Law

Legal Perspectives: HIV, AIDS and the Law

Ed. Note: The following article is the last in a three-part series based on information presented at the "Legal Perspectives on Lesbian and Gay Concerns in the 1990's" seminar held on March 14, 1991, at the Vermont Law School.

by Hugh Coyle

In his introduction to a discussion on legal issues associated with HIV/AIDS, Evan Wolfson noted that nearly every area of law has been affected by the epidemic, and that many battles remain to be fought. Wolfson himself is one of the leaders in that battle, particularly in his work with the Lambda Legal Defense and Education Fund of New York.

Wolfson began by addressing problems of discrimination, especially in employment, and noted that there are several major tools to work with in such cases. Two of the most commonly used acts are the Federal Rehabilitation Act of 1973, which applies primarily to federal employees, and the Americans with Disabilities Act, which relates to a wider (though not total) range of work situations.

Two cases in particular set important legal standards in the area of disease-related discrimination: the *Arline* case and the *Chalk* case. In *Arline*, the Significant Risk Standard was developed. This standard ruled that employees with contagious diseases are considered handicapped, and that employers need to supply reasonable accommodation for their condition. Employers also needed to establish that there was significant risk to other employees before initiating termination procedures against the infected employee.

Chalk tested this standard against an actual AIDS case, with the ultimate ruling that the standard remained applicable in cases dealing with HIV and AIDS. Thus, in most states, an employee with HIV is recognized as handicapped, and is covered by the anti-discrimination guidelines developed in *Arline*.

While these standards apply to those already infected with HIV, there are other statutes which protect those who are perceived to be at high risk for such infection. One in particular, the ERISA Statute, regulates the administration of employee benefits and prohibitsfiring an employee in order to deprive him or her of health or insurance benefits.

Traditionally, the courts have responded well to cases involving people with HIV or AIDS and those perceived to be at high risk, though the latter is being tested to a greater degree. Still, problems exist in dealing with such cases: the client may become too ill to follow through with the proceedings; the amount of time involved may further jeopardize the health or financial status of the client; and the legal tools used to fight the case are often called into question due to their precarious nature, thus prolonging the court case.

Such obstacles can be fatal in cases dealing with access to care, which Wolfson sees as the "paramount issue" in AIDS cases. Such considerations go beyond the epidemic and point to the need for some sort of national health care system. As Wolfson stated, "AIDS has indicated the problem; now we need to find the answer."

In his dealings with insurance companies on matters of health care, Wolfson observed what he called "massive discrimination." Gays and lesbians have traditionally been targets for discrimination in the insurance industry, with tactics ranging from red-lining of neighborhoods (the Village in New York, for example) to flagging certain industries as "high risk" (the florist and hairstyling trades, for example).

While such techniques are used by insurance carriers to justify not extending initial coverage, there are also a number of strategies used to deny claims made after the coverage has been established. These include the manipulation of pre-existing conditions (i.e. claiming that if the infection occurred prior to the start of the policy, then it would not be covered), the classification of medication and treatment as "experimental" (even though nearly all of HIV and AIDS treatments, given their recent development, could be termed as such), the prolongation of the investigation of the claim, and the actual alteration of the plan to avoid coverage in cases dealing with HIV and AIDS.

Typically, insurance companies will not include coverage for HIV and AIDS in health plans, citing the extreme costs that would be incurred. However, a recent report based on cases reported by New York's Empire Blue Cross and Blue Shield showed that HIV claims were able to be paid "with relative ease," even when a large number of cases were involved.

Some employers have switched from a standard coverage plan underwritten by an insurance company to a self-insured plan, which is not necessarily covered by state laws. The pivotal legal issue here is whether or not a federal statute such as *ERISA* pre-empts state laws.

The problems are even worse for the uninsured and those who must rely on entitlement programs. Obstacles here include underfunding and a lack of quality control.

Wolfson noted that one of the more frustrating aspects of HIV and AIDS legal cases was the number of times in which battles already won had to be re-fought as new cases called into question things which had already been done. A case in point is the

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