AIDS IN THE WORKPLACE: PUBLIC AND CORPORATE POLICY

MARIAN V. HEACOCK*
GREGORY P. ORVIS**

I. INTRODUCTION

In July 1989, a national news report that garnered only a small paragraph in a local morning paper stated that the Centers for Disease Control (CDC) had recently recorded its 100,000th case of Acquired Immune Deficiency Syndrome (AIDS) in the United States.[1] In 1985, this type of news would have created a state of near-hysteria in both the public and private sector of the United States economy. Because of the projections made in 1986 by the CDC, however, American businesses have begun to accept AIDS as a long-term reality. The rapid growth in the number of AIDS victims is, nevertheless, problematic for businesses as well as for the rest of society. The CDC has projected a "cumulative total of 365,000 confirmed cases of AIDS" by 1992,[2] and many of those who will be stricken by the disease will be active members of the work force.

This Article examines employment problems that AIDS creates for the private sector. It will review corporate policies regarding employees and job applicants who are either Human Immunodeficiency Virus (HIV)-positive or have been diagnosed with AIDS. Although housing and public accommodations are worth mentioning as issues also of concern as they relate to the overall physical and psychological health of those who are HIV-positive or diagnosed with AIDS,[3] these issues are beyond the focus of this discussion.

This Article will concentrate on the concerns that an em-

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* Associate Professor of Management at the University of Alabama at Birmingham. A.B., University of Alabama, 1961; M.A., University of Michigan, 1963; Ph.D., University of Alabama, 1967.

** Assistant Professor of Criminal Justice at the University of Alabama at Birmingham. B.A., University of New Orleans, 1975; J.D., Tulane School of Law, 1978; M.A., University of New Orleans, 1981; Ph.D., University of Houston, 1988.

1. *See* Birmingham Post-Herald, July 24, 1989, at A6, col. 1.

2. *See id.*

3. For a comprehensive analysis on discrimination in employment, housing, and public accommodations, see U.S. Conf. of Mayors, *AIDS/HIV Anti-Discrimination Initiatives*, 6 AIDS INFO. EXCHANGE 1 (1989).

ployer must confront when faced with either a prospective or current employee who has contracted the AIDS virus. The status of statutory and case law regarding AIDS and the effects of the law on the employer—including the issues of discrimination, AIDS testing, confidentiality, the rights of the employer, and the rights of non-infected employees—will be discussed in that context. In light of the current legal environment, employers should develop a concrete policy to address AIDS and its accompanying difficulties.

AIDS as a disease will be analytically separated into stages to provide a foundation for discussion of such policies. For those businesses that find early intervention to be a workable policy, emphasis should be placed on identification of the high cost stages in the treatment of employees who are HIV-positive or diagnosed with AIDS. Employee benefits and the effects of the insurance industry on a comprehensive corporate policy will also be considered. Various existing corporate policies on AIDS will be evaluated, in particular that of IBM. A model corporate policy on AIDS will be suggested at the conclusion of this Article.

II. LEGAL CONSIDERATIONS

Virtually every state has some legislation concerning AIDS, but statutory law is fragmentary and not uniform from jurisdiction to jurisdiction. In addition, case law governing AIDS in the workplace is sparse. Much of the case and statutory law is not directly related to the AIDS issue, but applies indirectly through broader handicap issues. As one commentator has noted, "The legal rights and duties of AIDS victims compared to the employer's responsibility to maintain a safe work environment have yet to be defined."[4]

A. *Discrimination*

There is more law governing discrimination against victims of AIDS than on any other AIDS-related issue, but there is still little precedent. In 1986, the city of Los Angeles was the first governmental body to specifically prohibit AIDS and HIV-related discrimination.[5] Many cities followed suit in adopting

4. Colosi, *AIDS: Human Rights Versus the Duty to Provide a Safe Workplace*, 39 LAB. L.J. 677, 678 (1988).
5. *See AIDS/HIV Anti-Discrimination Initiatives*, *supra* note 3, at 15.

AIDS or HIV-related discrimination ordinances in the absence of specific federal and state policies.[6] In most states, however, an AIDS victim who has been discriminated against would have to bring suit under a state's broader handicap-discrimination statute. Today, many states have laws prohibiting discrimination against handicapped persons, and at least fourteen of these states have declared that the AIDS infection is a handicap.[7]

There are limitations on potential gains from a lawsuit under a handicap-discrimination statute. For example, the first official determination that AIDS qualified as a handicap was made in 1986 by the Florida Commission on Human Relations.[8] The plaintiff in that case later filed suit in federal court for punitive damages under a handicap-discrimination statute. The district court refused to grant the punitive damages even though it did award the plaintiff reinstatement, back pay, and attorney's fees.[9] District Judge Gonalez cited Supreme Court precedent for the denial of punitive damages for emotional distress and mental anguish. The Supreme Court had applied a balancing test in the interpretation of Section 504 of the Rehabilitation Act of 1973,[10] wherein the implementation of statutory objectives is weighed against the need to keep statutory protections "within manageable bounds."[11] Judge Gonzalez reasoned that "equitable monetary damages" best accomplished the necessary balance.[12] The plaintiff ultimately settled out of court for $190,000, attorney's fees, and reinstatement to a different position with the school board.[13]

Federal law may provide some protection to persons with AIDS. Sections 503 and 504 of the Rehabilitation Act of 1973 have been widely accepted as applying to discrimination against AIDS victims because of the Act's broad wording, legis-

6. *See id.* at 15-16.

7. *See* Lewis, *Acquired Immunodeficiency Syndrome: State Legislative Activity,* 258 J. A.M.A. 2410, 2412 (1987).

8. *See* Shuttleworth v. Broward County Off. of Budget & Mgmt. Pol'y, FCHR No. 85-0624 (Apr. 7, 1986); Kuzmits & Sussman, *Twenty Questions About AIDS in the Workplace,* 29 Bus. Horizons 36, 38 (1986).

9. *See* Shuttleworth v. Broward County, 649 F. Supp. 35, 38 (S.D. Fla. 1986).

10. 29 U.S.C. § 794 (1982).

11. Alexander v. Choate, 468 U.S. 287, 299 (1985).

12. *Shuttleworth,* 649 F. Supp. at 38.

13. *See* Stevens, *Understanding AIDS: Employers Must Learn the Facts to Educate and Protect its Workforce,* 33 Personnel Admin. 84 (1988).

lative history, and broad judicial interpretation.[14] The Rehabilitation Act attacks discrimination against the handicapped in two ways: Section 503 prohibits discrimination against the handicapped by those who contract with the federal government.[15] Section 504 forbids discrimination against the handicapped in any program or activity receiving federal assistance.[16] It is clear that the statute was intended to be broadly interpreted "to bring equal employment opportunities to handicapped individuals in the federal government and in programs and organizations receiving federal funds."[17] One legal commentator has noted that the lower courts have applied liberal interpretations of the statutory terms "handicap" and "impairment"; many permanent conditions of impairment over which the handicapped individual has no control are included in the definitions of these terms. The courts, however, make case-by-case determinations of what constitutes a "handicap" or "impairment," and they have thus far declined to establish general guidelines for future reference.[18]

In 1987, the U.S. Supreme Court decided, with a seven-to-two majority, that a person with contagious tuberculosis was handicapped and therefore covered under the provisions of the Rehabilitation Act. Justice Brennan, however, added the following footnote to his majority opinion:

> This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.[19]

Legal scholars are split on the meaning of the Supreme Court's opinion in light of the obscure footnote. Some view the decision as a very narrow one that leaves AIDS victims as an "important test group" that must still seek to be covered by the

14. *See* Comment, *The Application of Handicap Discrimination Laws to AIDS Patients*, 22 U.S.F. L. REV. 317, 327 (1988).

15. *See* 29 U.S.C. § 793 (1982).

16. *See* 29 U.S.C. § 794 (1982).

17. O'Connor, *Defining "Handicap" for Purposes of Employment Discrimination*, 30 ARIZ. L. REV. 633, 637 (1988).

18. *See id.* at 642-43.

19. School Bd. v. Arline, 480 U.S. 273, 282 n.7 (1987), *reh'g denied*, 481 U.S. 1024 (1987).

Rehabilitation Act.[20] Others admit that some of the Court's language is narrow, but predict that much of the Court's language will be broadly interpreted.[21] At least one commentator has predicted that "it is probable that AIDS-related disorders will be treated similarly" to tuberculosis.[22] Still others perceive the case as a clear precedent for application of the Act to AIDS victims.[23] At least one federal court has directly asserted that the Act's provisions encompass AIDS victims. The Court of Appeals for the Ninth Circuit held that a person diagnosed with AIDS is handicapped within the meaning of the Rehabilitation Act.[24]

There is a growing trend in the federal government to expand federal protection against discrimination to AIDS victims. The Department of Justice formally stated in 1988 that Section 504 covers people with HIV as well as those with AIDS, reversing an earlier statement to the contrary.[25] There is currently an omnibus bill in the U.S. Senate that would prohibit discrimination against those with AIDS and those with HIV in the private as well as in the public sector.[26] The possible effects on the workplace of this bill's passage remain to be seen. In addition to the Rehabilitation Act and the bill pending in Congress, other existing federal statutes may be given a wider interpretation by their implementing authorities to protect persons with AIDS from discrimination. The Employee Retirement Income Security Act of 1974 (ERISA) is one such statute.[27] If an employee covered by an employee benefit plan is discharged after the employer learns that the employee is an AIDS victim, the

20. *See, e.g.*, Comment, *Running From Fear Itself: Analyzing Employment Discrimination Against Persons With AIDS and Other Communicable Diseases Under Section 504 of the Rehabilitation Act of 1973*, 23 WILLAMETTE L. REV. 857, 884 (1987).

21. *See, e.g.*, Carey & Arthur, *The Developing Law on AIDS in the Workplace*, 46 MD. L. REV. 284, 292-93 (1987).

22. Wasson, *AIDS Discrimination Under Federal, State, and Local Law After Arline*, 15 FLA. ST. U.L. REV. 221, 253 (1987).

23. *See, e.g.*, Broadus, *Arline: The Application of the Rehabilitation Act of 1973 to Communicable Diseases*, 39 LAB. L.J. 273 (1988).

24. *See* Chalk v. District Court, 832 F.2d 1158 (9th Cir. 1987).

25. *See* U.S. Dep't of Just., Memorandum to Arthur B. Culvahouse, Counsel to the President (Sept. 27, 1988).

26. *See* S. 933, 101st Cong., 1st Sess. (1989) ("Americans with Disabilities Act of 1990 (ADA)"). The probability that some form of this bill will become federal law is quite high. The bill has already been passed by the Senate and in two of the necessary four committees of the House of Representatives. Furthermore, President Bush recently expressed support for the bill. *See* Fort Worth Star-Telegram, Mar. 30, 1990, at 13, col. 1.

27. 29 U.S.C. §§ 1001-1461 (1982 & Supp. V 1987).

discharge may be interpreted under ERISA as a prohibited deprivation of employee benefits.[28]

B. *Testing*

Statutory and case law have recognized that the "police power" of state governments can be used to enforce mandatory testing, and even quarantine measures, for public health purposes.[29] Legislatures and courts have not exercised this power so far, but the federal government has forced State Department employees and military personnel to undergo mandatory testing for HIV.[30] The Federal Bureau of Prisons began a mandatory HIV screening program for incoming inmates in 1987 but later discontinued it, and only a few state prisons have such screening today.[31]

HIV testing is least scrutinized by the courts in the context of aliens, whether they seek temporary or permanent residence in America. An alien must undergo a serologic test and may be denied legal residence in the United States if testing results are HIV-positive.[32] If immigrants and refugees test positive, they are denied entrance into the United States.[33] The programs created under the Immigration Reform and Control Act to legalize undocumented aliens already within the United States require that they pass the same medical criteria that are applied to immigrants, including HIV testing.[34] There are, however, "waiver" provisions that would, in some cases, allow an alien with a "dangerous contagious disease" to remain in the country.[35] The prevalence of HIV testing in this context stands in sharp contrast to the protections afforded private employees.

There are few grounds on which a private sector employer may justify testing prospective or current employees for AIDS. First, an employer might argue that the test may identify those who will be unable to work in the future, but this justification is

28. *See* Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11, 24-25 (1985).

29. *See* Gray, *The Parameters of Mandatory Public Health Measures and the AIDS Epidemic*, 20 SUFFOLK U.L. REV. 505, 506-09 (1986).

30. *See* Hirsh, *AIDS and the Law*, 10 J. LEGAL MED. 169, 178 (1989).

31. *See* Sinkfield & Houser, *AIDS and the Criminal Justice System*, 10 J. LEGAL MED. 103, 110 (1989).

32. *See* Medical Examination of Aliens, 42 C.F.R. § 34 (1988).

33. *See* Wolchok, *AIDS at the Frontier*, 10 J. LEGAL MED. 127, 130 (1989).

34. *See* 8 C.F.R. §§ 210.2(d) & 245a.2(i) (1989).

35. Wolchok, *supra* note 33, at 130-31.

not legally sufficient to discharge a worker or to withhold an offer of employment unless there is a very high risk of immediate future disability.[36] Second, a medical test might be justified if job conditions pose a serious threat to co-workers' or customers' health and safety. Yet the known facts about the spread of AIDS do not support the possibility of such a threat in most, if not all, circumstances. Third, the test may be justified as a screening device that allows an employer to reduce the cost of health care plans. Assuming that employers could not legally discriminate against handicapped individuals and that an AIDS victim would be considered "handicapped," AIDS screening would be illegal despite these concerns.[37]

HIV testing is often regulated by state law.[38] Many states have laws that require a test subject to give "informed consent" in writing before any health care facility or worker, including a physician, can administer the HIV test. Other states prohibit any testing of a person for the AIDS antibody without that person's knowledge and consent. Some statutory exceptions do exist in both cases. Further, several states have legislation prohibiting insurance companies from requiring an applicant to take an AIDS antibody test. Some states will not allow insurance companies to ask whether an applicant has even taken an AIDS antibody test or to require an applicant to reveal the test results if the applicant has taken such a test.

Despite state and federal regulation, much HIV testing may still occur in the nonunion sector. A non-unionized employer in the private sector with no government connections has minimal legal limitations on any medical testing program it wishes to implement. Nevertheless, the probable "handicapped status" of AIDS victims renders the results virtually meaningless in most circumstances.[39] Several existing state and federal statutes limit a private employer's use of medical tests to discriminate in either employment or employee termination

36. *See* Perkins, *Prohibiting the Use of the Human Immunodeficiency Virus Antibody Test by Employers and Insurers*, 25 HARV. J. ON LEGIS. 275, 291 (1988).

37. *See id.* at 292-93.

38. *See* Lewis, *supra* note 7, at 2412-13. Lewis lists the following states as having legislation on antibody testing: California, Colorado, Delaware, Florida, Idaho, Illinois, Iowa, Oklahoma, Rhode Island, Tennessee, Texas, Virginia, and Wisconsin.

39. In light of the probable passage of the Americans with Disabilities Act, it could soon be that most employees with AIDS (subject to the limitations of the Act) will be protected from discrimination as "handicapped" persons. *See supra* note 26 and accompanying text.

practices.[40] Some states, however, do allow mandatory testing for the HIV infection by an employer under particular circumstances.[41] For example, Texas permits such testing if the employee's AIDS status is a "bona fide" occupational issue and a less discriminatory means of determining that status does not exist.[42] Other states and local governments have passed or are considering legislation that completely prohibits AIDS testing for employees or job applicants.[43] Only a few states have specific statutes that prohibit an employer from requiring that a job applicant take an HIV test as a precondition to employment.[44]

Union employers, on the other hand, have significantly less opportunity to initiate AIDS-testing programs. They may be restricted from unilaterally deciding to implement an AIDS-testing program under the "good faith" provisions of the National Labor Relations Act (NLRA), which requires an employer to bargain in "good faith" with the union over the "terms and conditions of employment."[45] In addition, the National Labor Relations Board (NLRB) has often ruled that other testing programs have affected the "terms and conditions of employment" and must be a subject of negotiation with the union.[46] Furthermore, a private employer who discharges a union employee on the basis of a positive HIV test may face a grievance procedure under the terms of a collective bargaining agreement. Grievance arbitrators have on occasion required the employer to prove a reasonable connection between the test results and the employer's business interests. In addition, arbitrators have been hesitant to uphold an employee's discharge based on the results of a single test because of testing unreliability.[47]

Employees are not without recourse when wrongfully tested

40. *See* Cross & Haney, *Legal Issues Involved in Private Sector Medical Testing of Job Applicants and Employees*, 20 IND. L. REV. 517, 525 (1987).

41. *See* James, Holmquest, & Blinka, *AIDS: A Plague on Institutional Health Policy Development*, 10 J. LEGAL MED. 65, 69 (1989).

42. TEX. REV. CIV. STAT. ANN. art. 4419b-1, § 9.02 (Vernon 1989).

43. *See* Redeker & Segal, *The Legal Ramifications of AIDS Discrimination*, 65 BUS. & SOC'Y REV. 18, 21 (1988). Florida is given as an example of a state with such regulations.

44. *See* Lewis, *supra* note 7, at 2412. Lewis cites California, Florida, and Wisconsin as examples.

45. 29 U.S.C. § 158(d) (1982).

46. *See* Cross & Haney, *supra* note 40, at 523. The NLRB, however, has not specifically applied this provision to AIDS-testing programs.

47. *See id.* at 532-35.

for AIDS.[48] An employer may be sued in civil court for testing employees for AIDS without proper procedure, authority, or justification. HIV testing is not precise, and employers who make workplace decisions based on incorrect information may be civilly liable. Procedural problems may arise if the chain-of-custody is not ensured so that the test results are connected with the correct employee. Furthermore, the employer may breach the employee's right to confidentiality and thus be subject to a risk of liability on that ground when testing for AIDS.

C. *Confidentiality*

States are also beginning to develop laws protecting the confidentiality of people with either the HIV infection or the AIDS virus because there is no specific federal policy that provides such protection.[49] Many states have confidentiality statutes that prohibit physicians from revealing their patients' HIV status, although some states have amended the statutes to allow doctors to disclose the information to potentially threatened parties. Such disclosures have been generally limited to patients' spouses and the health care workers on the patients' treatment teams.[50] Confidentiality of public health records, both public and private medical and epidemiologic records, and research records is statutorily mandated in several states, and disclosure is prohibited to varying degrees. Nevertheless, the disclosure of HIV testing results to anyone other than the test subject or prescribed others is prohibited in less than a dozen states.[51]

If employers choose to test their employees for HIV, they subject themselves to a "disclosure risk."[52] Disclosure of the test results may lead to a substantial tort liability. An employee with a true HIV-positive result could sue his employer for invasion of privacy if the results were revealed without the employee's consent. An employee with a false HIV-positive result could sue his employer for defamation of character if the results were released.

48. *See* Myers & Myers, *Arguments Involving AIDS Testing in the Workplace*, 38 LAB. L.J. 582, 590 (1987).

49. *See* Cardinale, *AIDS: The New Legal and Ethical Conflicts*, DRUG TOPICS, Apr. 18, 1988, at 72.

50. *See* Hirsh, *supra* note 30, at 178-79.

51. *See* Lewis, *supra* note 7, at 2412.

52. *See* Redeker & Segal, *supra* note 43, at 21.

D. *Legal Restrictions on the Employer*

It has been suggested that the fact that service-oriented employers may lose valuable customers because of the fear of AIDS justifies employment discrimination against AIDS victims. Retention of customers, however, is not a valid defense for an employer who dismisses an AIDS-infected job applicant or employee.[53] The courts have routinely rejected such arguments in non-AIDS contexts when used to defend the dismissal of other groups that are also routine victims of discrimination. The courts are equally likely to reject the so-called "altruistic defense." That defense holds that an employer may terminate an AIDS-infected employee because there is an increased risk of that employee contracting opportunistic infections if he were to remain in the workplace.[54] Although this argument may have some credence in the health-care field, it is unlikely that the courts would find it applicable to most employers.[55]

An employer may reject an AIDS-infected job applicant or terminate a present employee if the lack of infection is a "bona fide occupational qualification." The Ninth Circuit, however, has held that a "reasonable probability of substantial harm" must be created by such employment before an employer is allowed to reject a member of a protected class, such as an AIDS victim.[56]

Under sections 503 and 504 of the Rehabilitation Act, the employee bears the burden of proving that he is a "handicapped individual" as defined by the statute. As part of the plaintiff's burden to present a prima facie case under the Act, he must demonstrate that despite his handicap he is "otherwise qualified" to do the job.[57] Two modes of analysis could be used by courts to examine cases of discrimination against AIDS vic-

53. *See* Note, *Protection of AIDS Victims from Employment Discrimination Under the Rehabilitation Act*, 1987 U. ILL. L. REV. 355, 376.

54. "Opportunistic infections" come from virum and bacteria that regularly exist in the body, but do not normally cause disease in a healthy person. Once the immune system is no longer functional, however, they do manifest themselves as life-threatening infections. *See* Comment, *AIDS: The Legal Implications*, 9 U. ARK. LITTLE ROCK L.J. 641, 641 n.4 (1987).

55. *See* Note, *supra* note 53, at 376.

56. Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985).

57. *See* Fagot-Diaz, *Employment Discrimination Against AIDS Victims: Rights and Remedies Available Under the Federal Rehabilitation Act of 1973*, 39 LAB. L.J. 148, 154 (1988). The United States Supreme Court defined an "otherwise qualified" person, albeit in a non-AIDS context, as "one who is able to meet all of the program's requirements in spite of his handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).

tims. The Second Circuit has applied the burden-shifting *disparate treatment* analysis developed under Title VII[58] to mentally retarded children in a case brought under section 504 of the Rehabilitation Act.[59] This regime would appear equally applicable to AIDS victims charging discrimination. The Fifth Circuit adopted the *disparate impact* doctrine from Title VII to protect handicapped persons: The claimant must show that the physical criterion that excludes him from the position is not job-related and that the criterion has a statistically disproportionate impact on persons with his physical handicap.[60] Under the Fifth Circuit standard, the burden of proof then shifts to the employer to prove that the criterion is "job-related."[61]

Once the AIDS victim has established a case that cannot be refuted by the employer, the employer must "reasonably accommodate" the employee under the provisions of the Rehabilitation Act. The reasonableness of the accommodation is a balance between the employee's handicap and the cost of the accommodation to the employer. Job-restructuring, part-time employment, or a modified work schedule would be appropriate accommodations.[62]

E. *Legal Rights of Co-Employees*

The common law has long held that an employer has an obligation to provide a safe working place for employees. Although the safety of workers is a legitimate legal concern for employers, there is virtually no risk of transmitting AIDS in a non-health care workplace. No state or federal medical authority responsible for enforcing occupational health laws has agreed with either employer or employee assertions that it is a health

58. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1982) (prohibiting discrimination on the basis of race, color, religion, sex, or national origin).

59. *See* N.Y. State Ass'n for Retarded Children v. Carey, 612 F.2d 644 (2d Cir. 1979). The court applied the burden of proof standards established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (race discrimination case).

60. The disparate impact doctrine in employment discrimination jurisprudence stems from the Supreme Court's interpretation of Title VII in Griggs v. Duke Power Co., 401 U.S. 424 (1971).

61. *See* Prewitt v. U.S. Postal Service, 662 F.2d 292, 306 (5th Cir. 1981). It is likely that this burden shifting in the disparate impact context would be modified in light of the recent Supreme Court decision in Ward's Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (Title VII) (limiting the defendant's burden to *production* of legitimate reasons for its actions rather than *persuading* the court that its actions were necessary for its business).

62. *See* Fagot-Diaz, *supra* note 57, at 155-57.

hazard to work with someone with AIDS.[63] Thus, employment decisions based on a person's HIV status and employees' fears of transmission would be difficult to defend in a non-health care setting.[64]

No federal court has decided such a case, but one state court has decided an analogous situation. Prison inmates in New York sought a court order to test all inmates and to send those infected with AIDS to separate facilities.[65] The New York Supreme Court refused to grant the court order after it reviewed the medical evidence and the prison safeguards already in place. Those safeguards included medical precautions governing the spillage of body fluids. This case suggests the likelihood of a similar result, at least in New York, if workers brought a similar suit against their employer.

Employees may protest unsafe working conditions under state and federal labor laws, and they may even conduct a work stoppage under the NLRA if they believe in good faith that an abnormally dangerous working condition exists at their workplace.[66] The NLRA generally protects employees who act in concert for their mutual aid.[67] Both the NLRB and the courts have held that the refusal of employees to work because of health and safety fears comes under this legislation.[68] Therefore, employees might even be able to assert a concerted refusal to work with an employee with AIDS under the NLRA.[69] Statutory protection, however, is afforded only if the employees' activities are performed in conjunction with collective bargaining or union organizing efforts under section seven of the Taft-Hartley Act and are done for "mutual aid or protection."[70]

An employer who disciplines or discharges employees who refuse to work with others who have AIDS may be liable to the refusing employees so long as they "*reasonably* believe" that

63. *See* Myers & Myers, *supra* note 48, at 590.

64. *See* Spong, *AIDS and the Health Care Provider: Burgeoning Legal Issues*, 67 MICH. B.J. 610, 612-13 (1988).

65. *See* La Rocca v. Dalsheim, 467 N.Y.S.2d 302, 311 (1983).

66. *See* Elliott & Wilson, *AIDS in the Workplace: Public Personnel Management and the Law*, 16 PUB. PERSONNEL MGMT. 209, 217 (1987).

67. *See* 29 U.S.C. § 157 (1982).

68. *See* Leonard, *supra* note 28, at 37.

69. *See* 29 U.S.C. § 157 (1982).

70. Note, *AIDS and Employment: An Epidemic Strikes the Workplace and the Law*, 8 WHITTIER L. REV. 651, 674-75 (1986).

there is a health or safety risk in the workplace.[71] Because medical experts agree that AIDS is a communicable disease, but not contagious, the refusal to work with infected employees probably would not be considered reasonable. Furthermore, it is questionable whether concerted activity is protected when its purpose is to force an employer to unlawfully discriminate against an employee with AIDS.[72] Nevertheless, if an uninfected worker is susceptible to the opportunistic infections that accompany the AIDS virus, then the employer may be legally required to accommodate the susceptible worker in some way.[73] For any other refusals to work with others who have AIDS, education is an employer's best response to defuse the protests.

The need for workplace safeguards against possible AIDS transmission is greater for certain classes of workers than for others. In 1987, the Centers for Disease Control published guidelines on AIDS in the workplace for four groups of workers: health-care workers, personal service workers, food service workers, and a fourth, general category. The primary emphasis was on the dangers to health-care workers, and the guidelines addressed the concern of AIDS transmission from a patient, not a fellow employee.[74]

That same year, the Occupational Safety and Health Administration (OSHA) was delegated the responsibility of inspecting hospitals to ensure that health-care workers are protected from an unreasonable risk of AIDS transmission.[75] OSHA places a heavy burden on the employer to ensure that proper procedures are established and that conditions are monitored.[76] Furthermore, an employer may be punished if he does not provide AIDS education for his employees. OSHA recently fined an El Paso funeral home in the amount of $50,880 for not training its employees on how to avoid exposure to AIDS in their workplace.[77]

71. *See id.* at 672-74.

72. *See* Leonard, *supra* note 28, at 43.

73. *See* Elliott & Wilson, *supra* note 66, at 217.

74. *See* Centers for Disease Control, *Recommendations for Prevention of HIV Transmission in Health-Care Settings*, 36 MORBIDITY & MORTALITY WEEKLY REP. 3S (1987).

75. *See* 52 FED. REG. 41,818-24 (1987).

76. *See* James, Holmquest, & Blinka, *supra* note 41, at 67.

77. *See* San Antonio Express-News, July 14, 1989, at 1e, col. 1.

III. Stages and Extent of the Disease

A review of the numerous projections and abundant literature concerning the spread of AIDS indicates that as new knowledge emerges, it becomes increasingly evident that private sector employers must address a five-stage process of progression of the AIDS virus. During each stage, the disease has reached a different level, and the HIV-infected individual has different capabilities.

During the first stage, an individual is HIV-infected, but is both asymptomatic and seronegative.[78] Approximately 1.5 million Americans are currently in this "silently infected" stage.[79] These individuals are capable of full-time employment and are not suffering from any of the opportunistic infections that may or may not appear at a later date. During this period, the infected individual is presumed to be capable of productive employment. There is no firm estimate for how long this stage lasts. According to one source, "[o]ne can be infected with HIV for years without ever developing symptoms of AIDS."[80]

Some percentage of those in stage one experience seroconversion,[81] and move into stage two, in which an individual is HIV-infected and seropositive, but remains asymptomatic. The only way an individual in this classification could be identified is through testing. As an examination of employer policies will show, testing for the HIV antibody is not a popular concept among most employers. As with stage one, the individual is capable of productive employment. The time span for this period also remains unidentified. According to a recent report, the majority of HIV-infected individuals do not begin to show symptoms of the disease for eight years.[82] A study led by Dr. David T. Imagawa of Harbor-UCLA Medical Center in Torrance, California, and recently published in *The New England Journal of Medicine*, found that standard AIDS tests that were once thought to be capable of detecting the AIDS antibody

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78. "Seronegative" is defined as "lacking an antibody of a specific type . . . ." STEDMAN'S MEDICAL DICTIONARY 1408 (25th ed. 1990).

79. *See* Osborn, *AIDS and Public Policy*, 14 ECON. OUTLOOK USA 4 (1988).

80. UNITED STATES DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE: AIDS BULLETIN 1 (June 1987) [hereinafter AIDS BULLETIN].

81. "Seroconversion" is the "development of detectable specific antibodies in the serum as a result of infection or immunization." STEDMAN'S MEDICAL DICTIONARY 1408 (25th ed. 1990).

82. *See* Barron's, Mar. 13, 1989, at 7, col. 1.

within six months of infection may not be accurate. Data in the Imagawa study indicate that an infected individual may not show the AIDS antibody for three years.[83]

An infected individual enters the third stage when he becomes symptomatic and begins to experience AIDS-Related Complex (ARC). Although accommodation in the work place may become necessary at this point, there is no reason to conclude that an individual experiencing ARC cannot remain in the work force on a continuing basis. Data about this classification are difficult to confirm. One estimate, however, is that twenty to thirty percent of those exposed to the HIV virus will develop ARC within five years of exposure, and that nineteen percent of those with ARC will progress to full blown AIDS within fifteen to thirty months.[84]

A major problem for management, as well as for forecasters, is that the CDC does not report cases of ARC. As a result, forecasters are encumbered with a small population or sample from which to gather and generate projections. The only public policy measures that generate reports of ARC are those tests that are mandated under the rules of testing for blood donors, federal immigration policy, and military service. Obviously, a lack of solid data about this stage of the disease makes corporate policy more difficult to formulate, whatever that policy may become.

Stage four, known as full-blown AIDS, is the first stage that the CDC actually reports. At this point, an infected individual has contracted at least two or more opportunistic infections associated with the syndrome. Most data indicate that the period of time between stage two when an infected individual experiences seroconversion and the onset of stage four is between five and ten years. One estimate states that fifty percent or more of infected individuals will eventually become ill.[85] Assuming that there are individuals in this stage who are capable of working, this stage presents unique problems for the employer. So long as the employee is capable of performance on the job with reasonable accommodation, however, it has become the policy of major firms to continue employment.

83. *See* Birmingham Post-Herald, June 1, 1989, at A1, col. 1 (citing 320 NEW ENG. J. MED. 1458 (1989)).

84. *See* Elliott & Wilson, *supra* note 66, at 211.

85. *See* Osborn, *supra* note 79, at 4.

The identity of stage five is of significant value to the employer even though it may be of dubious value to other institutions. In this stage, the employee is no longer able or competent to work, has become disabled and is collecting disability (where provided) and is being tracked in the private sector under case management (where such private policy practices exist).[86] Properly collected, information regarding this stage can become vital in providing cost data for services to the ill employee.

According to demographic data, the most likely candidate to be an AIDS victim is male (ninety-three percent), white (sixty-one percent), and between the ages of thirty and thirty-nine (forty-seven percent).[87] Blacks and Hispanics account for twenty-four percent and fourteen percent of the disease, respectively. The age groups of twenty to twenty-nine and forty to forty-nine each have an incidence rate of twenty-one percent, with a ten percent rate over the age of forty-nine.[88] As of March 1987, the data indicated that sixty-six percent of AIDS victims were homosexual or bisexual males; seventeen percent were intravenous drug users; and eight percent had both of these characteristics. Heterosexuals with a partner in an at-risk group accounted for two percent of known cases.[89] It is expected that the rate for females will increase from seven percent to nine percent of known cases by 1991 because of heterosexual transmission from male intravenous drug users and bisexual men to their female sexual partners.[90] One recent study indicates that the fastest growth of persons infected with AIDS is among the heterosexual partners of persons infected with AIDS.[91]

There is a consensus that the treatment of AIDS does not have the same cost patterns as other, equally costly illnesses. According to Michael Gomez, Managing Consultant to A. Foster Higgins & Company, Inc., "Unlike some other catastrophic illnesses, AIDS requires only short periods of intensive medical

86. *See infra* notes 106-16 and accompanying text.

87. *See* AIDS BULLETIN, *supra* note 80, at 3.

88. *See id.*

89. *See id.*

90. *See* Osborn, *supra* note 79.

91. *See* Margolis, *Outreach and Counseling Efforts for High Risk Partners of HIV Infected Individuals*, 10 J. LEGAL MED. 59 (1989).

intervention."[92] Gomez says that the illness is primarily custodial, requiring medications throughout the course of the infection, but requiring hospitalization only in the final days of the patient's life. Furthermore, many patients are now electing to spend the final stages of the disease at home.[93] Another more recent study by Henry R. Adams, Director of Education, Texas Independent Nursing Home Association, corroborates the findings of Gomez. According to Adams, there are two periods of high cost within the progress of the disease. "The first is during the initial diagnosis phase, and the second is at the terminal stage of the illness."[94] According to Adams, Medi-Cal conducted a cost survey for 1984-85, finding that the average cost per patient was $59,000, with a life expectancy of eighteen months.[95] These figures are in sharp contrast to the estimated lifetime hospital costs of $147,000 per AIDS patient, which the Centers for Disease Control forecast in 1985 on the basis of the first 10,000 reported cases.[96] This information is sufficient to conclude that where case management is to be applied, the policy of each firm in the private sector must be to find a measure for the average cost per patient and a means of cost containment.

IV. Establishing Corporate Policy

A. *Insurance Benefits*

Many employee benefit programs provide employees with a benefits package that includes insurance. Most large firms with an established AIDS policy offer life insurance benefits as a portion of the benefits package. Where these benefits are in place, the employees are able to continue insurance coverage even after leaving the work force and being placed on long-term disability.

In the absence of a state regulation prohibiting the use of the HIV-antibody test for insurance purposes, however, many insurance companies require applicants to be tested. According to an internal survey of the insurance industry, sixty percent of

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92. Gomez, *Managing Healthcare Costs, Part I: The Dilemma of AIDS*, 20:5 Compensation & Benefits Rev. 23, 25 (1988).
93. *See id.*
94. Adams, *Financial Problems Inherent in the Admission of AIDS Patients into Long Term Care Facilities*, 10 J. Legal Med. 89, 94 (1989).
95. *See id.* at 96.
96. *See id.*

all insurance companies require the HIV-antibody test.[97] Based on estimates provided by the CDC, the insurance industry has concluded that "a person infected with HIV is, over a seven-year span, twenty-six times more likely to die than an individual with standard risks."[98] A spokesperson for the insurance industry asserts that by requiring the HIV-antibody test, they are meeting their social responsibility of protecting the integrity of the policies they are selling.[99] But according to Michael Gomez, the pursuit of testing by the life and health insurance industry may be premature. Payments for AIDS claims have not exceeded one percent of all health and life payments, and they are not projected to exceed ten percent of total health and life payments.[100]

Golden Rule Insurance Company of Indianapolis, reputed to be the leading writer of individual medical insurance policies, is setting the standard for the insurance industry. Golden Rule's policy is to provide medical coverage for policy holders who develop AIDS after the end of twelve consecutive months during which the person was continuously insured. Golden Rule does not require testing for the HIV antibody. It is the position of Golden Rule's chief executive officer, Pat Rooney, that testing is not cost-effective. According to Mr. Rooney, testing would cost his firm about $450,000 per week for all applicants. With an average AIDS claim of $75,000, Golden Rule believes that testing does not provide a cost-effective solution.[101] If the insurance industry followed Golden Rule's lead, corporations would be better able to provide appropriate benefits for their employees.

B. *Selecting a Corporate Policy*

There is a crucial need for corporations to develop policies to deal with AIDS victims. According to recent polls, only about ten percent of the companies surveyed have an AIDS policy in place. Most of the companies that do have established policies have had them for two years or less.[102]

97. *See* Hollowell & Eldridge, *AIDS and the Insurance Industry*, 10 J. LEGAL MED. 77, 80 (1989).

98. *Id.* at 81.

99. *See* Briggs, *AIDS: Hoopla or Horror?*, LIFE INS. SELLING, Apr. 1989, at 44.

100. *See* Gomez, *supra* note 92, at 24.

101. *See* National Underwriter, Oct. 3, 1988, at 51, col. 2.

102. *See AIDS Research: Where the Battle Stands*, BUS. WEEK., Mar. 23, 1989, at 132;

In developing corporate policies, firms can take one of three approaches. First, the firm can view AIDS as a life-threatening illness and have an insurance policy written specifically for employees affected by life-threatening illnesses. Second, the firm can create an AIDS-specific policy and write a comprehensive plan specificially for AIDS. Third, a firm with existing corporate policies to deal with life-threatening illnesses may opt not to adopt an AIDS-specific policy.[103] No one strategy is currently more popular than another. Determining the most appropriate plan will depend entirely upon the attitude and resolve of top management within the firm.

There are two areas of corporate policy that are not contested by firms that have adopted AIDS policies. These are the need for a comprehensive educational program,[104] and the necessity for confidentiality regarding AIDS victims.[105] In addition, most firms have established a program designed to foster cost containment. The most prevalent and successful program for the short-run has been case management. According to one analysis,[106] a case management team should include medical, psychological, and social workers who, in conjunction with the patient, the patient's physician, and the patient's family, try to determine the most appropriate care for the AIDS victim. James A. Klein observes that typical case management methods include monitoring the course of the illness, supervising and authorizing necessary medical services, and providing outpatient, home, and hospice care where needed.[107]

Chevron USA is one example of a firm that has used case management as a method both to contain cost and provide the desired level of care for the patient. According to John Ranslem, manager of benefits planning and policy, the average cost per patient is about $35,000.[108] Skilled nursing and hospice care are a standard part of the health benefits at Chevron. No-

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Stevens, *supra* note 13, at 84; Patterson, *Managing with AIDS in the Workplace*, MGMT. WORLD, Jan.-Feb. 1989, at 45.

103. *See* Wagel, *AIDS: Setting Policy, Educating Employees At Bank of America*, 65 PERSONNEL 4 (1988).

104. *See* J. KLEIN, AIDS: AN EMPLOYER'S GUIDEBOOK 5 (1985).

105. *See id.* at 19.

106. *See* Myers & Myers, *AIDS: Tackling a Tough Problem Through Policy*, PERSONNEL ADMIN., Apr. 1987, at 108.

107. *See* J. KLEIN, *supra* note 104, at 8.

108. *See Chevron's AIDS Cases Average $35,000 Each*, EMPLOYEE BENEFIT PLAN REV., Sept., 1988, at 35.

tably, Chevron does not test for the HIV antibody. Any increases in the health care premiums are passed along to the employees because the health care plan is contributory.[109]

Through the use of a self-insurance plan, Bank of America also uses case management to provide alternatives such as home care and hospice care. This plan also includes the use of community resources for nonmedical assistance.[110] According to William F. Holmes, Vice President and Manager of Equal Opportunity Programs at Bank of America, the Bank of America plan provides better service for less cost because it takes advantage of community services and is not tied to expensive, in-patient care. "Whereas managing the typical case of AIDS costs about $50,000 and more in New York City, and between $30,000 and $35,000 in San Francisco, the costs for us are about $25,000."[111]

One of the strongest proponents of the case management approach to handling AIDS cases is Jackie Mazoway, a registered nurse and National Medical Case Management Coordinator for Intracorp. According to Ms. Mazoway, insurers have learned the advantages of using case management to control the human and financial costs: "Case management, especially when initiated soon after diagnosis, provides alternatives that control the costs while easing the patient's way."[112] Although viewing an early commitment to case management as the most desirable way to address both human and economic costs in the present social environment, Mazoway does not see this as a long-term solution. According to Mazoway, the long-term efforts should be directed toward research that will lead to better prevention and ultimately a cure for AIDS, and into educational efforts that prevent the spread of the virus.[113]

The insurance industry has begun to adopt case management within its own corporate policies. One well known firm that is seriously involved in innovative case management is John Hancock Mutual Life Insurance Company. According to Steven Peskin, Medical Director of Management Cases, a patient can request a case manager who will keep the patient out of the

109. *See id.* at 38.
110. *See* Wagel, *supra* note 103, at 8.
111. *Id.*
112. National Underwriter, Apr. 18, 1988, at 18, col. 1.
113. *See id.* at 21.

hospital.[114] The Hancock plan will provide for home care for the patient, and where needed, Hancock will negotiate with the visiting nurse associations for preferred rates. In addition to this program of outreach, Hancock has participated with early intervention by approving the cost of an experimental drug, pentamidine, even before it has received FDA approval.[115] Mr. Peskin estimates that the average cost per patient from diagnosis to death is between $60,000 and $75,000 in most AIDS cases. By early intervention and innovative procedures such as case management, Hancock is reducing the total bill by $30,000, primarily as a result of allowing patients to stay out of the hospital.[116]

IBM has led the way in establishing a long-term policy for addressing AIDS in the workplace. The policy statement that sets forth "IBM's Practice Regarding People With AIDS," states:

> IBM developed its practice regarding people with Acquired Immune Deficiency Syndrome (AIDS) in 1985 in response to the worldwide spread of the disease and the threat it poses to our employees and the communities in which they live and work. That practice provides that we treat employees with AIDS in the same manner that we treat employees with other chronic illnesses—giving guidance, support, and health benefits for persons with the disease, and education for employees.[117]

According to Martin J. Sepulveda, Director of Health, IBM United States, AIDS is treated by the company as a chronic disease because the duration of AIDS is both long and indefinite.[118] This designation of AIDS as a chronic disease has resulted in treatment in the form of employee education, medical intervention, and medical action, according to IBM Corporate Health and Safety Director, Glenn E. Haughie.[119] Focusing on issues that relate to a specific disease, the employee is given information and education through a variety of media within the firm. Education is provided by the medical departments, an

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114. *See* Barron's, *supra* note 82, at 20, col. 2.

115. *See id.*

116. *See id.*

117. International Business Machine Corporation, Fact Sheet: IBM'S Practice Regarding People With AIDS 1 (1989) [hereinafter IBM Fact Sheet].

118. Telephone interview with Dr. Martin J. Sepulveda, Director of Health, IBM U.S. (Aug. 14, 1989).

119. Telephone interview with Dr. Glenn E. Haughie, Corporate Health and Safety Director, IBM (Aug. 14, 1989).

employee assistance program, brochures, videos, and an AIDS education booklet. In addition, there is an ongoing management training program. According to Dr. Haughie, confidentiality is emphasized and reinforced at the managerial level.[120]

IBM does not test applicants or employees for AIDS. Consequently, the corporation has no knowledge of the number of employees who may have AIDS at any given period in time. IBM's perspective is that the HIV-infected employee should be treated in the same manner as an employee with any other long-term illness would be treated.

IBM has a "broad-based benefits package for all employees," according to Michael A. Tarre, Director of Benefits, IBM United States.[121] There is no cost to the employee for the health insurance policy. The employee participates in the cost of medical care through the payment of an annual deductible and a twenty-percent co-payment for physicians' fees and prescribed drugs. The employee also pays for forty percent of the room and board during the first day of hospitalization. Hospitalization is fully covered by IBM after the first day. In addition to hospital care, IBM provides skilled nursing care in an approved extended care facility for a period of up to thirty days; home care for fifty visits with full reimbursement, with the employee paying twenty percent co-payment beyond the first fifty visits; and a hospice care program that reimburses for costs up to $5,000.[122]

At IBM, health care costs are attacked at the grass roots level. Each employee is educated on the merits of being a responsible consumer when using health care benefits. According to Mr. Tarre, IBM has several programs that focus on wellness. In addition to the Employee Assistance Program, there is a "Plan for Life" composed of a series of courses related to personal and physical wellness. There is also a "Voluntary Health Assessment Program." Beginning at age twenty-five and every five years thereafter, the employee may have a complete health risk assessment. This report is reviewed with the employee to discuss any potential medical problems if they should exist. The entire focus is on maintaining a healthy lifestyle and increasing

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120. *See id.*

121. Telephone interview with Michael A. Tarre, Director of Benefits, IBM U.S. (Aug. 17, 1989).

122. *See id.*

the life expectancy of the employee.[123]

It is the policy at IBM to keep employees with AIDS in the work force so long as they are able to work. When possible, accommodations will be made to allow an employee to remain on the job. According to Dr. Haughie, "it is the goal of IBM to assist in every way possible."[124] In AIDS cases, as with all long-term illnesses, the IBM employee will be allowed to remain in the workplace so long as it does not jeopardize the health of the ill employee. Each individual is reviewed on a case-by-case basis for long-term disability leave. All long-term illnesses, including AIDS, are treated similarly in this determination. Under the umbrella of the Sickness and Accident Plan, any employee with a chronic illness is allowed to be away from work for a period of up to one year with full salary. If the employee is unable to return to work, medical disability coverage becomes available. The employee receives seventy-five percent of normal pay for the first eighteen months, after which reimbursement is at the rate of forty percent of normal pay until retirement. Full medical coverage is also provided throughout this period. Upon death, the employee's eligible dependents are entitled to receive death benefits.

In addition to the continuing education program for employees and managers, IBM has been actively engaged for the past several years in providing support to education and research projects dealing with AIDS. Among these have been a $1.5 million donation in equipment, software, and support services to the World Health Organization's Global Program on AIDS; a $100,000 donation to the American Foundation for AIDS Research (AmFAR) to help fund an AIDS molecular-virology laboratory at St. Luke's-Roosevelt Hospital in New York; a contribution of $65,000 to AmFAR for the publishing and distribution of a directory of AIDS information materials; and a donation of $25,000 in 1986 and 1987 to the New York Blood Center to help cover the increased costs of testing blood as a result of the AIDS epidemic. Augmenting its expanding list of educational and research projects, IBM employees are actively involved in supporting community-based education and research projects at a local level throughout the United States.[125]

123. *See id.*

124. Telephone interview with Dr. Haughie, *supra* note 119.

125. *See* IBM FACT SHEET, *supra* note 117, at 2.

V. Conclusion

When firms have satisfactorily addressed the problem of cost containment, they can properly focus on a policy of education for the prevention of the spread of AIDS. As Ms. Mazoway indicated, education coupled with research to find the ultimate cure should be the proper long-term course for the business sector as a whole.[126] Addressing the National Conference on HIV in Washington, D.C. in November 1987, then-Secretary of Education, William J. Bennett, said, "The fact is, AIDS is a behavior-related disease."[127] June E. Osborn, Dean of the School of Public Health, the University of Michigan, strongly supports the thesis that the ultimate cure for the behavior-related AIDS epidemic is prevention through education. In considering whether significant changes can be made in behavior, given people's sexual preferences and habits, Ms. Osborn contends that "it is clearly important that we should try seriously and that campaigns of public education and information need to play a major role in public policy towards the AIDS epidemic."[128]

It would appear that both the government and the educational sectors have provided the business sector with some direction for its proper immediate and long-term goals with regard to AIDS in the workplace. Nevertheless, specific public policy on the AIDS issue is sporadic. For the most part, state and federal legislation have not specifically considered the AIDS victim, but instead have applied the general handicapped laws to AIDS-related problems. Furthermore, there are few judicial decisions interpreting the laws as they apply to AIDS victims. Even in *School Board v. Arline*,[129] the Supreme Court refused to extend the holding to apply to AIDS victims. In addition, the fact that there are distinct stages of the syndrome with different attendant problems has not been addressed by either state or federal governments.

In the absence of a comprehensive public policy, there is a great need for specific corporate policies to deal with the AIDS issue. It is currently believed by legal scholars that employers

126. *See* National Underwriter, *supra* note 112, at 18, col. 1.

127. W. Bennett, Speech as U.S. Secretary of Educ. at the Nat'l. Conf. on HIV (Nov. 17, 1987) (available U.S. Dept. of Educ.).

128. Osborn, *supra* note 79, at 4.

129. 480 U.S. 273, *reh'g denied*, 481 U.S. 1024 (1987).

must be careful in dealing with both current and prospective employees with AIDS. It is vital, therefore, that corporations develop policies to deal with AIDS-related issues. Case management is an excellent short-term approach, and a comprehensive program, such as IBM's, is necessary for the long-term.