Maintaining Employees' Privacy of HIV and AIDS Information in the Workplace

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I. INTRODUCTION

Justice Louis Brandeis stated in his dissent in Olmstead v. United States that “the right to privacy is ‘the right to be let alone—the most comprehensive of rights and the right most valued by civilized

1. 277 U.S. 438, 478 (1928).
An individual’s right to privacy in preventing disclosure and dissemination of personal information often presents itself in the employment arena. Individuals infected with the Human Immunodeficiency Virus ("HIV") or diagnosed with Acquired Immunodeficiency Syndrome ("AIDS") are particularly concerned with maintaining their right to privacy in the workplace, due to the common corporate mentality which views employing a person with AIDS as "a ‘malady’ worse than sexual harassment, computer fraud, employment discrimination, or insider trading." This negative reputation is a result of American "cultural, religious, moral, and ethical taboos" which commonly prevent AIDS from being freely discussed.

"The American public first began to hear about AIDS and HIV in the early '80s." Today, some experts predict that AIDS will become "the number-one problem facing American businesses in the coming decade." Employees are hesitant to disclose their HIV status due to the fear of impending discrimination. There are many reasons for this reluctance. First, as previously stated, the perception exists that American corporate culture is unsympathetic to those afflicted with the HIV virus. As a result, HIV-positive people will be apprehensive about disclosing their HIV status to
their employers. Also, the social ostracism associated with HIV and AIDS, “possible customer/co-worker reactions, [and] wanting to preserve one’s privacy and avoid questions as to how one acquired HIV . . . are other factors that would deter employees from disclosing their HIV status to employers.”

Failing to respect an employee’s right to privacy in the workplace can result in a company incurring legal liability. An employee can bring a cause of action against his employer for disclosing his HIV or AIDS status under various tort theories or under state law.

As will be illustrated in this Note, there is an abundance of litigation surrounding unauthorized disclosures of HIV and AIDS-related information. Although several states have addressed the issue of confidentiality of communicable disease information and

10. See Smith, supra note 8, at 18.
11. See Smith, supra note 8, at 18-19.
12. See MARTIN GUNDERSON ET AL., AIDS: TESTING AND PRIVACY 92 (1989) (referring to four privacy torts: appropriation of name or likeness, intrusion into solitude or seclusion, public disclosure of private facts, and placement of an individual in a false light).
13. See Adriane J. Dudley, AIDS in the Workplace—A Practical Guide for Employers, 24 URB. LAW. 791, 812 (1992) (reporting that “more than sixteen states have specific AIDS Confidentiality Acts, including Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Texas, and Utah”). In Doe v. Workmen's Compensation Appeal Board (USAir, Inc.), the plaintiff refused to disclose medical information regarding his HIV status to his employer, USAir, Inc. and asserted a defense under the Pennsylvania Confidentiality of HIV-Related Information Act. See Doe v. Workmen's Compensation Appeal Brd. (USAir, Inc.), 653 A.2d 715, 717 (Pa. Commw. Ct. 1995) (stating that the Act “does not prohibit disclosure of one's positive HIV status but merely requires one to demonstrate a ‘compelling need for’ the information and then sets forth various safeguards against further disclosure”). Several state laws, in addition to Pennsylvania, protect the confidentiality of AIDS-related disease information. See DONALD H.J. HERMANN & WILLIAM P. SCHURGEN, LEGAL ASPECTS OF AIDS § 10:22, at 260 (Supp. 1997). The Illinois AIDS Confidentiality Act is perhaps the most comprehensive statute dealing with AIDS, discussing various matters such as “consent to test,” “information about results and further testing or counseling,” “anonymity,” “disclosure of identity of person tested,” “disclosure by person to whom results have been disclosed,” “intentional or reckless violations,” penalties for violating the Act, and rules and regulations concerning implementation and enforcement of the AIDS Confidentiality Act. See 410 ILL. COMP. STAT. ANN. 305/1-15 (West 1996). Other notable state statutes include W. VA. CODE § 16-3C-3 (1995) and NEV. REV. STAT. ANN. § 441A. 220 (Michie 1996).


15. See NEV. REV. STAT. ANN. § 441A.220 (Michie 1996). Although the Nevada statute pertaining to confidentiality of information does not expressly mention AIDS, it may possibly be extended to employees' confidentiality of HIV/AIDS information. The statute states:
confidentiality of HIV test results, a federal statute has not been enacted to deal with confidentiality of either medical information generally or HIV and AIDS-specific information in employment.

As will be discussed herein, there is a need for the enactment of a federal statute for the purpose of ensuring the confidentiality of HIV and AIDS-related information in the workplace. By covering both private and public employees, and imposing penalties for non-compliance, such a statute would likely have the effect of deterring co-workers and employers of HIV-positive individuals from disseminating and disclosing information regarding the individual's HIV/AIDS status. However, until such a statute is enacted, employers can protect the privacy of their employees and, at the same time, attempt to limit their risk of legal liability by both implementing

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All information of a personal nature about any person provided by any other person reporting a case or suspected case of a communicable disease, or by any person who has a communicable disease, or as determined by investigation of the health authority, is confidential medical information and must not be disclosed to any person under any circumstances, including pursuant to any subpoena, search warrant or discovery proceeding.


Similarly, the Indiana statute which addresses disclosure also does not explicitly refer to AIDS or HIV, but applies to the disclosure of a communicable disease. See Ind. Code § 16-41-8-1(b) (1996). This statute states that "[e]xcept as provided in subsection (a), a person responsible for recording, reporting, or maintaining information required to be reported under IC 16-41-2 who recklessly, knowingly, or intentionally discloses or fails to protect medical or epidemiologic information classified as confidential under this section commits a Class A misdemeanor." See Ind. Code § 16-41-8-1(b) (1996).

16. Several states have statutes which specifically provide for the confidentiality of medical records and test results. See Tex. Health & Safety Code Ann. § 81.103 (West 1997). This statute states: "(a) A test result is confidential. A person that possesses or has knowledge of a test result may not release or disclose the test result or allow the test result to become known except as provided by this section." Id. The statute includes the provision that a test result may be released to a local health authority only if required under the statute, or to the Centers for Disease Control if required by federal law or regulation. See id.

A New Mexico statute provides that no employer may require disclosure of HIV test results as a condition of employment, unless the absence of HIV infection is a bona fide occupational qualification. See N.M. Stat. Ann. § 28-10A-1(A) (Michie 1996). In this statute, the employer bears the burden of proving that disclosure is necessary to prevent "a significant risk of transmitting" to others "in the course of normal work activities." N.M. Stat. Ann. § 28-10A-1(B)(1)(Michie 1996).

17. See Nan D. Hunter et al., The Rights of Lesbians and Gay Men 140 (3d ed. 1992) (stating that although several states have enacted confidentiality statutes "specifically concerning HIV-related medical records...[t]here is no single nationwide standard").
workplace policies and educating their employees about HIV and AIDS.\textsuperscript{18}

Disclosure of an employee's AIDS status will usually result in emotional harm to the employee, and may also result in actual or threatened physical harm.\textsuperscript{19} This is due largely to the fact that stereotypes continue to exist, despite the abundance of AIDS-related information available.\textsuperscript{20} Such a situation where disclosure of an employee's HIV status has led to unfriendly behavior by co-workers occurred when an employee of the City of Tampa, Florida who worked in the Department of Community Affairs, told his supervisors not to disclose that he was infected with HIV.\textsuperscript{21} However, the employee alleged that a memo was written about the conversation he had with his supervisors and that the memo wound up in an unlocked desk drawer.\textsuperscript{22} The employee thereafter began to receive anonymous letters from co-workers, some of them enclosing copies of the memo and containing additional confidential information from Doe's employee file.\textsuperscript{23} Subsequently, the employee sued the City for invasion of privacy. This type of behavior by Doe's co-workers, and the unauthorized disclosure of Doe's HIV status by his supervisors, illustrates the negative reaction which often occurs when an employee's HIV status is disseminated.

For this reason, employers and supervisors must take precautions when they are made aware of an employee's HIV status. Both employers and employees are affected by issues of individual pri-

\textsuperscript{18} See infra part VI. See also Gloria J.T. Smith, Business Needs AIDS Guidelines for Fairness to Victim, Coworkers, \textit{Bus. First of Columbus}, Nov. 1, 1996, available in 1996 WL 11865992 ("Developing a written HIV/AIDS policy requires a commitment of time and an understanding of the issues... A written policy should not constitute [a] company's entire AIDS program. But it will serve as the foundation upon which you can build a solid program of education and compliance.").


\textsuperscript{20} Diane E. Lewis, \textit{Workplace Attitudes Toward AIDS are Improving Slowly}, \textit{St. Louis Post-Dispatch}, Jan. 2, 1997, at 8C.

\textsuperscript{21} \textit{See Richard Danielson, Tampa Bay and State: City Faces Privacy Suit Series, St. Petersburg Times}, Sept. 26, 1995, at 1B, 3B.

\textsuperscript{22} See id.

\textsuperscript{23} \textit{See id.} Under Florida law, the medical records of government employees (including any diagnosis regarding HIV) were exempted from disclosure under the Florida Public Records Law. \textit{See id.}
vacy and legitimate business concerns. This is reflected by both an "increase in privacy-related litigation and legislative initiatives that alternatively protect worker privacy or permit information gathering on the part of employers (often with limitations)."

A company which seeks to protect its employees from discrimination but which also has concerns about incurring liability for unauthorized disclosures, will establish an AIDS policy, implement an educational program, and attempt to change its employees' misconceptions about the disease. There are four concerns to be addressed by a workplace AIDS policy in order for it to be effective: equal treatment of employees, legal responsibility in adhering to the policy and respecting the privacy of all employees, education, and employee confidentiality. This Note will present various approaches to aid employers in addressing the legal rights of their HIV and AIDS-infected employees. In addition, it will set forth both common law and statutory protections of HIV and AIDS-infected employees' rights to privacy and confidentiality in the workplace, as well as provide a guide for the implementation of workplace policies to help deal with issues surrounding the employment rights of an infected individual.

II. CAUSES OF ACTION FOR AN EMPLOYER'S UNAUTHORIZED DISCLOSURE OF THE EMPLOYEE'S HIV/AIDS-RELATED INFORMATION

When an employee alleges that his employer has breached a right to privacy of medical information, specifically one's HIV or AIDS status, traditional privacy torts have applied, as well as state statu-

25. Id.
To say there is but a line separating an employer's ability to obtain information and workers' personal privacy rights is not accurate. It is more of a shadowy band of indeterminate width consisting of a hodge podge of sometimes conflicting state and federal statutes, regulations, judicial decisions and constitutional principles. In other words, the law of privacy in the workplace is a minefield awaiting the unwary and uninformed employer.

27. See Knotts & Johnson, supra note 26, at 5-6.
28. See MARTIN GUNDERSON, ET AL., AIDS: TESTING AND PRIVACY 92 (1989). These torts, including intrusion into seclusion and public disclosure of private facts, are usually
tory claims. However, an employee cannot bring a claim for breach of confidentiality or violation of the right to privacy under federal statutory law, since no such federal legislation has been enacted thus far. Although several existing federal laws address AIDS and may be applied to workplace issues, such as disability discrimination, none of them deal specifically with the confidentiality of HIV information.

The most comprehensive federal law protecting people who have been infected with HIV is the Americans with Disabilities Act ("ADA"). However, the ADA does not address the issue of confidentiality based on state case law. However, some states have enacted legislation to deal with the specific issue of confidentiality of HIV/AIDS information. See id.


30. See NAN D. HUNTER ET AL., THE RIGHTS OF LESBIANS AND GAY MEN 140 (3d ed. 1992). The Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101 (1994) "does not expressly restrict disclosure of AIDS test results," but restricts disclosure of information obtained during medical examinations of applicants or employees. But see DONALD H.J. HERMANN & WILLIAM P. SCHURGIN, LEGAL ASPECTS OF AIDS § 10:22, at 262 n.9 (Supp. 1997). Disclosure of AIDS-related information is "permitted only to supervisors with a job-related need to know the information, to first-aid and safety personnel if treatment is required, or to government officials investigating compliance with the ADA." Id. Under the ADA, "if an HIV test is administered as part of a preemployment or employment physical, the test results must be treated as confidential." Id. at 262 (citing 42 U.S.C. § 2112(d)(3)(B)(1994)).


32. The Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 (1994). The ADA applies to employers with "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person . . . ." See 42 U.S.C. § 12111(5)(A) (1994). The ADA protects a "qualified individual with a disability [from discrimination] because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." See 42 U.S.C. § 12112(a) (1994). See also Anderson v. Gus Mayer Boston Store of Del., 924 F.
fidentiality of medical information of current employees with AIDS, except to the extent that the information is in the form of an HIV test result or if the information is discovered during an inquiry by the employer. The ADA requires employers to help employees who are HIV-positive retain their employment for as long as they are able to by providing “reasonable accommodations” at work. Under the ADA, an employer is not permitted to ask an employee who is suspected of being infected with HIV whether the...
employee does in fact have the illness.\textsuperscript{35} However, this section has not been extended to the disclosure by an employer of confidential HIV and AIDS information which is not in the form of a test result or obtained by a direct inquiry.\textsuperscript{36}

As is evidenced by the abundance of litigation surrounding unauthorized disclosures of HIV/AIDS-related information, the aim of this Note is to propose the enactment of a federal statute to deal solely with this issue. Individual states have addressed the issue of confidentiality of HIV information or of communicable disease


\textsuperscript{36} See DONALD H.J. HERMANN & WILLIAM P. SCHURGIN, LEGAL ASPECTS OF AIDS § 10:04, at 7 (1991) (“[T]he use of AIDS-related preemployment or employment inquiries could be introduced as evidence of an intent to discriminate on the basis of a handicap in any action arising out of AIDS-related employment decisions. . . . It is generally recommended, therefore, that all preemployment inquiries be limited to job-related issues.”). The Federal Vocational Rehabilitation Act of 1973 (“VRA”) was enacted to protect disabled individuals from being discriminated against. See 29 U.S.C. § 701 (1994). The Rehabilitation Act protects handicapped individuals who are “otherwise qualified” from being discriminated against “solely” on the basis of their disabilities. 29 U.S.C. § 794 (1994). See also Bless S. Young & Kimberly R. Wells, Managing AIDS in the Workplace, 41 PRAC. LAW. 41, 44 (1995).

In School Board of Nassau County v. Arline, the Supreme Court held that employees with “infectious diseases” could be considered “handicapped” within the meaning of the Rehabilitation Act. See School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 (1987). Finally, in Chalk v. U.S. District Court, the Rehabilitation Act was extended to protect people with AIDS. See Chalk v. U.S. Dist. Court Cent. Dist. of Cal., 840 F.2d 701 (9th Cir. 1988). In Chalk, a teacher was reassigned to an administrative position and barred from classroom teaching after his employer discovered he had AIDS. See id. at 703. The court in Chalk held that a reasonable medical opinion must determine whether Chalk would pose a risk of serious harm to his students if he returned to the classroom. See id. at 711.

The Occupational Safety and Health Act (“OSHA”), was enacted to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . .” See 29 U.S.C. § 651(b) (1996). OSHA advises that where an employee’s daily work practices bring him or her into contact with blood or other bodily fluids, the employee must act on the assumption that those fluids are infected and behave accordingly. See Milton Bordwin, AIDS: Not Just A Medical Problem; It Can Easily Turn Into a Legal Nightmare If Extra Care Is Not Taken, 56 OR. ST. B. BULL. 15, 16 (1996). This statute is focused on safety of workplaces, and does not deal with the issue of confidentiality. “OSHA emphasizes precautions, not disclosures or warnings.” See id.
information generally.\textsuperscript{37} The Federal government, by enacting statutes such as the ADA, has addressed the issue of inquiries of employees "as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity."\textsuperscript{38} However, except with respect to test results, neither the ADA nor any other federal statute protects employees from the unauthorized disclosure of their HIV or AIDS information in the workplace. In addition to a federal statute setting out rules to guide employers and co-workers who have knowledge of an employee's HIV or AIDS condition, an exhaustive federal statute should also include the legal consequences, or penalties, of noncompliance with such a statute, similar to those included in several state statutes.\textsuperscript{39}

\textsuperscript{37} See \textit{supra} note 16.


\textsuperscript{39} The author of this Note proposes that if a federal statute were to be enacted in the future to deal with the subject of the confidentiality of an employee's HIV/AIDS status in the workplace, such statute should contain a section which sets forth penalties to be imposed upon all employers and co-workers of the infected employee, for the unlawful disclosure of the HIV/AIDS status of a fellow employee, in order to ensure statutory compliance. Several states have already enacted statutes which contain such penalty provisions and can be used to illustrate how penalties would help to ensure that such statutes are adhered to by employers and co-workers. For example, California's statute, which deals with HIV disclosure, states the penalties for "negligently," "willfully," and "willfully or negligently" disclosing results of an HIV test "to any third party, in a manner that identifies or provides identifying characteristics of the person to whom the test results apply, except pursuant to a written authorization. . . ." \textit{CAL. HEALTH} \& \textit{SAFETY CODE} § 120980(b) & (c) (West 1995). This statute imposes a civil penalty not to exceed one thousand dollars for a negligent disclosure. See \textit{CAL. HEALTH} \& \textit{SAFETY CODE} § 120980(a) (West 1995). For a willful disclosure, "a civil penalty in an amount not less than one thousand dollars ($1000) and not more than five thousand dollars ($5000) plus court costs" is imposed and then "paid to the subject of the test." \textit{CAL. HEALTH} \& \textit{SAFETY CODE} § 120980(b) (West 1995). The penalties for a willful or negligent disclosure "that results in economic, bodily, or psychological harm to the subject of the test," include a misdemeanor charge, "punishable by imprisonment in the county jail for a period not to exceed one year or a fine of not to exceed ten thousand dollars ($10,000) or both." \textit{CAL. HEALTH} \& \textit{SAFETY CODE} § 120980(c) (West 1995). Penalties for noncompliance would likely help to deter employers and co-workers of employees with AIDS from disclosing private information. This would assist employers in providing infected workers with a safer, more comfortable workplace. See, \textit{e.g.} \textit{W. VA. CODE} § 16-3C-5 (1996) ("(a) Any person aggrieved by a violation of this article has right of action in the circuit court and may recover . . . [liquidated damages, actual damages, attorney fees, or an injunction for the violation].").
Maintaining Employees' Privacy of HIV and AIDS Information

If there are no vague lines regarding disclosure, then workplace policies, in conjunction with a federal law which clearly states that disclosing an employee's private AIDS-related information is unlawful and that noncompliance can result in the imposition of both criminal and civil penalties, would undoubtedly decrease an employer's chances of incurring legal liability. Furthermore, by enacting a federal HIV/AIDS confidentiality statute, the government would be increasing the chance of maintaining employees' security in their private medical information.

Currently, the non-existence of a federal statute imposing liability on employers for the disclosure of confidential HIV/AIDS information creates a limitation on the types of claims that an employee can bring against her employer. An employee can either bring a cause of action under state law or under various tort theories. The torts of invasion of privacy, in the forms of intrusion into solitude or seclusion and public disclosure of private facts, and intentional infliction of emotional distress are some of the more common bases for employees' claims for disclosure of their HIV/AIDS information.

However, disclosure of an individual's AIDS status does not always lead to an employer incurring legal liability. In Doe v. Southeastern Pennsylvania Transportation Authority (SEPTA), the court held that the employer's need for access to its employee's prescription drug information for auditing purposes, which revealed that the employee was taking legal medication for the treatment of AIDS, outweighed the employee's privacy interest. See 72 F.3d 1133, 1143 (3d Cir. 1995). A non-employment-related example of this is in the relationship between the HIV-infected patient and health care worker. See Urbaniak v. Newton, 277 Cal. Rptr. 354 (Cal. Ct. App. 1991). In Urbaniak, the court held that there is a strong public interest in a patient disclosing his HIV positive status in order to alert a health care worker to take certain safety precautions. See id. at 360.

The Supreme Court in Whalen v. Roe recognized a constitutional right to privacy of individuals to avoid "disclosure of personal matters." 429 U.S. 589, 599 (1977). The Court of Appeals for the Second Circuit has held that an individual has "a right to privacy (or confidentiality) in his HIV status," for the reason that a person is "normally entitled to keep [his personal medical condition] private." Doe v. City of New York, 15 F.3d 264, 269 (2d Cir. 1994).

In addition, an employee can bring an action against an employer for defamation "if... [the] employer disseminated a false statement about such employee, such that the employee had AIDS, when in fact this was not the case." See Walter B. Connolly, Jr. & Alison B. Marshall, An Employer's Legal Guide to AIDS in the Workplace, 9 St. Louis U. Pub. L. Rev. 561, 585 (1990).
A. Invasion of Privacy

In several instances, the Supreme Court has used the Constitutional right to privacy in decisions protecting individuals from public disclosure of private information. In cases involving the disclosure of an employee's private information in the workplace, a privacy right in medical information has been recognized by the courts. Whether a disclosure constitutes an invasion of privacy may depend upon the existence or non-existence of an individual's "legitimate expectation of privacy." Courts often weigh an individual's right to privacy against the right to discover relevant facts. In the employment arena, this is often in the form of weighing the plaintiff's right of privacy against the defendant's legitimate business interests.

44. See, e.g., United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) (holding that an employee's medical records "which may contain intimate facts of a personal nature . . . [fall] within one of the zones of privacy entitled to protection.").
45. See Martin Gunderson, et al., AIDS: Testing and Privacy 93 (1989). See also William P. Allen, Workplace Privacy and the Right to Know, Ariz. Bus. Gazette, Oct. 17, 1996, available in 1996 WL 8166699 (noting that the foremost issue in cases where claims of violation of the right to privacy are brought is whether an employee had a reasonable expectation of privacy regarding the area "invaded" or the information that was made public).

Criteria that have generally been utilized by the courts in striking such a balance include the need for disclosure, the extent of any handicap imposed by nondisclosure, the nature of the privacy interest, and the ability of the court to accommodate the privacy interest by a protective order or other limitation.

Id. at 532.

In Doe v. Borough of Barrington, the court held "the Constitution protects . . . [individuals] from government 'disclosure' of the fact that a person is infected with AIDS." 729 F. Supp. 376, 382 (D.N.J. 1990). See id. at 384 ("The sensitive nature of medical information about AIDS makes a compelling argument for keeping this information confidential."). In Borough of Barrington, the court held that the family members of an AIDS-infected citizen had a constitutional right to privacy in AIDS information regarding their relatives, and that "the state had no compelling interest in revealing that information . . . [and therefore] violated the . . . [plaintiff's] constitutional rights." Id. at 385. The court in Borough of Barrington recognized the social stigma, discrimination, and harassment that can result from the public knowledge of an individual's HIV status. See id at 384.
In *Plowman v. U.S. Department of Army*, a former civilian employee of the United States Department of the Army ("the Army") filed an action in federal court against his former supervisor, claiming that he was forced by the supervisor to resign after testing positive for HIV. The plaintiff alleged that his supervisor had violated his constitutional right to privacy by disseminating his confidential HIV test results. The court, in addressing the issue of whether the supervisor violated plaintiff's right to privacy, recognized two categories of privacy as defined by *Whalen v. Roe*:

These categories are "[1] the individual interest in avoiding disclosure of personal matters, and [2] the interest in independence in making certain kinds of important decisions." In *Plowman*, the plaintiff asserted a violation of privacy under the first category. The *Plowman* court pointed out that the scope of the constitutional right to privacy in medical records "is far from settled." The court concluded that the supervisor's "limited disclosure" thus "did not implicate a clear established constitutional right, nor were his actions inconsistent with any such right.

HIV and AIDS are such taboo subjects in employment that it may be devastating to an employee if an employer or co-workers

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48. 698 F. Supp. 627, 631-32 (E.D. Va. 1988) (involving claim by plaintiff that his constitutional right to privacy had been violated by his supervisor). See also Jeff Glenney, *AIDS: A Crisis In Confidentiality*, 62 S. Cal. L. Rev. 1701, 1713 (1989) ("The right to privacy has been cherished in the American political tradition even though the Constitution itself does not mention such a right . . . .").


50. See id. at 631. After seeking treatment at an Army hospital, plaintiff was given two HIV tests, both without his consent. See id. at 629-30. The physician who administered plaintiff's initial HIV test reported the positive results of the test to the plaintiff's supervisor. The supervisor then "consulted with four other persons in his command" to decide what action to take. Id. at 630. During this consultation, the supervisor disclosed plaintiff's name and HIV test results, but advised them not to further disseminate that information. See id. at 630.


54. Id. at 633.

55. Id. The court found that the disclosure was reasonable and granted summary judgment to defendant. See id. at 639.
merely suspect the HIV infection of either that individual or his or her sexual partner.6 An invasion of privacy claim in the form of “unreasonable publicity given to the life of another” was recognized in Borquez v. Ozer.57 In Borquez, the plaintiff was an attorney who alleged that the law firm which employed him invaded his privacy.58 The court applied section 652D of the Restatement (Second) of Torts59 and held that the plaintiff’s disclosure of his exposure to HIV “constitute[d] a private matter” under the Restatement and that the “disclosure of this information would be highly objectionable to a reasonable person because a strong stigma still attaches to both homosexuality and AIDS.”60 The court stated that the information that defendant disclosed was “not a matter of legitimate concern to the public,” was “inherently private,” and could “be disclosed only under narrowly specified circumstances.”61 The court also held that it was “appropriate to recognize the tort of invasion of privacy... where private information was unreasonably disseminated to fellow employees who had no legitimate interest therein.”62

Invasion of privacy claims in the area of disclosure of HIV-related information in employment, generally fall into two categories: intrusion into solitude or seclusion and public disclosure of private facts.63

57. See id. at 174.
58. Plaintiff also alleged “wrongful discharge based on sexual orientation.” See id. at 169. While attempting to make arrangements for another attorney to handle some of his assignments, plaintiff disclosed to defendant his sexual orientation, homosexual relationship, and an immediate need to be tested for HIV. See id. at 170. The plaintiff asked that defendant not disclose this information. See id. Following that conversation, defendant told his wife, who was a shareholder in the firm, and several others about plaintiff's disclosures. See id.
59. The RESTATEMENT (SECOND) OF TORTS § 652D (1976) provides:
   One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
   (a) would be highly offensive to a reasonable person, and
   (b) is not of legitimate concern to the public.
61. Id. at 173.
62. Id. at 174.
1. Intrusion into Solitude or Seclusion

In order to establish the tort of intrusion into solitude or seclusion, the plaintiff must show that the defendant "intentionally intrude[d]" into his "private affairs or concerns," and that the "intrusion would be highly offensive to a reasonable person." An inquiry about a person's HIV status or the taking of an unauthorized HIV test would likely be "highly offensive to a reasonable person," because it would "provide knowledge of the most vital details of one's present health and in some cases allow inferences about one's intimate behavior."

In McNemar v. Disney Store, Inc., the Third Circuit held that an employee's action against his employer for invasion of privacy under New Jersey state law was not supported by evidence that the manager's inquiry was "highly offensive to a reasonable person." In McNemar, the plaintiff made a limited disclosure of his HIV-positive status to a small number of people. Shortly after this disclosure, the plaintiff's district manager approached him, and "privately informed him that she had heard rumors that he had tested positive for HIV, and asked if the rumors were true."

McNemar filed a complaint against Disney which alleged invasion of privacy. McNemar argued that Disney was liable for intru-
sion upon his seclusion because he was asked by his district manager whether he was HIV-positive. The Third Circuit held that the manager’s inquiry did not intrude upon McNemar’s seclusion, since the purpose of the inquiry, as admitted by McNemar himself, was for support. The court determined that McNemar was not forced into disclosing his condition, that the manager’s conduct was not “highly offensive to a reasonable person,” and therefore that there was no invasion of privacy in the form of intrusion upon McNemar’s seclusion under New Jersey law.

2. Public Disclosure of Private Facts

An employee can also bring a cause of action against an employer for disclosure of private facts. To establish a claim of public disclosure of private facts with regard to an individual’s HIV status, a plaintiff must show that private information concerning an individual’s status was disclosed and that this disclosure would be offensive and objectionable to a reasonable person. “The information published must be private and not part of a public record

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71. See 91 F.3d 610, 622 (3d Cir. 1996).
72. See id.
73. Id.
74. Under the Restatement (Second) of Torts § 652D (1976):
   One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
   (a) would be highly offensive to a reasonable person, and
   (b) is not of legitimate concern to the public.
Id. § 652D, cmt. a defines “Publicity” as:
   [A matter] made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge . . . . Thus it is not an invasion of the right to privacy . . . . to communicate a fact concerning the plaintiff’s private life to a single person or even to a small group of persons.
Id. See also McNemar v. Disney Store, Inc., 91 F.3d 610, 622 (3d Cir. 1996) (examining the plaintiff’s allegations of public disclosure of private information in light of § 652D and the Restatement’s definition of “publicity”).
75. See, e.g., Borquez v. Ozer, 923 P.2d 166, 172 (Colo. Ct. App. 1995). The court in Borquez stated that the disclosure must be “highly offensive to a reasonable person” and concluded that the disclosure of an individual’s HIV status would meet this requirement because of the “strong stigma [that] still attaches to both homosexuality and AIDS.” Id. at 173. In Borquez, the court recognized this form of a privacy invasion “where private information was unreasonably disseminated to fellow employees [of the plaintiff] who had no legitimate interest therein.” Id. at 174. See also Urbanik v. Newton, 277 Cal. Rptr. 354 (Cal. Ct. App. 1991) (stating that disclosure of an individual’s HIV positive status may be entitled to protection of privacy rights under California state law because of the association...

http://scholarlycommons.law.hofstra.edu/hlelj/vol15/iss1/9
and must not be information which the plaintiff has consented to have published.\textsuperscript{76}

In \textit{Doe v. City of New York},\textsuperscript{77} the plaintiff brought an action against the City, claiming that his constitutional right to privacy was violated when his HIV-positive status was revealed to the public.\textsuperscript{78} The plaintiff claimed that the disclosure "caused him to be the victim of discrimination and resulted in severe embarrassment and ostracism."\textsuperscript{79} The court in \textit{City of New York} held that the plaintiff’s HIV status was protected by his constitutional right to privacy under both \textit{Whalen v. Roe}\textsuperscript{80} and \textit{United States v. Westinghouse Electric Corp.}\textsuperscript{81} In holding that "the right to confidentiality includes the right to protection regarding information about the state of one's health,"\textsuperscript{82} the court, however, stated that if the plaintiff’s HIV status was "a matter of public record," then he had no "constitutionally protected privacy interest" in his status.\textsuperscript{83} Conclusively, the court held that the plaintiff’s HIV status "did not . . . automatically

\textit{of HIV} with “sexual preference or intravenous drug uses”); \textit{Restatement (Second) of Torts} § 652D cmt. b (1976), explaining that:

\begin{quote}
Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are . . . disgraceful or humiliating illnesses.
\end{quote}

\textit{Restatement (Second) of Torts} § 652D cmt. b (1976). \textit{See generally Martin Gunder-\textsuperscript{s}on, ET AL., AIDS: TESTING AND PRIVACY} 92 (1989) (“To establish [the tort of public disclosure of private facts] the plaintiff must show that there was a public disclose of private facts and that such a disclosure would be objectionable to a reasonable person of ordinary sensibilities.”); Jeff Glenney, \textit{AIDS: A Crisis In Confidentiality}, 62 S. CAL. L. REV. 1701, 1727-28 (1989) (stating that in order to satisfy the prima facie case for this tort action, a plaintiff “must prove that the [employer] . . . released the private information, that the [employer] . . . intended to release the information, and that the private facts released were highly offensive to him and would be highly offensive to an average reasonable person.”) (emphasis in original).

\textsuperscript{76} \textit{See Gunder-\textsuperscript{s}on, ET AL., supra note 75, at 92.}

\textsuperscript{77} 15 F.3d 264 (2d Cir. 1994).

\textsuperscript{78} \textit{See id. at 265.}

\textsuperscript{79} \textit{Id. The court held that “[i]ndividuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition.” Id. at 267. The court labeled the right to privacy in one’s HIV-status “a right to ‘confidentiality.’” Id.}

\textsuperscript{80} 429 U.S. 589 (1977).

\textsuperscript{81} 638 F.2d 570 (3d Cir. 1980).


\textsuperscript{83} \textit{See Doe v. City of New York, 15 F.3d 264, 268 (2d Cir. 1994).}
become a public record when he filed his claim with [The New York City Commission on Human Rights]." The court applied a "substantial interest" standard to determine "whether the City[']s . . . issuing . . . [of a] press release . . . outweigh[ed] Doe's privacy interest." The court ultimately remanded the case for resolution of issues "including but not limited to whether Doe actually waived his constitutional right and whether the city's press release actually identified Doe."  

As one commentator reported, courts are divided on "whether the disclosure must be published to a sizable number of people." "[T]he publication may not be wide enough to meet the publication requirement of the tort," if such information is disseminated to one individual, such as an employer, but yet may nonetheless "trigger severe discrimination." Therefore, in jurisdictions where "extensive publication" is not required, "the tort offers significant protection."  

In Cronan v. New England Telephone Co., the Superior Court of Massachusetts held that the plaintiff's allegations, that his supervisor published his AIDS status to other company employees, set forth a claim that his privacy right was breached. The plaintiff alleged that defendant's disclosure was "not reasonably necessary

84. Id. at 269. The plaintiff had filed a complaint for employment discrimination against Delta Airlines with the New York Commission on Human Rights. See id. at 265. The Commission, Delta, and Doe subsequently entered into a "Conciliation Agreement" which settled Doe's claims against the airline. See id. The Commission, despite a confidentiality clause contained in the Agreement, "issued a press release disclosing the terms of the . . . Agreement" which led to Doe's co-workers becoming aware of his HIV status. See id.

85. See id. at 269.

86. Id. at 270.

87. See MARTIN GUNDERSON, ET AL., AIDS: TESTING AND PRIVACY 92 (1989) (referring to Prosser and Keeton's analysis of the tort of "public disclosure of private facts").  

88. Id. at 93.

89. See id. See, e.g., Borquez v. Ozer, 923 P.2d 166, 174 (Colo. Ct. App. 1995) (holding that where information regarding plaintiff's exposure to HIV was disseminated to all employees of the law firm where plaintiff had worked, the information constituted unreasonable publicity). But see Beck v. Interstate Brands Corp., 953 F.2d 1275, 1276 (11th Cir. 1992), where the plaintiff's complaint alleging invasion of privacy was dismissed because it failed to state that the defendant published specific information about plaintiff or plaintiff's AIDS status.

to safeguard substantial or legitimate business interests of the Company. Following the disclosure of his diagnosis, plaintiff was menaced by threatening phone calls from employees promising that he would be lynched upon his return to the company. Plaintiff claimed that he "did not return to work because he feared for his well-being and that the physical threats and violation of his privacy caused him severe anxiety which substantially aggravated his physical condition."

Cronan alleged that defendants breached his right to privacy in violation of Massachusetts' civil rights law. Cronan also alleged that defendants violated his civil rights in violation of two sections of a Massachusetts statute which protects constitutional rights. Subsequently, the parties settled out of court and plaintiff returned to his job at New England Telephone Co., which agreed to imple-

91. Id. See infra text accompanying note 118. Plaintiff had worked as a repair technician for his employer for twelve years when he was asked by his immediate supervisor, O'Brien, to explain medical appointments which had caused two, 1.5 hour absences. See Cronan v. New England Tel. Co., Daily Lab. Rep. (BNA) No. 179, at D-1 (Mass. Super Ct. Sept. 16, 1986). The supervisor subsequently went to his superiors and repeated Cronan's information. As a result, employees, both in locations where plaintiff had worked, and was still working, were informed that Cronan had AIDS. See id.

92. See id.

93. Id.


Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with . . . as described in Section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages.

ment an AIDS education program. The employer’s implementation of this program suggests that perhaps the company may have been able to avoid the litigation if it had handled plaintiff’s disclosure in a more discreet manner and had educated its employees about the nature of HIV transmission.

B. Intentional Infliction of Emotional Distress

A plaintiff may bring a claim against her employer for intentional infliction of emotional distress when her HIV status is disclosed without her consent. A plaintiff must prove that the employer “intentionally committed an extreme or outrageous act” in order to establish a prima facie case of intentional infliction of emotional distress.


A plaintiff who claims intentional infliction of emotional distress must meet four requirements: (1) that the defendant acted recklessly or intentionally; (2) that the conduct was extreme and outrageous; (3) that the defendant’s actions were the proximate cause of the plaintiff’s distress; and (4) that the plaintiff actually suffered severe emotional distress.

91 F.3d 610, 622-23 (3d Cir. 1996) (citations omitted). The court held that McNemar’s claim was “unpersuasive” because he didn’t prove that Disney’s conduct was “extreme and outrageous,” or that Disney “harassed McNemar in any way.” Id. This would have been necessary to support plaintiff’s claim for intentional infliction of emotional distress. See id. But see Beck v. Interstate Brands Corp., 953 F.2d 1275, 1276 (11th Cir. 1992) (holding that plaintiff failed to state a cause of action for intentional infliction of emotional distress because he failed to allege that the employer’s actions constituted “extreme vindictiveness,” “abuse” or “threats,” and that the defendant’s actions were not “so terrifying or insulting as naturally to humiliate, embarrass or frighten the plaintiff”) (quoting Georgia Power Co. v. Johnson, 274 S.E.2d 17, 18 (1980)); Plowman v. United States Dep’t of the Army, 698 F. Supp. 627, 637 (E.D. Va. 1988) (holding that the defendant was granted absolute immunity from liability for plaintiff’s intentional infliction of emotional distress claim because the defendant’s actions were “within the scope of his official responsibilities”).
In *Sullivan v. Delta Air Lines*, the plaintiff brought an action against his employer for invasion of privacy after he was terminated. He had alleged that he was unlawfully dismissed from his job one year after he told a supervisor that he was infected with HIV. A jury “found that Delta had invaded Sullivan’s privacy by placing his name on a roster of employees who were HIV positive,” and subsequently awarded him $275,000 in damages for emotional distress. However, the plaintiff’s damage award was subsequently “tossed out” because he died during the process of appeal. Although Sullivan had been awarded emotional distress damages, the court held that Delta had filed a “timely appeal” and had asserted “multiple substantive and procedural challenges” to the prior judgment, and therefore Sullivan’s emotional distress damages were no longer recoverable.

III. WHAT ARE THE MEDICAL RISKS OF HIV AND AIDS IN THE WORKPLACE?

Many prejudices existing against individuals infected with HIV or living with AIDS originate from the common fear of “catching” AIDS. In order for an employer to avoid liability for the disclosure of an employee’s confidential HIV-related information, and to prevent other employees from engaging in threatening and discriminatory behavior, it is essential that both the employer and the co-workers of an HIV-infected employee be educated about HIV and AIDS.

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99. See Across the Nation: Jury Awards $275,000 to Man Fired By Airline, SEATTLE TIMES, May 10, 1994, at A4.
100. See id.
102. AIDS Disclosure Award Overturned Due to Death, S.F. CHRON., Mar. 27, 1996, at A17.
104. However, casual contact between persons is not an established means of transmission. See CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC), ET AL., SURGEON GENERAL’S REPORT TO THE AMERICAN PUBLIC ON HIV INFECTION AND AIDS 118 (1994).
A. The Disease Itself

Acquired Immunodeficiency Syndrome ("AIDS") is comprised of "a specific group of diseases or conditions which are indicative of severe immunosuppression related to infection with the human immunodeficiency virus ("HIV")." HIV begins to destroy the body's immune system by attaching itself to white blood cells, the function of which are to fight off infection. "The first 'active' state of the disease consists of a group of illnesses known collectively as AIDS-related complex, or 'ARC'." A blood test will reveal this diagnosis, in addition to the presence of HIV antibodies and "one or more of a number of symptoms including fevers, sudden weight loss, chronic diarrhea, or swollen glands." Once exposed to the HIV virus, a person will typically develop antibodies to the virus. Commercially available tests are able to detect these antibodies.

The two most common tests utilized today to determine the presence of HIV antibodies are the enzyme-linked immunoabsorbent assay ("ELISA") test and the Western Blot test. They are used together to screen the blood for the presence of HIV antibodies. Although tests which come back positive indicate that the individual may be infected with the HIV virus, the test merely detects the antibodies which are developed after one has been exposed to the virus. Accordingly, a positive test result does not conclusively

106. See id. The first indication of HIV infection is a series of flu-like symptoms, such as fever and chills. See id. Research has indicated that an individual can remain HIV-positive but free of symptoms for up to 10 years before the virus destroys the immune system. See id. at 984-85.
107. See Bless S. Young & Kimberly R. Wells, Managing AIDS in the Workplace, 41 PRAC. LAW. 41, 43 (1995).
108. See id.
110. See id.
112. See id. The ELISA test is a blood screening test which "indicates a positive result when these antibodies are detected." See id. The Western Blot test is used to confirm results of the ELISA test and "detects the elevation of antibodies that combat HIV." Id. If both tests have positive results, then HIV infection is indicated. See id.
113. See DONALD H.J. HERMANN & WILLIAM P. SCHURGIN, LEGAL ASPECTS OF AIDS §10:14, at 16 (1991). However, a "window period" exists during which "an individual can test
establish that an individual will develop AIDS or AIDS-related complex. However, as is maintained by the Centers for Disease Control and Prevention, these tests, used together, are more than 99.9% reliable.

There are an abundance of writings suggesting that there is no real danger of HIV transmission through casual contact. HIV is contained "in the blood, semen, or vaginal secretions of an infected person." The two most common ways that HIV is transmitted are through sexual activity and through the sharing of intravenous drug needles. As aforementioned, HIV cannot be transmitted through casual contact, such as by sitting next to a co-worker who is infected with the virus or by attending a business meeting with an individual who has AIDS.

B. Statistics on AIDS/HIV Infected Persons in the U.S.

The Center for Disease Control and Prevention ("CDC") supplies data relating to cases of HIV infection and AIDS which have been reported to state, local, and territorial health departments through June 1997. The report states that 612,078 cases of men, negative on an HIV antibody test and still carry the HIV virus" because it takes a period of time after an individual is exposed to the virus for antibodies to be developed. See id. at 15. See also Centers for Disease Control and Prevention (CDC), et al., Surgeon General's Report to the American Public on HIV Infection and AIDS 11 (1994) (reporting that HIV antibodies normally show up within three to six months after an individual is infected, and that therefore, if risky behavior is performed less than 6 months before the test another test should be taken).


118. See id. at 6.

119. See id. (stating that a person cannot contract HIV from touching, hugging, kissing, sharing of toilets, sharing telephones, or attending public places with HIV-infected people).

women, and children with AIDS have been reported to the CDC.\textsuperscript{121} According to the report, the number of persons reported as presently living with either HIV infection (not AIDS) or with AIDS, reported through 1996, is 239,000.\textsuperscript{122} As a result of the drastic nature of AIDS and the large number of people who have been thus far afflicted (as reported by the CDC), the work environment must confront the legal and social ramifications which accompany this disease.

\textbf{IV. Situations in Which Confidential Medical Information Regarding AIDS is Commonly Disclosed}

Disclosure of HIV/AIDS-related information may occur more commonly in certain areas of employment than in others. In the health care industry, for example, disclosure of an employee’s HIV or AIDS status may be necessary to protect the health and safety of both health care workers and patients.\textsuperscript{123} In cases involving disclosure in the health care industry, a balancing approach has been used by courts, by which the health care worker’s rights are weighed against the patients’ rights.\textsuperscript{124} For example, in \textit{Estate of Behringer v. Medical Center at Princeton},\textsuperscript{125} disclosure to patients of the fact that a surgeon was afflicted with AIDS was held to be proper because of the nature of the relationship between the surgeon and his patients.\textsuperscript{126} However, the hospital was found to have “breached its duty of confidentiality” to the surgeon, by failing to take “reasonable precautions” to prevent the surgeon’s medical records con-

\footnotesize{\textsuperscript{121} See \textit{id.}\textsuperscript{122} See \textit{id.} at 3.\textsuperscript{123} This is due to the fact that “blood-to-blood contact” is inherent in the nature of many health care jobs. See Bless S. Young & Kimberly R. Wells, \textit{Managing AIDS in the Workplace}, 41 PRAC. LAW. 41, 50 (1995). However, “only healthcare workers who perform ‘invasive procedures’ that are ‘exposure-prone’ pose any significant risk of harm to the patients they treat,” if the necessary precautions are adhered to. \textit{Id.}\textsuperscript{124} Estate of Behringer v. Medical Ctr. at Princeton, 592 A.2d 1251, 1283 (N.J. Super. Ct. Law Div. 1991). In \textit{Behringer}, the court held that New Jersey’s policy supporting patient rights required that “the patient’s rights must prevail” and “[a]t a minimum, the physician must withdraw from performing any invasive procedure which would pose a risk to the patient.” \textit{Id.} (emphasis added).\textsuperscript{125} 592 A.2d 1251 (N.J. Super. Ct. Law Div. 1991).\textsuperscript{126} See \textit{id.} at 1282. The court held that there was a “reasonable probability of substantial harm” if the plaintiff surgeon “continued to perform invasive procedures.” \textit{Id.} at 1283.}
maintaining his AIDS status from becoming "a matter of public knowledge." \(^{127}\) The court decided that while a hospital can require an AIDS afflicted surgeon \(^{128}\) to obtain informed consent from his patients prior to performing surgery, the surgeon had a privacy interest in his HIV test results and a hospital must take "reasonable precautions" to prevent the diagnosis from becoming "a matter of public knowledge." \(^{129}\) Therefore, although in this case the disclosure was held to have been necessary, because of the reasonable probability of harm and the risk of transmission of HIV from a surgeon to his patient, it was nonetheless held to be a breach of the surgeon's confidentiality, as a patient of the hospital. \(^{130}\)

\(^{127}\) Id. at 1255.


\(^{129}\) See id. at 1255.

\(^{130}\) See id. at 1271. The court stated that "the easy accessibility to the [plaintiff's] charts and the lack of any meaningful medical center policy or procedure to limit access . . . cause[d] the breach to occur." Id. The court held that the medical center's breach of its "duty and obligation to keep such records confidential" made the center liable for damages incurred by plaintiff as a result of this breach. Id. at 1274.

This right to confidentiality is granted by many state confidentiality statutes. Not all states have such statutes. However, more and more states are enacting statutes to protect the confidentiality of AIDS-related information, communicable disease information generally, or medical information generally. See, e.g., W. VA. CODE § 16-3C-3 (1996):

Confidentiality of records; permitted disclosure; no duty to notify.

(a) No person may disclose or be compelled to disclose the identity of any person upon whom an HIV-related test is performed, or the results of such a test in a manner which permits identification of the subject of the test, except to the following persons:

(1) The subject of the test;

(2) The victim of the crimes of sexual abuse, sexual assault, incest or sexual molestation at the request of the victim or the victim's legal guardian, or of the parent or legal guardian of the victim if the victim is an infant where disclosure of the HIV-related test results of the convicted sex offender are requested;

(3) Any person who secures a specific release of test results executed by the subject of the test . . .

Id. IND. CODE § 16-41-8-1(a)(1)-(3) (1996): Confidentiality of information; violations; release of records; voluntary disclosure:

Sec. 1. (a) Except as provided in subsections (d) and (e), a person may not disclose or be compelled to disclose medical or epidemiological information involving a communicable disease or other disease that is a danger to health (as defined under rules adopted under IC 16-41-2-1). This information may not be released or made public upon subpoena or otherwise, except under the following circumstances . . .
The court held that the medical center should have given advisory instructions to its employees about the confidentiality of HIV results and access to the plaintiff's diagnosis should have been limited to those people who were involved in treating the plaintiff.\(^{131}\) The holding in *Behringer* has been referred to as "significant" because it "establishes a standard of confidentiality" for HIV tests.\(^{132}\) This standard makes hospitals and other health care employers simultaneously recognize the physician's right to privacy and enforce a patient's right to be fully informed as to any risks to which he or she may be exposed by agreeing to surgery.\(^{133}\)

In *Urbaniak v. Newton*,\(^{134}\) a patient's reasonable expectation of privacy in his HIV-positive status was held to have been violated where this information "had limited relevance to [his] . . . medical examination."\(^{135}\) This holding reflects the need for courts to encourage individuals to disclose their HIV-positive status, which can be crucial in order for health care workers to be able to take the

\(^{131}\) See Estate of Behringer v. Medical Ctr. at Princeton, 592 A.2d 1251, 1263 (N.J. Super. Ct. Law Div. 1991). "Employees not involved in [plaintiff's] . . . care did learn of plaintiff's diagnosis." *Id.* The fact that plaintiff was diagnosed with AIDS became widely known information within a few hours. See *id.* Precautions to ensure plaintiff's confidentiality may have included securing the chart, allowing access to only those health care workers with a bona-fide reason to know. See *id* at 1273.

\(^{132}\) DONALD H.J. HERMANN & WILLIAM P. SCHURGIN, LEGAL ASPECTS OF AIDS § 10:22, at 260 (Supp. 1997). See Estate of Behringer v. Medical Ctr. at Princeton, 592 A.2d 1251, 1283 (N.J. Super. Ct. Law Div. 1991). The court held that the medical center properly required plaintiff "to secure informed consent from any surgical patients." See *id.* at 1255. In *Behringer*, patients were presented with an "informed consent form" before undergoing surgery by HIV-positive surgeons. The form used by the hospital stated the following:

THE MEDICAL CENTER AT PRINCETON, NEW JERSEY SUPPLEMENTAL CONSENT FOR OPERATIVE AND/OR INVASIVE PROCEDURE

I have on this date executed a consent, which is attached hereto, for _________ (Procedure) to be performed by Dr. __________. In addition, I have also been informed by Dr. __________ that he has a positive blood test indicative of infection with HIV (Human Immunodeficiency Virus) which is the cause of AIDS. I have also been informed of the potential risk of transmission of the virus.

_________ (witness) __________ (signature of patient)

*Id.* at 1258. "Informed consent" is based on the "duty of a physician to disclose to a patient such information as will enable the patient to make an evaluation of the nature of the treatment and of any attendant substantial risks, as well as of available alternative therapies." See *id.* at 1278.


\(^{135}\) See *id.* at 361.
necessary safety precautions. The holdings in *Estate of Behringer* and *Urbaniak* demonstrate the conclusions that courts can reach when balancing privacy rights against the need for disclosure.

Although AIDS is a disease which cannot be spread by casual contact, the American public continues to fear that any contact with an HIV-positive individual may result in transmission.\textsuperscript{136} This fear may be rationally based when employees work in jobs that are considered "high-risk." "High-risk" jobs involve a high probability of AIDS transmission, unlike jobs involving casual contact.\textsuperscript{137} There is virtually no legal right of employees to know about a co-worker’s HIV infection in low-risk jobs\textsuperscript{138} involving "casual social contact."\textsuperscript{139} Moreover, even in "high-risk" jobs, when extensive precautions are taken, the need to notify other employees that a co-worker has AIDS is minimal.\textsuperscript{140} Such precautions help maintain a safe workplace for employees and also help to maintain an HIV-infected employee’s privacy.\textsuperscript{141} "In most workplace situations, there is virtually no chance of the type of exchange of body fluids that would transmit AIDS."\textsuperscript{142}

Therefore, if an employer determines that an employee is "physically able to perform the job," and concludes that his HIV/AIDS
condition does not pose a "measurable" risk to others, there is no
duty to disclose such information to other employees. Disclosure,
without the employee's consent, could violate the applicable
state confidentiality provisions and expose . . . the employer to
liability." 144

Medical histories may provide necessary information relating to
an employee's safe and healthy job performance. Nevertheless,
applicable state confidentiality laws generally provide that medical
information is private unless the employee chooses to disclose it. 145
"If disclosed, medical information can inadvertently lead to inap-
propriate employment decisions, perceived discrimination, libel or
slander . . . [and may lead] to further pain or loss for the person
with AIDS and legal liabilities for the employer." 146 However, if an
employer can prove that it had a "legitimate business interest" in
disclosing such information, the employer's defense to an invasion
of privacy claim may be persuasive. 147

A. Implementation of HIV Testing Programs

If an employer becomes aware that one of its employees is HIV-
positive, either from the results of an HIV test or from medication
that the employee is taking, the employer must consider whether
there exists a need to communicate this information to the

143. Walter B. Connolly, Jr. & Alison B. Marshall, An Employer's Legal Guide to AIDS
in the Workplace, 9 St. Louis U. Pub. L. Rev. 561, 577 (1990) (citation omitted).
144. See id.
145. See Borquez v. Ozer, 923 P.2d 166, 173 (Colo. Ct. App. 1995). In Borquez, the court
held that information concerning the plaintiff's health and possible HIV infection was not of
for its determination that "records relating to individuals diagnosed with AIDS, HIV-related
illness, or HIV infection are 'strictly confidential information' and may be disclosed only
under narrowly specified circumstances." Id.
1994, at 86, 87. See also Milton Bordwin, AIDS: Not Just A Medical Problem, 56 Ore. St. B.
Bull. 15 (1996) (stating that having an AIDS afflicted employee "can create more legal and
business problems for your company than almost any other health condition.").
Gazette, Oct. 17, 1996, available in 1996 WL 8166699. In the health care setting,
transmission of the HIV is a legitimate business concern. Therefore, a hospital may have a
legitimate business concern in the disclosure of HIV/AIDS information to patients of an HIV
positive physician. See Estate of Behringer v. Medical Ctr. at Princeton, 592 A.2d 1251 (N.J.
employee's co-workers. If the employer decides to disclose an employee's HIV-positive status, the employer will likely be violating that employee's privacy rights and this could result in the employer's being subjected to tort liability.

The more concerned employers become with the "human and economic costs of employing persons with AIDS, some employers may seek to monitor and/or minimize the number of such persons in their workforces." Applicant and employee testing and inquiries to identify persons infected with the HIV virus are commonly considered by employers. However, claims under civil rights laws and the ADA may arise against employers who have excluded persons from employment based upon these inquiries or upon positive HIV test results.

Employers who feel compelled to establish HIV testing programs for employees who perform invasive procedures or who are otherwise at risk of contracting and/or transmitting AIDS in the workplace, must ensure that test results will be disclosed in accordance with the requirements of applicable law and to the fewest possible persons who have an absolute need to know the test results. The privacy of such results is necessary, because without a guarantee of

148. Laura Pincus, The Americans With Disabilities Act: Employers' New Responsibilities to HIV-Positive Employees, 21 HOFSTRA L. REV. 561, 581 (1993) (stating that "[t]his evaluation requires that personal privacy be weighed against public good."); Bless S. Young & Kimberly R. Wells, Managing AIDS in the Workplace, 41 PRAC. LAW. 41, 42 (1995) (discussing how the employer must "balance[e] the privacy rights of AIDS-infected employees against the rights of non-infected employees to have a safe and hazard-free working environment.").

149. This is only true if under state law or under a company policy, confidentiality of all employee medical information, including HIV and AIDS information is required. See supra note 12, and accompanying text; See also Rose Knotts & J. Lynn Johnson, AIDS in the Workplace: The Pandemic Firms Want to Ignore, BUS. HORIZONS, July-Aug. 1993, at 5 (discussing the importance of the implementation of workplace AIDS policies).

150. See Pincus, supra note 148.


152. See id.

153. See id. at 3. "Employers may be tempted to identify applicants and employees with AIDS, either to exclude them from the workplace altogether, or to exclude them from certain employer-provided insurance benefits." Id. As discussed previously, employers may bring claims against employers for violating 42 U.S.C. § 12112(d)(A) and (B), the sections of the ADA prohibiting medical inquiries or medical examinations of employees. See supra note 35 and accompanying text.

confidentiality, individuals will not be likely to seek HIV testing and counseling.  

Testing for the HIV virus has been found to constitute “an intrusion and a search and seizure within the meaning of the Fourth Amendment.” Mandatory AIDS testing of employees has been held to be valid “if the group of employees involve[d] [was] at a high risk of contracting and/or transmitting AIDS to the public.” The employer “must demonstrate that universal precautions and voluntary testing will not prevent the contracting and/or spread of AIDS by high-risk employees or professionals.”

Conversely, in *Glover v. Eastern Nebraska Community Office of Retardation*, the court ruled that mandatory HIV testing for workers in a state government facility constituted an unreasonable search and seizure after applying “the standard which requires that ‘both the inception and the scope of the [involuntary intrusion into the body] must be reasonable.” The court stated that individuals have a reasonable expectation of privacy in the personal information that is contained in their bodily fluids which must be weighed against the government’s interest in providing a safe work and living environment for its employees. The court held that

155. See id. at 259.

156. See Anonymous Fireman v. City of Willoughby, 779 F. Supp. 402, 415 (N.D. Ohio 1991). The issue in *Anonymous Fireman* was whether the tests were “reasonable or unreasonable.” See id. The court held that the blood testing policy implemented by the City was not an unreasonable search and seizure. See id. at 418.

157. See id. at 416. In *Anonymous Fireman*, the court found that medical evidence showing that the risk of HIV transmission in the performance of the duties of a firefighter paramedic was a high one, justified the City’s mandatory testing as part of its “annual physical examination of its firefighters and paramedics.” The court held that this testing was “rational and closely related to fitness for duty and [was] a compelling governmental interest.” Id. at 417.

158. Id. at 417-18 (emphasis added).

159. 686 F. Supp. 243, 251 (D. Neb. 1988) The *Glover* court held that defendant’s testing policy intruded upon staff members’ constitutionally protected right “to be free from unreasonable searches and seizures.” See id. The court stated the following reasons for HIV testing:

(a) as an adjunct to the medical workup of a patient who may be infected, (b) for epidemiological purposes to establish the level of infection in a community, and (c) as a device used in conjunction with counseling those in high risk groups to stimulate them to change their high-risk behaviors.

Id. at 248.

160. See id. at 250 (citing O’Connor v. Ortega, 107 S.Ct. 1492, 1503 (1984)).

Maintaining Employees' Privacy of HIV and AIDS Information

the testing policy was not justified because the risk of anyone being infected with HIV was "extremely low and approach[d] zero." Employees are usually concerned about the disclosure of positive test results which indicate the presence of the HIV virus because of the "social stigma" attached to AIDS and the possibility that "adverse economic consequences may result."

B. Insurance

Employers screen employees for the HIV virus for several reasons, one of the primary reasons being for insurance purposes. Employers will undoubtedly face additional costs when they decide to hire an HIV-infected individual or a person who is in a high risk category for contracting AIDS. "These include the costs associated with lost work time due to illness," the cost of perhaps having to train a new employee, and additional costs depending upon the nature of the industry in which the individual is employed.

In the situation where an employer provides insurance to her employees by herself, or is a "self-insurer," there would be an enormous economic benefit to that employer if those who are HIV-positive are excluded. In addition, those employers who rely on "group insurance" may find themselves confronting insurance rates which "rise to unacceptable levels if there are too many claims against the insurance company." In the event that testing is used on applicants and newly hired employees, the testing would be used to assess "whether the employee’s HIV-positive status would qual-

162. Id. at 250 (concluding that “[s]uch a theoretical risk does not justify a policy which interferes with the constitutional rights of the [employees].”).
165. See id.
166. Id; see also DONALD H.J. HERMANN & WILLIAM P. SCHURGIN, LEGAL ASPECTS OF AIDS § 10:02, at 3 (1991) (stating that “the economic costs of employing persons with AIDS in terms of absenteeism and lost productivity can also become staggering . . . .” and “[t]he health and life insurance costs . . . associated with employing persons with AIDS are predicted to skyrocket in the future.”).
168. See id. Group insurance is an arrangement of “a single insurance contract that provides coverage for many individuals.” See ALAN I. WIDISS, INSURANCE: MATERIALS ON FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND REGULATORY ACTS 83 (1989). The coverage terms for a group insurance plan are usually set forth in a master agreement that is issued by the insurer to a representative of the group or to the employer, who may be the administrator of the insurance program. See id. at 95.
ify as a pre-existing condition which may be excluded from coverage." 169 Aside from the fact that substantial savings of costs would result from the exclusion of AIDS-related illnesses from coverage, the rules regarding pre-existing conditions can be limiting due to the fact that many states' "insurance regulations provide that a medical condition is not considered pre-existing if the employee does not seek treatment for it within a specified period of time after employment begins . . . ." 170

Employers must "keep the insurance and employment aspects separate" in order to avoid liability for unlawful disclosure and invasion of privacy. 171 There is a potential for an employer to incur legal liability if individuals who are responsible for the company's insurance plans learn that a new employee is HIV positive or at risk for the disease. 172 This type of behavior may be prevented through legislation. 173 For example, the federal government could enact legislation that requires screening conducted by self-insurers to be performed by non-employees who would inform the firm whether or not to grant insurance to the person, but would not state the reason why. 174 If a federal statute which required confidentiality of all HIV/AIDS information in employment were to be enacted, a spe-

169. See Bless S. Young & Kimberly R. Wells, Managing AIDS in the Workplace, 41 Prac. Law. 41, 54 (1995). A "pre-existing condition" is usually defined as "a disease or injury for which you received treatment or care" during a specified period before being covered by the insurance policy. See ALAN I. WIDISS, INSURANCE: MATERIALS ON FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND REGULATORY ACTS 1097 (1989).

170. Bless S. Young & Kimberly R. Wells, Managing AIDS in the Workplace, 41 Prac. Law. 41, 54 (1995). As stated previously, symptoms of AIDS may not develop for up to ten years after contracting HIV. See id. Additionally, some insurance plans provide coverage for pre-existing conditions given that the employee has worked for the employer for a certain length of time. See id.


174. See id. See also DONALD H.J. HERMANN & WILLIAM P. SCHURGIN, LEGAL ASPECTS OF AIDS § 10:22, at 260 (Supp. 1997) (explaining that the Florida Civil Rights Act "requires that all employers who provide or administer health or life insurance benefits develop and implement procedures to maintain the confidentiality of records and information, and makes an employer liable for damages to anyone damaged by the employer's failure to implement such a procedure"); FLA. STAT. ANN. ch. 760.50(5) (1996).
specific provision for disclosure of information contained in insurance records and policies would be necessary. Such a provision, along with express penalties for noncompliance, would help prevent employers and employees who have access to insurance plan documents from releasing employees' private medical information.

C. Workplace Prescription Drug Programs

In *Doe v. Southeastern Pennsylvania Transportation Authority (SEPTA)*, an employee brought an action under 42 U.S.C. § 1983 against his employer, alleging that the employer violated his right to privacy. The court recognized that Doe possibly could incur harm from this disclosure, but held, however, that the "employer's need for access to employee prescription records outweighed the employee's interests in confidentiality." The court re-examined its decision in *United States v. Westinghouse Electric Corp.*, where it had enumerated seven factors to determine

175. 72 F.3d 1133 (3d Cir 1995).

176. This statute provides the requirements for bringing a civil action for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws..." 42 U.S.C. § 1983 (1994). The employer, SEPTA, was a state and federal government-subsidized agency. See *Doe v. Southeast Pa. Transp. Auth. (SEPTA)*, 72 F.3d 1133, 1142 (3d Cir. 1995). The SEPTA court stated that a section 1983 action could only be maintained if the "underlying act violate[d] a plaintiff's Constitutional rights." See *id.* at 1137. The court held that the complaint in the underlying claim, if alleging an invasion of privacy, "must be 'limited to those [rights of privacy] which are 'fundamental' or 'implicit in the concept of ordered liberty'..." Id. (citations omitted). The court held that medical records fell within this category and that individuals have a constitutional right to privacy in their prescription records, albeit not an absolute right. See *id.* at 1138.

177. See *id.* at 1134-35. The plaintiff claimed that his supervisor and employer violated his privacy rights after the employer found that the employee had AIDS via drug purchase records made through an employee health program. See *id.* at 1133.

178. See *id.* at 1140. The court noted that the public understanding of AIDS has not changed very much in the years since AIDS has infiltrated American society, and stated that "[a]lthough AIDS hysteria may have subsided somewhat, there still exists a risk of much harm from non-consensual dissemination of the information that an individual is inflicted with AIDS." *Id.*

179. See *Doe v. Southeast Pa. Transp. Auth. (SEPTA)*, 72 F.3d 1133, 1143 (3d Cir. 1995). In connection with the review of prescription drug utilization reports, the defendant was made aware that Doe was taking Retrovir and three other medications for the treatment of AIDS. See *id.* at 1135-36. Co-workers then became aware of Doe's HIV-status. See *id.* at 1136. The court held that SEPTA's dissemination of Doe's AIDS information as contained in his prescription drug records, was "only to people with a right to know" and that SEPTA's "important interests" in the prescription information "outweighed the minimal intrusion into Doe's privacy." *Id.* at 1143.

180. 638 F.2d 570, 578 (3d Cir. 1980).
whether a given disclosure constituted an intrusion into an individual’s privacy.181

The SEPTA court stated that a “disclosure occurs in the workplace each time private information is communicated to a new person, regardless of the relationship between the co-workers sharing that information.”182 Nonetheless, it held that SEPTA had legitimate reasons for obtaining the prescription information and that SEPTA disclosed plaintiff’s information only to people with a right to know.183 Therefore, an employee’s privacy interests in his or her prescription records was not an absolute right against disclosure, and when weighed against the employer’s interests in obtaining information, the employer’s intrusion into his privacy was held to be “minimal.”184

181. See Doe v. Southeastern Pa. Transp. Auth. (SEPTA), 72 F.3d 1133, 1137-38 (3d Cir. 1995). These factors were:

the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980). In SEPTA, Rite-Aid supplied defendant with utilization reports which contained “statistics on the number of employees with five or more prescriptions dispensed in a one-month period,” and included the name of an employee or dependent, the name of the drug, and other relevant information. See Doe v. Southeastern Pa. Transp. Auth. (SEPTA), 72 F.3d 1133, 1135 (3d Cir. 1995).

182. Doe v. Southeastern Pa. Transp. Auth. (SEPTA), 72 F.3d 1133, 1139 (3d Cir. 1995). The court proclaimed that an employee’s “decision to give private information to some co-workers does not give carte blanche to other co-workers to invade his privacy.” Id. The court held that plaintiff had a limited, not absolute, right to privacy in his medical information under Whalen v. Roe, 429 U.S. 589 (1977), and in avoiding disclosure of his personal medical records which contained information regarding his AIDS condition. See id. at 1137-38. See also American Bar Assoc., Confidentiality/Testing/Experts: Confidential Records; AIDS, 20 MENTAL & PHYSICAL DISABILITY L. REP. 244, Mar.-Apr. 1996 (discussing the Third Circuit’s decision in Doe v. SEPTA).

183. See Doe v. Southeastern Pa. Transp. Auth. (SEPTA), 72 F.3d 1133, 1143 (3d Cir. 1995). The reasons that defendant gave for obtaining the prescription information included “look[ing] for signs of fraud and drug abuse,” determining whether the drug dispenser used “generic rather than brand name drugs whenever possible,” as was promised, determining the cost to SEPTA of “fertility drugs and medications to help employees stop smoking,” and determining “whether the reports were in a summary form and whether they would permit an audit.” Id. at 1135-36. The information was disclosed to a SEPTA staff physician, the head of SEPTA’s Medical Department, the Director of Benefits, and the Chief Administrative Officer. See id. at 1135-36.

184. See id. at 1143.
In *Roe v. Cheyenne Mountain Conference Resort*, a court held that an employer's demand that employees disclose their legal, prescription drug use violated the Americans With Disabilities Act ("ADA"), but did not violate the employee's right to privacy under the common law of Colorado. The ADA expressly "restricts an employer's ability to conduct medical examinations and make inquiries of employees and job applicants in an effort to discover the disabilities or perceived disabilities." The court held that the employer's policy "would force the employees to reveal their disabilities (or perceived disabilities) to their employer," which is prohibited by the ADA. However, the court held that the "policy does not violate Roe's common law right of privacy" because the employee did not allege that her prescription information was "disseminated or published" and therefore "any invasion [was] at best insignificant."

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187. See 42 U.S.C. § 12101 (1994). *Roe v. Cheyenne Mountain Conference Resort*, 920 F. Supp. 1153, 1155 (D. Colo. 1996). In *Cheyenne Mountain*, the plaintiff suffered from asthma, and was thus required to take prescription medication. See *id.* at 1154. Plaintiff challenged her company's policy which required employees to disclose the "use of legal prescription medication as violating the ADA, her common law right to privacy, and public policy. *See id.*
189. See *Roe v. Cheyenne Mountain Conference Resort*, 920 F. Supp. 1153, 1154 (D. Colo. 1996). However, an inquiry is acceptable if the "covered entity . . . make[s] pre-employment inquiries into the ability of an applicant to perform job-related functions." 42 U.S.C. § 12112(d)(2)(B). Roe was a current employee of the Resort, and therefore § 12112(d)(4)(A) would apply. See *Roe v. Cheyenne Mountain Conference Resort*, 920 F. Supp. 1153, 1154 (D. Colo. 1996). Under the statutory language of 42 U.S.C. § 12112(d)(4), Roe's employer would be permitted to require Roe to take a medical examination or to make inquiries of Roe only if the examination or inquiry is shown to be "job-related and consistent with business necessity." See *id.* at 1155 (referring to 42 U.S.C. § 12112(d)(4)). The court explained that the ADA does not allow the Resort "to make inquiries as to whether an employee has a disability," but does allow the Resort to administer drug tests. See *Roe v. Cheyenne Mountain Conference Resort*, 920 F. Supp. 1153, 1154 (D. Colo. 1996). The court stated that "a policy that requires employees to disclose the prescription medication they use would force the employees to reveal their disabilities (or perceived disabilities) to their employer," which is prohibited by § 12112(d)(4)(A) of the ADA. *Id.* at 1154. Importantly, the court emphasized that its holding was specific to the disclosure of legal, prescription drug medication, but stated that the employer was permitted to test employees for illegal drug use. *Id.* at 1155.
191. See *id.* at 1155 (discussing *Mares v. Conagra Poultry Co., Inc.*, 971 F.2d 492 (10th Cir. 1992)).
**Roe v. Cheyenne Mountain** considered whether an employer violated a federal statute by having access to employees' prescription drug use, and was decided approximately one month after *Doe v. SEPTA*. However, unlike the court in *Cheyenne Mountain*, the SEPTA court determined whether an employer violated an employee's right to privacy by reviewing case law and did not consider whether the employer's actions violated the ADA. These two cases illustrate the various claims that employees may possess for the same triggering event—an employer's unauthorized access to the medical information of an employee by making inquiries, even though the inquiries may not have been direct questions to the employee about her disability.

When an employer implements an HIV testing program for the purpose of screening employees to determine their economic risk for insurance reasons, or if an employer demands that employees disclose their prescription drug use, the employer will very likely violate state statutory law or common law which protects certain privacy rights of employees. A violation by an employer can create an unpleasant atmosphere, resulting in an employee fearing exposure and termination. Therefore, if a federal statute were to be enacted to protect the confidentiality of all HIV/AIDS information of employees in the workplace, this statute, in conjunction with the existing federal statutory law and common law, would help to ensure that HIV-infected workers, along with those perceived as being infected with HIV, can work in an atmosphere that is free from fear.

**V. WORKPLACE POLICIES: AN ATTEMPT TO LIMIT EMPLOYERS' LIABILITY AND SIMULTANEOUSLY PROTECT EMPLOYEES' PRIVACY OF HIV/AIDS-RELATED INFORMATION BY THE ISSUANCE OF GUIDELINES**

Based upon current statistics, an overwhelming number of employers will inevitably be forced to deal with HIV and AIDS in the workplace. However, despite the statistics, "a majority of

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192. 72 F.3d 1133 (3d Cir. 1995).
193. See, e.g., MARTIN GUNDESON, ET AL., AIDS: TESTING AND PRIVACY 184 (1989) (stating that HIV-infected persons are "likely to be subjected to irrational discrimination unless they are given legal protection").
U.S. companies have not adopted formal policies or even informal guidelines for dealing with the presence of employees who become infected with the virus.¹⁹⁵ In addition to education,¹⁹⁶ an employer can avoid or reduce the legal consequences which stem from disclosure of an employee’s AIDS status through the implementation of a workplace policy.¹⁹⁷

Employers should incorporate educational programs into their regular business practices which inform employees about the factual characteristics of HIV and AIDS, and allow for the employees to engage in relaxed discussions about HIV and AIDS.¹⁹⁸ Compaa

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¹⁹⁷ Employers must implement training sessions where employees can be educated about physiological and social facts about HIV and AIDS. The manager in charge of Levi Strauss & Co.’s program on AIDS in the workplace “was quoted in a February 1, 1993, Business Week report: ‘No matter how sophisticated or educated you are, AIDS can trigger irrational things in people. There’s big potential for disruption. It could close a plant down.’” See Milton Bordwin, An Ounce of Prevention: What to do Before AIDS Strikes in the Workplace, 56 Or. St. B. Bull. 9 (1996).

Education has a two-fold benefit—it’s good for each individual personally (it may prevent an employee from contracting AIDS in the first place). And it should also improve working relationships among the employees and an AIDS-infected worker, avoiding an automatic panic reaction and the resulting conflicts and strife.

Id. at 9-10.

¹⁹⁸ See, e.g. Milton Bordwin, An Ounce of Prevention: What to do Before AIDS Strikes in the Workplace, 56 Or. St. B. Bull. 9, 10 (1996); Gloria J.T. Smith, Business Needs AIDS Guidelines for Fairness to Victim, Coworkers, Bus. First of Columbus, Nov. 1, 1996, available in 1996 WL 11865992. Even though an AIDS policy and AIDS education helps to train management and employees deal with situations involving an HIV-positive employee, the reaction to news that an employee has HIV or AIDS will still be overrun with emotion, regardless of the amount of training that the employees have received. See ABC’s of AIDS are Slow to be Taught in the American Workplace, AIDS Wkly. Plus, Feb. 24, 1997, at 14 (“Whether it’s because of fear, ignorance, or just a lack of interest, AIDS education is still struggling to get a foot in the door of corporate America.”). Therefore, some employers are reluctant to implement a policy. See ABC’s of AIDS are Slow to be Taught in the American Workplace, AIDS Wkly. Plus, Feb. 24, 1997, at 14-15. Mark King, an AIDS educator “who has conducted seminars on AIDS at banks, hotels and law firms,” claims that because the implementation of policies is “safe” and “pragmatic,” employers are able to avoid in depth discussion of the uncomfortable AIDS topic. Id. However, having a policy incorporated into a corporate manual without discussion “doesn’t do anyone any good” and companies should talk frankly about HIV and AIDS to lessen some of the stigma attached to the disease. Id.

nies should at least attempt to change the biases of its employees which inevitably lead to discriminatory practices towards the infected individuals and legal liability for the employer.\footnote{199} “[C]ompliance, confidentiality, compassion and care” are four principles which are helpful in directing employers who employ an HIV-infected employee.\footnote{200} An employer may also elect to establish a “planning task force” which should “include representatives from such departments as human resources, legal, medical, employee assistance, benefits, equal employment, public relations, training, employee communications and labor relations,” to further assist them with this responsibility.\footnote{201} When constructing an AIDS policy, an assessment must be made of the workplace’s environment and the likelihood that AIDS-related problems will arise.\footnote{202}

\begin{footnotesize}
\footnote{199. See Eleanor Smith, \textit{Train Supervisors To Be AIDS Savvy}, HR Focus, Apr. 1, 1991, at 7 (“[L]awsuits stemming from inadequate AIDS-related training litter state and federal courts around the country. Not only are courts granting hefty cash awards to plaintiffs, they are ordering some employer-defendants to provide AIDS training to their workers in hospitals, prisons and police departments.”); Rose Knotts & J. Lynn Johnson, \textit{AIDS in the Workplace: The Pandemic Firms Want to Ignore}, Bus. Horizons, July-Aug., 1993 at 5 (“An active firm will . . . change attitudes about the disease.”).}
\footnote{200. Janice Anderson Huebner, \textit{What Can You Say About AIDS?}, HR Magazine, Dec. 1994 at 86. Compliance with the laws dealing with HIV-positive people, insuring that medical records and information are kept confidential, compassion for HIV-infected workers and co-workers who have a fear of contracting the disease, and “help[ing] the person who has AIDS and his or her co-workers” are the principles that should underlie education and policy-making in the workplace. \textit{See id.} at 86-89.}
\footnote{201. See \textit{Sam B. Puckett & Alan R. Emery, Managing AIDS in the Workplace} 66-67 (1988). The task force should consider medical facts about AIDS, including facts about transmission; “legal issues which will affect how much freedom” is available when dealing with AIDS in the workplace; considerations about cost; and basic philosophies about “values, relationships with employees and civic responsibility.”}
\footnote{202. The following principles may be used as a guide to help provide employers with a “framework” for developing workplace policies:
1. Persons with HIV infection, including AIDS, have the same rights, responsibilities and opportunities as others with serious illnesses or disabilities.
2. Our employment policies comply with federal, state and local laws.
3. Our employment policies are based on the scientific fact that persons with HIV infection, including AIDS, do not cause risk to others in the workplace through ordinary workplace contact.
4. Our management and employee leaders endorse a non-discrimination policy.
5. Special training and equipment will be used when necessary, such as in healthcare settings, to minimize risks to employees.
6. We will ensure that AIDS education is provided to all of our employees.
7. We will endeavor to ensure that education takes place before AIDS-related incidents occur in our workplace.
8. Confidentiality of persons with HIV infection and AIDS will be protected.}
\end{footnotesize}
Companies should determine whether to implement "an AIDS-specific policy, a broader infectious disease policy or an even broader disabled-employee policy, which would also cover AIDS." The infectious disease, or life-threatening illness approach to a workplace policy usually states that HIV/AIDS "will be handled as are all other serious illnesses, i.e. sensibly, compassionately, and without discrimination."

An HIV/AIDS specific approach "specifically acknowledges and addresses HIV/AIDS as a major health issue with potential impact on the workplace." These policies often (and should) contain an educational section which states that HIV cannot be transmitted through casual contact and that employees with HIV or AIDS are not a health risk to their co-workers. An "effective policy" will set forth the groundwork for an organization's HIV/AIDS program, make all discussion about HIV and AIDS uniform, set "standards of employee behavior," establish "consistency within the company," give employees places to go for support and information, and advise supervisors about how to handle HIV and AIDS. Nonetheless, employers must also make certain that their organizational policies "comply with federal, state, and local laws and guidelines."

The failure of companies to prepare for issues which arise out of employing a person who is HIV-positive increases the potential for disputes among co-workers or between employers and employees.

9. We will not screen for HIV as part of pre-employment or workplace physical examinations.
10. We will support these policies through their clear communication to all current and prospective employees.


203. See Milton Bordwin, An Ounce of Prevention: What to do Before AIDS Strikes in the Workplace, 56 OR. ST. B. BULL. 9, 10 (1996). The National Leadership Coalition on AIDS provides five policies which are general "life-threatening illness" approaches to workplace policies. See National Leadership Coalition on AIDS, Sample Policies (1993). Recently, the "National Leadership Coalition on AIDS" has merged with the "National AIDS Fund" and is presently referred to as the National AIDS Fund. However, for the purpose of this Note, the author will continue to refer to the organization as the "National Leadership Coalition on AIDS" because this organization compiled the Sample Policies pamphlet.

205. Id.
“if infected individuals or their coworkers believe their rights have been violated.” With respect to confidentiality, all workplace policies must contain guidelines which deal with confidentiality. These guidelines should set forth the rights of HIV-positive employees and should state the limited conditions under which disclosure may be permitted, such as where it is “necessary to assure proper care of the infected person and to protect others from increasing their risk to . . . HIV,” such as in “high-risk” work environments.

VI. Conclusion

Employing an individual who is infected with HIV or living with AIDS undoubtedly creates many legal and business problems for companies. In order to assist employers in limiting their legal liability and to simultaneously protect the privacy rights of employees’ confidential medical information, companies must combine education of management and employees with workplace HIV/AIDS policies. According to a survey of the American Management Association, “more than 80 percent of its member companies” do not have policies dealing with HIV and AIDS. This percentage is excessively high and therefore, companies must be made aware that policies are instrumental in limiting their legal liability for disclosure of HIV-related information.

Accordingly, this Note proposes that the federal government should enact a statute which would require all public and private

208. Kathleen Montgomery & Denise Brennan, Confronting AIDS in the Workplace: Responses of Southern California Organizations, 44 LAB. L.J. 511, 512 (1993). Montogomery and Brennan conducted a study designed “to assess the extent to which organizations have confronted the issue of AIDS . . . in the workplace.” Id. The study investigated companies throughout California in terms of workplace development and implementation of workplace policies to deal with employees infected with HIV. See id. at 511-512. Organizations which participated in the study varied in workforce size from 9 to 5000 employees. See id. at 514. The organizations included government, education, manufacturing, legal services, banking, and retail establishments. See id. at 515. An analysis of the data from the study suggested that “there remains a reluctance by the majority of organizations to articulate a formal policy about how they will treat [employees with AIDS] . . . . [S]ome of the reluctance to adopt an HIV policy is a result of management’s uncertainty about their obligations, legal and ethical, to HIV infected employees and their coworkers.” Id. at 517.


211. Id.
employers to respect employees' privacy rights specifically with regards to their HIV or AIDS status, and which would impose strict penalties for noncompliance. Many states have already enacted statutes dealing expressly with the confidentiality of HIV and AIDS-related information. However, until a federal statute is enacted to mandate the confidentiality of employees’ HIV/AIDS information, uniformly and nationwide, the implementation of, and adherence to, workplace policies and education programs are the primary ways to ensure an HIV/AIDS-infected worker’s confidentiality with respect to information regarding their HIV/AIDS status.

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