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AIDS: Does It Qualify as a "Handicap" Under the Rehabilitation Act of 1973?

In 1973, Congress implemented a broad governmental policy prohibiting discrimination on the basis of handicap. The Rehabilitation Act of 1973¹ (Rehabilitation Act) mandates that certain government contractors² and all organizations receiving federal financial assistance³ refrain from discriminating against "qualified handicapped individuals."⁴ Since its enactment, many handicapped

1 Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-796 (1982)).

2 Section 503 of the Act states:

(a) Any contract in excess of \$2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. The provisions of this section shall apply to any subcontract in excess of \$2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.

29 U.S.C. § 793(a) (1982).

For an excellent summary of this statute and others affecting employment of the handicapped, see Guy, *The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues*, 7 U. BALT. L. REV. 183 (1978).

3 Section 504 of the Act states:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794 (1982). This statute, unlike § 503 of the Act, imposes no affirmative action requirement to hire handicapped individuals on those receiving federal financial assistance, but simply demands nondiscrimination.

4 This note only addresses whether victims of AIDS can qualify as "handicapped individuals" under the Rehabilitation Act. Another potentially substantial hurdle awaits AIDS victims who seek protection under the Act. An employee, having or suspected of having AIDS, who seeks protection under § 504 must also show that he is "otherwise qualified" to perform the job in question. According to the Secretary of Health and Human Services (HHS), an "otherwise qualified" handicapped person is an individual who, with "reasonable accommodation," can perform the "essential functions" of the job. 45 C.F.R. § 84.3(k)(1) (1985). The United States Supreme Court has determined that an "otherwise qualified" handicapped individual is "one who is able to meet all of a program's requirements in spite of his handicap." *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). One court summed up the plaintiff's predicament:

In defining who is a handicapped individual, § 504's "Catch 22" aspect appears: the plaintiff must first show that he or she has some impairment which substan-

individuals have successfully used the Rehabilitation Act as an effective weapon to combat employment discrimination.

Eight years after Congress passed the Rehabilitation Act, the Centers for Disease Control (CDC) reported the first incidents of a debilitating, communicable disorder, later named Acquired Immuno-deficiency Syndrome (AIDS).⁵ Since 1981, the number of AIDS cases has increased dramatically,⁶ as has the discrimination faced by those afflicted with the disease.⁷ When employers discriminate against AIDS victims,⁸ the Rehabilitation Act provides one potential source of protection. If AIDS qualifies as a "handicap" for purposes of the Act, employers who receive federal contracts or

tially limits a major life activity, but this same plaintiff must show that he or she is not so handicapped as to be unable to perform the job.

Tudyman v. United Airlines, 608 F. Supp. 739, 744 (C.D. Cal. 1984).

For purposes of § 503, a "qualified handicapped individual" is one who is "capable of performing a particular job with reasonable accommodation to his or her handicap." 41 C.F.R. § 60-741.2 (1985). Because of its affirmative action provision, § 503 does not require that a handicapped individual be capable of performing a job *in spite* of his handicap for him to be classified as "qualified."

5 Although the CDC now recognizes that AIDS initially surfaced in 1979, the first published reports were issued in 1981. See notes 10-11 *infra*.

6 See notes 14-15 *infra* and accompanying text.

7 Many incidents of AIDS-related employment discrimination have been reported in recent years. One attorney, who is representing a graphic artist discharged following an AIDS diagnosis, has predicted that "[t]here will be thousands of employees going to their employers with this problem. AIDS is the ultimate health problem." *Draftsman Files First Washington-Area Case*, AIDS POL'Y & L., Feb. 26, 1986, at 7.

In New Orleans, La., a former waiter has sued Hilton Hotels alleging he was discharged after he told co-workers that his roommate had AIDS. The plaintiff is seeking \$57,000 in damages, including \$5,000 for harassment suffered when, on his last day at work, some co-workers wore white gloves "to avoid the plague." *Id.*

In Santa Barbara, Cal., Raytheon Co. placed a quality control analyst on involuntary medical leave after it discovered that the employee had AIDS. The company refused to allow the employee to return to work unless he could prove that AIDS was not casually transmitted or that a cure for the disease existed. Raytheon believed it "behaved rationally" based on its belief that the analyst's presence in the workplace demoralized its staff and threatened the health and safety of its work force. *Worker's Estate, Raytheon Argue First California AIDS Handicap Case*, AIDS POL'Y & L., Jan. 29, 1986, at 1. See also Tarr, *Case Law Scarce for Lawyers Involved in AIDS Suits*, NAT'L L.J., Nov. 25, 1985, at 29, col. 1.

One employee is seeking \$2 million in damages from her employer, the National Institute of Health, for requiring her to get "clearance" before bringing a friend, suspected of having AIDS, into the institute building for lunch. Thompson, *AIDS-Related Litigation Looms Over Employers*, INDUSTRY WEEK, Dec. 9, 1985, at 27.

The Enserch Corp. of Dallas, Texas recently placed two food service workers on disability leave with full salary and medical benefits after they tested positive on an AIDS blood test. The natural gas holding company believed the action was in the "best interest of all employees." Silas, *AIDS On The Job*, A.B.A. J., Jan. 1, 1986, at 22.

For other examples of discrimination against employees with AIDS, see Leonard, *Employment Discrimination Against Persons With AIDS*, 10 U. DAYTON L. REV. 681, 688 n.32 (1985); Parry, *AIDS As a Handicapping Condition—Part II*, 10 MENTAL & PHYSICAL DISABILITY L. REP. 2, 2 (1986); Comment, *AIDS: A Legal Epidemic?*, 17 AKRON L. REV. 717, 735 (1984).

8 This note defines an "AIDS victim" as a person who has tested positive on the AIDS blood test and who has exhibited AIDS-related symptoms. See notes 25-45 *infra* and accompanying text.

financial assistance cannot consider an employee's AIDS status when making employment decisions.⁹

This note discusses whether courts should consider AIDS victims and those erroneously believed to be AIDS victims "handicapped individuals" under the federal Rehabilitation Act. Part I gives a broad overview of AIDS, outlining current knowledge regarding the disease's symptomatology and communicability. Part II examines the Rehabilitation Act, considering the regulatory implementation, legislative history, and case law interpretations of the statute. Part III analyzes whether AIDS fits within the Rehabilitation Act's definition of a handicap. Part IV concludes that, based on the congressional intent behind the Rehabilitation Act and the current case law definition of a "handicapped individual," courts should consider AIDS a handicap entitled to the Act's protection.

I. AIDS: The Disease and Its Consequences

In June, 1981, the CDC reported an "unusual" outbreak of a deadly form of pneumonia in five young homosexuals in the Los Angeles area.¹⁰ Less than a month later, the same agency disclosed that ten more cases of the *pneumocystis carinii* pneumonia (PCP) had been identified in homosexual men.¹¹ At the same time, the CDC also announced that a rare form of cancer, *Kaposi's sarcoma* (KS), was appearing in the homosexual population with alarming frequency.¹² The CDC characterized the occurrence of these two un-

9 Employers who violate the Rehabilitation Act face several possible penalties. Contractors subject to § 503's provisions may be refused further federal contracts or have their current contracts terminated. See 41 C.F.R. §§ 60-741.28 to .30 (1985). Most courts believe that § 503 does not provide a private cause of action. See *Hodges v. Atchison, Topeka and Santa Fe Ry. Co.*, 728 F.2d 414 (10th Cir. 1984); but see *Clarke v. Felec Servs., Inc.*, 489 F. Supp. 165 (D. Alaska 1980) (holding that an implied private right of action exists under § 503). The Office of Federal Contract Compliance Programs which pursues § 503 claims against federal contractors regularly seeks both reinstatement and back pay for the victim of employment discrimination. See *Guy*, *supra* note 2, at 193-95. Organizations subject to § 504's provisions may have their federal financial assistance suspended or terminated. See 45 C.F.R. § 80.8 (1985); *Grove City College v. Bell*, 465 U.S. 555 (1984) (only program directly receiving federal financial assistance, not organization as a whole, may have assistance terminated). See also *Guy*, *supra* note 2, at 203-04. Courts recognize a private cause of action for reinstatement and back pay under § 504. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984).

All but four states have enacted handicap discrimination laws which affect a large number of employers not receiving federal contracts or financial assistance. The state definitions of a handicapped person vary greatly; however, many are patterned after the Rehabilitation Act definition. See *Leonard*, *supra* note 7, at 690-93.

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

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

12 *Id.*

common diseases in patients who were not immunosuppressed due to known underlying disease or therapy as "highly unusual."¹³ AIDS, though yet unrecognized as a distinct disease, had arrived on the medical scene.

Presently, the disease has reached epidemic proportions. Almost 19,000 persons have contracted the deadly disease¹⁴—14,831 in the last two years alone.¹⁵ Once afflicted, the patient's prognosis for survival is grim—the two year mortality rate for the disease is close to ninety percent.¹⁶ Over seventy-five percent of all patients diagnosed as having AIDS before January 1984 are known dead.¹⁷

Demographically, AIDS has continued to plague the gay community. Homosexual or bisexual men account for seventy-three percent of all AIDS cases.¹⁸ The disease afflicts other "risk groups" but to a much lesser degree. These risk groups include: intravenous drug users (17%),¹⁹ hemophiliacs (1%),²⁰ heterosexuals (1%),²¹ and recipients of blood or blood products (2%).²² Most

13 *Id.* at 306.

14 As of March 31, 1986, a total of 18,883 cases have been reported to the CDC. AIDS PROGRAM, CENTER FOR INFECTIOUS DISEASES, CENTERS FOR DISEASE CONTROL: WEEKLY SURVEILLANCE REPORT—UNITED STATES (March 31, 1986) [hereinafter cited as WEEKLY SURVEILLANCE REPORT]. For a more complete history of the early development of AIDS, see Comment, *supra* note 7, at 718-22.

15 According to CDC figures, 5,424 cases were diagnosed in 1984, 8,388 were found in 1985, and 1,019 had been reported by the end of March in 1986. WEEKLY SURVEILLANCE REPORT, *supra* note 14.

16 EPIDEMIC OF ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) AND KAPOSI'S SARCOMA VII (G. Giraldo & E. Beth ed. 1984).

17 WEEKLY SURVEILLANCE REPORT, *supra* note 14.

An experimental drug may offer some encouragement for AIDS victims. Though not a cure for the disease, azidothymidine (AZT) did produce some short-term improvement in those AIDS patients receiving the drug. One doctor who treated the patients stated that "[t]he most significant aspect of this study is that it shows that the immune system of an AIDS patient can at least partially reconstitute itself if the patients are given a drug which blocks the replication of the virus." *Drug Found to Give Patients With AIDS Short-Term Help*, N.Y. Times, March 14, 1986, at 9, col. 1.

18 WEEKLY SURVEILLANCE REPORT, *supra* note 14.

19 *Id.*

20 *Id.* According to a recent CDC report "[t]he pattern of hemophilia-associated AIDS appears to be changing in that the number of cases may be stabilizing or declining" *Changing Patterns of Acquired Immunodeficiency Syndrome in Hemophilia Patients—United States*, 34 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 241 (May 3, 1985).

21 WEEKLY SURVEILLANCE REPORT, *supra* note 14.

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

The CDC recognized early on that employers might use these demographic statistics as a vehicle for discrimination against "high risk" groups. In late 1983, the agency observed: "[T]he classification of certain groups as being more closely associated with the disease has been misconstrued by some to mean these groups are likely to transmit the disease through non-intimate interactions. This view is not justified by available data. Nonetheless, it has been used unfairly as a basis for social and economic discrimination.

AIDS victims are white²³ and between the ages of twenty and forty-nine.²⁴

When dealing with employment discrimination against AIDS victims, two traits of the disease must be examined carefully: symptomatology and communicability. The disease's effect upon an employee's body and its potential transmission to other workers impacts directly on whether discriminatory employment practices can be justified.

A. *Symptomatology*

According to the CDC, AIDS is defined as "a disease, at least moderately predictive of a defect in cell-mediated immunity, occurring in a person with no known cause for diminished resistance to that disease."²⁵ AIDS manifests itself in three forms: KS, PCP, and serious "opportunistic infections." The symptoms of an AIDS patient correspond to the specific illness contracted and to the changes that occur in the immune system when the AIDS victim acquires the disease.

Most AIDS victims contract the parasitic infection, PCP.²⁶ Symptoms such as weight loss, fever, diarrhea, and lymph node enlargement develop gradually over a few months.²⁷ Once the telltale symptom, shortness of breath, appears, the disease is usually quite

Update: Acquired Immunodeficiency Syndrome (AIDS)—United States, 32 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 466 (Sept. 9, 1983).

23 The current race/ethnicity distribution of AIDS victims breaks down as follows: White, not Hispanic—60%; Black, not Hispanic—25%; Hispanic—14%; Other or Unknown—2%. WEEKLY SURVEILLANCE REPORT, *supra* note 14.

24 Eighty-nine percent of all AIDS patients fall within the 20-49 age bracket. *Id.* Ten percent are older than forty-nine; a mere one percent are younger than 20. *Id.*

25 *Update on Acquired Immune Deficiency Syndrome (AIDS)—United States*, 31 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 507, 508 (Sept. 24, 1982). Though this definition was "[o]riginally intended as a guide to reporting cases to public health officers and identifying groups at risk, the CDC working definition appears, in retrospect, to have been an excellent delineation of the fullblown syndrome." F. SIEGAL & M. SIEGAL, AIDS: THE MEDICAL MYSTERY 15 (1983). Recently, the CDC slightly revised its definition of AIDS. The CDC designed the revised definition to include only the "more severe manifestations" of infection with the virus that causes AIDS. Only a "small" number of additional cases will be reportable as a result of the revision. See *Revision of the Case Definition of Acquired Immunodeficiency Syndrome for National Reporting—United States*, 34 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 373 (June 28, 1985).

Some observers believe that a considerable number of persons, having various forms of the disease, are not registered in CDC surveys. See Leonard, *supra* note 7, at 681.

26 As of March 31, 1986, 58% of all AIDS victims were suffering from or had suffered from PCP. WEEKLY SURVEILLANCE REPORT, *supra* note 14.

27 See Cahill, *Parasitic Infections*, in THE AIDS EPIDEMIC 87 (1983); K. MAYER & H. PIZER, THE AIDS FACT BOOK 53 (1983); F. SIEGAL & M. SIEGAL, *supra* note 25, at 22-23.

advanced.²⁸ Because it is rarely diagnosed at an early stage,²⁹ PCP frequently kills its victims.³⁰

Eighteen percent of AIDS patients have fallen victim to KS, an extremely rare form of cancer.³¹ Although its symptoms closely resemble those of PCP,³² KS is distinctly characterized by purplish skin lesions.³³ If an AIDS victim contracts KS alone, it is not as deadly as PCP;³⁴ however, when a patient contracts both of these diseases, the result is usually fatal.³⁵

If KS and PCP do not strike an AIDS victim, other "opportunistic infections" (OI) probably will.³⁶ The expansive range of possible infections includes certain virulent forms of meningitis and encephalitis.³⁷ Symptoms vary according to the particular disease contracted. A composite list, however, would include the following symptoms: fever, malaise, swollen glands, headaches, seizures, and lethargy.³⁸ OI frequently kills its victims; fifty-seven percent have died from such infections since 1979.³⁹

When a patient exhibiting the symptoms of AIDS is diagnosed as having the disease, a frequent by-product of that diagnosis is discrimination in the workplace. Fearing contagion and doubting AIDS victims' ability to fulfill job requirements, employers and co-workers frequently adopt a "hands off" attitude towards AIDS victims.⁴⁰ As one observer noted, "[t]here is a clear tension between the rights of an individual infected with a fatal disease and the rights of others to protect themselves from infection."⁴¹ Thus, when addressing employment discrimination, it is crucial to ask how contagious is AIDS? What, in fact, are the chances of employees contracting the disease from a co-worker who has AIDS? And is

28 K. MAYER & H. PIZER, *supra* note 27, at 53.

29 See K. CAHILL, *supra* note 27, at 87.

30 Of the 10,911 AIDS victims who have acquired PCP since 1979, 5,909 (54%) have died. WEEKLY SURVEILLANCE REPORT, *supra* note 14.

31 WEEKLY SURVEILLANCE REPORT, *supra* note 14.

32 *Follow-Up on Kaposi's Sarcoma and Pneumocystis Pneumonia*, 30 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 409 (Aug. 28, 1981).

33 K. MAYER & H. PIZER, *supra* note 27, at 50.

34 KS has killed 41% of those AIDS victims who have contracted this disease alone. WEEKLY SURVEILLANCE REPORT, *supra* note 14.

35 In 6% of the reported AIDS cases, the victim has acquired both KS and PCP. For such patients, the mortality rate is 66%. *Id.*

36 OI cases have comprised 19% of all AIDS cases to date. *Id.*

37 *Update on Acquired Immune Deficiency Syndrome (AIDS)—United States*, 31 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 507, 508 (Sept. 24, 1982).

38 K. MAYER & H. PIZER, *supra* note 27, at 54-57.

39 WEEKLY SURVEILLANCE REPORT, *supra* note 14.

40 See note 7 *supra*.

41 *Legal Issues Emerge in AIDS Epidemic: An Interview with NHLA Director, Henry P. Kaplan, MD, JD*, THE NATIONAL HEALTH LAWYERS ASS'N (NHLA) REGISTER, Winter 1985, at 1.

the public at large at risk when it deals with an AIDS-infected employee?

B. *Communicability*

Researchers have identified a retrovirus called human T-lymphotropic virus type III/lymphadenopathy-associated virus (HTLV-III/LAV) as the causative agent of AIDS.⁴² Exposure to the HTLV-III/LAV virus does not guarantee the onset of AIDS.⁴³ In cases in which exposure does produce immune dysfunction in its host, it may be several years before a fully developed case of AIDS is diagnosed.⁴⁴ Because researchers have developed a test which detects the presence of antibodies to HTLV-III/LAV in the bloodstream,⁴⁵ an employee may be diagnosed as "having AIDS" several years before the most debilitating effects of the disease are first experienced. Upon learning of such a diagnosis, employers may discriminate against AIDS victims several years before the disease makes employment impractical.

On a medical level, concerns that an "AIDS-infected" employee will spread the disorder to other employees or to customers appear unfounded. According to the CDC, the HTLV-III/LAV vi-

42 *Antibodies to a Retrovirus Etiologically Associated with Acquired Immunodeficiency Syndrome (AIDS) in Populations with Increased Incidences of the Syndrome*, 33 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 377 (July 13, 1984). The CDC has definitively stated that "human T-cell lymphotropic virus type III/lymphadenopathy-associated virus (HTLV-III/LAV) has been recognized as the cause of AIDS." *Revision of the Case Definition of Acquired Immunodeficiency Syndrome for National Reporting—United States*, *supra* note 25, at 373. See also Leonard, *supra* note 7, at 684 n.12; Comment, *supra* note 7, at 724 n.87.

43 Experts are uncertain as to how many of those persons exposed to the HTLV-III/LAV virus will actually develop AIDS. Estimates range between 9% and 20%. Tarr, *AIDS: The Legal Issues Widen*, Nat'l. L.J., Nov. 25, 1985, at 28, col. 1. A recent study by the National Cancer Institute indicates that as many as 30% of those exposed to the HTLV-III/LAV virus will contract AIDS. *PWA's Should Map Extent of Care, Study Says*, AIDS Pol'y & L., Feb. 26, 1986, at 8.

44 "[S]everal years usually separate acquisition of infection with HTLV-III/LAV and [the] onset of AIDS. . . ." *Update: Acquired Immunodeficiency Syndrome—United States*, 34 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 245, 248 (May 10, 1985). "Currently reported AIDS cases have resulted from HTLV-III/LAV exposure up to 7 years before diagnosis; the possibility of longer incubation periods cannot be excluded." *Update: Acquired Immunodeficiency Syndrome—United States*, 35 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 17, 20 (Jan. 17, 1986).

45 Tarr, *supra* note 43, at 28, col. 1. Controversy has erupted over whether employers ought to routinely administer the HTLV-III/LAV blood tests to employees and job applicants. One observer fears that the tests "will become the principal instrument of discrimination over the next few years." *Id.* Federal health officials have refused to endorse routine blood screening of employees and job applicants. *Summary: Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace*, 34 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 681 (Nov. 15, 1985). Federal health officials, however, have recommended that all persons in AIDS high risk groups undergo periodic blood testing to determine if they have become infected with the HTLV-III/LAV virus. Altman, *U.S. Urges Blood Test for Millions With High Risk of AIDS Infection*, N.Y. Times, March 14, 1986, at 1, col. 5.

rus is transmitted between adults only through sexual contact or parenteral exposure to infected blood.⁴⁶ These activities are not associated with the workplace. As the CDC has stated, "[t]he kind of nonsexual person-to-person contact that generally occurs among workers and clients or consumers in the workplace does not pose a risk for transmission of HTLV-III/LAV."⁴⁷ Present medical knowledge suggests that AIDS is not spread by casual contact.

Considering the high mortality rate of AIDS victims due to the disease's present incurability, it is not surprising that anxieties remain as to how the disease is spread. One observer recently noted that:

While it is unlikely that AIDS can be contracted from personal interactions other than the types identified so far, no one can say categorically that other types of transmissions are impossible. Those experts who have attempted to give the public the impression that the medical profession is certain how AIDS is transmitted and that no one outside the high-risk groups should worry may have gone too far in attempting to quell the public's fears.⁴⁸

Even with assurances from the medical authorities that AIDS is not spread by the casual contact found in the workplace, many employers continue to be wary of AIDS victims. When employers receive a "100 percent guarantee"⁴⁹ that AIDS cannot be transmitted at the workplace, employment discrimination against AIDS victims may subside slightly. Until then, however, the mystery surrounding the

⁴⁶ *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace*, 34 CENTERS FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 682 (Nov. 15, 1985).

⁴⁷ *Id.*

⁴⁸ Parry, *AIDS As a Handicapping Condition*, 9 MENTAL & PHYSICAL DISABILITY L. REP. 402, 403 (1985). Despite CDC findings, some experts remain skeptical of the assertion that AIDS cannot be transmitted by casual contact. Prof. William Haseltine of the Harvard Medical School recently warned a university audience, "[a]nyone who tells you categorically that AIDS is not contracted by saliva is not telling you the truth. . . . There are sure to be cases of proved transmission through casual contact." Dershowitz, *Emphasize Scientific Information*, N.Y. Times, March 18, 1986, at A27, col. 2. Prof. June Osborn of the University of Michigan has cautioned, "we cannot be certain that increased transmissibility or increments in virulence [of the AIDS virus] will not occur." Osborn, *The AIDS Epidemic: An Overview of the Science*, ISSUES IN SCIENCE AND TECHNOLOGY, Winter 1986, at 55.

Recent tests also indicate that the AIDS virus can remain active up to 15 days outside the body. Researchers caution, however, that the findings do not mean the virus can be spread casually because unbroken skin appears to be an effective barrier against infection. *Tests Show AIDS Virus Can Live Up to 15 Days Outside the Body*, N.Y. Times, Apr. 9, 1986, at A15, col. 5.

⁴⁹ In *Shuttleworth v. Broward County Office of Budget and Management Policy*, FCHR No. 85-0624 (Dec. 11, 1985), reprinted in Daily Lab. R. No. 242, at E-1 (Dec. 17, 1985), the employer defended its dismissal of an AIDS victim on the ground that it could not get a "100 percent guarantee" that AIDS was not transmissible in the workplace. See Leonard, *supra* note 7, at 697 n.66. The commission hearing the case refused to accept such a defense. See notes 117-21 *infra* and accompanying text.

possible transmission of the disease will continue as a major factor in such employment discrimination cases.

To alleviate some of the aforementioned employer fears, the CDC recently issued guidelines on how to prevent the transmission of AIDS in the workplace.⁵⁰ The recommendations, based upon a "worst case" scenario,⁵¹ address four separate classes of workers: health-care workers,⁵² personal-service workers,⁵³ food-service workers,⁵⁴ and other workers sharing the same work environment.⁵⁵ In general, precautions are necessary only if one's job entails possible exposure to AIDS-contaminated blood.⁵⁶ Unless one is a health-care worker involved in invasive procedures such as inoculating patients, the risk of transmission of the disease in the workplace is "extremely low."⁵⁷ Personal- and food-service workers "known to be infected with HTLV-III/LAV need not be restricted from work" unless they are otherwise ill.⁵⁸ As to workers in other settings, the CDC has stated:

[There is no] known risk of transmission to co-workers, clients, or consumers [which] exists from HTLV-III/LAV-infected workers Workers known to be infected with HTLV-III/LAV should not be restricted from work solely based on this finding.

50 See *Recommendations for Preventing Transmission of Infection with HTLV-III/LAV in the Workplace*, *supra* note 46.

51 The CDC has found that the epidemiology of the HTLV-III/LAV virus is similar to that of the virus which causes hepatitis B. Despite these similarities, the hepatitis B virus is spread far more easily. Because the recommendations for preventing the spread of the HTLV-III/LAV virus in the workplace are derived from the CDC's guidelines for controlling the transmission of hepatitis B, the recommendations concerning AIDS transmission contemplate a "worst case" scenario. *Recommendations for Preventing Transmission of Infection with HTLV-III/LAV in the Workplace*, *supra* note 46, at 683.

52 Health-care workers are defined to include "nurses, physicians, dentists and other dental workers, optometrists, podiatrists, chiropractors, laboratory and blood bank technologists and technicians, phlebotomists, dialysis personnel, paramedics, emergency medical technicians, medical examiners, morticians, housekeepers, laundry workers, and others whose work involves contact with patients, their blood or other body fluids, or corpses." *Id.*

53 Personal-service workers are defined as "individuals whose occupations involve close personal contact with clients (e.g., hairdressers, barbers, estheticians, cosmetologists, manicurists, pedicurists, massage therapists)." *Id.* at 693.

54 Food-service workers, according to the recommendations, are "individuals whose occupations involve the preparation or serving of food or beverages (e.g., cooks, caterers, servers, waiters, bartenders, airline attendants)." *Id.*

55 The "other workers" category would include any workers sharing work settings such as "offices, schools, factories, [or] construction sites." *Id.* at 694.

56 Even though it is theoretically possible to contract AIDS from other body fluids of an AIDS victim, "epidemiologic evidence has implicated only blood and semen in transmission." *Id.* at 682. The prosecutor's office of Genesee County, Mich. obviously did not believe this when, on December 8, 1985, it charged an AIDS victim, who had allegedly spit at four police officers, with assault with intent to murder. See *N.Y. Times*, Dec. 8, 1985, (national edition) at 17.

57 *Recommendations for Preventing Transmission of Infection with HTLV-III/LAV in the Workplace*, *supra* note 46, at 693.

58 *Id.*

Moreover, they should not be restricted from using telephones, office equipment, toilets, showers, eating facilities, and water fountains.⁵⁹

Although doubts persist, available medical knowledge suggests that the risk of AIDS transmission in the workplace is *de minimis*. This fact alone, however, will not eliminate employment discrimination against AIDS victims. Employers may discriminate for a variety of other reasons. Employers may believe retaining or hiring AIDS victims will hurt business because of the public's fear of the disease. Employees with AIDS may greatly increase an employer's health coverage costs.⁶⁰ Concerns about employee absenteeism and inability to perform job requirements may precipitate discrimination. Employers may harbor animosity towards homosexuals, the group most likely to contract the disease. Citing the disease's severe disabling effects and high mortality rate, employers may feel it is a waste of time, money, and effort to train AIDS victims for certain jobs.⁶¹ All of these employer concerns, whether justified or not, may cause AIDS victims considerable difficulty in securing and maintaining employment. Consequently, AIDS victims who suffer employment discrimination will turn to the legal system for protection. One potential source of protection for these individuals is the Rehabilitation Act.

II. The Rehabilitation Act of 1973: Whom Does It Protect?

One year after enacting the Rehabilitation Act and seven years before the first reports of AIDS started to trickle into the CDC, Congress redefined who was a "handicapped individual" protected under the Rehabilitation Act.⁶² That new definition defines a "handicapped individual" as "any person who (i) has a physical or mental impairment which substantially limits one or more of such

⁵⁹ *Id.* at 694.

⁶⁰ A national magazine for health care executives reported that, according to the CDC, the national cost per day for an AIDS patient is \$830, double the average daily cost for other patients. Burda & Powills, *AIDS: A Time Bomb at Hospitals' Door*, HOSPITALS, Jan. 5, 1986, at 54. The most recent cost estimates for treating one AIDS patient range between \$60,000 to \$140,000. Tarr, *supra* note 43, at 28, col. 3.

⁶¹ For a detailed treatment of potential employer defenses in employment discrimination cases involving AIDS victims, see Leonard, *supra* note 7, at 696-702.

⁶² A "handicapped individual" was originally defined as:

any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to [Titles I and III] of this Act."

Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (current version at 29 U.S.C. § 706(7)(B) (1982)). Congress decided that such a narrow definition was inconsistent with its intent in passing the Rehabilitation Act because of "its orientation toward employment and its relation to vocational rehabilitation services." S. REP. No. 1297, 93d Cong., 2d Sess. 37, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6373, 6388.

person's major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment."⁶³ The operative terms in this statute such as "impairment," "substantially limits," and "major life activities" are not defined in the Act. Therefore, the regulations promulgated by the federal agencies charged with implementing the Rehabilitation Act must be examined to understand who is a "handicapped individual" under federal law.

A. *Regulations Promulgated Under the Act*

Two federal agencies are primarily responsible for further defining the term "handicapped individual."⁶⁴ The Department of Health and Human Services (HHS)⁶⁵ implements section 504 of the Rehabilitation Act; its regulations govern the actions of employers receiving federal financial assistance.⁶⁶ The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) implements section 503 of the Act; its regulations provide guidance for federal contractors in determining which employees or job applicants qualify as handicapped.⁶⁷ Although the regulations issued by the two agencies differ in certain minor respects,⁶⁸ they should be read together when interpreting section 706(7)(B)'s definition of a "handicapped individual."⁶⁹ Certain aspects of the regulations bear directly upon a determination of whether AIDS is a protected

63 Pub. L. No. 93-516, § 111(a), 88 Stat. 1619 (1974) (codified at 29 U.S.C. § 706(7)(B) (1982)).

64 In 1974, when Congress amended the Rehabilitation Act, it stated:

Executive Order No. 11758, section 2, delegates to the Secretary of Labor the responsibility for carrying out the responsibilities embodied in section 503 of the Rehabilitation Act of 1973, and a similar delegation of responsibility to the Secretary of [Health and Human Services] is urged to carry out on a Government-wide basis those responsibilities embodied in section 504.

S. REP. NO. 1297, 93d Cong., 2d Sess. 40, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6391.

65 When Congress enacted the Rehabilitation Act, the now Department of Health and Human Services was called the Department of Health, Education and Welfare.

66 Exec. Order No. 11,914, 3 C.F.R. 117 (1977), authorizes the Secretary of the Department of Health, Education and Welfare (currently the Department of Health and Human Services) to coordinate implementation of § 504 by all federal departments and agencies which extend federal financial assistance. For a more specific examination of the statutory authority for such regulations, see Guy, *supra* note 2, at 197-99.

67 Exec. Order No. 11,758, 3a C.F.R. 116 (1974), empowers the Secretary of the Department of Labor to issue regulations effecting § 503 of the Rehabilitation Act.

68 See notes 76-80 *infra* and accompanying text.

69 Such was the clear design of Congress when, upon enacting the new definition, it stated that:

It is intended that sections 503 and 504 be administered in such a manner that a consistent, uniform, and effective Federal approach to discrimination against handicapped persons would result. Thus, Federal agencies and departments should cooperate in developing standards and policies so that there is a uniform, consistent Federal approach to these sections.

handicap.⁷⁰

1. "Physical Impairment"

According to the HHS regulations, a "physical impairment" for purposes of the Rehabilitation Act is "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine."⁷¹ Although the immune system is notably absent from the list, AIDS still appears to qualify as a "physical impairment." AIDS, a disease of many guises, could be seen as a "physiological disorder" which "affects" the "hemic and lymphatic" systems. These two systems, integral parts of the complex immune system, exhibit the most telling symptoms of AIDS⁷² and, thus, are "affected" by the disorder.

The federal agencies do not believe the definition of physical impairment should be construed narrowly. When adopting the present definition, the HHS expressly refused to "set forth a list of specific diseases and conditions that constitute physical . . . impairments because of the difficulty of ensuring the comprehensiveness of any such list."⁷³ Thus, it appears of limited consequence that AIDS does not fall mechanically within the definition's contours. In producing immune dysfunction, AIDS subjects all body systems to attack and, therefore, should properly be considered a "physical impairment."

It also seems immaterial that the disorder did not exist when Congress passed the Rehabilitation Act. When the HHS shortened its definition of "physical impairment," it deleted a clause "which made explicit the inclusion of any condition which is . . . physical

S. REP. NO. 1297, 93d Cong., 2d Sess. 40, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6391.

⁷⁰ A full discussion of the regulations promulgated pursuant to the Rehabilitation Act is beyond the scope of this note. This note discusses only those aspects of the regulations which bear directly upon a determination of whether an AIDS victim is within the definition of "handicapped individual."

⁷¹ 45 C.F.R. § 84.3(j)(2)(i) (1985).

⁷² See notes 25-39 *supra* and accompanying text.

⁷³ 45 C.F.R. § 84 app. A (1985). The HHS regulations do proceed to give an incomplete list of diseases and conditions which are explicitly included in the term "physical impairment." The regulations provide that:

The term includes, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness and, . . . drug addiction and alcoholism.

Id.

but whose precise nature is not at present known.”⁷⁴ According to the HHS, such a clause was unnecessary because the definition as adopted “clearly comprehend[s] such conditions.”⁷⁵ Such language suggests that AIDS is a “physical impairment” for purposes of the Rehabilitation Act.

2. “Substantially Limits”

The statutory definition of a “handicapped individual” requires that a physical impairment “substantially limit” the individual’s major life activities.⁷⁶ Although the “substantially limiting” restriction appears crucial in determining who is handicapped, neither the HHS nor the OFCCP regulations provide much guidance to the phrase’s proper interpretation.⁷⁷ The HHS side-stepped the entire issue when it promulgated its regulations by declaring that “[t]he Department does not believe that a definition of this term is possible at this time.”⁷⁸

The OFCCP provided minimal assistance when it defined the phrase to mean “the degree that the impairment affects employability. A handicapped individual who is likely to experience difficulty in securing, retaining or advancing in employment would be considered substantially limited.”⁷⁹ Such a definition is quite liberal; indeed, one writer has stated that this construction “conceivably could apply to anyone who is denied a job.”⁸⁰ The OFCCP definition makes meeting the “substantially limiting” restriction almost a foregone conclusion because a job applicant or an employee seeks the Rehabilitation Act’s protection precisely because he has experienced difficulty at the workplace. His physical impairment, therefore, affects his employability and “substantially limits” his activities.⁸¹

Whether or not the “substantially limiting” restriction refers to employability, as the OFCCP suggests, or to life activities in gen-

74 *Id.*

75 *Id.*

76 See text accompanying note 63 *supra*.

77 As one observer noted, “[t]he most significant restriction on the statutory definition of handicapped is the phrase ‘substantially limits’; the precise meaning of this phrase remains unclear.” Comment, *Employment Rights of Handicapped Individuals: Statutory and Judicial Parameters*, 20 WM. & MARY L. REV. 291, 294 (1978).

78 45 C.F.R. § 84 app. A (1985).

79 41 C.F.R. § 60-741 app. A (1985).

80 See Guy, *supra* note 2, at 229. One commentator suggested that the word “substantial” should not be read to mean “considerable in extent” but rather to mean “actual” or “real.” “The focus should be on whether the disability is ‘actual’ or ‘real,’ not on whether it is extensive.” Comment, *The Rehabilitation Act of 1973: Who Is Handicapped Under Federal Law*, 16 U.S.F.L. REV. 653, 674-77 (1982).

81 For one federal court’s interpretation of the term “substantially limits,” see notes 99-102 *infra* and accompanying text.

eral, as the plain reading of the statute suggests, AIDS can qualify as a "substantially limiting" impairment. Few impairments have as profound an impact on one's personal autonomy as does AIDS. When AIDS renders the body incapable of combatting disease, many, if not most, aspects of the victim's life are drastically altered. Due to the physically disabling effects of the disease and to the public stigma attached to contracting the disease, the victim's ability to function in society and at the workplace may be greatly hindered, i.e. "substantially limited."

3. "Major Life Activities"

This term, as used in the statutory definition of "handicapped individual," appears self-explanatory. The federal agencies have construed the term broadly. The HHS regulations provide the narrower of the two agency interpretations, citing the following functions as "major life activities": "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."⁸² To this list, the OFCCP regulations add "socialization, . . . vocational training, . . . adapting to housing, etc."⁸³ From their context, it can be inferred that these lists were not meant to be exhaustive or exclusive.⁸⁴

AIDS appears to substantially limit its victim's "major life activities." The extensive medical treatment an AIDS victim typically requires over the course of his disease⁸⁵ shows that he will frequently be unable to care for himself. As the disease progresses, an AIDS victim's capacity to work will invariably diminish. If the AIDS victim contracts a disease such as PCP which attacks the respiratory system, breathing will be inhibited. The mere diagnosis of AIDS will, in most instances, profoundly affect the victim's social interactions with other people. And though the agencies do not list it spe-

⁸² 45 C.F.R. § 84.3(j)(2)(ii) (1985).

⁸³ The complete definition provided by the OFCCP reads: "'Life activities' may be considered to include communication, ambulation, selfcare, socialization, education, vocational training, employment, transportation, adapting to housing, etc. For the purpose of section 503 of the Act, primary attention is given to those life activities that affect employability." 41 C.F.R. § 60-741 app. A (1985). One commentator has criticized this definition:

While the extent to which one's major life activities are limited or are perceived to be limited may be manifested in a decreased access to playmates, an education, or a job, these deprivations are the *effect*, rather than the *cause*, of one's status as a "handicapped individual" as Congress has defined the term. Under OFCCP's contrary interpretation, the definition is a tautological curiosity that is no help whatsoever to employers, agencies, or the courts.

Guy, *supra* note 2, at 231 (emphasis in original).

⁸⁴ For example, the inclusion of the abbreviation "etc." at the end of the OFCCP list of "life activities" shows that the OFCCP did not intend to limit the term's definition to those functions specifically mentioned.

⁸⁵ The high medical costs associated with treating an AIDS patient show the substantial degree of medical care that an AIDS victim requires. See note 60 *supra*.

cifically, the maintenance of one's good health can logically be seen as a "major life activity." The limiting of any of these activities⁸⁶ renders AIDS an impairment which affects "major life activities."

In summary, agency guidelines suggest that AIDS qualifies as a "physical or mental impairment which substantially limits one or more [of its victim's] major life activities."⁸⁷ Accordingly, employees or job applicants with AIDS would appear to be "handicapped individuals" protected by the Rehabilitation Act.

Declaring AIDS a handicap would mean that persons perceived as having AIDS, as well as actual victims of AIDS, could find legal refuge in the Rehabilitation Act. Persons perceived as having AIDS would include individuals who exhibit AIDS-associated symptoms, individuals who test positive on the AIDS blood test,⁸⁸ and friends of actual AIDS victims. These individuals would find protection under section 706(7)(B)'s definition of a "handicapped individual" which includes any person who is "regarded as having . . . an impairment."⁸⁹ Thus, any employee or job applicant who was discriminated against because he was suspected of having AIDS would qualify for protection, whether or not he in fact had the disorder.⁹⁰

86 Note that the statutory definition of a "handicapped individual" requires that the impairment affect "one or more" major life activities. 29 U.S.C. § 706(7)(B) (1982). Consequently, even if AIDS affects only one of the "major life activities" discussed in the text, the disease clears this definitional hurdle.

87 29 U.S.C. § 706(7)(B) (1982).

88 One example of the potential employment discrimination faced by persons who test positive on the AIDS blood test recently occurred in Abilene, Texas. The Hendrick Medical Center discharged an assistant cafeteria worker after his donated blood was found to contain antibodies to the HTLV-III/LAV virus. The hospital believed the worker's dismissal was necessary because of "the disruption to the work environment caused by [the employee's] inappropriate communication to other employees about his medical condition." The employee has filed a charge of discrimination under § 504 of the Rehabilitation Act. *AIDS-As-Disability Debate Fueled By Bias Case*, AIDS Pol'y & L., Feb. 26, 1986, at 3.

89 29 U.S.C. § 706(7)(B) (1982).

90 Regarding this clause of § 706(7)(B), Congress stated that:

Clause (C) in the new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority. This subsection includes within the protection of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause (A) in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.

S. REP. NO. 1297, 93d Cong., 2d Sess. 39, reprinted in 1974 U.S. CONG. & AD. NEWS 6373, 6389-90. The HHS regulations note that the "is regarded" clause "includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition." 45 C.F.R. § 84 app. A (1985). See also 45 C.F.R. § 84.3(j)(2)(iv) (1985); 41 C.F.R. § 60-741 app. A (1985).

An employee who is regarded as having AIDS but who in fact does not have the disease

In adopting such a definition, Congress wisely recognized that the sanctions imposed by the Rehabilitation Act should depend upon the existence of a discriminatory motive in an employer's mind, and not upon the presence of a handicap in an employee's body. One district court expressed this sentiment rather well:

[Congress'] intent was to protect people who are denied employment because of an employer's perceptions, whether or not those perceptions are accurate. It is of little solace to a person denied employment to know that the employer's view of his or her condition is erroneous. To such a person the perception of the employer is as important as reality.⁹¹

Before reaching a definitive conclusion on whether AIDS is a Rehabilitation Act handicap, one must examine how the federal courts have interpreted the statutory definition of "handicapped individual." If the courts have narrowly construed this definition, AIDS might not be deemed a handicap regardless of what HHS or OFCCP regulations might suggest.

B. *Federal Judicial Interpretations of the "Handicapped Individual"*

Very few federal courts have analyzed section 706(7)(B)'s definition of a "handicapped individual" in any significant detail.⁹² Most actions brought under the Rehabilitation Act involve physical or mental disabilities which either are presumed to be handicaps or are easily proven to be handicaps within the prescribed statutory definition.⁹³ Two federal decisions which do closely examine the

should find it much easier to prove that he is "otherwise qualified" to perform the job in question. See note 4 *supra*.

91 E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1097 (D. Hawaii 1980).

92 As one court stated: "Very few cases spend much time on the issue, as the issue usually requires little analysis." Tudyman v. United Airlines, 608 F. Supp. 739, 744 (C.D. Cal. 1984).

93 See, e.g., Mantoletto v. Bolger, 767 F.2d 1416 (9th Cir. 1985) (epilepsy); Norcross v. Sneed, 755 F.2d 113 (8th Cir. 1985) (congenital visual impairment); Bentivegna v. United States Dep't of Labor, 694 F.2d 619 (9th Cir. 1982) (diabetes); Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981) (severe mental illness); Simon v. St. Louis County, Mo., 656 F.2d 316 (8th Cir. 1981) (paraplegia); Carty v. Carlin, 623 F. Supp. 1181 (D. Md. 1985) (heart attack, nervous breakdown, hernia); Bento v. I.T.O. Corp. of R.I., 599 F. Supp. 731 (D.R.I. 1984) (heart bypass surgery); Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130 (S.D. Iowa 1984) (nocturnal epilepsy, dyslexia, cerebral palsy); Klein v. Albro, No. 81-CV-1288 (N.D.N.Y. Oct. 1, 1982) (muscular dystrophy) (available on LEXIS, Genfed library, Dist file); Longoria v. Harris, 554 F. Supp. 102 (S.D. Tex. 1982) (amputee); Bey v. Bolger, 540 F. Supp. 910 (E.D. Pa. 1982) (record of physical impairment, cardiac disease); Doe v. Syracuse School Dist., 508 F. Supp. 333 (N.D.N.Y. 1981) (history of prior nervous breakdown); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977) (epilepsy).

Courts have found some unusual "handicaps." See, e.g., Fynes v. Weinberger, C.A. No. 85-0427 (E.D. Pa. July 22, 1985) (asbestosis declared a handicap) (available on LEXIS, Genfed library, Dist file); Boyd v. United States Postal Serv., 32 Fair Emp. Prac. Cases (BNA) 1217 (W.D. Wash 1983) (Vietnam veteran suffering from post-traumatic stress dis-

Rehabilitation Act's definition of a "handicapped individual" support the argument that AIDS is a protected handicap.

In *E.E. Black, Ltd. v. Marshall*,⁹⁴ a federal court interpreted section 706(7)(B) for the first time.⁹⁵ The court, rejecting a claim that section 706(7)(B)'s definition of a "handicapped individual" was unconstitutionally vague, concluded that "Congress wanted the statute to have broad coverage and effect."⁹⁶ After examining the relevant regulations and legislative history,⁹⁷ the court affirmed prior administrative opinions in the case and held that the term "impairment" meant "any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity."⁹⁸ Considering the devastating impact that the disease has upon its victim's health, AIDS comes within the *Black* court's definition of "impairment."

The *Black* court also made an in-depth analysis of the term "substantially limits" and, again, construed the term broadly. Reasoning that "the real focus must be on the individual job seeker, and not solely on the impairment,"⁹⁹ the court held that each question of substantiality must be determined on a case-by-case basis.¹⁰⁰ The court stated that "[i]f an individual were disqualified from the same or similar jobs offered by employers throughout the area to which he had reasonable access,"¹⁰¹ his impairment would be "substantially limiting," at least in terms of employment.¹⁰² Under this interpretation of the term, it can be assumed that, partly because of the pervasive public paranoia about AIDS, the disorder would qualify as "substantially limiting." An AIDS victim might experience discrimination from many employers over a widespread area. Even

order deemed a "handicapped individual"); *Vickers v. Veterans Admin.*, 549 F. Supp. 85 (W.D. Wash. 1982) (unusual sensitivity to tobacco smoke limited employee's "major life activity" because of incapacity to work in anything but a completely smoke-free environment); *Daubert v. United States Postal Serv.*, 31 Fair Emp. Prac. Cases (BNA) 459 (D. Colo. 1982) (employee's back injuries determined to be handicap).

94 497 F. Supp. 1088 (D. Hawaii 1980). For a more probing analysis of this decision, see Haines, E.E. Black, Ltd. v. Marshall: *A Penetrating Interpretation of "Handicapped Individual" for Sections 503 and 504 of the Rehabilitation Act of 1973 and for Various State Equal Employment Opportunity Statutes*, 16 Loy. L.A.L. Rev. 527 (1983); Comment, *supra* note 80.

95 "This case of first impression involves the construction and interpretation of several sections of the Rehabilitation Act of 1973 . . . and appurtenant regulations." 497 F. Supp. at 1090.

96 *Id.* at 1098.

97 See notes 62-84 *supra* and accompanying text.

98 497 F. Supp. at 1098.

99 *Id.* at 1100.

100 *Id.*

101 *Id.* at 1101.

102 The court cautioned that "what is to be considered a similar job must be made on a case-by-case basis, and may differ among individuals with similar impairments, depending on their training, education, etc." *Id.*

if he does find an employer educated as to how AIDS is spread, employer concerns regarding employee relations and potential health insurance costs may influence employment decisions. Thus, according to the *Black* court's definitions of "impairment" and "substantially limits," AIDS would appear to be a handicap.

The risk of contagion might be viewed as a major obstacle in any attempt to have AIDS classified as a protected handicap. Although the risk of transmission might differentiate AIDS from so-called "traditional" handicaps, this fact, according to one court, does not necessarily remove the disease from the Rehabilitation Act's protection.¹⁰³ The United States Court of Appeals for the Eleventh Circuit recently ruled that the contagious disease, tuberculosis, is a handicap for purposes of the Rehabilitation Act. The case, *Arline v. School Board of Nassau County*,¹⁰⁴ involved an elementary school teacher who was discharged from her job because of her susceptibility to tuberculosis.¹⁰⁵ The district court had found that a contagious disease such as tuberculosis was not a "handicap" within the meaning of the Rehabilitation Act.¹⁰⁶

After examining the pertinent HHS regulations, the Eleventh Circuit disapproved of such a finding. The court stated that :

Though the district court apparently thought it illogical to conclude that Congress would have placed contagious diseases within the definition of "handicaps," there is no objective evidence to support this conclusion. Neither the regulations nor the statutory language give any indication that chronic contagious diseases are to be excluded from the definition of "handicap."¹⁰⁷

The court refused to carve out an exception to the statutory definition of a "handicapped individual" "where there [was] not a scin-

103 The HHS (then, the Department of Health, Education and Welfare), upon promulgation of its regulations regarding § 504 of the Rehabilitation Act, recognized that the Act did not solely protect those individuals with "traditional" handicaps. The regulations provide that:

A related issue . . . is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways. The most common recommendation was that only "traditional" handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps.

45 C.F.R. § 84 app. A (1985).

104 772 F.2d 759 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 1633 (1986).

105 *Id.* at 760.

106 The court of appeals noted that the district court supported its conclusion by stating, "it's difficult for this court to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person" *Id.* at 763.

107 *Id.* at 764.

tilla of evidence that Congress had any intention of doing so."¹⁰⁸ Finding no valid reason to rule otherwise, the Eleventh Circuit held that a contagious disease may qualify as a "handicap" under the Rehabilitation Act.¹⁰⁹

Although the federal case law on this issue is limited, those courts which have considered the issue have generally agreed with the liberal interpretation of section 706(7)(B) espoused by the *Black* and *Arline* courts.¹¹⁰ A few courts in recent years, concerned that the term handicapped might become a meaningless phrase,¹¹¹ have refused to classify certain purported impairments, such as crossed eyes,¹¹² an excessively muscular build,¹¹³ and left-handedness,¹¹⁴ as "handicaps."¹¹⁵ This type of concern is not present when addressing the devastating disease, AIDS. Considering both the flexibility that federal courts have exhibited when defining "handicapped in-

108 *Id.* The court also supported its decision not to create an exception by observing that "Congress' failure to exclude contagious diseases from coverage when it specifically excluded alcoholism and drug abuse implies that it harbored no similar disapproval about them." *Id.*

109 Although not specifically addressing whether a contagious disease could be classified as a "handicap" for purposes of the Rehabilitation Act, an important earlier case is *New York State Ass'n for Retarded Children, Inc. v. Carey*, 466 F. Supp. 479 (E.D.N.Y. 1978), *aff'd*, 612 F.2d 644 (2d Cir. 1979). In this case, the federal district court examined a contagious disease, hepatitis B, and concluded that restricting mentally retarded students infected with the disease to certain classes violated the Rehabilitation Act. The court reasoned that "[b]ased on the evidence we have heard, we find that the risk of contagion of hepatitis B among mentally retarded children is not substantial enough to justify their discriminatory exclusion from public school. The risk of contagion cannot be ignored, but there are prophylactic measures, not necessarily as stringent as those of the Department of Health, which can be taken to reduce the risks to a *de minimis* level." 466 F. Supp. at 486. Judicial attitudes such as this towards a disease more contagious (see *Recommendations for Preventing Transmission of Infection with HTLV-III/LAV in the Workplace*, *supra* note 46), albeit less deadly than AIDS, bodes well for AIDS victims who must bring their employment discrimination claims to federal court.

110 See *Black*, 497 F. Supp. at 1098 ("Congress was not required to spell out in detail every possible condition or abnormality that could constitute an impairment. It is clear that Congress was trying to protect a large number of people in a broad range of situations."). See also *Doe v. New York Univ.*, 666 F.2d at 775 ("Our conclusion [that severe mental illness constituted a "handicap"] is reinforced by the wide scope of the definition in [section 706(7)(B)] . . . and by its legislative history, which indicates that the definition is not to be construed in a niggardly fashion."); *Tudyman v. United Airlines*, 608 F. Supp. at 746 (court made its decision "cognizant that the definitions are generally to be read broadly").

111 See, e.g., *Tudyman*, 608 F. Supp. at 746.

112 *Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985) (criticizing *Black* court's analysis of definitional elements of § 706(7)(B)).

113 *Tudyman*, 608 F. Supp. 739 (C.D. Cal. 1984).

114 *de la Torres v. Bolger*, 610 F. Supp. 593 (N.D. Tex. 1985), *aff'd*, 781 F.2d 1134 (5th Cir. 1986).

115 See, e.g., *Oesterling v. Walters*, 760 F.2d 859 (8th Cir. 1985) (varicose veins in leg deemed an "impairment" which, although affecting "major life activities" of sitting and standing, did not "substantially limit" such activities); *Pridemore v. Rural Legal Aid Soc'y of West Cent. Ohio*, 625 F. Supp. 1180 (S.D. Ohio 1985) (a "borderline" case of cerebral palsy was deemed not to constitute a "handicap"); *Stevens v. Stubbs*, 576 F. Supp. 1409, 1414 (N.D. Ga. 1983) (An undisclosed transitory illness held not a "handicap." "Whatever

dividual" and the general disdain they hold for apparently unjustified employment discrimination, it seems likely that these courts will extend the Rehabilitation Act's protection to victims of AIDS.¹¹⁶

Although no federal court has addressed this issue,¹¹⁷ one tribunal, the Florida Commission on Human Relations, has considered whether it should classify AIDS as a legally recognized handicap in the employment context. *Shuttleworth v. Broward County Office of Budget and Management Policy*,¹¹⁸ involved a state clerical worker who was fired from his job because he had contracted AIDS. The Commission's opinion is noteworthy because it examined the Florida statute which defines a handicapped individual as a person having "a physical impairment which substantially limits one or more major life activities or . . . [a person who] is regarded as having such physical impairment."¹¹⁹ Over employer contentions that AIDS was not a handicap because it was a communicable disease, the Commission ruled that AIDS is a physical impairment for purposes of the Florida statute.¹²⁰ Because the employer dismissed its employee for having the handicap of AIDS, the Commission found

the precise delineations of the term 'impairment,' the court is unconvinced that it encompasses transitory illnesses which have no permanent effect on the person's health.").

The legislative history of § 706(7)(B) provides some additional support for these decisions. "[A] new definition has been developed which would provide sufficient latitude (*but still not be totally open ended*) . . . for the nondiscrimination programs carried out under sections . . . 503 and 504 . . ." S. REP. NO. 1297, 93d Cong., 2d Sess. 63, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6376, 6413 (emphasis added).

116 Most commentators believe AIDS is a handicap covered by the Rehabilitation Act. *See, e.g.,* Parry, *supra* note 7, at 2 ("[T]here can be little doubt that the federal [definition of a handicap] include[s] AIDS."); Cecere, *AIDS Presents Many Legal Issues for Workplace*, LEGAL TIMES, Dec. 2, 1985, at 10 ("Given the federal and state discrimination laws' definition of handicap, it is necessary to conclude that AIDS is a handicap since AIDS is a medical impairment of normal bodily functions.").

117 The New York State Attorney General, in a case dealing with discrimination in "public accommodations," concluded that AIDS is a handicap covered under the New York Human Rights Law. The case involved the refusal of an apartment board of directors to renew a gay doctor's lease. The doctor, although not an AIDS victim himself, had treated many AIDS patients at the Greenwich Village apartment complex. A trial judge, in denying the apartment board's motion to dismiss for failure to state a claim, impliedly affirmed the attorney general's earlier decision that AIDS was a handicap protected under state law. The case was settled before the court reached a final determination in the case. *People v. 49 West 12th St. Tenants' Corp.*, No. 43604/83 (N.Y. Sup. Ct. Oct. 17, 1983) (unpublished opinion), *discussed in* N.Y.L.J., Oct. 17, 1983, at 1, col. 1.

118 FCHR No. 85-0624 (Dec. 11, 1985), *reprinted in* Daily Lab. Rep. No. 242, E-1, E-5 (Dec. 17, 1985).

119 This language of the Florida statute, FLA. STAT. § 760.22(5) (Supp. 1984), is obviously modeled after the corresponding provisions of the Rehabilitation Act. In reaching its decision, the Commission also used the HHS regulatory definitions as guides in construing the key terms, "physical impairment," "substantially limits," and "major life activities." *Shuttleworth*, Daily Lab. Rep. No. 242, at E-5.

120 "[I]t is clearly evident that Complainant's lymphatic condition and cancer (Kaposi's sarcoma) qualify as physical impairments as previously defined." *Id.* at E-6.

in favor of the employee.¹²¹

In a recent case involving an AIDS victim's right to attend public school, a state court held that AIDS does qualify as a handicap under section 504 of the Rehabilitation Act. In *District 27 Community School Board v. Board of Education*,¹²² the Supreme Court of Queens County, New York ruled that the New York City Board of Education had properly allowed a student with AIDS to attend public school.¹²³ In holding that exclusion of the AIDS-infected child from school would violate section 504, the court determined that AIDS does qualify as a "physical impairment" for purposes of the Rehabilitation Act.¹²⁴ The court emphasized that, according to the relevant regulations, a covered impairment included disorders or conditions affecting the "hemic and lymphatic" body systems.¹²⁵ Because the AIDS virus destroys certain lymphocytes, integral elements of these systems, an AIDS victim "clearly has such a 'physical impairment.'" ¹²⁶ Without analyzing whether this physical impairment "substantially limits" its victim's "major life activities," the court declared that AIDS is a Rehabilitation Act handicap.¹²⁷ Although the rulings of this state court and of the Florida Commission on Human Relations are not binding precedent, the *District 27 Community School Board* and *Shuttleworth* opinions demonstrate that recognition of AIDS as a handicap is a plausible judicial stance. Federal courts should not hesitate to rule accordingly.

III. Can the Rehabilitation Act Protect AIDS Victims?

Most of the indicia from the foregoing examination of AIDS and the Rehabilitation Act support the conclusion that AIDS is a "handicap" protected by the Act. The debilitating effects¹²⁸ and disheartening incurability¹²⁹ of the disease show that AIDS, like commonly recognized handicaps, is a serious, disabling handicap for those who acquire it. Looking to the plain meaning of the statute, one might conclude that AIDS is a "physical impairment"¹³⁰ which "substantially limits"¹³¹ its victim's "major life activities."¹³²

121 *Id.*

122 No. 14940-85 (N.Y. Sup. Ct. Feb. 11, 1986).

123 Slip op. at 49.

124 *Id.* at 52.

125 *Id.* See notes 71-72 *supra* and accompanying text.

126 *District 27 Community School Board*, slip op. at 52. The court also observed that AIDS victims would be covered under the "is regarded" clause of the Rehabilitation Act definition of a "handicapped individual." *Id.* See notes 88-90 *supra* and accompanying text.

127 *District 27 Community School Board*, slip op. at 53.

128 See notes 25-41 *supra* and accompanying text.

129 See notes 14-17 *supra* and accompanying text.

130 29 U.S.C. § 706(7)(B) (1982). See notes 71-75 *supra* and accompanying text.

131 29 U.S.C. § 706(7)(B) (1982). See notes 76-81 *supra* and accompanying text.

132 29 U.S.C. § 706(7)(B) (1982). See notes 82-86 *supra* and accompanying text.

More exacting scrutiny of the relevant regulatory specifications for a handicap¹³³ lends even more probative force to the argument that AIDS qualifies as a handicap. The Act's legislative history clearly contemplates its broad application.¹³⁴ Thus, federal courts will probably hold that the Rehabilitation Act protects AIDS victims because "coverage would so clearly serve to promote Congress' intent to reduce instances of unthinking and unnecessary discrimination against those who are the focus of the statute's concern."¹³⁵

Some critics of the assertion that AIDS is a handicap for purposes of the Rehabilitation Act allege that there is a voluntary aspect to acquiring the disease. Although only applicable to individuals who contract AIDS through sexual contact,¹³⁶ this argument suggests that AIDS is not a handicap because it is an impairment acquired by choice. Congress' specific exclusion of current drug and alcohol abusers from the definition of a handicapped individual¹³⁷ could be construed to show that Congress did not intend to extend the Rehabilitation Act to protect those with "voluntary" im-

133 See notes 64-87 *supra* and accompanying text.

134 See notes 62 and 103 *supra*; cf. note 115 *supra* (definition broad, but not unlimited).

135 *Arline v. School Bd. of Nassau County*, 772 F.2d 759, 764 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 1633 (1986).

136 Theoretically, this argument might also be advanced against AIDS victims who acquire the disease through intravenous drug use. Such an argument is considerably weakened, however, by the determination of the Secretary of the HHS that drug abusers are protected under the Rehabilitation Act. See note 137 *infra*.

137 Section 706(7)(B), in addition to providing the definition of a "handicapped individual," contains the following provision:

For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

29 U.S.C. § 706(7)(B) (1982). The HHS regulations, however, in interpreting § 706(7)(B), provide that drug addiction and alcoholism may qualify as handicaps. The regulations provide that:

The Secretary has carefully examined the issue [of whether to include drug addicts and alcoholics within the definition of handicapped person] and has obtained a legal opinion from the Attorney General. That opinion concludes that drug addiction and alcoholism are "physical or mental impairments" within the meaning of section 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for purposes of section 504 if their impairment substantially limits one of their major life activities. The Secretary therefore believes that he is without authority to exclude these conditions from the definition.

45 C.F.R. § 84 app. A (1985). Most courts have agreed with the HHS interpretation and have ruled that alcoholism or drug abuse does not automatically disqualify one from handicapped status. The alcoholic or drug user must usually show that he has recovered from his substance abuse and that his impairment does not affect the current performance of his job. See *Tinch v. Walters*, 765 F.2d 599 (6th Cir. 1985); *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1231 n.8 (7th Cir. 1980); *Healy v. Bergman*, 609 F. Supp. 1448 (D. Mass. 1985); *Traynor v. Walters*, 606 F. Supp. 391 (S.D.N.Y. 1985); *Athanas v. Board of Educ. of School*

pairments. As one writer opined, a "volitional victim, to a large extent, does choose his or her problem."¹³⁸ An employer might assert that homosexuals who acquire AIDS are not innocent victims of a handicap, as are epileptics or paraplegics. The employer might claim that their impairments are self-imposed and should not be protected handicaps under the Rehabilitation Act.¹³⁹

In rebuttal, one must question whether a so-called "decision" to expose oneself to AIDS can be considered voluntary. One does not rationally choose to confront a life-threatening disease; homosexuals do not elect to become AIDS victims to obtain protection under the Rehabilitation Act. One exposed to AIDS through sexual contact does not choose to contract a handicap, just as one who loses an arm while running farm machinery does not choose to acquire his handicap. Both "accidents" are the unfortunate and unintended consequences of common behavior. Construing the development of AIDS to be a "voluntary" handicap stretches such a concept past the breaking point.

IV. Conclusion

Persons with AIDS are frequently the victims of both a deadly, misunderstood disease and cruel, unjustified discrimination. When this discrimination invades workplaces benefiting from federal contracts or financial assistance, the Rehabilitation Act of 1973 should provide a measure of legal protection for AIDS victims who have been discriminated against. Congress clearly intended for this Act to be a flexible and meaningful weapon to fight an employer's baseless discrimination against the handicapped. The broad definition of a protected "handicapped individual" that Congress enacted can include persons with AIDS. Accordingly, because no viable statutory or judicial barriers exist to such a classification, AIDS should be deemed a "handicap" for purposes of the Rehabilitation Act of 1973.

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Dist. 111, 28 Fair Emp. Prac. Cases (BNA) 569 (N.D. Ill. 1980); *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978).

¹³⁸ Ogden, *Justice and the Problem of the Volitional Victim*, 1977 LABOR L.J. 417, 420.

¹³⁹ The court in *Tudyman*, 608 F.2d 739, refused to deem the plaintiff's excessively muscular build a handicap for purposes of § 504. One of the reasons the court gave for its ruling was that the "[plaintiff's] weight and low fat content are self-imposed and voluntary. This distinguishes the present case from one in which the plaintiff's weight was involuntary—e.g., the result of a glandular problem." *Id.* at 746.