North Dakota Law Review

Volume 78 | Number 1 Article 3

2002

HIV-Infected Healthcare Workers and Practice Modification

Joe Zopolsky

HIV-INFECTED HEALTHCARE WORKERS AND PRACTICE MODIFICATION

JOE ZOPOLSKY*

I. INTRODUCTION

A significant number of healthcare workers (HCW)[1] are infected with HIV.[2] Further, "the Centers for Disease Control estimates that ninety percent of HIV-infected Americans are in the workplace.[3] As of June 30, 1997, 19,638 of 9,269,000 HCWs in the United States were reported to be HIV-positive.[4] In part, this group consisted of 1591 physicians, 105 surgeons, 4378 nurses, 428 dental workers, 376 dentists, 2616 technicians, 932 therapists, and 4082 health aids.[5] The total number of HIV-positive HCWs has been estimated to be as high as 86,000.[6]

The risk of HCW-to-patient infection is relatively low.[7] The risk for HIV transmission in any given surgery has been estimated to be between 0.24% and 0.024%.[8] Surgeons cut or stick themselves, however, in approximately 6.9% of all surgeries.[9] The cumulative risk that an HIV-positive surgeon will transmit the virus to a patient at some point in his or her career has been estimated to be between 0.8% and 8.1%.[10] These estimates, however, are problematic for three reasons: First, the estimates

---

* Attorney, Henslee, Fowler, Hepworth & Schwartz, Dallas, Texas. B.A., 1996, Emory University, Atlanta, Georgia; J.D., 2001, South Texas College of Law, Houston, Texas.

1. "Healthcare worker," is defined in the Texas Health & Safety Code as: "a person who furnishes health care services in direct patient care situations under a license, certificate, or registration issued by this state or a person providing direct patient care in the course of a training or educational program." TEXAS HEALTH & SAFETY CODE ANN. § 85.202(2) (Vernon 2001) (covering prevention of transmission of HIV and Hepatitis B virus by infected healthcare workers).

2. *See* Mara E. Zazali, *HIV-Infected Health Care Workers Who Perform Invasive, Exposure-Prone Procedures: Defining the Risk and Balancing the Interests of Health Care Workers and Patients*, 28 SETON HALL L. REV. 1000, 1007 (1998).

3. Nancy L. Breur, *Emerging Trends for Managing AIDS in the Workplace*, 74 PERSONAL J. 125 (1995).

4. Zazali, *supra* note 2, at 1007.

5. Breur, *supra* note 3, at 125.

6. *Id.*

7. Mary E. Chamberland & David M. Bell, Centers for Disease Control, *HIV Transmission from Health Care Worker to Patient: What is the Risk?*, 116 ANNALS OF INTERNAL MED. 871, 872 (1992).

8. *Id.*

9. Jerome I. Tokars et al., *Percutaneous Injuries During Surgical Procedures*, 267 JAMA 2899, 2900 (1992).

10. Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d. 1261, 1263 (4th Cir. 1995).

are based on a seven-year period assumed to be the work expectancy of an HIV-positive surgeon.[11] Second, the number of HCWs who have died as a result of AIDS is not an accurate reflection of how many HCWs are infected with HIV.[12] Third, the actual number of HIV-positive HCWs is unidentifiable due to the lack of mandatory HIV testing within the medical profession.[13] However, public fears of acquiring HIV from healthcare treatment persist.[14]

Kimberly Bergalis announced that she had contracted HIV from her dentist in August 1990.[15] In many ways, her case is regarded as the one which first brought the issue of HIV-positive HCWs to the attention of the public.[16] Before Ms. Bergalis' announcement, fifty-three percent of Americans believed that HIV-positive HCWs should be banned from practice.[17] After the announcement, estimates approached ninety percent.[18] Further, in May 1991, a Gallup Poll suggested that eighty-seven percent of Americans related their support for mandatory HIV testing for doctors and dentists.[19] As time has passed and people have become more educated, however, unwarranted fears of HIV and AIDS have subsided.[20] Although seventy percent of Americans considered AIDS the country's worst health problem in 1987, this figure decreased to thirty-seven percent in 1995.[21] Further, the manner in which the public has embraced Earvin "Magic" Johnson in his struggle with his HIV infection reflects a waning of unwarranted and unsubstantiated public fears of the disease.[22] Finally, *Doe v. Dist. of Columbia*[23] serves as an example of a decision in which a court held that all HIV-positive HCWs are not unqualified to perform their jobs because of heath risks that they may pose to others.[24]

---

11. Michael L. Closen, *HIV-AIDS, Infected Surgeons and Dentists, and the Medical Profession's Betrayal of Its Responsibility to Patients*, 41 N.Y.L. SCH. L. REV. 57, 73 (1996).

12. *Id.*

13. *Id.* at 72.

14. Rebecca Voekler. *Public Perceptions of AIDS; Polls: U.S. Understands Risks, but Backs Testing*, AM. MED. NEWS, Aug. 19, 1991, at 2.

15. *Id.*

16. *Id.*

17. *Id.*

18. *AIDS Victim Blames Policy: Related Developments.*, WORLD NEWS DIGEST, July 11, 1991, at 516 A2.

19. Karen Garloch, *Poll: Doctors with AIDS Should Stop Practicing*, CHARLOTTE OBSERVER, July 17, 1991, at A1.

20. Susan Brink et al., *Beating the Odds: Fending Off the AIDS Virus Isn't Just a Magic Trick*, U.S. NEWS & WORLD REP., Feb. 12, 1996, at 68.

21. *Id.*

22. *Id.* at 60.

23. 796 F. Supp. 559 (D.D.C. 1992).

24. *Doe v. D.C.*, 796 F. Supp. at 570.

As one author aptly noted: "The legal profession, the medical profession, and the public all aspire to the same goal: health care without fear of contracting [HIV]."[25] In order to resolve this dilemma, a variety of potential solutions have been proposed. These include mandatory HIV testing and disclosure for HCWs, practice modification, and expert review panel utilization. In light of the abundance of contradictory and inconsistent statutory and case law regarding HIV and healthcare, the challenge remains to deal effectively with HIV-positive HCWs.

This article provides an overview of the issues related to HIV-infected HCWs and concludes with specific recommendations for employers of HIV-infected HCWs. Because of the large body of Texas statutory and case law relating to HIV-infected HCWs, this article frequently uses Texas law to illustrate these issues.

II. APPLYING THE ADA AND REHABILITATION ACT OF 1973 TO HCWS INFECTED WITH HIV

Regulations prohibiting discrimination in the workplace are specifically set forth in the United States Code.[26] The Code states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual 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."[27] The Americans With Disabilities Act (ADA)[28] and Rehabilitation Act of 1973 (Rehabilitation Act)[29] shield certain employees from unlawful discrimination by employers. Despite similarities between the Rehabilitation Act and the ADA, the acts are distinguishable since the

25. Anne Whitford Stukes, Doe v. University of Maryland Medical System Corporation: *Should Doctors With AIDS Continue to Practice?*, 74 N.C. L. REV. 2013, 2035 (1996).

26. 42 U.S.C. § 12112(a) (1994).

27. *Id.*

28. Congress enacted the ADA in 1990. Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 331 (codified as amended at 42 U.S.C. §§ 12101-12213 (1994)). The act went into effect in July of 1992. 42 U.S.C. § 12111(5)(A) (1994). In 2001, the Supreme Court decided *Board of Trustees of the Univ. of Alabama v. Garrett* which held that individuals are barred from suing state entities for money damages for failing to comply with Title I of the ADA. Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356, 360 (2001); *see also* 42 U.S.C.§§ 12111-12117. However, the Court left open possible remedies for state violations of the ADA, such as lawsuits brought by the federal government and individual actions for injunctive relief. Brian Holohan, *Disability & ADA: State Sovereign Immunity to Title I of ADA Under Review*—University of Alabama v. Garret, 27 AM. J. L. AND MED. 347 (2001).

29. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 357 (codified as amended at 29 U.S.C. §§ 701-796*l* (1994 & Supp. V 1999)).

Rehabilitation Act is limited to "programs or activities receiving federal financial assistance."[30]

Accordingly, a claim is substantially easier to prove under the ADA. In order to recover under the ADA, an employee must meet certain requirements.[31] An employee may work either part-time or full-time.[32] An employee may be working within the United States, or in a foreign country.[33] An employee may also be an illegal alien.[34] Further, the employee must be (1) "a qualified individual,"[35] and (2) must be "disabled"[36] as defined by the ADA. An individual has a disability under the ADA if he meets one of the following three criteria: (i) the individual has a physical or mental impairment substantially limiting one or more life activities, (ii) the individual has a record of such impairment, or (iii) the individual is regarded as having such an impairment.[37] A "major life activity" is one that an average individual can perform with little or no difficulty.[38] The following factors determine whether an impairment substantially limits an individual's major life activity: (i) the nature and severity of the impairment, (ii) the duration or expected duration of the impairment, and (iii) the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.[39]

An individual also must show that he or she is "otherwise qualified" to do his or her job.[40] An "otherwise qualified" individual is one who can perform the "essential" functions of a job, despite his or her alleged

---

30. 29 U.S.C. § 794.

31. 42 U.S.C. § 12111.

32. *Id.* § 12111(5)(A).

33. *Id.* § 12111(4).

34. THOMAS D. SCHNEID, THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL GUIDE FOR MANAGERS 23 (1992).

35. A "qualified individual" is one who can perform the "essential functions" of a job "with or without reasonable accommodation." 42 U.S.C. § 12111(8). "Essential functions" are duties that must be performed, and serve as an integral and indispensable part of a job. 29 C.F.R. 1630.2(n)(1) (2001). Factors for determining which functions are essential to a job include the employer's judgment, written job descriptions, the amount of time spent on a job, and the work experience of past or present employees in similar jobs. *Id.* § 1630.2(n)(2) & (3). "Disabled individuals who cannot perform the essential tasks of a job are not qualified." Erika Perrone Tatum, *The Impact of The Americans with Disabilities Act on AIDS Discrimination in the Workplace,* 19 AM. J. TRIAL ADVOC. 623, 633 (1996). If an employer refuses to hire such a person, the employer is not in violation of the ADA. *Id.* The act also applies to individuals "with whom the qualified individual is known to have a relationship or association." *Id.* at 632; *see also* 29 C.F.R. § 1630.2.

36. 42 U.S.C. § 12102 (1994).

37. *Id.* § 12102(2); *see also* 29 C.F.R. § 1630.2(g).

38. 29 C.F.R. § 1630.2(j)(1)(i).

39. *Id.* § 1630.2(j)(2).

40. 42 U.S.C. § 12131(2) (1994).

disability.[41] If an employee serves as a "direct threat"[42] or "significant risk"[43] to the health or safety of others in the performance of the essential functions of his or her job, he or she is not "otherwise qualified" under the ADA.[44] A disabled person, therefore, is not "otherwise qualified" for a job if the person poses a "significant risk" to the health or safety of others.[45] *School Board v. Arline*[46] articulated four factors for courts to consider in determining whether a "significant risk" exists:

(a) the nature of the risk (how the disease is transmitted),

(b) the duration of the risk (how long is the carrier infectious),

(c) the severity of the risk, (what is the potential harm to third parties), and

(d) the probabilities that the disease will be transmitted and will cause varying degrees of harm.[47]

The significance of the *Arline* decision can be appreciated by noting the fact that its ruling instigated a congressional reaction. Nineteen days after the decision was rendered, the Rehabilitation Act was amended and extended to include individuals with contagious diseases.[48]

An employer must also meet specific requirements.[49] In 1992, the ADA only applied to those employers with twenty-five or more employees.[50] In July 1994, the Act was expanded to include employers with fifteen employees or more.[51] The ADA covers all private sector employers affecting commerce, and all state, local, and territorial governments.[52] In addition, a "covered entity" includes employment agencies, labor unions,

---

41. *Id.*

42. Any individual who has a contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health and safety of other individuals, or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job. 42 U.S.C. § 12182(b)(3) (1994); *see also* 29 U.S.C. § 706(8)(D) (1994 & Supp. V 1999).

43. The ADA definition of "direct threat" reinforces the interplay between the terms direct threat and significant risk; a direct threat is "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." 42 U.S.C. § 12182(b)(3). Further, in *Sch. Bd. v. Arline*, 480 U.S. 273, 287 n.16 (1987), the Supreme Court interpreted "direct threat" to mean "significant risk."

44. *Arline*, 480 U.S. at 287 n.16.

45. *Id.*

46. 480 U.S. 273 (1987).

47. *Arline*, 480 U.S. at 288.

48. Civil Rights Restoration Act of 1987, 29 U.S.C. § 706(8)(D).

49. 42 U.S.C. § 12111(5)(A) (1994).

50. 42 U.S.C. § 12111(5)(A) (Supp. II 1990).

51. 42 U.S.C. § 12111(5)(A) (1994).

52. *Id.*

and joint-labor management committees.[53] An employer under the ADA also includes agents of the employer such as supervisors and personnel managers.[54] In reference to the burden of proof, an employee seeking discrimination relief under the ADA must prove that he or she is "otherwise qualified,"[55] while the employer bears the burden of proving that he or she is not.

The United States Supreme Court has held that a contagious disease can, but does not necessarily, constitute a disability.[56] This position, in turn, has given lower courts the power to independently define "disability" for purposes of the ADA. Accordingly, a case-by-case analysis of the facts is necessary in order to determine whether or not HIV serves as a disability under the ADA.[57]

For example, some courts have held that HIV serves as a disability under the ADA. A Florida state court and the United States Court of Appeals for the First Circuit have held that an individual infected with HIV is "disabled" due to the adverse impact of the condition on his or her ability to reproduce.[58] In *Hernandez v. Prudential Ins. Co.*,[59] the court held that an HIV-positive employee had a physical impairment that substantially limited the major life activities of reproduction and caring for himself.[60] Accordingly, he was considered disabled within the meaning of the ADA.[61] In *Abbott v. Bragdon*,[62] the court held that a dental patient with asymptomatic HIV was disabled and therefore entitled to the ADA protection when refused dental treatment because of her HIV-positive status.[63] Here, the court found that a woman's asymptomatic HIV status constituted

---

53. *Id.* § 12111(2).

54. 42 U.S.C. § 2000e(b) (1994).

55. 29 U.S.C. § 794(a) (1994 & Supp. V 1999).

56. *See Arline*, 480 U.S. at 287-89. Mitchell Katine, adjunct professor of law at South Texas College of Law, cautions, however, that it is a "misperception" among the public that HIV is always considered a disability under the ADA. Meeting Between Mitchell Katine and the Author (Oct. 20, 2000). In further emphasizing the fallacy of this belief, Katine threatened to penalize the graded writings of his law students if they advocated the veracity of this particular position. *Id.*

57. In *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 60 (4th Cir. 1995), the Fourth Circuit U.S. Court of Appeals held that an examination of the facts of an individual case is necessary in order to determine whether a "disability" exists under the ADA.

58. Hernandez v. Prudential Ins. Co., 977 F. Supp 1160, 1169 (M.D. Fla. 1997); Abbott v. Bragdon, 107 F.3d 934, 949 (1st Cir. 1997).

59. 977 F. Supp. 1160 (M.D. Fla. 1997).

60. *Hernandez*, 977 F. Supp. at 1169.

61. *Id.*

62. 107 F.3d 934 (1st Cir. 1997), *vacated*, 524 U.S. 624 (1998), *remanded*, 163 F.3d 87 (1st Cir. 1998).

63. *Abbott*, 107 F.3d at 949. On remand, the court held that a "dentist's performance of cavity-filling procedure on patient did not pose 'direct threat' to others." *Abbott*, 163 F.3d at 87.

a physical impairment that substantially limited a major life activity because it hindered her ability to reproduce.[64]

Similarly, a New Jersey state court, the United States District Court for the Eastern District of Missouri, the United States District Court for the Eastern District of Pennsylvania, the Fifth Circuit United States Court of Appeals, and the Sixth Circuit United States Court of Appeals have held that because an individual infected with HIV serves as a "direct threat" or "significant risk," he or she is not "otherwise qualified" to perform the essential duties of his or her job, and is therefore disabled for purposes of the ADA.[65] In *Behringer v. Med. Ctr.*,[66] a New Jersey state court found that an HIV-positive surgeon posed a "reasonable probability of substantial harm" because he performed invasive procedures.[67] In *Doe v. Washington Univ.*,[68] a Missouri district court held that a dental student infected with HIV was not "otherwise qualified" because he could not meet his credential requirements without performing invasive procedures.[69] The court based its holding, in part, on the frequency of self-injury and the potential for subsequent HIV exposure to patients.[70]

In *Scoles v. Mercy Health Corp.*,[71] a Pennsylvania district court held that a hospital's refusal to allow an HIV-positive surgeon to treat a patient did not violate the Rehabilitation Act.[72] The court elaborated in saying that the surgeon posed a "significant risk" for three reasons.[73] First, no cure for HIV exists.[74] Second, each time the surgeon performs an invasive procedure, the patient is at risk.[75] Third, although people live for years after exposure, death is inevitable.[76] The court concluded that an HIV-positive surgeon cannot be "otherwise qualified" under either federal disability statutes or present medical standards.[77] In *Bradley v. Univ. of Tex. M.D.*

---

64. *Abbott*, 107 F.3d at 934.

65. Behringer v. Med. Ctr., 592 A.2d 1251, 1283 (N.J. Super. Ct. Law Div. 1991); Doe v. Washington Univ., 780 F. Supp. 628, 633 (E.D. Mo. 1991); Scoles v. Mercy Health Corp., 887 F. Supp. 765, 772 (E.D. Pa. 1994); Bradley v. Univ. of Tex. M.D. Anderson Cancer Ctr., 3 F.3d 922, 924 (5th Cir. 1993); *In re* Mauro v. Borgess Med. Ctr., 137 F.3d 398, 401 (6th Cir. 1998), *cert. denied*, 525 U.S. 815 (1998).

66. 592 A.2d 1251 (N.J. Super. Ct. Law Div. 1991).

67. *Behringer*, 592 A.2d at 1283.

68. 780 F. Supp. 628 (E.D. Mo. 1991).

69. *Doe v. Washington Univ.*, 780 F. Supp. at 633.

70. *Id.*

71. 887 F. Supp. 765 (E.D. Pa. 1994).

72. *Scoles*, 887 F. Supp. at 772.

73. *Id.*

74. *Id.* at 769.

75. *Id.*

76. *Id.*

77. *Id.*

Anderson Cancer Ctr.,[78] the Fifth Circuit held that an HIV-positive surgical technician was not "otherwise qualified" to perform the essential functions of his job because he posed a risk of transmitting HIV to patients.[79] The court focused on the probability that Bradley could transmit the disease and cause harm despite the fact that the risk was small, stating that a "cognizable risk of permanent duration with lethal consequences suffices to make a surgical technician . . . not 'otherwise qualified.'"[80] In *In re Mauro v. Borgess Med. Ctr.*,[81] the Sixth Circuit held that an HIV-positive surgeon posed a "direct threat" to himself, other employees, and the local community.[82] The court deemed it noteworthy that this particular job involved work with knives and sharp instruments, with the occurrence of cutting and bleeding being a great potentiality.[83] A surgical technician who is required to occasionally place his hands on or into a surgical incision and is exposed to the risk of needle sticks and lacerations, the court reasoned, posed a "significant risk" to patients.[84]

In and through *Mauro*, the Sixth Circuit joins the Fourth and Fifth Circuits in a novel and potentially disturbing trend.[85] These courts have manipulated the "*Arline* standard" regarding significant risk and have transformed a balancing test of relative weights into a narrow inquiry, with the outcome predetermined by the single factor of HIV infection.[86]

Conversely, a District of Columbia district court[87] and a Texas court of appeals[88] have held that an individual infected with HIV does not serve as a "direct threat" or "significant risk" and that he or she is "otherwise qualified" to perform essential job duties; therefore he or she is not disabled for

78. 3 F.3d 922 (5th Cir. 1993).

79. *Bradley*, 3 F.3d at 924.

80. *Id.*

81. 137 F.3d 398 (6th Cir. 1998), *cert. denied*, 525 U.S. 815 (1998).

82. *Mauro*, 137 F.3d at 401.

83. *Id.*

84. *Id.*

85. Patricia M. Bailey, *Significant Risk Concept Justifies Practice Restrictions of an HIV-Infected Surgeon*, 40 VILL. L. REV. 687, 716 (1995).

86. *Id.*

87. In *Doe v. Dist. of Columbia*, 796 F. Supp. 559, 565 (D.D.C. 1992), a fire department withdrew an employment offer after discovering that the prospective firefighter was HIV-positive. Part of the fireman's job description included rendering emergency non-surgical medical treatment to victims. *Id.* The court held that the risk that an HIV-positive fireman would transmit HIV while performing his duties was "extremely remote," and it immediately ordered the department to reinstate the employee. *Id.* at 569.

88. In *Garcia v. Allen*, 28 S.W.3d 587, 587 (Tex. App. 2000), the court held that the plaintiff's loss of a kneecap did not constitute a "disability" under the Texas Commission on Human Rights Act, because it did not substantially limit a "major life activity." The court found that the plaintiff was not substantially limited in his ability to work since he was still able to work in a variety of capacities. *Id.*

purposes of the ADA.[89] Further, in contrast to the aforementioned First Circuit and Florida state courts,[90] the Fourth Circuit United States Court of Appeals held that an asymptomatic, HIV-positive man was not physically impaired because reproduction did not constitute a major life activity.[91]

Alternatively, an Illinois Court in *Monroe v. Wal-Mart Stores*[92] held that it is proper for a jury to determine whether HIV serves as a disability.[93] Monroe worked as a "stocker" for Wal-Mart.[94] Within two weeks of revealing to a store manager that he had AIDS, a store employee reportedly informed management that Monroe had made a sexually harassing comment towards him.[95] After being reprimanded for his behavior, Monroe was terminated.[96] Since he had stated that he had experienced fatigue due to AIDS and had fainted on one occasion during his shift, Monroe raised an issue of fact about whether AIDS substantially limited a major life activity.[97] Further, Monroe had not received a negative performance evaluation, and therefore he raised an issue of fact as to whether he was performing at a level that met his employer's expectations.[98] The court denied the employer's motion for summary judgment, holding that numerous questions of fact and credibility remained, and that these would best be determined by a jury.[99] The court concluded that it was also a jury question to decide whether Wal-Mart's stated reason for terminating the employee (for making sexually harassing comments to a co-worker) was, indeed, the actual reason for termination.[100] The court also found that the jury should decide whether HIV served as a disability under the ADA.[101] In short, the jury was to determine the reasons why a store employee with AIDS was terminated and whether he was disabled under Title I of the ADA.[102]

---

89. *Doe v. Dist. of Columbia*, 796 F. Supp. at 565; *Garcia*, 28 S.W.3d at 587.

90. Hernandez v. Prudential Ins. Co., 977 F. Supp. 1160 (M.D. Fla. 1997); Abbott v. Bragdon, 107 F.3d 934 (1st Cir. 1997).

91. Runnebaum v. NationsBank, 123 F.3d 156, 161 (4th Cir. 1997) (en banc), *overruled on other grounds by* Abbott v. Bragdon, 107 F.3d 934 (1st Cir. 1997).

92. 1998 WL 158963 (N.D. Ill. 1998).

93. *Monroe*, 1998 WL 158963, at *5.

94. *Id.* at *1.

95. *Id.*

96. *Id.*

97. *Id.* at *2.

98. *Id.* at *2, *5.

99. *Id.* at *5.

100. *Id.*

101. *Id.*

102. *Id.*

Finally, decisions from a Pennsylvania state court[103] and the Fourth Circuit United States Court of Appeals[104] suggest a transition from the "significant risk" standard to an "any risk" standard in determining whether a disability exists for purposes of the ADA.[105]

It has been suggested that HIV discrimination cases be divided into two categories. The first classification encompasses those cases involving a risk of transmission that is no greater than that presented by casual contact.[106] Plaintiffs who pose no greater risk of HIV transmission than that presented by casual contact are likely to prevail under the ADA.[107] Conversely, plaintiffs who pose a risk of HIV transmission greater than that presented by casual contact, are less likely to prevail.[108]

With respect to physicians, the Centers for Disease Control (CDC) agrees with the bifurcation of the discrimination analysis in that they advise against restricting physicians whose procedures are not exposure prone: "Currently available data provide no basis for recommendations to restrict the practice of HCWs . . . who perform invasive procedures [which are not] exposure-prone."[109] These particular CDC findings have also been adopted by the State of Texas in the *Health & Safety Code*.[110] The Ninth Circuit United States Court of Appeals decision in *Chalk v. United States District Court*[111] typifies employment cases in which the risk of HIV transmission serves as no more of a risk than that presented by "casual contact."[112] In *Chalk*, the court upheld the legality of a lateral transfer of an HIV-positive teacher out of the classroom and into an administrative position.[113] The court stated that "there is no evidence of any significant risk to children or

---

103. In *In re Milton S. Hershey Medical Ctr.*, 595 A.2d 1290, 1302 (Pa. Super. Ct. 1991), *aff'd*, 634 A.2d 159 (Pa. 1993), the court held that because a surgical resident performed invasive procedures and a potential for actual transmission existed, the resident presented a health risk to his patients.

104. In *Doe v. Univ. of Maryland Med. Sys. Corp.*, 50 F.3d 1261, 1266 (4th Cir. 1995), the court held that a hospital could terminate an HIV-positive surgeon based on the threat of transmission of HIV to patients, although risk was admittedly low.

105. *Hershey Med. Ctr.*, 595 A.2d at 1290; *Maryland Med. Sys.*, 50 F.3d at 1266.

106. *See* Stukes, *supra* note 25, at 2021-22.

107. *Id.*

108. *Id.*

109. CENTERS FOR DISEASE CONTROL, RECOMMENDATIONS FOR PREVENTING TRANSMISSION OF HUMAN IMMUNODEFICIENCY VIRUS AND HEPATITIS B VIRUS TO PATIENTS DURING EXPOSURE-PRONE INVASIVE PROCEDURE 5 (1991) [hereinafter CENTERS FOR DISEASE CONTROL].

110. TEX. HEALTH & SAFETY CODE ANN. § 85.201 (Vernon 1992) (Subchapter I, Prevention of Transmission of HIV and Hepatitis B Virus By Infected Health Care Workers).

111. 840 F.2d 701 (9th Cir. 1988).

112. *Chalk*, 840 F.2d at 707.

113. *Id.* at 711-12.

to others at the school."[114] The court held that "[t]o allow the court to base its decision on the fear and apprehension of others would frustrate the goals of [the Rehabilitation Act]."[115]

The second classification consists of cases involving a risk of transmission greater than that presented by casual contact.[116] The CDC does not explicitly endorse the unrestricted practice of HIV-positive physicians who perform "exposure-prone procedures."[117] The *Texas Health & Safety Code* defines "exposure-prone procedure" as "a specific invasive procedure that poses a direct threat and significant risk of transmission of HIV or hepatitis B virus, as designated by a health professional association or health facility."[118] Notably, some members of the legal community suggest that settling HIV discrimination cases, rather than litigating, may serve as an attractive and viable alternative under certain circumstances.[119] With respect to settling HIV discrimination cases out of court, some legal authorities encourage negotiated buy-outs.[120] In these cases, individuals often have the opportunity to leave a job with a sum of money, health insurance, job reference protection, and anonymity.[121] This strategy might achieve a desirable result, for example, for an HIV-positive HCW in a small town.[122]

III. REASONABLE ACCOMMODATIONS

Under the ADA, an employer must reasonably accommodate a qualified individual with a disability.[123] The United States Code states that the term "reasonable accommodation" may include the following:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of

---

114. *Id.* at 711.
115. *Id.* 711-12.
116. Stukes, *supra* note 25, at 2022.
117. *Id.* at 2018.
118. TEX. HEALTH & SAFETY CODE ANN. § 85.202(1).
119. Ann H. Fisher, *Law: Health Care Workers With HIV*, HIV-Law, *accessed at* http://www.Web-Depot.com (last modified Oct. 2, 2000).
120. *Id.*
121. *Id.*
122. *Id.*
123. 42 U.S.C. § 12111(9)(A) & (B) (1994).

qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[124]

Whether an employer has reasonably accommodated an employee often serves as an issue of central importance to a particular case. The Fifth Circuit United States Court of Appeals held that a hospital could not reasonably accommodate an HIV-positive surgical technician without "eliminat[ing] the essential function of being in the operative field" and "such redefinition exceeds reasonable accommodation."[125] Similarly, the United States Supreme Court determined that a person "who poses a significant risk of communicating an infectious disease to others in the workplace" is not "otherwise qualified [to perform the job] if reasonable accommodation will not eliminate that risk."[126]

Scholars have suggested several examples of accommodations in order to help resolve disputes as to what is considered reasonable.[127] Typical accommodations include: (i) enabling the HIV-positive employee to work at home with computer equipment, (ii) providing flexible hours, (iii) transferring the employee to a less physically demanding area of work, and (iv) allowing co-workers to assist the employee in performing his or her job functions.[128] Finally, it is important to note that reasonable accommodations are not always mandatory[129] and are, at times, of secondary importance.[130]

IV. MANDATORY TESTING

In order to comply with the ADA, an employer may not test an employee or prospective employee in order to determine whether the

---

124. *Id.* § 12111(9).

125. In *Bradley v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 3 F.3d 922, 924-25 (1993), the court held that an HIV-positive surgical technician was not "otherwise qualified" to perform the essential functions of his job because he posed a risk of transmitting HIV to patients.

126. School Board v. Arline, 480 U.S. 273, 287 & n.16 (1987).

127. Michael D. Esposito & Jeffrey E. Meyers, *Managing AIDS in the Workplace*, 19 EMPLOYEE REL. L.J. 53, 61 (1993).

128. *Id.*

129. In situations where an employer is not able to eliminate the risks without altering the essential functions of the job, the employer is not required to reasonably accommodate. *See, e.g., Bradley*, 3 F.3d at 922 (holding a hospital was unable to eliminate the risk of HIV transmission without altering the essential functions of the job of a surgeon).

130. For example, employers in Texas are required to determine whether a prospective employee will be able to perform the essential duties of the job, regardless of accommodations. Mitchell Katine, *HIV/AIDS and the Law: Returning to Work After HIV Disability Leave*, 61 TEX. B.J. 932, 934 (Oct. 1998). Accordingly, from a prospective employer's perspective, reasonable accommodations are completely immaterial throughout the interview process. *Id.*

individual is HIV positive.[131] An employer may also ask an applicant to prove that he or she has the ability to perform the essential functions of the job.[132] After extending an offer to a prospective employee, an employer may require a medical examination, provided that it normally does so.[133] These examinations may not, however, be used to disqualify an employee with a disability.[134] At this juncture, an employer is finally permitted to request and obtain information regarding a prospective employee's disability from previous employers.[135]

It is not uncommon for hospitals or employers of HCWs to have policies and guidelines regarding HIV testing for employees.[136] An Alabama State Court, the CDC, and the *Texas Health & Safety Code* all have advocated that such testing serves as a constitutional violation or as an invasion of privacy.[137] In *Hill v. Evans,*[138] the court held an Alabama statute partially invalid on equal protection grounds.[139] The statute allowed physicians to perform HIV tests on patients without consent, despite whether invasive procedures were being performed.[140] The CDC has specifically rejected mandatory HIV testing policies.[141] Dr. William Roper, former director of the CDC, rationalized the position of the CDC by stating that "[t]he risk for

---

131. 42 U.S.C. § 12112(d)(2)(A) (1994); *see also* 1 Am. with Disabilities Act: Employee Rts. & Employer Obligations, (MB) § 5.01(1) (2002). For example, Texas does not allow employers to administer HIV tests for employees unless a bone fide occupational qualification warrants such a diagnostic examination. TEX. HEALTH & SAFETY CODE ANN., § 85.201 (Vernon 2001). HCWs in Texas, incidentally, have filed a class action suit in order to recover costs of testing and preventative treatment following exposure to HIV in the course of their employment. An employer may, however, "make preemployment inquiries into the ability of an applicant to perform job-related functions." 42 U.S.C. § 12112(d)(2)(B).

132. 29 C.F.R. § 1630.14(a) (2001).

133. *Id.* § 1630.14(b).

134. *Id.* § 1630.14(b)(3); *see also* Tatum, *supra* note 35, at 635.

135. 29 C.F.R. § 1630.14(b)(3)(c).

136. *See generally* Leckelt v. Bd. of Comm'rs, 909 F.2d 820 (5th Cir. 1990) (holding that a hospital policy requiring HIV testing for HCWs was acceptable); *see also* CURRENT POL'Y AT LAKEPOINTE MED. CENTER, ROWLETT, TEX. (on file with author); GUIDELINES FROM ALVARADO HOSP., CAL.(on file with author); GUIDELINES FROM GULF COAST HOSP., BILOXI, MISS. (on file with author); GUIDELINES FROM MEDICAL CITY DALLAS HOSP., TEX. (on file with author); GUIDELINES FROM METHODIST HOSP. OF DALLAS, TEX. (on file with author); GUIDELINES FROM PRESBYTERIAN HOSP. OF DALLAS, TEX. (on file with author); GUIDELINES FROM SANTA ANA HOSP., CAL. (on file with author); GUIDELINES FROM CENTURY CITY HOSP., CAL. (on file with author).

137. Hill v. Evans, No. 91-A-626-N, 1993 WL 595676, at *5-*10 (M.D. Ala. Oct. 7, 1993); *see also* CENTERS FOR DISEASE CONTROL, *supra* note 109, at 5; TEX. HEALTH & SAFETY CODE ANN. § 85.201(a)(4) (Vernon 2001).

138. No. 91-A-626-N, 1993 WL 595676 (M.D. Ala. Oct. 7, 1993).

139. *Hill*, 1993 WL 595676, at *5-*10.

140. *Id.* at *1 n.1.

141. CENTERS FOR DISEASE CONTROL, *supra* note 109, at 5; *see also AIDS Testing Urged for Doctors, Dentists,* HOUSTON CHRON., July 16, 1991, at 3A [hereinafter *AIDS Testing Urged for Doctors, Dentists*].

doctor-to-patient infection is low. For most procedures, it's absolutely zero."[142] The CDC guidelines are not legally enforceable, however, since individual states regulate any and all medical practices therein.[143] Regardless, CDC officials stated that they expected the guidelines to impact healthcare rules and regulations across the country.[144] For example, in Texas the position of the CDC is reinforced by the *Health & Safety Code*, which states that

> health care workers who perform exposure-prone procedures should know their HIV antibody status; health care workers who perform exposure-prone procedures and who do not have serologic evidence of immunity to HBV from vaccination or from previous infection should know their HbsAg status and, if that is positive, should also know their HbeAg Status.[145]

Conversely, the Fifth Circuit United States Court of Appeals, Congress, and the Department of Health and Human Services agree that such a policy is both desirable and legal.[146] In *Leckelt v. Board of Commissioners*,[147] the Fifth Circuit Court of the United States upheld the legality of a hospital policy requiring HIV testing for HCWs.[148] The court held that concerns regarding infection control justified the testing policy, which violated neither the Fourth Amendment, Fourteenth Amendment, nor the individual right to privacy.[149]

Congress attempted to enact legislation requiring mandatory testing.[150] The proposed bill would have mandated HIV testing of all HCWs.[151] The bill was named after Kimberly Bergalis, a woman who was infected with HIV by her dentist.[152] United States Senators Bob Dole and Orrin Hatch, both Republicans, expressed a particular interest in introducing legislation forcing states to adopt the recommendations of the CDC.[153] Health and Human Services Secretary Louis Sullivan stated that "[p]atients deserve

142. *Aids Testing Urged for Doctors, Dentists*, *supra* note 141, at 3A.

143. *Id.*

144. *Id.*

145. TEX. HEALTH & SAFETY CODE ANN. § 85.201(a)(4) (Vernon 2001).

146. *See generally*, Leckelt v. Bd. of Comm'rs, 909 F.2d 820 (5th Cir. 1990); *see also* Kimberly Bergalis Patient and Health Provider Protection Act of 1991, 137 CONG. REC. E2376-02 (daily ed. June 26, 1991) (statement of Rep. Dannemeyer) [hereinafter Kimberly Bergalis Act]; *AIDS Testing Urged for Doctors, Dentists, supra* note 141, at 3A.

147. 909 F.2d 820 (5th Cir. 1990).

148. *Leckelt*, 909 F.2d at 833.

149. *Id.* at 832-33.

150. Kimberly Bergalis Act, *supra* note 146.

151. *Id.*

152. *See* Voekler, *supra* note 14, at 2.

153. *AIDS Testing Urged for Doctors, Dentists*, *supra* note 141, at 3A.

accurate information, and they deserve the best measures to protect them from disease transmission."[154] Regardless and in sum, there seems to be a general agreement between the legal and medical communities that any mandate requiring all HCWs to submit to mandatory HIV testing would serve as nothing more than an impractical overreaction to a more complex and sophisticated problem.[155]

V. DISCLOSURE REQUIREMENTS AND PRACTICE MODIFICATION

A New Jersey state court, a Pennsylvania state court, Maryland's highest state court of appeals, and the Sixth Circuit United States Court of Appeals have all held that a HCW who is knowingly infected with HIV has a legal duty to warn.[156] In *In re Behringer v. Med. Ctr.*,[157] the New Jersey state court held that a patient had a right to know a surgeon's HIV status for any and all surgical procedures.[158] The decision held, notwithstanding CDC guidelines, which only require informed consent for those procedures determined to be exposure-prone by a medical expert review panel.[159] In *In re Milton S. Hershey Med. Ctr.*,[160] the Pennsylvania state court held that it was appropriate to disclose the HIV status of a resident after he knowingly exposed a patient to HIV.[161] The incident occurred when the resident accidentally cut his surgical glove during an invasive procedure.[162] In *Faya v. Almaraz*,[163] a Maryland appellate court applied a negligence standard and concluded that a physician had a duty to warn his patients because he knew of his HIV-positive status, and emotional distress to the patient was foreseeable.[164] In *EEOC v. Prevo's Family Mkt., Inc.*,[165] the Sixth Circuit held that an HIV-positive produce clerk was justly terminated after he disclosed his

154. *Id.*

155. *Calming AIDS Phobia; Legal Implications of the Low Risk of Transmitting HIV in the Health Care Setting*, 28 U. MICH. J.L. REF. 733, 794-96 (Eric N. Richardson & Salvatore J. Russo eds., 1995).

156. *In re* Behringer v. Med. Ctr., 592 A.2d 1251, 1255 (N.J. Super. Ct. Law Div. 1991); *In re* Milton S. Hershey Med. Ctr., 595 A.2d 1290, 1302 (Pa. Super. Ct. 1991); Faya v. Almaraz, 620 A.2d 327, 460-61 (Md. Ct. App. 1993); EEOC v. Prevo's Family Mkt., Inc., 135 F.3d 1089, 1090-91 (6th Cir. 1998).

157. 592 A.2d 1251 (N.J. Super. Ct. Law Div. 1991).

158. *Behringer*, 592 A.2d at 1255.

159. *Id.*

160. 595 A.2d 1290 (Pa. Super. Ct. 1991).

161. *Hershey Med. Ctr.*, 595 A.2d at 1302.

162. *Id.* at 1291.

163. 620 A.2d 327 (Md. Ct. App. 1993).

164. *Faya*, 620 A.2d at 460-61.

165. 135 F.3d 1089 (6th Cir. 1998).

HIV status and refused testing.[166] Similarly, Congress has advocated mandatory disclosure by HIV-positive HCWs.[167] It proposed a bill that would have mandated disclosure.[168] Congress intended the bill to mandate HIV testing of all HCWs, and it would have required disclosure by HIV positive HCWs.[169]

Some critics argue that excessive regulation on an HIV-positive surgeon is improper.[170] The dissenting opinion in *In re Mauro v. Borges Med. Ctr.*,[171] a Sixth Circuit case, stated that the risk of HIV-transmission from surgeon to patient was not substantial enough to prevent the physician from practicing medicine.[172] The critics also suggest that a physician's right to practice medicine supercedes a patient's right to be informed of such status.[173] Allowing a physician to determine whether or not he or she should disclose his or her HIV status allows the medical community to (at least be in a position to) serve its own interests rather than, exclusively, those of patients.[174] Further, critics have accused the profession of harboring a "Don't ask, don't tell" policy regarding the HIV-positive HCWs, thereby embracing a widespread breach of duty to warn among medical professionals.[175]

The American Medical Association (AMA) and the American Dental Association (ADA) have recommended that Physicians infected with HIV refrain from performing invasive procedures.[176] The AMA and ADA leave open the possibility, however, that these procedures may take place, provided that the patient has been informed and has consented.[177] On January 12, 1991, the CDC recommended that HCWs infected with HIV refrain from performing invasive procedures.[178] After this recommendation, the Texas Legislature proposed a bill mandating the same, and within two weeks, it proposed enactment of the findings into state law.[179] In the case

166. *Prevo's Family Mkt.*, 135 F.3d. at 1090-91.

167. Kimberly Bergalis Act, *supra* note 146.

168. *Id.*

169. *Id.*

170. *In re* Mauro v. Borges Med. Ctr., 137 F.3d 398, 401 (6th Cir. 1998).

171. 137 F.3d 398 (6th Cir. 1998).

172. *Mauro*, 137 F.3d at 410-11 (Boggs, J., dissenting).

173. Mark D. Johnson, *HIV Testing of Health Care Workers: Conflict Between the Common Law and the Centers for Disease Control*, 42 AM. U. L. REV. 479, 531-34 (1993).

174. *Id.*

175. Closen, *supra* note 11, at 79.

176. *AIDS Testing Urged For Doctors, Dentists, supra* note 141, at 3A.

177. *Id.*

178. Cindy Rugeley & Clay Robison, *Plans Merge Agencies, Add AIDS Rules: Infected Doctors Would Have to Inform Patients*, HOUSTON CHRON., July 25, 1991, at A1.

179. *Id.*

that a HCW must have his or her practice modified, the *Texas Health & Safety Code* sets forth certain regulations which an infected HCW may follow in his or her attempt to continue to practice medicine to the fullest extent possible.[180] The *Code* states:

> To promote the continued use of the talents, knowledge, and skills of a health care worker whose practice is modified because of the worker's HIV or Hepatitis B status, the worker should: (1) be provided opportunities to continue patient care activities, if practicable; and (2) receive career counseling and job retraining.[181]

The *Code* further states:

> This subchapter does not: (1) require the revocation of the license, registration or certification of a health care worker who is infected with HIV or hepatitis B virus; (2) prohibit a health care worker who is infected with HIV or hepatitis B virus and who adheres to universal precautions, as defined by this subchapter, from: (A) performing procedures not identified as exposure-prone; or (B) providing health care services in emergency situations.[182]

As the ADA and AMA guidelines suggest, HIV-positive HCWs are able to continue performing exposure-prone procedures despite HIV-positive status.[183] A dental clinic located in Houston, Texas, for example, employs HIV-positive dental workers in order to treat HIV-positive patients in a dental capacity.[184]

VI. THE EXPERT REVIEW PANEL PROCESS

The CDC, the *Texas Health & Safety Code*, and applicable case law set forth recommendations regarding the implementation and operation of Expert Review Panels.[185] The CDC specifically recommended that an Expert Review Panel contain "an infectious disease specialist with expertise in the epidemiology of HIV . . . transmission [and] a member of the [hospital] infection-control committee, preferably an epidemiologist."[186]

---

180. TEX. HEALTH & SAFETY CODE ANN. § 85.204(d)(1) & (2) (Vernon 2001).

181. *Id.*

182. *Id.* § 85.206(1) & (2) (Vernon 2001).

183. The AMA and ADA suggest that these procedures may take place provided that the patient has been informed and has consented. *AIDS Testing Urged For Doctors, Dentists, supra* note 141, at 3A.

184. The Bering Clinic is a dental clinic located in Houston, Texas, where HIV-positive HCWs have the opportunity to provide dental services to HIV-positive patients.

185. Scott Knox, *Laws on Reporting by Seropositive Doctors*, HIV-Law@Web-Depot.COM (Oct. 4, 2000), *available at* http://www.Hivlegalnyc.org/links.html (last visited Apr. 5, 2002).

186. CENTERS FOR DISEASE CONTROL, *supra* note 109.

Texas' code emphasizes the confidentiality requirement of Expert Review Panels.[187] The code states that "[a]ll proceedings and communications of the expert panel are confidential and release of information relating to a health care worker's HIV status shall comply with Chapter 81."[188] The confidentiality, however, is contingent on the assumption that the committee acted properly in performing its job functions, and that such actions are not records maintained in the ordinary course of business.[189]

The purpose of the panels is also treated in the Code.[190] "Health professional associations and health facilities should develop guidelines for expert review panels and identify exposure-prone procedures, as defined by this subchapter."[191] The Medical Practice Act states that records or determinations of, or communications to, a medical peer review committee are not subject to subpoena or discovery.[192] These guidelines, however, have been referred to by physicians as "very general."[193]

In *McAllen Methodist Hosp. v. Ramirez*,[194] the court held that the *Texas Health & Safety Code* section 83.204 provision was more narrow than the applicable portion of the Medical Practice Act.[195] The court justified its position by stating that the latter applies to all information related to the panels while the *Health & Safety Code* exclusively pertains to records and proceedings.[196] The "expert review panels" are also referred to as "medical committees," "peer review proceedings," and "institutional review panels."[197] These procedures, however, are not precisely followed at all times.[198] In some cases, an HIV-positive physician is required to report his or her HIV status to a panel of his or her choice.[199] In Ohio, for example, seropositive physicians have the option of reporting their condition to the Ohio Department of Health or an "institutional review panel."[200] The

187. TEX. HEALTH & SAFETY CODE ANN. §§ 83.204, 161.032(a) (Vernon 2001).

188. *Id.* § 83.204(b)(3).

189. *Id.*

190. *Id.* § 83.204(b)(4).

191. *Id.*

192. TEX. OCC. CODE ANN. §§ 151.001 to 151.005 (Vernon 2002).

193. Interview with Dr. Paul Zopolsky M.D., President and Medical Director, Digestive Health Assoc. of Texas (Oct. 29, 2000).

194. 855 S.W.2d 195 (Tex. App. 1993).

195. *Ramirez*, 855 S.W.2d at 200.

196. *Id.* at 297.

197. *Id.*; *see also* Larry A. "Max" Maxwell, *Annual Survey of Texas Law: Healthcare Law*, 48 SMU L. REV. 1303, 1333 (1995).

198. *See, e.g.*, Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261 (4th Cir. 1995) (allowing a panel of hospital administrators, rather than epidemiologists, to ban Doe from performing surgery altogether.)

199. Knox, *supra* note 185.

200. *Id.*

"institutional review panel" option is recommended, since "doctors can select people who will be realistic about HIV-transmission risks instead of leaving that decision up to unknown people."[201] In a case where a HCW fails to comply with the "expert review panel" process, disciplinary procedures are available.[202] The *Texas Health & Safety Code* states that "[a] health care worker who fails to comply with this subchapter is subject to disciplinary procedures by the appropriate licensing entity."[203] In addition, the Texas Senate has also expressed its approval for the imposition of penalties on HIV-positive HCWs who fail to disclose HIV status to patients, including both fines and mandatory incarceration.[204]

As expected, HCWs are steadfastly opposed to this type of regulation.[205] Brian Bradley, an HIV-positive surgeon whose lawsuit has helped shaped HIV discrimination law in Texas, typifies the reaction of HCWs to the bill.[206] Bradley stated, "[i]f I thought I posed a risk to a patient, I would walk away from my job. . . . I want to continue to contribute to life. It's essential that I work to do that."[207]

VII. RECOMMENDATIONS TO HOSPITALS AND OTHER EMPLOYERS OF HIV-POSITIVE HCWS

Since hospitals and other employers of HCWs are often the targets of litigation proceedings, it is in the best interest of such employers to consider liabilities related to HIV-positive HCWs in order to best protect themselves, their employees, and the public.[208] Although the CDC has documented only six cases of patients who have contracted HIV from a HCW, a significant number of HCWs are infected with the HIV virus.[209] Out of a total of 9,269,000 HCWs, 19,638 have been reported as having been infected with

---

201. *Id.*

202. TEX. HEALTH & SAFETY CODE ANN. § 85.205 (Vernon 2001).

203. *Id.*

204. Nancy Mathis, *Senate Seeks to Force Doctors with Aids to Disclose Illness*, HOUSTON CHRON., July 20, 1991, at A1.

205. Ruth Sorelle, *Health Workers Blast Helms Bill*, HOUSTON CHRON., July 20, 1991, at A25.

206. *Id.*

207. *Id.*; *see also* Bradley v. Univ. of Tex. M.D. Anderson Cancer Ctr., 3 F.3d 922 (5th Cir. 1993).

208. *See, e.g.*, Stafford v. Stafford, 726 S.W.2d 14, 16 (Tex. 1987), *overruled on other grounds by* Price v. Price, 732 S.W.2d 316 (Tex. 1987). In *Stafford*, the Texas Supreme Court allowed damages for mental anguish and lost wages in a suit for actual transmission of a venereal disease. *Id.*

209. Zazali, *supra* note 2, at 1007; *see also* NATIONAL HEALTH LAWYERS ASS'N, HEALTH LAW PRACTICE GUIDE (1997).

the HIV virus as of June 30, 1997.[210] Additionally, potential "infliction of emotional distress," "fear of AIDS," and "products liability" cases against hospitals should be noted.[211]

In *Faya v. Almaraz,* Maryland's highest state court allowed two patients to recover for emotional distress after they learned that their oncologist died of AIDS.[212] Here, the court did not require actual exposure for recovery.[213] *Faya* goes against the majority of the state cases, however, which require an actual injury in order to recover.[214] In *Marchita v. Long Island Railroad,*[215] the Second Circuit United States Court of Appeals allowed Marchita, a railroad worker, to prevail on a claim for negligent infliction of emotional distress for the railroad's failure to provide Marchita with a safe working environment.[216] The decision was based on *Consolidated Rail Corp. v. Gottshall,*[217] a United States Supreme Court case in which the Court concluded that employees can recover for both physical and emotional injuries if an employer's negligence threatens the employee with imminent physical impact.[218] Accordingly, Marchita's potential infection after a needle stick and resulting emotional distress were held to be actionable.[219]

Similarly, in *In re Behringer v. Medical Center at Princeton,* a New Jersey state court stated that there is a concern about an HIV-positive plastic surgeon not "otherwise qualified" to continue to operate because patients would also suffer stress of post-exposure testing.[220] In *Twyman v. Twyman,*[221] the Supreme Court of Texas refused to recognize this cause of action, although the lower courts permitted recovery.[222] Here, a wife sued a husband for feared exposure to HIV.[223] In *Drury v. Baptist Memorial Hospital,*[224] a patient who received a blood transfusion and feared that he

---

210. Zazali, *supra* note 2, at 1007.

211. Faya v. Almaraz, 620 A.2d 327, 337 (Md. 1993) (infliction of emotional distress); Twyman v. Twyman, 790 S.W.2d 819, 822 (Tex. App. 1990), *rev'd,* 855 S.W.2d 619 (Tex. 1993) (fear of AIDS); Riley v. Becton Dickinson Vascular Access, Inc., 913 F. Supp. 879 (E.D. Pa. 1995) (products liability).

212. Faya v. Almaraz, 620 A.2d 327, 337 (Md. 1993).

213. *Id.*

214. *See* Zazali, *supra* note 2, at 1038.

215. 31 F.3d 1197 (2d Cir. 1994).

216. *Marchita,* 31 F.3d at 1200.

217. 512 U.S. 532 (1994).

218. *Consol. Rail,* 512 U.S. at 549-50; *see also Marchita,* 31 F.3d at 1197.

219. *Marchita,* 31 F.3d at 1203.

220. *In re* Behringer v. Med. Ctr., 592 A.2d 1251, 1280 (N.J. Super. Ct. Law Div. 1991).

221. 790 S.W.2d 819 (Tex. App. 1990), *rev'd,* 855 S.W.2d 619 (Tex. 1993).

222. *Twyman,* 790 S.W.2d at 822.

223. *Id.*

224. 933 S.W.2d 668 (Tex. App. 1996).

had contracted HIV sued the treating hospital.[225] When it was proved that he was never infected, the case was dismissed on summary judgment.[226] Similarly, in *Leckelt v. Board of Commissioners*, "no fear of AIDS" cause of action was allowed.[227] Here, the United States Court for the Fifth Circuit held that a licensed practical nurse was not discriminated against solely because of a perception that he was infected with HIV.[228] Although liability for "fear of AIDS" is generally predicated upon an actual injury in the form of exposure or infection, the filing of such lawsuits gives rise to negative publicity for the hospital in question.[229]

Riley v. Becton Dickinson Vascular Access, Inc.,[230] serves as an example of a products liability action in which the court held that the product in question was not "unreasonably dangerous."[231] The court held that the product was acceptable since the only comparable alternative was much more expensive and was not significantly safer.[232] Although evidence such as this suggests biased court rulings in favor of hospitals,[233] hospital administrators and employers of HCWs should consider and remain familiar with the evolution of such laws, in order that the best interests of the hospitals, corporations, employees, and the public may be served and safeguarded to the greatest extent possible. This especially rings true when

---

225. *Drury*, 933 S.W.2d at 669-70.

226. *Id.* at 675.

227. Leckelt v. Bd. of Comm'rs, 714 F. Supp. 1377, 1379 (E.D. La. 1989).

228. *Id.* at 1389.

229. Jennifer N. Coffin, *Civil Rights Rehabilitation Act of 1973 and Americans With Disabilities Act-HIV-Infected Health Care Workers and the "Direct Threat" Defense*, 66 TENN. L. REV. 311, 327-28 (1998).

230. 913 F. Supp. 879 (E.D. Pa. 1995).

231. *Riley*, 913 F. Supp. at 894.

232. *Id.* at 892.

233. The Fourth Circuit's apparent sympathy for hospitals may reflect the court's biased nature in deciding cases involving hospitals. A possible justification for this action is the fact that hospitals provide a valuable public service. Stukes, *supra* note 25, at 2021-31. In *Sch. Bd. v. Arline*, 480 U.S. 273, 288 (1987), the Supreme Court mandated a deference "to the reasonable medical judgments of public health officials." In contrast to the medical community's position, a New Jersey state court in *Behringer* held that a patient had a right to know a surgeon's HIV status for any and all surgical procedures, and that a surgeon has an affirmative duty to disclose his HIV-positive status to patients. *In re* Behringer v. Med. Ctr., 592 A.2d 1251, 1283 (N.J. Super. Ct. Law Div. 1991). The court rendered this decision regardless of CDC guidelines, which only require informed consent for those procedures determined by a medical panel to be exposure-prone. CENTERS FOR DISEASE CONTROL, *supra* note 109, at 5; *see also* Stukes, *supra* note 25, at 2027. All lower courts did not, however, disregard the advice of the Supreme Court. In *Doe v. Washington Univ.*, 780 F. Supp. 628, 633 (E.D. Mo. 1991), the U.S. District Court for the Eastern District of Missouri relied on CDC studies regarding the Acer cluster and the likelihood of injury. The court concluded that substantial deference should be given to the academic decision that the risk of harm from an HIV-infected dental student was too great. *Id.* at 634.

considering the importance of securing and maintaining health insurance for HIV-positive employees in need of medical treatment is considered.[234]

VIII. CONCLUSION

In order to comply with the ADA and minimize unlawful discrimination due to HIV status, several guidelines have been suggested for employers of HCWs. First, essential functions of jobs should be specifically and explicitly defined.[235] Second, discriminatory questions on applications should be eliminated.[236] Third, management teams for ADA compliance should be assembled.[237] Fourth, HIV Education Programs should be developed and enacted.[238] Fifth, special training should be provided.[239] Sixth, employees refusing to work with HIV-positive persons should be reprimanded.[240] Finally, employers should review relevant insurance benefits.[241]

With continued education and adherence to the abundance of statutory and case law regarding discrimination against HIV-positive HCWs, it is certain that progress will be made towards the collective goal of the legal profession, the medical profession, and the public, to achieve healthcare treatment absent all fears of contracting HIV.

---

234. Jonathan R. Mook, *Expanding ADA Coverage to Employee Benefit Plans: Recent Judicial and Administrative Developments,* 20 EMPLOYEE REL. L.J. 571, 579 (1995).

235. 42 U.S.C. § 12111(8) (1994).

236. 29 C.F.R. § 1630.2(o)(1)(i) (2001).

237. SCHNEID, *supra* note 34, at 73.

238. Lucille M. Ponte, *AIDS Anxiety in the Workplace: A Review of Labor Arbitration Awards,* 23 SW. U. L. REV. 253, 281 (1994).

239. R. Bradley Prewitt, *The "Direct Threat" Approach to the HIV-Positive Health Care Employee Under the ADA,* 62 MISS. L.J. 719, 722 (1993).

240. JAMES G. FRIERSON, EMPLOYER'S GUIDE TO THE AMERICANS WITH DISABILITIES ACT 152-157 (1992).

241. Mook, *supra* note 234, at 576.