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SMU Law Review

Volume 42 | Issue 2 Article 4

January 1988

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Recommended Citation

Laura Leigh Brown, Comment, *AIDS in the Workplace: A Legal Dilemma*, 42 Sw L.J. 837 (1988)
https://scholar.smu.edu/smulr/vol42/iss2/4

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COMMENTS

AIDS IN THE WORKPLACE: A LEGAL DILEMMA

by Laura Leigh Brown

THE United States Centers for Disease Control (CDC) reported the fatal disease now known as Acquired Immune Deficiency Syndrome (AIDS) for the first time in July of 1981.[1] Three years later the CDC had reported approximately seven thousand cases.[2] By mid-1985 the number of reported cases of AIDS escalated to approximately twelve thousand.[3] President Reagan has called AIDS "Public Enemy Number One," and the CDC recently mailed informational brochures on AIDS to all American residences.[4] The fear and panic associated with AIDS spread throughout the country and eventually reached the workplace environment.[5] The AIDS-related workplace issues are numerous and largely interdependent.[6] With the abundance of legal issues arising in the workplace, the Surgeon General,

1. Hecht, *AIDS Update, AIDS Progress Report*, PLASMA QUARTERLY, Spring 1986, at 4.

2. Leonard, *Employment Discrimination Against Persons With AIDS*, 10 U. DAYTON L. REV. 681, 681 n.2 (1985).

3. Mass, *Medical Answers About AIDS*, in AMA MANAGEMENT BRIEFING, AIDS: THE WORKPLACE ISSUES 55, 74 (1985) [hereinafter AIDS: The WORKPLACE ISSUES].

4. SURGEON GENERAL, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNDERSTANDING AIDS (1988) [hereinafter UNDERSTANDING AIDS]. In 1987 President Reagan established the Presidential Commission on the Human Immunodeficiency Virus Epidemic to advise the nation on measures needed to confront AIDS. Dallas Morning News, Sept. 25, 1988, at 46A, col. 1. While the Commission requested adoption of a broad national standard outlawing AIDS discrimination, President Reagan failed to seek enactment of a federal antidiscrimination statute and chose instead to refer the matter to the Justice Department for further evaluation. *Id.* It seems that the administration prefers shifting protection from AIDS discrimination from the federal government to the states. *Id.* The Commission's proponents, however, argue that the AIDS problem merits a strong national law. *Id.* at 47A, col.1.

5. Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11, 11 (1985). As early as 1984 the *National Law Journal* reported that the majority of grievances received by the New York based Lambda Legal Defense and Education Fund Inc. were employment-related concerns. Nat'l L.J., July 9, 1984, at 1.

6. AIDS-related issues prevalent in the workplace include confidentiality arising from employee and applicant testing; discrimination problems arising due to refusal to hire based on positive results from an AIDS test; liability for transmission of AIDS; wrongful termination arising due to a positive result from an AIDS test; invasion of privacy; libel and slander arising if an employer reveals an AIDS-infected employee's condition to other workers; federal, state, or local laws governing occupational safety and health; workers' compensation laws; civil rights of employees; provisions of collective bargaining agreements; informed consent; employee right-to-know statutes; as well as a host of insurance issues. *Summary: Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type*

in one of his reports on AIDS,[7] advised employers to educate themselves as well as their employees about AIDS in order to reduce the circulation of misinformation.[8] The Surgeon General's most recent report indicates that AIDS cannot be transmitted by mere casual contact.[9]

When faced with the news of an employee with AIDS, the manner in which an employer reacts may affect the employer's potential future liability. Some employers respond with compassion and education. Other employers respond without considering the legal issues involved by firing the employee, and thereby possibly creating a disturbance in the workplace. Employers across the nation, as well as those attorneys representing them, need accurate and factual information concerning AIDS and the possible ramifications of any employment-related actions they may take towards employees infected with the AIDS virus.[10]

This Comment discusses various discrimination and privacy problems that arise in the workplace when an employer discovers an applicant or current employee with AIDS. The intent of the Comment is to help personnel managers, business owners, health care professionals, attorneys, and students alike to understand better the legal implications of AIDS-related issues in the workplace. The Comment begins with a brief medical background of AIDS, then discusses federal legislation, federal case law, Texas legislation and case law, and concludes with a discussion of the issues related to employee and applicant testing. An awareness of the numerous issues associated with AIDS and the advance preparation of a method to confront these issues can help employers decrease their risk of financial liability and help the AIDS-infected employee cope with the reality of the disease.

I. MEDICAL BACKGROUND

The following summary of medical terminology and facts associated with the AIDS virus is meant to serve as a brief orientation for an employer and that employer's attorney, when the employer learns of an employee with AIDS.[11] AIDS, as defined by the CDC, is the final stage of a series of health

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III/Lymphadenopathy-Associated Virus in the Workplace, 34 MORBIDITY & MORTALITY WEEKLY REP. 681, 687 (1985) [hereinafter *Recommendations*].

7. SURGEON GENERAL, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 32 (1986).

8. *Id.* The Surgeon General also encouraged the timely implementation of an AIDS educational "plan" in offices, factories, and other worksites. *Id. see also* Marcotte, *AIDS—A Dilemma for Employers*, 74 A.B.A. J. 24, 24 (1988) (businesses need to avoid discrimination while addressing workers' fears).

9. UNDERSTANDING AIDS, *supra* note 4, at 3. This report indicates AIDS cannot be transmitted from a mosquito bite, saliva, sweat, tears, urine, a bowel movement, clothes, a telephone, a toilet seat, or even from a kiss. *Id.*

10. An excellent source for accurate and current information on AIDS and federal law relating to AIDS is the San Francisco AIDS Foundation.

11. While available medical knowledge concerning AIDS constantly expands, the medical community has established and frequently uses several key definitions and terms. For the best summary of state-of-the-art medical knowledge about AIDS, see 259 SCI. AM., No. 4 (Oct. 1988) (special issue).

complications resulting from a virus[12] transmitted through the exchange of body fluids, namely blood or semen.[13] AIDS attacks a person's immune system, leaving the body defenseless against certain infections that a healthy person typically can fight successfully.[14]

When the AIDs virus enters the blood stream, it eventually destroys T-Lymphocyte cells that protect the body from infection and disease.[15] At this point the body produces antibodies that an HIV test can detect.[16] Individuals exposed to the virus may not display symptoms for more than five years.[17] Even though infected persons may not manifest any physical symptoms of the illness, they are able to infect others.[18]

The symptoms associated with AIDS depend on the nature and extent of the person's infection. Some common symptoms include: severe fatigue, sometimes accompanied by headaches or dizziness; recurring fevers or night sweats; weight loss; lymphadenopathy (enlarged and/or hardened lymph glands); thrush (a white coating on the tongue or in the throat, which may cause pain); persistent diarrhea; unexplained bleeding or bruising; persistent neurologic or psychiatric symptoms; and a frequently recurring dry cough caused by neither smoking nor the flu.[19] A less severe condition than AIDS, AIDS-Related Complex (ARC) may be present when an individual shows signs of illness that could also be attributed to other diseases.[20] A more

12. The virus is known as Human Immunodeficiency Virus (HIV), Human T-Cell Lymphotrophic Virus—Type III (HTLV-III), Lymphadenopathy Associated Virus (LAV), or AIDS-Related Virus (ARV) and hereinafter referred to as the "AIDS virus." Leonard, *The Legal Issues*, in AIDS: The Workplace Issues 28, 29 (1986); SURGEON GENERAL, *supra* note 7, at 10.

13. Leonard, *supra* note 12, at 29. The most common methods of transmitting AIDS are through intravenous drug use, blood transfusions, sexual intercourse with an infected partner, and prenatal or natal exposure. Hecht, *supra* note 1, at 4. Insignificant amounts of the AIDS virus were found in breast milk, urine, tears, sweat, and saliva. No reported cases of transmission from these fluids exists, nor does any evidence of transmission through mere casual contact exist. *Recommendations, supra* note 6, at 682.

14. Mass, *supra* note 3, at 56.

15. SURGEON GENERAL, *supra* note 7, at 10.

16. *Id.* Public use of this test to diagnose AIDS received unfavorable criticism for the following reasons: (1) the test identifies the presence of antibodies, but does not indicate the presence of the virus itself; (2) false positive or false negative readings may result; and (3) numerous questions abound concerning the ethics and confidentiality of testing. Mass, *supra* note 3, at 57-58.

17. Hecht, *supra* note 1, at 4. The incubation period, which varies among individuals, can be as short as several months. On the opposite end of the spectrum, an individual exposed to the virus may remain a lifetime carrier without ever developing AIDS. *Id. But see infra* note 148 for a recently developed contrary opinion indicating that 100% of those infected will develop AIDS.

18. SURGEON GENERAL, *supra* note 7, at 11.

19. Mass, *supra* note 3, at 64-65.

20. SURGEON GENERAL, *supra* note 7, at 11. While AIDS is now classified according to the stage of infection, "HIV infection" itself is increasingly viewed as the disease, with "AIDS [a]s just one, late manifestation of that process." Redfield & Burke, *HIV Infection: The Clinical Picture*, 259 SCIENTIFIC AMER. 90 (Oct. 1988). *See also* REPORT OF THE PRESIDENTIAL COMM'N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC (June 24, 1988) (recommending that "HIV infection" replace the three-stage nomenclature of "HIV-positive," "ARC," and "AIDS"). A progressive classification system for HIV infection apparently continues to have clinical significance, although classification systems vary. *See* Redfield & Burke, *supra*, at 90.

serious case occurs when the disease completely destroys the immune system, leaving the body susceptible to certain "opportunistic diseases."[21] The worst stage of the disease, "frank AIDS," "full-blown AIDS," or "CDC-defined AIDS," is the period of time when the body is most susceptible to rare cancers and infections.[22]

The medical community has designated certain groups of individuals as more likely to acquire the AIDS virus than others. Those designated "high risk" groups include: males or females who are or have been sexually active with various homosexual or bisexual males; intravenous drug users; those persons with hemophilia; and others who receive large quantities of blood by transfusion.[23] In general, monogamous male homosexuals with no prior history of sexual activity with other partners are less likely to acquire AIDS than sexually active female heterosexuals with bisexual male partners.[24]

On November 15, 1985, the United States Department of Health and Human Services published guidelines on AIDS in the workplace.[25] This publication served to help employers prevent the transmission of AIDS in the workplace. The guidelines focused on health care workers, personal service workers, and food service workers.[26] With regard to those working in offices, schools, factories, and construction sites, the guidelines indicated no known risk of AIDS virus transmission.[27] In an accompanying statement,[28] Dr. James O. Mason stressed that the guidelines represent the Public Health Service's continuing and unchanged attitude that AIDS is a sexually transmitted disease, acquired through transmission of blood or semen, not by daily physical contact.[29]

The Public Health Service's guidelines assist employers in educating themselves as well as their subordinates on the current medical knowledge about AIDS transmission. An overreaction by an employer who discovers

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21. Opportunistic diseases are those infections that would not ordinarily cause disease if the individual's resistance to disease was not fatally lowered. Sicklick & Rubinstein, *A Medical Review of Aids*, 14 HOFSTRA L. REV. 5, 5 (1985). Two of the most common opportunistic diseases are Kaposi's Sarcoma, a rare type of skin cancer, and Pneumocisti carinii pneumonia, a parasitic infection of the lungs. SURGEON GENERAL, *supra* note 7, at 10.

22. G. Portela, AIDS: A Resource Manual for Texas Employers 4 (1986) (on file with the *Southwestern Law Journal*).

23. *Id.* at 6. Haitians, previously classified by the CDC as a high-risk group, are now included among the "other unknown" group of individuals with AIDS. Specifically, Haitians do not make up a separate high-risk group because both heterosexual contact and use of contaminated needles contribute to AIDS transmission among Haitians. No evidence of a specific mode of transmission exists among this group. Mass, *supra* note 3, at 59.

24. G. Portela, *supra* note 22, at 7.

25. *Recommendations, supra* note 6, at 681.

26. *Id.*

27. Statement by James O. Mason, M.D., Dr. P.H., Acting Assistant Secretary for Health, U.S. Public Health Service, Nov. 14, 1985 [hereinafter Statement], *reprinted in* G. Portela, *supra* note 22, at 65. Dr. Mason stressed that employers should not prevent employees known to be infected in these types of employment settings from working, using telephones, office equipment, toilets, showers, eating facilities, and water fountains. Statement, *supra*, at 7.

28. Statement, *supra* note 27, at 1.

29. *Id.* at 3, 8. For parallel judicial authority, see LaRocca v. Dalsheim, 120 Misc. 2d 697, 467 N.Y.S.2d 302 (Sup. Ct. 1983).

that an employee has tested positive for AIDS could be very detrimental to the employer. Employers should be aware that an individual who tests positive for the presence of antibodies but who does not reveal any AIDS symptoms, does not have and may never develop CDC-defined AIDS.[30] Similarly, an individual revealing AIDS-related symptoms does not necessarily have AIDS, and may never develop CDC-defined AIDS.[31] Even a person who has AIDS may contain such an insignificant amount of the virus as to be unable to transmit the disease.[32]

An employer must take notice of the consequences of employee dismissal, segregation, or suspension when the employer merely perceives AIDS infection or the possibility of future acquisition of AIDS in an employee.[33] Similarly the duty of the employer's attorney to keep abreast of the current state of the law concerning AIDS in the workplace also plays an important role. Given the uncertainty in the law in this area, the employer will rely upon an attorney to provide careful and thoroughly investigated legal advice until the courts or legislature firmly establish relevant legal precedent.

II. THE LAW

A. *Federal Legislation*

When faced with the dilemma of how to handle a case of AIDS in the workplace,[34] the employer's attorney should give adequate attention to existing substantive laws.[35] While no federal statute strictly prohibits termination of an employee with AIDS, the Vocational Rehabilitation Act of 1973

30. Leonard, *supra* note 12, at 30. *But see infra* note 148 for an opposing view.

31. Leonard, *supra* note 12, at 30.

32. *Id.* This is the typical setting that makes AIDS such a controversial issue in the workplace. An employee may harbor an HIV infection while being virtually asymptomatic, or experience minor symptoms that do not physically prevent him or her from working. Leonard, *supra* note 5, at 19.

33. Primary factors an employer should consider when making an AIDS-related employment/termination decision are the employee's level of infection and physical ability to continue working. Madoff, *AIDS-Related Employment Discrimination Issues in the Workplace*, in AIDS: LEGAL ASPECTS OF A MEDICAL CRISIS 128, 132 (1986) (on file with the *Southwestern Law Journal*).

34. Various methods that employers use when dealing with AIDS in the workplace include: testing applicants as well as employees for the AIDS virus; implementing an AIDS educational program on the work site; permitting those employees who tested positive for AIDS to continue working until physically unable; offering the employee with AIDS monetary relief and benefits in exchange for an agreement to take a permanent leave of absence; and outright dismissal upon positive identification of the AIDS virus. Wall St. J., Oct 18, 1985, at 12, col. 2. A Dallas law firm identifies three approaches employers might take as (1) the "education/sympathy" approach; (2) negotiated indefinite leaves of absence or other settlement; and (3) extensive use of AIDS testing for applicants and/or current employees. R. Gaswirth & D. Fenton, What Employers Are Doing About AIDS 1 (1987) (on file with the *Southwestern Law Journal*).

35. Employers may be subject to a state's workers' compensation law as well as federal regulation by the Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678 (1982 & Supp. II 1984, Supp. III 1985, Supp. IV 1986), and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1982 & Supp. I 1983, Supp. II 1984, Supp. III 1985, Supp. IV 1986). For a discussion of the impact of these laws, see Zellner, *Employer's Dilemma: The AIDS Crisis*, FOR THE DEFENSE, May 1988, at 7-9. The Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) makes it clear that discharged employees with

(the Rehabilitation Act)[36] may serve as a guide. The Rehabilitation Act covers only those employers who are federal contractors, subcontractors, or those who receive other federal financial assistance.[37] The key question is whether a covered employee whose AIDS test produced positive results is "handicapped" within the meaning of the statute and therefore entitled to its protection.[38]

The Rehabilitation Act prohibits federal contractors, subcontractors, and recipients of federal funds from discriminating against certain handicapped individuals in the employment relationship.[39] The Rehabilitation Act defines a handicapped individual as any physically or mentally impaired individual whose primary life activities are substantially limited due to the impairment; who has a documented history of such impairment;[40] or whom others perceive as impaired.[41] To receive protection under the Rehabilitation Act, a handicapped employee must also meet the "otherwise qualified" standard.[42] An otherwise qualified handicapped person is someone who, despite the handicap, can perform the essential tasks of a job.[43] An employer has a legal duty to reasonably accommodate a handicapped employee unless such accommodation results in undue hardship.[44]

Attorneys representing employers who are confronted with AIDS in the workplace have little express administrative or judicial guidance to assist them in formulating and recommending a proper course of conduct for em-

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AIDS are entitled to continued coverage by the employer's medical benefits plan for eighteen months after the occurrence of a qualifying event. 29 U.S.C. §§ 1161-1168 (Supp. IV 1986).

36. 29 U.S.C. §§ 793-794 (Supp. IV 1986).

37. *Id.*

38. *See* Shumaker, *AIDS: Does it Qualify as a "Handicap" Under the Rehabilitation Act of 1973?*, 61 NOTRE DAME L. REV. 572 (1986); Note, *AIDS and Employment Discrimination: Should AIDS be Considered a Handicap?*, 33 WAYNE L. REV. 1095 (1987).

39. 29 U.S.C. §§ 793-794 (Supp. IV 1986).

40. The second and third phrases of the definition of "handicapped individual" extend coverage under the Rehabilitation Act to those who are not presently disabled. Leonard, *supra* note 2, at 691.

41. 29 U.S.C. § 706(8)(B) (Supp. IV 1986). The Department of Labor further defined key terms that the Rehabilitation Act uses in its definition of a "handicapped individual." "Life activities" include those normal, day-to-day physical activities that enable one to function in society, such as sensory functions, movement, and thought. 41 C.F.R. § 60-741.54 (1987). "Substantially limits" is generally the severity of the impairment and the concomitant extent to which the severity affects one's ability to work. *Id.* Factors to consider include potential difficulty in obtaining, maintaining, or excelling in employment. *Id.* "Has a record of such impairment" is a large category including those who may be completely recovered from a prior impairment as well as those who were erroneously classified. *Id.* The drafters included this phrase to guard against discriminatory attitudes of employers, supervisors, and co-workers. *Id.* The phrase, "regarded as having such an impairment" is one step removed from the previous phrase. It refers to those who are perceived as handicapped, regardless of whether an actual impairment exists. *Id.*

42. 29 U.S.C. § 794 (Supp. IV 1986).

43. *See* Southeastern Community College v. Davis, 422 U.S. 397, 406 (1979) ("otherwise qualified" individual with handicap may not be denied employment, terminated from job, or treated in manner inconsistent with treatment of nonhandicapped individuals).

44. 41 C.F.R. § 60-741.6(d) (1987). Relevant considerations regarding accommodation include: size of employee program, type of operation, composition and structure, and nature and cost of accommodation. 45 C.F.R. § 84.12(c) (1986). *See also* 29 C.F.R. § 1613.704 (1987) (reasonable accommodation); *id.* § 1613.702(f) (defining qualified handicapped person).

ployers.[45] Absent express and explicit guidance, attorneys can reasonably rely upon a cautious course of action that will eliminate the potential for employer liability.[46] If an employee tests positive for the AIDS virus, but is physically able to perform the essential tasks of his or her job without exposing anyone to actual and significant danger, then an employer must permit the employee to work, despite the fact that the person may have a potentially or actually disabling impairment.[47]

Attorneys may also want to educate employers on the scope of the Rehabilitation Act. The Rehabilitation Act clearly protects not only those actually disabled, but also those individuals perceived as disabled.[48] For this reason, employers who fall within the scope of the Rehabilitation Act must assume that both categories of employees are handicapped and therefore entitled to protection under the Act.[49]

Some argue that AIDS is not a handicap within the meaning of the Rehabilitation Act.[50] This notion emerges from the belief that the legislative history of the statute does not indicate that Congress intended to include contagious diseases within the meaning of "physical impairment."[51] This argument is weak in two respects. First, the Rehabilitation Act specifically excludes alcoholism and drug abuse from its coverage where current use of such substances prevents an individual from performing his daily employment tasks or where an individual's employment is a threat to others due to the use of such stimulants.[52] This indicates that if Congress did not intend the Rehabilitation Act to cover contagious diseases, Congress would have expressly excluded them along with the exemptions for alcoholism and drug abuse.[53] In addition, the United States Supreme Court recently held that tuberculosis, a contagious disease, is a handicap within the meaning of the

45. In the spring of 1988 Congress considered several legislative proposals such as H.R. 3071 and S. 1575, which contain four categories that the American Bar Association argues should be part of a federal AIDS policy: voluntary testing, counseling, confidentiality, and anti-discrimination. McMillion, *Toward a National Aids Policy*, 74 A.B.A. J. 123 (July 1, 1988).

46. Leonard, *supra* note 12, at 32.

47. *Id.* In 1979 the United States Supreme Court presented this theme in Southeastern Community College v. Davis, 422 U.S. 397 (1979), the Court's first case that interpreted the Rehabilitation Act. Leonard, *supra* note 12, at 32.

48. 29 U.S.C. § 706(8) (Supp. IV 1986). The significance of this extended coverage to those not actually ill but nevertheless in the "risk groups" is immense. Numerous instances of discrimination arise in the workplace based on unfounded fears of misinformed co-workers. These employees are faced with a real threat of losing their jobs, just as are those who are actually ill. Leonard, *supra* note 12, at 33. Such treatment should be considered equally as discriminatory and thus prohibited as are those instances of discrimination concerning an individual who actually has AIDS. *Id.* at 34.

49. G. Portela, *supra* note 22, at 11. In determining whether an employer has violated the Rehabilitation Act, the employer's motive for firing the employee is as important as the employee's physical condition. Leonard, *supra* note 12, at 32.

50. G. Portela, *supra* note 22, at 11.

51. *Id.*

52. 29 U.S.C. § 706(8)(B) (Supp. IV 1986).

53. G. Portela, *supra* note 22, at 11-12.

federal Rehabilitation Act.[54] An analogy to the AIDS situation seems reasonable and probable. Further, the chairman of the White House AIDS Commission recently recommended strong federal antidiscrimination protection for individuals infected with the AIDS virus.[55]

B. Federal Case Law—The Supreme Court

School Board of Nassau County, Florida v. Arline[56] is the first Supreme Court decision addressing the issue of handicap discrimination laws and their applicability to contagious diseases. In *Arline* an elementary school teacher filed suit in federal court alleging that the school board dismissed her solely because of her susceptibility to recurrence of tuberculosis. Arline initially contracted tuberculosis at age fourteen. The disease went into remission for twenty years, during which time she became employed at the elementary school. During 1977 and 1978 Arline suffered three relapses, the third of which resulted in her dismissal from the school.

Arline argued that her illness qualified her as a "handicapped" person within the meaning of the Rehabilitation Act. The district court held that Arline was not "handicapped" within the meaning of the Act, and that, even assuming she were, she was not "qualified" to teach elementary school.[57] The court of appeals reversed,[58] holding that those individuals with contagious diseases are within the coverage of the Act.[59]

In affirming the Eleventh Circuit's decision, the Supreme Court found that Arline had a recorded history of impairment due to hospitalization in her youth for tuberculosis, a disease that substantially limited one or more of her major life activities.[60] The Court did not consider whether an asymptomatic carrier of a contagious disease, such as AIDS, could be considered "physically impaired" within the meaning of the Act, or whether such a person, based on contagiousness alone, could be considered "handicapped" within the meaning of the Act.[61] Furthermore, the Court rejected the argu-

54. School Board of Nassau County, Florida v. Arline, 107 S. Ct. 1123, 1132, 94 L. Ed. 2d 307, 322 (1987).

55. Dallas Morning News, June 3, 1988, at 4A, col. 1. This recommendation is contrary to the Reagan administration's position that AIDS legislation should be enacted at state and local levels. *Id.*

56. 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987).

57. 772 F.2d 759, 761 (11th Cir. 1985).

58. *Id.* at 765.

59. *Id.* at 763-64.

60. 107 S. Ct. at 1124, 94 L. Ed. 2d at 308.

61. *Id.* at 1128 n.7, 94 L. Ed. 2d at 315 n.7. It is probable that the Supreme Court's unanswered question in footnote 7 of the *Arline* decision will be the subject of much debate in the legal community. The factual setting concerns whether an individual who is infected but not otherwise physically impaired would be protected from discrimination due to fear of contagion. Leonard, *AIDS in the Workplace*, in AIDS AND THE LAW 109, 112 (Yale AIDS Law Project 1987). One author believes that *Arline* makes it clear that the Supreme Court would consider these individuals as handicapped within the meaning of the Rehabilitation Act. *Id.* at 113. Whether these individuals would be considered handicapped within the meaning of state and local disability laws depends on the wording of the statute, the statute's legislative history, and administrative and judicial interpretation of the statute. *Id.*

On March 2, 1988, Congress enacted the Civil Rights Restoration Act of 1987, Pub. L. No.

ment that fear of a disease's contagious effects on others is a legitimate ground for termination.[62]

100-259, 102 Stat. 28 (1988). This new piece of legislation contains an amendment purporting to clarify questions that arise with handicapped individuals in the employment context. *Id.* at 31. The amendment itself amends the definition of "handicapped individual" found in section 706(8) of the Rehabilitation Act of 1973 by adding the following text after paragraph (B):

> (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.

Id. at 31-32 (emphasis added).

The implications of this amendment are not clear. One author believes this new legislation will have "some impact on inclusion of AIDS as a 'handicap' under many anti-discrimination statutes." Zellner, *supra* note 35, at 4. The import of the author's statement is not even clear. Some scholars believe the amendment answers the Supreme Court's unanswered question in footnote 7 of *Arline*. Interview with Tom Mayo, Professor of Law, Southern Methodist University (Sept. 13, 1988). What would constitute a direct threat to the health and safety of others would be a job-specific determination. An infected chef may impose a direct threat on the health and safety of those consuming his dishes, whereas an infected bank teller most likely would not impose such a direct threat on co-workers and customers.

Most importantly, the amendment does not refer to the employer's duty to provide reasonable accommodation. Shall we imply a duty to reasonably accommodate infected employees? Must the direct threat be unavoidable? By excluding infections and contagious conditions from the definition of "handicap," the amendment could be read as negating the duty, imposed by the substantive portion of § 504, to provide reasonable accommodation. The legislative history of the amendment, however, supports a different reading. According to the Senate and House floor managers, co-sponsors of the legislation, and even opponents of the legislation, the amendment to § 504 was intended to codify the *Arline* decision, to extend the holding in *Arline* to infected and contagious persons who are asymptomatic, and to clarify the duty of employers to consider reasonable accommodation in determining whether an employee poses a "direct threat" to others. *See, e.g.*, 134 CONG. REC. S256-57 (Jan. 28, 1988) (comments of Sen. Harkin & Sen. Humphrey); *id.* at S723 (Feb. 4, 1988) (comments of Sen. Cranston); *id.* at S772 (Feb. 16, 1988) (comments of Sen. Inouye); *id.* at S1738-40 (Mar. 2, 1988) (comments of Sen. Kennedy, Sen. Weicker & Sen. Harkin); *id.* at S2403, 2416 (comments of Sen. Hatch); *id.* at H566-68 (Mar. 2, 1988) (comments of Rep. Hawkins); *id.* at H583-84 (Mar. 2, 1988) (comments of Rep. Edwards); *id.* at H1064-65 (comments of Rep. Hawkins; exchange of letters between Sen. Harkin and Reps. Hawkins and Edwards). *See generally* C. Feldblum, Civil Rights Restoration Act of 1988 Coverage of Contagious Diseases Under Section 504 (1988) (unpublished paper prepared by American Civil Liberties Union Foundation, AIDS and Civil Liberties Project; copy on file with the *Southwestern Law Journal*).

At first blush some scholars may interpret this amendment as overruling *Arline*. By reviewing the Senate Report accompanying the Civil Rights Restoration Act, one could argue that this is not the proper interpretation. S. REP. NO. 100-64, 100th Cong., 2d Sess. 3 (1988). The Senate report speaks of rejecting the Humphrey amendment, an amendment that would have reversed the decision of *Arline*. *Id.* at 29. If the committee rejected such a version of the amendment, then logically the approved version of the amendment must not reverse *Arline*. If the amendment does not reverse *Arline*, then it must fill the gap left unanswered by the Supreme Court in footnote 7. Arguably Congress would not have enacted an amendment that merely repeated the holding of *Arline*.

The amendment also does not mandate that an infected or contagious individual display physical manifestations of the disease. Does this indicate that a contagious individual with no physical manifestations of the disease, who does not constitute a direct threat, or who is able to perform the duties of the job *will* be considered handicapped? Will an infected person displaying no physical manifestations of the disease *not* be considered handicapped if that person does not pose a direct threat to the health and safety of others? There is no clear answer.

62. 107 S. Ct at 1129-30, 94 L. Ed. 2d at 319. The Court stated that the Act replaces fearful reactions with well-reasoned and medically sound judgments when considering whether a contagious handicapped individual is "otherwise qualified" to continue working. *Id.* The

While the particular facts of *Arline* limited the holding to the contagious disease of tuberculosis, the Court's reasoning can apply reasonably and persuasively to AIDS cases. If federal and state courts[63] follow the reasoning of *Arline*, finding that AIDS and related conditions are "handicaps" within the meaning of the Rehabilitation Act, the likely effect will be protection from discrimination for those AIDS victims who are otherwise qualified to continue their employment.

Despite *Arline*'s interpretation as support for AIDS victims, two differences exist that may deter a federal court from following such a line of reasoning. First, tuberculosis is a disease the medical community has known for a relatively long period of time and it has firmly established sources of transmission.[64] The medical data concerning AIDS, on the other hand, is constantly undergoing changes as society becomes better educated in the causes of AIDS and the sources of AIDS transmission.[65] Second, since AIDS was not a known disease at the time the Rehabilitation Act drafters considered the Act's range of coverage, Congress at least arguably did not intend to extend the Act's coverage to a disease that did not then exist.[66]

C. *Other Federal Cases*

In December 1986, a federal district judge in California held in *Thomas v. Atascadero Unified School District*[67] that AIDS is a handicap within the meaning of the Rehabilitation Act.[68] Ryan Thomas, a child with AIDS, bit a fellow classmate, with the result that the school voted to bar Thomas from attending class. The judge found that the law required the school to reasonably accommodate the child and also found Thomas qualified to attend class.[69] The judge granted Thomas's motion for preliminary injunction, ordering the school to readmit the child based on his classification as a handicapped individual entitled to protection from discrimination under the Rehabilitation Act.[70]

Another federal case, *Shuttleworth v. Broward County Office of Budget &*

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test of whether a contagious handicapped person is "otherwise qualified," consists of a reasonable medical judgment based on the nature, duration, and severity of the risk, the probability of transmission with resulting harm, and whether, based on these medical findings, the employer is able to reasonably accommodate the employee. *Id.* at 1130-32, 94 L. Ed. 2d at 320-22.

63. Some states modeled their discrimination statute after the federal Rehabilitation Act, thereby enabling those states to follow the reasoning of courts interpreting the federal statute. G. Portela, *supra* note 22, at 17. *See* Leonard, *supra* note 2, at 691 n.39 (list of thirteen jurisdictions that have employment discrimination statutes similar to federal Rehabilitation Act).

64. G. Portela, *supra* note 22, at 14.

65. *Id.*

66. *Id.*

67. 662 F. Supp. 376, 381 (C.D. Cal. 1987).

68. *Id.* at 381.

69. *Id.* at 381-82.

70. *Id.* at 383. One significant aspect of this case is that the court placed the burden upon the school to prove danger of transmission, and not upon the child to show that no danger existed. *See Handicap Discrimination, Federal Judge Terms AIDS a Handicap Under Vocational Rehabilitation Act*, 1 AIDS Pol'y & L. (BNA) No. 22, at 1, 2 (Nov. 19, 1986).

Management Policy,[71] presented the first time that an employee terminated for having AIDS filed suit in the United States.[72] Broward County, Florida, fired Shuttleworth from his position as a budget analyst three months after a positive AIDS diagnosis. The Florida Commission on Human Relations had previously ruled in December 1985 that AIDS is a protected handicap in the employment setting.[73] After the administrative decision, Shuttleworth filed suit in federal court, alleging violation of his rights to due process and equal protection under both the federal[74] and state[75] constitutions, as well as the federal disability discrimination statute.[76] The parties settled out of court, the County agreeing to reinstate Shuttleworth and pay him $196,000, which included back pay, medical bills, attorney fees, and insurance reinstatement.[77]

Part of the difficulty concerning the definition of handicapped under the Rehabilitation Act stems from the conflicting opinions of the Department of Justice and the American Medical Association (AMA). In June of 1986 the Department of Justice issued an opinion on section 504 of the Rehabilitation Act,[78] stating that employment discrimination based on fear of contagion, whether real or perceived, is permissible discrimination that the Act does not prohibit.[79] Medical and legal authorities question the Department's opinion,[80] and the Supreme Court rejected this view in the *Arline*[81] decision.

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71. 639 F. Supp. 654 (S.D. Fla. 1986).

72. G. Portela, *supra* note 22, at 15.

73. Shuttleworth v. Broward County Office of Budget & Mgt. Pol., FCHR No. 85-0624, Dec. 11, 1985.

74. U.S. CONST. amend. XIV, § 1.

75. FLA. CONST. art. I, § 2 (1968, amended 1974).

76. 29 U.S.C. § 794 (Supp. IV 1986).

77. *Handicap Discrimination, Settlement Reached in Landmark Bias Suit*, 1 AIDS Pol'y & L. (BNA) No. 24, at 1 (Dec. 17, 1986). Abby Rubenfeld, managing attorney for Lambda Legal Defense and Education Fund, characterized the settlement as important precedent expressing public opinion. Rubenfeld typified the settlement as an admission by the county that they were wrong. *Id.* at 2.

78. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C.A. § 794 (West Supp. 1988)). Section 504 of the Rehabilitation Act was the section covering employers who receive federal financial assistance. *Id.*

79. Opinion Memorandum, U.S. Dep't of Justice, Office of Legal Counsel (June 20, 1986), 55 U.S.L.W. 2009-10 (July 1, 1986). The Justice Department's underlying rationale is that the ability to transmit a disease (contagion) is not a handicap; therefore, an employment decision based on fear of transmission does not violate the statute. *Id.*

80. Michael Berne, a health law attorney with the New York firm of Baer, Marks, and Upham predicted rejection of the Department's opinion based on his belief that the opinion was drafted merely as a means to serve a political end. *Lawyers, Legislators See Justice Department Setback*, 2 AIDS Pol'y & L. (BNA) No. 4, at 4 (Mar. 11, 1987). The Consortium for Citizens with Developmental Disabilities, the Leadership Conference on Civil Rights, and Reps. Henry Waxman (D-Cal.) and Ted Weiss (D-N.Y.) sent a letter to Attorney General Edwin Meese requesting withdrawal of the Department's opinion. The letter argued that if the Department's reasoning were accepted, it would create a major loophole in employment discrimination law, allowing the precise fear and irrationality the Rehabilitation Act intended to redress. *Discrimination, Justice Urged to Rescind Opinion*, 1 AIDS Pol'y & L. (BNA) No. 15, at 5 (Aug. 13, 1986). In addition, on Mar. 4, 1987, Rep. William Dannemeyer (R-Cal.) introduced H.R. 1396, 100th Cong., 1st Sess. (1987) as an attempt to adopt legislation to override the *Arline* decision by excluding individuals with contagious diseases from the definition of handicapped individuals found in the Rehabilitation Act of 1973. *Lawyers, Legislators See Justice Department Setback, supra*, at 4. The American Bar Association requested that Assis-

The AMA in its amicus curiae brief in the *Arline* case argued that the Department of Justice's opinion was incorrect as a matter of law.[82] The AMA argued that the Department of Justice's treatment of contagious diseases, distinguishing between the effect of the impairment on the individual and the effect on third parties, is erroneous.[83] The AMA proffered that it is the impairment itself that constitutes the handicap,[84] not merely its effects upon the individual.[85]

In a recent Ninth Circuit case, *Chalk v. United States District Court Central District of California*,[86] the United States Court of Appeals stated that AIDS may qualify as a handicap under the federal Rehabilitation Act.[87] Chalk worked for the county as a teacher. Subsequent to his AIDS diagnosis, his doctors consented to his return to the classroom. The county vetoed Chalk's return to the classroom and transferred him to an administrative position. Chalk sued the county based upon a violation of the federal Rehabilitation Act and requested injunctions against his exclusion from the classroom. The Ninth Circuit granted Chalk's preliminary injunction and approved his return to the classroom.[88]

D. State Legislation in Texas

Generally, the basis of most state statutes protecting employees suffering from AIDS are laws prohibiting discrimination against the handicapped or the disabled. Careful attention to the definition and interpretation of "handicapped" within each statute is necessary to ensure that AIDS falls within the definition.[89] Forty-four states and the District of Columbia have enacted statutes that forbid discrimination by employers in the private sector due to handicap.[90] In some states, the definition is modeled after that found in the federal Rehabilitation Act.[91] In addition to those states with general laws protecting the handicapped, California, Florida, Wisconsin, and most recently Texas, have enacted specific laws containing various prohibitions on

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tant Attorney General Charles J. Cooper in the Justice Department's Office of Legal Counsel issue a revised memorandum clarifying the proper interpretation of § 504 of the Act as espoused by the Supreme Court in *Arline*. McMillion, *supra* note 45, at 123.

81. 107 S. Ct. at 1123, 94 L. Ed. 2d at 307.

82. Brief of the American Medical Association as Amicus Curiae in Support of Petitioners at 11-12, Arline v. School Board, 772 F.2d 759 (11th Cir. 1985) (No. 85-1277).

83. *Id.* at 24-25.

84. The AMA defines handicap as "an impairment that causes certain limiting effects on life activities." *Id.* at 24.

85. *Id.*

86. 840 F.2d 701, 707 (9th Cir. 1988).

87. *Id.*

88. *Id.*

89. For example, Kentucky's discrimination statute specifically excludes coverage for persons afflicted with communicable diseases, thereby appearing to exclude AIDS as well. KY. REV. STAT. ANN. § 207.140(2)(c) (Michie/Bobbs-Merrill 1982).

90. G. Portela, *supra* note 22, at 17; *see also* Leonard, *supra* note 5, at 21 n.52 (discussing new legislation restricting employment discrimination on the basis of physical handicap or disability).

91. G. Portela, *supra* note 22, at 17; *see* Leonard, *supra* note 2, at 691 n.39 (list of thirteen jurisdictions that modeled their discrimination statutes after the federal Rehabilitation Act).

the uses of blood tests for AIDS.[92] Local ordinances enacted in a particular city may also serve as a guide.[93]

The Texas Commission on Human Rights Act (TCHRA)[94] prohibits discrimination in employment based on race, color, handicap, religion, sex, national origin, or age.[95] Section 2.01(7)(A) defines "handicapped person" as one who is mentally or physically handicapped, which includes mental retardation, hearing problems, speech problems, visual impairment, being crippled, and any other health problem requiring special ambulatory devices or services.[96] In addition, section 2.01(7)(A) contains specific exclusions from coverage for persons addicted to drugs or alcohol.[97] Section 2.01(7)(B) provides a similar definition for "handicap."[98]

The attorney general of Texas recently issued an opinion clarifying the handicap standing requirements for filing an employment discrimination complaint under article 5221k of the TCHRA.[99] The opinion stated that the commission's interpretation of a handicap, as expressed in section 2.01(7), was not limited to categories listed within the statute.[100] The attorney gen-

92. CAL. HEALTH & SAFETY CODE § 199.20 (West 1987); FLA. STAT. ANN. § 381.606 (West 1986); TEX. REV. CIV. STAT. ANN. art. 4419b-1, §§ 9.01-.06 (Vernon Supp. 1988); WIS. STAT. ANN. § 103.15 (West 1987).

93. On Dec. 21, 1986, Austin, Texas, became the first city outside of California to ban AIDS-based discrimination. The Austin City Council approved a broad ordinance prohibiting employers with at least sixteen employees, employment agencies, and labor unions from discriminating against employees with AIDS-related complex, employees who tested positive but do not have the disease, and those merely perceived as having AIDS or presenting a substantial risk of contracting the disease. *Discrimination, Broad Anti-Bias Ordinance Approved by Austin Council*, AIDS Pol'y & L. (BNA) No. 25, at 1 (Dec. 31, 1986). Los Angeles, San Francisco, West Hollywood, and Hayward, California, all passed similar ordinances prohibiting discrimination in employment, housing, and public accommodations. *Id.* For a brief discussion of three California ordinances, see G. Portela, *supra* note 22, at 19-20.

94. TEX. REV. CIV. STAT. ANN. art. 5221k (Vernon 1987 & Supp. 1988).

95. *See id.* § 5.01(1).

96. *See id.* § 2.01(7)(A). Section 1.04(b) provides a specific rule of construction, stating that the phrases "because of handicap" or "on the basis of handicap" refer to discrimination because of a health condition that does not impede that person's ability to perform the essential tasks of the job in question. *See id.* § 1.04(b). This rule of construction is very similar to the "otherwise qualified" requirement found in the federal Rehabilitation Act. Elstner v. Southwestern Bell Tel. Co., 659 F. Supp. 1328, 1346 (S.D. Tex. 1987).

97. TEX. REV. CIV. STAT. ANN. art. 5221k, § 2.01(7)(A) (Vernon 1987).

98. *See id.* § 2.01(7)(B). This section defines handicap as "a condition either mental or physical *that includes* mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health impairment that requires special ambulatory devices or services, as defined in Section 121.002(4), Human Resources Code . . . ." *Id.* (emphasis added). This section expressly excludes drug and alcohol addiction from coverage. *Id.*

99. Op. Tex. Att'y Gen. No. JM-648 (1987). A person seeking relief under the TCHRA may seek administrative review of the claim by filing a complaint with the commission. TEX. REV. CIV. STAT. ANN. art. 5221k, § 6.01(a) (Vernon 1987). If the commission determines that a reasonable basis exists for believing the employer has unlawfully discriminated against the claimant, and if the administrative procedures proved unsuccessful, the commission may then seek judicial action on behalf of the claimant, permitting the claimant to intervene in such civil action. *See id.* § 7.01(a).

100. Op. Tex. Att'y Gen. No. JM-648 (1987). The commission defines "mental or physical handicapping condition" as "a permanent condition which may or may not be controlled by medication or a corrective device and which may or may not impair a person's ability to perform a particular job." *Id.*

eral placed persons with chronic illnesses and diseases within the necessary standing requirements of the TCHRA.[101]

The attorney general's analysis began by emphasizing the legislative intent.[102] Based on an analysis of the commission's use of the words "including" and "include" in the statute, the attorney general determined that the usual meaning of these words implies an incomplete enumeration.[103] The attorney general's opinion then examined the specific exceptions of persons addicted to drugs, controlled substances, and alcohol from the definitions of "handicapped person" and "handicap."[104] The attorney general relied on *State v. Richards*,[105] in which the Texas Supreme Court characterized the use of specific exclusions as a common rule of statutory construction whereby the legislative intent is to include all other conditions not specifically excluded.[106] The opinion considered the interpretation of the statute by the agency charged with its administration[107] and concluded that the agency had properly interpreted the definitions contained in section 2.01(7) as merely a partial list of conditions that the TCHRA covers.[108]

The attorney general's opinion then focused on whether employer discrimination based on a perception that the employee is handicapped is actionable under the TCHRA.[109] The opinion determined that the TCHRA encompassed the commission's interpretation, which allowed a cause of action based on a perception that the claimant is handicapped, whether or not the person is in fact handicapped.[110] The attorney general pointed out that prior to September of 1983, section 121.003(f) of the Human Resources Code[111] employed the term "handicapped person" in prohibiting such discrimination by an employer.[112] The TCHRA replaced section 121.003(f), prohibiting such discrimination against "an individual."[113] The attorney general gave great weight to the plain language of the TCHRA, granting standing to those employees discriminated against on the basis of an em-

101. *Id.*

102. *Id.*

103. *Id.* The opinion discussed Republic Ins. Co. v. Silverton Elevators, Inc., 493 S.W.2d 748, 752 (Tex. 1973), and Peerless Carbon Black Co. v. Sheppard, 113 S.W.2d 996, 997 (Tex. Civ. App.—Austin 1938, writ ref'd), to support the well-settled rule that the words "include" and "including" are generally used as terms of enlargement rather than of restriction. Op. Tex. Att'y Gen. No. JM-648 (1987).

104. Op. Tex. Att'y Gen. No. JM-648 (1987).

105. 301 S.W.2d 597, 600 (Tex. 1957).

106. Op. Tex. Att'y Gen. No. JM-648 (1987).

107. *Id.* The opinion relied upon Heard v. City of Dallas, 456 S.W.2d 440, 444 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.), and Armco Steel Corp. v. Texas Employment Comm'n, 386 S.W.2d 894 (Tex. Civ. App—Austin 1965, writ ref'd n.r.e.). Op. Tex. Att'y Gen. No. JM-648 (1987).

108. Op. Tex. Att'y Gen. No. JM-648 (1987).

109. *Id.*

110. *Id.*

111. Human Resources Code, ch. 352, § 1, 1975 Tex. Gen. Laws 939, *repealed by* Act of 1983, ch. 7, § 10.03(c), 1983 Tex. Gen. Laws 57 (prior to Sept. 1983, § 121.003(f) of Human Resources Code).

112. Op. Tex. Att'y Gen. No. JM-648 (1987).

113. *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 5221k, §§ 5.01-.03 (Vernon 1987)).

ployer-perceived handicap, whether or not the employee is handicapped.[114]

The attorney general's opinion then referred to the Supreme Court decision in *School Board of Nassau County, Florida v. Arline*,[115] which held that the federal Rehabilitation Act does not exclude a person with tuberculosis, a contagious disease, merely because contagion constituted one of the symptoms of the impairment.[116] The Supreme Court opinion added that discrimination against employees who are not "otherwise qualified" to continue working because of an unreasonable risk of contagion based upon the sound medical judgment of a public health official, may constitute permissible discrimination not violative of the federal statute.[117] Based on the above opinion, the attorney general assumed the same line of reasoning would apply when considering the state discrimination statute.[118]

Though not explicitly providing coverage for persons with AIDS, the TCHRA seems to afford protection against discrimination for those individuals afflicted with the disease as long as they are physically able to meet the requirements of their job. Likewise, if an employer perceives those individuals as having AIDS when in fact they do not, the statute also arguably protects them. The position of the Texas Commission on Human Rights strengthens this position, as does the United States Supreme Court's ruling in *Arline*.[119]

E. Texas Case Law

A recent Texas case dealing with the issue of AIDS in the workplace provides further guidance. In *Little v. Bryce*[120] discharged butcher Steven Little brought an action for slander against a co-worker, and an action for wrongful termination against his employer based on his employer's false perception that Little had AIDS. Little apparently told Bryce, a co-worker at a grocery store, that one of his roommates underwent an AIDS test. Little alleged that

114. Op. Tex. Att'y Gen. No. JM-648, at 2946 (1987). The attorney general relied on Carter v. Gulf Oil Corp., 699 S.W.2d 907, 910 (Tex. App.—Beaumont 1985, no writ), which determined that in order to grant standing, the former statute required a determination of whether the claimant was a "handicapped person," while the TCHRA requires only a determination of whether an employer did not hire the individual "because of handicap." Op. Tex. Att'y Gen. No. JM-648, *supra*, at 2945-46. The attorney general also focused on Lunsford v. City of Bryan, 297 S.W.2d 115, 117 (Tex. 1957), where the court stated that the employer's subjective reason for discriminating against the employee, not the precise status of the employee, is the controlling factor. Op. Tex. Att'y Gen., *supra*, at 2946.

115. 107 S. Ct. 1123, 1132, 94 L. Ed. 2d 307, 316 (1987). For a discussion of *Arline*, see *supra* notes 56-66 & accompanying text.

116. Op. Tex. Att'y Gen. No. JM-648 (1987) (discussing *Arline*).

117. *Id.*

118. *Id.*

119. Determining that AIDS is a handicap within the meaning of the statute does not conclusively solve a potential claimant's problems, or allow the claimant immediate relief. Most state and federal employment discrimination statutes contain provisions that exclude coverage for the handicapped individual if (1) the person is not physically able to meet the job requirements, (2) the person's presence at work is a threat to his or her own health and safety, as well as to co-workers, or (3) the employer is unable to reasonably accommodate the handicapped person without facing an undue burden. Leonard, *supra* note 5, at 25-26.

120. 733 S.W.2d 937 (Tex. App.—Houston [1st Dist.] 1987, no writ).

Bryce told other co-workers and supervisors that it was possible Little had contracted AIDS and had been exposed to the virus by his roommate. When the supervisor called Little to his office he presented Little with two alternatives—voluntarily resign, or face termination due to health reasons. Little, denying he had AIDS, chose the latter, and subsequently sought $30,000 in actual damages and $300,000 in punitive damages for Bryce's slanderous statements. Little alleged wrongful termination in violation of the public policy of the state, as expressed in the TCHRA, claiming he was a handicapped person within the meaning of the statute.

The Houston court of appeals ruled that the district court erred in granting a summary judgment to the employer, and remanded the case for a trial on the merits.[121] Writing for the majority, Justice Sam Bass considered only the procedural matters of the case, stating that the function of an intermediate appellate court is to discuss only those matters that are necessary to and dispositive of the appeal.[122] In a concurring opinion, Justice Levy employed a somewhat different approach, considering the merits of the case at length.[123]

Justice Levy began his concurrence by tracing the evolution of the "employment-at-will" doctrine, noting numerous out-dated reasons for its existence.[124] Justice Levy then discussed article 5221k of the TCHRA as a legislatively created exception to the at-will doctrine.[125] The concurrence turned next to the United States Supreme Court's decision in *Arline*,[126] noting the Court's approval of protection for individuals who are physically able to function on the job, but who are perceived as handicapped and find it difficult to continue to work as a result of negative co-worker reaction.[127] Justice Levy stressed the necessity of conducting a fair inquiry in order best to serve the employee's interest in showing that he or she does not have the disease or that the risk of infection is slight, as well as the public's interest in freedom from contagion.[128]

Justice Levy criticized the majority's deliberate refusal to provide Little

121. *Id.* at 939. District Judge Eugene Chambers dismissed the suit before trial, stating that Little failed to show malice on the part of the employer. *Id.* at 938. On appeal, Little argued that the employer failed to prove its entitlement to the protection of a qualified privilege. *Id.* The court of appeals sustained this point of error. *Id.*

122. 733 S.W.2d at 938. Justice Bass, in commenting on Justice Levy's concurring opinion, discouraged such expression of personal viewpoints on issues of special interest that the majority did not consider. *Id.* at 939. Justice Bass stated that a discussion of those issues should evolve only after presentation of the evidence in a trial on the merits. *Id.*

123. *Id.*

124. *Id.* at 939-41. At one point, Justice Levy contrasted the antiquated at-will doctrine with modern notions of fairness and decency. Justice Levy restated the relevant facts of the case: Little's three-year outstanding personnel record, the employer's failure to observe normal termination procedures, the realization that neither Little nor his roommate were actually afflicted with AIDS, and the employer's failure to make even a minimal effort to investigate or verify Little's purported illness. *Id.* at 941.

125. *Id.*

126. 107 S. Ct. at 1123, 94 L. Ed. 2d at 315. For a discussion of *Arline* see *supra* notes 56-66 and accompanying text.

127. *Little*, 733 S.W.2d at 941-42.

128. *Id.* at 942.

with guidance on his cause of action.[129] This approach, Justice Levy believed, directly conflicted with notions of judicial economy.[130] Justice Levy expressed his desire that the majority address Little's substantive challenges, rather than reversing on a procedural matter and thus perhaps requiring the court to face the same issues on appeal in the future.[131] Justice Levy noted that AIDS discrimination is an intense, continuing, and expanding matter of public concern.[132] Together, Justice Levy's concurrence and the *Arline* decision should give an employee perceived as afflicted with AIDS some assurance that he or she will receive protection against unlawful discrimination under the TCHRA.[133]

III. EMPLOYEE AND APPLICANT TESTING

In response to the AIDS crisis in the workplace, many employers are fighting back by screening applicants as well as current employees for the presence of the AIDS virus.[134] The legal implications of requiring AIDS testing as a condition of future and continuous employment are of considerable importance to employers and their attorneys. Some significant questions that employers commonly ask are whether they can test applicants and employees for AIDS, whether they can refuse to hire an applicant based on the test result if the applicant tested positive, and whether an employer can terminate an employee based on a positive AIDS test result.[135]

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129. *Id.* at 947.

130. *Id.*

131. *Id.* at 944.

132. *Id.* at 947.

133. Employees must nevertheless give proper attention to employer defenses that may justify otherwise unreasonable discrimination against AIDS victims. Section 5.07 of the TCHRA provides an enumeration of certain employment practices that are not considered unlawful. TEX. REV. CIV. STAT. ANN. art. 5221k, § 5.07 (Vernon 1987). Section 5.07(a)(3) indicates that an employer may employ varying standards of compensation, terms, conditions, or privileges of employment under some form of legitimate employee benefit plan, so long as the plan is not merely a pretext for discrimination. *Id.* Section 5.07(a)(7) allows an employer to engage in discrimination provided the employer can prove that such practice is not intended to contravene directly the prohibitions of the TCHRA and is justified by a business necessity. *Id.*; *see* Elstner v. Southwestern Bell Tel. Co., 659 F. Supp. 1328, 1346 (S.D. Tex. 1987) (business necessity justifies telephone company's requirement that service technicians be able to climb telephone poles). In addition, *Elstner* holds that an employer may rebut a claimant's prima facie case by coming forward with evidence that the employer did not discriminate against the employee "because of handicap" or "on the basis of handicap." *Id.* at 1345.

134. G. Portela, *supra* note 22, at 41-42.

135. R. Gaswirth, AIDS—An Update for Employers 19-21 (Sept. 22, 1986) (on file with the *Southwestern Law Journal*). Related questions not covered herein include: what steps should an employer take if employees refuse to work with an employee who tested positive for AIDS? Does an employer have a duty to warn other employees if one employee tested positive for AIDS? If an employer hires an applicant despite a positive test result, can the employer be sued for negligent hiring? Interview with Ron Gaswirth, Attorney with Gardere & Wynne, Dallas, Texas (Nov. 1987). On Sept. 2, 1986, a Chicago woman filed a $12 million dollar suit for negligent hiring against American Airlines after a ticket agent who subsequently tested positive for the AIDS virus bit her while she attempted to board a flight. At the time, the airlines did not employ any method of medically screening employees, instead handling the problems on a case-by-case basis. *Employer Liability, Passenger Sues American Airlines Over Bite*, AIDS Pol'y & L. (BNA) No. 17, at 2 (Sept. 10, 1986). For a discussion of prohibited and permissible employer actions, see Zellner, *supra* note 35, at 6-7, 9-10.

A. Methods of Testing

Currently, no single test exists for determining whether or not a person has AIDS.[136] Diagnostic tests initially licensed by the U.S. Food and Drug Administration for screening blood donations may, however, help in diagnosing AIDS.[137] The tests most commonly used, the HIV[138] and ELISA[139] tests, detect the presence of the AIDS virus based on a finding of related antibodies.[140] These tests merely indicate the presence of antibodies, and not the existence of the underlying disease that the virus causes.[141] These tests are not tests for AIDS and have no prognostic value.[142]

The accuracy of either the HIV or ELISA test is questionable.[143] Since the test merely indicates the presence of antibodies, false negative results tend to occur.[144] This may result when exposure to the virus is so recent that the virus is still in the incubation period, so that the body has yet to form the antibodies.[145] False positive results may also occur for a variety of reasons; for example, other blood substances may lead to a positive test result.[146] In addition, a false positive may result when an individual who successfully defeated the virus still retains traces of the antibodies in his or her blood.[147]

In the case of an accurate positive result, it is important to remember that the test merely documents exposure to AIDS, and does not conclusively indicate that the individual will actually develop AIDS.[148] Due to the inaccuracy of the test, critics recommend implementing two ELISA tests.[149] Supplementary tests such as the Western Blot or the IFA (immunofluorescence assay) should follow two positive results on the ELISA

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136. Mass, *supra* note 3, at 69.

137. Leonard, *supra* note 12, at 41.

138. Human T-Cell Lymphotropic Virus-Type III.

139. Enzyme-Linked Immunosorbent Assay.

140. Sicklick & Rubinstein, *supra* note 21, at 9.

141. *Id.*

142. *Id. See also* Leonard, *supra* note 12, at 42; Mass, *supra* note 3, at 70. The test is most useful in detecting those people who are able to spread the disease. Reidinger, *A Question of Balance, Policing the AIDS Epidemic*, 73 A.B.A. J. 69, 72 (1987).

143. Leonard, *supra* note 12, at 41.

144. Sicklick & Rubinstein, *supra* note 21, at 9; Leonard *supra* note 12, at 41; G. Portela, *supra* note 22, at 40. A false negative result may occur when exposure to the AIDS virus is so recent that the test does not indicate the presence of the virus because the antibodies have not yet formed in the bloodstream. G. Portela, *supra* note 22, at 40.

145. *See supra* note 32 and accompanying text.

146. Leonard, *supra* note 12, at 41; G. Portela, *supra* note 22, at 40-41.

147. Leonard, *supra* note 12, at 41; G. Portela, *supra* note 22, at 41. The U.S. Food and Drug Administration found that the number of false positive results increase as testing within low-risk groups such as the general employee population increases. G. Portela, *supra* note 22, at 41.

148. Stein, *AIDS—An Employer's Dilemma*, 7 FLA. B.J. 55, 55 (1986). The American Medical Association, however, recently indicated that it is probable that 100% of those infected with the AIDS virus will eventually develop AIDS. *Special Report, AMA Forum Told That HIV May Always Lead to AIDS*, 2 AIDS Pol'y & L. (BNA) No. 8, at 6 (May 6, 1987).

149. Stein, *supra* note 148, at 55.

test.[150]

B. Mandatory Testing

The United States Armed Forces currently tests more than three million employees for the AIDS virus and the Department of State tests its Foreign Service employees.[151] Certain factors, not applicable in other employment contexts, justify mandatory AIDS testing in the Armed Services. First, the military often administers vaccines containing live virus to personnel in the event that the military will assign them to a country where the risk of contracting that particular disease is high.[152] In order to prevent inoculating a live virus into a person whose immune system is defenseless, the military uses mandatory AIDS tests.[153] Secondly, due to the need for emergency blood transfusions on the battlefield, mandatory AIDS tests are warranted to ensure a safe blood supply during wartime.[154]

In contrast to a public employer such as the Armed Forces, private employers are not able to justify mandatory testing on the same grounds. Moreover, the Food and Drug Administration's licensing restrictions on the AIDS test and the passage of stringent confidentiality and antidiscrimination laws may make it difficult for an employer lawfully to require such testing or to examine the test results without permission of the employee.[155] Some companies engaged in the food preparation business attempt to justify mandatory AIDS testing on the grounds that the AIDS test is merely one of several tests given to all applicants in order to expose the presence of contagious diseases.[156] Some companies extend this rationale to include the position that a positive result from any of the tests administered will not necessarily result in termination, but rather may result in a different task or job assignment.[157]

Opposition to mandatory AIDS-screening is widespread. The United States Department of Health and Human Services guidelines on AIDS in the workplace stressed that AIDS is not transmitted by casual contact, and for this reason, did not recommend routine AIDS tests.[158] One of the Surgeon General's Reports on AIDS advised that mandatory AIDS testing is not necessary, pointing out the possibility of unmanageable procedures, cost prohibitions, and the false sense of security that a false negative result produces.[159] More recently, officials at the Department of Health and Human

150. Gostin & Curran, *AIDS Screening Confidentiality, and the Duty to Warn*, 77 AM. J. PUB. HEALTH 361, 361 (1987).

151. Reidinger, *supra* note 142, at 72. The American Federation of Government Employees recently filed suit to end these testing programs. *Id.*

152. G. Portela, *supra* note 22, at 42.

153. *Id.*

154. *Id.*; Reidinger, *supra* note 142, at 72.

155. Leonard, *supra* note 12, at 42.

156. G. Portela, *supra* note 22, at 43.

157. *Id.*

158. *Recommendations, supra* note 6, at 681.

159. SURGEON GENERAL, *supra* note 7, at 33. The Surgeon General also encouraged vol-

Services reemphasized their opposition to screening employees for AIDS.[160] New Public Health Service guidelines favor prohibition of compulsive testing in most instances, and indicate that stringent confidentiality and antidiscrimination assurances are vital to the encouragement of voluntary testing.[161]

Absent a specific statute concerning AIDS testing, employers and their attorneys may seek guidance from the relevant state handicap discrimination statute. If AIDS is considered a handicap within the meaning of the state discrimination statute, an employer will not be allowed to discriminate based on the test results.[162] An employer will find it extremely difficult to justify adverse employment action against an employee who is capable of performing his or her job, absent a reasonable likelihood of harm to the employee or co-workers.[163] Requiring an AIDS test as a condition of employment may prove to be conclusive evidence of an employer's discriminatory behavior against AIDS victims.[164] This is especially true in instances where a nonmedical employer has no legitimate need to know whether a person has AIDS.[165]

C. *Statutory Authority in Texas*

Effective September 1, 1987, the Texas Legislature amended the Communicable Disease Prevention and Control Act (the Act),[166] implementing article 9 entitled "Tests for Acquired Immune Deficiency Syndrome and Related Disorders."[167] Sponsors of the bill that became law believe that article 9 is a balanced approach towards AIDS-related issues.[168] Since Texas is ranked fourth among those states with the largest number of confirmed cases of AIDS, sponsors of the bill believed Texas needed to confront the problem directly.[169] The desired effect of article 9 is to encourage society to treat AIDS as strictly a public health concern and to disregard any preconceived stigma or bias.[170] Planning for this bill began approximately six to nine months prior to the meeting of the legislature.[171] Most of the ideas for drafting the bill came from policy statements of the Texas Department of

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untary testing by those in a high-risk group. *Id.*; *see also* UNDERSTANDING AIDS, *supra* note 4, at 5.

160. *Employment, HHS Officials Reemphasize Opposition to Screening*, 1 AIDS Pol'y & L. (BNA) No. 8, at 6 (May 7, 1986).

161. *Antibody Testing, Voluntary Tests Endorsed by Public Health Service*, 2 AIDS Pol'y & L. (BNA) No. 16, at 7 (Aug. 26, 1987).

162. Stein, *supra* note 148, at 56.

163. *Id.*

164. Stein, *supra* note 148, at 57.

165. *Id.* In nonmedical employment situations the United States Department of Public Health does not recommend mandatory AIDS testing because casual contact does not transmit AIDS. *Id.* at 59 n.27.

166. TEX. REV. CIV. STAT. ANN. art. 4419b-1 (Vernon Supp. 1988).

167. *Id.* art. 4419b-1, §§ 9.01-.06.

168. Telephone interview with Leslie Friedlander, Administrative Assistant to Rep. Nancy McDonald (Nov. 2, 1987).

169. *Id.*

170. *Id.*

171. *Id.*

Health's Task Force and the federal CDC in Atlanta.[172]

The bill, approved June 17, 1987, essentially prohibits mandatory AIDS testing subject to specific limited exceptions.[173] Section 9.01 of the Act contains definitions for AIDS, HIV, bona fide occupational qualifications, blood bank, and test result.[174] Section 9.02, entitled Tests for AIDS and Related Disorders, contains the specific prohibition against mandatory testing and related exceptions.[175] Section 9.03 concerns the confidentiality and disclosure of test results.[176] Section 9.04 provides an action for civil liability and appropriate remedies for any person injured by a violation of sections 9.02 or 9.03.[177] Sections 9.05 and 9.06 specify the penalty for a violation of section 9.02 and 9.03 respectively.[178]

Section 9.02(a) prohibits any "person or entity" from requiring any other person to submit to any type of an AIDS-related test.[179] Section 9.02(c) provides a narrow exception to the general prohibition found in section 9.02(a), permitting AIDS testing in the event of a sudden and imminent danger to public health and welfare based on sound findings of medical and scientific fact.[180] Emergency rules adopted under section 9.02(c) must meet four additional requirements.[181]

Section 9.02(a)(1) through (5) contain additional exceptions permitting AIDS testing.[182] Section 9.02(a)(1) permits testing as a bona fide occupational qualification where no less discriminatory means exist to satisfy the qualification.[183] Section 9.02(a)(2) allows AIDS testing to screen blood, re-

172. *Id.* These are only a few of the policy statements concerning AIDS that the drafters of the bill used. *Id.*

173. TEX. REV. CIV. STAT. ANN. art. 4419b-l, §§ 9.01-.06 (Vernon Supp. 1988). The Texas Board of Insurance informed the legislature that insurers were not one of the classes excepted from the prohibition on AIDS testing. *Insurance Discrimination, Texas Adopts Emergency Rule Permitting Limited Testing*, 2 AIDS Pol'y & L. (BNA) No. 17, at 1 (Sept. 9, 1987). The board warned that without such an exception, life, health, and accident insurance companies would be forced to cease business activities in Texas. *Id.* As a result, the board adopted an emergency rule permitting insurers to test applicants for exposure to the AIDS virus as long as the insurer conducts testing without discrimination for all applicants in the same actuarial class. *Id.* at 8, col. 2.

174. TEX. REV. CIV. STAT. ANN. art. 4419b-1, § 9.01 (Vernon Supp. 1988).

175. *See id.* § 9.02.

176. *See id.* § 9.03.

177. *See id.* § 9.04.

178. *See id.* §§ 9.05-.06.

179. *See id.* § 9.02(a).

180. *See id.* § 9.02(c).

181. *Id.* Emergency rules adopted under § 9.02(c) must:

> (1) provide for the narrowest application of HIV testing necessary for the protection of public health;
>
> (2) provide procedures and guidelines to be followed by affected entities and state agencies that clearly specify the need and justification for the testing, specify methods to be used to assure confidentiality, and delineate responsibility and authority for carrying out the recommended actions;
>
> (3) provide for counseling of persons with seropositive test results; and
>
> (4) provide for confidentiality regarding persons tested and their test results.

Id.

182. *See id.* § 9.02(a)(1)-(5).

183. *See id.* § 9.02(a)(1). Section 9.02(b) places the burden upon the employer to prove that the test is necessary as a bona fide occupational qualification. *See id.* § 9.02(b).

lated products, organs, or tissues for donative protection.[184] Section 9.02(a)(3) permits AIDS testing if necessary with respect to a person covered under the Act.[185] Section 9.02(a)(4) provides for permissible AIDS testing of residents and clients of residential facilities of the Texas Department of Mental Health and Mental Retardation, subject to two additional requirements.[186] Section 9.02(a)(5) allows AIDS testing if necessary to manage accidental exposure to blood or other bodily fluids, subject to further requirements.[187] Section 9.02(g) provides an additional exception and permits AIDS testing of a patient before undergoing a medical procedure that might expose health care personnel to AIDS, provided adequate time to deduce the test result exists before the procedure.[188]

Section 9.03, Confidentiality and Disclosure of Test Results, prohibits the release of test results except in certain limited situations.[189] The person tested may authorize the release of the test results by written consent.[190] The written authorization must include the identity of the persons to whom disclosure will be made.[191]

The Dallas County AIDS Planning Commission, after six months of preparation, recently submitted its report entitled *A Community Response to AIDS* to the Commissioners Court.[192] The commission divided into seven task forces, each addressing a specific area of concern.[193] The Legal/Ethical Task Force addressed several topics, namely factors affecting the consideration of testing issues.[194] Commenting on prospective testing found in section 9.02(g) of the Act, the Legal/Ethical Task Force pointed out that patients

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184. *See id.* § 9.02(a)(2).

185. *See id.* § 9.02(a)(3). The drafters intent regarding this obscure exception is not clear. This provision will probably not provide any useful guidance due to its impreciseness.

186. *See id.* § 9.02(a)(4). Such testing is permitted if

> (A) the test result would change the medical or social management of the person tested or others who associate with that person; and
>
> (B) the test is conducted in accordance with guidelines that have been adopted by the residential facility or the Texas Department of Mental Health and Mental Retardation, and approved by the department.

Id.

187. *See id.* § 9.02(a)(5).

188. *See id.* § 9.02(g).

189. *See id.* § 9.03.

190. *See id.* § 9.03(d).

191. *Id.*

192. DALLAS COUNTY AIDS PLANNING COMMISSION, A COMMUNITY RESPONSE TO AIDS (1988).

193. *Id.* at v. The seven task forces consist of the Community Resources Task Force, the Education Task Force, the Health Care Task Force, the Hospitals Task Force, the Insurance Task Force, the Legal/Ethical Issues Task Force, and the Public Information Task Force. *Id.* at vii.

194. *Id.* at 7-5. Some comments that the Legal/Ethical Task Force made with respect to testing for antibodies for AIDS are: the testing must have an ethically acceptable purpose; the means used to perform the test and the use of the test results must parallel the tests' purpose; one must give notification that testing will be performed; counseling programs are needed to interpret the test results; confidentiality is needed; AIDS testing is not always accurate; increased testing may divert much needed funds from other AIDS programs; discovering infected persons will not cease the spread of AIDS, therefore re-testing would be necessary to identify those persons subsequently infected. *Id.*

undergoing such procedures may be forced to submit to an AIDS test only if there is ample time to receive the results prior to conducting the medical or surgical procedure.[195] Additionally, section 9.02(g) fails to define "patient" or "health care personnel," and does not indicate the types of facilities to which the provision applies.[196] The task force presumed that section 9.02(g) applies to all institutions having health care personnel at risk where the test results can be obtained prior to conducting the medical procedure.[197]

The Legal/Ethical Task Force then commented on retrospective testing found in section 9.02(a)(5) of the Act.[198] The task force noted that this section is not limited to health care facilities, although the occurrence of accidental exposure to blood is more likely at such a facility.[199] Section 9.02(d) refers back to section 9.02(a)(5) and by its language assumes that subsection (a)(5) is limited to health care agencies and facilities.[200] Section 9.02(d) requires that mandatory testing comply with certain protocols adopted by the agency or facility and these protocols must clearly establish procedural guidelines for testing that respect the rights of those persons involved; the section does not specify what these guidelines are or what rights of those persons involved are supposed to be respected.[201] The task force noted many unanswered issues such as: the failure of the section to specify the types of settings to which section 9.02(a)(5) applies; the failure of section 9.02(d) to specify the types of health care agencies or facilities that are within that section's scope; and the statute's silence regarding procedural guidelines that would sufficiently protect the rights of AIDS-infected persons.[202] The task force assumed that section 9.02(a)(5) applies equally to health care workers and patients who are exposed or infected.[203]

The Legal/Ethical Task Force turned next to section 9.02(a)(2) of the Act, which deals with compulsory testing in donative circumstances.[204] The task force noted that section 9.02(a)(2) does not specify the type of entity that may require such testing.[205] The task force found it conceivable, therefore, that health care facilities, organ banks, and bloodbanks could all implement mandatory testing programs for donative purposes.[206]

The Legal/Ethical Task Force then addressed factors affecting testing in employment.[207] The task force reiterated the applicability of section 9.02(a)(1) of the Act to situations where the test is necessary as a bona fide

195. *Id.* at 7-7.
196. *Id.* at 7-7 to -8.
197. *Id.* at 7-8.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at 7-9.
205. *Id.*
206. *Id.*
207. *Id.* The Legal/Ethical Task Force stated that § 9.02(a)(2) does not mention issues such as informed consent and pre-test or post-test counseling. *Id.*

occupational qualification and no less discriminatory means of satisfying this qualification exists.[208] The task force noted that the Act does not mandate that employers testing employees pursuant to section 9.02(a)(1) conduct pre- or post-testing counseling, nor does the Act address the issue of informed consent.[209]

The Legal/Ethical Task Force then considered factors affecting premarital testing.[210] Section 9.02(e) of the Act provides that when the rate of confirmed positive HIV infection reaches .83 percent, as reported under this Act, the Texas Board of Health must implement emergency rules for compulsory testing for HIV infection as a condition of receiving a marriage license.[211] The task force noted that so far the prevalence rate of confirmed positive HIV infection is well below the .83 percent threshold.[212]

The Legal/Ethical Task Force then addressed factors affecting testing of Texas Department of Mental Health and Mental Retardation (TDMHMR) residents and clients as found in section 9.02(a)(4) of the Act.[213] The task force merely pointed out that section 9.02(a)(4) authorizes testing of these persons, but only if the test results would alter the medical or social management of the person tested or those persons associating with that person, and the tests are implemented in compliance with guidelines of the relevant facility or the TDMHMR and are approved by the Texas Department of Health.[214] The task force stated that regulations concerning section 9.02(a)(4) have yet to be published.[215]

Lastly the Legal/Ethical Task Force examined section 9.02(c) dealing with discretionary testing by the Texas Department of Health (TDH).[216] Section 9.02(c) permits the Texas Board of Health to implement emergency rules for compulsory HIV testing if the commissioner of the TDH files a certificate of necessity with the board, supported by findings of medical and scientific fact, and professing a sudden and imminent threat to public health.[217] While this provision has yet to be employed and no rules or regulations have been drafted, the task force noted that if the board finds it necessary to enact such rules, they must meet four additional requirements found in section 9.02(c).[218]

The Legal/Ethical Task Force then proceeded to discuss guidelines that should be developed concerning mandatory and voluntary AIDS testing.[219] The discussion began by stressing that since there is no known cure for AIDS, any mandatory testing should be justifiable as helping prevent the

208. *Id.*
209. *Id.*
210. *Id.*
211. TEX. REV. CIV. STAT. ANN. art. 4419b-1, § 9.02(e) (Vernon Supp. 1988).
212. DALLAS COUNTY AIDS PLANNING COMMISSION, *supra* note 192, at 7-9.
213. *Id.* at 7-11.
214. *Id.*
215. *Id.*
216. *Id.*
217. TEX. REV. CIV. STAT. ANN. art. 4419b-1, § 9.02(c) (Vernon Supp. 1988).
218. DALLAS COUNTY AIDS PLANNING COMMISSION, *supra* note 192, at 7-11.
219. *Id.* at 7-27.

circulation of AIDS.[220] Whether testing is voluntary or mandatory, the task force recommended the test be implemented with an equal degree of care.[221] In addition, whether the testing is voluntary or mandatory, in most instances the individual must be notified that testing will take place.[222]

The Legal/Ethical Task Force first recommended that certain enumerated guidelines for testing be followed, constantly weighing the benefits of testing to the individual, the testing agency, and society against the known and possible consequences in each situation.[223] The second recommendation advocated the goal of confidentiality.[224] The third recommendation called for the monitoring of community testing facilities to ensure that low-cost testing is available to those persons who are most likely to benefit from the testing.[225] The fourth recommendation urged periodic evaluation of testing regulations and guidelines.[226] The final recommendation stressed that the task force does not believe in large scale testing of low risk individuals, but suggested that those persons in the high risk groups may benefit from voluntary testing and should be encouraged to participate.[227]

Additional AIDS-related legislation in Texas may be forthcoming.[228] During the week of October 26, 1987, Lieutenant Governor Bill Hobby and House Speaker Gib Lewis formed the state's first legislative task force on AIDS.[229] The seventeen-member panel consists of six legislators and eleven representatives of various professions such as the medical, social service, education, religion, and insurance professions.[230] Hobby and Lewis jointly appointed Representative Nancy McDonald, sponsor of article 9, as a member

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 7-27 to -28. The task force listed five guidelines for testing. *Id.*

224. *Id.* at 7-28.

225. *Id.*

226. *Id.*

227. *Id.* In the executive summary to the report of the Legal/Ethical Task Force, the members warned that all recommendations made are limited by the amount of information available at the time and by the preciseness of projections made based upon this information. *Id.* at 7-2. The task force suggested modification of the recommendations as new information is received and new possibilities develop. *Id.*

228. The Dallas County AIDS Planning Commission's 260-page report presented to the Dallas County Commissioners Court on June 30, 1988, proposed improvements in health care services for the county's AIDS victims, requested additional funding for those services, and proposed antidiscrimination laws that would provide protection for the victims. Dallas Morning News, July 1, 1988, at 1A, col. 3. The highlight of the commission's report consisted of a recommendation that the county establish a Dallas County Board of Health to address public health needs such as the AIDS crisis, infant mortality, teen pregnancy, and environmental health problems. *Id.* While Dallas County officials estimated they would take only one month to review the report, concerned citizens fear that the report will be set aside and forgotten. Dallas Morning News, July, 1, 1988, at 21A, col. 1. Prior attempts to establish a countywide health board failed due to political disagreement between the county's 26 municipalities. *Id.*, July 1, 1988, at 24A, col. 1. The health board, if established, would advise Dallas County, various other municipalities, and Parkland Memorial Hospital, on health-care issues. *Id.*

229. Dallas Morning News, Nov. 7, 1987, at 1A, col. 1.

230. *Id.*, Nov. 7, 1987, at 14A, col. 1.

of this committee.[231] The members of the Texas Joint Committee committed themselves to studying the AIDS problem for two years until the legislature's next meeting in January of 1989, at which time the committee will present a report to the legislature.[232] Cost issues associated with AIDS will be of primary importance to the committee.[233] The committee will also conduct an inquiry into various services that are needed to help alleviate the AIDS problem.[234]

IV. CONCLUSION

As the previous discussion recognizes, it is likely that AIDS will be considered a handicap under federal as well as Texas laws. Employers, therefore, are advised not to discriminate against employees with AIDS, employees who tested positive for the AIDS virus, or employees who are perceived as having AIDS, unless there is a real and substantial interference with the employee's ability to perform the essential tasks of his job. It would be wise for the employer to attempt to accommodate the employee if at all possible by assigning the employee to a different task.

While there is no guarantee against employer liability, the implementation of an AIDS response plan on the site may help decrease the risk of employer liability.[235] Such a plan can educate other employees as well as the public concerning AIDS and can help dispel rumors among co-workers concerning the transmission of AIDS. Attorneys should advise employers to institute a formal AIDS policy well in advance of discovery of an employee with AIDS. An attorney drafting a company policy on AIDS should take into account the particular needs of that business.

AIDS testing of individuals involves numerous ethical, practical, and legal issues. In the workplace employers need to be advised of the current state of the law concerning mandatory testing and what would be considered a bona fide occupational qualification. In Texas, the Texas Communicable Disease Prevention and Control Act provides employers with certain guidelines for testing employees. The Legal/Ethical Task Force of the Dallas County AIDS Planning Commission recommends that testing be conducted under the supervision of a licensed physician with the assistance of an accredited laboratory; that positive test results be confirmed by a second AIDS test; and

231. Telephone interview with Leslie Friedlander, Administrative Assistant to Rep. Nancy McDonald (Nov. 2, 1987).

232. Dallas Morning News, *supra* note 229, at 1A. The committee would like to estimate the cost of caring for AIDS patients. *Id.*

233. Telephone interview with Leslie Friedlander, Administrative Assistant to Rep. Nancy McDonald (Nov. 2, 1987). The committee will attempt to define the state's role as AIDS places an ever-increasing burden on the state's health care system. Dallas Morning News, *supra* note 229, at 1A.

234. Dallas Morning News, *supra* note 229, at 1A.

235. The Legal/Ethical Task Force of the Dallas County AIDS Planning Commission believes the best employer response to the problem of AIDS in the workplace is the education/sympathy approach. DALLAS COUNTY AIDS PLANNING COMMISSION, *supra* note 192, at 7-32.

that post-test counseling be provided.[236]

The number of reported cases of AIDS increases daily. AIDS in the workplace forces employers to confront moral issues surrounding AIDS as well as constantly changing legal issues concerning AIDS. Employers cannot be expected to keep abreast of the current state of the law in the AIDS area by themselves. The AIDS crisis in the workplace has created a new legal specialty—the AIDS lawyer. The constant flow of legal questions from concerned employers mandates that the attorney involved become proficient in this area of the law. Until medical knowledge and legal precedent concerning AIDS becomes firmly established and well founded, the legal dilemma of AIDS in the workplace will continue.

236. *Id.* at 7-2 to -3.