

# **AIDS and the Employment Relationship**

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## FOREWORD

The Industrial Relations Centre is pleased to include this study, AIDS and the Employment Relationship, in its publication series School of Industrial Relations Research Essay Series. The series is intended to give wider circulation to selected student research essays, chosen for both their academic merit and their interest to industrial relations practitioners and policy makers.

A substantial research essay is a major requirement of the Master's Program in Industrial Relations at Queen's. The essay may be an evaluation of a policy oriented issue; a limited empirical project; or a critical analysis of theory, policy, or the related literature in a particular area of industrial relations.

The author of the essay, Mary Halton, graduated from the School of Industrial Relations in October 1988.

I would like to express my appreciation to the author for granting permission to publish this excellent study.

D.D. Carter, Director  
Industrial Relations Centre  
and School of Industrial Relations  
Queen's University

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## **ABSTRACT**

The increased incidence of Acquired Immunodeficiency Syndrome (AIDS) is beginning to have a significant impact in the workplace. Some unique employment issues are being raised because of two dimensions of the problem: first, the disease is fatal and to date there is no known cure; and second, as a result of the lack of knowledge about AIDS, a great deal of fear of transmission of the disease persists among other members of the workforce. Current legislation provides AIDS victims with some employment protection, but because of the 'newness' of the disease, and the myriad of uncertain and untested boundaries that exist to be challenged in the employment relationship in this area, there is still a need to clarify the issues and to define more clearly the protection that exists in all areas of the law. In particular, there is a need for consistent social and legislative policy to assist victims of the Human Immunodeficiency Virus (HIV) to be allowed to continue to participate fully in the labour force as long as they are able to continue. Attitudes, however, appear to present the largest barrier to a satisfactory employment relationship. These discriminatory attitudes must be changed through education and continued government intervention.

## I. INTRODUCTION

### i) The Nature of AIDS

Acquired Immunodeficiency Syndrome (AIDS) is caused by a retrovirus known as HIV (Human Immunodeficiency Virus). The virus was formerly known as human T-cell lymphotropic virus-III (HTLV-III), lymphadenopathy associated virus (LAV), AIDS-associated virus (ARV) and immunodeficiency-associated virus (IDAV). (Ontario Disease Surveillance Report (ODSR), 1986). The case definition designed for accurate monitoring of the epidemiology of this new disease, formulated by the Centers for Disease Control (CDC) in the United States, is as follows:

A person who has had a reliably diagnosed disease that is at least moderately indicative of an underlying cellular immune deficiency, but who, at the same time, has had no known underlying cause for diminished resistance to the disease.

In fact, AIDS is not a disease, but a syndrome. People do not die from AIDS itself, but from opportunistic and infectious diseases (for example, unusual forms of pneumonia and tumors), to which they are vulnerable because their immune systems are greatly impaired by the virus (HIV). (National Safety and Health News, January, 1986).

The virus is spread when infected blood or semen enters into another person's bloodstream. Infection can occur through intimate sexual contact with an infected person, sharing contaminated needles or syringes, from an infected mother to an unborn child and, less commonly, through transfusion of infected blood or blood products. Although very small traces of the virus have been found in tears, saliva, breastmilk and urine, there have been no cases of anyone becoming infected from contact with these body fluids. Almost any other disease is more infectious than this virus, which is very weak outside the body. Many employees fear that contact with the blood of a coworker who may have the virus will transmit the disease. The CDC advises that in the event that a coworker cuts himself, contact between the blood and an open cut or wound should be avoided. Equipment contaminated with blood or body fluids of any worker, whether infected with the AIDS virus or not, should be cleaned with either soap and water or a detergent, and then decontaminated with a disinfectant. According to the CDC, this would be effective to kill the virus. As the virus is not spread through nonsexual, everyday contact, there is little opportunity for infection in the workplace. (Ontario Ministry of Health, AIDS in the Workplace. 1987).

It is important to understand that not everyone infected with the AIDS virus has AIDS, or will develop AIDS. Four stages of the disease have been identified. (Leonard, 1985, 681-687).

Seropositive. The employee tests positive for the virus in Stage One. In this stage, the employee appears healthy but healthy for the duration of his or her life or could later develop overt AIDS and the HIV spectrum of diseases. As a caveat, initial positive results have occurred in personnel who have not been exposed to the virus but who had something else in their blood that triggered the positive response.

AIDS-Related Complex (ARC). The employee begins to show signs of AIDS Related Complex (ARC) in Stage Two. The term ARC has been used since 1983 to describe HIV-infected patients. Victims of ARC typically exhibit prolonged symptoms of fatigue, fevers, night sweats, weight loss and persistent diarrhea. In this stage, the physical deterioration of the employee can have a significant impact on his or her work performance.

"Full Blown" AIDS. During Stage Three, the employee contracts an opportunistic infection. An opportunistic infection is one which does not normally arise in a healthy individual. Instead, an opportunistic infection attacks the body because the immune system is not functioning properly. Pneumocystis carinii pneumonia (an uncommon lung ailment which results in a rare type of pneumonia), and Kaposi's sarcoma (a rare form of skin cancer), are the most common opportunistic infections associated with this stage.

Finally, Stage Four finds the employee with multiple infections. This leads to total incapacity and ultimately to death.

The rest of society has less to fear from AIDS than do AIDS victims themselves. The AIDS patients' susceptibility to other diseases, those "opportunistic infections" that affect people with impaired immune systems, is of no threat to those whose immune systems are intact. Scientists suspect that individuals who have full-fledged AIDS are probably the least likely to communicate it, and that the greatest danger is posed by otherwise healthy individuals who are infected with the virus and give no outward sign of being carriers. (Whelan, 1986). Fear of the full-fledged AIDS victim, however, can be attributed to the fact that the disease thus far has been universally fatal. (Table I).

**Table 1 - Acquired Immunodeficiency Syndrome Cases**

Number of AIDS Cases*			
	Living	Dead	Total
Canada	844	1041	1885
Ontario	285	442	726
Toronto	164	253	417
U.S.	29679	38541	68220
World			97965

\* Since First Case in 1979

Source: Morbidity and Mortality Weekly Report. Atlanta: Centers for Disease Control. July 25<sup>th</sup>, 1988.

## ii) Employment Issues

Conventional medical opinion indicates that the risk of being infected by an AIDS carrier in the normal industrial or office setting is minimal, if it exists at all. (Ontario Ministry of Health, AIDS in the Workplace, 1987). This low risk factor in most working environments reduces the employer's ability to isolate the problem by customary procedures. (Health care workers and some personal service workers, such as those who pierce ears, give tattoos and use acupuncture are the main exceptions to this general principle.) Nevertheless, employers face complex questions with regard to AIDS and the employment relationship.

Does an employer have an obligation to hire a person with AIDS? Do the rights of AIDS sufferers seeking employment differ from those currently employed? Will an employer be able to dismiss an AIDS employee with notice? How much notice is reasonable, and what are the costs involved? Will incapacity to perform one's job, as a result of AIDS, constitute "just cause"? What level of incapacitation will be deemed to frustrate the employment contract? Is AIDS a handicap protected by human rights legislation? Is protection available to the healthy AIDS carrier under present legislation? How will the employer deal with his obligation of confidentiality, and possible responsibility to report infectious diseases? How does an employer determine whose rights are overriding when Human Rights legislation appears to protect the individual, while Occupational Health and Safety legislation provides protection for the rights of workers in general? If there is an obligation to employ the AIDS victim, what is considered to be reasonable accommodation? Does the employer have any rights with respect to business concerns, such as costs of accommodation, efficiency of operation, and safety of workers and the public, that may be affected by the employment of people with AIDS?

AIDS is rapidly becoming a major concern for employers throughout the country. Its impact on companies can no longer be ignored because of the medical, legal, benefits, employee relations, employment equity, employee assistance and safety issues involved. As the number of cases rapidly increases, with attendant major social and economic impact, it becomes evermore critical for every employer to understand this medical disease.

A great deal has been written about AIDS, some of it negative and confusing. This research paper will provide an analysis of the law as it relates to the employment of persons with AIDS. Following this review, recommendations on legislative, behavioral and attitudinal changes necessary to facilitate the acceptance of AIDS sufferers in all workplace situations will be made.

## II. LEGAL IMPLICATIONS

### i) Common Law

Today, the employment of half of the Canadian workforce, not subject to collective agreements, is governed by a combination of statute and common law. While the statutory element is clearly more important to AIDS victims at the lower end of the economic scale, the common law may appear more important to those on the higher end, particularly in the context of the action for wrongful dismissal. The common law does not prohibit an employer from refusing to hire a person who has a mental or physical handicap. However, some limited protection is provided to the AIDS victim by the common law if that person is already employed. At common law, the employment relationship is essentially a contract for the payment of compensation for service. The main concern of the common law of employment has been wrongful dismissal. Most of the case law involves damage actions by employees who allege that they have been dismissed without due notice for what the employer claims was misconduct or "cause" amounting to breach of the employment contract. In a non-unionized workplace, employees suffering from AIDS may be confronted with two issues:

1. Can an employer be justified in terminating an employee who has AIDS - can having AIDS be "cause" for dismissal?
2. Can the employer simply discharge an AIDS sufferer with proper notice?

#### **Just Cause for Dismissal**

In general, cause for dismissal depends upon the expected duration of the illness and whether the illness "frustrates" the employment contract. The test in wrongful dismissal cases is essentially whether the employee's incapacity is of such a nature or was likely to continue for so long that future performance of the employee's obligations would either be impossible or completely different from that to which the parties agreed.

The case law shows that, for indefinite contracts of employment, an employee who suffers a permanent disabling illness can be terminated without notice because the contract has been frustrated. (Kenney, 1988). Permanent illness destroys the consideration that the employee offered in exchange for the employer's promise to pay wages, as the employee will never again be able to perform his duties for his employer.

Temporary illness, on the other hand, will not frustrate the contract of employment. This is based on the idea that illness is an Act of God which cannot be foreseen or guarded against, and so must be forgiven on grounds of common humanity. (Kenney, 1988). Where the illness is temporary, an employer is required, at common law to accommodate the employee. The extent of an employer's obligation to accommodate an employee's temporary disability will vary, depending upon the length of service and the relationship, if any, between the employment and the source of the disability. The question that arises is how long must an employee be off sick before the illness is no longer considered temporary?

In a leading English case, Marshall v. Harland and Wolff Ltd., eighteen months was not considered to be long enough. The court went on to list five factors that would increase or decrease the likelihood of frustration of the employment contract:

- a) the presence of a relatively short notice period;
- b) the fact that an entitlement to sick pay has expired (not conclusive as a factor);
- c) a short expected duration for the employment in the absence of sickness;
- d) the fact that the employee occupies a key post in which he must be replaced on a permanent basis;
- e) the fact that the period of past employment is relatively short (i.e., seniority brings about an increasing elasticity in the relationship between the employer and the employee so that longer periods of absence due to sickness may be deemed acceptable).

However, where the employment contract is made for a specific purpose, or a fixed term, the test changes and becomes whether the illness prevents performance of the task, or of a significant part of the term. (Kenney, 1988).

In general, it appears that an employer will be justified in dismissing an employee for cause only when the employee is so incapacitated with AIDS that he is unable to fulfill his employment obligations and where it is unlikely that the employee will be able to perform his or her employment duties in the future. This requirement is likely to be met only when the employee actually has AIDS and is suffering from the infections associated with it. Where the employee is infected only with the AIDS virus and has no symptoms which will prevent him from performing the job, it seems unlikely that the employer will have cause to dismiss the employee. The duty to accommodate an employee with a temporary disability, referred to above, may extend to employees who are infected with the AIDS virus but who do not have AIDS or, ultimately, to an employee with AIDS whose disease is at a stage where only temporary absences from work are required.

### **Notice**

There is also an option in those jurisdictions without unjust dismissal legislation, of discharging an AIDS victim with proper notice or compensation in lieu of notice, if those employees are not covered by a collective agreement. Different employers are likely to take different actions, depending on their own knowledge and personal reaction, the strength of reaction by fellow employees (and customers, if relevant), and the economic situation that the victim will face upon discharge (Kenney, 1988).

The totality of the job security an ill employee has at common law lies in the fact that illness does not constitute just cause for summary dismissal. There is no term implied at common law that prevents an employer from dismissing a sick employee with due notice. The question then becomes one of determining what is "due" or "reasonable" notice.

In Bardal v. The Globe and Mail, Ltd., Chief Justice McRuer states that "...There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of the service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant. ..."

Because illness does not give rise to cause for summary dismissal, reasonable or due notice is likely to be determined by the courts in a manner similar to that indicated above. If employers follow similar procedures in preparation of a separation package, the AIDS victim is likely to be left with little or no common law recourse to dismissal. The total cost of a separation package to an employer will vary with each particular case.

In conclusion, it appears that at common law an employer will only have cause to terminate an employee who has AIDS if the employee is so incapacitated that he or she is unable to fulfill his or her employment obligations and where there is no likelihood of recovery in the foreseeable future. This will probably only arise where the employee has contracted AIDS and is suffering from the advanced stages of the disease. It is likely that an employee not covered by a collective agreement could sue for damages from wrongful dismissal if an employer purported to terminate without notice for cause, unless it could be proven that the dismissal was for inability to perform the job. Such employees in the federally regulated sector could also lay a complaint under the unjust dismissal adjudication provisions of the Canada Labour Code (s. 61.5) if they have at least one year of service.

## ii) **Human Rights Legislation**

The most significant protection available to employees who may have AIDS is provided under human rights legislation. The Ontario Human Rights Code, 1981, for example, provides the following protection.

### **General Prohibitions Against Discrimination**

Under section 4(1) of the Code, every person has the right to equal treatment with respect to employment without discrimination on a number of prohibited grounds. This "right to equal treatment" covers all aspects of employment including recruitment, hiring, training, transfer, promotion, apprenticeship terms, dismissal and lay-offs. It also covers the terms and conditions of employment; for example, rate of pay, overtime, hours of work, vacation benefits, shift work, discipline and performance evaluation.

### **Handicap**

One of the prohibited grounds of discrimination under section 4(1) is "handicap". An employer, therefore, is prohibited from discriminating against an employee in any one of the above-noted aspects of employment because of handicap.

"Handicap" is defined under section 9(b) of the Code, in part as follows:

9(b) "because of handicap" means for the reason that the person has or has had, or is believed to have had,

(i) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness..."

This is a very broad definition and there would appear to be no doubt that a person with AIDS falls within the definition of a person with a handicap. In fact, the Ontario Human Rights Commission issued a policy statement in 1986 which confirms that a person with AIDS falls within the definition of a "handicapped" person under the Code.

Although it is clear that an individual with AIDS falls within the definition of a "handicapped" person, it is less clear that someone who simply "tests positive" for the AIDS antibody is also "handicapped". The reason for this is that a person who simply tests positive for exposure to the AIDS virus does not necessarily have a "physical disability, infirmity, malformation, or disfigurement ... caused by ... illness". However, in most cases, discrimination against such individuals will occur because their employers conclude that they have AIDS or can transmit it to others, including other employees. Persons suspected of having AIDS therefore would be protected by virtue of section 9(b) of the Code, which includes in the definition of a handicapped person a person who "is believed to have or had ... a disability or infirmity" due to illness.

To clarify its position on AIDS, the Canadian Human Rights Commission issued a policy on AIDS on May 25, 1988. (Table II). This policy ensures that people who suffer discrimination because of groundless fears about AIDS, whether they have AIDS or are perceived to have AIDS, can now look to the Commission for protection.

Accordingly, there is no doubt that an employee who has AIDS and little doubt that a person who carries the AIDS virus will be granted protection from discrimination because of handicap under both the Ontario Human Rights Code and the Canadian Human Rights Commission policy.

### **Constructive Discrimination and Drug Screening**

In addition to prohibiting "direct discrimination" under section 4 and section 10, the Ontario Code also prohibits "constructive or systemic discrimination". Section 10 was recently amended by the Equality Rights Statute Law Amendment Act, 1986, and proclaimed on April 18, 1988. This would include an employment system, corporate policy, or practice or procedure which results in excluding members of a group, or results in an adverse impact on a group protected by legislation.

Section 10 prohibits employers from imposing a requirement, qualification or factor which is not, on its face, discrimination on a prohibited ground, but which results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination. Therefore, an individual who is discriminated against in employment because he or she is in a group which is perceived to be at high risk of exposure to the AIDS virus could file a human rights complaint alleging "constructive discrimination".

**Table 2 - The Canadian Human Rights Commission's Policy on AIDS**

<ol style="list-style-type: none"> <li>1) The Commission will assist in fostering improved public understanding of AIDS;</li> <li>2) The Commission will deal with complaints that allege discrimination             <ol style="list-style-type: none"> <li>a) As a result of infection with the Human Immunodeficiency Virus (HIV) on the basis of disability; and,</li> <li>b) Due to stereotypical assumptions that an is HIV infected based on that individual's membership in a group associated with the HIV infection. The complaint will be based on the grounds of perceived disability and sec, race colour or national or ethnic origin.</li> </ol> </li> <li>3) The Commission will deal with complaints where the discrimination alleged results from association with a person who suffers from the HIV infection;</li> <li>4) The Commission will consider HIV infection free a bona fide occupational requirement (BFOR where an individual assessment has determined no other arrangement of duties is possible and it is an essential requirement of a position that (Note: HIV antibody testing should take place only where the below conditions apply):             <ol style="list-style-type: none"> <li>a) The employee perform invasive procedures; or,</li> <li>b) The employee travel to countries which bar entry to those infected with the HIV; or,</li> <li>c) The employee perform job duties which impinge on the safety of the public and performs these duties alone.</li> </ol> </li> <li>5) The Commission will not consider employer or employee preference as sufficient to establish a BFOR nor will it consider employee preference sufficient to establish a bona fide justification (BFJ);</li> <li>6) The Commission will consider a bona fide justification (BFJ) where the service requires invasive procedures which result in exposure to blood or blood products and the risk is real after all reasonable precautions have been taken.</li> </ol>
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Section 10 could apply to prohibit indirect discrimination if an employer imposes a requirement that all employees undergo medical testing, perhaps as part of an otherwise acceptable pre-employment screening process. For example, it may be that being drug-free is a bona fide occupational requirement. However, in the course of drug testing, the drug samples may reveal other conditions such as epilepsy, diabetes, venereal disease, HIV infection, pregnancy or melanin pigmentation. The employer who would use such positive results in the employment context could open himself up for a charge of constructive discrimination. If the testing identifies AIDS sufferers, and the results of such testing are used to discriminate against persons with AIDS, such testing could well constitute prohibited "constructive" discrimination based on handicap.

Section 10 would also provide protection to persons from certain places of origin, such as Haiti, if such persons are discriminated against in their employment because they are potential AIDS carriers. Some visible minorities have high levels of melanin pigmentation in the blood, which can result in a positive drug test. Haitians have traditionally been considered to be in a group which is at a higher risk of exposure to AIDS. If an employer were to make a stereotypical assumption that an individual is infected with the HIV, based on that individual's race or affiliation in a group associated with HIV,

such persons could claim "constructive discrimination" based on "place of origin". Once again, in an effort to show its firm position on employment related drug testing, the Canadian Human Rights Commission has recently issued a strong policy on drug testing (Table III).

### **Sexual Orientation**

"Sexual orientation" was added to the list of prohibited grounds of discrimination under section 4(1) of the Code by the Equality Rights Statute Law Amendment Act, 1986. This amendment was proclaimed in force on December 18, 1986.

The prohibition against discrimination based on "sexual orientation" is, to some extent, a "double-edged sword". Discrimination against a person because they are a homosexual or a lesbian will in and of itself constitute discrimination. Given that homosexuals are also in a group considered to be at higher risk for exposure to the AIDS virus, discrimination against homosexuals on the basis that they may have AIDS (rather than because of their sexual orientation) could also constitute "constructive discrimination".

In summary, discrimination based on sexual orientation, whether it be because of a distaste for the sexual orientation of that person or because of fear of exposure to AIDS, is prohibited.

**Table 3 - Drug Testing, The Canadian Human Rights Commission Perspective**

- 1) Mass and random testing should not be implemented, and individual tests should only be considered when performance deficiencies have been observed. When the employer cannot identify deficiencies by performance evaluation, drug testing for that position may be permissible if being drug-free is essential to safe work performance.
- 2) Pre-employment and random screening should only be considered when an individual's job poses a safety risk, and where the individual's behavior cannot be observed.
- 3) The purpose of drug screening should only be used to refer employees to an Employee Assistance Program.
- 4) The Canadian Human Rights Commission will deal with complaints where an individual alleges discrimination on the basis of disability, sex, age, or race as a result of a requirement to undergo a mandatory drug test, or as a result of a positive drug test.
- 5) The Commission accepts the premise that there may be a correlation between the results of drug tests and job performance, in which case the CHRC must consider the Bona Fide Occupational Requirement (BOQ) argument).
- 6) The Commission will adopt the procedures outlined by the Addiction Research Foundation as being the minimum standard required for tests to provide accurate, valid and confidential results.
- 7) The Commission will determine, in accordance with the facts of each case, whether the employer has the duty to provide reasonable accommodation or whether an action taken constitutes reasonable accommodation.

## **Exceptions to the Code's Prohibition Against Discrimination**

The Code contains certain exceptions to the general principles which prohibit discrimination. The question, therefore, will be whether or not an employer can discriminate against someone who has AIDS or the related AIDS complex based on these exceptions to the Code. The first of these, found in section 16, provides a defense to an allegation of employment discrimination due to handicap if the handicapped person is incapable of performing or fulfilling the essential duties or requirements of the job. In brief, "essential duties" are those duties and responsibilities which are necessary for the performance of the job. Section 16 was also recently amended by the Equality Rights Statute Law Amendment Act, 1986 and, as with section 10, was proclaimed on April 18, 1988.

In all likelihood, it will be difficult for an employer to argue that a person who is simply carrying the AIDS virus is "incapable of performing or fulfilling the essential duties or requirements" of the job. Indeed, even an employee who has AIDS may still be able to perform the essential duties for a significant period of time after the disease is diagnosed.

Further, in order to find that a person is incapable of performing or fulfilling the essential duties or requirements of the job, section 16(1)(a) as amended will require that the employer establish not only that the person is incapable of performing due to the handicap, but also that the needs of the person cannot be accommodated without "undue hardship", for example, by moving the employee to another job. Regulations are currently being drafted which are intended to define the content of the duty to accommodate and also to define what will constitute "undue hardship". However, it is foreseeable that, in the case of employees with AIDS, employers may be required to modify the employee's duties, provide medical assistance under benefit plans or offer reduced hours.

Another exemption is found in section 10 which provides that a person has not been constructively discriminated against where a requirement, qualification or factor is imposed that results in the exclusion, restriction or preference of a group of persons identified by a prohibited ground of discrimination if the requirement, qualification or factor is reasonable and bona fide.

Before a requirement, qualification or factor can be considered reasonable and bona fide, thus permitting "constructive discrimination", section 10(2) will require that the Commission, a board of inquiry or a court be satisfied that the needs of the group of which the person is a member cannot be accommodated without "undue hardship", considering the "cost, outside sources of funding, if any, and health and safety requirements, if any".

In conclusion, employers should be extremely hesitant to assume that retaliatory or discriminatory action aimed at AIDS sufferers will be permitted under the Code. Starting from this assumption, an employer must carefully evaluate its actions in order to ensure that any actions which it does take are justified and protected by the exceptions to the prohibitions against discrimination found in the Code.

## **The Canadian Charter of Rights and Freedoms**

### ***Equal Opportunity***

"Every issue that presents itself raises the tension between two legitimate though competing goals. On the one hand, there is the important goal of protecting public health in the face of an as yet incurable and fatal disease. ... On the other hand, there is the important goal of protecting the rights of individuals, whether they be AIDS patients, persons who have tested antibody positive, or persons who are perceived to be infected or likely to so become." (Canadian Bar Association of Ontario, 1986, 17).

In the spirit of the Canadian Charter of Rights and Freedoms, one of the principles guiding the CBAO was that interferences with the liberty or rights of the individual will be accepted only to the extent that they can be demonstrably justified in terms of protecting public health. This principle insists that measures designed to protect public health be as least intrusive on individual rights as is possible in the circumstances (1986).

Regardless of whether the Charter is held to apply directly to the employment relationship, it is clear that existing legislation must be read in light of the Charter. Section 15(1) of the 'equality rights' section reads as follows:

"Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

This section of the Charter reinforces the protection already found in existing human rights legislation. Section 1 of the Charter, however, states:

"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject to only such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

An individual's rights and freedoms are, therefore, subject to 'reasonable limits prescribed by law'. An example of such a limit might be the bona fide occupational requirement provisions found in many human rights statutes. However, it is likely that AIDS, i.e. when carriers are identified as sero—positive, will be considered as a handicap or a disability. Since testing is done through blood sampling, there will be an added repulsion from Human Rights Commissions and courts to consider such tests as being reasonable, more particularly in view of the fact that there is no medical evidence that it is transmitted through casual contact including tears and saliva. The fact that the disease is infectious is not a factor in itself indicating that an employee is not qualified to hold the job. Furthermore, a person who tests positive to antibodies may never develop AIDS. Even if the person does, it may not be disabling until a certain stage of the illness is reached.

In other words, unless that certain stage is reached, it would be difficult for an employer to prove on an objective basis that the person who tests positive to anti-bodies cannot, on the basis of having been identified as seropositive alone, perform the essential duties of the job. (Foisy, 1988, 20-21).

Using the same principles in relation to Occupational Health and Safety legislation, it would seem that fellow workers have a very limited right to refuse to work with AIDS sufferers, which could be regarded as a reasonable limit. It must be kept in mind, however, that while the fear of contracting AIDS may be high, the actual risk to a health care worker or any other employee is extremely low. Given the current state of medical and scientific knowledge, we can assume with confidence that AIDS is not a disease spread by casual contact. So long as standard medical protocols are observed, there would seem to be no objective justification for refusal to work alongside or provide services to an AIDS sufferer, except in very few circumstances.

### ***Due Process***

Sections 7 and 8 of the Charter, when read together, provide a constitutional right to privacy:

"Section 7. Life, liberty and security of person. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 8. Search or seizure. Everyone has the right to be secure against unreasonable search or seizure." (Foisy, 1988, 17).

These provisions could be read as reinforcing the general limitations contained in the various Human Rights Codes and the Charter. It might be expected that additional obligations flowing from the Canadian Charter of Rights and Freedoms could be imposed on employers who require medical testing after having tendered a written offer of employment. First, employers will have to justify the reasons for which, in the particular circumstance of their enterprise, the screening of candidates via medical testing is appropriate. ... Secondly, the method used for these tests will have to respect the right to privacy protected by the Charter and will have to comply with various other requirements such as, for example, ensuring a safe chain of custody of the blood or urine samples. (Foisy, 1988, 21-23).

### **iii) Collective Agreements**

There are additional technical as well as policy considerations where employees are covered by a collective agreement because its terms may specifically, or by implication, qualify or preclude initiatives by the employer.

A Collective Agreement is deemed to provide all of the terms and conditions of employment, and the provisions are enforceable by virtue of the Labour Relations Act. Management rights, although articulated in the agreement, are usually qualified by the requirements that there be just cause for discipline, and that weight be given to seniority. The question remains as to whether the restrictions imposed by a Collective Agreement will constitute "undue hardship" under the accommodation rule as practiced by the Ontario Human Rights Commission. Because seniority rights, for example, are individually vested under a collective agreement, their application could relieve the employer from providing an "accommodation" as might otherwise be required under the Ontario Human Rights Code.

Furthermore, the Labour Relations Act of Ontario requires that the employer and the union bargain "in good faith" with respect to wages, hours of work, and other terms and conditions of employment.

Safety rules and practices are conditions of employment under this section. In those work environments in which the presence or potential transmission of AIDS clearly poses a threat to worker safety, such as in health care, employers may have to bargain in good faith over any proposed AIDS policy or testing program covering unionized workers.

If AIDS is a subject of bargaining, several issues arise regarding the flow of information between the employer and the union concerning AIDS victims in the workplace. The employer's duty to bargain in good faith includes an additional duty to supply the union with requested information that will enable the union to negotiate effectively and to perform properly its other duties as bargaining representative. At some point, a union may demand information pertaining to the health of employees suspected to be AIDS victims, raising the issue of the employer's obligation to disclose such information as part of its duty to bargain. Employers may consider releasing such information if they could delete from the records names and any other information that could link the record to a specific employee, thereby refraining from violating employees' rights to privacy and confidentiality.

A program which informs employees more fully about the transmittal of AIDS as it relates to themselves in their employment relationship with others (employees, customers, the public, service contractors, etc.) will probably be permissible where a collective agreement exists, recognizing the trade union's role, if any, in supporting it.

A collective agreement normally has nothing to say with respect to an employer's decision not to hire an employee because of a disability. Generally, it is human rights legislation which will provide a remedy under these circumstances. However, nearly all collective agreements provide seniority and just cause provisions giving the sick employee rights which differ from those existing at common law. This is especially true in the area of job security. (Kenney, 1988). Once employed, an employee in a unionized workplace generally can file a grievance under the collective agreement alleging that his or her termination, demotion, transfer or other treatment in employment was without just cause. (There may be some restrictions if the employee is a probationary employee.) In some cases, the employee's treatment in employment may be due to the presence or possible presence of AIDS. Therefore, one must determine whether or not the potential of AIDS is "just cause".

Arbitration decisions have drawn a distinction between just cause for dismissal in cases of discipline, and just cause for dismissal in cases of illness. Depending on the reason behind the dismissal, different factors are to be taken into consideration. In addition, different considerations are brought to bear depending on whether the illness results in excessive, intermittent, long term, or permanent absenteeism. (Canadian General Electric Co. Ltd. v. Oil Chemical and Atomic Workers, 1975).

It would seem that, based on arbitration jurisprudence, an employee with AIDS who was absent from work intermittently, through no fault of his own, could remain on the job, so long as his absences were not undue. (Re United Automobile Workers and Massey — Ferguson Ltd., 1969). When his condition renders him incapable of regular attendance in the future, his employment status may be altered or the employee may then be terminated.

Because the employer will have no means of determining with certainty that an employee is sero—positive, or is suffering from symptoms of ARC, the first stage of the disease will likely be bypassed

completely and the employee's AIDS infection characterized as long term, or in light of present medical knowledge, permanent when it is first being dealt with by the employer. Seniority provisions may protect the employee for a time, in that he may be reassigned to other work he is capable of in the workplace, but, if the medical evidence indicates that he is incapable of attending regularly in the future, and he is somehow able to collect sick pay for a reasonably long period, it is likely that he will be seen as having been terminated with cause. (Kenney, 1988).

The main question where a collective agreement is in effect will be whether the employee's disability is so serious that there has been an "irreparable breach" of the employment relationship. Similar to the principles of human rights legislation, an employer must establish not merely that it is possible that an employee will have difficulty in performing his duties and responsibilities but rather that, in fact, the level of risk indicated above has occurred.

It appears from the above that an employer will not be able to terminate the employment of an employee who is simply carrying the AIDS virus as persons who carry the AIDS virus may never develop symptoms. In short, it would be difficult to argue that such an employee is "incapable of performing" the job. Where an employee has AIDS, however, and is experiencing the symptoms associated with the disease, it may become increasingly difficult for the employee to come to work and to perform his or her duties. In this case, the employer will be entitled to dismiss the employee if the employee is unable to perform the job and is unlikely to recover in the foreseeable future.

Where the employee is able to perform his or her job, an employer likely is not justified in dismissing the employee unless the mere presence of a worker with AIDS creates sufficient risk to the employee's health, that of his fellow employees, the property of the employer, or the customer or public. However, since the medical data indicates, for the most part, that AIDS cannot be transmitted by casual contact, an employer will probably not have grounds to dismiss an employee on this basis. One exception, however, may apply in the case of employers such as those in the health care business where employee may come into contact with the body fluids or the blood of others. Again, however, the prevailing medical opinion is that the risk is very slight that AIDS can be transmitted through this kind of contact and, therefore, concerns of transmission from the employee to others probably are not sufficiently well-founded to warrant dismissal.

There has only been one case to date where an employee grieved a suspension which was imposed because he was suffering from AIDS. In Pacific Western Airlines Ltd., 1987, a flight attendant who had been employed for 17 years by Pacific Western Airlines in British Columbia was indefinitely suspended from his duties, with pay, on the grounds that he was suspected of having contracted AIDS. In allowing the grievance, the board of arbitration concluded that the evidence showed that the grievor was able to carry out his duties and, in fact, was fit to work three days before his suspension. The Board also relied on the fact that the disease is not incapacitating at a particular stage, differs from individual to individual and noted that the mere prospect of a deterioration in ability does not justify a suspension. In addition, the board relied on expert evidence to conclude that AIDS is not spread by casual contact and that the risk to coworkers" or to the public was theoretical only. Therefore, while the employer was concerned that coworkers or the public may be apprehensive or in danger, neither of these concerns could be substantiated by the evidence.

The evidence also showed that the employee was capable of performing his regular job duties and was removed from flight duties for the sole reason that he was suspected of having contracted AIDS. The employer further argued that the suspension was justified on safety grounds because the disease could affect performance. However, the evidence showed that this was not so. The arbitrator noted that an employer cannot generalize about ability to perform, and essentially, employers will have to wait until the disease has in actual fact affected performance, instead of assuming that it will.

While the employer lost the grievance, the board concluded that this was largely because its concerns were based on conjecture rather than fact. u ... If the Employer is able to show in a given case that the presence of an employee with AIDS has impacted adversely on its business interests, either because the disease has rendered the individual employee incapable of performing his duties, or because the presence of such an employee represents an actual rather than a hypothetical risk to safety, the Employer will be free to remove the employee from flight duties." (Pacific Western Airlines, Ltd., 1987, 307).

It must be pointed out that this is the first case on AIDS to proceed to arbitration in Canada, and, unlike the common law, these precedents are not strictly binding. Arbitrators may use their increased discretion to formulate entirely different results in the AIDS context in the future. Nevertheless, the case is an instructive one, emphasizing the significance of reacting only to a verified inability to perform, or a real risk of transmittal of the disease.

In conclusion, it appears that an employer whose employees are subject to a collective agreement is not entitled to dismiss an employee who has AIDS nor to otherwise discriminate against the individual unless he or she is incapable of performing the job duties and is unlikely to recover from the illness in the foreseeable future. If the employee is capable of performing the duties of the job, it appears that the employer may alter the employee's employment only if there is sufficient proof of probable transmission to others, or that the employee presents a safety risk or danger to himself, other employees or the public.

### III. HUMAN RESOURCE IMPLICATIONS

Employees and customers, naturally enough, want to function in risk-free environments. Similarly, employers want to provide a safe work place, but, in doing so, do not want to discriminate against AIDS victims. How then should employers respond to applicants and employees with AIDS-related conditions, and how do they resolve employment problems arising from those situations? Unlike work-related disabilities, an employer faces the prospect of a highly emotional, if not volatile, reaction not only from an afflicted employee, but also from co-workers, those who are customers of or suppliers to the employer, and the general public.

The complexity of the implications of the disease is unprecedented for medical, legal and practical considerations. Its contagious nature is medically ambiguous, its testing procedures inadequate, and the law is not as yet framed to meet its abnormal characteristics. Each human resource issue will require careful assessment within the human relations culture of the employer, as well as the legal and public relations implications.

#### i) Employment

The Ontario Human Rights Code, 1981 promotes equal employment opportunity regardless of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offenses, marital status or handicap. The Code prohibits the use of an employment application form or a "written or oral inquiry ... that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination."

Human rights legislation is based upon the principle that employment decisions should be based on criteria relating to the applicant's ability to do the job in question rather than on factors that are unrelated to job performance. Also covered by the Code are recruitment and employment practices that are not openly or intentionally discriminatory, but are discriminatory in their effect. On the other hand, the Code recognizes the legitimate right of employers to obtain the most qualified and suitable candidate for a particular job. The Code is built on the merit principle and is intended to promote equal employment opportunity. It recognizes the need to balance the concerns of the employee and the needs of the employer.

It is not a violation of the Code if a person is treated differently because his or her handicap makes it impossible to perform the essential duties required of an employer. "Essential" duties and requirements refers to those duties and responsibilities which are necessary for the performance of the job. For example, if a person applies for a job as a lawyer, it may not be "essential" that he or she be able to type. However, if that person is applying for a job as a typist, the ability to type would be "essential".

#### Employment Advertising

The Code forbids advertisements that would discourage a disabled person from applying for a job. In particular advertising for an "able-bodied" person is prohibited by the Code unless "able-bodied" is a genuine and reasonable job requirement.

It is unlawful for any employer to try to place a job order which classifies or restricts applicants on any of the prohibited grounds for discrimination, and it is also unlawful for an employment agency to accept such an order. In spite of this prohibition, in a survey of recruiters canvassed by the Canadian Recruiters Guild over the last two years, 97% of 672 recruiters and managers said they have rejected handicapped job seekers because of personal or perceived biases. (Human Resources Management in Canada, 1988, 63.1). The Guild survey found that discriminatory practices are most pervasive among agency recruiters. According to the Guild, every agency recruiter contacted said he or she had received discriminatory hiring requests from clients, and 94% said they complied with the requests, usually out of fear of reprisal or of losing business. By comparison, 87% of corporate recruiters said they had received discriminatory requests and 73% said they had complied.

What all of this suggests is that although the legislation exists, its mere presence has not prevented employers from discriminating against the handicapped in the past. However, more and more AIDS sufferers are becoming aware of their rights, and employers are becoming more knowledgeable and recognizing how unfounded their fears have been in the past.

### **Application Forms**

To avoid a person being screened out for consideration for a job because of an assumption that he or she cannot perform the job, questions are generally not allowed on application forms which would elicit, either directly or indirectly, information about any of the prohibited grounds of discrimination. This means that an employer's application form may not ask about sexual orientation, marital status, ancestry or ethnic origin, race, health, handicaps, physical defects, illnesses, mental disorders, or medical history, and an employer may not require that applicants endure preemployment medical examinations. By preventing these types of questions and examinations, employers may be prevented from arbitrarily screening out of applicants whom they suspect or perceive to have been infected with the AIDS virus.

### **Employment Interviews**

The interview is the appropriate time to ascertain whether a person can perform the essential duties of the job. Therefore it is advisable for employers to identify the essential duties of the job, and to ask questions at the employment interviews to determine whether the applicant is able to perform them. Questions about handicap are permissible in an interview, as long as the questions are related to whether the person can perform the essential job requirements.

A greater latitude is permitted in employment interviews than on employment application forms. Thus, questions concerning certain prohibited grounds of discrimination that are not permitted on application forms may be asked by the employer at a job interview, but only in specific circumstances. Examples are questions about age, sex, marital status, record of offenses or handicap. The employer must be able to show that such questions are asked because they are related to genuine and reasonable qualifications for the job that is being applied for. For example, the Code permits discrimination on the ground of handicap when a physical characteristic or ability is a genuine and reasonable job consideration.

Therefore, an employer who is hiring a surgeon to perform invasive procedures which require that he work closely with blood products, where the risk of transmission of the AIDS virus is high, could

reasonably inquire at the interview about the applicant's physical health and the HIV virus, whereas questions about handicap are not permitted on the application form.

When an employer claims that age, sex, record of offenses or handicap is a genuine and reasonable qualification because of the nature of the employment, the Commission must be satisfied that the circumstances of the applicant cannot be accommodated without undue hardship on the employer. In assessing undue hardship, consideration is given to the cost, any outside sources of funding and any health and safety requirements.

### **Post-Hiring Inquiries**

A distinction should be drawn between pre-employment and post-hiring inquiries. A question that could be considered a violation of the Code if asked of an applicant before he or she has been hired, could appropriately be asked after hiring if there is a legitimate need for such information for personnel purposes. For example, it could be valid after hiring to request information about a handicap such as AIDS where it is necessary for medical or life insurance coverage. However, exclusion from such plans may not be used as a reason for denying employment.

### **Medical Inquiries**

The Ontario Human Rights Commission treats AIDS in the same manner that it treats other handicaps. It is the intention of the Code that:

- no questions regarding the physical and mental health should be asked on an employment application form;
- inquiries about a person's ability to perform the particular job may be asked at a personal employment interview; and
- employers may not require job applicants to undergo a medical examination as part of the application process. Employment-related medicals may only be conducted after a written offer of employment has been made. The medical must be restricted to determining whether the person is capable of performing the essential duties of the job.

The Commission also requires that an employer be able to show that safety or some other valid business concern would be affected if people who had a certain physical condition, such as AIDS, were hired. Although the job offer can be conditional upon passing the medical, the employer must make reasonable efforts to accommodate an applicant who has failed it. For example, if an applicant for a position as a laboratory technician tests positive for AIDS, and the employer has a legitimate concern about the individual's performance on the job because he will be working closely with blood products, then the employer must first try to accommodate the individual, probably with another job where the risk of exposure to blood products is not a condition of employment. Only if the employer cannot accommodate the person without undue hardship, can the offer of employment be rescinded.

The Commission endorses the policy of keeping all medical records confidential and separate from general personnel information.

## Employment Benefits

The Code permits genuine and reasonable distinctions or exclusions because of handicap in the following types of employee benefit plans:

- an employee disability or life insurance plan or benefit if the reason is a pre-existing handicap that substantially increases the risk;
- an employee-pay-all or participant-pay-all benefit in an employer benefit, pension or superannuation plan; or
- an employee group plan which has fewer than 25 participants.

However, when an employee is excluded from an employee benefit, pension or super-annuation plan or fund, or a contract of group insurance between an insurer and the employer because of a handicap such as AIDS, the employer must pay compensation to that employee which is equivalent to the amount contributed to the insurer on behalf of an eligible employee. Employment may not be denied or made conditional upon enrolment in such a plan.

### ii) Life and Health Insurance

Medical care for AIDS victims is extensive and prolonged and, in the final stages of the disease, patients may be hospitalized for long periods of time. The total cost of treatment can run into the hundreds of thousands of dollars. While the medical insurance plans of most companies cover treatment, some of the cost will ultimately be passed on to the employer in the form of higher insurance premium rates. Employees with AIDS can, accordingly, be a very expensive proposition, particularly for employers that are self-insured.

At the Annual Meeting of the Canadian Life and Health Insurance Association (CLHIA), the President of London Life Insurance, Earl Orser, attempted to reassure the industry by putting the costs to insurers from AIDS death claims, into perspective (1987). He indicated that the estimated additional AIDS claims of \$2.3 billion on existing business between now and the end of the century, represents only 5 to 6 per cent of total death claims. And in a survey that CLHIA completed in September, 1987, member companies reported that in 1986, AIDS-related death claims represented less than one per cent of total death claims (Table V). To further make his point, he reported that while there will be 300 to 400 AIDS-related deaths in Canada this year, there will be 50,000 deaths from cancer. The AIDS-related claims seem almost insignificant compared to total death claims, and appear to certainly be within the range with which the insurance system can deal, without massive impacts on rates and solvency. However, he did advise insurers to take prudent measures to protect themselves against anti—selection and misrepresentation of clients by necessitating routine testing for AIDS antibodies.

Can cost considerations justify discrimination against AIDS individuals? The courts, and the express language of some handicap discrimination statutes themselves, have usually rejected the argument that employers may discriminate against disabled employees who have the potential for running up large medical bills. Nor may an employer lighten its health insurance expenses by requiring those who test positive for the AIDS virus to pay higher premiums, reflecting their higher level of risk.

Some medical plans exclude or limit coverage for "preexisting conditions", to discourage an individual from seeking employment based primarily on an employer's insurance program (Ritter and Turner, 1987). However, the Ontario Human Rights Code provides that an employer must pay an employee excluded from an employee benefit plan because of a handicap, compensation equivalent to the contribution that the employer would make to the plan on behalf of an employee who does not have a handicap (LeGault, 1987).

Realistically, economically prohibitive costs may, in the future, be a consideration in determining the extent to which an employer must make special accommodations for persons with AIDS.

**Table 4 - Canadian Life and Health Insurance Association**

**Spring, 1988 Survey of Member Companies**

Questions: How many death claims are related to AIDS? What are the amounts of the claims?

**Group Claims**

	Pre-1986	1986	1987	Total
# of Claims	11	49	109	169
Amounts of Claims	\$0.4M	\$1.7M	\$5.0M	\$7.1M

\*\*\* The \$7.1 million paid out in death claims related to AIDS is only 1% of the total death claims paid in this period for group claims.

**Problems With the Survey Results:**

1. Claims do not always give a cause of death – AIDS merely weakens the immune system, so undoubtedly there are deaths that are unreported.
2. The cause of death is not always specific.
3. The \$ amounts relate only to death claims; they are not inclusive of other sick-related costs.

**What Will Happen to Premium Rates in the ST/MT/LT?**

\*\*They will be adjusted based on experience.

\*\*Death rates in other areas are on the decline, so the combination of experience factors is affected. Rates will be higher that they otherwise would have been.

\*\*The CL & HIA is optimistic for a number of reasons:

- AIDS education is on the increase.
- The rates of new infection are not increasing in Canada (ie.) in Canada, 10/17000 cases (.6%) are attributed to IV drug abuse, the behavior believed to be most responsible for the spread of AIDS in the heterosexual community, whereas in the US, the rate is 15% to 17%.
- There is no conclusive evidence that heterosexual incidence is on the rise.

Charles Black  
V.P., CL&HIA  
May 02, 1988

### iii) Medical Monitoring in Employment

Medical monitoring is used by employers in the areas of employee selection, ongoing occupational health care, and health investigations. Atherly (1986) identifies three applications for medical monitoring in employment:

- a. Pre-employment and pre-placement medical examinations, laboratory tests, and health-related and psychological questionnaires.
- b. Employee health screening and surveillance during employment.
- c. Biological monitoring for workplace contaminants in workers' bodies.

No cases specifically concerned with mandatory AIDS testing have yet been decided in Canada. However, information protection is seen increasingly in legislation. The provincial health disciplines acts and the federal Privacy Act protect the confidentiality of medical and personal information, respectively.

In employment practice, personal and medical data on AIDS victims should be handled with procedures which not only treat them as private and confidential, but also are seen to do so. The inviolability of the human body, a basic right, applies to medical examinations and procedures, including the collection of body fluids. Unnecessary testing may be considered to be medical voyeurism. To perform these types of procedures on anyone without an informed consent is an assault and a trespass on the person.

The federal, provincial and territorial human rights codes prohibit discrimination in employment on the basis of handicap or disability, apparently then, protecting the AIDS victim. Except for Quebec, the federal, provincial and territorial human rights codes do not deal with protection of privacy. Quebec's Charter of Rights and Freedoms specifically states that every person has a right to inviolability, dignity, and respect for his or her private life. As a result, employees in Quebec may be at a considerable advantage in challenging mandatory AIDS testing.

The Canadian Charter of Rights and Freedoms does not specifically guarantee a right to privacy, but it does protect individuals against unreasonable search and seizure, which AIDS testing may violate. The critical issue yet to be determined in most jurisdictions is whether it will be judged to be unreasonable.

Typically, Occupational Health and Safety laws require employers to ensure that their employees are fit to do their jobs. Employers might argue that AIDS testing of all or certain employees is necessary to satisfy this legal requirement. To date, there are no reported decisions in which this type of argument has been successfully made by employers attempting to implement a requirement for AIDS testing.

It is not unlawful per se to require applicants to complete prehire questionnaires or physical examinations, or periodically to require employees to have a physical examination. But, employers that use health questionnaires or pre— or post—hire medical exams should make sure that employment decisions are not based on anything other than the individual's current ability to do the job. To exclude an applicant who currently can perform the job because he or she has AIDS, has tested positive for the AIDS virus, or is prone to getting AIDS would be unlawful, unless the job—relatedness of that decision can be otherwise justified. In fact, action taken against an employee on the basis of test results would almost invariably constitute prima facie handicap discrimination (Rowe, et. al., 1986).

As a practical matter, screening for exposure to the AIDS virus would likely do more harm than good. Besides being very expensive, a positive test shows that a person has been exposed at one time to the virus but does not confirm whether the virus is still present or whether it is currently active or inactive. Moreover, unreasonable intrusion into another person's seclusion or private affairs may support a claim for compensatory and punitive damages. An actionable intrusion might occur if an employer performed an AIDS test without the employee's knowledge or consent. A positive result, if leaked, could provoke adverse employment actions and lead to unfavorable inferences about how an employee was exposed to the disease. Thus an invasion of privacy claim could probably be made.

Once an employer learns, whether through AIDS testing or a voluntary disclosure, that an employee or applicant has AIDS or is sero-positive, the employer must handle the information with extreme caution. If the information is released improperly, the AIDS victim might be able to establish that the employer is civilly liable in tort. Conversely, the employer may also be liable to infected employees or job applicants if it does not disclose positive test results to the infected individual. In Dornak v. Lafayette General Hospital, (1981), a hospital employer that gave a pre-employment medical which revealed tuberculosis had a duty to disclose the condition to the tested employee. And, in Wojcik v. Aluminum Co. of America, (1959), a wife who caught tuberculosis from her husband had cause of action against his employer who, she claimed, knew of the condition and failed to disclose it to her or her husband. Although to date there have been no similar cases regarding AIDS, it is easy to see the relevance of such findings vis-a-vis an AIDS employee. Hence, employers considering screening for AIDS must weigh the benefits, if any, of such testing against the considerable exposure to liability that may result.

### **Employer Defenses**

A primary concern of employers in dealing with applicants and employees suffering from AIDS is the potential health threat for the worker himself, coworkers and customers or the public. As noted, the ways in which the disease is transmitted are not fully and conclusively understood. Since for now AIDS is incurable and fatal, the fact that some questions remain about the extent of its contagiousness is understandably alarming.

### **Safety of Other Employees and Safety of the Public**

Section 14(2)(g) of the Occupational Health and Safety Act of Ontario requires an employer to "take every precaution reasonable in the circumstances for the protection of the worker.

The thrust of this Act is directed towards protecting the safety and health of an employee against injuries or illnesses arising from the physical properties and operational activities being carried on. It is questionable if it extends to contagious diseases which result from exposure to other persons, rather than to conditions directly associated with the operational activities of the employer.

However, it is easy to foresee situations which will require practical answers despite the anomalies of the law. To illustrate, para-medics or employees engaged in plant safety programs, may refuse to accept instruction in or to administer the mouth-to-mouth resuscitation technique. These types of employee reactions will challenge management's human relations skills to the utmost, particularly if literal effect is to be given to the limitations under the competing statutes.

Since AIDS is not medically considered to have a high risk factor, it remains to be determined what obligation an employer may have to other employees under this Act, where the work performance of a carrier of the disease is not affected. In fact, an employer may incur liability by taking certain measures against employees who have or are suspected of having AIDS. The employer's fear of spreading the disease will not likely be considered a viable defense to a discrimination claim for one simple reason: No evidence exists that AIDS can be spread through the casual contact characterizing a typical workplace. AIDS cannot be spread by coffee cups, telephones, toilets, or water fountains shared at work, or even by non-intimate skin-to-skin contact. According to the Centers for Disease Control, a review of five years of clinical studies of over 10,000 patient histories shows no routes of transmission other than intimate sexual contact, contaminated syringes, tainted blood supplies, or transmission in utero.

In a recent arbitration case, where a male flight attendant was suspended with full pay and benefits when it was discovered that he had contracted AIDS, the arbitrator followed a policy similar to that of the Human Rights Commission. (Pacific Western Airlines, Ltd., 1987). While the employer was concerned that co-workers or the public may be apprehensive or in danger, neither of these concerns could be substantiated by the evidence, and the employer lost the case.

For obvious reasons, the fear of contagion has been most severely felt by employers hiring or retraining health-care and food-service workers with AIDS. Yet the lawfulness of discriminating against AIDS victims in even those arguably more hazardous settings is very questionable. No evidence exists that AIDS is spread through food handling. While there is some scant evidence of AIDS being transmitted to health-care workers from AIDS patients through contact (via broken skin) with contaminated needles and syringes, no cases of the reverse have been reported - that is, health-care workers with AIDS somehow communicating the disease to patients or coworkers. (Ontario Ministry of Health, AIDS in the Workplace, 1987).

A second common concern is that, given the public hysteria about AIDS, an employer cannot effectively run a business if any of its workers have the disease. An employer may find, for example, that retaining employees with AIDS may result in a loss of customers, or coworkers may refuse to work close to those with, or suspected of having, the disease. Incidents like these have been reported throughout the country.

But non-acceptance of the AIDS victim by coworkers and customers is unlikely to be accepted by the courts as a defense for discriminating against employees or applicants with AIDS. The law does not condone discrimination merely because employees or customers are misinformed or prejudiced. Human Rights cases have held consistently that it is no defence for an employer to rely on refusals to deal with an individual by customers or other employees.

What, then, is the employer to do in instances in which employees refuse to work with, or serve, AIDS victims? One option is to discipline or terminate these employees. It is true that many provinces and virtually all collective bargaining agreements allow an employee to refuse to work under clearly unsafe and unhealthy conditions. Yet, to repeat, working alongside someone with AIDS is not, according to current scientific knowledge, unsafe or unhealthy. In a situation in the U.S., the California Labor Commission dismissed a complaint filed under the Occupational Safety and Health Act by four nurses who claimed they were unlawfully discriminated against when their employer reassigned them to a different shift because they insisted on wearing gloves and gowns when treating AIDS patients.

(Bernales, et. al. *v. City and County of San Francisco, Department of Public Health*, 1985). If a claim by nurses who have day-to-day contact with syringes and other medical equipment used on AIDS patients has not been upheld, it is doubtful that complaints about unsafe working conditions by employees in other fields (in which more casual contact takes place) will be taken seriously.

Under the Ontario Occupational Health and Safety Act, a worker has a right to refuse to do work where "he has reason to believe that" the physical condition of the workplace in which he works is likely to endanger himself. (Section 23(3)(b)). The case law indicates that, initially, the test as to whether the employee has the right to refuse to work is a subjective one. As long as the employee believes that the workplace is unsafe, he can stop working. Therefore, if an employer has educated employees about how AIDS is transmitted, the possibility of an employee arguing that he had reasonable cause to believe the work was unsafe would be reduced. It is less likely, then, that a reasonable refusal could take place. Where the employee has been instructed by the Ministry of Labour and the employer that there is no danger of transmittal, the continued refusal would then be considered unreasonable and the employee would be subject to discipline.

The Public Service Staff Relations Board recently dealt with the refusal of two prison guards to report for work because they feared contracting AIDS or Hepatitis B from inmates. (Walton and the Treasury Board — Correctional Services, Canada, 1987). The two guards, who were assigned to work in the prison hospital, refused to open three isolation cells because their occupants were suspected of having AIDS or Hepatitis B. (The Canada Labour Code grants employees the right to refuse to work under conditions which they have a reasonable cause to believe are dangerous.) The guards claimed that working with the three inmates posed a danger to their health, and even to their lives.

A federal Department of Labour safety officer investigated and concluded that no danger existed. Exercising their rights under the Canada Labour Code, the guards referred the safety officer's decision to the Public Service Staff Relations Board.

At the hearing, the guards testified that the inmates, because of their suspected medical conditions, were kept in isolation cells. These cells had no modern plumbing facilities. Every morning one of the guards' first tasks was to escort the cell inmates, each carrying their pail of human waste, to a washroom where the pails would be dumped. According to the guards, they had received reports from other prison employees that these inmates were "generally aggressive" and had threatened to throw the pails' contents at them. The contents could contain semen resulting from masturbation, as well as feces and urine. In addition, the guards feared that if they were bitten or spat on by the "violent or aggressive" inmates, there might be a danger of infection.

The guards had been provided with protective gloves, gowns, slippers and hats. However, they claimed that the protective clothing was inadequate given the inmate aggressiveness. Some of the protective clothing was "flimsy" and did not cover all their bodies.

A National Health and Welfare doctor, an AIDS expert, then testified that the disease is not transmissible through casual contact with the virus. The doctor also testified that "the virus can be easily inactivated by soap and water or heat," and that the use of rubber gloves and the application of band-aids to openings in

the skin constitute perfectly adequate protection against AIDS for prison guards "in the normal course of their employment."

The doctor testified that Hepatitis B, unlike AIDS, can easily be transmitted through casual contact. The Board decided that fear of contracting Hepatitis B was a justifiable reason for the guards' refusal to work, however, the Board ruled that fear of contracting AIDS from inmates suspected of having the disease was not a reasonable cause for refusing to work.

This decision may provide an indication of how occupational health and safety tribunals will deal with employees' refusals to work because of the fear of contracting AIDS from fellow workers or from customers.

Of course, disciplining employees does not help the morale of those who have a genuine fear of contracting AIDS but are nonetheless required to work with persons who have the disease. Employers must respond positively to the AIDS—related fears of their employees. Perhaps the best means of calming such fears is through a comprehensive educational program. Such educational programs can be helpful in minimizing the pervasive, and often times disruptive, fear of AIDS.

### **Safety of the Employee with AIDS**

The AIDS victim's own health is another area of employer concern. On this point, a number of jurisdictions permit an employer to refuse to employ a handicapped person if performance of the job is hazardous to his or her "health and safety."

The "health and safety" defense has a very high evidentiary threshold. The employer must have concrete facts that establish a reasonable probability, not a mere possibility, of harm to the employee, co—worker or the public. The burden of proof on the employer is virtually impossible to carry in the AIDS context, since currently no medical evidence suggests that the physical exertion or mental stress of working, or the increased contact with coworkers and others, would in any way aggravate the disease. Thus depending, of course, on the particular job in question, employers must proceed with utmost caution in seeking to rely on the health and safety defense to discharge or otherwise discriminate against those with AIDS.

### **Costs**

Many employers fear that retaining an employee who has AIDS in their workplace will lead to a catastrophic business loss once the public becomes aware that such an individual is employed in their firm. The argument that an employer should be free to exclude a person from the workplace because of a demonstrable loss of business due to his presence has been raised in the context of collective agreement arbitration, particularly in cases dealing with the right of an employer to discipline employees for failure to adhere to company rules or policies concerning personal appearance (Elliot and Saxe, 1986(b)). Arbitrators generally approach such cases by determining whether such a rule is reasonable. The test is an objective one — has the public complained or can the company show by way of public opinion surveys or market research that the presence of say, a bearded male employee, will negatively affect the corporate image and lead to a decline in business?

In the past, when companies could provide arbitration boards with expert's surveys which demonstrated a threat to corporate image and a consequent likelihood of business loss because of negative perception, arbitrators have upheld the company rule. However, there are problems with applying the same reasoning to a case involving an AIDS sufferer. It would be quite likely that a company could show by way of current public opinion surveys that customers would not patronize a business that employed individuals with AIDS, particularly in the hospital industry. However, unlike the public appearance cases, where an employee can, if he must, shave off his beard or mustache, it is impossible for an AIDS victim to change his status. The Human Rights Commission is likely to find that market-place prejudices should not be allowed to defeat the purpose of the Human Rights Code.

Another concern to an employer who employs an AIDS sufferer is the possibility of civil suits from customers. Presumably, the legal basis for such an action would be the alleged negligence of the employer in continuing the employment of a known AIDS sufferer. However, a customer who initiated such an action would have an onerous task proving that it was exposure to an AIDS employee in the workplace that caused him to contract AIDS, since current medical opinion is that it is extremely difficult, if not impossible, to contract AIDS through this type of causal contact. Because of this, the courts would likely hold that an employer who continued the employment of an AIDS sufferer had acted responsibly vis-a-vis his customers (Elliot and Saxe, 1986(b)).

And finally an employer may try to use the defense that employing an AIDS victim is too costly as a result of time off due to illness, payments made with respect to medical and life insurance coverage, and the cost of physically accommodating the AIDS employee on the job. However, at this stage, none of these costs appear to be any more prohibitive than accommodating employees with other fatal diseases such as cancer. Large employers, in particular, will have difficulty proving "undue hardship".

Whether an employer tries to use health and safety or business costs as a defence, the onus will rest with the employer to substantiate his concerns with evidence of actual occurrences. Even if the employer does provide the evidence, it is unlikely that a Human Rights Commission will allow an AIDS sufferer to be terminated without considerable effort on the employer's part to accommodate the employee.

## IV. CONCLUSION

Existing rights available to those infected with the AIDS virus are substantial. For this reason, and for reasons of good employee relations, employers should proceed carefully and with informed medical advice before taking any action which would prejudice either the hiring of new employees or the treatment of current employees who have AIDS or the related AIDS complex. While the Centers for Disease Control in Atlanta consider AIDS a "fragile virus" unlikely to be transmitted by ordinary workplace activities, many managers are not yet prepared to calmly and responsibly handle AIDS—related fear and conflict among employees. And, while the latest epidemiological facts may help managers dispel some of their own fears, most managers will never before have confronted an epidemic that upsets themselves and others so much. Part of the employer's problem is that the medical community has incomplete knowledge of this virus. All of the possible ways in which AIDS may be transmitted are not conclusively understood. And most importantly, at this time, there is no known cure for AIDS. As a result, managers dealing with AIDS may doubt their own capacity to make rational, responsible decisions. In light of this fear, managers must stay well informed and must talk with colleagues about what they can do to cope with their own fears of AIDS; about the legal climate, to avoid discrimination claims and liability; and about helping their companies in managing fearful employees. The following recommendations may be useful to employers as they begin to confront the issue of AIDS in their workplace.

1. Creating calm in your workplace begins with yourself. If you have not confronted your own feelings about AIDS and the likely contractors of the disease, give it some hard thought. You do not want to be coping with surprise, or automatic emotional reactions while listening to an employee tell you that he has AIDS and needs your help. Acknowledge and discuss your own fears about AIDS before a crisis arises so that decisions may be made in a compassionate and responsible manner. Knowledge and planning can help cope with the situation and avoid the destruction that ignorance and fear generates.
2. When dealing with AIDS in the workplace, remember to maintain confidentiality of medical information as well as the privacy of employees.
3. Being unemployed can be devastating emotionally and physically. As long as people with AIDS can work, it will keep them emotionally and spiritually intact. Working can be a centre of dignity and calm during a time of tremendous upheaval. Employers should not take any adverse employment actions with respect to AIDS employees unless the employer cannot reasonably accommodate the individual, the individual presents a safety risk, or the individual can no longer perform his duties. This should be well documented.
4. Employers should be hesitant to screen current employees or job applicants for AIDS for a number of reasons. Often, testing is performed only in certain centres and may be very expensive. More importantly, the test is impractical and not particularly informative in that a positive result only indicates exposure to the virus, and does not confirm the presence of the disease or the likelihood of developing it. In addition, there is a possibility of false positives and false negatives.
5. Employers should probably cover medical expenses related to AIDS, even it is a pre—existing condition. Current evidence indicates that these costs are no more prohibitive for AIDS than for any other life threatening illness that employers are confronted with in the workplace.

6. In order to prevent sensationalizing AIDS even further than it has been, it is advisable to develop a general policy for all communicable, long—term and life threatening illnesses and accidents, as opposed to a special AIDS policy. The time to do so is now before you have someone in your company with AIDS. By doing so, you can reduce the fear and eliminate the mistakes that might otherwise result from overreacting in a panic situation. This policy should be reviewed in depth with the collective bargaining representatives of each trade union in the organization.
7. As a primary component of such a policy, employers should introduce an education program on how the disease is transmitted to reduce fear and stress in the workplace. This helps to prevent panic reaction and work refusals. If employees know the facts and realize that the company has everyone's best interests in mind, they can act more rationally. Additional training should be provided for managers and supervisors, and should deal with employment discrimination and appropriate personnel actions. Such a program, in addition to alleviating workplace anxiety, will serve as evidence that the employer responded in a positive manner in an attempt to resolve the matter, should its good faith be questioned in any later legal proceedings.
8. If your organization has an Employee Assistance Program, ensure that the people who run it are knowledgeable about AIDS, know where to get help and information, and know the labour law in Canada concerning AIDS. It is particularly important that they are aware of and understand your company's policy and approach to dealing with employees with AIDS.
9. To date, AIDS has been treated by the government, labour tribunals and the courts in the same manner as other communicable diseases or handicaps. There appears to be a conscious effort to protect AIDS victims and prevent them from being stigmatized. Based on the current state of medical knowledge on the disease, this appears to be reasonable. However, new findings on the transmittal of the disease may quickly alter this approach. Employers should carefully monitor the evolving medical knowledge concerning AIDS, especially as it relates to the spread of the disease through casual contact. They should also closely monitor legal developments.

Although an employer may have legitimate concerns about individuals who are suffering from AIDS or persons who are perceived to have the disease, those concerns may be at odds with handicap discrimination laws. The status of the law in the context of AIDS-related conditions is still developing, but it appears that the traditional concepts of nondiscrimination and reasonable accommodation will apply. As with other handicaps and disabilities, employers should handle the issue of AIDS-related conditions with care, sensitivity, and an awareness of the law. For employers to do otherwise is to risk incurring the wrath of the courts and allocating and expending considerable resources in defending themselves against lawsuits brought by employees.

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