

NOTES

AIDS IN THE WORKPLACE: A HANDICAP UNDER THE REHABILITATION ACT?

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I. INTRODUCTION

For the first time in modern history, a worldwide epidemic of a deadly viral disorder has come alive and infiltrated society at an alarming rate. Acquired Immune Deficiency Syndrome ("AIDS") was recognized in a handful of patients in 1981 by physicians on both coasts of the United States.¹ Since then, the potential for lawsuits involving AIDS in the workplace has been enormous. Although there are hundreds of federal, state, and local employment laws which give protection to employees of various groups who are discriminated against, there is no federal law and few state laws which specifically restrict the discretion of management in the handling of AIDS in the workplace.² This Note addresses the problems persons with AIDS encounter when trying to engage in the normal life pursuit of employment in the workplace and any possible recourse they may obtain through current developments in the law.

1. J. OSBORN, *The AIDS Epidemic: Discovery of a New Disease*, in AIDS AND THE LAW 18 (H. Dalton & S. Burris eds. 1987).

2. W. BANTA, AIDS IN THE WORKPLACE 18 (1988) [hereinafter W. BANTA].

II. MEDICAL FACTS

AIDS is a syndrome—a conglomeration of symptoms—not a disease.³ AIDS is caused by a virus which attacks the body's brain, lung cells, and the immune system and allows infectious diseases to invade the body.⁴ Medically speaking, no one has died of AIDS or ARC (AIDS-related complex); however, thousands of people are dying every year from infections or diseases because of the incapacitating effect the Human Immuno Deficiency Virus ("HIV") has on their immune system, and ultimately their lives.⁵

HIV is the human T-cell lymphotropic virus type III which is the cause of AIDS.⁶ Almost all persons infected with HIV manufacture antibodies, and research has shown that the majority of infected persons have not developed complications.⁷ Medical research indicates that only a minority of HIV-infected individuals develop the AIDS-related complex (ARC), and from that minority only a few develop AIDS.⁸ ARC causes moderate damage to the immune system and is characterized by nonspecific symptoms of illness, such as swelling of the lymph nodes.⁹

A vast majority of people continue to remain in fear of contracting the virus through casual contact.¹⁰ The virus, however, cannot be spread by casual contact with an infected person, according to current medical consensus.¹¹ For example, people who share households with AIDS patients but

3. *Id.* at 1.

4. *Id.* at 2.

5. *Id.* at 1-2.

6. *Id.* at 1.

7. *Id.*

8. *Id.*

9. *Id.*

10. R. GREEN, *The Transmission of AIDS*, in AIDS AND THE LAW 29 (B. Dalton & S. Burris eds. 1987). A September, 1985 CBS poll found that 47% of persons polled thought it possible to contract AIDS from a drinking glass used by a sick person, 32% from a kiss, and 28% from a toilet seat. *Id.*

11. *Id.* See also J. BRODER, AIDS: MODERN CONCEPTS AND THERAPEUTIC CHALLENGES 83-86 (1987). "According to information gathered on AIDS cases in the last five years, there is no evidence of transmission of the HIV through air, food, water, or fomites, or by arthropods or casual conduct." *Id.* A. LEONARD, *The Legal Issues*, in AIDS: THE WORKPLACE ISSUES 29 (1985) [hereinafter A. LEONARD]. Although small amounts of the virus have been found in other body fluids of infected individuals (saliva, tears, and sweat), the Center for Disease Control (CDC) advises that it is not in amounts sufficient for transmission through casual contact. With more than 14,000 cases studied, there is no evidence that the AIDS virus is transmitted through casual, nonsexual contact. *Id.*

The Surgeon General of the United States has concluded:

There is no known risk of non-sexual infection in most of the situations we encounter in our daily lives. We know that family members living with individuals who have the AIDS virus do not become infected except through sexual contact. There is no evidence of transmission (spread) of AIDS virus by everyday contact even though these family members shared food, towels, cups, razors, even toothbrushes, and kissed each other.

who are not their sexual partners do not contract the virus.¹² Household members and health care workers who have had extensive contact with AIDS patients or their bodily fluids illustrate that the types of contact experienced in the workplace do not place healthy persons at risk of contracting the virus from infected co-workers.¹³ Until the public fear that AIDS can be contracted through casual contact is dispelled, discriminatory treatment toward workers with AIDS will continue.

The AIDS virus, Human Immunodeficiency Virus (HIV), is transmitted primarily in four ways: (1) through the exchange of semen or cervical or vaginal secretions during sexual contact; (2) through administrations of infected blood or blood products; (3) by the shared use of hypodermic needles that have been contaminated; and (4) perinatally from infected mothers to their fetuses or newborns.¹⁴

The development of AIDS after infection with the virus may occur suddenly or years later. "[I]t appears that exposed individuals may harbor the virus for months or years to no ill effect, and that some aggravating event may occur that suddenly causes the virus to reproduce wildly," until a total destruction of "host" cells (T-lymphocytes) occurs.¹⁵ The final stages of AIDS occurs with the destruction of T-lymphocytes which are in essence the body's immune system.¹⁶ Once the immune system is broken down, the body is left defenseless against any AIDS-related opportunistic infections.¹⁷

Persons whose blood has tested positively for the AIDS virus or for symptoms of AIDS may not develop the disease.¹⁸ Similarly, a person with AIDS may have little or no live virus present in the body, and therefore, would be unable to transmit the disease.¹⁹ Yet, people in these groups have been discriminated against in the workplace by way of suspension, segregation, or dismissal on the basis of others' fear of AIDS.²⁰

Chalk v. United States Dist. Court, 840 F.2d 701, 706 (9th Cir. 1988) (citing U.S. Public Health Service, *Surgeon General's Report on Acquired Immune Deficiency Syndrome* at 13 (1986)). See also, C. KOOP, AIDS AND THE LAW vii (W. Dornette ed. 1987). A commentary from the Surgeon General in April, 1987, confirmed the above medical analysis:

AIDS is an infectious disease. It is contagious, but cannot be spread in the same manner as a common cold or measles or chicken pox. It is contagious in the same way that sexually transmitted diseases, such as syphilis and gonorrhea, are contagious. AIDS is not spread by common everyday contact but by sexual contact.

Id.

12. A. LEONARD, *supra* note 11, at 28.

13. *Id.*

14. W. BANTA, *supra* note 2, at 2.

15. A. LEONARD, *supra* note 11, at 29.

16. *Id.*

17. *Id.* at 29-30. AIDS-opportunistic infections include pneumocystis carinii pneumonia, severely disfiguring skin cancer, or swelling of the lymph nodes to a disabling degree. *Id.* at 29.

18. *Id.* at 30.

19. *Id.*

20. *Id.*

III. FEDERAL VOCATIONAL REHABILITATION ACT OF 1973

The "employment at will" doctrine is generally recognized as the governing principle in employment issues.²¹ The doctrine, however, is subject to several public policy exceptions and any state or federal laws that prohibit employment discrimination.²² As a result, federal and state laws are regarded as the most effective resource for an AIDS victim in the event of employment discrimination.²³

One such federal law is the Federal Vocational Rehabilitation Act (hereinafter "Rehabilitation Act").²⁴ Section 504 of the Rehabilitation Act provides: "No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"²⁵

Persons or entities subject to the Act include: (1) all employers (federal or private) who receive federal financial assistance,²⁶ or (2) other companies having contracts or subcontracts with the federal government in excess of \$2500.²⁷ An employee with AIDS who has filed a discrimination complaint under the Rehabilitation Act must first establish jurisdiction by showing that the employer has sufficient connection with federal governmental assistance.²⁸ Secondly, the complainant must show that AIDS is a handicap within the meaning of the statute.²⁹

A. *The Meaning of "Handicapped Individual"*

According to the Rehabilitation Act, a "handicapped individual" is defined as anyone who: (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.

21. Note, *AIDS in the Workplace: How Should Corporate America Cope?*, 12 DEL. J. CORP. L. 527, 530 (1987).

22. *Id.*

23. *Id. See, e.g.*, IOWA CODE ch. 601A (1989). Section 601A.6(1) states that:

[i]t shall be an unfair or discriminatory practice for any . . . [p]erson to refuse to hire, . . . to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of . . . disability of such applicant or employee, unless based upon the nature of the occupation.

IOWA CODE § 601A.6(1) (1989). A "disability" under chapter 601A can mean "a person with a positive human immunodeficiency virus test result, a diagnosis of acquired immune deficiency syndrome," or a related complex or condition related to AIDS. IOWA CODE § 601A.2(11) (1989).

24. 29 U.S.C. §§ 701-796 (1988).

25. 29 U.S.C. § 794(a) (as amended).

26. *Id.*

27. 29 U.S.C. § 793.

28. 29 U.S.C. §§ 793, 794.

29. *Id.*

ment.³⁰ The purpose of the Act is to provide access to employment and education for a broad range of individuals with handicaps.³¹ The broadly stated purpose of the Act and the expansive definition stated within the Act seems to imply that HIV carriers would fall under the protection of the Act. An employer's refusal to hire an individual based on a physiological abnormality is exactly the type of discrimination the Act was designed to prevent.³²

The United States Supreme Court has not yet addressed the issue of AIDS as a handicap under the Rehabilitation Act. The Supreme Court, however, has held that discrimination based solely on fear of contagion is discrimination based on a handicap when the impairment has that effect on others.³³

The Supreme Court held in *School Board of Nassau County v. Arline*³⁴ that a school teacher afflicted with the contagious disease of tuberculosis was a handicapped individual within the meaning of the Rehabilitation Act.³⁵ The Court began its analysis by determining that Arline was handicapped because she had a physical impairment which substantially limited one or more of her life activities.³⁶ Arline's tuberculosis was a physiological disorder or condition affecting her respiratory system which "substantially limited one or more [of her] major life activities" by requiring her to be hospitalized.³⁷ Arline's hospitalization for tuberculosis also sufficed to establish that she had a "record of impairment" within the meaning of the Act.³⁸

The Court held that because Arline's contagiousness and physical impairment each resulted from the same underlying condition, the contagious effects of a disease could not be meaningfully distinguished from the physical effects of a disease when defining a handicap.³⁹ The Court noted that it would be "unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment."⁴⁰

The Supreme Court declined to answer the question of whether a person who was simply a carrier of a contagious disease without having a physical impairment or suffering from any other symptoms associated with the

30. 29 U.S.C. § 706(8)(B). The Act specifically excludes individuals who are alcoholics or drug abusers whose current use of alcohol or drugs prevents such individual from performing the duties of the job or whose employment would constitute a direct threat to the property or safety of others. *Id.*

31. S. REP. NO. 1297, 93rd Cong., 2d Sess. 37-38, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6388-89.

32. *See id.*

33. *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), *aff'g* 772 F.2d 759 (1985).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 281 n.5 (quoting 45 C.F.R. pt. 84, app. A, at 310 (1985)).

38. *Id.*

39. *Id.* at 282.

40. *Id.*

disease could be deemed a "handicapped individual" within the meaning of the Act.⁴¹ The issue of whether symptomless HIV-infected persons were impaired within the meaning of the Rehabilitation Act was noted, but not decided by the *Arline* Court:

This case does not present, and we therefore do not reach, the questions [of] whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.⁴²

Although the *Arline* opinion did not address the issue of AIDS as a handicap, it is a significant step towards applying the Rehabilitation Act to HIV carriers and in defining AIDS as an impairment. Some commentators have concluded that *Arline* suggests the existence of symptoms should not be necessary either for defining a physiological abnormality as an impairment or defining it as substantially limiting a major life activity.⁴³ "Asymptomatic conditions such as HIV infection, if they result in substantial limitations because of the fear or prejudice they cause in others, are just as handicapping as symptomatic conditions."⁴⁴ Although the *Arline* Court did not expressly hold that asymptomatic conditions were impairments or handicaps, "such an interpretation concords with the Court's reasoning."⁴⁵

The Rehabilitation Act was enacted to prohibit employers from discriminating against applicants or employees or from treating them differently from non-handicapped individuals solely because of their handicaps.⁴⁶ "[T]he primary goal of the Act is to increase employment of the handicapped."⁴⁷ The isolation of the ill or those who are perceived to be ill may place a certain physical impairment upon them. Even though such a perceived impairment may not diminish a person's capacity to perform in the workplace, negative reactions of others may nevertheless substantially restrain that person's ability to work. At this point, the employee is discriminated against because of prejudiced attitudes or ignorance.

To guard against this type of discrimination, Congress provided that a handicapped person may be one who "is regarded as having such an impairment."⁴⁸ Congress recognized that "society's accumulated myths and fears about disability and disease are as handicapping as the physical limitations

41. *Id.* n.7.

42. *Id.*

43. Note, *Asymptomatic Infection With the AIDS Virus as a Handicap Under the Rehabilitation Act of 1973*, 88 COLUM. L. REV. 563, 581 (1988).

44. *Id.*

45. *Id.*

46. 29 U.S.C. § 794 (1988).

47. *Consolidated Rail Corp. v. Darone*, 465 U.S. 624, 633 n.13 (1984).

48. 29 U.S.C. § 706(8)(B)(iii) (1988) (emphasis added).

that flow from actual impairment."⁴⁹

The attitudes of those who make or influence employment decisions may taint a person whom they perceive to have an impairment, whether or not the perceived impairment actually exists.⁵⁰ For instance, a person with a disfiguring scar ordinarily would not be considered handicapped. However, an employer violates the Rehabilitation Act if that person is treated as if he or she were handicapped.⁵¹ Thus, handicap discrimination occurs when an individual has or is *regarded* as having the physical manifestations of a disease, or is regarded as being able to infect others, whether or not such contagiousness exists.⁵²

One of the earliest decisions classifying AIDS as a handicap is a Florida case, *Shuttleworth v. Broward County*.⁵³ Upon learning of the plaintiff's diagnosis of AIDS, the defendant employer discharged the plaintiff, despite his excellent work record.⁵⁴ The plaintiff filed a handicap discrimination complaint with the Florida Commission on Human Relations under the Florida Human Rights Act.⁵⁵ The Florida Human Rights Act contains provisions similar to those of the Rehabilitation Act.⁵⁶

The Commission held that AIDS is a handicap under the Florida Human Rights Act and that the defendants violated the Florida Act in discriminating against the plaintiff.⁵⁷ The Commission decided that there was no substantial risk of future injury to the plaintiff employees or to the public because of the evidence put on by plaintiff showing that AIDS could not be transmitted in the workplace by nonsexual casual contact.⁵⁸ The plaintiff later filed suit in federal court, and on motion for summary judgment, asserted a section 504 violation claiming AIDS as a handicap.⁵⁹ The case, how-

49. School Bd. of Nassau County v. Arline, 480 U.S. at 284 (citing S. REP. NO. 1297, 93d Cong., 2d Sess. 50, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6373).

50. M. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 7.09 (1987).

51. *Id.*

52. 29 U.S.C. § 706(8)(B)(iii) (1988).

53. Daily Lab. Rep. (BNA) No. 242, at E-1 (Dec. 17, 1985) (aff'd without opinion April 7, 1986).

54. *Id.* See also Recent Developments, *Employment Discrimination: AIDS Victims—Shuttleworth v. Broward County Office of Budget & Management Policy*, 9 HARV. J. L. & PUB. POL'Y 739 (1986).

55. See *supra* note 53.

56. FLA. STAT. ANN. §§ 760.01-.10 (West 1986). Section 760.10 provides: "(1) It is unlawful employment practice for an employer: (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's . . . handicap. . . ." *Id.*

57. See *supra* note 53.

58. *Id.* See W. BANTA, *supra* note 2, at 47. See also Note, *AIDS and Employment Discrimination: Should AIDS Be Considered a Handicap?*, 33 WAYNE L. REV. 1095, 1101-03 n.80 (1987) (no substantial threat to co-workers existed because the plaintiff's work setting consisted of a private office enclosed on all sides).

59. *Shuttleworth v. Broward County*, 639 F. Supp. 654, 656 (S.D. Fla. 1986).

ever, settled before it ever came to trial.⁶⁰

In 1988, the Ninth Circuit decided an AIDS case following the dictates of the *Arline* decision.⁶¹ In *Chalk v. United States District Court*,⁶² the court granted a preliminary injunction to a teacher with AIDS, preventing a school from placing the teacher in an administrative position outside the classroom.⁶³ The Ninth Circuit interpreted the *Arline* decision's application of section 504 of the Rehabilitation Act as being fully applicable to individuals who suffer from contagious diseases.⁶⁴

In obtaining the preliminary injunction, Chalk showed probable success on the merits by submitting into evidence voluminous amounts of medical authority revealing an overwhelming conclusion that the risk of transmission of AIDS in the classroom setting was minimal and highly unlikely.⁶⁵ "[S]ection 504 allows the exclusion of an employee only if there is a significant risk of communicating an infectious disease to others."⁶⁶

The court empathized with the plaintiff and concluded that although the plaintiff was assigned to another job for the same salary, he was deprived of using his specially developed skills as a teacher, "[h]is closeness to students, and his participation in their lives which was a source of tremendous personal satisfaction and joy to him."⁶⁷ The court concluded that Chalk had sufficiently demonstrated that he was threatened with irreparable injury.⁶⁸ The alternative work to which Chalk was assigned involved neither student contact, nor "utilization of his skills, training, or experience."⁶⁹ The court held that such nonmonetary deprivation was a substantial injury which they were required to consider, notwithstanding the fact that Chalk sustained no monetary loss.⁷⁰

Finally, the court in *Chalk* found it necessary to balance the hardships of both parties.⁷¹ The court found that the plaintiff's injury outweighed any

60. The case was "settled shortly before trial on the following terms: Shuttleworth was offered reinstatement in his former job and paid back wages and benefits estimated at \$190,000, including medical costs not to exceed \$100,000; his life and health insurance were reactivated; and his attorneys were paid \$56,000 in fees and expenses." W. BANTA, *supra* note 2, at 47. Damages for alleged emotional distress and mental anguish were denied by the court "on the basis that they are not available in Section 504 actions." *Id.*

61. *Chalk v. United States Dist. Court*, 840 F.2d 701 (9th Cir. 1988).

62. *Id.*

63. *Id.* at 709.

64. *Id.* at 704.

65. *Id.* at 706-07.

66. *Id.* at 707-08 (citing *School Bd. of Nassau County v. Arline*, 480 U.S. at 284 n. 16 (1987) (emphasis added)).

67. *Id.* at 709.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 710.

harm to the defendant.⁷² The defendants asserted that their injury was "based entirely on the risk to others posed by [Chalk's] presence in the classroom."⁷³ This claim of injury was unfounded since Chalk had already proven that there was "no evidence of any significant risk [of AIDS transmission] to children or others at the school."⁷⁴

Although the *Chalk* decision is only persuasive authority to most federal courts, its recognition of AIDS as a handicap under section 504 of the Act and its plausible judicial stance in applying the *Arline* opinion to HIV carriers is significant. In addition, the *Chalk* decision indicated that the plaintiff did not have to disprove every theoretical possibility of harm.⁷⁵ The plaintiff only had to show that there was no significant risk of communicating an infectious disease to others.⁷⁶

Similarly, the United States District Court for the Western District of Missouri applied section 504 of the Rehabilitation Act to an applicant for admission to a vocational facility who was an active carrier of hepatitis B.⁷⁷ In *Kohl by Kohl v. Woodhaven Learning Center*,⁷⁸ the district court held that the mentally retarded plaintiff with hepatitis was a "handicapped individual" within the meaning of the Act because he was *regarded* as having an impairment (the plaintiff's condition was perceived as posing a threat to others in the facility).⁷⁹

The Eighth Circuit Court of Appeals reversed the lower court decision and remanded.⁸⁰ The court of appeals accepted the district court's finding that the plaintiff was handicapped within the meaning of the Act,⁸¹ but rejected the lower court finding that the plaintiff was otherwise qualified for the defendant's programs.⁸² In essence, the court of appeals decided that the plaintiff could not be reasonably accommodated because his handicap of hepatitis posed a significant risk of communicating an infectious disease to others in the workplace.⁸³

Thus far, it appeared that many lower courts had generally accepted the theory that persons afflicted with AIDS were considered handicapped within the meaning of the Rehabilitation Act.⁸⁴ Then in 1988, Congress

72. *Id.*

73. *Id.*

74. *Id.* at 711.

75. *Id.* at 709.

76. *Id.*

77. *Kohl by Kohl v. Woodhaven Learning Center*, 672 F. Supp. 1221 (W.D. Mo. 1987).

78. *Id.*

79. *Id.* at 1224. The court, however, refrained from answering the question of whether the plaintiff could be deemed a handicapped individual by reason of his behavioral problems.

80. *Kohl by Kohl v. Woodhaven Learning Center*, 865 F.2d 930 (8th Cir. 1989).

81. *Id.* at 935.

82. *Id.* at 936-38. For a further discussion of determining whether a handicapped individual is "otherwise qualified," see *infra* notes 64-68 and accompanying text.

83. *Id.* at 940-41.

84. See, e.g., *Doe v. Centinela Hospital*, 57 U.S.L.W. 2034 (D.C. Cal. 1988). In *Centinela*

amended the definitional section of the Act with an apparent purpose to exclude those individuals with contagious diseases from the definition of "handicapped."⁸⁵ Section 706(8)(C) states:

For the purpose of sections 793 and 794 of this title,⁸⁶ as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.⁸⁷

It is uncertain at this point whether 29 U.S.C. section 706(8)(C) is fully applicable to AIDS because the section has not yet been judicially interpreted. By examining the legislative intent, it appears that AIDS may fall within the statute,⁸⁸ although a number of arguments have opposed the inclusion of AIDS in this section.⁸⁹ Senator Matsunaga, in the congressional debates, argued that there was no need to change the law in order to protect the public health, because an individual must be able to show he or she is an "otherwise qualified" handicapped individual before they can participate in any job or program.⁹⁰

Secondly, the purpose of section 504, as noted by the *Arline* Court, "is to ensure that individuals with handicaps are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others, and this purpose is not served if persons with contagious diseases are automatically excluded."⁹¹ Thus, "the fact that some persons who have contagious diseases may pose a health threat to others under certain circumstances does not justify excluding from coverage of the act *all* persons with actual or perceived contagious diseases."⁹²

According to the current medical consensus, transmission of AIDS is contracted not through casual contact, but through: (1) sexual contact involving the exchange of infected bodily fluids; (2) exposure to contaminated blood through transfusions or IV drug use; or (3) perinatal exposure.⁹³ Section 706(8)(C) excludes contagious diseases from being a handicap only if

Hospital, an HIV-carrier who was discharged from a federally funded hospital's residential alcohol and drug rehabilitation program was held to be an individual with handicaps within the meaning of the Act. *Id.* at 2035-36.

85. See 29 U.S.C. § 706(8)(C) (1989).

86. Sections 793 and 794 refer to the prohibition of discriminating against the handicapped working for federally funded employers. 29 U.S.C. § 793, 794. See also *supra* notes 26-29 and accompanying text.

87. 29 U.S.C. § 706(8)(C) (1989).

88. 134 Cong. Rec. §§ 251-53 (daily ed. Jan. 28, 1988) (statement of Sen. Armstrong).

89. *Id.* at 249-50.

90. *Id.*

91. *Id.* at 250.

92. *Id.* (emphasis added).

93. See *supra* note 14 and accompanying text.

such infection constitutes a *direct* threat to the health and safety of others or the individual is unable to perform the duties of the job.⁹⁴ Unless an AIDS individual is working under the conditions listed above, it appears that there would be no *direct* threat to the health and safety of the public.

If the current medical consensus is accurate, it appears that an AIDS victim would not be excluded from the Act automatically. That is, an AIDS situation will be analyzed on a case-by-case basis to decide whether: (1) the public health is directly threatened, or (2) if the individual is able to perform the duties of the job.⁹⁵ If an AIDS victim is in a position such that transmission of the infection is substantial, then a direct threat to the public exists and the AIDS victim has no recourse under the Act. But if that individual is otherwise qualified for the job with reasonable accommodation, he or she should be allowed their day in court to show that they will not pose a direct threat to the health and safety of others. In addition, the individual must be able to show that he or she can perform the duties of the job.

Senator Matsunaga argued that if persons with contagious diseases were automatically excluded from the coverage of section 504, those "accused of being contagious [would] never have the opportunity to have their condition evaluated in light of medical evidence and to have reasonable medical judgment determine their risk to others."⁹⁶ AIDS victims would have no opportunity to show that they are otherwise qualified and "whether, with reasonable accommodation, they [could] do the job without significant risk to the public."⁹⁷ "Fear and prejudice, not reason [would] prevail."⁹⁸

Therefore, it is the opinion of this author that section 706(8)(C) should not be interpreted as automatically excluding workers with AIDS from the Act's coverage. Instead, workers with AIDS should be given the opportunity to have their day in court and to present their job situation, the medical risks involved, and whether their situation constitutes a *direct* threat to the public health and safety. The possibility that some people may pose a health risk to the workplace under certain circumstances does not justify a blanket exclusion of all persons from coverage under the Act. Surely the legislators could not have intended to permit employment discrimination based on the prejudicial attitudes or ignorance of employers. It is important that the courts defer to the medical profession as well as considering the individual's circumstances in determining whether a direct threat is involved.

B. "Otherwise Qualified" Individual

Once a handicap has been established, the individual must show that he

94. 29 U.S.C. § 706(8)(C).

95. *Id.*

96. 134 Cong. Rec. § 250 (daily ed. Jan. 28, 1988) (statement of Sen. Matsunaga).

97. *Id.*

98. *Id.*

or she is "otherwise qualified" to perform the job's requirements in spite of the handicap.⁹⁹ The burden of proof is placed on the individual to show his or her capability, with reasonable accommodation, to perform the essential functions of the job in question without endangering the health and safety of the individual or other employees in the workplace.¹⁰⁰ The *amicus* brief submitted by the American Medical Association and accepted by the Court in *Arline*, set out factors that courts should consider in conducting an inquiry of whether an individual is "otherwise qualified." These factors include:

[finding of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.¹⁰¹

The Court in *Arline* remanded the case to the lower court to determine whether Arline was "otherwise qualified."¹⁰² If Arline posed a significant risk of communicating an infectious disease to others in the workplace, she would not be otherwise qualified in the workplace and a reasonable accommodation would not eliminate that risk. If the school board could present evidence that Arline's recurring tuberculosis would be a substantial threat to the health of the children and others at school, her suit should be dismissed and the school board's position upheld.¹⁰³ However, if the preponderance of medical evidence suggested the absence of such a threat, Arline's position should be reinstated with back wages and attorney fees awarded.¹⁰⁴

C. Reasonable Accommodation by the Employer

The Court emphasized that the employee with the contagious disease must be able to perform the essential functions of the job regardless of whether there is a threat to the health of others; if not, the question then becomes whether a reasonable accommodation by the employer is appropriate.¹⁰⁵ When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable ac-

99. *Id.* In an employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. 45 C.F.R. § 84.3(k) (1985).

100. See W. BANTA, *supra* note 2, at 40. Accommodation is not reasonable if it either imposes undue financial and administrative burdens on the grantee or requires a fundamental alteration in the nature of the program. *Southeastern Community College v. Davis*, 442 U.S. 397, 410-12 (1979).

101. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 (1987).

102. *Id.*

103. *See id.*

104. See W. BANTA, *supra* note 2, at 44.

105. *School Bd. of Nassau County v. Arline*, 480 U.S. at 287.

commodation" by the employer would enable the handicapped person to perform those functions.¹⁰⁶

What exactly must an employer provide that qualifies as a "reasonable accommodation"? Some cases hold that accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on a grantee¹⁰⁷ or "requires a fundamental alteration in the nature of the program."¹⁰⁸ Thus, where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discriminatory.

The *Arline* Court noted that in making inquiries into reasonable accommodations of the employer, courts "should defer to the reasonable medical judgments of public health officials" in analyzing the risk factors of AIDS in the workplace.¹⁰⁹ The court in *Chalk* used a test which balanced "the needs for protection of other persons, continuation of the work mission, and reasonable accommodation" of the afflicted individual.¹¹⁰ The Court in *Arline* emphasized the goal of section 504: "protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoidance of exposing others to significant health and safety risks."¹¹¹

The court in *Kohl* found that the plaintiff was not otherwise qualified and could not be reasonably accommodated based on the significant risk of contagion which occurred with hepatitis B.¹¹² The court found it was not reasonable to inoculate and screen all staff members and clients to accommodate the plaintiff.¹¹³ Such accommodation would require a burdensome fundamental alteration in the defendant's program.¹¹⁴

A concern exists that employers may establish a policy of discharging all AIDS victims if they become greatly affected by the cost of health and disability benefits and the problem of absenteeism during the various stages of AIDS.¹¹⁵ "It is estimated that the cost of treating [an] AIDS patient averages \$140,000 per patient."¹¹⁶ An employee may have a cause of action under ERISA if the employer has discharged him or her in order to avoid

106. *Id.* at 287 n.17.

107. *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979).

108. *Id.* at 410.

109. *School Bd. of Nassau County v. Arline*, 480 U.S. at 288.

110. *Chalk v. United States Dist. Court*, 840 F.2d 701, 705 (9th Cir. 1988).

111. *School Bd. of Nassau County v. Arline*, 480 U.S. at 287.

112. *Kohl by Kohl v. Woodhaven Learning Center*, 865 F.2d 930, 937 (8th Cir. 1989) (the court found that the chance of infection was 10-15% under the circumstances).

113. *Id.* at 937-39.

114. *Id.* at 938.

115. *Vogel, Containing Medical and Visibility Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?*, 62 NOTRE DAME L. REV. 1024, 1031 (1987).

116. *Id.*

incurring insurance claims.¹¹⁷ However, "the employee must 'show that the adverse decision was made with' intent to deprive him or her of benefits," which is often difficult to prove.¹¹⁸

Perhaps the best way of dealing with the "reasonable accommodation" issue is through a case-by-case analysis. Clearly, there would be different risks created for employees with AIDS and their co-workers, depending on the particular type of job.¹¹⁹ In addition, persons who are HIV-carriers are not affected uniformly, due to the many stages of the virus.¹²⁰

IV. CONCLUSION

Many commentators and courts have concluded that AIDS should be considered a handicap under section 504 of the Rehabilitation Act because of the Act's intended broad coverage. The Act appears to take into consideration the social concerns such as public safety and the duty of employers to reasonably accommodate the handicapped. Thus, persons with AIDS should not be singled out and discriminated against in the workplace based on an employer's irrational fear of AIDS. The Rehabilitation Act could give employees with AIDS, otherwise qualified for the job, some recourse against employers receiving federal government funds.

The recently amended section of the Act which purports to exclude workers with AIDS from the Act's coverage is open to judicial interpretation. Because the definitions of "contagious" and "direct threat" to the public are somewhat vague, the discrimination claims of a worker with AIDS should be evaluated on a case-by-case basis.

117. *Id. See also* 29 U.S.C. §§ 1001-1461 (1982) (ERISA § 1-4082). ERISA (Employee Retirement Income Security Act) is a statute specifically designed to safeguard workers' pensions and other employee benefits.

118. *See Vogel, supra* note 115.

119. For example, a New York court found it necessary to apply a substantive analysis in examining the risks of a child with AIDS in the classroom. One of the central conclusions was that the transmission of AIDS in the classroom setting was a mere theoretical possibility and their exclusion of the AIDS victim on that basis would violate section 504. *District 27 Community School v. Board of Educ.*, 130 Misc. 2d 398, 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986).

120. The different levels of AIDS have been classified as follows:

Type I: Individuals who are members of groups *perceived* as being at significant risk for infection with the AIDS virus. ("Risk Group Individuals").

Type II: Persons exposed to or infected by the AIDS virus (this group includes those persons who test positive for the presence of antibodies to the AIDS virus). ("Asymptomatic Carriers").

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

Type IV: Persons with confirmed CDC-defined AIDS who are physically able to function in the workplace. ("CDC-Defined AIDS Individuals").

Type V: Persons with CDC-defined AIDS or ARC who are not physically able to function in the workplace. ("Nonemployable Individuals").

Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11, 20 (1985).

A case-by-case analysis is consistent with fair treatment to those workers with AIDS. Workers with AIDS may constitute more of a threat to the public health in certain job positions than in others. Thus, it would be unfair to permit an employer to discriminate equally against an AIDS worker who sits behind a desk all day and one who handles patient IV's in a health facility. However, if he or she does not pose a direct threat to public health and is otherwise qualified to perform the duties of the job with reasonable accommodation, that individual with AIDS should be allowed his day in court.

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