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Legal Redress For Disability Discrimination: Bob, Carol, Ted and Alice Encounter Aids

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LEGAL REDRESS FOR
DISABILITY DISCRIMINATION:
BOB, CAROL, TED AND ALICE
ENCOUNTER AIDS

PENN LERBLANCE*

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Editor's Note: Penn Lerblance died of AIDS on September 18, 1993.
I. INTRODUCTION AND BACKGROUND

A. OBJECTIVE AND APPROACH

To what extent is a person with a disability protected by legal remedies against disability-based discrimination?

This article proposes to explore this compelling question. Disability discrimination, a relatively new area of civil rights protection, is a concern not only to people with disabilities, who are estimated at about 35 million in the United States, but to a majority of employers, businesses providing services and goods to the public, and governmental entities.

This article will focus on Acquired Immune Deficiency Syn-
drome (AIDS) and Human Immunodeficiency Virus (HIV) disease as a concrete example of disability discrimination.1 This is appropriate for several reasons. AIDS is this nation’s most litigated disease; it presents a wide range of issues not associated with other disabilities. Because once infected a person may have 10 to 12 years without serious impairment, infected persons have many productive work years. A severe social stigma associated with AIDS also exists. These issues make the physical challenge of the disease all the more difficult. The many years between initial infection and death are mentally draining for a person who had thought he or she had many years left to enjoy. Too, needless discrimination and social stigmatization are killers, for they kill the human spirit and destroy human dignity.

This survey of legal remedies will proceed by considering hypothetical and actual cases to appreciate how the remedies operate in practical situations. In reviewing possible remedies for disability discrimination, we will consider the cases of Bob, Carol, Ted, and Alice. Bob’s story presents issues of mandatory HIV testing and disclosure of a person’s HIV status. Carol’s story presents the troublesome issue of employment discrimination. Ted’s story presents the issue of discrimination by providers of goods and services to the public. Finally, Alice’s story explores disability-based discrimination in housing.

B. ABOUT HIV DISCRIMINATION

There can be no serious question that there is discrimination against people with AIDS or HIV infection. AIDS-based discrimination has been, and continues to be, widespread in employment, housing, public accommodations, and other areas of life. In a well known case, Ryan White, an HIV infected school child, was told he could not attend public school because he was HIV infected. Although he ultimately won a lawsuit for reinstatement in school, he and his family were effectively run out of

1. The term “HIV disease” or “HIV infection” refers to a person who has been infected with HIV whether symptomatic or not. HIV is the viral agent that causes AIDS. A person with HIV infection may remain without symptoms for years, although the immune system becomes progressively deficient. With a progressively compromised immune system certain cancers and opportunistic infections develop. When a person with HIV infection develops specified defining infections they will be diagnosed with AIDS. Thus AIDS is the last phase of HIV infection.
their home and forced to move to a different community because of hostile attitudes and adverse reactions to his presence. The three Ray children in Florida provide another well known example of parents and neighbors demanding that HIV infected school children be removed from the school. Some peoples' hostility about the risk the Ray children presented to neighbors and schoolmates was so strong that the Ray home was fire-bombed.

An employee, on leave from work because of his HIV disease, had his coworkers threaten to kill him if he ever returned to work. Police in Michigan filed a charge of attempted murder against an AIDS victim who spat at them. A Florida judge required AIDS sufferers to wear masks in his courtroom. Not only have landlords sought to evict people with HIV infection, but people merely perceived to be gay have been refused apartment rental. In Los Angeles paramedics denied prompt assistance to a heart attack victim because they feared he had AIDS.

Aside from these examples of AIDS discrimination, studies and surveys reveal a strong dislike for association with people who are HIV infected. One survey of employee attitudes found that seventy-five percent of the workers surveyed admitted they would be concerned about sharing restroom facilities with people with AIDS; forty percent had negative feelings about eating in the same cafeteria; thirty-seven percent said they would not share the same tools or equipment. Even more troubling, one-third of those surveyed said they do not believe medical assurances that AIDS can be transmitted only through sexual contact or blood contamination.

Most insurance companies in Texas refuse to sell group health coverage to small businesses if one employee has a serious medical condition such as AIDS or cancer, according to a survey by the Texas Department of Insurance. The survey found that almost all insurers attempt to determine if any applicant in an underwritten group has AIDS. Most also try to determine if any applicant is HIV infected.10

Perhaps most troubling are the findings that health care providers have strong negative attitudes about treating people with HIV infection. A survey of the American Medical Association (AMA) found that more than half of the physicians who responded said they would not treat HIV infected patients if they had a choice.11 A study of primary care physicians in Los Angeles County found that a majority refer patients who are HIV infected to other doctors.12 A study of doctors in their last year of residency as a surgeon or specialist indicated that thirty-nine percent had refused care to patients with HIV infection.13

According to another study, HIV-related discrimination reports increased nationwide by fifty percent in 1988, following an eighty-eight percent increase in 1987.14 Persons experiencing discrimination simply because of the perception that they were HIV infected or because they cared for a person with HIV disease accounted for thirty percent of the reports of discrimination.15

Several factors contribute to negative attitudes about people with HIV infection. First is the fear, both reasonable and unreasonable, of contagion. For example, a surgeon may justifiably have a concern that operating on an HIV infected patient

15. Id.
would create a high risk of exposure to HIV. On the other hand, there are those who mistakenly believe that HIV is transmitted by flies and water fountains. Second is a general aversion of many individuals to people with serious illnesses, especially those who are dying. Many persons avoid and disassociate themselves from people with life threatening diseases. Third, and maybe most important, is negative attitudes about homosexuals and intravenous drug users, the two population groups in the United States where HIV is most prevalent.

C. AIDS BASICS AND TRANSMISSION RISK

AIDS was officially recognized as a disease causing death in 1981 by the Centers for Disease Control (CDC), United States Public Health Services. In the United States by the end of 1992 there have been over 170,000 deaths reported from AIDS, over 250,000 diagnosed cases of AIDS, and an estimated one million infected with HIV, but not yet diagnosed with AIDS. Worldwide there are 2.5 million estimated AIDS cases, with an estimated 14 million people infected with HIV. In the United States AIDS has become the second most frequent killer of men ages 25-44 and the sixth most frequent killer of young women. AIDS is now near the top of death-causing conditions in years of potential life lost.

In the early years of the epidemic there was understandable confusion and ignorance as to the nature of the disease and its modes of transmission. However, by 1985 there was and remains a consensus of public health officials and medical research authorities as to the basics of AIDS, its causative agent, HIV, and the way HIV is transmitted from one person to another.

19. Id.
21. See generally U.S. Dep't of Health and Human Services, U.S. Surgeon Gen-
AIDS is caused by infection of an individual with HIV, a retrovirus that penetrates the chromosomes of certain human immunity cells that combat infection throughout the body. People infected with HIV may remain without symptoms for a number of years. As the disease progresses, however, a number of symptoms can occur. Eventually, the virus destroys its host cells, thereby weakening the victims' immune systems. When the immune system becomes compromised, the infected person becomes susceptible to a variety of so-called "opportunistic infections," many of which can prove fatal.

Transmission of HIV from an infected person to an uninfected person is known to occur in three ways: (1) through intimate sexual contact; (2) through invasive exposure to contaminated blood or certain other bodily fluids; or (3) through perinatal exposure from mother to infant. Although HIV has been isolated in several body fluids, the epidemiologic evidence has implicated only blood, semen, vaginal secretions, and possibly breast milk in transmission.

Most importantly, the weight of scientific evidence and experience indicate that HIV is not an airborne infection spread through casual contact between people at the workplace, in schools, or in other general public association. There is no appreciable risk of HIV transmission through close, nonsexual contact with HIV infected persons. As the infected person's immune system deteriorates, the HIV infected person becomes increasingly susceptible to opportunistic infection. These infections do not cause AIDS, nor do they increase the risk of transmission of HIV. However, some of these opportunistic infections, such as tuberculosis, may themselves be communicable to others in casual, nonsexual contact.

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25. Chalk, 840 F.2d at 701.
26. Id. at 706.
Confidentiality of medical information is a major factor in protecting against unnecessary discrimination based on one's health condition. Statutes in nearly all jurisdictions have long sought to protect against unauthorized disclosures of medical information. In addition, most jurisdictions recognize a general or constitutional right to privacy which protects health and medical information.

However, the strong negative social stigma associated with AIDS has prompted great concern by the public to identify HIV infected persons. It follows that to the extent that an individual's HIV status is unknown, he or she is less likely to be subjected to HIV based discrimination. Once it becomes known that a person is HIV infected the chance of discrimination is greatly increased. Additionally, people who provide care for AIDS patients and people perceived to be at high risk of HIV infection are subjected to discrimination even though they may be HIV negative.

Given this pervasive discrimination, California and some other jurisdictions have enacted statutes specifically protecting information concerning a person's HIV status. The California enactment essentially prohibits requiring an HIV test and disclosing a person's HIV test status. Some jurisdictions have anonymous HIV testing programs whereby the name of a person submitting to an HIV test is never known. Even if there is a name-linked HIV test, identification of a test subject is protected by general privacy and confidentiality laws.

Fear of stigmatization and discriminatory retribution has discouraged people from being tested for HIV. Without testing there can be no early medical intervention which could prolong the quality of life of a person with HIV infection. And if that person knows he or she is HIV infected, he or she can take steps to keep from transmitting it to others. Thus it can be said that a

breach in confidentiality and the threat of the resulting discrimina-
tion exacerbates the conditions associated with the HIV in-
jected person's health and treatment. In short, confidentiality
breach and discrimination are bad medicine.

II. BOB: MANDATORY HIV TESTING AND
DISCLOSURES

A. Bob’s Story

Bob is an ardent anti-abortionist. He has participated in
several demonstrations protesting abortions. At one of these
demonstrations, Bob and other protesters blocked the entry
door to an abortion clinic preventing employees and clients from
entering the premises. Upon their arrival, the police ordered the
demonstrators to cease blocking the entry way. The protestors
refused, making it necessary for the officers to arrest the protest-
ors. Bob went limp, and had to be physically lifted by two offi-
cers from the entry way. It was a hot day and Bob’s perspira-
tion got on the officers.

Shortly after this encounter with Bob one of the officers be-
came concerned that he could get AIDS just by touching some-
one who was infected. The officer had no reason to believe the
arrestee was infected. Nevertheless, the officer’s superior con-
tacted Bob, requesting that he voluntarily take an HIV test. Bob
indignantly refused. Thus, the following questions arise: can an
arresting officer require an HIV test of a resisting arrestee where
there was some touching and bodily fluid contact, although there
is no reason to believe the arrestee is infected? If so, what dis-
closures of the HIV test results would be lawful?

B. SEARCH, PRIVACY AND COMPULSORY HIV TESTING

There are two basic issues presented when an officer seeks
involuntary HIV testing: first, the lawfulness of requiring sub-
mission to an HIV test; second, disclosure and dissemination of
the results of a compulsory HIV test. Requiring an HIV test of a
resisting arrestee and disclosing the results invokes the constitu-
tional right to be free of unreasonable searches and the constitu-
tional right to privacy.
1. Freedom from Unreasonable Search

Generally, people are not subject to involuntary blood testing at the demand of an officer absent justification under reasonable circumstances. The Fourth Amendment of the United States Constitution guarantees freedom from unreasonable searches and seizures. There is no doubt that compulsory blood tests are searches subject to the Fourth Amendment. Whether an involuntary blood test is reasonable, and thus lawful, depends on the justifying circumstances, namely the existence of probable cause and the appropriateness of the manner of the intrusion for testing. One example of a reasonable search is a blood test where there is probable cause to believe the test subject was driving while intoxicated. Most case law focusing on reasonableness addresses whether mandatory blood testing for HIV is reasonable.

Sections 199.20 to 199.27 of the California Health and Safety Code prohibit involuntary HIV testing and protect the privacy of people who take an HIV test or any AIDS test. Therefore, under the statute, it is unlawful to negligently or willfully disclose results of an HIV or AIDS test or identify a test subject. The statute makes it unlawful to use HIV or AIDS test results for the “determination of insurability or suitability for employment.” Moreover, the statute makes it unlawful to compel in administrative, judicial, or legislative proceedings identification of an HIV or AIDS test subject. An unlawful “disclosure” includes release, transfer, dissemination or other communication except where the statute authorizes a disclosure. Unlawful disclosures are punishable by civil and criminal sanctions ranging from a fine of $1000 to $10,000 and, for willful

31. Pumping a person’s stomach for possible illegal drug consumption has been held unnecessarily intrusive and an unreasonable search. Rochin v. California, 342 U.S. 165 (1952).
33. CAL. HEALTH & SAFETY CODE § 199.21a-b (West Supp. 1993).
34. Id. § 199.21(f).
35. Id. § 199.20 (West 1990).
36. Id. §§ 199.21(k)-(l) (West Supp. 1993).
disclosures, one year imprisonment. Violators of the statute are liable for actual damages, including damages for economic, bodily, or psychological harm which are a proximate result of the disclosure.

There are exceptions to the ban on involuntary testing and non-disclosure requirements of the California Health and Safety Code. Relevant to our inquiry is one statutory exception which was enacted through a voters' initiative. This exception, section 199.97, authorizes an arresting officer, through a court order, to compel HIV testing of a resisting arrestee where the officer's skin comes in contact with bodily fluids of the arrestee.

Section 199.97 survived a constitutional challenge in Johnetta J. v. Municipal Court, where the court of appeal held that the statute's authorization of compulsory HIV testing was reasonable and did not violate the right to be free of unreasonable search. Johnetta J. became unruly at a court hearing on child dependency in the process of which Johnetta, while being restrained, bit an officer, drawing blood. Subsequently, the officer requested that Johnetta be tested for HIV, although there was no reason to believe she was HIV infected. She refused and the officer then requested a court to order the testing pursuant to section 199.97. A test was ordered and on appeal the court upheld the constitutionality of section 199.97 upon a finding of probable cause to believe there was a transmission of saliva to the officer through a bite; that HIV is present in saliva; and that there was a theoretical possibility that HIV could be transmitted by a human bite. The court acknowledged that there were no documented instances of HIV transmission through a bite, and that the weight of medical authorities says there is no substantial risk of transmission through a bite.

Interestingly, the court concluded that it was not necessary that there be probable cause to believe that the arrestee was HIV infected. It should be noted that in Johnetta the court found that there was at least a theoretical transmission of HIV

37. Id. §§ 199.21(a)-(c).
38. Id. § 199.21(d).
41. Id. at 673-74.
in saliva to the officer through a bite that breaks the skin. Because intact skin protects against HIV, it might be argued in Bob’s case that an officer who comes into contact with an arrestee’s perspiration encounters no theoretical possibility of HIV transmission. So Johnetta is distinguishable.

There are other statutory exceptions to California's prohibition against mandatory HIV testing, especially concerning people convicted of a crime and incarcerated in correctional institutions. In Love v. Superior Court the court of appeal upheld the constitutionality of a statutory exception authorizing involuntary testing of persons convicted of prostitution. Similarly, in People v. McVickers the California Supreme Court upheld the constitutionality of the statutory exception authorizing involuntary HIV testing for anyone convicted of certain sex crimes. Specifically the McVickers court held that because a blood test for AIDS was not a punishment, there was no ex post facto violation in the retroactive application of the mandatory HIV testing of convicted sex offenders. The McVickers court found that the statute had the necessary element of an objective, legitimate state interest because the purpose of mandatory testing of sex offenders is to prevent the spread of AIDS. The statutory authorizations for involuntary testing of arrestees and persons convicted of a crime contain very strict limitations upon who can receive the information about an HIV test subject. Such disclosures are limited to court officials, police officials, and corrections officials.

Courts have upheld California's statutory prohibition against involuntary HIV testing except where authorized by a statutory exception. For example, identification of blood donors has become an important issue where tainted donated blood has caused HIV infection. In Irwin Memorial Blood Centers v. Su-

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42. The California Penal Code authorizes compulsory testing for convicted prostitutes, § 1202.6 (West Supp. 1993), as well as for persons convicted of certain sex offenses, § 1202. Other examples of authorized testing and disclosure include: disclosure by treating physicians, Cal. Health & Safety Code § 199.22(a) (West 1990); disclosure by health care providers, § 199.215; testing on cadavers, § 199.22(b); testing at alternative testing sites, § 199.22(a); testing for medical research, § 199.22(c); and warnings to sex and needle partners, § 199.25.
44. 840 P.2d 955 (Cal. 1992).
45. Id. at 959-60.
The court concluded that the deposition of blood donors with the use of screens or anonymously is an unlawful identification of those tested for HIV. Identification of blood donors tested for HIV would, according to the court, violate the statutory bar.

As to Bob's situation, the compulsory HIV test is sought on the basis of section 199.97 which authorizes such a test when the resisting arrestee's bodily fluids come in contact with the officer's skin. Because Bob's perspiration came into contact with the officer's skin, arguably there is authorization for testing Bob. However, to the extent that section 199.97 permits a compulsory test when perspiration gets on skin, the statute appears to conflict with the constitutional right to be free of unreasonable search. Because perspiration-to-skin is not a realistic HIV exposure and because no substantial risk of HIV transmission exists, it is submitted that there is no probable cause of possible infection which means that the testing search is unreasonable. Thus Bob may have a cause of action under the constitutional right to be free of unreasonable search.

2. The Right to Privacy

Separate from the issue of whether the right to be free from unreasonable search is violated by an involuntary HIV test search, although closely related by overlapping analysis, is the question of whether the right to privacy is violated by an officer-directed compulsory HIV test. A person's privacy rights under these circumstances are invoked by the involuntary test, the taking of the blood sample, and disclosure of the results of such a test. As to Bob's situation, the privacy interest inquiry has a twofold focus; first, does a compulsory HIV test upon an officer's request violate the test subject's right to privacy; second, does disclosure or dissemination of the HIV test result violate a right to privacy.

a. Privacy and Testing

A right to privacy may be predicated upon the United

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46. 279 Cal. Rptr. 911 (Ct. App. 1991).
States Constitution, the California Constitution, or a common law tort of invasion of privacy. However, the analysis is much the same regardless of which cause of action is in play. In Griswold v. Connecticut, the U.S. Supreme Court declared that “[v]arious guarantees [of the U.S. Constitution Bill of Rights] create zones of privacy.”

There seems little doubt that a person has an expectation of privacy concerning his or her blood and tests that may be made on a blood sample. The second part of the analysis, however, is whether compulsory testing is an unreasonable intrusion into an expectation of privacy. It is at this point that the interests of the state in compulsory testing must be weighed against the seriousness of the privacy invasion. In Johnetta the court of appeal upheld compulsory HIV testing of an arrestee who bit an officer.

As to Bob’s situation, the HIV testing was a governmental invasion of his expectation of privacy. The pivotal question is whether it was reasonable. At issue is whether the state’s interests outweigh his expectation of privacy. Given the lack of a substantial risk of transmission of HIV through an infected person’s perspiration coming in contact with the officer’s intact skin, it is a persuasive argument that the blood testing intrusion was not reasonable. Thus while the facts in Johnetta (possible saliva entering the blood through a bite) may justify a reasonable intrusion, the facts in Bob’s case (perspiration in contact with intact

skin) may be considered an unreasonable intrusion. Where there is no substantial risk of transmission through perspiration, there is no compelling state interest which would override the expectation of privacy in one's blood.

b. Privacy and Disclosures

That brings us to consideration of the second part of the privacy analysis, namely, disclosure of the HIV test results identifying the test subject. Under the statutory scheme of section 199.97, which authorizes blood testing for HIV, the purpose of the HIV test is to notify the officer whether the arrestee's blood was positive or negative for the presence of HIV antibodies. The authorized disclosures of HIV test results under section 199.97 include the test subject, the officer who was assaulted, the officer's employer, and the State Department of Health Services. Further disclosures are not authorized. The disclosure to the test subject and the assaulted officer would appear to be reasonable given the purpose of the statute, which is primarily to curtail the spread of the disease and allow for early medical intervention. However, it is questionable that a disclosure to the officer's employer, not being a party to a possible virus transmission, serves the statutory purpose. Likewise, because HIV infection is not generally reported to public health officials, it is debatable that such a disclosure is reasonable. Under section 199.97 disclosures other than those specified would be unlawful. Although identifying disclosure to the officer's employer and to public health officials may be authorized by the statute, section 199.97 may run afoul of the constitutional right to privacy regarding the disclosure to the officer's employer and the public health officials.

In a landmark decision, Urbaniak v. Newton, the California Supreme Court recognized a constitutional right to privacy regarding the disclosure of a person's HIV status. In Urbaniak the court concluded that a right to privacy arises in disclosure of HIV positive status to a health care worker for the purpose of alerting the worker to the need for taking safety precautions in handling medical implements contaminated with infected...
Urbaniak received a head injury at work and was seeking worker's compensation. He participated in a medical examination to ascertain the extent of his injury which was arranged by the employer's defense counsel. After the physician had completed the examination and had left the room, Urbaniak became concerned about blood traces on reusable metal electrodes with sharp points used on Urbaniak during the examination. While only Urbaniak and a nurse were present, Urbaniak cautioned the nurse about careful sterilizing of the electrodes because he had tested positive for HIV. Urbaniak's HIV infection subsequently appeared in the examining physician's report, which was distributed to the insurer, counsel for Urbaniak, defense counsel, the Workers Compensation Appeals Board, and Urbaniak's chiropractor.

The court found that Urbaniak's disclosure to the nurse was intended solely for her benefit in cleaning the electrodes. Thus at issue was whether the nurse's disclosure to the physician, the physician's disclosure in his report, and the dissemination of the report were an invasion of privacy.

In defining the constitutional right to privacy the court held that the constitution conferred a judicial right of action for damages and that its protection was against invasions of privacy by private citizens as well as by the state. The test adopted was a blend of federal law and common law tort. Key points of the test adopted are as follows: an objectively reasonable expectation of privacy; public disclosure of true, embarrassing private facts; and the concept of improper use of information properly obtained.

In applying that test, the court found that Urbaniak had a reasonable expectation of privacy regarding his disclosure to the nurse. Moreover, the disclosure was of true, embarrassing private facts. Thus the further disclosure, beyond his comment to the nurse, of Urbaniak's HIV infection was improper use of information properly obtained. The court found an important

53. Id. at 357.
54. Id.
55. Id. at 358-59.
public interest in a patient's disclosure of his HIV status for the purpose of alerting a health care worker to the need for safety precautions. The court reasoned: "In the field of health care, disclosure of information about a patient constitutes 'improper use' when it will subvert a public interest favoring communication of confidential information by violating the patient's reasonable expectations of privacy." 56

As to Bob's situation, the disclosure of his HIV test to himself and the assaulted officer would not violate an expectation of privacy because the purpose of the statute was to alert the assaulted officer in the event of Bob's infection. The statutory authorization serves as a declaration of public interest in informing the officer. Although allowed by the statute, the disclosures to the officer's employer and the public health officials might be challenged as going beyond the public interest and the special need of the statute. These disclosures will not serve the purpose of alerting (or comforting) the assaulted officer. Clearly, disclosure of Bob's HIV infection is a private fact which may prove to be embarrassing and objectionable to a reasonable person of ordinary sensibilities.

On the other hand, it might be contended that, because of the statutory authorization, the assaulting arrestee has a lessened expectation of privacy as to the disclosures to the officer's employer and the public health officials. In addition, that the test subject was an arrestee subject to custody may serve to lessen a reasonable expectation of privacy.

One point is clear: disclosures beyond those authorized by the statute would be unlawful as a violation of section 199.97 and the right to privacy. Unauthorized disclosures of a person's HIV status may, under certain circumstances, violate other laws as well as California's statutory scheme of the California Health and Safety Code. For example, in Doe v. Borough of Barrington 57 an unauthorized disclosure of a person's HIV status by a police officer was held to violate the Civil Rights Act of 1964. While driving a vehicle, Doe and her husband were stopped by the Barrington police. The police arrested Doe's husband. Doe

56. Id. at 360-61.
and Doe's husband told the investigating officer that he, Doe's husband, was HIV infected. Although the information was voluntarily given to the officer, the officer subsequently told the Does' neighbors that Doe's husband was HIV infected. This communication by the officer to the neighbor, the court reasoned, served no legitimate purpose, and thereby constituted an unlawful invasion of privacy. In finding an unlawful invasion of privacy by the officer, the court observed:

The sensitive nature of medical information about AIDS makes a compelling argument for keeping this information confidential. Society's moral judgments about the high-risk activities associated with the disease, including sexual relations and drug use, make the information of the most personal kind. Also, the privacy interest in one's exposure to the AIDS virus is even greater than one's privacy interest in ordinary medical records because of the stigma that attaches with the disease. The potential for harm in the event of a nonconsensual disclosure is substantial. . . .

Because the privacy invasion was made by a police officer, his disclosure constituted a violation of the Civil Rights Act of 1964 which prohibits the denial of a civil right by state police officers.

It should be noted that in addition to statutory authorization for compulsory HIV testing and disclosure, it has been held that courts have the equitable authority to order a compulsory HIV test under certain circumstances. In a Wisconsin case, Syring v. Tucker, the court found that the circumstances justified a court-ordered HIV test absent statutory authorization. Tucker, a Dade County Wisconsin Social Services client, became disruptive in the office of Syring, a social worker. Tucker bit Syring on a forearm when Syring physically restrained Tucker from hitting a county security guard who was trying to remove her from the office. After Tucker bit Syring she yelled at Syring that she had AIDS. In upholding a trial court's equitable authority to order a physical exam the court found that an order for an HIV test and disclosure was constitutional because Tucker had given up her

58. Id. at 384.
expectations of privacy when she shouted she had AIDS. “Any legitimate expectations of privacy that Tucker might have had as to her HIV or AIDS status were forfeited when she publicly announced she had AIDS.”

In summary of Bob’s situation the question is whether a compulsory HIV test is lawful and, if so, are certain disclosures of the test result lawful? It might appear that under section 199.97 the compulsory test and disclosures are authorized and thus lawful because all that is necessary under the statute is bodily fluid contact with the officer's skin. However, because perspiration-to-skin is not a means of HIV transmission, and presents no realistic risk of infection, Bob has a defense to the statute’s test authorization based on the constitutional right to be free of an unreasonable search and the constitutional right to privacy. Bob’s expectation of privacy is not outweighed by any substantial public interest. If the test is unlawful, there would be no lawful basis to distribute the test results. If the compulsory test is found to be lawful, distribution of the test result to the officer’s employer and the public health officials is subject to a constitutional right to privacy challenge because such disclosures lack a valid public interest.

III. CAROL: EMPLOYMENT CONFIDENTIALITY AND DISCRIMINATION

A. Carol’s Story

Carol has worked for Southcoast Advertising, an Oceanside, California advertising firm, for five years. The firm’s workforce consists of the two partners, two full-time secretaries, and 22 consultants, including Carol, who are employed on a “contract basis.” Carol is a participant in Southcoast’s group health insurance program. Carol works over 40 hours per week at the Southcoast office. Southcoast Advertising was contacted by a former United States Senator from Indiana who is campaigning for the presidency of the United States. The former senator wants Southcoast to run his campaign in California. The senator, as a prospective client, advises Southcoast that as a condition to the deal it would be necessary for Southcoast personnel

60. Id. at 378.
to be tested for illegal drug use and for HIV. The senator declared he wanted a "squeaky clean campaign," without any embarrassing revelations. Southcoast decided that the senator's testing request was reasonable under the circumstances. Thereupon Southcoast advised all of its personnel that they would have to submit to a blood test for illegal drugs and HIV status. Carol, eager to keep her position with Southcoast, submitted to the requested blood tests. Unfortunately for Carol, she tested positive for HIV. This news came as a shocking surprise to Carol because she did not consider herself at risk for HIV infection. Because she tested positive for HIV, Southcoast terminated her employment.

Carol's scenario presents two primary issues. The first is the legality of the requirement for an HIV test as a condition of employment. The second primary issue is the legality of Southcoast Advertising's termination of Carol's employment because of her positive HIV test result.

B. EMPLOYER MANDATED HIV TESTING

The Americans with Disabilities Act of 1990 (ADA) contains express language governing applicant interviewing and hiring procedures. The gist of this provision of the ADA, section 102(c), is that no inquiries may be made by the employer regarding an applicant's disabilities, nor can the employer require a pre-employment physical examination. After an offer of employment has been made by the employer, a medical exam may be required of all newly hired employees. The language of this ADA provision expressly refers to the hiring process rather than to the employees who have been in the work force for a number of years. However, it may be that ADA section 102(c) applies to all employees, not just those in the initial hiring process. If so it

61. As to the blood test requirement, it is interesting to note that the Federal Rehabilitation Act of 1973 (Rehabilitation Act) and the California Fair Employment and Housing Act (FEHA) do not have express provisions concerning mandatory testing as a condition for employment. For the most part these two statutes are not confidentiality statutes. Instead, they speak to discriminatory action. It could be reasoned that there would be discriminatory action if only some employees were selected for blood testing. However, where all personnel are required to submit to a blood test there does not appear to be disability discriminatory acts like those prohibited by the Rehabilitation Act or the FEHA.

might be argued that random or selective testing of employees would be unlawful, while testing of all employees would be lawful.

As noted, many jurisdictions have statutes protecting confidentiality of medical information. In addition to a general confidentiality statute, California Health & Safety sections 199.20 to 199.27 specifically address confidentiality of HIV test results. The statutes prohibit mandatory HIV testing for purposes of employment and make unlawful all unauthorized disclosures of HIV tests. Under the facts of Carol’s scenario Southcoast is in violation of the California statutory scheme because they have made submission to an HIV test a condition of employment.

However, Carol’s mandatory HIV testing does not appear to violate California’s Confidentiality of Medical Information Act which prohibits unauthorized third-party disclosures of medical information. Under the facts of Carol’s scenario, Carol submitted to the HIV test as a condition of continuing employment. There is no third-party disclosure of information as there would be if, for example, her employer were to disclose Carol’s HIV status to someone.

C. DISCRIMINATORY JOB TERMINATION

The second primary issue in Carol’s scenario is the legality of her job termination by Southcoast Advertising based on Carol’s positive HIV test.

1. Rehabilitation Act

The Rehabilitation Act of 1973, which prohibits discrimination based on handicap by entities receiving federal money, would apply to Carol’s case if the jurisdictional requirements of

63. It may be argued that for purposes of §§ 199.20 to 199.27 the distinction between employee and independent contractor is irrelevant as both concern employment in the broad general use of the term “employment.” Moreover, these sections are not limited in applicability to employers of more than a specified number of employees as is the ADA.
the Rehabilitation Act were present. The first requirement is that the claimant have a handicap. The second is that the alleged discrimination be committed by an entity receiving federal money. Carol would win on the first requirement, but would likely lose on the second requirement.

a. Defining Handicap

The first jurisdictional requirement turns upon whether Carol's positive HIV status is a handicap. Arguments that a positive HIV status is not a handicap have not been well received by the courts. In a landmark decision, School Board of Nassau County v. Arline, the United States Supreme Court held that a person with a contagious disease can be a handicapped person within the meaning of section 504 of the Rehabilitation Act of 1973. More specifically, in Chalk v. United States District Court, a circuit court of appeals held that a person with AIDS is a handicapped person within the meaning of the Rehabilitation Act. Several other courts have ruled that the Rehabilitation Act is an available remedy for persons with HIV infection.

The Rehabilitation Act provides that no “otherwise qualified handicapped individual” shall, solely by reason of his handicap, be excluded from participation in any program receiving federal financial assistance. “Handicapped individual” is defined to mean any person who “(i) has a physical . . . impairment which substantially limits one or more of [his or her] major life activities, (ii) has a record of such an impairment, or (iii) . . .

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66. The term “handicap” is used in the Rehabilitation Act, in the Federal Fair Housing Amendments Act (FHAA), and in many state statutes. The term “disability” is used in the Americans with Disabilities Act and in the California Fair Employment and Housing Act. For purposes of the Rehabilitation Act, FHAA, ADA, and California FEHA, the term “handicap” and the term “disability” have the same definition. In this paper the terms are used interchangeably. However, some state “handicap” statutes define handicap differently than do the federal statutes. Under some state statutes “handicap” does not include contagious diseases or mental impairment.


69. Chalk v. United States District Court, 840 F.2d 701 (9th Cir. 1988).

70. See infra note 82 and accompanying text.

is regarded as having such an impairment.” 72 “Major life activities” is defined so as to include working. 73

Arlene, who had several incidents of tuberculosis over the years, was fired from her elementary school teaching position by the Nassau County School Board because of her continually recurring tuberculosis. The Supreme Court ruled that Arline’s history of tuberculosis, which affected her respiratory system, and thus substantially limited “one or more of [her] major life activities,” established that she had a “record of . . . impairment” which qualified her as handicapped. 74 In addition, the Court held that the fact that her handicap was a contagious disease did not necessarily mean that Arline was not “otherwise qualified” for her job under section 504. 75

“Otherwise qualified” normally means that the claimant can perform the tasks of the job in question despite his or her handicap with reasonable accommodation by the employer. 76 However, Arline had been dismissed not because she could not perform her job, but because of her recurrences of tuberculosis, which constituted a “record of . . . impairment.” Under these facts, whether she was otherwise qualified depended on whether her condition would expose others to significant health and safety risks. Whether the person handicapped with a contagious disease presents an unacceptable “safety risk” can only be determined by an individualized inquiry. 77 Because the trial court in Arline did not make sufficient factual findings on this issue, the Supreme Court remanded the case for a determination of whether Arline was “otherwise qualified.”

73. 29 C.F.R. § 32.3 (1993).
74. Arline, 480 U.S. at 281.
75. Id. at 285-86.
76. 45 C.F.R. § 84.3(k) (1993).
77. This inquiry should include findings of facts:

   based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Arlene, 480 U.S. at 288 (citing Brief for AMA as Amicus Curiae at 19).
The *Arline* decision was the principle guide in *Chalk v. United States District Court* which held that a school teacher with AIDS was handicapped within the meaning and protection of the Rehabilitation Act. Specifically the court in *Chalk* concluded that petitioner Chalk, a classroom school teacher who was removed from his teaching duties because he had been diagnosed with AIDS, was entitled to a preliminary injunction to restore him to his former duties as a classroom teacher. The court in *Chalk* found that the Supreme Court's *Arline* decision settled the question of whether a person handicapped by a contagious disease was within the coverage of the Rehabilitation Act. The only remaining question was whether petitioner Chalk was "otherwise qualified" for his former teaching position. Unless Chalk met this standard, he was not eligible for relief under the Rehabilitation Act.

Reiterating the *Arline* standard, the *Chalk* court noted that an "otherwise qualified" individual, in the employment context, is one who can perform the essential functions of the job in question in spite of his or her handicap, with reasonable accommodations if appropriate. Thus the issue was whether Chalk could perform the essential functions of the job as a classroom teacher without creating a substantial risk to the health and safety of others. After noting how the AIDS virus was transmitted, the court concluded that Chalk's present condition did not create a substantial risk to the health and safety of his students or others.

In reaching this conclusion, the *Chalk* court applied the *Arline* standard which requires a factual inquiry to determine if a person handicapped by a contagious disease presents a substantial risk to the health and safety of others. The *Chalk* court observed that this risk analysis does not require proof of complete certainty that there is absolutely no present or future risk, because this would be an impossible burden of proof on the claimant. "Little in science can be proved with complete certainty, and section 504 does not require such a test." The court held that it was error to require that the claimant disprove every theoretical possibility of harm. Rather the focus is whether there

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78. *Chalk*, 840 F.2d at 707.
79. Id. at 709.
is a substantial risk to the health of others. In reaching that determination, deference should be given to reasonable medical judgments of public health officials.

The substantial risk inquiry must be guided by the goal of section 504 which is "protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of [employers] as avoiding exposing others to significant health and safety risks." A significant risk of transmission is a legitimate concern which could justify exclusion of the employee if the risk could not be eliminated through reasonable accommodation. The court rejected the argument that exclusion could be justified on the basis of pernicious mythologies, irrational fear, prejudiced attitudes or ignorance.

In addition to Arline and Chalk several courts have ruled that an HIV infected school child cannot be excluded from school merely because of the child's HIV infection. The courts are in agreement that a school child with HIV infection is handicapped within the meaning of section 504, subject to the limitations of not posing a direct health threat and the ability to perform the tasks required of all students.

Accordingly, under the facts of Carol's scenario, her HIV infection would be classified as a handicap for purposes of section 504 of the Rehabilitation Act.

b. Federal Funding Requirement

Carol's case, however, does not satisfy the second jurisdictional requirement that the disability-based discrimination must be by an entity which is a recipient of federal funding. While most public schools, as in Chalk, receive federal funding, most private businesses, like Southcoast, do not. Thus the Rehabilitation Act section 504 would not provide a legal remedy for Carol.

80. Id. at 705; Arline, 480 U.S. at 287.
81. Chalk, 840 F.2d at 711.
2. **Americans with Disabilities Act**

Another possible remedy for Carol’s job termination is Title I of the Americans with Disabilities Act of 1990 (ADA). Broadly speaking, the ADA guarantees equal opportunity for qualified individuals with disabilities in employment (Title I), in access to services and benefits provided by state and local governments (Title II), in equal access to goods and services provided by private commercial entities (Title III), and in telecommunications access (Title IV). The ADA was patterned after the Rehabilitation Act, its regulations, and its interpretive case law. The Rehabilitation Act, however, only covered entities receiving federal funding. Title I of the ADA prohibits disability-based discrimination by all employers, public or private, for-profit or not-for-profit, if they have twenty-five or more employees for each working day in twenty or more calendar weeks per year.

Title I of the ADA protects “covered employees” from disability-based discrimination on the job. “Covered employee” is defined as any “qualified individual with a disability,” which means any person with a disability who, with or without reasonable accommodation, can perform the essential function of the employment position in question. An employer can defend a charge of disability discrimination by proving that the employee is not qualified for the job because that person poses a direct threat to the health or safety of others in the workplace.

A person with a “disability” is defined by the ADA as: (a) a person with any physical or mental impairment which substantially limits one or more of the major life activities; (b) any person with a record of such impairment; and (c) a person regarded as having such an impairment whether or not they are in fact

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87. ADA § 101(b); 42 U.S.C. § 12,111(b).
88. ADA § 103(b); 42 U.S.C. § 12,113(b).
The ADA regulations specify that a person with asymptomatic or symptomatic HIV infection is disabled within the meaning of the Act. Accordingly, Title I of the ADA would cover Carol’s job termination based on her HIV infection.

The difficult issue for Carol, in seeking relief under the ADA, is whether she is an “employee” and if her employer has twenty-five or more “employees.”

Generally the law has recognized a significant distinction between an “employee” and an “independent contractor.” The line between employees and independent contractors is not always easily drawn. Whether a person is an employee or an independent contractor is essentially a fact question decided on a case-by-case basis. On one hand, Carol has been working exclusively for Southcoast for a number of years; she works forty hours a week; she is a participant in the employer’s health insurance program; and Southcoast withholds from her salary social security contributions and federal income taxes. These facts suggest that Carol is an employee. On the other hand, Carol is not classified as an employee by Southcoast. Rather, she is labeled a consultant or independent contractor and it is understood that should Southcoast not have work for Carol she would not be paid. Supervision of Carol’s daily work at Southcoast is limited to an average of about two to three hours a day. Of course, if her work is not satisfactory, she is not paid. If a court, after considering the facts, ruled that Carol is independent contractor then the ADA would be inapplicable. Moreover, if the Southcoast’s twenty-two consultants are not classified as employees, the total number of employees for Southcoast is only four. With only four employees Carol’s case would not satisfy the ADA jurisdictional requirement of twenty-five or more employees. If a court finds that Carol and the other consultants are employees, Carol would have standing for a cause of action under the ADA.

89. ADA at § 3; 42 U.S.C. § 12,102(2). The ADA’s definition of “disability” is generally the same as “handicap” defined in the Rehabilitation Act of 1973, supra note 64, and interpretative case law. Sec 56 Fed. Reg. 35,740 (1991), (App. to 29 C.F.R. § 1630).
3. **State Remedies**

Most states have statutes which protect handicapped persons from disability-based discrimination and assure access to public accommodations. In California the Fair Employment and Housing Act (FEHA) makes it unlawful for an employer to bar or discharge a person from employment or discriminate against a person because of his or her physical handicap or mental condition. In *Raytheon Co. v. California Fair Employment and Housing Commission* the court held that a person diagnosed with AIDS is handicapped within the meaning of the FEHA. Moreover, the *Raytheon* court held that section 504 of the Rehabilitation Act did not preempt the state's disability statute, FEHA, because both had the same purpose. In so holding the *Raytheon* court noted that Congress did not expressly preempt state disability statutes and the FEHA provided greater benefits that the relief under section 504.

However, the FEHA only applies to employers of five or more employees. Whether Carol can use the FEHA remedy depends on whether Carol and the twenty-two consultants are determined to be "employees." If the consultants are employees, Carol has a viable cause of action under the FEHA. On the other hand, if the consultants are independent contractors, the FEHA would not be available to Carol.

Another possible state remedy is the common law action for wrongful discharge. Although a wrongful discharge action does not require a specified number of employees in the employer's work force, Carol must be an employee to bring a wrongful discharge action. This is because wrongful termination actions focus on the discharge of an employee. If Carol is found to be an employee she would have standing to bring a wrongful discharge action. The success of Carol's wrongful discharge action would turn on the nature of her employment relationship. If Carol is an employee, she would be considered to have employment-at-will because she does not have an employment contract for a

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specified term of years. Generally, in its pure form, employment-at-will means that the employer can terminate the employment of an employee at any time for any reason. In that situation Carol would not be successful in a wrongful discharge action.

However, in recent years many jurisdictions have qualified the absolute right of employment termination for any reason. In particular, California has qualified the employer’s right to fire an at-will employee at any time when the discharge would violate designated “public policy” imperatives. For example, discharge of an at-will employee for reasons of race or age would violate important public policy mandates of non-discrimination on the basis of race or age. Another public policy exception is invoked when an employee has been discharged for revealing to the authorities that the employer is violating the law, the so-called “whistleblower” policy.

If Carol were an at-will employee, there would seem to be a strong argument that firing her because she is HIV infected would violate an important public policy mandate against disability discrimination. The evidence of a strong public policy against disability discrimination can be found in the Congress’s enactment of the ADA and various state disability and handicap anti-discrimination statutes, such as California’s FEHA.

The position that a public policy against discrimination can be found in anti-discrimination statutes is not without its critics and limitations. There is a line of cases holding that anti-discrimination statutes can not be employed to establish a public policy element in the tort of wrongful discharge. Part of the reasoning behind this no-boot-strap position is the idea that the statutory anti-discrimination is an exclusive remedy, and creating a tort of wrongful discharge based on public policy would be neither necessary nor appropriate.

94. An action for wrongful discharge would be a contract cause of action and perhaps also a tort. In a tort action, punitive damages are recoverable. California courts have recognized the tort of wrongful termination in violation of fundamental public policy. See Foley v. Interactive Data, 765 P.2d 373 (Cal. 1988); see also Rojo v. Kliger, 801 P.2d 373 (Cal. 1990); Collier v. Superior Court, 279 Cal. Rptr. 453 (Ct. App. 1991); Verduzco v. General Dynamics, 742 F. Supp. 559 (S.D. Cal. 1990).
95. CAL. LAB. CODE § 98.8 (West 1989).
However, this analysis in the instant situation ignores that some statutory declarations are much broader than the remedies afforded in the statute. For example, the ADA contains sweeping language of a basic public policy against disabilities discrimination. Yet under the employment title there is only a remedy for those in a work force of more than twenty-five employees. It would seem to be a strong argument that to give meaning to the broad language of public policy, the policy should be used in wrongful discharge cases to establish a remedy for those working for an employer who has less than twenty-five employees. This position is strengthened by the fact that the ADA provides that the Act does not preempt other federal statutory relief from discrimination, nor does it preempt state statutory actions and common law remedies which provide equal or better relief. In short, the ADA and state anti-discrimination statutes are not exclusive remedies.

In summary, Carol’s case looks like this: (a) Requiring an HIV test as a condition of continued employment may be in violation of the ADA’s limitation on medical examinations. While the HIV test as a condition of employment is unlawful under California’s HIV privacy statute, such an employment requirement is lawful in many other jurisdictions. There is no violation of confidentiality of medical information statutes. (b) Carol’s job termination based on her HIV test would not be actionable under section 504 of the Rehabilitation Act because her employer does not receive federal funding. Carol is a qualified individual with a disability for purposes of the ADA. However, the ADA and California FEHA will afford a remedy only if Carol and the other consultants are employees. If she is an employee, her success on a wrongful discharge action is predicated upon a finding of a public policy exception to the at-will doctrine.

IV. TED: DISCRIMINATION IN PUBLIC ACCOMMODATIONS

A. TED’S STORY

Ted is a runner who lives in Chula Vista, California. The sponsors of an upcoming 10K race, in which Ted sought participation, required that all participants be tested for steroids. While being tested for steroids, his physician inquired whether
Ted wanted to be tested for HIV. Ted agreed to the test. The test results were negative for steroids, but positive for HIV. During the big race Ted fell, injuring his ankle. After the race, Ted attempted to make a physician's appointment, but his physician refused to treat Ted for his ankle injury "because of the risk of HIV exposure" to the doctor. The physician advised Ted to contact another physician for his ankle injury and all other medical needs.

Subsequently, Ted's physician became concerned about the risk Ted posed to others. Because of their physician-patient relationship over the years, the physician had become familiar with certain details of Ted's life and family situation. Given his knowledge, Ted's physician decided to warn three individuals of their possible HIV exposure through Ted. The physician contacted Ted's wife, Carol, and advised her that she had been exposed to HIV infection. Surprised and dismayed, Carol became quite upset. The physician warned Carol that she should be tested for HIV to determine if she had been infected. Although the physician did not disclose Ted's name, Carol exclaimed: "Oh my God, Ted must be the infected carrier."

The physician, knowing that Ted and Alice had been sexually intimate, contacted Alice with the news that she had been exposed sexually to an HIV carrier. The physician warned Alice that she should seek an HIV test and be careful in sexual relations with others. Ted's physician knew that Ted had a drug abuse problem several years ago. The physician remembered that Bob and Ted had engaged in intravenous drug use possibly using the same needle. Ted's physician notified Bob that he had been exposed to HIV through intravenous drug use and that he should be tested for HIV.

In seeking reimbursement from his employer's health insurance program, Ted submitted the necessary claim forms and consented to his physician verifying the medical services rendered. Ted's physician submitted the requested verification information to Ted's employer, including an unrequested copy of the steroid and HIV test results. The employer's insurance administrator, upon receiving this information, exclaimed in front of the employer that poor Ted had HIV disease. After considering the potential economic impact in treating an AIDS patient,
Ted's employer notified all employees that, effective immediately, the employer health insurance benefits would be limited for HIV and AIDS expenditures to a lifetime cap of $5,000. There had been no limit on reimbursement for other health conditions.

Ted's scenario presents three important issues: the first is refusal of medical treatment; the second is the physician's disclosures to Carol, Alice and Bob; and the third is the employer's cap on medical insurance benefits for HIV disease and AIDS.

B. PHYSICIAN REFUSAL OF TREATMENT

Is there a legal remedy for a physician's refusal to treat? More broadly, the question is whether there is a legal remedy for denial of goods and services by privately owned businesses. Such a denial of services on the basis of disability is known as discrimination in public accommodations, that is, services offered to the public. Public accommodations discrimination is quite different from employment discrimination.

For quite some time the law has imposed on physicians no duty to treat.97 Thus physicians have been free to provide services on a selective basis. There are some exceptions to the no-duty-to-treat rule. A primary exception to the no-duty rule is the doctrine of abandonment.98 Under the abandonment doctrine a physician is not at liberty to stop treatment once there has been an undertaking of care. To do so without an appropriate referral would subject the physician to tort liability. The abandonment doctrine would not be useful to Ted because the physician had not undertaken treatment for the ankle injury, notwithstanding that the physician had treated Ted for a number of years.99

However, Congress has now created a significant statutory exception to the no-duty-to-treat rule. By virtue of the 1990 enactment of the ADA it is illegal to discriminate on the basis of disability in public accommodations, that is, in the provision of

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goods and services to the public by private businesses; private business include physician offices. Thus the physician would be liable under the ADA to Ted for refusing to treat Ted's ankle injury based on Ted's HIV infection.

It should be noted that under the ADA the physician is not required to treat Ted for HIV infection or cancer if such treatment is outside the physician's specialty and area of practice. The ADA does not require doctors to treat persons with disabilities for any and all ailments. Rather, the physician's obligation is to treat disabled people for conditions within the physician's practice and specialty. The ADA does not require that a physician change the nature of his or her medical practice, provided he or she does not discriminate on the basis of disability in providing his or her typical services. Accordingly, Ted has legal redress against the physician if basic treatment for an ankle is within the physician's general practice.

The Rehabilitation Act would not be useful to Ted unless Ted's physician takes the Medicare and Medicaid reimbursement. It should be remembered that the jurisdictional requirement for actions under the Rehabilitation Act is that the discriminating entity receives federal funding. If Ted's physician accepts Medicaid and Medicare reimbursement, then the physician's business is an entity receiving federal money, providing jurisdiction for a handicap discrimination action under the Rehabilitation Act.

C. Physician Disclosure of HIV Infection

The next significant issue presented by Ted's scenario is whether the physician is lawfully entitled to contact Bob, Carol, and Alice regarding their possible exposure. The warnings made by the physician would appear to be lawful because they have statutory authorization and because they do not explicitly violate the right to privacy. It is, however, necessary to distinguish these discretionary warnings from the so-called duty-to-warn doctrine.

Among the qualifications to California's prohibition against identifying HIV test subjects is an express authorization for physicians to disclose "to a person reasonably believed to be the spouse . . . , sexual partner or person with whom the patient has shared the use of hypodermic needles . . ." their possible exposure to HIV. This authorization does not permit name identification of the infected person. Moreover, the authorization is discretionary, not mandatory. Accordingly, a physician does not have a duty to warn sex and needle partners.

Similarly, the physician's warnings do not violate confidentiality of medical information statutes. California's Confidentiality of Medical Information Act prohibits unauthorized disclosures of a person's medical information. There is no violation of the Act where statutes authorize certain disclosures. Because Ted's physician, following the guide of section 199.25(a), did not identify the infected person by name or otherwise, there is no breach of confidentiality under the Act.

The physician's warnings of possible HIV infection invoke an inquiry concerning the right of privacy. As noted, the California Constitution explicitly guarantees a right of privacy. The Urbaniak decision found a privacy violation when a health care worker made an unauthorized disclosure of a named individual's HIV status. However, under the facts of Ted's case, there is no invasion of privacy because the infected individual was not identified by name even though Ted was easily identifiable by the warnings. Moreover, there is a paramount state interest in encouraging warnings of the kind given here, in order to encourage early medical intervention and prevention of infection.

D. INSURANCE LIMITS ON HIV DISEASE

1. Release of HIV Test to Employer

The facts in Ted's scenario also present another problem. The physician, in complying with the insurance reimbursement forms, included a copy of Ted's HIV test. Because Ted's em-
ployer is self-insured, the information went to the employer. Upon learning Ted had HIV, the employer revised the company health insurance program to put a lifetime cap on expenses for HIV disease. Previously there had been no lifetime caps on any medical expenses for any condition. After the employer modified the plan, there still were no caps on any other medical condition except HIV. The problem here has two aspects: first, was the HIV disclosure to the employer lawful; second, was it lawful for the self-insured employer to put an insurance reimbursement cap exclusively on HIV disease expenditures. As to the first issue, two arguments may be made by the physician: one, the insurance company required the disclosure, and two, Ted consented.

It is an appealing argument that while it was appropriate for Ted’s physician to verify his medical services for purposes of reimbursement, the physician is liable for negligently or intentionally disclosing Ted’s HIV test result. While the physician must of course advise the insurer of provided services (office visit, lab expenses, etc.), it is questionable whether it was appropriate for him to include the HIV test result. Certification of the fact that the physician performed the test and had lab expenses would seem to be sufficient to satisfy insurance purposes. This argument is bolstered by California Health and Safety Code sections 199.20 to 199.27, which clearly prohibit disclosure of HIV test results except in certain express circumstances. Disclosure to employers is not one of these statutory exceptions. Indeed, section 199.21(f) expressly bars the use of HIV tests for employment purposes.

It might be argued that Ted’s consent to release medical information for insurance purposes would include consent to release the results of any lab test. The decisive point is whether the results of the lab test were necessary for insurance reimbursement purposes. If not, it is likely that the physician violated section 199 and the Confidentiality of Medical Information Act. Moreover, implied consent, oral consent, or a signed general consent are insufficient under section 199, which requires signed written consent of a test subject to release an HIV test result.
2. **Employer Cap on HIV Benefits**

The other troubling issue raised by Ted's case is whether the employer can legally cap reimbursement for HIV disease expenditures, while placing no limit on expenses for other conditions. Initially this selection might seem to be discriminatory. However, some federal courts, with the implied blessing of the Supreme Court, have ruled that the Employee Retirement Insurance Security Act (ERISA) preempts state insurance laws in the regulation of self-insured employer benefit programs. Thus employer self-insured health plans are not subject to state laws which often mandate insurance coverage. This was the holding of *McGann v. H & H Music Co.*, which further held that in regulation of self-insured health insurance programs, ERISA does not prohibit an employer cap on coverage for HIV or AIDS benefits.

In that case, McGann, an employee of H & H Music, was diagnosed with AIDS and submitted medical expense claims for reimbursement under the employer medical plan. At that time the plan had a lifetime expense limit of one million dollars for all diseases. Shortly thereafter H & H notified all employees of changes in the medical plan. The employer medical plan became self-insured, bringing it under ERISA's jurisdiction, and it reduced maximum medical benefits payable to any employee for AIDS to $5000.

Thereafter McGann sued H & H under section 510 of ERISA which makes it unlawful to retaliate against a employee benefit plan participant for “exercising any right to which he is entitled.” McGann contended that the provision limiting cov-

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It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may
verage for AIDS-related expenses was directed specifically at him in retaliation for exercising his rights under the medical plan. The court found against McGann holding that he was not denied any right to which he was entitled. The court found that there was nothing to indicate H & H ever promised that the $1,000,000 coverage was permanent. "Defendants [H & H] broke no promise to McGann. The continued availability of the $1,000,000 limit was not a right. . . ." The court found that to hold otherwise would mean an employer "could not effectively reserve the right to amend a medical plan to reduce benefits . . . ." 112

The court in H & H Music went on to hold that "ERISA does not broadly prevent an employer from 'discriminating' in the creation, alteration or termination of employee benefits plans." ERISA "does not prohibit welfare plan discrimination between or among categories of diseases." Moreover, the court concluded that ERISA "does not prohibit an employer from electing not to cover or to continue to cover AIDS, while covering or continuing to cover other catastrophic illnesses, even though the employer's decision in this respect may stem from some 'prejudice' against AIDS or its victims generally." 113

However, H & H Music was decided before the effective date of the ADA. The ADA generally makes it illegal to discriminate based on disability. An employer cap on expenses for HIV disease, but no other medical condition, is discrimination based on a particular disability. Accordingly there is a forceful argument that the ADA would prohibit this kind of disability-based discrimination.

Insurers and employers assert that insurance matters are totally excluded from ADA coverage. 114 This theory is premised on the language in section 501 of the ADA: this "Act shall not be construed to prohibit or restrict . . . an insurer . . . from underwriting risks, classifying risks, or administering such risks that

111. McGann, 946 F.2d at 405.
112. Id.
113. Id. at 408.
are based on or not inconsistent with State law. . . .”\(^\text{116}\) The position that insurance is totally exempt from the ADA is somewhat diminished by further language in section 202: the above language about insurance “shall not be used as a subterfuge to evade the purposes . . . “ of the ADA. The regulations implementing the ADA also provide: “an employer . . . cannot deny a qualified individual with a disability equal access to insurance or subject a qualified individual with a disability to different terms or conditions of insurance based on disability alone. . . .”\(^\text{116}\)

To suggest that the first part of section 202 is a total exemption of insurance from the ADA is an unjustified and overly broad interpretation exceeding the language of section 202 and is inconsistent with the purposes of the ADA. The critical question, which will have to await court interpretation, is whether selecting certain disabilities for coverage exclusion or limitation is “underwriting risks, classifying risks or administering such risks. . . .” It may plausibly be argued that disability-based coverage exclusions and reimbursement caps are outside the meaning of “underwriting risks.” Thus it is debatable whether it was lawful for Ted’s employer to cap benefits for HIV disease. This issue remains an open question.\(^\text{117}\)

In summary of Ted’s situation, the physician’s refusal to treat Ted’s ankle injury merely because of Ted’s HIV infection is a disability-based discrimination in violation of the ADA, provided the physician’s practice includes ankle injuries. The physician’s disclosures, or warnings of possible HIV exposure, to Ted’s sex and needle partners does not violate the California Health and Safety Code sections 199.20 to 199.27 because Ted was not identified as the HIV carrier. Because Ted’s identity was not made known, he appears to have no cause of action for violation of his right to privacy, nor for a violation of confidentiality of medical information statutes. The physician’s disclosure of Ted’s HIV test result to Ted’s employer was unlawful. Whether it was legal for the employer’s to put a cap on HIV benefits depends on how the courts interpret the insurance provisions of the ADA.

\(^{117}\) See Owens v. Storehouse, 984 F.2d 394 (11th Cir. 1993).
Alice is a person with HIV infection. She has resided for several years in her apartment. One day in a casual conversation Alice's landlord, having noticed frequent deliveries by a local pharmacy, inquired about Alice's health. Alice confided in the landlord that she had HIV disease, but was not seriously ill at the present time. The landlord pondered the news of Alice's disease and its possible impact on present and future tenants. Fearing a negative reaction by the other tenants, the landlord gave Alice an eviction notice which complied with the terms of their month-to-month lease.

Alice became quite upset about losing her apartment. She was put into contact with the owner of a very large house who was planning to convert it into a "group house" for ambulatory people with HIV disease. Several neighbors of the prospective group house were greatly concerned about living near an AIDS shelter. After hearing the neighbors' complaint, the City Zoning Board refused to issue a special use permit for the group home.

The legal issues presented by Alice's scenario are two: First, does Alice have any legal remedy against her landlord for her eviction based on her HIV infection, even though the eviction otherwise complied with the terms of their lease? Second, does the owner of the prospective group house have any legal remedy against the City Zoning Board for denial of the special use permit?

B. HIV-BASED HOUSING EVICTION

Relief for housing eviction based on disability would be available under the Fair Housing Amendments Act of 1988 (FHAAA) and perhaps under state housing laws prohibiting handicap discrimination. The ADA would not help Alice because it does not cover housing discrimination. The Rehabilitation Act would be an unlikely recourse because the landlord does not receive federal funding.

Title VIII of the Civil Rights Act of 1968, popularly known
as the Fair Housing Act, was enacted to prohibit racial segregation in housing.\textsuperscript{118} In 1988 the Fair Housing Amendments Act (FHAA) was enacted, amending the law to extend the principle of equal housing opportunity to people with handicaps.\textsuperscript{119} Essentially the FHAA made it unlawful for public and private entities to discriminate against people with handicaps in the sale, rental, or advertising of dwellings, in the provision of brokerage services, and in residential real estate transactions.\textsuperscript{120} The primary purposes of the FHAA are to end segregation of housing for people with disabilities, to increase housing choices for people with disabilities, and to require reasonable accommodations by landlords, thus allowing the disabled full enjoyment of appropriate housing.

An aggrieved party under the FHAA may seek court relief in a private civil action for injunctive relief, damages and penalties, and attorney fees for the successful party. In addition to private court action, the aggrieved party may seek administrative relief with Department of Housing and Urban Development (HUD).\textsuperscript{121} The Act does not require the exhaustion of administrative relief before filing a private lawsuit in court. Administrative relief would, however, be less costly and easier.

The FHAA defines “handicap” as that term is used in section 504 of the Rehabilitation Act and its interpretative regulations. “Handicap” means: (1) physical or mental impairment which substantially limits one or more of such person’s major life activities; (2) a record of having such an impairment; or (3) being regarded as having such an impairment.\textsuperscript{122} The FHAA’s protection of people with a handicap extends to people with AIDS, HIV infection, and those perceived to have HIV infection whether or not they are in fact infected.\textsuperscript{123}

The obligation to provide housing to people with a handi-
cap, and the obligation to make reasonable accommodations in dwellings, is limited by a "direct threat" exception. The Act does not require that a "dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 124 The landlord has the burden of showing, through direct and objective evidence of overt acts, that the tenancy poses a direct threat. Generalized assumptions, subjective fears, and speculation are insufficient to prove the requisite direct threat to others. The direct threat exception is not available if the discrimination is based on stereotypes, ignorance, perceptions about disabilities and unfounded speculation.

Accordingly, the FHAA would be a successful remedy for Alice against her landlord for her eviction, because the eviction was based on possible negative reactions by tenants to Alice's HIV infection. The baseless fears of the tenants and landlord that Alice's tenancy presents a safety risk cannot be used to invoke the direct threat exception.

C. DISCRIMINATORY ZONING PRACTICES

The second issue presented by Alice's scenario is whether there is a legal remedy against the zoning board for the denial of a special use permit for a group house for people with HIV infection. The FHAA not only provides a cause of action by an aggrieved handicapped person, it also confers standing to bring a cause of action against individuals or entities which provide housing for people with handicaps. 126 The FHAA prohibits state and local health, safety, land use, and zoning regulations that exclude people with handicaps or restrict them from living in group homes and other congregate living arrangements. Neighbors' prejudices, unjustified fears, and negative attitudes about people with handicaps may not be invoked as a basis to restrict the housing choices and opportunities of people with disabilities. 126

According to the HUD regulations, the FHAA's definition of "aggrieved person," one who is entitled to bring a claim under the Act, includes advocacy organizations and providers of housing for people with disabilities in addition to the handicapped consumer. Such organizations and providers need not be handicapped themselves. Thus, under the facts of Alice's case, the owner of the prospective group house for people with HIV infection is an "aggrieved person" with a right to bring an action under the FHAA even though the owner is not handicapped.

A case in point is Baxter v. City of Belleville. Charles Baxter sought to open "Our Place," a group home for HIV infected persons in Belleville, Illinois. After learning of Baxter's intentions, the Belleville Zoning Board refused to issue him a special use permit for the group house. Baxter then filed suit for injunctive relief and damages under the FHAA.

The court held that HIV infected persons are handicapped within the meaning of the FHAA. The court found that the group house, "Our Place," would not constitute a direct threat to the health or safety of others. Finally, the court held that the actions of the City of Belleville were based at least in part on handicap discrimination. Accordingly, the court issued a preliminary injunction forbidding the City of Belleville from refusing to issue a special use permit to Baxter.

As to Alice's case, the FHAA would most likely provide a successful remedy for the special use permit for a group house for HIV infected persons. Similarly, California disability statutes would provide a remedy for Alice's eviction and the denial of the special use permit. Because the city which denied the special use permit receives federal funding, Alice would also have a cause of action under the Rehabilitation Act.

VI. CONCLUSION

Returning to the opening theme of this article, there are several remedies for disability discrimination depending on sev-
eral factors. Whether the various legal remedies will prove useful, however, depends on circumstances at the time and place of the alleged discriminatory act. Generally, the disability claimant must prove that there is jurisdictional inclusion, that plaintiff is covered and qualified, that the discriminating entity is a covered entity, and that the elements necessary for proving discrimination are present. This burden is no small matter. For example, if the claimant seeks a claim under section 504 of the Rehabilitation Act, claimant must prove that defendant is receiving federal funds. Likewise, for the ADA employment provisions to apply, there must be twenty-five or more employees. For the California FEHA to have jurisdiction, there must be five or more employees. For state and local coverage, there is the necessary boundary jurisdictional issue.

In selecting the appropriate and available cause of action, consideration should be given to whether an action affords an administrative enforcement, as opposed to an exclusive remedy of bringing a private lawsuit. Most statutory causes provide for administrative enforcement, while the common law tort and contract actions do not afford administrative relief. A benefit to the administrative recourse is cost and time. An administrative claim will set in motion an investigation conducted by the administrative agency. This represents a considerable cost saving because the claimant does not have to pay initial discovery costs associated with a private lawsuit. Too, because the administrative forum is less formal than a trial, there is usually a great saving in time. Moreover, an attorney is not required for administrative enforcement.

Given the fact that many people with disabilities have a short life expectancy, time is of the essence. In Raytheon Co. v. California Fair Employment & Housing Commission, the claimant Chadbourne died before the appellate court had reached its decision. The same is true in many other HIV cases, including McGann v. H & H Music Co. Thus the time saving factor looms large as an advantage to administrative relief.

Of course, there may be a requirement that the claimant has fully exhausted administrative relief before seeking judicial relief. For example, issuance of a right-to-sue letter by the EEOC is a prerequisite to seeking judicial relief for an ADA claim under Title I. However, an action under the ADA public services title (Title II) does not require administrative exhaustion before seeking judicial relief. 132

One challenge to a discrimination claim is that the statute or cause of action under which relief is sought has been preempted by a superior law. For example, if a claimant presses a claim under a state statute, such as the FEHA, the defense might assert that federal legislation preempts the state claim. Likewise, it might be argued that local anti-discrimination ordinances are preempted by state statutes covering the same subject. However, many decisions have ruled that state FEHA relief is not preempted by federal legislation. 133 In addition, Congress, with the enactment of the ADA, did not intend to displace any of the rights or remedies provided by other federal laws or other state or local laws, including state common law actions, that provide greater or equal protection to individuals with disabilities. 134 If a state tort claim confers greater remedies, it is not preempted by the ADA.

Another important factor in deciding which relief to pursue depends on what remedies are available. Traditionally, under the Rehabilitation Act, section 504, the remedy is equitable relief including back pay, but no punitive damages. 135 However, under the ADA Title I, employment discrimination, the claimant may seek compensatory damages, punitive damages, and a jury trial. 136 Whereas an action under Title III, public services by private entities, affords only compensatory damages, fines and no jury trial right. 137

137. The remedies and procedures for violations of Title III are the same as those set forth in Section 204(a) of the Civil Rights Act of 1964. ADA § 308(a), 42 U.S.C. § 12,188(a) (Supp. III 1991); Civil Rights Act of 1964, § 205(a), 42 U.S.C. § 2000a-3(a) (1988).
There are some unresolved issues which need to be addressed in order to improve redress for disability-based discrimination. For example, singling out a particular disability for limited insurance coverage as occurred in McGann\(^{138}\) resulted in no meaningful coverage for the catastrophic illness AIDS. This ruling will encourage cost conscious employers to self-insure and limit expense coverage for catastrophic diseases such as cancer or heart problems. Obviously if an employer can eliminate costs for expensive health conditions they can significantly reduce their health care costs. As this cost burden is removed from private insurance and employers, it is shifted to the insured employee as direct out-of-pocket and to public insurance reimbursement systems for the financially needy. This is an unfortunate shift in cost burdens. Many ill people will not be able financially to pay for the enormous costs associated with catastrophic illnesses. Their only hope is that some government insurance, such as Medicare or Medicaid, will provide coverage. This cost shift from private insurance to public insurance defeats the very purpose of insurance, and puts the cost on those least able to pay for it.

It may be that some court will reverse the trend of McGann and find that ERISA section 510 prohibits disability discrimination in self-insured plans. There is also hope that the newly effective ADA will be found to ban the kind of discrimination presently allowed under the holding of McGann v. H & H Music. Another avenue to address this unfortunate holding is for Congress to amend ERISA so as to expressly prohibit the disability-based discrimination permitted in McGann.\(^{139}\) Of course, there will be difficulty in passage of such a proposal as self-insured employers lobby for the continuation of the McGann holding as a cost saving benefit.

Related to the problem created by McGann, is the broader issue of whether the ADA applies to the insurance industry. The statutory root to this confusion is the ADA provision that the ADA does not interfere with insurance risk rating. If the purpose of the ADA is to be fulfilled this provision cannot be allowed to free the entire insurance industry from the require-

\(^{138}\) McGann v. H & H Music Co., 946 F.2d 401 (5th Cir. 1991).
\(^{139}\) See McGann, 946 F.2d at 405.
ments of the ADA.

Another problem at the state level is the dubious position that a compulsory HIV test is authorized if there is contact of an arrestee's bodily fluids with the skin of the arresting officer. It is bad medicine and bad law. It is possible that another court may rule that compulsory testing is legal only if there were a substantial risk of HIV transmission. Absent such judicial redress, the Legislature should enact reconstructive language to the same effect. Passage of such proposed legislation may be difficult given the position of the police officers' lobby seeking to broaden the occasion for compulsory HIV testing.

Police and employer lobbies are urging positions which conflict with the goal of prohibiting disability discrimination; this underscores the difficulty of removing unnecessary barriers to equal and fair treatment regardless of disability. Many who lobby against freedom from unnecessary disability discrimination do so because of financial considerations, prejudice, and ignorance. These motivating factors are legally insufficient. The goal of legislation prohibiting disability-based discrimination is to protect persons with disabilities for deprivations based on prejudice, stereotypes, unfounded fear, ignorance. It would be a pernicious idea that discrimination cannot be justified by prejudicial attitudes, but can be justified if the motivation is cost avoidance. Indeed, if cost savings is an excuse to justify discrimination, it would mean that the anti-discrimination legislation has been dealt a fatal blow.

One final point is of broader implication. The purpose of anti-discrimination legislation is to avoid deprivations prompted by pernicious mythologies or irrational fear. In supporting such legislation and its goals, society improves the chance of avoiding discrimination against any individual regardless of their group identification. Freedom for all can be guaranteed only if society


141. The cost of alterations by an employer which are necessary for accommodating an employee disability is a factor in determining whether the accommodations are reasonable and must be made. However, using cost in figuring whether an accommodation is reasonable is quite different from a position that discrimination is justified by cost savings generally. See 56 Fed. Reg. 35,752 (1991).
protects against unnecessary and unjustified discrimination against any person or group.
APPENDIX
A REMEDIES CHECKLIST
A. CONFIDENTIALITY: STATE REMEDIES

1. CALIFORNIA CONSTITUTION, PRIVACY RIGHT, ART. 1, § 1.
   Prohibits invasion of privacy by state or private parties. Remedy is private lawsuit for damages.

2. CALIFORNIA CONFIDENTIALITY MEDICAL INFORMATION ACT, CIVIL CODE §§ 56-56.13.
   Prohibits unauthorized disclosures of medical information. Compensatory and punitive damages are available.

3. CALIFORNIA PRIVACY OF AIDS/HIV TEST ACT, HEALTH & SAFETY CODE §§ 199.20 -.27.
   Prohibits disclosures of AIDS/HIV test results and use of AIDS/HIV test for purposes of insurability or employment. Violators subject to actual damages, fine ($1000 to $10,000), and possible jail time.

4. COMMON LAW ACTIONS:
   a) INVASION OF PRIVACY. Private suit is available for compensatory and punitive damages.
   b) DUTY OF CONFIDENTIALITY. Duty is owed by physician to his/her patients regarding medical information. Private suit is available for compensatory and punitive damages.

5. LOCAL GOVERNMENT REMEDIES:
   a) COUNTY AIDS/HIV TEST PRIVACY ORDINANCE.
   b) CITY AIDS/HIV TEST PRIVACY ORDINANCE.

B. CONFIDENTIALITY: FEDERAL REMEDIES


2. U.S. CONSTITUTION: Right to Privacy.

   Prohibits disability inquiries of job applicants and pre-offer of employment medical exam. Administrative remedy or private suit is available for equitable relief and damages.
C. DISCRIMINATION: STATE REMEDIES

1. CALIFORNIA FAIR EMPLOYMENT & HOUSING ACT (FEHA), GOVT. CODE § 12,940(A). Prohibits disability-based discrimination against qualified handicapped employee. Administrative enforcement and/or private suit is available for equitable relief and damages.

2. CALIFORNIA HANDICAPPED ACCESS IN PUBLIC ACCOMMODATIONS, CIVIL CODE § 54.1. Prohibits handicapped-based discrimination in access to public accommodations.

3. COMMON LAW ACTIONS:
   a) CONTRACT: WRONGFUL DISCHARGE.
   Provides action for damages resulting from job discharge before term specified or discharge in violation of public policy.
   b) TORT: DEFAMATION.
   False accusation of AIDS may result in employees' damages recovery against employer for slander. Also employer is liable in damages for defamation resulting from employees' compelled self-publications.
   c) TORT: EMOTIONAL DISTRESS.
   Provides action for intentional infliction of emotional distress because of abusive conduct by employer, supervisors or co-workers. Recovery is in damages for intentional actions deemed to be so outrageous as to exceed all bounds of decency.

4. LOCAL GOVERNMENT PROTECTIONS.
   County and city ordinances may protect against AIDS-based or disability-based discrimination in employment, public access and housing. Remedies vary but often allow administrative relief or private suit for damages.

D. DISCRIMINATION: FEDERAL REMEDIES

   Prohibits entities receiving federal funds from discrimination against qualified, handicapped individuals. Allows equitable relief, damages, attorney fees, and/or termination of federal funding.

Prohibits discrimination based on handicap in sale, rental, related businesses, and zoning. Administrative relief is available through HUD and/or private suit for equitable relief, fines, actual and punitive damages, and attorneys' fees.


Prohibits discrimination against qualified individual in employment, public or private services, and transportation. Allows equitable relief, damages, and attorneys' fees. Jury trial and punitive damages available for intentional discrimination in employment.


Protects against denial of constitutional rights such as a state officer's violation of person's right to privacy. Allows equitable relief, compensatory and punitive damages, and attorneys' fees.

5. **Employee Retirement Insurance Security Act (ERISA), §§ 502(a), 510, 29 U.S.C. §§ 1132(a), 1140.**

Prohibits discharge of employee to avoid health insurance costs. Administrative enforcement is available through the Department of Labor and suit by "participants" in employment benefit plan.