1988

Protecting Persons with AIDS from Employment Discrimination

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Comments

Protecting Persons with AIDS from Employment Discrimination

INTRODUCTION

Between May 26 and June 30, 1988, the federal government attempted something it had never done before: it tried to reach every resident by mail regarding a major public health problem—AIDS.1 As of March 14, 1988, more than 56,000 cases of acquired immune deficiency syndrome (AIDS) had been reported in the United States.2 Of those cases reported, there have been more than 31,000 fatalities.3 As the number of cases reported each year increases,4 the medical community must deal with containing a disease that is epidemic in proportion,5 while the legal community must deal with controlling the disease “without wholesale obliteration of individual rights.”6

One of the rights a person with AIDS has is the right to be employed. Some of those afflicted with the disease have already

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3 Id.
4 Id.
6 Reidinger, A Question of Balance: Policing the AIDS Epidemic, 73 A.B.A. J. 69 (June 1, 1987).
reported cases of employment discrimination. Persons with AIDS must be protected from such discrimination and may be able to use section 504 of the Rehabilitation Act of 1973 to obtain such protection.

Part I of this Comment discusses AIDS, the disease. Part II explains section 504 of the Rehabilitation Act of 1973, and Part III shows how AIDS qualifies under that section. Part IV explores the handicap employment law in Kentucky and how persons with AIDS will fare under the law. Finally, this Comment concludes that while persons with AIDS may be safe under section 504 of the Rehabilitation Act, changes need to be made in Kentucky law to afford persons with AIDS proper protection.

I. AIDS

AIDS was first recognized and reported to the Centers for Disease Control (CDC) in 1981; seven years later the disease is still fatal. AIDS is diagnosed when there is laboratory evidence of the HIV infection, the virus that causes AIDS, and an

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9 See infra notes 14-40 and accompanying text.
10 See infra notes 41-92 and accompanying text.
11 See infra notes 93-116 and accompanying text.
12 See infra notes 117-32 and accompanying text.
13 See infra notes 133-37 and accompanying text.
14 Human Immunodeficiency Virus Infections in the United States, 36 CENTERS FOR DISEASE CONTROL: MORBIDITY & MORTALITY WEEKLY REP. 817 (Dec. 18, 1987); see also Friedland, Saltzman, Rogers, Kahl, Lesser, Mayers & Klein, Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Caudidiasis, 314 NEW ENG. J. MED. 344 (1986) [hereinafter Friedland].
15 HTLV-III/LAV is one of several former names of the virus that causes AIDS. The virus is now referred to as HIV. See Sipes, AIDS the Haunting Facts, the Human Care, 8 NURSING LIFE 33, 35 (Mar./Apr. 1988).
indicator disease\textsuperscript{16} that has been either definitively or presumptively diagnosed.\textsuperscript{17} The HIV virus attacks and disables the immune system of an individual's body so that the system is unable to fight other diseases. Symptoms of the disease include "persistent fevers, night sweats, diarrhea, headaches, anorexia, repeated common infections, and dramatic weight loss."\textsuperscript{18} When these symptoms become chronic, they are referred to as AIDS-related complex (ARC).\textsuperscript{19} Some patients die of ARC before developing AIDS.\textsuperscript{20}

AIDS can be transmitted by introducing HIV into the bloodstream or by intimate sexual contact.\textsuperscript{21} Bloodborne transmission occurs when the HIV infection is in the blood received by blood transfusion recipients and hemophiliacs. Injection of a needle contaminated by HIV also results in bloodborne transmission of the disease to intravenous drug abusers.\textsuperscript{22} Drug abusers frequently share contaminated needles,\textsuperscript{23} and, due to this practice, they constituted approximately 19\% of the AIDS cases reported from April 1987 to April 1988.\textsuperscript{24} Another large high risk group

\textsuperscript{16} Indicator diseases, also known as opportunistic diseases, are diseases which, when present with HIV, result in a diagnosis of AIDS. Two such diseases are pneumocystis carinii pneumonia (PCP) and Kaposi's sarcoma (KS). PCP is a type of pneumonia characterized by weakness, fever, dyspnea, and a hacking, dry cough. KS is a skin cancer that causes purplish lesions and spreads quickly. It rarely kills its victims but does cause pain, disfigurement, and internal obstructions. \textit{Id.} at 37.

\textsuperscript{17} AIDS can be diagnosed without laboratory evidence of HIV infection if other possible causes of immunodeficiency have been ruled out, and an indicator disease is definitively diagnosed. Another way to obtain a diagnosis without laboratory evidence of the HIV infection is when "all other possible causes of immunodeficiency have been ruled out and [PCP] has been definitively diagnosed or all other possible causes of immunodeficiency have been ruled out, an indicator disease other than [PCP] has been definitively diagnosed, and the patient's T4 count is less than 400/cu mm." \textit{Id.} at 38 (citing \textit{Revision of the CDC Surveillance Case Definition for Acquired Immunodeficiency Syndrome}, 36 CENTERS FOR DISEASE CONTROL: MORBIDITY & MORTALITY WEEKLY REP. SUPPLEMENT 15 (Aug. 14, 1987)). T4 cells are cells that are part of the body's immune system. They are destroyed by the HIV virus, and this contributes to the body's general weakening and susceptibility to various infections. \textit{Id.} at 36.

\textsuperscript{18} Sipes, \textit{supra} note 15, at 37.

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} Friedland, \textit{supra} note 14, at 344.

\textsuperscript{22} \textit{Id.}

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Quarterly Report, supra} note 2, at 224.
is homosexual men, who accounted for approximately 68% of AIDS cases reported during the same period. HIV has been isolated from semen, supporting the belief that transmission occurs by intimate sexual contact, both homosexual and heterosexual. However, in a study of 101 subjects who had nonsexual household contacts with AIDS patients, only one subject tested positive for the HIV virus. This individual was a five-year-old whose mother had AIDS. It is believed the child was infected with the disease at birth. This belief was sustained by the fact that the child had been hospitalized with pneumonia three times since birth. Thus, "[t]he risk of transmission by less intimate contact is believed to be low or nonexistent." 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 [HIV]."

In spite of all the bad news concerning AIDS, there is some good news. First, sources of transmission have been identified, and with education it is hoped that the spread of the disease can be stopped. Second, there is a test for identifying whether an individual is infected with the virus. In 1984, researchers de-

25 Friedland, supra note 14, at 344.  
26 Quarterly Report, supra note 2, at 224.  
27 Friedland, supra note 14, at 344.  
28 Id.  
29 The nonsexual household contacts included sharing a toilet, bath, shower, and kitchen with the person with AIDS. It also included interaction with the person, such as shaking hands, hugging, and kissing on the cheek. Id. at 346.  
30 Id. at 347. Another subject was interpreted "as being falsely positive, since the Western blot assay and a repeat enzyme immunoassay were negative. In addition, the child was clinically well and had no other immunologic abnormalities." Id.  
31 Id.  
32 Id. at 344.  
33 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, 682 (Nov. 15, 1985) [hereinafter Recommendations].  
34 See supra notes 21-33 and accompanying text.  
35 See Understanding AIDS, supra note 1, at 261.  
36 See Sipes, supra note 15, at 35. But this is not necessarily good news for everyone because those individuals who test positive for the virus have to live with the fear of developing the disease and eventually dying from it. Also, they may be faced with discrimination, employment and otherwise, as a result of being identified as carrying the virus. However, it is good news because it can be used to identify those carrying the
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developed an enzyme-linked immunosorbet assay (ELISA) test to detect the HIV virus. But, while the test reveals whether a person has been exposed to the HIV virus, it does not indicate whether the person has AIDS or is merely a carrier of the disease. Another advance related to the disease includes the effective use of aggressive drug treatment and therapy to increase the length of the lives of individuals diagnosed as having AIDS.

II. THE REHABILITATION ACT OF 1973

Congress passed the Rehabilitation Act of 1973 (hereinafter "the Act") to "maximize [the] employability, independence, and integration into the workplace and the community" of individuals with handicaps. One year later, Congress amended the definition of a handicapped individual because the definition was too narrow and, therefore, inconsistent with its interest in passing the Act.

The Act prohibits discrimination by the federal government, its large contractors, and programs receiving federal financial assistance. Section 504 of the Act, which governs programs receiving federal financial assistance, has proven to be a significant source of protection for individuals with handicaps. One commentator referred to section 504 as "the civil rights act for disabled persons."

virus and, therefore, prevent the infection of others. See supra notes 21-40 and accompanying text.

See Sipes, supra note 15, at 35.
See supra notes 16-17 and accompanying text.
Landesman, supra note 5, at 521.
Sipes, supra note 15, at 35.
Section 501(b) of the Act requires that federal agencies take affirmative action to employ handicapped individuals. 29 U.S.C. § 791(b).
Section 503(a) of the Act requires certain federal contractors to take affirmative action to employ handicapped individuals. 29 U.S.C. § 793(a).
See Comment, Running from Fear Itself, 23 Willamette L. Rev. 857, 865 (Fall 1987).
Section 504 reads, in part, as follows:

No otherwise qualified handicapped individual in the United States, as defined in section 706(8) of this title, shall, solely by reason of his handicap, be excluded from the participation in, or 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.48

The section requires proof of three elements before an individual can pursue a claim of discrimination. First, the individual must be "handicapped."49 Next, the individual must be "otherwise qualified" for the employment he is pursuing or seeking to maintain.50 Finally, the individual must prove exclusion from such employment solely because of his handicap.51

According to the definition in the Act,52 there are three categories under which an individual can qualify as handicapped: (1) having a physical or mental impairment that substantially limits one or more of a person's major life activities, (2) having

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49 See infra notes 52-85 and accompanying text.
50 See infra notes 86-92 and accompanying text.
51 Proof of this element may not be difficult for persons with easily identifiable physical or mental handicaps. However, as a majority of persons with AIDS are also homosexuals and drug abusers, this element may be more difficult for those persons to prove. Homosexuals and drug abusers are not covered by the Act. See infra notes 52 and 59 and accompanying text. A comprehensive discussion of proof of this element is beyond the scope of this Comment.
52 The Act defines "individual with handicaps" as follows: any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title [sections 503 and 504 of the Act] 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.

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a record of such impairment, or (3) being regarded as having such an impairment.53

The regulations promulgated pursuant to section 504 by the Department of Health and Human Services (HHS) give guidance on how the above requirements are met.54 The regulations begin by defining "physical or mental impairment."55 Generally, the definition includes any physiological disorder that affects certain body systems or any mental or psychological disorder.56 In an appendix to the regulations, HHS stated that the definition did not include a list of specific diseases or conditions, "because of the difficulty of ensuring the comprehensiveness of any such list."57 HHS emphasizes that the definition refers only to physical or mental impairments,58 "[t]hus, environmental, cultural, and economic disadvantage are not in themselves covered; nor are prison records, age, or homosexuality."59 Individuals in the above listed groups would qualify, however, if they have a physical or mental handicap.60 Next, the regulations define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."61

54 See 28 C.F.R. § 41.31 (1987); 45 C.F.R. § 84.3(j) (1987).
55 "Physical or mental impairment" means (A) 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; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
28 C.F.R. § 41.31(b)(1); 45 C.F.R. § 84.3(j)(2)(i).
56 Id.
57 45 C.F.R. Pt. 84 App. A (1987). The appendix includes a list of diseases contemplated by physical or mental impairment: "[t]he 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, as discussed below, drug addiction and alcoholism." Id.
58 Id.
59 Id.
60 Id.
61 28 C.F.R. § 41.31(b)(2); 45 C.F.R. § 84.3(j)(2)(ii).
Despite the guidance in interpreting "physical or mental impairments" and "major life activities," there is no guidance regarding how to interpret "substantially limits." HHS answered, "[t]he Department does not believe that a definition of this term is possible at this time."\textsuperscript{62} The discussion above\textsuperscript{63} covers the first category under which an individual can qualify as handicapped: "a physical or mental impairment which substantially limits one or more major life activities."

An individual can also qualify under section 504 if he "has a record of such an impairment."\textsuperscript{65} A person "has a record of such an impairment" if he has a history of a handicap or has been misclassified as having a handicap.\textsuperscript{66} Examples of people who would qualify under this category are persons with a history of mental or emotional illness, heart disease, or cancer, but who have since recovered, as well as persons incorrectly classified as having a condition such as mental retardation. The difference between the latter category and the former category is that under the latter, a person no longer has to have a current physical or mental impairment to qualify. If an employer decides to terminate an employee based on the individual's past history of impairment or his fear that the condition will recur, the employee would be protected under this part of the definition.

The third category of the definition extends coverage of the Act to an individual "regarded as having such an impairment."\textsuperscript{68} The HHS regulations explain what is contemplated by this category,\textsuperscript{69} which is by far the broadest and will allow inclusion of

\begin{itemize}
\item \textsuperscript{62} 45 C.F.R. Pt. 84 App. A.
\item \textsuperscript{63} See supra notes 52-62 and accompanying text.
\item \textsuperscript{64} 29 U.S.C. § 706(8)(B).
\item \textsuperscript{65} Id.
\item \textsuperscript{66} 28 C.F.R. § 41.31(b)(3); 45 C.F.R. § 84.3(j)(2)(iii).
\item \textsuperscript{67} 45 C.F.R. Pt. 84 App. A.
\item \textsuperscript{68} 29 U.S.C. § 706(8)(B).
\item \textsuperscript{69} "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities that 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 toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.
\item \textsuperscript{61} 45 C.F.R. § 84.3(j)(2)(iv); see also 28 C.F.R. § 41.31(b)(4).
\end{itemize}
many individuals who could not qualify under the other two categories. The HHS appendix gives examples of persons with a limp or a disfiguring scar as individuals who would qualify under this category. These individuals have either a physical or mental impairment that does not substantially limit major life activities or a physical or mental impairment that substantially limits a major life activity because someone else believes they are so limited.

The breadth of coverage intended by Congress is evident from the statute and regulations. HHS has rejected suggestions that the statute is too broad and should be confined to "traditional" handicaps, based on the belief that such a narrowing interpretation would contravene congressional intent.

Judicial interpretation has also provided guidance for identifying handicap status. Some courts have recently begun to limit the broad coverage of the Act by narrowly construing "impairment" and "substantially limits." In doing so, the courts have given little deference to the HHS regulations promulgated pursuant to section 504 of the Act. This lack of deference may soon be reversed, however, as a result of the United States Supreme Court's recent decision in School Board of Nassau County, Florida v. Arline.

Before the Supreme Court's decision in Arline, there were a few other significant decisions that provided interpretations of who qualified as handicapped. In E. E. Black, Ltd. v. Marshall, the court defined "impairment" as "any condition which weakens, diminishes, restricts, or otherwise damages an individ-

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70 45 C.F.R. Pt. 84 App. A.
71 Id.
72 Id.
73 See, e.g., Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986) ("substantially limits" narrowly interpreted); de la Torres v. Bolger, 781 F.2d 1134, 1137 (5th Cir. 1986) (use of narrow "dictionary" meaning to define "impairment"); Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985) ("substantially limits" narrowly interpreted); Tudyman v. United Airlines, 608 F. Supp. 739 (C.D. Cal. 1984) ("impairment" narrowly defined). For a more in-depth discussion of these cases see Comment, supra note 46, at 874-78.
74 School Bd. of Nassau County, Fla. v. Arline, — U.S. —, 107 S. Ct. 1123 (1987); see infra notes 80-92 and accompanying text.
75 See supra note 73 and accompanying text.
dual’s health or physical or mental activity.” The court rejected the definition of “substantially limits,” however, and emphasized the need to evaluate these matters on a case-by-case basis because the definitions contained in the Act “are personal and must be evaluated by looking at the particular individual.”

Arlene presented the question of whether a person with tuberculosis, a contagious disease, may be considered a “handicapped individual” within the meaning of section 504 of the Act. Gene Arline was an elementary school teacher in Nassau County, Florida, who was discharged from her position after suffering her third relapse of tuberculosis.

After reviewing the requirements necessary for an individual to qualify as handicapped, the Court concluded Arline was handicapped and, therefore, within the purview of the Act. According to medical testimony, Arline’s disease affected her respiratory system and required hospitalization:

Arlene thus had a physical impairment as that term is defined by the regulations, since she had a “physiological disorder or condition . . . affecting [her] . . . respiratory [system].” 45 C.F.R. § 84.3(j)(2)(i) (1985). This impairment was serious enough to require hospitalization, a fact more than sufficient

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7 Id. at 1097.

7 The court rejected the view that “substantially limits” prevents an individual from performing work he prefers as long as he can perform other work. “A person, for example, who has obtained a graduate degree in chemistry, and is then turned down for a chemist’s job because of an impairment, is not likely to be heartened by the news that he can still be a streetcar conductor, an attorney or a forest ranger.” Id. at 1099. The court also rejected the definition because coverage included:

any individual who is capable of performing a particular job, and is rejected for that particular job because of a real or perceived physical or mental impairment. Thus, for example, a worker who was offered a particular job by a company at all of its plants but one, but was denied employment at that plant because of the presence of plant matter to which the employee was allergic, would be covered by the Act.

The court believed this interpretation to be overbroad and not the result Congress intended. Id.

7 Id.


7 Id.

7 Id. at 1127.
to establish that one or more of her major life activities were substantially limited by her impairment.\textsuperscript{83}

The court dismissed the petitioner’s argument that the Act does not cover conditions that could “impair the health of others”\textsuperscript{84} because:

[allowing] discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. . . . The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments.\textsuperscript{85}

In addition to being “handicapped,”\textsuperscript{86} an individual must be “otherwise qualified” to come under the protection of the Act.\textsuperscript{87} The HHS regulations define “otherwise qualified” as a person “who, with reasonable accommodation, can perform the essential functions of the job in question.”\textsuperscript{88} The Supreme Court addressed the issue of who is “otherwise qualified” in \textit{Arlene}.\textsuperscript{89} Relying on its earlier decision in \textit{Southeastern Community College v. Davis}\textsuperscript{90} to explain the basic framework for determining “otherwise qualified,”\textsuperscript{91} the Court adopted the standards sug-

\textsuperscript{83} \textit{Id.} The Court also concluded that Arline could have qualified under 29 U.S.C. § 706(7)(B)(ii) because her hospitalization would suffice to establish “a record of . . . impairment as required by that statute.” \textit{Id.}

\textsuperscript{84} \textit{Id.} at 1128 n.6.

\textsuperscript{85} \textit{Id.} at 1129.

\textsuperscript{86} \textit{See supra} notes 48-85 and accompanying text.

\textsuperscript{87} 29 U.S.C. § 794.

\textsuperscript{88} 28 C.F.R. § 41.32; 45 C.F.R. § 84.3(k).

\textsuperscript{89} \textit{Arlene,} \underline{--} U.S. \underline{--}, 107 S. Ct. at 1130-31.

\textsuperscript{90} 442 U.S. 397 (1979).

\textsuperscript{91} “An otherwise qualified person is one who is able to meet all of a program’s requirements in spite of his handicap.” \textit{Southeastern Community College v. Davis}, 442 U.S. 397, 406, 99 S. Ct. 2361, 2367, 60 L.Ed.2d 980 (1979). In the employment context, an otherwise qualified person is one who can perform “the essential functions” of the job in question. 45 CFR Sec. 84.3(k) (1985). When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any “reasonable accommodation” by the employer would enable the handicapped person to perform those functions. \textit{Ibid.} Accommodation is not
gested by the amicus brief of the American Medical Association for determining whether a person with a contagious disease is otherwise qualified. 92

III. AIDS AS A HANDICAP

Many commentators and a number of states have concluded that AIDS is a handicap. 93 The broad coverage Congress intended the Act to have supports this conclusion. 94 Therefore,

reasonable if it either imposes "undue financial and administrative burdens" on a grantee, Southeastern Community College v. Davis, supra, at 412, 99 S. Ct. at 2370, or requires "a fundamental alteration in the nature of [the] program" id., at 410. See 45 CFR § 84.12(c) (1985) (listing factors to consider in determining whether accommodation would cause undue hardship); 45 CFR pt. 84, App. A, p. 315 (1985) ("where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination"); Davis, supra, at 410-413, 99 S. Ct. at 2369-2370; Alexander v. Choate, 469 U.S. at 299-301, and n.19, 105 S. Ct. at 720 and n.19; Strathie v. Department of Transportation, supra, at 231.

Arlene, _____ U.S. _____, 107 S. Ct. at 1131 n.17.

92 "[W]e agree with amicus American Medical Association 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." Brief for American Medical Association as Amicus Curiae 19.

In making these findings, courts normally should defer to the reasonable medical judgments of public health officials." Arline, _____ U.S. _____, 107 S. Ct. at 1131.


94 Particularly helpful for persons with AIDS is the fact that HHS did not try to come up with a comprehensive list that would include all diseases. See supra note 57 and accompanying text. Additionally, they intended coverage to extend to diseases not known at the time of the promulgation of the regulations. This is evidenced by language in the appendix, which states that, "the inclusion of any condition which is mental or physical but whose precise nature is not at present known" is implied in the definition of "impairment." See 45 C.F.R. Pt. 84 App. A.
AIDS fits squarely into the definition of handicapped under the Act. Individuals manifesting physical symptoms of the disease will qualify under the first category of the definition—a physical or mental impairment substantially limiting one or more major life activities. While the immune system is not on the HHS list of systems impaired (which was created to clarify the definition of impairment), the hemic (blood) and lymphatic systems are. These systems are a major part of the immune system and are adversely affected by the HIV virus. Additionally, by attacking the immune system, the HIV virus has the impact of attacking all other body systems. Accordingly, AIDS is a physical impairment.

The physical effects of AIDS alone are disabling and can lead to hospitalization. AIDS destroys not only the health, but often the personal life of its victims. People are afraid of this fatal disease and, therefore, persons with AIDS sometimes lose their friends and family. Persons with AIDS will reach a point where they are unable to care for themselves because of their disease. Caring for oneself is one of the definitions of “major life activities” as defined by the HHS regulations. By coupling the physical impact of the disease with the devastation to the individual’s personal life, “the AIDS victim is substantially limited in his or her ability to function meaningfully in society.”

The interpretations of “handicapped” provided by the Black and Arline decisions will also assist persons with AIDS in their pursuit of protection. The Black definition of impairment will certainly apply to persons with AIDS as they experience the gradual loss of their health. Also, the Arline decision will help overcome the argument that a contagious disease cannot constitute an “impairment.” Persons with AIDS who suffer from

95 See supra notes 52-85 and accompanying text. For an in-depth classification of persons with AIDS and how they can qualify as “handicapped,” see Comment, supra note 46, at 893-905.
97 See supra note 55.
98 Sipes, supra note 15, at 37.
99 Id.
101 Note, Aids & Employment Discrimination, supra note 93, at 1107.
102 See supra note 77 and accompanying text.
103 See supra notes 84-85 and accompanying text.
pneumonia\textsuperscript{104} are in a situation analogous to Arline's since the disease affects their respiratory system and could require hospitalization.\textsuperscript{105}

Those individuals who are discriminated against because they are perceived as having the virus will be covered under the third category of the definition of handicapped—individuals regarded as having such an impairment.\textsuperscript{106}

It follows from the foregoing analysis\textsuperscript{107} that AIDS is a handicap. A few state human rights commissions have come to the same conclusion.\textsuperscript{108} The first state tribunal to deal with an AIDS discrimination case was the Florida Commission on Human Rights. In \textit{Shuttleworth v. Broward County Office of Budget and Management},\textsuperscript{109} the Commission ruled that AIDS is a handicap under the Florida Human Rights Act of 1977.\textsuperscript{110} Todd Shuttleworth, an analyst employed by the Broward County Office of Budget and Management Policy, was fired in September, 1984, after the county discovered that he had AIDS. Shuttleworth filed a complaint with the Florida Commission on Human Relations charging discrimination based on a physical handicap. Applying the definition used in previous cases,\textsuperscript{111} the Commission concluded that an individual with AIDS came within the coverage provided by the Florida Human Rights Act.\textsuperscript{112}

\begin{itemize}
  \item \textsuperscript{104} See supra note 16.
  \item \textsuperscript{105} See supra note 83 and accompanying text.
  \item \textsuperscript{106} Individuals who are perceived as having the virus would include asymptomatic carriers of the disease, individuals who are in high risk groups, or individuals who associate with someone with the disease. 29 U.S.C. § 706(7)(B).
  \item \textsuperscript{107} See supra notes 93-106 and accompanying text.
  \item \textsuperscript{110} FLA. STAT. §§ 760.01-.10 (1988).
  \item \textsuperscript{111} The definition includes people who do not enjoy the full and normal use of their sensory, mental, or physical faculties. \textit{See Note, AIDS and Employment Discrimination, supra} note 93, at 1102 (citing Fenesy v. GTE Data Serv., Inc., No. 79-214 (Fla. Comm'n on Human Relations, Aug. 11, 1981)).
  \item \textsuperscript{112} Id.
\end{itemize}
Although a case has been filed, no federal court has yet decided whether AIDS is a handicap under section 504 of the Act. Vincent Chalk filed suit in the United States District Court for the Central District of California after being assigned to an administrative position in the California school system in which he had been teaching hearing-impaired students. The reassignment came after Chalk was diagnosed as having AIDS. Chalk's motion for a preliminary injunction ordering his reinstatement in the classroom was denied by the district court. However, this ruling was reversed by the United States Court of Appeals for the Ninth Circuit.

The court of appeals based its decision on Chalk's probable success on the merits, relying heavily on the Supreme Court's decision in Arline. The court also relied on three decisions that were concerned with the legality of keeping children with AIDS out of the classroom. While the court of appeals' decision is not determinative of the issue of whether AIDS is a handicap, it may have a persuasive effect on the district court.

Permitting section 504 of the Act to protect persons infected with AIDS will serve to alleviate some fear and prejudice among the general public regarding persons with the disease. It will also allow persons with AIDS to support themselves financially and to maintain a certain amount of personal dignity. Clearly it was within Congress' intent in passing the Act to protect such people.

IV. KENTUCKY LAW—WILL IT PROTECT THE AIDS VICTIM?

Kentucky is one of two states that specifically excludes persons with communicable diseases from the protection of

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113 Chalk v. United States Dist. Court Cent. Dist. of California, No. 87-6418.
114 Chalk v. United States Dist. Court Cent. Dist. of California, 840 F.2d 701 (9th Cir. 1988).
115 Id. at 704.
116 Id. at 708. The three decisions relied on by the court were: Thomas v. Atascadero Unified School Dist., 662 F. Supp. 376 (C.D. Cal. 1987); Ray v. School Dist. of DeSoto County, 666 F. Supp. 1524 (M.D. Fla. 1987); and District 27 Community School Bd. v. Board of Educ., 130 Misc.2d 398, 502 N.Y.S.2d 325 (Sup. Ct. 1986). In the first two cases, the courts granted injunctions prohibiting the school districts from excluding children with AIDS or children who had tested positive for HIV. In the third case, the court upheld the New York City Board of Education's policy of determining on a case-by-case basis whether children with AIDS should be permitted to attend school in an unrestricted setting. In each case the decision was based on the conclusion that any risk of transmission of the virus was too remote to exclude the children from school.
117 Georgia is the other state, however, a discussion of Georgia law is beyond the
handicap discrimination laws. The Kentucky law provides, "[n]othing contained in KRS 207.130 to 207.240 shall be construed to prohibit the rejection of an applicant for employment . . . on the basis of: . . . [a]ny communicable disease, either carried by, or afflicting the applicant." The Kentucky Administrative Regulations make reference to the book Control of Communicable Diseases in Man for the definition of "communicable disease." The definition is as follows:

An illness due to a specific infectious agent or its toxic products which arises through transmission of that agent or its products from an infected person, animal, or inanimate reservoir to a susceptible host, either directly or indirectly through an intermediate plant or animal host, vector, or the inanimate environment.

While AIDS fits this definition, it is different from other diseases regarded as communicable because its transmission is not airborne. From a reading of other Kentucky statutes dealing with communicable diseases, it appears the legislators were contemplating a disease more easily transmitted, such as tuberculosis. Kentucky Revised Statutes (hereinafter KRS) section 217.370 prohibits a person with a contagious disease from working in "a building, room, enclosure, premises or vehicle occupied or used for the production, preparation, manufacture, packing, storage, sale, distribution or transportation of food." KRS sections 317.580 and 317A.130 prevent any barber, cosmetolo-

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118 KY. REV. STAT. ANN. § 207.140(2)(C) (Michie/Bobbs-Merrill 1982) [hereinafter KRS].
119 Id.
120 902 KY. ADMIN. REGS. 2:010 (1987).
121 CONTROL OF COMMUNICABLE DISEASE IN MAN 447 (American Public Health Ass'n. 1985).
122 See supra notes 21-33 and accompanying text.
124 KRS § 217.370.
gist, manicurist, and his or her student or apprentice from practicing while he or she has a communicable disease.\textsuperscript{125}

The CDC has specifically \textit{rejected} declining or terminating the employment of persons with AIDS from these areas.\textsuperscript{126} They do, however, recognize the need for good hygiene and good sanitary conditions.\textsuperscript{127} Persons with AIDS should not be excluded from the restriction placed on persons with communicable diseases "unless they have evidence of other infections or illnesses for which any [worker] should also be restricted."\textsuperscript{128}

It is probable that the legislators intended the statutes and regulations restricting the employment of persons with a communicable disease to be temporary measures to protect the public health. While legislation for the public health is necessary, these statutes and regulations as written can be used to discriminate against persons with AIDS. The discrimination would occur partially as a result of the uneducated fear of the general public—the very prejudice the federal government has taken measures to end.\textsuperscript{129}

Without Kentucky case law prohibiting employment discrimination against persons with AIDS, a person with AIDS may face such discrimination without means of recourse.\textsuperscript{130} According to one source, there has been no legislation proposed or drafted in Kentucky that would prohibit employment discrimination against persons with AIDS.\textsuperscript{131} Until there is legislation adopted by the General Assembly or until the Kentucky courts interpret the handicap discrimination law to apply to persons with AIDS,

\begin{itemize}
\item \textsuperscript{125} KRS §§ 317.580 and 317A.130.
\item \textsuperscript{126} "PSWs [personal service workers] known to be infected with HTLV-III/LAV need not be restricted from work unless they have evidence of other infections or illnesses for which any PSW should also be restricted." \textit{See Recommendations, supra} note 33, at 693.
\item \textsuperscript{127} "All PSWs should be educated about transmission of bloodborne infections, including HTLV-III/LAV and HBV. Such education should emphasize principles of good hygiene, antisepsis, and disinfection." \textit{Id.}
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{See supra} notes 41–42 and accompanying text.
\item \textsuperscript{130} This is presupposing that the individual is not employed by a federally funded program, activity, or agency. If this were the case, the individual would be covered by the Act. \textit{See supra} notes 43–48 and accompanying text.
\item \textsuperscript{131} Telephone interview with Staff Member of Legislative Research Commission (July 13, 1988) (name withheld by request).
\end{itemize}
there is no protection for such persons under Kentucky law.\textsuperscript{132}

CONCLUSION

AIDS is a deadly disease that must be controlled "without wholesale obliteration of individual rights."\textsuperscript{133} AIDS is a handicap, and persons with AIDS deserve protection from employment discrimination.\textsuperscript{134} The federal government has taken steps to ensure the equal employment of individuals with handicaps,\textsuperscript{135} and protection presently is afforded to persons with AIDS in some states.\textsuperscript{136} But Kentucky must change its laws to prevent discrimination against persons with AIDS because "[i]t would be unfair to allow an employer to seize upon the distinction between the [non-physical] effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment."\textsuperscript{137}

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\textsuperscript{132} People with AIDS would be protected in Kentucky if they came within the federal statutes. See supra notes 43-48 and accompanying text.

\textsuperscript{133} See supra note 6 and accompanying text.

\textsuperscript{134} Whether an individual accepts this conclusion will most likely depend on whether he/she accepts the belief that AIDS can only be transmitted by the methods described above. See supra notes 21-33 and accompanying text.

\textsuperscript{135} See supra notes 41-72 and accompanying text.

\textsuperscript{136} See supra notes 108-12 and accompanying text.