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1988 MISSOURI AIDS AND HIV INFECTION LAWS: THE EMPLOYER'S PERSPECTIVE

David L. Wing*

Reaction of employers to the 1988 Missouri AIDS and HIV infection laws¹ has varied widely. In addressing thousands of Missouri employer representatives over the last three years at presentations concerning AIDS-related employment issues, I have had substantial opportunities to hear the concerns of both health care and non-health care employers. It would be inappropriate to claim to speak for all employers on AIDS or any other issue. However, my contacts with employers through seminars, my representation and work with individual employers and employer groups such as the Associated Industries of Missouri, the Missouri Hospital Association, and the Kansas City Area Hospital Association, and my participation on the AIDS Advisory Group to the Missouri Department of Health permit me to identify general themes that are emerging as employers react to the recent legislative developments. This article notes the legislative provisions of most concern to employers and sets forth some of the themes of employer reactions.

The most important provision for Missouri employers with six or more employees is the nondiscrimination provision set forth in section 6. Section 6 expressly brings HIV infection, AIDS, and AIDS-related complex ("ARC") within the protection of the Missouri Human Rights Act.² The Human Rights Act prohibits employers from making employment decisions based upon an individual's race, color, religion, national origin, sex, ancestry, age or handicap.³ "Handicap" is defined for employment purposes as "a physical or mental impairment which substantially limits one or more of a person's major

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1. Act approved June 1, 1988, 1988 Mo. Legis. Serv. 285 (Vernon) (S. COMM. SUBST. H. COMM. SUBST. H.B. No. 1151 & 1044) [hereinafter H.B. Nos. 1151 & 1044].

2. MO. REV. STAT. § 213 (1986).

3. *Id.* § 213.055.1(1)(a) (1986).

life activities, or a condition perceived as such, which with or without reasonable accommodation does not interfere with performing the job"⁴

In effect, the new AIDS and HIV legislation clarifies that "handicap" will include individuals with HIV infection, AIDS, and ARC. The same section further provides that an individual with HIV infection, AIDS, or ARC will *not* have protection under the Human Rights Act if the individual has a currently contagious disease or infection and, by reason of such disease or infection, the individual "would constitute a direct threat to the health or safety of other individuals or . . . is unable to perform the duties of their [sic] employment."⁵

Section 6 appears to codify the current practice of the Missouri Human Rights Commission as well as its interpretation of the meaning of handicap with respect to AIDS, ARC, and HIV infection. Because an individual can have HIV infection without any symptoms, a question had existed as to whether such an infection would be a physical impairment and thus protected by the Human Rights Act. The new legislation resolves this question.

Additionally, the exclusion of Human Rights Act protection for individuals with HIV infection, AIDS, or ARC who constitute a direct health or safety threat or who are unable to perform the duties of their employment is an acknowledgement of the standards that have been recognized in the development of federal handicap discrimination law. In interpreting the federal Rehabilitation Act of 1973,⁶ the United States Supreme Court in *School Board of Nassau County v. Arline*⁷ held that a person with a contagious disease or infection can fall within the definition of handicap but not be qualified for employment because of a direct health or safety threat or an inability to perform the duties of employment.⁸ After the *Arline* decision, Congress considered and confirmed that the Court correctly interpreted its intent as to the scope of "handicap" in the Rehabilitation Act.⁹ In enacting the 1988 Civil Rights Restoration Act, Congress specifically excluded from protection individuals with currently contagious disease or infection who pose a direct health and safety threat or who are unable to perform the duties of the job. Indeed, the language setting forth these restrictions in the Missouri legislation is virtually identical to the language chosen by Congress in the Civil Rights Restoration Act.

The effect of section 6 will be that in any dispute over the employment of an individual with HIV infection, AIDS, or ARC, the critical issues probably will be upon whether there is a direct threat to the health or safety of other individuals and whether the infected individual is able to perform the duties of

4. *Id.* § 213.010(8) (1986).

5. H.B. No. 1151 & 1044, § 6.

6. 29 U.S.C. §§ 701-796(i) (1982).

7. 480 U.S. 273 (1987).

8. *Id.* at 280-81.

9. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 9, 102 Stat. 28,

employment. Because medical evidence strongly and repeatedly confirms that HIV is not transmitted by casual contact in the workplace, the primary emphasis in any employment dispute probably will be upon one's ability to do the job.

Many Missouri employers were surprised at the speed with which the Missouri legislature moved to protect employees with AIDS and also at the scope of the protection afforded. As noted above, this scope goes far beyond individuals with the symptoms of AIDS or ARC and includes individuals without symptoms who have the HIV infection. Missouri is one of only a very few states to have enacted new statutes specifically to provide such protection.

Many employers were well aware before the HIV infection laws were enacted that the Missouri Human Rights Act could have been interpreted to cover employees or applicants with AIDS or HIV infection. We have been advising employers of this possibility for several years.¹⁰ Moreover, employers who receive federal assistance or who are federal contractors are subject to the federal Rehabilitation Act of 1973,¹¹ the federal handicap discrimination law. Since the United States Supreme Court's *Arline* decision in early 1987, it has been clear that these employers could not discriminate against persons with AIDS or ARC and very possibly could not discriminate against a person with only HIV infection.

Notwithstanding the express exclusion from protection for anyone who poses a direct health threat or who is unable to perform the duties of employment, section 6 imposes heavy practical burdens on employers. For instance, although an employer need not continue to employ a person with AIDS or HIV infection who is unable to perform his or her duties, in terminating such employment the employer will run a substantial risk of administrative charges and litigation any time the evidence of inability to perform is less than completely beyond dispute. The more subjective the employer's evaluation of the employee's performance, the greater the risk of administrative proceedings, litigation and liability. Unfortunately, virtually all performance evaluations are to some extent subjective.

The problem for employers is exacerbated by the nature of the progression of AIDS. An employee with AIDS or ARC can have any of a large number of secondary infections. As these infections are treated and resolved, the individual may slip repeatedly in and out of the category of able to perform the duties of employment. At this point, courts generally appear to require employers to focus on the employee's present abilities and not to speculate as to disabilities that may occur in the future.

Another problem for employers lies in the subjectivity of evaluating what reasonable accommodation is required by state law for handicapped

10. *E.g.*, Wing, *AIDS in the Workplace: The Emerging Legal Issues*, 42 J. Mo. B. 163, 165-67, 170 (1986) (AIDS may be a handicap under state law).

11. 29 U.S.C. §§ 793-794 (1982), amended by 29 U.S.C. §§ 793-794 (Supp. IV

employees. The Missouri Human Rights Act includes the reasonable accommodation requirement in the definition of handicap.¹² The Commission's regulations note only that accommodations include, but are not limited to, making the facilities used by employees readily accessible, restructuring jobs, creating part-time or modified work schedules, acquiring or modifying of equipment or devices, providing of readers or interpreters, or other similar actions.¹³ In determining the reasonableness of the accommodation, the Commission will consider "[t]he nature and cost of the accommodation . . .", the size and nature of the business, the "good faith efforts previously made to accommodate similar disabilities . . .", and the ownership interest in the subject of the proposed accommodation . . ."¹⁴

As can readily be seen, the determination is based on all the facts and circumstances. It is virtually impossible for an employer to be assured completely that the Commission and the courts will agree that the duty of reasonable accommodation has been met. Accordingly, an employer who wants to avoid charges and litigation will end up erring on the side of providing more in the way of accommodation than the reasonableness standard contemplates. In the view of many employers, the practical effect of an employer's desire to avoid costly handicap discrimination charges and litigation and to avoid liability is workplace inefficiency.

Another factor that pressures employers to accept workplace inefficiencies rather than run the risk of handicap discrimination litigation is the prospect of a jury trial with an award of punitive damages. The possibility of a jury trial and of punitive damages was not addressed in the 1988 AIDS and HIV infection laws but rather was introduced by the legislature as part of the Missouri Human Rights Act in 1986.¹⁵ Punitive damages are specified as an available remedy; the courts have not yet determined whether a jury trial is available. The availability of punitive damages and possibility of a jury trial in the plaintiff employee's arsenal of weapons causes some employers to settle even strong cases. Although virtually all employers in Missouri have adopted the principles of equal employment opportunity, a great many of these employers become angry and bitter that no matter how carefully they make an employment decision, the dispute may be resolved for an employee in a protected category by jurors who are much more likely to identify with the concerns of an employee than with the concerns of an employer. The anger and bitterness are increased further because the jury may have an opportunity to give the plaintiff employee a potential windfall of a portion or, possibly, all of the employer's assets as punitive damages.

At this point, no one can tell how sympathetic jurors are likely to be toward a plaintiff whose handicap is AIDS, ARC, or HIV infection. Whether

12. MO. REV. STAT. § 213.010(8) (1986).

13. MO. CODE REGS. tit. 8, § 60-3.060(1)(G)(2) (1986).

14. *Id.* § 60-3.060(1)(G)(3) (1986).

15. MO. REV. STAT. § 213.111 (1986).

jurors will be likely to identify with the plaintiff employee out of a concern that they could possibly be afflicted with a similar handicap, whether they will identify with the concern of the employer in having employees who are able to do their work, or whether they will identify with the concerns of co-employees who are fearful of working with an employee who has AIDS, ARC or HIV infection may depend, at least in part, on how the plaintiff employee came to have the infection in the first place. In any event, the mere possibility of a jury trial and of punitive damages will cause many employers to accept workplace inefficiencies rather than insist that their employees be able to perform the duties of employment as the language of the Missouri Human Rights Act expressly states.

The possibility of punitive damages and perhaps a jury trial is a dramatic departure for the Missouri Human Rights Act and for plaintiffs and defendants under that Act. The comparable federal acts such as Title VII of the Civil Rights Act of 1964,¹⁶ the Age Discrimination in Employment Act of 1967,¹⁷ and the Rehabilitation Act of 1973¹⁸ do not permit similar punitive damages. Only the Age Act permits a jury trial. Additionally, only a relatively few states permit jury trials and punitive damages in employment discrimination litigation. Thus, Missouri appears to have stepped out in front on this issue. Such leadership inures to the benefit of employees who have protected status and to the detriment of employers and the efficiency of the workplace in general.

Apart from discrimination concerns, some employers are upset about being burdened with the responsibility and expense of educating their employees about AIDS, ARC, and HIV. Although the 1988 Missouri AIDS and HIV infection laws do not expressly require such education, many employers feel they have little practical alternative. If employees with AIDS, ARC, or HIV infection have a right to continued employment (assuming that they meet the requirements of the laws), then the employees in the work force who do not have AIDS, ARC, or HIV infection will be concerned about the risk of contagion of such diseases and infections in the workplace. Because the employer has a duty to provide a reasonably safe workplace and because an employer cannot tolerate its entire workforce walking out, the employer reasonably can conclude that it has little alternative but to spend time and money educating the general workforce. The workforce must be aware that there is generally no risk of contagion by casual workplace contact.

In addition to discrimination restrictions on employers, section 8 of the 1988 Missouri AIDS and HIV laws indirectly may affect employers in that it restricts the conduct of insurers, health services corporations, and health maintenance organizations with respect to individuals with HIV infection.¹⁹ The

16. 42 U.S.C. § 2000e-5(g) (1982).

17. 29 U.S.C. §§ 621-634 (1982).

18. 29 U.S.C. § 796 (1982).

19. H.B. No. 1151 & 1044, at 289.

AIDS law permits these insurance organizations to conduct HIV testing to assess one's fitness for insurance coverage and, by implication, to refuse, exclude or limit coverage. However, they are not permitted to deny or alter coverage to a previously covered individual under any individual or group insurance policy or health maintenance organization contract covering medical expenses because of a diagnosis that the individual has HIV infection or an HIV-related condition.

It is unclear whether participation in an employer's group insurance policy could be conditioned upon a negative test for the HIV antibodies. Even if permitted by the 1988 Missouri AIDS and HIV infection laws and other insurance statutes and regulations, it is possible that an employer could be found to have committed an unlawful employment practice under the Human Rights Act by conditioning participation in group insurance on a negative HIV antibody test. In pertinent part, the Human Rights Act prohibits employers from limiting, segregating, or classifying an employee or employment applicant in any way which would "adversely affect his status as an employee" because of a handicap.²⁰ As noted above, the 1988 Missouri AIDS and HIV laws extend this coverage to persons with HIV infection, AIDS, or ARC. Employers contemplating such restrictions, limitations, or exclusions in health insurance policies for HIV-related conditions must proceed carefully.

Notwithstanding the nondiscrimination and insurance provisions of the new laws, some employers will explore ways to keep health care costs down. No law requires employers to provide health insurance in the first place. Thus, some employers may choose the alternative of eliminating health care coverage altogether. However, because the availability of group health care coverage is valuable to many employees, elimination is not a favored option for employers at this time.

Some employers are considering the more realistic option of a cap or ceiling on yearly or lifetime medical expenses for catastrophic illnesses. General limits adopted in advance of any individual being diagnosed with HIV infection arguably would not support a discrimination claim for a person with AIDS or HIV infection. Unfortunately, placing limits on the catastrophic coverage for medical expense insurance curtails a benefit for employees precisely when the employees will need it the most.

The 1988 Missouri AIDS and HIV infection laws also impact on certain employers because of the nature of the work they perform. For instance, health care employers may be affected because of (1) the duty to provide consultations to individuals whose blood is being sampled for HIV antibody tests,²¹ (2) the duty to report confirmed HIV infection in an individual tested,²² (3) good faith immunity for certain disclosures to the Missouri Department of Health, health care workers involved in direct care of the HIV

20. MO. REV. STAT. § 213.055.1(1)(b) (1986).

21. H.B. No. 1151 & 1044, at 286.

22. *Id.*

positive individual, the individual's spouse, or the subject of the test result,²³ (4) the HIV infected person's duty to disclose this information to health care professionals prior to treatment,²⁴ (5) good faith immunity for reports to the Missouri Department of Health and other specific actions taken with respect to persons reasonably believed to be HIV infected,²⁵ and (6) licensed health care and nursing facilities' duty to contact the employer of an emergency medical person who has brought in a patient with a reportable infectious or contagious disease, or mortuary personnel involved in the removal or care of such a patient who has died.²⁶

The reaction of health care employers to these requirements has corresponded primarily to the extent and clarity of the duty that is imposed. For instance, the provision requiring notice to employers of emergency medical personnel is unclear and appears to presume that emergency medical personnel have been exposed to a bloodborne contagious infection such as HIV infection without regard to whether they had contact with the individual's blood or other body fluids that could potentially transmit the virus.

Because the 1988 Missouri AIDS and HIV infection laws will expire by their own terms on December 31, 1989,²⁷ the legislature very probably will be addressing HIV infection issues related to employment in the near future. Employers generally hope that their burdens under any new legislation will be decreased. They hope the legislature will recognize that the risks of administrative charges and handicap discrimination lawsuits, with their potential for punitive damages, cause employers to accept serious inefficiencies in the work force. Of course, these inefficiencies adversely impact on the ability of Missouri employers to compete. Finally, if burdens must be imposed on employers, they hope the burdens will be clearly defined.

23. *Id.* § 3.2(1).

24. *Id.* § 3.5.

25. *Id.* § 3.7.

26. *Id.* § 3.8.

27. *Id.* § 16.

