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Donald J. McNeil  
*Partner, Keck, Mahin & Cate, Chicago, IL*

Laurie A. Spieler  
*Associate, Keck, Mahin & Cate, Chicago, IL*

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Mandatory Testing of Hospital Employees Exposed to the AIDS Virus: Need to Know or Unwarranted Invasion of Privacy?

Donald J. McNeil and Laurie A. Spieler*

I. INTRODUCTION

Hospitals exist in part to cure, or at least ease the suffering of, acutely ill patients. Patients come to hospitals to get better, not to pick up a new disease. Hospital employees also expect to leave work without carrying their patients' illnesses with them. For these reasons, hospitals traditionally have maintained strict infection control policies to help prevent — or at least control — the spread of disease.

An important part of any infection control policy is the hospital's need to know the health status of its employees. For decades, hospitals have required employees exposed to infectious disease to be tested to determine whether the disease has spread. Recently, the right of hospitals to test employees exposed to one disease, acquired immunodeficiency syndrome ("AIDS"), or to the human immunodeficiency virus ("HIV") that leads to AIDS, has been called into question.

It is not entirely clear why long-accepted principles of infection control should be challenged as to this one disease. Perhaps opponents of HIV testing are being overly protective of those health care workers who will turn up positive, assuming (illogically) that hospitals will ignore all they have learned about disease and callously fire infected employees. Perhaps homosexual activists see

* Mr. McNeil is a partner and Ms. Spieler an associate at the law firm of Keck, Mahin & Cate in Chicago, Illinois. Both Mr. McNeil and Ms. Spieler were involved in preparation of the post-trial memoranda and Fifth Circuit brief for the defendants in Leckelt v. Board of Comm'rs, 714 F. Supp. 1377 (E.D. La. 1989), aff'd, 909 F.2d 820 (5th Cir. 1990), which is discussed throughout this Article. Much of this Article is based on research and analysis performed by the attorneys who have represented the defendants in Leckelt. The authors wish to acknowledge the contributions of Andrew B. David of Sugar, Friedberg & Felsenthal, Chicago, lead counsel for the defendants both in the trial court and on appeal; K. Bruce Stickler of Keck, Mahin & Cate; Daniel J. Walker and Anne Mallett Barker of Watkins & Walker, Houma, Louisiana; and Elmer E. White III of Kullman, Inman, Bee & Downing, New Orleans, Louisiana. The authors also are indebted to Thomas Seltz of the Loyola University of Chicago Law Journal staff for his excellent research and other assistance in the preparation of this Article.
HIV testing as a disguised attempt to rid hospitals of a minority group of which much of society still disapproves. Or perhaps opposition to HIV testing is a manifestation of the view of some civil libertarians that employers should not be allowed to force employees to reveal the information contained in their blood under any circumstances. In any event, opponents of HIV testing of hospital employees have attacked such testing in the courts and legislatures, invoking constitutional or statutory protections or enacting new restrictions into law.

In *Leckelt v. Board of Commissioners*, the United States Court of Appeals for the Fifth Circuit affirmed a district court decision rejecting many of the constitutional, statutory, and common law arguments against HIV testing of hospital employees. This Article will discuss the issues raised by the *Leckelt* case, as well as other potential constitutional, statutory, and common law bases for challenging blood testing of hospital employees exposed to HIV. The Article begins with a discussion of HIV and AIDS. There follows a brief review of the nature and history of hospital infection control policies and current guidelines regarding treatment of hospital employees infected with HIV. The Article then reviews the legal bases for challenging HIV testing of hospital employees and analyzes why such challenges should fail. The Article concludes with some suggestions as to the appropriate response by hospitals when they learn that health care workers with patient exposure are infected with HIV or have AIDS.

II. BACKGROUND

A. HIV and AIDS

1. Medical Background

HIV, the virus which most authorities believe causes AIDS, was discovered in the early 1980s. Although extensive research continues today and much remains to be learned about HIV and AIDS, the medical community appears to have reached a consensus as to the following facts:

2. See infra notes 6-16 and accompanying text.
3. See infra notes 17-79 and accompanying text.
4. See infra notes 80-182 and accompanying text.
5. See infra notes 183-90 and accompanying text.
Once infected with HIV, a person almost certainly will develop AIDS.\(^7\) There is no cure for AIDS, and there is no vaccine to prevent infection with HIV.\(^8\) HIV is transmitted through intimate sexual contact, exposure to infected blood or blood components, or from mother to child in utero or through breast milk.\(^9\) It now appears virtually certain that HIV cannot be transmitted through casual contact.

HIV is a retrovirus that attacks the immune system. The infected individual is unable to fight off "opportunistic" diseases, such as atypical tuberculosis, pneumocystis carinii pneumonia, Kaposi's sarcoma, and herpes zoster. A person with a normal immune system easily fights off these infections, but they thrive on the suppressed immune system of an HIV-infected person. The AIDS virus also can cause dementia or wasting, as well as less severe symptoms, once characterized as AIDS-Related Complex ("ARC").\(^{10}\) These include fever, swollen lymph nodes, weight loss, night sweats, decreased appetite, and diarrhea.

It is impossible to tell when an HIV-infected person will become symptomatic. The onset of symptoms that would affect a hospital employee's ability to perform his or her job often is quite gradual. There can be a slow deterioration of physical and mental health and a breakdown of the victim's immune system, symptoms that are not readily observable, but which can present a serious safety risk while the employee is performing caregiving duties.\(^{11}\) For example, HIV may involve an alteration of brain functions,\(^{12}\) which can cause anything from occasional memory lapses and the inability to perform routine tasks to complete dementia.\(^{13}\) The infected

\(^7\) Leckelt, 714 F. Supp. at 1380.
\(^8\) Id.
\(^9\) Id.
\(^{10}\) ARC originally was viewed to be a less serious disease that was, like AIDS, also caused by HIV, but which would not necessarily develop into full-blown AIDS. Today, ARC no longer is recognized as a separate disease.
\(^{11}\) See Letter from Surgeon General C. Everett Koop, M.D. to the Department of Justice (July 29, 1988) (attached to the Department of Justice, Office of Legal Counsel Memorandum, "Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals," September 27, 1988). In his letter, Surgeon General Koop stated:

HIV infection is the starting point of a single disease which progresses through a variable range of stages. In addition to an acute flu-like illness, early stages of the disease may involve subclinical manifestations, i.e., impairments and no visible signs of illness.

\(^{12}\) At the Leckelt trial, defendant's medical expert, Peter Mansell, M.D., testified that one study showed that 30% of otherwise asymptomatic HIV-infected individuals had neuropsychiatric disorders.
\(^{13}\) Leckelt, 714 F. Supp. at 1380.
individual does not go from being perfectly normal one day to a state of complete dementia the next.

2. HIV Testing

No test has been developed that actually isolates the HIV virus. However, there are two tests that detect antibodies for HIV: (1) the enzyme-linked immunosorbent assay ("ELISA") and (2) the western blot assay. The presence of the HIV antibody indicates that HIV has been in the body and probably is still there.\(^{14}\) Like all such tests, false positive results are possible, but extremely unlikely.\(^{15}\) Generally, a person who tests positive on both the ELISA and western blot tests is considered "seropositive" for HIV.\(^{16}\)

**B. Hospital Infection Control Policies**

1. History, Nature and Purpose

The American Hospital Association ("AHA") first published recommendations almost thirty years ago calling for all hospitals to establish a system of reporting infections among their patients and employees.\(^ {17}\) There are three principal reasons for such policies: (1) to prevent the spread of infection; (2) to enable the hospital to monitor an infected health care worker's ability to safely and efficiently perform his or her job; and (3) to protect infected employees from dangers in the workplace and ensure that they obtain adequate care.\(^ {18}\)

The AHA has issued guidelines that describe the essential components of a successful hospital infection control program.\(^ {19}\) Hospitals cannot prevent patients from introducing infections into the health care setting. However, hospitals, like other employers, are free to pick and choose their employees. Therefore, an important component of a hospital infection control policy is health screening of applicants. The AHA guidelines for selecting hospital employees suggest taking the medical history of applicants and conducting

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14. *Id.* at 1381.
15. Weldon-Linne, Weldon-Linne, & Murphy, *AIDS-Virus Antibody Testing: Issues of Informed Consent and Patient Confidentiality*, 75 ILL. B.J. 206, 207 (1986). For example, the ELISA test will produce a false positive result in about 0.2% of persons carrying the antibody. *Id.*
17. *American Hospital Association, Infection Control in the Hospital* 22 (4th ed. 1979) [hereinafter INFECTION CONTROL].
physical examinations and tuberculin skin tests.\textsuperscript{20} In addition to these initial examinations, hospital employers may require further examinations based on local or state health department regulations.\textsuperscript{21} The AHA also recommends implementing policies that require all personnel with illnesses to report their condition to their supervisors or employee health service immediately.\textsuperscript{22} According to the AHA, hospital personnel with communicable infections should be transferred to duties without patient contact or placed on leave with pay until their condition no longer poses a hazard to others.\textsuperscript{23}

The Joint Commission on Accreditation for Hospitals ("JCAH") also has established industry standards for infection control.\textsuperscript{24} Hospitals must comply with JCAH infection control standards to be accredited. JCAH requires that all new employees be trained regarding their responsibilities under their hospital's infection control program.\textsuperscript{25} According to the JCAH, this is a key factor in determining a hospital's qualification for accreditation.\textsuperscript{26} Another key factor in JCAH's accreditation process is the requirement that the facility's infection control committee review and monitor the taking of cultures from personnel when such testing is required by hospital policies or federal, state, or local regulations.\textsuperscript{27}

The infection control policy of Terrebonne General Medical Center ("TGMC") during the time Kevin Leckelt was a licensed practical nurse there is an example of a typical hospital infection control policy. The policy was instituted to facilitate the early reporting of infections within the hospital. In order to effectuate that goal, the hospital infection control committee had the authority, not only to report any actual or suspected infections of employees or patients, but also to follow up by initiating culture and sensitivity testing and other control measures.\textsuperscript{28} Employees were required to report any infectious or communicable diseases to the employee health service.\textsuperscript{29} If an employee was diagnosed as having a com-
municable disease that was in the infectious stage, the employee was sent home and placed on sick leave.\textsuperscript{30} Employees returning to work following sick leave because of a communicable disease were required to get clearance from the employee health nurse before returning to duty.\textsuperscript{31} In the case of hepatitis B, the affected employee also needed clearance from his or her personal physician before being allowed to return to work.\textsuperscript{32}

2. Typical State Requirements

State departments of public health are responsible for issuing guidelines and regulations regarding the control of infectious diseases in the health care setting. The Illinois Department of Public Health ("IDPH") regulations are typical. IDPH has designated AIDS as a contagious, infectious, communicable disease that is dangerous to public health. Under IDPH regulations, each suspected or diagnosed case of AIDS must be reported to IDPH.\textsuperscript{33}

IDPH also regulates and provides recommendations on hospital infection control policies. An IDPH regulation specifically recommends periodic testing of health care employees as part of regularly scheduled physical examinations:

An employee health program, including a program of periodic physical examination of all personnel is recommended. Appropriate x-ray and laboratory examinations and immunizations should be included.

Personnel absent from duty because of any communicable disease shall not return to duty until examined for freedom from any condition that might endanger the health of patients or employees.\textsuperscript{34}

The Louisiana State Department of Public Health promulgated a hospital infection control manual in 1987.\textsuperscript{35} The manual recommends that hospitals conduct pre-employment physicals on each employee and take a complete medical history of the employee, including any communicable diseases. It further recommends physical examinations and laboratory tests only when medically indicated.\textsuperscript{36} The manual specifically addresses the need for HIV test-

\textsuperscript{30} Id. at 1390.
\textsuperscript{31} Id. at 1379.
\textsuperscript{32} Id.
\textsuperscript{33} ILL. ADMIN. CODE tit. 77, § 690.100B(b)(1) (1985).
\textsuperscript{34} Id. § 250.450.
\textsuperscript{35} McFarland, McNair, Kaiser, Kent & Key, Infection Control Policies and Procedures (1987). Dr. Louise McFarland, one of the authors of the manual, testified on behalf of the plaintiff at the Leckelt trial.
\textsuperscript{36} Id. at 28.1.
Mandatory Testing

ing of patients and health care workers. If a health care worker is exposed to blood or other body fluids, the patient’s consent to HIV testing should be sought. If the patient tests positive for HIV or refuses to undergo testing, the employee should undergo HIV testing and be counseled about the risk of infection.37

3. Hospital Liability for Inadequate Infection Control Procedures

Infection control procedures are aimed at protecting the health of patients and employees alike. Health care employers understandably are concerned about potential liability for the negligent transmission of communicable diseases. The risk of transmitting AIDS in the health care setting from either patients to employees or employees to patients is relatively low. But a recent case shows that such a risk does exist.

A doctor sued a New York hospital after contracting AIDS when she was stuck by a needle used on an AIDS patient. The needle had been left lying on a bed. New York City’s Health and Hospitals Corporation settled the case for an undisclosed sum prior to its submission to the jury.38 The likelihood of more cases in which doctors, nurses, lab technicians, and patients sue for negligent transmission of AIDS in the health care setting has increased employer concern and intensified the need for renewed vigilance in employee screening and adherence to infection control policies.

Historically, there is legal precedent for health care providers’ fear of liability. Courts have held hospitals liable when patients have contracted infections in hospitals due to the negligence of the health care institution. For example, in Helman v. Sacred Heart Hospital,39 a hospital was held liable when a patient contracted a staphylococcus infection during his hospital stay because his nurses failed to wash their hands after tending to another patient who had an infection. The court held that a hospital may be liable for failing to isolate patients with communicable diseases. If hospitals can be held liable for failing to isolate patients with known infectious diseases, hospitals likewise risk liability for failing to reassign employees with patient care duties who are known to have infectious diseases.

The adequacy or inadequacy of a hospital’s screening procedure also may subject it to liability for negligently transmitting infec-

37. Id. at 33.4.
tions to patients. For example, in *Kapuschinsky v. United States*, a hospital did not give pre-employment examinations, including nose and throat cultures, to employees who were assigned to work in a newborn nursery. A recently hired nurse passed an infection to an infant she had cared for in the nursery. The court held that because infants are highly susceptible to infections, screening employees was not only reasonable, but necessary for employees charged with the care of infants.

A hospital also was held liable for negligently failing to recognize symptoms of a nurse’s poor health. The nurse, who had a chronic cough and cold, was allowed to care for newborn infants. Unbeknownst to the hospital, the nurse had tuberculosis. An infant the nurse cared for later contracted tuberculosis and died. According to the court, even if the hospital thought the nurse had only a cold, it still should not have permitted her to care for infants.

The case law that holds health care employers liable for transmission of infectious diseases by employees apparently places an affirmative duty on such employers to screen their workforces adequately. Health care employees have responded by establishing comprehensive infection control policies.

4. Policies Specifically Related to HIV

a. *Centers for Disease Control Guidelines*

Public and private agencies responsible for infection control have developed guidelines geared specifically to prevention of the spread of AIDS. The most influential guidelines have been issued by the Centers for Disease Control (“CDC”) of the United States Department of Health and Human Services (“HHS”). The CDC endorses “universal precautions” as the primary method for preventing transmission of AIDS in the health care setting. Medical history and physical examinations cannot reliably identify all patients infected with AIDS or other blood-borne pathogens, nor are extensive examinations always possible in an emergency setting. Therefore, the CDC recommends that health care workers use universal precautions for all patients, including the following:

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41. Id. at 748.
43. Id. at 115, 271 N.W. at 110.
preventive measures:

1. All health care workers should wear gloves when touching blood, body fluids, mucous membranes or non-intact skin of patients, or items or surfaces soiled with blood or body fluids, and gloves should be changed after each contact with a patient.\textsuperscript{45}

2. Gloves should also be worn when performing venipuncture and other vascular access procedures.\textsuperscript{46}

3. Masks and protective eyewear should be worn during procedures that are likely to generate droplets of blood or body fluids. This precaution prevents exposure of the health care workers’ mucous membranes in the mouth, nose and eyes. Health care workers should also wear gowns and aprons during procedures that are likely to generate splashes of blood or body fluids.\textsuperscript{47}

4. Health care workers should wash their hands and other skin surfaces immediately after contact with blood or other body fluids. Hands should also be washed immediately after gloves are removed.\textsuperscript{48}

The CDC’s guidelines on universal precautions also direct health care workers with exudative lesions or weeping dermatitis to refrain from direct patient care duties or handling patient care equipment until the condition clears.\textsuperscript{49} They also recognize the value of testing both patients and health care personnel for HIV infection for several reasons: managing exposures of health care workers, diagnosing and managing the patient’s condition, and counseling the patient about preventing further HIV transmission.\textsuperscript{50} The CDC guidelines initially state that the utility of HIV testing of patients in conjunction with universal precautions is “unknown.” However, they proceed to provide guidance to hospitals that do institute testing programs for their patients. The CDC recommends that any HIV testing programs include the following components: getting consent for testing, informing and counseling seropositive patients, limiting communication of test results to those involved in the care of infected patients or as required by law, and assuring that positive test results will not result in the

\textsuperscript{45} \textit{Id.} at 6.
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.}
\textsuperscript{50} \textit{Id.} at 14.
seropositive patient being denied medical care.\textsuperscript{51}

The CDC guidelines also state that the utility of routine testing of health care workers for HIV infection "cannot be assessed."\textsuperscript{52} The guidelines apparently recognize, however, that health care institutions may adopt testing programs for employees. The CDC states that if health care workers who perform invasive procedures\textsuperscript{53} are tested, the institution must consider several issues, including the frequency of testing, consent, confidentiality, and the consequences of positive test results.\textsuperscript{54}

As of July 1987, the CDC was aware of 1,875 adults with AIDS who were employed in the health care setting. This figure amounted to approximately 5.8\% of all adults with AIDS. In spite of the fact that there had been no confirmed instances of infected health care workers transmitting HIV to patients, the CDC recognized that transmission remained a distinct possibility.\textsuperscript{55} The CDC noted that HIV-infected employees are at an increased risk of developing complications from infectious diseases. This is of particular concern when employees are exposed to patients with easily transmitted infectious diseases. According to the CDC "[a]ny health-care worker with an impaired immune system should be counseled about the potential risk associated with taking care of

\begin{itemize}
\item \textsuperscript{51} Id. at 15.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} The CDC guidelines of August 21, 1987 define invasive procedures as:
\begin{itemize}
\item surgical entry into tissues, cavities or organs or repair of major traumatic injuries
\item 1) In an operating or delivery room, emergency department, or outpatient setting, including both physicians' and dentists' offices;
\item 2) Cardiac catheterization and angiographic procedures;
\item 3) A vaginal or cesarean delivery or other invasive obstetric during which bleeding may occur; or
\item 4) The manipulation, cutting, or removal of any oral or peroral tissues, including tooth structure, during which bleeding occurs or the potential for bleeding exists.
\end{itemize}
\item \textsuperscript{54} Id. at 15.
\item \textsuperscript{55} On July 27, 1990 the CDC reported the first case of apparent HIV transmission from an infected health care worker to a patient. Centers for Disease Control, \textit{38 Morbidity and Mortality Weekly Report} 489 (July 27, 1990). A dentist with AIDS apparently infected a patient during a tooth extraction. The dentist had been diagnosed with AIDS three months before he performed the procedure. The patient tested positive for HIV antibodies 24 months after the tooth extraction. Other than this dental procedure, the patient had not engaged in any high risk behavior for AIDS. She did not use intravenous drugs, she had not had sex with an HIV-infected person, and she had not received any blood transfusions. The CDC analyzed blood samples taken from both the patient and dentist. The blood test results revealed that the HIV strains of the dentist and patient were closely related. In its report, the CDC stated that "the case reported here is consistent with transmission of HIV to a patient during an invasive dental procedure, although the possibility of another source of infection cannot be entirely excluded." In light of this new development in the transmission of HIV, the CDC is reviewing and revising its guidelines for the prevention of HIV transmission in the health care setting.
\end{itemize}
patients with any transmissible infection and should continue to follow existing recommendations for infection control to minimize risk of exposure to other infectious agents."

Although the CDC guidelines discourage HIV testing as an alternative to universal barrier precautions, they implicitly recognize the necessity of testing to identify HIV-infected employees whose health status must be monitored to insure that they are able to safely and effectively perform their duties. The guidelines state that all HIV-infected health care workers, symptomatic or not, should be counseled about the potential risk of taking care of patients with infections. They also provide that the health care worker's personal physician, in conjunction with the hospital's personnel health service or medical director, "should determine on an individual basis whether the infected [employee] can adequately and safely perform patient-care duties and suggest changes in work assignments, if indicated." A hospital cannot fulfill its responsibilities to counsel seropositive employees, consult with their personal physicians, and determine appropriate assignments for them, unless it knows whether a health care worker is seropositive.

b. Occupational Safety and Health Administration Guidelines

The Occupational Safety and Health Administration ("OSHA") is responsible for protecting the health and safety of the nation's workers. In the health care setting, OSHA traditionally has relied only on its "general duty clause" to protect workers from blood-borne diseases. In light of the significant health risk posed by occupational exposures to infectious diseases such as hepatitis B and AIDS, OSHA issued proposed rules for regulating such exposures in the work place. This is the first time that OSHA has addressed biological hazards in the work place. OSHA's proposed

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56. CDC Recommendations, supra note 44, at 16.
57. Id.
58. Id.
59. The guidelines, of course, do not deal with whether HIV testing of exposed health care workers should be mandatory. This is a decision appropriately left to individual hospitals.
60. OSHA was created by the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. (1970). The purpose of the Act was to reduce personal injuries and illnesses arising from occupational health and safety hazards.
61. The general duty clause requires that each employer "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1) (1988).
regulations draw upon the recommendations of the CDC and make adherence to the CDC's "universal precautions" mandatory.

Employers must take the following specific steps to ensure compliance with the requirement of universal precautions:

1. Complete an analysis of occupational tasks that put employees at risk of exposure;  
2. Identify employees who perform those tasks;  
3. Develop written infection control plans for occupational exposure;  
4. Develop and conduct employee training programs;  
5. Implement and monitor adherence to "universal precautions" and  
6. Implement other engineering and work practice controls that will prevent or reduce the employees' risk of exposure to blood-borne pathogens.

OSHA's rules state that after receiving a report of a workplace exposure, the employer must make available to each exposed employee a confidential medical evaluation and follow up, including documenting the route of exposure, the antibody status of the source patient, and how the exposure occurred. If the antibody status of the patient is not known, with the patient's consent, blood can be collected and tested to determine the presence of HIV or hepatitis B infection. Blood should be collected from the exposed employee as soon as possible following the exposure. However, the actual testing of the blood may be done at a later date if the employee so requests. Following the testing, the employee who was exposed must be counseled. Any illnesses must be reported, and safe and effective post-exposure procedures must be implemented.

No action has been taken to finalize and codify OSHA’s proposed rules. Public comments and briefs regarding the regulations were accepted through May 1990. Until the final standard is

63. Id. at 23,113.  
64. Id.  
65. Id. at 23,114.  
66. Id.  
67. Id. at 23,115.  
68. Id. at 23,116.  
69. Id. at 23,126.  
70. Id.  
71. Id. at 23,126 to 23,127.  
72. Id. at 23,127.  
73. Id.
promulgated, OSHA intends to protect employees exposed to infectious diseases in the workplace by enforcing OSHA's 1983 agency guidelines on hepatitis B, general industry standards, and the "general duty" clause.\textsuperscript{74}

c. American Hospital Association Report

The AHA essentially has adopted the CDC guidelines. In a 1988 report, the AHA recognized that health care institutions must make decisions "with regard to direct patient care responsibilities for employees with AIDS or with HIV infection."\textsuperscript{75} The AHA called for its member institutions to make an individualized determination about each seropositive employee, symptomatic or not. The AHA report also specifically recommended that any employee exposed to the blood or body fluids of an HIV-infected patient be tested for evidence of infection. The report stated:

If an individual has an exposure to blood or other body fluids, the source patient should be assessed. . . . If the source patient has AIDS or other evidence of HTLV-III/LAV\textsuperscript{76} infection, declines testing, or has a positive test result, the exposed individual should be tested clinically and serologically for evidence of HTLV-III/LAV infection . . . .\textsuperscript{77}

In its report, the AHA not only endorsed testing employees exposed to the blood of HIV-infected patients, but also recommended testing employees exposed to the blood of patients in high risk groups:\textsuperscript{78} "In the absence of local law to the contrary, we believe that testing for antibodies at the appropriate intervals after an employee's exposure to an infected or high risk patient may be mandatory."\textsuperscript{79}

C. Leckelt v. Board of Commissioners

In April 1986, Kevin Leckelt ("Leckelt") was a licensed practical nurse at Terrebonne General Medical Center ("TGMC") in

\textsuperscript{74} Hardy, \textit{From the Office of Legal and Regulatory Affairs}, 22 \textit{JOURNAL OF HEALTH AND HOSP. LAW} 239 (July 1989).

\textsuperscript{75} \textit{AMERICAN HOSPITAL ASSOCIATION, AIDS AND THE LAW: RESPONDING TO THE SPECIAL CONCERNS OF HOSPITALS} 65 (Spring 1988) [hereinafter AHA REPORT].

\textsuperscript{76} HTLV-III/LAV was the name given to the AIDS virus at the time the report was issued.

\textsuperscript{77} AHA REPORT at 68.

\textsuperscript{78} There are several high risk groups for HIV infection: homosexual and bisexual males, intravenous drug users, persons intimately associated with either group, and transfusion recipients. 54 Fed. Reg. 23,054 (May 30, 1989).

\textsuperscript{79} AHA REPORT at 65.
His duties included giving medications, making assessments of patients, changing dressings on open wounds, starting intravenous tubes ("IV's"), performing catheterizations, and giving enemas. Leckelt normally was assigned to a floor in the hospital that treated a mixture of patients, both pre- and post-operative, as well as those hospitalized for non-surgical reasons. On occasion, Leckelt also was assigned to work in the surgical recovery room, intensive care unit, and emergency room.\(^8^1\)

At TGMC, it generally was believed (and Leckelt never denied the fact) that Leckelt was homosexual.\(^8^2\) In March 1986, Marvin Potter ("Potter"), who had lived with Leckelt for eight years, was admitted to TGMC and later diagnosed as having AIDS. TGMC officials, including the hospital's acting medical chief of staff, became concerned that Leckelt, who was involved in direct patient care, had been exposed to AIDS.\(^8^3\) Leckelt also was concerned about his exposure. Sometime in the spring of 1986, he had an HIV test performed anonymously at a clinic in New Orleans.\(^8^4\)

TGMC officials understood that the CDC guidelines recommended that seropositive health care workers be counseled and that their employers confer with the employee's personal physicians. After consulting legal counsel, TGMC decided that it needed to know Leckelt's HIV status to comply with the CDC guidelines. The hospital's infection control practitioner asked Leckelt to undergo HIV testing. Leckelt responded that he already had undergone testing and agreed to bring in his results.\(^8^5\) Leckelt later reneged on his agreement and refused to produce the results.\(^8^6\) After Leckelt refused several additional requests for the test results, he was terminated.\(^8^7\) TGMC considered Leckelt's refusal to

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\(^{80}\) Leckelt v. Board of Comm'rs, 909 F.2d 820 (5th Cir. 1990).
\(^{81}\) Id.
\(^{82}\) Id. at 822.
\(^{83}\) Id. At trial, Leckelt did not contest that he was in a group considered by medical experts to be at high risk of HIV infection. *Leckelt*, 714 F. Supp. at 1383 n.2.
\(^{84}\) 909 F.2d at 823.
\(^{85}\) Id.
\(^{86}\) Id. Leckelt testified that he never picked up the results. *Id.* at 824.
\(^{87}\) TGMC's discussions with Leckelt about producing the test results occurred over several weeks. During this time, TGMC's infection control practitioner learned for the first time that Leckelt was a hepatitis B carrier. She also learned that Leckelt had failed to inform TGMC that he had a syphilis infection in March 1985. TGMC was aware that Leckelt had a lymphadenopathy in February 1984, which was possibly related to AIDS. At the time TGMC first requested Leckelt's test results, he was off work with a weeping lesion, another symptom consistent with HIV infection. Thus, at the time of Leckelt's termination, TGMC had reasons other than Leckelt's homosexual relationship with Potter to believe that Leckelt had been exposed to HIV. *Id.* at 823 nn. 5-7. For purposes of the issues discussed in this Article, it may be assumed that Leckelt would have been
disclose his HIV status a violation of TGMC's infection control policy, which required that employees report any infectious or communicable disease and undergo testing when indicated.88

Leckelt sued TGMC, claiming that his termination violated section 504 of the Rehabilitation Act ("section 504"),89 Louisiana's Civil Rights for Handicapped Persons Act,90 the prohibitions against unreasonable searches in the federal91 and state constitutions,92 and the equal protection clauses of the federal93 and state constitutions.94 After a bench trial, Judge Patrick Carr of the Eastern District of Louisiana entered judgment in favor of TGMC.95 The plaintiff appealed, and a panel of the Fifth Circuit Court of Appeals unanimously affirmed the trial court's decision dismissing all of Leckelt's claims.96

III. DISCUSSION

A. Constitutional and Statutory Provisions and Common Law Principles Applicable to HIV Testing

1. Overview

Few hospital employees have individual employment contracts. Absent such contracts, or restrictions imposed by collective bargaining agreements, a hospital is free to set the rules by which its employees must live and fire those employees who break the rules. Courts will not question an employer's reason for discharging an employee unless that reason violates some statutory, constitutional, or common law restriction on the employer's right to discharge.

Cases like Leckelt can raise factual issues, the resolution of which is outcome determinative. Like Leckelt, a plaintiff may claim that he or she was treated adversely, not because of a refusal to undergo HIV testing, but for some other reason. Leckelt claimed that he was fired because TGMC thought he was seropositive even if he had no past history of violation of infection control policies or symptoms consistent with HIV infection.

88. Id. at 824. TGMC's infection control policies did not specifically address HIV. Prior to Leckelt's termination, TGMC had tested one other employee with known exposure to HIV, a nurse who was stuck by a needle with which Potter had been injected. She voluntarily submitted to HIV testing. Id. at 826-27.


91. U.S. CONST. amend. IV.

92. LA. CONST. art. I, § 3.

93. U.S. CONST. amend. XIV.

94. LA. CONST. art. I, § 5.


96. Leckelt, 909 F.2d at 821, 833.
tive, not because he refused to produce his test results.97 For purposes of this discussion, it is assumed that a hospital is testing to determine the HIV status of a health care worker with direct patient-care responsibilities, based on a reasonable belief that the worker was exposed to HIV. It is also assumed a the hospital’s sole motive for discharging an employee who refuses to undergo testing (or produce the results of a test already taken) is the employee’s refusal. Issues raised by random or universal testing or testing of employees without direct patient-care responsibilities are left to another day.

2. Federal Law

a. Section 504

Section 504 of the Rehabilitation Act prohibits recipients of federal funds from discriminating against “otherwise qualified” individuals with handicaps.98 Virtually all hospitals, public and private, are subject to section 504 because they receive Medicare reimbursement.99 A person is considered an “individual with handicaps” if he or she “(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.”100 Courts have recognized a private right of action under section 504 by any employee who, though “otherwise qualified,” is subjected to discrimination “solely by reason of his handicap.”101

97. Id. at 826.
99. Courts have held that § 504 prohibits discrimination by hospitals that receive no federal funds other than reimbursement of fees incurred by Medicare patients, even though such payments on their face might not be considered “financial assistance.” Frazier v. Northwest Miss. Regional Medical Center Bd. of Trustees, 765 F.2d 1278 (5th Cir. 1985); United States v. Baylor Univ. Medical Center, 736 F.2d 1039 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985).
Mandatory Testing

An employee terminated for refusal to undergo HIV testing is not suffering discrimination "solely by reason of his handicap." Section 504 prohibits discrimination, not testing.\textsuperscript{102} HHS, which is responsible in part for enforcing the provisions of section 504 as they relate to hospitals, has adopted regulations that place some restrictions on testing. Leckelt urged that these regulations prohibit HIV testing of health care workers, but his argument failed for two reasons. The regulations do no such thing, and even if they did, they would be unenforceable because they would provide protection broader than section 504 itself.\textsuperscript{103}

In the trial court, Leckelt also relied upon the following HHS regulation: "[A] recipient may not conduct a pre-employment medical examination or may not make pre-employment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap."\textsuperscript{104} On its face, this regulation prohibits only pre-employment medical examinations and pre-employment inquiries of applicants regarding handicaps. The intent of the regulation's drafters was to eliminate artificial barriers to the hiring of handicapped individuals. As the Rehabilitation Act mandates, applicants for employment are to be judged on the basis of their qualifications for the job in question. Thus, a hiring employer can ask only if an applicant has the ability to perform job-related functions.\textsuperscript{105} Once an employee has been hired based on his or her qualifications for the job, the need to prohibit medical examinations no longer exists. The employee remains fully protected by the Rehabilitation Act itself; therefore, an em-


In \textit{Arlene}, 480 U.S. at 282, the Supreme Court held that infection with a contagious disease constitutes an impairment within the meaning of § 504. The holding in \textit{Arlene} was codified and incorporated into the Rehabilitation Act by the Civil Rights Restoration Act of 1988, Pub. L. No. 100-259, which added a provision to the Act clarifying that persons who have suffered or are suffering from contagious diseases are protected by the Act unless they "would constitute a direct threat to the health or safety of other individuals."


\textsuperscript{104} 45 C.F.R. § 84.14(a) (1989).

\textsuperscript{105} \textit{Id.}
ployer may not use the results of a test to discriminate against an otherwise qualified individual with handicaps.

On appeal, Leckelt relied on yet another HHS regulation to prove that he suffered discrimination:

A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) the test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

This argument also failed. The regulation was designed to eliminate any selection criteria that act as a screen to eliminate persons with handicaps. The intent of the regulations’ drafters was to eliminate artificial barriers that substantially limit the opportunities of handicapped persons. The regulation “is an application of the principle established under Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Co.*, 401 U.S. 494 (1971).”

Griggs and its progeny prohibit facially neutral selection criteria, used to make hiring or promotion decisions, which have a disparate impact on a protected class of employees. They do not limit (or even address) an employer’s right to obtain information about employees that is not related to the selection process.

HHS specifically limited its regulation regarding medical examinations to those given before an employee is hired. A prohibition against post-employment medical examinations would be contrary to the purposes of the Rehabilitation Act. As the Supreme Court noted in *School Board of Nassau County v. Arline*, one purpose of the Rehabilitation Act is to eliminate decisions based upon speculation as to an employee’s physical or mental ability to perform a job. An employer’s decisions must be based on sound medical information, not on speculation. A prohibition of post-employment testing would produce the irrational and speculative decision-making condemned by the court in *Arline*.

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107. 45 C.F.R. § 84.13(a) (1989).
109. 45 C.F.R. § 84.14(a).
111. *Id.* at 279.
112. *Id.* at 288.
Even if post-employment HIV testing of health care workers fell within the HHS regulations, hospitals still would be permitted to test for job-related attributes and inquire into employees' "ability to perform job-related functions."\footnote{113} HIV testing of an employee believed to have been exposed to HIV seeks, in part, to determine whether such an employee will be able to perform his or her job.\footnote{114} As discussed above, an HIV-infected individual may suffer impairments to ability to perform that are not readily apparent. When a hospital has reason to believe that a health care worker may have become infected, it must determine the worker's HIV status if it is to counsel the worker regarding condition, confer with the worker's personal physician, and monitor ability to safely and effectively perform job duties and compliance with required precautions. The information sought by HIV testing thus complies with the HHS regulations' requirement that information sought from employees be job-related.\footnote{115}

A hospital may terminate an employee who refuses to undergo HIV testing without running afoul of section 504 or the regulations adopted pursuant thereto. For the private hospital, not subject to constitutional restraints on state action, that ends the inquiry under federal law.\footnote{116}

\textit{b. Fourth Amendment}

The public hospital also must be concerned with any constitutional restraints on the right to test because the compelled disclosure of blood test results constitutes a "search" under the fourth amendment.\footnote{117} The fourth amendment protects individuals against searches that infringe "an expectation of privacy that society is prepared to consider reasonable."\footnote{118} In \textit{Leckelt}, the court held that TGMC's request to know Leckelt's HIV status did not violate the fourth amendment because the request did not impinge
upon some reasonable expectation of privacy and the request was “reasonable under all the circumstances.”

In *O'Connor v. Ortega*, the Supreme Court recognized that employees’ expectations of privacy may be reduced by their employers’ practices and procedures. Infection control policies are no secret to hospital workers. Employees routinely are tested after exposure to contagious diseases. Thus, in most cases, employees exposed to HIV will expect to be tested, and their employers’ requests for the test results will not violate any expectation of privacy the employee may have had. In *Skinner v. Railway Labor Executives’ Association*, the Supreme Court noted that an employee’s expectation of privacy also may be diminished by reason of the employee’s “participation in an industry that is regulated pervasively to insure safety, a goal dependent, in substantial part, on the health and fitness of covered employees.” Similarly, the health care industry also is “regulated pervasively to insure safety,” a goal that hospital infection control policies are designed to promote.

Even if a hospital employee exposed to HIV has a reasonable expectation of privacy as to his HIV status, a hospital’s inquiry into that status generally will be “reasonable under all the circumstances.” In determining whether such a request is reasonable, a court must balance the nature and quality of the intrusion on the employee’s privacy against the hospital’s need to ensure the health and safety of its patients, the employee himself, and the employee’s co-workers. In evaluating the nature and quality of the “search,” courts will consider “the scope of the particular intrusion, the manner in which it [was] conducted, the justification for initiating it, and the place in which it [was] conducted.” Hospitals, perhaps more than any other employer, are sensitive to the need to conduct medical testing without unduly intruding on the privacy of the person being tested. The test generally will be conducted in the hospital, with appropriate safeguards to insure confidentiality of test results. The scope of the examination will be limited to the information necessary to determine if additional evaluation of the employee’s condition will be necessary.

As for the justification for testing, “the ‘operational realities of the workplace’ may render entirely reasonable certain work-related

120. 480 U.S. at 717. *See also* *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 617 (1989).
123. *Von Raab*, 816 F.2d at 176 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1985)).
intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts." The Supreme Court has recognized the strong governmental interest in maintaining a safe, efficient workplace. In National Treasury Employees Union v. Von Raab, the Supreme Court upheld a United States Customs Service requirement that employees seeking transfer to certain sensitive jobs submit to urine testing for drug use. The Court held that such testing was reasonable in part because employees involved in field operations would endanger the safety of their fellow agents if their performance were impaired by drug use. In Skinner, the Court upheld as reasonable blood, breath, and urine tests of railroad employees following accidents or violation of safety rules. The Court held that the limited intrusion involved was outweighed by the governmental interest in promotion of railway safety, both for employees and the general public.

A hospital faced with an employee exposed to HIV has an equally important need to guard the safety of patients, the employee's co-workers, and the employee. Even though HIV is not easily transmitted, if the employee is infected with HIV, the hospital may want to remove the employee from situations in which blood-to-blood contact is possible. HIV testing is the first step in a process designed to ensure that a health care worker will not transmit HIV to someone else, will not contract a disease that might be fatal because of an impaired immune system, and will otherwise be fit to work. Under these circumstances, a hospital's interest in knowing its employees' health status far outweighs the limited intrusion of a blood test.

Before Leckelt, no court had addressed the constitutionality of HIV testing of hospital employees with direct patient care responsibilities who have been exposed to HIV. In two cases, courts addressed broader HIV testing programs by non-hospitals with differing results.

In Glover v. Eastern Nebraska Community Office of Retardation, the Eighth Circuit upheld an injunction prohibiting HIV testing of employees of a state agency serving mentally retarded persons. Under the agency's policy, all employees who had direct contact with clients had to undergo blood testing for HIV and the

124. Von Raab, 489 U.S. at 671.
125. Id. at 679.
126. Id. at 634.
hepatitis B virus. The litigants focused solely on the danger of transmission of the viruses from an infected staff member to a client. The trial court enjoined the testing, finding that "the evidence in this case establishes that the risk of transmission of the [AIDS] virus at [the agency] is minuscule at best and will have little, if any, effect in preventing the spread of [AIDS] or in protecting the clients."\textsuperscript{129} Based on these findings, the trial court concluded that the search of agency employees' blood was not justified and thus violated the fourth amendment. The Eighth Circuit affirmed, finding that the testing policy was not "reasonable" because the risk of disease transmission was negligible. However, the court noted that "[b]y our decision we intend no broad-based rule with regard to testing public employees for any infectious disease, including AIDS. We hold only that under the facts established in this case, the District Court properly enjoined [the agency's] policy as an unreasonable search and seizure under the Fourth Amendment."\textsuperscript{130}

The program at issue in \textit{Glover} provided residential, vocational, and other specialized services for the mentally retarded. It did not involve the type of contact hospital employees often have with patients. The \textit{Glover} defendants intended to test their employees every year, even though few of the employees were health care workers, and none was in a group at high risk of contracting any of the diseases. The scope of the defendants' "search" thus was much broader than a hospital's policy of testing only those employees who are exposed to an infectious disease. The \textit{Glover} defendants also did not face the same problems of protection, monitoring and accommodation a hospital would face if an employee involved in direct patient-care were infected with HIV.

In \textit{Local 1812, A.F.G.E. v. United States Department of State},\textsuperscript{131}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{129} Glover v. Eastern Nebraska Community Office of Retardation, 686 F. Supp. 243 (D. Neb. 1988). The court stated: The evidence establishes that the risk of transmission of the AIDS virus from staff to client, assuming a staff member is infected with [the AIDS virus], in the [agency] environment is extremely low, approaching zero. The medical evidence is undisputed that the disease is not contracted by casual contact. The risk of transmission of the disease to clients as a result of a client biting or scratching a staff member, and potentially drawing blood, is extraordinarily low, also approaching zero. The risk of transmission of the virus from staff to client due to the staff member attending to a client's personal hygiene needs is zero. Further, there is absolutely no evidence of drug use or needle sharing at [the agency], nor is there a problem of sexual abuse of clients by staff.
\item \textsuperscript{130} 867 F.2d at 464.
\item \textsuperscript{131} 662 F. Supp. 50 (D.D.C. 1987).
\end{enumerate}
\end{footnotesize}
the District Court for the District of Columbia refused to enjoin a plan to administer mandatory HIV tests to all Foreign Service employees seeking to qualify for or who were already qualified for service abroad. The court held that the plaintiffs were unlikely to prevail in their claim that such testing violated the fourth amendment. After finding that HIV-infected individuals placed in certain foreign countries would be at substantially increased risk, the court held that the testing was not an unreasonable search because it was "closely related to fitness for duty."\textsuperscript{132} A hospital's HIV testing of an exposed health care worker also is directly related to his or her present and future ability to perform care-giving duties in a safe and effective manner.

Thus, it appears reasonable under the fourth amendment for a hospital to conduct HIV testing of employees, provided the employee is involved in direct patient care and the hospital has a reasonable belief that the employee has been exposed to HIV.

c. Substantive due process/"penumbral" right of privacy

The fourth amendment is not the only federal constitutional source of privacy rights. The Supreme Court has recognized that the due process clause protects the right of citizens to be free from governmental intrusion into their personal lives.\textsuperscript{133} The Court has held that this right is to be derived from "penumbras" of express constitutional rights although the Court has never been clear as to the scope of the right of privacy thus derived.\textsuperscript{134} The Court has recognized that the right encompasses an individual's interest in nondisclosure of personal matters.\textsuperscript{135} Such matters include "[i]nformation about one's body and state of health."\textsuperscript{136} In determining whether an employer's request for information violates an employee's right of nondisclosure, courts apply a balancing test similar to that used in fourth amendment cases.\textsuperscript{137}

While it has been argued that the scope of protection afforded by the "penumbral" right of privacy is greater than that provided by the Fourth Amendment,\textsuperscript{138} courts still must weigh the individual's

\textsuperscript{132} Id. at 53.


\textsuperscript{134} See Clothier, Meeting the Challenge to Privacy Rights by Employer Drug Testing: The Right of Nondisclosure, 1988 U. CHI. LEGAL FORUM 213, 216-17.


\textsuperscript{136} United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980).

\textsuperscript{137} See supra note 122 and accompanying text.

\textsuperscript{138} Clothier, supra note 134, at 233.
expectation of privacy against the government’s need for the information requested.\textsuperscript{139} Given the diminished expectation of privacy hospital employees have, the limited intrusion involved in a blood test, and the hospital’s need to know the health status of care-giving employees, HIV testing of hospital employees exposed to the virus does not unconstitutionally intrude upon the employee’s privacy.\textsuperscript{140}

d. Equal protection

A hospital employee discharged for refusing to undergo HIV testing may claim that the termination violates his right to equal protection of the laws under the fourteenth amendment to the United States Constitution. The equal protection clause “is essentially a direction that all persons similarly situated should be treated alike.”\textsuperscript{141} When a public body treats a certain class of individuals differently than it treats all other individuals, the general rule is that the classification must be rationally related to a legitimate state interest.\textsuperscript{142} If a hospital conditions further employment of an employee exposed to HIV on the employee’s undergoing testing, the exposed individual may claim that he or she is being treated differently from other hospital employees and thus is being denied equal protection. Such a claim should fail for two reasons. First of all, if a hospital tests all exposed individuals, then it is treating all similarly situated employees alike. Second, the testing of exposed individuals is rationally related to a legitimate state interest.

When “individuals in the affected group have distinguishing

\textsuperscript{140.} Courts have held that the “penumbral” right to privacy may, in certain circumstances, protect individuals against unwarranted disclosure of their serostatus. One court held that a police officer who disclosed to neighbors that an individual was infected with HIV violated that person’s and his family’s constitutional right of privacy. Doe v. Borough of Barrington, No. 88-2642 (SSB) (D.N.J. Jan. 29, 1990). In Herbert v. Amrex-Zetron, No. C709912, (Calif. Super. Ct. Feb. 6, 1990), an employee sued his former employer for emotional distress after the company’s insurer leaked information to the personnel director that the plaintiff had AIDS and was undergoing treatment with the drug AZT. See infra note 183 and accompanying text for mention of AZT. During discovery, the employer sought disclosure of the HIV status of the plaintiff’s lover, with whom the plaintiff had been involved for over eight years. The employer argued that the lover’s serostatus was information essential to evaluating the plaintiff’s emotional distress claim. The judge disagreed and ruled that the lover’s serostatus was protected by both federal and state constitutional privacy rights.
\textsuperscript{142.} Id. at 440.
characteristics relevant to interests the state has the authority to implement," equal protection "requires only a rational means to serve a legitimate end." There is little doubt that the state has the authority to implement procedures to protect patients and health care workers from the spread of infectious disease. Accordingly, there is nothing "irrational" in testing employees exposed to HIV to determine whether they have contracted the virus. Such testing is not only a rational means, it is the only means of determining whether an employee has contracted the virus and thus should be subject to monitoring and modification of job duties necessary for the protection of patients and the employee.

In Leckelt, the plaintiff argued that it is irrational to test employees for presence of the HIV antibody because universal precautions will prevent transmission of the disease. The court rejected this argument. Leckelt's position ignored the possibilities that an infected employee would not follow universal precautions, would be exposed to patients with highly contagious diseases, would be entitled to accommodation of his handicap, and would have to be monitored in the performance of his job duties. Leckelt also argued that TGMC's testing requirement should be subjected to heightened scrutiny because handicapped individuals are a "suspect class" for equal protection purposes. As a matter of constitutional law, if the class being treated differently by a public body is a "suspect class" (e.g., a particular race), there must be a compelling state interest to justify different treatment. But the "class" of individuals affected by an HIV testing policy is not a class of handicapped individuals. It is simply a class of persons exposed to the disease. Even if such persons could be considered "handicapped," a plurality of the Supreme Court has held that handicapped individuals do not constitute a suspect class for equal protection purposes.

Thus, an HIV testing policy limited to those exposed to the virus does not impermissibly single out such individuals in violation of the equal protection clause.

e. Procedural due process

Some hospital employees may have a property interest in contin-

143. Id. at 441.
144. Indeed, the trial court in Leckelt found that Leckelt himself had not followed such precautions. Leckelt, 714 F. Supp. at 1383.
145. 473 U.S. at 442, 446.
146. Id.
ued employment created by an individual employment contract or a hospital policy disseminated to employees. Before depriving such an employee of his or her property interest in continued employment, the state must afford the employee due process of law, i.e., notice of the charge against the employee and an opportunity to respond. An employee terminated for refusing to undergo HIV testing generally will have no viable procedural due process claim. The hospital will inform the employee that without HIV testing, the employee will be terminated. The refusal to undergo testing will not be at issue, and the minimal “hearing” (i.e., opportunity to respond) required by due process will take place when the employee notifies the hospital of his or her refusal to be tested.

f. National Labor Relations Act

Hospitals whose employees are represented by unions and covered by collective bargaining agreements may be less free to implement HIV testing policies and to discipline employees for refusal to comply with such policies. Once a union is certified to represent employees, an employer is bound to bargain with the union regarding all terms and conditions of employment. Thus, a hospital gen-


eraly must bargain with its unions before implementing a policy that would entitle it to discipline or discharge employees. There may be situations in which, after bargaining to impasse, a hospital unilaterally may implement a testing policy, but the employer still must bargain with the union before implementing the policy.

Most labor contracts contain a requirement, implied or express, that the employer have "just" or "good" cause before terminating an employee. In grievance and arbitration proceedings instituted by an employee who refuses to undergo HIV testing, the employer may have to justify the termination decision. Given the importance of infection control policies, and the right of hospitals to implement such policies, an employee's flat refusal to comply with the employer's rule constitutes gross insubordination and thus should be considered good cause for discharge.


a. Constitutional provisions

Most states have constitutional provisions that correspond to the unreasonable search, privacy, equal protection, and due process provisions of the federal constitution. Few state courts have been willing to interpret these state constitutional rights as providing broader protection than that afforded by the federal constitution. In one recent case, the California Court of Appeal rejected a claim that drug testing of applicants for private employment violated the right of privacy in the California state constitution. The defendant employer conditioned its offer of employment to all applicants upon the applicant's passing a medical examination and drug test. The court held that the test involved was minimally intrusive given the wide use of pre-employment physical examinations. Applicants knew of the drug testing policy in advance, and the procedures realized by the employer protected the individual's privacy and the confidentiality of test results.

But in another case, a different panel of the California Court of Appeal held that an employer's termination of an employee who refused to take a random drug test did violate the state constitu-

150. The National Labor Relations Board has held that when a contract is silent about a subject such as drug testing, and the employer and union bargain to impasse, the employer is then free to implement a drug testing program. Johnson-Bateman Co., 294 NLRB No. 67 (1989).
tional right of privacy. The employee refused to consent to a pupillary reaction test that was required of all employees under the employer's testing procedure. The trial court dismissed the complaint, holding that the employer's compelling interest in a drug-free workplace outweighed the minimal intrusion of the test, especially since the employee should "have had expectation of such a reasonable examination." The Court of Appeal reversed, holding that "[t]he allegation that plaintiff's right of privacy has been violated is the assertion of a public policy which is sufficiently important to overcome a demurrer."

In yet another decision, the California Court of Appeal again ruled that a private employer's drug testing program violated its employees' right to privacy under the California constitution. A computer programmer refused to provide a urine sample that her employer had requested as part of an unannounced, department-wide drug testing program. The plaintiff was fired for insubordination for refusing to comply with her employer's instructions. The plaintiff sued, alleging several causes of action, including wrongful termination in violation of public policy, breach of the implied covenant of good faith and fair dealing, and intentional infliction of emotional distress. The jury awarded the employee $485,042, and the jury's verdict was upheld on appeal. These cases highlight one way in which state constitutional provisions may impose greater restrictions on the right to test employees. The courts held that the California constitutional right of privacy restricts private actors as well as the state. Other state courts, however, have refused to extend constitutional prohibitions to the actions of private entities.

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153. 266 Cal. Rptr. at 283.
154. Id. at 286.
156. 267 Cal. Rptr. at 620.
157. The California Court of Appeal upheld the amount of the jury's award. The court, however, ruled that plaintiff's claim that her employer's actions constituted a wrongful termination in violation of public policy did not state a cause of action. The court reasoned that the right to privacy is a private right that cannot give rise to a claim for breach of a public policy. Id. at 636.
158. Not only does a state constitutional right to privacy impact upon an employer's right to test its employees, but it also may affect the employer's right to request mere disclosure of HIV status. See Herbert v. Amrex-Zetron, No. C709912, (Calif. Super. Ct. Feb. 6, 1990), discussed supra note 140.
b. **HIV testing statutes**

Several states have enacted statutes prohibiting HIV testing of employees or placing limitations on such testing. State HIV testing laws fall into four general categories: 1) statutes that regulate HIV testing, including issues of consent and confidentiality, but that do not specifically deal with HIV testing in the employment setting; 2) statutes that prohibit HIV testing in the employment setting altogether; 3) statutes that generally prohibit HIV testing in the employment setting but allow HIV testing of some employees; and 4) statutes that not only permit HIV testing in the employment setting, but apparently endorse an employer's right to use HIV test results in making employment decisions.

Most common, and providing the least guidance to health care employers who wish to institute HIV testing of employees, are statutes that regulate all HIV testing. Such statutes typically provide that HIV testing cannot be done without a subject’s consent, and that once the test is done, the results of the HIV test cannot be disclosed without the subject’s consent.\(^1\) Although it remains an open question, such statutes suggest that there can be no mandatory HIV testing of health care workers unless an employee is willing to consent to HIV testing and thereafter consents to the disclosure of HIV test results.

Some states completely prohibit HIV testing in the employment setting.\(^2\) Other states generally prohibit HIV testing as a condition of employment, but allow for exceptions when an applicant’s or employee’s serostatus is related to the person’s ability to safely perform a particular job. Many of the states that allow HIV testing in certain situations have borrowed applicable standards from employment discrimination law. For example, in Florida, it is unlawful for employers to require HIV testing, unless the absence of HIV infection is a “bona fide occupational qualification” (“bfoq”) of the job in question.\(^3\) Likewise, the employer must show that

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1. The following states have enacted general restrictions on HIV testing: Colorado, COLO. REV. ST. § 25-4-1401 et seq. (Supp. 1988); Delaware, DEL. CODE ANN. tit. 16 § 1202 et seq. (Supp. 1988); Illinois, ILL. REV. STAT., ch. 111 1/2, para. 7303 (1989); Iowa, IOWA CODE § 601A.6 (West Supp. 1990); Maine, ME. REV. STAT. ANN. tit. 5 § 19204-B.1 (1989); Missouri, MO. ANN. STAT. § 191.653 et seq. (Vernon 1983 & Supp. 1990); West Virginia, W. VA. CODE § 16-3C-1 et seq. (1989).


there was no reasonable accommodation short of HIV testing.\textsuperscript{163} Several other states have a bfoq exception and likewise place the burden on the employer to prove that the HIV test is job-related and necessary to ascertain an individual’s qualifications for a particular job.\textsuperscript{164}

Other states that allow exceptions to their general prohibition of HIV testing rely on the standard set forth by the Supreme Court in \textit{School Board of Nassau County v. Arline},\textsuperscript{165} and allow employers to use HIV testing if such testing is recommended in the reasonable medical judgment of public health authorities.\textsuperscript{166} For instance, in Rhode Island, HIV tests cannot be used discriminatorily to deny infected individuals employment opportunities unless “competent medical authorities can show a clear and present danger of the AIDS virus being transmitted to others . . . .”\textsuperscript{167} The Wisconsin statute, while prohibiting employers from discriminating against persons who test positive in the employment context, allows differential treatment if the state epidemiologist determines, and the Secretary of Health and Social Services declares, that employees infected with HIV pose a significant risk of transmitting such infections to others.\textsuperscript{168}

Of all the states that regulate HIV testing, North Carolina provides employers with the greatest flexibility. North Carolina’s statute distinguishes between HIV testing in the pre-employment and post-employment settings. Although North Carolina restricts employers from testing employees for HIV to determine suitability for

\begin{itemize}
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\end{itemize}
continued employment, it does allow employers to test job applicants for HIV. North Carolina also allows employers to reject an applicant solely on the basis of a confirmed positive HIV test. North Carolina employers may test current employees for AIDS during annual medical examinations if they are required for all employees. The North Carolina statute also enables an employer to either reassign or terminate an employee who is infected with the AIDS virus if the infected employee poses a significant health risk to himself, co-workers, or the public, or if his serostatus prevents him from performing his normally assigned job duties.

c. Handicap discrimination statutes

Most states have enacted statutes prohibiting discrimination on the basis of mental or physical handicaps unrelated to ability to perform the job. In general, courts interpreting the scope of protection under these statutes have followed cases interpreting section 504 of the Rehabilitation Act. Many states have enacted regulations limiting pre-employment medical examinations similar to those enacted by HHS under section 504. No state has enacted a regulation prohibiting post-employment medical examination of employees.

In Leckelt, one of the allegations was that the employer violated Leckelt’s rights under the Louisiana Civil Rights for Handicapped Persons Act, which states that employers shall not: "[d]ischarge or take other discriminatory action against an otherwise qualified individual on the basis of physical or mental examinations or pre-employment interviews that are not directly related to the requirements of the specific job or are not required of all employees.” The Fifth Circuit affirmed the trial court’s ruling that Leckelt had been terminated because he refused to submit his test results and not because of what those results would have revealed. Therefore, the hospital’s request for his HIV test results did not violate Louisiana’s handicap discrimination statute.

170. Id. § 130A-148(i)(4).
171. Most states with handicap discrimination laws have declared that individuals with AIDS or who are HIV positive are protected under such laws.
173. 909 F.2d 820, 831 (5th Cir. 1990).
175. 909 F.2d at 831.
d. Breach of contract

As discussed above, an employer may limit its right to terminate employees through individual employment contracts or issuance of a document such as an employee handbook or policy manual that guarantees continued employment absent just cause for discharge. If a hospital does so, it may well have to defend a claim that refusal to undergo HIV testing does not constitute just cause. So long as the hospital has an infection control policy that clearly mandates such testing, an employee's refusal to undergo testing is an act of insubordination that merits termination. It is possible that a court would require an employer to support its need to know an employee's HIV status before finding that refusal to reveal that status constitutes just cause for discharge. But once the rationality of such a policy is established, a court should have no trouble finding that an employee's unjustified refusal to comply with the policy constitutes just cause for discharge.

e. Common law torts

HIV testing of employees raises the possibility of a variety of tort claims. These might arise at several points in the testing process, including administration of the test itself, dissemination of its results, and adverse action based upon test results.

No hospital would take any blood test without obtaining a written consent. If the employee agrees to undergo testing and signs such a consent, common law actions such as battery and invasion of privacy (as to the test itself) will no longer be available to the employee. Once the employee undergoes testing, a new crop of torts rear their ugly heads. If reasonable care is not used in analyzing the employee's blood, an action for negligence (or even negligent infliction of emotional distress) may arise. Because most

176. See supra note 147 and accompanying text.
177. See equal protection discussion, supra notes 141-46 and accompanying text.
178. An individual unsuccessfully attempted to hold a doctor liable in an invasion of privacy action for performing an unauthorized HIV test and then (erroneously) notifying the plaintiff that he was infected with HIV. Doe v. Dyer-Goode, 389 Pa. Super. 151, 566 A.2d 889 (1989). The plaintiff had consented to a premarital blood test, but did not consent to the HIV testing. The court dismissed Doe's invasion of privacy claim because he had consented to having his blood drawn and the blood test done. The court held that having the unauthorized test performed did not constitute a tortious invasion of privacy. 566 A.2d at 891.
179. In addition to his invasion of privacy claim, the plaintiff in Doe sued the physician for negligently misinforming him that he had tested HIV positive. Id. Doe also claimed intentional infliction of emotional distress, based on the mistaken reporting of his HIV test results and the failure to provide him with adequate counseling when told of his
hospitals are quite experienced in administering blood tests, the chance of such a claim is virtually nonexistent.

More real is the danger of a claim of invasion of privacy if test results are disseminated beyond those with an absolute need to know. Most states recognize the tort of unwarranted publication of a private fact, such as infection with a contagious disease like AIDS. Thus, an employee's positive test results must be shared only with supervisors or managers responsible for accommodation and benefits. Any greater dissemination will create a genuine risk of liability.

If an employee is terminated for refusing to undergo HIV testing, the employee may believe his or her termination is unfair and go searching for a tort cause of action. The search probably will be in vain. Most states have recognized a public policy exception to the common law rule of employment-at-will. But termination of an employee for refusing to undergo HIV testing violates no public policy. Courts also will imply in employment contracts a covenant of good faith and fair dealing. Absent unusual circumstances, however, termination of an employee for violating an established infection control policy could not be construed as either unfair or in bad faith.

The court dismissed both of plaintiff's claims, holding that (1) the doctor could not be held accountable for reporting inaccurate test results when she herself had not performed the faulty test, id. at 892, and (2) the doctor's conduct in conveying Doe's HIV test results was not so extreme and outrageous to be outside the bounds tolerated in a civilized society. Id. at 893. Not raised in plaintiff's complaint, and therefore not addressed in the court's opinion was whether the physician's actions constituted negligent infliction of emotional distress.


B. Accommodation of the HIV-Positive Employee

Most hospital employees exposed to HIV will agree (and even request) to be tested. If the employee is seropositive, the hospital will have difficult decisions to make regarding accommodation of the employee's handicap. But one thing seems clear: A hospital may not discharge a health care worker merely because of the employee's seropositivity without violating section 504 and state handicap discrimination laws. These laws allow an employee to be terminated based on his or her handicap only if, after reasonable accommodation has been explored, the individual still is unable to perform the job safely and efficiently.

In evaluating the continued employment of an employee with a contagious disease, the employer must consider the risk of transmission. The Supreme Court has held that this inquiry must include the following:

- Findings of facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Given the relatively slight risk that HIV will be transmitted in most health care settings, termination of an HIV seropositive individual rarely, if ever, will be justified. But the fatal consequences of transmission, and the need to protect the health care worker whose immune system may be impaired, may require some changes in job duties. The hospital should consider removing the employee from any assignment that involves invasive procedures or potential contact with the body fluids of patients. In the case of a physician or nurse, it may be necessary to remove emergency

183. This is especially true now that the drug Aidothmidine ("AZT") has been found effective in delaying the onset of AIDS in HIV-infected individuals. In fact, homosexual rights organizations, long opposed to testing, have recently changed their position and now favor HIV testing of those at high risk of contracting HIV. Boston Globe, Dec. 10, 1989, at 1.


186. It may be possible to allow an employee who performs invasive procedures to continue in his job without putting patients at risk. In 1987, a Cook County (Illinois) attending physician infected with AIDS filed suit when his clinical privileges were restricted. The suit was settled when the hospital agreed to permit the physician to perform his normal duties, provided he used suitable precautions (such as double-gloving) when performing arterial puncture, lumbar puncture, electro-neuromyography, and examina-
room or surgical responsibilities. The employee also should be kept away from patients with easily transmitted infectious diseases, such as measles or varicella.187

If an employee refuses a voluntary transfer (with no loss of pay) or the removal of certain duties, the hospital may choose to take such action without the employee's consent. If the employee has no symptoms that increase the risk of contagion or that impair the employee's job performance, a forced transfer may be perceived as discriminatory.188 The damages resulting from such a complaint will not be great, however if the transfer is to a position with no reduction in compensation and if confidentiality is maintained. This limited risk may be less than the risk of transmission of the disease to a patient.189

In any event, as the CDC guidelines suggest, the employee should be counseled and the hospital should consult regularly with the employee's personal physician. The employee should be requested to sign a medical information release form so that direct contact with the physician is possible.190 The physician should be asked to provide a diagnosis and prognosis of the employee's condition and confirm, on a regular basis, that the employee's condition does not pose a significant risk to patients, fellow employees, or the health care worker.

IV. CONCLUSION

Hospitals have a duty, to their patients and employees, to do everything possible to prevent the spread of infectious disease and to ensure quality care. Hospitals cannot, consistent with these duties, ignore the fact that an employee has been exposed to HIV. Testing, accompanied by appropriate guarantees of confidentiality and accommodation, is a necessary part of every infection control policy. Employees who refuse to comply with such a policy can be terminated without running afoul of constitutional or statutory provisions, except in those states that flatly prohibit such testing. If positive test results are obtained, the hospital should do everything possible to accommodate the employee's handicap while tak-

189. Id. at 53.
190. For an example of such a form, see McNeil, supra note 181, at 9.
ing appropriate precautions to protect the health and safety of patients and employees. The employee who chooses not to be tested has made a decision that continued employment at the hospital means less to him or her than whatever motivated the refusal. Termination in such a case is not a punishment — it is the natural result of the employee’s decision to put his own feelings or concerns over the needs of the hospital and its patients.