



AIDS Law

by Arthur S. Leonard

Encyclopedia Copyright © 2015, glbtq, Inc.
Entry Copyright © 2004, glbtq, inc.
Reprinted from <http://www.glbtq.com>

AIDS law comprises the legal principles contained in the body of statutes, regulations, administrative rulings, and judicial decisions that emerged in response to legal issues presented by the epidemic of acquired immunodeficiency syndrome, which was first identified and named by federal public health officials in July 1981.

Disability Law

The earliest legal response to the epidemic took the form of judicial decisions, beginning in the fall of 1983, when a New York State court ruled that a cooperative apartment building violated a state law banning disability discrimination when it refused to renew the office lease of Joseph Sonnabend, a prominent AIDS doctor.

Subsequently, courts in New York, California, Florida, Massachusetts, New Jersey, West Virginia, and other states rendered important early decisions applying disability discrimination laws to assist persons infected with HIV (Human Immunodeficiency Virus), the virus believed to cause AIDS, in cases involving denial of services by hospitals and funeral homes, employment discrimination, attempted exclusion of children with AIDS from public schools, refusal to rent residential housing, and refusal of access to drug treatment programs.

In 1985, the city of Los Angeles, California, became the first jurisdiction to pass a law specifically outlawing discrimination on the basis of HIV infection, but this did not spark a trend of AIDS-specific civil rights laws. Instead, lawyers working in this area concentrated their efforts, usually successfully, on getting courts to find protection for people with HIV under existing laws banning disability discrimination. In 1984, Lambda Legal Defense & Education Fund published an "AIDS Legal Guide" that proved influential in persuading government officials and judges that disability discrimination laws applied to protect people infected with HIV.

In 1987, the United States Supreme Court ruled in *School Board of Nassau County, Florida v. Arline*, 480 U. S. 273, that physical impairments caused by infectious agents could be disabilities within the meaning of federal civil rights law, giving its imprimatur to the early discrimination law rulings, even though the case the Court was deciding did not directly involve AIDS.

Congress enacted the Americans With Disabilities Act (ADA) in 1990, incorporating the reasoning of the Arline decision, but providing that an individual with a disability would not be protected from discrimination if her presence in a workplace or other contested setting presented a "direct threat" to others.

In an important test of this law, *Bragdon v. Abbott*, 524 U.S. 624 (1998), the Supreme Court ruled in 1998 that a dentist may have violated the law by refusing to provide routine treatment in his office to a woman infected with HIV. However, subsequent rulings in lower federal courts have cast doubt on how helpful the

ADA will ultimately prove in many AIDS discrimination cases, in part because new treatments have significantly reduced the disabling effects of HIV infection for many individuals.

The protection of civil rights laws for people affected by AIDS was of particular significance to gay men, who are widely perceived as the most significant "risk group" for AIDS and who encountered new forms of discrimination during the 1980s fueled by fear of the deadly epidemic. Some early court decisions found that defendants had violated disability laws when their motivation for discriminating against gay men was fear of exposure to AIDS.

Lesbian and Gay Public Interest Law Firms

The lesbian and gay public interest law firms all took an immediate interest in guiding the development of AIDS law, as gay men infected by AIDS turned to them for legal assistance. Lambda Legal Defense & Education Fund in New York, Gay and Lesbian Advocates and Defenders in Boston, and National Gay Rights Advocates in San Francisco all established AIDS law projects, and the American Civil Liberties Union established an AIDS & Civil Liberties Project under the auspices of its Lesbian and Gay Rights Project.

Although some of the clients of these programs were not gay, the development of "good law" in the area of AIDS was seen as crucial to protecting the civil rights of gay people. A side effect of this process was that openly gay and lesbian attorneys working on AIDS-related issues received extensive exposure in the press as "authorities," helping to advance public respect for gay people.

Transmission Fears

Discrimination law was but one of the areas touched by AIDS. Domestic relations courts coping with child custody and visitation issues had to evaluate the impact of a parent being infected with HIV, and made important rulings that usually were careful to take a realistic view of the risks involved.

Both criminal and civil courts had to confront questions of liability for transmission, either through blood transfusions or sexual activity, and here the results were not always so rational. In some cases, courts actually sentenced HIV-infected individuals to lengthy prison terms for spitting at law enforcement officers in tense situations, under theories of "attempted murder" that seemed to have little anchor in reality.

Fear of potential liability for transmitting HIV through transfusions eventually led to substantial changes in the regulation of the blood industry, although resistance to change by industry leaders undoubtedly contributed to the spate of transfusion AIDS cases during the mid-1980s. Lawsuits stemming from fear of contracting AIDS generated a significant new body of judicial precedents in the area of "emotional distress" claims, and prompted some courts to adopt unprecedented concepts of legal causation.

Several states amended their criminal codes to provide severe penalties for the knowing transmission of HIV, although there was no proof that such laws would have any significant effect on the spread of the virus, and the number of actual prosecutions was small, tending to focus almost exclusively on heterosexual men accused of infecting large numbers of women.

Public Health Law

In the realm of public health law, the need to respond to public concerns about the spread of HIV helped to stimulate a much-needed modernization of public health laws and regulations at all levels of government, with newly-enacted confidentiality protection for medical information and much more careful specification of the limited circumstances where isolation or quarantine could be imposed on public health grounds.

An overhaul of the "medical exclusion" provisions of U.S. immigration law in 1990 provided hope for a rational policy for dealing with HIV-infected immigrants, refugees, and asylum-seekers, but the results

were mixed, as HIV infection was deemed by the Secretary of Health and Human Services to be a medical condition of public health consequence, mainly due to the expense of treatment, so infected persons were barred from permanent immigration to the U.S.

However, grounds were contained in the statute for compassionate treatment of infected refugees and asylum applicants. (The AIDS developments were occurring at a time of significant ferment in immigration law, which included a repeal of the traditional exclusion of "sexual deviants" that had been used to detect, exclude, and deport gay people in some instances.)

Insurance and Public Benefits Law

Administrators and courts had to determine how AIDS, an unanticipated new phenomenon, would be dealt with under insurance and public benefits laws. Pressures stemming from the AIDS epidemic led to new principles governing insurance underwriting expressed in rulings by state insurance commissioners, and led courts to push the boundaries of health insurance policy coverage for "experimental" treatments.

Testing for HIV as part of the process of selling insurance was eventually prohibited in most states for sales of health insurance policies, although it was generally permitted for sales of life insurance policies. The AIDS epidemic also helped to stimulate a new system of "viatical" transactions, under which HIV-infected holders of life insurance policies sold the right to collect their benefits to "viaticators" in exchange for the discounted face value of their policies, in order to be able to use the money thus obtained for expenses generated by their illness. This practice died out, however, when new medications radically extended the life expectancies of many HIV-infected people.

A combination of legally-informed lobbying and public pressure by attorneys and AIDS activists led to significant changes in the legal regime governing the testing and development of new pharmaceuticals, making new treatments available much more quickly than had been the norm prior to the late 1980s.

Academic Law

The variety of challenging legal issues resulting from the epidemic led many law schools to establish special courses on AIDS law by the end of the 1980s, when the first law school text on the subject was published. (A third edition of that text was published in 2002, documenting the rapid development of the law over the space of little more than a decade.)

Although some of the academic interest in AIDS law had faded by the beginning of the twenty-first century, as many of the interesting legal questions had been answered, the law journals and the courts continued to cope with new applications of the legal principles of AIDS law to the changing face of the epidemic.

In addition, hostility by conservative federal judges to the Americans With Disabilities Act resulted in rulings that appeared to weaken the protection for people with HIV that had been intended by Congress when the Act was passed. Thus, the future direction of AIDS law was not secure in the early years of the new century.

Bibliography

Adams, William E., Jr., Mary Anne Bobinski, Michael L. Closen, Robert M. Jarvis, and Arthur S. Leonard. *AIDS Cases and Materials*. 3rd ed. Durham, N. C.: Carolina Academic Press, 2002.

Gostin, Lawrence, and Lane Porter, eds. *International Law & AIDS: International Response Current Issues, and Future Directions*. Chicago: American Bar Association, 1992.

Jarvis, Robert M., Michael L. Closen, Donald H.J. Hermann, and Arthur S. Leonard. *AIDS Law in a Nutshell*.

2nd. ed. St. Paul, Minn.: West Publishing Co., 1996.

About the Author

Arthur S. Leonard, Professor at New York Law School, graduated from Cornell University and Harvard Law. He started New York's gay lawyers association and edits its newsletter, *Lesbian/Gay Law Notes*. Leonard has been a director or trustee of Lambda Legal Defense, Center for Lesbian and Gay Studies at the City University of New York, Society of American Law Teachers, Congregation Beth Simchat Torah (the world's largest lesbian and gay synagogue), and Jewish Board of Family and Children's Services. He writes for *Gay City News*, a weekly newspaper, and co-edited the first law school casebook on AIDS.