FOIA Number: 2018-0755-F

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: National AIDS Policy Office

Series/Staff Member: Patsy Fleming

Subseries: National AIDS Strategy

OA/ID Number: 9002

FolderID:

Folder Title:
Agency Submissions-EEOC [Equal Employment Opportunity Commission]

Stack:	Row:	Section:	Shelf:	Position:
S	66	5	10	2

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

OFFICE OF LEGAL COUNSEL

FAX TRANSMITTAL COVER SHEET

DATE: 5-28-96

PLEASE DELIVER TO:

NAME: Jane Danville

AGENCY/OFFICE/DEPT: White House Task Force (AIDS)

FAX #: 202-632-1096

TELEPHONE #: _____

THIS MESSAGE IS BEING SENT BY:

NAME Peggy Wahrmann

TELEPHONE #: (202) 663-4600

THIS MESSAGE HAS _____ PLUS THIS COVER SHEET.

This Fax # is (202) 663-4639

REMARKS: Called to Thank

IF YOU HAVE ANY PROBLEMS RECEIVING THIS TELECOPY MESSAGE, PLEASE CALL THE FOLLOWNG # IMMEDIATELY, (202) 663-_____. THANK YOU.

CIVIL RIGHTS

Agency: U.S. Equal Employment Opportunity Commission

Goal: As part of EEOC's overall enforcement goal, to eliminate employment discrimination against persons with HIV disease.

Objective: Enforce Title I of the Americans with Disabilities Act (ADA), which protects job applicants and employees with HIV disease from employment discrimination.

Action Steps: Receive, investigate, and resolve ADA discrimination complaints from job applicants and employees with HIV disease;

Litigate select cases involving employment discrimination against persons with HIV disease; and

Educate the public regarding ADA's protections for job applicants and employees with HIV disease.

Descriptions: Enforcement of Title I of the ADA.

FY 95: Part of EEOC's general operating budget.
FY 96: Part of EEOC's general operating budget.
FY 97: part of EEOC's general operating budget

Populations Served: Job applicants and employees with HIV disease.

Constituency Involvement: Ongoing communication with AIDS-related disability groups.

Unmet Need: An increase in the Commission's investigative and legal staff would provide for quicker resolution of all EEOC complaints, including HIV-related complaints brought under the ADA.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

EEOC DATA FOR THE NATIONAL PLAN TO COMBAT AIDS

AREA: Civil Rights

GOAL: To eliminate employment discrimination against persons with HIV disease. Enforcement of ADA sections

Objective: To enforce Title I of the Americans with Disabilities Act (ADA), which protects applicants and employees with HIV disease from employment discrimination.

Action Steps:

(1) Receive, investigate, and settle ADA discrimination complaints from applicants and employees with HIV disease.
(2) Litigate meritorious cases involving employment discrimination against persons with HIV disease.
(3) Educate the public regarding ADA's protections for applicants and employees with HIV disease.

Programs:

(1) Description: Receive, investigate, and settle discrimination complaints from applicants and employees with HIV disease.

- 903 employment discrimination complaints from persons with HIV disease have been received by the EEOC from July 26, 1992, through June 30, 1995.

- HIV complaints receive priority processing. (See Attachment A.)

- 703 of the 903 HIV complaints have been resolved in some fashion by the EEOC.

- Through administrative settlements, the EEOC has obtained $5,761,402 in monetary benefits for complainants with HIV disease.

Resources: Part of the EEOC's general operating budget.

Populations Served: Applicants and employees with HIV disease.

Constituency Involvement: Ongoing communication with AIDS-related disability groups.

(2) Description: Litigate meritorious cases involving employment discrimination against persons with HIV disease.

- The EEOC has filed twenty-six lawsuits involving employment discrimination against persons with HIV disease. (See Attachment B.) These cases make up about one-quarter of EEOC's ADA litigation docket.

- Fourteen of these lawsuits have settled on terms very favorable to the EEOC. Relief has included the elimination of caps on health insurance coverage for HIV disease, reasonable accommodation, and AIDS/ADA training for managers. Monetary relief has totalled about one million dollars.

Resources: Part of the EEOC's general operating budget.

Populations Served: Applicants and employees with HIV disease, AIDS advocacy organizations.

Constituency Involvement: Ongoing communication with AIDS -related disability groups.

(3) Description: Educate the public regarding ADA's protections for applicants and employees with HIV disease.

- The EEOC has issued policy guidance on ADA and employer-provided health insurance. (See attachments C and D.) This guidance makes clear that employers who limit AIDS coverage must prove that such limitations do not constitute a subterfuge to evade the purposes of the ADA.

- EEOC provides technical assistance to the public on ADA/HIV issues through speeches, training workshops, informal opinion letters, and telephone advice.

Resources: Part of the EEOC's general operating budget.

Populations Served: Applicants and employees with HIV disease, employers, AIDS advocacy organizations.

Constituency Involvement: Ongoing communication with all stakeholders.

Unmet Needs: An increase in the Commission's investigative and legal staff would provide for quicker resolution of all EEOC complaints, including HIV-related complaints brought under the ADA. (See Attachment E - EEOC Organizational Plan.)

U.S. Equal Employment Opportunity Commission

Area: Civil Rights
Goal: To eliminate employment discrimination against persons with HIV disease.

Objective	Action Steps	Programs					Unmet Needs
		Description	Resources		Populations Served	Constituency Involvement	
			FY 1995	FY 1996 (proposed)			

Area: Civil Rights
Goal: To eliminate employment discrimination against persons with HIV disease.

Objective	Action Steps	Programs					Unmet Needs
To enforce Title I of the Americans with Disabilities Act (ADA).	Receive, investigate, and settle ADA discrimination complaints from applicants and employees with HIV disease.	Enforcement of ADA sections which protect applicants and employees with HIV disease from employment discrimination.	Part of the EEOC's general operating budget.	Part of the EEOC's general operating budget.	Applicants and employees with HIV and AIDS.	Ongoing communication with AIDS-related disability groups.	An increase in the Commission's investigative and legal staff would provide for quicker resolution of all EEOC complaints, including HIV-related complaints brought under the ADA.
	Litigate meritorious cases involving employment discrimination against persons with HIV disease.				Applicants and employees with HIV disease, AIDS advocacy organizations.	Ongoing communication with AIDS-related disability groups.	
	Educate the public regarding ADA's protections for applicants and employees with HIV disease.				Applicants and employees with HIV disease, employers, AIDS advocacy organizations.	Ongoing communication with all stakeholders.	

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

October 13, 1995

Jane Sanville
Office of National AIDS Policy
Executive Office of the President
750 17th Street, N.W.
Washington, DC 20503

Dear Ms. Sanville:

Enclosed, as requested, please find EEOC data for the National Plan to combat AIDS.

If I can be of further assistance, please give me a call at (202) 663-4503.

Sincerely,

Peggy R. Mastroianni

Peggy R. Mastroianni
Assistant Legal Counsel
ADA Policy Division

Enclosures

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

EEOC DATA FOR THE NATIONAL PLAN TO COMBAT AIDS

AREA: Civil Rights

GOAL: To eliminate employment discrimination against persons with HIV disease.

Objective: To enforce Title I of the Americans with Disabilities Act (ADA), which protects applicants and employees with HIV disease from employment discrimination.

Action Steps:

(1) Receive, investigate, and settle ADA discrimination complaints from applicants and employees with HIV disease.
(2) Litigate meritorious cases involving employment discrimination against persons with HIV disease.
(3) Educate the public regarding ADA's protections for applicants and employees with HIV disease.

Programs:

(1) Description: Receive, investigate, and settle discrimination complaints from applicants and employees with HIV disease.

- 903 employment discrimination complaints from persons with HIV disease have been received by the EEOC from July 26, 1992, through June 30, 1995.

- HIV complaints receive priority processing. (See Attachment A.)

- 703 of the 903 HIV complaints have been resolved in some fashion by the EEOC.

- Through administrative settlements, the EEOC has obtained $5,761,402 in monetary benefits for complainants with HIV disease.

Resources: Part of the EEOC's general operating budget.

Populations Served: Applicants and employees with HIV disease.

Constituency Involvement: Ongoing communication with AIDS-related disability groups.

(2) Description: Litigate meritorious cases involving employment discrimination against persons with HIV disease.

- The EEOC has filed twenty-six lawsuits involving employment discrimination against persons with HIV disease. (See Attachment B.) These cases make up about one-quarter of EEOC's ADA litigation docket.

- Fourteen of these lawsuits have settled on terms very favorable to the EEOC. Relief has included the elimination of caps on health insurance coverage for HIV disease, reasonable accommodation, and AIDS/ADA training for managers. Monetary relief has totalled about one million dollars.

Resources: Part of the EEOC's general operating budget.

Populations Served: Applicants and employees with HIV disease, AIDS advocacy organizations.

Constituency Involvement: Ongoing communication with AIDS -related disability groups.

(3) Description: Educate the public regarding ADA's protections for applicants and employees with HIV disease.

- The EEOC has issued policy guidance on ADA and employer-provided health insurance. (See attachments C and D.) This guidance makes clear that employers who limit AIDS coverage must prove that such limitations do not constitute a subterfuge to evade the purposes of the ADA.

- EEOC provides technical assistance to the public on ADA/HIV issues through speeches, training workshops, informal opinion letters, and telephone advice.

Resources: Part of the EEOC's general operating budget.

Populations Served: Applicants and employees with HIV disease, employers, AIDS advocacy organizations.

Constituency Involvement: Ongoing communication with all stakeholders.

Unmet Needs: An increase in the Commission's investigative and legal staff would provide for quicker resolution of all EEOC complaints, including HIV-related complaints brought under the ADA. (See Attachment E - EEOC Organizational Plan.)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

AUG 13 1992

IMMEDIATE ACTION
92-PO - DD - 13

MEMORANDUM

TO : District Directors

FROM : James H. Troy, Director
Office of Program Operations

SUBJECT : Priority Processing of Certain ADA Charges

Certain ADA charges will receive priority processing. That is, ADA charges that identify the disability as HIV/AIDS or other terminal disabilities, e. g., cancer, heart, lung and liver impairments that have been deemed terminal. These charges should be resolved within **120 days**. This was communicated to you at the ADA training in Dulles and Dallas.

All HIV/AIDS charges should be processed within the 120 day timeframe. In the case of other terminal disabilities, investigators should alert the appropriate supervisor and obtain supervisory approval before flagging the case for priority processing. This will ensure that only appropriate ADA charges are placed in this priority category. Furthermore, to avoid flagging inappropriate ADA charges, investigators should be instructed that they should not routinely inquire whether the charging party's disability is terminal unless charging party furnishes some particular lead indicating such is the case. The responsibility is placed on charging party to provide this information to the investigator.

At minimum, "Special Processing" should be placed on the front cover of the case file for easy identification. We recommended color coded files if available.

CDS

In order to identify priority ADA charges in CDS, the Process Type Code "I" for Special Processing should be entered into CDS in addition to the disability code. For example, ADA code "SX" (HIV) would be entered for the disability and Process Type Code "I" entered to flag the charge for priority processing. This will assist in monitoring/tracking priority ADA charges.

Questions should be directed to your respective Field Management Programs Director.

cc: Area and Local Office Directors

Paula J. Choate, Director
Field Management Programs - West

Godfrey D. Dudley, Director
Field Management Programs - East

A

10/95

Federal Court Cases Concerning AIDS/HIV-Infection In Which EEOC Is a Party

Insurance-Related Cases

EEOC v. Allied Services Division Welfare Fund, et al., Civ. Act. No. 93-5076 WMB (C.D. Cal.): EEOC challenged health benefit plan that had lifetime cap of $5,000 for AIDS-related treatments, and $300,000 lifetime cap on other treatments.

SETTLED: Retroactive repeal of caps, payment of charging party's medical expenses, injunctive relief

EEOC v. The Gage Co., Civ. Act. No. 94-CV-72089-DT (E.D. Mich.): EEOC challenged health benefit plan that had lifetime cap of $5,000 for AIDS-related treatments, and $1 million lifetime cap on other treatments.

SETTLED: cap eliminated, payment of $100,000 to charging party

EEOC v. John Ascuaga's Nugget Casino, Civ. Act. No. N-95-00016 ECR (D. Nev.): EEOC challenged health benefit plan that excluded AIDS-related treatments.

Estate of Kadinger, EEOC et al. v. IBEW et al., Civ. Act. No. 3-93-159 (D. Minn.): EEOC challenged health benefit plan that had lifetime cap of $50,000 for AIDS-related treatments, and $500,000 lifetime cap on other treatments.

SETTLED: cap eliminated, $100,000 to plaintiff's estate, $2500 to Minnesota AIDS Project, injunctive relief

EEOC v. Laborers District Council Building & Construction Health & Welfare Fund, Civ. Act. No. 94-CV-3971 (E.D. Pa.): EEOC challenged health benefit plan that had lifetime cap of $10,000 for AIDS-related treatments, and $100,000 lifetime cap on other treatments.

SETTLED: cap eliminated; $43,000 to charging parties

EEOC v. Lee Data Corp., Civ. Act. No. CV94-3875MRP (C.D. Cal.): EEOC challenged health benefit plan that had lifetime cap of $100,000 for AIDS-related treatments, and $1 million lifetime cap on other treatments.

EEOC v. Mason Tenders Welfare Trust Fund, et. al., Civ. Act. No. 93 Civ 1154 JES (S.D.N.Y.): EEOC challenged defendant health and welfare fund's insurance plan provision denying medical expenses for AIDS-related illnesses.

EEOC v. Metro Traffic Control, Inc. and Southern Benefits Services, Inc., Civ. Act. No. 95 Civ 0278 (AGS)(S.D.N.Y.): EEOC challenged health benefit plan that had lifetime cap of $50,000 for AIDS-related treatments, and $1 million lifetime cap on other treatments.

EEOC and Johnson v. Monroe Foods, Inc., et al., Civ. Act. No. Y93-2925 (D. Md.): EEOC challenged health benefit plan's exclusion of employees with HIV, ARC, or AIDS.

SETTLED: elimination of challenged benefits provision, $90,000 to charging party, injunctive relief

EEOC v. Tarrant Distributors, Inc., Civ. Act. No. H-94-3001 (S.D. Tex.): EEOC challenged health benefit plan's provision of lesser benefits to employees with HIV, ARC, or AIDS.

SETTLED: elimination of cap, $40,000 for charging party's medical bills, $20,000 to American Foundation for AIDS Research

EEOC v. Tokheim Corp., Civ. Act. No. 1:95CV0048 (N.D. Ind.): EEOC challenged health benefit plan that excluded AIDS medications from coverage.

Other Cases

EEOC v. Allied Signal Aerospace, (NJ): EEOC sued employer for failing to provide reasonable accommodation (travel limitations, periodic breaks), and then firing a procurement specialist because he had AIDS.

EEOC v. ADPS Enterprises, Civ. Act. No. C94-0407 (W.D. Wash.): EEOC sued employer for allegedly asking employee whether he had AIDS and for firing him because he had AIDS.

DISMISSED: Company has declared bankruptcy

EEOC & John Doe v. Campbell University, Civ. Act. No. 5:94-CV-301-60(3)(E.D.N.C.): EEOC sued employer for allegedly firing employee from his job as a physical education teacher because he had AIDS.

SETTLED: $325,000 in damages, attorneys fees, and expert fees; AIDS training for supervisors; defendant to continue to employ charging party

EEOC v. Chandler Nursing Center, Inc., Civ. Act. No. 3-95V-0042T (N.D. Tex.): EEOC sued employer for allegedly denying reasonable accommodation and firing employee from his job as a medication aide because he was HIV-positive.

EEOC v. Chemtech International Corp., et al., Civ. Act. No. H-94-2848 (S.D. Tex.): EEOC sued employer for allegedly firing purchasing chief who had AIDS while he was out on an approved 90-day leave.

SETTLED: $50,000 in health coverage and $50,000 in damages to charging party, ADA training for company's managers

EEOC v. PMK Corp. d/b/a Cost Cutters of Austin, Civ. Act. No. A-94-CA-584JN (W.D. Tex): EEOC sued employer for allegedly laying off employee from her job as hairstylist because she was HIV-positive.

SETTLED: $30,000 to charging party, injunction, training handbook on ADA

EEOC v. Dial Corp., St. Louis: EEOC sued employer for allegedly failing to give employee with AIDS time off for treatment.

SETTLED: $40,000 plus reasonable accommodation to charging party

EEOC v. Dolphin Cruise Line, Inc., Civ. Act. No. 95-292 (S.D. Fla.): EEOC sued employer for allegedly failing to hire applicant because he tested positive on a preemployment AIDS test.

EEOC v. Gulf Grinding Co. d/b/a/ Gulf Precision Industries, Inc., Civ. Act. No. H-95-0382 (S.D. Tex): EEOC sued employer for allegedly firing employee from his job as a precision grinder because he had AIDS, and for failing to keep his medical information confidential (employer held "election" among co-workers on whether they wanted to work with him).

SETTLED: $65,000 in damages to charging party, training on ADA, neutral job references for charging party, injunctive relief

John Doe and EEOC v. Kohn Nast & Graf, et al., Civ. Act. No. 93-CV-4510 (E.D. Pa.): EEOC sued employer for allegedly firing employee from his job as a law firm associate because he was HIV-positive, for asking him questions about his HIV status, for retaliating against him, and for failing to keep his medical information confidential.

SETTLED: damages (confidential settlement), injunctive relief

EEOC v. Nelson & Associates and Third East Hills Park, (PA): EEOC sued employer for forcing an employee to take an AIDS test, and then disclosing his HIV status to tenants, co-workers, and the employee's babysitter.

EEOC v. Prevo's Family Market (Detroit): EEOC sued employer for transferring Produce Clerk after it found out he was HIV positive and then placing him on involuntary leave and firing him.

EEOC v. 1348 Division Corp. d/b/a The Pub, Civ. Act. No. EV94-190-C (S.D. Ind.): EEOC sued employer for allegedly firing employee because of his HIV-positive status, and failing to keep his medical information confidential.

EEOC v. Regis Corp., Civ. Act. No. 6-95-CV-011-C (N.D. Tex.): EEOC sued employer for allegedly firing employee from his job because he was HIV-positive.

SETTLED: $35,000 to charging party, injunctive relief

EEOC v. Spectacor Management Group, Civ. Act. No. 95-2688 (E.D. Pa.): EEOC sued employer for allegedly failing to provide reasonable accommodation (flexible work schedule/working at home) for employee with AIDS, and for failing to keep his medical condition confidential.

SETTLED: monetary relief to charging party, long term disability benefits, good references

EEOC v. MTS Corp. and TMS, Inc., d/b/a Supercuts, Civ. Act. No. 94-1473 (D.N.M.): EEOC sued employer for allegedly harassing an employee because of his AIDS, refusing to provide him with reasonable accommodation, and constructively discharging him.

eeoc U.S. Equal Employment Opportunity Commission

NEWS

FOR IMMEDIATE RELEASE
Tuesday, June 8, 1993

CONTACT: Reginald Welch
Nicole Spiegelthal
(202) 663-4900
TDD (202) 663-4494

EEOC ISSUES INTERIM ENFORCEMENT GUIDANCE ON THE APPLICATION OF THE ADA TO DISABILITY-BASED PROVISIONS OF EMPLOYER-PROVIDED HEALTH INSURANCE

WASHINGTON -- The U.S. Equal Employment Opportunity Commission today issued interim enforcement guidance instructing Commission investigators on how to analyze charges which allege that a disability-based distinction in the terms or provisions of an employer-provided health insurance plan violates the Americans with Disabilities Act (ADA).

Title I of the ADA prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against individuals with disabilities in employment.

The Guidance identifies four basic ADA requirements in the area of health insurance:

1) disability-based insurance distinctions are permitted only if the employer-provided health insurance plan is bona fide and if the distinctions are not being used as a subterfuge for purposes of evading the Act;

2) decisions about the employment of an individual with a disability cannot be motivated by concerns about the impact of the individual's disability on the employer's health plan;

3) employees with disabilities must be accorded equal access to whatever health insurance the employer provides to employees without disabilities; and

4) an employer cannot make an employment decision about any person, whether or not that person has a

-more-

C

disability, because of concerns about the impact on the health plan of the disability of someone with whom that person has a relationship.

The enforcement guidance reiterates congressional report language and previous EEOC regulatory guidance that the ADA does not provide a "safe harbor" for health insurance plans that were adopted prior to its July 26, 1990 enactment. Subterfuge is to be determined regardless of the date an insurance or employer benefit plan was adopted.

In determining whether a specific term or provision of an employer-provided health insurance plan is in fact a disability-based distinction, EEOC investigators are instructed to determine whether the insurance term, provision, or condition singles out a particular disability, discrete group of disabilities, or disability in general. Also, whether it singles out a procedure or treatment of a particular disability or discrete group of disabilities (e.g. exclusion of a drug used only to treat AIDS) will be considered.

The enforcement guidance clarifies what employers must prove if the specific insurance term or provision is found to be a disability-based distinction. Because the employer has control of the risk assessment, actuarial, and/or claims data relied upon in adopting a disability-based distinction, the burden of proof should rest with the employer.

The employer must first prove that the health insurance plan is either a bona fide insurance plan that is not inconsistent with applicable state law, or that it is a bona fide self-insured plan. Then the employer must prove that the disability-based distinction is not being used as a subterfuge to evade the purposes of the Act.

An employer can prove that a disability-based distinction is not being used as a subterfuge in several ways. For example, if the employer is relying on actuarial data to justify the disability-based distinction, the evidence must include a detailed explaination of the rationale underlying the disability-based distintion, including the actuarial conclusions arrived at, the actuarial assumptions relied upon to reach those conclusions, and the factual data that supports the assumptions and/or conclusions.

Or, if the employer asserts that the disability-based distinction was necessary to prevent the occurrence of an unacceptable change in coverage or premiums, or to assure the fiscal soundness of the insurance plan, the evidence presented should include nondisability-based options for modifying the insurance plan that were considered and the reason(s) for the rejection of these options.

-more-

The interim enforcement guidance will remain in effect until superseded by more comprehensive guidance, subject to public comment, regarding the application of the ADA to a broad range of issues arising in the context of employer-provided health insurance.

In addition to the ADA, which prohibits job discrimination against individuals with disabilities, EEOC enforces Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act, prohibitions against discrimination affecting individuals with disabilities in the federal sector, and sections of the Civil Rights Act of 1991.

# # #

EEOC

NOTICE

Number
N-915.002

Date
June 8, 1993

1. SUBJECT: Interim Enforcement Guidance on the application of the Americans with Disabilities Act of 1990 to disability-based distinctions in employer provided health insurance.

2. PURPOSE: This interim enforcement guidance sets forth the Commission's position on the application of the Americans with Disabilities Act to disability-based distinctions in employer provided health insurance.

3. EFFECTIVE DATE: Upon issuance.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: Americans with Disabilities Act Division, Office of Legal Counsel.

6. INSTRUCTIONS: This enforcement guidance is to be used on an interim basis until the Commission issues final guidance after publication for notice and comment. File after [ ] of Volume II of the Compliance Manual.

7. SUBJECT MATTER:

I. INTRODUCTION

The interplay between the nondiscrimination principles of the ADA and employer provided health insurance, which is predicated on the ability to make health-related distinctions, is both unique and complex. This interplay is, undoubtedly, most complex when a health insurance plan contains distinctions that are based on disability. The purpose of this interim guidance is to assist Commission investigators in analyzing ADA charges which allege that a disability-based distinction in the terms or provisions of an employer provided health insurance plan violates the ADA.[1] This interim guidance does not address the application of the ADA to other issues arising in the context of employer provided health

[1] In light of the recent amendments to the Rehabilitation Act of 1973, the analysis in this interim guidance also applies to federal sector complaints of discrimination arising under section 501 of that statute.

DISTRIBUTION: W

D

insurance. Nor does it address the application of the ADA to other types of "fringe benefits," such as employer provided pension plans, life insurance, and disability insurance. These subjects will be addressed in future documents.

II. BACKGROUND AND LEGAL FRAMEWORK

The ADA provides that it is unlawful for an employer[2] to discriminate on the basis of disability against a qualified individual with a disability in regard to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Section 1630.4 of the Commission's regulations implementing the employment provisions of the ADA further provides, in pertinent part, that it is unlawful for an employer to discriminate on the basis of disability against a qualified individual with a disability in regard to "[f]ringe benefits available by virtue of employment, whether or not administered by the [employer]." 29 C.F.R. § 1630.4(f). Employee benefit plans, including health insurance plans provided by an employer to its employees, are a fringe benefit available by virtue of employment. Generally speaking, therefore, the ADA prohibits employers from discriminating on the basis of disability in the provision of health insurance to their employees.

The ADA also prohibits employers from indirectly discriminating on the basis of disability in the provision of health insurance. Employers may not enter into, or participate in, a contractual or other arrangement or relationship that has the effect of discriminating against their own qualified applicants or employees with disabilities. 42 U.S.C. § 12112(b)(2); 29 C.F.R. § 1630.6(a). Contractual or other relationships with organizations that provide fringe benefits to employees are expressly included in this prohibition. 42 U.S.C. § 12112(b)(2); 29 C.F.R. § 1630.6(b). This means that an employer will be liable for any discrimination resulting from a contract or agreement with an insurance company, health maintenance organization (HMO), third party administrator

---

[2] The ADA also prohibits employment agencies, labor organizations, and joint labor management committees from discriminating in employment against qualified individuals with disabilities. However, for convenience, only the term "employer" is used throughout this document.

(TPA), stop-loss carrier, or other organization to provide or administer a health insurance plan on behalf of its employees.

Another provision of the ADA makes it unlawful for an employer to limit, segregate, or classify an applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability. 42 U.S.C. § 12112(b)(1); 29 C.F.R. § 1630.5. Both the legislative history and the interpretive Appendix to the regulations indicate that this prohibition applies to employer provided health insurance. S. Rep. No. 116, 101st Cong., 1st Sess. (Senate Report) (1989) at 28-29; H.R. Rep. No. 485 part 2, 101st Cong., 2nd Sess. (House Labor Report) (1990) at 58-59; H.R. Rep. No. 485 part 3, 101st Cong., 2nd Sess. (House Judiciary Report) (1990) at 36; Appendix to 29 C.F.R. § 1630.5.

Several consequences result from the application of these statutory provisions. First, disability-based insurance plan distinctions are permitted only if they are within the protective ambit of section 501(c) of the ADA. (See the discussion in Section III, infra.) Second, decisions about the employment of an individual with a disability cannot be motivated by concerns about the impact of the individual's disability on the employer's health insurance plan. Appendix to 29 C.F.R. § 1630.15(a). Third, employees with disabilities must be accorded "equal access" to whatever health insurance the employer provides to employees without disabilities. See Appendix to 29 C.F.R. § 1630.16(f). Fourth, in view of the statute's "association provision," 42 U.S.C. § 12112(b)(4); 29 C.F.R. § 1630.8, it would violate the ADA for an employer to make an employment decision about any person, whether or not that person has a disability, because of concerns about the impact on the health insurance plan of the disability of someone else with whom that person has a relationship.

As previously noted, this interim guidance is devoted solely to the ADA implications of disability-based health insurance plan distinctions. The ADA implications of other issues arising in the context of employer provided health insurance will be addressed in future guidance.

III. DISABILITY-BASED DISTINCTIONS

A. Framework of Analysis

Whenever it is alleged that a health-related term or provision of an employer provided health insurance plan violates the ADA, the first issue is whether the challenged term or provision is, in

fact, a disability-based distinction. If the Commission determines that a challenged health insurance plan term or provision is a disability-based distinction, the respondent will be required to prove that that disability-based distinction is within the protective ambit of section 501(c) of the ADA.

In pertinent part, section 501(c) permits employers, insurers, and plan administrators to establish and/or observe the terms of an insured[3] health insurance plan that is "bona fide,"[4] based on "underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law," and that is not being used as a "subterfuge" to evade the purposes of the ADA. Section 501(c) likewise permits employers, insurers, and plan administrators to establish and/or observe the terms of a "bona fide" self-insured health insurance plan that is not used as a "subterfuge." 42 U.S.C. § 12201(c). The text of section 501(c) is incorporated into § 1630.16(f) of the Commission's regulations.[5]

---

[3] An "insured" health insurance plan is a health insurance plan or policy that is purchased from an insurance company or other organization, such as a health maintenance organization (HMO). This is in contrast to a "self-insured" health plan, where the employer directly assumes the liability of an insurer. Insured health insurance plans are regulated by both ERISA and state law. Self-insured plans are typically subject to ERISA, but are not subject to state laws that regulate insurance.

[4] The term "bona fide" is defined in Section III (C)(1), infra.

[5] Section 1630.16(f) states:

(f) Health insurance, life insurance and other benefit plans-

(1) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with State law.

(2) A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

Consequently, if the Commission determines that the challenged term or provision is a disability-based distinction, the respondent will be required to prove that: 1) the health insurance plan is either a bona fide insured health insurance plan that is not inconsistent with state law, or a bona fide self-insured health insurance plan;[6] and 2) the challenged disability-based distinction is not being used as a subterfuge. If the respondent so demonstrates, the Commission will conclude that the challenged disability-based distinction is within the protective ambit of section 501(c) and does not violate the ADA. If, on the other hand, the respondent is unable to make this two-pronged demonstration, the Commission will conclude that the respondent has violated the ADA.

B. What Is a Disability-Based Distinction?

It is important to note that not all health-related plan distinctions discriminate on the basis of disability. Insurance distinctions that are not based on disability, and that are applied equally to all insured employees, do not discriminate on the basis of disability and so do not violate the ADA.[7]

---

(3) A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(4) The activities described in paragraphs (f)(1), (2) and (3)... are permitted unless these activities are being used as a subterfuge to evade the purposes of [Title I of the ADA].

[6] If an employer provided health insurance plan is a "multiple employer welfare arrangement" (MEWA) pursuant to section 3(40) of ERISA, it may be subject to certain state insurance laws even if it is self-insured. See footnote 13, infra.

[7] The term "discriminates" refers only to disparate treatment. The adverse impact theory of discrimination is unavailable in this context. See Alexander v. Choate, 469 U.S. 287 (1985), a case brought under § 504 of the Rehabilitation Act of 1973. See also the discussion of Choate in the Senate Report at 85; House Labor Report at 137.

For example, a feature of some employer provided health insurance plans is a distinction between the benefits provided for the treatment of physical conditions on the one hand, and the benefits provided for the treatment of "mental/nervous" conditions on the other. Typically, a lower level of benefits is provided for the treatment of mental/nervous conditions than is provided for the treatment of physical conditions. Similarly, some health insurance plans provide fewer benefits for "eye care" than for other physical conditions. Such broad distinctions, which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability. Consequently, although such distinctions may have a greater impact on certain individuals with disabilities, they do not intentionally discriminate on the basis of disability[8] and do not violate the ADA.[9]

---

[8] However, it would violate the ADA for an employer to selectively apply a universal or "neutral" non-disability based insurance distinction only to individuals with disabilities. Thus, for example, it would violate the ADA for an employer to apply a "neutral" health insurance plan limitation on "eye care" only to an employee seeking treatment for a vision disability, but not to other employees who do not have vision disabilities. Charges alleging that a universal or "neutral" non-disability based insurance distinction has been selectively applied to individuals with disabilities should be processed using traditional disparate treatment theory and analysis.

[9] This position is consistent with the case law developed pursuant to § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, the statute on which the ADA is patterned. Courts faced with challenges to insurance plan distinctions between physical benefits and mental/nervous benefits under the Rehabilitation Act have held that such distinctions are rational and do not discriminate on the basis of disability. See, e.g., Doe v. Colautti, 592 F.2d 704 (3d Cir. 1979)(holding that Pennsylvania's medical assistance statute was not required by the Rehabilitation Act to provide the same level of benefits for inpatient hospital treatment of mental illness as for inpatient hospital treatment of physical illness; the court noted that care for physical illness and care for mental illness were two different benefits), and Doe v. Devine, 545 F. Supp. 576 (D.D.C. 1982), aff'd on other grounds, 703 F. 2d 1319 (D.C. Cir. 1983)(holding that Blue Cross "cutbacks" in mental health benefits for federal employees are reasonable and do not discriminate on the basis of disability).

Blanket pre-existing condition clauses that exclude from the coverage of a health insurance plan the treatment of conditions that pre-date an individual's eligibility for benefits under that plan also are not distinctions based on disability, and do not violate the ADA. Universal limits or exclusions from coverage of all experimental drugs and/or treatments, or of all "elective surgery," are likewise not insurance distinctions based on disability. Similarly, coverage limits on medical procedures that are not exclusively, or nearly exclusively, utilized for the treatment of a particular disability are not distinctions based on disability. Thus, for example, it would not violate the ADA for an employer to limit the number of blood transfusions or X-rays that it will pay for, even though this may have an adverse effect on individuals with certain disabilities.

> Example 1. The R Company health insurance plan limits the benefits provided for the treatment of any physical conditions to a maximum of $25,000 per year. CP, an employee of R, files a charge of discrimination alleging that the $25,000 cap violates the ADA because it is insufficient to cover the cost of treatment for her cancer. The $25,000 cap does not single out a specific disability, discrete group of disabilities, or disability in general. It is therefore not a disability-based distinction. If it is applied equally to all insured employees, it does not violate the ADA.

In contrast, however, health-related insurance distinctions that are based on disability may violate the ADA. A term or provision is "disability-based" if it singles out a particular disability (e.g., deafness, AIDS, schizophrenia), a discrete group of disabilities (e.g., cancers, muscular dystrophies, kidney diseases), or disability in general (e.g., non-coverage of all conditions that substantially limit a major life activity).

As previously noted, employers may establish and/or observe the terms and provisions of a bona fide benefit plan, including terms or provisions based on disability, that are not a "subterfuge to evade the purposes" of the ADA. Such terms and provisions do not violate the ADA. However, disability-based insurance

distinctions that are a "subterfuge" do intentionally discriminate on the basis of disability and so violate the ADA.

> Example 2. R Company's new self-insured health insurance plan caps benefits for the treatment of all physical conditions, except AIDS, at $100,000 per year. The treatment of AIDS is capped at $5,000 per year. CP, an employee with AIDS enrolled in the health insurance plan, files a charge alleging that the lower AIDS cap violates the ADA. The lower AIDS cap is a disability-based distinction. Accordingly, if R is unable to demonstrate that its health insurance plan is bona fide and that the AIDS cap is not a subterfuge, a violation of the ADA will be found.

> Example 3. R Company has a health insurance plan that excludes from coverage treatment for any pre-existing blood disorders for a period of 18 months, but does not exclude the treatment of any other pre-existing conditions. R's pre-existing condition clause only excludes treatment for a discrete group of related disabilities, e.g., hemophilia, leukemia, and is thus a disability-based distinction. CP, an individual with acute leukemia who recently joined R Company and enrolled in its health insurance plan, files a charge of discrimination alleging that the disability-based pre-existing condition clause violates the ADA. If R is unable to demonstrate that its health insurance plan is bona fide and that the disability-specific pre-existing condition clause is not a subterfuge, a violation of the ADA will be found.

It should be noted that the ADA does not provide a "safe harbor" for health insurance plans that were adopted prior to its July 26, 1990 enactment. As the Senate Report states, subterfuge is to be determined "regardless of the date an insurance or employer benefit plan was adopted." Senate Report at 85; see also House Labor report at 136-138; House Judiciary Report at 70-71; Appendix to 29 C.F.R. § 1630.16(f). Consequently, the challenged

disability-based terms and provisions of a pre-ADA health insurance plan will be scrutinized under the same subterfuge standard as are the challenged disability-based terms, provisions, and conditions of post-ADA health insurance plans.[10]

C. The Respondent's Burden of Proof

Once the Commission has determined that a challenged health insurance term or provision constitutes a disability-based distinction, the respondent must prove that the health insurance plan is either a bona fide insured plan that is not inconsistent with state law, or a bona fide self-insured plan. The respondent must also prove that the challenged disability-based distinction is not being used as a subterfuge. Requiring the respondent to bear this burden of proving entitlement to the protection of section 501(c) is consistent with the well-established principle that the burden of proof should rest with the party who has the greatest access to the relevant facts.[11] In the health insurance context,

---

[10] It has been suggested that the Commission should interpret "subterfuge" under the ADA as having the same meaning as was accorded that term under the Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 621 et seq. In Ohio Public Employees Retirement System v. Betts, 492 U.S. 158 (1989), the Court held that a pre-ADEA benefit plan could not be a subterfuge, and that, since the ADEA did not expressly apply to fringe benefits, subterfuge required a showing of the employer's specific intent to discriminate in some non-fringe aspect of the employment relationship. However, both the language of the ADA, expressly covering "fringe benefits," and the Act's legislative history, rejecting the concept of a "safe harbor" for pre-ADA plans, make plain congressional intent that the Betts approach not be applied in the context of the ADA.

[11] See Morgado v. Birmingham-Jefferson County Civil Defense Corps., 706 F.2d 1184, 1189 (11th Cir. 1983, cert. denied, 464 U.S. 1045 (1984) (employer relying on Equal Pay Act provision allowing pay differentials for reasons other than sex must prove entitlement to provision's protection because such facts "are peculiarly within the knowledge of the employer"); EEOC v. Whitin Machine Works, Inc., 635 F.2d 1095, 1097 (4th Cir. 1980) (when facts are "within [the] unique knowledge" of the employer, it bears burden of proof concerning those facts); EEOC v. Radiator Specialty Co., 610 F.2d 178, 185 n. 8 (4th Cir. 1979) ("general principle of allocation of proof to the party with the most ready access to the relevant

it is the respondent employer (and/or the employer's insurer, if any) who has control of the risk assessment, actuarial, and/or claims data relied upon in adopting the challenged disability-based distinction. Charging party employees have no access to such data, and, generally speaking, have no information about the employer provided health insurance plan beyond that contained in the employer provided health insurance plan description. Consequently, it is the employer who should bear the burden of proving that the challenged disability-based insurance distinction is within the protective ambit of section 501(c).

1. The Health Insurance Plan Is "Bona Fide" and Consistent with Applicable Law

In order to gain the protection of section 501(c) for a challenged disability-based insurance distinction, the respondent must first prove that the health insurance plan in which the challenged distinction is contained is either a bona fide insured health insurance plan that is not inconsistent with state law, or a bona fide self-insured health insurance plan.[12] If the health insurance plan is an insured plan, the respondent will be able to satisfy this requirement by proving that: 1) the health insurance plan is bona fide in that it exists and pays benefits, and its terms have been accurately communicated to eligible employees; and 2) the health insurance plan's terms are not inconsistent with applicable state law as interpreted by the appropriate state authorities.[13] If the health insurance plan is a self-insured

---

information" requires Title VII defendant to show inappropriateness of labor pool statistics).

[12] See footnote 3, supra, for a discussion of the difference between "insured" and "self-insured" insurance plans.

[13] The term "applicable state law" refers both to the determination of: 1) which state's laws are applicable to the particular charge (e.g., which state's laws are applicable in the event that the health insurance policy was drawn up in accordance with the laws of the state of Maryland, but the insured employee resides in the state of Virginia) and 2) which laws of that appropriate state are relevant to the particular charge. With respect to health insurance plans that are MEWAs, applicable state law is determined with reference to ERISA section 514 (b)(6)(A). Questions concerning the "applicable state law" should be directed to the Regional Attorney.

plan, the respondent will only be required to prove that the health insurance plan is bona fide in that it exists and pays benefits, and that its terms have been accurately communicated to covered employees.

2. The Disability-Based Distinction Is Not a Subterfuge

The second demonstration that the respondent must make in order to gain the protection of section 501(c) is that the challenged disability-based distinction is not a subterfuge to evade the purposes of the ADA. "Subterfuge" refers to disability-based disparate treatment that is not justified by the risks or costs associated with the disability. Whether a particular challenged disability-based insurance distinction is being used as a subterfuge will be determined on a case by case basis, considering the totality of the circumstances.

The respondent can prove that a challenged disability-based insurance distinction is not a subterfuge in several ways. A non-exclusive list of potential business/insurance justifications follows.

a. The respondent may prove that it has not engaged in the disability-based disparate treatment alleged. For example, where a charging party has alleged that a benefit cap of a particular catastrophic disability is discriminatory, the respondent may prove that its health insurance plan actually treats all similarly catastrophic conditions in the same way.

b. The respondent may prove that the disparate treatment is justified by legitimate actuarial data,[14] or by actual or

[14] Actuarial data that is seriously outdated and/or inaccurate is not legitimate actuarial data. The respondent, for example, will not be able to rely on actuarial data about a disability that is based on myths, fears, or stereotypes about the disability. Nor will a respondent be able to rely on actuarial data that is based on false assumptions about disability, or on assumptions that may have once been, but are no longer, true. For example, a respondent would not be able to justify an exclusion of epilepsy from its insurance plan that is based on an erroneous assumption that people with epilepsy are more likely to have serious accidents (and thus file more claims for insurance benefits) than are individuals who do not have epilepsy.

reasonably anticipated experience, and that conditions with comparable actuarial data and/or experience are treated in the same fashion. In other words, the respondent may prove that the disability-based disparate treatment is attributable to the application of legitimate risk classification and underwriting[15] procedures to the increased risks (and thus increased cost to the health insurance plan) of the disability, and not to the disability per se.

c. The respondent may prove that the disparate treatment is necessary (i.e., that there is no nondisability-based health insurance plan change that could be made) to ensure that the challenged health insurance plan satisfies the commonly accepted or legally required standards for the fiscal soundness of such an insurance plan. The respondent, for example, may prove that it limited coverage for the treatment of a discrete group of disabilities because continued unlimited coverage would have been so expensive as to cause the health insurance plan to become financially insolvent, and there was no nondisability-based health insurance plan alteration that would have avoided insolvency.

d. The respondent may prove that the challenged insurance practice or activity is necessary (i.e., that there is no nondisability-based change that could be made) to prevent the occurrence of an unacceptable change either in the coverage of the health insurance plan, or in the premiums charged for the health insurance plan. An "unacceptable" change is a drastic increase in premium payments (or in co-payments or deductibles), or a drastic alteration to the scope of coverage or level of benefits provided, that would: 1) make the health insurance plan effectively unavailable to a significant number of other employees, 2) make the health insurance plan so unattractive as to result in significant

---

[15] Risk classification refers to the identification of risk factors and the grouping of those factors that pose similar risks. Risk factors may include characteristics such as age, occupation, personal habits (e.g., smoking), and medical history. Underwriting refers to the application of the various risk factors or risk classes to a particular individual or group (usually only if the group is small) for the purpose of determining whether to provide insurance.

adverse selection[16], or 3) make the health insurance plan so unattractive that the employer cannot compete in recruiting and maintaining qualified workers due to the superiority of health insurance plans offered by other employers in the community.

e. Where the charging party is challenging the respondent's denial of coverage for a disability-specific treatment, the respondent may prove that this treatment does not provide any benefit (i.e., has no medical value). The respondent, in other words, may prove by reliable scientific evidence that the disability-specific treatment does not cure the condition, slow the degeneration/deterioration or harm attributable to the condition, alleviate the symptoms of the condition, or maintain the current health status of individuals with the disability who receive the treatment.[17]

IV. COVERAGE OF DEPENDENTS

The coverage of an employee's dependents under an employer provided health insurance plan is a benefit available to the employee by virtue of employment. Consequently, insurance terms, provisions, and conditions concerning dependent coverage are subject to the same ADA standards, including the application of section 501(c) to disability-based distinctions, as are other insurance terms, provisions, and conditions.

---

[16] Adverse selection is the tendency of people who represent poorer-than-average health risks to apply for and/or retain health insurance to a greater extent than people who represent average or above average health risks. Drastic increases in premiums and/or drastic decreases in insurance benefits foster an increase in adverse selection, as those who are considered to be "good" insurance risks drop out and seek enrollment in an insurance plan with lower premiums and/or better benefits. An insurance plan that is subjected to a significant rate of adverse selection may, as a result of the increase in the proportion of "poor risk/high use" enrollees to "good risk/low use" enrollees, become not viable or financially unsound.

[17] However, the respondent may be found to have violated the ADA if the evidence reveals that the respondent's health insurance plan covers treatments for other conditions that are likewise of no medical value.

The ADA, however, does not require that the coverage accorded dependents be the same in scope as the coverage accorded the employee. For example, it would not violate the ADA for a health insurance plan to cover prescription drugs for employees, but not to include such coverage for employee dependents. Nor does the ADA require that dependents be accorded the same level of benefits as that accorded the employee. Thus, it would not violate the ADA for a health insurance plan to have a $100,000 benefit cap for employees, but only a $50,000 benefit cap for employee dependents.

V. CHARGE PROCESSING

1. In General

Charges alleging that a term or provision of an employer provided health insurance plan discriminates on the basis of disability should be processed in accordance with the foregoing guidance. When confronted with a charge alleging that a health insurance plan distinction is a disability-based distinction that violates the ADA, the investigator should initially determine whether the challenged insurance term or provision is, in fact, a disability-based distinction . To do this, the investigator should determine whether:

1) the insurance term, provision, or condition singles out a particular disability, discrete group of disabilities, or disability in general; and/or

2) the insurance term, provision, or condition singles out a procedure or treatment used exclusively, or nearly exclusively, for the treatment of a particular disability or discrete group of disabilities (e.g., exclusion of a drug used only to treat AIDS). (Section III. B, supra.)

If it is determined that the challenged insurance term or provision is not a disability-based distinction and is applied equally to all insured employees, the investigator should conclude that the health insurance plan distinction does not violate the ADA.

On the other hand, if the challenged insurance term or provision is found to be a disability-based distinction, the investigator should determine whether the respondent can justify the disability-based distinction by satisfying the requirements of section 501(c) of the ADA. To make this determination, the investigator should take the steps described below.

1) The investigator should obtain evidence from the respondent that the health insurance plan is a bona fide plan. (Section III.C.1, supra.)

2) If the health insurance plan is an insured plan, the investigator should also obtain evidence from the respondent that the health insurance plan is not inconsistent with the applicable state law(s). (Section III.C.1, supra.)

3) The investigator should obtain evidence from the respondent relevant to any business/insurance justification proffered to justify the disability-based insurance distinction. The evidence obtained should be specific and detailed. For example, if the respondent is relying on actuarial data to justify the disability-based distinction, the investigator should require a detailed explanation of the rationale underlying the disability-based distinction, including the actuarial conclusions arrived at, the actuarial assumptions relied upon to reach those conclusions, and the factual data that supports the assumptions and/or conclusions.

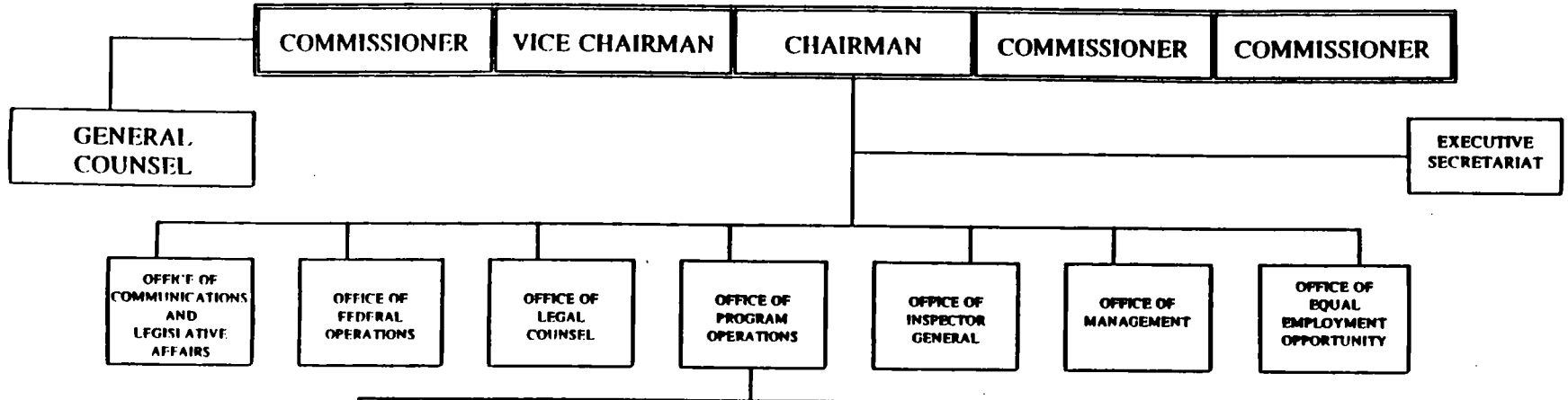
Similarly, if the respondent asserts that the disability-based distinction is justified by actual or reasonably anticipated experience, the investigator should obtain evidence about the respondent's insurance claims experience, and the way in which the respondent has reacted to similar previous experience situations. If the respondent asserts that the disability-based distinction was necessary to prevent the occurrence of an unacceptable change in coverage or premiums, or to assure the fiscal soundness of the health insurance plan, the investigator should obtain evidence of the nondisability-based options for modifying the health insurance plan that were considered and the reason(s) for the rejection of these options. If the respondent asserts that its health insurance plan excludes a disability-specific treatment because it is of no medical value, the investigator should obtain evidence regarding the scientific evidence relied upon by the respondent in reaching that determination. (Section III.C.2, supra.)

Commission staff should direct questions concerning the guidance or its application in particular cases to the Office of Legal Counsel Attorney of the Day.

6-5-93
Date

Approved: Tony Gallegos
Chairman

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION



FIELD MANAGEMENT PROGRAMS (EAST) DISTRICT (DO), AREA (AO), LOCAL (LO)

ATLANTA (DO) Savannah (LO)	BALTIMORE (DO) Norfolk (AO) Richmond (AO)	BIRMINGHAM (DO) Jackson (AO)
CHARLOTTE (DO) Raleigh (AO) Greensboro (LO) Greenville (LO)	CLEVELAND (DO) Cincinnati (AO)	MEMPHIS (DO) Little Rock (AO) Nashville (AO)
MIAMI (DO) Tampa (AO)	NEW ORLEANS (DO)	NEW YORK (DO) Boston (AO) Buffalo (LO)
PHILADELPHIA (DO) Newark (AO) Pittsburgh (AO)	ST. LOUIS Kansas City (AO)	WASHINGTON FIELD OFFICE

FIELD MANAGEMENT PROGRAMS (WEST): DISTRICT (DO), AREA (AO), LOCAL (LO)

ALBUQUERQUE (DO)	CHICAGO (DO)	DALLAS (DO) Oklahoma City (AO)
DENVER (DO)	DETROIT (DO)	HOUSTON (DO)
INDIANAPOLIS (DO) Louisville (AO)	LOS ANGELES (DO) San Diego (AO)	MILWAUKEE (DO) Minneapolis (AO)
PHOENIX (DO)	SAN ANTONIO (DO) El Paso (AO)	SAN FRANCISCO (DO) Fresno (LO) Honolulu (LO) Oakland (LO) San Jose (LO)
	SEATTLE (DO)	

APPROVED:

Tony E. Gallegos, Acting Chairman

DATE _____

SUPERSEDES CHART OF OCTOBER 11, 1989

To Jane

Date 10/3 Time 3:15

WHILE YOU WERE OUT

M Peggy Mastroianni

of

Phone 202 663 4600

Area Code Number Extension

TELEPHONED	✓	PLEASE CALL	
CALLED TO SEE YOU		WILL CALL AGAIN	
WANTS TO SEE YOU		URGENT	
RETURNED YOUR CALL			

Message

Operator

OFFICE OF NATIONAL AIDS POLICY
EXECUTIVE OFFICE OF THE PRESIDENT

750 17th Street, N.W.
Washington, DC 20503

Phone: 202-632-1090
Fax: 202-632-1096

FACSIMILE COVER SHEET

TO: Peggy Mastroianni

FAX NUMBER: 663-4639

FROM: Jane Sanville

DATE: 10/3/95

PAGES INCLUDING COVER SHEET: 6

COMMENTS:

Attached are a memo that went out regarding the plan, and a table & a sample. I'll give you a call later today.

********** -JOURNAL- ********** DATE OCT-03-1995 ***** TIME 11:37 ********

DATE/TIME = OCT-03 11:34

JOURNAL NO. = 16

COMM.RESULT = OK

PAGES = 06

DURATION = 00:03'01

MODE = XMT

STATION NAME =

TELEPHONE NO. = T 96634639

RECEIVED ID = 2026634639

RESOLUTION = STANDARD

-WHITE HOUSE AIDS POLICY -

********** - 2026321096- **********

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

OFFICE OF LEGAL COUNSEL

FAX TRANSMITTAL COVER SHEET

DATE: 10/3/95

PLEASE DELIVER TO:

NAME: Jane Sanville

AGENCY/OFFICE/DEPT: White House

FAX #: 632-1096

TELEPHONE #: 632-1090

THIS MESSAGE IS BEING SENT BY:

NAME Peggy Mastroianni

TELEPHONE #: (202) 663-4503

THIS MESSAGE HAS 1 PLUS THIS COVER SHEET.

This Fax # is (202) 663-4639

REMARKS:

IF YOU HAVE ANY PROBLEMS RECEIVING THIS TELECOPY MESSAGE, PLEASE CALL THE FOLLOWNG # IMMEDIATELY, (202) 663-4503 THANK YOU.

National AIDS Program Office
August 13, 1993, 9 am
Room 405A, Humphrey Bldg, 200 Independence Ave SW
Meeting with Buck Buckingham (Special Assistant to Kristine Gebbie)

Introduction:

1. Who we are -- we enforce Title 1

-- we deal solely with employment (as opposed to cure, prevention, etc.)

-- ~~1.5%~~ 1.83% of charges (~~244~~ 370) in first ~~year~~ 17 mos are from persons with HIV/ARC/AIDS

-- about 1/5 of these are benefits charges ~~(49)~~

-- about 1/2 are discharge

-- the rest are mostly ~~discipline~~ accomm., harassment, ~~hiring~~ discipline

EEOC Activities Related to AIDS

1. Interim Enforcement Guidance on the Application of ADA to Disability-Based Distinctions in Employer Provided Health Insurance

-- deals specifically with distinctions based on AIDS in employer-provided health insurance

-- requires employers to prove that such distinctions do not constitute a subterfuge to evade the purposes of the ADA

2. Mason Tenders: 2nd lawsuit filed by Commission under ADA

-- based on charges filed by union members who could not afford AZT or other treatment after AIDS was removed from health insurance coverage by the employer-union welfare fund

Bottom like ct

3. Technical Assistance

e.g.
-- we are a national partner in Business Responds to AIDS
-- we provide ongoing technical assistance
-- we reviewed and revised BRTA's Title 1 materials

-- National Leadership Coalition on AIDS
-- we reviewed the Coalition's model guidelines on TB

cases FY93 FY94

Peggy Mastroianni

10/3 EEOC

Section of the ADA Private, State, + Local

(Title II - State, local EMTs

III accomodation Dentists.

Justice.

> What is title I?

> Collaborate c justice

Anything on process/mission

> When lawsuits filed, they are on behalf -- file cases in the public interest.

EEOC v.

Area - Civil Rights

Goal - Prevention

Goals ->

- charging party ->
- people bring cases to EEOC, complaint driven.
- EEOC must investigate.

Objective | Action | Description

Admin investigation of complaint, writing policy.

Enforcing - Policy - TA

50,000 - 1.8% are HIV-related.

903 since July 1992 through June 1995.

All applicants hiring

Interact with Disability Groups ->

Fast track HDS cases → large backlog in other areas.

AIDS Policy & Law

The Bi-Weekly Newsletter on Legislation, Regulation, and Litigation Concerning AIDS

Volume 10, Number 16 September 8, 1995

Route to: PF ✓ RS JS LR

Workers' Compensation

Occupational Risks Sufficient to Support Award of Claim

A Florida claims judge has allowed an HIV-positive medical technician to collect workers' compensation benefits even though the employee faked a needle puncture to establish that the infection occurred on the job.

Gary Redford, who works at SmithKline Beecham's blood lab in Miramar, Fla., claimed he stuck his palm on a bloody needle while trying to repair a balky hematology analysis machine on Sept. 3, 1993. Redford didn't report the accident to his supervisor — despite a company policy requiring reporting.

After Redford came down with flu-like symptoms and swollen lymph glands, he began to suspect he had become infected with HIV. In December, he sought an anonymous test from a county public health clinic. The results confirmed his suspicion. He had himself tested by a private physician three weeks later, and again the test was positive.

Upon learning he was infected, Redford "freaked out" because he thought that without an incident report, he would not be able to collect workers' compensation benefits, according to his testimony. So a few weeks later, Redford staged a phony needle puncture so he could report his infection to his employer.

*(Please see **WORKERS' COMP** on p. 5)*

Judge Rules HIV May Be Grounds For Reduction in Prison Sentence

A federal judge in Ohio has ruled that a criminal defendant with symptomatic HIV disease is eligible for a reduced sentence because AIDS is considered an "extraordinarily physical impairment."

Although some state courts have taken that view for some time, this is the first time a federal court has found that the onset of AIDS-related infections can be taken into account in sentencing decisions, according to Lambda Legal Defense and Education Fund, which submitted a brief in the case.

The ruling does not apply to defendants who, while HIV-positive, are free of symptoms of the disease. Judge Ann Aldrich deliberately chose not to clarify what defense attorneys and prosecutors should expect in cases where the defendant's medical condition is in the gray area between asymptomatic HIV and hospice care.

"It's really going to take a case-by-case review," said Catherine Hanssens, director of Lambda's AIDS Project. "You're going to have to have an individualized assessment to determine whether a downward departure in sentencing is warranted."

*(Please see **SENTENCE** on p. 10)*

MORE INSIDE

- Tip for defense lawyers ... p. 10
- Legislation would offer parole to inmates with AIDS ..... p. 11
- Prisoner gets early release from 'three-strikes' law ..... p. 11

Inside this Issue ...

0887-1493/95/$2 + $1.50

Americans with Disabilities Act

EEOC Is Making Quick Work of AIDS Job-Bias Litigation

The U.S. Equal Employment Opportunity Commission (EEOC) takes HIV discrimination seriously. Fewer than 2 percent of the people who come to the EEOC seeking relief from employment discrimination have HIV or AIDS. But nearly one-quarter of the cases the agency has sent to court involve HIV or AIDS.

The EEOC has been quite successful in resolving cases, even though to date none have been decided by a jury verdict. Half of the cases it has taken to court under the Americans with Disabilities Act (ADA) have been settled out of court, sometimes within weeks of the lawsuit being filed.

"Even though the government is supposedly slow at times, we've done a good job in enforcing these cases under the ADA," said Ken Morse, an attorney with the EEOC's Office of General Counsel in Washington.

Since the ADA took effect in July 1992, the EEOC has received nearly 50,000 claims of disability-based employment discrimination, 903 of which involve HIV. The volume prevents the agency from investigating each case; in many instances, the EEOC will issue a "right to sue" letter enabling a claimant to seek relief directly in court. The agency pursues some claims directly, selecting cases involving special issues or special needs.

As of July 20, the EEOC has filed 105 lawsuits under the ADA to protect people with all sorts of impairments, from hearing and visual impairments to diabetes and mental disorders. With 26 cases, AIDS is the largest single category of disabilities sent to court. Other cases involve back or hip impairments, 14; cancer, nine; carpal tunnel syndrome, seven; heart disease and epilepsy, six each.

Morse said the EEOC sometimes selects life-and-death cases to litigate.

"If someone doesn't have any income or health insurance as a result of discriminatory treatment by an employer, they could deteriorate rather quickly. We try to intervene," he said.

Filing a lawsuit also has educational value. Sometimes, he said, employers try to control benefit costs without thinking of the legal consequences of their actions. By filing suit, the EEOC reminds employers that they cannot fire a worker with a disability or cap an employee's medical benefits to improve their bottom line.

The EEOC has resolved 50 percent of its AIDS lawsuits. By comparison, 25 percent of lawsuits involving other types of disabilities have been settled or decided by a jury. ❑

Docket of Active and Resolved Cases as of August 1995

CASES RESOLVED

EEOC v. ADPS Enterprises Inc.

DC W.Wash; C94-0407

Issues: Defendant asked charging party whether he had AIDS and terminated him based on his disability.

Filed: March 21, 1994

Resolved: March 2, 1995. Stipulation and order of dismissal filed.

Contact: Seattle District Office, (206) 220-6906

EEOC v. Allied Services Div. Welfare Fund

DC C.Calif.; CA 93-5076-WMB

Issues: Defendant placed a $5,000 lifetime cap on AIDS medical benefits while all other catastrophic illnesses have a $300,000 cap.

Filed: Aug. 24, 1993

Resolved: Sept. 28, 1993. Stipulated settlement with defendant paying charging party for medical expenses incurred and defendants deleting cap.

Contact: Los Angeles District Office, (213) 894-1083

EEOC v. John Ascuaga's Nugget Casino

DC Nev.; CA N-95-00016-ECR

Issues: Defendant denied equal access to medical benefits.

Filed: Jan. 10, 1995

Resolved: Suit for preliminary injunctive relief settled. Defendant agreed to change its policy and pay charging party's medical bills.

Contact: Los Angeles District Office, (213) 894-1083

EEOC, Doe v. Campbell University

DC E.N.C.; 5:94-CV-301-60(3)

Issues: Doe was discharged because he has AIDS.

Resolved: March 30, 1995. Consent decree provides for Doe's continued employment, maintenance of salary and benefits, $325,000 in compensation,

EEOC UPDATE

0887-1493/95/$2+$1.50

attorney's fees and experts' fees. Decree also requires the university's managers to be trained about AIDS and the Americans with Disabilities Act.

Contact: Detroit District Office, (313) 226-6701

EEOC v. Gage Co.

DC E.Mich.; 94-CV-72089-DT

Issues: Defendant terminated charging party based on disability, refused to reinstate him to comparable position, denied him equal access to medical benefits and placed $5,000 cap on lifetime AIDS medical coverage, while capping other catastrophic illnesses at $1 million.

Filed: May 27, 1994

Resolved: July 11, 1994. Consent decree requires defendant to pay $100,000 to charging party's discretionary trust and eliminate AIDS cap on benefits.

Contact: Detroit District Office, (313) 226-4647

EEOC UPDATE

EEOC v. Gulf Grinding Co.

DC S.Texas; CA H-95-0382

Issues: Defendant failed to accommodate charging party's request for a cool working environment; disclosed to his co-workers that he has AIDS; conducted a referendum among co-workers to determine if he should be retained; and discharged him due to his disability.

Filed: Feb. 9, 1995

Resolved: July 10, 1995. Consent decree requires defendant to pay $65,000 in compensation, train management staff, maintain confidentiality of medical files and post notice about nondiscrimination policy. Consent decree was the result of mediation.

Contact: Houston District Office, (713) 653-3401

Kadinger, EEOC v. IBEW, et. al.

DC Minn.; CA 3-93-159

Issues: Defendants imposed a $50,000 lifetime cap on AIDS medical benefits while capping all other catastrophic illnesses at $500,000.

Filed: By plaintiff, March 17, 1993; by EEOC, Dec. 21, 1993

Resolved: Dec. 21, 1993. Consent decree requires defendants to pay Kadinger's estate $100,000 for reimbursement of medical expenses and agreed to lift the AIDS cap retroactively to July 26, 1992.

Contact: Minneapolis Area Office, (612) 335-4061

Doe, EEOC v. Kohn, Nast & Graf

DC E.Pa.; 93-CV-4510

Issues: Defendant inquired about Doe's HIV status and terminated Doe on the basis of his disability.

Filed: Motion to intervene granted March 7, 1994

Resolved: Oct. 31, 1994. Defendant and Doe reached confidential consent decree during the fourth week of the trial. In separate stipulation, defendant agreed not to engage in disability-based employment discrimination, not to retaliate against anyone who exercised their rights under the ADA and to post a notice regarding protection provided by the ADA.

Contact: Philadelphia District Office, (215) 656-7109

EEOC v. Laborers Dist. Council

DC E.Pa.; 94-CV-3971

Issues: Defendant placed a $10,000 lifetime cap on AIDS medical benefits while other catastrophic illnesses were capped at $100,000.

Filed: June 27, 1994

Resolved: Jan. 5, 1994. Consent decree requires defendant to pay $42,500 in medical bills for the initial charging party and $1,209 in medical bills for a second charging party. Defendant dropped AIDS cap and agreed not to refuse to provide health insurance on the basis of HIV disease.

Contact: Philadelphia District Office, (215) 656-7109

EEOC, Johnson v. Monroe Foods

DC Md.; CA Y93-2925

Issues: Defendant excluded medical care as a result of AIDS.

Filed: Oct. 7, 1993

Resolved: Partial consent decree entered into by EEOC, defendant union, and defendant health and welfare fund providing for payment of $85,853 to Johnson and elimination of challenged benefit provision. A further consent decree on Nov. 28, 1994 with remaining defendant-employer enjoins employer from denying medical benefits to employees with HIV disease and retaliating against anyone who exercised their rights under the ADA. Employer also agreed to pay $5,000 to Johnson.

Contact: Baltimore District Office, (410) 962-3872

EEOC v. P.M.K. d/b/a Cost Cutters

DC W.Texas; A-94-CA-584-JN

Issues: Defendant fired charging party upon learning she was HIV-positive.

Filed: Aug. 24, 1994

Resolved: Dec. 19, 1994. Consent decree requires defendant to pay charging party $30,000, promises not to discriminate on basis of disability and provide a handbook to all employees making specific refer-

*(Please see **DOCKET** on p. 8)*

DOCKET, from p. 7

ence to the right of employees to be free of disability-based discrimination.

Contact: San Antonio Office, (210) 229-4843

EEOC v. Spectacor

DC E.Pa.; CA 95-2688

Issues: Defendant refused to allow charging party to grant him a flexible work schedule to accommodate medical treatments.

Filed: May 5, 1995

Resolved: June 22, 1995. Case settled. In addition to monetary relief, defendant agreed to place charging party on long-term disability, convert his life insurance from a group policy to an individual policy, issued him a positive letter of recommendation and promised to conduct AIDS sensitivity training for employees.

Contact: Philadelphia District Office, (215) 656-7109

EEOC UPDATE

EEOC v. Tarrant Distributors

DC S.Texas; CA H-94-3001

Issues: Defendant placed a $5,000 annual cap and $10,000 lifetime cap on AIDS-related medical benefits while capping other catastrophic illnesses at $1 million.

Filed: Sept. 14, 1994

Resolved: Oct. 11, 1994. Consent decree. Defendant agreed to eliminate cap effective Jan. 1, 1995, pay $40,000 in charging party's unpaid medical bills, cover the medical expenses of any other employees who exceed the AIDS cap, and donate $20,000 to the American Foundation for AIDS Research (AmFAR).

Contact: Houston District Office, (713) 653-3405

Trial Docket

EEOC v. AlliedSignal Aerospace

DC N.J.; CA 92-2776 (WHW)

Issues: Termination due to disability; refusal to grant charging party's request for a different position with less travel, as his doctor recommended; defendant retaliated against charging party 12 days after being informed that charging party was seeking legal counsel.

Filed: June 23, 1995

Contact: Philadelphia District Office, (215) 656-7109

EEOC v. Chandler Nursing Center Inc.

DC N.Texas; CA 3-95V-0042T

Issues: Defendant failed to accommodate charging party's disability by educating co-workers.

Filed: Jan. 9, 1995

Contact: Dallas District Office, (214) 655-3327

EEOC v. Chemtech International

DC S.Texas; CA H-94-2848

Issues: Defendant failed to accommodate charging party's disability.

Filed: Aug. 17, 1994

Contact: Houston District Office, (713) 653-3401

EEOC v. Dolphin Cruise Line Inc.

DC S.Fla.; CA 95-292

Issues: Defendant refused to hire charging party because of HIV-positive results on pre-employment, post-offer physical exam.

Filed: Feb. 15, 1995

Contact: Miami District Office, (305) 530-6000

EEOC v. Lee Data Corp.

DC C.Calif.; CV94-3875MRP

Issues: Defendant placed a $100,000 lifetime cap for AIDS medical treatment while all other illnesses carry a $1 million cap (except neonatal at $500,000 and mental/alcohol/chemical at $25,000).

Filed: June 9, 1994

Contact: Los Angeles District Office, (213) 894-1083

EEOC v. Mason Tenders Welfare Trust Fund

DC S.N.Y.; 93-Civ-1154-JES (state declaratory action); 93-Civ-3865

Issues: Defendants maintain health-care plans which exclude medical coverage for HIV disease.

Filed: June 9, 1993. Fund and other defendants had previously filed declaratory action seeking court decision holding plan provision lawful. EEOC filed amicus brief in that action and has since filed direct suit. See EEOC Appellate Docket.

Contact: New York District Office, (212) 748-8493

EEOC v. Metro Traffic Control, et. al.

DC S.N.Y.; 95-Civ-0278 AGS

Issues: Defendant limited AIDS medical coverage to $50,000 (later $75,000) while all other catastrophic illnesses had a $1 million cap.

Filed: Jan. 18, 1995

Contact: New York District Office, (212) 748-8493

0887-1493/95/$2+$1.50

EEOC UPDATE

EEOC v. MTS Corp., d/b/a Supercuts

DC N.Mex.; CIV-94-1473 LH

Issues: Defendant condoned hostile work environment; failed to accommodate charging party's request to transfer, which forced him to request a leave of absence; constructively discharged charging party; and retaliated against charging party for filing EEOC complaint.

Filed: Dec. 28, 1994

Contact: Phoenix District Office, (602) 640-2362

EEOC v. Nelson Associates, et. al.

DC W.Pa.; CA 95-0888

Issues: Defendant unlawfully inquired into charging party's HIV status and disclosed charging party's HIV status to co-workers, tenants and babysitter. A companion case alleges that charging party was constructively discharged as a result of such harassment.

Filed: June 12, 1995

Contact: Philadelphia District Office, (215) 656-7109

EEOC v. 1348 Division Corp.

DC S.Ind.; EV-94-190-C

Issues: Defendant terminated charging party because of his disability and breached confidentiality by discussing his medical condition with other employees and failing to keep charging party's medical records separate from his personnel file.

Filed: Dec. 2, 1994

Contact: Indianapolis District Office, (317) 226-7208

EEOC v. Prevo's Family Markets

DC W.Mich; 1:95-CV-446

Issues: Defendant placed charging party on involuntary leave of absence; transferred charging party to another job and subjected him to more stringent medical conditions because of his disability; conducted prohibited medical inquiries; and terminated charging party because of his disability.

Filed: July 5, 1995

Contact: Detroit District Office, (313) 226-6701

EEOC v. Regis Corp.

DC N.Texas; 6-95-CV-011-C

Issues: Defendant terminated charging party because of his disability or perception as having a disability.

Filed: Feb. 6, 1995

Contact: San Antonio District Office, (210) 229-4843

EEOC v. Tokheim Corp., et. al.

DC N.Ind.; 1:95-CV-0048

Issues: Defendant denied equal access to medical benefits and administered a health plan which excludes AIDS medications from coverage.

Filed: Feb. 24, 1995

Contact: Indianapolis District Office, (317) 226-7208

Appellate Docket

Carparts Distribution Center v. AWANE

CA 1; No. 93-1954 (37 F.3d 12)

Issues: Proprietor of small business was denied AIDS-related medical benefits from a health-care plan run by a trade association which runs the health plan. The trade association had capped lifetime AIDS-related benefits at $25,000.

EEOC Involvement: Filed amicus brief on behalf of plaintiff.

Decided: Oct. 12, 1994. First Circuit Court of Appeals held that District Court erred in interpreting the term "employer" under Title I of the ADA to exclude defendants and erred in concluding the defendants were not "public accommodations" under Title III. The appeals court directed the trial court to allow plaintiff the opportunity to present evidence regarding coverage of defendants under Titles I and III.

Contact: EEOC Appellate Services, (202) 663-4736

Mason Tenders v. Donaghey

S.N.Y.; 93 Civ. 1585 JES

Issues: Declaratory action brought by health and welfare fund seeking to have declared lawful its exclusion of coverage for AIDS-related medical benefits.

EEOC Involvement: EEOC filed direct suit against plaintiff. See trial docket.

Decided: November 1993. Court denies plaintiff's motion for summary judgment.

Contact: EEOC Appellate Services, (202) 663-4736