

RETURNING TO WORK AFTER HIV DISABILITY LEAVE

By: Mitchell Katine

As a result of the widespread use of a new type of medications¹ called protease inhibitors², infection with the human immunodeficiency virus (“HIV”) is no longer considered an acute disease resulting in death. Through the use of protease inhibitor “cocktails³,” many HIV infected individuals have been able to increase their “T-cell⁴” count and have been able to decrease their “viral load⁵” to an undetectable level. As a result, the HIV infected individual often has few, if any, HIV related symptoms, feels better, and is ready to return to work. Many of these individuals had prepared themselves to die by getting their personal and business affairs in order, selling their life insurance policies through a transaction known as a viatical settlement⁶, stopped working and gone on disability leave. Although protease inhibitors are working miraculously for many people, the effect of the drugs vary from individual to individual. Protease inhibitors are not a cure. However, protease inhibitors have provided renewed hope that HIV infection can be treated as a chronic long term illness and that those infected can live relatively normal and healthy lives. As a result of the physical and psychological benefits of protease inhibitor drugs, many HIV infected individuals want to return to work. Unfortunately, prejudice and discrimination still exist against people infected with HIV. However, there are federal and state laws which may protect people with HIV from discrimination. It is wise for both the HIV positive individual and employers to be mindful of the various laws applicable to people infected with HIV.

HIV TRANSMISSION ISSUES

It is well established that HIV cannot be transmitted in the usual work environment through casual contact⁷. The only bodily fluids known to transmit HIV are blood, semen, vaginal secretions, and breast milk. The modes of transmission of HIV are intimate sexual contact (such as unprotected vaginal and anal intercourse), receiving HIV infected blood through a blood transfusion, intravenous drug use (or similar mode), or interutero transmission between a mother and child (as well as through breast feeding). HIV positive health care workers are the only group of employees who must adhere to special regulations⁸.

IMPACT ON HEALTH INSURANCE

Many HIV positive people on disability leave have continued their health insurance coverage through COBRA for at least 18 months (after separation from employment) or 29 months (if found to have been disabled by the Social Security Administration within 60 days from the date of separation of employment). Medicare coverage begins after 29 months from the date social security determines an individual to be disabled. In addition to COBRA insurance continuation (and for those employees who worked for employers with less than 20 employees wherein COBRA continuation does not apply), the State of Texas activated the Texas Health Insurance Risk Pool effective January 1, 1998⁹. Individuals who are HIV positive are automatically eligible for risk pool coverage, as long as they are not eligible for other major medical insurance (such as through COBRA or a new

employer). At the termination of COBRA coverage, an HIV positive individual could begin risk pool coverage in addition to Medicare.

Returning to work and employer provided group health insurance is often a welcome financial relief for the returning employee. Employer provided group health insurance is made even more attractive when considered in light of the Americans With Disabilities Act and the new Texas insurance laws which prohibit an employer and group health insurance coverage from excluding HIV positive people from coverage or limiting HIV positive specific claims.¹⁰

IMPACT ON DISABILITY INSURANCE

The major potential insurance loss for a person considering to return to work from a disability leave is the loss of employer provided long term disability benefits. If a person receiving group long term disability benefits returns to work, the employee will usually be able to “reinstate” their group long term disability insurance if returning to the prior employer¹¹. Often long term disability insurance (group and private) contain a preexisting exclusion clause. This provision limits benefits for a “disability” caused by a “preexisting condition” to a “disability” which occurs after two years from the effective date of coverage.

Additionally, often overlooked is the policy definition of “sickness.” Sometimes a long term disability policy contains a definition of “sickness” which defines a “sickness” as an illness which *first manifests* itself while the policy is in force. In this regard, the date the individual is unable to work is less significant than the date the individual first tested HIV positive. The date the individual tested HIV positive is often asserted by insurance companies as the date the disability first manifested itself. If the individual tested positive before the effective date of the coverage, then the insurance company could deny the long term disability claim on the basis that the disability is not a “covered illness” (as opposed to a preexisting condition).¹² An employer is not obligated to provide group long term disability insurance absent a contract to do so (such as in a labor agreement). Therefore, an HIV positive employee could return to her job, begin working and then the employer could decide to discontinue group long term disability insurance. If the HIV positive employee must return to disability, she would do so without the coverage from the employer’s long term disability policy (since it was terminated). Had the employee not returned to work, she would have continued to receive long term disability benefits until age 65 or for life (depending on policy terms).

TRIAL WORK PERIODS

In order to encourage claimants to return to work, most group long term disability policies (and social security disability) offer a return to work incentive program called “trial work periods”. The trial work programs usually offer a period of time (from three months to nine months) in which the disabled individual is permitted to return to the work force, continue receiving disability income, and if it is determined that they are unable to work, they can return to disability leave status without any interruption in benefits. However, caution should be used by clients attempting to take advantage of these programs. In the event the claimant wants to return to long term disability status, the

insurance company or Social Security Administration could dispute whether the claimant is still disabled. Utilizing a return to work program may bring unnecessary attention to the medical improvement of a claimant and should be used with caution.

GETTING READY TO RETURN TO WORK

The decision to voluntarily return to work should rest entirely with the client. The most important factor in making this decision is whether the client is physically capable of returning to work and performing the essential functions of a job, with or without reasonable accommodations. The client should consult with his or her medical professional as to whether the doctor thinks the client is ready to return to work. It is recommended that the client be stable, with good medical test results for at least six months before returning to work. All medical factors should be taken into consideration, including the client's T-cell count, viral load, past opportunistic infections, energy level, weight status, and cognitive abilities. If all of these factors are good and stable for six months, it may be time to attempt to return to work.

SELECTING NEW EMPLOYMENT

As a general rule, the more employees employed by an employer, the better the treatment of employees who are HIV positive. There are three levels of legal benefits available to HIV positive employees, depending on the number of employees employed by an employer. The lowest level is 15 employees. The Americans With Disabilities Act ("ADA") applies to employers who employ 15 or more employees.¹³ An HIV positive person does not want to work for an employer with under 15 employees because he or she will have no protection from discrimination. The second level of protection is employers who employ 20 or more employees. COBRA insurance continuation of health benefits apply to employers who employ 20 or more employees.¹⁴ The final level of protection applies to employers who employ 50 or more employees. Employees who have worked 1,250 hours for an employer who employ 50 or more employees is entitled to protection through the Family Medical Leave Act ("FMLA").¹⁵ The FMLA provides up to 12 weeks of unpaid time off to employees who are too sick to work. Under the FMLA, the sick employee's job is secure and insurance benefits are continued during the 12 weeks. The 12 weeks can be taken intermittently. Based on the foregoing, the more employees employed by a company, the more benefits and better employee treatment usually exist.

The ADA makes it clear that an employer may not ask disability related questions and may not conduct medical examinations prior to extending a conditional offer of employer.¹⁶ This should provide some comfort to HIV positive individuals to know that they will not be asked their HIV status, anything about the medications they must take, or any medical related questions. Texas also has a law which prohibits all HIV testing unless the employer can prove that the HIV test is a bona fide occupational qualification.¹⁷ The only employment positions where HIV status might be relevant are the health care industry. Texas has specific laws which regulate HIV positive health care workers.¹⁸ Employers are forced to focus their application inquiry on whether the prospective employee can perform the essential functions of the job, with or without reasonable

accommodations. HIV status should be irrelevant. Since HIV status is irrelevant, it is not suggested that HIV status be disclosed to an employer.

DISCLOSURE OF HIV STATUS

Before disclosure, an HIV positive employee should determine whether they are within the protected class covered by the ADA. The first question in this regard is whether the HIV positive employee is a “qualified individual with a disability.”¹⁹ The recent United States Supreme Court decision in *Bragdon v. Abbott* did not answer the question of whether an asymptomatic HIV positive person is considered to be a person with a disability under the ADA.²⁰ The ADA defines “disability” to mean a physical or mental impairment that substantially limits one or more of the major life activities of such individual.²¹ The opinion in *Bragdon* makes significant comments in support of the proposition that asymptomatic HIV infection *should* constitute a disability under the ADA, but since the Supreme Court was not presented with such a fact scenario, it could not render a decision in that circumstance. In *Rennebacum v. NationsBank of Maryland, N.A.*, the appellate court held that asymptomatic HIV infection is not a disability under the ADA.²²

Assuming the employee meets the ADA’s definition of a “qualified individual with a disability,” when should the employee disclose his or her HIV positive status to the employer? In answering this question, an employee should be advised that he or she has the initial burden of proving that the employer had notice of the employee’s substantial physical or mental limitation (i.e., disability status) before the employee can hold the employer liable for discrimination under the ADA.²³

The employee must balance the risk of non-disclosure (and therefore, non-coverage under the law) versus disclosure and coverage, but subject himself or herself to the possibility of discriminatory treatment and pretextual employment termination. With the foregoing in mind, it is suggested that HIV positive disclosure be made to an employer in two circumstances. Both circumstances presume that the HIV positive individual meets the definition of a “qualified individual with a disability.” If the HIV positive individual does not meet this definition, then disclosure of HIV positive status becomes irrelevant because the employee has no protection under the law. Assuming the individual is a “qualified individual with a disability,” it is suggested that he or she disclose their HIV positive status to the employer when (i) a reasonable accommodation is needed to perform the essential job functions²⁴, or (ii) the employer already knows (or suspects) that the employee is HIV positive.

It is the responsibility of the employee to notify the employer that an accommodation is needed.²⁵ An accommodation need only be provided to qualified individuals with disabilities. If an employer does not have knowledge that an employee has a disability, the need to provide a reasonable accommodation never arises.

The second scenario in which an employee should consider giving his or her employer notice of HIV positive disability is when the employee believes that the employer already knows the

employee's HIV positive status. Knowledge of one's HIV positive status can be gained from many sources. There are many ways for an employer to learn that an employee is HIV positive. Employers can also suspect that an employee is HIV positive because of the way he or she looks (i.e., sick) in connection with known or suspected sexual orientation information. It is often good for a client who suspects that his or her employer knows their HIV positive status to get an objective opinion from a trusted third party, such as the lawyer. Often paranoia makes one believe disclosure is necessary when an objective analysis does not support the need to make disclosure.

Once the client decides to make disclosure to an employer, the lawyer should assist the client in drafting a notice of disability letter to the employer. The notice letter should be from the employee to the employer and should include:

1. Disclosure of HIV positive infection;
2. Describe major life activities which are substantially limited;
3. Describe willingness and ability to perform job;
4. Request any needed reasonable accommodations; and
5. Remind employer of confidential nature of information.

Once notice of disability is given to the employer, the employee should carefully monitor and document treatment by the employer. In the event the employee believes he or she has been discriminated against because of their disability, the employee must file a charge of discrimination with the Equal Employment Opportunity Commission within 300 days from the date of the discrimination.

Mitchell Katine is a partner with Williams, Birnberg & Andersen, L.L.P. in Houston. He is also an adjunct professor at South Texas College of Law where he teaches HIV and the Law. Mr. Katine is also the chair of the State Bar's new Sexual Orientation and Gender Identification Issues Section.

1. This article is limited to the effects of the new medications on persons living in North America. Many developing countries do not have access to the new medications.
2. "Protease Inhibitor" is a drug that binds to and blocks HIV protease from working, thus preventing the production of new functional viral particles. AIDS Medical Glossary, Gay Men's Health Crisis, Vol. II, Number 6, June 1997.
3. "Protease Inhibitor Cocktails" refer to combination drug therapy whereby two to three drugs are used simultaneously to more effectively combat the disease. HIV Disease: A Review and Update by Jihad Slim, M.D. and Sally A. Fallon, R.N.; Hospital Physician, May 1997, pages 15-36.

4. “T-cell” also known as T-Lymphocyte. These include CD4 and CD8 cells. The ratio of CD4 to CD8 cells are a common measure of immune system status. AIDS Medical Glossary, Gay Men’s Health Crisis, Vol. II, Number 6, June 1997.
5. “Viral Load” means the amount of HIV RNA per unit of blood plasma. Viral load is an indicator of virus concentration and reproduction rate. HIV viral load is increasingly employed as a predictor of disease progression. AIDS Medical Glossary, Gay Men’s Health Crisis, Vol. II, Number 6, June 1997.
6. “Viatical settlement” is a financial transaction by which an individual with a terminal illness sells his or her insurance policy to a third party for a certain percentage of the face value of the policy. These types of transactions are now regulated by the Texas Department of Insurance.
7. See medical evidence in *Baxter v. City of Belleville, Illinois*, 720 F. Supp. 720, 724 (S.D. Ill. 1989); Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis; The New England Journal of Medicine, Vol. 314, No. 6; Feb. 6, 1986.
8. See § 85.201 et seq. of the Texas Health and Safety Code for provisions related to regulation of HIV positive health care workers.
9. HB 710 became effective on January 1, 1998 to bring Texas into compliance with part of the Kassebaum-Kennedy Act.
10. Insurance Coverage and the Americans With Disabilities Act by Sharona Hoffman and Guy D. Kidd; The Houston Lawyer, July/August 1994; also see Texas Small Employer Insurance Availability Act.
11. And assuming the employer continues to carry the same long term disability coverage.
12. *Massachusetts Casualty Insurance Company v. Forman*, 516 F.2d 425 (5th Cir. 1975).
13. 42 U.S.C. § 12111(5).
14. Consolidated Omnibus Budget Reconciliation Act of 1985, 29 U.S.C. § 1161-1168.
15. The Family and Medical Leave Act of 1993.
16. 42 U.S.C. § 2112(d).
17. § 81.201 et seq. Texas Health and Safety Code.
18. § 85.201 et seq. Texas Health and Safety Code.

19. 42 U.S.C. § 12111(8). The ADA defines (in pertinent part) a “qualified individual with a disability” to mean an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.
20. ___ U.S. ___, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998).
21. 42 U.S.C. § 12102(2); and also includes a record of such an impairment or being regarded as having such an impairment.
22. 1997 WL 465301 (4th Cir. Md).
23. *Taylor v. Principal Financial Group*, 73 F.2d 155, 163 (5th Cir. 1996); *Amato v. St. Luke’s Episcopal Hospital*, 987 F. Supp. 523, 532 (S.D. Tex. 1997).
24. The ADA defines “reasonable accommodation” as including:
 - (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
 - (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 U.S.C. § 12111(a).
25. *Taylor* at 165; 29 C.F.R. § 1630.9, App. (1995).