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# EMPLOYER DEFENSE STRATEGIES IN DISCRIMINATION CASES INVOLVING WORKERS WITH HIV: JUDICIAL INTERPRETATIONS AND FUTURE EXPECTATIONS

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**ABSTRACT**

Throughout the course of civilization, illnesses, particularly those caused by disease, have been met with prejudice and discrimination. In the present day, individuals who have been infected with the human immunodeficiency virus (HIV) have been the targets of discrimination in numerous aspects of their lives, particularly in employment. Employers have utilized a variety of defense strategies with varying success to defend charges of unlawful discrimination against workers with HIV. This article analyzes the application of the most common defense strategies and offers insights as to how the Americans with Disabilities Act will likely impact defense claims for HIV-related employment discrimination.

Employers have used a number of different means by which to discriminate against workers infected with human immunodeficiency virus (HIV). They have also developed various justifications to defend the allegations against them. The success of these defenses has varied. This article presents a categorical analysis of the major defenses employers have used in discrimination claims relative to HIV. It examines the extent to which the courts have validated or refuted specific defenses and presents the legal justifications for such actions. The objectives are: 1) to present a systematic model of precedent-setting cases concerning specific employer behaviors that allegedly discriminate; 2) to address the legal consequences of these behaviors; and 3) to assess the ongoing efficacy of these defense strategies in the future.





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## DISCUSSION OF DEFENSES

### Employment-at-Will

Why does our legal system allow an employer arbitrarily to dismiss or otherwise mistreat an employee afflicted with HIV, or any other employee for that matter? Employment-at-will, a doctrine that constitutes the common law concerning the employment relationship in the United States, has prevailed since the late nineteenth century. H. G. Wood first postulated the "at-will" doctrine in his *Treatise on the Law of Master and Servant* in 1877, stating that hiring of employees is for an indefinite duration and at the discretion of the employer [1]. The employment relationship can be terminated at the will of either party for any or even no reason. Hence, the doctrine appears to be an extension of a laissez-faire philosophy of commerce calling for a free market economy with no government intervention. Free enterprise abhors government interference in both markets and decisions made by business owners. These decisions include whom to hire and the terms and conditions of employment.

The doctrine of employment-at-will first found significant support in the court system in 1884 in the case of *Payne v. Western and Atlantic RA Co.* [2]. In that case a Tennessee court confirmed the right of an employer to hire or fire any individual for good cause, bad cause, or no cause at all. While the concept of employment-at-will may seem dated by today's labor standards, it was applied as recently as 1977 in the case of *Clark v. Prentice Hall, Inc.* [3]. In this case the court held a plaintiff's employment was terminable at will and the employer, with or without cause and regardless of motive, could discharge an employee without liability [3, at 496-97]. While the doctrine is designed to protect the privacy of the employment relationship for both the employer and employee, the utilization and citation of the doctrine has centered on the employer's right to terminate a worker rather than an employee's right to leave his/her job [4].

It is misleading to infer that workers have no protection whatsoever from unscrupulous and unethical employers. Legislators at the federal level have made some dents in the employment-at-will doctrine. In 1935, passage of the National Labor Relations Act [5], also known as the Wagner Act, allowed labor unions through the collective bargaining agreement to introduce into employment contracts the idea that employees could be fired only for just cause [5, § (7)(8)]. Public sector employees have generally been protected by the courts in the application of constitutional due process guarantees [6]. These guarantees prohibit the government from discharging its employees without "just cause" [6, p. 483]. Private sector, nonunionized employees have very limited coverage. Approximately 75 percent of the employees in the United States have no explicit protection from arbitrary dismissal under these laws [7].

It should be noted, however, that many states have recognized exceptions to the employment-at-will doctrine for terminations that violate a recognized public

policy. Findings of public policy violations are permitted by state statute and are judicially manufactured. They involve employer actions contrary to public interest. The public policy exception is often referred to as "wrongful discharge" and has included employee terminations for whistle blowing, refusal to commit a crime, and absence due to jury duty [8]. This concept of wrongful discharge is illustrated in the 1983 case of *Goins v. Ford Motor Company* [9]. A Michigan court of appeals found that an employee terminated for filing a worker's compensation claim had judicial recourse because his termination was contrary to public policy [9].

An interesting point concerning the concept of wrongful discharge is its potential applicability to an employee with HIV. Arguably, an HIV-infected employee discharged solely because of his/her HIV status might have a claim for wrongful discharge on the theory that the termination violates public policy. Clearly, however, such an individual would stand a better chance in his/her action against an employer if the firing violated a specific federal or state law.

While the doctrine of employment-at-will still governs a significant number of employment relationships today, the only noted exceptions involve violations of laws that establish certain groups in society as "protected classes" [10] or specific terms of a collective bargaining agreement that expressly state agreed-upon terms and conditions of employment.

A number of individual states have recognized exceptions to the employment-at-will doctrine for employee terminations that violate a recognized public policy. The leading case here is the previously mentioned *Goins v. Ford Motor Company* [9]. In this case, Ford terminated an employee for filing a worker's compensation claim. The court found the employee had a course of action. Even though the employer, under employment-at-will, had the legal right to dismiss the employee, the Michigan court found the termination to be contrary to public policy and ordered the worker reinstated. The terms of the Employee Retirement Income Security Act (ERISA) [11] later codified the specific issues in the case by prohibiting employers from terminating employees in an attempt to deprive them of benefits to which they were entitled [12]. However, this pre-ERISA case serves as a model for other claims of terminations that are cited as inconsistent with public policy.

Given the finding in the *Goins* case [9], an employee discharged because he or she is infected with the HIV virus could arguably have a claim for wrongful discharge on the ground that the termination violates public policy. The courts, however, have not found such arguments persuasive and have generally ruled in favor of the employers. The employment-at-will doctrine was cited as a material fact affecting the decision in several cases.

The court in *Petri v. Bank of New York Co., Inc.* [13] accepted the bank's argument that Petri was an employee-at-will after establishing the fact that he was not protected by the New York State Human Rights Act. Because Petri had not tested positive for the HIV virus, he could not find protection under the law to

constitute a perceived disability. In *Chapoton v. Majestic Caterers* [14], the plaintiff who *did* test HIV-positive was found not to be protected under the Virginia Rights of Persons with Disabilities Act. Even though the court found the act applied to symptomatic HIV infection, it also found Chapoton was an at-will employee.

In the case of *Evans v. Kornfeld* the court ruled an HIV-positive employee had no claim under the Pennsylvania Human Relations Act due to his at-will status [15]. The court found no requirement that an at-will employee be terminated for "just cause" and said continued employment opportunities were solely at the discretion of the employer and employee. This court, however, went one step further in specifically rejecting the plaintiff's claim that termination of an HIV-infected employee should be prohibited under the public policy doctrine. The court ruled against this concept in finding the public policy exception of employment-at-will in Pennsylvania not relevant, since the discharge had not been motivated by any specific intent by the employer to harm the employee [15].

In *Brunner v. Al Attar,* a Texas court also rejected the public policy exception to the employment-at-will doctrine [16]. Brunner, a clerical employee of an auto body and paint shop, was dismissed because she volunteered at an AIDS service organization. The court found Brunner was an at-will employee and could be fired for any reason or no reason whatsoever. It further rejected the plaintiff's public policy exception argument in ruling the Texas Supreme Court had limited public policy exceptions to employment-at-will to two situations: for refusing to perform an illegal act or because the employer attempted to avoid paying an earned pension [16, at 784-86].

In addition to these cases, in a number of other cases the courts accepted the defendants' defenses of employment-at-will. These cases are not cited here because employment-at-will was not the major basis on which the case was decided. The cases enumerated above clearly illustrate judicial acceptance of the employment-at-will doctrine if the plaintiff is unable to prove he or she is disabled and the punative actions of the employer were based on this disability. Therefore, workers seeking protection under any state public policy exceptions to employment-at-will might find more redress in filing charges under a specific federal or state law. While HIV infection is clearly identified as a protected disability under the Americans with Disabilities Act (ADA) [17], the challenge still remains for those who are *perceived* to be carriers of HIV and discriminated against to find conclusive and consistent support for their claims. It appears unlikely, given court decisions to date, that these individuals can find protection under public policy exception arguments to employment-at-will.

## Expense to Employer

One common defense employers have used to justify discriminating against HIV-infected employees involves the expenses that will be incurred in continuing

to employ these individuals. The costs relative to anticipated absenteeism and increased health insurance premiums seem to be foremost among employers' concerns. Precedents in non-HIV cases have generally favored the plaintiffs in these claims. In *Chrysler Outboard v. Wisconsin Department of Industry, Labor and Human Resources,* the employer based its refusal to hire an applicant who had leukemia on anticipated increases in insurance costs and a concern over future absenteeism [18]. The court found for the plaintiff. In *McDermott v. Xerox Corporation,* the court found that higher benefit costs were not justification for refusing to hire an obese applicant [19]. In both cases, the courts further held the likelihood of future absenteeism was immaterial if the applicant had the capacity at present to perform the job in question. These decisions are consistent with the one rendered in *Bentivegna v. United States Department of Labor,* in which the court rejected potential long-term health problems as a basis for refusing a diabetic individual a job as a building repair person [20].

Based on these decisions, the justification for discrimination based on potential costs alone does not appear to be accepted by the courts in the case of HIV. This was indeed the case when the courts heard *Shawn v. Legs Company Partnership* in which a choreographer filed suit against the production company employing him [21]. Prior to the beginning of rehearsals for the Broadway musical "Legs Diamond," choreographer Michael Shawn was hospitalized with weight loss and high fever and found to be HIV-positive. Despite the plaintiff's and his physician's assurances that he would be back at work well before the agreed-to rehearsal start-up date, the producers fired Shawn because they felt they "couldn't risk a $4 million show" should Shawn "break down." Another choreographer was hired even though Shawn was still able to work and had completed all preproduction work on the choreography [21].

In *Doe v. Cooper Investment,* the court found that Cooper Investment fired Doe, who had AIDS, to avoid the perceived additional costs that would result from Doe's use of the company health plan. The court found the employer to be in violation of ERISA and issued a temporary restraining order directing Cooper to provide Doe with health insurance [22]. It is important to keep in mind that ERISA prohibits termination based on the denial of health insurance or any other employee welfare benefits.

Some employers, however, have successfully found a way around the arguments presented in these cases. In *Alexander v. Choate,* the Court held a state may place durational limits on in-patient coverage in state medical plans despite the resulting disproportionate impact on the handicapped, as long as the handicapped received equal access to the benefit and the limitation was neutral on its face [23]. Following this reasoning, employers could, therefore, put "neutral ceilings" on benefits packages to insulate themselves from health care costs associated with certain employee conditions, presumably including HIV infection and AIDS.

The courts supported this interpretation twice in two major 1991 cases involving alleged ERISA violations. In *McGann v. H & H Music Co.,* the H & H Music

Co. switched its insurance coverage to a self-insurance plan that reduced the cap on AIDS-related benefits from $1 million to $5,000 [24]. The court found the revisions in the employer's insurance coverage were not in violation of ERISA and the company had the right to change its plan at will [24, at 407]. McGann did not have a right to health benefits whose terms never changed. It also found the reduction of AIDS benefits was not intended to deny benefits to McGann for any reasons that would also not be applicable to other beneficiaries who might then or thereafter have AIDS [24, at 405]. Rather, the reduction was prompted by the knowledge of McGann's illness and that McGann happened to be the only beneficiary then known to have AIDS. This judgment is consistent with the Supreme Court's decision in *Alexander v. Choate* [23].

The same conclusion was reached in *Owens v. Storehouse, Inc.* [25]. When the financial condition of the defendant company deteriorated, Storehouse modified its employee health insurance provisions to cap AIDS-related medical benefits at $25,000 [25, at 418]. The court found no ERISA violation, arguing ERISA was designed to protect the "employment relationship" and not the integrity of the specific plan [25, at 419]. It ruled ERISA did not provide protection for the modification or elimination of employee benefits accomplished independently of employee termination or harassment [25, at 419].

This case can be contrasted to *Doe v. Cooper Investment* discussed previously [22], in which the plaintiff was terminated. This termination was the key factor affecting the judgment in Doe's favor. The decision in *Owens v. Storehouse, Inc.* further stated that ERISA allows an employer to consider "business needs" in modifying a plan, justifying the employer's actions from a cost perspective [25].

ERISA's coverage is limited in preventing employers from discriminating relative to benefits. The ADA allows insurers an exemption from its provision. It appears that until the law either is changed or interpreted differently, the employer defense of expense may prevail as long as an employee is not terminated.

## Altruistic Concern for Employee

Several employers have attempted to justify their discriminatory treatment of employees infected with HIV by arguing they were looking out for the employee's best interests in protecting him/her from any further harm. One can speculate that some work environments might lend themselves to this defense much more than others (such as laboratories or other operations with chemicals that might be toxic to those with impaired immune systems, health care environments where germs and disease are prevalent, etc.). However, the courts have demonstrated a reluctance to accept arguments that handicapped or disabled employees or applicants must be terminated or rejected for their own protection.

In the leading employment case involving this defense, *Shuttleworth v. Broward County Office of Budget and Management Policy,* the court found the office environment in which Shuttleworth worked posed "no threat whatsoever"

to his health [26]. In a nonemployment case, the court found in *District 27 Community School Board v. Board of Education* that the New York City Board of Education had properly allowed a student infected with HIV to attend and remain in a public school even though he showed clinically evident immune suppression but no physical symptoms of AIDS [27]. The court not only found the school setting involved no risk of casual transmission of the virus to classmates but also that the student's health was not put at risk by exposing his immune system to the classroom environment [27].

Despite these rulings, a Texas court found in 1991 that an employee diagnosed with ARC was outside of the protection of the Texas Commission of Human Rights Act. In *Hilton v. Southwestern Bell Telephone Company,* the court found that the plaintiff's condition did not come under the Texas Commission of Human Rights Act's definition of a handicap due to lack of physiological impairment ("the defendant's senses, ability to walk, use his hands and arms, sit or stand are not affected") [28]. It further found him not to be "otherwise qualified" because his job as a drafting clerk would pose "a constant risk of instant death" to Hilton [28, at 830]. As noted previously, it found that "the mere act of traveling from home to work and back each day would be death defying" and that "every trip to the pencil sharpener, to the supply closet, to the restroom, to a supervisor's office, or elsewhere—each a job-related function—is a potentially fatal act" [28, at 830].

Despite the verdict in the Hilton case, the employer defense of altruistic concern for the employee's well-being appears to be weak and generally not accepted by courts. One need only look at the contradictory reasoning in the Hilton case (it found no impairment while simultaneously finding the ability to travel to work to be "death defying") to realize the flaw in logic and the improbability of any other court utilizing this case as a precedent.

In sum, the only potential acceptance of the defense of altruistic concern might involve one of the specific types of work environments described above or possibly an instance of an employee with more advanced stages of infection who somehow remained "otherwise qualified" and insisted on maintaining his or her position, despite the physical and/or mental demands of work. The first justification was found in *Local 1812, American Federation of Government Employees v. Department of State,* in which the court upheld the right of the employer to deny those with HIV infection certain assignments [29]. In selecting employees for long-term overseas assignments, the court agreed the nature of overseas work preempted the employment of HIV-positive individuals due to the inadequacy of medical care in foreign countries available to treat the disease.

Relative to the second justification, the court's opinion in *Benjamin R. v. Orkin Exterminating Company, Inc.* favored limiting the ranks of "otherwise qualified" individuals to those who had not contracted "serious symptoms" of the disease because the presence of symptoms usually makes the individuals "too sick to work" and their debilitated immune systems place them at risk for contracting ailments from their fellow employees [30].

## Fear of Contagion

The single most common justification employers have used for discriminating against employees infected with HIV involves the fear of contagion. This fear has been expressed relative to coworkers, customers, or both. It is a generally accepted medical fact that HIV transmission almost never happens in the workplace. While one might assume this fear is somewhat irrational now that more is known about HIV (versus what was known ten years ago), all but one of the cases cited involve decisions that were rendered between 1989 and 1992. Obviously this concern is still compelling.

The courts have consistently cited this medical belief of remote possibility of workplace transmission in rejecting defendant pleas for the safety of coworkers of those infected. In *Shuttleworth v. Broward County Office of Budget and Management Policy,* the court found Shuttleworth did not have an easily transmitted opportunistic infection at the time of dismissal and there was no evidence to show that HIV could be transmitted by casual contact at work [26, at 656]. In *Cain v. Hyatt and Hyatt Legal Services,* the court found the employer's perceptions that the plaintiff's AIDS would negatively impact the morale of the staff due to fear of workplace transmission to be "unreasonable fears" [31].

In *State of Minnesota v. Di Ma Corporation and Richard Carriveau,* Carriveau's (the owner of Di Ma) fears of catching the virus from an employee were considered unjustified [32]. Similarly, in *Raytheon Company v. California Fair Employment and Housing Commission, Estate of Chadbourne, Real Party in Interest,* the court rejected the defendant's concerns about contagion in denying an employee with AIDS reinstatement [33]. It determined that since HIV is not transmitted through casual contact, the defendant presented no evidence to show the employee to be a risk to his coworkers [33, at 1242, 1251].

Public school settings, firefighting, and health care facilities were also found to be employment settings in which courts ruled in favor of plaintiffs regarding an employer's fear of transmission. In *Racine Education Association v. Racine Unified School District,* the court found the school district's policy of placing those with HIV infection on indefinite sick leave constituted illegal discrimination [34, at 722]. Once again this was based on the erroneous assumption of possible transmission through casual contact. In *Doe v. District of Columbia,* the court ruled the duties of a firefighter posed "no measurable risk" that Doe would infect other firefighters or the public [35]. The court concluded the risk of Doe transmitting HIV to others could be compared "to that of being struck by a meteor" and there were no reported cases of transmission by firefighting or emergency personnel through their job duties [35, at 659]. In *Doe v. Westchester County Medical Center,* the court found in the case of Doe, a hospital pharmacist whose employment offer had been withdrawn, a theoretical possibility of HIV transmission existed. However, this probability was so small as not to be statistically measurable [36].

Although the courts have generally rejected defendant employer claims of fear of contagion, three rulings have favored employers. The first of these, *Brunner v. Al Attar,* was a case in which Brunner, a volunteer with an AIDS service foundation, received no protection because the court found her to not be handicapped [16]. As a result of the fact that the plaintiff was outside the coverage of the law, the court was not able to address the issue of employer fear of contagion [16].

The two remaining cases involved health care workers. In the case of *Estate of Behringer v. Medical Center at Princeton* the employee, an otolaryngologist and plastic surgeon, had his surgical privileges severely restricted and later revoked [37]. The court justified the medical center's actions in finding that restricting the plaintiff's surgical privileges was substantially justified by a reasonable probability of harm to the patient [37, at 158]. This risk of harm included not only actual transmission but the risk of a surgical accident such as a scalpel cut or needle stick. The court found the medical center's policy of restricting the surgical privileges of health care providers should they pose "any risk of HIV transmission to the patient" was a "reasonable exercise of the center's authority" [37, at 658].

In *Leckelt v. Board of Commissioners of Hospital District No. 1,* the plaintiff, a licensed practical nurse, had job duties that included changing patients' dressings, giving medication both orally and by injection, starting intravenous lines, performing catheterizations, and administering enemas [38, at 821]. Leckelt's firing was due to his refusal to provide the hospital with the results of an HIV test. The court found that because Leckelt's duties involved invasive procedures and because he failed to comply with hospital policy concerning infectious diseases, he was not otherwise qualified to perform his job of nurse [38, at 830].

In sum, because transmission of the HIV virus is accomplished only through the exchange of bodily fluids, most workplaces appear to be immune from transmission by casual contact. Medical research has shown the virus is not transmitted through the air and dies almost immediately upon leaving the human body. Hence, the only workplace settings in which the risk of HIV transmission appears is that of health care.

The United States Centers for Disease Control (CDC) published guidelines concerning HIV in the workplace [39]. The guidelines stated that although health care settings did pose some risk of transmission, simple precautions could reduce that risk to near-zero [39]. These recommendations were later amended in response to an incident involving an HIV-infected Florida dentist who allegedly passed the infection on to several patients. They stated that "infected health care workers who adhere to 'universal precautions' and who do not perform invasive procedures pose no risk for transmitting HIV to patients" [40, p. 7]. The CDC recommended the practices of health care workers infected with HIV who utilize such precautions should not be restricted [40].

The universal precautions consist of using gloves and masks and complying with standards for sterilization and disinfection. Health care workers who perform

exposure-prone procedures were encouraged to know their HIV antibody status and, if infected, were encouraged to inform their prospective patients [40].

While employers may attempt to justify discriminatory behavior based on a fear of transmission, the courts are unlikely to accept such a defense in a nonhealth care setting. In health care settings, employers who do not make "reasonable accommodations" of HIV-infected employees based on these CDC guidelines may find the fear-of-contagion defense rejected by the courts.

## Negative Responses of Customers and/or Coworkers

In several cases employers have justified firing HIV-infected employees on the grounds of the objections and/or perceptions of customers or coworkers. It has been argued this defense is analogous to cases that arose under the sex discrimination provisions of Title VII of the Civil Rights Act of 1964 [41]. Two leading cases heard under that law were decided in favor of the plaintiffs.

In *Diaz v. Pan Am World Airways* the court held gender was not a bona fide occupational qualification [42]. The case involved an airline carrier that argued competitive pressures brought about by customer preferences required it to hire women rather than men as flight attendants [42, at 388]. Similarly, in the case of *Sprogis v. United Airlines* the court held an employer could not refuse to hire married "stewardesses" because passengers preferred single ones [43, at 988].

The courts have generally ruled in the plaintiff's favor in cases involving discrimination defended by the rationale that others, whether coworkers or customers, would respond negatively. In *Chalk v. United States District Court, Central District of California,* the court ruled in its injunction that the Department of Education was required to reinstate an employee with AIDS to his classroom teaching position [44]. The possibility that the teacher's return to the classroom would produce fear and apprehension in both parents and students was not grounds to deny the injunction. In *Isbell v. Poor Richard's,* involving a waiter who was dismissed due to his HIV seropositivity, the court stated the employer could not rely on the defense of "customer preference" to justify otherwise unlawful discrimination [45].

A contrary opinion was rendered in the case of *Benjamin R. v. Orkin Exterminating Company, Inc.* [30]. Although the judgment in this case was for the plaintiff, one judge hearing the case stated in his opinion that he was unaware of any "reasonable accommodation" that could be made to remedy an employee whose HIV status is of concern to the employer's clients, since "irrational public fear" is "beyond the employer's control" [30, at 825-26]. In other words, an employer was not liable for the discriminatory attitudes or behaviors of customers. The judge implied an employer could discriminate against an employee if the employer could prove the employee's health would cause a loss of business.

A determination of what constitutes a threat versus irrational public fear must presumably take into account the epidemiology of the disease and any

breakthroughs in medical research that alter our understanding. It appears unlikely that courts might reconsider public fears in assessing how far protection against discrimination should go relative to an employer's legitimate business interests. To date no court has accepted this defense. It would appear employers have no justification to violate the ADA or any state or local law despite the economic burden that might be placed on them. Much as employers have, in some cases, been mandated by the courts to educate their employees about HIV, a court might realistically require an employer to educate its customers.

### Pointless to Hire/Employ a Terminally Ill Person

A significant number of employment decisions relative to both hiring and promotion might be based on an employee's limited life expectancy. To date only two cases have stated this point as a reason for discrimination. In both of these cases, judgment was rendered for the plaintiff. In *Cain v. Hyatt Legal Services,* the defendant argued that over time Cain would become incapable of performing his responsibilities [31, at 683-84]. The court, in ruling in the plaintiff's favor, found Cain's AIDS condition did not substantially interfere with his ability to perform the essential functions of his job [31, at 684]. In the case of *Shawn v. Legs Production Company,* the choreographer initially employed by the production company was seen as a "futile investment" once his HIV test results were made known [21]. In fact, the production company claimed a right to know Shawn's status to avoid "risking a $4 million show" [21].

Although this defense has been used in only a few cases, that does not mean the attitudes on which the defense is based cannot motivate other employers to engage in such behavior. However, the terms of the ADA will probably further limit any potential this defense may have for a discrimination allegation. In making a determination of whether an employee or prospective employee is "otherwise qualified," such determination must be made *at the time of the employment decision* and may not be based on speculation regarding an individual's future capabilities [46]. A person infected with HIV who is qualified to perform a job at the time a particular employment decision is made may not be disqualified based on the employer's assumption that the individual may become so ill in the future as to be incapable of performing the job [46].

This issue of the time factor relative to rendering an individual "otherwise qualified" is an important issue for HIV infection. Because the nature of the disease through its symptoms and progress is random and varies so significantly from individual to individual, each case must be decided on its own facts. However, this creates a potential roadblock for the judicial system, as an individual's status relative to "otherwise qualified" may change between the time an initial complaint is filed and the time the complaint is eventually heard. It is plausible that someone who is "otherwise qualified" at the time of the complaint may not necessarily be so by the time the complaint is heard. An individual who files a

claim requesting injunctive reinstatement who is later unable to remain "otherwise qualified" will gain no benefit from the suit and even though the employer may be found to be in violation of the law, no remedy for the violation would necessarily be provided.

## Ignorance

Several employers have attempted to defend their discrimination allegations on the basis that they were unaware of the employee's or applicant's handicap. To prove the alleged discrimination was made on the basis of a handicap or disability, it is necessary to prove the employer was aware of such a condition to illustrate that the actions taken were a consequence of this condition.

The courts have rendered decisions favoring both plaintiffs and defendants in this regard. Interestingly enough, all of the cases decided in favor of the defendants involved federal law and all of the cases decided in favor of the plaintiff involved state law. Two of the cases involving federal law were also heard at the state level and, in both cases, the state court also decided in the defendant's favor. Nonetheless, an examination of the legal issues and principles affecting the decision may aid in understanding just how far the defense of ignorance can extend.

*Leckelt v. Board of Commissioners of Hospital District No. 1* was judged in favor of the employer at the federal level as well as at the state level under the Louisiana Civil Rights for Handicapped Persons Act [38]. In this case, the courts found that neither act protected the nurse [Leckelt] who was perceived to be infected with HIV because a handicap had not been established [38, at 826-27]. By refusing to provide the hospital with his test results, Leckelt, an LPN with a history of sexually transmitted diseases as well as symptoms of HIV infection, did not establish his protected status, despite his employer's perceptions. This case was also decided based on the fact that the specific nature of Leckelt's duties rendered him not "otherwise qualified" by failing to comply with the hospital's infectious disease control policy [38].

The case of *Phelps v. Field Real Estate Company* was also heard under both federal law and state law (the Colorado Antidiscrimination Act) [47]. The case, heard under ERISA, involved termination allegedly connected to the costs of insurance benefits. It was judged for the defendant employer, with both courts ruling that liability required showing the employer knew or should have known of the physical condition and the corresponding mandate to accommodate. While the employee had full-blown AIDS, he had not informed his employer and, presumably, did not manifest any obvious symptoms of the disease. The rulings found no liability when an employee prevents the employer from developing an awareness of a handicap [47].

*Ritter v. United States Postal Service* was a federal case in which Ritter, a postal worker, was dismissed for chronic absenteeism accompanied by a failure to notify

his employer of impending absences [48]. He argued his absences were due to AIDS and his dismissal constituted discrimination even though he had not notified the Postal Service of his alleged condition. In ruling for the Postal Service, the court found an employee who asserts a charge of handicap discrimination must show the alleged discriminant possessed knowledge of the handicapping condition [48].

While these cases imply that notification of employers of handicaps prior to any alleged discriminatory treatment is necessary to prove a discrimination charge, two state court cases found to the contrary. In the case of *State of Minnesota v. Di Ma Corporation and Richard Carriveau,* an openly gay salesclerk employed by an adult bookstore was suspected of being infected with HIV [32]. The court ruled under the Minnesota Human Rights Act that even though the defendant did not know the employee's HIV status, the employee was still illegally discriminated against because he was perceived to be carrying the virus [32].

In *Estate of McKinley v. Boston Harbor Hotel,* the defendant employer was found to be in violation of the Massachusetts Fair Employment Act [49]. McKinley, a waiter in the defendant employer's hotel dining room, was infected with HIV but never informed his employers. After taking medical leave, he was harassed and reassigned due to the perception that he had AIDS. The perception was confirmed by management's inquiry of McKinley's coworkers as to whether or not they knew whether he had AIDS. The defendant argued that since McKinley never told management about his condition, he was not protected by the statute. The Massachusetts Commission Against Discrimination reached the "inescapable conclusion that the employer did indeed perceive McKinley to have AIDS" and that those perceived to have AIDS were covered under the statute, regardless of the presence of absence of symptoms. It found employers cannot feign ignorance when there are obvious signs of disability and these perceptions were confirmed by management's questioning of McKinley's coworkers.

While the ADA clearly affords protection to those infected with HIV, two questions remain relative to the defense of ignorance. The first involves an employee who has not notified his or her employer of the infection. In all of the federal cases heard, the courts ruled that ignorance was an acceptable defense for the employer. However, two state laws were interpreted to imply that the employee is not necessarily required to disclose his or her condition to be protected. Because HIV infection is often an "invisible disability," the question remains concerning the role of employer notification to insure protection. While employees who inform their employers of their infection will clearly be protected by the ADA, those who choose not to disclose their HIV infection could find themselves without protection.

The second question that remains to be answered is the validity of ignorance as a defense in cases where employees are perceived to be infected with HIV. While the ADA does include those perceived to be disabled within its coverage, HIV is often an invisible disability, creating a greater potential for the employer defense

of ignorance. Further, because HIV infection is equated with homosexuality, the potential is high for an employer to discriminate against a known homosexual under the perception that he might be infected with HIV.

Federal law provides no protection against employment discrimination relative to sexual orientation. Therefore an employer may legally justify terminating someone perceived to be carrying the HIV virus on the ground that the employer dislikes homosexuals. If the employee has not tested HIV-positive or if the employee has tested positive and not made this status known, he would have no basis for an employment discrimination claim unless the particular state had passed a law prohibiting discrimination based on sexual orientation. Therefore, in any case in which the defendant employer attempts to use ignorance as a justification for its actions, the deciding factor in the verdict may be the employer's specific actions, as illustrated in the *Estate of McKinley* case [49].

## Employee Not Protected

One final defense employers have used in employment discrimination cases based on HIV involves the argument that the employee is not protected under the applicable law. Employers have had some success in this defense, as illustrated in the following cases.

In *Rose City Oil v. Missouri Commission on Human Rights,* a convenience store employee who was reassigned from sandwich making to cashiering duties and subsequently terminated based on the perception that he was HIV positive found no protection under the Missouri Human Rights Act [50]. In a very narrow reading of the law, which specifically included those "perceived as being handicapped" as receiving protection, the defendant employer argued the plaintiff had not established that a handicap existed [50, at 316-17]. The state law's definition of what constituted a handicap required the *actual existence* of a condition that might be perceived as a handicap. The court concurred, stating that perceptions themselves were not actionable unless the accompanying condition existed [50, at 317].

In *Petri v. Bank of New York Co., Inc.,* the plaintiff argued that because the defendant employer knew of his sexual relationship with an HIV-positive man, the bank's action in firing him violated the New York Human Rights Law based on his perceived disability [47]. The Bank of New York argued the plaintiff did not have AIDS nor had he tested positive to constitute perceived disability. The court agreed, finding the plaintiff had only established the fact that he was a homosexual [47, at 612]. Mere membership in a high-risk group for HIV would import into the statute a ban on sexual orientation discrimination that the legislature had specifically failed to pass [47, at 610]. It found proof of an illness or the perception of an illness was required as the motivating factor in the firing to make the employer's conduct actionable [47, at 613].

In *Leckelt v. Board of Commissioners of Hospital District No. 1,* the courts found the LPN not covered by either federal law or the Louisiana Civil Rights for

Handicapped Persons Act [38]. The decisions were based on the fact that no HIV test results had been provided by the employee, rendering him unable to claim protected status under either act [38, at 826-27]. As in *Petri*, the court found the only thing of which the plaintiff could prove his employer had a specific knowledge was his homosexuality, which was not protected under either state or federal law [38].

In two cases, however, employers who defended their actions on the grounds that the alleging employees were not protected under law had this rationale rejected by the courts. In *Shuttleworth v. Broward County Office of Budget and Management Policy,* the defendant employer argued against the inclusion of the plaintiff's AIDS condition as a protected handicap under the Florida Human Rights Act of 1977 [26]. The court found AIDS clearly was "a physical impairment that limited one or more major life activities" [26, at 656]. In *Sanchez v. Lagoudakis,* the defendant claimed the plaintiff's allegation of a perceived handicap despite the fact that she tested negative for HIV was erroneous [51]. The court disagreed, finding the significant issue was the employer's motivation rather than the employee's physical condition [51, at 660]. By refusing to allow the employee to continue working until she could prove she was HIV-negative, the court found "the employer has undertaken the kind of discriminatory action that the (Michigan Handicapper's Civil Rights) Act prohibits [51, at 662].

Employers have had mixed success in using the defense that employees were not protected under relevant laws in their HIV-based employment discrimination claims. It is quite clear in this regard that the ADA expressly includes HIV infection as a disability within the protection it offers. However, as discussed in the preceding section on the defense of ignorance, what remains to be seen is the extent to which employees who have not tested positive for HIV infection or those who have tested positive but have not made their employers aware of this fact will receive protection under the ADA. Again, it can be expected that verdicts may reflect the specific facts of the case but until a cohesive body of case law is developed, it remains to be seen as to whether an employer can justifiably defend the discriminatory treatment of workers perceived to be carrying HIV by arguing that such employees are not protected.

## SUMMARY

As evidenced by the above discussion, employers have had some success utilizing specific reasons in defending their discriminatory treatment of workers infected with or perceived to be infected with the HIV virus. The ADA should help to clear up much of the confusion surrounding the issues of whether HIV infection itself is a protected handicap. The important questions concern the coverage afforded to those who are members of high-risk groups who have not tested positive yet may be perceived to be either infected with the virus or be at risk for it, and those who have tested positive but have not disclosed this protected

disability to their employers. These questions have yet to be answered and may be major sources of contention in the courts under the ADA.

The provision of employee welfare benefits is another important issue concerning the ADA and the future of potential claims for discrimination under both the ADA and ERISA. While ERISA does not mandate that employers continue to provide any benefits, including health insurance, to employees, the ADA forbids employers from discriminating against employees with disabilities in all aspects of employment, but exempts insurers from such discrimination. The question that remains to be answered is how this law will apply to employers who self-insure their employees. Under ERISA employers have been allowed to legally discriminate against employees in altering or canceling benefits as long as the "employment relationship" continued. The extent to which the courts will allow this practice to continue under cases that are heard and argued under the ADA remains to be seen. However, because the terms of the ADA appear so broad in this regard, it appears likely the courts will not change their interpretations of ERISA under the provision of the ADA. While the judicial decisions may be logically supported, the fact that Congress has not found a way to resolve this dilemma in employment law may result in increased incidents of such discrimination. A controversy of free enterprise employment may be turned into a larger problem of public policy through its far-reaching affects on numerous other segments of society.

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## ENDNOTES

1. J. M. Feinman, The Development of the Employment-at-Will Rule, 20 *American Journal of Legal History* 118 (1976).
2. *Payne v. Western and Atlantic RA Co.*, 82 Tenn 507, (1884).
3. *Clark v. Prentice Hall, Inc.*, 233 S.E.2d 496 (Ct. App. 1977).
4. C. Fisher, L. Schoenfeldt, and J. Shaw, *Human Resource Management*, Houghton-Mifflin, Boston, 1990.
5. National Labor Relations Act, P.L. No. 74-198, 49 Stat 449 (1935).

6. C. W. Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 *Virginia Law Review* 481, (1976).
7. H. Cooperman, *The Emerging and Developing Theory of Unlawful Discharge: A Plaintiff's Perspective,* Baltimore, Maryland, (1987).
8. Connolly and Marshall, An Employer's Legal Guide to AIDS in the Workplace, 9 *St. Louis University Public Law Review,* 561 (1990).
9. *Goins v. Ford Motor Company,* 347 N.W.2d 1984 (Mich. Ct. App. 1983).
10. For example, Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, or national origin. It covers employment terms and conditions such as selection, placement, promotion, discharge, training, and compensation. The Pregnancy Discrimination Act of 1978 protects pregnant women from unfair and unjust treatment as an amendment to Title VII with identical provisions and scope of Title VII. The Age Discrimination in Employment Act of 1967, amended in 1986, prohibits employment discrimination against job applicants and employees at or over the age of forty.
11. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat 829 (1974).
12. 29 U.S.C. Sect. 510.
13. *Petri v. Bank of New York Co., Inc.,* 582 N.Y.S.2d 608 (1992). In this case the plaintiff employee, an open homosexual, had not tested positive for the HIV virus. Consequently, the court found his termination could not be attributed to his perceived disability because the absence of such test results prevented him from establishing his protected class status.
14. *Chapoton v. Majestic Caterers,* AIDS Litigation Project II 234 (Chancery No. 87-688W, 16 Va. Cir. Ct. for the City of Roanoke, VA, June 7, 1989). In this case the plaintiff employee informed the defendant employer of asymptomatic HIV-positive status. The court found the employee was not handicapped under Virginia state law, but an employee-at-will.
15. *Evans v. Kornfeld,* AIDS Litigation Project 227 (Court of Common Pleas, Luzerne Co., Penn. No. 3468-C, 1988). In this case the dismissal of the HIV-positive plaintiff was found to be lawful under the employment-at-will doctrine, as Pennsylvania state law did not include HIV seropositivity.
16. *Brunner v. Al Attar,* 786 S.W.2d 784 (Tex. App. Houston, 1990).
17. Americans with Disabilities Act of 1989, P. L. No. 101-336, 104 Stat 327 (1990).
18. *Chrysler Outboard Corp. v. Wisconsin Dept. of Industry, Labor and Human Resources,* 13 EPD 11,526, 14 FEP 344 (Wis. Cir. Ct. 1976).
19. *McDermott v. Xerox Corp.,* 65 NY2d 213, 480 NE2d 695, 491 NYS2d 106 (1985).
20. *Bentivegna v. U.S. Dept. of Labor,* 694 F2d 619 (9th Cir. 1987).
21. *Shawn v. Legs Company Partnership,* AIDS Litigation Project II 217 (No. 89-04346, N.Y. Supp. Ct., N.Y. City, AIDS Litigation Reporter May 11, 1990).
22. *Doe v. Cooper Investment,* 16 Pens. Rep. (BNA) 766 (C.D. Colo. April 18, 1989).
23. *Alexander v. Choate,* 105 S.Ct. 712, 713 (1985).
24. *McGann v. H & H Music Co.,* 742 F.Supp 392 (S.D. Tex, 1990), aff'd 946 F2d 401 (5th Cir 1991).
25. *Owens v. Storehouse, Inc.,* 773 F.Supp 416 (1991).

26. *Shuttleworth v. Broward County Office of Budget and Management Policy,* 639 FSupp 654, 649 FSupp 35 (S. D. Fla. 1986).
27. *District 27 Community School Board v. Board of Education,* 130 Misc 2d 398, 502 NYS 325 (Sup. Ct. 1986).
28. *Hilton v. Southwestern Bell Telephone Co.,* 936 F.2d 823, 830.
29. *Local 1812, American Federation of Government Employees v. United States Department of State,* 662 FSupp 50 (D. D. C. 1987). In this case the court held that although foreign service employees who were HIV-positive were handicapped, they were not otherwise qualified for worldwide duty. The court based its conclusion on the fact that HIV-infected persons would be subject to poor medical care and unsanitary conditions in many posts and these conditions would be harmful to the employees due to their lowered immune systems. The court further found testing of employees permissible because no employee would be terminated or denied benefits as a result of a positive test; it reasoned that asymptomatic, HIV-positive employees could be posted to countries with "safe" health care and sanitary conditions.
30. *Benjamin R. v. Orkin Exterminating Co., Inc.,* 390 S.E.2d 814, 825 (W.Va. 1990).
31. *Cain v. Hyatt Legal Services,* 734 F.Supp 671, 681 (E.D. Pa. 1990).
32. *State of Minnesota v. Di Ma Corporation and Richard Carriveau,* Minnesota Department of Human Rights, Dec. 7, 1990.
33. *Raytheon Company v. California Fair Employment and Housing Commission, Estate of Chadbourne, Real Party in Interest,* 212 Cal App. 3d 1242, 261 Cal. Rptr. 197 (1989).
34. *Racine Education Association v. Racine Unified School District,* 476 N.W.2d 707, 164 Wis.2d 567, 70 Ed.Law Rep. 975 (1989).
35. *Doe v. District of Columbia,* 796 F.Supp 559 (1992).
36. *Doe v. Westchester County Medical Center,* AIDS Litigation Project II 279, Dept. of HHS, Department Appeals Board, Docket No. 91-504-2, Decision No. 191, April 20, 1992.
37. *Estate of Behringer v. Medical Center at Princeton,* 249 N.J.Super. 597, 592 A.2d 1251 (1991).
38. *Leckelt v. Board of Commissioners of Hospital District No. 1,* 909 F.2d 820 (5th Cir. 1990).
39. United States Centers for Disease Control, Recommendations for Prevention of Human Immunodeficiency Virus Transmission in Health Care Settings, 36 *Morbidity and Mortality Weekly Report* 35 (1987).
40. United States Centers for Disease Control, Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis-B Virus to Patients During Exposure-Prone Invasive Procedures, 40 *Morbidity & Mortality Weekly Report* 1-9 (1991).
41. Murtha, Underutilized Weapon Against AIDS: The Workplace: A Strategic Approach, 10 *Pace Law Review* 45 (1990).
42. *Diaz v. Pan American World Airways, Inc.,* 3 EPD 8166, F2d 385 (CA-5, 1971), cert. denied 3 EPD 7560, 404 US 950 (1971).
43. *Sprogis v. United Air Lines, Inc.,* 3 EPD 8239, 444 F2d 1194 (CA-7, 197), cert. denied 4 EPD 7560, 404 US 991 (1971).

44. *Chalk v. United States District Court, Central District of California,* 840 F.2d 701 (9th Cir. 1988).
45. *Isbell v. Poor Richard's,* AIDS Litigation Project 263 (West Virginia Human Rights Commission, Docket No. EH-352-87, 1988).
46. Report of the House Committee on the Judiciary, 101st Congress, House Report No. 101-485.
47. *Petri v. Bank of New York Co., Inc.,* 582 N.Y.S.2d 608 (1992).
48. *Ritter v. United States Postal Service,* 37 M.S.P.R. 334 (1988).
49. *Estate of McKinley v. Boston Harbor Hotel,* Mass. Comm. Against Discrimination No. 90-BEM-1263 (1992).
50. *Rose City Oil Company v. Missouri Commission on Human Rights,* 832 S.W.2d 314, 1992 WL 103027 (Mo. App. 1992). In this case, despite the fact that it was rumored the employee was HIV-positive and these perceptions were the basis for apparent discriminatory treatment, the court found the employee did not clearly establish a handicapping condition existed by informing his employer of HIV-positive test results.
51. *Sanchez v. Lagoudakis,* 440 Mich 496, 486 N.W.2d 657 (1992).

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