hardly need be documented. Two of the early leading articles include Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404 (1967), and Summers, supra note 22. See also To Strike a New Balance, Report of the Ad Hoc Committee on Termination at Will and Wrongful Discharge Appointed by the Labor and Employment Law Section of the State Bar of California, LABOR AND EMPLOYMENT LAW NEWS, Feb. 8, 1984 (publication of the State Bar of California Labor and Employment Law Section). For contrary views, see Epstein, In Defense of the Contract at Will, 51 U. CH. L. REV. 947 (1984); Power, A Defense of the Employment at Will Rule, 27 ST. LOUIS U.L.J. 881 (1983).
posite directions on the same issue,\textsuperscript{24} and the degree to which the basic human rights of individual autonomy and privacy are protected from invasion in the workplace. While this Article cannot deal exhaustively with these global issues, they do underlie much of what will be considered.

I. MEDICAL ASSUMPTIONS UNDERLYING THE LEGAL ANALYSIS

The analysis of workplace legal issues which follows is predicated upon an understanding of medical facts about AIDS.\textsuperscript{25}

First, AIDS is the end stage of complications of infection by a retrovirus\textsuperscript{26} which will be referred to herein as HIV (Human Immuno-

\textsuperscript{24} For example, the National Labor Relations Act protects employees who "engage in . . . concerted activities for the purpose of . . . mutual aid or protection" from employer discipline. National Labor Relations Act § 7, 29 U.S.C. § 157 (1982). Concerted refusals of employees to work due to health- and safety-related fears have been held to be protected concerted activities. See NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962). However, the Rehabilitation Act of 1973 prohibits federal agency employers and employers receiving federal financial assistance from discriminating against the handicapped. 29 U.S.C. § 794 (1982). Reactions of employees to the perceived health threat of AIDS in the workplace may bring the two statutes into conflict. See infra notes 117 to 138 and accompanying text.

\textsuperscript{25} The following summary of medical facts about AIDS is derived from many sources, and is an attempt to relate those facts pertinent to the legal analysis in a relatively nontechnical manner. Knowledge about the etiology of AIDS is constantly improving, although some basic facts were well established early in the history of the epidemic. Some good sources outside the technical medical journals current at the time of this writing include: A.G. FETTNER & W.A. CHECK, THE TRUTH ABOUT AIDS: EVOLUTION OF AN EPIDEMIC (rev. ed. 1985); N.Y. STATE DEP'T OF HEALTH, ACQUIRED IMMUNE DEFICIENCY SYNDROME: 100 QUESTIONS & ANSWERS (1985); J. SLAFF & J. BRUBAKER, THE AIDS EPIDEMIC: HOW YOU CAN PROTECT YOURSELF AND YOUR FAMILY—WHY YOU MUST (1985); AIDS: THE EMERGING ETHICAL DILEMMAS, HASTINGS CENTER REP., Aug. 1985, at 1 (special supplement); Laurence, The Immune System in AIDS, Sci. AM., Dec. 1985, at 84-93; Mass, Medical Answers About AIDS (Gay Men's Health Crisis, Inc. 1985). An earlier publication which provides considerable insight although it predates the discovery of HIV is THE AIDS EPIDEMIC (Cahill ed. 1983).


\textsuperscript{26} Retroviruses are distinguished from all other viruses by their means of replication
nodeficiency Virus). The virus, which is bloodborne (specifically in white blood cells known as T-4 helper lymphocytes), is transmitted through the exchange of blood or semen during sexual intercourse, or by the use of tainted blood or blood products, including blood transfusions, shared intravenous needles, blood clotting medications, and prenatal or natal exposure. No other mode of transmittal from person to person has been documented, although HIV has been found in saliva, urine, and tears of some infected persons. HIV is not spread through casual physical contact, and does not live outside the body long enough in sufficient quantity to be spread by food, drinking fountains, utensils, or toilet facilities.

Once introduced into the body, HIV produces an enzyme which allows it to transcribe its genetic material onto the genetic material and genetic properties. See NIH Conference, the Acquired Immunodeficiency Syndrome: An Update, 102 Annals Internal Med. 800, 807 (June 1985) [hereinafter cited as NIH Conference]; Laurence, supra note 25, at 88.

27. The virus suspected of causing AIDS has been given different names by different research teams. The French, who first isolated it, called it Lymphadenopathy-Associated Virus, or LAV. The American team at the National Institutes of Health called the variant it isolated Human T-Lymphotropic Virus, Variant III (or HTLV-III), having concluded that it is a variant of earlier discovered retroviruses implicated in T-cell infections. An American west coast team adopted the name AIDS-Related Virus (ARV). D. Altman, supra note 1, at 50-51; J. Slaff & J. Brubaker, supra note 25, at 131. In 1986, the International Committee for the Taxonomy of Viruses announced the designation Human Immunodeficiency Virus (HIV), which will probably become the standard name for the virus. The Advocate, Aug. 19, 1986, at 23.


30. See Krim, AIDS: The Challenge to Science and Medicine, in AIDS: The Emerging Ethical Dilemmas, Hastings Center Rep., Aug. 1985, at 2, 4 (special supplement). See also Health & Pub. Policy Comm., supra note 28, at 575 (there is no documented evidence that handshaking, sharing common drinking glasses, clothing, toilets, or air space transmits HIV). A recent study indicates that household members who have no sexual or perinatal contact with persons infected with HIV are at minimal risk of infection. See Friedland, Saltzman, Rogers, Kahl, Lesser, Mayers & Klein, Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients With AIDS or AIDS-Related Complex With Oral Candidiasis, 314 New Eng. J. Med. 344 (Feb. 6, 1986).

31. See Recommendations, supra note 25, at 693 ("All epidemiologic and laboratory evidence indicates that bloodborne and sexually transmitted infections are not transmitted during the preparation or serving of food or beverages . . ."). But see AIDS-Associated Virus Yields Data to Intensifying Scientific Study, 254 J. A.M.A. 2865, 2866 (Nov. 22-29, 1985) (the AIDS virus does exist outside the body for a certain time period).
of the T-4 lymphocytes, thus altering the lymphocytes and impeding their growth and replication. The T-4 lymphocytes play an important role in triggering immune response to certain organisms which are already present in large portions of the population. Having performed its transcription function, HIV may remain “dormant” in the T-4 lymphocytes and never cause any further damage to the immune system. However, there is evidence that HIV sometimes crosses the blood-brain barrier and infects brain cells, resulting in dementia or meningitis, and also infects cells of the central nervous system in some individuals. The most significant and lethal activity of HIV, which seems to be triggered by unidentified cofactors, is the stimulated replication of infected T-4 lymphocytes, rapidly reproducing in the form of new HIV, which then attacks remaining healthy T-4 lymphocytes until there are few healthy ones left. During the intermediate stage of infection, when the number of healthy T-4 lymphocytes is reduced, the individual may experience various symptoms which are referred to as AIDS-Related Complex.

32. See, e.g., Gottlieb, Immunologic Aspects of the Acquired Immunodeficiency Syndrome and Male Homosexuality, 70 MED. CLINICS N. AM. 651, 657 (May 1986); Krim, supra note 30, at 4; Laurence, supra note 25, at 88-90.
33. See Gottlieb, supra note 32, at 651, 654; Laurence, supra note 25, at 88-90.
34. The blood-brain barrier prevents the free exchange of substances in the circulation into brain tissue. See Pardridge, Olendorf, Cancilla & Frank, Blood-Brain Barrier: Interface Between Internal Medicine and the Brain, 105 ANNALS INTERNAL MED. 82 (July 1986).
36. Krim, supra note 30, at 4. See also Health & Pub. Policy Comm., supra note 28, at 575 ("Cofactors that may predispose to or promote the development of the infection are poorly understood."). Cf. Curran, Morgan, Hardy, Jaffe, Dorrow & Dowdle, The Epidemiology of AIDS: Current Status and Future Prospects, 229 SCI. 1352, 1356 (Sept. 1985) (while cofactors may modify the course of infection, they are not likely to be essential for AIDS to develop in an individual with HIV).
37. See, e.g., Krim, supra note 30, at 4-5. Cf. AIDS Therapy: A Step Closer?, 107 NEWSWEEK 60 (Feb. 24, 1986) (a newly discovered peculiarity about how the AIDS virus carries out its cellular subversion may lead to new drug therapy that would prevent further virus production).
38. The CDC has not adopted an official surveillance definition of ARC, for which it does not collect statistics, but many clinicians define ARC as a condition involving two or more of the symptoms which have been identified as characteristic of development of the syndrome (such as enlarged lymph nodes, oral thrush, shingles, weight loss, persistent fevers or night sweats, persistent dry cough or diarrhea, fatigue, etc.) in combination with clinical tests showing compromise of immune function. Mass, supra note 25, at 13, 15-17, 21-22. See also Gottlieb, supra note 32, at 655 (discussing features of ARC); Young, Management of Opportunis-
Infected T-4 lymphocytes are unable to perform their normal immune system functions, which results in proliferation of common (and usually harmless) parasites, producing lymphadenopathy (enlarged lymph nodes), Kaposi's sarcoma (a form of skin cancer), pneumocystis carinii pneumonia, and other opportunistic infections characteristic of end-stage AIDS. The CDC has defined AIDS, for epidemiological surveillance purposes, as a reliably diagnosed disease predictive of immune deficiency in a person with no known underlying cause of immune deficiency. However, as can be seen from this description, end-stage (or CDC-defined) AIDS is only one of several manifestations of HIV infection, which are lumped together in the public mind as AIDS.

One of the medical facts which makes AIDS a significant workplace issue is that a person may experience HIV infection in its various stages and be virtually asymptomatic, or have symptoms which, while uncomfortable, are not actually disabling. Indeed, some individuals with CDC-defined AIDS are, apart from such nondisabling conditions as early-stage Kaposi's sarcoma, in relatively good health and physically able to function at work, and there are some people who have lived and worked for months or years after a confirmed AIDS diagnosis. AIDS is a disability of the immune system,
but not itself an overtly disabling illness; rather, symptoms produced by the body's reaction to organisms usually suppressed by the healthy immune system, such as weakness, fatigue, severe weight loss, and loss of respiratory and digestive function, are the overt physical disabilities linked to AIDS. These eventually lead to death in most CDC-defined AIDS cases.

For the purposes of discussion, the following typology of individual cases will be used:

Type I—Individuals who are members of groups perceived as being at significant risk for HIV infection.

Type II—Persons exposed to or infected by HIV (i.e., those who are seropositive on available tests for HIV antibodies).

Type III—Persons experiencing AIDS-Related Complex (ARC) who are physically able to function in the workplace.

Type IV—Persons with confirmed CDC-defined AIDS who are physically able to function in the workplace.

Type V—Persons with AIDS-Related Complex or CDC-defined AIDS who are not physically able to function in the workplace.

These categories are fluid because individuals will move back and forth between them at various times. In the following analysis, the legal issues may vary with respect to different categories. The issue of contagion, however, is virtually the same with respect to Types II through V.

45. "In New York City, 70% of all AIDS patients die within two years of diagnosis." D. Sencer & V. Botnick, supra, note 6, at 1. The median survival time from date of diagnosis in New York City, as of December 1985, was 14 months. Id. at 3.

46. This typology is a revision of one presented in my earlier Article. Leonard, supra note 3, at 687.

47. The significant "risk groups" classified by the CDC are: sexually active homosexual/bisexual men and their heterosexual sexual partners; intravenous drug users; consumers of blood products (such as clotting medications for treatment of hemophilia) prior to widespread use of the antibody test to exclude infected blood from use in manufacturing such products. See Leonard, The Legal Issues, in AIDS: The Workplace Issues 28, 43-45 (American Management Association 1985). Early in the epidemic, recent immigrants from Haiti were classified as a risk group, due to the disproportionate number of cases occurring in that population, but improved epidemiological evidence led to the assignment of many Haitian cases to other risk categories and removal of Haitians as a distinct category. See D. Altmann, supra note 1, at 71-73. For a comprehensive current discussion of risk factors for HIV transmission, see generally Castro, Hardy & Curran, supra note 28, at 635. See also Miller, DeLuca & Ringler, AIDS in the Wife of a Bisexual Man, 86 N.Y. J. Med. 158 (March 1986) (discussing case report which illustrates expansion of traditional risk groups).

48. See supra note 47.

49. See supra note 38.

50. See supra note 40 and accompanying text.
II. AIDS AND EMPLOYMENT DISCRIMINATION LAW

Persons in all the categories described above may find job protection from a variety of federal, state and local laws, ordinances, and executive orders aimed at preventing employment discrimination against persons with physical handicaps or disabilities. Each state has statutes or executive orders which prohibit employment discrimination on such a basis, either in the public sector, the private sector, or both. These laws vary widely in their definitional language for "handicap" or "disability," but the differences in language do not seem to affect the determination whether AIDS comes within their meaning. The initial determinations of administrators on this issue have been unanimous in finding AIDS to be a covered condition.

51. See Bayer & Oppenheimer, supra note 9, at 31; Leonard, supra note 3, at 689-703 (discussing the Rehabilitation Act of 1973 and several state statutes which address the handicap discrimination issue); Stromberg, Law Notes: AIDS Poses Significant Legal Considerations for the Workplace, BUS. & HEALTH, Jan./Feb. 1986, at 30-31; Recent Developments: Public Health and Employment Issues Generated by the AIDS Crisis, 25 WASHBURN L.J. 505, 524-31 (1986) [hereinafter cited as Recent Developments].


53. In District 27 Community School Bd. v. Board of Educ., 130 Misc. 2d 398, 302 N.Y.S.2d 325 (Sup. Ct. 1986), a case involving the question whether children with HIV infection should automatically be excluded from attending public schools, the court noted that excluding the children might violate the Rehabilitation Act § 504, because AIDS and HIV infection fit the definition of handicap contained in the law. See also New York State Ass'n for Retarded Children, Inc. v. Carey, 612 F.2d 644 (2d Cir. 1979), aff'd, 466 F. Supp. 479 (E.D.N.Y. 1979) (segregation of retarded school children infected with hepatitis B held violative of § 504).

Formal opinions adopting the view that AIDS is a handicap or disability within the meaning of these laws have been issued by the Executive Director of the Florida Commission on Human Relations in Shuttleworth v. Broward County Office of Budget and Mgmt't Policy, DAILY LAB. REP. (BNA) No. 242, at E-1, E-5 to E-6 (Dec. 17, 1985) (Fla. Comm'n on
The policy choice reflected in these laws is to remove physical condition as a basis for employment decisionmaking in cases where the physical condition at issue does not prevent the individual from performing the job.\textsuperscript{54} This is especially well illustrated by the concept of "perceived disability," contained in many of the statutes,\textsuperscript{5} which extends protection to people who are not actually disabled in any way but who suffer discrimination due to beliefs or prejudices surrounding their physical condition.\textsuperscript{56} Given this underlying policy,


A memorandum issued by the Office of Legal Counsel to the Department of Health and Human Services in June 1986 concluded that CDC-defined AIDS, and probably most cases of ARC, would be considered handicaps under the Federal Rehabilitation Act, but that seropositivity would not meet the statutory definition. Cooper, \textit{supra} note 21. The Office of Civil Rights, U.S. Dep't of Health and Human Services, held AIDS to be a covered handicap in \textit{In re} Charlotte Memorial Hosp., No. 04-84-3096 (Region IV, Aug. 5, 1986). Thus far, the only negative ruling on this question is an Administrative Law Judge's determination in Chadbourne v. Raytheon Corp., Cal. Fair Employment and Hous. Comm'n, Case No. FEP 83-84 LI-031p (Aug. 4, 1986) (Richard J. Lopez, ALJ).


\textit{See} Leonard, \textit{supra} note 3, at 691.

\textit{See} E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1097 (D. Hawaii 1980): [Congress's] intent was to protect people who are denied employment because of an employer's perceptions, whether or not those perceptions are accurate. It is of little solace to a person denied employment to know that the employer's view of his or her condition is erroneous. To such a person the perception of the employer is as important as reality.
it is understandable that enforcement agencies will construe their statutes, even where the definitional language does not on its face necessarily support such a construction, to include the AIDS situation.

In addition to state laws prohibiting employment discrimination on the basis of physical condition, there are several local ordinances adopted by California municipalities which expressly prohibit employment discrimination against persons with AIDS, as well as use of medical procedures to screen employees.

At least two federal statutes may apply to AIDS-based employment discrimination. The Rehabilitation Act of 1973 contains provisions requiring federal agencies and contractors to adopt affirmative action programs with respect to the handicapped. The Act also prohibits federal agency employers from discriminating against the handicapped, and imposes a similar nondiscrimination requirement.


58. San Francisco Ordinance No. 49985, 3 EMPL. PRAC. GUIDE (CCH) 20,950B (Dec. 20, 1985) (to be codified at SAN FRANCISCO, CAL., MUNICIPAL CODE pt. II, ch. VIII, art. 38, §§ 3801-3816). Los Angeles Ordinance No. 160289, 3 EMPL. PRAC. GUIDE (CCH) § 20,950A (Aug. 16, 1985) (to be codified at LOS ANGELES, CAL., MUNICIPAL CODE ch. III, art. 5.8, §§ 45.80-93); ordinances passed by West Hollywood, San Jose, Oakland, and some other municipalities are not yet published by generally available labor law reporting sources. Many cities have adopted ordinances forbidding employment discrimination on the basis of physical disability or handicap. Unfortunately, these local laws are not collected and published in any comprehensive cumulation, but must be located by researching individual municipal codes. See, e.g., NEW YORK CITY, N.Y., ADMINISTRATIVE CODE §§ B1-7.0 to -7.1 (Supp. 1985-86).


61. Sections 501, 504, 29 U.S.C. §§ 791, 794 (1982), which are enforced by the Office of Civil Rights of each federal agency.
upon programs receiving federal financial assistance.\textsuperscript{62} The definition of "handicap" under the federal law is quite broad,\textsuperscript{63} and definitions contained in implementing regulations issued by the Office of Federal Contract Compliance Programs\textsuperscript{64} and the Department of Health and Human Services,\textsuperscript{65} appear by their breadth to confirm the initial interpretation by agency officials that AIDS will be considered a handicap under this law.\textsuperscript{66}

The Employee Retirement Income Security Act of 1974 (ERISA)\textsuperscript{67} may also provide some coverage in situations where employees who are covered by employee benefit plans are discharged after an ARC or AIDS diagnosis or a positive antibody test result.

\begin{itemize}
\item \textsuperscript{62} Section 504, 29 U.S.C. § 794 (1982). This provision has been construed to create a private right of action in federal court for employment discrimination. See Arline v. School Bd., 772 F.2d 759 (11th Cir. 1985), \textit{cert. granted}, 106 S. Ct. 1633 (1986) (handicap discrimination claim by teacher with tuberculosis creates private right of action); Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 632-34 (1984). In \textit{Darrone}, the Supreme Court held that the 1978 Amendments to the Rehabilitation Act of 1973, § 505, 29 U.S.C. § 794a (1982), adopting the rights and remedies provided in Title VI of the Civil Rights Act of 1964, did not incorporate the limitation found in § 604 of Title VI, 42 U.S.C. § 2000d-3 (1982), which provides that employment discrimination is actionable only when the "primary objective" of the federal assistance received by the employer is "to provide employment." \textit{Id.} at 632-34. In United States Dep't of Transportation v. Paralyzed Veterans, 106 S. Ct. 2705 (1986), the Supreme Court ruled that only direct financial assistance to the entity charged with discrimination would serve to impose the § 504 requirement. A private action for monetary relief may not, however, be brought against a state government employer under § 504, Atascadero State Hospital v. Scanlon, 105 S. Ct. 3142 (1985), under current Supreme Court interpretation of 11th Amendment sovereign immunity principles.
\item \textsuperscript{63} 29 U.S.C. § 706(7) (1982). The definition provides that "handicapped individual" means "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." \textit{Id.} at § 706(7)(B). The leading case construing this provision, E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980), essentially interprets it as meaning that "Congress wanted those individuals who either had or were perceived as having physical or mental conditions that disqualified them from employment to be considered as either impaired or regarded as impaired." \textit{Id.} at 1098. Expressly excluded from this definition are drug abusers "whose current use of... drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current... drug abuse, would constitute a direct threat to property or the safety of others." 29 U.S.C. § 706(7)(B) (1982). Because intravenous drug users are a major AIDS risk group, there is a certain inherent tension in resorting to the Rehabilitation Act to protect such individuals from AIDS-related discrimination, if their drug habit might prevent performance of job duties.
\item \textsuperscript{64} 41 C.F.R. ch. 60, app., pt. 60-1.3 (1985) (OFCCP is the enforcement agency for violations of § 503).
\item \textsuperscript{65} 45 C.F.R. § 84.3(j), (k) (1985).
\item \textsuperscript{66} \textit{See} Cooper, \textit{supra} note 21.
\item \textsuperscript{67} 29 U.S.C. §§ 1001-1461 (1982).
\end{itemize}
Section 510 of ERISA prohibits discharges intended to deprive employees of benefits to which they are entitled under benefit plans. Benefit plans are broadly defined, and include plans providing health care benefits and coverage, as well as pensions and life insurance. Some federal courts have held that the discharge of an employee who has been diagnosed with an expensive-to-treat ailment would create a cause of action under this provision, which is enforceable by direct suit in federal court.

The question whether interpretations of these state and federal laws as applied to the AIDS situation will hold up to court challenge is problematic, for courts may be more inclined than civil rights agencies to engage in the "rights balancing" characteristic of judicially developed employment law doctrines. Furthermore, a deter-


69. Id. The section specifically provides, in pertinent part: "It shall be unlawful for any person to discharge, . . . suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ." Id. For a detailed discussion of the legislative history and developing case law under § 510, see Martucci & Utz, Unlawful Interference With Protected Rights Under ERISA, 2 THE LAB. LAW. 251 (Spring 1986).


71. A recent decision supporting this cause of action is Folz v. Marriott Corp., 594 F. Supp. 1007, 1014-15 (W.D. Mo. 1984), in which the court held that an employee with a good work record who was suddenly discharged after receiving a diagnosis of multiple sclerosis stated a cause of action under § 510 of ERISA. Note, however, that several courts have held that the federal courts have the authority to require that the employee first exhaust available appeals remedies provided by the benefit plan before bringing a federal court action. See Kross v. Western Elec. Co., 701 F.2d 1238, 1243-46 (7th Cir. 1983); Amato v. Bernard, 618 F.2d 559, 566-68 (9th Cir. 1980). But see Janowski v. International Bhd. of Teamsters Local No. 710 Pension Fund, 673 F.2d 931, 935 (7th Cir. 1982) (exhaustion doctrine not applicable where the issue before the court is solely of statutory interpretation). The applicability of an exhaustion requirement to this type of case seems questionable, since internal appeals procedures under employee benefit plans usually deal solely with claims for benefits under the plan rather than claims of unlawful discharge. Accord Zipf v. AT&T, 85-3420 (3d Cir. 1986) (available DAILY LAB. REP. (BNA) No. 171, at E-I (Sept. 4, 1986)).

72. 29 U.S.C. § 1132(a)(3) (1982). The Secretary of Labor may also bring suit on behalf of a plan participant pursuant to § 1132(a)(5).

73. Recent labor law scholarship has noted that, in many instances, the courts have restricted employee rights that seem to be clearly articulated in statutory language based on a view of the countervailing rights of management not necessarily found on the face of the pertinent statute. Perhaps the most articulate exposition of this view is contained in J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983). This is evidenced by cases dealing with employer prerogatives in making decisions that may significantly affect working conditions without engaging in collective bargaining, First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), and in cases involving the right of employers to post their premises against nonemployee union organizers, NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), and to replace economic strikers permanently, NLRB v. MacKay Radio & Tel. Co.,
mination that AIDS is a handicap within the meaning of these laws is just the beginning of the inquiry, because these employment discrimination statutes permit the exclusion of a handicapped person if (1) that person cannot physically perform the job; (2) the person’s presence creates a health or safety problem for himself or others; or (3) the special problems created by a person with the handicap could not be accommodated without undue burden on the employer. The degree of protection a handicap discrimination law will extend to a person with AIDS will thus depend upon that person’s actual physical condition, the nature of the job, and the changing views about AIDS and transmissibility of HIV.

Certainly, in jurisdictions where the concept of “perceived

304 U.S. 333 (1938). The same tendency may explain the judicially imposed requirement that union strikes over health and safety issues in violation of a no-strike clause during the term of a collective agreement must be based on “objective” evidence of “abnormally dangerous” conditions. See Gateway Coal Co. v. U.M.W., 414 U.S. 368, 385-87 (1974). See generally Atleson, Threats to Health and Safety: Employee Self-Help Under the NLRA, 59 MINN. L. REV. 647 (1975) [hereinafter cited as Atleson, Threats] (arguing that a subjective good faith or reasonableness standard would more equitably balance the competing interests of employers and employees when employees strike over perceived dangerous work conditions).

74. See Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979) (construing the phrase “otherwise qualified handicapped individual” in § 794 of the Rehabilitation Act of 1973 to mean a person “who is able to meet all of a program’s requirements in spite of his handicap”); Arline v. School Bd., 772 F.2d 759, 764-65 (11th Cir. 1985), cert. granted, 106 S. Ct. 1633 (1986) (analyzing accommodation requirement once condition is found to be real or perceived handicap); Mantolete v. Bolger, 767 F.2d 1416, 1421-23 (9th Cir. 1985) (analyzing risk to safety of self or others as a factor in Rehabilitation Act analysis). See also Leonard, supra note 3, at 693-695, 696-701, for a review of employer defenses under handicap discrimination laws.

75. The sort of inquiry to be undertaken by a judicial decisionmaker in a case of this sort was described by the Eleventh Circuit Court of Appeals in Arline v. School Bd., 772 F.2d 759, 764-65 (11th Cir. 1985), cert. granted, 106 S. Ct. 1633 (1986), as follows: The court is obligated to scrutinize the evidence before determining whether the defendant's justifications [for the discharge] reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice.

Id. The Ninth Circuit, in Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985), commented: [I]n order to exclude such individuals, there must be a showing of a reasonable probability of substantial harm. Such a determination cannot be based merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports. The question is whether, in light of the individual's work history and medical history, employment of that individual would pose a reasonable probability of substantial harm.

Id. The court noted that Congress' intent was “to prevent employers from refusing to give much needed opportunities to handicapped individuals on the basis of misinformed stereotypes.” Id.
handicap" is recognized, Type I persons (risk group members) will be considered "handicapped" under the law and none of the usual employer defenses will apply, because such individuals are neither actually ill nor proven sources of infection. Indeed, Type II individuals (those exposed to or infected by HIV) should also be considered "handicapped" in such jurisdictions and, given the well-established facts about HIV transmission, none of the employer defenses should apply to them, either. In jurisdictions which do not recognize the "perceived disability" concept, however, these individuals may lack direct protection.

Types III and IV present a difficult problem on their face, because individuals may actually have ARC or AIDS and not have any apparent physical disability at a given time. Should they be considered "handicapped" in a jurisdiction which does not recognize the concept of "perceived handicap"? The underlying purpose of a "handicap discrimination" statute would support coverage in these cases, even though the definitional language of "handicap" in a particular statute may not, on its face, seem to cover the situation. Furthermore, the definitions of ARC and AIDS include physical symptoms that could be seen as evidence of some sort of "handicap." Additionally, immune system compromise may be seen as the "impairment" which constitutes the disability. If statutory protection does not extend to such situations, it is difficult to see how it could ever extend to a progressively disabling illness (as opposed to an injury).

76. See Leonard, supra note 3, at 691.
77. See Recommendations, supra note 25, at 682 ("The kind of nonsexual person-to-person contact that generally occurs among workers and clients of consumers in the workplace does not pose a risk for transmission of HTLV-III/LAV.").
78. Cooper, supra note 21, at D-7.
79. Admittedly, some courts in jurisdictions that do not recognize the concept of "perceived" handicap protection have held that serious, even potentially fatal illnesses, may be the basis for discrimination when they are in periods of remission and thus nondisabling. The most notorious case involved an Illinois woman with a cancerous condition, who had the misfortune to be living in a jurisdiction where the pertinent statute contained no definition of "handicap." Lyons v. Heritage House Restaurants, 89 Iili. 2d 163, 432 N.E.2d 270 (1982). In Lyons, the Illinois Supreme Court held that a woman with uterine cancer was not handicapped within the meaning of the Illinois Constitution or the Illinois Equal Opportunities for the Handicapped Act, and dismissed her employment discrimination claim for failure to state a cause of action. In this regard, the issue whether employees with cancer enjoy protection under disability discrimination statutes is closely analogous to the AIDS issue. By extending coverage to people with "a record" of a disability (29 U.S.C. § 706(7)(B)), Congress clearly signalled its intention in the Rehabilitation Act to include cancer patients in remission as persons subject to protection.
Assuming that the statute is held to apply, however, the issue of employer defenses is significant. Even though transmissibility is not normally a valid defense in an AIDS case, an argument could be made that a person with a compromised immune system should not be exposed to the variety of infectious agents found in the workplace for his or her own safety. This argument would be quite persuasive if AIDS were a disease involving generalized loss of immune function, or particular vulnerability to infectious agents found in some or all workplaces. But the medical evidence is that AIDS involves a loss of particularized immune function, and that the opportunistic infections associated with AIDS are caused by parasites that are normally present in most of the adult population. Consequently, medical authorities writing on AIDS have not suggested that persons with ARC or AIDS need to be excluded from the workplace to prevent them from contracting opportunistic infections. The medical evidence appears to indicate that they are just as likely to contract such infections sitting at home as attending a job.

The accommodation issue can also present serious problems in Type III and IV cases. It is likely that persons with ARC or AIDS will have problems maintaining good attendance, due to the occasional need for treatment for ARC systems or opportunistic infections. Furthermore, ARC and AIDS tend to be debilitating, lessening the individual’s stamina and ability to maintain a high degree of effort throughout a full workday. Depending upon the nature of the job and the needs (and particularly the size) of the employer’s operation, it may be that accommodating the person with ARC or AIDS will, in some circumstances, create an undue burden. This, however, will be a matter for the employer to prove objectively. More-

80. See Laurence, supra note 25, at 84.
81. The issue of accommodation, and most particularly the degree to which the accommodation requirement may be invoked to require more than minimal employer expenditures, has been the subject of considerable debate by scholars. See, e.g., Note, A Principled Limitation for Section 504 of the Rehabilitation Act: The Integrity-of-the-Program Test, 53 Fordham L. Rev. 1409 (1985); Note, Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness, 97 Harv. L. Rev. 997 (1984); Note, Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act, 55 N.Y.U. L. Rev. 881 (1980); Comment, Section 504 of the Rehabilitation Act: Analyzing Employment Discrimination Claims, 132 U. Pa. L. Rev. 867 (1984). The relatively undemanding accommodation standard under Title VII in religious discrimination cases, explicated in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), does not seem relevant to the handicap situation, given the different legislative history and purpose of the handicap discrimination statutes and the lack of a first amendment problem in the background of the analysis.
over, the defense will not be available prospectively, since speculation about long term future inability to meet work requirements is not normally a permissible basis for present discrimination under these statutes.\footnote{82}

Responding to a request for an opinion from the Department of Health and Human Services on the applicability of section 504 of the Rehabilitation Act\footnote{83} to the AIDS situation, Assistant Attorney General Charles J. Cooper wrote a memorandum which came to public attention late in June 1986.\footnote{84} The Cooper memorandum rejects many of the interpretations embraced by state agency officials, concluding that federal handicap discrimination law only forbids discrimination against those who suffer an actual physical impairment or who are perceived, wrongly or rightly, as suffering such an actual impairment.\footnote{85} Because persons with CDC-defined AIDS, Types IV and V in our classification scheme, have impaired immune function, they would be considered "handicapped" under this analysis,\footnote{86} and those Type III individuals experiencing physical symptoms characteristic of immune deficiency would also be considered "handi-
However, Cooper does not consider asymptomatic infection to be an actual impairment, and would thus exclude asymptomatic carriers of the virus (Type II) from the statutory definition, as well as uninfected members of so-called "risk groups" who might encounter discrimination because of a perception that they may be carrying, and capable of transmitting, the virus (Type I).

Furthermore, reasoning that ability to transmit an infectious agent is not itself an "impairment" within the meaning of the statute or regulations, Cooper argues that situations where individuals encounter discrimination because of fear of contagion rather than because of beliefs that they are physically unable to work are not within the statutory prohibition of discrimination. Cooper reasons that a person with CDC-defined AIDS who is actually physically impaired but otherwise qualified to work would not be protected from discrimination motivated by fear of contagion, because the statute only forbids discrimination motivated "solely by reason of [the] handicap." Under Cooper's interpretation, the lack of an objective basis for fearing contagion would be irrelevant, so long as such stated fears were not a pretext for discrimination based on actual physical impairment.

Cooper notes that only "otherwise qualified" handicapped individuals are protected from discrimination. Without stating a firm conclusion whether a person with AIDS is automatically "disquali-

87. *Id.* at D-9. Cooper concludes that the decision whether persons with ARC are handicapped must be made on a case-by-case basis, taking into account whether their symptoms are actually disabling. This follows logically from his refusal to regard seropositivity as a handicap under the "regarded as" category. *Id.*

88. *Id.* at D-9 to D-10. Cooper's argument is essentially that asymptomatic infection does not impair a major life activity (i.e., does not itself affect the individual's physical abilities), and thus does not meet the literal requirement of 29 U.S.C. § 706(7)(B) (1982), unless the individual is suffering discrimination because his employer actually regards seropositivity as a disabling condition. *Id.*

89. *Id.* at D-10. Here, as in the other categories discussed above, Cooper relies on a distinction between those who suffer discrimination because it is feared that they can spread the disease, and those who suffer discrimination because they are perceived as actually having CDC-defined AIDS or ARC. Cooper would find the former not protected, while the latter would be protected so long as the motivation for discrimination is their perceived physical impairment rather than fears about their ability to spread infection. *Id.*

90. *Id.* at D-7 to D-9, D-10 to D-13.


92. Cooper, *supra* note 21, at D-10 to D-12. Cooper argues further that because of the severity of AIDS, one cannot presume that such employer fears are pretextual merely because they lack any scientific foundation. *Id.* at D-11 to D-12.
fied" by virtue of being able to transmit the viral agent, Cooper states:

We do not believe that Congress intended enactment of section 504 substantially to rearrange human conduct with regard to contagious illnesses. Accordingly, we believe that a person capable of communicating the AIDS virus is not "otherwise qualified" to participate in a covered program or activity unless the risk that he poses to the health of other participants can be calculated with a high degree of medical certainty and is low enough, without "substantial modifications in the [ ] program," to be safely disregarded.83

This in effect places the burden on the discriminatee to establish that he does not present a risk of contagion in the workplace.

Cooper's interpretation seems contrary to a regulation adopted by the Department of Health and Human Services in construing the statutory definition of handicap, and to the underlying policy of the statute itself.84 The regulation states that handicap status extends to a person who "has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or . . . has none of the impairments defined in . . . this section but is treated by a recipient as having such an impairment."85 The regulation includes an illustrative list of "major life activities" including, most pertinently for this analysis, "working,"86 and defines "impairment," as pertinent here, as "any physiological disorder or condition . . . affecting one or more of the following body systems,"87 then providing a comprehensive list of body systems including several affected by the virus implicated in AIDS.88

Under this definition, it seems clear that infection by the virus is a physical impairment, since it is a condition which affects one or more of the listed body systems, even in the absence of physical

83. Id. at D-13 (citations omitted).
84. Cooper's memo is also contrary to the recommended approach by the staff attorneys in the Civil Rights Division of the Justice Department, contained in Department of Justice, Civil Rights Division, Draft Memorandum From Stewart B. Oneglia To William Bradford Reynolds, Coverage of Acquired Immune Deficiency Syndrome (AIDS) Under the Rehabilitation Act of 1973 (Apr. 1, 1986). See Pear, AIDS Victims Gain in Fight on Rights, N.Y. Times, June 8, 1986, at 1, col. 5.
88. Id.
symptoms (other than antibody production). Furthermore, seropositivity is clearly an impairment under the regulatory definition of the “regarded as having such an impairment” category because it may prevent the employee from working due to the attitudes of others toward this condition.

By focusing narrowly on the question whether capability of transmitting the virus is an “impairment,” Cooper misses the more important motivational issues behind AIDS-based discrimination: the employer’s fear of economic impact and workplace disruption due to the unfounded fears of fellow employees and the general public. Cooper’s response to the regulation is to dismiss it as not authorized by the statute and thus invalid, because it does not comport with his view of a common-sense meaning of “impairment.” But the regulation is fully compatible with the underlying philosophy of the statute, which is to limit adverse employment decisions by federal agencies and recipients of federal assistance to those situations in which employees’ physical conditions are such as objectively to justify removing them from the workplace.

In addition to contradicting a valid regulation, Cooper’s assertion that fears of contagion, however irrational, may be used to justify discrimination against persons with CDC-defined AIDS, either by rendering them “disqualified” or by labeling ability to transmit the virus as “not a handicap,” is fundamentally inconsistent with the policy underlying section 504. Cooper argues that such discrimination has not occurred “solely by reason of [the] handicap,” and thus is not cognizable under section 504. He reaches this result by as-

99. Cooper, supra note 21, at D-8. Cooper relies on de la Torres v. Bolger, 610 F. Supp. 593 (N.D. Tex.), aff’d, 781 F.2d 1134 (5th Cir. 1986), which held that left-handedness was not a statutory handicap. To compare infection with HIV to naturally-occurring left-handedness seems disingenuous, but one may well take issue with the Fifth Circuit’s decision in that case, for left-handedness is clearly a physiological condition that affects the neurological and musculoskeletal systems, and the more proper focus for the court might have been on whether the left-handed postal worker in question was “otherwise qualified” for the position, or whether a “reasonable accommodation” could have alleviated the production problems that led to his discrimination claim. Cooper also relies on a definition found in E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980), in which the court was faced with the question whether an applicant for a carpenter’s position who had suffered back injuries was handicapped. The definition Cooper quotes (“any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity”) is one adopted for purposes of the case by the Assistant Secretary of Labor and the administrative law judge under § 503, 29 U.S.C. § 793 (1982), governing employment practices of federal contractors, in default of any statutory or regulatory definition of “impairment” under that section; the court approved it using the normal deferential standard for reviewing agency interpretations.

100. Cooper follows the same approach in discussing the Eleventh Circuit’s decision in
inserting that the issues of infectiousness and physical impairment should be treated as separate and distinct for purposes of identifying the handicap which is the cause of the discrimination. But this approach fails to appreciate the critical distinction between diseases which present a genuine issue of workplace contagion and those which do not. The CDC Guidelines and the overwhelming weight of medical authority since their publication support the contention that contagion in the workplace is a spurious issue in the case of AIDS. To allow such a spurious issue to be used as a justification for discrimination defeats one of the purposes articulated by Congress for passing the statute, which was to “guarantee equal opportunity” so that handicapped persons would be able to live independently; rendering persons with AIDS or ARC (most of whom Cooper concedes to be handicapped within the meaning of section 504) unemployable due to unjustified fears of workplace contagion destroys their ability to live independently.

Arline v. School Bd., 772 F.2d 759 (11th Cir. 1985), cert. granted, 106 S. Ct. 1633 (1986), arguing that the tubercular school teacher was dismissed not because of any physical impairment caused by her illness, but rather because of fear of contagion, and consequently that she should not be protected by the statute. Cooper, supra note 25, at D-9 n.70.


102. Cooper, supra note 21, at D-3 to D-5. Cooper’s attempt to create doubts about the unanimity of medical opinion has already resulted in controversy about his opinion. See Pear, U.S. Apologizes to AIDS Researcher, N.Y. Times, July 23, 1986, at D20, col. 4.

103. The only workplaces where transmission issues seem relevant are health care settings where needle-stick accidents may prove to be a transmission mode. Cooper, supra note 21, at D-4. Of course, employment requiring sexual contact of the type which can transmit the virus would also present such a risk.


105. Perhaps the most bizarre portion of the Cooper memorandum is the part headed “Congressional Intent as Illuminated by the Background of Laws Dealing with Contagion,” at D-13 to D-16. Because the legislative history of the Rehabilitation Act says nothing about contagious conditions, Cooper argues that a negative inference should be drawn from Congressional silence in light of the long history of federal legislation authorizing public health officials to undertake action to contain the spread of epidemics. If the virus implicated in AIDS were spread through air, water, or food, such discussion might have some relevance to the issue, at least with respect to the “otherwise qualified” portion of the § 504 formulation. But where workplace contagion is not a serious issue, there is no basis for arguing that the history of public health measures is of any weight in determining whether unjustified fears of contagion would justify employment discrimination against persons with AIDS. The public health laws Cooper relies upon empower the Public Health Service to make the decision whether isolation or workplace exclusion of infected individuals is necessary to protect public health; the Public Health Service has made that decision in its published Guidelines, supra note 25, and has concluded that exclusion of seropositive persons or those suffering physical symptoms is not required for public health reasons. Here as elsewhere, the Cooper memorandum’s discussion of AIDS is undermined by the looming shadow of the Supreme Court’s consideration of Arline v. School Bd., 106 S. Ct. 1633 (1986), during the October 1986 Term, for the discussion seems...
In addition to advancing an unjustifiably narrow interpretation of the Rehabilitation Act protections against discrimination, the Justice Department’s adoption of the Cooper memorandum as its official interpretation of section 504 is bad public policy. It is likely to undermine efforts by the Public Health Service and the Centers for Disease Control to encourage voluntary submission to serological testing by members of so-called “risk groups” as a means of preventing further spread of the virus. Additionally, it will be seen as federal authorization for employers to discriminate against employees who have AIDS, ARC, or test positive, thus unnecessarily expanding the number rendered unemployable, and placing an extra burden on public welfare agencies at a time of governmental fiscal stringency. It is to be hoped that the federal courts will reject the Justice Department’s interpretation when they are presented with individual suits under section 504.

Under traditional concepts of employment law, apparently not modified by the passage of “handicap discrimination” statutes, persons who are physically unable to work are normally not entitled to continued employment. As the law has developed during the twentieth century, exceptions to this concept have grown up, particularly around disability due to pregnancy or other work-related injuries or illnesses which can be expected to have a finite duration. With the advent of modern concepts of workers’ compensation systems and disability benefits programs, many employers follow the policy of

106. It may also be seen as a tacit authorization for employers to require serological testing of applicants or current employees. See infra text accompanying notes 163-165.

107. In its decision in In re Charlotte Memorial Hosp., No. 04-84-3096 (Region IV, Aug. 5, 1986), the Office of Civil Rights, U.S. Dep’t of Health and Human Services has already adopted a narrow construction of the Cooper opinion. Although the employer’s asserted motivation for discharging a registered nurse with AIDS was fear of workplace contagion, OCR ruled that discrimination occurred because the hospital employer’s normal policies for dealing with employees with infectious conditions were not followed.

108. See Leonard, supra note 3, at 689-90.

109. For example, 42 U.S.C. § 2000e-2(a) (1982) provides that it is unlawful for an employer “to discriminate against any individual . . . because of such individual’s . . . sex.” Section 2000e(k) provides that the term “because of sex” as used in the statute includes “because of or on the basis of pregnancy, childbirth, or related medical conditions.” Section 2000e(k) also provides that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes as other persons similar in their working ability.”
placing temporarily disabled employees on medical or disability leave, with the understanding that a return to work is possible when the disability ends. Type V persons (ARC or AIDS sufferers who are not physically able to function in the workplace) may well qualify for this type of treatment since, despite the ultimately terminal nature of CDC-defined AIDS, it is not uncommon for people with ARC or AIDS to go through alternating cycles of ill health and normal health. Even though it is highly unlikely that most cases of HIV infection or AIDS are work-related (and thereby covered by the workers compensation concept), it would seem appropriate to treat all but the most severe and apparently irreversible end-stage cases as temporary disability cases. Thus, employees who are presently unable to work due to AIDS should be treated in the same manner as others, such as pregnant women, by placing them on the same type of leave arrangement.

Indeed, the loss of the financial benefits, especially medical insurance, associated with employment may present a greater problem in AIDS cases than the actual loss of employment. The primary aim of enforcement agencies which receive employment discrimination charges may be the continuation of some level of employee status so that the financial support systems so badly needed at this time of medical crisis will not be suddenly taken away.

If the employer's concern about medical costs is the motivating factor in removing the employee from the workplace, the ERISA provision mentioned above may come into play. If this little-noted provision is exploited to the extent its language will bear, a major change in the underlying legal assumptions governing the employment relationship could result. The traditional rule that an employer need not retain in his employ an individual who is not presently physically capable of performing could be effectively eliminated. A rule that employees who have worked long enough to qualify for medical benefit coverage may not be discharged solely on the basis of a medical condition for which they are entitled to benefits would

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110. See generally Skagen & Ather, supra note 8, at 11-27 (discussing management responses to AIDS issues and invoking some common practices for dealing with disabling illnesses).

111. In discussing the work of the New York City Commission on Human Rights in dealing with AIDS-related employment discrimination cases, the authors of a report to New York's Mayor stress that a major accomplishment connected with reinstatement is that "invaluable insurance coverage which had been lost in the process of termination was re-obtained." D. Sencer and V. Botnick, supra note 6, at 43.

make sense under the predominantly private American health care system, under which health insurance coverage is typically obtained as part of employee compensation. Depriving the employee of the benefit of such coverage when he becomes ill is tantamount to withholding wages that have been earned.\textsuperscript{119} It would seem perverse public policy to allow employers to reap benefits in employee loyalty and labor peace by promising medical benefits for their employees but to allow them to discharge those employees when they become ill, leaving them without benefit protection, thus shifting their costs to government assistance rolls.\textsuperscript{114}

Much of this discussion about the impact of employment discrimination laws in the context of AIDS is, admittedly, speculative. There is no reason, however, under these statutes, to treat AIDS differently from other noncontagious conditions which, for some of their duration, allow the person with the condition to function physically in a workplace setting.\textsuperscript{116} If not for the widespread public fears about AIDS, there would be no reason to give it any special treatment at all.\textsuperscript{118}

113. D. ALTMAN, supra note 1, at 120-21. Of course, this principle would not require the employer to keep such an employee on the job. Rather, the principle would require that the employment relation not be severed, so that the employee would retain the right to benefits that would be lost through termination of the relationship. Unpaid medical leave might be the appropriate status for such an employee.

114. The intention expressed by some representatives of the health insurance industry is to avoid having to incur the costs of providing medical benefits to some persons with AIDS through aggressive underwriting and to use, where legal, the HIV antibody test as a screen for individual policy applicants. This merely reinforces the importance of ERISA and handicap discrimination laws as a means of enabling employees who develop AIDS to continue their employment status, at least for purposes of medical and life insurance coverage. See Bayer & Oppenheimer, supra note 9, at 33-34. On the significant costs that loss of employee health coverage would shift to the public sector, see D. ALTMAN, supra note 1, at 119-26; Waldman, The Other AIDS Crisis: Who Pays for the Treatment?, THE WASH. MONTHLY, Jan. 1986, at 25-31. For a cogent argument against the use of HIV antibody tests by insurance companies, see B. Schatz, C. Heilmann & W. Warner, AIDS and Insurance, in A Dialog on Industry Issues 3, 4-6 (NILS Publishing Co. December 1985).

115. In this regard, AIDS probably presents a clearer case for protection under disability discrimination law than does tuberculosis (a condition held to constitute a handicap in Arline v. School Bd., 722 F.2d 759 (11th Cir. 1985), cert. granted, 106 S. Ct. 1633 (1986)), given current medical knowledge about the lack of danger of HIV contagion in workplace settings. Tuberculosis, by contrast, is spread by a mycobacterium, characterized as aerobic, transmitted "mainly by contact with the sputum or saliva of infected persons." J.E. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE T-138 (1979 ed.); DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1656 (25th ed. 1979).

116. In addition to the statutory protection against employment discrimination, it should be recalled that about a fifth of the civilian workforce is covered by collective bargaining agreements which may provide a source of protection to those employees in an AIDS-related discrimination case, due to the applicability of a "just cause" standard for dismissal. See Leo-
III. LABOR RELATIONS LAW ISSUES

AIDS in the workplace can be expected to present some difficult questions under the National Labor Relations Act. Public hysteria about AIDS has created situations in some workplaces where co-workers or supervisors genuinely, if misguidedly, fear working next to a person with AIDS. These fears can result in pressures on the employer to remove the person with AIDS from the situation.

Should the sincerity of these fears insulate the coworkers from employer discipline, especially if the coworkers take concerted action on the basis of such fears?

Sections 7 and 8(a)(1) of the National Labor Relations Act protect employees who engage in concerted activities for mutual aid or protection from employer discipline or discharge. The courts and the National Labor Relations Board have held that concerted refusals of employees to work due to safety or health fears may come within this statutory protection. In perhaps the most important of these cases, NLRB v. Washington Aluminum Co., the Supreme Court said in dicta that the reasonableness of the employees' concerted refusal to work was not an issue, so long as they were acting in good faith.

If employees engage in a protected refusal to work,
the employer may not discharge them, but may replace them, either permanently or temporarily. Employees enjoy this protection as long as their union representative has not waived their right to strike.\textsuperscript{123} Even if such a waiver has taken place, section 502 of the Act\textsuperscript{124} may protect employees if they have an objective basis for their good faith belief that the condition they are protesting is "abnormally dangerous."\textsuperscript{125}

In recent years, the National Labor Relations Board appears to have adopted a more demanding standard for the protection of employee work refusals under section 8(a)(1). It has narrowed the definition of "concertedness" found in earlier case law,\textsuperscript{126} and it has be-


\textsuperscript{125} Gateway Coal Co. v. UMW, 414 U.S. 368, 386-87 (1974) ("a union seeking to justify a contractually prohibited work stoppage under § 502 must present 'ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists'") (quoting Gateway Coal Co. v. UMW, 466 F.2d 1157, 1162 (1972) (Rosenn, J., dissenting)). See generally Atleson, Threats, supra note 73 (arguing that Supreme Court was incorrect in adopting an objective standard under § 502). Of course, if an employer takes disciplinary action against an employee in a case where there is a union contract containing a grievance and arbitration procedure, the Board will in the first instance defer the case to grievance arbitration consistent with the Congressional policy favoring resolution of labor disputes through arbitration. Collyer Insulated Wire, 192 NLRB 837 (1971). Once the arbitrator has rendered his decision, the Board will defer to the arbitrator's decision provided: (1) the proceedings before the arbitrator were fair and regular; (2) all parties agreed to be bound by the arbitrator's decision; (3) the arbitrator's decision is not clearly repugnant to the purposes and policies of the National Labor Relations Act; and (4) there is factual parallelism between the contractual and statutory cases. See Speilberg Mfg. Co., 112 NLRB 1080, 1082 (1955) (establishing the first three requirements); Olin Corp., 268 NLRB 573 (1984) (establishing fourth component). A refusal by the Board to defer to an arbitrator's decision, where the articulated requirements have been met, may constitute an abuse of discretion. See American Freight Sys., Inc. v. NLRB, 722 F.2d 828 (D.C. Cir. 1983); Richmond Tank Car Co. v. NLRB, 721 F.2d 499 (5th Cir. 1983).

\textsuperscript{126} Compare Meyers Indus., Inc., 268 NLRB 493, 497 (1984), rev'd sub nom., Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985) (an employee's activity is "concerted" if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.") with Alleluia Cushion Co., 221 NLRB 999, 1000 (1975) ("[W]here an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted."). The discussion of this issue in Recent Developments, supra note 51, at 531-34, appears to have been written in ignorance of recent developments under the NLRA.
gun to require some "reasonableness" in the employee's actions.\textsuperscript{127} This might reflect a view by the Board that the underlying policy of the Labor Act was not intended to protect clearly unreasonable refusals to work, but the Board has not expressly articulated reasons for this shift. Indeed, a reading of pertinent cases indicates that the Board probably did not intend to make any significant change in the standard. However, it would appear an irrational interpretation of the statute to extend protection to work refusals stemming from delusions or a wilful refusal to consider objective evidence of safety presented by an employer.

Under current Board law, in the absence of an existing collective bargaining agreement, the protections of the National Labor Relations Act do not extend to work refusals by individual employees.\textsuperscript{128} Sections 7 and 8(a)(1) of the Act deal solely with concerted

\begin{itemize}
\item \textit{Compare} Johnson-Stewart-Johnson Mining Co., 263 NLRB 123, 123 (1982) ("Protesting an unsafe working condition can be protected activity under the Act if the employee so protesting has a good faith, reasonable belief that such a condition exists.") with Wagner-Smith Co., 262 NLRB 999, 999 n.2 (1982) ("[I]t is well settled that the merit of a complaint or grievance is irrelevant to the determination of whether an employee's conduct is protected under the Act, so long as the complaint was not made in bad faith.") and Colorado Forge Corp., 260 NLRB 35, 36-37 (1982) ("[I]t is well settled that the Board does not pass on the reasonableness of the employees' complaints" underling their concerted refusal to work); Tamara Foods, Inc., 258 NLRB 1307, 1308 (1981), enforced, 692 F.2d 1171 (1982) ("Inquiry into the objective reasonableness of employees' concerted activity is neither necessary nor proper in determining whether that activity is protected."). In Washington Cartage, Inc., 258 NLRB 701 (1981), the Board dismissed an unfair labor practice charge where a truck driver had been discharged for refusing to drive a truck he considered unsafe, even though the driver genuinely believed the truck was unsafe. The Board found that the employee's fears were due in part to his inexperience. \textit{Id.} at 704. Consequently, it would appear that the Board may not recognize protection for protesting employees whose fears are based on personal ignorance or phobias.

\item In Meyers Indus., Inc., 268 NLRB 493, 496 (1984), the Board overruled Alleluia Cushion Co., 221 NLRB 999 (1975), which had held that actions of a single employee are concerted, protected activities under the Act if the issue involved is of interest to all employees. However, the Board declined to similarly overrule or set forth the parameters of its decision in Interboro Contractors, Inc., 157 NLRB 1295 (1966), enforced, 388 F.2d 495 (2d Cir. 1967), where the Board had held that actions of an individual employee in attempting to enforce a provision of an existing collective bargaining agreement are grievances within the framework of the contract and thus are concerted activity protected by \textsection{7} of the Act. The Board's \textit{Interboro} doctrine was recently upheld by the Supreme Court. NLRB v. City Disposal Sys., Inc., 465 U.S. 822 (1984). \textit{See also} American and Efird Mills, 269 NLRB 1077 (1984). In this case, the Administrative Law Judge (ALJ) commented:

Where there is no collective-bargaining agreement the merit of a single employee's complaint on a safety matter must be corroborated by at least some objective criteria establishing a basis for a reasonable belief of the existence of a dangerous condition so as to make it a likely concern to more than just the complaining employee. \textit{Id.} at 1080-81. However, the Board's decision affirming the dismissal of the unfair labor practice charge expressly did not rely upon this portion of the ALJ's decision. \textit{Id.} at 1077.
\end{itemize}
activities and, despite its plain language seeming to implicate individual employee actions, section 502 of the Act has not yet been construed to apply to situations other than those in which a union calls for a health or safety inspired strike in a case where the union has previously waived the right to strike through agreement to grievance arbitration. Regulations promulgated by the Department of Labor to enforce the Occupational Safety and Health Act, however, seem to afford individual employees protection if they are confronted by a hazardous condition which might subject them to serious injury or death, as long as their work refusal is reasonable and taken in good faith.

Where does this leave the employer faced by an individual or concerted work refusal by employees who fear the presence of a person with AIDS in the workplace? If an employer has taken adequate steps to educate his workforce about AIDS, and particularly about the virtually conclusive evidence about transmissibility, subsequent work refusals should not be found to be in good faith. Thus, the employer could threaten or carry out discipline or discharge as a means of ending the work refusal. Assuming, however, that an administrative or judicial adjudicator finds that such work refusals are taken in good faith, would they be considered “reasonable” in such circumstances, and is there an “objective basis” for the employees’ fears?

Certainly, if there were significant doubts as to how HIV is

133. Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980). As characterized by the Court in Whirlpool, the pertinent regulation protects “the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available.” Id. at 3-4.
134. This is implied by the court in NLRB v. Modern Carpet Indus., Inc., 611 F.2d 811, 814-15 (10th Cir. 1979):

There is every reason to believe that they were in good faith. There was no reason to suspect that they were not. The company did not act with intelligence in the matter. If indeed the lead was harmless, management could at least have told the employees who had made the appraisal or, better still, could have made a statement in writing assuming liability for any harm that might be sustained. The employees offered to work with it after the lead was tested.

135. In at least one case, an arbitrator has ordered reinstatement of an employee who refused to work due to AIDS fears, relying principally on management’s clumsy response to the situation. Minn. Dept of Corrections, 85 Lab. Arb. (BNA) 1785 (Gallagher, Arb., 1985).
transmitted, or that HIV infection is necessary for the development of AIDS, employee fears might be “reasonable” or “objectively based,” for there is no denying at this stage in its history that CDC-defined AIDS is usually a terminal condition and seems to be spreading at epidemic rates.\(^{138}\) The repeated statements by public health authorities and leading medical researchers that HIV is not transmitted by casual workplace contact, and the increasing publication of such medical assurances in electronic and print media, makes a refusal to work with a person with AIDS seem unreasonable. Fellow employees’ disbelief of these reassurances should not form the basis for authorizing discrimination against the person with AIDS.

Regardless whether the employee beliefs are reasonable, it is questionable whether concerted activity would be protected where it is engaged in for the purpose of compelling the employer to discriminate unlawfully against another employee. Indeed, there is some case law indicating that a union may be committing an unfair labor practice under sections 8(b)(1)(A) or 8(b)(2) if it seeks to pressure the employer to discriminate in a manner violative of civil rights laws.\(^{137}\) Surely, concerted activity for such a purpose could not be considered protected, and such union or employee pressure would not be a valid defense to a discrimination action against the employer by the person with AIDS.\(^{138}\)

\(^{136}\) The current rate of new cases may not, however, be an accurate indication of current rate of new infection, because of the considerable “incubation” period associated with HIV infection and substantial behavior modification by some of the affected risk groups. Eckholm, *Onset of AIDS After Transfusion Found to Lag Average of Five Years*, N.Y. Times, May 29, 1986, at A21, col. 1-2.

\(^{137}\) See, e.g., International Bhd. of Painters Local 1066, 205 NLRB 651 (1973); Amalgamated Local 453, 149 NLRB 482 (1964). The union might also be violating its statutory duty to provide fair and unbiased representation to the employee with AIDS. As judicially and administratively developed, the duty of fair representation would require the union to act in good faith, and to avoid action which could be seen as “invidious treatment” against particular employees. For a current summary of the law as to the union’s duty of fair representation, see, 2 THE DEVELOPING LABOR LAW 1285-1358 (C. Morris 2d. ed. 1983). However, an employer faced with these problems in a union-represented workplace would be wise to involve the union in any attempted resolution of the problem, if only to avoid the sort of “no-win” situation described in W.R. Grace & Co. v. Local 759, 461 U.S. 757 (1983), where an employer was caught between the requirements of a collective agreement and a court-approved Title VII settlement.

\(^{138}\) Direct case law on this point is scant, but an analogy can be drawn from cases arising under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1982), which held that mere concerted employee refusals to comply with a safety rule mandated by OSHA, while perhaps protected under the National Labor Relations Act, without more, did not excuse the employer from OSHA compliance. *See Atlantic & Gulf Stevedores, Inc. v. OSHRC*, 534 F.2d 541 (3rd Cir. 1976); *I.T.O. Corp. v. OSHRC*, 540 F.2d 543 (1st Cir. 1976).
While an employer may be able to threaten or carry out discipline or discharge, it is undoubtedly better labor relations practice to attempt to prevent the problem by employee education and, if that fails, by transfer or replacement of the protesting employee. If a union is present, it would also be prudent to involve the union in discussions of ways to accommodate employees with AIDS. Disciplinary action or discharge of fellow employees who refuse to work with the employee with AIDS should be a last resort. Such an approach is especially appropriate in the emotional climate surrounding AIDS, where an inability to understand the sophisticated medical knowledge underlying the assurances of safety can arouse fears that are genuine, although unjustified.

IV. TESTING AND RELATED ISSUES

One of the most vexing legal issues arising from the AIDS crisis is whether blood tests to detect HIV infection can have an appropriate role in employment. Given the current state of medical knowledge, and the conclusions of public health officials that such testing on a routine basis is unnecessary to protect the general workforce or the public from the risk of infection, it might seem that such testing has no lawful purpose, except in a limited range of workplaces

139. Since employee health and safety issues are mandatory subjects for bargaining, an employer is obligated under the National Labor Relations Act to deal with the union on workplace matters involving health and safety. See Carbonex Coal Co., 248 NLRB 779, 800 (1980), aff'd, 679 F.2d 200 (10th Cir. 1982); J.P. Stevens & Co., 239 NLRB 738, 742-43 (1978), modified on other grounds, 623 F.2d 322 (4th Cir. 1980), cert. denied, 449 U.S. 1077 (1981). However, the obligation to bargain does not require agreement. 29 U.S.C. § 158(d) (1982).

140. The current blood testing for antibodies may become outmoded as medical research leads to more direct medical tests for the presence of the suspected virus, in a form which could be made as readily available as the current, relatively inexpensive ELISA antibody test.

141. Recommendations, supra note 25, at 686, 691, 693-94.

142. Testing might be seen as a marker for homosexuality in male employees, or intravenous drug use in employees of both sexes. The military, which maintains regulations against enrollment of homosexuals in its ranks, has processed personnel with AIDS for discharge on grounds of homosexuality. See Friedman & Stamey, Military, in AIDS LEGAL GUIDE: A PROFESSIONAL RESOURCE ON AIDS-RELATED LEGAL ISSUES AND DISCRIMINATION 50-56 (Lambda Legal Defense & Education Fund, Inc. 1984, rev. ed. to be published 1987). Employment discrimination on the basis of sexual orientation is not prohibited by federal law, and the Rehabilitation Act would only protect the intravenous drug user whose drug use does not present competency or safety issues. 29 U.S.C. § 706(7)(B) (1982). State law protection against employment discrimination for homosexuals and/or drug users is spotty. However, employers should be aware that one state (Wisconsin), the District of Columbia, and many counties and municipalities (including some large cities with significant numbers of reported AIDS cases) have adopted ordinances prohibiting discrimination on the basis of sexual orientation. See E.
where seropositivity might appear relevant to job function. Yet there is an almost irresistible urge to use a test when it exists, especially if there is a perception that the test can be used to predict difficulties before they occur. There is evidence that some employers have seized upon the availability of this test as a way of removing the AIDS problem from their workplaces.

The law on medical testing and screening of employees is new and largely undeveloped. What little case law exists has more to

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143. With respect to the private sector, it might at first seem difficult to suggest such a workplace without describing jobs far from the mainstream, such as employment as an actor in pornographic productions involving performance of sexual acts, or as a sex therapy surrogate. However, it has been suggested that certain job functions in health care might present circumstances where seropositivity would be a disqualifying factor. See Recommendations, supra note 25, at 682, 691 (CDC still developing workplace recommendations for health care workers who perform “invasive procedures,” such as surgeons and dentists, and for specialized settings such as prisons or institutions housing persons “who may exhibit uncontrollable behavior”). In the public sector, the military has taken the position that the necessity that active duty soldiers be available as a source for emergency blood transfusions provides a justification for excluding seropositive individuals. Although this looks like using a worst-case scenario to justify the military’s traditional exclusion of homosexuals, the military also advances an economic justification based on the medical costs associated with the complications of HIV infection. Bayer & Oppenheimer, supra note 9, at 31. This justification would not be available to a private employer subject to disability discrimination laws, however.

144. See N.Y. State Div. of Human Rights, supra note 8, at 4-8. Of course, the predicate for using a test as a predictive device is that the test is an accurate predictor, and here the antibody test is seriously lacking, since current evidence indicates that seropositivity alone is not highly predictive of development of ARC or AIDS over a period of several years. Estimates of the number currently infected in the United States (and thus seropositive) range from 300,000 to one million, but the number of cases presently counted by the CDC as of August 1986 numbers about 23,000. See Levine & Bayer, Screening Blood: Public Health and Medical Uncertainty in AIDS, in AIDS: The Emerging Ethical Dilemmas, Hastings Center Rep., Aug. 1985, at 8-11 (special supplement); Pear, U.S. Files, supra note 21, at 1, col. 3; Mass, supra note 25, at 35. The use of medical tests to detect employees who may be at “high risk” for developing occupational diseases is, of course, already practiced in some areas of employment, and has received significant scholarly attention. See M. Rothstein, Medical Screening of Workers 23-51 (1984); Rothstein, supra note 82, at 1421-96. Although the AIDS situation does not deal with an occupational illness, as such, many of the concerns to be discussed are similar.

145. Report of the Committee on Development of the Laws of Individual Rights and Responsibilities in the Work Place, 1982 A.B.A. Lab. and Empl. L. Comm. Rep. 11 [hereinafter cited as A.B.A. Report] (concluding that statutory restrictions as to physical testing of private sector employees have been virtually nonexistent, although suggesting possible applicability of tort concepts). See generally, Rothstein, supra note 82, at 1421-96 (discussing the interrelationship between relatively new medical screening procedures and existing labor laws
do with testing for the use of controlled substances or alcohol, or susceptibility to occupational illness, than for the presence of infectious agents. Objections to such testing (apart from potentially illegal use of the results of the test) could be based on the perceived invasion of individual privacy when a test requiring drawing blood is involved, as well as the degree to which such tests reveal intimate details of the person's lifestyle and private habits which are believed to be outside the scope of legitimate employer interest.

146. See, e.g., Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985); Barnes & White, Employee Privacy Rights: "Everything You Always Wanted to Know—But Shouldn't," 64 Mich. B.J. 1104, 1108 (1985). Testing might be considered unlawful under laws forbidding sex or race discrimination if it had a disparate impact on particular racial or sexual groups, under the theory of Griggs v. Duke Power Co., 401 U.S. 424 (1971), unless, of course, the disparate impact was irrelevant because the test was job-validated. The burden would be on the user of the test to demonstrate validation. Id. at 431-32. See also Rothstein, supra note 82, at 1452-57 (concluding that in the case of medical screening of employees through testing for susceptibility to occupational illness, in order to overcome the presumption of discriminatory intent raised by the disparate impact, courts would probably require the employer to demonstrate that: (1) valid reasons exist for excluding presently capable employees on the basis of the probability that they will become impaired in the future; (2) it is essential to the business that employees be free from occupational illness; (3) a high correlation exists between the trait revealed by the testing and increased susceptibility to disease; (4) the test used is an accurate predictor; and (5) no other test is available that will accomplish the employer's purpose with less of a disparate impact). There are no reported validation studies with respect to the antibody test for HIV and job duties or qualifications. Furthermore, if an employee refused to take a test which would have a disparate impact forbidden by Title VII, the law might forbid disciplinary action against the employee based on such a refusal. See id. at 1466-67. The notion of any sort of medical screening, including genetic screening, as a tool for excluding employees who might develop disabling conditions in the future, regardless whether such conditions are work derived, has received considerable discussion, some critical. See, e.g., Barnes & White, supra, at 1108; Diamond, Genetic Testing in Employment Situations: A Question of Worker Rights, 4 J. LEGAL MED. 231 (1983); Rothstein, supra note 82, at 1409-96. Note, Employment Discrimination Implications of Genetic Screening in the Workplace Under Title VII and the Rehabilitation Act, 10 Ant. J. L. & Med. 323 (1984); Hunt, supra note 54, at 52, 55-57, 59-61.

147. Many state fair employment laws have generated regulations intended to define what are appropriate uses of physical tests. See, e.g., Disability, 3 EMPL. PRAC. GUIDE (CCH) ¶ 26,059 (N.Y. State Div. of Human Rights Nov. 1979) (rulings regarding pre-employment inquiries); Ohio Civ. Rights Comm'n R. 4112-5-08(F), 3 EMPL. PRAC. GUIDE (CCH) ¶ 26,678.08 (Dec. 12, 1979); TEX. HUM. RES. CODE ANN. § 121.010 (Vernon Supp. 1986). Most significant in this connection are restrictions against disability-based discrimination with respect to regulations promulgated under the Rehabilitation Act. See Note, supra note 146, at 336-46; infra note 163 and accompanying text.

148. Cf. Comment, Analyzing the Reasonableness of Bodily Intrusions, 68 MARQ. L. REV. 130 (1984) (discussing the fourth amendment's prohibition against unreasonable searches and seizures as protection of the individual's right to privacy in cases where the authorities seek to extract evidence from the body of a criminal suspect or defendant).

149. The notion that a concept of employee privacy limits the employer's right to personal information about employees can be found at an early stage of development, and has arisen in a
Evaluating the validity of these objections in a legal context is difficult because, apart from theoretical constitutional restraints upon public employers and some scattered state constitutional and statutory privacy provisions, there is little statutory basis for personal privacy rights of private sector employees. Much employee privacy law is derivative in the sense that it may be a byproduct of statutes intended to do other things, such as prevent discrimination or abuse of data bases. Thus, employers are not supposed to make certain inquiries of job applicants which are not job-related and could create the potential for unlawful discrimination in hiring. A general, comprehensive, statutory law of private sector employee privacy does not yet exist, however, although the AIDS phenomenon demonstrates why development of such a body of law would be appropriate. This lack of statutory guidance has led some jurisdictions to develop a variety of contexts, including use of electronic monitoring of employee performance, use of the polygraph, and protection of the confidentiality of personnel and medical records of employees.

See Castagnera-Cain, Defamation and Invasion of Privacy Actions in Typical Employee Relations Situations, 13 LINCOLN L. REV. 1 (1982); Diamond, supra note 146, at 245-47; Duffy, Privacy vs. Disclosure: Balancing Employee and Employer Rights, 7 EMPLOYEE REL. L. J. 594 (1982); Rothstein, supra note 82, at 1469-75; Stack, Polygraphs and Privacy—Statutory Intervention is Needed to Protect Private Workers' Rights, FLA. B.J., 19 (1985); Note, Electronic Monitoring in the Workplace: The Need for Standards, 52 GEO. WASH. L. REV. 438 (1984); Hunt, supra note 54, at 60-61. See generally INDIVIDUAL RIGHTS IN THE CORPORATION 177-278 (A. Westin & S. Salisbury eds. 1980) (identifying several management and statutory approaches to employee privacy) and Belair, Employee Rights to Privacy, PROC. N.Y.U. THIRTY-THIRD ANNUAL NAT'L CONFERENCE ON LABOR 3 (1981) (discussing the developing notion of private sector employee privacy). In Phillips v. Smalley Maintenance Servs., Inc., 435 So. 2d 705 (Ala. 1983), the court, applying the Restatement (Second's) definition of the tort of invasion of privacy to a sexual harassment complaint against an employer, allowed a female employee to recover damages for medical problems resulting from the harassment.


Rothstein comments, in connection with medical tests for susceptibility to occupational illness, that “private sector employees have few, if any, rights in this area.” Rothstein, supra note 82, at 1470.

A.B.A. REPORT, supra note 145, at 3-7; Duff & Johnson, supra note 151, at 751-54; Menard & Morrill, supra note 151, at 93-94.

to experiment with AIDS-specific legislative protection. To date, Florida, Wisconsin, California, and Massachusetts have adopted legislation or regulations which would restrict the use of antibody tests for HIV for workplace decisionmaking.

If a nonstatutory right of private sector employee privacy is to be found in jurisdictions lacking such statutes, it might be derived from the common law of torts. One might imagine a privacy action premised on the theory that requiring an intrusive medical procedure whose results may not lawfully be used is an unjustified invasion of the body, a kind of physical assault, and certainly an insult to the physical integrity of the employee. Furthermore, if the employee tests seropositive and the employer fails to keep the information confidential, one can imagine the potential for defamation and related tort developments.

156. Wis. Stat. § 103.15, 3 Empl. Prac. Guide (CCH) ¶ 29,130 (July 20, 1985) (providing that employees and job applicants may not be required to take an AIDS screening test as a condition of employment).
159. Such an approach could be premised on an expansive interpretation of § 652(B), Restatement (Second) of Torts, which recognizes a tort for intrusion upon the seclusion of an individual. Restatement (Second) of Torts § 652(B) (1977). Without resorting to the Restatement, but using essentially the same concept, the West Virginia Supreme Court of Appeals recently found a potential violation of private sector employee privacy rights in a discharge for refusal to undergo a polygraph examination. Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984). Without expressly exploring the issue, and noting that courts in some other jurisdictions had reached a contrary result, the court proclaimed that it would violate public policy protecting the personal integrity of individual privacy to allow an employer to discharge an employee for refusing to take such a test. Id. at 117. A West Virginia statute forbidding such tests, which became effective after the incident involved in the case, was seen by the court as merely codifying existing public policy. Id. The Restatement policy was expressly invoked by the Alabama Supreme Court in Phillips v. Smalley Maintenance Servs., Inc., 435 So. 2d 705 (Ala. 1983), finding privacy tort protection for a female employee who alleged that she was sexually harassed by a supervisor. Prior to these recent developments, courts (and some labor arbitrators) had been generally reluctant to recognize privacy rights in these types of cases. See Rothstein, supra note 82, at 1469-71.
160. Some existing statutory authority exists regarding confidentiality of employee records, particularly medical records. See A.B.A. REPORT, supra note 145, at 6-7; Report of the Privacy Protection Study Commission, Privacy Law in the United States, Appendix 1.
While employers in many states may be able to compel job applicants or current employees to undergo medical tests, handicap and disability discrimination law may significantly impede the ability of employers to use the results of those tests. If an employee tests positively for antibodies to HIV (or, assuming a direct test for the virus becomes generally available, tests positively for infection), what is the employer to do with that information? In a jurisdiction which would regard seropositivity as a "perceived disability," any action taken to remove the employee from the workplace or to sever the employment relationship would be unlawful, unless the employer could prove that a negative antibody test was a bona fide occupational qualification.\textsuperscript{161} It would also seem clear that an employee terminated on the basis of seropositivity would be entitled to unemployment benefits, since the discharge could hardly be considered as being "for cause" under current doctrines of unemployment compensation law.\textsuperscript{162}

Furthermore, regulations promulgated under federal and state handicap discrimination laws may affect the timing and use of medical tests. For example, Rehabilitation Act regulations forbid prehire medical testing which is not justified as job-related and nondiscriminatory.

\textsuperscript{161} Noninfection as a bona fide occupational qualification presents complicated employment discrimination law issues, particularly if it results in disparate impact against members of groups who are otherwise protected. A policy against employing persons with AIDS would, in most parts of the United States, have a disparate impact on the basis of gender, race or color, and perhaps national origin, thus potentially violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(2) (1982). Thus, such a policy would require validation, documenting the job-relatedness of noninfection as a requirement. See supra note 146; Rothstein, supra note 82, at 1452-60.

\textsuperscript{162} See, e.g., Mack v. Ross, 54 A.D.2d 522, 386 N.Y.S.2d 244 (1976) (employee who terminated her employment because she was disabled from performing the lifting her job required found not to have voluntarily quit). See generally Annot., 14 A.L.R.2d 1308 (1950) (discussing the effect of disability on the right to unemployment compensation). A related issue, dismissal of an employee who seeks leave time to care for a relative or friend with AIDS, was recently decided in California favorably to the benefit rights of the dismissed employee. California Unemployment Insurance Appeals Bd., Case No. SF-24774 (Sept. 13, 1985) (Robert P. Mason, ALJ) (The claimant's name was redacted from the slip opinion to preserve confidentiality.).
The results of any such test may only be used in a manner consistent with the statute, which bans employment discrimination based on "a record" of a disability or a condition perceived as a disability if the individual is "otherwise qualified" to perform the work.\(^5\)

The Cooper memorandum issued by the Justice Department in June 1986 contends that seropositivity is not a handicap and that discrimination against seropositive people is not forbidden by the Rehabilitation Act (particularly if motivated by fear of contagion, however irrational).\(^6\) If this interpretation were adopted by the courts, serological testing of employees for the purpose of detecting (and discharging) those who test positive would presumably not violate the federal law. However, this conclusion is inconsistent with existing regulations and the policy of the statute, and should be rejected by the courts for reasons previously stated.\(^5\)

The central issue arising from employee testing concerns the extent to which employers need information about their employees which may not relate to present ability to perform their work,\(^5\) and the degree to which knowledge about HIV infection bears upon such information. At present, the significance of a seropositive test result is relatively uncertain, not because the tests are inaccurate, but because the comparatively short history of AIDS as a recognized disease deprives medical investigators of the opportunity to generalize about long-term consequences of a seropositive result. The employer has access only to existing knowledge, which indicates that a relatively small percentage of seropositive individuals will actually develop "terminal" AIDS over a period of five years from the date of infection.\(^5\) Significantly less than half of a seropositive group will develop any physical symptoms of infection in that time.\(^5\) To penalize the majority of seropositive individuals who will not become ill in the foreseeable future does not seem justified, given the lack of risk

\(^1\) See 45 C.F.R. §§ 84.13, 84.14(c) (1985).
\(^2\) Cooper, supra note 21, at D-9 to D-10.
\(^3\) See supra text accompanying notes 83-107.
\(^4\) See generally INDIVIDUAL RIGHTS IN THE CORPORATION, supra note 149, at 193-99 (discussing the use of consumer reporting agencies by employers to investigate the background and lifestyles of prospective employees, and the protection afforded employees by the Fair Credit Reporting Act of 1970, 15 U.S.C. §§ 1681-1681t (1982)).
\(^5\) Indeed, describing CDC-defined AIDS as always "terminal" may be misleading, since 15% of those diagnosed with CDC-defined AIDS in 1981 are still alive at the time of writing in 1986. See Lieberson, supra note 1, at 43-44.
\(^6\) Id.
of contagion in the workplace and the serious social and personal costs of employee discharges.169

Closely related to the issue of testing is the issue of confidentiality. Assuming that there is a legitimate reason for the employer to be aware of an employee’s seropositive status or ARC or AIDS diagnosis, are there legitimate reasons to inform fellow employees? Due to the minimal risk of HIV transmission during ordinary workplace contact, it may seem that fellow employees have no legitimate interest in knowing. Workplace accidents involving exposure to blood from a seropositive person might provide a justification for letting fellow employees know, if special precautions must be taken in such situations. However, studies among hospital workers who have been exposed to bleeding incidents with AIDS patients do not appear to justify special precautions.170

Does an employee have a protected privacy interest in this information about him or herself? Once again, the common law of torts may suggest answers. One court has opined that due to the social stigma presently attached to seropositivity, individuals may have a protected privacy interest in such information, at least as against a litigating party seeking disclosure through judicial process.171 The same view might create liability where an employer or his agents reveal this sort of information about an employee.172 Certainly, while such forms of liability are uncertain but possible, respect for employee confidentiality in this regard would seem legally prudent. Fur-

169. The question of balancing employee and employer rights in the use of medical tests to "screen" the workforce involves significant questions of social policy, which are complicated in the case of AIDS by the identities of some of the larger risk groups. For some discussion of the policy implications of medical testing to screen workers, see Rothstein, supra note 82, at 1491-96.

170. Recommendations, supra note 25, at 684.

171. South Fla. Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798, 802 (Fla. Dist. Ct. App. 1985) (privacy rights of blood donors outweigh evidentiary need of litigant seeking to prove AIDS was contracted through blood donation). This case is pending on appeal before the Florida Supreme Court.

172. A tort action in Massachusetts has been filed against the telephone company in a case where a supervisor allegedly violated a promise to an employee to keep his AIDS-related medical condition confidential. Cronan v. New England Tel. & Tel. Co., No. 80332 (Suffolk County Super. Ct. Aug. 15, 1986). A major source of such problems could be company medical departments, using an antibody test and taking inadequate precautions to safeguard confidentiality of their results, or a personnel department, providing inadequate confidentiality to information contained in medical benefit claims forms. Much of the existing developed private sector privacy law has to do with protecting the confidentiality of personnel and medical records of employees. See Duff & Johnson, supra note 151, at 753-62; Menard & Morrill, supra note 151, at 97-104.
therefore, preserving the confidentiality of such information would diminish the likelihood of the kind of fellow worker reactions previously discussed.\footnote{173}

V. Conclusion

The phenomenon of AIDS poses significant questions about the rights and responsibilities of employees and employers. To what extent should our society require employers to carry some of the burden of dealing with a new and mysterious illness which, when it occurs in their workplace, may create a serious potential for disruption and economic loss, even though it presents no real risk of medical harm to the employer, other employees, or customers of the business? To what extent should employers be required to shoulder the economic burdens associated with treating the illness and supporting those afflicted, in a society which lacks a national health insurance system, leaving the unemployed or indigent dependent on a public welfare system which is only a partial safety net that falls short in many relevant ways? Preliminary answers to some of these questions may be suggested by existing employment laws such as the Rehabilitation Act, ERISA, and Title VII. The application of these laws to the AIDS situation may be viewed as fortuitous, however, since it is likely that something like the AIDS phenomenon was not contemplated by the legislators who enacted them. In a few California cities, the initial response of local legislators contemplating the AIDS phenomenon has been to balance rights and responsibilities in favor of protecting persons with AIDS against discrimination, which may be seen as confirming the same balance in construing the other laws discussed in this Article. That legislative proposals striking the balance against the person with AIDS have thus far been unsuccessful may indicate that our society would prefer to deal with the legal fallout from this medical crisis in a positive manner.

However, translating the balance struck by the laws into reality may require significant courage and maturity on the part of employers, many of whom will be placed in positions where they may be sorely tempted deliberately to disobey legal nondiscrimination requirements, knowing that the progressively terminal nature of AIDS, in many cases, will reduce the personnel and business problem into a money problem\footnote{174} which can be settled without an adverse impact on

\footnote{173. See supra text accompanying note 128 to text following note 139.}
\footnote{174. This is, of course, only true to the extent that CDC-defined AIDS is invariably disabling to a degree that disqualifies employees from working, which may not always be the}
their overall operations. Such an approach would add misery for those already medically afflicted, and would divert scarce societal resources from treatment and prevention of the illness to fighting unlawful discrimination. It would also increase the strain on existing social welfare systems, which would have to assume the burden of providing housing, sustenance and treatment to the disease sufferers whose income and benefit sources would have been cut off.

The AIDS challenge to employers is to transcend what may be an immediate instinctive response generated by personal or economic fears and to recognize the legal obligations as social and business obligations as well. Some companies have already demonstrated\textsuperscript{175} that a compassionate approach to the issues raised by AIDS in the workplace can benefit the employer as well as the workforce.

\textsuperscript{175} Skagen & Aberth, \textit{supra} note 8, at 14-25.