CURRENT STATUS OF HIV AS A DISABILITY

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EMPLOYMENT AND INSURANCE ISSUES FOR PEOPLE WITH DISABILITIES
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CHAPTER 7

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Current Status of HIV as a Disability

I. INTRODUCTION

In approximately 1985, HIV began to appear throughout the United States. The medical community, as well as legal community, were not prepared for its devastating impact. However, as more and more people became diagnosed with HIV, more and more doctors and lawyers became trained in their fields to provide assistance to their growing client populations. Unfortunately, it took approximately ten years before sufficient medical advances were made in order to stem the tide of deaths resulting from HIV and AIDS. However, after thousands of people had died, the United States pharmaceutical companies finally developed medications which would control the detrimental effects of HIV to a great extent. Although it is by no means easy to live with HIV, a newly infected individual will probably not die from HIV, but will die from some other unrelated condition. Unfortunately, for many people who have built up resistence to HIV medication through trial and error procedures, the advance of new medications may not be as effective. In any event, I think most people would agree that the number of persons dying from HIV have subsided and HIV is now often seen more as a chronic condition in which HIV infected individuals are able to live their lives and remain in the work force.

As more and more people with HIV return to work from disability leave, or remain at their jobs while taking necessary medications, it is important for persons to be familiar with the laws that could protect someone with HIV if presented properly.

The Americans With Disabilities Act was enacted specifically to provide protection for persons with a disability. There is no specific state or federal law that makes HIV or AIDS discrimination illegal in employment settings. The only way a person with HIV can receive protection from employment discrimination is if their HIV infection constitutes a "disability" under federal or state law. At this point, as will be more fully explained below, simply being HIV positive does not constitute a "per se disability" under federal or state law. An individualized assessment and analysis is required.

The federal general anti-discrimination law for private employers is found at 42 U.S.C. § 12112 of the Americans With Disabilities Act and states as follows:

> § 12112. Discrimination
>
> (a) General rule
>
> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

In addition to the federal law, there is a comparable state law found in the Texas Labor Code under § 21.051 which states as follows:

> § 21.051. DISCRIMINATION BY EMPLOYER. An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer: (1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment; or (2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee. Acts 1993, 73rd Leg. Ch. 269 § 1, eff. Sept. 1, 1993.
>
> § 21.105. DISCRIMINATION BASED ON DISABILITY. A provision in this subchapter or Subchapter B referring to discrimination because of disability or on the basis of disability applies only to discrimination because of or on the basis of a physical or mental condition that does not impair an individual's ability to reasonably perform a job. Acts 1993, 73rd Leg., ch. 269, § 1, eff. Sept. 1, 1993.

In order for an HIV positive employee to be eligible for the protections under either the ADA or the Texas Labor Code, they must meet the definition of "disability" as well as be qualified to perform the essential functions of the job with or without reasonable accommodations. Meeting this definition is not an easy task. If an individual with HIV gives notice of their HIV infection and claims that he or she is asymptomatic or totally unaffected by their illness, yet HIV positive, he or she may effectively be defining themselves out of protection from employment discrimination. On the other hand, an individual with HIV must be well enough to perform the essential functions of his or her job with or without reasonable accommodations. Many people believe that

as long as they are "legitimately ill" or in the hospital, that their employment is protected. This generally held belief is not true. The ADA and Texas Labor Code only protect employees from employment discrimination who are able to perform the essential functions of their job. The Texas Labor Code has a specific provision under § 21.105 which states that the protections of the Labor Code only apply to an individual who suffers discrimination because of or on the basis of a physical or mental condition that does not impair an individual's ability to reasonably perform a job.

The ADA and Texas Labor Code only apply to employers who have 15 or more employees. Accordingly, if a small employer, who employs under 15 employees, wishes to discriminate against a person with a disability, that employer may do so without fear of violating the law. On the other hand, an employee's employment may be protected for an extended period of time if the employee works for an employer who has 50 or more employees, and the employee has been employed for over a year under the Family Medical Leave Act. The Family Medical Leave Act provides up to 12 weeks of unpaid protected leave based on a serious health condition of the employee. The leave may be taken intermittently. The Family Medical Leave Act is a uniquely effective federal law for persons with HIV who often do not know, on a day to day basis, whether they will be well enough to go to work.

An important initial consideration for all persons with HIV is whether or not they should make disclosure of their HIV status to their employer. Except for employees who work in a surgical setting, there is no federal or state law that *requires* an HIV positive person to disclose their HIV status. Texas has a special statute dealing with HIV positive healthcare workers found in subchapter I of Chapter 85 of the Texas Health and Safety Code. An HIV positive individual who works in a non-surgical setting must realize that disclosing their HIV status has both a potentially positive and negative implication. If the employee remains silent and never discloses their HIV status, the employer can present the argument that he or she did not know that the individual was a person with a disability, and therefore, could not have discriminated against the employee. This argument has proved particularly successful. Therefore, employees need to understand the risk of not disclosing their HIV status, to-wit, not being able to take advantage of the laws that protect people with disabilities.

On the other hand, there have been many people who have disclosed their HIV status to an employer and then experienced discrete and subtle discrimination which is difficult to prove. Therefore, it has generally been my recommendation to persons with HIV that their HIV positive status be disclosed in two circumstances. The first circumstance is when the employee's work performance is deteriorating and the employee needs a reasonable accommodation. The employer is not obligated to provide a reasonable accommodation to any employee, until and unless the employee has identified himself or herself as a person with a disability, and provided sufficient documentation. The second circumstance is in that employment setting when the employee has given the employer sufficient indications that he or she is a person with a disability, but has never formally made the disclosure. Often a person with HIV has intentionally or unintentionally disclosed their HIV status to their employee in subtle and non-direct ways in hopes that the employer will figure out the situation. Often the employer does figure out the employee's HIV positive status, but it is never discussed or mentioned. These situations can persist for months or years. However, in the event the employer eventually terminates the employee's employment, the employer can continue to take the position that he or she never knew of the employee's HIV/disability status, and successfully defend a discrimination case.

However, sometimes the employee is paranoid and believes that the employer has figured out his or her HIV status, but is incorrect. In this situation, the employee may be disclosing their HIV status unnecessarily and thus subjecting themselves to subtle or discrete discrimination, followed by eventual employment termination. Therefore, I suggest that the employee receive objective feedback from friends, family and legal advisors in order to help the employee determine whether or not the employer has discovered the employee's HIV status or not. The decision of whether or not to make disclosure to one's employer is solely that of the employee and the lawyer should never force or compel the employee to either make disclosure (or not make disclosure) due to the ramifications of such decisions.

In the event the employee decides to give disclosure of his or her HIV status, I recommend doing so in a face to face meeting accompanied by a handwritten disclosure notice which generally states that the employee is a person with a disability, namely HIV positive status as a result of various substantial limitations on various major life activities, and that the employee is able to perform the essential functions of his or her job with or without reasonable accommodations. I also suggest that the written notice contain a request that the information be kept confidential, and that the employee request that an interactive exchange be had between the employer and the employee in order to determine necessary reasonable accommodations. Please keep in mind that an employee

is not restricted to requesting reasonable accommodations at the notice phase, and such request can be expanded as the disability and related symptoms change from time to time. A copy of the notice letter should be retained by the employee for future purposes. The employee should also prepare a journal to keep track of conduct prior to making disclosure, as well as the disclosure experience, and conduct following the disclosure.

Employment discrimination cases are difficult to win, but if the proper steps are taken, an employee has a chance of succeeding in the event a situation in which discrimination is experienced occurs.

In the event an employee experiences discrimination in Texas, he or she has 180 days to file a charge of discrimination with the Texas Commission on Human Rights, and 300 days to file a charge of discrimination with the EEOC. These deadlines are jurisdictional and must not be missed.

II. *BRAGDON V. ABBOTT*, 524 U.S. 624, 118 S.CT. 2196 (1998)

This case is the landmark HIV ADA case in which a woman named Sidney Abbott, who was infected with HIV, but had not yet developed symptoms, went to her dentist for an examination. The dentist discovered a cavity and told Ms. Abbott that he had a policy against filling cavities of HIV infected patients in his office. He proposed performing the dental work in a hospital facility and she would be required to pay the additional costs for the use of the hospital. Ms. Abbott refused and filed suit under the ADA claiming discrimination based upon her disability. Although this case presents itself as a Title III, Public Accommodations Case, it is the first case in which the United States Supreme Court has addressed whether or not an HIV positive person has a right to bring any type of discrimination charge under the ADA's prohibition against persons with disabilities. Accordingly, the fact that it is a Title III case is irrelevant to the substantive questions of whether or not a person with HIV qualifies as a person with a "disability" as defined under the Americans With Disabilities Act. The definition of disability is identical regardless of whether the case involves Title III (Public Accommodations) or Title I (Private Employment) of the ADA.

In order to understand the analysis of the Supreme Court in *Bragdon v. Abbott*, it is important for the definition of disability under the ADA to be clearly understood. The definition of "disability" under the ADA is found at 42 U.S.C. § 12102(2) and states as follows:

> (2) Disability
>
> The term "disability" means, with respect to an individual–
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

This case presents an excellent medical analysis of what occurs when a person becomes infected with HIV. For example, the court described the initial stage of HIV infection as follows:

> The initial stage of HIV infection is known as acute or primary HIV infection. In a typical case, this stage lasts three months. The virus concentrates in the blood. The assault on the immune system is immediate. The victim suffers from a sudden and serious decline in the number of white blood cells. There is no latency period. Mononucleosis-like symptoms often emerge between six days and six weeks after infection, at times accompanied by fever, headache, enlargement of the lymph nodes (lymphadenopathy), muscle pain &myalgia), rash, lethargy, gastrointestinal disorders, and neurological disorders. Usually these symptoms abate within 14 to 21 days. HIV antibodies appear in the bloodstream within 3 weeks, circulating HIV can be detected within 10 weeks. Carr & Cooper, Primary HIV Infection, in Medical Management of AIDS 89-91; Cohen & Volberding, Clinical Spectrum of HIV Disease, in AIDS Knowledge Base 4.1-7; Crowe & McGrath, Acute HIV Infection, in AIDS Knowledge Base 4.2-1 to 4.2-4; Saag. AIDS; Etiology 204-205.

The Court in *Bragdon* held that HIV infection is a per se physical impairment by stating as follows:

> In light of the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease, we hold it is an impairment from the moment of infection. As noted earlier, infection with HIV causes immediate abnormalities in a person's blood, and the infected person's white cell

> count continues to drop throughout the course of the disease, even when the attack is concentrated in the lymph nodes. In light of these facts, HIV infection must be regarded as a physiological disorder with a constant and detrimental effect on the infected person's hemic and lymphatic systems from the moment of infection. HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease.

Accordingly, from the moment of infection forward, a person with HIV is considered to have a physical impairment. The real question is whether or not that physical impairment substantially limits one or more major life activities of the infected person.

The Supreme Court in *Bragdon v. Abbott* found that reproduction fell well within the phrase "major life activity." The court further stated that "reproduction and the sexual dynamics surrounding it are central to the life process itself." Ms. Abbott claimed that her HIV infection substantially limited her major life activity of reproduction. The final question the Supreme Court had to address in *Bragdon v. Abbott* was whether or not the patient's physical impairment was a substantial limitation on the major life activity she asserts.

The Supreme Court stated that the ADA required substantial limitations on major life activities, not "utter inabilities." For example, the court noted that conception and child birth were not impossible for an HIV positive person, but without doubt, were dangerous to the public health. Additionally, the Supreme Court determined that the disability definition did not turn on personal choice. "When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." In this case, Ms. Abbott testified that her HIV infection controlled her decision not to have a child. That testimony was unchallenged.

The Supreme Court held that Ms. Abbott's HIV infection was a physical impairment which substantially limited her major life activity of reproduction. In light of the court's holding, the court stated that it "need not address the second question presented, i.e., whether HIV infection is a per se disability under the ADA." That question remains unanswered to this day.

After determining that Ms. Abbott was a person with a "disability" as defined by the ADA, the Supreme Court ultimately determined that the dentist's actions constituted impermissible discrimination of such disability and a violation of Title III of the ADA's Public Accommodation section. This case was a bright beginning for people with HIV and many scholars and activists hoped it was the start of real protections for people with HIV. Unfortunately, after the *Bragdon v. Abbott* case, most other HIV cases did not hold for the plaintiff. Most cases were summarily dismissed due to the fact that the court would find that the HIV positive plaintiff was not a person with a "disability."

III. *SUTTON V. UNITED AIRLINES, INC.*, 527 U.S. 471, 119 S.CT. 2139 (1999)

This case involves twin sisters who had vision problems, but with glasses or contact lenses, functioned identically to individuals without similar visual impairments. The question presented in this case was whether or not the sisters were members of the class of persons protected by the Americans With Disabilities Act. The Supreme Court held that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individuals impairment, including, in this instance, eyeglasses and contact lenses. In addition, we hold that petitioners failed to allege properly that respondent "regarded" them as having a disability within the meaning of the ADA."

While most cases deal with whether or not the complaining party meets the definition of "disability" under paragraph § 42 U.S.C. 12102(1)(2)(A) of the ADA (i.e., an actual "disability"), others attempt to assert, usually alternatively, that they also fit within having a "record" of such an impairment or being "regarded as" having such an impairment.

In this case, the two women who failed to be hired by the airline company applied for employment as commercial air pilots. They met the company's age, education, experience, and Federal Aviation Administration certification qualifications. However, the airline company had an additional requirement that required them to have a minimum vision ability of *uncorrected* visual acuity of 20/100 or better. The applicants were unable to meet the company's visual acuity requirements, and therefore, were not offered a pilot position. Petitioners alleged that due to their severe vision difficulties (i.e., a physical impairment), they had a substantially limiting impairment on the ability to work or were regarded as having such an impairment and thus were disabled under the ADA. The trial court dismissed their complaint for failing to state a claim due to the fact that the applicants could fully correct their visual impairments. The trial court held that they were not "actually substantially limited in any major life activity and thus had not stated a claim that they were disabled within the meaning of the ADA."

The Supreme Court focused on the question of whether or not the definition of disability under

subsection (A) should consider corrective or mitigating measures or not.

In evaluating whether or not the complaining parties had a disability, the court made it clear that the ADA's definition of disability required that the individuals be evaluated on an individualized basis. This is important to keep in mind in future situations. Whether or not a person meets the ADA's definition of being a person with a "disability," should be based upon that specific individual's situation and physical characteristics. The Supreme Court in *Sutton* makes reference to the *Bragdon v. Abbott* decision and quotes the sentence from *Bragdon* which said that the court is declining to consider whether an HIV infection is a per se disability under the ADA. This reference was made by the court in the *Sutton* decision in support of its individualized disability inquiry process.

The Supreme Court held that "disability under the Act is to be determined with reference to corrective measures," and the Supreme Court agreed with the lower courts that petitioners have not stated a claim that they are substantially limited in any major life activity. It is important to keep in mind that the major life activity complained of by the plaintiffs was "working."

With regards to the complainants' contention that they were substantially limited in the major life activity of working, the Court responded as follows:

> They contend only that respondent mistakenly believes their physical impairments substantially limit them in the major life activity of working. To support this claim, petitioners allege that respondent has a vision requirement that is allegedly based on myth and stereotype. Further, this requirement substantially limits their ability to engage in the major life activity of working by precluding them from obtaining the job of global airline pilot, which they argue is a "class of employment."
>
> When the major life activity under consideration is that of working, the statutory phrase "substantially limits" requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs.
>
> Indeed, even the EEOC has expressed reluctance to define "major life activities" to include working and has suggested that working be viewed as a residual life activity, considered, as a last resort, *only* "[i]f an individual is not substantially limited with respect to *any other* major life activity."

In addition to claiming that they were disabled under subsection (A) of the ADA's disability definition, the complainants also alleged that they met the disability definition under subsection (C) where individuals who are "regarded as" having a disability are considered to come within the meaning of "disabled" of the ADA.

> There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual–it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting. These misperceptions often "resul[t] from stereotypic assumptions not truly indicative of . . . individual ability." See 42 U.S.C. § 12101(7). See also *School Bd. Of Nassau Cty. V. Arline*, 480 U.S. 273, 284, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987).

The Court concluded its opinion by stating that due to the fact that the petitioners have not alleged, and cannot demonstrate, "that respondents vision requirement reflects a belief that petitioners vision substantially limits them, we agree with the decision of the court of appeals affirming the dismissal of petitioners claim that they are regarded as disabled." The judgment of the court of appeals was affirmed.

This case has a potentially important significance for persons with HIV. As I understand the holding of this case, mitigating measures must be taken into account when determining whether or not a person meets the ADA's definition of disability. In this regard, medication necessary to treat an illness is considered a mitigating measure. Therefore, there are persons with HIV who are asymptomatic without medication, but when taking the required medication, they experience substantially limiting symptoms on major life activities. Therefore, although a person with HIV might not meet the definition of a person with a disability under the ADA without medication, if he or she were to take his or her

medication as needed, they may experience symptoms (such as fatigue, diarrhea, fevers, weight loss, and cognitive difficulties) which would put them in the category of a person with a disability according to the ADA.

In 1999, the U.S. Equal Employment Opportunity Commission issued "enforcement guidance: reasonable accommodation and undue hardship under the Americans With Disabilities Act." Pursuant to those enforcement guidelines, the EEOC set forth various questions and answers in order to assist persons in understanding how the ADA works. In this regard, question 38 addresses the issue of medication and reasonable accommodations:

> Question: Must an employer provide a reasonable accommodation that is needed because of the side effects of medication or treatment related to the disability, or because of symptoms or other medical conditions resulting form the underlying disability?
>
> Answer: Yes. The side effects caused by the medication that an employee must take because of the disability are limitations residing from the disability. Reasonable accommodation extends to all limitations resulting from a disability.
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>> Example A: An employee with cancer undergoes chemotherapy twice a week, which causes her to be quite ill afterwards. The employee requests a modified schedule – leave for the two days a week of chemotherapy. The treatment will last six weeks. Unless it can show undue hardship, the employer must grant this request.
>
> Similarly, any symptoms or related medical conditions resulting from the disability that cause limitations may also require reasonable accommodation.
>
>> Example B: An employee, as a result of insulin-dependent diabetes, has developed background retinopathy (a vision impairment). The employee, who already has provided documentation showing his diabetes is a disability, requests a device to enlarge the test on his computer screen. The employer can request documentation that the retinopathy is related to the diabetes but the employee does not have to show that the retinopathy is an independent disability under the ADA. Sine the retinopathy is a consequence of the diabetes (an ADA disability), the request must be granted unless undue hardship can be shown.

IV. *FLOWERS V. SOUTHERN REGIONAL PHYSICIAN SERVICES, INC.*, 247 F.3D 229 (5TH CIR. 2001)

This case involves a woman named Sandra Flowers who was employed by Southern Regional Physician Services, Inc. as a medical assistant. In early 1995, Ms. Flowers' supervisor discovered that she was infected with HIV. By the end of the year, Ms. Flowers' employment was terminated. Ms. Flowers claimed that she was terminated because of her disability and also that she was subjected to "harassing conduct" designed to force her from her position or cast her in a false light for the purpose of terminating her because of her HIV status. It is important to note at the onset that no party argued that Ms. Flowers was not disabled within the meaning of the ADA, and therefore, the court assumed that she met the "disability" definition.

At the trial level, the jury determined that Ms. Flowers' disability was not a motivating factor of the employer's decision to terminate her employment, but found in Ms. Flowers' favor on the claim involving "disability based harassment" that created a hostile work environment. The jury awarded Ms. Flowers $350,000 which was reduced to $100,000 by the district court. The question presented to the Fifth Circuit was whether or not the ADA provides a cause of action for disability based harassment. The Fifth Circuit examined the history and background of the ADA in comparison with the history and background of Title VII and concluded that "the purposes and remedial frameworks of the two statutes also command our conclusion that the ADA provides a cause of action for disability-based harassment." "Accordingly, because Title VII has been extended to hostile work environment claims, we follow the growing consensus that our harassment jurisprudence be extended to claims of disability-based harassment. As such, we find that a cause of action for disability-based harassment is viable under the ADA."

The Court set forth the elements required for a plaintiff to succeed on a claim of disability-based harassment by stating the following:

> Accordingly, to succeed on a claim of disability-based harassment, the plaintiff must prove:
>
> > (1) that she belongs to a protected group; (2) that she was subjected to unwelcome harassment; (3) that the harassment complained of was based on her disability or disabilities; (4) that the harassment complained of affected a term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt, remedial action.
>
> Moreover, the disability-based harassment must "be sufficiently pervasive or severe to alter the conditions of employment and create an abusive working environment.

Although it first appeared that the Fifth Circuit was going to uphold the district court's award of $100,000 to the plaintiff, after examining the evidence, the Fifth Circuit held that Ms. Flowers failed to present any evidence of actual injury as a result of the harassment, as opposed to the employment termination, and therefore, she would only be entitled to an award of nominal damages. In support of its decision, the Fifth Circuit stated as follows:

> As the record makes clear, daily harassment towards an HIV-positive individual such as Flowers may not only affect that individual emotionally, but may also cause a decline in the health of that individual, resulting in a particularized physical consequence. Dr. Osterberger, Flowers's personal physician at the time of her employment with Southern Regional, provided general testimony regarding the effects of stress on a person with HIV and stated that such stress "can" aggravate HIV, however, this general testimony did not connect the possible effects of such stress with a particular injury to Flowers. Dr. Osterberger did not testify that Flowers suffered injury, but only stated that it was possible for HIV-positive individuals to suffer injury. Moreover, there is no testimony that Flowers's health deteriorated during the period of time between Hallmark's discovery of Flowers's HIV-positive condition and Flowers's termination from Southern Regional.
>
> Because there is no evidence in the record focusing on the existence of actual injury during the time period before Flowers was discharged, we must vacate the jury's award of damages.
>
> For the foregoing reasons, we AFFIRM the final judgment entered on the jury verdict as to Southern Regional's liability for disability-based harassment. However, we VACATE the jury's damages award and REMAND the case for the entry of an award of nominal damages. Each party shall bear its own costs.

As the above sections indicate, doctors that treat HIV positive persons usually provide critical testimony. In this case, Ms. Flowers' treating physician did not testify that Flowers suffered injury, but only stated that it was *possible* for HIV positive individuals to suffer injury. Having worked with many doctors, this is often the "quick" approach of doctors. The HIV treating physicians often use boilerplate language in opinion letters and do not make individualized assessments in connection with their patient. For some reason, the doctors are afraid to give straightforward, clear opinions. Instead, doctors like to make generalized, ambiguous statements about people with HIV in general. As in this case, such wishy-washy expert opinions are often insufficient.

The final holding in this case affirmed the judgment as to the disability based harassment, but vacated the jury's damage award and remanded the case for the entry of an award of nominal damages. Hence, this was a hollow victory for Ms. Flowers.

V. *SWATZELL V. SOUTHWESTERN BELL TELEPHONE COMPANY*, 2001 WL1343429 (N.D. TEX. 2001)

In this case, Mr. Swatzell was diagnosed with AIDS in May 1996. After being diagnosed, he voluntarily notified his supervisor of his condition. Within one week thereafter, Mr. Swatzell's co-workers were aware of his condition although he had informed his supervisor "confidentially." In August of 1996 through October of 1996, Mr. Swatzell began making requests for reasonable accommodations such as emergency restroom breaks, breaks to consume medication, and for different lunch hours so that he could take his medication as indicated. Mr. Swatzell's requests were denied. In October of 1998, Mr. Swatzell took short term disability leave because he

was unable to gain reasonable accommodations from his employer. Mr. Swatzell returned to work for a period of time and then again went out on short term disability because he was unable to cope with workplace harassment and management's refusal to make reasonable accommodations. Mr. Swatzell returned to work in December 1998 and his supervisor instituted the first step of the company's disciplinary process. The company believed that Mr. Swatzell was engaging in "disability abuse." On August 5, 1999, Mr. Swatzell filed a charge of discrimination with the EEOC. In February 2000, Mr. Swatzell took long term disability leave at one-half pay. Mr. Swatzell remained a company employee on long term disability leave at the time that he received his EEOC right to sue letter. Mr. Swatzell brought suit against the company for violations of the ADA and intentional infliction of emotional distress.

The plaintiff brought suit against the company because the plaintiff contends that he was "forced" to take long-term disability leave, which resulted in the employee receiving one-half his regular salary. The defendant/company argued that such allegation did not constitute an "adverse employment" action. The Court held that such allegation presented a fact question which prevented a summary judgment from being granted. In order for the plaintiff to prevail on his Title I ADA claim, he must establish his case in accordance with the standards applicable to Title VII claims.

> 1. DISABILITY DISCRIMINATION
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> Plaintiffs may establish Title VII disability discrimination claims by direct or indirect evidence in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), the Supreme Court set out a framework for presenting indirect evidence of discrimination in analyzing employment discrimination cases. This method requires the plaintiff to establish a prima facie case by showing that: (1) he is a member of a protected class; (2) he was qualified for his job; (3) despite his qualifications, a decision was made that adversely affected his employment; and (4) either has position was filled by someone outside of the protected group, or non-members received more favorable treatment because of their status as non-members of the protected class. Once the prima facie case is established, the burden shifts to the employer to articulate a legitimate non-discriminatory reason for its employment decision.

If the employer presents a legitimate non-discriminatory reason for its employment decision, then the plaintiff gets an opportunity to argue that the employer's stated non-discriminatory reason is merely pretext.

In this case, the court finds that "having AIDS or being HIV positive is an established disability under the ADA." The court cites *Bragdon v. Abbott* for this proposition. As discussed above, *Bragdon v. Abbott* did not hold that having AIDS or being HIV positive was a per se disability under the ADA. The company filed a motion for summary judgment. With regards to the ADA discrimination claims, the court denied the company's motion for summary judgment because "the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that plaintiff's disability was a determinative factor in the actions of which the plaintiff complains." The court also addresses the question of whether or not the employee has a valid disability retaliation claim. The court sets forth the burden for establishing an HIV retaliation claim under the ADA as follows:

> In the Fifth Circuit, the plaintiff establishes a prima facie case of retaliation by showing: (1) that he engaged in a statutorily protected activity; (2) that he experienced an adverse employment action following the protected activity; and (3) that the protected activity was the "but for" cause of the adverse employment action. *See id. McDonald v. Temple Indep. School Dist.*, 770 F.2d 1340, 1346 (5th Cir. 1985); *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 507 (5th Cir. 1994).

Often it is easier to establish a claim for retaliation than actual employment discrimination. The court further addresses the issue of whether or not "disability harassment" created a hostile work environment. The court relies upon the Fifth Circuit decision in *Flowers v. Southern Regional Physician Services,*, 247 F.3d 229, 232 (5th Cir. 2001) as the leading case in this area. The court **denied** the company's motion for summary judgment on disability based hostile work environment by finding that a general issue of material fact existed because there were many instances of which plaintiff complained. "These instances, when taken together, could sustain a harassment claim because their repetitive and derogatory nature may rise above the "mere name calling" bar on ADA harassment claims." The court granted the company's motion for summary judgment on the plaintiff's intentional infliction of emotional distress claim.

As evidenced by this case, if an HIV positive plaintiff can get past summary judgment with regards to being a person with a "disability," he or she can often get the opportunity to present his or her case to a jury.

VI. *BALLARD V. HEALTHSOUTH CORP.*, 147 F.SUPP.2D 529 (N.D. TEX. 2001)

This case involved an x-ray technician who tested positive on February 19, 1997 and returned to work and voluntarily disclosed his HIV status to his employer on February 27, 1997 (and asked his employer to keep this information confidential). The employee alleges that after he disclosed his HIV status to his area manager, that the area manager told other individuals that were not authorized to receive such information. In June 1997, Mr. Ballard submitted a letter of resignation and gave two weeks notice. The employee rescinded his resignation and returned to work. On December 22, 1997, he was written up for stating on his time card that he had worked for an hour longer than he actually had. Finally, on January 19, 1998, the employee resigned his employment without notice and has not worked for the company since. The employee filed a complaint with the EEOC, received his right to sue notice, and then filed suit under the ADA against the company. The employee alleged in his suit that as a result of his disability, being HIV positive, that the employer (1) violated the confidentiality provisions of the ADA by informing various employees about his HIV test results, and (2) discriminated against him by creating a hostile work environment.

The court addressed the ADA confidentiality provision first.

> In this regard, the ADA sets out three specific circumstances under which an employer must protect the confidentiality of medical information obtained about its employees. 42 U.S.C. § 12112(d). First, under section 12112(d)(3), an employer may require new employees to undergo a medical exam under certain circumstances and provided that "information obtained regarding the medical condition or history of the applicant . . . is treated as a confidential medical record." *Id*. Second, under section 12112(d)(4)(A), an employer may require an employee to undergo a medical exam if the exam "is shown to be job-related and consistent with business necessity." *Id*. An employer must keep information obtained pursuant to such an exam confidential. 29 C.F.R. § 1630.14 (2000). Finally, under section 12112(d)(4)(B), an employer may "conduct voluntary medical examinations, which are part of an employee health program available to employees," but the employer must treat information obtained as confidential. *Id*. Thus, to prove that the Defendant was required by the ADA to keep his HIV positive status confidential, Ballard must first show that the Defendant obtained the information under one of these three sets of circumstances (emphasis added).

The court held, as a matter of law, that the employee was not entitled to the protection of the confidentiality provisions of the ADA because the employee "voluntarily disclosed information he obtained from a personal visit to his private physician." The court felt that such voluntary disclosure was not a matter that the ADA was designed to handle.

This case has particular significance for HIV positive employees who must disclose their disability status to an employer in order to obtain reasonable accommodations. In such circumstance, the ADA does not appear to provide any confidentiality protection.

It is important to note that the employee merely asserted a claim under the ADA, and did not under the Texas HIV confidentiality statute. Texas has a specific HIV confidentiality statute which states as follows:

> § 81.103. CONFIDENTIALITY: CRIMINAL PENALTY. (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.

The term "test result" is broadly defined under § 81.101 of the Texas Health & Safety Code as follows:

> "Test result" means any statement that indicates that an identifiable individual has or has not been tested for AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS, including a statement or assertion that the individual is positive, negative, at risk, or has or does not have a certain level of antigen or antibody.

Finally, the court reviewed the employee's claim for hostile work environment under the *Flowers* standard, and concluded that the employee had "failed to produce enough evidence to show that the defendant's conduct was so severe or persuasive that it created an objectively abusive or hostile work environment. As such, he may

not pursue a claim of hostile work environment against the defendant and his claim must be dismissed."

VII. *CARRILLO V. AMR EAGLE, INC.*, 148 F.SUPP.2D 142 (D. PUERTO RICO 2001)

This case involves a former flight attendant who was HIV positive. The employee brought suit against his employer alleging he was terminated in violation of the ADA because of his HIV status. This case was dismissed at the close of plaintiff's case in chief on the basis that the employee failed to establish his membership in the protected class of persons with a "disability." The court, in an outrageous decision, states as follows:

> Cruz Carrillo has not met this burden. He failed to introduce into evidence any medical evidence from which a reasonable jury could find that HIV substantially limits a man's ability to reproduce; there is no study, medical testimony, or statistical evidence in the record of a significant risk of infection of female partners by men with HIV; there is no evidence of whether an infected man's sperm may carry and transmit the virus to his child at conception; there is no evidence in the record of any treatment available to lower the risk of infection. Plaintiff contends that because his impairment removed his incentive to reproduce, it substantially limits his major life activity of reproduction. The Court is unpersuaded. Cruz Carrillo's testimony, without more, is not enough to shoulder his burden of showing a substantial limitation. He is not an expert in the medical field of immunology or reproduction, and as previously discussed, no objective evidence has been presented to support his position. Thus, Cruz Carrillo has failed to show that his impairment substantially limits his asserted major life activity.

This case is an excellent example of the need for plaintiff's counsel not to take anything for granted and to be prepared to introduce expert medical testimony on every element of the plaintiff's case, including the fact that there is a significant risk of infection of female partners of men who have HIV. One may presume that the court could take judicial notice of this fact, but as this case demonstrates, no presumptions can be had when dealing with an HIV positive plaintiff.

This case further demonstrates the principal that before a plaintiff can complain about not receiving a reasonable accommodation, he must be able to prove that he requested one. The court held that counsel for plaintiff had argued that the employer had a duty to engage in an interactive process with the employee to establish a reasonable accommodation. Prior to reaching this question, the court found that no request for an accommodation was ever made, and therefore, the employer was not under any obligation to engage in an interactive process or to provide an accommodation. "This court finds that plaintiff failed to meet the threshold element of his failure to accommodate claim – a request for an accommodation. His failure to accommodate claim must fail."

The court, in footnote 9, cites to federal statutes which state that "under the ADA, the interactive process is a mandatory obligation triggered by an employee giving notice of the employee's disability and desire for accommodation." Americans With Disabilities Act of 1990 § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.2(o)(3).

VIII. *KUSICK V. CIRQUE DU SOLEIL*, SETTLEMENT AT EEOC MEDIATION (NO CASE FILED)

On April 22, 2004, Lambda Legal announced a settlement in its lawsuit on behalf of its client, Matthew Kusick. This dispute involved an HIV positive acrobat who was hired by Cirque du Soleil as an acrobat.

The federal discrimination complaint with the EEOC was filed in July 2003. Before filing the complaint, Lambda Legal attempted to persuade Cirque du Soleil to change its policy voluntarily. The company refused to do so. The company told Mr. Kusick that because he was HIV positive, he was a "known safety hazard" and the company would not continue to employ him. The EEOC investigated the complaint and found that there was reasonable cause to believe that the company had discriminated against the employee when it discharged him because of his disability, record of disability, and being regarded as disabled. The EEOC then proceeded with mediation which resulted in the settlement.

The company has agreed to pay $600,000 as follows: $300,000 in compensatory damages, $60,000 in back pay, $200,000 in front pay, and $40,000 in attorney's fees. This is the largest settlement in United States history regarding an HIV positive employee.

It appears that there was much public pressure put on the company through picketing and possible boycotts. It is also my understanding that the question of whether or not Mr. Kusick met the definition of a person with a "disability" under the Americans With Disabilities Act was never challenged.

Under the settlement agreement, the employer will host annual anti-discrimination training for all of its employees worldwide and will adopt a zero tolerance policy towards discrimination based on HIV and other disabilities. For two years, the company will have its records open to the EEOC insuring that the company is in compliance with the terms of the settlement agreement.

IX. CONCLUSION

Although persons with HIV had great hope after the Supreme Court decision of *Bragdon v. Abbott* in 1998, those hopes have been dashed with disappointment. Moreover, the state laws that have been enacted in order to provide confidentiality for persons with HIV, as well as the ADA's confidentiality provisions, have also been disappointments. As persons with HIV continue to work at their jobs, they must do so with caution and suspicion. Discrimination continues to exist based upon incorrect generalizations instead of accurate medical facts which indicate that HIV is not casually transmitted in most employment settings. As a general rule, HIV positive employees are well advised not to disclose their HIV status until it is to their advantage to do so. When such disclosure becomes appropriate, it is recommended that planning and preparation be put in place before, during and following such disclosure to the employer.

In the event the HIV positive employee begins to experience discrimination, the employee may find it helpful to file a charge of discrimination with the EEOC while still employed. In many instances, the employer will retaliate against an employee for filing such a charge, and thus, give the employee a retaliation claim to pursue against the employer, in addition to the usual discrimination charge. Additionally, with proper counseling, I believe that most HIV positive people would meet the definition of disability under both the ADA and the Texas Labor Code. HIV and the side effects of the HIV medication continue to impact the individuals in a substantially limiting way on numerous major life activities such as sleeping, eating, procreation, and many other activities that most people perform and take for granted. An individualized assessment should be made with the client prior to the client proceeding with an HIV positive claim of discrimination.

As long as you have sufficient time in light of the state and federal filing deadlines, I suggest that the attorney for the discharged employee attempt to resolve an employment discrimination situation with the former employer prior to filing the charge of discrimination. Confidentiality and privacy are not only important to the employee, but are often valued by the employer. Once a lawsuit is filed, not only does the employee often lose anonymity, but the lawsuit also paints the employer in a bad light which sometimes must be vindicated through victory at trial.

It has also been my experience that juries in Texas often possess the same bigotry, homophobia, and discrimination against HIV positive persons, as well as gay and lesbian individuals, that are held by many employers. Accordingly, although it is sad to say, even though your client may have experienced discrimination from the employer, that discrimination may be continued through the Texas jury system. An HIV positive and/or gay or lesbian plaintiff should proceed with caution in the use of the jury system in Texas.

Although legal protections for persons with HIV is difficult to sustain, the medical advances which continue to support the lives of those persons infected with HIV has provided an opportunity for such individuals to work and live as a productive member of society. Discrimination still exists in our community. As such, proper steps should be taken by HIV positive employees, and their counsel, to best preserve their legal rights, and to best present their case in a court of law.

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1994-2002 **South Texas College of Law**
Adjunct Professor
1998-1999 Professor Excellence Award

Spring, 1997 / Fall, 2001- 2002 / Fall, 2003 **University of Houston Law Center**
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1993-1999 **Texas Real Estate Commission**
Commissioner (Appointed by Governor)
1994-1996 Elected TREC Secretary/Treasurer
1997-1998 Elected TREC Vice Chairman

LICENSES AND CERTIFICATIONS:

American Red Cross Education Instructor, 1995
Mediator Training, April, 1992
U. S. Southern District of Texas, May, 1987
State Bar of Texas, November, 1985

HONORS AND AWARDS:

Uncommon Man Award, 2003, by the Uncommon Legacy Foundation.
NAACP Outstanding Service Award, 1998
ABC Channel 13's 1997 Community Service Award, 1997
Selected Alumni of the Month for April 1997 by South Texas College of Law Alumni Association
Selected "Person of the Week" by KTRK Channel 13 News (7/26/96)
State Bar of Texas, Frank J. Scurlock Award presented by the Legal Services to the Poor in Civil Matters Committee, 1996
Houston Bar Association, President's Award, 1994

Humanitarian Award, Sixth Annual Houston Conference on AIDS in America, 1994
Houston Volunteer Lawyers Program, Outstanding Volunteer Award, 1991

PROFESSIONAL AFFILIATIONS AND VOLUNTEER ACTIVITIES:

State Bar of Texas, Standing Committee on Disability Issues, 2003-2006
State Bar of Texas, Bar Journal Committee, member 1998-1999
State Bar of Texas, Subcommittee on Condominium and Common Interest Ownership; Vice Chair 1989-1992; 1998-99
State Bar of Texas, Grievance Committee, 1988-1991, 1994-1997, Committee Chair, 1995-1996
State Bar, Texas Bar Foundation, Member
Houston Bar Foundation, Member
Houston Bar Association, Minority Opportunities Committee, 1995-1997
Houston Bar Association, Houston Volunteer Lawyers Program
Commissioner, City of Houston Commission on Disabilities, Appointed by Mayor Bob Lanier, 1996-1997
Houston Bar Association, Special Olympics Committee, 1992-1995
Houston Bar Association, Continuing Legal Education Committee, 1993-1996
Houston Bar Association, Alternative Dispute Resolution (ADR) Long Range Planning Task Force, 1992-1993
Houston Bar Association, ADR Committee, 1987-1992
Houston Bar Association, Moderated Settlement Conference Task Force, Co-Chair, 1988-1992, Chair, 1992-1994
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