

A NEW BASE FOR DISCRIMINATION : AIDS

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In 1981, the United States Centers for Disease Control (CDC) reported the first incidents of a communicable disorder, later named *acquired immuno-deficiency syndrome* (AIDS)¹.

An unusual outbreak of a deadly form of pneumonia in five young homosexual males in the Los Angeles area², followed by ten more cases of the *pneumocystis carinii pneumonia*³ in less than a month, and the alarming frequency of a rare form of cancer, *Kaposi's Sarcoma*⁴, focused medical attention on the condition. AIDS, which would be diagnosed as a distinct disease entity shortly after, had arrived on the medical scene.

Presently, the disease has reached epidemic proportions. It is called a «pandemic»⁵ because it is, in fact, a global disease. As of January 30, 1989 the World Health Organization reported 121, 440 cases worldwide⁶. Once afflicted, the patient's prognosis for survival is grim: the two - year mortality rate for the disease is close to ninety percent⁷. Over

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1) Although the CDC now recognizes that AIDS initially surfaced in 1979, the first published reports were issued in 1981.

2) *Pneumocystis Pneumonia - Los Angeles*, 30 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 250, 251 (June 5, 1981).

3) *Kaposi's Sarcoma and Pneumocystis Pneumonia Among Homosexual Men - New York City and California*, 30 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 305 (July 3, 1981).

4) Id.

5) A «pandemic» is a disease «widely epidemic; distributed or occurring widely throughout a region, country or continent or globally.» Donald's Illustrated Medical Dictionary 1217 (27th ed, 1985).

6) With 84,862 in the Americas, 18,594 in Europe, 16,753 in Africa, 1,158 in Oceania, and 343 in Asia. 63 Weekly Epidemiological Record 203 (1989).

7) CENTERS FOR DISEASE CONTROL FACTS ABOUT AIDS 5 (1986).

75 percent of all patients diagnosed as having AIDS before January 1984 are known dead⁸.

Because the mortality rate for persons with CDC - defined AIDS is very high; because the means by which the disease is transmitted⁹, a vaccine to prevent it¹⁰, and ways of treatment have remained uncertain¹¹, public fear surrounding AIDS victims has produced a legal crisis as well as a health crisis¹².

One of the manifestations of these fears is employment discrimination against persons with AIDS, and persons who are members of publicly identified «risk groups»¹³. To date the judicial experience in the U.S. in this particular field has included a number of cases in which employers, either upon their own motion or at the behest of co-workers, have taken adverse action, including termination of employment, against such persons¹⁴.

The highly delicate issue that the Courts face here is to perform the necessary sensitive «balancing» of individual rights and social interests involved in the context of public health. The purpose of this note is two-fold: First to demonstrate shortly the facts about AIDS, and, second, to examine and discuss human rights issue in the context of employment discrimination. In order to test the legal rights and duties in the AIDS epidemic in the above-mentioned context, we will fo-

8) CDC, AIDS PROGRAM, CENTER FOR INFECTIOUS DISEASES, CENTER FOR DISEASE CONTROL: WEEKLY SURVEILLANCE REPORT - UNITED STATES (Mar. 6, 1987) [Hereinafter cited as WEEKLY SURVEILLANCE REPORT].

9) See, *infra* notes 38 - 43 and the accompanying text.

10) «...[d]espite rapid progress in a worldwide research effort, a vaccine against AIDS may not be available for many years, if ever.» *Crucial Tests on Humans Near in U.S. Hunt for AIDS Vaccine*, N.Y. Times, Mar. 18, 1987, at A 1 Col. 1; See also, *Türkiye'de 52 AIDS'li* (52 AIDS case in Turkey), Cumhuriyet, Sep. 28, 1988, at 1.

11) See, *infra* note 23 and the accompanying text.

12) The legal crisis surrounding AIDS involves many areas of law. Some of the issues are legal rights to services (hospital care, funeral arrangements, etc.), confidentiality of medical records, housing rights, insurance law, public benefits (especially disability benefits) and employment discrimination.

13) See, *infra* notes 27 - 37 and the accompanying text.

14) For the news related to motions filed for discrimination claims see Daily Labor Reporter (BNA), and AIDS POLICY & LAW (BNA). The latter is a bi-weekly newsletter on legislation, regulation and litigation concerning AIDS.

cus on U.S. We prefer U.S. because, about seventy percent of the cases reported to WHO is from U.S., and the practice relating to the issue consequently is much more than other countries. Thus, in the first part the currently known facts about AIDS, as they relate to employment rights, are presented. In Section A of the second part, the constitutional rights of AIDS - afflicted persons by focusing on the risk groups are demonstrated. This is followed by an analysis (Section B) of the U.S. Courts, response to threats to individual rights and liberties arising from public health regulations through case precedent. Section C is on the rights and duties of the several parties in labor relations related to conflicts arising out of AIDS.

PART I

AIDS : The Current State of Knowledge

A. *An Overview*

As defined by the CDC, AIDS is «a reliably diagnosed disease that is at least moderately indicative of an underlying cellular immuno-deficiency in a person who has had no known underlying cause of cellular immuno-deficiency nor any other caused reduced resistance reported to be associated with that disease»¹⁵. AIDS impairs the proper functioning of the body's immune system, leaving the victim unable to combat infection. As a result, persons with AIDS are susceptible to illnesses which do not usually affect those with normally functioning immune systems. These diseases are often referred to as «opportunistic» infections¹⁶.

Evidence for the existence of the virus that causes AIDS was first reported in 1983 by researchers in France. Its identity and its link to AIDS were proved by the next year by a group at the National Cancer

15) *Acquired Immunodeficiency Syndrome (AIDS) Update - United States*, 32 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 310 (July 1, 1983). Later, the CDC slightly revised its definition of AIDS. The CDC designed the revised definition to include only the «more severe manifestations» of infection with the virus that causes AIDS. Only a «small» number of additional cases will be reportable as a result of the revision. See, *Revision of the Case Definition of Acquired Immunodeficiency Syndrome for National Reporting - United States*, 34 CENTERS, FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 373 (June 28, 1985).

16) *Acquired Immunodeficiency Syndrome (AIDS) Update - United States*, 32 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 309 (June 24, 1983).

Institute in Bethesda, Md., U.S.¹⁷. The most recent research on the *Human Immunodeficiency Virus* (HIV)¹⁸, still reveals its complexity¹⁹. [T]he virus has far more genes than expected and therefore a greater subversive repertoire than had been imagined. It is capable of attacking more different human cells than had been thought, and it has more complex means of destroying its victim's immune defenses had been appreciated in the past»²⁰.

In 1985, antibody tests called ELISA (enzyme-linked immuno-sorbent assay) and the western blot were approved for the detection of antibodies to HIV²¹. The antibody tests were developed to screen blood and plasma in order to prevent the transmission of AIDS in blood transfusions or in the use of bloodproducts. The tests also are available for individuals, but the presense of antibodies merely indicates that the person has been exposed to HIV, but not necessarily that s/he is still infected or will develop AIDS²², therefore their reliability is still questionable.

Although there is a remarkable pharmacological development to combat AIDS²³, curing the disease entails special problems. Research

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- 17) D'Eramo, *Discovering the Cause of AIDS: An Interview with Dr. Robert C. Gallo*, N.Y. Native, Aug. 27, 1984 at 16.
- 18) In addition to Human Immunodeficiency Virus type 1 (HIV - 1), at least one other human retrovirus, namely HIV - 2, has been implicated as a cause of AIDS in Africa and Europe. See Piot, Plummer, Mhalu, Lamboray, Chin, Mann, AIDS: An International Perspective, 239 Science 573 (February 5, 1988), at 239 - 40.
- 19) Stone, Q. and A. on AIDS. New York Magazine, Mar, 23, 1987, at 42; Schmeck; AIDS Virus: Studies Reveal Extraordinary Complexity, N.Y. Times, Mar. 3, 1987 at C 1, col. 4.
- 20) Schmeck, *supra* note 19.
- 21) *Provisional Public Health Service Inter - Agency Recommendations for Screening Donated Blood and Plasma for Antibody to the Virus Causing Acquired Immunodeficiency Syndrome*, 34 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 1 - 5 (Jan. 11, 1985).
- 22) Id.
- 23) *Lymphomed leads AIDS drug test*, Financial Times, Feb. 4, 1989, at. 10; AIDS: Son bulgular ve tedavi önerileri (AIDS: Recent Developments and Recommendations for Treatment). Cumhuriyet: Bilim Teknik, April 16, 1988, AIDS: Son bulgular ve tedavi önerileri (AIDS: Recent developments and at 1, AIDS Research: Where the Battle Stands. Business Week, Mar. 23, 1987 Cure Still Not Achieved. N.Y. Times, Mar. 21, 1987, at A 1, col. 6; Wallis, You Haven't Heard Anything Yet, Time, Feb. 16, 1987, at 54; Schmeck, AIDS Drugs Offer Hope But Cure Remains Distant, N.Y. Times, Mar. 17, 1987, at A 1, col. 1.

has shown that the HIV attacks the central nervous system, the brain and the spinal cord, but most drugs can not penetrate the so-called blood-brain barrier that guards that region²⁴. Also, many anti-viral drugs are known to have toxic side effects, especially if they have to be taken for the rest of a patient's life²⁵. Furthermore, it is determined that the virus is capable of mutating against a constant attack by a certain kind of drug²⁶.

Among the risk groups²⁷ homosexual or bisexual men account for sixty-eight percent of all AIDS cases²⁸. The disease afflicts other «risk groups» but to a much lesser degree. These risk groups include: intravenous drug users (19 %)²⁹, hemophiliacs (1 %)³⁰, heterosexuals (4 %)³¹, and recipients of blood and blood products (3 %)³². Others who have contracted AIDS include pediatric victims (who contracted the virus in utero from infected mothers), Haitian immigrants to the United States³³, persons who have had sexual contact with prostitutes³⁴, and persons with no identified risk³⁵.

The current race/ethnicity distribution of adult AIDS victims

24) Stone, *supra* note 19, at 43.

25) *The Army to Combat AIDS*, New York Magazine, Feb. 23, 1987, at 55.

26) Stone, *supra*, note 19.

27) «Risk groups» was defined for purposes of screening blood donors. *Prevention of Acquired Immunodeficiency Syndrome (AIDS): Report of Inter-Agency Recommendations*, 32 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 101 (Feb. 18, 1983).

28) HÜRRIYET, October 30, 1988 (AIDS ARAŞTIRMASI [AIDS Research]).

29) *Id.*

30) *Id.*

31) *Id.*

32) *Id.*, although the CDC could include hemophiliacs within this risk group. the CDC has chosen to list victims of this blood disease separately. *Id.*

33) This group is now in the other, unknown group for purposes of the CDC reporting, due to evidence that the usual modes of transmission were responsible for the high rate of AIDS in this group. *Acquired Immuno-deficiency Syndrome (AIDS): Update-United State*, 34 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 245, 247 (Apr. 5, 1985).

34) *Heterosexual Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus*, 34 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 561 (Oct. 11, 1985). Also see, Plot, Plummer, Mhalu, Lamboray, Chin, Man, *AIDS: An International Perspective*, 239 Science 573 (February 5, 1988), at 574.

35) AIDS SURVEILLANCE REPORT FROM C.W. RILEY, SUPERVISOR, SEXUALLY TRANSMITTED DISEASES PROGRAM, VA. DEP'T OF HEALTH TO ALL STD EMPLOYEES, Sept. 18, 1985.

breaks down as follows: White, non-Hispanic: 58 %; Black, non-Hispanic: 26 %; Hispanic: 15 %; other or unknown: 1 %³⁶. Although it seems that non-Hispanic Whites form the majority, such a conclusion is the outcome of the deception of figures. Up to October 1986, overall cumulative incidences for Black and Hispanic adults were 3.1 and 3.4 times respectively that for non-Hispanic Whites³⁷. This outcome is based on the fact that Blacks and Hispanics represent 12 % and 6 %, respectively, of the United States population.

B. Communicability of AIDS

According to the CDC, AIDS is spread by sexual intercourse with an infected person, inoculation of the virus into the bloodstream and transmission from an infected pregnant mother to the fetus³⁸. Although HIV has been isolated from blood, semen, saliva, tears, breast milk and urine and is likely to be isolated from some other body fluids, secretions and excretions, the CDC insists that epidemiologic evidence has implicated only blood and semen in transmission³⁹. This allegation is based merely on the studies of nonsexual household contacts. Many of the health officials allege that absence of transmission of the virus to persons in the same household from the infected person is the evidence of this fact⁴⁰.

Despite the CDC findings, some experts remain sceptical of the assertion that AIDS cannot be transmitted by casual contact. Prof. W. Haseltine of the Harvard Medical School claims that «[a]nyone who tells you categorically that AIDS is not contracted by saliva is not telling

36) HÜRRİYET, *supra* note 28.

37) *Acquired Immunodeficiency Syndrome (AIDS) Among Black and Hispanic*, 35 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 655 (Oct. 23, 1986).

38) *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace*, 34 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 682 (Nov. 15, 1985). [Hereinafter *Recommendations*].

39) *Id.*, See also, *Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Agent Summary Statement*, 35 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 540, 541 (Aug. 29, 1986).

40) *Id.*, S.L. Fannin, MD, Associate Deputy Director of the CDC programs of Los Angeles County Department of Health Services is another official to point out this allegation. *Acquired Immuno-deficiency Syndrome Epidemiology*, in AIDS - LEGAL, ASPECTS OF A MEDICAL CRISIS 17, 19 (1985).

you the truth... there are sure to be cases of proved transmission through casual contact»⁴¹. Prof. June Osborn of the University of Michigan has cautioned, «[w]e cannot be certain that increased transmissibility or increments in virulence [of the AIDS virus] will not occur»⁴².

Although the CDC claims that there is no evidence of transmission through saliva, it has issued precautions for dental care personnel⁴³. Similarly, in spite of the allegation that there is no evidence of transmission through the tears on an infected person, the CDC has issued recommendations for health-care professionals performing eye examinations or other procedures involving tear contact⁴⁴.

The CDC has stated, «[t]he kind of nonsexual person-to-person contact that generally occurs among workers and clients or consumers in the workplace does not pose a risk for transmission of HTLV-III/LAV»⁴⁵.

The guidelines on how to prevent the transmission of AIDS in the workplace is also to alleviate some of the employer fears⁴⁶. The recommendations based upon the modes of transmission of a similar virus, *hepatitis B* (HBV)⁴⁷, address four separate classes of workers: health care workers, personal service workers, food service workers, and other workers sharing the same work environment. In general, precautions are necessary only if one's job entails possible exposure to AIDS - con-

41) Dershowitz, *Emphasize Scientific Information*, N.Y. Times, Mar. 18, 1986, at A 27, col. 2.

42) Osborn, *The AIDS Epidemic: An Overview of the Science* in ISSUES IN SCIENCE AND TECHNOLOGY, 1986, at 55.

43) *Acquired Immunodeficiency Syndrome (AIDS): Precautions for Health-Care Workers and Allied Professionals*. 32 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP 450-51 (July 15, 1983).

44) *Education and Foster Care of Children Infected with Human, T-Lymphotropic Virus Type III/Lymphadenopathy - Associated Virus*, 34 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 533-34 (Dec. 20, 1985).

45) *Recommendations*, *supra* note 38.

46) *Id.*

47) Despite the similarities, the risk for HBV transmission «far exceeds» that of HIV. *Id.* at 683. Thus, the CDC's guidelines for controlling the transmission of HIV contemplate a «worst case» scenario. See Shumaker, *AIDS: Does It Qualify as a «Handicap» Under the Rehabilitation Act of 1973?*, 61 NOTRE DAME L. REV. 572, 580 note 51 (1986).

taminated blood⁴⁸. Unless one is a health care worker involved in invasive procedures such as inoculating patients, the risk of transmission of the disease in the workplace is «extremely low»⁴⁹. Personal and service workers «known to be infected with HTLV-III/LAV need not be restricted from work» unless they are otherwise ill⁵⁰. As to workers in other settings, the CDC has stated:

[There is no] known risk of transmission to co-workers, clients, or consumers [which] exists from HTLV-III/LAV-infected workers... Workers known to be infected with HTLV-III/LAV should not be restricted from work solely based on this finding. Moreover, they should not be restricted from using telephones, office equipment, toilets, showers, eating facilities, and water fountains⁵¹.

Even with assurances from the medical authorities that AIDS is not spread by the casual contact found in the workplace⁵², many employers continue to be wary of AIDS victims⁵³. When employers receive a «100 percent guarantee»⁵⁴ that AIDS cannot be transmitted at the workplace, employment discrimination against AIDS victims may subside slightly.

C. *Categories of Infected Individuals*

Since persons infected with AIDS virus do not present a uniform profile in terms of their physical condition and suitability for employ-

48) *Recommendations*, *supra* note 38, at 682.

49) *Id.*, at 693.

50) *Id.*

51) *Id.*, at 694.

52) The Department of Health and Human Services is another official authority to state the allegation. See, *Daily Labor Reporter* (BNA), Nov. 15, 1985, at E 2.

53) Besides the sceptical approach of some researchers toward «noncommunicability through casual contact,» conflicting news in the media about the nature of the virus also muddies the issue. See, *Tests Show AIDS Virus Can Live Up to 15 Days Outside the Body*, N.Y. Times, Apr. 9, 1986, at A 15, col. 5. *But see*, «[O]utside the body the virus is fragile, easily killed by sunlight, common household cleaners, and even hand soap.» *supra* note 19, at 130.

54) In *Shuttleworth v. Broward County Office of Budget and Management Policy*, FCHR No. 85 - 0624 (Dec. 11, 1985), *reprinted* in 242 *Daily Labor Rep.* E - 1 (Dec. 17, 1985). The employer defended its dismissal of an AIDS victim on the grounds that it could not get a «100 percent guarantee» that AIDS was not transmissible in the workplace. See, Leonard, *Employment Discrimination Against Persons with AIDS*, 10 DAYTON L. REV. 681, 697 note 66 (1985).

ment, it is suggested to categorize such individuals in several groups, each of which may present different issues in the workplace⁵⁵. In brief, persons afflicted with the AIDS virus may be categorized as:

(1) persons who have the complete AIDS syndrome. These go through two phases. During the earlier phase, hospitalization is not needed and the persons are physically able to work. In the later phase they require extended hospitalization or become so weakened by the syndrome that they are relatively immobile.

(2) persons who have AIDS - Related Complex (ARC)⁵⁶.

(3) persons who are asymptomatic but have either virologic or serologic evidence of AIDS through blood screening⁵⁷.

(4) persons who have no AIDS infection but, due to their association with a known risk group, suffer discrimination based on others' fears of AIDS.

PART II

A. *Constitutional Claims of AIDS-Afflicted Persons*

a. Discrimination Claims on Account of Sexual Orientation

The factor which most controls the availability of legal redress for discrimination on account of sexual orientation depends on the public or private nature of the employer⁵⁸. Public entities and officials may have constitutionally based liabilities, while private entities generally will not⁵⁹.

55) Kube, *AIDS and Employment Discrimination Under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons with Disabilities Act*, 20 U. RICH. L. REV. 425, 426 (1986). Leonard, *supra* note 54 at 687. Stein *AIDS-An Employer's Dilemma*, 60 FLA. BAR J. 55 (1986).

56) ARC is a milder form of AIDS which does not include the presence of opportunistic infections, but its victims suffer from «warning» symptoms of AIDS. These include continued fever or night sweats, loss of weight, swollen glands, purple or discolored growths on the skin or mucus membranes, chronic cough, diarrhea, unexplained bleeding and shortness of breath. ARC may or may not become AIDS. See, 252 J. A.M.A. 2037 (1984). It is reported that 50,000 to 125,000 people are in this group.

57) For the effect of blood tests: See, *supra* notes 8 - 9 and the accompanying text. The CDC figures show that there are 1,500,000 people in this group.

58) DUNLAP, *Employment*, in *SEXUAL ORIENTATION AND THE LAW* 5 - 1, 5 - 3 (R. Achtenberg ed. 1985).

59) Generally, the requirements of «state action will be interposed against any claim that a private or quasipublic entity has particular constitutionally grounded duties as to homosexuals. In a lawsuit brought on behalf of homosexual employees of a privately owned entity, the California Sup-

Pursuant to the Fifth and Fourteenth Amendments to the U.S. Constitution, no governmental entity, official or agent may deprive a person of liberty or property without due process of law, nor may he or she or it deprive any person of the equal protection of the laws. However, the evidence reveals that homosexuals are not among the «protected» groups⁶⁰.

The Supreme Court has refrained from establishing any general protection of adult consensual sexual activity. The Court in *Doe v. Commonwealth's Attorney* summarily affirmed that there is no fundamental right to privacy in homosexual intercourse⁶¹. The statement of the Court in *Carey v. Population Services International* that it regarded the privacy issue as unsettled⁶² was taken to cover homosexual conduct⁶³, however, since *Carey* was a case concerning contraception, «the unanswered question» may only be with regard to heterosexual private consensual sexual behavior. The two circuits that have ruled on the issue have split. One rejected the privacy argument and upheld a Texas anti-sodomy statute⁶⁴, while the other subjected Georgia's anti-sodomy statute to strict scrutiny on privacy grounds⁶⁵. The Supreme Court re-

reme Court held that California law places special nondiscrimination obligations on a state-protected public utility. *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 24 Cal. 3d 458, 466 - 67; 595 P. 592, 597; 156 Cal. Rptr. 14, 19 (1979). To date, this approach has not been adopted by the courts of states other than California.

- 60) See, generally E. BOGGAN, M. HAFT, C. LISTER, J. RUPP & T. STODDARD, *AN ACLU HANDBOOK: THE RIGHTS OF GAY PEOPLE* (rev. ed. 1983).
- 61) *Doe v. Commonwealth's Attorney for the City of Richmond*, 425 U.S. 901 (1976). (summary affirmance of 403 F. Supp. 1199 (E.D. Va. 1975)). The district court in *Doe* rejected the constitutional challenge of a Virginia sodomy statute criminalizing adult consensual same-sex sexual activity. Without briefs or oral argument, the Supreme Court summarily affirmed the district court's decision 6 to 3. (Marshall, Brennan and Stevens, JJ., dissenting).
- 62) «The Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults...» *Carey v. Population Serv. Int.*, 431 U.S. 678, 688 n. 5 (1977). (Burger and Rehnquist, JJ., dissenting).
- 63) See, Collier. *Preventing the Spread of AIDS by Restricting Sexual Conduct in Gay Bathhouses: A Constitutional Analysis*, 15 GOLDEN GATE U. L. REV. 301, 316. See also Comment. *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV., 1274, 1284 n. 63.
- 64) *Baker v. Wade*, 769 F. 2d 289 (5th Cir. 1985).
- 65) *Hardwick v. Bowers*, 760 F. 2d. 1202, 1211 (11th Cir. 1985).

versed the later decision by a five to four vote⁶⁶.

The majority in *Bowers v. Hardwick* asserted that the Court has regard as «fundamental» only those liberties that are either «implicit in the concept of ordered liberty»⁶⁷ or «deeply rooted in this nation's history and tradition»⁶⁸. Homosexual sodomy was not such a liberty under either of these formulations. In view of the fact that, until 1961, all 50 states outlawed sodomy, and 24 still do, any claim that the right to practice sodomy is «implicit in the concept of ordered liberty» or is «deeply rooted in this nation's history and tradition» according to the Court, was «...at best, facetious»⁶⁹.

The «privacy of home» argument based on *Stanley v. Georgia*⁷⁰, insofar as it claimed a constitutional protection for all voluntary sexual conduct between consenting adults in the home, was rejected by the Court⁷¹. The language used against this argument⁷², is an open indicator of the present Court's approach to homosexuality and related issues. It is quite predictable that the Court will take a highly restrictive view of what substantive due process protection, if any, shall be given to those persons. It seems that it will be too optimistic to expect a protection for any kind of discrimination on account of sexual orientation from the Court which, besides the rest, explicitly have stated reluctance to recognize new rights⁷³.

The Supreme Court only in one case of a Federal civil personnel, recognized that adverse actions against persons on account of their sexual orientation deprive those persons of due process⁷⁴. In others, the

66) *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986). (White J., delivering the opinion of the Court; Burger, Powell, Rehnquist, O'Connor JJ., joining; Blackmun, Brennan, Marshall, Stevens dissenting.)

149, 151, 152, 82 L. Ed 288 (1937)).

67) *Id.*, at 2844 (citing *Palko v. Connecticut*, 302 US 319, 325, 326, 58 S. Ct.

68) *Id.* (citing *Moore v. East Cleveland*, 431 U.S. 494, 503, 97 S. Ct. 1932, 1937, 52 L. Ed. 2d 531 (1977)).

69) *Id.* at 2846.

70) 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969).

71) *Bowers v. Hardwick*, *supra* note 66, at 2846.

72) «[We are unwilling to start down that road.]»

73) «[W]e are [not] inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution...» *Id.*

74) See *Singer v. U.S. Civ. Serv. Comm'n*, 429 U.S. 1034 (1977) (vacated and remanded) 530 F. 2d 247 (9th Cir. 1976) (homosexual activist's dismissal was cancelled) (White and Rehnquist, JJ., dissenting).

Supreme Court consistently denied the petition for certiorari⁷⁵.

State and local public employees' constitutionally biased claims of discrimination have fared significantly less well. Even when claims outside the equal protection and due process guarantees have been advanced, such as blatant violations of rights of speech, association and privacy, discriminatory treatment of sub-federal public employees has been given judicial imprimatur⁷⁶.

Reported cases have also rarely been litigated on behalf of rejected applicants to public employment who are homosexual⁷⁷. However, it seems the dismissed or to be dismissed employee has a better chance of prevailing on a due process claim than does the nonpromoted or harassed employee or the applicant for employment, because of the sub-

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- 75) *See* Van Doteghem v. Grey, 451 U.S. 935 (1981); Gaylord V. Tacoma School Dist. No. 10, 434 U.S. 879 (1977); Burton v. Cascade School Dist. Union High School No. 5, 423 U.S. 839 (1975).
- 76) *See, a.g.*, Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P. 2d 1340 (high school teacher's dismissal, because of admitted homosexuality, based on charge that his being homosexuality, based on charge that his being homosexual made him «immoral» was upheld); *but Cf.* Morrison v. States Bd. of Educ., 1 Cal. 3d 214, 230 - 35, 461 P. 2d 375, 387 - 391, 82 Cal. Rptr. 175, 187 - 91 (1969) (State Supreme Court determined that revocation of teaching credential because of past homosexual relationship was accomplished by incorrect and probably unconstitutionally vague interpretation of «immorality» and held that unfitness too teach must be found); Acanfora v. Board of Educ. of Montgomery County, 491 F 2d 498 (4th Cir. 1974) (while court of appeals paid lip service to the protection of homosexual junior high school teacher's rights of speech and association, it upheld his discriminatory transfer, because he had not included his membership in a homosexual organization on his teaching application); Childers v. Dallas Police Dep't, 513 F. Supp. 134. 138 - 42 (N.D. Tex. 1981) (court found First Amendment activities of plaintiff clerical employee were clearly protected by First Amendment, but on «balance» held police department's interests in not employing homosexual person to outweigh those protections.) *but see* Van Doteghem v. Grey, 628 F. 2d 488, 490 - 93 (5th Cir. 1980) (dismissal of homosexual employee of county treasurer's office because he addressed a public commission on the subject of homosexual rights was held to violate employees' First Amendment rights, and found those rights outweighed the «unrest» that their exercise created or might create).
- 77) Florida Bd. of Bar Examiners re N.R.S., 403 So. 2d 1315 (Fla 1981) (Florida Supreme Court ruled that private, consenting, non-commercial adult sexual activity is not relevant to disprove of bar applicant's fitness to practice law, in spite of Florida's anti-sodomy statutes); *see also* Kreps v. Sheriff Department of Contra Costa County, Civil Serv. Comm'n Hearing Memo no. N 14221 (2/2/80) (the right of a homosexual applicant to become a county sheriff's deputy was vindicated).

stantiality of the liberty and property interests being infringed. Increasingly the burden upon an employee claiming deprivation of a liberty or property interest is to show a tangible, reasonable expectation of continued employment, based upon state law, contract or some form of express agreement⁷⁸.

An overview of related cases reveals that courts other than the Supreme Courts split about the issue of discrimination on account of sexual orientation. Bowers⁷⁹ indicate that a majority of the present Court will be relatively unsympathetic to assertions by homosexuals to be constitutionally protected.

b. Discrimination Claims on Account of National Origin and Race

«[T]he experience of our nation has shown that prejudice may manifest itself in the treatment of some groups⁸⁰. The Supreme Court has determined that these groups are deserving of extraordinary protection within the political process and should be deemed a suspect class⁸¹. Justice Stone, in his famous footnote in *United States v. Carolene Products Co.*,⁸² defined a suspect class as a «discrete and insular minority» that is kept out of the political process⁸³.

Three factors used to determine suspect classifications flowed from this definition: (1) the class must have a long history of discrimination; (2) it must have an immutable trait which distinguishes the class from others; and (3) there must exist stereotypical characteristics unrelated to the abilities of the class. In the past, classifications based on

78) *Bishop v. Wood*, 426 U.S. 341, 344 (1976) (sufficiency of public employee's property interest must be tested to reference to state law); see *Board of Regents of State Colloge v. Roth*, 408 U.S. 564, 575 - 78 (1972) (no «liberty» or «property» interest in holding a specific, chosen public job; no «property» interest in renewal of teaching appointment); but see *Perry* found to be based upon «unwritten common law») cf. *Paul v. Davies*, 424 U.S. 693 (1976) (impairment of plaintiff's employment opportunities by means of police published flyer identifying him as known shoplifter did not infringe his «liberty» or «property» interests sufficiently to activate due process protections).

79) *Bowers v. Hardwick*, *supra* note 66.

80) *Plyer v. Doe*, 457 U.S. 202 (1982), at 216 n. 14.

81) See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *McLoughlin v. Florida* 379 U.S. 184, 192 (1964) (stating that suspect classifications tend to be irrelevant to any proper legislative purpose).

82) 304 U.S. 144 (1938).

83) *Id.*, at 152 n. 4 (stating that «prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to pro-

race⁸⁴ and national origins⁸⁵ have qualified as suspect and have met the three factor test shown above.

Related to the AIDS issue, as a consequence of the rapid increase of the disease among Blacks and Hispanics, and the CDC's former announcement about Haitian to be a risk group, a rise of employment discrimination claims concerning these persons may be observed. In spite of taking into consideration all affirmative action programs and such on behalf of those highly protected persons, it is not easy to predict the Court's approach the AIDS-related issues.

«Fear» is such an important factor in this issue that, for its sake a principle like objectivity may even be ignored. This was readily apparent in *Korematsu v. United States*⁸⁶. In *Korematsu* the Supreme Court upheld an act of Congress that prohibited citizens of Japanese ancestry from the West Coast war area during World War II⁸⁷. The Court upheld the exclusion order because the military was unsure who was or was not a spy at the time the order was issued⁸⁸. The Court held that although racial antagonism is not a legitimate reason to quarantine, «pressing public necessity» justifies the existence of a restriction⁸⁹.

It is apparent that the *Korematsu* decision put fear above Constitutional rights. A similar fear may surface against AIDS victims. In case public necessity is a key concept in handling the issue, the outcome would seem to be almost unpredictable.

c. Mandatory Testing and Reporting Requirements

Mandatory blood testing, although a minor personal invasion, would infringe the individual's protected privacy, that is «interest in avoiding disclosure of personal matters»⁹⁰. The bodily intrusion inflicted in mandatory blood tests is similar to that of compulsory immunization, which

protect minorities, any of which may call for a correspondingly more searching judicial inquiry»).

84) See, a.g. *McLaughlin v. Florida*, *supra* note 81.

85) See, a.g. *Hernandez v. Texas*, 347 U.S. 475 (1954).

86) 323 U.S. 214 (1944) *reh'q denied* 324 U.S. 885 (1945).

87) *Id.* at 219.

88) *Id.* at 224. «[W]e cannot - by availing ourselves of the calm perspective of hindsight - now say that at that time these actions were unjustified.»
Id.

89) *Id.* at 216. See also, *Whirlpool Corp. v. Marshall*, 455 U.S. 1 (1981). (Court accepted adverse actions on the grounds that there was «fear of real danger»).

90) *Whalen v. Roe*, 429 U.S. 589, 599 (1977).

has long been upheld by the courts⁹¹. But unlike a vaccination, a positive AIDS blood test could have a devastating impact on an individual's life. Blood tests currently available are designed to protect the blood supply, not to diagnose carriers⁹². Particularly existence of the possibility of a false diagnosis, or disclosure of the results to third parties could have serious results. As one Florida court recognized, «[A]IDS is the modern day equivalent to leprosy. AIDS, or a suspicion of AIDS, can lead to discrimination in employment, education, housing and even medical treatment. If the donors names were disclosed... they would be subject to this discrimination and embarrassment...»⁹³.

Only if a state could show a mandatory blood test requirement were necessary to advance the public health could it justify such a measure⁹⁴. However, regulation requiring individuals to take affirmative measures to protect their own health has also been upheld as constitutional by the courts⁹⁵.

Requirements that physicians report cases of AIDS to a public health authority raise problems similar to those raised by mandatory testing. The principle of notifying authorities about cases of communicable diseases has been upheld since 1887⁹⁶, and required reporting of infectious disease has rarely been challenged in the courts⁹⁷.

When an AIDS -reporting regulation requires the disclosure of identity, it threatens the individual's privacy as well as his liberty in-

91) See, e.g., *Hartman v. May*, 168 Miss. 477, 151 So. 737 (1934) (upholding a state ordinance requiring smallpox vaccinations as a prerequisite to admittance to public schools, even though there was no current smallpox epidemic with the reasoning that the dangerous and contagious nature of the disease made the ordinance reasonable).

92) See, *supra* notes 21 - 22 and the accompanying text.

93) *South Fla. Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 802 (Fla. Dist. Ct. App. 1985) (denying the demand of the list of blood donors' after a transfusion because of a car accident).

94) Courts have upheld laws requiring individuals seeking marriage licenses to blood tests for venereal disease, see, e.g. *Peterson v. Widule*, 157 Wisc. 641, 147 N.W. 966 (1944).

95) *Contra*, *State ex rel. Haws v. Lazaro*, 157 W. Va. 417, 437, 202 S.E. 2d 109, 123 (1974) (finding a statute that permitted involuntary hospitalization of an individual in need of treatment unconstitutional).

96) See, J. TOBEY, *PUBLIC HEALTH LAW* 133 (1947).

97) See, Damme, *Controlling Genetic Disease through Law*, 15 U.C.D. L. REV. 801, 807 (1982).

terest in his «good name, reputation, honor or integrity»⁹⁸. However, the Court appeared to limit the definition of constitutionally-protected «liberty» principally as the result of *Paul v. Davis*⁹⁹. In this case, plaintiff, after being arrested for shoplifting, was inaccurately listed as an «active shoplifter» in a flyer which the police circulated to hundreds of local merchants. By a 5 to 3 vote, the Supreme Court held that an interest in one's reputation, by itself, is not a constitutionally protected liberty or property interest. Justice Rehnquist's majority opinion distinguished early cases on the basis that they involved state action which altered a right or status previously recognized by state law¹⁰⁰.

Claims of violation of constitutional rights in the context of regulations for mandatory blood testing or reporting requirements, to be involved by an AIDS - afflicted person who is a homosexual or intravenous drug user may especially be a factor for the present Court to apply the reasoning in *Paul v. Davis* to such allegations.

B. *Public Health Precedent*

Under American law, states have the authority to exercise their police power¹⁰¹ to protect public health. The sovereign right of a government to promote the health and welfare of the general public is so broad that the Supreme Court, in the leading case *Jacobson v. Massachusetts*, held that states have the authority to «[e]nact... health laws of every description» as a way of protecting a community against an epidemic of disease¹⁰². This power extends to reasonable regulations that protect the public health and safety¹⁰³. A court determines the level of scrutiny to be applied case-by-case. When dealing with communicable diseases, courts have determined that a rationality test is applicable¹⁰⁴. That is, legislation is presumed valid if it advances any legitimate state interest¹⁰⁵.

Public health precedent is full of cases in which the courts have upheld measures that deprive persons of their liberty «[f]or the good

98) *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

99) *See, supra* note 78.

100) *Id.*, 79.

101) The police power is an implied power reserved to the states through the Tenth Amendment. *See Jacobson v. Massachusetts*, 197 U.S. 11, 24 (1905).

102) *Id.*, 25.

103) *Id.*, 33.

104) *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

105) *See, Supreme Court, 1984 Term*, 99 HARV. L. REV. 120, 161 - 62 (1985).

of the general public»¹⁰⁶. Courts, when confronted with constitutional challenges to a state's police power to quarantine, invariably have upheld the mandate of the state's legislature¹⁰⁷. In *People Ex Rel, Barmore v. Robertson*, for example, the Illinois Supreme Court upheld an Illinois law that provided for the quarantine of individuals believed to be a threat to the general public¹⁰⁸.

The courts' treatment of public health regulation seems to have changed very little since the turn of the century. Although in the 1920s the courts began to require some showing of medical necessity as medical science advanced¹⁰⁹, they continued to allow class membership alone to justify public health restrictions when a disfavored class, such as prostitutes, was the subject of the regulation¹¹⁰. The attitude that the diseased are a menace, survived through the 1950s and 1960s, when incarcerated tuberculosis patients challenged state authority to quarantine¹¹¹.

In *La Rocca v. Dalsheim* involving AIDS victims in prison, the Court

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- 106) See, *Little Rock v. Smith*, 204 Ark. 692, 696, 163 S.W. 2d. 705, 707 (1942) (upholding city ordinance requiring quarantine of prostitute until treatment).
- 107) See, e.g., *In Re Halko*, 246 Cal. App. 2d 533, 54 Cal. Rptr. 661 (1966) (quarantine of tuberculosis victim); *United States v. Shinnick*, 219 F. Supp. 789 (E.D.N.Y. 1963) (quarantine of smallpox victim); *Ex parte Martin*, 83 Cal. App. 2d 164, 186 P. 2d. 287 (1948) (quarantine of venereal disease victim); *People ex rel. Barmore v. Robertson*, 302 Ill. 111, 422, 134 N.E. 815 (1922) (quarantine of typhoid victim); *In Re King*, 128 Cal. App. 27, 16 P. 2d 694 (1915) (quarantine of venereal disease victim).
- 108) *People ex. rel. Barmore v. Robertson*, *supra* note 106. (in this case court allowed quarantine of a rooming house, where some residents contracted typhoid fever. The Court found the owner, as a carrier of the disease, though she was asymptomatic, to be sufficient for a «reasonable suspicion» to permit quarantine.)
- 109) See, e.g. *People ex rel. Barmore v. Robertson*, *supra* note 106, at 432 - 33; see also in general, Burris, *Fear Itself: AIDS, Herpes and Public Health Decisions*, 3 YALE L. & POL'Y REV. 479.
- 110) See, e.g., *Ex parte Clemente*, 61 Cal. App. 666, 215 P. 698 (1923), (holding that a quarantine was justified because information about a woman's acts of prostitution furnished a reasonable ground to believe she carried disease): accord *Huffman v. District of Columbia*, 39 A. 2d 558, 562 (D.C. 1944); see also, *Ex parte Martin*, 83 Cal. App. 2d 164, 165, 188 P. 2d 287, 291 (1948) (the court deemed it reasonable to believe that Martin might be infected with a venereal disease because the motel she was arrested in was frequented by prostitutes).
- 111) See, e.g., *Moore v. Draper*, 57 So. 2d 648, 649 (Fla. 1952).

argued the necessity of quarantine in prisons¹¹². The *La Rocca* Court's holding of the necessity of quarantine in prison was based on the fact that quarantining AIDS victims precluded their sexual contact with others and thus diminished the spread of the disease¹¹³. In dicto, the Court added that although quarantine was necessary in prisons, AIDS was not yet a grave enough threat to justify wholesale quarantine in the general public¹¹⁴. The Court accepted the premise that AIDS was not transmitted by casual contact or germs in the air, and it held that the congregation of AIDS victims was not a threat to the other prisoners¹¹⁵. The Court noted, however, that as medical knowledge concerning AIDS increases, the legal considerations likely will change¹¹⁶.

In a similar case, *Cordero v. Coughlin*, the Court, consistent with *La Rocca*, held that the quarantine of AIDS victims in a prison was constitutional¹¹⁷. The significance of this case is the Court's holding that AIDS victims are not a suspect class¹¹⁸. Thus, all that is needed to uphold an action is a legitimate governmental purpose being accomplished by rational means.

Regulation geared to the control of AIDS will, in fact, almost certainly meet the proper purpose requirement, whether at the strict, intermediate, or minimum level of scrutiny. Courts have generally found preservation of the public health to be a compelling interest¹¹⁹; the potential of AIDS to spread at an exponential rate suggests that protection of the public against AIDS merits equal deference¹²⁰. Quieting the unsubstantiated fears of the voting public is not a compelling interest¹²¹. However, if AIDS should be interpreted as a «real danger»¹²², measures to alleviate the «fear» may be justified by the Courts.

112) 120 Misc. 2d 697, 467 N.Y.S. 2d 302 (N.Y. Sup. Ct. 1983).

113) *Id.* at 710, 467 N.Y.S. 2d at 311.

114) *Id.* at 709, 467 N.Y.S. 2d at 311.

115) *Id.* at 707, 467 N.Y.S. 2d at 310.

116) *Id.* at 710, 467 N.Y.S. 2d at 311..

117) 607 F. Supp. 9 - 10 (S.D.N.Y. 1984).

118) *Id.* at 10.

119) See, e.g. *Brown v. Stone*, 348 So. 2d 218 (Miss. 1979) (finding the state's interest in compulsory vaccination of school children sufficiently compelling to override parents' religious interests), *cert. denied*, 449 U.S. 887 (1980). (1980).

120) See *City of New York v. New Saint Mark's Baths*, No. 43640 - 85, Motion No. 114, *slip op.* (N.Y. Sup. Ct. Jan. 6, 1986).

121) See *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3259 (1985) (holding that negative attitudes or unsubstantiated fears are not permissible bases for treating a home for the mentally retarded differently from other multiple dwellings).

122) See, *Whirlpool Corp. v. Marshall*, *supra* note 89.

C. *Rights of Parties Related to AIDS issue in Labor Law Context*

a. *Rights of AIDS - Afflicted Persons in the Labor Law Context*

Common Law assumption in the United States is that the employment relationship in the private sector is «at will» - that is, the employer has the discretion to terminate the relationship¹²³. Pursuant to the Fourteenth Amendment to the Constitution, due process guarantees restrict the government entities acting as an employer, thus public sector employees have somewhat more job security.

Generally speaking, guidelines barring employment discrimination, based on a handicap, are provided by statute in most states¹²⁴. In Federal legislation, the Rehabilitation Act of 1973¹²⁵, as amended, prohibits discrimination against handicapped persons in Federal level employment practices. Section 504 states: «no otherwise qualified handicapped individual in the United States... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected no discrimination under any program or activity receiving Federal financial assistance...»¹²⁶.

To establish a *primo facie* case¹²⁷ of section 504 discrimination, a claimant must prove: (1) he is handicapped; (2) he is otherwise qualified; (3) the discrimination is based solely on his handicap; and (4) the program or activity in which he is employed (5) receives Federal financial assistance.

Under the Rehabilitation Act, the new definition of a «handicapped individual» is, «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»¹²⁸. Since the terms in this statute are not defined in the act, the regulations promulgated by the

123) This traditional «at will» doctrine is currently eroding as many states are beginning to recognize the principle that employees should not be fired «at will» without «just cause.» Thus, the «at will» doctrine varies from state to state. See generally Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Blumrosen, *Strangers No More: All Workers Are Entitled to Just Cause Protection Under Title VII*, 2 IND L.J. 519 (1978).

124) See, generally Leonard, *supra* note 54.

125) Pub. L. No. 93 - 112, § 2, 87 Stat. 357 (1973) (codified as amended at 29 U.S.C. §§ 701 - 96 (1982)).

126) *Id.* § 794.

127) This list is based on the statutory language of § 504. The later two elements will not be addressed in this paper, as they involve no issue unique to a person with AIDS.

Federal agencies charged with implementing the Rehabilitation Act must be examined to understand who is a «handicapped individual» under Federal law. The Department of Health and Human Services (HHS), charged with implementing section 504, broadly defines «physical impairment» and «major life activities.» Physical impairment is defined as «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...»¹²⁹ Major life activities are defined as, «Functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and *working*»¹³⁰.

After proving the existence of a handicap, a person seeking section 504 protection must prove that he is «otherwise qualified» for the job. The HHS regulations define a «qualified handicapped person» as a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question»¹³¹.

To date, the only Federal ruling related to AIDS termed AIDS a handicap under Federal disability law¹³². The case was filed on behalf of a child with AIDS who was barred from kindergarten after he bit a classmate. The significance of this ruling is to put the burden on the school board to show that there was a danger of transmission, rather than requiring the individual claiming discrimination to prove no danger existed.

Two Federal decisions which do closely examine the Rehabilitation Act's definition of a «handicapped individual» support the argument that AIDS is a protected handicap.

In *E.E. Black, Ltd. v. Marshall*¹³³, a Federal court interpreted sec-

128) Pub. L. No. 93 - 516 § III (a), 88 Stat. 1619 (1974) (codified at 29 U.S.C. § 706 (7) (B) (1982)).

129) 45 C.F.R. § 84.3 (j) (2) (i) (a) (1985).

130) *Id.* § 84.3 (j) (2) (ii) (emphasis added).

131) 45 C.F.R. § 84.3 (k) (i) (1985).

132) *Thomas v. Atascadero Unified School District*, USDC Cal. No. 886 - 609 AHS (BY) 1 AIDS Policy & Law 22 (Nov. 19, 1986) at. 1.

133) 497) F. Supp. 1088 (D. Hawaii 1980).

tion 706 (7) (B) for the first time. The Court, rejecting a claim that section 706 (7) (B)'s definition of a «handicapped individual» was unconstitutionally vague, concluded that «Congress wanted the statute to have broad coverage and effect»¹³⁴. After examining the relevant regulations and legislative history, the court affirmed prior administrative opinions in the case and held that the term «impairment» meant «any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity»¹³⁵. Considering the devastating impact that the disease has upon its victims' health, AIDS comes within the *Black* court's definition of «impairment».

The risk of contagion might be viewed as a major obstacle in any attempt to have AIDS classified as a protected handicap. Although the risk of transmission might differentiate AIDS from so-called «traditional» handicaps, this fact has recently been argued by the Supreme Court. The Court, by a 7 to 2 vote, ruled that contagious disease tuberculosis is a handicap for purposes of the Rehabilitation Act's protection. The case, *School Board of Nassau County v. Arline*¹³⁶, involved an elementary school teacher who was discharged from her job because of her susceptibility to tuberculosis. The Supreme Court had ruled that the Rehabilitation Act of 1973 protecting the rights of handicapped persons barred discrimination against those suffering from contagious diseases unless they posed a real risk of infection to others or could not do their work.

However, Associate Justice Brennan's majority opinion in dicta explicitly declined to decide whether the 1973 law protects carriers of the AIDS virus who do not suffer physical symptoms but who may be able to transmit the disease. The Court rejecting the Administration's argument that such unimpaired AIDS carriers were not protected by the Rehabilitation Act, has noted that the Act has been misplaced in this case, because the handicap here, tuberculosis, had given rise both to a physical impairment and to contagiousness. Since the dicta of the *Arline* Court is only related to asymptomatic AIDS-afflicted persons, the reasoning of the case could be applied to the cases concerning persons from other groups.

b. Rights of Non-AIDS-Afflicted Persons in Labor Relations

134) *Id.* at 1098.

135) *Id.*

136) *School Board of Nassau County, Fla. v. Arline*, No. 85 - 1277.

The foremost affirmative defense in an AIDS case is fear of contagion¹³⁷.

In *Shuttleworth v. Broward County Office of Budget and Management Policy*¹³⁸, the court denied the argument of the defendant not to have the «100 percent guarantee» for AIDS to be non-communicable through casual contact¹³⁹.

Unless there is a reasonable probability of substantial harm by the person to others¹⁴⁰, employers may not discriminate against persons presently able to perform a job because they have or are regarded as having a physical or mental handicap. However, in *Heutzel v. Singer Co.*¹⁴¹, the court held that «an employee is protected against discharge or discrimination for complaining in good faith about working conditions or practices which he reasonably believes to be unsafe, whether or not there exists at the time of the complaint an OSHA¹⁴² standard or order which is being violated.» Thus, in view of the *Heutzel* court's decision, an employer faces liability if he hires or retains a person with AIDS, or one who is viewed as having AIDS, and subsequently discharges or disciplines another employee who complains about the health risk of working with that person.

137) A startling illustration of the fears generated by publicity about AIDS is provided by an incident in a New York City trial court on October 23, 1984. A man diagnosed as having AIDS was standing trial for a murder committed prior to his diagnosis. The judge had called upon the City Health Commissioner to appear personally to assure court personnel and jurors that they were not endangered by the defendant's presence in the courtroom. The defendant wore a surgical mask. Despite the health official's statement to those in the courtroom that «AIDS was not transmitted through the aid and that they did not have to be concerned about being in the same courtroom with the defendant» half of the prospective jurors asked to be excused, and court officers insisted on wearing masks and surgical gloves. The judge denied defense counsel's request that the officers be ordered to remove their protective paraphernalia to avoid prejudicing the jury. The president of the court officers' union was quoted as fearing for the health of the officers because «germs are spreading all over the court.» Shenon, *Court Officers Wear Masks and Gloves at Trial of a Defendant with AIDS*, N.Y. Times, Oct. 24, 1984, at B1, col. 1.

138) See *supra* note 54.

139) However, the commission reasoned its denial as *Shuttleworth* «worked in a private office which was enclosed by a floor to ceiling wall on one side and by five feet high partitions the other three sides.»

140) *Martolete v. Bolger*, 767 F. 2d 1416 (9th Cir. 1985) (holding that to exclude a qualified handicapped person from the workplace, an employer must demonstrate reasonable probability of substantial harm to himself or others).

Another argument of the employer based on the employee's future health fails in most cases¹⁴³. The substantial medical insurance costs do not justify adverse employment action¹⁴⁴.

Conclusion

The AIDS crisis presents a significant challenge to the legal system. The unusual disease at issue does not fit neatly into the framework of the present system. The courts are being called upon to decide issues without benefit of conclusive information about the underlying subject, the disease itself. The decisions reached at all levels of the judicial system show more or less the same characteristics: cautious, not generally decisive, leaving the door open to any advances in medical knowledge. Where possible, the courts have avoided taking any stand, as, for example, in the recent decision of the Supreme Court on a similar issue in the *Arline* case, where the Brennan majority opinion seems to prefer not to be particular on the AIDS issue.

The delicate balance that the Courts are supposed to maintain in weighing the public interest against the individual interest creates a specific tension with all the unknowns about the AIDS epidemic. An overview of the health precedent indicates that providing and protecting the safety of public health has always been an issue of priority for all three powers. Even with the weighed importance given to the individual rights, the plague dimensions of AIDS makes it highly difficult to make a prediction concerning the decision of the Supreme Court. However, because some of the victims of the epidemic are members of unprotected groups, the problem is moved a step further. The challenging characteristics of these groups against the conservative moral values expressed in Rehnquist Court decisions, makes the outcome of these potential cases more predictable.

It would seem that the vagueness of these issues will continue unresolved for some time. Until the medical questions about the issue have

141) 138 Cal. App. 3d. 290, 188 Cal. Rptr. 159 (1982).

142) OSHA is an acronym for the California Occupational Safety and Health Act.

143) See *Bentivegna v. United States Dept. of Labor*, 694 F. 2d. 619 (9th Cir. 1982) (the Court noted that any qualification based on risk of future injury must be examined with special care, since almost all handicapped persons are at greater risk from work related injuries); see also *McDermott v. Xerox Corp.* 491 NYS 2d. 106 (N.Y. 1984) (the Court held that an employer may not refuse to hire a presently otherwise able employee but may refuse if there is an immediate health risk).

144) See *E.E. Black, Ltd. v. Marshall*, *supra* note 133.

been resolved, it is perhaps the best that can be expected of the courts to continue on their present path: cautious, not generally decisive, and leaving an open door.

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