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AIDS DISCRIMINATION: THE DISEASE THAT MEDS CAN'T TREAT

(for the panel "Vindicating the Rights of People Living with HIV – Lessons from Litigation")

I. Overview

In 1996, the politically and socially conservative HIV-positive writer Andrew Sullivan announced in the New York Times that AIDS was over.[1] In 2006, the CDC recommended routine voluntary HIV screening as a normal part of medical practice, similar to screening for other treatable conditions.[2] As AIDS fell from the news pages, the American Medical Association Journal of Ethics reported that the "social, clinical, and political foundations of AIDS exceptionalism no longer held sway."[3] Many private and public funders heard that message and moved their money to "real" problems. AIDS is no longer the ribbon du jour.

So why are so many people still calling the AIDS Law Project of Pennsylvania to tell us horrible stories of discrimination and privacy breaches?

Last year, we commemorated our 25th anniversary, and the complaints about discrimination and privacy have remained constant over the last two and a half decades. You name the industry; we have heard a complaint about it. We have represented lawyers, doctors, truck drivers, clergy, barbers, executives, food-service workers and even a gymnastics instructor in employment discrimination cases. Clients have been denied services by dentists, surgeons, bikini-waxers, tattoo parlors, funeral homes, fertility clinics and adoption agencies. They have been excluded from high school football teams, personal-care homes, health clubs, cosmetology classes, and medical-assistant training programs.

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[1] Andrew Sullivan, *When Plagues End*, New York Times, Nov. 10, 1996. *available at* http://www.nytimes.com/1996/11/10/magazine/when-plagues-end.html?src=pm&pagewanted=1).

[2] CDC. *Revised Recommendations for HIV Testing of Adults, Adolescents, and Pregnant Women in Health-Care Settings,* MMWR 2006;55(RRI4): 1-17.

[3] Gerald M. Oppenheimer, PhD, MPH, and Ronald Bayer, PhD, *The Rise and Fall of AIDS Exceptionalism,* Virtual Mentor. December 2009, Volume 11, Number 12: 988-992. *available at* http://virtualmentor.amaassn.org/2009/12/mhstl-0912.html.

We expected that over time - as the CDC routinized HIV, as more people knew someone with HIV, and as the kids who heard Magic Johnson disclose his HIV status in 1991 became adults, those calls would stop and we would do something else with our time.

But we aren't making those vacation plans just yet. A 2009 Kaiser Family Foundation study[4] found that notable shares of individuals still report that they would be uncomfortable with an HIV positive co-worker (23%), a child's teacher (35% of parents), or roommate (42%) and fully half (51%) of adults say they would be uncomfortable having their food prepared by someone who is HIV positive. The Williams Institute at UCLA[5] has done several studies looking at HIV discrimination in health care settings, all yielding disturbing results.

I am sorry to say that while medicine and science have done their part, there's still plenty of work for the lawyers to do. To help us with our work, here is a selection of cases to drop into your next demand letter.

II. Recent HIV-related cases of interest

Employment

Baffo v. *New York Inst. of Tech.,* No.10-cv-01245 (E.D.N.Y. June 12, 2012). Jury awarded $1.35 million in damages to a former New York Institute of Technology employee who was fired three weeks after notifying his supervisor that he was HIV-positive.

EEOC and D.B. v. *Capital Healthcare Solutions, Inc* 2011 WL 9330933 (W.D.Pa., settled January 24, 2012). HIV-positive medical assistant denied employment because defendant erroneously believed law prohibited hiring him. Case settled for $22,000 after the Pennsylvania Department of State issued an update to the occupational and licensing regulations specifically excluding HIV as a communicable, infectious or contagious disease, which would otherwise bar people from employment.

Jane Doe v. *Snack Food Company and Staffing Agency* (Filed with the EEOC in 2008, settled against defendant Staffing Agency, March 2011, settled against defendant Snack Food Company, August 2011). Case brought on behalf of woman fired from snack food factory. Snack Food Company and the staffing agency that placed her in the job both thought law prohibited HIV-positive individuals from working around food. Case settled for undisclosed monetary damages from both defendants. The staffing agency also agreed to place a legal notice regarding the rights of people with HIV in the workplace.

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[4] Kaiser Family Foundation, *2009 Survey of Americans on HIV/AIDS: Summary of Findings on the Domestic Epidemic* (April 2009), *available at* http://www.kff.org/kaiserpolls/upload/7889.pdf.

[5] http://williamsinstitute.law.ucla.edu/?s=AIDS+discrimination&cat=3 (last visited Feb 25, 2014).

Healthcare and public accommodations

US v. Rite Aid of Michigan, Inc. (DJ# 202-38-56, settled Feb. 4, 2014) Settlement of $15,000 for pharmacy refusal to administer a flu shot because complainant had HIV.

US v. Barix Clinics (#DJ 202-62-284) Settlement of $45,000 for bariatric surgery office's refusal or cancellation of surgery for two individuals because they have HIV.

US v. Glenbeigh, Rock Creek, Ohio (DJ # 202-57-164, settled March 13, 2013) Settlement of $37,500 for exclusion of an individual from an alcohol treatment program based on HIV and HIV-related medical conditions.

US v. Woodlawn Family Dentistry (DJ# 202-79-262, settled Feb. 6, 2013) Settlement of $10,000 for dentist office's unequal treatment of people with HIV in the scheduling of future appointments. Woodlawn required a patient with HIV to schedule all future appointments as the last appointment of the day.

US v. Castlewood Treatment Center (DJ # 202-42-139, settled Feb. 6, 2013) Settlement of $140,000 for eating-disorder clinic's refusal to admit HIV positive patient.

US v. Fayetteville Pain Center (DJ # 202-54-141, settled Jan. 22, 2013) Settlement of $15,000 for unlawful exclusion of a person with HIV from treatment.

Mother Smith v. *Milton Hershey School,* Civil Action No. 11-cv-7391 (E.D. Pa.), *US v. Milton Hershey School* (DJ # 202-63-162); (settled Sep. 12, 2013) Settlement of $715,000 plus undisclosed attorney's fees for exclusion of 13-year-old HIV positive honor student from private residential school.

US v. Knoxville Chiropractic Centers (DJ # 202-70-75, settled May 11, 2012) Settlement of $10,000 for chiropractor's denial of treatment solely because patient has HIV.

US v. CHW Medical Foundation and Medical Clinic of Sacramento (DJ# 202-11E-118, settled May 10, 2012) Settlement of $25,000 for refusing to perform surgery on a person with HIV due to fear of HIV-infected blood.

Canal Side Care Manor v. Pa. Human Relations Commission, 2011 WL 4986670 (Pa. Commw. Ct., Oct. 20, 2011) Pennsylvania Commonwealth Court affirmed a ruling by the state Human Relations Commission awarding an HIV positive woman $63,000 in damages after finding unlawful discrimination.

US v. American Laser Centers (DJ # 202-51-330, settled June 20, 2011) Settlement of $17,000 for laser hair removal company's refusal, based on HIV status, of the full array of services.

Doe v. Deer Mountain Day Camp, Inc., 682 F. Supp. 2d 324, 350 (S.D.N.Y. 2010) Court found in favor of plaintiff, holding that although the camp had a responsibility to protect their campers, that obligation did not excuse discrimination when it is based on unsubstantiated fears.

Confidentiality

M.M. et al. v. Fairmount Behavioral Health Sys. Et al., C.C.P.2011, No. 11071472 (settled December 23, 2011) Case settled for undisclosed amount. Residents of drug treatment center alleged that the dietician was careless with a list of HIV positive patients.

Williams v. Chestnut Hill Health Systems, et al., Phila. C.C.P. 2007, No.: 071000051. Arbitration award of $30,000. Plaintiff sued rehabilitation hospital after an employee gained access to his medical information and disclosed his HIV status to third parties without his consent.

Doe v. Medlantic Healthcare Group, Inc., 814 A.2d 939 (2003 D.C. App. LEXIS 2). Jury award of $250,000, upheld on appeal. Plaintiff sued hospital after employee gained access to his confidential medical records and spread news of his HIV diagnosis to friends and co workers.

Brown v. H.I.R.E. (Index no. 03/400072, Sup. Ct., N.Y. County, settled 2005). Settlement of $30,000 after discovery, for emotional harm plaintiff suffered when the director of his AIDS supportive housing facility intentionally disclosed his HIV status to a third party without his consent.

Non-HIV Disability Discrimination Cases

Palma v. Rite Aid Corp., No. BC465411, (Cal. Super. Ct. July 23, 2012) Jury awarded $3.5 million to the plaintiff, who was fired after she was diagnosed with a nonwork-related disability. Plaintiff claimed that, although she was able to perform her job, Rite Aid manufactured a false reason to terminate her.

Anderson v. American Airlines Inc., No. 3:05-cv-0429 (N.D. Cal. Nov. 5,2008) Court rejected defendant's motion for a new trial, holding that substantial evidence supported the jury's award of $238,333 in economic damages and $1 million in non-economic damages after finding that the employer's perception that plaintiff had a mental disability was a motivating reason for her discharge. The jury rejected the employer's claim that plaintiff was fired for insubordination.

Jordan v. Bates Advertising Holdings Inc., No.118785/99 (N.Y. Sup. Ct. Feb. 7, 2006) Court upheld a jury's $2.5 million damages award to a former advertising executive with multiple sclerosis who claimed that she had been terminated because her employer perceived her as being disabled.

Bush v. Wyoming Mach. Co., No. 2:10-cv-00213 (D. Wyo. Dec. 2, 2011) Jury awarded $1.2 million in damages to plaintiff who claimed that he was denied a sought-after position and ultimately terminated because of his disability or because he was regarded as disabled. The plaintiff's disability was that he had several heart-related medical issues.

Espinoza v. Orange, No. G043067 (Cal. Ct. App. Feb. 9, 2012) Court upheld jury verdict awarding $820,000 to plaintiff who alleged disability-based harassment, because he has no fingers on his right hand.

Betson v. Rite Aid Corp., No. BC427992 (Cal. Super. Ct. Apr. 11, 2011) Jury awarded $500,000 to a woman fired by Rite Aid Corp. after more than 21 years at the pharmacy's store in Beverly Hills, Calif., claimed she was retaliated against for taking medical leave following a work-related injury.

McKelvey v. Geren, No. 07-CV-14538 (E.D. Mich. Oct. 23, 2009) Jury awarded $4.3 million to a former civilian Army employee who claimed he was harassed and constructively discharged because of disabilities he sustained while on active duty in Iraq.

Calef v. FedEx Ground Package Sys. Inc., No. 08-2031 (4th Cir. Aug. 27, 2009) Court upheld a jury award of $1.2 million to plaintiff under West Virginia law where plaintiff, a former FedEx service manager, claimed the company forced her out of her job because it perceived her to be disabled after she hurt her hand playing volleyball.

Finan v. Good Earth Tools Inc., No. 08-2221 (8th Cir. May 19, 2009) Court upheld a jury verdict awarding plaintiff $677,276 when plaintiff was fired less than a year after he was diagnosed with epilepsy.

Leuzinger v. Lake County, No. 4:06-cv-00398 (N.D. Cal. Feb. 5, 2008) Court upheld $1.7 million award for discrimination on the basis of disability where the employer terminated the employee because of a wrist injury.

Bates v. Dura Auto. Sys. Inc., No.1 :08-0029 (M.D. Tenn. Aug. 29, 2011) Court upheld a jury verdict totaling $878,000 to six employees who were fired because they tested positive for legal prescription drugs that the employer argued were unsafe.

Alberigi v. Sonoma County, No. SCV-233788 (Cal. Super. Ct. Mar. 14, 2006) Employee awarded $6.5 million by a jury that found that Sonoma County discriminated against him because of his panic disorder and agoraphobia.

EEOC v. *AutoZone Inc.,* No. 07-1154 (C.D. Ill. Nov. 8, 2011) Jury awarded $600,000, which was reduced to $300,000, to a Plaintiff who was not granted a reasonable

accommodation for a back injury. The employee was denied a reasonable accommodation and then terminated.

Soliday v. 7-Eleven Inc., No. 2:09-cv-00807 (M.D. Fla. June 23, 2011) Jury awarded $934,000 to a deaf former manager of the 7-Eleven convenience store chain who alleged he was fired after 26 years when the company would not reasonably accommodate his disability in violation of federal and state law.

Ekstrand v. *School District of Somerset,* No. 08-cv-193-bbc (W.D. Wis. Oct. 5, 2010) Jury awarded plaintiff $246,662 as a result of defendant's failure to provide her a room with an exterior window, after receiving information that such accommodation was medically necessary.

Brady v. *Wal-Mart Stores Inc.,* No. 06-5486 (2d Cir. July 2, 2008) Court affirmed $900,000 judgment under the ADA and the New York State Human Rights Law where an employee with cerebral palsy who was transferred involuntarily by Wal-Mart from a job as a pharmacy aide to a less desirable post and offered no job training or coaching.

Kapche v. *Holder,* No.11-5017 (D.C. Cir. Apr. 13, 2012) Court upheld jury verdict of $100,000 under the Rehabilitation Act where the plaintiff alleged he was discriminated against because he was a Type1 insulin-dependent diabetic. Plaintiff alleged that the FDA would not hire him because of his disabilities.

Dahill v. *Boston Police Dep't,* No. 98-CV-11441 (D. Mass Feb. 6, 2002) Jury awarded $847,000 to a former police cadet who was denied employment by the Boston Police Department in 1997 because of a hearing impairment, despite the use of hearing aids that corrected his hearing to normal limits.