HIV, AIDS & Job Discrimination: North Carolina Failure and Federal Redemption

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I. INTRODUCTION

Last spring, Campbell University received bills totaling over twenty thousand dollars for the medical treatment of one Campbell physical education teacher who had missed five weeks of work. Upon inquiry, Campbell officials found the source of the teacher's problem - Acquired Immune Deficiency Syndrome (hereinafter “AIDS”). When the teacher returned to work, school officials told him to clean out his office and not return for any reason. Yet, before the school discovered the illness, one school official informed the teacher that his absence was no problem. Recovering from pneumocystis carinii pneumonia during his absence, the teacher sent lesson plans and prepared tests for his students. Before the incident, he consistently earned solid performance ratings. Campbell University relieved the teacher of his duties solely because he had AIDS.¹

The teacher contacted the Equal Employment Opportunity Commission (hereinafter “EEOC”). On April 25, 1994, the EEOC filed a law suit against Campbell University for violating the Americans with Disabilities Act (hereinafter “ADA”).² This law-

1. The above are only alleged facts in the EEOC's federal suit against Campbell University as reported in Donna Seese, Teacher with AIDS Sues Campbell University, THE NEWS & OBSERVER, Apr. 28, 1994, at A3 and Campbell Defends Decision to Ban Teacher with AIDS, DAILY REFLECTOR, Apr. 29, 1994, at A1. Subsequently, attorneys for the teacher asked the U.S. District Court in Raleigh to seal all court documents to protect the teacher's identity. As of this writing, the court documents are unavailable to the general public. It should be noted that it is not the author's intention to determine the liability of any party concerned in this pending case. Any reference to this case is solely in the context of an introduction to HIV/AIDS related job discrimination law in North Carolina.

suit is North Carolina's first AIDS related job discrimination case under the ADA. Yet, such lawsuits are not uncommon elsewhere, and victims of AIDS related job discrimination are seeing results:

**Chicago:** Dovenmuehle Mortgage, Inc. fired a clerk three months after he confided to his immediate supervisor that he had AIDS. The clerk was among the first AIDS patients in the country to file under the ADA. After losing a motion for summary judgment, the mortgage company agreed to pay the clerk $160,000 in damages and back pay and reinstated the clerk as well.

**Philadelphia:** William Shapiro, Esq. P.C. fired one of its lawyers without notice or severance pay eight days after the lawyer told fellow attorney William Shapiro that he had AIDS. The lawyer sued under the ADA, the Pennsylvania Human Relations Act, and the Pennsylvania common law for intentional infliction of emotional distress. The Shapiro firm filed a motion to dismiss in federal court. District Judge Gawthrop denied the law firm's motion as to all of the lawyer's claims except intentional infliction of emotional distress. Less than one month later, the Shapiro law firm settled the case on undisclosed terms. Said the prevailing lawyer, "I'm satisfied."

The preliminary results are optimistic for people who are victims of AIDS related job discrimination. But as North Carolina approaches its first AIDS employment discrimination case under the new federal act, it is important to note the development of AIDS related discrimination law in North Carolina. In the past, the results illustrated above were not always possible. In 1989, the Presidential Commission on the Human Immunodeficiency Virus Epidemic (hereinafter "Presidential Commission") urged for legislative change, when it stated:

5. Id.
10. Slobodzian, supra note 8, at B2.
As long as discrimination occurs, and no strong national policy with rapid and effective remedies against discrimination is estab-
lished, individuals who are affected with HIV will be reluctant to
come forward for testing, counseling and care. This fear of poten-
tial discrimination . . . will undermine our efforts to contain the
HIV epidemic, and will leave HIV-infected individuals isolated
and alone. 11

As the Presidential Commission pushed for a “national” pol-
icy, North Carolina government reinforced the need for such
sweeping federal legislation. In fact, before the ADA, the Camp-
bell teacher relieved of his duties arguably would have had no
cause of action under North Carolina law. For example, the North
Carolina Supreme Court declined to apply the state’s Handi-
capped Persons Protection Act to persons infected with the
Human Immunodeficiency Virus (hereinafter “HIV”). 12 The court
reached this result despite the fact that the North Carolina Gen-
eral Assembly patterned its law after a federal law which federal
courts interpreted as applying to HIV infected persons. Also, the
North Carolina General Assembly attempted to address the issue
of AIDS discrimination by adding employment provisions to its
Communicable Disease Act. 13 The legislature, instead, provided a
license to employers to discriminate based on HIV or AIDS. These
shortcomings, in part, forced the advent of a national policy. Yet,
it was not until 1992, when the ADA became effective, that North
Carolina citizens were provided with a significant weapon against
AIDS related job discrimination.

This Comment explores the origin and effect of the ADA on
AIDS related discrimination law in North Carolina. First, the
Comment provides an overview of the disease, the discrimination
behind it, and the past efforts to confront the problem. In particu-
lar, the Comment details how the federal government and most
states moved to respond to AIDS discrimination and how simulta-
neously North Carolina’s government stripped most victims of
AIDS discrimination of their day in court. The Comment then
describes the ADA, its application to AIDS discrimination, and

Gasarch, Discrimination Against the Disabled, AIDS AND THE LAW 199, 209
(1990). See also infra text accompanying notes 74-97.
98-110.
how the ADA contrasts with North Carolina’s response to AIDS discrimination.

II. OVERVIEW

A. The Problem

AIDS is a specific group of diseases or conditions which are indicative of severe immunosuppression related to infection with HIV.\textsuperscript{14} The condition arises from HIV’s attack on one type of white blood cell, the T-cell.\textsuperscript{15} These cells contribute in two ways to the body’s immune defenses: \textit{regulatory T-cells} work with B-cells (another type of white blood cell) to produce particular antibodies, while \textit{cytotoxic T-cells} directly attack body cells either already infected by viruses or malignant due to cancer.\textsuperscript{16} One of the \textit{regulatory T-cells}, the \textit{helper T-cells}, aid in activating B-cells, T-cells, and other disease-fighting cells. HIV attaches to a protein on the \textit{helper T-cells}, causing the \textit{helper T-cells} to die.\textsuperscript{17}

In its most extreme manifestation, the gradual elimination of \textit{helper T-cells} leads to an irreversible immunodeficiency state.\textsuperscript{18} The body, therefore, becomes open to many rare cancers and opportunistic diseases, i.e., Kaposi’s sarcoma and \textit{pneumocystis carinii} pneumonia.\textsuperscript{19} Not all HIV-infected individuals, however, exhibit this extreme state, but suffer from a range of symptoms. On the other hand, one can have HIV yet show no outward signs of infection.\textsuperscript{20} This condition is commonly referred to as \textit{asymptomatic HIV infection}. Generally AIDS is diagnosed (rather than HIV infection) upon the appearance of specific clinical conditions

17. Id.
18. Id. at 4.
listed by the CDC, including two of the more frequent manifestations of HIV infection - Kaposi's sarcoma (a rare skin cancer) and pneumocystis carinii pneumonia. Researchers know neither the percentage of those with HIV infection who will develop "full blown" AIDS nor the length of time before HIV infection develops into AIDS.

Evidence shows that HIV transmission occurs only "(1) through intimate sexual contact with an infected person; (2) through invasive exposure to contaminated blood or certain other bodily fluids; or (3) through preinatal [sic] exposure (i.e., from mother to infant)." On the contrary, there is no evidence that HIV transmission occurs through "casual workplace contact," such as shaking hands, hugging, or even kissing on the cheek or lips. For example, out of an estimated health-care workforce of over five and a half million, only forty health-care workers actually became infected with HIV on the job. In contrast to its devastating effects, the virus itself is fragile and killed by most ordinary disinfectants.

Despite the difficulties present in HIV transmission, the reported number of HIV infections and AIDS cases continues to rise. As of December 31, 1993, the CDC reports 361,164 cases of AIDS in the United States and its territories. North Carolina reported over four thousand of those cases. Additionally, North Carolina reports that over four thousand cases of HIV infection (not AIDS) have been identified since the state began HIV infection reporting in February 1990. This number, however, represents only the minimum number of HIV-infected persons in North Carolina. Estimates purport that between 650,000 and 1,400,000 Americans are HIV infected. In fact, the CDC projects

25. Id. at 737.
26. CDCP, supra note 14, at 19. Note, however, that eighty-three cases of HIV transmission may have occurred on the job. Id.
28. CDCP, supra note 14, at 5.
29. Id.
30. Id. at 21.
31. Id. at 31.
32. Christyno L. Hayes, Note, Rights of HIV-Infected Employees and Job Applicants Under North Carolina Law: Lots of Legislative Activity, But Just How
that in the United States, between 130,000 and 205,000 people will suffer severe immunosuppression by January 1995.33

New legal problems arise with these statistics. As the late Randy Shilts describes:

Suddenly there were children with AIDS who wanted to go to school, laborers with AIDS who wanted to work, and researchers who wanted funding, and there was a threat to the nation's public health that could no longer be ignored. Most significantly, there were the first glimmers of awareness that the future would always contain this strange new word.34

Shilts saw that the incredible number of people with AIDS presents a uniquely modern dilemma.

First, there exists the timeless challenge of facing "the unknown." As with diseases of the past when unfamiliar - leprosy, polio, epilepsy, cancer- fear of contagiousness leads to the isolation of the sick. This fear does not end until there is an understanding of how to transmit and prevent the disease.35 Second, because the AIDS epidemic first struck the "fringe" elements of our society through behavior many Americans consider repugnant, many treat a public health crisis as a moral crisis. In the process of rejecting the behavior, many ignore the disease. As one author explains:

[An innate fear persists not just of the disease, but of the stigma surrounding AIDS and those suffering from it. Even though AIDS is today recognized as a threat to the general public, people still associate the disease with gays and intravenous drug abusers. There is no question that many of the problems . . . reflect the antagonism toward these groups.36

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Finally, the AIDS epidemic creates the challenge of controlling an epidemic that spreads predominantly through sources generally considered inappropriate topics for public discussion - sex and drugs.

The challenge of breaking through these barriers failed during the early years of the epidemic. The disease continues to spread today and fear remains. Often, fear translates into unwarranted exclusion of individuals with either HIV infection or AIDS from the mainstream of society. Government, both state and federal, found that its role was not only to control the disease, but also remedy the social injustice it bore.

**B. Early Responses to AIDS Discrimination**

1. **The Rehabilitation Act of 1973**

Before the ADA, the Rehabilitation Act of 1973 (hereinafter "RA") provided the most significant protection for victims of AIDS related discrimination. The protection offered by the RA, however, extended only to programs or activities receiving federal financial assistance or programs or activities conducted by an executive agency or the United States Postal Service. Yet, within this narrow scope, AIDS discrimination sufferers found their first victories. More important, the RA’s language and subsequent case law formed the foundations of both the ADA and North Carolina's legislation for the disabled.

At its core, the RA states that no otherwise “qualified handicapped person” can "be excluded from the participation in, be

37. See generally Shilts, supra note 34.


40. See 29 U.S.C. § 794(d) (1988 & Supp. IV 1992) (stating that the standards used to determine whether section [794(a)] has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990.”);
denied the benefits of, or be subjected to discrimination" under
any federally funded program "solely by reason of her or his disa-


bility." 42 The RA covers "any person who (i) has a physical or
mental impairment which substantially limits one or more major
life activities, (ii) has a record of such an impairment, or (iii) is
regarded as having such an impairment." 43 Enforcement of the
RA duplicates the procedures and remedies of the 1964 Civil
Rights Act. 44

The RA's statutory language never refers specifically to AIDS,
or any contagious disease in general, as a protected handicap.
Although many commentators disagreed as to the inclusion of
AIDS as a handicap, 45 the United States Supreme Court essen-

reasonable accommodation, can perform the essential functions of the job in
question." Id. In 1992, Congress changed the language of the RA to conform to
the ADA's terminology. Thus, "qualified handicapped person" is now "qualified
individual with a disability."

43. 45 C.F.R. § 84.3(k). The regulations define "Physical or mental
impairment" as:

[A]ny physiological disorder or condition, cosmetic disfigurement, or
anatomical loss affecting one or more of the following body systems:
neurological; musculoskeletal; special sense organs; respiratory,
including speech organs; cardiovascular; reproductive, digestive,
genito-urinary; hemic and lymphatic; skin; and endocrine; or any
mental or psychological disorder, such as mental retardation, organic
brain syndrome, emotional or mental illness, and specific learning
disabilities.

45 C.F.R. § 84.3(i) (1993). "Major life activities" is defined as "functions such as
caring for one's self, performing manual tasks, walking, seeing, hearing,
speaking, breathing, learning, and working." Id. Both the North Carolina
Handicapped Persons Protection Act [hereinafter "NCHPPA"] and the ADA are
patterned after this language.

44. 29 U.S.C. § 794(a) (1988). After exhausting administrative remedies, an
injured party may file a complaint with the EEOC. If, after an investigation,
reasonable cause is found and the EEOC can reach no informal conciliation with
the employer, the EEOC refers the matter to the Attorney General, who may
either file a civil action against the head of the violating federal agency or
program or allow the injured party to file such an action. See 42 U.S.C. § 2000e-

45. In fact, the Department of Justice during the Reagan Administration
concluded in one memorandum that the RA is applicable to discrimination
stemming from the "disabling effects of AIDS," but not an "individual's real or
perceived ability to transmit the disease." See Gasarch, supra note 11, at 199,
209 (discussing a memorandum from Charles C. Cooper, assistant attorney
general, Office of Legal Counsel, to Robert E. Robertson, general counsel,
Department of Health and Human Services (June 6, 1986)).
tially resolved the debate with its opinion in *School Board of Nassau County v. Arline*.

Although the case did not address AIDS specifically, the Court confronted discrimination based on another contagious disease. In *Arline*, a local school board discharged an elementary school teacher who had suffered a third relapse of tuberculosis within two years. Justice Brennan, writing for the majority, maintained that allowing discrimination solely because a physical impairment may be contagious was inconsistent with the purposes of the RA. Justice Brennan opined:

> Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious. The [RA] is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments. . . . The fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were “otherwise qualified.” Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent.

The Court concluded that a contagious disease may constitute a “handicap” under the RA.

The Court then held that in finding whether the dangers of transmission outweigh the disabled individual’s right to a job, a court should consider “(a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.”

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47. See id. at 282 n.7.
48. Id. at 276.
50. Id. at 288. The Court adopted the position espoused in the American Medical Association’s *amicus curiae*. See Brief for American Medical Association as Amicus Curiae at 19, *Arline* (No. 85-1277).
requires exclusion of the employee where there is a "significant risk of communicating an infectious disease to others."

The Court remanded the case to the District Court to conclude whether the fired employee was "otherwise qualified" to serve as a teacher, and thus protected under the RA.

In subsequent federal litigation, as AIDS was incorporated into the scope of the RA, the notion that exclusion should be based only on medically sound judgment remained central to courts' analyses of the issues. For example, in California, a local Department of Education reassigned a teacher of hearing-impaired students to an administrative position and barred him from teaching in the classroom after learning the teacher was diagnosed with AIDS. The teacher filed an action under the RA, asking first for a preliminary injunction to gain reinstatement. The trial court denied the preliminary injunction because it was not "completely certain" that transmission could not occur in the typical classroom environment and the fear of the children, which the teacher's presence in the classroom would produce, outweighed any injury to the teacher.

On appeal, the Ninth Circuit, using the analysis outlined in Arline, held that AIDS is a handicap under the RA. In showing that a fired employee is "otherwise qualified" for a position apart from a disability, the court held that the claimant need not disprove "every theoretical possibility of harm." The RA only

51. Arline, 480 U.S. at 287 n.16.
52. Id. at 288-89. On remand, the district court held that the teacher was "otherwise qualified" when she was discharged, and therefore, she was entitled to reinstatement and back pay. See Arline v. School Bd. of Nassau County, 692 F. Supp. 1286 (M.D. Fla. 1988). Subsequently, the RA was amended to include language based on the Arline decision. The language included, in pertinent part, reads:

(C) For the purpose of sections 793 and 794 of this title, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

53. Chalk, 840 F.2d at 703.
54. Id. at 707, 711.
55. The court essentially assumed that AIDS was a "handicap," and moved directly from an outline of the Arline decision to the "otherwise qualified" analysis. Id. at 705.
56. Id. at 707-09.
requires exclusion if there is a significant risk of harm. As in *Arline*, the court concluded that while "[l]ittle in science can be proved with complete certainty, [courts should rely on] reasonable medical judgements [before] speculation . . . with no credible support in the record." Similarly, the court held that the fears of parents and students are not grounds for denial of a preliminary injunction; the district court should monitor a case, "guided by qualified medical opinion" to ensure safety to the community. The court remanded the case to the district court with direction to grant the preliminary injunction.

Requiring action based only on "medically sound judgment," however, does not guarantee that no one can ever exclude a person with AIDS from certain tasks. In fact, many courts are reluctant to find health-care workers with AIDS "otherwise qualified" for health care employment. For example, a surgical technologist is not "otherwise qualified" due to the "cognizable risk of permanent duration with lethal consequences." The technologist placed his hands in a body cavity at least once a day, and had accidents with sharp surgical instruments in the past. In another case, an employer transferred a HIV-positive firefighter to light duty after learning of his HIV status. The Eleventh Circuit affirmed the exclusion from active duty in part because although "the belief of posing a risk through rescue duties was erroneously held" by two

57. *Id.* at 708 (citing *Arline*, 480 U.S. at 288 n.16).
58. *Chalk*, 840 F.2d at 708.
59. *Id.* at 711.
60. *Id.* at 712. Courts consistently apply this analysis to the opposite side of the classroom - where the student has AIDS. In fact, a California federal district court granted a preliminary injunction allowing a child with AIDS to attend regular kindergarten classes before the Supreme Court announced the *Arline* opinion. The court found that the child was "otherwise qualified" for class enrollment, although in one incident the child "got into a skirmish" and bit a fellow student. *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1987). In post-*Arline* decisions, courts addressing the inclusion of children with AIDS into integrated classroom settings have reached similar results. See *Martinez v. School Bd. of Hillsborough Co.*, 861 F.2d 1502 (11th Cir. 1988); *Ray v. School Dist. of DeSoto Co.*, 666 F. Supp. 1524 (M.D. Fla. 1987).
61. *Bradley v. University of Tex. M.D. Anderson Cancer Ctr.*, 3 F.3d 922, 924 (5th Cir. 1993). See also *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820 (5th Cir. 1990) (licensed practical nurse who refused to submit HIV test results was not "otherwise qualified" for position).
62. *Bradley*, 3 F.3d at 924.
doctors consulted prior to the firefighter's transfer, the defendants relied upon this "reasonable medical opinion." 64

Generally persons infected with HIV do not pose a direct threat to the safety of others. 65 The RA and its case law illustrate that AIDS and HIV infection is a "disability," which should not alone disqualify a person from employment. In sum, the question is really whether the person can otherwise operate in the environment without creating an undue risk of injury to others. Specifically, this hurdle must be crossed before liability can extend to the employer. Finding the answer to this question falls upon science, not the layman's preconceived notions of contagiousness.

2. States

As with the resolution of many issues, states differ in approach. 66 Most states have responded to AIDS discrimination by expanding the rights of the individual excluded from general employment, either by interpreting an existing handicap anti-discrimination statute as including AIDS or HIV infection 67 or adding specific AIDS anti-discrimination language. 68 An expand-

64. Id. at 1182. See also Harris v. Thigpen, 941 F.2d 1495 (11th Cir. 1991). Alabama prison officials segregated inmates with AIDS from the general prison population. The trial court concluded that the prisoners were not "otherwise qualified" due to the homosexual activity, intravenous drug use, and tattooing pervasive in a prison environment. See Harris v. Thigpen, 727 F. Supp. 1564 (M.D. Ala. 1990). The Eleventh Circuit remanded the case for a determination of the prisoners' qualifications regarding each program, not simply regarding the general population.

65. Hancock, supra note 36, at 8.

66. See generally Mathiason & Berlin, supra note 15, at 748-49; Webber, supra note 38, at 99-103.


sion of a victim's rights, however, is not absolute. For example, Georgia and Kentucky expressly exclude those with communicable disease from protection under their respective disability acts. 69 Additionally, in Missouri, a clerk complained to the Missouri Commission on Human Rights when his employer moved him from his duties as sandwich maker after it was rumored he had AIDS. 70 The statute defined "handicap" as "a physical or mental impairment which substantially limits one or more of a person's major life activities, or a condition perceived as such." 71 The court held that the employee had "no 'condition' to be 'perceived.' . . . The statute requires the existence of a condition which might be perceived to be a handicap." 72 Although most states respond to AIDS related job discrimination by expanding victims' rights, examples such as these added fire to the argument for a national policy. 73

C. North Carolina's Handling of AIDS Discrimination

As the following illustrates, the importance now attached to the ADA stems in part from North Carolina's failure to provide a comprehensive cause-of-action for victims of AIDS related discrimination.

1. Burgess v. Your House of Raleigh

In 1985, the North Carolina General Assembly expanded the rights of disabled individuals with legislation patterned after the federal RA. 74 The North Carolina Handicapped Persons Protection Act (hereinafter "NCHPPA") 75 prohibits "[a]n employer to fail to hire or consider for employment or promotion, to discharge, or

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69. GA. CODE ANN. § 34-6A-3(b) (1992); KY. REV. STAT. ANN. § 207.140(2)(c) (Michie/Bobbs-Merrill 1991).
72. Rose City Oil Co., 832 S.W.2d at 317. Compare with Hilton v. Southwestern Bell Tel. Co., 936 F.2d 823 (5th Cir. 1991) (interpreting a Texas act as excluding AIDS, for the examples of impairments listed in the statute's definition of handicap were all "physiological rather than pathological condition of physical health").
73. See Webber, supra note 38, at 45, 99.
otherwise to discriminate against a qualified handicapped person on the basis of a handicapping condition with respect to compensation or the terms, conditions, or privileges of employment.\textsuperscript{76} Like the RA, a “Handicapped person” is “any person who (i) has a physical or mental impairment which substantially limits one or more major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment.”\textsuperscript{77} Yet, while the North Carolina legislature patterned the statute’s language after the RA, North Carolina’s courts chose to ignore the federal act’s case law concerning AIDS related discrimination.

In \textit{Burgess v. Your House of Raleigh, Inc.},\textsuperscript{78} the North Carolina Supreme Court held the state handicap act does not apply to one infected with HIV who is otherwise asymptomatic. In the case, the defendant, Your House of Raleigh restaurant, employed plaintiff, Scott Burgess, as a short-order cook until learning that he was HIV-positive. Based solely on this information, the defendant fired the plaintiff.\textsuperscript{79} Plaintiff sued defendant, alleging his discharge violated the anti-discrimination language in the NCHPPA. The superior court, however, dismissed the suit, concluding that plaintiff was not a “handicapped person” as defined by the state handicap act.\textsuperscript{80} The North Carolina Supreme Court granted discretionary review before a determination by the North Carolina Court of Appeals.\textsuperscript{81} Plaintiff primarily argued that the court should, like other federal and state courts, recognize that an asymptomatic HIV infected individual has a physical impairment which limits major life activities and thus falls within the statute’s definition of a “handicapped person.”\textsuperscript{82} Mentioning “little

\textsuperscript{76} N.C. GEN. STAT. § 168A-5(a) (1987).
\textsuperscript{77} N.C. GEN. STAT. § 168A-3(4) (1987). The NCHPPA patterns its definitions of “physical or mental impairment” and “major life activity” after the RA. One difference between the NCHPPA and the RA is the absence of “working” as a “major life activity.” \textit{See supra} note 43.
\textsuperscript{78} 326 N.C. 205, 388 S.E.2d 134 (1990).
\textsuperscript{79} \textit{Id.} at 207, 388 S.E.2d at 135.
\textsuperscript{80} \textit{Id.} at 208, 388 S.E.2d at 136.
\textsuperscript{81} \textit{Id.}
uniformity" and "minimal case law," however, the court found the case law from other states "of little value." The court then distinguished the federal and state acts, despite conceding that their definitions of "handicapped person" and "qualified handicapped person" were "virtually identical."

The court agreed that HIV infection is a "physical impairment" under the state act, but unlike federal case law refused to recognize it as one which "limits a major life activity." Plaintiff maintained that the termination from employment was itself a limitation of a "major life activity." The court noted that unlike the federal act, the state act does not list "working" as a major life activity. The absence of the word "working" led the court to conclude that "the General Assembly intended the [NCHPPA] to be more narrow in scope than its federal counterpart." As an asymptomatic carrier of HIV, the plaintiff did not show any other condition which actually limited any specifically listed "major life activity." Plaintiff also argued that limitations on child rearing and intimate relations constitute limitations on "major life activities." Yet, the court concluded these activities are not within the scope of "major life activities" as evidenced by the listed activities, "that is, essential tasks one must perform on a regular basis in order to carry on a normal existence." The plaintiff, therefore,

83. Burgess, 326 N.C. at 211, 388 S.E.2d at 138.
84. Id.
85. HIV infection, plaintiff contended, fell within the statute definition of a "physical impairment" due to HIV's toll on the hemic and lymphatic systems, as well as the substantial limits HIV infection places on the ability to conceive and bear healthy children. Plaintiff-Appellant's New Brief at 12-13, Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 388 S.E.2d 134 (1990) (No. 235PA89).
86. Burgess, 326 N.C. at 213, 388 S.E.2d at 138.
87. Id.
88. Id. Plaintiff argued that the list is illustrative, not exhaustive. Plaintiff-Appellant's New Brief at 11-12, Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 388 S.E.2d 134 (1990) (No. 235PA89) ("The statute defines 'major life activities' as 'functions such as caring for one's self, performing manual tasks, [etc.]. . .'").
89. Burgess, 326 N.C. at 213-14, 388 S.E.2d at 139. The court added that nonetheless plaintiff's usual "working" duties were not actually impaired by his HIV infection. Id.
90. Id.
91. Id. at 214, 388 S.E.2d at 139.
92. Id.
failed to show that asymptomatic HIV infection limits a "major life activity."  

The court also distinguished the state handicap act from the federal RA based on the inclusion of a communicable disease exemption in the state act. Unlike its federal counterpart, the state handicap act states that "[i]t is not a discriminatory action for an employer . . . [t]o fail to hire, transfer, or promote, or to discharge a handicapped person because the person has a communicable disease which would disqualify a non-handicapped person from similar employment."  

The court reasoned that the "person suffering from the communicable disease must have an additional disability which qualifies as a handicap."  "Carrying this analysis one step further," the court stated:

If one removes the words "communicable disease" in the provision and replaces them with the word "handicap," so that the exemption reads, "[i]t is not a discriminatory action for an employer . . . to discharge a handicapped person because the person has a [handicap] which would disqualify a non-handicapped person from similar employment," the provision would make no sense, because one cannot, by definition, simultaneously be both handicapped and non-handicapped.  

The plaintiff, of course, had shown no additional disability and thus liability could not arise under the Act.  The supreme court affirmed the trial court's dismissal of the case. Victims of AIDS related discrimination would have to now turn to the North Carolina General Assembly.

93. Id. The court, in cursory fashion, also stated that plaintiff failed to show that he is regarded as having such an impairment. Id. at 214, 388 S.E.2d at 139-40. Plaintiff maintained that the "perception of others renders him a 'handicapped person' within the meaning of the [NCHPPA] . . . ." Plaintiff-Appellant's New Brief at 13, Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 388 S.E.2d 134 (1990) (No. 235PA89).


95. Burgess, 326 N.C. at 215, 388 S.E.2d at 140.

96. Id. at 216, 388 S.E.2d at 140-41.

97. The court also found that the legislature did not intend to cover HIV infection when it passed the NCHPPA, for House anti-AIDS discrimination language as well as a Senate subcommittee amendment repealing the communicable disease exemption were both absent from the final version of the bill. Id. at 216-17, 388 S.E.2d at 141. In addition, the General Assembly subsequently passed a Communicable Disease Act. Id.
2. The North Carolina Communicable Disease Act (NCCDA)

Contributing to the defeat of the plaintiff's claim in *Burgess v. Your House of Raleigh, Inc.* 98 was the fact that the North Carolina General Assembly recently had rewritten the North Carolina Communicable Disease Act (hereinafter "NCCDA"), adding "AIDS-specific anti-discrimination provisions."99 While the legislation does address both AIDS testing and discrimination, the General Assembly riddled the statute with so many exceptions that any utility it might have possessed largely has disappeared. Generally, the added language provides that no AIDS test can be "required, performed or used to determine suitability for continued employment," nor may any employer discriminate against any person with AIDS or HIV infection "on account of that infection in determining suitability for continued employment."100 Upon violation, the injured person may file a civil action101 in superior court where the alleged injury occurred or where either party resides.102

The new language, however, creates a dichotomy between the job applicant and the existing employee. While the NCCDA prohibits testing as a prerequisite for continued employment, any employer may require an AIDS test for job applicants in required pre-employment medical examinations.103 Employers cannot discriminate against an existing employee with AIDS, but can deny employment "based solely on a confirmed positive test for AIDS virus infection."104 Further, the NCCDA does not entirely insulate existing employees. An employer can include a test for AIDS infection as part of an annual required medical examination routinely required of all employees, and take "appropriate" action, including reassignment or termination, if continued employment "would pose a significant risk to the health of the employee.

99. Id. at 216, 388 S.E.2d at 141. The court in *Burgess* used the passage of the bill to bolster their claim that the General Assembly did not intend asymptomatic HIV infection to qualify as a "handicap" under the NCHPPA.
101. The court possesses the power to award declaratory and injunctive relief, as well as back pay and reasonable attorney's fees. Id. The injured party must file the action within one hundred eighty days "after the date on which the aggrieved person became aware or, with reasonable diligence, should have become aware of the alleged discriminatory practice or prohibited conduct." Id.
102. Id.
coworkers, or the public, or if the employee is unable to perform the normally assigned duties of the job."\textsuperscript{105}

Thus, as the United States entered the nineties, the federal government and many states had taken great strides in the fight against AIDS related discrimination. In contrast, by 1990 North Carolina courts had denied victims of AIDS discrimination a cause-of-action under the state's handicap protection act, and the legislature had added "anti-discriminatory" measures that authorized discrimination if the person with HIV/AIDS was an applicant rather than an employee. Recognizing that in some jurisdictions, state law was not responding sufficiently to discrimination against the disabled,\textsuperscript{106} in 1990 Congress passed the ADA.\textsuperscript{107} Like the federal RA, the ADA incorporates the enforcement provisions of the Civil Rights Act of 1964, giving the EEOC the power to hear complaints and sue personally or give the injured party a "right-to-sue."\textsuperscript{108} But unlike the RA, which applied only to federally funded programs, the ADA touches most private employers, as well as employment agencies, labor organizations, and joint labor-management committees.\textsuperscript{109} The ADA became effective July 26, 1992, and applied to employers with twenty-five or more employees. As of July 26, 1994, the ADA applies to employers with fifteen or more employees.\textsuperscript{110}

\section*{III. Analysis}

\subsection*{A. The Act and Its General Application to HIV/AIDS}

1. The Scope of Discriminatory Behavior Prohibited under the ADA

a. The General Provisions

The type of behavior classified as discrimination falls into several broad areas within employer-employee relations. Generally, Title I of the ADA prohibits employers from discriminating against a "qualified individual with a disability" based on that dis-

\begin{thebibliography}{99}
\bibitem{107} 42 \textsc{U.S.C.} §§ 12101-12213 and 47 \textsc{U.S.C.} §§ 225, 611 (Supp. II 1990).
\bibitem{108} 42 \textsc{U.S.C.} § 12117(a).
\bibitem{109} 42 \textsc{U.S.C.} § 12111(2). The ADA does not apply to the federal government, a federal government corporation, Indian tribes, or "a bona fide private membership club" exempt from taxation. 42 \textsc{U.S.C.} § 12111(5)(B).
\bibitem{110} 42 \textsc{U.S.C.} § 12111(5)(A).
\end{thebibliography}
ability "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Particularly, section 12112(b) of 42 U.S.C. provides:

An employer cannot (1) limit, segregate, or classify an applicant or existing employee adversely based on the person's disability; (2) administer the business in such a fashion that the administration discriminates against those with disabilities or perpetuates existing discrimination; (3) deny a job or position to an applicant or existing employee based on the person's disability or another's disability "with whom the qualified individual is known to have a relationship or association"; or (4) maintain a criteria or test which "screens out" persons with disabilities unless out of business necessity.

Additionally, the ADA expands the scope of discriminatory conduct to include a "reasonable accommodation" standard. A "qualified individual with a disability" protected under the ADA is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Although the ADA does not specifically define "reasonable accommodation," it states that the term includes making existing facilities "accessible to and usable by individuals with disabilities, or restructuring the job, making modified work schedules, or reassigning the employee." An employer must make reasonable accommodations to disabled employees or applicants, unless the employer can show that any accommodation would impose an undue hardship on business operation. An employer also cannot deny employment because such employment would require some reasonable accommodations.

The ADA addresses medical examinations and medical inquiries. Generally, an employer may not require a medical examination until after offering employment. The required medical examination itself should not be concerned with the existence or severity of a disability, unless "job-related and consistent

111. 42 U.S.C. § 12112(a).
112. 42 U.S.C. § 12112(b).
113. 42 U.S.C. § 12111(8).
114. 42 U.S.C. § 12111(9).
with business necessity.”118 The results of the examination may be a condition of employment only if medical examinations are required for all entering employees and the results are kept confidential.119 Of course, an employer may not use the results of the examination in a discriminatory fashion.120 Similarly, an employer cannot make inquiries concerning the existence of a disability unless the inquiry concerns the ability of the applicant to “perform job-related functions.”121

b. Application to HIV/AIDS Employment Discrimination

The ADA retains the RA’s definition of a “disability.”122 Like the RA, the ADA expressly includes neither HIV infection nor AIDS. Congress, however, practically assumed that HIV and AIDS were “disabilities.”123 In fact, the relationship between the RA and the ADA implies the two should be read as consistent with one another.124 A recent ADA case, Doe v. Kohn, Nast, & Graf,125 addressed the issue directly.

118. 42 U.S.C. § 12112(d)(4)(A). “A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site.” 42 U.S.C. § 12112(d)(4)(B).


122. 42 U.S.C. § 12102(2) defines “disability” as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” Id.


124. See Webber, supra note 38, at 60 (citing House Labor Report at 52, reprinted in 1990 U.S.C.C.A.N. 334, for the proposition that Congress intended that the ADA be “read in light of existing standards under the [RA]”). See also Smith v. Dovenmuehle Mortgage Co., Inc., No. 94 C 139, 1994 WL 440662, at *7
In Kohn, the plaintiff argued that HIV infection is a “disability” due to the substantial limitations the infection places on reproduction. The defendant, on the other hand, argued that HIV infection did not qualify as a “disability” for “although [plaintiff] may have some dysfunction in an utterly unrelated area—a dysfunction familiar to millions of Americans, who happen to be sterile, but who nevertheless go about ably living their lives—to hold that that medical problem makes the ADA applicable to him would be to stretch the language and the purpose of the statute beyond the breaking point.” Although finding the factual record in the case thin with regard to “whether HIV status is a disorder or condition that affects the “reproductive” system,” the court concluded that HIV/AIDS is a “disability.” The court opined:

[The court] deem[s] it significant that the Congress chose to use the broad term “life”—“major life activities”. That encompasses a lot. Had the term “work-life”, or “work” been used—“major work activities”, for example—it would, of course, suggest that the disability would only be deemed relevant in the on-the-job context. Instead, the term “working” appears as just one example of the various major activities embraced within the full scope of one’s life. It is clear, therefore, that the language of the statute does not preclude procreating as a major life activity, but may well include it.

With support in legislative history, litigation under the RA and ADA, and the now corresponding case law, there is little doubt that the ADA protects individuals with HIV and AIDS.

2. Defenses: Limits on the Scope of Prohibited Activity

The ADA provides several defenses which may provide protection to employers charged with discriminatory conduct:

a. Business Necessity

Generally, employers may not deny employment based solely on the applicant’s disability or employ a hiring criteria or test which tends to “screen out” the disabled. But if the employer

n.3 (N.D. Ill. June 10, 1994) (stating that the RA was the precursor to the ADA and 42 U.S.C. § 12117(b) (Supp. II 1990) requires consistency between the two).
126. Id. at *5.
127. Id. at *6.
128. Id. at *7.
can show that the hiring practice is "(1) job-related, (2) consistent with business necessity, and (3) for a position which cannot be performed by a disabled individual even with reasonable accommodation," the hiring practice may not result in liability. For example, as one writer notes, "a paid blood donor with HIV infection would be an individual with a disability who could not meet the employer's qualification standards and whose disability could not be accommodated."  

b. Direct Threat

The ADA only protects a "qualified individual with a disability" from discrimination. A person is "qualified" simply if the person can perform, with or without reasonable accommodation, the essential functions of the position. The ADA, however, also allows employers to "include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." A "direct threat" defense is simply the adoption of Arline's reasoning: disabled persons cannot be excluded unless they pose "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." Whether an employee poses a "significant risk" is determined by examining "(1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the harm will occur, and (4) the imminence or immediacy of the potential harm." This defense is applicable, for example, in a health care setting. As one commentator argues, "[w]orkers who perform exposure-prone medical procedures in which blood contact might occur should generally stop performing such procedures if they are infected." And some courts agree.

130. 42 U.S.C. § 12113(a).
131. Webber, supra note 38, at 68.
133. 42 U.S.C. § 12113(b).
137. See Bradley, 3 F.3d at 924 (Surgical technologist was not "otherwise qualified" due to the "cognizable risk of permanent duration with lethal consequences."). See also supra notes 61-62 and accompanying text.
c. Undue Hardship

As mentioned above, an employer must make reasonable accommodations to disabled employees or job applicants, unless the employer can show that any accommodation would impose an undue hardship on the business operation.\(^\text{138}\) Nonetheless, if accommodation would require “significant difficulty or expense,” a reasonable accommodation may not be necessary.\(^\text{139}\) Consideration should be given to (1) the nature and cost of the accommodation, (2) the financial resources of the actual facility involved; the number of persons employed at the facility; and the effect on expenses and operation of the facility; (3) the employer’s financial resources; the number of employees; the “number, type, and location of its facilities”; and (4) the nature of the employer’s business operations; “including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.”\(^\text{140}\) For example, a solo practitioner with a large caseload and very limited resources seeks an administrative assistant. Under such a fact pattern, it may be an undue hardship to hire a person with “full blown” AIDS. Although some job restructuring or decrease in working hours would likely be reasonable in a larger practice, the solo practitioner may not have the resources or the time to accommodate such a person.\(^\text{141}\)

d. Communicable Disease Exemption for Food Handling Positions

The ADA requires the Secretary of Health and Human Services to publish and update annually a list of all infectious and communicable diseases which transmit through “handling the food supply.”\(^\text{142}\) If an employee has a disease included on the list, and the risk cannot be eliminated by reasonable accommodation, the employer “may refuse to assign or continue to assign such individual to a job involving food handling.”\(^\text{143}\) Although HIV infection is not a listed disease, persons with HIV are at a heightened risk for secondary infections. If a secondary infection is on

\(^\text{139}\) 42 U.S.C. § 12111(10)(A).
\(^\text{140}\) 42 U.S.C. § 12111(10)(B).
\(^\text{141}\) Does this suggest that the larger employer should absorb most of the costs of accommodation? See Fitzpatrick & Benaroya, supra note 135, at 579.
\(^\text{143}\) 42 U.S.C. § 12113(d)(2).
the list, the exemption applies. Thus, the exemption indirectly affects HIV-positive employees.\textsuperscript{144}

\textbf{B. ADA as Compared with North Carolina's Response to HIV/AIDS Discrimination}

The ADA and North Carolina anti-discrimination law stem from common origins. The ADA and the NCHPPA both found discrimination against a disabled person wrong because it excludes individuals on the basis of an impairment inconsequential to a position, thereby preventing the excluded person from realizing their fullest potential.\textsuperscript{145} With the introduction of the AIDS epidemic, the need for protection from discrimination found a new immediacy. Both Congress and the North Carolina legislature found that people are less fearful of HIV testing by ensuring protection from discrimination if the test result is positive.\textsuperscript{146} But, as illustrated above, the results of federal and state action were polar opposites. The ADA now cures several ills created by the North Carolina legislature and courts.

1. \textit{Defining a Disability}

Despite any defense a defendant might raise to exculpate any alleged discriminatory behavior, clearly a person with HIV infection or AIDS in North Carolina now has a cause-of-action. Yet the RA, the NCHPPA, and the ADA all define "disability" identi-
cally. 147 Both North Carolina and federal courts agree that even asymptomatic HIV infection constitutes a “physical impairment.” 148 The difference lies in the statutory interpretation of “major life activity.” In Burgess, the North Carolina Supreme Court concluded that because the General Assembly eliminated “working” from the state act’s adaptation of the RA’s list of “major life activities,” the legislature intended to include only “essential tasks one must perform on a regular basis in order to carry on a normal existence.” 149 Neither working, having intimate relations, nor having children constituted such “essential tasks.” 150

Perhaps the General Assembly wanted to exclude AIDS from coverage under the state handicap act. As one author notes, the “only apparent reason for the legislative deletion of ‘working’ from the North Carolina act’s definition of major life activities is to expressly exclude coverage of impairments that do not affect basic physical functions but do result in employment termination.” 151 In Burgess, however, the court recognized that “[a] construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language.” 152 The NCHPPA was created to correct a social injustice, an injustice which expressly included the denial of work. 153 As a remedial statute, courts should liberally construe the NCHPPA. 154 Yet courts continually impaired the object of the

147. See 45 C.F.R. § 84.3(j) (1993) (“(1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.”); N.C. GEN. STAT. § 168A-3(4) (1987) (same); 42 U.S.C. § 12102(2) (Supp. II 1990) (same).

148. See Burgess, 326 N.C. at 212, 388 S.E.2d at 138; Chalk, 840 F.2d at 704-05; Kohn, 1994 WL 454813 at *7-8.

149. Burgess, 326 N.C. at 214, 388 S.E.2d at 139.

150. Id.

151. Hayes, supra note 32, at 1206-07.

152. Burgess, 326 N.C. at 215, 388 S.E.2d at 140 (citing State v. Hart, 287 N.C. 76, 80, 213 S.E.2d 291, 295 (1975)).

153. See N.C. GEN. STAT. § 168A-2(b) (1987) (“[T]he practice of discrimination on the basis of a handicapping condition threatens the rights and proper privileges of the inhabitants of this State; and such discrimination results in a failure to realize the productive capacity of individuals to their fullest extent.”). It should be noted that in this author’s opinion, not classifying work as a “major life activity” is an anomaly, particularly since the statute specifically acknowledges that the denial of work is a deprivation of a citizen’s rights.

statute by construing the statute as protecting only those with physical impairments which limit “essential tasks.” The result denies protection to not only those with asymptomatic HIV infection but to all impairments that limit a person’s health or appearance but do not necessarily leave a person unable to perform “essential functions.” This conclusion seems contrary to the express purposes of the NCHPPA. The court ignored a more sensible conclusion to reach a result conforming to an inferred legislative intent.

In contrast, the ADA ensures that such narrow limitations will not be placed on the ability of disabled persons to state a cause-of-action. The ADA’s regulations advise that “the use of the words ‘such as’ indicates that this list is illustrative and is not intended to be exclusive.” In addition, the ADA and federal case law recognize the very real limitations diseases such as HIV and AIDS place on reproductive freedom and socialization.

2. Reasonable Accommodation

Essential to furthering a policy of reincorporating individuals excluded from the mainstream of American life is realizing that

(No. 235PA89) (citing Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979)).

155. For example, a person suffering of chronic heart disease whose employer, fearing large expenses, fired him, and who is disabled under the ADA, because of the person’s “past history of heart disease, the permanent damage suffered to his heart as a result, and the medical need to treat post-surgical arrhythmia on two occasions.” Finley v. Cowles Business Media, No. 93 CIV. 5051(PKL), 1994 WL 273336 (S.D.N.Y. June 20, 1994). Yet, under the Burgess reasoning, this person arguably would have no cause-of-action. Although the person had a physical impairment and was still under treatment, the condition does not limit his “essential tasks,” i.e., his ability to care for himself, to perform manual tasks, etc.

156. See N.C. GEN. STAT. § 168A-2(a)-(b) (1987). Because “the practice of discrimination based upon a handicapping condition is contrary to the public interest and to the principles of freedom and equality of opportunity,” the “purpose of this Chapter is to encourage and enable all handicapped people to participate fully to the maximum extent of their abilities in the social and economic life of the State. . . .” Id.


158. See Kohn, 1994 WL 454813 at *7; Webber, supra note 38, at 60-61. See also Arline, 480 U.S. at 283 (recognizing that an “impairment might not diminish a person’s physical or mental capabilities, but could nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment”).
often inclusion requires recognition of diversity. The ADA acknowledges that at times some accommodation is necessary to ensure that disabled employees can “enjoy the same benefits and privileges” of employment.\footnote{159} But accommodation is not unlimited. Unlike many affirmative action programs, reasonable accommodation always remains conditioned on whether the employee can perform the “essential functions of the job.”\footnote{160} The employer also may show that an accommodation would place an undue hardship on the business.\footnote{161} In contrast, the NCCDA has no reasonable accommodation standard. In fact, it authorizes an employer to reassign or even fire an employee “if the employee is unable to perform the normally assigned duties of the job.”\footnote{162} Following such statutory language, an employer arguably can fire an employee with HIV or AIDS who needs to readjust his work schedule around medical treatment or complete work at home during a period of illness. While the NCCDA does not ask the employer to change the work environment at all, irrespective of the employee’s ability to perform the essentials of the position, the ADA seeks to change the status quo without overburdening employers or guaranteeing the disabled jobs without regard to qualification.

3. Fact versus Fear

From \textit{School Board of Nassau County v. Arline}\footnote{163} to today’s application of the ADA, federal legislation and case law demand that any exclusion or limitation on employment of persons with HIV or AIDS be based on “reasoned and medically sound judgments,” not fear alone.\footnote{164} The policy behind the practice is simple: while the dangers of transmission of an infectious disease are sometimes very real, exclusion from the mainstream of American life is often unwarranted and stigmatizing to its victims. North Carolina’s response to AIDS related job discrimination, however, defeats any public health policy concerning HIV testing, and in fact perpetuates the atmosphere of fear that plagued America during the early years of the AIDS epidemic.

\footnotesize
\begin{itemize}
  \item \footnote{159} 29 C.F.R. § 1630.2(o) (1991).
  \item \footnote{161} 42 U.S.C. § 12112(b)(5)(A).
  \item \footnote{162} N.C. GEN. STAT. § 130A-148(i)(4) (1992).
  \item \footnote{163} 480 U.S. 273 (1987).
  \item \footnote{164} Id. at 285.
\end{itemize}
a. Medical Testing & Inquiry

The NCCDA primarily illustrates North Carolina’s failure to protect either victims of discrimination or public health. First, the NCCDA actually encourages the exclusion of people with AIDS. Overwhelming scientific evidence shows that HIV is not transmitted through casual workplace conduct.\textsuperscript{165} Although arguably there is a heightened risk of transmission in the health care profession,\textsuperscript{166} the NCCDA allows required testing regardless of the type of work or risks of exposure.\textsuperscript{167} It essentially gives the employer a license to deny employment. Second, the job applicant is not encouraged to get tested, for a confirmed positive test then becomes the basis for the denial of employment. Those reluctant to get tested, mindful of the stigma associated with AIDS, avoid those positions which require HIV testing and accept positions which do not require testing. They remain untested and, if HIV-positive, also untreated. Ignorance of the presence of HIV of course then increases the chance that the infected individual will transmit unknowingly the virus to someone else.

Finally, as one commentator notes, testing today is an imperfect science. On average, one person out of every hundred test false-positive when they in fact do not carry HIV.\textsuperscript{168} Because the popular ELISA test detects only the antibodies to HIV, a test may give a false-negative during the period of time between the introduction of HIV in the body and the body’s production of detectable antibodies when the person actually carries HIV.\textsuperscript{169} Testing a general working population generates unwarranted fear due to false-positives while at the same time giving others a false sense of security, and in the end serving “only to strengthen the forces of irrationality, ignorance, and fear presently surrounding AIDS and HIV-infection.”\textsuperscript{170}

With the enactment of the ADA, medically sound judgments guide any limitations on employment. The ADA replaces the atmosphere of “irrationality, ignorance, and fear” created by the

\textsuperscript{165} See Bullard, supra note 38, at 499-500.
\textsuperscript{166} See CDCP, supra note 14, at 19 (Forty health-care workers became infected with HIV on the job.); Bradley, 3 F.3d at 924 (Surgical technologist was not “otherwise qualified” due to the “cognizable risk of permanent duration with lethal consequences.”).
\textsuperscript{167} Hayes, supra note 32, at 1208.
\textsuperscript{168} Id. at 1209-10.
\textsuperscript{169} Id. at 1211.
\textsuperscript{170} Id. at 1211.
AIDS & JOB DISCRIMINATION

NCCDA with an inquiry into the relationship between the disease and the job position. Any inquiries concerning the existence of HIV or AIDS must concern the ability of the applicant to “perform job-related functions.” The danger of general work population tests is prevented by promoting private HIV/AIDS testing accomplished with knowledge that a positive result will not result in unemployment or exclusion. The ADA takes testing out of the pre-employment process unless out of business necessity. Additionally, the ADA places strict limits on medical examinations and inquiries. These enactments protect the person with HIV or AIDS from discrimination while also realizing that those afflicted with a deadly virus cannot perform any job.

b. Communicable Disease Exemptions

In Burgess, the court performed “semantic gymnastics” to use the communicable disease exemption as a factor denying plaintiff’s cause-of-action. Again, perhaps the General Assembly wished to exclude AIDS from coverage under the state handicap act using a communicable disease exemption. But this purpose is not expressed. Clearly the legislature included the communicable disease exemption to insure that one with a communicable disease that presents a threat of harm to a working environment cannot endanger others simply because he has a “handicapped” status. Conversely, if the communicable disease would not disqualify a non-handicapped person, that is, the disease would not present a significant threat to the safety of others, the protection of a “handicapped” status should still exist. HIV infection alone should not disqualify a person from most employment; a HIV-posi-

172. 42 U.S.C. § 12112(d).
173. See supra notes 148-52.
175. Christyno L. Hayes notes that the protection from communicable disease is already provided with the requirement that the disabled person be “qualified.” Hayes, supra note 32, at 1207. If the person represents a threat to the health or safety of co-workers, the person would fail to be “qualified” under the Act. Id. Therefore, the exemption was only intended to exclude AIDS discrimination. Id. She also states at n. 94, that “[t]his conclusion is buttressed by the fact that the communicable disease exemption was added in 1987, at the height of public and governmental ignorance and hysteria over the AIDS epidemic.” Id.
176. For example, a visually-impaired individual may be terminated from his position as cook if he is a carrier of Salmonella typhi, like “typhoid Mary.” He cannot risk the lives of others because it is discriminatory to fire a visually-impaired person.
tive employee can perform his usual duties with no threat of harm to others. Assuming arguendo that the court considered one with HIV infection a "handicapped person," is it not a discriminatory action for an employer to fire one with HIV infection where the disease alone would not disqualify a "non-handicapped" employee? The court refused to see HIV infection both as a disease that would not disqualify a person from normal working duties and a disease that creates both the medical and social stigma deservant of "handicapped" status.177.

Under the ADA, there is no general communicable disease exemption. But, as the result of political compromise, Congress passed a "food handler" exemption.178 Despite the politically-charged atmosphere surrounding its creation, it retains the same basic philosophy of action based on medical judgment. Exclusion is allowed only if the individual suffers from a communicable disease listed by the Secretary of Health and Human Services. Under the North Carolina act, despite whether the General Assembly intended to create the exemption to keep HIV/AIDS unprotected or whether the supreme court played word games to exclude HIV/AIDS, the result is the same. Individuals living with HIV or AIDS are unprotected from discrimination regardless of

177. See School Bd. of Nausau County v. Arline, 480 U.S. 273 (1987), wherein Justice Brennan, addressing the applicability of tuberculosis as a "handicap" under the 1973 Rehabilitation Act stated:

We do not agree ... that, in defining a handicapped individual ..., (the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant .... [The] contagiousness and her physical impairment each resulted from the same underlying condition ....: It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment .... [A]n impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.

Id. at 282.

178. Several members of Congress wanted a "food handler" exemption to authorize the employers in the business of preparing or serving food to reassign or fire "food handler" employees with HIV or AIDS. After the provision was eliminated at conference, North Carolina's own Sen. Helms fought vigorously for the provision's return, stating, "Scientists may make any contention they wish .... Are scientists prepared to tell me that somebody with AIDS, or HIV, who is bitter about the fact he is sick, if he purposely contaminates a salad that he is making, will that not transmit the disease?" 136 Cong. Rec. S9527-02, S9542 (daily ed. July 11, 1990).
the position. The ADA does not let fear of contagious disease control an employee's job security. Instead, medical knowledge guides employment practice.

IV. CONCLUSION

As we observe the EEOC and Campbell University enter into North Carolina's first AIDS-related employment discrimination case under the ADA, it is worth noting again the ADA's balance. Although North Carolina citizens finally have a comprehensive cause-of-action to fight this breed of discrimination, there still exists difficult questions which may arise in this case. Does a teacher's status as having "full blown" AIDS create a "significant" risk of harm to his colleagues and students? Does his interaction with students as a physical education teacher distinguish his case from cases such as Chalk, where the teacher was a lecturer? Can Campbell show "undue hardship" because of its ultimate duty to protect its students and the consequences of liability if transmission occurs? Ironically, this case is the first in North Carolina which has the potential to actually search for the answers.

As more and more people were diagnosed with HIV and AIDS, federal and many state governments moved to curb discrimination. As shown, these policies developed for two primary purposes (1) excluding those with HIV or AIDS because of ignorance, hatred, or fear is wrong and not only perpetuates a false image of many afflicted with the disease but unduly deprives the excluded of opportunity; and (2) because of the social stigma attached with AIDS, unless protection is offered, citizens will be fearful of HIV testing, and in the process the disease will spread. While the federal government and many states under the RA led the fight against such discrimination, North Carolina, while recognizing these policies, ironically limited victims' rights in several ways which effectively locked out most remedies, and more disturbingly, promoted exclusion and the perpetuation of mythology.

Not until the passage of a national policy was this path reversed. The ADA effectively recognizes (1) that HIV and AIDS are disabilities which substantially limit reproductive freedom and socialization; (2) that reincorporation of persons with HIV or AIDS requires at times some accommodation because of our diver-

180. For an interesting discussion of ADA issues which may arise in the coming years, see generally Fitzpatrick & Benaroya, supra note 135.
sity; and (3) that any exclusion or limitations on employment must be based only on medically sound judgment and not fear. Regardless of the outcome of the Campbell University case, an injured plaintiff now has the ability to find justice.

Jeremy McKinney