

AIDS AND DISCRIMINATION IN THE WORKPLACE: HOW WILL THE VIRGINIA COURTS RULE?

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INTRODUCTION

In June of 1989, *Nation's Business* magazine reported the results of a study conducted by the Philadelphia Commission on AIDS and the Greater Philadelphia Chamber of Commerce on the attitudes about and the impact of AIDS in small businesses in Philadelphia.¹ The results were disturbing. Only four percent of the enterprises surveyed had company policies on AIDS. Further, 75 percent of the companies knew little, if anything, about any of their legal obligations towards employees with AIDS. Forty percent responded that they would limit contact between the employee with AIDS and his co-workers. Sixteen percent indicated that they would encourage employees with AIDS or HIV (Human Immunodeficiency Virus or Human T-Cell Lymphotropic Virus Type III)² infection to resign. Thirty percent said that they would disclose to the infected employee's co-workers confidential information concerning his infection without the employee's consent.³

The Fall 1988 issue of *The Colonial Lawyer* included an article ("1988 article") authored by Thomas Sotelo,⁴ which investigated whether under the available regulations and cases, the Rehabilitation Act of 1973⁵ ("Rehabilitation Act") afforded protection to individuals suffering from the Acquired Immune Deficiency Syndrome (AIDS), AIDS-

¹ Singer, *AIDS Concerns for Business; Includes related articles on principles for the workplace and information about AIDS*, NATION'S BUS., June 1989, at 75, ____.

² See *infra* text accompanying notes 12-35.

³ Singer, *supra* note 1, at ____.

⁴ Sotelo, *AIDS: Handicap or Not?*, 17 COL. LAW. 1 (1988).

⁵ 29 U.S.C. § 794 (1983).

related Complex (ARC), or infection with the Human Immunodeficiency Virus (HIV),⁶ and whether this protection could be extended to those perceived as being at a high risk of having AIDS, because of their association with certain "high-risk" groups.⁷ If the Rehabilitation Act's formulation of "handicapped individual" is found to be applicable to these persons, its antidiscrimination policies also apply to them. In the 1988 article, the author concluded that persons suffering with the forms of AIDS listed above indeed fit within the Rehabilitation Act's definition of handicapped, and may use the act as a defense against employment discrimination.⁸

The purpose of this paper is to examine developments in the law since the 1988 article, both at the federal and state levels. Although AIDS victims may be deemed handicapped individuals under the Rehabilitation Act and the attendant regulations, the human rights laws of the states may differ significantly in structure and degree of protection offered the handicapped individual. In all cases, there are many factors to be taken into account in deciding whether the situation in any given case actually fits into the scope of the statutes. On the state level, this paper will focus primarily on Virginia's Rights of Persons with Disabilities Law,⁹ and its probable interpretation in an AIDS-related employment discrimination case.

The examination of Virginia's laws protecting the rights of AIDS victims will be looked at in the context of general facts about the nature of AIDS, ARC, HIV infection, and the spread of the disease. Developments in the federal law since *School*

⁶ Throughout the article, "HIV" is used to refer to Human T-Cell Lymphotropic Virus Type III (HIV-III) as well as Human Immunodeficiency Virus, both recognized as AIDS causing agents.

⁷ Homosexuals, blacks, and hispanics are groups who have been hit the hardest by the spread of the syndrome. Singer, *Helping People with AIDS Stay on Job*, N.Y. Times, Apr. 15, 1989, § 1, at 28, col. 1. See also Kosterlitz, *'Us,' 'Them' and AIDS*, 20 NAT'L. J. 1738, 1741-42 (1988).

⁸ Sotelo, *supra* note 4, at 13.

⁹ VA. CODE ANN. §§ 51.5-1 to -46 (1988 & Supp. 1989).

Board of Nassau County, Florida v. Arline,¹⁰ and *Thomas v. Atascadero Unified School District*¹¹ will also be examined. Finally, it examines the probable construction of Virginia's antidiscrimination statute in light of the interpretations courts of other states have given their own human rights statutes.

THE AIDS EPIDEMIC

Epidemiologists believe that the AIDS virus was actively spreading in the United States by the late 1970's;¹² early cases were first documented in 1979.¹³ Originally considered a disease limited to homosexual males and intravenous drug users, AIDS has spread into the general population striking individuals in other "lower risk" groups.¹⁴

The HIV virus, which causes AIDS, is extremely fragile, and must gain access to the bloodstream of its intended victim.¹⁵ It has spread in four ways: (1) through sexual intercourse with persons infected by the AIDS virus, (2) sharing needles used to inject intravenous drugs, (3) injections of contaminated blood products, as in blood transfusions,¹⁶ or (4) to a child from an infected mother during birth, or from breast

¹⁰ 480 U.S. 273 (1987) (A teacher with tuberculosis met the statute's requirements for a handicapped individual, and could not be removed from employment because of a relapse of her disease. The fact that the disease is contagious does not, in and of itself, remove it from the protection of the Rehabilitation Act).

¹¹ 662 F. Supp. 376 (C.D. Cal. 1987) (A child who was demonstrating symptoms of ARC was designated "otherwise qualified" for the purposes of being allowed to remain in class).

¹² N.Y. Times, Nov. 7, 1989, at B7, col. 1.

¹³ Comment, *AIDS and Employment Discrimination Under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons with Disabilities Act*, 20 U. RICH. L. REV. 425, 425 (1985) [hereinafter Comment, *Aids and Employment Discrimination*].

¹⁴ Kosterlitz, 'US,' 'Them' and AIDS, 20 NAT'L J. 1738, 1740 (1988).

¹⁵ J. LANGONE, AIDS: THE FACTS 73 (1988).

¹⁶ *Id.* at 71.

feeding.¹⁷ All evidence has indicated that the virus is not spread through casual contact.¹⁸ Once in the bloodstream, the virus attacks white blood cells and disrupts the functioning of the immune system.¹⁹ Two types of blood cells, B-cells and T-cells, work together to find and destroy unfamiliar substances (antigens) in the bloodstream.²⁰ The B-cells attach themselves to antigens and produce multiplying antibodies, or "memory cells," that will attack antigens of the same type.

T-helper cells recognize any familiar antigens that enter the bloodstream, and prompt the B-cells to immediately begin production of the antibodies needed to fight them.²¹ T-suppressor cells limit antibody production, and ensure that the B-cells only make antibodies to attack the appropriate antigens.²²

HIV impairs the functioning of T-helper cells, rendering them incapable of recalling substances to which the B-cells have antibody-producing abilities. Since the

¹⁷ *Id.* at 73-74.

¹⁸ *Id.* at 75-77. In February, 1986, the *New England Journal of Medicine* reported the results of a study of the possible spread of AIDS among family members. Families were singled out for the study, since the contact between family members is closer and more intimate than in any other instances that may be considered "casual contact." "[T]he study involved 101 people -- parents, children, siblings, and other relatives of 39 AIDS victims --each of whom had lived with the patient for at least three months . . . , while the victims were infected. *Id.* at 75-76. Although there was significant evidence of close contact -- for instance, ninety-two percent of the family members surveyed shared the same shower or bathtub as the AIDS patient, fifty percent drank from the same drinking glasses, and thirty seven percent slept in the same bed as the patient -- only one person out of the 101 studied had positive results for the presence of antibodies when later tested. This single victim was a five year old girl, whom doctors believe was infected since birth, as her mother had AIDS. *Id.* at 76.

¹⁹ Comment, *Aids and Employment Discrimination*, *supra* note 13, at 426-28.

²⁰ *Id.* at 427.

²¹ *Id.* It is essential for the T-helper cells to remind the B-cells of their capacity for making the antibodies, since B-cells neither recognize antigens on their own, nor remember that they are able to make the applicable antibodies. *Id.*

²² *Id.*

B-cells are unable to recognize antigens, they fail to produce antibodies, and the body cannot protect itself from viral and fungal invasions.²³

Infection with HIV tends to have three basic manifestations. The most severe is full-blown AIDS, the final stage of an AIDS virus infection.²⁴ A diagnosis of AIDS involves laboratory evidence of the presence of the AIDS virus (HIV infection), as well as an "indicator disease."²⁵ Also referred to as opportunistic diseases, these invade the body once the immune system is suppressed by the AIDS virus.²⁶ Symptoms of AIDS itself include swollen glands, unexplained loss of appetite, weakness, recurring fever and common infections, night sweats, persistent and unexplained diarrhea, continuous dry coughing, shingles, and skin rashes and spots.²⁷ Evidence indicates that HIV attaches to the central nervous system as well as the immune system causing a range of consequences "from forgetfulness to dementia."²⁸ AIDS is usually fatal when confronted in its full-blown state. ARC (AIDS-Related Complex) is a milder form of the disease, and is generally not life-threatening.²⁹ Further, ARC may or may not ever develop into full-blown AIDS.³⁰

²³ *Id.*

²⁴ LANGONE, *supra* note 15, at 8.

²⁵ Comment, *Protecting Persons with AIDS from Employment Discrimination*, 77 KY. L.J. 403, 404-05 (1988-89) [hereinafter, Comment, *Persons with AIDS*].

²⁶ Sotelo, *AIDS: Handicap or Not?*, 17 COL. LAW. 1, 2 (1988). Two often-noted opportunistic diseases associated with AIDS are pneumocystis carinii pneumonia, and Kaposi's sarcoma. *Id.* Pneumocystis carinii pneumonia is a form of pneumonia that causes weakness, fever, labored breathing, and a dry, hacking cough. LANGONE, *supra* note 15, at 14. Kaposi's sarcoma is a usually non-fatal skin cancer that produces painful purple lesions that cover the body. *Id.* at 16.

²⁷ LANGONE, *supra* note 15, at 14-16.

²⁸ *Id.* at 14.

²⁹ *Id.* at 12.

³⁰ *Id.*

The third possible manifestation of the disease is an often-asymptomatic infection with the HIV virus.³¹ A person in this category could either test virus-positive, with detectable antibodies in the blood, or antibody-positive, with a positive serological test result, and never develop the symptoms of AIDS or ARC.³² The infection caused by HIV proceeds slowly, and it is impossible to predict the number of people who are HIV-positive and will develop AIDS or ARC.³³ It is estimated that for every current AIDS patient, there are 25 to 75 people who are carrying the virus.³⁴ It is also estimated that 1.5 million Americans are currently in this category.³⁵

THE REHABILITATION ACT OF 1973

The Rehabilitation Act of 1973³⁶ ("Rehabilitation Act") provides for equal opportunities for benefits of federally-funded programs and federal agencies, to those persons who qualify as "individual[s] with handicaps."³⁷ Such a person is defined by

³¹ Comment, *AIDS and Employment Discrimination*, *supra* note 13, at 430. *See also* LANGONE, *supra* note 15, at 10. The only symptom that tends to manifest itself at this stage of the syndrome is a short-term, mononucleosis-type disorder, characterized by swollen glands. *Id.*

³² Comment, *AIDS and Employment Discrimination*, *supra* note 13, at 430.

³³ LANGONE, *supra* note 15, at 10-11. Infected persons without symptoms have developed detectable antibodies within two to eight weeks after being exposed to the virus, though antibodies have also taken up to six to eight months to appear. Even with the presence of the antibodies, the victim may remain free of symptoms for a considerable amount of time (weeks or years), depending on how the disease was transmitted. *Id.* at 11.

³⁴ Koch, *Arlington AIDS Program to Focus on Education*, *The Washington Post*, May 12, 1988, *Virginia Weekly*, § vi. *See also* Singer, *Helping People with AIDS Stay on Job*, *N.Y. Times*, Apr. 15, 1989, § 1, at 28, col. 1.

³⁵ LANGONE, *supra* note 15, at 10.

³⁶ Pub.L. No. 93-112, Title V, § 504, 87 Stat. 394 (1973) (codified as amended at 29 U.S.C. §§ 701-796 (1983)).

³⁷ The Rehabilitation Act states, in pertinent part, that:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title,

the Rehabilitation Act as either an individual "who has a physical or mental impairment which substantially limits one or more of such person's major life activities,"³⁸ "has a record of such an impairment,"³⁹ or "is regarded as having such an impairment."⁴⁰ For

shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C.A. § 794 (Supp. 1989).

³⁸ 29 U.S.C.A. § 706(8)(B)(i) (Supp. 1989).

Regulations promulgated under this statute define "physical or mental impairment" as:

any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; . . . hemic and lymphatic; skin

45 C.F.R. § 1232.3(h)(2)(i) (1989). All of these apply to AIDS or ARC patients.

"Major life activities" are defined as:

functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

45 C.F.R. § 1232.3(h)(2)(ii) (1989).

³⁹ 29 U.S.C.A. § 706(8)(B)(ii) (Supp. 1989).

Regulations define this to apply to a person who:

has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

45 C.F.R. § 1232.3(h)(2)(iii) (1989).

⁴⁰ 29 U.S.C.A. § 706(8)(B)(iii) (Supp. 1989). An individual regarded as having a physical or mental impairment:

(A) has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards such impairment; or (C) has none of the impairments defined in

the purposes of employment discrimination, persons whose handicaps involve drug or alcohol abuse are specifically excluded from coverage. These are the only such limitations.⁴¹

The Rehabilitation Act does not apply to all persons who have a disability. Under the plain language of the Rehabilitation Act, protection to individuals with a handicap is limited to those who are "otherwise qualified."⁴² In the 1988 article, the author argued that individuals with AIDS, ARC, or who are carriers of the HIV virus are all protected under the Rehabilitation Act.⁴³ Persons afflicted with AIDS fit into the criteria of having a physical or mental impairment, due to the symptoms they endure.⁴⁴ They meet the second criteria, substantial limitation of major life activities, through their impaired ability to fight disease, need for constant medical attention, and endurance of the stigma associated with having AIDS.⁴⁵ Persons with ARC, or who are asymptomatic carriers of the virus, may meet the handicapped criteria as persons with "a record of

paragraph (h)(2)(i) of this section but is treated by a recipient as having such an impairment.

45 C.F.R. § 1232.2(h)(2)(iv) (1989).

⁴¹ 29 U.S.C.A. § 706(8)(B) (Supp. 1989).

⁴² 29 U.S.C.A. § 794(a) (Supp. 1989). Regulations define "qualified handicapped person" as:

(1) . . . , a handicapped person who, with reasonable accommodation, can perform the essential functions of the job or assignment in question.

45 C.F.R. § 1232.3(i)(1) (1989). In cases involving contagious diseases, "reasonable accommodation" is concerned with eliminating the risk to other employees or others working closely with the AIDS victim. *But see* 29 U.S.C.A. § 706(8)(C) (Supp. 1989).

⁴³ Sotelo, *AIDS: Handicap or Not?*, 17 COL. LAW. 1, 4-9 (1988).

⁴⁴ *Id.* at 6-7.

⁴⁵ *Id.* at 7. *See also* J. LANGONE, *AIDS: THE FACTS*, 71-72 (1988).

such impairment."⁴⁶ The author also cited cases that indicated that courts also tended to support the definition of AIDS as a handicap within the scope of the Rehabilitation Act,⁴⁷ despite the fact that AIDS is not listed as a handicap in the statute.

Other authors have agreed with the view that AIDS is a handicap.⁴⁸ The only exception to inclusion of AIDS in the Rehabilitation Act appears to be in limited circumstances, where bona fide health and safety risks render employment of an AIDS victim imprudent.⁴⁹ In these conditions, the employee will not be considered "otherwise qualified" to participate in the employment in question, and thus the Act is inapplicable.

Cases decided since the publication of the 1988 article continue to point towards the idea that, were the question before the Supreme Court, the Court would rule that AIDS is indeed a handicap under the Rehabilitation Act.⁵⁰ The holdings in the two cases principally cited in the 1988 article, *Thomas v. Atascadero Unified School*

⁴⁶ Sotelo, *supra* note 43, at 8. This applies whether or not the carrier actually has symptoms; the criteria is more based on the ways that the individual is perceived by other persons. *Id.*

⁴⁷ *Id.* at 9-12.

⁴⁸ See, e.g., Comment, *Protecting Persons with AIDS from Employment Discrimination*, 77 KY. L.J. 403, 407-17 (1988-89); Comment, *AIDS and Employment Discrimination Under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons with Disabilities Act*, 20 U. RICH. L. REV. 425, 433-45 (1985).

⁴⁹ Examples of these situations involve "sensitive jobs," positions where the employee is charged with the safety of others, or is involved with an intellectually demanding or particularly intricate line of work. The AIDS virus' attack on the central nervous system has been shown to cause dementia in the victim, and the slow process of deterioration often makes detection of any mental impairment difficult. See generally Hentoff, *The Rehabilitation Act's Otherwise Qualified Requirement and the AIDS Virus: Protecting the Public from AIDS-Related Health and Safety Hazards*, 30 ARIZ. L. REV. 571 (1988).

⁵⁰ The following does not purport to represent a comprehensive survey of all the new federal case law since the Fall 1988 issue of the Colonial Lawyer. For the purposes of this article, these cases are included to indicate the apparent direction that case law has taken.

District,⁵¹ and *School Board of Nassau County, Florida v. Arline*⁵² both turned on the presence or absence of a significant risk of infection to others. The courts in those cases held respectively that absent a significant risk of others contracting the illness (ARC in *Thomas* and tuberculosis in *Arline*), the individual will be classified a "qualified individual," and thus protected under the Rehabilitation Act. In the *Arline* decision, the Supreme Court endorsed the American Medical Association's formulation of the finding of facts necessary to balance whether or not an individual with a contagious disease is "otherwise qualified" for the employment in question.⁵³ The *Arline* decision is cited extensively in *Chalk v. United States District Court Central District of California*.⁵⁴ This case, similar to *Arline*, involved a situation in which a teacher was removed from his position due to his contagious disease. However, *Arline* involved tuberculosis, and the Supreme Court was careful not to rule on the applicability of the case's holding to the AIDS virus.⁵⁵ In *Chalk*, the Ninth Circuit Court of Appeals

⁵¹ 662 F. Supp. 376 (C.D. Cal. 1987).

⁵² 480 U.S. 273 (1987).

⁵³ *Id.* at 288. The Court held that:

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

Id. (citing Brief for the American Medical Association as *Amicus Curiae* 19).

⁵⁴ 840 F.2d 701 (9th Cir. 1988).

⁵⁵ The case does not present, and we therefore do not reach, the question whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered solely on the basis of contagiousness, a handicapped person as defined by the Act.

utilized the standards articulated in *Arline* for finding a significant risk, to overturn the District Court's refusal to issue a preliminary injunction reinstating Chalk to his teaching position.⁵⁶

Another case that used the *Arline* standards to deal with AIDS in the classroom, though in the context of a student's right to attend class, is *Martinez v. School Board of Hillsborough County, Florida*.⁵⁷ This case involved the segregation of a five-year-old mentally retarded girl, who was isolated from the rest of her special education class, because of the school board's fear that the AIDS virus with which she was infected would present a risk of contamination to the other students. The girl was not toilet trained, and habitually sucked her fingers.⁵⁸ The court took an approach similar to that in *Arline* in interpreting Section 504 of the Rehabilitation Act. The 11th Circuit Court of Appeals held that the risk involved in having the child in the classroom was easily accommodated by seating her apart from the other students, and therefore, the risk did not rise to the level of "significant."⁵⁹

The situation involved in *Martinez*, where it was found that the risk of AIDS infection was merely a "remote theoretical possibility,"⁶⁰ may be compared to an employment setting, in an attempt to predict how a court might rule in the latter situation. It is clear that, with the exception of a few lines of work where AIDS

Arline, 480 U.S. at 282 n. 7.

⁵⁶ Chalk, 840 F.2d at 710-11.

⁵⁷ 861 F.2d 1502 (11th Cir. 1988).

⁵⁸ *Id.* at 1503-04.

⁵⁹ *Id.* at 1505-06. The court divided the process of determining a significant risk into steps. First, the "trial judge must determine whether the individual is 'otherwise qualified,'" based on the criteria set forth in *Arline*. *Id.* at 1505. Then, even if the individual with a handicap is not deemed "otherwise qualified," the court must determine if the handicapped person could be made so through reasonable accommodation. *Id.*

⁶⁰ *Id.* at 1506.

constitutes a valid threat to either those around the victim or the victim himself,⁶¹ segregation and discriminatory treatment will not be permitted, and the *Arline* criteria will classify the AIDS victim as "otherwise qualified" under the Rehabilitation Act.

THE VIRGINIA HUMAN RIGHTS ACT

Like the majority of state statutes on human rights, Virginia's Rights of Persons with Disabilities Law ("Disabilities Law") does not specifically address AIDS or any other infection with the HIV virus.⁶² Surprisingly, there have been no cases in Virginia at the appellate level to assist in the interpretation of the Disabilities Law. One author, faced with this problem, has suggested merely relying on the plain language of the statute.⁶³

⁶¹ See *supra* note 48. See also Local 1812, American Fed'n. of Gov't. Employees v. Dept. of State, 662 F. Supp. 50 (D.D.C. 1987), where AIDS testing was upheld on the grounds that persons who were HIV infected were medically unfit for worldwide service with the Department of State. The reasoning behind the testing was that many foreign posts are considered medically inadequate to deal with complications that may arise from the HIV infection, and both the sanitary conditions in other countries, and the live-virus vaccines which were often required for overseas assignments could exacerbate the condition of those already infected with the AIDS virus. *Id.* at 52.

⁶² The Virginia Human Rights Act provides the policy behind the Act:

[t]o safeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, . . . , or disability, . . . in employment. . . .

VA. CODE ANN. § 2.1-715.1 (1987). States with statutes whose codes specifically address persons with AIDS include Florida, Iowa, Maryland, and Texas. The Texas code expressly excludes persons with AIDS from its protection, if the "infection with human immunodeficiency virus . . . constitutes a direct threat to the health or safety of other persons or . . . makes the affected person unable to perform the duties of the person's employment." TEX. REV. CIV. STAT. ANN. art. 5221k, § 2.01(4)(B) (Vernon 1989).

⁶³ Comment, *AIDS and Employment Discrimination Under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons with Disabilities Act*, 20 U. RICH L. REV. 425, 446 (1985).

However, the current state of the federal law, after cases such as *Arline* and *Chalk*, as well as amendments to the Disabilities Law shed more light on how the Virginia statute would be interpreted. In 1988, the definition of "otherwise qualified person with a disability" was amended, making the Disabilities Law conform more closely with the Rehabilitation Act.⁶⁴ This is a significant change in the law, because prior to this amendment, the major difference in the protections afforded persons with AIDS under the Disabilities Law, and the corresponding sections of the Rehabilitation Act, turned on the fact that the Rehabilitation Act included an allowance for accommodations when considering the qualifications of a potential employee infected with the AIDS virus.⁶⁵ Conversely, the Disabilities Law defined an "otherwise qualified person with a disability" as one who had to be "qualified without accommodation" to perform the job in question.⁶⁶ Accommodation, however reasonable, could not be considered in addressing whether or not the person was otherwise qualified for employment. Once the employee was hired, the now amended § 51.01-41(c) provided for accommodations once the employee had been deemed qualified, and hired.⁶⁷ Since most persons with AIDS could easily and appropriately fill most of the positions from which they would have been barred because of their need for accommodations, the author correctly asserted that the Disabilities Law should be modified to conform to the Rehabilitation Act.

⁶⁴ VA. CODE ANN. § 51.5-3 (1988 & Supp. 1989). The 1988 Amendments deleted the term "without accommodations" following the word "qualified" in the definition.

⁶⁵ 29 U.S.C.A. § 706(8)(B) (Supp. 1989).

⁶⁶ Comment, *AIDS and Employment Discrimination under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons with Disabilities Act*, 20 U. RICH. L. REV. 425, 446-48 (1985) (quoting VA. CODE ANN. § 51.01-3 (Supp. 1985)).

⁶⁷ *Id.* at 447-48.

In 1988, the Disabilities Law was indeed modified, and now reasonable accommodation is required when considering the employment of a person with AIDS.⁶⁸ Since this modification, the Disabilities Law is actually broader than the Rehabilitation Act, since it applies not only to those agencies and programs supported by state funds, but to private employers as well.⁶⁹ Further, the Disabilities Law goes a step beyond the affirmative policies in the Rehabilitation Act, since it also mandates the formulation of specific policies in several state agencies for procedures dealing with AIDS in the scope of the workings of the agency.⁷⁰ This affirmative step, encourages the agencies themselves to review their own policies and procedures for working with persons with AIDS, forces them to address the issue, indicates that Virginia's view on AIDS is

⁶⁸ VA. CODE ANN. § 51.5-3 (1988 & Supp. 1989). As amended, § 51.5-3 now defines "otherwise qualified person" as one who is qualified [without accommodations] to perform the duties of a particular job or position. (Brackets mark text deleted by the 1988 Amendment.) *Id.*

⁶⁹ VA. CODE ANN. § 51.5-41(A) (1988). § 51.5-41(A) expands the coverage of the statute to cover private employers:

A. No employer shall discriminate in employment or promotion practices against an otherwise qualified person with a disability solely because of such disability.

Id.

⁷⁰ For instance, VA. CODE ANN. § 2.1-51.14:1 mandates that

The Boards of Health, Mental Health, Mental Retardation, and Substance Abuse Services, Rehabilitative Services, Social Services and Medical Assistance Services shall review their regulations and policies related to service delivery in order to ascertain and eliminate any discrimination against individuals infected with the *human immunodeficiency virus*. (emphasis added)

VA. CODE ANN. § 2.1-51.14:1 (Supp. 1989). Other statutes provide for school-attendance guidelines, and model education programs on the human immunodeficiency virus. VA. CODE ANN. §§ 22.1-271.3, 23-9.2:3.2 (Supp. 1989).

realistic, and that any cases concerning AIDS discrimination brought under the current code would be resolved in a manner that would interpret the code's provisions broadly.

CONCLUSION

The projections available on the probable spread of AIDS are disturbing. The U.S. Public Health Service has predicted that, by the end of 1991, 270,000 cases will have developed in the United States, with more than 74,000 of those occurring in that year alone; 179,000 people in the United States will have died of AIDS by 1991, with 54,000 of those deaths occurring that year; and new cases of AIDS spread through heterosexual contact will increase from the 1,100 reported in 1986 to almost 7,000 in 1991.⁷¹ With these numbers, the inescapable fact is that sooner or later every manager or employee will be faced with a subordinate or co-worker with AIDS.⁷² Problems arise when these employers adopt an ostrich posture, and refuse to recognize this possibility.⁷³ Commonly-cited factors include the attitude that since the company has yet to be confronted with the issue of AIDS in the workforce, it can afford to deal with the problem when it arises, or that the sensitive nature of the disease is such that cases can only be dealt with on an individual basis.⁷⁴ The natural result of these attitudes is that when a case of AIDS does surface at a particular workplace, the result is fear and discrimination, as reported in the survey at the opening of this article.⁷⁵

⁷¹ LANGONE, *AIDS: THE FACTS* 67-68 (1988).

⁷² Singer, *AIDS Concerns for Business: Includes related articles on principles for the workplace and information about AIDS*, *NATION'S BUS.*, June 1989, at 75, ____.

⁷³ Singer, *Helping People with AIDS Stay on Job*, *N.Y. Times*, Apr. 15, 1989, § 1, at 28, col. 1.

⁷⁴ AMERICAN MANAGEMENT ASSOCIATION, *AIDS: THE NEW WORKPLACE ISSUES* 50 (1988).

⁷⁵ Singer, *supra* note 72, at ____.

While many states, as well as the federal government, are constantly expanding the employment protections afforded by their statutes and regulations that deal with handicapped individuals, the real key to ending this discrimination is education of the workforce.⁷⁶ Like Virginia, many states are implementing this concept through their laws, which, while they may only affect a portion of the job market for now, lead the way and provide an example for companies in both the public and the private sector, in ending the irrational fear of individuals with AIDS.

⁷⁶ Without more widespread education about AIDS, it appears that those with the disease will continue to experience discrimination through adverse decisions about hiring, firing, promotion, and conditions of employment. Programs that address the scientific, psychological, social, legal, and human-resource issues concerning AIDS can minimize workplace disruptions, preserve employee morale, and sidetrack discriminatory behavior.

Id. at ____.