

July 2015

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Janet A. Michael

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## Recommended Citation

Michael, Janet A. (1989) "Chalk v. United States District Court Central District of California: A Major Victory for AIDS Employees Under the Federal Rehabilitation Act of 1973," *Akron Law Review*: Vol. 22 : Iss. 2 , Article 9.  
Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol22/iss2/9>

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# CHALK v. UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA: A MAJOR VICTORY FOR AIDS EMPLOYEES UNDER THE FEDERAL REHABILITATION ACT OF 1973

## INTRODUCTION

In *Chalk v. United States Dist. Court Central Dist. of Cal.*,<sup>1</sup> a school teacher infected with Acquired Immune Deficiency Syndrome (AIDS) was allowed to teach *in the classroom*, despite the school system's desire to transfer him to an administrative position. This is the first case in which a federal appeals court interpreted a federal statute, the Rehabilitation Act,<sup>2</sup> to include AIDS victims within its definition.<sup>3</sup> The court reviewed applicable statutes, relevant case law, and current medical data in determining that a school teacher was a "qualified handicapped person" under the Rehabilitation Act. In rendering the *Chalk* decision, the Ninth Circuit Court of Appeals took a major step in balancing the rights of employees infected with AIDS against the health risk that those employees pose to other persons.<sup>4</sup> By holding in favor of the school teacher, the Court has prompted concern among employers and employees.

This note will first review the facts of *Chalk* and will present a broad overview of AIDS, outlining current medical knowledge of the disease. Second, this note will analyze the Rehabilitation Act, examining regulations, legislative history, and case law interpreting the Act. Finally, this note will analyze the impact of *Chalk* on future employment cases.

## FACTS

Vincent L. Chalk taught hearing impaired students for the Orange County Department of Education (Department).<sup>5</sup> Chalk was diagnosed as having AIDS in February of 1987.<sup>6</sup> Eight weeks later, Chalk's physician, Dr. Andrew Siskind, released Chalk from his care and told him that he could work.<sup>7</sup> At the Department's request, the Director of Epidemiology and Disease Control, Dr. Thomas J. Prendergast, examined Chalk and reported back to the Department that Chalk did not pose a risk of infecting his students with AIDS.<sup>8</sup> Still concerned about the

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<sup>1</sup>840 F.2d 701 (9th Cir. 1988).

<sup>2</sup>Rehabilitation Act of 1973, PUB. L. NO. 93-112, 87 STAT. 355 (codified as amended at 29 U.S.C. § 701-796 (1982)).

<sup>3</sup>*Court Rules Teacher with Aids 'Qualified' to Teach Because Normal Classroom Contact Cannot Spread Virus*, GOV'T EMPL. REL. REP. (BNA) NO. 1255, at 387 (March 14, 1988).

<sup>4</sup>DICKENS, *Legal Rights and Duties in the AIDS Epidemic*, 239 SCIENCE 580 (1988).

<sup>5</sup>*Chalk*, 840 F.2d at 703.

<sup>6</sup>*Id.* AIDS is discussed in detail in a later portion of this casenote.

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

risk of transmission, the Department told Chalk that it would reassign him to an administrative position.<sup>9</sup> Chalk never took the position.<sup>10</sup>

Chalk sought a preliminary injunction in the District Court for the Central District of California, ordering the Department to reinstate him to classroom duties.<sup>11</sup> Chalk alleged that the Department violated Section 504 of the Rehabilitation Act of 1973, "which forbids federally funded programs from discriminating against otherwise qualified handicapped persons."<sup>12</sup>

The District Court denied Chalk's injunction.<sup>13</sup> The Court held that the risk of harm to the students outweighed any harm to Chalk because of medical uncertainty surrounding the transmission of AIDS.<sup>14</sup>

The Ninth Circuit Court of Appeals reversed.<sup>15</sup> The Court examined *School Bd. of Nassau County v. Arline*<sup>16</sup> in determining whether the Rehabilitation Act applies to AIDS victims.<sup>17</sup> In *Arline*, the School Board discharged Arline, a school teacher, after a third relapse of tuberculosis within two years.<sup>18</sup> The district court held that tuberculosis was not a handicap within the statute because Congress never intended for the statute to cover contagious diseases.<sup>19</sup> The court of appeals reversed, holding that Section 504 of the Rehabilitation Act covers contagious diseases.<sup>20</sup> The Supreme Court granted certiorari and affirmed the court of appeals.<sup>21</sup> In view of this decision, the *Chalk* court reasoned that persons with AIDS, a contagious disease, are handicapped within the meaning of Section 504.<sup>22</sup>

After stating that a handicap existed, the Court analyzed whether Chalk was

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* at 703-04.

<sup>12</sup>*Id.* at 703; Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794 (West Supp. 1987) provides in part as follows: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." For other theories of redress against AIDS discrimination see Leonard, *Employment Discrimination*, AIDS LEGAL GUIDE (Lambda Legal Defense & Education Fund, Inc., 1987); Leonard, *AIDS in the Workplace*, AIDS AND THE LAW (Yale University 1987); Parry, *AIDS as a Handicapping Condition — Part II*, 10 MENTAL & PHYSICAL DISABILITY L. REP. 2 (1986); DICKENS, *Legal Rights and Duties in the AIDS Epidemic*, 239 SCIENCE 580 (1988).

<sup>13</sup>*Chalk*, 840 F.2d at 703.

<sup>14</sup>*Id.* at 707. The district court also found that Chalk suffered no irreparable injury which merited an injunction because the Department offered him an administrative position with the same salary. *Id.* at 709.

<sup>15</sup>*Chalk v. United States Dist. Court*, 832 F.2d 1158 (9th Cir. 1987).

<sup>16</sup>107 S. Ct. 1123 (1987), *reh'g denied*, 107 S. Ct. 1913 (1987).

<sup>17</sup>*Chalk*, 840 F.2d at 704-05.

<sup>18</sup>*Arline*, 107 S. Ct. at 1125.

<sup>19</sup>*Id.* The district court also stated that even if Arline was handicapped, she was not "otherwise qualified" to teach school. *Id.*

<sup>20</sup>*Arline v. School Bd. of Nassau County*, 772 F.2d 759, 764 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 1163 (1986), *aff'd*, 107 S. Ct. 1123 (1987), *reh'g denied*, 107 S. Ct. 1913 (1987).

<sup>21</sup>*Arline*, 107 S. Ct. at 1126.

<sup>22</sup>*Chalk*, 840 F.2d at 704-05.

“otherwise qualified” to teach. The *Chalk* Court examined prior Supreme Court decisions that discussed when a person was “otherwise qualified” within the meaning of Section 504.<sup>23</sup> In *Southeastern Community College v. Davis*,<sup>24</sup> the Supreme Court defined an “otherwise qualified” person as “one who is able to meet all of a program’s requirements in spite of his handicap.”<sup>25</sup> Realizing that this broad definition was inadequate when applied to contagious diseases, the Supreme Court later reformulated its standard for determining when an individual with a contagious disease was *not* “otherwise qualified.”<sup>26</sup> The Supreme Court stated 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.”<sup>27</sup> This standard requires the courts to use a balancing test, weighing the rights of handicapped individuals to be free from discrimination against the legitimate concerns of “exposing others to significant health risks.”<sup>28</sup>

In conducting this balancing test, the *Chalk* Court considered the American Medical Association (AMA) recommendations as set forth in *Arline*.<sup>29</sup> The recommendations include:

“(1) the nature of the risk (how the disease is transmitted), (2) the duration of the risk (how long the carrier is infectious), (3) the severity of the risk (what is the potential harm to third parties), and (4) the probabilities the disease will be transmitted and will cause varying degrees of harm.”<sup>30</sup>

The guidelines also require that the court base its findings on current medical knowledge.<sup>31</sup>

The *Chalk* Court found that there was *no* current medical evidence that demonstrated “any appreciable risk” of transmitting the AIDS virus in an ordinary school setting.<sup>32</sup> Using this reasoning, the court stated that Chalk was not required to disprove every theoretical possibility of harm to students and co-workers.<sup>33</sup> The court concluded that public fear of AIDS was not grounds to deny the injunction.<sup>34</sup>

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<sup>23</sup>*Arline*, 107 S. Ct. at 1126-32; *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

<sup>24</sup>*Id.* The Court held that the nursing student was not “otherwise qualified,” because the ability to understand speech without reliance on lipreading is necessary for patient safety.” *Id.* at 407.

<sup>25</sup>*Id.* at 406.

<sup>26</sup>*Chalk*, 840 F.2d at 705.

<sup>27</sup>*Arline*, 107 S. Ct. at 1131 & n.16.

<sup>28</sup>*Id.* 107 S. Ct. at 1131.

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup>*Chalk*, 840 F.2d at 706-09.

<sup>33</sup>*Id.* at 701.

<sup>34</sup>*Id.* at 711. Another factor leading to the Court’s decision to grant an injunction stemmed from a belief that Chalk suffered irreparable harm. *Id.* at 710. Chalk sustained emotional and psychological injury, and the further delay pending trial represented irretrievably lost time to Chalk in view of his impending fatal disease. *Id.*

## ANALYSIS

*AIDS — A Brief Description*

The Center for Disease Control (CDC) designated AIDS as a disease in 1981.<sup>35</sup> A virus, human T-lymphotropic virus type III (HTLV-III), causes AIDS, a disease that renders the human immune system incapable of withstanding other illnesses.<sup>36</sup> The virus attacks white blood cells (T-Lymphocytes) and renders them incapable of fighting off disease.<sup>37</sup> This leaves persons afflicted with AIDS vulnerable to "opportunistic diseases" that do not threaten most people.<sup>38</sup> Two common opportunistic diseases are Kaposi's sarcoma,<sup>39</sup> a rare skin cancer, and pneumocystis carinii pneumonia,<sup>40</sup> an uncommon form of pneumonia. Although many persons who develop the opportunistic diseases are permanently hospitalized, others have responded well to treatment and are able to work.<sup>41</sup>

Some "risk groups"<sup>42</sup> have developed a milder syndrome, AIDS-related complex (ARC), that is associated with AIDS. The symptoms that these persons exhibit include: swollen lymph nodes (lymphadenopathy), weight loss, fatigue, and night sweats.<sup>43</sup> Many persons exhibiting these symptoms are still physically able to work.<sup>44</sup>

Current research indicates that there are only four ways that the disease is transmitted.<sup>45</sup> These include: (1) sexual contact that results in an exchange of blood

<sup>35</sup>*Pneumocystis Pneumonia — Los Angeles*, 30 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 250, 251 (June 5, 1981 [hereinafter cited as MMWR]).

<sup>36</sup>U.S. Public Health Services, *Surgeon General's Report on Acquired Immune Deficiency Syndrome* at 9-10 (1986) [hereinafter cited as *Surgeon General's Report*]; SARNGADHARAN, POPOVIC, BRUCH, SCHUPBACK & GALLO, *Antibodies Reactive with Human T-Lymphotropic Retroviruses (HTLV-III) in the Serum of Patients with Aids*, 224 SCIENCE 506 (1984).

<sup>37</sup>*Surgeon General's Report*, *supra* note 36, at 9.

<sup>38</sup>*Id.* at 11-12. Opportunistic infections are those that "occur due to the opportunity afforded by the altered physiological state of the host." TABER'S CYCLOPEDIA MEDICAL DICTIONARY 1169 (15th ed. 1985).

<sup>39</sup>Price & Price, *Kaposi's Sarcoma — An Acquired Immunodeficiency Syndrome*, OHIO ST. MED. J. 143 (1984).

<sup>40</sup>Wofsy, *Pneumocystis Carinii Pneumonia*, 19 *Frontiers Radiation Therapy and Oncology* 74 (1985). For a more detailed treatment of various opportunistic infections associated with AIDS, see V. DEVITA, S. HELLMAN, & S. ROSENBERG, *AIDS ETIOLOGY, DIAGNOSIS, TREATMENT AND PREVENTION* (1985).

<sup>41</sup>Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681, 684-85 (1985).

<sup>42</sup>Figures from United States Department of Health and Human Services (HHS), dated August, 1985, show the following breakdown of reported AIDS cases: homosexual or bisexual men — 73%; intravenous drug abusers — 17%; hemophiliacs — 1%; heterosexual contacts of someone with AIDS or at a risk for AIDS — 1%; others 6%, found in U.S. Dept. of Health and Human Services, *Facts about AIDS*, (1985); see also *Update: Acquired Immunodeficiency Syndrome — United States*, 36 MMWR 522-25 (Aug. 14, 1987) (statistical increase of AIDS cases from 1985 to 1987); *Human Immunodeficiency Virus (HIV) Infection Classification*, 36 MMWR 1S-20S (Supp. Dec. 25, 1987) (percentage of AIDS victims that contracted specified opportunistic diseases and other health problems); *Update: Acquired Immunodeficiency Syndrome (AIDS) — Worldwide*, 37 MMWR 286-95 (May 13, 1988) (statistical breakdown of AIDS cases in different nations).

<sup>43</sup>Ziegler & Abrams, *The AIDS — Related Complex*, in *AIDS Etiology, Diagnosis, Treatment and Prevention* (V. DEVITA, S. HELLMAN, S. ROSENBERG, 1985).

<sup>44</sup>Leonard, *supra* note 41, at 685.

<sup>45</sup>Friedland & Klein, *Transmission of the Human Immunodeficiency Virus*, 317 NEW ENG. J. MED. 1125 (1987).

or semen, (2) sharing intravenous drug needles, (3) blood transfusions, and (4) transmission from infected mother to an unborn child.<sup>46</sup> "Although the AIDS virus has been detected in tears and saliva, there is no reported case of transmission from these body fluids."<sup>47</sup> While medical authorities have assured the public that AIDS cannot be transmitted by casual contact in the workplace,<sup>48</sup> employers and employees are still apprehensive about working with AIDS victims.

### *History and Purpose of Section 504 of the Rehabilitation Act*

Section 504 states in pertinent part, "no otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>49</sup>

The congressional purpose of the Rehabilitation Act was "to develop and implement, through . . . the guarantee of equal opportunity . . . programs of vocation rehabilitation . . . for individuals with handicaps in order to maximize their employability, independence, and integration into the workplace . . . ." <sup>50</sup> Congress enacted the Rehabilitation Act to remedy "previous societal neglect" of the handicapped.<sup>51</sup> The Rehabilitation Act requires employers to consider and evaluate the handicapped as potential or continued employees.<sup>52</sup> Employers are not permitted to "whimsically" discriminate against individuals solely on the basis of their handicap.<sup>53</sup>

### *Elements of Section 504 Violation*

To establish a Section 504 violation,<sup>54</sup> a Plaintiff must prove: (1) he is handicapped; (2) he is otherwise qualified for the position; (3) the discrimination is based solely on his handicap; and (4) the program or activity receives federal funding.<sup>55</sup>

<sup>46</sup>*Id.*

<sup>47</sup>Surgeon General's Report, *supra* note 36, at 25.

<sup>48</sup>*Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace*, 34 MMWR 682 (Nov. 15, 1985); Surgeon General's Report, *supra* note 36, at 25; U.S. Dept. of Health and Human Services, *Facts About AIDS*, 1985.

<sup>49</sup>Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794 (West Supp. 1987).

<sup>50</sup>29 U.S.C.A. § 701 (West Supp. 1987).

<sup>51</sup>H.R. 8395, 93rd Cong. 1st Sess., 119 CONG. REC. 5880, 5883 (1973) (statement of Sen. Cranston).

<sup>52</sup>Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794 (West Supp. 1987).

<sup>53</sup>*Id.*

<sup>54</sup>*Doe v. New York Univ.*, 666 F.2d 761, 774-75 (2d Cir. 1981).

<sup>55</sup>*Id.* In *Chalk* the Department admitted that it received federal funding. *Chalk*, 840 F.2d at 705 & n.6. For case reviews in which "federal funding" is an issue, see Rasin, *AIDS and Employment Issues*, AIDS: LEGAL ASPECTS OF A MEDICAL CRISIS (Law J. Seminars — Press 1985); Cerere, *AIDS in the Workplace: Legal Implications in AIDS: THE LEGAL COMPLEXITIES OF A NATIONAL CRISIS* (Law J. Seminars — Press 1987).

## 1. The Meaning of "Handicapped Individual"

Section 504 of the Rehabilitation Act defines a handicapped individual as "any person who (i) has a *physical* or mental *impairment* which substantially limits one or more of such person's *major life activities*, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment" (emphasis added).<sup>56</sup> The Department of Health and Human Services (HHS) has defined "physical impairment" and "major life activities."<sup>57</sup> Physical impairment is "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genito-urinary, *hemic*, *lymphatic*, and endocrine . . ." (emphasis added).<sup>58</sup> Major life activities are "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and *working*" (emphasis added).<sup>59</sup>

Persons having AIDS or ARC suffer physical impairments because infections associated with these diseases affect the "hemic"<sup>60</sup> and "lymphatic"<sup>61</sup> systems, which are integral parts of the immune system.<sup>62</sup> Once the immune systems breaks down, all organs become physically impaired.<sup>63</sup> The debilitating effects associated with AIDS or ARC impair most of the listed major life activities.<sup>64</sup>

The third part of the Rehabilitation Act's definition of a handicapped person protects immune carriers<sup>65</sup> and persons mistakenly perceived as infected with AIDS because they are *viewed* as having an impairment.<sup>66</sup> This provision protects employees if an employer discriminates against them based upon a real or perceived condition of AIDS.<sup>67</sup>

Consequently, the Court correctly concluded that Chalk was handicapped

<sup>56</sup>29 U.S.C.A. § 706(7)(B) (West 1982).

<sup>57</sup>45 C.F.R. § 84.3 (1987).

<sup>58</sup>*Id.* § 84.3 (j)(2)(i)(a) (1987).

<sup>59</sup>*Id.* § 84.3 (j)(2)(ii) (1987).

<sup>60</sup>"Hemic" means "pertaining to blood." TABER'S CYCLOPEDIA MEDICAL DICTIONARY 742 (15th ed. 1985).

<sup>61</sup>Lymphatic system is defined as a central body system that is responsible for defending against disease. *Id.* at 985.

<sup>62</sup>For additional discussion of AIDS as a physical impairment, see Comment, *AIDS and Employment Discrimination Under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons with Disabilities Act*, 20 U. RICH. L. REV. 425, 436 (1986); Note, *AIDS: Does it Qualify as a "Handicap Under the Rehabilitation Act of 1973?"*, 61 NOTRE DAME L. REV. 572, 583-84 (1986); Leonard, *AIDS in the Workplace*, AIDS AND THE LAW (Yale University 1987).

<sup>63</sup>V. DeVITA, S. HELLMAN, & S. ROSENBERG, AIDS Etiology Diagnosis, TREATMENT AND PREVENTION (1985).

<sup>64</sup>Leonard, *supra* note 41, at 684-85.

<sup>65</sup>Immune carriers are infected persons not exhibiting any physical symptoms of the disease. TABER'S CYCLOPEDIA MEDICAL DICTIONARY 275 (15th ed. 1985).

<sup>66</sup>29 U.S.C. § 706(7)(B) (1982) (emphasis added).

<sup>67</sup>Leonard, *AIDS in the Workplace*, AIDS and the Law (Yale University 1987).

based upon current medical knowledge and statutory interpretation.<sup>68</sup>

## 2. "Otherwise Qualified" for the Position

A "qualified handicapped person is a handicapped person who, with reasonable accommodations<sup>69</sup> can perform the essential functions of the job in question.<sup>70</sup> It is the court's duty "to conduct an individualized inquiry and make appropriate findings of fact."<sup>71</sup>

In finding that Chalk was not "otherwise qualified," the district court relied heavily on the second (duration of risk) and third (severity of risk) AMA factors.<sup>72</sup> In reversing this decision, the court of appeals de-emphasized the district court's findings by giving great weight to the first (nature of risk) and fourth (probability of transmission) AMA factors.<sup>73</sup> Although the AMA factors weighed evenly for and against Chalk, the majority of medical evidence support the court of appeals' holding.<sup>74</sup> The medical community has stated that the disease cannot be transmitted by non-parenteral routes such as saliva.<sup>75</sup> Activities that occur in the classroom further support the proposition that transmission of the disease is highly unlikely in a classroom setting.<sup>76</sup> As a mature adult, Chalk can understand the nature of his disease and can take proper precautions in minimizing the risk of infecting others. After considering the mode of transmission and the type of contact that occurs in the classroom, the detrimental effects to Chalk outweigh the remote possibility of transmitting the disease to students and co-workers.<sup>77</sup>

## 3. Discrimination Based Solely upon the Handicap

This third requirement has been the most controversial in the workplace. The Justice Department has taken one perspective; however the courts have taken an opposite view.

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<sup>68</sup>Legislative history and prior cases lead to the conclusion that Congress intended for the Act to cover perceived handicaps. Parmet, *Aids and the Limits of Discrimination Law*, 15: 1-2 LAW, MEDICINE & HEALTH CARE 61, 63 (1987) (when Congress amended the Rehabilitation Act, it intended for persons perceived as having a substantial impairment to be covered under the act); see also Leonard, *Employment Discrimination Against Persons with Aids*, 10 U. DAYTON L. REV. 681, 699-702 (1985) (enforcement agencies have construed state laws to forbid discrimination based on public fear of contracting the disease); Note, *Aids: Does it Qualify as a "Handicap" Under the Rehabilitation Act of 1973?*, 61 NOTRE DAME L. REV. 572, 592-94 (1986) (legislative history indicates that the act should have broad application). E.E. Black, Ltd. v. Marshall, 497 F.Supp. 1088, 1098 (D. Hawaii 1980) (Congress wanted to protect those individuals perceived as having physical or mental conditions).

<sup>69</sup>45 C.F.R. § 84.12 (1987); see also Rasin, *supra* note 55, at 37; Cecere, *supra* note 55, at 159.

<sup>70</sup>45 C.F.R. pt. 84, at 346 (1987).

<sup>71</sup>*Arline*, 107 S. Ct. at 1131 & n.16.

<sup>72</sup>*Chalk*, 840 F.2d at 707.

<sup>73</sup>*Id.*

<sup>74</sup>Surgeon General's Report, *supra* note 36, at 25.

<sup>75</sup>*Id.*

<sup>76</sup>New York Ass'n for Retarded Children v. Carey, 612 F.2d 644, 650 (2d Cir. 1979).

<sup>77</sup>*Id.*



The Justice Department has stated that "discrimination based on fear of contagion regardless of whether the fear is irrational is *not* covered by the Act."<sup>78</sup> The Justice Department stated: "[A] person cannot be regarded as handicapped simply because others shun his company. Otherwise, a host of personal traits — from ill temper to poor personal hygiene — would constitute handicaps."<sup>79</sup>

The Justice Department's memorandum has not been followed.<sup>80</sup> In *Arline*, the Supreme Court stated that Section 504 protects those who are discriminated against because of fears and myths about their diseases.<sup>81</sup> The Court explained that "it is unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment."<sup>82</sup>

An employer should be cautious before using the Justice Department's reasoning to justify discriminatory treatment toward AIDS victims. The cases decided thus far indicate that the courts are sympathetic toward the needs of AIDS victims in the workplace.

### *Impact of Chalk on Future Employment Cases*

The *Chalk* decision has defined more clearly the rights of employees with AIDS. However, the rights of employers and co-workers still remain unclear. It is expected that employers and employees will assert a variety of defenses in future AIDS litigation cases. First, employers may argue that their business will suffer undue economic hardship due to medical expenses of AIDS employees. This argument has been rejected.<sup>83</sup> One Supreme Court case held that a state may place limits on insurance coverage despite its disproportionate impact on the handicapped.<sup>84</sup> Consequently, an employer may be permitted to place limits on benefit packages to avoid bearing the health care burden of those with AIDS.<sup>85</sup>

Second, employers may argue that employees infected with AIDS will be absent for long periods of time to seek medical treatment. The courts have generally rejected this argument.<sup>86</sup> Those with AIDS in the advanced stages will probably not seek employment nor continue to work in the first place. Employees infected

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<sup>78</sup>Justice Department's Memorandum, *supra* note 68. (Justice Department also examined the legislative history and found "no mention that Congress intended the Rehabilitation Act to prohibit discrimination based on fear of contagion.")

<sup>79</sup>*Id.*

<sup>80</sup>*Mentolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985) (federal contractor cannot rely on risk of contagion rationale for discrimination against AIDS victims); *Legal and Ethical Issues*, Presidential Commission on the Human Immunodeficiency Virus Epidemic (1988).

<sup>81</sup>*Arline*, 107 S. Ct. at 1130.

<sup>82</sup>*Id.* at 1128.

<sup>83</sup>*McDermott v. Xerox Corp.*, 65 N.Y.2d 213, 480 N.E.2d 695, 491 N.Y.S.2d 106 (1985).

<sup>84</sup>*See* Comment, *supra* note 62, at 445 (citing *Alexander v. Choate*, 469 U.S. 287 (1985)).

<sup>85</sup>*Id.*

<sup>86</sup>*Chrysler Outboard Corp. v. DILHR*, 14 F.E.P. 344 (1976).

with milder forms of the AIDS virus may not exhibit symptoms that require medical treatment for several years.

Third, co-workers may refuse to work with AIDS victims due to fear of contracting the disease. This situation "brings labor laws and handicapped discrimination laws into potential conflict."<sup>87</sup> Some statutes protect employees who refuse to work due to a reasonable fear that their health is endangered.<sup>88</sup> Employers may be able to prevent the problem by educating employees about AIDS.<sup>89</sup> Further, employees may have a difficult time proving their fear is reasonable due to the current state of medical knowledge.<sup>90</sup>

### CONCLUSION

A review of federal and state cases discussing "qualified handicapped persons" indicate a trend toward recognizing AIDS as a handicap, and lend further support to the *Chalk* holding.<sup>91</sup> The cases indicate that the Rehabilitation Act should continue to provide legal protection for AIDS victims. Employer caution and flexibility in dealing with AIDS employees will greatly reduce the legal liability associated with discriminatory employment practices toward AIDS victims.

JANET ANN MICHAEL

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<sup>87</sup>Brown, *AIDS Discrimination in the Workplace: The Legal Dilemma*, CASE & COMMENT 3-10 (May-June 1987).

<sup>88</sup>*Id.*

<sup>89</sup>AIDS in the Workplace (Commerce Clearing House, Inc. 1985).

<sup>90</sup>Brown, *supra* note 87, at 8.

<sup>91</sup>*See, e.g.*, *People v. 49 West 12 Tenants Corp.* N.Y.L.J., Oct. 17, 1983, at 1 (N.Y. Sup. Ct.) (preliminary injunction granted to keep New York cooperative apartment building from depriving AIDS patients a doctor's office on the premises); *State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 21, 480 N.E.2d 695, 491 N.Y.S.2d 106 (1985) (refusal to hire obese persons violates New York law prohibiting handicap discrimination); *District 27 Community School Bd. v. Board of Educ.*, 130 Misc. 2d 398, 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986) (excluding children with AIDS from public schools constitutes Section 504 discrimination); *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644 (2d Cir. 1979) (exclusion from school of mentally handicapped children who carry the hepatitis B antigen violates Section 504); *Ray v. School Dist. of DeSoto County*, 666 F. Supp. 1524 (M.D. Fla. 1987) (preliminary injunction granted prohibiting the school from excluding three hemophiliac brothers testing seropositive for AIDS from the classroom).

