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AIDS AS A HANDICAP UNDER THE FEDERAL REHABILITATION ACT OF 1973

The number of reported cases of Acquired Immune Deficiency Syndrome (AIDS) in the United States has continued to climb steadily each year since the United States Centers for Disease Control¹ officially reported the first cases of patients with symptoms of AIDS in June 1981.² The medical research community has documented the effects of the disease thoroughly.³ The primary clinical symptom of AIDS is the severe suppression of the immune system.⁴ As a result of the breakdown of the immune system, opportunistic infections and cancers, unchecked by certain antibodies normally produced by the immune system, attack the body of an AIDS victim.⁵ The opportunistic

1. THE UNITED STATES GOVERNMENT MANUAL-1984/85 at 273 (1984). The Secretary of Health, Education, and Welfare established the Centers for Disease Control in 1973 and charged the agency with protecting the public health of the Nation. *Id.* The Centers for Disease Control provide leadership and direction in the prevention and control of diseases and in the response to public health emergencies. *Id.* In 1981, the Centers for Disease Control established a task force to determine risk factors, to conduct laboratory studies, and to disseminate timely information on AIDS. CENTERS FOR DISEASE CONTROL, DEP'T OF HEALTH & HUMAN SERVS., REPORTS ON AIDS (cover acknowledgments) (1985).

2. Foege, *The National Pattern of AIDS*, in THE AIDS EPIDEMIC 7 (K. Cahill ed. 1983). The United States Centers for Disease Control first reported the occurrence of opportunistic infections in five homosexual males, all of whom showed evidence of defective immune systems, in Spring 1981. Pneumocystic Pneumonia—Los Angeles, *reprinted in* Centers for Disease Control, Dep't of Health & Human Servs., *Reports on AIDS*, 1, 1-2 (1985). The five patients suffered from the disease now known as AIDS. Update: Acquired Immunodeficiency Syndrome (AIDS)—United States, *reprinted in* Centers for Disease Control, Dep't of Health & Human Servs., *Reports on AIDS*, 49, 49 (1985). Medical researchers now believe that American physicians treated patients with AIDS symptoms before 1981. *Id.* Data for the time period before the first officially reported case of AIDS in 1981 are based on reports from individual physicians and health departments. Foege, *The National Pattern of Aids*, THE AIDS EPIDEMIC 8 (K. Cahill ed. 1983). The incidence of AIDS in the United States has doubled every six months between the second half of 1979 and 1983. *Id.* at 10-12. Physicians have reported more new cases of AIDS in 1985 than the previous six years during which the medical community first documented the disease. *AIDS Cases in 1985 Exceed Total of All Previous Years*, Washington Post, Jan. 17, 1985, at A1, col. 4 [hereinafter cited as *AIDS Cases in 1985*]. The length of time that it takes for the number of reported AIDS cases to double, however, has decreased. *Id.*

3. See generally CENTERS FOR DISEASE CONTROL, DEP'T OF HEALTH & HUMAN SERVS., REPORTS ON AIDS (1985) (containing 70 articles related to AIDS published by Centers for Disease Control from June 1981 through September 1985). The *New England Journal of Medicine* has published over 35 articles on AIDS-related topics in the first half of 1985 alone. 312 NEW ENG. J. MED. 1680b (1985) (subject index).

4. *AIDS Virology: A Battle on Many Fronts*, SCI., Nov. 1, 1985, at 519 [hereinafter cited as *AIDS Virology*]; see *infra* note 5 and accompanying text (discussing method by which AIDS virus suppresses immune system).

5. See Comment, *AIDS: A Legal Epidemic?*, 17 AKRON L. REV. 717, 718-23 (1984) (summarizing medical history of AIDS through 1983). The primary symptom of AIDS is a sharp drop in the number of T cells, the blood cells that are crucial to the body's ability to respond to infectious agents invading the body. *AIDS Virology*, *supra* note 4, at 519. AIDS victims are vulnerable to serious, often fatal, opportunistic diseases, including Kaposi's sarcoma,

diseases and cancers eventually prove fatal.⁶ Although medical researchers recently have discovered the virus that causes AIDS,⁷ a cure for the disease continues to elude the medical community.⁸ The public's fear of contracting AIDS has continued to grow because medical evidence shows that the disease, once thought to strike only the high-risk groups of homosexual males, intravenous drug users, and hemophiliacs, may strike individuals outside of the three high-risk groups.⁹ In spite of the medi-

a rare form of skin cancer, and *Pneumocystis carinii*, a parasitic infection of the lungs. See Safai, *Kaposi's Sarcoma*, in *THE AIDS EPIDEMIC* 98-112 (K. Cahill ed. 1983) (discussing outbreak of Kaposi's sarcoma in AIDS patients); Cahill, *Parasitic Infections*, in *THE AIDS EPIDEMIC* 86-97 (K. Cahill ed. 1983). The virus that causes AIDS, the HTLV-III/LAV virus, multiplies in T cells, particularly in a subclass of T cells known as T4 cells, killing the T cells in the process. *AIDS Virology*, *supra* note 4, at 521. A sharp decrease in the number of T4 cells results in the collapse of the immune system. *Id.* at 519.

6. *AIDS Cases in 1985*, *supra* note 2, at A1, col. 4. Most AIDS patients die approximately fifteen months after doctors diagnose the disease. *Id.* As of April 30, 1985, 49% of the adults and 69% of the children reported to have contracted AIDS have died. Update: Acquired Immunodeficiency Syndrome—United States, *reprinted in* Centers for Disease Control, Dep't of Health & Human Servs., *Reports on AIDS*, 90, 90 (1985). Seventy five percent of AIDS patients diagnosed before January 1983 have died. *Id.*

7. See *AIDS Virology*, *supra* note 4, at 518 (research at National Cancer Institute firmly implicates new virus as cause of AIDS). The virus that causes AIDS is the human T-lymphotropic virus type III (HTLV-III), lymphadenopathy-associated virus (LAV), or AIDS-associated retrovirus (ARV). *Id.* at 521; see Provisional Public Health Service Inter-Agency Recommendations for Screening Donated Blood and Plasma for Antibody to the Virus Causing Acquired Immunodeficiency Syndrome, *reprinted in* Centers for Disease Control, Dep't of Health & Human Servs., *Reports on AIDS*, 75, 75 (1985). The Centers for Disease Control usually refer to the virus at HTLV-III/LAV. See Revision of the Case Definition of Acquired Immunodeficiency Syndrome for National Reporting—United States, *reprinted in* Centers for Disease Control, Dep't of Health & Human Servs., *Reports on AIDS*, 95, 95-6 (1985) (referring to virus causing AIDS as HTLV-III/LAV). The Centers for Disease Control recently have updated the definition of AIDS in light of the discovery of the HTLV-III/LAV virus. *Id.* at 96. The Centers for Disease Control currently define AIDS victims as persons whose "clinical manifestations of HTLV-III/LAV infection may be directly attributable to infection with this virus or the result of secondary conditions occurring as a consequence of immune dysfunction caused by the underlying infection with HTLV-III/LAV." *Id.*; see *id.* (discussing refinements to general case definition of AIDS adopted by Centers for Disease Control); *infra* note 7 (discussing HTLV-III/LAV virus).

8. See Results of Gallup Poll on Acquired Immunodeficiency Syndrome—New York City, United States, 1985, *reprinted in* Centers for Disease Control, Dep't of Health & Human Servs., *Reports on AIDS*, 104, 104 (1985) (noting unavailability of vaccine or specific therapy for treatment of AIDS). At the present time, no cure for AIDS exists, although treatments for the opportunistic diseases that commonly afflict AIDS patients are available. AMERICAN MANAGEMENT ASSOCIATION, *AIDS, THE WORKPLACE ISSUES* 72 (1985). Furthermore, researchers are uncertain whether they can develop a vaccine that effectively will prevent an individual from contracting AIDS. *Id.* at 76.

9. See Acquired Immune Deficiency Syndrome (AIDS) Update—United States, *reprinted in* Centers for Disease Control, Dep't of Health & Human Servs., *Reports on AIDS* 37, 37 (1985). AIDS is not a disease exclusive to homosexuals, intravenous drug users, and hemophiliacs. *Id.* AIDS patients include infants and heterosexuals. *Id.*; see Comment, *supra* note 5, at 720-22 (AIDS has spread to most segments of population).

Until 1985, the Centers for Disease Control included persons born in Haiti and now living

cal community's assurances that the transmission of AIDS occurs only by the transfer of semen, blood, and possibly saliva and tears into the bloodstream of another person,¹⁰ and not by casual contact,¹¹ the public

in the United States along with the high risk groups of homosexual males, intravenous drug users, and hemophiliacs. Update: Acquired Immunodeficiency Syndrome—United States, *reprinted in* Centers for Disease Control, Dep't of Health & Human Servs., *Reports on AIDS*, 90, 92 (1985). The Centers for Disease Control now place Haitian-born AIDS patients into the "other/unknown" high risk category. *Id.* The Centers for Disease Control discontinued the separate category for Haitian-born patients now living in the United States in light of information that both heterosexual contact and exposure to contaminated needles not associated with drug abuse play a role in the transmission of AIDS. *Id.*

10. Recommendations for Preventing Possible Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus from Tears, *reprinted in* Centers for Disease Control, Dep't of Health & Human Servs., *Reports on AIDS*, 109, 109-10 (1985). Researchers have found HTLV-III, the virus that causes AIDS, in the blood, semen, saliva, and tears of AIDS patients. *Id.* at 109. All secretions and excretions from an AIDS victim may contain lymphocytes, host cells for HTLV-III. *Id.* at 110. The body fluids of an AIDS victim, therefore, may yield the AIDS virus. *Id.* Researchers, however, have not documented the transmission of the AIDS virus through saliva and tears. Education and Foster Care of Children Infected with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus, *reprinted in* Centers for Disease Control, Dep't of Health & Human Servs., *Reports on AIDS*, 106, 107 (1985). Researchers have identified no person-to-person transmission of AIDS other than through sexual contact and injection of blood. *Id.*; see Prevention of Acquired Immune Deficiency Syndrome (AIDS): Report of Inter-Agency Recommendations, *reprinted in* Centers for Disease Control, Dep't of Health & Human Servs., *Reports on AIDS*, 32, 33 (1985). The mother of a two-year old child infected with the AIDS virus, however, became infected after repeated contact with the child's blood and body fluids while caring for the child at home. *Baby Infects Mother with AIDS Virus*, *The Washington Post*, Feb. 7, 1986, at A4, col. 1. This is the first case in the United States in which an individual became infected with the AIDS virus through external contact with blood or contaminated body fluids, rather than by injection of blood or by sexual contact. *Id.* English researchers, however, have reported a case similar to the mother's contraction of AIDS. *Id.* The Centers for Disease Control commented that contracting AIDS through external contact is unusual and in no way represents some kind of casual contact transmission. *Id.*

11. See Recommendations for Preventing Possible Transmission of Human T-Lymphotropic Virus Type III-Lymphadenopathy-Associated Virus from Tears, *reprinted in* Centers for Disease Control, Dep't of Health & Human Servs., *Reports on AIDS*, 109, 110 (1985). Researchers have found no evidence indicating the transmission of AIDS by household or casual contact. *Id.* Casual or household contact includes dwelling in the same physical environment of another person, touching, hugging, or wearing clothing another person has worn or touched, breathing in the same area as a person who has coughed or sneezed, exposing skin surfaces to those of another person, or eating food that another person has prepared or touched. AMERICAN MANAGEMENT ASSOCIATION, AIDS, THE WORKPLACE ISSUES 68 (1985). The Montefiore Medical Center in Bronx, New York, in cooperation with the Centers for Disease Control, recently completed the largest and most thorough study to date of members of the families of AIDS victims. *Family Contact Fails to Spread AIDS*, *Roanoke Times & World-News*, Feb. 6, 1986, at A10, col. 1, 3 [hereinafter cited as *Family Contact*]. The study examined the extent to which family members hugged, kissed, and shared toothbrushes, drinking glasses, beds, towels, and toilets with AIDS victims. *Id.* at col. 1. The research team leader stated that the study provides conclusive evidence that AIDS does not spread through close day-to-day contact. *Id.* According to the research leader, the results of the study, in combination with other evidence, indicate that the risk of transmitting AIDS through household contact is "virtually nonexistent." *Id.* The risk of transmitting AIDS by casual contact, therefore, is unlikely. *Id.*

remains fearful of casual contact with AIDS victims.¹²

As a result of the widespread public fear of contracting AIDS and the knowledge that no cure for the disease exists, AIDS victims, and those perceived as potential AIDS victims, are experiencing discrimination in all areas of their lives, including in employment opportunities.¹³ Employers often dismiss an employee because the employee has contracted AIDS.¹⁴ Legal commentators and human rights activists generally agree that the most viable legal strategy by which AIDS victims may seek compensation from former employers who allegedly discriminate against AIDS victims is to assert that AIDS is a handicap and that state and federal laws prohibit

12. See Tanne, *AIDS: Is Anyone Safe?* READER'S DIGEST, Feb. 1986, at 60, 60 (noting that public attention focuses on fear of casual contact with AIDS victims). In *LaRocca v. Dalsheim*, the Supreme Court for Dutchess County, New York, noted the appearance of hot lines, crisis centers, medical advisory boards, and informational newsletters for homosexuals to attempt to alleviate the public's anxiety regarding AIDS. *LaRocca v. Dalsheim*, 120 Misc.2d 697, 699, 467 N.Y.S.2d 302, 304 (1983).

13. See Amiel, *AIDS and the Rights of the Well*, MACLEAN'S, Sept. 30, 1985, at 11 (noting forms of discrimination against AIDS victims). Public anxiety regarding AIDS results in many forms of discrimination against AIDS victims. See *Approach to Victims of AIDS Becoming Discrimination Issue*, 57 DAILY LAB. REP. (BNA) CC-1 (March 25, 1985) (available on LEXIS) (noting that AIDS has created variety of legal problems for AIDS victims and members of high-risk groups). For example, many dentists refuse to treat AIDS patients, travel agents often attempt to screen AIDS victims from travel tours, and firemen frequently refuse to give mouth to mouth resuscitation to persons whom the firemen perceive as potential AIDS victims. Amiel, *AIDS and the Rights of the Well*, MACLEAN'S, Sept. 30, 1985, at 11. In New York City, apartment tenants sought to have a doctor evicted because he treated AIDS patients. *Approach to Victims of AIDS Becoming Discrimination Issue*, 57 DAILY LAB. REP. (BNA) CC-1 (March 25, 1985) (available on LEXIS). A New York court subsequently ruled in favor of the doctor. *Id.*; see *People v. 49 West 12 Tenants Corp.*, No 43604/83 (Sup. Ct. N.Y. County Oct. 17, 1983); see also *infra* note 14 and accompanying text (discussing employment discrimination against AIDS victims).

14. See generally Tarr, *AIDS Victims Face Bias, Too*, Nat'l L.J., Sept. 16, 1985, at 30, col. 2 (noting growing number of complaints of alleged employment discrimination against AIDS victims) [hereinafter cited as *Victims Face Bias*]. AIDS victims and those individuals perceived as potential AIDS victims often face employment discrimination. *Id.* For example, Columbia University refused to take back an employee who took a leave of absence because, while on the leave of absence, doctors diagnosed the employee as having early symptoms of AIDS. Blodgett, *Et Al.*, STUDENT LAW., Jan. 1984, at 8. Similarly, an employer fired an employee after the employee took a day off from work to see a doctor. *Id.* at 9. The employer knew the employee was a homosexual and apparently assumed the employee saw the doctor because the employee had contracted AIDS. *Id.* Similarly, United Airlines allegedly fired a flight attendant because airline officials thought the attendant's swollen glands were a symptom of AIDS. *Id.* at 8. Most AIDS discrimination cases never reach litigation because both the employer and the employee generally are anxious to settle disputes out of court. AMERICAN MANAGEMENT ASSOCIATION, AIDS, THE WORKPLACE ISSUE 10 (1985); *Victims Face Bias*, *supra* at 30, col. 3. Employers often are willing to settle out of court with an employee with AIDS once the employer learns more about AIDS. *Victims Face Bias*, *supra* at 30, col. 3. Moreover, employees are willing to settle with their employers because the employee usually needs his salary or continued medical insurance to pay for physician and hospital bills resulting from the disease. *Id.*

discrimination on the basis of a handicap.¹⁵ The assertion that a communicable disease such as AIDS is a handicap under federal and state discrimination laws, however, may be difficult to support in light of the sparse case law discussing discrimination based on an illness or contagious disease.¹⁶

In December 1985, the Florida Commission on Human Relations considered the issue of employment discrimination against AIDS victims in *Shuttleworth v. Broward County Office of Budget and Management Policy*.¹⁷ *Shuttleworth* is the first employment discrimination case brought under either state or federal law in which an AIDS victim relied on the theory that AIDS is a handicap under state discrimination laws.¹⁸ In its administrative deter-

15. See, e.g., Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681, 689-96 (1985) (advancing theory that AIDS qualifies as handicap under state and federal anti-discrimination laws); *Approach to Victims of AIDS Becoming Discrimination Issue*, 57 DAILY LAB. REP. (BNA) CC-1 (March 25, 1985) (available on LEXIS) (same); *Focus is on Employment Issues at New York AIDS Conference*, 1138 GOV'T EMPL. REL. REP. (BNA) 1613, 1614 (Nov. 11, 1985) (same); *AIDS as Handicap*, 120 LAB. REL. REP. (BNA) 278 (Dec. 2, 1985) (same).

The federal Rehabilitation Act of 1973 (federal Act) prohibits employment discrimination on the basis of a handicap. 29 U.S.C. §§ 701-796(i) (1982). The federal Act, however, only applies to the employment practices of the federal government and of large contractors and programs receiving federal financial assistance. *Id.* §§ 793, 794; see *infra* notes 25-37 and accompanying text (discussing purpose and scope of federal Act). In addition, forty-four states and the District of Columbia have enacted legislation prohibiting discrimination on the basis of a handicap in both the private and public sectors. See FAIR EMPL. PRAC. MANUAL, 8A LAB. REL. REP. (BNA) at 451:102 to 451-107 (1985) (summarizing status of state laws prohibiting employment discrimination). Five states prohibit handicap discrimination only in the public sector. *Id.* Only Delaware has no legislation regarding handicap discrimination. *Id.* Some cities, including Los Angeles and San Francisco, have enacted municipal statutes banning discrimination based on AIDS. See *Los Angeles Law on AIDS Seen Working on Bias*, 1155 GOV'T EMPL. REL. REP. (BNA) 371 (March 17, 1985) (discussing success of Los Angeles statute prohibiting discrimination based on AIDS); *Ban on Discrimination Against AIDS Victims*, 120 LAB. REL. REP. 278 (Dec. 2, 1985) (discussing enactment of San Francisco legislation prohibiting discrimination based on AIDS).

16. See Leonard, *supra* note 15 at 690 (AIDS patients may not assume applicability of handicap laws to victims of AIDS and other communicable diseases). In three states, handicap laws explicitly exclude coverage for individuals afflicted with communicable diseases. See GA. CODE § 34-6A-3(b)(2) (1982) (statute does not prohibit rejection of applicant for employment on basis of any communicable disease); KY. REV. STAT. § 207.140(2)(c) (1982) (statute does not prohibit rejection of applicant for employment or housing on basis of any communicable disease); N.H. REV. STAT. ANN. § 354-A:3 (XIII) (1984) (physical or mental handicap means handicap other than illness).

17. *Shuttleworth v. Broward County Office of Budget and Management Policy*, 242 DAILY LAB. REP. (BNA) E-1 (Dec. 17, 1985). In addition to initiating an action before the Florida Commission on Human Relations (the Commission), Shuttleworth brought suit against Broward County (the County) in the United States District Court for Southern Florida, alleging that the County's dismissal of Shuttleworth because he had contracted AIDS violated § 504 of the federal Act as well as Shuttleworth's constitutional rights to equal protection and due process. *AIDS-Based Discrimination Claim May Proceed in Federal Court*, 1174 GOV'T EMPL. REL. REP. (BNA) 1061, 1061 (Aug. 4, 1986). The court set a December 1986 trial date for the § 504 claim, which the court severed from the rest of the suit. *Id.*

18. See *Firing of Employee with AIDS is Handicap Bias, Florida Agency Rules* 242 DAILY

mination in *Shuttleworth*, the Florida Commission on Human Relations ruled that AIDS is a handicap and that the Florida Human Rights Act of 1977¹⁹ protects AIDS victims from employment discrimination because of their handicap.²⁰ Furthermore, the Florida Commission concluded that an employer's concern that an AIDS victim may infect co-workers and customers does not justify the employer's action of dismissing an AIDS victim.²¹ While the ruling of the Florida Commission on Human Relations in *Shuttleworth* establishes a precedent for the State of Florida,²² the case's precedential value in courts outside of Florida is uncertain.²³ Of particular interest, in light of the *Shuttleworth* decision, is whether AIDS would qualify as a handicap under the federal Rehabilitation Act of 1973.²⁴

The purpose of the federal Rehabilitation Act of 1973 (federal Act) is to develop and implement coordinated vocational rehabilitation services for handicapped individuals.²⁵ The federal Act contains three provisions to

LAB. REP. (BNA) A-6 (Dec. 17, 1985) (available on LEXIS) (noting that *Shuttleworth* is first decision to consider whether AIDS is handicap) [hereinafter cited as *Firing of Employee*]; *AIDS as Handicap*, 120 LAB. REL. REP. (BNA) 346, 346 (Jan. 23, 1985) (same); see *Shuttleworth*, 242 DAILY LAB. REP. E-1 (Dec. 17, 1985); see also notes 75-100 (discussing *Shuttleworth*).

19. FLA. STAT. ANN. §§ 760.01-760.37 (West 1985); see *infra* note 82 and accompanying text (discussing Florida anti-discrimination statute).

20. See *Shuttleworth*, 242 DAILY LAB. REP. at E-1 to E-2 (Florida Human Rights Act protects AIDS victims from employment discrimination); see also FLA. STAT. ANN. §§ 760.01-760.37 (West 1985) (Florida Discrimination in the Treatment of Persons statute).

21. *Shuttleworth*, 242 DAILY LAB. REP. at E-2; see *infra* notes 99-103 and accompanying text (discussing risk of AIDS victim infecting co-workers as employer justification for dismissing AIDS victim).

22. See *Housing Auth. of the City of Sanford v. Billingslea*, 464 So.2d 1221, 1224 (Fla. Dist. Ct. App. 1985). In *Housing Authority of the City of Sanford v. Billingslea*, the Florida District Court of Appeal for the Fifth Circuit held that the Florida Human Rights Act grants to the Commission on Human Relations at least concurrent jurisdiction with the Florida Circuit Court to hear employment discrimination cases that involve county and municipal employers. *Id.* The Commission's ruling in *Shuttleworth*, therefore, set a statewide precedent. See *Firing of Employee*, *supra* note 18, at (discussing precedential value of *Shuttleworth* ruling for state of Florida).

23. See *Firing of Employee*, *supra* note 18, at ____ (noting uncertainty of value of *Shuttleworth* ruling in jurisdictions outside of Florida).

24. See U.S.C. §§ 701-794 (1982) (federal Rehabilitation Act of 1973); see also *Shuttleworth*, 242 DAILY LAB. REP. E-1 (Dec. 17, 1985).

25. See 29 U.S.C. § 701 (1982). Although the purpose of the federal Act is to implement coordinated vocational services for the handicapped, the federal Act is not a comprehensive statute proscribing handicap discrimination in employment. *Id.* Congress approached the problem of handicap discrimination in a piecemeal fashion. C. RICKEY, *MANUAL ON EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS F3* (Federal Judicial Center, Education and Training Series 1981). Other pertinent federal statutes include the Revenue Sharing Act, which prohibits handicap discrimination by state and local agencies funded by revenue sharing, and the Vietnam Veterans' Readjustment Assistance Act, which requires federal contractors and executive agencies to take affirmative action to hire disabled veterans. See 31 U.S.C. § 1242(a)(1) (Revenue Sharing Act); 38 U.S.C. §§ 2012, 2014 (1982 & Supp. 1985) (Vietnam Veterans' Readjustment Assistance Act).

eliminate discrimination against handicapped persons whenever a nexus exists between an employer and the federal government.²⁶ Section 501 of the federal Act prohibits employment discrimination by the federal government against handicapped federal employees and requires the federal government to take affirmative action to hire handicapped individuals.²⁷ In addition, section 503 requires federal government contractors to take affirmative action to hire qualified handicapped persons.²⁸ Finally, section 504 of the federal Act proscribes handicap discrimination against otherwise qualified handicapped individuals participating in any program receiving federal financial assistance or any program conducted by the executive branch of the federal government.²⁹ The scope of section 504 encompasses more than discrimination in

26. 29 U.S.C. §§ 791, 793, 794 (1982); *see infra* notes 27-31 and accompanying text (discussing §§ 501, 503, and 504 of federal Act, designed to eliminate handicap discrimination).

27. 29 U.S.C. § 791 (1982). Section 501 of the federal Act exclusively deals with employment of federal employees and candidates for federal employment. *Id.* The Equal Employment Opportunity Commission (EEOC) is the only agency empowered to enforce § 501. *Id.*; *see C. RICEY, supra* note 25, at F[3] (discussing enforcement of § 501). Federal employees must exhaust EEOC administrative remedies before bringing action under § 501 in federal court. *C. RICEY, supra* note 25, at F[3]2; *see* 29 C.F.R. §§ 1613.12-1613.282 (1985) (EEOC regulations for pursuing EEOC administrative remedies). Section 501 requires the federal government to take affirmative action to hire and to accommodate handicapped individuals. 29 U.S.C. § 791; *see* 29 C.F.R. § 1613.704 (regulations requiring affirmative action). An employer's reasonable accommodation may include making facilities accessible to handicapped persons and modifying work schedules. 29 C.F.R. § 1613.704.

28. 29 U.S.C. § 793 (1982). Section 503 of the federal Act provides that any contract for the procurement of personal property or non-personal services for the United States in excess of \$2,500 to which any federal department or agency is a party must contain a clause requiring the contractor to take affirmative action to employ handicapped individuals to perform the contract. *Id.* Section 503 also applies to subcontractors who enter into contracts in excess of \$2,500 with prime contractors carrying out a contract with the federal government. *Id.* Section 503, like § 501, requires contractors with the federal government to take affirmative action to hire and accommodate handicapped individuals. *Id.* Although the language of § 503 refers to affirmative action, by implication, § 503 also prohibits discrimination when a handicapped individual is fully qualified and does not require a contractor's assistance. *See Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1079 n.5 (5th Cir. 1980) (legislative history indicates § 503 has anti-discrimination component); S. REP. NO. 318 93d Cong., 1st Sess. 26 (discussing prevention of employment discrimination as one purpose of § 503), *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2076. The United States Department of Labor's Office of Federal Contract Compliance Programs is responsible for the enforcement of § 503. 29 C.F.R. § 793 (1982).

29. 29 U.S.C. § 794 (1982). Because § 504 of the federal Act requires non-discrimination by employers administering programs receiving federal financial aid, hospitals, universities, states, and municipalities receiving federal grant funds are within the reach of § 504. *J. NORTHRUP, OLD AGE, HANDICAPPED AND VIETNAM-ERA ANTI-DISCRIMINATION LEGISLATION* 78 (1977); *see* 45 C.F.R. § 84.3(f) (1985) (defining "recipient" to include any entity to which federal government directly or indirectly extends financial assistance).

Some courts require a plaintiff bringing an employment discrimination suit under § 504 of the federal Act also to establish that the primary objective of the financial assistance received by the employer is to provide employment. *See Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672, 674-75 (8th Cir.) (purpose of federal financial aid received by employer must be to provide employment), *cert. denied*, 449 U.S. 892 (1980); *Trageser v. Libbie Rehabilitation Center*, 590 F.2d 87, 89 (4th Cir. 1978) (same), *cert. denied*, 442 U.S. 947 (1979). These

employment opportunities.³⁰ Section 504, however, does not require federally funded programs and activities conducted by an executive agency to take affirmative action to hire handicapped individuals.³¹ Although the federal Act provides handicapped individuals protection against employment discrimination by a federally supported employer, the federal Act offers handicapped individuals no protection from employment discrimination in the private sector.³²

To qualify for protection under the federal Act, an individual must demonstrate that he satisfies the statutory definition of "handicapped individual."³³ Section 501, 503, and 504 of the federal Act all rely on the same definition of "handicapped individual."³⁴ The federal Act defines a handicapped individual as "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."³⁵ Furthermore, an individual bringing an action under section 503 or 504 also must demonstrate that he is an otherwise qualified

jurisdictions held that, because § 504 of the federal Act makes available to aggrieved individuals the rights, remedies, and procedures of Title VI of the Civil Rights Act of 1964, § 504 of the federal Act incorporates by implication the requirement of § 604 of the Civil Rights Act that the primary objective of the financial aid be employment. *See Carmi*, 620 F.2d at 674-75 (§ 504 of federal Act incorporates requirement of Civil Rights Act that primary purpose of federal financial aid is to promote employment); 42 U.S.C. § 2000d-3 (Civil Rights Act requirement that primary objective of federal financial assistance is to provide employment). The United States Supreme Court in *Consolidated Rail Corp. v. Darrone*, however, held that Congress did not intend to incorporate the primary objective requirement of § 604 of the Civil Rights Act into the federal Act. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 635 (1984). The Supreme Court reasoned that it would be anomalous to conclude that Congress intended to limit an act designed to enhance a handicapped individual's right to sue employers receiving federal funding. *Id.*

30. 29 U.S.C. § 794 (1982); *see* C. RICKEY, *supra* note 23, at F1 (discussing scope of § 504).

31. 29 U.S.C. § 794 (1982).

32. *See* Comment, *Employment Discrimination—Analyzing Handicap Discrimination Claims: The Right Tools for the Job*, 62 N.C. L. REV. 535, 539 (1984) (federal Act provides no protection to private sector employees).

33. *See* 29 U.S.C. § 706(7)(B) (1982) (definition of "handicapped individual").

34. 29 U.S.C. §§ 791, 793, 794 (1982); *see* 29 U.S.C. § 706(7)(B) (definition of "handicapped individual").

35. 29 U.S.C. § 706(B) (1982). Regulations implementing the federal Act provide guidance for interpreting the terms used in the federal Act's definition of "handicapped individual." *See* 41 C.F.R. § 60-741 Appendix A (1985) (defining terms found in federal Act's definition of "handicapped individual"); 29 U.S.C. § 706(B) (definition of "handicapped individual"). "Major life activities" include communication, ambulation, selfcare, socialization, education, vocational training, employment, transportation, and adapting to housing. 41 C.F.R. § 60-471 Appendix A. A "substantially limited" handicapped individual is one who is likely to experience difficulty in securing retraining or advancement in employment. *Id.* Individuals having a "record of an impairment" include those who have recovered from a previous impairment and those who employers erroneously may classify as having an impairment. *Id.* An individual "regarded as having an impairment" is a person who others perceive as having a handicap, whether or not that individual is, in fact, handicapped. *Id.*

individual who meets all job requirements.³⁶ If the individual's handicap prevents him from satisfactorily performing a job, the federal Act does not protect the individual.³⁷

Once a plaintiff has established a prima facie case by showing that he is handicapped, that he is an otherwise qualified handicapped individual, and that his employer discriminated against him, the burden shifts to the employer to rebut the presumption of illegality.³⁸ The employer may attack the plaintiff's prima facie case by presenting evidence that the employee's impairment is not a handicap under the federal Act or, in section 503 or 504 suits, that the employee's handicap substantially interferes with the employee's ability to perform at work and, therefore, that the employee is not otherwise qualified.³⁹ Alternatively, an employer may establish an affirmative defense

36. 29 U.S.C. §§ 793, 794 (1982); see *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). In *Southeastern Community College v. Davis*, the United States Supreme Court held that an otherwise qualified person is "one who is able to meet all of a program's requirements in spite of his handicap." *Id.*

37. See *Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d at 676 (employee who cannot perform job responsibilities receives no protection from § 504 of the federal Act). Only handicapped persons capable of performing a job with reasonable accommodation receive the protection of §§ 503 and 504 of the federal Act. 29 U.S.C. §§ 793, 794 (1982). In *Southeastern Community College v. Davis*, the Supreme Court noted that technological advances may qualify some handicapped individuals for employment without imposing undue financial and administrative burdens upon an employer. *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979). In these situations, an employer's refusal to modify an existing program to accommodate a handicapped individual may be unreasonable and discriminatory. *Id.* Employers, however, have no obligation to effect substantial modification of employment standards to accommodate handicapped individuals. *Id.* at 413.

38. See *New York State Ass'n for Retarded Children, Inc. v. Carey*, 612 F.2d 644, 649 (2d Cir. 1979). In *New York State Ass'n for Retarded Children, Inc. v. Carey*, the Second Circuit stated that a general principal of discrimination law requires that, once a plaintiff establishes a prima facie case of discrimination, a defendant must present sufficient evidence to rebut the plaintiff's prima facie case by showing that the employer dismissed the plaintiff for a nondiscriminatory reason. *Id.* To establish a prima facie case of unlawful discrimination in an employment discrimination dispute, a plaintiff must show that he had a handicap, that he otherwise meets the qualifications for the position, and that the employer rejected him for the position. *School Bd. of Pinellas County v. Rateau*, 449 So.2d 839, 841 (Fla. Dist. Ct. App. 1984). The burden of proving an inability to accommodate a handicapped individual is on the employer. *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 308 (5th Cir. 1981). The allocation of the burden of proof in actions arising out of the federal Act parallels the allocation of the burden of proof in Title VII cases. *Rateau*, 449 So.2d at 841. In *McDonnell Douglas Corp. v. Green*, the United States Supreme Court noted that, in a complaint under Title VII charging racial employment discrimination, a complainant has the burden of establishing a prima facie case by showing that he belongs to a racial minority, that he applied and was qualified for the position, and that the employer continued to seek applicants for the position. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). The burden of proof in Title VII cases then shifts to the employer to articulate a nondiscriminatory reason for rejecting the applicant. *Id.* The applicant then must show that the justification for rejection articulated by the employer is pretextual. *Id.* at 804.

39. See *supra* notes 33-35 and accompanying text (discussing definition of "handicapped individual"); *supra* notes 36 and 37 and accompanying text (discussing §§ 503 and 504 requirement that handicapped individual be "otherwise qualified").

or a justification for his decision to dismiss an employee.⁴⁰ If, for example, an employer establishes that a plaintiff's presence at work presents a health or safety risk to other employees or customers of the employer, the affirmative defense or justification for dismissal may prevail, and the court may determine that the employer did not dismiss illegally the plaintiff.⁴¹

Under the federal Act, an AIDS victim charging an employer with unlawful discrimination based on a handicap must establish as part of his prima facie case that a contagious disease such as AIDS is a protected handicap.⁴² In addition, a plaintiff must show that he otherwise meets the qualifications for the position and that an employer rejected him for the position.⁴³ Finally, an AIDS victim relying on the theory that AIDS is a handicap under the federal Act must rebut an employer's probable affirmative defense that the presence of an AIDS patient at work presents a significant risk of infection to co-workers and customers.⁴⁴

While no court has considered directly whether AIDS qualifies as a handicap under the federal Act,⁴⁵ the United States Court of Appeals for the Eleventh Circuit has addressed whether a contagious disease falls within the coverage of the federal Act.⁴⁶ In *Arline v. School Board of Nassau County*,⁴⁷ the Eleventh Circuit considered whether tuberculosis, a chronic contagious disease,⁴⁸ is a handicap within the coverage of the federal Act.⁴⁹

40. See *New York State Ass'n for Retarded Children, Inc. v. Carey*, 612 F.2d 644, 650 (2d Cir. 1979) (employer must make at least some substantial showing justifying employer's action); *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973) (same).

41. See *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 861-63 (7th Cir. 1974) (court may consider safety of bus passengers and highway motorists in determining validity of employer's dismissal of bus driver in employment discrimination case brought by bus driver), *cert. denied, sub nom. Brennan v. Greyhound Lines, Inc.*, 419 U.S. 1122 (1975); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236-38 (5th Cir. 1976) (courts may consider safety of third parties when determining validity of employer's dismissal of employee in employment discrimination case brought by employee). See generally *Leonard, supra* note 15, at 697 (employer's affirmative defenses focusing on safety issues in workplace may prevail in employment discrimination cases).

42. See *supra* note 38 and accompanying text (plaintiff must establish, as part of prima facie case, that impairment satisfies federal Act's definition of handicap). See 29 U.S.C. §706(7)(B) (1982) (definition of "handicapped individual").

43. See *id.* (plaintiff must establish that he is otherwise qualified for position).

44. See *Leonard, supra* note 15, at 697 (foremost employer affirmative defense in AIDS case is fear of contagion); *supra* notes 40 and 41 and accompanying text (employer may assert affirmative defense based on health and safety issues).

45. See *supra* notes 18-20 and accompanying text (no court has considered whether AIDS is handicap under federal Act).

46. See *Arline v. School Bd. of Nassau County*, 772 F.2d 759, 763-64 (11th Cir. 1985) (considering whether contagious disease constitutes handicap within meaning of federal Act), *cert. granted*, 106 S. Ct. 1633 (1986).

47. 772 F.2d 759 (11th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3695 (1986).

48. See 4 J. SCHMIDT, ATTORNEY'S DICTIONARY OF MEDICINE T-157 (1984). Tuberculosis is a contagious disease caused by infection with the bacteria *Mycobacterium tuberculosis*. *Id.* Tuberculosis most frequently affects the lungs, although the disease also may affect bone, lymph nodes, and other tissue. *Id.* The disease spreads primarily by contact with saliva and sputum ejected from the lungs of the infected persons. *Id.*

49. *Arline*, 772 F.2d at 764.

In *Arline*, the School Board of Nassau County, Florida (School Board) had dismissed the plaintiff, Arline, from her position as a third grade school teacher solely because of her susceptibility to tuberculosis.⁵⁰ Arline first had contracted tuberculosis in 1957, after which the disease went into remission.⁵¹ The School Board hired Arline as a school teacher in 1966.⁵² Arline subsequently suffered three relapses of tuberculosis between 1977 and 1978.⁵³ The School Board dismissed Arline after her third relapse in 1978.⁵⁴ After attempts to obtain relief in state administrative proceedings had failed, Arline brought suit in the United States District Court for the Middle District of Florida, alleging that her dismissal by the School Board violated section 504 of the federal Act.⁵⁵ Arline contended that tuberculosis is a handicap within the meaning of the federal Act and that the School Board had violated the federal Act because the School Board had fired Arline as a result of her handicap, even though Arline was otherwise qualified to perform her job.⁵⁶ Arline asserted that the risk of Arline infecting her students was so minimal that her handicap posed no obstacle to her continued employment and that the School Board's decision to fire Arline because of her handicap, therefore, was unreasonable and discriminatory.⁵⁷ In the alternative, Arline contended that, even if nonsusceptibility to tuberculosis is a necessary physical requirement for teaching young children, the School Board should have offered Arline reasonable accommodation in the form of another job within the School District.⁵⁸

The United States District Court for the Middle District of Florida issued an oral opinion in *Arline* and found for the School Board.⁵⁹ The district court ruled that a contagious disease such as tuberculosis is not a handicap under the federal Act.⁶⁰ The district court found unpersuasive the argument

50. *Id.* at 760. In *Arline v. School Board of Nassau County*, the Nassau County School Board (School Board) hired Arline as an elementary school teacher in 1966. *Id.* The School Board dismissed Arline after thirteen years of service. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*; see 29 U.S.C. § 794 (no program receiving federal financial assistance shall discriminate against otherwise qualified handicapped individual). In *Arline v. School Board of Nassau County*, the Eleventh Circuit noted that Arline had at least two hearings before the School Board, one hearing before the Board of Education, and one hearing before the State Board of Education. *Arline*, 772 F.2d at 760 n.3. The district court rejected Arline's claim that the School Board violated her right of due process. *Id.* at 760-61 n.3.

56. *Arline*, 772 F.2d at 760-61; see 29 U.S.C. § 791 (no employer receiving federal financial assistance shall discriminate against otherwise qualified handicapped individual).

57. *Arline*, 772 F.2d at 761.

58. *See id.*

59. *See id.*

60. *See id.* In addition to finding that tuberculosis is not a handicap covered by the federal Act, the district court in *Arline* also concluded that the School Board did not receive federal financial assistance within the meaning of § 504 and, therefore, Arline did not meet the

that Congress had intended to include contagious diseases within the definition of handicap.⁶¹ The district court ruled that, in any event, the School Board had an overriding duty to protect the public from contagious diseases and that this public duty justified Arline's dismissal.⁶² In the view of the district court, the School Board, therefore, had no obligation to provide Arline an alternative position within the School District.⁶³ Arline appealed the decision of the district court to the United States Court of Appeals for the Eleventh Circuit.⁶⁴

The Eleventh Circuit reversed the district court's determination that a contagious disease is not a handicap within the meaning of the federal Act.⁶⁵ In considering Arline's claim, the Eleventh Circuit construed the meaning of "handicapped individual," "otherwise qualified," and "federal financial assistance" in section 504 of the federal Act.⁶⁶ The Eleventh Circuit noted that the language of the statute and the implementing regulations promulgated by the United States Department of Health and Human Services support in every respect a conclusion that individuals with contagious diseases are "handicapped individuals" within the coverage of the federal Act.⁶⁷ The

requirements of § 504. *See id.* at 762. The Nassau County school system received federal funds designed to assist school systems attended by significant numbers of children from low income families as well as federal impact aid. *Id.* at 762; *see* 20 U.S.C. §§ 3801-3876 (1982 & Supp. 1986) (Financial Assistance to Meet Special Educational Needs of Disadvantaged Children); 20 U.S.C. §§ 238-241 (Assistance for Local Educational Agencies Affected by Federal Activity). The district court concluded that Arline was not a beneficiary of the funds earmarked for children from low income families because she did not teach children from low income families. *Arline*, 772 F.2d at 761. Furthermore, the district court held that federal "impact aid" received by the School Board is more analogous to land taxes than to federal assistance. *See id.* The federal government provides impact aid to school systems whose enrollment increases substantially as a result of the attendance of the children of federal employees, but whose tax revenues decrease as a result of federally owned property within the district. *See id.* at 761.

61. *See id.*; *supra* notes 33-35 and accompanying text (discussing definition of handicap under federal Act).

62. *See Arline*, 772 F.2d at 761.

63. *See id.* at 765. In *Arline v. School Board of Nassau County*, the United States District Court for the Middle District of Florida made no findings regarding the cost to the School Board of accommodating Arline in a new position. *Id.* The district court concluded merely that the School Board's overriding duty to protect the public from contagious diseases precluded the School Board from considering the risks involved in accommodating Arline in a different position. *Id.* The district court did not make clear whether its decision that the School Board had no obligation to accommodate Arline rested on a finding that tuberculosis is not a handicap, or that Arline was not otherwise qualified for any teaching position because of her susceptibility to tuberculosis, or that reasonable accommodation did not include the requested relief. *Id.* at 761 n.7.

64. *Id.* at 760.

65. *Id.* at 764.

66. *Arline*, 772 F.2d at 760; *see* 29 U.S.C. § 794 (1982) (no person receiving federal financial assistance shall discriminate against otherwise qualified handicapped individual).

67. *See Arline*, 772 F.2d at 764 (persons with contagious diseases are handicapped within meaning of federal Act); *see also* 29 U.S.C. § 706(7)(B) (1982) (definition of "handicapped individual"); 45 C.F.R. § 84.3(j)(2) (1985) (providing definitions for significant terms used in federal Act's definition of "handicapped individual"). In *Arline v. School Board of Nassau*

Eleventh Circuit found no evidence to indicate that Congress intended to exclude contagious diseases from the statutory definition of handicapped individual.⁶⁸ The Eleventh Circuit observed that a person with tuberculosis "has a physical or mental impairment which substantially limits. . .major life activities" because tuberculosis can impair significantly respiratory functions and other major body systems.⁶⁹ The Eleventh Circuit noted that, even when Arline's tuberculosis is in remission, Arline met the statutory definition of a handicapped person because Arline has a record of an impairment of a major life activity and because the School Board regarded Arline as having such an impairment.⁷⁰ The Eleventh Circuit concluded that regarding tuberculosis as a handicap under the federal Act promotes Congress' intent to prohibit unnecessary discrimination.⁷¹ The Eleventh Circuit noted, however, that section 504 of the federal Act proscribes discrimination only when a handicapped individual is "otherwise qualified" for the job when given "reasonable accommodation."⁷² The Eleventh Circuit, therefore, remanded the case to the district court to determine whether the risk of Arline transmitting the disease to her students precluded Arline from being otherwise qualified for her job, and, if so, whether it was possible for the School Board to accommodate Arline in another position.⁷³ The Eleventh Circuit further directed the district court to review carefully the evidence before determining whether the School Board's affirmative defense that the School Board had dismissed Arline to protect students from a contagious disease reflected a decision based on an objective weighing of risks and alternatives.⁷⁴

County, the Eleventh Circuit noted that Congress explicitly had excluded alcoholism and drug abuse from the definition of handicap. *Arline*, 772 F.2d at 764; see 29 U.S.C. § 706(7)(B) (definition of handicapped individuals excludes alcoholism and drug abuse). For purposes of §§ 503 and 504 of the federal Act, the definition of a handicapped individual does not include a person whose current use of drugs or alcohol prevents him from performing his job or presents a threat to the safety or property of others. 29 U.S.C. § 706(7)(B). The Eleventh Circuit concluded that Congress' failure explicitly to exclude contagious diseases from the definition of handicap indicates that Congress did not disapprove of considering contagious diseases as handicaps. *Arline*, 772 F.2d at 764.

68. *Arline*, 772 F.2d at 764; see 29 U.S.C. § 701 (1982) (purpose of federal Act is to implement coordinated vocational services for handicapped individuals).

69. *Arline*, 772 F.2d at 764.

70. *Id.*

71. *Id.*; see 29 U.S.C. § 701 (1982) (purpose of federal Act is to implement coordinated vocational services for handicapped individuals); *supra* notes 25 & 26 and accompanying text (discussing purpose of federal Act). In *Arline*, the Eleventh Circuit noted that, to prevent unnecessary discrimination, a court must weigh all the evidence before determining whether an employer's decision to refuse to hire or to dismiss a handicapped individual is a well informed judgment. *Arline*, 772 F.2d at 764-65.

72. *Arline*, 772 F.2d at 765; see 29 U.S.C. § 794 (1982) (proscribing discrimination when otherwise qualified handicapped individual given reasonable accommodation); see also *supra* note 28 and accompanying text (discussing requirement under federal Act that handicapped individual be otherwise qualified for job).

73. *Arline*, 772 F.2d at 765.

74. *Id.* at 764-65.

While the Eleventh Circuit in *Arline* accepted the argument that a contagious disease such as tuberculosis is a handicap under the federal Act,⁷⁵ no state or federal court or agency has addressed whether the contagious disease of AIDS is a handicap under the federal Act.⁷⁶ The Florida Commission on Human Relations, in its administrative determination in *Shuttleworth v. Broward County Office of Budget and Management Policy*,⁷⁷ however, provided the rationale to extend the Eleventh Circuit's acceptance of a contagious disease as a protected handicap to provide relief under the federal Act to AIDS victims.⁷⁸ In *Shuttleworth*, the Broward County, Florida Office of Budget and Management Policy (County) had employed Shuttleworth as a policy analyst from May 1983 until September 1984.⁷⁹ The County had fired Shuttleworth in September 1984 because the County had learned that Shuttleworth had contracted AIDS and because, in the County's view, medical evidence regarding the severity and communicability of AIDS was incomplete.⁸⁰ The County maintained that dismissing Shuttleworth was the only means to protect Shuttleworth from contagious infections carried by other employees in the office and to safeguard Shuttleworth's co-workers from the AIDS virus and any contagious infections associated with the AIDS virus carried by Shuttleworth.⁸¹ Shuttleworth subsequently filed a complaint of discrimination with the Florida Commission on Human Relations (Commission), alleging that the County had discriminated against him on the basis of his handicap, AIDS, in violation of the Florida Human Rights Act of 1977 (Florida Act).⁸²

75. See *supra* notes 65-71 and accompanying text (discussing Eleventh Circuit's conclusion in *Arline* that contagious diseases are handicaps); see also 29 U.S.C. § 706(7)(B) (1982) (definition of handicapped individual).

76. See *supra* note 43 and accompanying text (noting that no court has considered classifying AIDS as handicap under federal Act).

77. 242 DAILY LAB. REP. (BNA) E-1 (Dec. 17, 1985).

78. *Id.*; see *infra* notes 104-27 and accompanying text (discussing rationale to extend handicap coverage under federal Act to AIDS victims).

79. *Shuttleworth*, 242 DAILY LAB. REP. at E-1.

80. *Id.*

81. *Id.*

82. *Id.*; see FLA. STAT. ANN. §§ 760.01-760.37 (West 1985) (Florida Human Rights Act of 1977). The general purpose of the Florida Human Rights Act of 1977 (Florida Act) is to prevent discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or marital status. FLA. STAT. ANN. § 760.01(2). The function of the Florida Commission on Human Relations (Commission) is to promote the goals of the Florida Act. *Id.* § 760.05. The Florida legislature provided the Commission with the power to act upon complaints alleging discriminatory practices. *Id.* § 760.06(5). Any aggrieved person or the Attorney General may file a complaint alleging a discriminatory employment practice. FLA. ADMIN. CODE § 22T-9.01(1) (1982). The Office of Field Services investigates the complaint and prepares a report, with a recommendation of appropriate action to the Office of General Counsel. *Id.* §§ 22T-9.03(1), 22T-9.04(1). After reviewing the report from the Office of Field Services, the Office of General Counsel makes a recommendation to the Executive Director of the Commission regarding whether reasonable cause exists to believe that an unlawful employment practice has occurred.

In his complaint, Shuttleworth contended that AIDS is a handicap under the Florida Act and that contact typically occurring in the workplace does not transmit the disease.⁸³ Furthermore, Shuttleworth asserted, and the County did not dispute, that Shuttleworth's handicap did not affect his job performance.⁸⁴ Shuttleworth alleged, therefore, that the County unlawfully discriminated against Shuttleworth on the basis of his handicap.⁸⁵ The County disputed Shuttleworth's contention that AIDS is a handicap and asserted that, in any event, unresolved medical questions regarding the severity and communicability of the disease justified the County's action.⁸⁶ Moreover, the County defended its decision to fire Shuttleworth by asserting that the County cannot assume the risk of allowing even one person unwittingly to contract AIDS as a result of Shuttleworth's continued employment.⁸⁷ In determining that the potential risks to other employees justified Shuttleworth's dismissal, the County relied on medical information contained in an article prepared by the Florida Department of Health and Rehabilitative Services (Florida Department of Health).⁸⁸

Id. § 22T-9.01(1). After the Executive Director makes a determination, the Clerk of the Commission issues a notice of determination to the parties. *Id.* § 22T-9.04(2). If the Clerk issues a Notice of No Reasonable Cause, the complainant may file with the Commission a petition for redetermination of the allegation. *Id.* § 22T-9.04(4) (1982 & Supp. 1984). If the Clerk issues a Notice of Determination of Reasonable Cause, on the other hand, an invitation to the parties to participate in conciliation will accompany the Notice. *Id.* § 22T-9.04(3) (1982). A duly executed conciliation agreement operates as a dismissal of the complaint. *Id.* § 22T-9.04(3). If the parties fail to reach conciliation, a complainant may file a petition for relief from an unlawful employment practice within 30 days of service of a notice of failure of conciliation. *Id.* § 22T-9.08(1) (1982 & Supp. 1984). Upon consideration of a recommended order prepared by a hearing officer, the Commission may dismiss the petition and complaint or determine that the employer committed an unlawful employment practice. *Id.* § 22T-9.08(7). If the Commission determines that an unlawful employment practice has occurred, the Commission issues an order prohibiting the practice and providing relief from the effects of the practice. *Id.*

83. *Shuttleworth*, 242 DAILY LAB. REP. at E-1; see FLA. STAT. ANN. §§ 760.01-760.37 (West 1985) (Florida Act proscribing discrimination).

84. *Shuttleworth*, 242 DAILY LAB. REP. at E-1.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at E-2 (discussing document prepared by Florida Department of Health and Rehabilitative Services (Florida Department of Health) regarding precautions for health care workers to observe while treating AIDS patients). The Florida Department of Health had prepared a document entitled *AIDS—Information and Procedural Guidelines for Providing Health and Social Services to Persons with AIDS, July 1984*. *Id.* at E-1. The Florida Department of Health prepared the document to advise hospitals concerning recommended procedures for the treatment of patients with AIDS and hospital employees with AIDS. *Id.* at E-3. The Department of Health advised hospitals to treat AIDS patients in routine hospital settings. *Id.* The Department of Health also advised hospital administrators to evaluate hospital employees with AIDS on a case-by-case basis to determine whether the employee should remain in a patient care position. *Id.* at E-2. The Department of Health noted that the hospital administration should base its decision regarding job placement of an employee with AIDS on whether the employee is free from easily transmissible infections and is not unduly susceptible to infections. *Id.*

In upholding Shuttleworth's claim of employment discrimination, the Commission determined that AIDS is a handicap within the scope of the Florida Act.⁸⁹ Noting that the Florida Act does not define the term "handicap," the Commission looked to the plain meaning of the word.⁹⁰ Turning to the dictionary definition of handicap, and recalling the Commission's interpretation of the term in prior cases, the Commission concluded that, under the Florida Act, a handicapped individual is one who "does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties."⁹¹ The Commission reasoned that, in light of the medical evidence presented by Shuttleworth indicating that AIDS victims lose their natural immunity to diseases, AIDS is a handicap within the coverage of the Florida Act.⁹²

In addition to concluding that AIDS is a handicap under the Florida Act, the Commission implied that AIDS may fall within the definition of handicap under the federal Act.⁹³ The Commission's construction of the definition of handicap under the Florida Act is similar to the definition of handicap under the federal Act.⁹⁴ Furthermore, the Commission acknowledged the similarity of its ruling that an AIDS patient is a handicapped individual under the Florida Act and the Eighth Circuit's decision in *Arline* that an individual with the chronic contagious disease of tuberculosis is a handicapped individual under the federal Act.⁹⁵

89. *Id.* at E-1.

90. *Id.*

91. *Id.* In *Shuttleworth*, the Commission noted that, in construing similar statutes of three other states, other states have resorted to the definition of "handicap" found in Webster's Third International Dictionary. *Id.*; see *State v. Turner*, 3 Ohio App. 2d 5, 7-8, 209 N.E.2d 475, 477 (1965) (relying on dictionary definition of handicap in child neglect case); *Chicago, Milwaukee, St. Paul and Pacific R.R. Co. v. Washington State Human Rights Comm'n*, 87 Wash.2d 802, 805, 557 P.2d 307, 310 (1976) (relying on dictionary definition of handicap in employment discrimination case); *Chicago, Milwaukee, St. Paul and Pacific R.R. v. Department of Indus. Labor and Human Relations*, 62 Wis.2d 392, 398, 215 N.W.2d 443, 446 (1974) (same). *Webster's Third International Dictionary* defines "handicap" as "a disadvantage that makes achievement unusually difficult." WEBSTER'S THIRD INT'L DICTIONARY 1027 (1981). Webster's definition of "handicap" is consistent with the Commission's interpretation of "handicap" in prior cases. *Shuttleworth*, 242 DAILY LAB. REP. at E-1; see *Feney v. GTE Data Servs., Inc.*, FCHR Case No. 79-214 (FCHR Aug. 11, 1981) (term "handicapped individual" construed by Florida Commission to mean one who does not enjoy full and normal use of sensory, mental or physical faculties).

92. *Shuttleworth*, 242 DAILY LAB. REP. at E-1.

93. *Id.*

94. *Cf.* 29 U.S.C. § 706(7)(B) (1982) (defining "handicapped individual" as one who has physical or mental impairment which substantially limits major life activity).

95. See *Shuttleworth*, 242 DAILY LAB. REP. at E-1 (noting similarity of *Arline* and *Shuttleworth* decisions). But see *id.* at E-5 (Investigatory Report). The Investigatory Report submitted to the Commission by the Office of Field Services prior to the Commission's determination in *Shuttleworth* examined in greater depth than the Commission's determination in *Shuttleworth* the County's argument that AIDS is not a handicap under the Florida Act. See *id.* at E-2 (Investigatory Report). The County had noted in its defense that the Fair Housing Act, a separate section of the Florida Act unrelated to unfair employment practices, defines a

After determining that AIDS is a handicap under the Florida Act, the Commission noted that the Florida Act permits employers to make employment decisions based on a handicap only when the absence of the handicap is a bona fide occupational qualification necessary to perform the job.⁹⁶ In interpreting the term "bona fide occupational qualification," the Commission relied on a prior Florida case in which the Florida District Court of Appeal construed the term.⁹⁷ The Florida state court held that the principal

handicapped individual as a person who has "a physical impairment which substantially limits one or more major life activities or . . . has a record of having, or is regarded as having, such physical impairment." *Shuttleworth*, 242 DAILY LAB. REP. at E-5; see FLA. STAT. ANN. § 760.22(5) (West 1985) (definition of handicap under Florida Fair Housing Act). In light of the similar terms used in the definition of handicap appearing in the Florida Fair Housing Act, which is identical to the federal Act's definition of handicapped individual, the County looked to the regulations implementing the federal Act for examples of what constituted physical or mental impairments. *Shuttleworth*, 242 DAILY LAB. REP. at E-5; see 29 C.F.R. § 32.3 (1985) (definition of handicap under Department of Labor's regulations implementing the federal Act); see also 29 U.S.C. § 706(1)(B) (1982) (federal Act's definition of handicapped individual). The County contended that not one disease or condition listed in the regulations as an example of a mental or physical impairment is classifiable as a contagious, infectious, or communicable disease. *Shuttleworth*, 242 DAILY LAB. REP. at E-5; see 29 C.F.R. § 32.3 (definition of handicap under regulations implementing § 504 of federal Act). The regulations list orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism as examples of physical or mental impairments. 29 C.F.R. § 32.3. *But see* 29 U.S.C. § 706(7)(B) (excluding from definition of handicapped individual alcoholics and drug abusers who cannot perform job or who threaten safety or property or others).

In considering whether an AIDS victim qualifies as a handicapped individual under the Florida Act, the Office of Field Services first determined that AIDS constitutes a physical impairment based on regulations implementing the federal Act. *See Shuttleworth*, 242 DAILY LAB. REP. at E-5. As the Office of Field Services notes, certain opportunistic infections and cancers that are rare in healthy individuals commonly afflict AIDS victims as a result of a patient's loss of natural immunity to these diseases. *See id.* The Office of Field Services recommended to the Commission that AIDS qualifies as a physical impairment because the disease renders its victim's immune system defenseless against opportunistic diseases. *Id.* Shuttleworth's medical records indicated that he was suffering from a lymphatic condition and cancer. *Id.* at E-5 to E-6. Both the lymphatic condition and the cancer impaired Shuttleworth's physical faculties and, therefore, in the opinion of the Office of Field Services, Shuttleworth's condition qualified as a physical impairment. *See id.* at E-6. Finally, the Office of Field Services noted that, although Shuttleworth's physical impairment did not limit substantially major life activities, the County treated the impairment as constituting such a limitation and that the impairment is, therefore, a handicap. *See id.* The definition of "handicapped individual" in both the federal Act and the Florida Fair Housing Act includes persons regarded as having a physical impairment that substantially limits one or more major life activities. *See* FLA. STAT. ANN. § 760.22(5) (definition of handicap under Florida Fair Housing Act); 29 U.S.C. § 706(7)(B) (definition of "handicapped individual" under federal Act). *But see infra* note 110 and accompanying text (discussing view that AIDS is a physical impairment that substantially limits a major life activity).

96. *Shuttleworth*, 242 DAILY LAB. REP. at E-2.

97. *Id.*; see *School Bd. of Pinellas County v. Rateau*, 449 So.2d 839, 842 (Fla. Dist. Ct. App. 1984) (construing meaning of bona fide occupational qualification under Florida Act). In *School Board of Pinellas County v. Rateau*, the School Board of Pinellas County, Florida (School Board) appealed a final order of the Florida Commission on Human Relations, directing the

issue in employment discrimination cases is whether an employee with a handicap will be able to perform the duties of the job without substantial risk of future injury to himself.⁹⁸ Furthermore, to establish a bona fide occupational qualification, an employer must have a reasonable basis for its assessment of the risk of injury.⁹⁹ The Commission ruled that the County had failed to show that Shuttleworth's continued employment would result in a substantial risk of future injury to Shuttleworth.¹⁰⁰ The Commission found, therefore, that the County had failed to establish that Shuttleworth did not meet a bona fide occupational requirement.¹⁰¹

Finally, the Commission considered the County's defense that its action was necessary to prevent the spread of AIDS to Shuttleworth's co-workers. The Commission stated that the consensus of the medical community is that intimate contact, as opposed to casual contact, is the mode of transmission of the AIDS virus.¹⁰² The Commission noted that the Florida Department of Health advised persons in high risk groups to avoid any exposure to AIDS victims with easily transmissible opportunistic diseases.¹⁰³ The Commission reasoned that, under the facts of this case, Shuttleworth posed no health threat to his co-workers because Shuttleworth had no easily transmissible

School Board to cease and desist from discriminating against Rateau, a substitute school teacher. *School Bd. of Pinellas County v. Rateau*, 449 So.2d 839, 839 (Fla. Dist. Ct. App. 1984). Rateau's charge of unlawful discrimination resulted from the School Board's withdrawal of an offer of a temporary teaching job because of Rateau's back condition. *Id.* at 840. The District Court of Appeal of Florida for the First District explained that the principle issue was whether Rateau, who admitted having a bad back, would be able to perform the duties of the teaching position without substantial risk of further injury to his back. *Id.* at 842. The uncontradicted evidence presented by the School Board was that the teaching position required frequent bending, stooping, and lifting. *Id.* at 840, 842. The medical evidence indicated that Rateau faced a substantial risk of further injuring his back if he assumed the teaching position requiring frequent bending. *Id.* at 842. Rateau's testimony that he performed similar activities with no adverse effects to his back did not weaken the School Board's position. *Id.* Because the medical evidence indicated that Rateau faced a substantial risk of further injury to his back if he assumed the teaching position, the district court revoked and remanded the case to the Florida Commission on Human Relations for an entry of an order dismissing Rateau's petition. *Id.* at 843.

98. *Rateau*, 449 So.2d at 842.

99. *Id.*

100. *Shuttleworth*, 242 DAILY LAB. REP. at E-2.

101. *Id.*

102. *Id.* at E-1. In general, the medical community shares the conclusion reached by the Florida Department of Health that AIDS does not spread by casual contact. *See supra* notes 10-12 and accompanying text (casual contact does not spread AIDS).

103. *Shuttleworth*, 242 DAILY LAB. REP. at E-1. The Florida Department of Health advised that persons receiving large-dose steroid drugs on a daily basis, persons with known immune-deficiency diseases, persons receiving chemotherapy who have not achieved hematologic recovery, persons receiving immunosuppressive medication, and persons who are pregnant should avoid any exposure to AIDS patients. *Id.* The danger to persons in these high risk groups, however, occurs only when they come into contact with AIDS patients with easily transmissible opportunistic infections. *Id.* at E-1 to E-2. Contact with AIDS victims who do not have transmissible infections poses no danger to persons in high risk groups. *Id.*

opportunistic infections at the time that the County fired Shuttleworth.¹⁰⁴ The Commission concluded that AIDS is a handicap under the Florida Act and that the County had failed to substantiate legitimate, nondiscriminatory reasons for dismissing Shuttleworth.¹⁰⁵ The Commission, therefore, determined that the Commission had reasonable cause to believe that the County unlawfully discriminated against Shuttleworth by firing Shuttleworth because he had contracted AIDS.¹⁰⁶

The *Arline* and *Shuttleworth* decisions together provide a foundation for the prediction that an employer legally may not discriminate against an employee with AIDS.¹⁰⁷ *Arline* provides the basis for the conclusion that, under the federal Act, AIDS is a protected handicap,¹⁰⁸ while *Shuttleworth* provides the analysis for the conclusion that, in many situations, no health or safety justifications exist for an employer to reject an applicant or dismiss an employee because the applicant or employee has AIDS.¹⁰⁹ An AIDS victim whose immune system becomes severely suppressed has a physical impairment that limits the body's ability to fight infections, which is arguably a major life activity.¹¹⁰ Furthermore, the Florida Commission's implication in *Shut-*

104. *Id.* at E-2. The report of the Office of Field Services noted that Shuttleworth's medical records revealed that Shuttleworth was suffering from a lymphatic condition and Karposi's sarcoma, a rare skin cancer, neither of which are easily transmissible. *Id.* at E-5 to E-6.

105. *Id.*; see *supra* notes 86-97 and accompanying text (discussing Commission's analysis and conclusions).

106. *Shuttleworth*, 242 DAILY LAB. REP. at E-2. Although the Commission in *Shuttleworth* ruled that the County unlawfully discriminated against Shuttleworth because of his handicap, AIDS, the Commission specifically refused to address discrimination issues regarding employees with easily transmissible infections. *Id.* In addition, the Commission refrained from addressing issues regarding an employer's duty to reassign or alter working conditions of AIDS victims. *Id.* The County subsequently petitioned the Commission's Executive Director for a redetermination. *Broward County, Fla., Tries Again for Panel's Backing on Dismissal*, 21 DAILY LAB. REP. (BNA) A-3 (Jan. 31, 1986) (available on LEXIS). In addition to its original arguments, the County planned to assert that the County fired Shuttleworth for fear that he would be absent excessively as the disease progressed. *Id.* The Commission, however, reaffirmed its decision that the County violated the Florida Act by dismissing Shuttleworth because he had AIDS. *Florida Human Relations Commission Reaffirms Decision on AIDS Victim*, 24 Gov't EEMPL. REL. REP. (BNA) 542 (April 21, 1986) (available on LEXIS).

107. See *infra* notes 108-27 and accompanying text (discussing possibility of concluding that federal Act protects AIDS victims).

108. See *infra* notes 110-12 and accompanying text (discussing conclusion that AIDS meets definition of handicap found in federal Act).

109. See *infra* notes 117-20 and accompanying text (discussing conclusion in *Shuttleworth* that health and safety concerns do not justify employer's action in firing AIDS victim).

110. See Leonard, *supra* note 15, at 691 (advancing theory that AIDS is impairment that substantially limits major life functions). Under the federal Act, a handicapped individual includes a person who "has a physical impairment which substantially limits one or more of such person's major life activities." 29 U.S.C. § 706(7)(B) (1982). "Major life activities" include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. See 45 C.F.R. §§ 84.3(j)(2)(ii) (1985) (Department of Health and Human Services' definition of major life activity for purpose of implementing § 504 of federal Act); 29 C.F.R. § 32.3 (Department of Labor's definition of major life activity for purposes of § 504

tleworth that AIDS potentially is a handicap under the federal Act lends some support to an AIDS victim's argument.¹¹¹ A court, in determining whether AIDS is a federally protected handicap, therefore, reasonably could conclude that AIDS is a handicap under the federal Act.¹¹²

While *Arline* demonstrates that AIDS may fall within the definition of handicap under the federal Act,¹¹³ an AIDS victim seeking protection from employment discrimination must rebut an employer's assertion that AIDS is a contagious disease that requires an employer to take measures to prevent the spread of the disease through contact in the workplace.¹¹⁴ To an uninformed trier of fact, the most persuasive affirmative defense in an AIDS case most likely is the fear that co-workers and customers will contract AIDS.¹¹⁵ While an AIDS victim may transmit to other employees opportunistic infections associated with AIDS, the primary concern of workers is the risk of an AIDS victim or a carrier of the AIDS virus transmitting the AIDS virus to others.¹¹⁶ An informed understanding of the nature of the disease is essential to the decision of a court wrestling with the socially sensitive issue of the rights of AIDS victims and their co-workers.¹¹⁷ The *Shuttleworth* decision demonstrates that, after balancing the concerns of both parties, courts may find unpersuasive an employer's asserted justification for firing an employee with AIDS because of the possibility of infecting a co-worker or customer.¹¹⁸ In *Shuttleworth*, the Florida Commission recognized that the present judgment of the medical community is that the transmission of the AIDS virus does not occur as a result of casual contact typically occurring

of federal Act). While the immune function is not specifically listed as a major life activity, the list of life functions noted in the regulations is not exhaustive. See *Shuttleworth*, 242 DAILY LAB. REP. at E-5 (noting that list defining major life functions is not meant to be exhaustive); Leonard, *supra* note 15, at 691 (same). A court, therefore, could conclude that the body's ability to maintain health by fighting infections is a major life activity. See Leonard, *supra* note 15, at 691 (ability to preserve health is major life activity). But see *supra* note 92 and accompanying text (noting Office of Field Services' implication in *Shuttleworth* that AIDS is physical impairment that does not substantially limit major life activities).

111. See *supra* notes 93-95 and accompanying text (noting Commission's inference in *Shuttleworth* that AIDS may be handicap under federal Act); see also *Firing of Employee*, *supra* note 18, at ____ (noting that, although *Shuttleworth* decision is not controlling in other jurisdictions, AIDS victims initiating employment discrimination cases against federally funded employers still may rely on *Shuttleworth* decision).

112. See *supra* notes 110-12 and accompanying text (advancing argument that AIDS is handicap under federal Act).

113. See *supra* notes 107-10 and accompanying text (discussing conclusion that *Arline* supports contention that AIDS is handicap under federal Act).

114. See *supra* note 44 and accompanying text (discussing probable employer affirmative defense in AIDS cases).

115. See Leonard, *supra* note 15, at 697 (fear of contagion is employer's foremost affirmative defense in AIDS cases).

116. See *Shuttleworth*, 242 DAILY LAB. REP. at E-1.

117. See *Arline*, 772 F.2d at 764-65.

118. See *Shuttleworth*, 242 DAILY LAB. REP. at E-2; *supra* notes 102-04 and accompanying text (discussing Florida Commission's determination that risk of AIDS patient infecting co-workers does not justify dismissal of AIDS patient).

in the workplace.¹¹⁹ The Florida Commission, therefore, concluded that evidence indicating that there is no reasonable probability that AIDS may spread by casual contact is more persuasive than an employer's defense that AIDS may spread to co-workers under normal workplace conditions.¹²⁰

In light of *Arline* and *Shuttleworth*, an AIDS victim bringing suit against a federally supported employer for alleged employment discrimination reasonably may rely on the federal Act for relief.¹²¹ The conclusion that AIDS falls within the federal Act's definition of handicap, however, does not end the inquiry of whether an employer discriminated against an AIDS victim. The federal Act acknowledges that not every handicapped individual is capable of performing all aspects of a particular job.¹²² An AIDS victim, therefore, must be capable of performing all job requirements in spite of the AIDS handicap.¹²³ This determination is a fact specific issue, unique to each individual case.¹²⁴ For example, AIDS patients who have contracted several opportunistic diseases, requiring hospitalization, most likely will be incapable of continuing work.¹²⁵ On the other hand, those individuals perceived as potential AIDS victims merely because they are members of a high risk group, or because they associate with AIDS victims, are more likely physically capable of performing job requirements.¹²⁶ Therefore, in light of the *Arline* and *Shuttleworth* decisions, an AIDS victim who is capable of performing all job requirements reasonably may look to the federal Act for protection against discrimination by a federally supported employer.¹²⁷

DEBORAH LEE TITUS

119. *Shuttleworth*, 242 DAILY LAB. REP. at E-2; see *supra* notes 10-12 and accompanying text (transmission of AIDS does not occur through casual contact). In a move to allay the public's fear of contracting AIDS through casual contact, the United States Public Health Service has advised that employers have no reason to exclude AIDS victims from the workplace. *AIDS: No Need for Worry in the Workplace*, NEWSWEEK, Nov. 25, 1985, at 51. The Public Health Service has recommended against instituting routine programs to screen for the AIDS virus in the health care, personal service, and food service professions. *Id.*

120. *Shuttleworth*, 242 DAILY LAB. REP. at E-2.

121. *Arline*, 772 F.2d 759; *Shuttleworth*, 242 DAILY LAB. REP. E-1; see *infra* notes 122-27 and accompanying text (discussing conclusion that AIDS victim may rely on federal Act for protection against handicap employment discrimination).

122. See *Arline*, 772 F.2d at 764 (law recognizes that not all handicapped individuals can function in all aspects of society).

123. See *Southeastern Community College*, 442 U.S. 397, 406 (1979) (otherwise qualified person is one who meets all program requirements in spite of handicap).

124. See *Arline*, 772 F.2d at 764 (issue of whether handicapped individual is otherwise qualified is fact specific issue); *School Bd. of Pinellas County v. Rateau*, 449 So.2d 839, 842 (Fla. Dist. Ct. App. 1984) (same).

125. Leonard, *supra* note 15, at 687.

126. *Id.*; see *supra* note 9 and accompanying text (discussing groups which are at higher risk of contracting AIDS).

127. *Arline*, 772 F.2d 759; *Shuttleworth*, 242 DAILY LAB. REP. E-1; see *supra* notes 107-20 and accompanying text (discussing contention that AIDS victims may rely on federal Act for protection against employment discrimination); *supra* note 71 (purpose of federal Act is to prevent unnecessary discrimination).

