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TEST #1

1 HOUR CREDIT

ELIMINATION OF BIAS

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AIDS/HIV in the Workplace

For lawyers and any other employers, it must be treated like any other on-the-job disability

By PATRICK J. CAIN

If you're a seasoned employment lawyer, or a veteran human resources professional, dealing with AIDS or HIV in the workplace probably is by now familiar territory. However, for the general practitioner or the small business owner, dealing with the job applicant or employee who has AIDS or who is HIV-positive can be both frightening and daunting, particularly when the issue comes up for the first time. This article touches on some general rules which should at least set some parameters around the problem and which can help you and your client avoid serious error.

As a starting point for private employers, two of the most important statutes are the federal Americans With Disabilities Act (ADA) and California's Fair Employment and Housing Act (FEHA). The ADA applies to employers with 15 or more employees. 42 U.S.C. §12111(5)(A).

The FEHA applies to employers with five or more employees. California Government Code §12926(d). Not all categories of employers are subject to the ADA or to the FEHA. For example, the federal government (except for Congress), a federal corporation, and true private member clubs all are exempt from the ADA's definition of employer. 42 U.S.C. §12111(5)(B). The FEHA does not apply to religious corporations or to corporations not organized for public profit. California Government Code §12926(d)(1). The remainder of this article assumes an employer which is subject to both the FEHA and the ADA.

The ADA protects "qualified individuals with a disability." 42 U.S.C. §12112(a). This means someone who, although they have a disability, can (1) perform the essential functions of the job which the individual holds or seeks, and (2) can do so with or without "reasonable accommodation." What constitutes a "reasonable accommodation" will depend on the circumstances of the particular workplace. Generally, however, making a reasonable accommodation can require the employer to adjust working hours, work schedules, or even job assignments, and to make changes in the physical environment. 42 U.S.C. §12111(9). However, an employer is not required to make accommodations which would impose an undue hardship on the employer's operations. 42 U.S.C. §12112(b)(5)(A).

Discrimination

The FEHA prohibits discrimination because of, among other things, physical disability. California Government Code §12940(a). As with the ADA, the FEHA does not prohibit an

employer from refusing to hire an applicant or from discharging an employee when that person cannot perform the essential functions of the job even with reasonable accommodation. California Government Code §12940(a)(1).

The ADA's definition of physical disability is broad enough to include AIDS/HIV, which has been held to constitute a disability under the Rehabilitation Act of 1973, an anti-discrimination statute directed at government contractors and other entities receiving federal funds. 42 U.S.C. §12102(d) (ADA definition of disability); *Chalk v. U.S. Dist. Court Central Dist. of California*, 840 F.2d 701 (9th Cir. 1988) (AIDS as disability under the Rehabilitation Act of 1973).

The FEHA specifically includes in its definition of disability any disease which affects the body's immunological system. California Government Code §12926(k)(1)(A). Moreover, under the FEHA, AIDS/HIV is a disability even in early stages when the disease does not impair the individual's ability to do his job. *Raytheon v. Fair Employment & Housing Commission*, 212 Cal.App.3d 1242, 1248-49, 261 Cal.Rptr. 197 (1989).

(However, both the ADA and the FEHA specifically exclude homosexuality from the definition of "disability." 42 U.S.C. §12211(a), California Government Code §12926(i) and (k). On the other hand, California law specifically prohibits discrimination based on a person's sexual orientation. California Labor Code §1102.1. There presently is no federal law which expressly prohibits private employers from discriminating based on sexual orientation.)

Because having AIDS and being HIV-positive are disabilities, job applicants cannot be "screened" by requiring medical examinations. The ADA prohibits pre-employment medical examinations or other questioning designed to determine the nature or extent of a disability. 42 U.S.C. §12112(d)(2)(A). Stated simply, the employer may not require -- either through testing or by questioning -- that job applicants disclose their AIDS or HIV status. The employer may do nothing more than inquire about the applicant's ability "to perform job-related functions." 42 U.S.C. §12112(d)(2)(B).

Medical exams

A medical examination may be required after the employment offer is extended, but then only if everyone applying for the particular position is tested. Moreover, the test results may be used only to determine the person's ability to perform the particular job, and the job offer cannot be withdrawn if the employee is able to perform the job with or without reasonable accommodation. Finally, the test results must be maintained in strict confidence, which includes not making them part of the regular personnel folder, and permitting only limited access. 42 U.S.C. §12112(d)(3). In all events, under California law, AIDS test results cannot be used to determine suitability for employment. California Health & Safety Code §120980(f).

Should the employer become aware that an employee has AIDS or is HIV-positive (e.g., from an insurance claim form), that information must be kept confidential. California law imposes liability and statutory penalties for unauthorized disclosure of AIDS test results. California Health & Safety Code §120980. Similarly, one federal court has found that there is a constitutional right to privacy as to one's medical information, which extends to the person's HIV status. *Doe v. City of New York*, 15 F.3d 264 (2d Cir. 1994).

Both the FEHA and the ADA provide that it is not discriminatory to refuse to hire an applicant, or to discharge an employee, due to a disability which would or does prevent that person from performing the essential functions of the particular job without endangering that person's or another's health or safety. 42 U.S.C. §12113(a) and (b), California Government Code §12940(a)(1). However, this exception is applied narrowly. *Jimeno v. Mobil Oil Corp.*, 66 F.3d

1514, 1534 (9th Cir. 1995) (defense that employee's disability posed a danger to himself or others has a "narrow scope," and to be successful the employer must "offer more than conclusions").

Moreover, the risk of harm must be "imminent" and must involve a "substantial degree of risk." *Id.* It is not enough that the harm is "merely potential." *Id.*

Danger to self

The "danger to self/others" exception is narrowly applied in AIDS/HIV cases as well. Often an AIDS/HIV test requirement is defended on the ground of protecting the safety of others. However, many courts, after considering the available medical literature, conclude that when the risk of transmission is highly unlikely, the mere fact of AIDS/HIV itself is not enough to justify testing. Thus, in *Glover v. Eastern Nebraska Community Office of Retardation*, 867 F.2d 461 (8th Cir.), cert. denied, 493 U.S. 932, 110 S.Ct. 916 (1989), the appellate court concluded that AIDS testing of public employees working with the mentally retarded violated the constitutional right to privacy because the risk of transmission was so low.

Similarly, in *Doe v. District of Columbia*, 796 F. Supp. 559 (D.D.C. 1992) the court concluded that the D.C. fire department had engaged in unlawful discrimination when it discharged the plaintiff based solely on his HIV-positive status. The court, after considering expert testimony on AIDS transmission, along with the stated job requirements, concluded that there was no credible evidence that being HIV-positive made plaintiff unable to perform his job.

In *Chalk v. U.S. Dist. Court Cent. Dist. California*, 840 F.2d 701, (9th Cir. 1988), a school district sought to bar a teacher from working with children based on his having AIDS. The teacher sued for violation of the Rehabilitation Act of 1973 (an anti-discrimination statute covering government contractors and others receiving federal funds).

The Ninth Circuit, noting that the teacher's doctor had cleared him to return to work, and after an extensive review of the then-current medical literature, concluded that the teacher had demonstrated a likelihood of success on his claim that the district's actions were discriminatory, and so ordered the issuance of a preliminary injunction permitting the teacher to return to teaching pending the outcome of his discrimination claim.

Along similar lines, it should be noted that while the ADA does permit employers to refuse to assign to food handling jobs an individual who suffers from an infection or communicable disease which can be transferred by food handling, that exception does not apply to AIDS/HIV cases. Under the statute, the exception applies only to those diseases and infections which the Secretary of Health & Human Services has identified as communicable by food handling. 42 U.S.C. §12113(d). AIDS/HIV is not included in that list.

However, the Fifth Circuit, in *Bradley v. University of Texas M.D. Anderson Cancer Center*, 3 F.3d 92 (5th Cir. 1993), cert. denied, 510 U.S. 1119, 114 S.Ct. 1071, 127 L.Ed.2d 389 (1994) concluded that the HIV-positive status of a surgical technologist rendered him not qualified to perform his job duties, and so the hospital did not discriminate unlawfully when it assigned him to other duties. The court concluded that while the medical evidence suggested that the risk of transmission was small, the plaintiff's occupation as a surgical technologist did create the opportunity for transmission, the consequences of which were too catastrophic for the court to overlook.

Similarly, in *Leckelt v. Board of Comm'rs of Hospital District No. 1*, 909 F.2d 820 (5th Cir. 1990), the Fifth Circuit concluded that the hospital had not discriminated unlawfully when it fired a nurse-practitioner who refused to provide his HIV test results to the hospital. The circumstances were that the hospital required such tests of all employees who had been exposed

to infectious diseases, the plaintiff in the past had been exposed to various infectious diseases, and his partner -- who recently had been a patient in the hospital -- had died from AIDS-related complications.

Refusal to hire

Clearly, there are situations where it will be permissible to refuse to hire an applicant, or to discharge or reassign a current employee, based on that person's AIDS or HIV status. However, the current judicial trend is that the exception is a narrow one, based largely on the growing perceptions concerning the limited modes of transmission of the disease.

In short, the person with AIDS or who is HIV positive must be treated -- at all stages of the employment process -- like any other person with a disability. There are no "special" exceptions to the disability discrimination laws either for those suffering from AIDS/HIV or for those who fear it. Treating AIDS/HIV no differently from any other workplace disability will help employers avoid needless claims.

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Test — Elimination of Bias

1 Hour MCLE Credit

This test will earn 1 hour of MCLE credit in Elimination of Bias.

1. True/False. Generally speaking, the ADA and FEHA apply to private employers with 15 or more employees.
2. True/False. The ADA and the FEHA prohibit an employer from declining any applicant with a disability.
3. True/False. There is no limit on what an employer is required to do to accommodate a person with disabilities.
4. True/False. AIDS and HIV-positive status are recognized disabilities under the ADA and FEHA.
5. True/False. Unless and until it affects the individual's ability to do his job, AIDS/HIV is not considered a disability under the FEHA.
6. True/False. Because of the perception that homosexuals are more likely to have AIDS or be HIV-positive, the ADA and the FEHA prohibit discrimination against homosexuals.
7. True/False. Under the ADA, an employer may be required to not only alter the workplace's physical environment as part of reasonably accommodating a person with disabilities, the employer also may be required to adjust work schedules, work hours, or even job assignments.
8. True/False. In order to accommodate the concerns of current employees, an employer may require job applicants to submit to blood tests to determine whether they have AIDS or are HIV positive, so long as this is required of all job applicants.
9. True/False. An employer who knows or suspects that a job applicant has AIDS or is HIV-positive may not ask about that applicant's ability to perform the essential functions required in the job for which the person is applying, because that might reveal the nature or extent of the disability.
10. True/False. Even if a job applicant volunteers that he or she has AIDS or is HIV-positive, the employer still may not inquire about the extent of the disability, beyond asking about the applicant's ability to perform job-related functions.
11. True/False. Once an employment offer is extended, an employer may require that an AIDS/HIV test be taken by a prospective employee who the employer reasonably and in good faith believes has AIDS or is HIV-positive.

12. True/False. In response to the inquiry of a concerned co-worker, an employer may disclose that an employee has AIDS or is HIV-positive, so long as the co-worker agrees to keep that information strictly confidential.
13. True/False. An employer may refuse to hire, or may discharge, someone whose disability prevents them from performing the essential functions of their job without endangering their health and safety, or the health and safety of others.
14. True/False. Because AIDS/HIV is such a deadly disease, it always is appropriate to limit the job duties of an infected employee or applicant so as to minimize their contact with co-workers and customers.
15. True/False. Because AIDS/HIV is such a deadly disease, it always is appropriate to prohibit those with AIDS/HIV from performing food-handling tasks.
16. True/False. Federal law prohibits private employers from discriminating on the basis of sexual orientation.
17. True/False. Because both the ADA and the FEHA specifically exclude homosexuality from the definition of "disability," California employers face no statutory liability for discriminating on the basis of sexual orientation.
18. True/False. An employer may discharge or reassign an employee known to have AIDS or be HIV-positive, but who is competently and safely performing his job, so long as the employer reasonably and in good faith believes that at some point in the future the employee's AIDS/ HIV status is likely to present a substantial risk of harm to himself or others in the performance of his job.
19. True/False. As part of the permissible inquiry into whether a job applicant is capable of performing the job's essential functions, an employer may ask the applicant how many days of work they missed last year, or whether they will need time off for medical reasons in the new job.
20. True/False. Assume that two people, one of whom is known to have AIDS, share a desk in the research department of an investment firm. The department manager lawfully may reassign the employee who has AIDS simply in response to the good faith -- albeit unreasonable -- concerns of the other employee about the risk of transmission of AIDS/HIV.

Certification

- This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour, of which 1 hour will apply to elimination of bias.
- The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

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