Volume 68 | Number 6 Article 12

9-1-1990

Rights of HIV-Infected Employees and Job Applicants under North Carolina Law: Lots of Legislative Activity, but Just How Much Protection Does It Afford

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Editor's Note: On July 26, 1990, as this issue was going to print, President George Bush signed into law the Americans with Disabilities Act (ADA) discussed in footnote 53 below. This landmark legislation, hailed as a civil rights act for the disabled, is modelled after the federal Rehabilitation Act of 1973 but extends protection to the private sector. Despite legislative attempts to exclude HIV-infected persons, the ADA clearly protects anyone who is disabled by the virus. However, the ADA contains a lengthy grace period for employers: the effective dates of the various provisions range from eighteen months to four years in the future. Although the ADA's sweeping protections eventually will go far towards alleviating discrimination against HIV-individuals who have become disabled by the virus, state measures are nevertheless necessary to protect those who are not yet disabled.

> [W]e are fighting two fights—one against the HIV virus and one against discrimination. We may not win the first fight until we have won the second.[1]

The rapidly growing number of Americans affected by Acquired Immune Deficiency Syndrome (AIDS)[2] has generated a host of questions relating to employment. As of July 1990 more than 139,000 cases of AIDS had been reported in the United States;[3] in North Carolina, there were 1,427 reported cases.[4] The United States Public Health Service currently estimates that between 650,000 and 1,400,000 Americans are infected with Human Immunodeficiency Virus

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1. NORTH CAROLINA LEGISLATIVE RESEARCH COMM'N, REP. TO THE 1989 GENERAL ASSEMBLY OF NORTH CAROLINA, ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS), at 24 (1989) [hereinafter LEGISLATIVE REP.].

2.

> The acquired immunodeficiency syndrome (AIDS) is a late manifestation of infection with human immunodeficiency virus (HIV). Most people infected with HIV remain asymptomatic for long periods. HIV infection is most often diagnosed by using HIV antibody tests. . . .
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> . . . .
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> The time between infection with HIV and development of AIDS ranges from a few months to [greater than] ten years. Most people who are infected with HIV will eventually have some symptoms related to that infection.

Centers for Disease Control, *Sexually Transmitted Disease Treatment Guidelines*, 38 MORBIDITY AND MORTALITY WEEKLY REP. 1 (Supp. 1989) [hereinafter *CDC Treatment Guidelines*]. There is no known vaccine or cure for AIDS. *Id.*

A full discussion of the epidemiology of AIDS is beyond the scope of this Note. For an excellent judicial exposition of the relevant medical facts, see Chalk v. United States Dist. Ct., 840 F.2d 701 (9th Cir. 1988). For a thorough discussion of the history and demographics of the AIDS virus, see the October 1988 issue of *Scientific American* magazine, which includes the following articles: Gallo & Montagnier, *AIDS in 1988*, 259 SCI. AM. 41 (1988) (authored by the investigators who discovered the HIV virus); Heyward & Curran, *The Epidemiology of AIDS in the United States*, 259 SCI. AM. 72 (1988); Mann, Chin, Piot & Quinn, *The International Epidemiology of AIDS*, 259 SCI. AM. 82 (1988).

3. UNITED STATES CENTERS FOR DISEASE CONTROL, HIV/AIDS SURVEILLANCE REP. - UNITED STATES 5 (Aug. 1990).

4. *Id.*

(HIV), the virus that causes AIDS.[5] "From the perspective of the individual with AIDS, the syndrome is incurable, physically incapacitating, mentally debilitating, and—finally—lethal."[6] Because the syndrome disables victims progressively,[7] AIDS and AIDS-related infection create unique problems in society and in the workplace. Controversial questions about the rights of persons with AIDS or HIV-infection abound, including sensitive concerns regarding testing, confidentiality, and privacy. In the workplace, these issues are magnified, and additional problems emerge regarding discrimination in hiring and firing, the costs to employers in productivity, health insurance, and possible tort liability to third parties.

Federal law prohibits discrimination against an otherwise-qualified person on the basis of a communicable disease.[8] Section 504 of the Federal Rehabilitation Act[9] (the federal act) covers any federally assisted entity and federal con-

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5. *Estimates of HIV Prevalence and Projected AIDS Cases: Summary of a Workshop, October 31-November 1, 1989*, 39 MORBIDITY AND MORTALITY WEEKLY REP. 110, 111 (1990) [hereinafter M.M.W.R.]; *see also* Heyward & Curran, *supra* note 2, at 80. Because HIV is the virus that causes AIDS, all persons with AIDS are HIV-positive. *See* Curran, Jaffe, Hardy, Morgan, Selik & Dondero, *Epidemiology of the HIV Infection and AIDS in the United States*, 239 SCIENCE 610 (1988). However, not all persons with HIV have AIDS, nor are HIV-positive persons certain to develop full-blown AIDS. *See* UNITED STATES PUBLIC HEALTH SERVICE, SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNODEFICIENCY SYNDROME, at 11 (1986). Persons who demonstrate some symptoms of AIDS but do not manifest the opportunistic infections that trigger an AIDS diagnosis are classified as suffering from AIDS-Related Complex (ARC). *Id.* For ease of reading, this Note will use only the terms HIV-infection and AIDS, referring to those who are asymptomatic and those who exhibit symptoms, respectively.

Although alarming numbers are dying each year of AIDS, the focus of this Note is those who need the protection of the law—those who are living with AIDS. In 1989 there were between 92,000 and 98,000 living persons with AIDS; by 1993 there may be as many as 225,000 persons living with AIDS. M.M.W.R., *supra*, at 17. New experimental treatments have the potential to lengthen the lifespans of HIV-infected persons. *See* Leonard, *AIDS, Employment, and Unemployment*, 49 OHIO ST. L.J. 929, 930-31 (1989); LEGISLATIVE REP., *supra* note 1, at D-11 (discussing average length of time between contracting HIV and developing AIDS).

6. W. BANTA, AIDS IN THE WORKPLACE 149 (1988).

7. Because of the indeterminable incubation period of the AIDS virus, and the various dissimilar stages of illness associated with it, infected persons cannot all be classified as handicapped. No bright line indicates which stage of AIDS causes physical disability in its victims. On one hand, persons in the final stages of the disease are so disabled by the virus they are unable to work, and therefore fall within the definition of handicapped. On the other hand, mere carriers of the AIDS virus, or persons in the early stages of the disease usually exhibit no disabling effects. Although members of this latter, less-afflicted class may not appear handicapped, they suffer from equally virulent employment discrimination. In fact, these victims may be in the greatest need of protection.

Note, *Are AIDS Victims Handicapped?*, 31 ST. LOUIS U.L.J. 729, 739 (1987) (citations omitted). *See* Heyward & Curran, *supra* note 2, at 81; *see also* LEGISLATIVE REP., *supra* note 1, at D-11 (average time from infection to disease now appears to be between eight and fourteen years).

8. *See* School Bd. of Nassau County v. Arline, 480 U.S. 273, 285-86 (1987) (§ 504 of the Rehabilitation Act of 1973 prohibits discrimination against persons with communicable diseases).

9. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (1982). § 504 prohibits federal employers, federal contractors and programs receiving federal monies from discriminating against the handicapped, and requires federal agencies and contractors to implement affirmative action for handicapped employees. *See* 45 C.F.R. § 84.1 to -.14 (1989) (regulations enacted to effectuate § 504). To benefit from the Act's protection, the person must be handicapped yet physically able to perform the job; must not create a health or safety risk to himself or others; and any special needs must be capable of accommodation without undue burden on his employer. *Id.*; *see generally* Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401 (1984) (discussing the scope and interpretation of § 504).

tractors.[10] Private-sector employers are restricted only by state laws. Many states have elected to classify AIDS and HIV-positivity as a handicap and to provide protection to victims under general handicap and disability legislation;[11] others have expressly excluded the conditions from the protection of handicap statutes.[12] Still other states have passed AIDS-specific antidiscrimination statutes.[13] North Carolina has refused to consider HIV-positive status or AIDS a handicap. In 1989 the North Carolina General Assembly amended the Communicable Disease Law to address discrimination against persons with AIDS and HIV-infection in employment, housing, public services, and places of public accommodation.[14] While the legislation answered queries about what protection

10. Because the Federal Rehabilitation Act covers any entity to which the federal government directly or indirectly extends financial assistance, its coverage includes executive agencies and programs, the postal service, hospitals, universities, states, and municipalities. *See* 45 C.F.R. § 84.3(f) (1989).

11. *See, e.g.*, Shuttleworth v. Broward County, 639 F. Supp. 654, 656 (S.D. Fla. 1986) (discussing Florida Commission on Human Relations decision); Cronan v. New England Tel. Co., 41 Fair Empl. Prac. Cas. (BNA) 1273 (Mass. Super. Ct. 1986) (telephone company employee alleging constructive discharge because of AIDS stated claim under state handicap law); Raytheon Co. v. Fair Empl. & Hous. Comm'n, 46 Fair Empl. Prac. Cas. (BNA) 1089 (Cal. Super. Ct. 1989) (plaintiff successful in AIDS-discrimination suit).

12. *See, e.g.*, KY. REV. STAT. ANN. § 207.140(2)(c) (Baldwin 1982) (communicable disease exemption to handicap law); TENN. CODE ANN. § 8-50-103(c) (Supp. 1987) (same).

13. A Massachusetts statute prohibits employers from requiring HIV tests from job applicants or current employees. *See* MASS. ANN. LAWS ch. 111, § 70F (Law. Co-op. Supp. 1990).

14. An Act to Amend the Communicable Disease Act, ch. 698, 1989 N.C. Sess. Laws 373, 374 (codified as amended at N.C. GEN. STAT. § 130A-148 (1989)). The portion of the new law applicable to employment provides:

> (i) Except as provided in this section, no test for AIDS virus infection shall be required, performed or used to determine suitability for continued employment, housing or public services, or for the use of places of public accommodation as defined in G.S. 168A-3(8), or public transportation.
>
> Further it shall be unlawful to discriminate against any person having AIDS virus or HIV infection on account of that infection in determining suitability for continued employment, housing, or public services, or for the use of places of public accommodation, as defined in G.S. 168A-3(8), or public transportation.
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> . . . Any person aggrieved by an act or discriminatory practice prohibited by this subsection other than one relating to housing may bring a civil action to enforce rights granted or protected by this subsection.
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> The action shall be commenced in superior court in the county where the alleged discriminatory practice or prohibited conduct occurred or where the plaintiff or defendant resides. Such action shall be tried to a court without a jury. Any relief granted by the court shall be limited to declaratory and injunctive relief, including orders to hire or reinstate an aggrieved person or admit such person to a labor organization.
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> In a civil action brought to enforce provisions of this subsection relating to employment, the court may award back pay. Any such back pay liability shall not accrue from a date more than two years prior to the filing of an action under this subsection. Interim earnings or amounts earnable with reasonable diligence by the aggrieved person shall operate to reduce the back pay otherwise allowable. In any civil action brought under this subsection, the court, in its discretion, may award reasonable attorney's fees to the substantially prevailing party as a part of costs.
>
> A civil action brought pursuant to this subsection shall be commenced within 180 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 prohibitory conduct.
>
> Nothing in this section shall be construed so as to prohibit an employer from:
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> (1) Requiring a test for AIDS virus infection for job applicants in preemployment medical examinations required by the employer;

AIDS victims have, many are concerned that it failed to address their demands for full antidiscrimination protection in all facets of life.[15]

In *Burgess v. Your House of Raleigh, Inc.*[16] the Supreme Court of North Carolina recently held that the definition of handicapped in the North Carolina Handicapped Persons Protection Act[17] (the state act), which differs only slightly

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(2) Denying employment to a job applicant based solely on a confirmed positive test for AIDS virus infection;

(3) Including a test for AIDS virus infection performed in the course of an annual medical examination routinely required of all employees by the employer; or

(4) Taking the appropriate employment action, including reassignment or termination of employment, if the continuation by the employee who has AIDS virus or HIV infection of his work tasks would pose a significant risk to the health of the employee, coworkers, or the public, or if the employee is unable to perform the normally assigned duties of the job.

N.C. GEN. STAT. § 130A-148(i) (1989).

15. The North Carolina General Assembly first attempted to address through legislation the AIDS epidemic during its 1987 session. There were nine different bills introduced during the session, including proposals for mandatory testing, education and revisions of the communicable disease laws. *See* LEGISLATIVE REP., *supra* note 1, at C-1. Of these, three AIDS-related bills became law. *Id.* at 8. These included provisions for AIDS education in the public schools, An Act to Provide for Instruction in the Public Schools on the Prevention of AIDS and Other Communicable Diseases, ch. 630, § 1, 1987 N.C. Sess. Laws 1140 (codified at N.C. GEN. STAT. § 115C-81 (1987)) (preventive education to be taught emphasizing parental involvement, abstinence from sex and drugs); earlier amendments to the Communicable Disease Law, An Act to Amend the Communicable Disease Law, ch. 782, § 3, 1987 N.C. Sess. Laws 1607 (codified at N.C. GEN. STAT. § 130A-133 (1989)) (expanding communicable disease definition to include communicable conditions so as to cover HIV infection; proposed antidiscrimination language deleted before bill passed); and the creation of a Legislative Research Commission study of AIDS, An Act to Authorize Studies by the Legislative Research Commission, ch. 873, § 2.1, 1987 N.C. Sess. Laws 2188 (The Report prepared by this Commission was presented to the 1989 Session of the General Assembly and is herein referred to as LEGISLATIVE REP.; *see supra* note 1).

16. 326 N.C. 205, 388 S.E.2d 134 (1990).

17. N.C. GEN. STAT. §§ 168A-1 to -12 (1987). The state act, which applies only to those employers who have 15 or more employees, *id.* § 168A-3, provides in relevant part:

> It is a discriminatory practice for . . . [a]n employer to fail to hire or consider for employment or promotion, to discharge, or otherwise discriminate against a qualified handicapped person on the basis of a handicapping condition . . . [or] to require an applicant to identify himself as handicapped prior to a conditional offer of employment . . . .

Id. § 168A-5(a). The state act defines a handicapped person as:

> 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. As used in this subdivision, the term:
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> a. "Physical or mental impairment" means (i) any physiological disorder or abnormal condition . . . 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 . . . but (iii) excludes sexual preferences . . . .
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> b. "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, and learning.
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> c. "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits major life activities.
>
> d. "Is regarded as having such impairment" means (i) has a physical or mental impairment that does not substantially limit major life activities but that is treated as constituting such a limitation; (ii) has a physical or mental impairment that substantially limits major life activities because of the attitudes of others; or (iii) has none of the impairments defined in paragraph a. of this subdivision but is treated as having such an impairment.

Id. § 168A-3(4). For further discussion of the North Carolina act, see Note, *AIDS and Employment Discrimination: Employer Guidelines and Defenses*, 23 WAKE FOREST L. REV. 305, 317-320 (1988) (pre-*Burgess* discussion of potential application of handicap statute to persons with HIV-infection or AIDS).

from the definition in the Federal Rehabilitation Act,[18] does not encompass a person with the HIV-infection.[19] This decision had a substantial impact upon the protections afforded HIV-infected employees of non-federally funded employers. Had the court found AIDS and HIV-infection to be a handicap under North Carolina law, persons infected with HIV would have received the blanket protection of the state handicap statute, and the newly amended Communicable Disease Law would have reinforced that protection and provided a remedy to victims of discrimination attributable to HIV-infection. In North Carolina HIV-infected persons today may claim protection from discrimination only under the newly amended Communicable Disease Law.[20]

This Note presents a comprehensive overview of North Carolina employment law regarding persons with AIDS and those who test positive for the virus. It includes an examination of the recently enacted AIDS-specific employment provisions of the North Carolina Communicable Disease Law. It also analyzes *Burgess v. Your House of Raleigh, Inc.*,[21] in which the Supreme Court of North Carolina recently held that an asymptomatic person is not considered handicapped under the North Carolina Handicapped Persons Protection Act. The Note compares North Carolina's law with federal laws on AIDS in the workplace, and contrasts North Carolina's legislative approach to AIDS in the employment context with measures taken by other jurisdictions. The Note concludes with suggestions for strengthening the protections North Carolina law affords to both asymptomatic HIV-carrier persons and persons with AIDS.

After *Burgess* it is clear that the newly amended Communicable Disease Law provides the sole protection against HIV-related discrimination to North Carolina residents not covered by the federal act.[22] The degree of job protection provided by the amendments depends on whether the aggrieved person is a current employee or is seeking employment. The new legislation expressly prohibits discrimination in continued employment,[23] but provides that an employer is not prohibited from denying employment to an applicant who tests positive for HIV.[24] An employer also is not prohibited from reassigning or terminating an employee if continued employment would "pose a significant risk to the health of the employee, co-workers, or the public, or if the employee is unable to perform the normally assigned duties of the job."[25]

The communicable disease law prohibits blood testing for AIDS infection as a prerequisite for continued employment.[26] However, it does allow an employer to require a blood test for AIDS infection as part of a pre-employment

18. *See infra* notes 67-83 and accompanying text.

19. *Burgess*, 326 N.C. at 211, 388 S.E.2d at 140. The court's reading of North Carolina law also suggests that the act does not even protect "full-blown AIDS" as a handicap. *See infra* text accompanying notes 80-83.

20. *See supra* note 14 (relevant text of amended statute).

21. 326 N.C. 205, 388 S.E.2d 134 (1990).

22. *See supra* text accompanying notes 16-20.

23. N.C. GEN. STAT. § 130A-148(i) (1989). *See supra* note 14.

24. N.C. GEN. STAT. § 130A-148(i)(2).

25. *Id.* § 130A-148(i)(4).

26. *Id.* § 130A-148(i).

medical examination or to include a test for HIV in routine, required medical examinations.[27] Under the statute, it is unlawful to discriminate against a person with HIV on account of that infection in continued employment, housing, public services, public accommodation, or public transportation.[28] The statute's provision for discrimination in continued employment is essentially the "otherwise qualified" standard used in most disability and handicap statutes.[29] However, the statute does allow discrimination against job *applicants* on the basis of HIV-infection, by allowing denial of employment on the basis of a positive HIV test.[30]

The law gives an aggrieved plaintiff the right to bring a civil action in superior court.[31] The plaintiff's remedy is limited to declaratory and injunctive relief, including orders to hire or reinstate, and to receive up to two years' backpay.[32] Such backpay must be offset by any interim earnings or amounts

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27. *Id.* § 130A-148(i)(1), (3). *Cf. id.* § 168A-5(b)(6) (North Carolina Handicapped Persons Protection Act mandates that an employer may require that a person undergo a medical exam to determine person's ability to do job only if employer has made an offer of employment conditional on meeting physical requirements and the exam is required of all persons conditionally offered the same position regardless of handicapping condition).

28. N.C. GEN. STAT. § 130A-148(i).

29. The North Carolina Handicapped Persons Protection Act defines "qualified handicapped person":

> With regard to employment, a handicapped person who can satisfactorily perform the duties of the job in question, with or without reasonable accommodation, . . . further provided that the handicapping condition does not create an unreasonable risk to the safety or health of the handicapped person, other employees, the employer's customers, or the public.

Id. § 168A-3(9). The burden is on the employer to justify the discriminatory action taken by showing that the handicapped person was not otherwise qualified for the job.

30. N.C. GEN. STAT. § 130A-148(i)(2) (1989). This provision was enacted despite the Legislative Commission's findings that "[t]he vast majority of HIV-positive people are healthy, functioning members of society." LEGISLATIVE REP., *supra* note 1, at 9; *cf.* Letter from C. Everett Koop, Surgeon General of the Public Health Service, to Douglas Kmiec, Acting Assistant Attorney General (July 29, 1988), *reprinted in* D. Kmiec, Memorandum for Counsel to the President on the Application of § 504 of the Rehabilitation Act to HIV-infected Individuals, at 4 (September 27, 1988) [hereinafter Koop Letter]. Ironically, the sponsor of the new antidiscrimination law, Senator Helen Marvin, was a member of the Legislative Commission Committee on AIDS. *See* LEGISLATIVE REP., *supra* note 1, at B-1.

Had the *Burgess* court found HIV to be covered as a handicap under state law, such discrimination would not be condoned. While the Communicable Disease Law does not expressly authorize such action, it reads "[n]othing in this section shall be construed to prohibit" these forms of discrimination. N.C. GEN. STAT. § 130A-148(i). Because *Burgess* held that HIV-infected individuals do not receive the protection of the handicapped act, there is no law that does prohibit private-sector employers from requiring HIV tests and basing employment decisions on HIV status. North Carolina advocates for persons with AIDS, optimistic about the outcome of the *Burgess* decision, appear to have underestimated the impact of the new law. *See* NORTH CAROLINA AIDS SERVICE COALITION, *Legislative Update* (July 27, 1989) ("[T]he law is silent on these issues. . . . If there are other laws that do authorize or prohibit certain things, this new law does not affect them.") While it is true that the new law does not expressly authorize testing or denial of employment, in the wake of *Burgess*, it virtually invites employers to do so.

31. N.C. GEN. STAT. § 130A-148(i). There is no right to a jury trial, and attorney's fees may be awarded at the discretion of the court. *Id.* The cause of action granted by the statute has a three month statute of limitations. *Id.*

32. *Id.* Raytheon Co. v. Fair Empl. & Hous. Comm'n, 46 Fair Empl. Prac. Cas. (BNA) 1089 (Cal. Super. Ct. 1989), illustrates the inappropriateness of such a remedy and the failure of most existing handicap laws to provide adequate relief. Plaintiff was terminated because of AIDS six months before he became disabled. The Superior Court decision in his favor came four years after he filed his complaint and almost three years after his death. *Id.* at 1091. *See* Leonard, *supra* note 5, at

that could have been earned by the plaintiff.[33]

Certain employers who are covered by federal law are not affected by the new North Carolina law. The United States Supreme Court has interpreted the Federal Rehabilitation Act of 1973 to prohibit discrimination against a person with AIDS or HIV-infection by any entity that receives federal assistance. In *School Board of Nassau County v. Arline*[34] the Court held that discrimination on the basis of a communicable disease is prohibited by section 504 of the Rehabilitation Act.[35] A teacher, terminated after she suffered a third relapse of tuberculosis, brought suit claiming violation of section 504.[36] The school district asserted that Arline was not dismissed because of any disability or handicap, but because her contagiousness threatened the health of her students.[37] The Court held that a person who is physically disabled by a contagious disease such as tuberculosis is handicapped within the meaning of section 504 and that employers may not discriminate against such a person if she is "otherwise qualified" to perform the job.[38] In refuting the defendant's claim that the contagiousness element of a disease may be distinguished from physical impairment, Justice Brennan wrote for the majority: "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 the patient and use that distinction to justify discriminatory treatment."[39] The Court concluded that contagiousness itself does not obviate the existence of a handicap under the federal act, but expressly declined to go beyond the case before it to address the question of whether an asymptomatic HIV-positive individual could be considered handicapped solely because of contagion.[40] While *Arline* did not concern the status of a person with AIDS or HIV-infection and addressed the issue only in dicta, both commentators and lower courts have seized upon the Court's language and interpreted *Arline* to

941-47 (criticizing inadequacy of approaching AIDS discrimination under traditional handicap theory due to AIDS' progressively debilitating nature).

33. N.C. GEN. STAT. § 130A-148(i).

34. 480 U.S. 273 (1987) (7-2 decision).

35. *Id.* at 285-86. For an interesting article that argues that *Arline* was wrongly decided and has been misinterpreted, see Lawson, *AIDS, Astrology and* Arline*: Towards a Causal Interpretation of Section 504*, 17 HOFSTRA L. REV. 237 (1989).

36. *Arline*, 480 U.S. at 276.

37. *Id.*

38. *Id.* at 285.

39. *Id.* at 282.

40. *Id.* Justice Brennan continued:

> The United States argues that it is possible for a person to be simply a carrier of a disease, that is, to be capable of spreading a disease, without having a "physical impairment" or suffering from any other symptoms associated with the disease. The United States contends that this is true in the case of some carriers of the [AIDS] virus. From this premise the United States concludes that discrimination solely on the basis of contagiousness is never discrimination on the basis of handicap. The argument is misplaced in this case, because the handicap here, tuberculosis, gave rise both to a physical impairment and to contagiousness. This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.

Id. at n.7.

include persons with HIV or AIDS within the coverage of the federal act.[41]

In 1988 Congress passed the Civil Rights Restoration Act, which qualified the Rehabilitation Act's definition of "individual with handicaps."[42]

> For the purposes of sections [503] and [504], . . . as such sections relate to employment, [the term "individual with handicaps"] 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.[43]

The provision codified the *Arline* Court's interpretation of the "otherwise qualified" standard.[44] The legislative history of the amendment indicates that its purpose was to "assure employers that they are *not* required to hire or retain individuals with contagious diseases or infections who pose a direct threat to the health or safety of others or who cannot perform the duties of a job."[45] The exclusionary provision implies that persons who do not fall within the specified grounds for exclusion are covered by section 504.[46] It also makes clear that a direct threat to others or inability to perform the job, and not contagion alone, is required to justify exclusion from the federal act's protection.[47]

In 1988 the Department of Justice's Office of Legal Counsel prepared and delivered to counsel of the President an opinion on the scope of the antidiscrimination provisions of the federal Rehabilitation Act.[48] The opinion ad-

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41. *See, e.g.*, Chalk v. United States Dist. Ct., 840 F.2d 701, 708 (9th Cir. 1988) (holding individual with AIDS covered by § 504 in light of *Arline*); Jones & Sheppard, *AIDS and Disability Employment Discrimination in and beyond the Classroom*, 12 DALHOUSIE L.J. 103, 110-11 (1989); Turk, *AIDS: The First Decade*, 14 EMPLOYEE REL. L.J. 531, 532-42 (1989); Note, *AIDS and Employment Discrimination: Employer Guidelines and Defenses*—School Board of Nassau County v. Arline, 23 WAKE FOREST L. REV. 305, 305-10 (1988); Comment, *The Application of Handicap Discrimination Laws to AIDS Patients*, 22 U.S.F. L. REV. 317, 325-27 (1988). *But see* Lawson, *supra* note 35 (arguing for a narrow interpretation of *Arline*).

42. Pub. L. No. 100-259, § 9, 102 Stat. 28, 31-32 (1988) (codified as amended at 29 U.S.C. § 706(8)(C) (1989)). The Civil Rights Restoration Act amending § 504 was sponsored jointly by Senators Harkin and Humphrey and sometimes is referred to as the Harkin-Humphrey amendment. *See* D. Kmiec, Memorandum for Counsel to the President on the Application of § 504 of the Rehabilitation Act to HIV-infected Individuals, at 4 (September 27, 1988) (author was Acting Assistant Attorney General, Office of Legal Counsel) [hereinafter Kmiec Opinion].

43. 29 U.S.C. § 706(8)(C) (1989).

44. Kmiec Opinion, *supra* note 42, at 16 ("In our judgment, this qualification merely codifies the 'otherwise qualified' standard discussed by the Court in *Arline* . . . including the provision of a means of reasonable accommodation that can eliminate the health or safety threat or enable the employee to perform the duties of the job."). The Restoration Act is ambiguous as to whether its "constitute[s] a direct threat" standard replaces *Arline*'s standard of "significant risk" of workplace transmission. *See* Leonard, *supra* note 5, at 937.

45. *See* 134 CONG. REC. H1065 (daily ed. Mar. 22, 1988) (colloquy between sponsors of bill).

> The basic manner in which an individual with a contagious disease or infection can present a direct threat to the health or safety of others is when the individual poses a significant risk of transmitting the contagious disease or infection to other individuals. The Supreme Court in *Arline* explicitly recognized this necessary limitation in the protections of section 504. The amendment is consistent with this standard.

Id. Further legislative history is discussed in the Kmiec Opinion, *supra* note 42, at 19-20.

46. Kmiec Opinion, *supra* note 42, at 18.

47. *Id.*

48. *Id.*

dressed whether persons with AIDS are protected, despite AIDS' status as a contagious disease, and whether asymptomatic HIV-infected persons also are protected. The Department of Justice answered both questions in the affirmative: the first by reference to the Supreme Court's holding in *Arline*,[49] and the second based on medical clarification from the Surgeon General that even asymptomatic HIV-positive individuals are, from a medical standpoint, physically impaired.[50] The Surgeon General had reported:

> [M]uch has been learned about HIV infection that makes it inappropriate to think of it as composed of discrete conditions such as ARC [AIDS related complex] or "full blown AIDS." HIV infection is the starting point of a single disease which progresses through a variable range of stages. In addition to an acute flu-like illness, early stages of the disease may involve subclinical manifestations i.e., impairments and no visible signs of illness. The overwhelming majority of infected persons exhibit detectable abnormalities of the immune system. Almost all HIV infected persons will go on to develop more serious manifestations of the disease and our present knowledge suggests that all will die of HIV infection barring premature death from other causes.
>
> Accordingly, from a purely scientific perspective, persons with HIV infection are clearly impaired. They are not comparable to an immune carrier of a contagious disease such as Hepatitis B. Like a person in the early stages of cancer, they may appear outwardly healthy but are in fact seriously ill.[51]

The Department of Justice concluded that "all HIV-infected individuals who are not a direct threat to the health or safety of others and are able to perform the duties of their job are covered by section 504."[52]

While federal law thus provides extensive protection for HIV-infected persons who are otherwise qualified, only state legislation restricts employers who are not within the coverage of section 504 because they do not receive federal funds.[53] Most states have declared AIDS a disability or handicap for purposes

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49. *See supra* notes 34-41 and accompanying text.

50. Kmiec Opinion, *supra* note 42, at 8 (citing Koop Letter, *supra* note 30).

51. Koop Letter, *supra* note 30.

52. Kmiec Opinion, *supra* note 42, at 18 (1988).

53. *See supra* notes 9-10 (scope of § 504's coverage). In Raytheon Co. v. Fair Empl. & Hous. Comm'n, 46 Fair Empl. Prac. Cas. (BNA) 1089 (Cal. Super. Ct. 1989), a California appeals court rejected the argument that the federal Rehabilitation Act preempts state legislation in the field of handicap discrimination, holding that Congress expressly intended that employment discrimination remedies overlap and parallel. *Id.* at 1100.

Federal preemption of handicap law remains a possibility. The Americans with Disabilities Act of 1990 (ADA), S.B. 933, 101st Cong., 1st Sess., 135 CONG. REC. S10954 (daily ed. Sept. 12, 1989), which has passed the United States Senate and is now pending before the United States House of Representatives, would provide broad nondiscrimination protection for disabled persons in the private sector, covering employment, public services, public accommodations, transportation, and telecommunications. Although many of the concepts used in the ADA originated in § 504 jurisprudence, the two differ in one important regard: while § 504 restricts only employers who receive federal financial assistance, the ADA would cover the private-sector.

For a thorough discussion of the evolution of the ADA, see *The Americans with Disabilities Act (ADA): A Comparison and Analysis of the Bill as Introduced and as Passed by the Senate*, C.R.S. REP. No. 89-544A (Sept. 27, 1989); *The Americans with Disabilities Act (ADA): An Overview of Selected Major Legal Issues*, C.R.S. REP. No. 89-433A (July 25, 1989); *The Americans with Disabili-*

of prohibiting discrimination under state law;[54] others have enacted AIDS-specific legislation.[55] In a 1985 article discussing state laws prohibiting employment discrimination on the basis of handicap or disability, Professor Leonard observed that "[t]he initial determinations of administrators on this issue have been *unanimous* in finding AIDS to be a covered condition."[56] While that observation may have been true in 1985, since then a number of states have excluded AIDS and its related conditions from their handicap statutes.[57] Like North Carolina, many states and municipalities have instead promulgated AIDS-specific legislation, sometimes increasing and sometimes decreasing the legal protections offered to persons with AIDS and HIV-infection.[58] Whether AIDS is to be classified and protected as a handicap under state law has been a hotly debated question,[59] and today the answer varies from state to state. In North Carolina, the answer is clearly "no."

North Carolina long has adhered to the common-law doctrine of "employment-at-will" which provides that unless a definite term of employment is specified, a contract between an employer and employee may be terminated by either party for any reason or no reason at all.[60] However, this common-law doctrine has been modified by a number of statutory enactments based on public policy,[61]

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ties Act (ADA): Legal Analysis of Proposed Legislation Prohibiting Discrimination on the Basis of Handicap, C.R.S. REP. No. 88-621A (Sept. 19, 1988).

Although discussion of the ADA is beyond the scope of this Note, persons with AIDS and HIV-infection clearly would be covered by its protections if it is enacted as passed by the Senate. Therefore, its potential impact on the state of the law ought to be anticipated. *See* Leonard, *supra* note 5, at 929-64 (discussing need for national AIDS discrimination legislation due to failure of states tc adequately protect victims); Gaynor, *Executive Action Against AIDS: A Proposal for Federal Regulation Under Existing Law*, 49 OHIO ST. L.J. 999 (1989) (discussing various alternative solutions); Hollowell & Eldridge, *Subsistence, Equal Opportunity and the Individual Diagnosed with HIV*, 9 J. LEGAL MED. 561 (1989) (calling for a comprehensive federal AIDS antidiscrimination law).

54. *See* Gostin, *Public Health Strategies for Confronting AIDS—Legislative and Regulatory Policy in the United States*, 261 J. A.M.A. 1621 (1989) (in 34 states the courts, human rights commissions or attorneys general have formally or informally declared that handicap laws apply to AIDS or HIV-infected individuals); *see, e.g.*, Shuttleworth v. Broward Co., 639 F. Supp. 654, 656 (S.D. Fla. 1986) (discussing administrative opinion holding employment discrimination against person with AIDS a violation of state handicap law); Raytheon Co. v. Fair Empl. & Hous. Comm'n, 46 Fair Empl. Prac. Cas. (BNA) 1089, 1100 (Cal. Super. Ct. 1989) (AIDS and HIV-infection protected handicap under California's Fair Employment and Housing Act); Cronan v. New England Tel. Co., 41 Fair Empl. Prac. Cas. (BNA) 1273, 1275 (Mass. Super. Ct. 1986) (AIDS found to be handicap under state law because of "potential to contract other illnesses" and "an employer's erroneous perception of him as someone who is contagious to co-workers"). *See generally* Lewis, *Acquired Immunodeficiency Syndrome: State Legislative Activity*, 258 J. A.M.A. 2410, 2410-14 (1987) (summary of state AIDS legislation); Gostin, *supra*, at 1622-29 (summary of state AIDS legislation).

55. *See infra* note 99.

56. Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11, 21 (1985) (emphasis added).

57. *See supra* note 12.

58. *See infra* note 99.

59. *See, e.g.*, Note, *Are AIDS Victims Handicapped?*, 31 ST. LOUIS U.L.J. 729 (1987); Note, *AIDS and Employment Discrimination: Should AIDS Be Considered a Handicap?*, 33 WAYNE L. REV. 1095 (1987); Comment, *The Application of Handicap Discrimination Laws to AIDS Patients*, 22 U.S.F. L. REV. 317 (1988).

60. *See* Smith v. Ford Motor Co., 289 N.C. 71, 80, 221 S.E.2d 282, 288 (1976).

61. The federal act obviously overrides the common law employment-at-will doctrine. One North Carolina judicially-created public policy exception to the common-law doctrine is that a person may not be discharged for refusal to commit an illegal act. *See, e.g.*, Coman v. Thomas Mfg.

including both the Federal Rehabilitation Act and the state handicap act. The doctrine of employment-at-will also is limited to some extent by the recently enacted AIDS-specific antidiscrimination provisions in the Communicable Disease Law. Until recently, however, the status under the North Carolina Handicapped Persons Protection Act of persons with AIDS or HIV-infection was uncertain. In *Burgess v. Your House of Raleigh, Inc.*[62] the Supreme Court of North Carolina held that the state handicap act does not protect those persons. Burgess, a short order cook, was fired when his employer learned that he had tested positive for HIV.[63] Plaintiff sued under the North Carolina Handicapped Persons Protection Act.[64] The trial court dismissed, holding that an asymptomatic HIV-carrier is not handicapped within the meaning of the statute.[65] The Supreme Court of North Carolina granted discretionary review *ex mero motu*.[66]

Plaintiff urged the court to look to federal courts' interpretations of "handicap" under section 504 of the Rehabilitation Act of 1973,[67] upon which the North Carolina act was patterned.[68] While acknowledging that the statutes are "virtually identical," the *Burgess* court pointed out two significant differences in the two statutes. First, the North Carolina act's definition of "major life activities"[69] is more limited, and, second, the state act contains a communicable disease exemption[70] not found in the federal act. Both the federal act and the North Carolina act define "handicapped person" as one who has a physical or mental impairment that substantially limits one or more "major life activities."[71] The sole difference between the two acts is the definition of "major life

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Co., 325 N.C. 172, 381 S.E.2d 445 (1989) (employee wrongfully terminated for refusal to falsify records).

62. 326 N.C. 205, 388 S.E.2d 134 (1990).

63. *Id.* at 207, 388 S.E.2d at 135. It was undisputed that the sole reason for plaintiff's termination was his status as HIV-positive. *Id.*

64. *Id.*

65. *Id.* at 208, 388 S.E.2d at 136.

66. *Id.* The supreme court granted discretionary review voluntarily, bypassing the appellate court, without being requested to do so, pursuant to its statutory authority. *See* N.C. GEN. STAT. § 7A-27(a) (1987); *see* BLACK'S LAW DICTIONARY 516 (5th ed. 1979).

67. *Burgess*, 326 N.C. at 211, 388 S.E.2d at 138; *see* School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) (communicable diseases are covered under § 504) (discussed *supra* notes 34-41 and accompanying text); Chalk v. United States Dist. Ct., 840 F.2d 701 (9th Cir. 1988) (AIDS covered by § 504); Ray v. School Bd. of Desoto County, 666 F. Supp. 1524, 1529 (M.D. Fla. 1987) (same); Doe v. Dolton Elem. School Dist., 694 F. Supp. 440, 444 (N.D. Ill. 1988) (same); Local 1812 v. Department of State, 662 F. Supp. 50, 54 (D.D.C. 1987) (same).

The plaintiff also cited the Opinion of the Office of Legal Counsel's interpretation of the federal act. *See* Plaintiff-Appellant's New Brief at 10, Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 388 S.E.2d 134 (1980) (No. 235PA89) and *supra* text accompanying notes 48-52; Thomas v. Atascadero Unified School Dist., 662 F. Supp. 376, 379 (C.D. Cal. 1986) (asymptomatic HIV-infection a covered handicap under § 504).

68. *See Burgess*, 326 N.C. at 211, 388 S.E.2d at 138.

69. *See supra* note 17.

70. North Carolina General Statutes § 168A-5(b) (1987) provides in part: "It is not a discriminatory action for an employer . . . to discharge a handicapped person because the person has a communicable disease which would disqualify a non-handicapped person from similar employment . . . ." Section 130A-133(1) defines communicable disease as "an illness due to an infectious agent or its toxic products which is transmitted directly or indirectly to a person from an infected person or animal through the agency of an intermediate animal, host or vector, or through the inanimate environment." *See infra* note 94.

71. *See* N.C. GEN. STAT. § 168A-3(9)(a); *supra* note 29; 45 C.F.R. § 84.3(j)(2)(ii). To receive

activities." The North Carolina act defines the term as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, and learning."[72] The federal definition contains a single additional word — "working"— in its list of major life activities.[73]

The plaintiff in *Burgess* contended that his seropositivity status was the result of a physical impairment that affected his hemic and lymphatic systems and prevented him from continuing his employment, thus qualifying him as a handicapped person.[74] The court found it significant that the drafters of the North Carolina act had specifically removed the term "working" from the language of the senate bill as it was originally drafted.[75] The court observed:

> The specific exclusion of "working" from this list is significant because it is the only activity listed by the federal act that was not included in our state act. As this Court has recognized, 'by modifying the language borrowed from [a] federal act, the North Carolina legislature must have intended to alter its meaning to some extent.' The deletion of the term "working" is some indication that the General Assembly intended for the Handicapped Persons Act to be more narrow in scope than its federal counterpart.[76]

Plaintiff contended that the state list of major life activities, like the federal list, was illustrative rather than exhaustive,[77] and cited his inability to have a healthy child or to engage in sexual relationships. The court rejected plaintiff's argument and held that these limitations "are not of the same nature as those listed in the statute, that is, essential tasks one must perform on a regular basis to carry on a normal existence."[78] Because the plaintiff failed to show that his

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protection under either the state or federal act, a person must prove not only that he is handicapped but also that he is a "*qualified* handicapped person." 45 C.F.R. § 84.3(j)(2)(ii).

72. N.C. GEN. STAT. § 168A-3(4)(b).

73. *See* 45 C.F.R. § 84.3(j)(2)(ii) (1987).

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

75. *Id.* at 213, 388 S.E.2d at 139 (citing S.B. 272, Comm. Substitute (adopted May 30, 1985)).

76. *Id.* (quoting State *ex rel.* Edmisten v. Penney Co., 292 N.C. 311, 316, 233 S.E. 2d 895, 898 (1977)).

77. *Id.* at 214, 388 S.E.2d at 139. Plaintiff cited the Kmiec Opinion, *supra* note 42, which described the federal act's list of major life activities (which includes working) as "illustrative and not exhaustive" and "a helpful starting point for . . . analysis." *See* Plaintiff-Appellant's New Brief at 10-11, Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 388 S.E.2d 134 (1990) (No. 235PA89). The Kmiec Opinion continued:

> We would expect that courts will resolve the factual question whether the impairment of HIV infection limits a major life activity by reviewing this list for guidance in ascertaining whether a particular activity constitutes a basic function of life comparable to those on the list. . . .
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> . . . .
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> . . . Since the regulatory list was not intended as an exhaustive one, we believe at least some courts would find a number of other equally important matters to be directly affected. . . .
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> . . . [W]e believe that it is reasonable to conclude that the life activity of procreation . . . is substantially limited for an asymptomatic HIV-infected individual. . . . Because of the infection in their system, they will be unable to fulfill this basic human desire. There is little doubt that procreation is a major life activity . . . ."

Kmiec Opinion, *supra* note 42, at 9-11.

78. *Burgess*, 326 N.C. at 214, 388 S.E.2d at 139. *But see supra* note 77. "Working," however, *would* appear to meet the court's description of the category. The court did not expressly reject

condition substantially limited his ability to perform any of the tasks specifically listed in the North Carolina act, the court concluded that he was not a handicapped person under the act.[79]

The court found a second feature to distinguish the North Carolina act from its federal counterpart: the state handicap law contains a communicable disease exemption,[80] which allows an employer to terminate a handicapped employee who has a communicable disease. The statute provides that the employer is exempt from compliance with the handicapped act if "the person has a communicable disease which would disqualify a non-handicapped person from similar employment."[81] The court reasoned as follows:

> The exemption means that the existence of a communicable disease is to be treated as a basis for exemption from the application of the act if it would disqualify a non-handicapped person. The person suffering from the communicable disease must have an additional disability which qualifies as a handicap. . . .
>
> . . . [T]he legislature did not intend for a communicable condition itself to be a protected handicap because such an interpretation would render the communicable disease exemption meaningless.[82]

The court's interpretation of the communicable disease exemption is significant because it suggests that not only asymptomatic HIV-carriers but also persons with "full-blown AIDS" are exempted from the protection of the North Carolina act. Because of North Carolina's more restricted definition of handicapped person, and because of the state statute's exemption of communicable diseases, the *Burgess* court refused to be guided by federal decisions holding that AIDS and HIV-infection constitute a protected handicap.

The court bolstered its interpretation of the statutory language by referring to the legislative history of the recently enacted amendments to the Communicable Disease Law.[83] The court traced North Carolina's past efforts to enact AIDS-specific antidiscrimination legislation.[84] Those efforts included the Senate's rejection of an antidiscrimination provision specifically designed to protect HIV-infected persons and an amendment to the Handicapped Persons Act that would have included communicable diseases in its definition of handicap and

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plaintiff's argument that the list was illustrative rather than exhaustive, but declined to imply a term that the legislature specifically had deleted. *See Burgess*, 326 N.C. at 213-14, 388 S.E.2d at 139.

79. *Burgess*, 326 N.C. at 214, 388 S.E.2d at 140.

80. *See supra* note 70. Georgia, Kentucky, and Tennessee also exempt communicable diseases from handicap protection. *See* TENN. CODE ANN. § 8-50-103(c) (Supp. 1987) (" 'Handicap' does not include any disease or condition which is infectious, contagious or similarly transmittable to other persons."); *see also* GA. CODE ANN. § 34-6A-3(b)(2) (1988) (communicable disease exemption); KY. REV. STAT. ANN. § 207.140(2)(C) (Baldwin 1981) (same).

81. N.C. GEN. STAT. § 168A-5(b)(3) (1987).

82. *Burgess*, 326 N.C. at 215-16, 388 S.E.2d at 140.

83. *See Burgess*, 326 N.C. at 218, 388 S.E.2d at 141-42 (discussing legislative history of N.C. GEN. STAT. § 130A-148 (1989)). "Courts may use subsequent enactments or amendments as an aid in arriving at the meaning of a prior statute by utilizing the natural inferences arising out of the legislative history as it continues to evolve." *Id.* at 216, 388 S.E.2d at 141 (citing Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 548 (1980)).

84. *See id.* at 217-18, 388 S.E.2d at 141-42.

repealed the communicable disease exemption.[85] The court resolved that "[t]his legislative history demonstrates that the General Assembly specifically addressed the particular question at issue here and affirmatively chose not to include persons infected with HIV within the scope of the Handicapped Persons Act."[86] The supreme court concluded that "both the plain language of its provisions and the legislative history surrounding it indicate that the legislature did not intend to protect persons infected with HIV" under the Handicapped Persons Protection Act.[87] The court described the new communicable disease law, although enacted too late to help plaintiff Burgess,[88] as "a specific, comprehensive declaration of the extent to which AIDS infection may affect employment decisions."[89]

Any analysis of the new legislation must be in the context of the *Burgess* ruling and the General Assembly's past attempts to legislate on AIDS/HIV discrimination.[90] A recurring but unanswered question is why the legislature declined to include AIDS and HIV-infection within the North Carolina handicap act.[91] Indeed, the legislature appears to have performed semantic gymnastics to exclude AIDS and HIV-infection from coverage under the act.[92] The only ap-

85. *Id.* at 217, 388 S.E.2d at 141.

86. *Id.* at 217, 388 S.E.2d at 141-42. Plaintiff's brief emphasized that the amendments to the Communicable Disease Act are under the subsection "Laboratory Tests for AIDS Virus Infection" and the section deals largely with standards for tests of blood, tissue, semen or organs for HIV. Plaintiff-Appellant's New Reply Brief at 1-2, Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 388 S.E.2d 134 (1990) (No. 235PA89). Rather than a statute intended to alter the handicap law, the plaintiff argued, this law is a public health statute; its provisions on discrimination should be interpreted as a supplement to the handicap act rather than an abridgment, because the handicap statute does not apply to employers of fewer than fifteen employees. *Id.* at 2. The plaintiff cited treatises and cases for the proposition that when statutes are capable of consistent construction, both ought to be given effect. *Id.* at 3 (citing Morton v. Mancari, 417 U.S. 535, 551 (1974) ("courts are not at liberty to pick and choose [among statutes]")). Because both statutes can be read to prohibit discharge of HIV-infected individuals, the plaintiff reasoned, the statutes may be construed in harmony. *Id.* at 4.

87. *Burgess*, 326 N.C. at 209, 388 S.E.2d at 137.

88. The court's observation that "[a]s of the filing of plaintiff's complaint and the entry of the order of dismissal, the statutory protections now being afforded simply did not exist" suggested that with different timing Burgess would have been protected from discrimination under the new legislation. But, as the court also noted, the statute specifically exempts restaurants from compliance until July, 1991; had the statute been in force it would have been of no use to Burgess, a short-order cook. North Carolina law currently provides no protection for plaintiffs like Burgess. *See infra* note 105.

89. *Burgess*, 326 N.C. at 218, 388 S.E.2d at 142.

90. House Bill 458 would have amended the Communicable Disease Law as follows: "Except as provided in subsection (h), no test or test result for AIDS virus infection shall be required, performed or utilized to determine suitability for employment, housing or public services, or for the use of public places of public accommodation . . . or public transportation." H.B. 458, 1987 General Assembly, 1st Sess. § 16(f) (May 19, 1987). This broad antidiscrimination provision would have prohibited completely discrimination and testing in employment. The proposal passed the House but was deleted by a Senate subcommittee, which substituted another provision that would have amended the Handicapped Persons Act to include coverage of communicable diseases or conditions, thereby repealing the communicable disease exemption. H.B. 458, 1987 General Assembly, 2d Sess., § 16(h), Senate Comm. Substitute Bill (adopted July 30, 1987). In the end, neither provision was adopted. *See Burgess*, 326 N.C. at 217-18, 388 S.E.2d at 141-42.

91. "In the present period of speculation and concern over the incurable and fatal nature of AIDS there is no doubt that a known carrier of the virus which causes it is perceived to be handicapped." Local 1812 v. Department of State, 662 F. Supp. 50, 54 (D.D.C. 1987).

92. The *Burgess* court did some gymnastics of its own, reasoning:

If one removes the words 'communicable disease' in the provision and replaces them with

parent 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. This would appear to authorize employment discrimination based on perceived handicaps, which is expressly protected by the handicapped act.[93]

There is likewise no apparent justification for the handicap act's communicable disease exemption. By exempting communicable diseases from coverage as handicaps, the legislature only could have intended to exclude AIDS and HIV-infection from coverage.[94] Any other purpose sought to be served through the exclusion, such as protection of other employees or the public, is already achieved under both the federal and state statutes, which protect only "qualified" handicapped individuals from discrimination.[95] As noted by the Department of Justice's Office of Legal Counsel, "the consideration of the 'otherwise qualified' standard allows for a reasonable determination of whether contagiousness threatens the health or safety of others or job performance, and in those events, permits the exclusion of the individual."[96] A communicable disease exemption is therefore unnecessary to protect either the health and safety of the workplace or the productivity of the employee.[97]

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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.

Burgess, 326 N.C. at 216, 388 S.E.2d at 140-41.

93. *See supra* note 17 (definition of handicapped under state act).

94. This 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. In School Board of Nassau County v. Arline, 480 U.S. 273 (1987), discussed *supra* notes 34-41 and accompanying text, the United States Supreme Court disagreed with the petitioner's argument that in defining a handicapped individual, the contagious effects of the disease could be meaningfully distinguished from the disease's effects on the claimant. *Arline*, 480 U.S. at 282. Yet that appears precisely to be the intent and the result of the North Carolina communicable disease exemption.

95. *See* 29 U.S.C. § 794 (1982). In Raytheon v. Fair Empl. & Hous. Comm'n, 46 Fair Empl. Prac. Cas. 1089 (Cal. Super. Ct. 1989), a California appeals court noted that under California law, the communicability of the disease does not affect the determination of whether a handicap exists, but instead is considered when evaluating the reasonableness of the discriminatory action taken by the employer, a burden the employer must carry. *Id.* at 1091. If the employee is a significant risk to co-workers or the public, he is not qualified. *See also* Beauford v. Father Flanagan's Boys' Homes, 831 F.2d 768 (8th Cir. 1987) (§ 504 claim denied because employee was disabled by AIDS and unable to work, therefore, not otherwise qualified).

96. Kmiec Opinion, *supra* note 42, at 6. The Supreme Court said in *Arline* that "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." 480 U.S. at 287 n.16 (1987). The contagiousness of a person should be used to determine whether the employer is justified in action taken concerning the handicapped employee; it does not make the employee's condition any less a handicap.

97. There are, of course, other employer interests that are protected by a communicable disease exemption, including higher health costs and lower productivity, as well as coworker aversion to working with the infected employee. Courts have consistently rejected these types of employer interests as justification for discrimination against handicapped employees. *See* Wegner, *supra* note 9, at 448-51 (describing policy decision to reject cost as justification for handicap discrimination). Nevertheless, it is likely that the vociferous advocacy of the employers' lobbyists in the state capital was somewhat motivated by these interests.

The federal act's "otherwise qualified" standard requires an employer not only to hire a quali-

The joint efforts of the legislature and the supreme court have succeeded in barring HIV-infected individuals, and apparently those with full-blown AIDS, from protection as a handicap under state law. That leaves HIV-infected individuals with only the coverage of the new AIDS-specific law. Although the Communicable Disease Law appears to protect adequately the rights of those infected with HIV or suffering from AIDS with regard to housing, public services, public accommodation and transportation, it is virtually an invitation to discriminate in the area of employment.[98]

The Communicable Disease Law's provisions for workplace testing and employment decisions based on HIV status are problematic in several ways. The North Carolina legislation clearly represents a minority approach; some state legislatures have acted to prohibit completely the use of blood tests for any purpose related to employment;[99] and others prohibit employers from taking any action based on an employee's actual or suspected HIV status.[100] Likewise, federal law prohibits pre-employment inquiries as to whether an applicant is handicapped.[101] In contrast, the North Carolina statute authorizes testing of both job applicants and current employees, regardless of the type of job or the risk level of the person to be tested.[102] Current medical findings are unanimous in their conclusion that such testing of the general population is unnecessary.[103] The consensus of the medical and scientific community is that AIDS is not transmit-

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fied handicapped person, but also to make reasonable accommodations to eliminate any health threat or inability to perform the job. 45 C.F.R. § 84.3(k)(1) (1987) (" 'qualified handicapped person' means . . . [w]ith respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question"); *see also* Kmiec Opinion, *supra* note 42, at 21-28 (discussing Harkins-Humphrey amendment to § 504 regarding requirement of reasonable accommodation).

98. *See supra* note 30 and accompanying text.

99. *See, e.g.*, WISC. STAT. ANN. § 103.15 (West Supp. 1987) (employers may not require or solicit AIDS test from applicants or employees and may not base employment terms on HIV status unless state officials declare transmission through employment to be a significant risk); ME. REV. STAT. ANN. tit. 5 § 19204-B (Supp. 1987) (unlawful to solicit or require AIDS test as a condition of employment); MASS. ANN. LAWS ch. 111, § 70F (Law. Co-op. Supp. 1990) (unlawful to solicit or require AIDS test as a condition of employment).

A number of municipalities have also enacted regulations limiting the use of AIDS testing in the employment context. *See* AIDS IN THE WORKPLACE 31-185 (BNA 1987) (Austin, Texas Code § 7-4-120-133 (1986) (no person shall require another to undergo any medical procedure or test designed to show or help show whether a person has AIDS or is a HIV-infected individual unless such testing is necessary as a bona fide occupational qualification); Boston, Mass. Mayoral Executive Order of March 6, 1987 (affirming city's commitment to state law that employers prohibited from requiring HIV-antibody tests as a condition of initial or continuing employment)). *See generally* 1 L. LARSON & P. BROWSKY, UNJUST DISMISSAL, § 7.07[2] (1988) (discussing AIDS testing).

100. *See supra* note 99.

101. *See* 45 C.F.R. § 84.14 (1989).

102. *See* N.C. GEN. STAT. § 130A-148(i)(1) and (3) (1989).

103. The opinion of the United States Department of Health and Human Services is that there is no need for routine AIDS testing. *See* W. BANTA, *supra* note 6, at 95. The United States Centers for Disease Control (CDC) has said that employment testing is not necessary because AIDS is not transmissible in the workplace, *including restaurants and hospitals. See CDC Recommendations for Preventing AIDS Transmission in the Workplace*, reprinted in W. BANTA, *supra* note 6, at 159-69 [hereinafter *CDC Guidelines*]. The CDC also has found that employment testing discourages people from seeking counseling and testing and thus interferes with efforts to combat the spread of AIDS. W. BANTA, *supra* note 6, at 95. Former Surgeon General C. Everett Koop also thinks mandatory testing not wise, since those who need treatment are likely to avoid testing. *Id.*

In contrast, a 1987 poll showed that 37% of the American public believes that all job applicants

ted by casual contact; blood, tissue and genital secretions are the only known vehicles of transmission.[104] Except for a few possible situations, for example where an employee's job requires him to be in contact with body fluids,[105] most employers have no need to know whether employees are HIV-positive, and therefore pre-employment and routine employment testing serve no good purpose.

Furthermore, current testing technology may be inappropriate for mass screening. Testing for the HIV-infection is accomplished most commonly through testing for antibodies by a test known as ELISA.[106] The ELISA test has a number of shortcomings, as reported to the General Assembly by the North Carolina Legislative Research Commission:

> Importantly, this test was not developed for diagnositc [sic] purposes, but rather as a tool to screen units of blood being used for transfusion. This test may cost as much as $20 to $60 depending on where it is performed. No antibody test is perfect, and the HIV ELISA test has shortcomings. About 1 in every 100 normal persons will react falsely with this test. Thus, the odds of a positive test correctly indicating the presence of HIV infection will vary with the proportion of persons being tested who really are infected. For example, suppose the ELISA test is used to screen 1000 persons, of whom only one truly has HIV

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should be tested; 34% believe present employees should be tested and 52% believe that everyone should be tested. *Id.* at 97.

104. HIV-infection is only known to be transmitted through sexual contact, the sharing of contaminated needles, contaminated blood and blood products, infected organ or tissue transplants, and from mother to infant across the placenta. *CDC Guidelines, supra* note 103, at 10 (no known risk of transmission to co-workers, clients or consumers exists from infected workers in offices, schools, factories, construction sites or food service); Friedland & Klein, *Transmission of the Human Immunodeficiency Virus*, 317 NEW ENG. J. MED. 1125, 1125-33 (1987).

> There is no known risk of non-sexual infection in most of the situations we encounter in our daily lives. We know that family members living with individuals who have the AIDS virus do not become infected except through sexual contact. There is no evidence of transmission (spread) of AIDS virus by everyday contact even though these family members shared food, towels, cups, razors, even toothbrushes, and kissed each other.

Chalk v. United States Dist. Ct., 840 F.2d 701, 706 (9th Cir. 1988) (quoting U.S. PUBLIC HEALTH SERVICE, SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME, at 13 (1986)).

105. The United States Centers for Disease Control has taken the position that even testing of health care and restaurant workers is not necessary. *CDC Guidelines, supra* note 103, at 10.

> All epidemiologic and laboratory evidence indicates that blood-borne and sexually transmitted infections are not transmitted during the preparation or serving of food or beverages, and no instances of [HIV] infection have been documented in this setting. . . .
>
> . . . .
>
> Routine seriologic testing of [food-service workers] for antibody [to HIV] is not recommended to prevent disease transmission . . . to consumers.

Id. at 168. This leads one to question the temporary exemption of restaurants from the Communicable Disease amendments. Restaurant employers presumably are free to require tests of selected employees and to terminate employment based on AIDS regardless of confirmation of a test result. The author of this Note was able to locate no legislative history that suggested any justification for this temporary exemption. It is clearly unwarranted based on current medical findings and the recommendations of the Centers for Disease Control.

106. The Enzyme Linked Immunosorbent Assay is a screening test. *CDC Guidelines, supra* note 103, at 1. If the screening result is positive, it is confirmed with a more specific test, usually the Western blot assay. *Id.* A positive ELISA result must be confirmed before a positive HIV diagnosis is given. *Id.*

> infection. About 11 persons will test positive: 1 true positive, and 10 false positive. . . . [T]he odds of a positive ELISA test indicating true infection is about 10% . . . . This feature of testing needs to be considered whenever a screening program is considered.[107]

The key to the ELISA test is that its effectiveness as a screening device depends on the population in which it is used. It is a blunt tool when used in a general population with a low incidence of HIV-positives.[108] Far too many unaffected people will test positive. In the context of an epidemic as feared and misunderstood as AIDS, the ramifications of an excessive number of false positives are frightening.[109]

While the North Carolina statute requires a "confirmed positive test" before an employer may take action based on an HIV blood test, the statute does not indicate how this test must be confirmed.[110] Contrary to the admonition of the Legislative Research Commission,[111] the North Carolina legislation does not consider the limitations of current testing technology. The statute also does not regulate the conditions under which blood tests may be taken or confirmed;[112] whether employers or employees must bear the high cost of a required test; or how results ought to be recorded, filed, or communicated.[113] Confidentiality concerns are great in the area of AIDS testing, yet the North Carolina legislature has authorized testing in the employment context with no provisions for protecting the privacy of those to be tested, or protecting employers against tort liability for suits based on privacy and defamation.[114]

Most importantly, there is no test that tells whether a person actually has,

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107. LEGISLATIVE REP., *supra* note 1, at 4-5. The prevalence of HIV-infection in the population of North Carolina is thought to be about 0.02%; therefore, the probability that an individual who tests positive is indeed infected is only nine percent. Ninety-one percent of those who test positive will be false positives. Landis, *To Test Or Not To Test*, 48 N.C. MED. J. 357, 359-61 (1987) (discussing high costs and little gains associated with mass screening in the general population). *See generally* Myers & Myers, *Arguments Involving AIDS Testing in the Workplace*, 38 LAB. L.J. 582, 585-90 (1987) (arguments for and against testing in workplace).

108. *See* Landis, *supra* note 107, at 361.

109. It is difficult to predict a person's reaction to being told he has tested positive for the AIDS virus, but suicide is not uncommon. *See* Holzhauer, *AIDS Testing in the Health Care Setting*, 4 ISSUES IN LAW & MED. 359, 363-65 (1988); Marzuk, Tierney, Tardiff, Gross, Morgan, Hsu & Mann, *Increased Risk of Suicide in Persons with AIDS*, 259 J. A.M.A. 1333 (1988); Glass, *AIDS and Suicide*, 259 J. A.M.A. 1369 (1988). For this reason, too, the employment context is inappropriate for testing. As the law now stands, test results may be communicated to the employer who may simply tell a job applicant over the telephone that he has tested positive and therefore not a desirable employee. North Carolina law does not provide for follow-up counselling, psychological or medical referrals or even an explanation of the significance of a positive test result.

110. Elsewhere the statute provides that the Public Health Commission shall adopt rules establishing certification of laboratories and that AIDS tests may be performed only by certified laboratories; certification procedures are to include proficiency testing, record maintenance, adequate staffing and confirmatory testing. *See* N.C. GEN. STAT. § 130A-148(a) (1989).

111. *See supra* text accompanying note 107; Landis, *supra* note 107, at 359.

112. Although laboratories performing tests must be certified, there are no provisions for the conditions under which blood samples are to be taken, other than that laboratories are to test only specimens submitted by a licensed physician. *See* N.C. GEN. STAT. § 130A-148(a) (1989).

113. *See supra* note 109 and accompanying text.

114. *See* W. BANTA, *supra* note 6, at 18-24 (discussing possible causes of action against employers); Holzhauer, *supra* note 109, at 351-57.

or may develop, AIDS.[115]

> The only fact established by the test is whether the person has antibodies to the AIDS virus. A person who recently contracted the virus but had not yet manufactured antibodies would produce a negative result. Typically, there is a six- to twelve-week hiatus between developing the virus and manufacturing the antibodies that can be detected. . . . No AIDS test . . . can predict whether a person testing positive will ever develop AIDS . . . .[116]

In addition, some commentators feel that testing for HIV tends to give rise to a false sense of security.[117] Testing in the general employment context serves only to strengthen the forces of irrationality, ignorance, and fear presently surrounding AIDS and HIV-infection, and encourages discrimination rather than protection and understanding of persons who are already battling a deadly opponent.

The North Carolina legislature has failed to adequately protect the rights of people with AIDS and HIV-infection. HIV-infected individuals, even those who are disabled by AIDS, are not protected under the North Carolina Handicapped Persons Protection Act. The communicable disease exemption will exclude persons who have progressed to the final stages of AIDS, even if they are able to meet the standard of "qualified handicapped person," thereby posing no threat to the health or safety of those around them. Persons who are HIV-positive but asymptomatic, although able to work and not a threat to the health and safety of those around them, likewise are excluded by this exemption. The federal handicap protection scheme includes those afflictions within its scope to effectively protect rights in the public-sector. The North Carolina act tracks the language of the federal statute, with the exception of the communicable disease exemption and the deletion of "working" from the list of major life activities.[118]

These legislative modifications of the federal definition serve the sole purpose of excluding people with AIDS and HIV-infection from the protections afforded by the handicap act. The narrow reach of employment protections for victims of AIDS and HIV infection runs counter to the purpose stated by the General Assembly in the North Carolina Handicapped Persons Protection Act: It was intended to "encourage and enable all handicapped people to participate

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115. Tests screen only for the presence of HIV antibodies in the blood. *CDC Guidelines*, *supra* note 103, at 1. "Detectable antibody usually develops within three months after infection. A confirmed positive antibody test means that a person is infected with HIV and is capable of transmitting the virus to others. Although a negative antibody test usually means that a person is not infected, antibody tests cannot rule out infection from a recent exposure." *Id.*

116. W. BANTA, *supra* note 6, at 98.

117. *See supra* note 115; Holzhauer, *supra* note 109, at 349-50. Holzhauer argues that routine testing in a health care setting will result in workers lowering their guard with patients who tested negative, thus increasing the risk of transmission from what he calls "silent HIV patients," those who are infected but whose bodies have not yet begun to produce antibodies. *Id.* at 349. Reliance on tests rather than precautions to prevent transmission requires constant testing and a more accurate testing technology than we now possess. *Id.* at 350; *see generally* W. BANTA, *supra* note 6, at 99-105 (arguments for and against workplace testing).

118. It is incongruous that an HIV-infected employee of a North Carolina hospital or university is legally handicapped, while a similarly infected employee of the private business across the street is not. While the public employer may not test for HIV before hiring and may not base a decision to hire on an applicant's HIV status, the private businessman, limited only by the Communicable Disease Law, may do both. *See supra* notes 9-10 (scope of § 504).

fully to the extent of their abilities in the . . . economic life of the state, [and] to engage in remunerative employment."[119] This policy justification of encouraging the handicapped to work if they are able is equally as compelling where HIV-positive individuals are concerned. It is impossible to rationalize the legislature's decision to condone, indeed encourage, employers treating job applicants differently from current employees.[120] As the United States Supreme Court observed in *Arline*:

> Few aspects of a handicap give rise to the level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such non-infectious disease as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious. The [Rehabilitation] Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments.[121]

The North Carolina General Assembly appears to have ignored such medical judgments in shaping its AIDS-related legislation. Laws enacted specifically to protect the rights of HIV-infected persons excluded from other statutory protection fall far short of this goal. The *Burgess* court found the new legislation to indicate that the legislature preferred to treat AIDS and HIV-infection in a specific statute, rather than to classify it as a handicap.[122] Justice Meyer, writing for the court, said that the amendments to the communicable disease law were

> the product of extensive efforts to balance the interests of the infected employee with the concerns, *whether legitimate or illusory*, of employers faced with the *perceived* risk of liability as a result of employing a person with the HIV virus.[123]

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119. N.C. GEN. STAT. § 168A-2(a) (1987). *See also id.* § 168A-2(b) (discrimination based on handicap is contrary to the public interest and to the principles of freedom and equality of opportunity); Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 524, 259 S.E.2d 248, 251 (1979) (statute is remedial and "should be construed liberally, in a manner which assures fulfillment of the beneficial goals for which it was enacted and which brings with it all cases fairly falling within its intended scope").

> Lack of access to, and the threat of unfair discrimination from, subsistence-related private interests [such as employment, housing, medical care, education, marriage, travel and military service] produces a substantial negative impact upon individual survival. Furthermore, such discrimination also exerts a substantially adverse impact upon the nation's economy—both in terms of lost labor time, and the contribution that the labor time can make towards underwriting the costs associated with the AIDS epidemic.

Hollowell & Eldridge, *supra* note 53, at 568.

120. An eventual constitutional challenge based on equal protection grounds is not unlikely. The legislature appears to have given employers permission to discriminate against job applicants, but not against current employees. Conversation with William E. Murphy, Professor of Law, University of North Carolina at Chapel Hill, April 24, 1990.

121. School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987). "Because AIDS' victims include a high percentage of homosexual men and users of illegal drugs, many consider the disease the result of illicit conduct, and its victims are isolated not only by others' dread of catching the deadly disease but also by others' notions of morality." Carey & Arthur, *The Developing Law on AIDS in the Workplace*, 46 MD. L. REV. 284, 285-86 (1987). *See also* Raytheon Co. v. Fair Empl. & Hous. Comm'n, 46 Fair Empl. Prac. Cas. (BNA) 1089, 1091 (Cal. Super. Ct. 1989) (comparing panic of AIDS epidemic to the internment of Japanese Americans, the polio scare, and fear of cancer victims).

122. Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 218, 388 S.E.2d 134, 142 (1990).

123. *Id.* (emphasis added).

Whether the court intended the irony in that statement is uncertain. However, "illusory" concerns and "perceived" risks are not the stuff of which antidiscrimination laws are made; they are the evil that this type of statute is meant to remedy. While the state legislature is to be lauded for the protections it gave HIV-infected persons under the communicable disease law in housing, public services, public accommodation and transportation, one wonders why the legislature determined protections against testing and discrimination to be less essential in the employment context.[124] The state handicap legislation was amended to exclude these victims; the state communicable disease law specifically denies that its provisions are to be construed so as to prohibit an employer from requiring AIDS tests and denying employment based on HIV-positive status.[125] The legislature should return to the drafting table and craft legislation that does expressly prohibit HIV-testing and hiring decisions based on HIV-status.[126] The General Assembly has ignored both current medical realities and the findings of its own research commission.[127] Instead of extinguishing public misinformation and irrational fears surrounding the AIDS epidemic, it has fanned the flames.

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124. One wonders how HIV-positive individuals are expected to take advantage of their protected access to public transportation and services when they are unable to obtain employment and support themselves.

125. N.C. GEN. STAT. § 130A-148 (1989).

126. "The use of coercive powers, far from accomplishing the ostensible objective of impeding the AIDS epidemic, could well fuel it." Gostin, *supra* note 54, at 1629.

127. "Sound legislative policy on HIV-infection needs to protect the rights of these individuals and allow them to continue their contribution, instead of becoming a drain on society." LEGISLATIVE REP., *supra* note 1, at 9.