

# PENNSYLVANIA AIDS LAW REPORT

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A PUBLICATION OF THE AIDS LAW PROJECT OF PENNSYLVANIA  
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## *In this Issue ...*

... our major article covers the nondiscrimination provisions of federal and state law, specifically, the Americans with Disabilities Act, which is arguably the most important single piece of congressional legislation in response to the AIDS epidemic. Accompanying the article is a "Reference List of HIV Nondiscrimination Standards" that we hope will be a useful quick reference guide for practitioners.

We're also proud to include an update on our case docket. Because of the length of the complete docket, we have divided it roughly in half; the other half will appear in the next issue. Many people do not realize that the AIDS Law Project is involved in numerous cases involving individual client advocacy in the courts and before administrative agencies, nor do they realize the extent to which individuals with HIV face discrimination. Two of our cases (one of which is included here) involve claims of discrimination by funeral homes, so the discrimination faced by persons with AIDS doesn't even end with death.

Also included in this issue are the preliminary results of our consumer survey concerning availability of legal services for persons with HIV infection across Pennsylvania. The results confirm what we already knew: because of their poverty, people with HIV illness are frequently unable to obtain legal assistance without the availability of legal service programs such as the AIDS Law Project or volunteer attorneys.

We've appreciated the many favorable comments in response to the first issue. Please continue to contact us with questions or ideas for future issues. One favorable comment came

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## *AIDS/HIV and Discrimination: Protection Under Federal and State Laws*

*Both federal and state nondiscrimination laws provide broad protection against HIV-related discrimination. These protections apply to employment, access to public facilities and government services, and other areas as well. This article provides an overview of these protections.<sup>1</sup> Endnotes are printed beginning on page 14. A "Reference List of Nondiscrimination Standards" is provided on pages 8 and 9.*

### *Introduction*

The primary federal laws against discrimination are the Americans with Disabilities Act of 1990<sup>2</sup> (ADA) and the Rehabilitation Act of 1973<sup>3</sup> (Rehab Act). These federal statutes overlap in coverage in many areas, so the discussion in this article will be limited to the ADA, unless otherwise noted. On the state level, the Pennsylvania Human Relations Act<sup>4</sup> (PHRA) also offers protection against discrimination, supplementing that of federal law. The federal and state laws are invoked most frequently in regard to HIV-related discrimination complaints, but several local jurisdictions (specifically Philadelphia, Pittsburgh, and Harrisburg), also have local laws that forbid HIV-related discrimination.<sup>5</sup>

### *AIDS/HIV as Protected Category*

Although neither federal nor state nondiscrimination laws specifically mention AIDS or HIV infection as a protected category, there is no question at this time that these laws provide such protection. In fact, these laws do not identify any specific disability or handicap as being protected, but instead provide protection in general for persons "with disabilities." The legislative history of the ADA,<sup>6</sup> and court rulings and administrative regulations under the ADA, Rehabilitation Act, and PHRA compel the conclusion that persons with AIDS/HIV are persons with disabilities, and thus, are protected from discrimination.<sup>7</sup>

### *Privacy Rights of Complainants*

Persons with HIV infection often fear that by filing a complaint regarding discrimination, they will risk disclosure of their HIV status, particularly in cases that might result in attention by the news media. Although the nondiscrimination statutes do not explicitly allow for the practice of filing complaints under a pseudonym ("John/Jane Doe," for example), the courts generally allow it. Administrative agency complaints can sometimes be filed by attorneys or organizations on behalf of individuals with HIV infection. Additionally, administrative agency records and the information they contain, including complaints,

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## ***In this Issue...***

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to us by way of the **Delaware Valley Hospital Council**, which passed on to us the comments of **Arthur K. Hoffman, Esq.**, of the law firm of **Duane, Morris & Hecksher**, who commented on behalf of the **Hospital Association of Pennsylvania** on the Act 148 forms we printed in our last issue. While noting that the forms that accompanied our Act 148 article were consistent with Act 148, Mr. Hoffman made a few suggestions that might improve the significant exposure certification form (Form 4). We're happy to share them with you: Form 4 could also include the health care worker's signature, to make it clear that the health care worker, and no one else, had sought the certification. Also, since physicians cannot certify their own exposures, a statement to that effect could also be included on the form itself (similarly, we think, the physician could certify that the health care worker seeking the certification is not the physician's employee, since Act 148 prohibits physicians from certifying significant exposures experienced by their own employees). Mr. Hoffman pointed out the importance of hospitals developing post-exposure check lists to be certain both Act 148 and the OSHA bloodborne safety standard are complied with. We agree that this is an important issue that health care institutions need to address. We know from our own experience with calls from health care workers that sometimes there is confusion about what should happen when an employee has an injury posing the risk of blood exposure. Workplace safety standards in regard to HIV will be the topic of a future issue of the **Pennsylvania AIDS Law Report**.

Again, we remind readers that if you are not already on our mailing list for the **Pennsylvania AIDS Law Report** and want to receive it in the future, please call or write us with your name and address.

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## ***AIDS/HIV and Discrimination... (continued from page 1)***

are not generally accessible to the public. The complainant's identity should thus not be a matter of public record. Although there are no absolute guarantees concerning the privacy of information about complainants with HIV infection once a complaint is filed, in reality, persons with HIV have little to fear regarding the risk of disclosure of their identity in the course of asserting their rights against unlawful discrimination.

### ***Time Limits on Filing Complaints***

In reviewing potential complaints of discrimination, advocates for persons with HIV infection should check the Reference List (pages 8-9) to note the time limits for filing complaints. If not filed within the deadline, the claim may be barred. Such deadlines vary; employment discrimination complaints under the ADA must be filed with the Equal Employment Opportunity Commission within 180 days of the discriminatory act, but the time limit for filing with the Philadelphia Commission on Human Relations, which has exclusive jurisdiction over complaints based on sexual orientation or involving employers of 3 or less employees in Philadelphia, is only 90 days. Case managers and other advocates for persons with HIV should be prompt in providing legal service referrals for persons discriminated against so that the individual's right to pursue a complaint is not lost.

The scope of both the ADA and the PHRA are quite expansive and not all elements of these statutes are directly relevant to AIDS/HIV issues. The discussion which follows focuses on issues which are specifically related to advocacy for persons with HIV.

## ***Title I: Employment Discrimination***

### ***Key Concepts***

The ADA contains broad prohibitions against HIV-related employment discrimination. Several key concepts involved in the ADA's employment standards include those of "disability," "discrimination," "qualified individual with a disability," "reasonable accommodation," and "undue hardship."

The ADA defines a disability as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of an individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.<sup>8</sup>

As noted above, persons with HIV infection are deemed to be within this definition. Asymptomatic HIV infection itself, because of the risk of transmission, limits reproductive ability and the ability to engage in sexual relations, and thus has been deemed a substantial limit on a major life activity. Symptoms of HIV illness may also limit a person's ability to engage in major life activities. To the extent that medical or employment records show that a person has HIV, there is a record of impairment pertaining to that person. Finally, even if the person in question is not HIV infected, but is perceived to be so infected, that person is protected. For example, if an employer discriminates against a gay employee because of fear that the employee, because of his sexual orientation, is HIV positive, that discrimination is illegal even if the employee is not in fact infected. Additionally, the ADA prohibits retaliation by firing or other unfair treatment against individuals who seek or assist in enforcement of the ADA.<sup>9</sup>

When used in the context of nondiscrimination standards, the concept of "disability" thus has a different meaning than when the concept is used in the

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## *AIDS/HIV and Discrimination... (continued from page 2)*

context of benefits available for persons unable to work, such as social security disability benefits (SSDB/SSI). Many persons with disabilities are able to work, and the nondiscrimination laws protect them from discrimination; persons who are disabled (i.e., unable to work, as defined by their private insurer or the Social Security Administration), are eligible for benefits based on the limitations on their ability to work.

Discrimination under the ADA is given a common sense definition. It includes, of course, termination of employment, but would apply also to any difference in treatment by the employer, such as in hiring, promotion, or other terms and conditions of employment. An employer's transfer of an employee with AIDS to a position that does not require contact with the public, for example, is discriminatory, even though the new assignment is at a pay level at least equivalent to that paid before. Discrimination in job benefits is also covered.

In order to be protected under the ADA, the individual in question must be a qualified individual with a disability. That is, someone with a disability who is able to perform the essential functions of the job that the individual holds or is applying for, with or without reasonable accommodation.<sup>10</sup> In other words, the employee has to be able to perform the basic job function as defined by the employer. If an applicant for employment lacks an educational or skill level legitimately required by the employer, that applicant is not qualified for the job, regardless of the individual's status as a person with HIV. Or if, even with reasonable accommodation, an employee is too ill to work and perform the essential job function, the employee would not be protected from termination or other action taken by the employer, assuming that the employer would have treated an employee without HIV infection, but who could not work, in the same way. To some extent, the ADA defers to an employer's consideration as to what comprises a job's essential functions and states that job descriptions prepared prior to advertising a job or interviewing applicants are evidence that is useful in determining what "essential functions" are. In fact, with the rare, limited exception of employment that by its definition involves transfer of blood or other fluids capable of transmitting HIV (paid blood or semen donors, for example), HIV infection, in and of itself, rarely results in a person being not qualified for employment. An employer's attempt to justify HIV status as job-related would fail in virtually all cases.

The ADA's protections are not limited just to persons with HIV or suspected of being HIV infected; the ADA goes even further in protecting persons who are discriminated against because they have a relationship or association with someone who has a "known disability." In some cases, employers have discriminated against an employee because a family member has a disability. For example, an employer may discriminate against a foster parent of a child with HIV because of fear that the child's illness and need for medical care will result in the foster parent's absence from work. The employer may prefer a job applicant who is thought not to have responsibilities in regard to a person with a disability.

This is illegal under the ADA. This provision protects family members, lovers or "significant others," roommates, and friends of HIV infected individuals who are discriminated against because of their relationship with someone with HIV.

Employers are required to make reasonable accommodation to allow individuals with HIV or AIDS to maintain their current positions or qualify for new positions. Examples of reasonable accommodations detailed in the

ADA include: "job restructuring, part-time or modified work schedules, reassignment to a vacant position ... appropriate adjustment or modification of examinations, training materials or policies, ... and other similar accommodations ..."<sup>11</sup> Thus, for example, an HIV-infected individual may need to take time off from her job occasionally in order to make doctor's appointments. If she can do so consistent with the requirements of her job, the employer is required to grant that adjustment to the work schedule. The ADA does not, however, require that an employer make another position available for a person with HIV who cannot fulfill the requirements of his job. For example, if, because of fatigue, an employee is only able to work a part-time schedule, and the position is a full-time position, the employer is not required to create another part-time position to accommodate the employee. If the employer has part-time work available, however, and the employee is qualified for it, the employer must consider the employee for that position without discrimination based on the employee's HIV status. In some cases, employers have sought to reassign employees to other positions that do not require contact with others in the workplace. Transfer or reassignment of this sort should not be confused with accommodation of the HIV-related disability as required by law; the transfer is discriminatory and illegal since it is not to accommodate the disability of the

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employee, but is required to accommodate the fears of customers or others. In one such notable case, *Chalk v. United States District Court*,<sup>12</sup> a public school teacher with AIDS was successful under the Rehab Act in challenging his transfer, because of his diagnosis, from a classroom teaching position to an administrative position.

The ADA requires employers to make accommodations to workers with disabilities unless such accommodations would create an undue hardship on the employer. The undue hardship assessment is an individualized determination that courts make on a case-by-case basis. The factors set out in the ADA to be used in making the undue hardship evaluation include the nature and cost of the suggested accommodation, the overall financial resources of the employer, the number of persons that the employer employs, and the impact of the accommodation on the employer's overall operation. A large corporate employer will be able to accommodate an employee in a way that a smaller employer cannot.

The employer's duty to accommodate the employee with HIV arises only if the employer is aware of the employee's disability and the need to accommodate it. This frequently poses one of the most difficult issues for employees: when and how to inform an employer regarding their HIV illness. The law does not require HIV-infected employees to inform their employers of their HIV status. For employees without symptoms of HIV illness that affect work performance, of course, there may not be any need to inform the employer. (Compare the Pennsylvania Department of Health's recommendation that health care workers should inform their employers of their infection, discussed in the article which begins on page 5.) In order to obtain the benefit of the law's reasonable accommodation requirement, however, the employee must notify the employer regarding the disability and the need to accommodate it. Whether the employee must actually disclose the underlying cause of the disability is not clear; certainly, however, enough information needs to be provided to the employer so that the employer can assess the disability and determine what accommodation is actually necessary.

### ***Scope of Employer Coverage***

Currently, the ADA covers employers with 25 or more employees. Private employers as well as states and their political subdivisions are covered. Federal agencies are not covered by the ADA, although, in general, the Rehab Act does apply to them. Beginning July 25, 1994, the ADA's coverage will broaden to include employers of 15 or more employees.

### ***Employment-Related Medical Examinations***

Because HIV screening is possible using antibody tests that first became available in 1985, employers may seek to

use such tests to screen for employment applicants with HIV. An employer may even want to ask an employee or applicant for employment about their HIV status. The ADA significantly limits the use of such tests or inquiries.

### ***Pre-employment examinations***

The ADA prohibits any pre-employment medical examination or medical inquiry unless the applicant for employment has already been deemed otherwise qualified for the position and a conditional offer of employment has been made to the applicant.<sup>13</sup> After the conditional offer of employment has been made, an employer can require a medical examination, if all potential new employees, regardless of their disability or lack thereof, are required to undergo such an examination. The employer cannot, therefore, attempt to apply an HIV test requirement to the one applicant suspected of being HIV infected. Furthermore, because discrimination against persons with HIV infection is unlawful, the employer may not use the test results to discriminate in any way, such as by withdrawing a conditional offer of employment.

Pre-employment HIV testing is further complicated by the requirements of Pennsylvania's Confidentiality of HIV-Related Information Act.<sup>14</sup> In conducting any HIV testing, the employer, or others doing the testing on the employer's behalf, are required to provide the applicant with pre- and post-test counseling and to obtain written informed consent prior to the testing. Before the medical service provider discloses the result of the test to the employer, written consent from the applicant is also required. Employer-required HIV testing also raises the issue of voluntary consent for HIV testing, since the job applicant is required to either submit to the test or forego the employment opportunity. This coercive situation can be viewed as violating the requirement that all HIV testing be performed on a voluntary, informed consent basis. As discussed in the accompanying article (page 5), the Pennsylvania Department of Health has concluded that mandatory testing of health care workers (or patients) would violate this provision of the HIV Confidentiality Act.

The employer also has an obligation to maintain the confidentiality of HIV test results along with all other pre-employment medical information. The ADA creates a federal cause of action for breaches of confidentiality with regard to medical data that an employer obtains through employee testing. Other laws pertaining to the right to privacy in medical information would also apply to pre-employment medical information.

All medical testing as a requirement of employment must be carried out after an offer of employment has been made and all employees must be subject to the testing. The ADA prohibits an employer from withdrawing an offer of employment on the basis of the results of pre-employment

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# ***New Developments Regarding HIV-Infected Health Care Workers***

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*During November 1993, two significant developments occurred regarding HIV-infected health care workers (HCWs) in Pennsylvania. First, the Pennsylvania Supreme Court decided the appeal in the Hershey Medical Center case, which involved patient notification regarding the HIV test results of a physician involved in invasive procedures. Second, the Pennsylvania Department of Health announced its long-awaited guidelines for HIV-infected HCWs.*

Although the risk of HIV transmission from health care worker to patient is extraordinarily remote (having been documented only in the anomalous case of the six patients of Dr. Acer, the Florida dentist with AIDS), the issue has attracted significant public attention. Other than the Florida case, the Centers for Disease Control and Prevention (CDC) has been unable to document any cases of HIV transmission from HIV-infected HCWs to their patients.

## ***Pennsylvania Supreme Court Upholds Patient Notification***

The Hershey Medical Center case arose when a resident physician in the joint Hershey Medical Center and Harrisburg Hospital OB/GYN departments tested HIV positive. The resident, ("Dr. Doe") informed hospital officials of the test result and took a leave of absence from his surgical duties. The hospitals then sought court approval, pursuant to Act 148, to inform other staff and certain patients of Dr. Doe's infection. (Act 148 was the subject of a major topic article in the *Pennsylvania AIDS Law Report*, Issue 1, July 1993.) The trial court allowed disclosure of Dr. Doe's name to other physicians in the OB/GYN joint program for purposes of investigating the risk of patient exposure to HIV potentially transmitted by Dr. Doe. More significantly, the Court also allowed the hospitals to contact patients in writing, describing Dr. Doe only as an unnamed physician in their joint residency program, and setting forth the dates of the physician's service in that program. The hospitals then wrote to 447 patients regarding the fact of Dr. Doe's infection and offered HIV testing and counseling. The patients contacted were those who received surgical or obstetrical services during which Dr. Doe "held or was likely to have held sharp instruments, i.e., procedures in which Dr. Doe might conceivably have sustained cuts that would have allowed his blood to come in contact with the blood of patients." In fact, the hospitals' records did not indicate in which procedures Dr. Doe actually held such instruments, yet alone injured himself in a manner that posed a risk of transmission to a patient. Nevertheless, despite the lack of

actual evidence of risk of HIV transmission to any patient, the trial court's ruling was affirmed by the Superior Court, 595 A.2d 1290 (1991), and now has been affirmed by the Supreme Court. The Supreme Court noted, however, that because the hospitals were unable to document any incident posing an actual risk of HIV transmission, the trial court would have been justified in denying the hospitals' request. As noted below, the state Health Department now has recommended that patient notification not be undertaken unless there is an actual record or recollection providing a reasonable basis for believing that an incident occurred posing a risk of transmission. As a result of their disclosure to the patients, the hospitals are now being sued in a class action by patients who claim that they suffered emotional distress as a result of the hospitals' disclosure and the hospitals' failure to prevent the physician from having contact with them.

## ***Health Department Guidelines for HIV-Infected HCWs***

The Pennsylvania Health Department has now issued guidelines for HIV infected health care workers, which, if followed, are likely to prevent the patient notification approach taken by the hospitals and approved by the courts in the Hershey Medical Center case. Issued in November 1993, the guidelines were developed and approved by the CDC as required under federal law.

The guidelines reaffirm commitment to universal precautions as the best means of preventing HIV transmission. They note that transmission of HIV from HCWs to patients has been shown to be theoretically possible, but that such transmission "has never been demonstrated."

Consistent with the Americans with Disabilities Act, the guidelines allow restrictions on an HIV-infected HCW only when the HCW poses a "direct threat" to his/her health or safety or to the health or safety of others, and the direct threat cannot be eliminated or reduced to a medically acceptable level by reasonable accommodation. The "direct threat" to others is further defined as applying in two limited situations: (1) the HCW's inability or refusal to meet basic infection control standards; or (2) the HCW is unable to care for his/her patients. The guidelines recommend that HIV-infected HCWs involved in patient care should consult their physician to determine the potential risk of transmitting HIV. HCWs involved in invasive procedures are "encouraged" to consult their institution or employer for evaluation by a risk assessment team, or, alternatively, to consult the expert review panel established by the Health Department for guidance. The guidelines do not impose any sanctions for an HIV-infected HCW's failure to consult their employer or the

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## ***New Developments...*** *(continued from page 5)*

expert review panel. Once an institution is informed regarding the employee's HIV status, the institution's internal risk assessment team should then develop a list of "exposure-prone procedures" for each HIV-infected HCW. The risk assessment team reviews the HCW's record in regard to any risk of exposure to patients. The team then advises the HCW under what circumstances the HCW may perform exposure-prone invasive procedures, as defined for that HCW. The risk assessment team may place restrictions on the HCW's performance of those procedures. If disagreement exists after the internal risk assessment review has been completed, the institution or the HCW may request review by the Health Department's expert review panel. If restrictions on practice are imposed, the HCW is required to inform all institutions where he/she practices of those restrictions. If a HCW or institution fails to comply with recommendations of the Health Department's expert review panel, the Department will take whatever actions it deems necessary to protect public health and safety. Unlike the result in the Hershey Medical Center case, retroactive notification of patients is not appropriate if there is no record or recollection reasonably indicating that an exposure has occurred. The guidelines reaffirm the confidentiality protections required by Act 148, including their application to personnel involved in the expert review panel activities. Finally, mandatory testing of patients or health care workers is deemed illegal under Act 148.

A case involving the discrimination claims of an orthopedic surgeon with HIV, Doe v. Mercy Health Corporation, is included in our Docket Update, page 12.

For copies of the Health Department guidelines, contact the Bureau of HIV/AIDS Epidemiology, telephone: (717) 783-0479.

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## ***HIV/AIDS and Discrimination...*** *(continued from page 4)*

medical testing unless the medical examination shows that the individual is not capable of performing the essential functions of the job for which she was being hired. As noted above, HIV status rarely, if ever, renders an individual incapable of performing the essential job functions (for example, a pre-employment HIV test and denial of employment for persons with HIV would be lawful for paid blood donors). Given these stringent limitations on the employer's right to test for HIV as part of the pre-employment examination, it is not surprising that few, if any, employers attempt to undertake such testing.

### ***Tests or inquiries concerning employees***

In regard to employees, as opposed to applicants for employment, the limitations of the ADA are even more stringent. The employer is prohibited from inquiring regarding whether the employee is HIV infected. Thus, the question, "Do you have AIDS or HIV?" is illegal. The employer may, however, inquire into the employee's job performance or attendance, with the result that the employee may choose to disclose HIV status. As noted above, the employee should know that in order to require the employer to accommodate the employee's HIV-related disability, the employer must be aware of the disability. Should an employee disclose HIV information, however, the employee should be prepared to provide the employer with information regarding HIV/AIDS (for example, brochures or publications covering HIV transmission issues from the CDC or local AIDS service organizations) in the event that the employer is misinformed regarding HIV and how it is transmitted.

### ***Employers' "Direct Threat" Defense***

The ADA permits an employer to refuse to hire a individual with a disability when that individual poses a "direct threat" to health and safety. A "direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."<sup>15</sup> EEOC regulations have further defined the direct threat defense. According to those regulations, the direct threat may be either to the individual employee with HIV or to others. In addition, an employer may not discriminate because of a "slightly increased risk"; rather "the risk can only be considered when it poses a significant risk, i.e., high probability of substantial harm; a speculative or remote risk is insufficient."<sup>16</sup> Note, however, that since the Secretary of Health and Human Services has determined that HIV is not transmitted in food or beverages, the direct threat defense is not available to an employer wishing to discriminate against a person employed in food preparation jobs.<sup>17</sup> Congressional resolution of the food handler issue also demonstrates that customer preference cannot be a defense to a claim of discrimination. Rarely, if ever, will an employee's HIV status pose such a risk to others that the direct threat defense would be available to an employer.

A major area of concern in regard to the "direct threat" issue and HIV is employment of HIV-infected health care workers, such as surgeons or dentists, providing patient care that involves invasive medical procedures. An update on the law in Pennsylvania is provided in the page 5 article.

### ***Discrimination and Employer-Provided Health Insurance***

The Equal Employment Opportunity Commission (EEOC) recently issued guidelines on the application of the ADA to the provision of health insurance.<sup>18</sup> The guidelines explicitly state that the ADA prohibits employers from discriminating in the provision of health insurance to disabled employees as well as from indirectly discriminating on the basis of disability in the provision of health

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# Consumer Survey Results Announced

*As part of its IOLTA-funded project to enhance legal services statewide in Pennsylvania, the AIDS Law Project has been conducting a survey of legal service consumers with HIV/AIDS throughout the state. The survey has been completed by 221 individuals, commencing with initial survey distribution in March 1993. The survey instrument, modeled after the survey undertaken by the National Association of Persons with AIDS in 1991, was distributed to AIDS Law Project clients who had previously provided us with permission to correspond with them, through the use of other organizational mailing lists likely to include persons with HIV infection, and through distribution to AIDS service organizations who in turn provided the surveys to their clients for completion.*

## Profile of Respondents

Our respondents, not surprisingly, tended to be from a low socioeconomic group. Approximately one-third of the respondents reported a net annual income of \$6,000 or less, and about 60% of the respondents reported an annual income of \$12,000 or less. 42% of the total number of individuals surveyed stated that they received public assistance or SSI.

As a group, however, our respondents are relatively well educated. Nearly one-third of the respondents had graduated from college or indicated that they had graduate education, while 34% of the respondents noted that they possessed a high school degree or less education. 23% indicated that they had attended college but had not graduated.

## Legal Problem Areas

We asked our respondents to rank legal service needs in terms of difficulty in obtaining services, in categories of "major" "minor" or "not a problem" or not of concern. The respondents indicated that they had major problems requiring legal assistance in a number of areas, including a variety of discrimination problems (see box below).

The questionnaire also asked the respondents to indicate issues of interest to them that were minor problems. Many of the same areas as those listed for the major problems were again indicated. One new area that emerged is the area of personal decision-making. 21% noted writing a will and writing a living will were minor problems as was getting a power of attorney drafted.

Respondents were also questioned about their concerns for the future. Again, the areas of personal decision-making,

discrimination in access to health-care and housing and discrimination in employment were prominent, as were concerns about access to benefits such as social security, food stamps, medicaid and medical assistance. Financial concerns were indicated by 26% of the respondents, those who foresaw future problems with bill collectors.

## Experience with Legal Services

Most referrals to legal services were from AIDS social service agencies. About 15% of the respondents stated that they were offered legal services by private attorneys for no fee while 24% had hired a private attorney to represent them with their HIV-related legal problems. Consistent with the fact that the AIDS Law Project's client list was utilized in soliciting responses, the AIDS Law Project was the largest provider of legal services to the respondents, with 34% having made use of the services of the Law Project.

About one-quarter of the survey respondents stated that they had consulted an attorney but had not received legal services because they could not pay the fee. 5% who consulted an attorney were turned away because the attorney stated that he did not have the necessary knowledge to handle the problem while 4% indicated that they were turned away because of both a lack of funds and inadequate knowledge on the part of the attorney.

Survey respondents also noted that they did not receive legal services related to HIV issues when they were needed because of their own lack of knowledge about their legal rights (9%), because of their lack of knowledge about the legal resources that were available to them (10%) or both (5%).

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## Identification of Major Problem Areas

(Percentages of respondents indicating major problems)

Discrimination Issues		Benefits Issues	
Access to health care	24%	Maintaining private insurance	63%
Employment	17%	Obtaining Social Security Disability	15%
Housing	15%	Obtaining food stamps	14%
Access to public services	15%	Financial Problems	
HIV-Related Issues		Problems with bill collectors	26%
Confidentiality and privacy issues	25%	Bankruptcy issues	14%

# Reference List of HIV

Statutory Provision:	Americans with Disabilities Act of 1990		
	Title I	Title II	Title III
<b>Coverage:</b>	Prohibits discrimination in employment by employers with 25 or more employees (beginning July 26, 1994, 15 or more employees), but not the federal government as employer	Prohibits discrimination in services, programs, employment, or activities provided by the state, any state agency or instrumentality, or local government	Prohibits discrimination in facilities and services (e.g., hotels, restaurants, stores, funeral parlors, clinics, and professional offices, including those of physicians and dentists)
<b>Codified at:</b>	42 U.S.C. §§ 12111-12117 (Supp. II 1990)	42 U.S.C. §§ 12131-12134 (Supp. II 1990)	42 U.S.C. §§ 12181-12189 (Supp. II 1990)
<b>Interpretive Regulations:</b>	29 C.F.R. pt. 1630 (1993)	28 C.F.R. pt. 35 (1993); HIV defined as disability at § 35.104	29 C.F.R. pt. 36 (1993)
<b>Enforcement:</b>	File complaint with Equal Employment Opportunity Commission (EEOC), pursuant to procedure under Title VII, 1964 Civil Rights Act; after exhaustion of administrative remedies, pursue private right of action	File complaint with federal agency (or with U.S. Dept. of Justice) having jurisdiction over state or local entity; or pursue private right of action (whether or not federal agency finds violation)	File complaint with U.S. Dept. of Justice; or pursue private right of action (30 days after filing complaint with state or local commission having jurisdiction)
<b>Filing Deadline(s):</b>	File EEOC complaint within 180 days from act of discrimination; file civil action within 90 days of receipt of right to sue letter	File with federal agency (or Dept. of Justice) within 180 days; ADA has no time limit for commencement of private cause of action	File with Dept. of Justice within 180 days; ADA has no time limit for commencement of private cause of action
<b>Remedies:</b>	Equitable relief (including backpay and reinstatement), compensatory damages and punitive damages (upon showing of intentional discrimination), attorney's fees and costs	Injunctive relief, compensatory damages, attorney's fees and costs	In enforcement by Dept. of Justice: injunctive relief, monetary damages, including out-of-pocket expenses and damages for pain and suffering (but no punitive damages), and civil penalties; in private civil action: injunctive relief, and attorney's fees and costs (but no monetary damages)



# Nondiscrimination Standards

Rehabilitation Act of 1973			Pennsylvania Human Relations Act
§ 501	§ 503	§ 504	
Requires affirmative action by federal agencies in employing persons with disabilities	Prohibits discrimination by federal government contractors with contracts or subcontracts in excess of \$10,000	Prohibits discrimination by public or private entities receiving federal financial assistance, the federal government and its agencies, and the U.S. Postal Service	Prohibits discrimination in employment (employers with 4 or more employees, with certain exemptions), housing, public accommodations and services, including state, county and local governmental agencies
29 U.S.C. § 791 (1988 & Supp. IV 1992)	29 U.S.C. § 793 (1988 & Supp. IV 1992)	29 U.S.C. § 794 (1988 & Supp. IV 1992)	43 P.S. §§ 951-963 (1991 & Supp. 1993)
29 C.F.R. §§ 1613.701-09 (1993)	41 C.F.R. Pt. 60-641 (1993)	Consult specific agency's regulations, e.g., Health and Human Services, at 45 C.F.R. pt. 84 (1992)	16 Pa.Code Chp. 44 (1992)
File complaint with federal agency employer (consult specific agency's regulations); seek judicial review of agency determination or commence civil action 180 days after filing with agency	File complaint with Dept. of Labor; courts differ as to availability of private right of action (note that in many cases coverage under § 503 will be co-extensive with § 504 and ADA, Title I	Pursue private right of action; or file complaint with federal agency having jurisdiction over entity receiving federal assistance	Administrative agency exhaustion requirement, file with Pennsylvania Human Relations Commission (PHRC)
File complaint with federal agency employer within 30 days; may file civil action after exhaustion of administrative remedies	File administrative complaint within 180 days, subject to good cause exception	File agency complaint within 180 days; private civil action within two years of act of discrimination	File PHRC complaint within 180 days from act of discrimination; private cause of action accrues one year after filing PHRC complaint; file judicial complaint within 2 years of PHRC closure of case
Injunctive relief, compensatory damages, attorney's fees and costs	Injunctive relief, compensatory damages, attorney's fees and costs (remedies are co-extensive with those of Title I, ADA); noncompliance may result in loss of federal contracts	Injunctive relief, compensatory damages, attorney's fees and costs; noncompliance may result in loss of federal assistance for entities receiving such assistance	Compensatory damages, injunctive relief; punitive damages, attorney's fees and costs are available in civil action enforcement

insurance. The EEOC indicated that the ADA does not allow an employer's decision about a disabled individual to be "motivated by concerns about the impact of the individual's disability on the employer's health insurance plan" and that disabled employees "must be accorded 'equal access' to whatever health insurance the employer provides to employees without disabilities." The EEOC directive indicates that health insurance distinctions based on disability may violate the ADA. The EEOC gives, as an example, an insurance plan which caps benefits for the treatment of AIDS at \$5,000 per year while the cap for the treatment of all other physical conditions is \$100,000 per year. Such distinctions are characterized by the EEOC as illegal subterfuges meant to evade the purposes of the ADA. The EEOC directive also notes that the ADA applies to all health insurance plans, even those that were adopted prior to the enactment of the ADA on July 26, 1990. A case involving a challenge (successful to date) to one such discriminatory benefits plan is included in the Docket Update, page 12 (Doe v. Laborers International Union of North America).

### ***ADA Enforcement through the EEOC***

The ADA's employment provisions are enforced through the same administrative procedure that applies to claims of discrimination under Title VII of the Civil Rights Act of 1964.<sup>19</sup> First, a written complaint detailing the discrimination must be filed with a local EEOC office within 180 days of the violation (or within 180 days of when the employee becomes aware of the violation). Filing the disability complaint with the Pennsylvania Human Relations Commission (PHRC) will result in cross-filing with the EEOC as well. The EEOC (or the PHRC, in cases first filed with the PHRC) then undertakes investigation of the complaint, including, as appropriate, interviews with witnesses and review of documents. If, after its investigation, the EEOC concludes that reasonable cause does not exist to believe that an unlawful employment practice has occurred, the EEOC issues a letter detailing this determination to all parties involved. This letter of determination (the "right to sue" letter) informs of the right to sue in federal court within 90 days of the receipt of the letter of determination.<sup>20</sup> If the EEOC concludes that, based on its investigation, there is probable cause to believe that unlawful discrimination has occurred, the EEOC will attempt to obtain a conciliation agreement from the employer, thus resolving the case without further litigation. If the conciliation agreement has not been obtained within 180 days after the filing of the complaint or the EEOC has not commenced suit on the complainant's behalf, the EEOC must then issue a right to sue letter to the complainant. The complainant then has 90 days to file suit asserting the violations. After suit is filed, the court considers the case *de novo*, that is, without regard to the previous proceedings before the EEOC or PHRC.

Under the ADA, successful complainants can obtain their attorney fees and costs for both the administrative and judicial proceedings. The 1991 Civil Rights Act<sup>21</sup> significantly expanded the remedial provisions of the ADA. That Act authorizes jury trials and allows compensatory and punitive damages in cases of intentional discrimination. For violation of the Rehabilitation Act, which applies to employers that receive federal funding, suit can be filed directly in federal court, with claims for compensatory damages, attorney's fees and costs. Additionally, administrative complaints can be made under the Rehabilitation Act, and, upon an agency determination that unlawful discrimination has occurred, the employer's federal funding may be terminated as a sanction. Under the Pennsylvania Human Relations Act, claims for compensatory damages are allowed, and, after pursuing an administrative complaint with the Pennsylvania Human Relations Commission (a process similar to that described above for the EEOC), claimants can sue in court for reinstatement in employment, compensatory and punitive damages, as well as their court costs and attorney fees.<sup>22</sup> In short, there are a variety of potentially very effective remedies available under both state and federal law for persons discriminated against because of their HIV status.

## ***Title II: State and Local Government Services***

Title II of the ADA requires that HIV-infected individuals not, on the basis of their disability, "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."<sup>23</sup> Public entities, as defined by the ADA, include state and local governments, and instrumentalities of states or local governments. Thus, as individuals covered by the ADA, HIV-infected persons are guaranteed nondiscriminatory access to public services and programs. Title II is enforced by filing a complaint with the federal agency having jurisdiction over the state or local government agency (or with the U.S. Department of Justice); suit can also be filed against the agency at fault for discrimination. Attorney's fees and costs are recoverable in such lawsuits.

## ***Title III: Public Accommodations***

Title III of the ADA offers HIV-infected individuals protection in a wide array of settings by prohibiting discrimination in public accommodations and services of private entities. This section of the ADA provides that individuals with disabilities shall not be discriminated against on the basis of disability in the "full and equal enjoyment of the

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# ***AIDS Law Project Case Docket Update Part I***

***A listing of currently pending or recently resolved litigation matters  
sponsored by the AIDS Law Project of Pennsylvania***

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*As noted below, AIDS Law Project "cooperating attorneys" represent our clients, along with AIDS Law Project staff, on a pro bono basis. If no cooperating attorney is listed for the case, it is being handled directly by AIDS Law Project staff without assistance of private, volunteer attorneys. As is common in litigation of cases involving HIV issues, a pseudonym (typically, "Doe") is used to protect the identity of the client with AIDS/HIV. These cases represent approximately half of the cases currently under AIDS Law Project sponsorship. The other cases will be summarized in the next **Pennsylvania AIDS Law Report** (Docket Part II).*

## ***Discrimination in Services***

### **1. Doe v. Price, Philadelphia Court of Common Pleas.**

**SUCCESSFUL AT TRIAL:** This case asserted claims against a funeral director for his failure to properly handle the November 1988 burial of a man whose death was caused by AIDS. After being informed that the cause of death was AIDS, the funeral director, without informing the family, refused to allow the man's body into the funeral home, with the result that the funeral service was conducted over an empty casket. The family was informed of this fact only when they inquired why the casket was not being removed for transportation to the cemetery. In November 1992, plaintiff obtained a default judgment against the funeral director for his failure to comply with the Court's discovery orders. At the conclusion of the trial on December 15, 1993, a **Philadelphia Common Pleas Court jury awarded the plaintiff \$75,000 in compensation for her emotional pain and suffering and \$100,000 in punitive damages.** Evidence presented to the jury showed that funeral services can be safely provided to persons who have died of AIDS.

Lead counsel for the plaintiff are AIDS Law Project cooperating attorneys **Andrew A. Chirls and Christopher R. Booth, Jr.**, of **Wolf, Block, Schorr & Solis-Cohen**, Philadelphia, Pennsylvania.

### **2. Doe v. Roe, Inc., Pennsylvania Human Relations Commission.**

**PENDING CASE:** This case involves a claim of HIV-related discrimination by Roe, Inc., a health maintenance organization (HMO) against a patient with HIV infection. The patient was denied medical services by his HMO-contracted primary care physician. The HMO, after being informed of the physician's discriminatory actions, referred the patient to another HMO physician. The patient's Pennsylvania Human Relations Commission (PHRC) complaint alleges that the HMO is liable on the basis that it aided and abetted the physician's unlawful discrimination. (A separate PHRC complaint against the physician was settled upon the physician's agreement not to discriminate against persons with AIDS/HIV and to undertake mandatory staff training on HIV workplace safety issues.) In a previous appeal of the case, the Pennsylvania Commonwealth Court rejected the HMO's argument that the PHRC lacks jurisdiction over Roe, Inc., as an HMO. The Court remanded the case to the PHRC for further investigation.

The complainant is represented by AIDS Law Project cooperating attorney **Jake Aryeh Marcus**, of Philadelphia, Pennsylvania.

### **3. Doe v. City of Philadelphia et al., Administrative complaint with U.S. Department of Justice, Civil Rights Division.**

**PENDING CASE.** The AIDS Law Project has filed an administrative complaint with the U.S. Department of Justice against the City of Philadelphia and its emergency medical service providers on the basis of violations of the Americans with Disabilities Act. The complainant in these cases was experiencing a number of symptoms of illness, ultimately resulting in loss of consciousness. Bystanders sought emergency assistance for him by calling 911. Upon arriving on the scene, an emergency medical technician asked the complainant if he was taking any medication. The complainant quietly, because he didn't want anyone else to know, stated he was taking AZT. The medical technician then announced to other medical team members, and within the hearing of bystanders, that because of the AZT treatment the individual must be "HIV positive." The emergency medical team determined that the complainant should be

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transported to a hospital, but they refused to assist the complainant get on a stretcher; assistance was provided by a bystander. The complainant was then transported to the hospital. This case, which is currently under investigation by the U.S. Department of Justice, is one of several complaints received by the AIDS Law Project concerning discrimination by emergency medical service employees in Philadelphia.

4. **Webber et al. v. A Philadelphia-Area Hospital**, Administrative complaint filed with U.S. Department of Health and Human Services, Office of Civil Rights. **SUCCESSFUL DISPOSITION.** This administrative complaint was filed by AIDS Law Project staff in 1991 on behalf of a hospital patient who alleged that because she was suspected of being HIV infected, she was isolated from other patients, and, after giving birth, her daughter was similarly isolated from other new-borns. After investigation, the Office of Civil Rights determined that the hospital had indeed discriminated against the patient and her daughter under the Rehabilitation Act of 1973 by placing infectious disease warning signs on the door to the patient's room. During the pendency of the complaint, the hospital revised its policies regarding that practice and thus no further remedial action was required.

### ***Discrimination in Employment***

5. **Herrero v. Computer Learning Center and Administrative Management Group**, Pennsylvania Human Relations Commission. **PENDING CASE.** This case involves claims of discrimination under the Pennsylvania Human Relations Act for an employer's termination of an HIV-infected employee from employment as a result of the employee's disclosure of HIV illness in the course of seeking reimbursement for medical services under the employer's health benefits program. Additionally, the former employee is challenging the employer's health benefits lifetime cap of \$15,000 on all HIV-related benefits. The former employee was terminated from employment after submitting claims for medical services pertaining to his HIV illness.
6. **Doe v. Laborers International Union of North America et al.**, Administrative complaint filed with Equal Employment Opportunity Commission. **PENDING CASE.** This case challenges a \$10,000 lifetime cap on all HIV-related medical expenses in the union health and welfare benefits fund that provides coverage for the complainant. The fund's normal

lifetime cap for benefits is \$100,000. The claim is based on Title I of the Americans with Disabilities Act (ADA). In June 1993, the Equal Employment Opportunity Commission (EEOC) issued an interim guidance, stating the EEOC's position that disability-based insurance benefit limitations violate the ADA. **On September 9, 1993, after investigating the case, the EEOC issued a determination that the fund's AIDS cap violates the ADA.** The fund claimed that it had adopted the cap out of fear that HIV-related claims would bankrupt the fund. According to the EEOC, however, this fear was "not based on any actuarial or other objective information" and, additionally, was a "subterfuge" in that the fund began considering the AIDS cap only two months after learning that another individual covered by the fund was HIV infected. The EEOC is now proceeding with its conciliation process.

The AIDS Law Project is co-counsel in this case along with AIDS Law Project cooperating attorneys Esther E. Berezofsky and Faithe Moore of Shein, Johnson & Berezofsky, Philadelphia, Pennsylvania.

7. **Doe v. Mercy Health Corporation of Southeastern Pennsylvania**, U.S. District Court, Eastern District of Pennsylvania; Administrative complaint filed with EEOC.

**PENDING CASES.** In these cases, an orthopedic surgeon with HIV challenges the revocation of his surgical privileges at Mercy Catholic Medical Center as a result of his disclosure to hospital staff of his HIV infection. The federal court complaint states that after Dr. Doe disclosed the fact of his HIV infection, Medical Center officials demanded his agreement to cease performing surgery at the Medical Center. The officials making this demand, who themselves lacked expertise in HIV transmission issues, failed to consult any local, state, or federal experts on HIV transmission in surgical procedures, nor did they convene an expert review panel as required by then-current standards to assess what, if any, risk of HIV transmission was posed by Dr. Doe. The Medical Center officials then obtained court approval under the Pennsylvania Confidentiality of HIV-Related Information Act to inform Dr. Doe's patients of his HIV infection. Registered letters were sent to 1,050 patients, stating the risk of transmission was "extremely remote." At the same time, the Medical Center held a press conference announcing its actions. Although Dr. Doe was not mentioned by name, adequate identifying information was provided so that members of the news media, coworkers, and patients

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were able to deduce Dr. Doe's identity. Dr. Doe was then suspended from practice at the Medical Center. Subsequently, Medical Center's Medical Board recommended that Dr. Doe be reinstated to full privileges without any restrictions. This recommendation was rejected by the Medical Center. Dr. Doe's federal court complaint alleges violation of the public accommodations provisions of Title III of the Americans with Disabilities Act (ADA), and the Rehabilitation Act; also, an administrative complaint alleging violation of the employment discrimination provisions of Title I of the ADA has been filed with the EEOC. Dr. Doe seeks full restoration of his surgical privileges as well as compensatory damages, attorney's fees, and costs. On May 4, 1993, after initial fact-finding, the EEOC issued a determination concluding that the Medical Center had violated the ADA. The EEOC in Washington D.C., is making a determination whether to file a complaint in federal court on behalf of Dr. Doe.

**John Adam DiPietro**, of Conshohocken, Pennsylvania, is lead counsel on this case; plaintiff is also represented by co-counsel **Scott Burris** of the **ACLU of Pennsylvania**; **Evan Wolfson** of **Lambda Legal Defense and Education Fund, Inc.**, New York City; **Robert Saunders** of **Skadden, Arps, Slate, Meagher & Flom**, Wilmington, DE; and the **AIDS Law Project**.

9. **Doe v. Goodnoe Farm Dairy Bar, Inc.**, Bucks County Court of Common Pleas.

**SETTLED.** This case involved a claim of unlawful employment discrimination against the Goodnoe Farm Dairy Bar for terminating the employment of a restaurant manager upon being informed that he had tested HIV positive. On the eve of trial, the case settled. The settlement agreement prohibits disclosure of its terms. Subsequent to settlement, however, our client was quoted in the *Philadelphia Inquirer* as stating that he was very pleased with the result: "I believed then and I believe now that discrimination against people with HIV and AIDS cannot go unchallenged. It is against the law to fire someone because they have HIV or AIDS; and it is wrong."

Plaintiff was represented by lead counsel **Robert O. Baldi**, of **Baldi and Cepparulo**, of New Hope, Pennsylvania, and **James O. Castegnara**, of **Saul, Ewing, Remick, & Saul**, Philadelphia, Pennsylvania, cooperating attorneys with the AIDS Law Project.

**Other Matters**

10. **Parents United for Better Schools, Inc. v. School District of Philadelphia**, Commonwealth Court of Pennsylvania.

**PENDING CASE.** The AIDS Law Project has joined with 38 other organizations and individuals as **amicus curiae** (friend of the court) on a brief filed by the American Civil Liberties Foundation of Pennsylvania opposing a court challenge to the Philadelphia School District's condom distribution program. The voluntary program, which provides free condoms in Philadelphia secondary schools to students who specifically request them, includes a parental opt-out provision. The program was challenged in court by some parents, but the trial court dismissed the parents' lawsuit on the basis that they lacked standing to challenge the School District policy, since they had the option, which they had exercised, to exclude their own children from participation. The parents have now appealed the dismissal. The friend of the court brief argues that under federal and state law there is no basis for the parents' claim that condoms cannot be provided to minors unless parental consent is provided, and that the condom distribution program does not in any way violate the rights of the parents to control the upbringing of their children.

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***In the Next Issue . . .***

- **Documenting Personal Decisionmaking**  
(Advance Directives, Powers of Attorney, etc.)
- **Case Docket Update, Part II**
- **More Survey Results**