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Acquired Immune Deficiency Syndrome ("AIDS") and the Human Immunodeficiency Virus ("HIV") pose issues that all employers will likely confront in some manner in the future. No segment, however, will be more vulnerable to the ravages of the disease than the healthcare industry. Hospitals, physicians, healthcare workers, and patients alike have competing rights and responsibilities that will need to be addressed when dealing with AIDS in the workplace. The balancing of an individual's rights against a priority public health concern is in legal evolution. The courts are increasingly confronted with a myriad of issues that arise when confronted with the problem of AIDS in the workplace under federal and state laws. The reported cases involving AIDS show that the courts have recognized the impact of public health and safety when dealing with the question of rights and responsibilities of AIDS in the workplace. Of paramount concern, especially with healthcare facilities and the performance of invasive procedures, is the prevention of the spread of a fatal disease.

Understanding the current state of scientific knowledge about the risks associated with individuals who have AIDS or HIV is an integral part of the legal analysis involved when an individual claims his or her rights have been violated because of HIV status. While there is no final word on the issue of transmission of HIV, the general medical consensus is that the disease is primarily transmitted in one of three ways: participating in intimate sexual relations, exposure to blood or blood components, and exposure in utero or through breast milk. The disease cannot be transmitted by casual contact. Exposure to blood or blood components is clearly the method of transmission that will be of primary concern in dealing with AIDS in the healthcare industry. Until the medical community can eliminate the possibility of transmission of the fatal disease, the concerns of public health and safety will most likely

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prevail in the balance of the institution's responsibilities against an individual's rights.

AIDS AND DISCRIMINATION

It is well recognized that both federal and state laws prohibit discrimination against individuals with handicaps or individuals who are perceived as having a physical or mental impairment, regardless of their actual condition. Under section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"),[1] entities receiving federal financial assistance[2] are prohibited from discriminating against an "otherwise qualified individual" on the basis of his or her handicap.[3] While AIDS may constitute a handicap under federal law, the scope of section 504's application to an individual's HIV-positive status is still unsettled. Many courts have assumed that HIV-positive individuals were "handicapped with a contagious disease" for purposes of determining whether an individual was "otherwise qualified" for a particular position.[4] Other courts have suggested or recognized that seropositivity[5] (testing positive for HIV) is itself a "handicap" under section 504.[6] State laws also prohibit discrimination; these laws may be used in litigation when an employee claims to have been the victim of discrimination because of AIDS or HIV.

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1. Section 504 of the Rehabilitation Act provides: "*No otherwise qualified* individual with handicaps shall, *solely by reason of his handicap*, be excluded from participation, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C.A. § 794 (Supp. 1992) (emphasis added). An "otherwise qualified individual with handicaps" is one who, with reasonable accommodation, can perform the essential functions of the job in question. 45 C.F.R. § 84.3(k)(1) (1992).

2. Since receipt of Medicare and Medicaid payments by a hospital triggers the application of Section 504, virtually all healthcare institutions could be subject to the Act's prohibitions against discrimination. *See* Glanz v. Vernick, 756 F. Supp. 632 (D. Mass. 1991).

3. *See supra* note 1. The Rehabilitation Act defines a "handicapped individual" for purposes of section 504 as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C.A. § 706(8)(B) (Supp. 1992).

4. The United States Supreme Court in School Board of Nassau County, Florida v. Arline, 480 U.S. 273 (1987), held that contagious diseases (in that case tuberculosis) fell within the statutory and regulatory framework of the Rehabilitation Act. The court, however, did not decide whether asymptomatic carriers of a disease such as AIDS could be considered "physically impaired" or whether such a person could be considered "handicapped" solely because of his or her contagiousness.

5. This term is frequently used in medical journals to denote HIV positive testing.

6. *E.g.*, Leckelt v. Bd. of Comm'rs. of Hosp. Dist. No. 1, 909 F.2d 820 (5th Cir. 1990); Glanz v. Vernick, 756 F. Supp. 632 (D. Mass. 1991).

The Americans with Disabilities Act[7] ("ADA") also prohibits discrimination on the basis of disability. While the ADA is similar in purpose to the Rehabilitation Act, its coverage is broader because it is not limited to recipients of federal assistance or federal contractors. In addition, unlike the Rehabilitation Act, an individual who pursues an action against an employer alleging discrimination under the ADA does not have to demonstrate that the sole cause of the adverse employment decision was due to a disability. Under the ADA, an individual may also sue for punitive damages.

There appears to be a "bright-line" prohibition of discrimination against individuals with AIDS or HIV. However, those individuals who bring actions against their employers asserting their statutory rights do not always prevail for two reasons: first, the courts balance the public health interests against the interests of the plaintiff, and second, the plaintiff has a heavy burden of proof.[8] In addition, given the general reluctance to disclose AIDS or HIV, many individuals may not pursue the legal remedies available to them for alleged discrimination. The loss of confidentiality over one's medical condition, as would necessarily result from the litigation, may impede an individual's decision to pursue legal redress.

In most of the reported decisions, the individual who is claiming discrimination is an employee whose employment status was jeopardized by the employer's discovery that the individual has AIDS or HIV. In those cases, the courts analyzed the individual's asserted right to be free from discrimination in light of the employer's responsibilities for the health and safety of others. For example, in *Leckelt v. Board of Commissioners of Hospital District No. 1*,[9] the district court analyzed a nurse's rights under various federal and state constitutional and statutory provisions. Leckelt, a licensed practical nurse, refused to disclose the results of an HIV

7. 42 U.S.C.A. §§ 12101-117 (Supp. 1992).

8. In any case involving a charge of handicap discrimination, under section 504 for example, the plaintiff must establish a prima facie case by showing that he or she is a handicapped person within the meaning of the Act, that he or she is qualified for employment despite the handicapped condition, and that he or she was discharged from employment under circumstances that support a finding that the discharge was based solely on this handicap. Once a plaintiff establishes a prima facie case, the defendant must come forward with evidence of a legitimate, non-discriminatory reason for discharging the plaintiff or show that the plaintiff was not "otherwise qualified." If the defendant meets this burden, the plaintiff then has the opportunity to prove that either the reason given by the defendant was a pretext or the reason given by the defendant "encompasses unjustified consideration of the handicap itself." Leckelt v. Bd. of Comm'rs. of Hosp. Dist. No. 1, 714 F. Supp. 1377, 1385 (E.D. La. 1989), *aff'd*, 909 F.2d 820 (5th Cir. 1990) (quoting Puskin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1387 (10th Cir. 1981)).

9. 714 F. Supp. 1377.

antibody test when requested to do so by the hospital. The hospital advised him that he could not return to work until he submitted the results of the test. When Leckelt failed to submit the test results, the hospital ultimately terminated Leckelt for failure to comply with the hospital's policy.

Leckelt filed suit claiming that he was discriminated against under section 504 of the Rehabilitation Act. Specifically, Leckelt alleged that the hospital perceived he was seropositive for HIV[10] and, thus, handicapped within the meaning of the Rehabilitation Act. The hospital asserted that its request for the test results was made not only for Leckelt's protection but also for the safety of the hospital's patients.

The issues before the district court were whether the plaintiff (1) was an individual with a handicap, (2) was discharged solely because of this handicap, and (3) was otherwise qualified to retain his position.

The district court concluded that the hospital did not perceive the plaintiff to be seropositive for HIV and, therefore, handicapped.[11] It also found that the plaintiff did not produce evidence from which it could be inferred that the hospital discharged him solely because of a perceived handicap. He was discharged because he had violated the hospital infection control policy on reporting infection or communicable disease and not because he was regarded as seropositive for HIV.[12] He was also not "otherwise qualified" to perform his job as a licensed practical nurse because of his refusal to comply with the hospital's infection control policies.[13] In analyzing Leckelt's discrimination claim, the court concluded that the hospital's stated reason for his discharge was not pretextual. The court found that the hospital had the right to require such testing in order to fulfill its obligation to its employees and to the public concerning infection control and health and safety in general.[14] In particular, the district court noted that the hospital was trying to comply with the guidelines established by the Centers for Disease Control ("CDC") governing procedures for reporting

10. The hospital's discovery of Leckelt's possible exposure to AIDS was unusual. In the context of reviewing a report of the infection control committee over the need for a policy addressing employees with AIDS, a hospital administrator learned that Leckelt's male roommate for eight years was a patient at the hospital and was believed to have AIDS. Leckelt was believed to be a homosexual.

11. 714 F. Supp. at 1386.

12. *Id.* at 1389.

13. *Id.* at 1387.

14. *Id.* at 1389.

infection among its patients and employees. The employee handbook stated that employees committing serious infractions of hospital policy were subject to immediate termination. Thus, the court held, Leckelt was terminated not because of any HIV status but because of his refusal to comply with the hospital's infectious disease policy.[15]

The district court also concluded that the hospital's request for the plaintiff to submit the results of the HIV test was job-related and consistent with the purposes of the Rehabilitation Act.[16] It relied, in part, on the Supreme Court's decision in *School Board of Nassau County, Florida v. Arline*.[17] Under the law established in *Arline*, employers are empowered to conduct an "inquiry into the health status of an individual employee handicapped with a contagious disease . . . ."[18] The court in *Arline* determined that an employer cannot make a reasoned and medically sound judgment regarding an individual's employment status unless it knows the individual's health status. Without such knowledge, the employer could not ascertain what would constitute a reasonable accommodation of the employee's handicap required under the discrimination laws.[19]

On appeal, the Fifth Circuit Court of Appeals rejected Leckelt's claim of discrimination under section 504 of the Rehabilitation Act.[20] The Court of Appeals affirmed the district court's ruling, assuming for purposes of its analysis that seropositivity for HIV antibodies is an impairment protected under section 504 and that the hospital treated him as if he had the impairment.[21] It also affirmed the district court's holding that the plaintiff was not "otherwise qualified" to perform his job.

Given the unique facts involved in *Leckelt* and the resulting termination of the employee, neither the hospital nor the court addressed the issue of what might constitute a "reasonable accommodation" under the Act. If, in fact, Leckelt had tested positive for HIV prior to his termination, the hospital would have been required to ascertain what reasonable accommodations would be available for him to continue employment as a licensed practical nurse.

15. *Id.* at 1386.
16. *Id.* at 1389.
17. 480 U.S. 273.
18. 714 F. Supp. at 1388.
19. *Id.* at 1389.
20. 909 F.2d 820.
21. *Id.* at 825.

Reasonable accommodation requires balancing the individual's rights to be free from discrimination against the employer's obligations to its other employees and/or patients. Most hospitals would likely begin the task of determining what types of accommodations were feasible by ascertaining how they could comply with their own policies and the guidelines established by the CDC. For example, a hospital may be required to change the employee's assignments to eliminate those involving invasive procedures. It might also transfer an employee to another department or take extra precautions within the employee's present position. Consultation between the individual's physician and the institution's health personnel could also be of assistance in determining whether an infected worker could adequately and safely perform patient duties.

While the *Leckelt* decision is fairly fact-specific and, thus, may not necessarily govern similar situations, it is illustrative of the type of examination of the competing rights and responsibilities that courts most likely confront given the ever-increasing litigation involving AIDS and healthcare employment.

In *Estate of Behringer v. Medical Center at Princeton*,[22] the court was confronted with a charge of discrimination by an otolaryngologist/plastic surgeon whose surgical privileges were initially restricted and then revoked after he tested positive for HIV. As characterized by the court, the case addressed the "apparent conflict between a doctor's rights under the New Jersey Law Against Discrimination ("LAD"), and a patient's 'right to know' under the doctrine of 'informed consent.' "[23] Issues related to a hospital's obligations to protect the confidentiality of an AIDS diagnosis of a healthcare worker are discussed in the next section.

Dr. Behringer was a patient at the Medical Center at Princeton when he tested positive for HIV and was diagnosed as suffering from AIDS. Within several weeks of his diagnosis, his surgical privileges at the medical center were suspended. Before his death, Dr. Behringer brought suit against the Medical Center for, among other things, a violation of LAD. His claim was based on the restriction and ultimate curtailment of his surgical privileges at the Medical Center. The hospital initially canceled all of his surgeries pending review by the medical and dental staff and the Chairman of the Department of Surgery. Thereafter, patients were required to sign an informed consent form noting that the physician was

22. 592 A.2d 1251 (N.J. Super. Ct. Law Div. 1991).
23. *Id.* at 1254 (citation omitted).

HIV positive. Finally, the medical center adopted a policy limiting "any activity," including surgical procedures that created a risk of transmission of the disease to others. From the date of diagnosis until his death two years later, he did not perform any further surgeries at the medical center.

During the course of litigation, Dr. Behringer gave up his argument that he was an "employee" of the medical center within the definition section of LAD. Instead, he relied upon a section of LAD that prohibited discrimination in the contracting with, providing services to, or otherwise doing business with an individual on the basis of race, creed, color, etc.[24] The court found that the application of this section of the statute was warranted. As such, the trial court concluded that Dr. Behringer, as a surgeon suffering from AIDS, was protected under the state discrimination law as someone who was handicapped.[25]

Nevertheless, the court also found that the medical center met its burden of establishing that its policy of temporarily suspending and, thereafter, restricting plaintiff's surgical privileges was substantially justified by a " 'reasonable probability of substantial harm' " to the patient.[26] The court also upheld the hospital's imposition of requiring informed consent before Dr. Behringer could perform invasive procedures. Where the ultimate risk of harm is death, even the presence of a low risk of transmission justified the adoption of the policy, which precluded performance of invasive procedures when there was any risk of transmission.[27] For these reasons, the court concluded that Dr. Behringer was not entitled to recover under the New Jersey Law Against Discrimination.

The court in *Behringer* recognized the anomaly presented when an individual's claim of discrimination requires the disclosure of a medical condition that might otherwise remain confidential. The fact that the case involved a surgeon on staff at an institution where the physician was also a patient demonstrates the complexity of issues that must be addressed by the courts in evaluating the rights and responsibilities of the individual and the employer in a discrimination action. As discussed below, Dr. Behringer claimed a breach of confidentiality.

In a recent administrative proceeding, the United States Department of Health and Human Services ("Department") filed charges

24. *Id.* at 1274.
25. *Id.* at 1275.
26. *Id.* at 1283 (citation omitted).
27. *Id.*

against Westchester County Medical Center ("Medical Center") for alleged discrimination under section 504 of the Rehabilitation Act.[28] The Department maintained that the Medical Center's refusal to hire an HIV-infected pharmacist violated the Act. After reviewing extensive evidence, the administrative law judge found that the Medical Center had engaged in unlawful discrimination by restricting the employment of a prospective hospital pharmacist with the HIV.

In a lengthy opinion, the administrative law judge concluded that it was extremely unlikely that the hospital pharmacist could transmit HIV to a patient in the normal course of his duties. He did not believe that the preparation of parenteral products created a "meaningful risk" of transmission.[29] As such, the administrative law judge concluded that the pharmacist would not, by reason of the HIV infection, constitute a direct threat to the health or safety of others.[30] As a result, the administrative law judge concluded that all federal financial assistance to the Medical Center should be terminated until such time as it complied with section 504 of the Rehabilitation Act.[31]

In rendering his decision, the administrative law judge rejected the Medical Center's arguments that it had properly limited the types of pharmaceutical procedures it would allow a prospective new pharmacist to perform once it found out he was infected with HIV. The Medical Center had contended that the consequences of contracting HIV were so horrible that it should be able to impose what it deemed to be "minimal" job restrictions in order to avert even a remote possibility that the pharmacist may inadvertently infect the Medical Center's patients.

The Department argued that "fear and superstition" must give way to a "rule of reason." Thus, it was able to persuade the administrative law judge that the chances of an inadvertent communication of HIV by a hospital-based pharmacist in the performance of his or her duties were so minuscule as to be insignificant under the law.

In his opinion, the administrative law judge suggested that if he were to find that the pharmacist posed even a "small but palpable" risk of transmitting HIV during the course of performing his du-

28. *In re Westchester County Medical Center*, Docket No. 91-504-2, Decision No. 191 (H.H.S. Departmental Appeals Board, April 20, 1992), *aff'd*, DAB Decision No. 1357 (H.H.S Civil Rights Reviewing Authority, September 25, 1992).

29. *Id.* at 47.

30. *Id.* at 49.

31. *Id.* at 53-55.

ties, he would not hesitate to affirm that the Medical Center could take reasonable measures to protect against that risk. Since he found no such risk, however, he concluded that the Medical Center's restrictions were arbitrary and constituted discrimination in violation of the Rehabilitation Act.[32]

In rendering this decision, the administrative law judge distinguished *Behringer* on the grounds that it involved a surgeon who was performing invasive procedures that the CDC had identified as manifesting some risk of communication of HIV when performed by an HIV-infected healthcare worker. The duties of the pharmacist, on the other hand, were not found to be comparable.[33]

In each of the reported cases the alleged violation of the HIV infected employee's rights took place as a result of a hospital's attempts to comply with nationally followed guidelines for employees who have an infectious disease, including AIDS. A court may reach a different conclusion under different circumstances.

CONFIDENTIALITY - CONSTITUTIONAL AND STATUTORY CHALLENGES

An individual's HIV status is generally protected from disclosure by statutes mandating its confidential nature. In addition to statutory prohibitions against the disclosure of such information, the United States Constitution and state constitutions recognize an individual's right to privacy with respect to such information. Nevertheless, the developing case law in this area demonstrates that the right to privacy and confidentiality is not absolute. In cases involving claims of breach of confidentiality or invasion of one's right to privacy, the courts are confronted with the task of balancing an individual's rights against another's interests in the disclosure of such information. Under certain circumstances, the latter may justify disclosure of what might otherwise be protected information.

In the healthcare industry, courts are being confronted with the task of balancing the privacy right of an individual who has tested HIV positive against the competing needs for the public disclosure of this information to a third party. What makes the balancing of these competing interests so compelling in the healthcare area is the very nature of the contact between the healthcare workers and the patients involved; to date, many of the reported cases involve

32. *Id.* at 50.
33. *Id.* at 51.

physicians who are either in residency programs at hospitals or who are on the staffs of institutions.

In *Leckelt*, the nurse who was terminated for failing to comply with the hospital's policy requiring disclosure of his test results also charged his former employer with violating his right to privacy. The district court found that the hospital had a longstanding practice and procedure requiring nursing personnel to inform the hospital of their health status and to undergo testing in the event of actual or suspected infection.[34] "Where the employees were exposed to infectious diseases, cultures and sensitivity testing was conducted to determine if the employee had contracted the disease."[35] In rejecting the plaintiff's claim, the district court concluded that Leckelt "did not have a reasonable expectation of privacy with regard to his test results" given the hospital's longstanding infection control practices and procedures, and given the plaintiff's long-term relationship with one who died of AIDS.[36]

The court recognized as strong governmental interests the public hospital's need to guarantee the safety of its patients from infectious disease and to provide a safe and efficient workplace to all employees, including the plaintiff.[37] The court in *Leckelt* concluded:

> Defendant's request for plaintiff's test results was the first step in the process designed to insure that plaintiff would not transmit HIV to someone else, would not contract a disease which might be fatal or disabling to plaintiff because of his possibly impaired immune system, and would otherwise be fit to perform his job. Defendant's interest in knowing plaintiff's health status far outweighed the limited intrusion of requiring [plaintiff] to disclose the results of a test he had already taken voluntarily.[38]

In distinguishing *Glover v. Eastern Nebraska Community Office of Retardation*,[39] in which the eighth circuit court of appeals struck down an employer's mandatory HIV testing and reporting requirement for staff as a violation of the Fourth Amendment, the *Leckelt* court pointed out that the health workers in *Glover* did not "conduct surgical or invasive procedures on their [patients]."[40]

As *Leckelt* shows, in cases involving the interpretation of a

34. 714 F. Supp. at 1391.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 1392.
39. 867 F.2d 461 (8th Cir. 1989).
40. 714 F. Supp. at 1392.

state's statute governing the confidentiality of AIDS-related information, the courts must determine whether the employer has demonstrated a "compelling need" for the disclosure of such information. Hospitals have generally been permitted to disclose a physician's identity and his HIV positive status to certain colleagues and patients. In so doing, the courts have recognized the strong public policy supporting a patient's right to this information under the doctrine of "informed consent." Notwithstanding the low risk of transmission of HIV for physicians who employ universal precautions such as gloves and masks, many courts have concluded that "any risk" may be too great where the ultimate harm or risk is death.

In *In Re Milton S. Hershey Medical Center of the Pennsylvania State University*,[41] the court was confronted with an issue of first impression involving an individual's HIV status under the state's confidentiality statute. The issue was "whether the trial court correctly permitted two hospitals to disclose the identity of a member of their staff who tested positive for . . . HIV."[42]

This case involved a physician participating in a joint obstetrics and gynecology residency program who suffered a cut during an invasive, internal surgical procedure and exposed a patient to his blood. The physician voluntarily submitted to a blood test for HIV, after which he was informed that the test results were positive. At that time, the physician voluntarily withdrew from participation in future surgical procedures.

The physician appealed the trial court's ruling, which permitted the two hospitals involved in the residency program to disclose his identity and HIV status to certain colleagues and patients. Included in the judgment was an order precluding those individuals from further disclosing his identity.[43]

The appellate court found that the trial court did not abuse its discretion in issuing its order allowing the limited disclosure. Accordingly, the court concluded that the ruling did not violate Pennsylvania's Confidentiality of HIV-Related Information Act.[44] The appellate court concluded that the hospitals sustained their burden of demonstrating a "compelling need" to disclose Dr. Doe's HIV status to the patients potentially affected by the contact with him,

41. 595 A.2d 1290 (Pa. Super. Ct. 1991).
42. *Id.* at 1291.
43. *Id.* at 1294.
44. *Id.*

as well as to certain staff members.[45] The hospitals argued that the disclosure of the physician's identity was necessary to prevent the spread of AIDS. The hospitals believed it was their duty to inform the individuals of their potential exposure to HIV and to offer them treatment, testing, and counselling. The hospitals also felt that there was a compelling need to disclose the physician's name to other treating physicians in their respective departments so that those physicians would contact their patients in the event that the physician assisted in any invasive procedures that involved them.

Among the factors the court considered in rendering its decision were the hospitals' implied assurances that their patients would receive safe and adequate medical care.[46] In addition, the physician who was infected was involved in invasive surgical procedures where there was a high risk of sustaining cuts and exposing patients to his blood.[47]

Of significance to the appellate court was that the list of patients was compiled in a manner that was least intrusive to Dr. Doe's rights. The class of patients to be notified was narrowly drawn to include only those individuals whose contact with the physician involved intrusive procedures. By limiting the class in this manner, the physician's interest in confidentiality was protected as best as possible.[48] For these reasons, the appellate court concluded that the trial court neither abused its discretion nor violated the Pennsylvania Confidentiality of HIV-Related Information Act.

The court rejected Dr. Doe's position that there was no compelling need to disclose his HIV-related information. The court found that the physician's medical problem was not limited to his own condition. According to the court, "It became a public concern the moment he picked up a surgical instrument and became a part of a team involved in invasive procedures."[49]

Subsequent to the appellate court's decision in *In Re Milton S. Hershey*, patients treated by Dr. Doe were sent a letter explaining they were treated by an infected physician and were at risk of contracting AIDS. Shortly thereafter a class action was filed against the two hospitals[50] on behalf of three subclasses: those who Dr. Doe treated, their sexual partners, and the "children 'who were

45. *Id.*
46. *Id.* at 1295-1296.
47. *Id.* at 1296.
48. *Id.* at 1301.
49. *Id.* at 1298.
50. A separate suit was apparently filed against the resident but has not yet been the subject of any reported decisions.

delivered at the defendant hospitals or otherwise exposed to the HIV virus.' "[51] The plaintiffs were further segregated into two groups: those who it was believed would contract HIV as a result of Dr. Doe's treatment and those who would not develop HIV.

The defendant hospitals filed objections to an amended complaint challenging the legal sufficiency of the allegations against them. As to the allegations of negligence, the defendants argued that they did not have a legal duty to ascertain the resident's HIV status prior to permitting him to treat patients. The hospitals relied, in part, on the Pennsylvania HIV-Related Information Act, which "specifically forbids the performance of any HIV-related tests on an individual without first obtaining informed written consent."[52] In denying the defendants' objections, the court did not resolve this issue except to state that plaintiffs had alleged other acts of negligence, which precluded it from dismissing plaintiffs' amended complaint.[53]

The court next rejected defendants' challenges that "mere treatment" by an HIV-infected physician did not give rise to an actionable wrong because the injuries were "not of the type which the law recognizes as legally compensable."[54] The court noted that one of the subclasses of patients was comprised of patients upon whom the resident had performed an invasive procedure. At the preliminary stages of the pleadings, the court was not willing to dismiss plaintiffs' claims based on defendants' insistence that there was no medically recognized exposure to these patients. The court noted that the medical literature seemed divided on the subject of risk of exposure to HIV from infected healthcare workers.[55]

The court refused to accept, at least in the preliminary stages of the litigation, defendants' argument that there was no causation between the resident's treatment and the risk of the patients developing HIV since it can only be transmitted through sexual conduct, exposure to infected blood or blood components, or exposure in utero or through breast milk.[56] The court based its decision on

51. Wolgemuth v. Milton Hershey Medical Ctr., 111 Dauph. 352, 356 (Pa., Jan. 30, 1992) (quoting the amended complaint).

52. *Id.* at 358.

53. In rendering its decision, the court noted that both the trial court and appellate decisions that were rendered in *In Re Milton Hershey* were important sources for its conclusions.

54. 111 Dauph. at 359.

55. *Id.* at 359-362.

56. According to Carol Levine & Ronald Bayer, *The Ethics of Screening for Early Intervention in HIV Disease*, 79 AM. J. PUB. HEALTH 1661, 1662 (1989), there exists a 30% chance that an HIV positive mother will give birth to an HIV positive child.

"the invasive nature of the procedures attendant to obstetrics and gynecology and the consequent risks . . . ."[57] Confronted with conflicting scientific data on the matter, the court did not feel that it was in the position to make a determination of "what is or is not a medically recognized exposure."[58]

On the issue of informed consent, the court concluded that the hospital had a duty to provide information to patients that would enable them "to make an intelligent decision about whether or not to allow this physician and his possible effect on the surgical field to be part of their medical treatment."[59] The court concluded that the physician's HIV status and the risk of infection was "of such a critical nature that any patient would want this information before allowing the invasive procedures."[60] Possible exposure to HIV was considered by the court to be germane to surgical and operative treatment. The fact that in the course of such treatment the resident might transmit AIDS was critical to the court's analysis.[61]

In conclusion, the court went to great lengths to emphasize that its decision was based on rules governing the legal sufficiency of a pleading. Of significance was the court's declaration that it was *not* stating that treatment by an HIV-infected physician would necessarily result in a cognizable damages claim. What was of paramount concern to the court was the invasive nature of the surgery performed by the resident. This was the determinative factor for the court in allowing the case to proceed.[62]

The court in *Estate of Behringer v. Medical Center at Princeton*[63] reached a similar conclusion regarding the patient's right to information. Dr. Behringer, an otolaryngologist/plastic surgeon who was diagnosed as suffering from AIDS, brought suit against the hospital alleging discrimination based on the imposition of certain conditions on his continued performance of surgical procedures and the subsequent revocation of those privileges. The trial court held that the hospital acted properly in initially suspending his surgical privileges, in imposing the requirement of informed consent, and in ultimately barring the surgeon from performing surgery.[64]

Not only did *Behringer* involve issues relating to a physician's

57. 111 Dauph. at 362.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 371.
63. 592 A.2d 1251.
64. *Id.* at 1283.

staff privileges, but also the physician's right to privacy as a patient. In addition to his discrimination claim, Dr. Behringer alleged that the hospital breached its duty to maintain confidentiality of diagnoses and test results. The trial court held that the medical center breached its duty of confidentiality to the plaintiff as a patient when it failed to take reasonable precautions regarding plaintiff's medical records to prevent plaintiff's AIDS diagnosis from becoming a matter of public knowledge.[65]

According to the hospital's stated policy, access to patient charts was limited to only those persons with the responsibility of caring for the patient. In practical terms, however, the charts were available to all hospital personnel. While the CDC recommended that access to HIV results be limited, the medical center had no such policy. The hospital failed to instruct the employees of the confidentiality of the HIV test results, and failed to issue a written or verbal restriction against the discussion of Dr. Behringer's diagnosis among hospital employees.[66] The ramifications of the lack of special procedures directed at securing the confidentiality of the AIDS diagnosis were even greater since the patient was also a physician at the institution.[67]

The court noted that it was "not the charting *per se* that generate[d] the issue [of confidentiality], it was the easy *accessibility* to the charts and the lack of any meaningful medical center policy or procedure to limit access that caused the breach to occur."[68]

While the court recognized the hospital's need to allow access to the chart to those who may treat the patient, it concluded that Dr. Behringer had stated a cause of action against the hospital for breach of the medical center's duty and obligation to take steps to maintain the confidentiality of his medical records. The court rejected the medical center's argument that any disclosure by its employees or others outside of its control is beyond its responsibility.[69]

While *Behringer* involved issues of patient record confidentiality, the importance of limiting access to HIV-related information in other records, such as employee health records, cannot be overlooked. Based on *Behringer* and other similar cases, employers should take steps to segregate this information from general per-

65. *Id.* at 1284.
66. *Id.* at 1262-1263.
67. *Id.* at 1272-1273.
68. *Id.* at 1271 (emphasis in original).
69. *Id.* at 1273-1274.

sonnel records and to limit access to this information to only those individuals who would have a compelling reason to know. This is especially true with respect to any insurance-related medical records.

In the case of *Weston v. Carolina Medicorp, Inc.*,[70] the court was asked to address several issues, including the rights of a physician who chose to maintain the confidentiality of a patient's HIV status in violation of the hospital's infectious disease policy. Under the policy, a physician admitting a patient with the HIV infection was required to place the patient "on blood and body fluid isolation, a status which identifies the patient as being potentially infectious and also requires the use of protective measures for health care personnel coming in contact with the patient."[71] The court concluded that the physician "was bound by the Hospital's policy" and that the hospital's decision to discipline the physician by suspending him from the staff was not wrongful, arbitrary, or capricious.[72]

In so holding, the court rejected the physician's argument that a North Carolina statute gave "him the absolute discretion to decide whether to divulge information about HIV test results."[73] The statute mandated "that all information indicating that any person has the AIDS virus infection is 'strictly confidential.' "[74] The court noted, however, that an exception for the release of such information was permitted "to 'health care personnel providing medical care to the [infected] patient.' "[75] Once again, in balancing a patient's rights to confidentiality, the court found in favor of the institution's responsibility to protect public health and safety.

CONSTITUTIONAL CHALLENGES - EQUAL PROTECTION

In addition to the federal and state discrimination laws and right to privacy issues, cases have also addressed an individual's challenges to certain employment conduct on other constitutional grounds such as the equal protection clause of the Fourteenth Amendment of the United States Constitution.

The equal protection clause provides that no state shall "deny to any person within its jurisdiction, the equal protection of the

70. 402 S.E.2d 653 (N.C. Ct. App. 1991).
71. *Id.* at 655.
72. *Id.*
73. *Id.* at 658.
74. *Id.* at 659.
75. *Id.*

laws." It directs that all persons similarly situated be treated alike. In *Leckelt*, the plaintiff argued that defendants violated his right to equal protection. The district court rejected this challenge, finding that the public hospital's "infectious control policies are rationally related to a legitimate state interest of protecting patients and healthcare workers from the spread of infectious or communicable diseases."[76]

Under Louisiana's state equal protection clause, which requires a heightened scrutiny, the district court in *Leckelt* concluded that the defendants' actions were constitutional: "The state had a substantial and compelling interest in preventing the spread of HIV infection or AIDS to hospital patients and co-workers, in preventing the spread of the highly contagious disease to HIV [positive individuals] with impaired immune systems, and insuring that the health care workers can safely and adequately perform their jobs."[77] The court of appeals upheld the district court's decision.[78]

Given the public policy arguments in favor of preventing the spread of this disease, it is unlikely that an equal protection challenge will meet with much success in future litigation.

Access to Health Care

Another area of future litigation involves access to health care for individuals who have AIDS or are HIV positive. While many institutions do not have an employer-employee relationship with their staff physicians, the true nature of the relationship may compel a court to find an employer-employee relationship and impose liability on the institution for claims of discrimination based upon a physician's refusal to render medical care.

In *Glanz v. Vernick*,[79] a patient filed a lawsuit against a physician and a clinic alleging discrimination under section 504 of the Rehabilitation Act of 1973. The plaintiff asserted that the physician refused to perform elective ear surgery because he had tested positive for HIV. The plaintiff sought to hold the clinic liable for the physician's refusal to perform surgery under the legal doctrine of *respondent superior*, which imposes vicarious liability upon the employer for the conduct of its employees or agents. The plaintiff also alleged a separate cause of action under section 504 for the institu-

76. 714 F. Supp. at 1390.
77. *Id.* at 1391.
78. 909 F.2d 820, 832 (5th Cir. 1990).
79. 756 F. Supp. 632 (D. Mass. 1991).

tion's failure to "adequately educate, train and supervise" its staff regarding HIV infection.

The clinic moved for summary judgment arguing that it never treated the plaintiff and had no control over the physician's medical decision; therefore, it could not be held liable for his actions. The clinic also argued that it was not liable for failure to train under section 504.

The court denied summary judgment finding genuine issues of material fact involving the extent of power or control the hospital exercised over the professional conduct of the treating physician. The hospital employed an "AIDS Coordinator" who testified "that the hospital staff has 'very clear directives' not to refuse care to AIDS patients."[80] The hospital also performed the billing for services rendered at the hospital. In addition, the physician received a salary from the hospital for teaching residents. All of these factors tended to support the conclusion that the physician was an employee of the hospital rather than an independent contractor.[81] This factual evidence was enough to preclude the court from ruling as a matter of law that the hospital was not liable for the physician's actions.

As an aside, the court noted that vicarious liability may be applied in section 504 actions.[82] The objective of vicarious liability is to create " 'an incentive for the employer to exercise special care in the selection, instruction and supervision of [its] employees . . . .' "[83] The court concluded that it was appropriate to hold the hospital responsible for its medical staff's actions.[84]

The issue raised in *Glanz* is not employment, as in *Behringer* and *Leckelt*, but access to health care, which is a far more serious issue. When balancing these interests, the courts must consider the ramifications of a patient having limited or no access to health care.

CONCLUSION

Healthcare employees and patients with HIV/AIDS face the threat of discrimination and loss of privacy. While there are no easy answers to achieve the appropriate balance between the competing interests of employees, employers, and patients in the

80. *Id.* at 636.
81. *Id.*
82. *Id.*
83. *Id.* at 637 (citation omitted).
84. *Id.*

healthcare area, the overriding judicial concern in this area has been to protect those involved from the further spread of this infectious, incurable, and fatal disease. To the extent that the courts are influenced by the state of medical knowledge at the time relevant to a particular decision, the courts will likely find in favor of public safety concerns for those trying to stop the spread of this deadly disease; this may change as a more definitive consensus of the methods of HIV transmission and the risks associated with the disease is established.

Based upon the existing case law, an individual will be hard pressed to argue that the risk of transmission of a fatal disease and the prevention of the spread of AIDS are not compelling interests that outweigh, in most instances, an individual's right to privacy or desire to perform invasive procedures. In most instances, the balance will tip in favor of public health concerns regardless of the small risk of transmission of the fatal virus. However, the balance will be weighted differently when a patient's right to health care is considered.