

**IS AIDS A HANDICAP UNDER THE REHABILITATION
ACT OF 1973 AFTER *SCHOOL BOARD v. ARLINE* AND
THE CIVIL RIGHTS RESTORATION ACT OF 1987?**

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INTRODUCTION

Life . . . is a tale Told by an idiot, full of sound and fury, Signifying nothing.¹

THOSE who test positive for Acquired Immune Deficiency Syndrome ("AIDS") are devastated by the realization that AIDS victims die a painful death, full of sound and fury, and are ostracized from education, health care, housing, jobs, public accommodations and general social interaction, so that their lives begin to signify nothing. AIDS is a relatively new,² rapidly spreading and deadly disease.³ While 89% of adult AIDS victims are homosexual or bisexual men and users of intravenous drugs, the other 11% include users of blood and blood products, such as hemophiliacs and trans-

1. W. SHAKESPEARE, *MACBETH*, Act V, Scene V (K. Muir 8th ed. 1959). The more complete text of the quote is as follows:

To-morrow and to-morrow, and to-morrow, Creeps in this petty pace from day to day, To the last syllable of recorded time; And all our yesterdays have lighted fools The way to dusty death. Out, out, brief candle! Life's but a walking shadow; a poor player, That struts and frets his hour upon the stage, And then is heard no more: It is a tale Told by an idiot, full of sound and fury, Signifying nothing.

Id.

2. On June 5, 1981, the United States Centers for Disease Control ("CDC"), a branch of the United States Public Health Service, first reported that an unnamed condition caused a collapse of immune systems in five healthy homosexual men. *Pneumocystis Pneumonia—Los Angeles*, 30 *CENTERS FOR DISEASE CONTROL, MORBIDITY & MORTALITY WEEKLY REP.* 250, 251 (June 5, 1981) [hereinafter *MMWR*]; *See also Kaposi's Sarcoma and Pneumocystis Pneumonia among Homosexual Men—New York City and California*, 30 *MMWR* 305 (July 3, 1981).

3. No patient who acquires AIDS has been cured of the disease. *See generally NIH Conference—The Acquired Immunodeficiency Syndrome: An Update*, 102 *ANNALS OF INTERNAL MEDICINE* 800, 802 (June, 1985) [hereinafter *NIH Conference*]. The drug, azidothymidine (AZT), the only drug licensed for sale in the United States that has proven benefits in the treatment of AIDS, targets against the enzyme that encodes the genetic message of the AIDS virus into the DNA of an invaded human cell. *PENNSYLVANIA MEDICAL SOCIETY, AIDS: INFORMATION FOR PHYSICIANS*, 22 (Dec. 1, 1987) [hereinafter *PMS*].

fusion patients, heterosexual partners, and children of AIDS victims. There are tests which detect antibodies to the AIDS virus but there is no test that can identify who will eventually develop AIDS. While the current weight of the medical evidence indicates that AIDS is not spread by casual workplace contact, there are those who fear otherwise.⁴ And, while some of society shun AIDS victims because of a fear of catching the disease, some also shun them because of notions of appropriate morality.

The purpose of this Article is twofold: (1) to examine whether one who tests positive for AIDS, exhibits AIDS Related Complex ("ARC"), has AIDS, ("actual victims") or is perceived to fall into any of these categories, ("perceived victims") is an "individual with handicaps" within the meaning of the Rehabilitation Act of 1973 ("Act");⁵ and, (2) if so, whether, and under what circumstances, that person is an "otherwise qualified individual with handicaps." The current medical aspects of AIDS are detailed in Part One of this Article. The legal background is reviewed in Part Two. In Part Three, it is suggested that an actual victim is, and a perceived victim may be, an "individual with handicaps" within the meaning of the Act. It is also argued that such a person is an "otherwise qualified individual with handicaps" as long as, with reasonable accommodation on the part of the employer, that person can do the job in spite of the handicap *and* as long as the threat to the health or the safety of others is *de minimis* in the context of the victim's job responsibilities. Finally, there is a short discussion on the impact of the Civil Rights Restoration Act of 1987 with respect to these issues.

PART ONE: THE MEDICAL ASPECTS OF AIDS

A. *What is AIDS?*

The AIDS virus is a retrovirus⁶ known as the Human T-Lymphotropic Virus, Type III ("HTLV-III")/Lymphadenopathy-Associated Virus ("HTLV-III/LAV")⁷ ("HIV"). The bloodborne HIV

4. G. ANTONIO, *THE AIDS COVER-UP*, 95-109 (2d ed. 1987) [hereinafter *COVER-UP*].

5. 29 U.S.C. § 791 (Supp. 1987).

6. Retroviruses are distinguished from other viruses by their means of replication and genetic properties. *NIH Conference*, *supra* note 3, at 807.

7. In 1984, an American research team at the National Institute of Health identified, as the suspected AIDS virus, the human T-cell lymphotropic virus (variant III), known as HTLV-III. Earlier, a French research team had identified another virus (LAV) as the suspected cause of AIDS. Leonard, *AIDS and Employment*

infects white blood cells called T-4 lymphocytes, which play an essential part in the human immune system by calling for the production of antibodies to attack foreign agents.⁸ Once in the body, HIV binds to the target cell, enters the cell and transcribes its genetic material onto the genetic material of the T-4 lymphocytes of the host cell, thereby altering the lymphocytes and impeding their growth and replication.⁹ The HIV replication cycle is restricted until the infected cell has been activated by other pathogens such as hepatitis B virus or allogenic stimulation from exposure to semen, blood or allografts.¹⁰ The HIV eventually destroys the body's immune system with the result that the organs of an AIDS infected person do not produce the requisite antibodies allowing the foreign agents to freely damage the body.¹¹

There is a wide spectrum of "AIDS victims" ranging from those with AIDS, those with ARC, and those who test seropositive¹² for the AIDS antibodies to those who are perceived to fall in any of the identified categories. The full AIDS syndrome is the last stage of complications caused by HIV and is the only category recognized by the CDC as AIDS.¹³ This syndrome occurs when the virus actively attacks the body's immune system and causes the occurrence of

Law Revisited, 14 HOFSTRA L. REV. 11, 17 n.27 (1985) [hereinafter Leonard-2]. Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681, 684, n.12 (1985). See generally Note, *AIDS: Does It Qualify as a "Handicap" Under the Rehabilitation Act of 1973?*, 61 NOTRE DAME L. REV. 572, 574-76 (1986); Note, *AIDS and Employment Discrimination: Should AIDS be Considered a Handicap?*, 33 WAYNE L. REV. 1095 (1985). For a more detailed discussion of the physiology of AIDS, see Comment, *AIDS: A Legal Epidemic?* 17 AKRON L. REV. 717, 718-22 (1984).

8. Many medical scientists argue that HIV, perhaps in combination with or in the presence of one or more unidentified "cofactors," attacks and destroys T-4 helper lymphocytes, whose normal function is to call for the production of certain antibodies to fight foreign agents. PMS, *supra* note 3, at 9.

9. *Id.*

10. *Id.*

11. *Antibodies to a Retrovirus Etiologically Associated with Acquired Immunodeficiency Syndrome (AIDS) in Populations with Increased Incidences of the Syndrome*, 33 MMWR 377 (July 13, 1984).

12. 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. See *infra* text accompanying notes 23-24.

13. *Revision of the CDC Surveillance Case Definition for Acquired Immunodeficiency Syndrome*, 36 MMWR No. 15. (Aug. 15, 1987) [hereinafter *Revised Definition*]. See the discussion by CDC in the September, 1987 *Revised Definition*, *infra* notes 26 and 30 and accompanying text.

certain opportunistic infections,¹⁴ such as Kaposi's sarcoma,¹⁵ a rare skin cancer, and pneumocystis carinii pneumonia,¹⁶ a lung ailment uncommon in younger people. The visible signs and symptoms of AIDS include, during the early stages, neurologic, mental, motor and behavioral problems indicative of AIDS dementia,¹⁷ and swollen lymph nodes, and, in the later stages, chronic diarrhea, shortness of breath, malaise, fatigue, weight loss, fever, confusions, skin lesions and loss of respiratory and digestive function.¹⁸ Once afflicted with AIDS, the patient's prognosis for survival is dim—the case fatality rate for those diagnosed with AIDS over three years ago is over 80%.¹⁹ While some AIDS victims require extended hospitalizations and are unable to work, some victims in the early stages of AIDS are in relatively good health and may be able to work.

Those with AIDS Related Complex ("ARC") manifest symptoms suggestive of the AIDS syndrome but do not manifest the secondary complications of the disease.²⁰ Such symptoms include persistent chronic abnormal enlargement of the lymph nodes, abnormal fatigue, oral thrush, shingles, night sweats and a clinically observable decrease in the production of T-helper lymphocytes in the blood.²¹ Such persons may or may not require hospitalization and may or

14. The most common AIDS related infections are pulmonary diseases, such as Kaposi's Sarcoma, Pneumocystis Carinii Pneumonia, Cytomegalovirus, Mycobacterium anium-intracellulare. See PMS, *supra* note 3, at 20.

15. Kaposi's Sarcoma is a rare form of cancer that results in violet-looking, placque-like lesions on skin or mucous membranes and on the walls of blood vessels. PMS, *supra* note 3, at 20. See also *Revised Definition*, *supra* note 13, at 4S.

16. Pneumocystis Carinii Pneumonia, the most common AIDS-related disease, is a very serious pneumonia that causes respiratory problems, fever, weight loss, lymph node enlargement, tachycardia and general malaise. PMS, *supra* note 3, at 20.

17. AIDS dementia is defined as the ability of HIV to destroy the brain, apart from the immune system. Symptoms of AIDS dementia include short term memory loss, mental confusion, and a personality disintegration. Persons who die as a result of AIDS dementia are not reportable to CDC under the revised definition. See generally COVER-UP, *supra* note 4, at 245 n.13.

18. PMS, *supra* note 3, at 8.

19. CDC: AIDS WEEKLY SURVEILLANCE REPORT 5 (April 18, 1988) [hereinafter 4/18/88 SURVEILLANCE REPORT].

20. NIH Conference, *supra* note 3, at 800. The CDC has not adopted a case definition of ARC and does not collect statistics concerning ARC victims.

21. *Revised Definition*, *supra* note 13.

may not be physically able to work.²² Those who test seropositive to having been exposed to the AIDS virus usually manifest no visible physical symptoms of illness or disease.²³ Those who test positive usually can perform physical work.

Those with ARC and who test seropositive may be suffering with HIV-induced brain disease which may indicate no physical symptoms but could cause an adverse effect on job performance and the safety of others.²⁴ Further, it is reported that an estimated 50% or more of those who test seropositive will develop HIV-induced brain disease.²⁵

Finally, those who are perceived to fall into any of the above categories, such as members of risk groups described in Part B, and family and friends of AIDS victims, have no potential for infection and are able to work. In summary, those who have AIDS, who have ARC and who test seropositive may or may not be able to work depending on the stage of disease or infection and the requirements of the job; however, those who are perceived as having AIDS or at risk of getting AIDS can do the job since they have no infection.

B. Who has AIDS?

The Centers for Disease Control ("CDC") revised surveillance case definition of AIDS ("Revised Definition"), effective September 1, 1987, requires reporting of anyone for whom laboratory evidence indicates the presence of the AIDS virus and one indicator disease diagnosed directly or presumptively, i.e., without clinical confirmation.²⁶ Presumptively diagnosed diseases include Kaposi's sarcoma and pneumocystis carinii and certain other progressive,

22. *Id.*

23. Symptoms such as fever, weight loss, fatigue, diarrhea, and swollen lymph nodes may not surface until after an incubation period, which is the time between infection with the virus and the onset of symptoms. The incubation period may span from six months to over seven years. *NIH Conference, supra* note 3, at 801.

24. *Conference Report: Second International Conference on AIDS*, 145 *MED. J. AUSTRAL.* 524-29, as cited in *COVER-UP, supra* note 4, at 248.

25. *COVER-UP, supra* note 4, at 251.

26. *Revised Definition, supra* note 13, at 4S-5S. Before September 1987, CDC defined AIDS as a reliably diagnosed disease that is predictive of an underlying cellular immunodeficiency in a person who has had no known underlying cause of cellular immunodeficiency. *Revised Case Definition of Acquired Immune Deficiency Syndrome—United States*, 34 *MMWR* 373 (June 28, 1985).

seriously disabling diseases.²⁷ Where laboratory evidence does not indicate the presence of the AIDS virus, either because the AIDS test was not performed or gave inconclusive results, the Revised Definition requires reporting of anyone who has an indicator disease diagnosed by a definitive method and without specific known causes of immunodeficiency.²⁸

For those who test negative to the presence of the AIDS virus, the Revised Definition requires reporting of anyone who has an indicator disease diagnosed by a definitive method, who has no specific known causes of immunodeficiency and who has a low T-helper lymphocyte count.²⁹ The effect of the 1987 revision is to include, among others, those who have certain diseases indicative of AIDS for which no clinical diagnosis has been definitively made.³⁰

The CDC reports that 65% of the adult cases have occurred in sexually active homosexual and bisexual men who had multiple partners; 7% occurred in homosexual and bisexual men who use intravenous drugs; 18% occurred in present or past heterosexual abusers of intravenous drugs; 4% occurred in heterosexual persons who had some sexual contact with someone with AIDS or at risk for AIDS; 2% occurred in adult recipients of blood and blood products; and 1% occurred in persons with hemophilia or other coagulation disorders.³¹ The remaining 3% of adult AIDS patients do not fall into any of these groups and the way in which they contracted the disease is still unknown.³² In children, 77% of the reported cases occurred in children whose parents have AIDS or are at high risk for AIDS; 14% occurred in transfusion recipients; 6% in hemophiliacs; and, in 3% of the cases, the source of the disease is unknown.³³ All of the above, except those in the "uncertain" category, are viewed as "risk groups."³⁴ Finally, 59% of adult AIDS victims are white, 26%

27. *Revised Definition*, *supra* note 13, at 5S.

28. *Id.* at 4S.

29. *Id.* at 6S. The T-helper/inducer lymphocyte count is to be less than 400 mm³.
Id.

30. *Id.* at 1S.

31. 4/18/88 SURVEILLANCE REPORT, *supra* note 19, at 1. For current and accurate data, telephone inquiries can be made to Surveillance and Evaluation Branch, United States AIDS Program, Center for Infectious Diseases, CDC at (404) 329-3534.

32. *Id.*

33. *Id.*

34. *Id.* at 5.

are Black, 14% are Hispanic and 1% is unknown.³⁵ Eighty-nine percent of the victims are between the ages of twenty and forty-nine.³⁶

C. *How Contagious is AIDS?*

The virus is transmitted through sexual contact, exposure to infected blood or blood components, needle sharing by drug users, and by an infected mother across her placenta to her unborn child. What is not known is the length of time that a person is contagious.³⁷ In this respect, CDC recommends that health care workers consider all patients as potentially infected with the virus and adhere to strict infection-control precautions to minimize the risk of exposure to blood and body fluids of all patients.³⁸

35. *Id.*

36. 4/18/88 SURVEILLANCE REPORT, *supra* note 19, at 1.

37. Persons exposed to the virus usually develop detectable levels of antibody against the virus within six to twelve weeks of infection. *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 MMWR No. 31 (Aug. 14, 1987) [hereinafter *PHS Guidelines*]. The presence of the antibody indicates current infection, even though many infected persons may have little or no clinical evidence of disease for years. It is estimated that between 1.0 and 1.5 million infected persons in the United States are not aware that they are infected with the virus. While CDC recommends testing for certain risk groups, such as persons planning to get married, CDC also urges that those who are tested for the virus not be subjected to inappropriate discrimination in, among other things, employment. *Id.*

38. *Recommendations for Prevention of HIV Transmission in Health-Care Settings*, 36 MMWR 3S (Aug. 21, 1987) [hereinafter *Recommendations re: Health Care*]. See generally *Recommended Infection Control Practices for Dentistry*, 35 MMWR 237 (1986); *Recommendations for Preventing Transmission of Infection With Human T-lymphotropic Virus Type III/lymphadenopathy-Associated Virus During Invasive Procedures*, 35 MMWR 221 (1986); *Recommendations for Preventing Transmission of Infection With Human T-lymphotropic Virus Type III/lymphadenopathy-Associated Virus in the Workplace*, 34 MMWR 681 (1985) [hereinafter *Recommendations in the Workplace*]; *Recommendations for Providing Dialysis Treatment to Patients Infected With Human T-lymphotropic Virus Type III/lymphadenopathy-Associated Virus Infection*, 35 MMWR 376 (1986); *Acquired Immunodeficiency Syndrome (AIDS): Precautions for Health Care Workers and Allied Professionals*, 32 MMWR 450 (1983); *Acquired Immunodeficiency Syndrome (AIDS): Precautions for Clinical and Laboratory Staffs*, 31 MMWR 577 (1982).

In *Recommendations re: Health Care*, CDC advises that health care, personal-service and food-service workers, among others, take precautions such as: wearing rubber gloves, gowns, masks, eye coverings, using disposable items such as needles, washing thoroughly, and handling sharp items such as needles and scalpels with

HIV has been isolated from blood, semen, saliva, tears, breast milk, urine and is likely to be isolated from other body fluids, secretions and excretions.³⁹ While some persons hypothesize that AIDS may be transmitted through other body fluids, such as tears and saliva,⁴⁰ studies of nonsexual household contacts of AIDS patients indicate that casual contact with saliva and tears does not result in transmission of infection.⁴¹ Also, the great weight of the medical evidence indicates that AIDS is not spread by airborne transmission of the virus or by casual workplace contact.⁴² In summary, AIDS is not spread by the kind of nonsexual person-to-person contact that generally occurs among workers and clients or consumers in the workplace, including such settings as offices, schools, factories, and construction sites.⁴³

D. What do the AIDS' Tests Test?

Individuals infected with the AIDS virus develop antibodies which can be detected by the EIA (enzyme immunoassay) ("EIA" or

extraordinary care to prevent accidental injuries. *Recommendation re: Health Care*, *supra* note 38, at 6S.

Ninety-five percent of the health-care workers known to be infected with the AIDS virus have high risk behavior. *Id.* at 4S. The CDC recommends that workers with exudative lesions or weeping dermatitis refrain from all direct patient care and from handling patient-care equipment until the condition resolves. *Id.* at 6S.

39. *Recommendations in the Workplace*, *supra* note 38, at 682.

40. See COVER-UP, *supra* note 4, at 109; *c.f. Recommendations for Preventing Possible Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus from Tears*, 34 MMWR 533-34 (Aug. 30, 1985).

41. *Lack of HIV Transmission by Casual Contact*, 112 LANCET 863 (Oct. 1986).

42. *Recommendations in the Workplace*, *supra* note 38, at 682. The CDC recommends that workers in settings, such as offices, schools, factories, construction sites, who are known to be infected with HIV should not be restricted from work on this account, or from using telephones, office equipment, toilets, showers, eating facilities, and water fountains. *Id.* at 690. In the case of accidents in the work setting, these Recommendations advise that equipment that is contaminated with blood or other body fluids from any worker, known to be infected or not, should be cleaned with soap and water or a detergent and with bleach. *Id.*

43. *Id.* at 682. This conclusion is supported by the medical literature. 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. OF MED. 344 (1986); Sande, *Transmission of AIDS: The Case Against Casual Contagion*, 314 NEW ENG. J. OF MED. 380 (1986).

"ELIZA") and Western Blot tests.⁴⁴ While these tests detect the antibodies to the AIDS virus, the tests can not differentiate between those who will develop the disease and those who will suffer no long-term effects from exposure.⁴⁵ Indeed, the presence of antibodies does not mean necessarily that the person will develop AIDS or even that the person's body continues to harbor the virus.⁴⁶ It can be seen, therefore, that employers that routinely administer these blood tests to employees and job applicants may "diagnose" persons as "having AIDS" long before the onset of the symptoms of AIDS and then may discriminate against these persons years before the disease makes employment impractical.⁴⁷

PART TWO: THE LEGAL ASPECTS OF AIDS

Those who test positive for the AIDS antibodies, who have symptoms, who have ARC or who have AIDS all are potential victims of employment discrimination. They may seek legal redress under the relevant portions of the Rehabilitation Act of 1973 ("Act"), and the regulations promulgated under the Act, as well as state and local statutes. In subpart A, of the Act, relevant regulations and the Opinion of the United States Department of Justice are reviewed. In subpart B, certain state and local statutes dealing

44. *PHS Guidelines*, *supra* note 37. There, CDC explained that the sensitivity of the ELIZA test is 99% when performed under optimal laboratory conditions. Since there is an incidence of a "false positive rate," many ELIZA positives are retested. If the results are still positive, the results are confirmed with the Western Blot test, which produces very few false positive results. *Id.* See generally *Serologic Testing for HIV Infection*, 36 MMWR 13S (Aug. 18, 1987).

45. CDC reports that AIDS cases have resulted from exposure to the virus up to seven years before diagnosis and that longer incubation periods are possible. *Update: Acquired Immunodeficiency Syndrome—United States*, 35 MMWR 17, 20 (Jan. 17, 1986).

46. A reduced level of serum antibody to the HIV virus is "significantly predictive of the development of AIDS." Polk, *Predictors of the Acquired Immunodeficiency Syndrome Developing in a Cohort of Seropositive Homosexual Men*, 316 NEW ENG. J. OF MED. 61, 65 (1986). There, it is reported that the antibody levels decline as the immune system progressively submits to the disease. This situation, the author suggests, means that persons with high levels of the serum antibody are less likely to develop the disease. *Id.*

47. CDC has refused to endorse routine blood screening of employees and job applicants. See *Recommendations in the Workplace*, *supra* note 38, at 683. CDC has, however, endorsed routine blood screenings for certain at-risk groups. See *PHS Guidelines for Antibody Testing*, *supra* note 37.

with, or relevant to, discrimination in employment against victims of AIDS and handicapped persons briefly are overviewed. In subpart C, the Supreme Court's recent decision of *School Board of Nassau County v. Arline* ("Arline") is reported.⁴⁸

A. The Act, Relevant Regulations and the Opinion of the Department Of Justice

1. The Rehabilitation Act of 1973

Congress enacted the Rehabilitation Act of 1973 ("Act")⁴⁹ in order to improve the lives of handicapped individuals by enabling them more readily to participate and to work in society.⁵⁰ Section 501 of the Act ("Section 501") prohibits discrimination against, and requires affirmative action for, qualified handicapped applicants for employment with, and employees of, every agency and department of the executive branch.⁵¹ Section 503 of the Act ("Section 503") prohibits discrimination against, and requires affirmative action for, qualified individuals with handicaps with respect to employment under federal contracts.⁵² Section 504 of the Act ("Section

48. *School Bd. of Nassau County v. Arline*, 107 S. Ct. 1123, *reh'g denied*, 107 S. Ct. 1913 (1987).

49. Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701-96 (Supp. 1987)).

50. S. Rep. No. 318, 93rd Cong., 1st Sess. 4, 18, 19, *reprinted in* 1973 U.S. CODE CONG. & ADMIN. NEWS 2076, 2079, 2092, 2093.

51. Section 501, codified at 29 U.S.C. § 791(b) (Supp. 1987), deals only with employment of handicapped individuals by agencies of the federal government, in contrast with §§ 503 and 504, the texts of which are found at *infra* notes 52 and 53. Section 501 provides:

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall . . . submit to the Equal Employment Opportunity Commission . . . an affirmative action program plan for the hiring, placement and advancement of individuals with handicaps in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met

29 U.S.C. § 791(b) (Supp. 1987). A private cause of action exists for those persons who are excluded from employment because they are handicapped. *See Morgan v. United States Postal Serv.*, 798 F.2d 1162 (8th Cir. 1986) (*per curiam*), *cert. denied*, 107 S. Ct. 1608 (1987).

52. Section 503(a) and (b) (codified at 29 U.S.C. §§ 793(a), (b) (Supp. 1987)). Section 503 provides:

504") prohibits discrimination against qualified individuals with handicaps with respect to participation in federal grants and programs.⁵³ The Act also provides that an "individual with handi-

(a) Amount of contracts or subcontracts; provision for employment and advancement of qualified handicapped individuals; regulations

Any contract in excess of \$2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract, the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with handicaps as defined in section 706(8) of this title. The provisions of this section shall apply to any subcontract in excess of \$2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations

(b) Administrative enforcement; complaints; investigations; departmental action

If any individual with handicaps believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

See 41 C.F.R. § 60-741.1 to .30 (1980) for the affirmative action obligations of contractors and subcontractors for handicapped workers. 41 C.F.R. § 60-741.4 requires that government procurement contracts contain the following clause:

The contractor will not discriminate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices such as the following: Employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

Id. Section 503 does not give rise to a private right of action. *Hodge v. Atchison, Topeka and Santa Fe Ry. Co.*, 728 F.2d 414 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 97 (1984).

53. Section 504 (codified at 29 U.S.C. § 794 (Supp. 1987)). Section 504 provides:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by

caps" is one who has a physical or mental impairment substantially limiting one or more major life activities, or one who has a record of, or is regarded as having, such an impairment.⁵⁴

The Equal Employment Opportunity Commission ("EEOC") has the power to enforce Section 501⁵⁵ and Section 504 with respect to federal executive agencies, and positions in the legislative and judicial branches which are in the competitive service.⁵⁶ The Office of Federal Contract Compliance Programs within the Department of Labor is responsible for the administrative enforcement of Section 503.⁵⁷ The Department of Justice ("DOJ") has been designated as

the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section

. . . .

Id. A private cause of action exists for those persons who are excluded from federally funded programs because they are defined as handicapped under Section 604, *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984), or because officials have incorrectly classified and treated them as being handicapped when they in fact are not. *Carter v. Orleans Parish Pub. Schools*, 725 F.2d 261 (5th Cir. 1984).

54. 29 U.S.C. § 706(8)(B) (1987) provides:

Subject to the second sentence of this subparagraph, the term 'individual with handicaps' 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. . . . [S]uch term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Id. In 1986, as a result of Pub. L. 99-506, the term "individual with handicaps" was substituted in the statute for the term "handicapped individual" found in the predecessor section 706(7). It is not clear that such change has been made in all of the relevant regulations. The DOJ, EEOC and HHS regulations contain language substantially identical to the statutory definition of "individuals with handicaps." See 28 C.F.R. § 41.31(a); 29 C.F.R. § 1613.702(a); 45 C.F.R. § 84.3(j).

The legislative history of the predecessor section 706(7), which was identical in text to section 706(8) except for the indicated phrase, reflects Congress' concern that the handicapped be protected against discrimination caused both by prejudice and by erroneous but prevalent perceptions about the handicapped, *Southeastern Community College v. Davis*, 442 U.S. 397, 405-06 n.6 (1979), and those perceived to have a handicap. S. REP. NO. 1297 at 37-39, 63-64 (1974).

55. Section 505 (codified at 29 U.S.C. § 794 a(a)(1) (Supp. 1987)), authorizes the EEOC to enforce section 501. See also 29 C.F.R. § 1613.708 (1985).

56. 29 C.F.R. § 1613.701(b).

57. See 41 C.F.R. § 60-741.1 to .30 for the affirmative action obligations of contractors and subcontractors for handicapped workers.

the agency responsible for coordinating the implementation of Section 504 by each federal department and agency that is empowered to extend federal financial assistance.⁵⁸ In this regard, since most issues arise under Section 504, the focus of the remainder of this article is on Section 504 and the regulations promulgated pursuant to it.

2. The Regulations

Under the regulations promulgated pursuant to Section 504, an "individual with handicaps" or a "handicapped person" means any person who has a physical or mental impairment⁵⁹ that substantially limits one or more major life activities,⁶⁰ who has a record of such an impairment,⁶¹ or who is regarded as having such an impairment.⁶² A "qualified handicapped person" means a handi-

58. Exec. Order No. 12250, 45 Fed. Reg. 72,995 (1980). According to this Executive Order, the regulations of the Secretary of Health and Human Services ("HHS") relating to the coordination of the implementation of Section 504 are deemed, until revoked, to have been issued by the Attorney General. In addition, the HHS regulations were to continue in effect until revoked or modified by the Attorney General. In this regard, the regulations of the EEOC, the DOJ and the HHS are set out *infra* notes 59-64.

59. 28 C.F.R. § 41.31(b)(1) (1986) provides that "physical or mental impairment" means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine. . . . The term 'physical or mental impairment' includes, but is not limited to, such diseases and conditions as . . . cancer, . . . , drug addiction

Id. Both the EEOC and the HHS regulations are identical except that they do not contain the final sentence. 29 C.F.R. § 1613.702(b) (1986); 45 C.F.R. § 84.3(j)(2)(i) (1985).

60. 28 C.F.R. § 41.31(b)(2) provides: "'Major life activities' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* The EEOC and HHS regulations are identical. 29 C.F.R. § 1613.703(c) (1986); 45 C.F.R. § 84.3(j)(2)(ii) (1986).

61. 28 C.F.R. § 41.31(b)(3) provides: "'Has a record of such an impairment' means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." *Id.* EEOC and HHS regulations are substantially identical. 29 C.F.R. § 1613.702(d) (1986); 45 C.F.R. § 84.3(j)(2)(iii).

62. 28 C.F.R. § 1.31(b)(4) provides:

capped person who, with reasonable accommodation, can perform the essential functions of the job in question and, with respect to services, who meets the essential eligibility requirements for the receipt of such services.⁶³

“Reasonable accommodation” means that accommodation is required unless the recipient can demonstrate that the accommodation would impose an undue hardship upon the operation of its program.⁶⁴ The extent of the burden on the employer to make

‘Is regarded as having such an impairment’ means: (i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation; (ii) 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 (iii) has none of the impairments defined in paragraph (b)(1) of this section but is treated by a recipient as having such an impairment.

Id. HHS’s regulation is substantially identical. 45 C.F.R. § 84.3(j)(2)(iii) (1985). EEOC’s regulation, 29 C.F.R. § 1613.703(d), is substantially identical except that the word “employer” is used for “others” and “recipient”. *Id.*

63. 28 C.F.R. § 41.32. Section 41.32 states that a “qualified handicapped person” means: “(a) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question and (b) with respect to services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.” *Id.* EEOC’s regulation, 29 C.F.R. § 1613.701(f), differs from the above as follows: “with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others” *Id.* HHS’s regulation, 45 C.F.R. § 84.3(k)(1), is substantially similar to that of the DOJ.

The Supreme Court has ruled that an “otherwise qualified person” is a person who is able to meet all of the program’s requirements in spite of his handicap. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). In *Davis*, a student with a bilateral, sensor-neural hearing loss claimed that she should be included in the college’s nursing program. The Court ruled that while she was a “handicapped individual,” the college was not required to undertake affirmative action that would lower the standards of the program to accommodate the student, such as dispensing with the need for effective oral communication in the nursing program. *Id.* at 413.

64. 28 C.F.R. § 41.53. Section 41.53 provides: “A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship upon the operation of its program.” *Id.* EEOC’s regulation, 29 C.F.R. § 1613.704(a), contains the same definition as the regulation above and sections 1613.704(b) and (c) expand on what “reasonable accommodation” may include as follows:

- (b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and
- (2) job restructuring, part-time or modified work schedules, acquisition or

reasonable accommodations is determined on a case-by-case basis. Some of the factors to be considered include the size of the employer's program, the type of operation and the nature and cost of the needed accommodation.⁶⁵ While the regulations impose no affirmative action obligations,⁶⁶ they do provide that recipients⁶⁷ may not use employment tests or criteria that discriminate against handicapped persons or make preemployment inquiries as to whether an applicant is a handicapped person.⁶⁸

modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions. . . .

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.

Id. HHS's regulation, 45 C.F.R. § 84.12, is substantially similar to that of the EEOC.

65. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). There, the Court also stated that it appeared unlikely that the student could have benefited from any affirmative action with regard to "modifications" of the college's program to accommodate such handicapped persons by the provision of "auxiliary aids" such as sign-language interpreters. *Id.* at 408-09.

66. *Id.*

67. While the Supreme Court has not ruled on the issue, it appears that entities such as hospitals and colleges that receive federal financial assistance are within the meaning of the statute. *United States v. Baylor Univ. Medical Center*, 736 F.2d 1039 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985). There, the court held that a university medical center whose inpatient and emergency room services received medicaid and medicare payments received federal financial assistance within the meaning of Section 504 and were required to allow HHS access to the facility for purposes of investigating complaints of discrimination on the basis of handicap. *Id.* However, in *United States Dep't of Transp. v. Paralyzed Veterans*, 106 S. Ct. 2705 (1986), the Court ruled that only direct financial assistance to the entity charged with discrimination would serve to impose the Section 504 requirement. *Id.* at 2711.

68. 28 C.F.R. § 41.55 provides: "A recipient may not conduct a preemployment medical examination or make a preemployment inquiry as to whether an applicant is a handicapped person or as to the nature or severity of a handicap except under the circumstances described in 28 C.F.R. § 42.513." *Id.* 28 C.F.R. § 42.513 permits such inquiries for the purpose of enabling and evaluating affirmative action programs. EEOC's regulation, 29 C.F.R. § 1613.706, is similar and more expansive of the above. Section 1613.706(b) provides:

(b) Nothing in this section shall prohibit an agency from conditioning an offer of employment on the results of a medical examination conducted prior to the

3. *Opinion of the United States Department of Justice*

On June 23, 1986, the United State Department of Justice ("DOJ"), published an Opinion of Legal Counsel regarding the application of Section 504 of the Act to the AIDS situation.⁶⁹ The DOJ concluded that Section 504 prohibits discrimination based on the disabling effects of the disease (i.e., physical impairment) because that is discrimination based on handicaps.⁷⁰ Since persons with CDC-defined AIDS have impaired immune function and those with ARC experience physical symptoms characteristic of immune deficiency, these persons, said the DOJ, would be considered handicapped.⁷¹

The DOJ concluded, however, that Section 504 does not prohibit discrimination based on an individual's real or perceived ability to transmit the disease to others because the ability to transmit the condition, i.e., a person's contagiousness, does not itself adversely

employee's entrance on duty, *Provided*, That: (1) All entering employees are subjected to such an examination regardless of handicap or when the preemployment medical questionnaire used for positions which do not routinely require medical examination indicates a condition for which further examination is required because of the the job-related nature of the condition, and (2) the results of such an examination are used only in accordance with the requirements of this part. Nothing in this section shall be construed to prohibit the gathering of preemployment medical information for the purposes of special appointing authorities for handicapped persons.

Id.

69. Cooper, *Memo From Assistant Attorney General Cooper On Application of Section 504 of the Rehabilitation Act to Persons With AIDS*, 122 Daily Lab. Rep. (BNA) D-1 (June 25, 1986) [hereinafter *DOJ Memo*]. The DOJ Memo was in response to a March 11, 1986 request by the general counsel of the Department of Health and Human Services ("HHS") to consider questions concerning the application of the Act to individuals who have, or are regarded as having, AIDS or ARC or who test positive for AIDS antibodies. *Id.*

Shortly after the DOJ Memo, the Office of Civil Rights of Health and Human Services ("OCR") issued a finding of discrimination in violation of Section 504 in an AIDS case, which finding appears to give narrow effect to the Justice Department's ruling in *In re Charlotte Memorial Hosp.*, 153 Daily Lab. Rep. (BNA) A-3 (August 8, 1986). However, the Director of the OCR said future investigations of discrimination would be governed by the DOJ Memo, even though the Public Health Service of Health and Human Services had repudiated it. *Id.*

70. *Id.* at D-5 to D-6. The DOJ reasoned that victims of AIDS are handicapped persons protected by the Act because they suffer physiological disorders that substantially limit major life activities or have the consequence of limiting a major life activity. *Id.*

71. *Id.* at D-9.

affect the employee's physical or mental condition.⁷² The DOJ reasoned that since a symptomatic infection does not impair a major life activity, it is not an impairment for purposes of the statute.⁷³ The DOJ also said that the lack of an objective basis for fearing contagion is irrelevant, so long as the stated fears were not a pretext for discrimination based on actual physical impairment.⁷⁴ Further, a person who is able to communicate the AIDS virus is not "otherwise qualified," said the DOJ, to participate in a Section 504 program or activity unless the risk to the health of others can be safely disregarded with a high degree of medical certainty and is low enough without substantial modifications in the program.⁷⁵ Accordingly, said the DOJ, the burden of proving the lack of any significant risk of transmission is that of the plaintiff-employee.⁷⁶

The effect of the opinion, it would seem, is to permit employers to take adverse employment action against victims of AIDS, ARC and related conditions as long as such action is based on fear of contagiousness, regardless of how unfounded, rather than on the disabling effect of the disease itself. In other words, the opinion permits employers to act on the basis of unfounded stereotypes and prejudices with respect to an extremely broad group of people, i.e., anyone considered to be able to spread AIDS regardless of whether the person even tests positive to having AIDS "antibodies". Further, according to the opinion, none in the group would have recourse under the Act to challenge the reasonableness of the employer's fear of contagiousness in light of the current medical understanding of

72. *Id.* at D-7 to D-10.

73. *Id.*

74. *Id.* at D-10 to D-12. The DOJ reasoned that such a conclusion was compelled by the language of the statute, principles of statutory interpretation and by the absence of any Congressional intent to disturb the broad powers given by federal and state law to public health officials to prevent the spread of communicable diseases. *Id.*

75. *Id.* at D-13.

76. *Id.* According to the DOJ Memo:

The mechanisms of transmission are still not fully understood, and epidemiological evidence does not permit the kind of categorical statements about risk that would make one doubt the legitimacy of claims of fear. These considerations must inform any analysis engaged in by a fact finder to determine whether discrimination truly occurred by reason of handicap, and thus counsel against an initial presumption of pretext.

Id.

the disease or the availability of reasonable accommodation.⁷⁷ Finally, while the DOJ's approach was rejected for victims who are both disabled and contagious in *Arline*, discussed below, the Supreme Court has yet to address the issue of whether contagiousness alone is a handicap under the Act.

B. State and Local Legislation Prohibiting Discrimination on the Basis of AIDS and Handicaps

While no state has prohibited discrimination on the basis of AIDS, some cities have.⁷⁸ In another context, some states⁷⁹ and local

77. *Id.*

78. For example, discrimination based on AIDS, related conditions or a perception that a person is suffering from AIDS is prohibited in Los Angeles under Los Angeles, Cal. Ordinance 160289 (Nov. 25, 1985) codified LOS ANGELES, CAL., MUN. CODE ch. III, art. 5.8, 45.80-.93 (1986); in San Francisco under SAN FRANCISCO, CAL. MUN. CODE pt. II, ch. VII, art. 38, 3801-16, effective Dec. 19, 1985; and in West Hollywood, Cal. Ordinance No. 77, effective Aug. 15, 1985. See *Leonard-2*, *supra* note 7, at 23 n.58.

The District of Columbia prohibits insurers from discriminating against persons with AIDS in coverage or provision of insurance benefits. See "Provision of Insurance Act of 1986," D.C. Act 6-170. The Act was held constitutional under the Fifth Amendment. *American Council of Life Ins. v. District of Columbia*, 645 F. Supp. 84, 89 (D.D.C. 1986).

In Philadelphia, Pennsylvania, the mayor's executive order 4-86 prohibits discrimination against persons with AIDS in city employment and services. 24 Gov't Empl. Rel. Rep. (BNA) No. 1163 at 663 (May 12, 1986).

An Austin, Texas ordinance bans discrimination in employment, housing and public accommodations against those individuals who have AIDS, who are with ARC, who test seropositive for the virus, who are perceived to have AIDS or who are perceived to be at risk for it. Also, those Austin employers with 16 or more employees are prohibited from refusing to hire, discharging or adversely affecting an individual's employment based on his or her HIV status, whether real or perceived. The ordinance follows city laws banning discrimination on the basis of handicap which had already been construed to cover AIDS. 1 AIDS Policy & Law (BNA) No. 25 at 1 (Dec. 31, 1986).

79. CAL. HEALTH & SAFETY CODE, ch. 1.11-12, §§ 199.20-.30 (1985) prohibits employers, among others, from testing people for exposure to AIDS without their written consent, limit the disclosure of test results, and prohibit the use of the results of such tests in any determination of suitability for employment or insurability. *Id.*

Fla. Stat. Ann. § 381.606(5) (West 1985) prohibits the use of AIDS blood screening tests to determine insurability or suitability for hire or continued employment and protects persons who submit to AIDS testing from unauthorized disclosure of the results. *Id.*

Wis. Stat. Ann. §§ 103.15(2)(a), (b)-(3) (West 1985) banned testing of applicants and employees for exposure to the AIDS virus. In 1986, however, the state relaxed the

municipalities⁸⁰ have legislated that the AIDS blood screening test can not be used to determine insurability or suitability for hire or continued employment. AIDS victims, therefore, seek recourse under the state handicap statutes.

An AIDS victim may be considered handicapped in one state but not in another.⁸¹ For example, the most commonly used state statutory language parallels that found in the Act.⁸² In fact, many existing state and local statutes protect the handicapped and disabled, including those with potentially contagious diseases, such as AIDS, or those perceived as having such diseases.⁸³ At least one

ban and gave the state epidemiologist the final authority to decide whether blood screening is appropriate for employers and insurers. *Id.*

80. In Philadelphia, Pennsylvania, the mayor's executive order 4-86, *supra* note 78, prohibits medical screening of employees in city employment and of clients for city services for AIDS. 24 Gov't Empl. Rel. Rep. (BNA) No. 1163 at 663 (May 12, 1986).

The District of Columbia prohibits the testing of persons with respect to obtaining insurance, discussed in *supra* note 78.

Two articles probing the AIDS insurance crisis are Clifford and Iuculano, *AIDS and Insurance: The Rationale for AIDS-Related Testing*, 100 HARV. L. REV. 1806 (1987) and Schantz, *The AIDS Insurance Crisis: Underwriting or Overreaching*, 100 HARV. L. REV. 1782 (1987).

In Massachusetts, employers are prohibited from requiring HTLV-III testing as a condition of employment. MASS. GEN. L. ch. 214, § 706 (1986). In Quincy, Massachusetts, the city has agreed to end a policy requiring school employees who have AIDS or who have been exposed to HIV to report their condition to the school superintendent. 25 Gov't Empl. Rel. Rep. (BNA) No. 1244 at 1789 (Dec. 28, 1987).

81. For a more complete survey of state statutes, see Leonard-2, *supra* note 7, at 21 n.52. The majority of states and the District of Columbia have adopted legislation forbidding discrimination on the basis of handicap in both private and public employment. *Id.*

82. See, e.g., PENN. STAT. ANN. tit. 43, §§ 951-63 (West 1964) (the Pennsylvania Human Relations Act); 16 Pa. Code § 44.4 (1972).

83. Set out below are the laws as interpreted judicially or administratively in some jurisdictions in which the existence of AIDS is great:

The California Fair Employment and Housing Act ("FEHA") prohibits employers from discriminating on the basis of physical handicap or medical condition. CAL. GOV'T CODE § 12940(a) (West 1964). The Fair Employment Housing Commission held that AIDS constitutes a physical handicap within the meaning of the FEHA. *California Fair Employment & Hous. Comm'n v. Raytheon Co.*, 29 Daily Lab. Rep. (BNA) A-5 (Feb. 13, 1987).

The District of Columbia Human Rights Act (D.C. HRA) prohibits discrimination on the basis of physical handicap. D.C. CODE §§ 1-2512(a)(1) (1981 ed.). While there are no reported cases alleging discrimination because of AIDS, an opinion of the District's Corporation Counsel sent to a member of the District of Columbia Council

state requires that the handicap be permanent,⁸⁴ and a few states explicitly exclude communicable diseases from the definition of handicap.⁸⁵ Some states define a person as a handicapped person if he or she is discriminated against because of an abnormal condition.⁸⁶ In light of the above, AIDS victims may be considered handicapped or have certain protections in one state but not in

is that the D.C. HRA protects AIDS victims from employment discrimination. Leonard-2, *supra* note 7, at 22 n.53.

The Florida Human Rights Act (Florida HRA) of 1977 prohibits discrimination on the basis of handicap. FLA. STAT. ANN. §§ 760.01-.10 (West 1986). The Florida HRA protects an AIDS-afflicted employee from discrimination on the basis of handicap. *Shuttleworth v. Broward County*, 639 F. Supp. 654 (S.D. Fla. 1986); Florida HRA, No. 85-0624 (Dec. 11, 1985); 242 Daily Lab. Rep. (BNA) E-1 (Dec. 17, 1985); 24 Gov't Empl. Rel. Rep. (BNA) No. 1160, at 42 (Apr. 7, 1986) (county clerical employee, who had AIDS, was fired from his job. The Florida Commission on Human Relations, relying on current medical evidence concerning the nature of the disease, found an absence of substantial risk of future injury to Shuttleworth, co-workers or the general public and an absence of evidence that the disease was easily transmitted through casual contact in the workplace. Shuttleworth also filed an action in federal court under the Act.) *See also infra* note 88.

In Massachusetts, discrimination on the basis of AIDS is protected under the Massachusetts handicap law. *Cronan v. New England Tel. Co.*, 179 Daily Lab. Rep. (BNA) D-1 (Sept. 16, 1986) (after being diagnosed as having ARC, employees threatened to lynch him if he returned and employer denied his request to return to work).

The New York Human Rights Law ("HRL"), N.Y. Exec. Law § 296(1)(a) (McKinney 1988), prohibits discrimination on the basis of disability. New York State Division of Human Rights, *AIDS-Based Discrimination*, 3 Empl. Prac. Guide (CCH) ¶ 26,165 (Oct. 1987). AIDS appears to be a disability under the HRL. *People v. 49 W. 12th St. Tenants Corp.*, (N.Y. Sup. Ct. 1983) (preliminary injunction granted barring eviction of tenant-doctor who treated AIDS patients).

In Oregon, a person with HIV, ARC or AIDS qualifies as a person with a handicap under the Oregon law barring discrimination on the basis of handicap. 24 Gov't Empl. Rel. Rep. (BNA) No. 1157, at 430 (Mar. 31, 1986).

See also, the Wisconsin Fair Employment Law, *supra* note 79. In Wisconsin, it has been determined that AIDS is a covered handicap and that probable cause existed to believe that a school district discriminated because of handicap and sexual orientation when it adopted a work policy which excluded district staff members who had AIDS and ARC from attending work. *Racine Educ. Ass'n v. Racine United School Dist.*, 98 Daily Lab. Rep. E-1 (BNA) (May 21, 1986).

84. HAWAII REV. STAT. 378-1 (1985). On the other hand, New Hampshire, which excludes "illness" from the definition of handicap, N.H. REV. STAT. ANN. 3543-A:3 (XIII) (1984), administratively has ruled that "illness" is limited to short term, temporary medical conditions. N.H. ADMIN. CODE 405.1 (1984).

85. GA. CODE ANN. 66-503(b)(2) (Supp. 1985); KY. REV. STAT. 207.140(2)(c) (1982).

86. WASH. ADMIN. CODE R. 166-22-040 (1983).

another. Also, since the most commonly used state statutory language parallels that found in the Act, the interpretations given to the Act will undoubtedly be quite instructive to the states.

C. Judicial Developments

In *School Board of Nassau County v. Arline*⁸⁷ the Supreme Court addressed the issue of whether a person suffering from a disabling, contagious condition, i.e., tuberculosis, is a "handicapped individual" for purposes of Section 504 of the Act. *Arline* is, therefore, instructive in analyzing whether a perceived or actual victim of AIDS is an "individual with handicaps" for purposes of Section 504 and the circumstances in which a person is an "otherwise qualified individual with handicaps."⁸⁸

Gene H. Arline taught elementary school in Nassau County, Florida from 1966 until 1979 when she was discharged after

87. *School Bd. of Nassau County v. Arline*, 107 S. Ct. 1123, *reh'g denied*, 107 S. Ct. 1913 (1985).

88. There are few federal court cases dealing with the issue of whether perceived or actual victims of AIDS are protected under Section 504 of the Act. *See, e.g.*, *Chalk v. United States Dist. Court Central Dist. of Cal.*, 840 F.2d 701 (9th Cir. 1988) (after school board refused to grant request by teacher with AIDS to return to teaching duties upon recovery from an AIDS related illness, court reversed the district court's denial of a preliminary injunction and held that Chalk had shown a strong likelihood of success on the merits of Section 504 action; that he was subjected to irreparable injury by not being permitted to resume his classroom occupation; and that the evidence overwhelmingly indicated that the casual contact incident to Chalk's teaching duties presented no significant risk of harm to others).

See also, *Local 1812, Am. Fed'n of Gov't Employees v. United States Dep't of State*, 662 F. Supp 50 (D.D.C. 1987) (union's motion for preliminary injunction against mandatory testing of blood of all foreign service employees seeking to qualify, or who qualify, for worldwide service abroad for the presence of HIV denied because probability of success on merits were slight); *Shuttleworth v. Broward County Office of Budget and Management Policy*, 639 F. Supp. 654 (S.D. Fla. 1986) (county clerical employee fired after AIDS diagnosis alleging that his Section 504 rights were violated). District court denied the employer's motion for summary judgment and dismissal. *Id.* *Broward County settled with Shuttleworth*, on December 5, 1986, and agreed to rehire Shuttleworth and pay him \$196,000 which included back pay, payments of medical bills, attorneys' fees and reinstatement of his life and health insurance, and to treat any employee with AIDS as handicapped under federal law. 237 Daily Lab. Rep. (BNA) A-8 (Dec. 10, 1986). *Id.*

For a related matter, *see* *District 27 Community School Bd. v. Board of Educ.*, 130 Misc. 2d 398, 502 N.Y.S. 2d 325 (N.Y. Sup. Ct. 1986) (court noted that automatic exclusion of children with HIV infection from attending school may violate Section 504).

suffering a third relapse of tuberculosis within two years.⁸⁹ She first pursued, and was denied, relief in state administrative proceedings.⁹⁰ She then brought suit in federal court, alleging that the school board's decision to dismiss her because of her tuberculosis violated Section 504 of the Act.⁹¹

Arline was hospitalized for tuberculosis in 1957 and, for the next twenty years, her disease was in remission.⁹² A culture indicated that tuberculosis was again active in her system in 1977, and again in March 1978 and in November 1978.⁹³ After Arline's second relapse in the spring of 1978 and her third relapse in November of 1978, the school board suspended Arline with pay for the remainder of the school year.⁹⁴ At the end of the school year 1978-79, the school board held a hearing, after which it discharged Arline "not because she had done anything wrong" but because of the continued occurrence of tuberculosis.⁹⁵

Arline argued that since it was not disputed that the school board discharged her solely on the basis of her illness, and since her illness qualified her as a "handicapped person" under the Act, then she was dismissed solely as a result of her handicap in violation of Section 504 of the Act.⁹⁶ The district court held that while Arline suffers a handicap, she was not a "handicapped person" under the Act because Congress did not intend to include contagious diseases within the definition of a "handicapped person."⁹⁷ The district court also stated that, assuming that a person with a contagious disease could be deemed a handicapped person, Arline was not "qualified" to teach elementary school.⁹⁸

89. 107 S. Ct. at 1125.

90. *Id.*

91. She also sought relief under 42 U.S.C. § 1983 alleging that the board denied her due process of law. Both the district court and the court of appeals rejected this argument. *Arline* did not present this argument to the Supreme Court. *Id.* at 1125 n.1.

92. *Id.* at 1125.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

The Court of Appeals for the Eleventh Circuit reversed,⁹⁹ holding that persons with contagious diseases are within the coverage of Section 504 and that Arline's condition fell within the statutory and regulatory framework of the Act.¹⁰⁰ The court remanded the case for further findings as to whether the risks of infection prevented Arline from being "otherwise qualified" for her job and, if so, whether it was possible to make some reasonable accommodation for her in that teaching position.¹⁰¹ The Supreme Court granted certiorari¹⁰² and affirmed.¹⁰³

Justice Brennan, in announcing the opinion of the Court, first focused on the section 706(7) definition of "handicapped individual" which had been amended in 1974 to read:

[A]ny 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.¹⁰⁴

He noted that the legislative history of the amendment reflected Congress' concern that the handicapped be protected against discrimination caused both by prejudice and by erroneous but prevalent perceptions about the handicapped, particularly those persons who have a record of, or are regarded as having, an impairment but who at present have no actual incapacity at all.¹⁰⁵ Justice Brennan also referred to the HHS Regulations¹⁰⁶ because the HHS Regulations defined the terms "physical impairment"¹⁰⁷ and "major life activities."¹⁰⁸

Justice Brennan then considered whether Arline could be consid-

99. 772 F.2d 759 (1985).

100. *Id.* at 764.

101. *Id.* at 765.

102. 475 U.S. 1118 (1986).

103. Justice Brennan delivered the opinion of the Court, in which Justices White, Marshall, Blackmun, Powell, Stevens, and O'Connor joined. Chief Justice Rehnquist filed a dissenting opinion, in which Justice Scalia joined. *Id.*

104. 107 S. Ct. at 1126.

105. *Id.* at 1127.

106. *Id.*

107. 45 C.F.R. § 84.3(j)(2)(i) (1985).

108. 45 C.F.R. § 84.3(j)(2)(ii) (1985).

ered a handicapped individual under the Act. He first concluded that, since the record reflected that Arline suffered tuberculosis in an acute form in such a degree that it affected her respiratory system, she had a "physiological disorder or condition . . . affecting [her] respiratory [system]" and, therefore, she had a physical impairment as the term is defined by the HHS Regulations.¹⁰⁹ He next concluded that since this impairment was serious enough to require hospitalization, one or more of her major life activities were substantially limited by the impairment.¹¹⁰ He also concluded that her hospitalization in 1957 established a record of impairment within the meaning of the statute and she was, therefore, a handicapped individual.¹¹¹

Justice Brennan then addressed the petitioner's contention that Arline was dismissed not because of her diminished physical capabilities, but because of the threat that her relapses of tuberculosis posed to the health of others.¹¹² Justice Brennan noted that since Arline's contagiousness and her physical impairment each resulted from the same underlying condition of tuberculosis, it would be unfair to permit an employer to distinguish between the effects of disease on others and the effects of a disease on a patient and to use that distinction to justify discriminatory treatment.¹¹³ He stated that nothing in the legislative history suggested that Congress intended such a result, particularly where one's impairment might not diminish a person's physical or mental capabilities but could

109. 107 S. Ct. at 1127.

110. *Id.*

111. *Id.* Petitioners conceded that a contagious disease may constitute a handicapping condition to the extent that it leaves a person with diminished physical or mental capabilities and that Arline's hospitalization for tuberculosis in 1957 demonstrated that she had a record of physical impairment. *Id.* at 1128.

112. *Id.*

113. *Id.* In note 7, Justice Brennan addressed the argument by the United States that discrimination on the basis of contagiousness is never discrimination on the basis of a handicap because it is possible for a person to be a carrier of a disease and to be capable of spreading a disease without having a "physical impairment" or suffering any other symptoms associated with the disease, such as with some carriers of the AIDS virus. *Id.* at 1128 n.7. Justice Brennan said that "the argument was misplaced in this case because the handicap here, tuberculosis, gave rise both to a physical impairment and to contagiousness." *Id.* He refused to 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. *Id.* n.7.

substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.¹¹⁴

Justice Brennan also concluded that to allow discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of Section 504,¹¹⁵ especially since discrimination against persons with noncontagious diseases, such as epilepsy or cancer, is rooted in an irrational fear that the disease might be contagious.¹¹⁶ Rather, he said, the Act is structured so that reflex discrimination is replaced by action based on reasoned and medically sound judgments that the person is handicapped and otherwise qualified.¹¹⁷ He recognized that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances. He concluded, though, that such a threat does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases.¹¹⁸ He reasoned that, if the Court ruled otherwise, those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified."¹¹⁹

Justice Brennan then focused on the final question of whether Arline was otherwise qualified for the job of elementary school

114. *Id.* at 1128-29.

115. *Id.* at 1129. He explained that the purpose of the Act is to ensure that handicapped individuals, or those who are regarded as impaired, and who, as a result, are substantially limited in a major life activity, are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. *Id.*

116. *Id.*

117. *Id.* at 1129-30.

118. *Id.*

119. *Id.* at 1130. In note 15, Justice Brennan disagreed with the dissent's implication that the majority's holding rested only on "its sense of fairness and implied support from the Act." *Id.* at 1132 n.15. He argued that the majority's holding was premised on the plain language of the Act and on the HHS Regulations implementing the Act, neither of which the dissent discussed and both of which supported a conclusion that those with a contagious disease, such as tuberculosis, may be considered "handicapped" under the Act. *Id.* He concluded that the dissent's construction of the Act to exclude those afflicted with a contagious disease was arbitrary (and, therefore, unfair) and at odds with basic canons of statutory construction. *Id.* Justice Brennan also commented that the majority's decision will complement rather than complicate state efforts to enforce public health laws, noting that because the Act requires employers to respond rationally to those handicapped by a contagious disease, the Act will assist local health officials by lessening the individual's reluctance to report his or her condition. *Id.*

teacher.¹²⁰ The district court, he said, was to conduct an individualized inquiry and make appropriate findings of fact, and to weigh appropriately the interests of the individual and the legitimate concerns of the grantee, such as avoiding exposure of others to significant health and safety risks.¹²¹ In the context of the employment of a person handicapped with a contagious disease, he agreed with *amicus curiae* American Medical Association that this inquiry should 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."¹²² He then said that, "in making these findings, courts normally should defer to the reasonable medical judgments of public health officials."¹²³

Justice Brennan also stated that, under the "other-qualified" inquiry, the court must evaluate, in light of the medical findings, whether the employer could reasonably accommodate the employee without undue hardship or a fundamental alteration in the nature of the programs.¹²⁴ Since the district court failed to make a finding as to the duration and severity of Arline's condition, the probability that she would transmit the disease, whether she was contagious at

120. 107 S. Ct. at 1130-31.

121. *Id.* at 1131. In note 16, Justice Brennan did concede that a person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk. *Id.* at 1131 n.16. He said that "the Act would not require a school board to place a teacher with active, contagious tuberculosis in a classroom with elementary school children." *Id.*

122. *Id.* at 1131.

123. *Id.* He also noted that the case did not present "the question whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied." *Id.* at 1131 n.18.

124. *Id.* Justice Brennan said in note 17 that if the person is not able to perform the essential functions of the job in question, the court must consider whether reasonable accommodation by the employer would enable the handicapped person to perform those functions. *Id.* at 1131 n.17. An accommodation is not reasonable if it can not be made without undue financial and administrative burdens on a grantee or a fundamental alteration in the nature of the program. *Southeastern Community College v. Davis*, 442 U.S. 397, 410, 412 (1979). He also made reference to 45 C.F.R. § 84.12(c) which lists factors to be considered in determining whether accommodation would cause undue hardship. 107 S. Ct. at 1131 n.17.

the time she was discharged or whether the school board could have reasonably accommodated her, the Court remanded for further findings of fact as to whether Arline was otherwise qualified.¹²⁵

PART THREE: DISCUSSION

Whether a person who has AIDS, who has ARC, who tests seropositive or, in some cases, who is regarded as having an impairment is covered by the Act is a case-by-case determination of whether the person is an "individual with handicaps" and whether such a person is an "otherwise qualified individual with handicaps."¹²⁶ When the person is both disabled and contagious, a person is an "otherwise qualified person with handicaps" when it is determined that, with reasonable accommodation on the part of the employer, the individual's interests outweigh the employer's legitimate concern for the health and safety of others and the person can do the job in spite of the handicap.¹²⁷

A. "Individual With Handicaps"

The focus in this section is whether the Section 706(8) phrase "individual with handicaps" includes persons with AIDS, persons with ARC, persons who test seropositive to HIV and persons who are regarded as having, or at "high risk" for contracting, AIDS. According to Section 706(8)(B), an individual with handicaps is one who has a physical or mental impairment which substantially limits one or more of such person's major life activities, who has a record of

125. *Id.* at 1131-32. Chief Justice Rehnquist dissented, arguing that since Congress failed to impose an unambiguous condition on the grant of federal funds, a grantee could make no knowing acceptance unless Congress spoke clearly. *Id.* at 1132 (Rehnquist, J., dissenting). He also argued that Congress left to the states leeway to enact public health statutes designed to protect against the introduction and spread of contagious diseases. *Id.* He then concluded that because the language of the Act, regulations and legislative history are silent on this issue, contagiousness is not a handicap within the meaning of Section 504 and the protections of the Act do not extend to individuals, such as Arline. *Id.* at 1133-34. On remand, Judge John H. Moore II held that Arline is entitled to reinstatement to her position as an elementary school teacher of in lieu thereof to "front-pay" in the amount of \$768,724. (*Arline v. School Board of Nassau County*, No. 82-305-Civ-J-16 (M.D. Fla. July 1, 1988) (LEXIS, Genfed library, Dist. file).

126. The masculine will be used in the text for purposes of ease of discussion. Also, while Section 504 applies to grantees of federal financial assistance, some of whom are employers, the focus of the text is on employment and, therefore, the term employer is used.

127. See *supra* notes 87-125.

such an impairment, or who is regarded or treated as having such an impairment.¹²⁸ As discussed below, when a person is reportable as an AIDS victim under the CDC's Revised Definition, that person has a physical or mental impairment which substantially limits one or more of such person's major life activities. Also, unreportable persons, such as persons with ARC and those who test seropositive for HIV, and possibly some associates of AIDS victims, are within Section 706(8)(B) either because such persons have a physical or mental impairment which substantially limits one or more of such person's major life activities, have a record of such an impairment or are regarded as having such an impairment.

1. Section 706(8)(B)(i): Physical or Mental Impairment Which Substantially Limits One or More of Such Person's Major Life Activities

The regulations applicable to Section 504 ("Regulations") provide that a physical or mental impairment is any physiological disorder or condition affecting one or more of the neurological, musculoskeletal, respiratory, cardiovascular, hemic and lymphatic, skin and endocrine systems.¹²⁹ As *Arline* teaches, where contagiousness and physical impairment each result from the same underlying condition, it is unfair to permit an employer to distinguish between the effects of a disease on others and the effects of a disease on a patient and to use that distinction to justify discriminatory treatment. The critical question, however, that *Arline* did not decide is whether contagiousness alone is sufficient to deem the person an "individual with handicaps."¹³⁰

128. 29 U.S.C. § 706(9)(B) (1987). For the text of Section 706(7)(B), see *supra* note 54.

129. See the text of the relevant regulations at *supra* notes 59-64.

130. *School Bd. of Nassau County v. Arline*, 107 S. Ct. 1123, 1128 n.7, *reh'g. denied*. 107 S. Ct. 1913 (1985). As discussed in the text accompanying *supra* notes 69-77, the DOJ's position is that while the disabling effects of AIDS or ARC may substantially limit major life activities and, thus, constitute a handicap, the ability to transmit the disease to others without having a "physical impairment" or without suffering any other symptoms associated with the disease does not constitute a handicap. It should be noted that the DOJ cited no medical evidence in its DOJ Memo for its conclusion that no physical impairment exists when a person merely tests positive for the HIV.

a. Physical or Mental Impairment

A person reportable under the CDC Definition as an AIDS victim is a person who is physically or mentally impaired for purposes of the Act because of the presence of the opportunistic infections.¹³¹ An AIDS victim meets the definition found in the Regulations because that person has a physiologic disorder, or a cosmetic disfigurement, affecting the neurological (e.g., meningitis, encephalitis, AIDS-related dementia), respiratory (e.g., pneumocystis carinii pneumonia), hemic and lymphatic (e.g., lymphoma), skin (e.g., Kaposi's sarcoma), or endocrine systems. An AIDS victim, therefore, in addition to possibly being contagious, is physically or mentally impaired for purposes of the Act.

Likewise, a person with ARC, while not meeting the CDC Revised Definition, is a person who is physically or mentally impaired for purposes of the Act because of the presence of the beginning stages of the opportunistic infections. In other words, an ARC victim has a physiologic disorder, or a cosmetic disfigurement, which affects, perhaps to a lesser extent than with AIDS, the neurological (e.g., brain infection, dementia, headaches), respiratory (e.g., flu-like symptoms indicative of cryptococcal pneumonia), hemic and lymphatic (e.g., HIV presence, fevers), skin (e.g., weight loss), and endocrine systems. A person with ARC, therefore, in addition to possibly being contagious, is physically or mentally impaired for purposes of the Act.

A person who tests seropositive may be physically or mentally impaired for purposes of the Act merely because of the HIV infection. Some HIV-infected persons have external signs of HIV infection such as neurologic, motor and behavior problems indicative of AIDS dementia, a mononucleosis-like flu, and swollen nodes in two or more extra-inguinal sites.¹³² Other HIV-infected persons who have no external physical manifestations of the disease¹³³ are impaired because, due to the invasion of HIV, they have a condition which, at any point in time,¹³⁴ is, or has the potential of, weakening,

131. See *Revised Definition*, *supra* note 13.

132. PMS, *supra* note 3, at 8.

133. These persons may incubate the virus for over seven years. See *NIH Conference*, *supra* note 3, at 801.

134. Medical experts are unable to pinpoint when HIV actively begins to attack the white blood cells. Some medical evidence that HIV is affecting the immune system of the seropositive person may be laboratory tests indicating a significantly reduced white blood cell count. PMS, *supra* note 3, at 8.

diminishing, restricting or otherwise damaging their health, by affecting the immune system and reducing the ability of the victim to ward off opportunistic infections, or by impairing their physical or mental activity,¹³⁵ particularly their brains. In conclusion, a seropositive person who may or may not exhibit outward signs of infection, in addition probably to being contagious, is physically or mentally impaired for purposes of the Act because such a person has a condition which at any point can weaken and seriously damage that person's immune system and brain.

b. Which Substantially Limits Major Life Activities

"Major life activities" include functions such as caring for one's self, performing manual tasks, walking, breathing, learning and working.¹³⁶ When one has an opportunistic disease, or symptoms of such disease, as do AIDS and ARC victims, one's major life activities, such as caring for oneself, breathing and working, are substantially affected because, at some point, the victims must be hospitalized or, at least, remain home from work to battle the opportunistic disease or the symptoms. Even though the physical impairment and contagiousness each result from the same underlying condition, AIDS and ARC victims have, according to *Arline*, physical impairments which substantially limit major life activities within the meaning of Section 504.

A person who tests positive to HIV with no external (or an insignificant) manifestation of HIV-infection may not be able to meet the second leg of Section 706(8)(B)(i) because that person's contagiousness does not usually cause a limitation to his major life activities. Rather, it is usually the reaction of employers and others to the contagiousness that causes a limitation to his major life activities. Thus, while the contagious person physically or mentally may be able to work, a major life activity, that person may be denied the opportunity to do so because of fear and prejudice. The result is that the ability to work, while not physically impaired, is realistically impaired by the condition of contagiousness. Since the inquiry under Section 504 appears to be whether the physical condition affects major life activities, the physical condition of being conta-

135. In *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980), the court defined impairment as "any condition which weakens, diminishes, restricts or otherwise damages an individual's health or physical or mental activity." *Id.* at 1098.

136. See the text of the relevant regulations at *supra* note 60.

gious does not affect the contagious person's major life activities in a physical sense.¹³⁷

2. *Section 706(8)(B)(ii): Has a Record of Impairment; Section 706(8)(B)(iii): Is Regarded as Having an Impairment*

A person who tests seropositive to HIV, who is contagious, but who has no other physical effects of the disease can, within the language of sections 706(8)(B)(ii) and (iii), be a person "with a record of an impairment" or "regarded as having an impairment."¹³⁸ Section 706(8)(B)(ii) provides that an individual with handicaps is one who has a record of such impairment. The Regulations define "record of such an impairment" to mean a person who has a history of, or has been misclassified as having, a physical impairment that substantially limits one or more major life activities.¹³⁹ The focus here is not whether the victim has, but whether his classification connotes having, a physical impairment that substantially limits major life activities. Since the ELIZA or Western Blot tests themselves can constitute the record, the question of fact becomes how the employer classified the person and whether that classification connoted having a physical impairment that substantially limits major life activities.

Regardless of whether a person with AIDS or ARC or who tests seropositive does or does not have an impairment within the meaning of the statute, that person usually meets the requirements of Section 706(8)(B)(iii) because he is usually regarded or treated as having such an impairment.¹⁴⁰ In other words, employers or fellow employees view a person who tests positive as one whose condition will cause him to miss work, have mental problems, become sick and die, cause substantially increased health insurance costs, and cause HIV to be communicated to the employer's workforce.

Where employment decisions have been made on the basis that a person is an associate of an AIDS victim or a member of high-risk groups, such as homosexuals, there is an argument that the person

137. As discussed in Part III C of this Article, the definition of Section 706(8) has been amended to exclude certain individuals who have a "currently contagious disease or infection." *Infra* at text accompanying notes 165-73.

138. While the discussion in the text does not speak to victims of AIDS or ARC, it is equally applicable to such victims.

139. See the text of such regulations at *supra* note 61.

140. See the text of the relevant regulations at *supra* note 62.

is an "individual with handicaps" within the meaning of Sections 706(8)(B)(ii) or 706(8)(B)(iii) because the person was misclassified as having a physical impairment or regarded or treated as having an impairment. Such a result appears consistent with the statute and legislative history and will depend, ultimately, on whether Section 504 covers individuals with no present or historical physical indication of a disease or impairment.

3. Drug Abuse and AIDS Related Conditions

There is serious question whether a person who has AIDS or ARC or who tests seropositive and who is also an intravenous ("IV") drug abuser is protected under Section 706(8)(B).¹⁴¹ Section 706(8)(B) provides that the term "individual with handicaps" does not include an individual who is a drug abuser whose current use of drugs prevents such individual from performing the duties of the job or whose employment by reason of such abuse would constitute a direct threat to property or others.¹⁴² The critical question of fact is whether the victim's current drug use or his AIDS-related condition prevents performance of job duties or constitutes a direct threat to the health and safety of others.¹⁴³ If sound medical evidence supports a finding of the latter and not the former, the next inquiry under the Act becomes whether the person is a "qualified individual with handicaps."

4. Conclusion

The above conclusions appear consistent with the language and the underlying purposes of the Act—to replace reflex discrimination with action based on reasoned and medically sound judgments that the person is handicapped and otherwise qualified.¹⁴⁴ Even though some of the above persons may pose a serious health threat to others

141. See *supra* note 54.

142. *Id.*

143. While some may argue that the answer depends on whether the person contracted AIDS as a result of IV-drug abuse, sexual activities or receipt of a transfusion of contaminated blood, such an argument is inconsistent with Section 706(8)(B) because Section 706(8)(B) inquiry is whether the condition (i.e., having AIDS, ARC or testing positive, or the drug abuse) is the cause of the person's inability to do the job.

144. *School Bd. of Nassau County v. Arline*, 107 S. Ct. at 1123, 1129–39, *reh'g denied*, 107 S. Ct. 1913 (1985).

under certain circumstances, those accused of being contagious are to be given, according to *Arline*, the opportunity to have their condition evaluated in light of medical evidence and to have a determination made as to whether they were "otherwise qualified" to do the job.¹⁴⁵

B. "Qualified Individual With Handicaps"

A "qualified individual with handicaps" means a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question.¹⁴⁶ An accommodation is not reasonable if it imposes excessive administrative or financial burdens on the employer or requires a fundamental alteration in the nature of the program.¹⁴⁷ Also, while employers are not required to find another job for an employee who is not qualified for the job he was doing, the employer "cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies."¹⁴⁸

When the person is contagious, the court must, in addition, balance on a case-by-case basis whether the interests of the individual are outweighed by the employer's legitimate concerns of avoiding exposing others to significant health and safety risks.¹⁴⁹ This balancing process requires factual findings, based on reasonable medical judgments of public health officials,¹⁵⁰ given the state of medical knowledge, about the nature of the risk (how the disease is transmitted), the probabilities the disease will be transmitted and will cause varying degrees of harm, the duration of the risk (how long is the carrier infectious), and the severity of the risk (what is the potential harm to third parties).¹⁵¹ In summary, whether a contagious individual is otherwise qualified depends on whether,

145. *Id.* at 1130.

146. For the text of the applicable regulations, *see supra* note 63.

147. 107 S. Ct. at 1131.

148. *Id.* at 1131 n.19.

149. *Id.* at 1131.

150. While *Arline* did not present the question whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied, it would appear that such deferral should be appropriate as long as such physicians' opinions are consistent with the reasonable medical opinions of public officials, such as the Public Health Department, who are vested with the obligation of controlling contagious disease. *See supra* text accompanying note 123.

151. 107 S. Ct. at 1131.

with reasonable accommodation: (1) the interests of the individual outweigh the risk to the health and safety of those in the workplace and in the public at large; and, (2) the individual is physically and mentally able to do the job in spite of his handicap.

1. The Interests of the Individual Outweigh the Risk to the Health and Safety of Those in the Workplace and the Public at Large

The focus of this subpart is on the risk balancing process. In light of the discussion in Part I of this Article, it appears that the following conclusions can be made about AIDS and AIDS-related conditions.

a. The Nature of the Risk (How The Disease Is Transmitted.)

The HIV virus is transmitted through sexual contact with an infected person, exposure to infected blood or blood components, needle sharing by infected drug users, and by an infected mother across her placenta to her unborn child. While HIV has been isolated from blood, semen, saliva, tears, breast milk, urine and is likely to be isolated from other body fluids, secretions and excretions, studies of nonsexual household contacts of AIDS patients indicate that casual contact with saliva and tears does not result in transmission of infection. Also, while the CDC reports that there is no evidence that AIDS is spread by airborne transmission of the virus or by casual workplace contact, there is no sound medical evidence that this is true.

b. The Probabilities the Disease Will Be Transmitted and Will Cause Varying Degrees of Harm

The probability that the HIV will be transmitted and will cause varying degrees of harm depends on the particular job and the composition of the workplace in general. Where a person handles blood products, works with transfusion patients, performs invasive procedures in the doctor's or dentist's office, the hospital or other health care facility, attends to patients in hospital and personal care facilities, or handles food, the chance exists that HIV can be transmitted by accident through a needle prick, a cut finger, or, as some people speculate, by a sneeze on food which people ingest.¹⁵²

Where the victim's job does not involve the above, and involves nonsexual, non-invasive casual contact that generally occurs among

152. COVER-UP, *supra* note 4, at 113.

workers and clients or consumers in the workplace, such as offices, schools, factories, and construction sites, the current medical evidence is that the probability of transmission is almost nonexistent. While there appears to be a wide middle ground for jobs in, for example, child care, athletics and preschool, elementary and secondary schools where there is more physical contact than in an office setting, there is no medical evidence that the probability of transmission is any greater in those settings than in the office setting. Any risk analysis should carefully probe this facet in light of changing medical evidence concerning transmissibility¹⁵³ and the available means of minimizing the risk of transmitting the HIV, such as wearing disposable garb and masks, using disposable needles and adhering to strict cleaning routines.¹⁵⁴

A related oft-stated consideration is the probability that a person with a compromised immune system, who is exposed to the variety of infectious agents found in the workplace, will contract an opportunistic disease in the workplace. 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 populations.¹⁵⁵ Since AIDS victims are just as likely to contract such infections sitting at home as attending a job, medical authorities do not suggest that persons with ARC or AIDS need to be excluded from the workplace to prevent them from contracting the opportunistic infections.¹⁵⁶

c. The Duration of the Risk (How Long Is The Carrier Infectious?)

Although current medical evidence indicates that the virus can be incubated over seven years, it is not known how long a person incubates HIV or how long a person is infectious. Also, it is not known what percentage of the population or who is infected with the

153. *Id.* at 95-108.

154. In a related context, in the health-care workplace, contagiousness of patients is of significant concern because of the potential of exposure to the blood and body fluids of AIDS infected victims. This risk has been addressed in many CDC publications which strongly advise health care workers to consider all patients as potentially infected with the virus and to adhere to strict infection-control precautions, such as wearing gloves and gowns, to minimize the risk of exposure to blood and body fluids of all patients. *See supra* note 38.

155. Laurence, *The Immune System in AIDS*, *Sci. Am.*, Dec. 1985, at 84-93, cited in Leonard-2, *supra* note 7, at 28 n.80.

156. Leonard-2, *supra* note 7, at 28.

HIV, and, while estimates go as high as 50-75%, what percentage of infected persons develop the deadly AIDS syndrome.

d. The Severity of the Risk (What Is The Potential Harm To Third Parties?)

The probability of potential harm to third parties depends on the job applied for or occupied by the victim. Where the job involves minimal contact with others and minimal responsibilities for the safety of others, such as janitorial and some clerical positions, the danger to third parties is almost nonexistent. Where, however, the job involves invasive contact with others, high stress, or safety-related responsibilities for others, such as jobs in the health care, food service, public transportation or public safety arenas, the potential of harm to third parties is much greater because one's contagiousness or one's deteriorating mental and physical abilities can cause serious injury.

In both the health care and public safety contexts, it may not be the contagiousness as much as the physical or mental damage caused by the HIV that raises concern. For example, a surgeon who tests seropositive, who exhibits no physical symptoms but who has early symptoms of AIDS-related dementia, such as a reduced ability to concentrate, a diminished capacity to perform fine motor skills or difficulty making accurate decisions, may create a serious potential of harm to his or her patients.¹⁵⁷ Similar concerns could be raised concerning those involved with public transportation, such as air traffic controllers, pilots, train or bus drivers, or public safety, such as police, firefighters, those who monitor nuclear power plant systems, those who maintain any public transportation vehicle, those in the military involved with public safety, defense and welfare, and those in high stress jobs in both public and private sectors.

Since the employer has the burden of proving that a potential of harm to third parties exists, the employer must carefully analyze the job the victim performs, in light of objective medical evidence, before determining that the danger to the workplace or the public outweighs the individual's interests. In conclusion, in the risk balancing process, the scales may tip in favor of the public where the person is involved in, among others, invasive medical procedures, public transportation, public safety and some high-stress jobs. While the person may not be able to do the job he was hired for, the employer must still attempt to reasonably accommodate his handicap.

157. See generally W. BANTA, AIDS IN THE WORKPLACE, 123 (1988).

2. The Individual is Physically Able to do the Job in Spite of His Handicap

The focus of this leg of the inquiry is whether the applicant or employee who has AIDS, who has ARC or who tests seropositive to HIV antibodies, is able physically and mentally to do the job now or for the near future, providing no law prohibits the latter inquiry. This determination ultimately is a question of fact requiring an accurate analysis of the specific job and sound medical opinion that the person is physically and mentally able to do the job.

When the victim is an employee, the employer may, consistent with its duties to make reasonable accommodation, require the employee to undergo a series of medical evaluations by physicians or psychiatrists who, if possible, have experience in treating AIDS victims to determine whether the employee is physically and mentally able to perform all of the duties of the position and does not create a serious health risk to the workforce or to the public at large.¹⁵⁸ If the person is not physically or mentally able to so perform, then the employer should determine whether there are other available positions for which the employee is qualified and capable, in light of the desires of the employee¹⁵⁹ and the threat to the health and safety of fellow employees and the public at large.¹⁶⁰ In light of the individual's most current medical diagnosis and evaluation, possible courses of action include: leaving the employee in his regular job, transferring him to a more isolated location,

158. *Id.* at 124.

159. Some employees' primary concern is continuation of health insurance benefits and not continuation of work. *Id.* at 115-16. Others feel that they need to work because of financial reasons or the therapeutic importance to a recovery process. *Id.* Mr. Banta comments that the Consolidated Omnibus Budget Reconciliation Act (COBRA) is relevant to whether it is proper to terminate AIDS victims. *Id.* at 117. COBRA requires employers with twenty or more employees to offer to continue medical insurance coverage at group rates for up to eighteen months to any employee who quits or is discharged for reasons other than gross misconduct; provided, however, that the employee pays the entire cost of insuring themselves. *Id.* Mr. Banta states that if attempts to accommodate an AIDS victim by transfer are unrealistic considering the size of the facility and the lack of job openings and there is no leave of absence policy, COBRA provides a means by which the victim's health insurance would be continued. *Id.*

160. *Id.* at 207. When the person is an applicant, the analysis becomes whether he can do the job for a reasonable time before illness prevents it, in light of the training required for the job and related business needs such as significantly increased insurance premiums, if this consideration is permitted by law. *Id.*

having him perform duties at home or at a location other than the facility, granting him a paid medical leave of absence, giving him an unpaid medical leave of absence with health insurance coverage, or, the least desirable, discharge.¹⁶¹ The choice ultimately depends on whether the accommodation is reasonable in that it does not impose excessive administrative or financial burdens on the employer or require a fundamental alteration in the nature of the program.

3. *Some Thoughts Relevant to Reasonable Accommodation*

Since an employer has a duty, either under the applicable laws of the federal, state or local governments or in accordance with general contract and tort principles, to protect and promote the health and safety of its employees and of the public at large, an employer may have a real interest in knowing who is infected with HIV in the workplace.¹⁶² A court, in analyzing the issue of the employer's reasonable accommodation, should not penalize an employer who may have adopted the procedures discussed below, as long as such procedures were adopted with an intention to accommodate the individual, to the extent practicable, and to protect the workplace and the public at large.

Since the health of the work force is threatened when either a fellow employee or his spouse contracts an infectious disease, employers probably can require employees, absent a statute to the contrary, periodically to inform the appropriate company representative if they or their spouses contract HIV, ARC or AIDS. Such information should be kept confidential and should not be communicated to the workplace or to the public at large. Further, the information should be verified by a medical report from the victim's physician and/or the company's physician. The information and report should be reduced to a writing, signed by both and witnessed or perhaps notarized.

If, on balance, the employee either remains in his job or is accommodated in another, the employee should be advised that his AIDS, ARC or, perhaps, seropositive condition makes him vulnerable to health hazards in the workplace, that he may contract an infectious disease from fellow workers who are successfully fighting

161. *Id.* at 122.

162. On the other hand, some laws prohibit inquiry of any AIDS related conditions. See the discussion in *supra* notes 80, 83. See also *supra* note 68 which sets out the text of the Regulations which prohibit preemployment inquiries as to whether a person is handicapped and, if so, as to the severity of the handicap.

it off and who do not realize that they have it. Due to the potential for liability, it is also not unreasonable to require the person to execute a release certifying that the person understands the risks and dangers to his health associated with working, such as catching an opportunistic infection from a fellow worker, releases the employer of all liability and assumes such risk with full knowledge of its implications. There is a risk, however, that such a release could be found to be against public policy in that workmen compensation statutes often prohibit the waiver by an employee of an employer's liability for certain injuries sustained on the job.

When an AIDS or ARC patient wishes to return to work from a leave of absence, it is not unreasonable to require a written statement from the victim's physician or from the employer's physician that the victim is able both physically and mentally to return to work and perform the essential duties of his job and that the presence of the employee in the workplace is not a threat to the health and safety of the employee, fellow employees, patients, customers, or the public at large. It is also not unreasonable to require the returning victim to execute a release similar to the one described above, provided such a release is in accordance with applicable state law.¹⁶³ Finally, it should be noted that while the employer may be permitted to require any of the above, the employer's duty of accommodation under the Act remains the same.

C. The Previous Discussion in Light of the Civil Rights Restoration Act

On March 22, 1988, the United States Senate and House of Representatives passed the Civil Rights Restoration Act, S.557,¹⁶⁴ and, in doing so, overrode President Reagan's veto on March 16, 1988 and enacted into law P.L. 100-259.¹⁶⁵ Section 9 of the Civil Rights Restoration Act provides:

163. A number of these ideas are discussed in W. BANTA, *supra* note 157, at 111-37.

164. Pub. L. No. 100-259, Section 9, Mar. 22, 1988. *See*, 326 Empl. Prac. Dec. (CCH) §§ 3345.03 (1988). 134 Cong. Rec. S.226 (Jan. 28, 1988); 134 Cong. Rec. H.598 (Mar. 2, 1988). CRS Rept. No. IB87123 (Mar. 30, 1988) at CRS-13 and CRS Rept. No. 88-214A (Mar. 14, 1988) at CRS-1.

165. CRS Rept. No. IB87123 (Mar. 30, 1988) at CRS-13. S557 was proposed in response to the decision of the Supreme Court in *Grove City College v. Bell*, 465 U.S. 555 (1985). In *Grove City*, the Supreme Court ruled that if some of the students of an educational institution receive federal grants to pay for their education, the educational institution is covered by the nondiscrimination provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681(a), (Title IX), only with

Section 7(8) of the Rehabilitation Act of 1973 is amended by adding after subparagraph (B) the following:

'(C) For the purpose of sections 503 and 504, 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.'¹⁶⁶

The legislative history reflects that the purposes of the amendment ("Amendment") were: (1) to assure employers that they do not have to keep or hire individuals with a contagious disease or infection when such individual poses a direct threat to the health or safety of other individuals or cannot perform the essential duties of a job; (2) to instruct that the Amendment does not change the current laws regarding reasonable accommodation as it applies to individuals with handicaps; and (3) to make clear that, as was stated in 1978 with respect to alcohol and drug abuses, it is first determined that a person is handicapped and then that a person is otherwise qualified.¹⁶⁷

respect to the program receiving the federal grants, i.e., the College's financial aid program.

Since the relevant provisions of Title IX were similar to those of Section 504, section 601 of Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the Age Discrimination Act of 1975, 42 U.S.C. § 6102, the issue of program specificity had implications for the later three acts. S557 made clear that the term "program or activity" was to receive a broader interpretation for all four acts than the Court interpretation in *Grove City*. CRS Rept. No. 88-214A (Mar. 14, 1988) at CRS-2.

166. Pub. L. No. 100-259, Section 9 (Mar. 22, 1988).

167. 134 CONG. REC. S256-S257 (daily ed. Jan. 28, 1988). These purposes are found in a floor colloquy between the two cosponsors, Senator Humphrey, from New Hampshire, and Senator Harkin, from Iowa, in introducing, on January 28, 1988, their amendment, No. 1396, to the end of the bill, S557. During the debate on S557, Senator Simon argued that there was no need to change the law after *Arline* and that the purposes of Section 504 were not served if persons with contagious diseases are automatically excluded from coverage. *Id.* at S249-S250. Senator Armstrong disagreed with *Arline* because medical knowledge was uncertain and the Court's approach put a financial and administrative burden on school districts trying to remove an allegedly contagious individual but felt that passing the Humphrey amendment was a "very marginal improvement in a very bad situation." *Id.* at S251-S255. Senator Wilson argued that the Amendment would adjust the definition of handicapped person by making clear that one who simply suffered a handicap and posed no threat of harm to others and could do the job would be protected. *Id.* at S255. There were various other comments made by the Senators subsequent to the passage of S557 as amended.

The Amendment sets out a two-part test: (1) does the individual have a "currently contagious disease or infection;" and, (2) by reason of such disease or infection (a) would such individual constitute a direct threat to the health or safety of other individuals or (b) be unable to perform the duties of the job. The Amendment, however, fails to specify what constitutes a "direct threat" as opposed to an indirect threat, and to clarify whether an employer is required to determine if reasonable accommodation might eliminate the risk of direct threat or enable the individual to perform the duties of the job so that the person may be "otherwise qualified."¹⁶⁸

The Amendment fails to specify what constitutes a "direct threat" as opposed to an indirect threat. One may pose a direct threat to the health of others if the person has a disease or infection easily transmitted to others in the employment context by touch, sneezing, etc. As discussed earlier in this article, based on the medical evidence to this date, the documented cases of transmission of HIV have been limited to those who have had intimate sexual contact with infected persons, who are IV drug users and have used needles of infected persons, who have received transfusions of contaminated blood and who are infected as unborn children of infected pregnant mothers.¹⁶⁹ Since all of these means of transmission are not the kind of contact in the general workplace, except for certain limited

The House debated S557 on March 2, 1988 and the legislative history there is similar to that in the Senate. 134 CONG. REC. H561 (daily ed. Mar. 2, 1988) (remarks of Rep. Coehlo); *Id.* at H573 (remarks of Rep. Weiss); 234 CONG. REC. H574 (daily ed. Mar. 2, 1988) (remarks of Rep. Owens); 134 CONG. REC. H575 (daily ed. Mar. 2, 1988) (remarks of Rep. Waxman). CRS Rept. No. 88-214A (Mar. 14, 1988) at CRS-12 and CRS-13. A more complete review of the legislative history of the Amendment is found in CRS Rept. No. 88-214A (Mar. 14, 1988) at CRS-2 through CRS-11 and CRS-27, which report is the source of the above.

168. The Amendment also does not explicitly state whether a person who tests seropositive for HIV antibodies but who has no physical manifestations of the disease can be considered an "individual with handicaps" for purposes of protection under the Act. In *Arline*, the Supreme Court refused to decide whether persons who were contagious but did not manifest physical symptoms of their disease, such as those who test seropositive for HIV antibodies, would be considered individuals with handicaps. *School Bd. of Nassau County v. Arline*, 107 S. Ct. 1123, *reh'g denied*, 107 S. Ct. 1913 (1985). Under the Amendment and in light of the legislative history, such a person should be treated as an "individual with handicaps" unless that person poses a direct threat to others or cannot perform the job. In any event, such a person should be deemed an "individual with handicaps" based on the analysis in Part III of this Article.

169. See *supra* text accompanying notes 26-36.

instances involving contact with infected blood in the health care workplace, merely testing positive without some opportunistic disease that is contagious may not pose a direct threat to the health of others for purposes of the Amendment.

One may pose a direct threat to the safety of others if one is infected and the infection (or a disease) is causing dementia or otherwise affecting the mental or physical processes in a way that diminishes the person's ability to make quick and accurate decisions concerning the safety of others.¹⁷⁰ What remains to be resolved is whether anyone in a health-related or safety-related job who tests seropositive to HIV can be deemed to constitute a direct threat to others merely because that person may develop HIV-related dementia. In summary, employers and the courts need to exercise restraint as to what constitutes a "direct threat to the health or safety of other individuals."

The Amendment also fails to clarify whether an employer is required to determine if reasonable accommodation might eliminate the risk of direct threat to the health or safety of others or enable the person to perform the duties of the job. If so, a person who, at first glance, meets the definition of the Amendment, may escape its exclusion and be "otherwise qualified" and, thus, within the protection of Section 504. There is again no clear legislative intent to exclude persons who with reasonable accommodation may not pose a serious threat to the health or safety of others or may be able to perform the duties of the job. Although the issue was not addressed in the Amendment, the legislative history reflects an intent to preserve the test of *Arline*¹⁷¹ where the employer is required to determine, through a balancing process,¹⁷² if reasonable accommodation might eliminate the risk of such a threat or enable the person to perform the duties of the job.

In summary, based on a fair reading of *Arline*, the Amendment and the legislative history accompanying the Amendment, persons who test seropositive to HIV, or who have ARC or AIDS are excluded from the protection of Section 504 only if it is determined that, after reasonable accommodation, they pose a direct threat to the health or safety of others or are unable to perform the duties of the job.

170. See *supra* text accompanying note 157.

171. See *supra* text accompanying notes 87-125.

172. See *supra* text accompanying notes 120-25.

CONCLUSION

While the Act as amended applies only to a distinct group of employers, it may provide an avenue of protection to persons who are victims of AIDS or ARC, who test positive or who are perceived as having AIDS. Further, since many state and local handicap statutes pattern the language of the Act, it is possible that yet another avenue of protection is available.¹⁷³

Where the record reflects that a person suffers from AIDS, ARC or HIV-infection, the initial inquiry is whether the person is entirely excluded from coverage of Section 504 by virtue of the Amendment. If such person has a "currently contagious infection or disease" and either poses a "direct threat" to the health or safety of others or is unable to perform the duties of the job, such person is excluded from the definition of an "individual with handicaps." It remains for judicial resolution, in the context of reliable medical evidence, what constitutes a direct threat to the health or safety of others and whether an employer has a duty to make reasonable accommodation before a determination is made that such person poses a direct threat or is unable to perform the duties of the job.

Where the record reflects that a person suffers from AIDS, ARC, or HIV-infection and the person is not excluded by the Amendment because the person poses no direct threat to the health or safety of others and is able to perform the duties of the job, the next inquiry is whether such person is an "individual with handicaps" for purposes of Section 504. Where the record reflects that such person suffers from AIDS, ARC or HIV-infection in a manner that affects that person's body systems, such as the respiratory, cardiovascular, lymphatic, hemic, or skin systems, that person has a "physiological disorder or condition" and, therefore, has a physical or mental impairment within the meaning of Section 706(8)(B)(i). In addition, that impairment usually can be found to limit one or more of his major life activities—at a minimum, his ability to get or keep a job. Where employment decisions are made on the basis that a person is an associate of an AIDS victim or a member of high-risk groups, such as homosexuals, there is an argument that the person is an

173. In a very informative and clearly presented workbook and videotape on the issue of AIDS in the workplace, *see*, J. Wood & C. Watt, *AIDS In The Workplace: A Reasoned Approach For Employers* (1988), which is available by contacting Mr. Wood at Berkman Ruslander Pohl Lieber & Engel, 40th Floor, One Oxford Center, Pittsburgh, PA 15219.

“individual with handicaps” because the person was misclassified as having a physical impairment or regarded as having an impairment. Finally, an HIV carrier may also have a physical impairment but may not be able to prove that the impairment substantially limits one or more of his major life activities. Such a person, however, could probably demonstrate that he is “regarded as having such an impairment.”

Whether an individual is an “otherwise qualified individual with handicaps” depends on whether, with reasonable accommodation: (1) the interests of the individual outweigh the risk to the health and safety of those in the workplace and the public at large; and, (2) the individual is physically and mentally able to do the job in spite of his handicap. When the employer addresses each case on its own facts, in light of available medical evidence, and with an eye to accommodating the victim while protecting the health and safety of others and without unduly burdening or restructuring the business, the employer can be said to have reasonably accommodated. Giving the victim the chance to work or to continue to work, and treating him fairly, may be giving him the chance to have his life again signify something.

