1988


Carol A. McLaughlin
Art & Hadden

Follow this and additional works at: https://engagedscholarship.csuohio.edu/jlh

Part of the Health Law and Policy Commons

How does access to this work benefit you? Let us know!

Recommended Citation

This Symposium is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Journal of Law and Health by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.
LEGAL ISSUES IN HEALTHCARE SETTINGS
AIDS: CURRENT STATE OF THE LAW - AN OVERVIEW

by

CAROL A. McLAUGHLIN

TABLE OF CONTENTS
July, 1989

I. MEDICAL INFORMATION

1. State of the Art Knowledge of Acquired
   Immunodeficiency Syndrome (AIDS) ............... 78
2. Current Studies of Risks of Nosocomial
   (Hospital Acquired) Infection with HIV
   Virus in Health Care Workers .................... 82
3. Current Studies of Household Contact ............ 83
4. Centers for Disease Control Recommendations
   for Preventing Transmission of Infections
   With HIV Virus .................................... 84
5. Cost Per AIDS Patient ............................. 90
6. AIDS: HCW's and the Public's Perceptions
   and Attitudes ..................................... 91

II. SETTINGS

1. Employer Surveys ................................... 92
2. Workplace Discrimination: Federal Laws and Cases ...... 92
3. Workplace Discrimination: State and Local Laws
   and Cases ......................................... 98
4. Workplace Discrimination: Employer Defenses
   for Refusal to Hire ................................ 102
5. Workplace Discrimination: Pre-Employment Inquiries,
   Physical Examinations, Blood Tests .................. 103
6. Workplace Safety: Employee Refusal to Work
   with AIDS Employee ............................... 103
7. Health Care Workers: Refusal to Treat AIDS Patients .... 104
8. Workers' Compensation/Unemployment Insurance .......... 105

---

1 Presented as part of an address on the current state of the law at the
   AIDS Symposium held at Cleveland-Marshall College of Law on March

2 Attorney, Arter & Hadden, Cleveland, Ohio; B.S., Seton Hill College
   1970; M.S., Case Western Reserve University 1972; J.D., Case Western
   Reserve University. In addition, Ms. McLaughlin is a licensed dietitian
   who continues to devote substantial time and energy lecturing statewide
   on issues of importance to the health care law field.
III. Torts Claims Available to Persons With HIV Infection

1. Defamation ........................................ 105
2. Invasion of Privacy .............................. 106
3. Assault ........................................... 106
4. Emotional Distress .............................. 106
5. Medical Malpractice .......................... 106
6. Multiple Claims ................................. 106

IV. Children With AIDS ................................. 107

V. Other Issues in the Healthcare Setting ............... 108

1. Privacy/Confidentiality vs. Health & Welfare of Others ........................ 108
2. Institutional Liability for Transfusion
   Acquired AIDS .................................. 109
3. Emergency Care .................................. 110
4. Development of an Institutional AIDS Policy in a Health Care Setting .......... 110

VI. Selected Bibliography ............................... 113

I. Medical Information

1. State of the Art Knowledge of Acquired Immunodeficiency Syndrome (AIDS)

A. AIDS Virus and Its Detection
   1. Human Immunodeficiency Virus ("HIV") retrovirus accepted as primary cause of AIDS.
   2. Presence of HIV antibody in serum reasonable proof of past or present infection with AIDS virus.

B. Case Definition and Epidemiology
   1. AIDS
      a. AIDS is only form of HIV infection reported nationally.
      b. As of 2/28/89, 88,096 cases reported with 1,440 children under age 13; 51,310 deaths attributed to AIDS.

d. 5 - 20% with HIV infection convert to AIDS over 5 year period.

e. Average life expectancy 18-24 months; 10/87 CDC study suggests up to 98% of victims die less than 3 years after diagnosis.


g. 1,260 confirmed AIDS cases; 20 children under age 13; 715 deaths in Ohio residents as of April 3, 1989; Ohio reporting since 1981. Epidemiology Department, Ohio Department of Health; reportable disease under Ohio Admin. Code § 3701-3-02 (1980).


2. ARC (AIDS Related Complex)
   a. Clinical and laboratory syndrome characterized by conditions clinically associated with immunosuppression such as enlarged lymph nodes, oral thrush, weight loss and unexplained diarrhea.
   b. 10 - 20% with HIV infection develop ARC.
   c. ARC is reportable in Ohio under Ohio Admin. Code, § 3701-3-02 (1980).

3. Seropositive
   a. Without clinical symptoms; individual has been exposed to the AIDS virus as evidenced by a positive test for antibodies to the HIV virus.

4. 1991 Public Health Service Predictions
   a. 145,000 will require medical care for AIDS; 54,000 will die; 74,000 will contract AIDS.
   b. 270,000 cumulative total with 179,000 deaths.

C. Detection/Testing
   1. ELISA Test (Enzyme-Linked Immunosorbent Assay) developed to screen blood and blood products for AIDS contamination. (Available for use in 1984).
   2. Diagnosis of HIV exposure in individuals: ELISA test positive on two (2) separate testings usually within 72 hours; confirmed by Western blot assay; same blood sample for all three tests; estimated cost at $60-$80.
   3. Significance of seropositive test: individual has been infected with AIDS virus at some time, but should be viewed continuously infectious.
D. High Risk Groups For Acquiring Infection With HIV
1. Homosexual and bisexual men (62% of cases).
2. Heterosexual intravenous drug abusers (19% of cases).
3. Homosexual or bisexual men who have used drugs (7% of cases).
4. Persons transfused with contaminated blood or blood products (3% of cases).
5. Individuals with hemophilia (1% of cases).
6. Heterosexual sex partners of persons with HIV infection (4% of cases).
7. Undetermined (4% of cases).
8. Pediatric cases (1% of cases).

E. Methods of Transmission of HIV
1. Sexual contact.
2. Parenteral (not through the digestive system) exposure to infected blood or blood components.
3. Perinatal transmission from mother to neonate or through breast feeding; Blanche, et al., A Prospective Study of Infants Born to Women Seropositive for Human Immunodeficiency Virus Type 1, 320 New Eng. J. Med. 1643 (1989).

F. Isolation of HIV Virus
Isolation from blood, semen, saliva, tears, breast milk, cervical secretions, cerebrospinal fluid and urine, but epidemiological evidence implicates only blood, semen and cervical secretions in transmission.
2. **Current Studies of Risks of Nosocomial (Hospital Acquired) Infection with HIV Virus in Health Care Workers (HCWs).**

A. Of 1,758 HCWs tested for HIV antibodies, 26 (1.5) were seropositive, and all but three (3) belonged to groups recognized as high risk for AIDS; See Update: Acquired Immunodeficiency Syndrome in San Francisco Cohort Study, 1978-85, 34 M.M.W.R. 575 (Sept. 27, 1985).


C. 300 HCWs in San Francisco General Hospital with an average four years (4) exposure to HIV infected patients; all negative except 14 male homosexual workers. See Sande, *Transmission of AIDS: The Case Against Casual Contagion*, 314 NEW ENG. J. MED. 380 (1986).

D. 938 HCWs with 451 exposures to blood or serum of HIV patients; two seropositive with parenteral exposure. See McCray, *Occupational Risk of the Acquired Immunodeficiency Syndrome Among Health Care Workers*, 314 NEW ENG. J. MED. 1127 (1986).

E. 2,492 personnel in Kinshasa, Zaire Hospital. Medical, administrative and manual workers with similar seropositivity; not associated with any measurement of patient, blood or needle contact. See Mann, Francis, Quinn, Bila, Asila, Bosenge, Nzilambi, Jansegers, Piot, Ruti & Curran, *HIV Seroprevalence Among Hospital Workers in Kinshasa, Zaire: Lack of Association with Occupational Exposure*, 256 J.A.M.A. 3099 (1986).


H. 2 reported cases of laboratory workers with HIV virus: worker cut finger while cleaning a special centrifuge used to produce concentrated solution of HIV virus; worker growing virus in large amount and concentration. Gottfried, *Acquired Immunodeficiency Syndrome and the Clinical Laboratory Worker*, 111 ARCH. PATHOL. LAB. MED. 1024 (1987); see also Recommendations for Prevention of HIV Transmission in Health-Care Settings, 36 M.M.W.R. No. 2S (Aug. 21, 1987).

For CDC Update on AIDS and HIV infection in HCWs; as of March 14, 1988 a total of 2,586 of 55,315 adults with AIDS report health care or clinical laboratory setting for employment; 95% classified into known transmission categories. *See AIDS and HIV Update: Acquired Immunodeficiency Syndrome and Human Immunodeficiency Virus Infection Among Health-Care Workers*, 259 *J.A.M.A.* 2817 (1988).


### 3. Current Studies of Household Contact


4. Centers for Disease Control ("CDC") Recommendations for Preventing Transmission of Infections with HIV Virus

A. Precautions for Clinical and Laboratory Staff
2. Use of gloves, gowns, handwashing, specimen warning labels and disposal of soiled articles and needles.

B. Precautions for Health Care Workers and Allied Professionals: Dental Personnel and Persons Performing Necropsies or Providing Morticians’ Services

C. Recommendations for Prevention of HIV in the Workplace
2. CDC recommendations; transmission from patient to HCW:
   a. Needles, scalpel blades, other sharp instruments handled with extraordinary care.
   b. Disposal of all sharp items in puncture-resistant containers located as close as possible to area of use; no manipulation of needles by hand such as recapping.
   c. Use of infectious disease precautions when possibility of exposure to blood or other body fluids (gloves, gowns, masks, eye coverings as appropriate).
d. Use of disposable airway equipment and resuscitation bags located in areas where need is predictable.
e. Pregnant HCWs should be especially familiar with precautions to prevent transmission. (Also concern about cytomegalovirus ("CMV") which can cause birth defects).
f. Ongoing education of all HCWs (including students) as to AIDS transmission and prevention.

3. For a health care worker with parenteral or mucous membrane exposure to blood or other body fluids, assess source patient to determine the likelihood of HIV infection. Update: Human Immunodeficiency Virus Infections in Health-Care Workers Exposed to Blood of Infected Patients, 36 M.M.W.R. 285, 288 (May 22, 1987); Recommendations for Prevention of HIV Transmission in Health-Care Settings, 36 M.M.W.R. No. 2S (Aug. 21, 1987).

4. CDC Recommendations: Transmission From HCWs to Patients
a. Risk where high degree of trauma to patient would provide a portal of entry of AIDS virus and access of blood or serous fluid from the infected HCW to the open tissue of a patient.
b. Wear gloves for direct contact with mucous membranes or non-intact skin of all patients.
c. Workers with exudative lesions or weeping dermatitis should refrain from all direct patient care and handling of patient care equipment until condition resolves. Items b and c to be followed by all HCWs.
d. If patient is exposed to blood or other body fluids of a health care worker, inform patient.
e. Testing of all HCWs who do not perform invasive procedures not recommended. See 8/87 CDC recommendations for update.
f. HCW with AIDS should be counseled about potential risk associated with caring for patients with transmissible infections; consider changes in work assignments.

5. Sterilization, Disinfection, Housekeeping and Waste Disposal to Prevent Transmission of HIV
a. Sterilization and disinfection procedures currently recommended for health care and dental facilities are adequate to sterilize or disinfect instruments, devices or other items contaminated with the blood or body fluids from persons infected with AIDS virus.
b. A 1/10 dilution of common household bleach (sodium hypochlorite) will destroy the virus; approximately 1-1/2 cups bleach per gallon of water.
6. Considerations Relevant to Other Workers
   a. Personal service workers such as hairdressers, barbers and manicurists should be educated about the transmission of blood-borne infections including AIDS and hepatitis B virus.
   b. Food service workers should follow recommended standards and practices of good personal hygiene and food sanitation and exercise care to avoid injuries to hands when preparing food. A food service worker infected with the AIDS virus does not need to be restricted from work unless he evidences other infection or illness for which any food service worker should also be restricted.
   c. For other workers sharing the same work environment, there is no known risk of transmission to co-workers, clients or consumers in settings such as offices, schools, factories or construction sites.

   1. For HCWs with contact with tissues/mucous membranes performing/assisting in operative, obstetric or dental invasive procedures.
   2. Operative procedures include surgical entry into tissues, cavities or organs or repair of traumatic injuries in operating, delivery, emergency or outpatient department.
   3. Use of gloves for touching mucous membranes and non-intact skin; other appropriate barriers such as masks, eye coverings and gowns if aerosolization or splash is likely.
   4. Prevent injuries to hands caused by needles, scalpels, and other sharp instruments.
   5. HCWs with exudative lesions or weeping dermatitis should NOT perform or assist.
   6. Routine serological testing not recommended for HCWs or patients.


H. See Diagnosis and Management of Mycobacterial Infection (TB) and Disease in Persons With HIV Infection, 35 M.M.W.R. 448 (July 18, 1986).

1. Public health considerations for testing, including counseling pre- and post-testing; confidentiality of personal information; understanding that person may decline to be tested without being denied health care or other services except where testing is required by law (blood and organ donors, prisoners, immigrants).

2. Recommendations for:
   a. Persons with sexually transmitted disease.
   b. I.V. drug abuser (routine testing with treatment).
   c. Persons who consider themselves at risk.
   d. Women of childbearing age with identified risks for HIV infection.
   f. Persons undergoing medical evaluation and treatment as a diagnostic tool for evaluating patients with clinical signs/symptoms.
   g. Persons admitted to hospitals for purposes of periodic determination of prevalence of HIV infection in age groups at greatest risk for infection.
   h. Persons in correctional facilities.
   i. Prostitutes.

3. Partner notification/contact tracing: Physicians and Health Department personnel should use confidential procedures to assure partners are notified if a person is unwilling to notify partners or it cannot be assured partners will seek counseling.


1. Use of Universal Precautions for all patients:
   a. Appropriate barrier precautions: gloves for all blood, body fluid, mucous membrane and non-intact skin exposure (masks, protective eyewear, gowns and aprons as needed).
   b. Handwashing.
   c. Needle, scalpel, sharp instrument procedure.
   d. For emergency resuscitation have available mouthpieces, resuscitation bags, etc.
   e. All HCWs with exudative lesions or weeping dermatitis should refrain from all direct patient care/handling patient care equipment.
   f. Pregnant workers strictly adhere to precautions.


3. Environmental considerations/recommendations for sterilization and disinfection, housekeeping, cleaning and decontaminating spills of blood or other body fluids, laundry, infective waste.

4. Implementation of precautions/employers with policies for:
   a. Initial orientation and continuing education of all HCWs about AIDS. See Wertz, Sorenson, Liebling, Kessler, & Heeren, Knowledge and Attitudes of AIDS Health Care Providers Before and After Education Programs, 102 PUB. HEALTH REP. 248 (1987).
   b. Provision of necessary equipment/supplies.
   c. Monitoring adherence to use of protective measures.

5. Testing of patients for:
   a. Management of parenteral/mucous membrane exposures of HCWs.
   b. Patient diagnosis and management.
   c. Counseling and serologic testing to control HIV transmission in the community.
   d. Test of individual patients on agreement between patient and physicians.

6. Testing HCWs:
Routine testing of HCWs performing invasive procedures to prevent HIV transmission cannot be assessed.

7. Management of exposures:
   a. Identification and testing of source patient with accompanying guidelines.
   b. Serologic testing should be available to all HCWs who are concerned that they may have been infected with HIV.

8. See Committee on Infections, American Hosp. Ass'n Statement on Employee Protection for Blood-Borne Disease (June 18, 1987) (recommends universal precautions for all blood and body fluid exposures as representing best means of protection of health care personnel rather than routine HIV testing of all hospital patients. See BIBLIOGRAPHY No. 51.

K. Centers for Disease Control, Update: Universal Precautions for Prevention of Transmission of Human Immunodeficiency Virus, Hepatitis B Virus, and Other Bloodborne Pathogens in Health Care Settings, 37 M.M.W.R. 337 (June 24, 1988). Universal precautions apply to blood, and other body fluids containing visible blood, semen, vaginal secretions and fluids including cerebrospinal fluid, synovial fluid, pleural fluid, peritoneal fluid, pericardial fluid, and amniotic fluid. Universal precautions do not apply to feces, nasal secretions, sputum, tears, urine, and vomitus unless they contain visible blood. Although institutions may judge that routine gloving for all phlebotomies is not necessary, "gloves should always be available to health care workers who wish to use them for phlebotomy." Id.

L. Transmission from Tears

M. Heterosexual Transmission of HIV

N. Prevention of Perinatal Transmission of HIV

O. Education and Foster Care of Children Infected With HIV
1. Consider the behavior, neurologic development and physical condition of the child as well as expected type of interaction with others in the setting.
2. Most infected school-aged children should be allowed to attend school and after-school day-care or be placed in a foster home in an unrestricted setting.

3. Infected preschool children and some neurologically handicapped children who lack control of their body secretions or who display behavior such as biting, and those with uncoverable, oozing lesions, are better placed in a more restricted environment until more is known about AIDS transmission in these settings.


P. Information for Persons Who Have a Positive Test for HIV Antibody

See Peterman, Drotman & Curran, Epidemiology of the Acquired Immunodeficiency Syndrome (AIDS), 7 EPIDEMIOLOGIC REVIEWS 1, 15 (1985).

Q. Screening Donated Blood

1. Inform donors that their blood or plasma will be tested for HIV antibody.

2. Donor informed if test is positive and may be placed on facility's donor deferral list.


5. Cost Per AIDS Patient

A. The total lifetime cost of hospitalization per AIDS patient is approximately $147,000; the cost for all AIDS patients has totaled $1.4 billion for the last 6 years. For the first 10,000 AIDS victims, lost earnings due to disability equal $189 million; $4.8 billion in potential earnings are lost due to early death (90% of AIDS patients range in age from 20 to 49 years). See Hardy, Rauch, Echenberg, Morgan & Curran, The Economic Impact of the First 10,000 Cases of Acquired Immunodeficiency Syndrome in the United States, 255 J.A.M.A. 209 (1986).
B. In Boston, the total lifetime costs of hospitalization equal $50,380. See Seage, Landers, Barry, Groopman, Lamb & Epstein, Medical Care Costs of AIDS in Massachusetts, 256 J.A.M.A. 3107 (1986).

A fewer number of hospital days in San Francisco results in costs of $41,499. See Scitovsky, Cline & Lee, Medical Care Costs of Patients with AIDS in San Francisco, 256 J.A.M.A. 3103 (1986).


6. AIDS: HCWs and Public Perceptions and Attitudes


G. Dawson, Cynamon & Fitti, AIDS Knowledge and Attitudes, ADVANCE DATA, Nov. 19, 1987, at 1 (Provisional Data from the National Health Interview Survey: United States August, 1987).


J. Wachter, Cooke, Hopewell & Luce, Attitudes of Medical Residents Regarding Intensive Care for Patients with the Acquired Immunodeficiency Syndrome, 148 ARCH. INTERN. MED. 149 (1988).
II. Settings

1. Employer Surveys
   See Bibliography Nos. 47, 48, 58.

2. Workplace Discrimination: Federal Laws and Cases
      1. § 501 (29 U.S.C. § 791) applies to those hired/employed in Federal programs.
      2. § 503 (29 U.S.C. § 793) requires affirmative action by any private party who receives a Federal department or agency contract in excess of $2500.
      4. March 22, 1988 amendment of the Act applicable to § 503 and § 504: The term “individual with handicap” does not include a person with “a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health and safety of other individuals or who, . . . is unable to perform the duties of the job.” (Civil Rights Restoration Act of 1987).
      5. Definition of “handicapped person.” 29 U.S.C. § 706(7)(B)(1986): a. Has a physical or mental impairment which substantially limits one or more of such person’s major life activities; b. Has a record of such impairment, or c. Is regarded as having such an impairment.
      6. Regulations and cases seem to mandate reasonable accommodation by employer. See Nondiscrimination on the Basis of Handicap, 45 C.F.R. § 84.4 (1977).
      7. Pre-employment physicals/testing must be job related.
      9. Infectious disease as handicap under § 504.
            Application of § 504 of Act to persons with AIDS; concluded discrimination based on disabling effects of AIDS may violate § 504, but statute does not restrict measures to prevent disease spread.
Seropositivity alone does not protect individual as handicapped within meaning of Act.

b. Department of Justice Memorandum of September 27, 1988. Section 504 of Act protects all person with HIV virus including asymptomatic carriers.

c. Infectious Disease as Handicap Under § 504.


2. Arline rejects Justice Department argument that employer fear of contagion may be legitimate basis for employer discrimination; employers actions must be based on reasoned and sound judgments.

3. The Court's ruling did not require placement of teacher with contagious tuberculosis in classroom nor did it bar dismissal of an individual if individual poses significant risk of transmitting infection in the workplace and the risk cannot be eliminated by “reasonable accommodation.”

4. Requires district court case by case determination and findings of fact as to risk of contagion to determine if individual is “otherwise qualified” based on four criteria: nature of the risk, duration of the risk, severity of the risk and the probability that the disease will be transmitted and cause varying degrees of harm. These factors are outlined in Southeastern Community College v. Davis, 442 U.S. 397 (1979).

5. In a footnote, the Court specifically refused to address the issue of an asymptomatic carrier of a disease such as AIDS as being within the protection of the Act. However, commentators and practitioners predict that if the issue of asymptomatic carriers is presented, the Court will rule as it did in Arline. Arline, 480 U.S. at 282, n.7.


- RN placed on indefinite medical leave without pay when his physician, without nurse's knowledge or consent, disclosed nurse had possible pre-AIDS condition (later did develop AIDS).

- HHS Department of Civil Rights found that hospital violated law by failing to allow complainant to return to work after receiving evidence that it would be safe for patients to have contact with the nurse. See Finding of AIDS Bias under § 504, HHS Civil Rights Director tells House Panel, 153 Daily Lab. Rep. (BNA) A-3 (Aug. 8, 1986).

* All cases marked with an asterik are AIDS cases.
*e. Leckelt v. Board of Comm'rs, No. 86-4235 (E.D. La. Mar. 15, 1989) complaint charged hospital with violating Federal Vocational Rehabilitation Act; discrimination based on "perceived disability."

- Former employee's friend and roommate admitted to hospital for AIDS treatment in April, 1986. Day after patient transferred, hospital officials asked employee (licensed practical nurse) to take HIV test and submit results to hospital.
- Employee repeatedly refused test; was not allowed to return to job; fired April 29, 1986.
- Employee worked in E.R. and ICU and often performed procedures involving body fluids. Evidence presented that employee failed to follow universal precautions; former patient testified he treated her when he had an unbandaged open wound on his hand. Also evidence of failure to follow hospital regulations regarding reporting infectious diseases. District court upholds dismissal but did not reach issue of appropriateness to demand that employee undergo HIV testing.

*f. National Gay Rights Advocates filed complaint on September 11, 1986 with HHS Office of Civil Rights against Humana Hospital in Orlando, Florida for violation of § 504 of Vocational Rehabilitation Act based on "perceived handicap."

- A former employee's physician disclosed results of HIV test to Humana Hospital. The hospital's infection control committee approved the employee's continued employment as a surgical technician.
- However, Humana's Personnel Director offered employee choice of resignation, termination or medical leave. The employee selected medical leave and accused the hospital of violating federal handicap law. See Charge of Bias Based on AIDS Filed Against Florida Hospital, 185 Daily Lab. Rep. (BNA) A-2 (Sept. 24, 1986).

*g. The Illinois ACLU filed a complaint against the Cook County Board of Commissioners on August 5, 1987 on behalf of a hospital staff physician. The suit alleged a violation of the Federal Vocational Rehabilitation Act and the 14th Amendment of U.S. Constitution. The staff physician, who was afflicted with AIDS, was prohibited from performing certain invasive procedures. He sought a preliminary and permanent injunction prohibiting restrictions on his duties and privileges plus $500,000 compensatory damages and $500,000 punitive damages from the Medical Director of the Hospital.

- County Commissioners barred physician from direct patient care on February 9, 1987. See Cook County Board Votes to Limit Privileges of Doctor Who Has AIDS, 27 Dai-
ly Lab. Rep. (BNA) A-9 (Feb. 11, 1987). Physician pursued hospital’s internal hearing process and was permitted to provide direct patient care limited to non-invasive procedures. Medical Director given discretion to determine “invasive procedures.” Complaint alleged physician effectively prohibited from providing direct patient care.


**h.** *American Fed’n of Gov’t Employees Local 1812 v. United States Dept. of State*, 662 F.Supp. 50 (D.D.C. 1987). Local 1812 was denied a preliminary injunction on the basis of constitutional claims or a claim under § 504 of the Vocational Rehabilitation Act to block State Department expansion of employee medical fitness program to include AIDS antibody testing for overseas assignments. The court rejected the constitutional claim because the tests were rationally related to fitness for duty due to the risk of developing AIDS and the lack of adequate medical care at foreign posts. *Id.* at 53.

— The court further concluded that the Rehabilitation Act was triggered because HIV carriers are perceived to be handicapped under 29 U.S.C. § 706(7)(B)(i) but that these individuals were not otherwise qualified for foreign service as required under the Act. *Id.* at 54.

**i.** *Chalk v. District Court*, 840 F.2d 701 (9th Cir. 1988). Ninth Circuit Court of Appeals granted a preliminary injunction to permit Vincent Chalk to return to former duties teaching hearing-impaired children. The court determined that Chalk may be handicapped due to AIDS and is likely to succeed on the merits of his suit brought under § 504 of the Vocational Rehabilitation Act of 1973. The court found “no evidence in the relevant medical literature that demonstrates any appreciable risk of transmitting the AIDS virus under the circumstances likely to occur in the ordinary school setting.” *Id.* at 707.

**j.** *Doe v. Centinela Hosp.*, 57 U.S.L.W. 2034 (C.D. Cal. June 30, 1988). After testing HIV positive, patient discharged from residential alcohol and drug treatment program. Patient rejected alternative of outpatient care and claimed violation of § 504 of the Federal Vocational Rehabilitation Act. The court determined that the hospital was subject to § 504 due to receipt of Medicare payments. Doe was protected by § 504 because hospital’s refusal to treat was based on fear of contagion. First case where a court definitely ruled that persons who test HIV
positive but are otherwise asymptomatic are covered by the federal statute. Settlement reached in which hospital agreed to rescind policy of mandatory HIV testing prior to entry into drug program and exclusion of HIV positive individuals from program.

1. Protects "concerted activity" of employees to withhold services in protest of "terms and conditions of employment."

- Specific provision protecting employee's right to work stoppage because of "good faith" belief of dangerous condition in the workplace.

1. Employer with general duty to provide safe workplace cannot punish or discriminate against employees for exercise of rights related to job safety and health hazards. Permitting AIDS infected employee to continue work probably not "general duty" clause violation given present medical knowledge.

5. On April 6, 1988, OSHA cited Griffin Hospital in Derby, Connecticut for failure to have effective training program on blood-borne diseases and failure to provide employees with personal protective equipment; a $5,770 fine is proposed as a penalty. The citation is based on OSHA's general duty clause. See OSHA Cites Hospital for Lack of Precautions on Worker Exposure to Bloodborne Diseases, 73 Daily Lab. Rep. (BNA) A-6 (Apr. 4, 1988); OSHA Cites Blood Exposure Violations in Six California Healthcare Facilities, 230 Daily Lab. Rep. (BNA) A-7 (Nov. 30, 1988).

6. Office of Health Compliance Assistance, Enforcement Procedures for Occupational Exposure to Hepatitis B Virus (HBV) and Human Immunodeficiency Virus (HIV), OSHA Instruction CPL-2-2.44A (Aug. 15, 1988). This OSHA Instruction was issued for the purpose of enforcing the Department of Labor & Department of HHS Joint Advisory Notice [52 Fed. Reg. 41818 Oct. 30, 1987]. Employers are not normally required to report needlesticks on OSHA Form 200. Phlebotomists may choose whether or not to wear gloves in certain circumstances.

7. See Department of Labor; OSHA-Occupational Exposure to Bloodborne Pathogens: Proposed Rules and Notice of Hearing, 54 Fed. Reg. 23042 (May 30, 1989). Chronicles events leading to proposed standard for hepatitis B virus (HBV), human immunodeficiency virus (HIV) and other bloodborne diseases; reviews 25 cases of HIV infection associated with occupational exposure; OSHA estimates average cost per facility to comply will be $1,379, with range of $142 per facility for medical equipment repair to $33,035 per facility for hospitals; standard includes Centers for Disease Control universal precautions, engineering and work practice controls, personal protective equipment, training and record keeping.


1. May provide cause of action relative to discharge or discrimination for depriving employee of benefits employee is entitled to under an employee benefit plan. See Graves v. Blue Cross, 688 F.Supp. 1045 (N.D. Cal. 1988). ERISA did not preempt employee afflicted with AIDS from bringing suit which alleged that employer's health insurer had mishandled his claims in violation of state law.

Kross v. Western Electric Co., 701 F.2d 1238 (7th Cir. 1983).
   1. Disparate impact theory utilized since approximately 75% of AIDS victims in U.S. are men.

   1. Discrimination against handicapped individuals as violation of due process.

H. Federal Legislation.
   H.R. 5142 "AIDS Federal Policy Act" (combined H.R. 4557 (AIDS Testing and Counseling), H.R. 4850 (AIDS Research) and H.R. 4843 (Abandoned Infants) ) was passed by Congress; floor amendment from Rep. W. Dannemeyer (R-CA), to require HIV testing for all hospital patients ages 15-50 who are scheduled for surgery, was defeated.

I. Fourth Amendment Protection Under U.S. Constitution.

3. Workplace Discrimination: State and Local Laws and Cases

   1. Ohio Rev. Code Ann. § 4112.01(A)(13) (Baldwin 1980) defines handicap as a "medically diagnosable, abnormal condition which is expected to continue for a considerable length of time, whether correctable or uncorrectable by good medical practice, which can reasonably be expected to limit the person's functional ability, including, but not limited to seeing, hearing, thinking, ambulating, climbing, descending, lifting, grasping, sitting, rising, any related function, or any limitation due to weakness and significantly decreased endurance, so that he cannot perform routine living and working without significantly increased hardship and vulnerability to what are considered the everyday obstacles and hazards encountered by the non-handicapped."
3. **Ohio Rev. Code Ann. § 4112.02(L) (Baldwin 1980)** does not require employment of a handicapped person if employment would increase occupational hazards affecting the handicapped person, co-workers, the general public or the facility.

   a. OCRC will consider a person afflicted with AIDS to be handicapped as defined by/protected under Ohio's Fair Employment Practices Act.
   b. OCRC defers to reasonable medical judgment of public health officials, given state of medical knowledge concerning AIDS.
   c. "With respect to testing for AIDS, employers are strongly cautioned that mandatory testing or the use of the results of such testing may violate Ohio's antidiscrimination laws. Significantly, the CDC has issued guidelines which strongly argue against the use of wholesale testing for employment or other purposes. In general, therefore, employers must establish a business necessity for testing or for the use of test results."

5. Duty of "Reasonable Accommodation."
   a. Not required to incur more than minimal costs and minimally disruptive measures.
   b. Examples: reduced work load, flextime, more frequent rest breaks, allowing employee to work at home, allowing time off for medical appointments, starting workday later, giving sick leaves as necessary for treatment, and restructuring the job.

B. State AIDS Related Discrimination Complaints
   - September, 1986 survey by National Gay Rights Advocates found that 34 states willing to take AIDS discrimination complaints.

C. New York State Human Rights Commission

   *2. Seitzman v. Hudson River Assoc., 126 A.D.2d 211, 513 N.Y.S.2d 148 (1987). A group of medical doctors obtained preliminary injunction against selling agent of a New York City cooperative for reneging on contract to sell when it was learned that one of the doctors would treat AIDS patients; a later decision held that punitive damages are available in an action brought under the state human rights law. Seitzman v. Hudson River Assoc., N.Y.L.J., May 5, 1989, p. 22, col. 5.

   *3. Barton v. New York City Comm’n on Human Rights, 531 N.Y.S.2d 979 (N.Y.Sup.Ct. 1988); New York court ruled that the state Human Rights Commission had authority to address alleged discriminatory practices of a dentist who terminated a lease
because a second dentist used the space to treat AIDS patients. The court upheld the findings made by the New York Commission on Human Rights and affirmed the award of $15,000 damages for emotional harm.


D. Florida Commission on Human Relations

*1. Shuttleworth v. Broward County, No. 85-0624 (Fla. Comm'n Human Relations, Dec. 11, 1985); Commission found that individual with AIDS is within protection of the Florida statute defining a “handicap” in that the individual “does not enjoy in some manner, the full and normal use of his sensory, mental or physical facilities.” Shuttleworth was fired from his job as a Budget Analyst with Broward County three months after his AIDS diagnosis. Decision reaffirmed by the Commission on April 7, 1986. For a summary of proceedings, see 237 Daily Lab. Rep. (BNA) A-8 (Dec. 10, 1986).

*2. Shuttleworth v. Broward Cty., 639 F.Supp. 654 (S.D. Fla. 1986); District court judge denied defendants’ motions for summary judgment and dismissal, thus allowing Shuttleworth to present his claim of handicap discrimination under § 504 of the Federal Vocational Rehabilitation Act. A settlement was reached on December 5, 1986 after Shuttleworth’s former employer agreed to rehire him and pay him $196,000 which included back pay, medical bills, attorney’s fees and agreed to reinstate his health and life insurance. Punitive damages were not allowed.

E. California Department of Fair Employment and Housing


*2. Raytheon Co. was the first case in which the California Fair Employment and Housing Commission ruled that AIDS is a handicap under California law (decided on Feb. 5, 1987). In so ruling, the Commission overturned the ruling of an administrative law judge. The Commission ordered $4,359 in back pay, plus interest, to the decedent’s estate after determining that the Raytheon Company discriminated against the decedent by refusing to allow him to return to work after he was diagnosed with AIDS. See Department of Fair Employment & Housing v. Raytheon Co., No. FEP 83-84; L1-031p, L-33676, 87-04, 29 Daily Lab. Rep. (BNA) E-1 (Feb. 13, 1987).


F. West Virginia Human Rights Commission

*Waiter wins AIDS discrimination case before West Virginia Human Rights Commission; restaurant ordered to rehire and pay $47,865 for legal fees, lost wages, tips and compensation for “humiliation, embarrassment, emotional and mental distress.” Employee claimed restaurant required medical evidence he did not have AIDS when he returned to work in October 1986 after treatment for shingles and throat infection. The employee further claimed that he was terminated when he informed his employer that he was HIV positive but had not contracted AIDS. First W. Va. AIDS Bias Case Won by Waiter in Parkersburg, 22 Daily Lab. Rep. (BNA) A-2 (Feb. 3, 1988).


G. Oregon Civil Rights Division

*Oregon Civil Rights Division, Bureau of Labor, No. EM HP-870108-1353 (Jan. 9, 1988). In 1/86, an auto dealership issued health insurance policy revision which specifically excluded AIDS treatment. Employee objected and on 12/23/86, the ACLU notified the employer that AIDS exclusion might violate state handicapped discrimination law. Employee demoted and filed complaint. The Oregon Civil Rights Division determined that AIDS exclusion was unlawful because it discriminated against men “[b]ecause more than 90% of those infected with AIDS are males (in Oregon and nationally) . . . [and] exclusion of AIDS disparately impacted males in denying employees an employment benefit . . . .” AIDS Treatment Exclusion From Benefits Called Sex Discrimination Against Men, 26 Daily Lab. Rep. (BNA) A-2 (Feb. 9, 1988).


J. City Ordinances


K. State Legislation


4. Workplace Discrimination: Employer Defenses for Refusal to Hire

A. Increased Cost of Insurance; Usually Rejected

B. Risk to Employee: High Risk of Infection, Prolonged Recovery, Risk of Complications; Usually Rejected


C. Physical Condition As Serious Threat to Health and Safety of Employee, Other Employees, Customers
   1. As to employee; determined by employee's physician.
   2. As to co-workers, customers; state of the art knowledge as to potential risk.

D. Present Ability To Do The Job: If Employee Cannot Perform Now, Even With Reasonable Accommodation, Then Not Protected

5. Workplace: Pre-Employment Inquiries, Physical Examinations, Blood Tests

A. Inquiries To Determine If Applicant Physically Able to Perform Job Applied For is Legally Permitted.
B. Pre-Employment Physical Legally Permitted and Employment Can Be Conditioned on Successful Completion of Exam If Exam is Done After Offer of Employment; Exam Required Of All, Not Just "High Risk."
C. Testing May Be Permissible After Offer of Employment If Required of All Employees and Job Related.
D. California, Florida and Wisconsin Prohibit the Use of Blood Tests by Employers to Determine an Individual's Suitability For Employment.

6. Workplace Safety/Employee Refusal To Work With AIDS Employee

A. OSHA Standards Require Private Employer to Provide Safe Work Environment.
   1. Employee refusal must be reasonable and based on a good faith belief of danger to health and safety.
   2. Employer education of employees as to AIDS and AIDS transmission bears on employee's good faith belief.
   3. Federal OSHA
   4. Nurses' Case Under California OSHA
      *Bernales v. City & County of San Francisco, Dep't of Pub. Health, Case Nos. 11-17001-1 through 11-17001-4 (Sept. 9, 1985); Reassignment of nurses upheld; nurses at San Francisco General Hospital insisted on gloves, masks and gowns when treating AIDS patients; state of the art knowledge of transmission of AIDS did not support nurses' insistence. See North Carolina Law Blocks Discrimina-

B. National Labor Relations Act/National Management Relations Act; See outline at II (2)(B) and (C).

7. Health Care Workers/Refusal to Treat AIDS Patients

A. Physicians:
   1. Private physician staff member, with exception of emergency, is not required to treat everyone who comes for treatment and may arbitrarily refuse to treat.
   2. Physician under contract to hospital to provide service; see terms of employment contract; refusal to treat may be breach of contract.

B. Dentists:

C. Other Health Care Personnel:
   1. Employment-at-will absent contractual or statutory protection; either employer or employee can terminate without notice for any reason or no reason.
   2. Employee with duty to perform assigned work without protection if refuses to treat patients on medical, moral or philosophical grounds. See Warthen v. Toms River Community Mem. Hosp., 199 N.J. Super. 18, 488 A.2d 229 (1985) (refusal to treat terminally ill dialysis patient on ethical grounds; employee discharge upheld).
   3. Concerted activity; See outline at II (2)(B) and (C).
   4. Rights under OSHA; See outline at II (2)(D).
5. Collective bargaining agreements; provisions restrict authority of employer to discharge or to authorize arbitration.


8. Workers' Compensation/Unemployment Insurance

A. Workers' compensation is not available for pre-existing conditions, but if basis of illness is infection contracted on the job, then workers' compensation may cover.

B. Compensation claims may arise in cases of medical personnel who (1) receive puncture wounds possibly contaminated with the AIDS virus or (2) a disabling psychiatric condition based upon a "good faith" belief of developing or being at risk for AIDS.

C. Unemployment benefits payable if worker can show "honest, good faith" belief that continued employment (fear of contracting AIDS) would jeopardize health or if worker fired because employer suspects worker has AIDS.

D. San Francisco General Hospital nurse received $5,000 settlement in workers' compensation claim linking fear of AIDS infection to stress-related ulcer.

The nurse, one of four nurses at the hospital was involved in controversy over desire to wear masks and gloves while treating patients who might have AIDS. *Nurse Wins Workers' Compensation Claim Linking Fear of AIDS With Ulcer*, 48 Daily Lab. Rep. (BNA) A-6 (Mar. 13, 1987).

*E. Unemployment Compensation denied to research technologist who left hospital position due to fear of working in lab and contracting AIDS from the alleged carelessness of co-workers or from other unknown causes. She claimed unawareness of these risks at the time of hire. Appeals Bureau finds she did not leave job for good cause and denied unemployment compensation. *Vinokurov v. Mt. Sinai Hosp.*, No. 88-3158 U (Fla. Dep't of Labor & Employment Security, Unemployment Compensation Appeals Bureau, Apr. 1, 1988).

III. Tort Claims Available to Persons With HIV Infection

1. Defamation


that he had AIDS virus. Supervisor asked if employee had AIDS, and he denied it. Summary judgment for defendant denied.

2. **Invasion of Privacy**

   A. For communication/report that individual has AIDS, or HIV antibody positive.

   *B. *Anderson v. Strong Memorial Hosp.*, 140 Misc.2d 770, 531 N.Y.S.2d 735 (N.Y.Sup. Ct. 1988). Court ruled that a patient has cause of action for breach of physician-patient privilege when hospital allowed media to have access to photograph of a patient involved in AIDS treatment and research project. Court dismissed invasion of privacy claim because New York does not recognize this common law action. Only available remedy was for commercial exploitation of photograph published without prior written consent.


3. **Assault**

   — Compelled testing actionable as assault and battery and/or invasion of privacy.

4. **Emotional Distress**

   — Intentional infliction of emotional distress if outrageously treated.

5. **Medical Malpractice**

   *1. Award of $750,000 to AIDS victim and son. Physician negligent in diagnosis and treatment of decedent’s illness when she was originally diagnosed as having asthma when she had pneumonia linked to AIDS. *See* Health Lawyers News Report, Feb. 1988, at 7.

   *2. *Mosele v. Bures*, 139 Misc.2d 409, 258 N.Y.S.2d 976 (N.Y.Sup. Ct. 1988); complaint stated plaintiff feared increased risk of AIDS exposure due to blood transfusions necessitated by physician’s malpractice, judge orders all references to increased risk of AIDS stricken from complaint unless plaintiff submitted to HIV testing.

6. **Multiple Claims**

   *1. Suit seeks damages for forced HIV testing without consent, unauthorized disclosure of results, violation of privacy, emotional distress, destroying evidence and dumping indigent patient. An
AIDS BIBLIOGRAPHY

unemployed 21 year old patient requested hernia operation at a California county hospital. He told doctors he was infected with HIV but refused test based on fear of disclosure in open medical record. Hospital did not routinely test for HIV, but ran test along with other pre-op tests. Results were discussed with hospital administrators and noted in medical record. See Medical World News, Oct. 26, 1987 at 37.

IV. CHILDREN WITH AIDS

A. CDC Guidelines

B. Issues
1. Criteria for case by case review.
2. Precautions to prevent theoretical risk of transmission and to protect health of AIDS children.
3. Extent of disclosure of identity of children with AIDS.

C. Analogous Cases Dealing With Other Infectious Diseases
1. New York State Ass’n For Retarded Children, Inc. v. Carey, 612 F.2d 644 (2nd Cir. 1979); prevented New York City schools from segregating 50 retarded children who were hepatitis B carriers as violation of § 504 of the Rehabilitation Act of 1973.

D. New York City Health Department Policy
1. Does not automatically exclude AIDS children from school; case by case review.
2. District 27 Community Bd. v. Board of Educ., 130 Misc.2d 398, 502 N.Y.S.2d 325 (1986); court dismissed lawsuit brought in state supreme court seeking to enjoin the school’s admission of a child with AIDS.

1. Parents sued under § 504 of Federal Vocational Rehabilitation Act when their AIDS-afflicted son, Ryan Thomas, was excluded from kindergarten following biting incident.
2. Court found as a matter of law that school was within § 504 as recipient of federal funds, and Thomas was “handicapped person” and “otherwise qualified” absent any evidence he posed “a significant risk of harm to his kindergarten classmates or teachers.” Id. at 381-82.
3. Court also found violation of 45 C.F.R. § 88.4(b). Id. at 382.


G. AIDS on Campus


V. OTHER ISSUES IN THE HEALTHCARE SETTING

1. Privacy/Confidentiality vs. Health & Welfare of Others

A. State reporting requirements for contagious diseases: Ohio requires reporting of AIDS; reporting of ARC after 3/24/86.

B. Colorado first state to mandate physician and laboratory reporting of seropositive test results (Aug. 1985).

C. Screening of blood donors.


D. Duty to Warn.
1. Family, spouses and sexual partners.


2. **Institutional Liability For Transfusion Acquired AIDS**

A. Transaction involving whole blood, plasma, blood products and blood derivatives for purpose of transfusion is a service, whether for renumeration or not, not a sale. *See Ohio Rev. Code Ann. § 2108.11* (Anderson 1976).


C. Negligence exists where defendants fail to follow generally accepted professional guidelines such as screening guidelines of the American Association of Blood Banks.


3. **Emergency Care**


B. Testing of ER patients/consent.

C. Notification of emergency transport personnel and other safety forces.


4. **Development of an Institutional Policy on AIDS in a Health Care Setting**

A. Develop AIDS policy and publish it.

B. Initial orientation and continuing education of all HCWs, supervisors and management about AIDS.


1. Precautions to prevent transmission.
   a. Universal precautions.
   b. Precautions for invasive procedures.
   c. Precautions for dentistry.
   d. Precautions for autopsies or morticians' services.
   e. Precautions for dialysis.
   f. Precautions for laboratories.

2. Environmental considerations for HIV transmission.
   a. Sterilization and disinfection.
   b. Housekeeping.
   c. Cleaning and decontaminating spills of blood or other body fluids.
d. Laundry.
e. Infective wastes.

3. Implementation of precautions.
   a. Initial orientation and continuing education and training of all HCWs, including students and trainees on AIDS issues.
   b. Provision of equipment and necessary supplies.
   c. Monitoring adherence to recommended protective measures.

5. Management of infected HCWs.

D. Confidentiality.

E. Refusal to work/refusal to treat.

F. Personnel policies for employees who test HIV positive.
   1. Reasonable accommodation.
   2. AIDS as a long-term disability.
   3. Employee benefit plan treatment of AIDS.
   4. Other employee assistance programs and AIDS.

VI. SELECTED BIBLIOGRAPHY

35. American Hospital Association, Management of HTLV-III/LAV Infection In the Hospital (Rev. 1986) (available from the AHA at (312) 280-6000).

37. American Management Association, AIDS in the Workplace - Management Briefing (available from P.O. Box 319, Saranac Lake, NY 12983; $10.00 per copy).

38. Commerce Clearing House, AIDS: Employer Rights and Responsibilities (available from 4025 W. Peterson Avenue, Chicago, IL 60646; $10.00 per copy).


42. The Catholic Health Association of the United States, AIDS: Legal Implications for Health Care Providers (1987) (available from 4455 Woodson Road, St. Louis, MO 63134).

43. AIDS Task Group of the American Academy of Hospital Attorneys, American Hospital Association, AIDS and the Law: Responding to the Special Concerns of Hospitals (available from 840 North Lake Shore Drive, Chicago, IL 60611).


63. Redfield & Tramont, Toward a Better Classification System for HIV Infection, 320 NEW ENG. J. MED., 1414 (1989).