HIV and the Law 2009 Update
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Houston, Texas

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Mitchell Katine is a founding partner with the law firm of Katine & Nechman L.L.P. Over the course of his career, Mitchell has not only distinguished himself as an outstanding professional with unique talents and expertise in a myriad of legal fields, he has also been a community leader and advocate for many of the most marginalized in our society. He is perhaps best known as having served as local counsel for John Lawrence and Tyron Garner in the landmark United States Supreme Court case of Lawrence v. Texas, which created new paradigms in U.S. privacy law jurisprudence.

After 20 years, including 11 as partner, at the prominent Houston firm of Williams, Birnberg & Andersen, L.L.P., Mitchell decided to start his own practice with his new law partner, John Nechman. He continues to concentrate on the areas of real estate, with a special emphasis on real estate litigation, homeowner association law, title insurance matters, landlord-tenant disputes, and adjoining landowner issues. He also handles employment and HR matters, estate planning and probate, general and business litigation, as well as insurance, adoption, and disability (including HIV and AIDS) matters.

While at Williams, Birnberg, & Anderson, L.L.P., Mitchell quickly forged a reputation as an attorney of formidable skills. He also became a certified mediator, a publisher of numerous law-related articles, and nationally-known speaker and Continuing Legal Education presenter on numerous topics. In 1993, Texas Governor Ann Richards appointed him to the Texas Real Estate Commission, where he served as a Commissioner for 6 years. In 1994, he became an adjunct professor at South Texas College of Law, and in 2001, he took on the same role at the University of Houston Law Center, teaching "HIV & The Law." He has also served on the State Bar of Texas's Grievance Committee Panel as well as the Disability Issues Committee.

Since the early days of the HIV/AIDS crisis, Mitchell has been a stalwart leader in the battle to help those with HIV/AIDS. He has also helped create numerous GLBT legal organizations in Houston and Texas, and he regularly appears on local and national television and radio programs where issues such as same-sex marriage, gay and lesbian adoption, HIV/AIDS, and civil rights are discussed and debated. He is particularly proud of his role as local counsel in the Lawrence case, in which the Supreme Court overruled the case of Bowers v. Hardwick and overturned all sodomy statutes in the country.

Mitchell and his partner, Walter, have fulfilled a lifelong dream of having a family by adopting two children, Sebrina and Sebastian. In their free time, the family enjoys the outdoors, especially playing softball with the Legal Eagles, a Montrose Softball League team sponsored by Katine & Nechman L.L.P.

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HIV and the Law 2009 Update

I. Employment Law

1. *Texas Farm Bureau Mutual Insurance Companies v. Sears*, 84 S.W.3d 604 (Tex. 2002)

When considering employment law in Texas, it is important to begin any analysis with the ever present and very strong employment-at-will doctrine. In 2002, the Supreme Court of Texas issued an opinion in *Texas Farm Bureau Mutual Insurance Companies v. James Sears* which demonstrated the breadth of the employment-at-will doctrine in Texas. In the *Sears* case, Mr. Sears was accused of being involved in a kickback scheme. The company conducted an internal investigation regarding the allegations and ultimately decided to fire the employee. The employee filed a lawsuit against the employer alleging that the employer had negligently performed the internal investigation. The Supreme Court of Texas held that the purpose of internal investigations of an at-will employee is for the benefit of the employer not the employee. The employer does not have a duty to the employee to perform the investigation correctly or reasonably.

The Supreme Court of Texas set forth the question involving whether or not an employer owes an employee a duty to perform an employment investigation correctly as follows:

> We have never decided whether an employer owes its at-will employee a duty of ordinary care in investigating alleged misconduct. Of course, an employer has no duty to investigate at all before terminating an at-will employee, because either party may end the relationship at any time without reason or justification. See *Garcia v. Allen*, 38 S.W.3d 587, 591 (Tex.App.-Corpus Christi 2000, pet. denied); *Rios v. Texas Commerce Bancshares, Inc.*, 930 S.W.2d 809, 816 (Tex.App.-Corpus Christi 1996, writ denied). But there is conflict among our courts of appeals on whether an employer owes its at-will employee a duty of ordinary care once it has decided to investigate the employee's alleged misconduct.

In its decision, the Supreme Court stated that absent a contract, the relationship between an employer and employee is "at-will" meaning that, except for very limited circumstances, either party may terminate the employment relationship for any reason or no reason at all. If the Supreme Court found that an employer had a duty to perform its internal investigations properly, it would have modified the employment-at-will doctrine. Accordingly, the Supreme Court held that an employer

does not owe an employee at-will any duty to perform its internal investigations properly by stating as follows:

> By definition, the employment-at-will doctrine does not require an employer to be reasonable, or even careful, in making its termination decisions. If the at-will doctrine allows an employer to discharge an employee for bad reasons without liability, surely an employer should not incur liability when its reasons for discharge are carelessly formed. Engrafting a negligence exception on our at-will employment jurisprudence would inevitably swallow the rule.

Since an employer does not need a reason to terminate an employee under the employment-at-will doctrine, then the employer's internal investigation is solely for the purpose of the employer and does not give the employee any right to complain of the investigation if it is performed improperly.

Of course, an employee may have other claims for defamation if an employer publicizes incorrect reasons for the termination of an employee. However, defamation is a separate cause of action from any connected with employment discrimination.

2. ***Matagorda County Hospital District v. Burwell*** **189 S.W.3d 738 (Tex. 2006)**

The Burwell case involves the question whether an employee manual which states that an employee "may" be dismissed for cause modified the employment at will doctrine. The trial court found in favor of the employee on her contract claim but against her on her discrimination claim. The Court of Appeals affirmed the breach of contract verdict. The Supreme Court of Texas held that even assuming that the employee manual created a contract, a statement that an employee "may" be dismissed for cause is not a specific agreement that an employee may be dismissed only for cause. As such, the Supreme Court of Texas found that there was no evidence of any breach of an employment contract and reversed the lower court's decision rendering judgment that the employee take nothing. In reaffirming the employment at will doctrine, the Supreme Court of Texas stated as follows:

> The court of appeals misread the manual. It plainly provides that dismissal may be for cause, but it nowhere suggests that dismissal may be *only* for cause, and that limitation cannot simply be inferred. As we stated in *Montgomery County Hospital District v. Brown*:
>
> For well over a century, the general rule in this State, as in most American jurisdictions, has been that absent a specific agreement to

the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all.

The employment at will doctrine is a very strong doctrine attorneys for both employers and employees must fully appreciate before they proceed with an employment discrimination case.

3. ***School Board of Nassau County, Florida v. Arline*, 107 S.Ct.1123 (1987)**

The *Arline* case is one of the threshold employment law cases in the area of disability discrimination and employment. The *Arline* case involved a school teacher who was diagnosed with tuberculosis. From 1966 until 1979, the employee taught elementary school in Nassau County, Florida. She was discharged in 1979 after suffering a third relapse of tuberculosis within two years. After she was denied relief in State administrative proceedings, she brought suit in Federal court for violation of Section 504 of the Rehabilitation Act. This case was decided prior the enactment of the Americans with Disabilities Act. However, since the ADA is based on language and case law of the Rehabilitation Act, it is significant.

The question presented in the *Arline* case was whether a person afflicted with tuberculosis, a contagious disease, may be considered a "handicapped individual" within the meaning of Section 504 of the Rehabilitation Act, and if so, whether such an individual is "otherwise qualified" to teach elementary school. The definition of a person with disability under the Rehabilitation Act is the same as the definition of a person with a disability under the ADA, to wit: any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, or has a record of such an impairment, or is regarded as having such impairment. Since the definition under the Rehabilitation Act is the same as the definition under the ADA, the case law for the Rehabilitation Act is often controlling in ADA cases.

In its analysis, the Supreme Court determined that the employee's hospitalization for tuberculosis in 1957 established that the employee had a record of an impairment and was therefore a handicapped individual protected by the Rehabilitation Act. The Supreme Court went on to discuss discrimination of persons with disabilities by stating that "allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of §504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." The Supreme Court concluded that the fact that an individual with a record of a physical impairment is also contagious does not suffice to remove that person from coverage under the Rehabilitation Act.

Once it is determined that an employee satisfies the definition of having a "disability" under the Rehabilitation Act, as well as the ADA, the next question is whether or not the employee is "otherwise qualified" to perform the essential functions of the job, with or without reasonable accommodations. In the *Arline* case, the Supreme Court had to determine whether or not Arline was otherwise qualified for the job of an elementary school teacher. As under the ADA, the Rehabilitation Act requires that the district court make and individualized inquiry and make appropriate findings of fact as to whether or not the employee is "otherwise qualified" for the employment position. Not only should a district court make an "individualized inquiry", but the employer too should conduct an individualized inquiry in determining whether or not an employee is otherwise qualified, as well as in conducting its determination as to whether or not it should provide a requested reasonable accommodation.

In *Arline*, the Supreme Court established a four-part test to determine whether or not an employee with a disability who has a contagious disease, is "otherwise qualified" to perform the employment position. The Supreme Court agreed with the American Medical Association's *Amicus* brief in establishing the four-part test. The four-part test is as follows:

> The inquiry should include:
>
> > Based on reasonable medical judgments given the state of medical knowledge, about a) the nature of the risk (how the disease is transmitted), b) the duration of the risk (how long is the carrier infectious), c) the severity of the risk (what is the potential harm to third parties) and d) the probabilities the disease will be transmitted and will cause varying degrees of harm.
> >
> > In making these findings, courts normally should defer to the reasonable medical judgments of public health officials. The next step in the "otherwise qualified" inquiry is for the court to evaluate, in light of these medical findings, whether the employer could reasonably accommodate the employee under the established standards for the inquiry.

The Supreme Court held that a person suffering from the contagious disease of tuberculosis can be a handicapped person within the meaning of the Rehabilitation Act and that Arline was such a person. The Supreme Court remanded the case to the district court to determine whether or not Arline was "otherwise qualified" for her position in accordance with the four-part test established in the Supreme Court opinion.

The *Arline* four-part test is used today in determining whether or not a person with HIV is "otherwise qualified" for specific employment positions. Remember, the employer and the district court should conduct an individualized assessment of the HIV positive employee in determining whether or not the employee is "otherwise qualified".

As will be discussed later, the 2008 amendment to the Americans with Disabilities Act also specifically incorporates the Airline's broad view of the third prong of the definition of "handicapped" under the Rehab Act of 1973 (i.e. being regarded as having such an impairment).

4. ***Bradley v University of Texas M.D. Anderson Cancer Center*, 3 F.3d 922 (5th.Cir. 1993)**

The Brian Bradley case originated out of Houston and set the standard for HIV positive health care workers in the country. Brian Bradley was a surgical technician who worked at MD Anderson Cancer Center. MD Anderson Cancer Center learned of Brian Bradley's HIV status by reading a front page story in the Houston Chronicle. On the same day that the Houston Chronicle article appeared, MD Anderson Cancer Center relieved Brian Bradley of his duties as a surgical technician. Brian Bradley brought suit against MD Anderson Cancer Center under the Rehabilitation Act. The district court granted a motion for summary judgment and the Fifth Circuit Court of Appeals affirmed the summary judgment in favor of MD Anderson Cancer Center based on the proposition that Brian Bradley was not "otherwise qualified" to perform his job as a surgical technician.

The four part test from the Supreme Court decision in *Arline* was allegedly used in determining whether or not Brian Bradley was "otherwise qualified" to perform his job as a surgical technician. The parties did not dispute the first three factors of the test. The nature of the risk was not an issue, as all parties recognize that blood entering a patient's body can transmit HIV. The duration of the infection was permanent and the virus was, especially at that time, considered to lead to the fatal disease of AIDS.

It is important to remember that this case occurred in the early 1990s when the status of HIV and AIDS leading to death was much more significant than it is today. The disputed issue from the *Arline* test was the fourth prong of the four-part test, to wit: the probabilities the disease will be transmitted and will cause varying degrees of harm. The Fifth Circuit found that Brian Bradley's duties included handing the handles of instruments to surgeons while he held the sharp end and Brian Bradley admitted that accidents occurred despite care. Bradley reported suffering five (5) needle puncture wounds while on the job.

The Fifth Circuit Court of Appeals decision found that Brian Bradley was not "otherwise qualified" to perform his duties as a surgical technician because while the risk was small, it was not so low as to nullify the catastrophic consequences of an accident. "A cognizable risk of permanent duration with lethal consequences suffices to make a surgical technician with Bradley's responsibilities not "otherwise qualified".

It is important to note that the Fifth Circuit decision is affirming a summary judgment granted in favor of MD Anderson Cancer Center. If this type of case were brought today, I would hope that an individualized assessment would be made by both the employer and the district court through a trial where competing experts could express their opinions in connection with the four elements set forth by the Supreme Court in *Arline*. This type of case is better determined by considering the various expert opinions, as opposed to having it decided as a matter of law on summary judgment.

A. **HIV Positive Health Care Workers Chapter 85, Subchapter I, TX. Health and Safety Code.**

Attached hereto as Exhibit "A" is the text of the HIV positive health care workers statute found in Chapter 85, Subchapter I of the Texas Health and Safety Code. This statute was enacted in 1991 and has remained principally unchanged since its enactment. The definitions in the statute are very important to understand the limited effect on HIV positive health care workers.

The statute only limits procedures which are "exposure prone" procedures. Exposure prone procedures are defined in Section 85.202 as a specific invasive procedure that has been designated as such by a health professional association or health facility. Accordingly, if a health professional association or health facility has not designated any procedures as "exposure prone" procedures, then no procedures fall under the statute.

The statute specifically states in Section 85.204(f) that a health care worker who is infected with HIV, who performs invasive procedures not identified as "exposure prone" should not have his or her practice restricted, provided the infected health care worker adheres to the standards for infection control provided in Section 85.203. Section 85.203 of the statute describes general infection control standards which all health care workers should follow known as "universal precautions".

In order to limit the effects of the HIV positive health care worker statute further, Section 85.206 specifies what the Subchapter <u>does not do</u>.

Included in Section 85.206 is that the statute does not require the revocation of the license, registration or certification of a health care worker who is infected with HIV.

The statute specifically says that it does not prohibit a health care worker who is infected with HIV and who adheres to universal precautions from performing procedures not identified as exposure prone or providing health care services in emergency situations. Finally, the statute specifically says that it does not require the testing of health care workers.

In summary, HIV positive health care workers are free to practice medicine as long as their procedures have not been identified by their health facility or by a health professional association as "exposure prone". Most health facilities and health professional associations do not specify specific procedures as exposure prone procedures.

The real problem arises when patients or the public find out that a health care practitioner is HIV positive and demand that the health care facility take action. As in the case of Brian Bradley, had Brian Bradley not gone public in an article in the Houston Chronicle, he would probably have been permitted to continue working as a surgical technician without any problems. Brian Bradley told me that there were many other members of the M. D. Anderson surgical team who were known to be HIV positive and who were permitted to keep their jobs because their HIV status, although known to the employer, was not made public in the Houston Chronicle.

5. ***Bragdon v Abbott*, 118 S.Ct. 2196 (1998)**

The Americans with Disabilities Act was enacted in 1990 and took affect in 1992. The first United States Supreme Court decision regarding the Americans with Disabilities Act involved a woman with HIV. It is important to note that the Americans with Disabilities Act does not specify any particular diseases as being "per se" disabilities. Instead, the ADA defines disability in the same way that the Rehabilitation Act defines it.

A "disability" is defined as a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such an impairment, or being regarded as having such an impairment. *Bragdon v. Abbott*, involved a Title III violation under the ADA (prohibition of discrimination in public accommodations). Title I of the ADA involves private employment where most discrimination cases have been brought. Nevertheless, "disability" under the ADA is defined the same whether it is Title I or Title III. It just so happens that the first Supreme Court case involving the ADA and HIV was a Title III public

accommodations case. The same definition of "disability" is used under both Title I and Title III.

In *Bragdon v. Abbott* a dental patient named Sidney Abbott had HIV and went to her dentist for an examination. Abbott disclosed her HIV infection on the patient registration form. The dentist completed a dental examination, discovered that the patient had a cavity and informed Ms. Abbott of his policy against filling cavities of HIV infected patients. He offered to perform the work at a hospital with no added fee for his services, though Ms. Abbott would be responsible for the cost of using the hospital's facilities. Ms. Abbott declined and sued the dentist under the ADA for discrimination in public accommodations. The initial question in the *Bragdon v. Abbott* case was whether not Sidney Abbott was a person with a "disability" protected under the ADA.

Title III under the ADA states that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privilege, advantages, or accommodations of any place of public accommodation by any person who....operates a place of public accommodation. The term "public accommodation" is defined to include a professional office of a health care provider. The ADA's definition of "disability" is drawn almost exactly from the definition of "handicapped individual" in the Rehabilitation Act of 1973.

To determine whether or not a person meets the definition of having a "disability" under the ADA, the definition of "disability" has to be dissected and analyzed with regard to each individual. The first step in the inquiry (under the first prong of the definition of disability) is to determine whether or not the individual has a physical or mental impairment. HIV infection is not included in the list of specific disorders constituting physical impairments. One reason for this is that HIV was not identified as the cause of AIDS until 1983. The *Bragdon v. Abbott* decision contains a very thorough and specific description of how HIV progresses in attacking the body and its immune system from the moment of infection. For example, the Supreme Court opinion states 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, headaches, enlargement of the lymph nodes (lymphadenopathy), muscle pain (myalgia), rash, lethargy, gastrointestional disorders, and neurological disorders. Usually these symptoms abate within 14 to 21 days. HIV

antibodies appear in the bloodstream within three 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 4.107; Crowe & McGrath, Acute HIV Infection, in AIDS Knowledge Base 4.2-1 to 4.2-4; Saag, AIDS: Etiology 204-205.

After symptoms associated with the initial stage subside, the disease enters what is referred to sometimes as its asymptomatic phase. The term is a misnomer, in some respects, for clinical features persist throughout, including lymphadenopathy, dermatological disorders, oral lesions, and bacterial infections. Although it varies with each individual, in most instances this stage lasts from 7 to 11 years. The virus now tends to concentrate in the lymph nodes, though low levels of the virus continue to appear in the blood. Cohen & Volberding, AIDS Knowledge Base 4.1-4, 4.108; Saag, AIDS: Etiology 205-206; Staprans & Feinberg, Natural History and Immunopathogenesis of HIV-1 Disease, in Medical Management of AIDS 29, 38. It was once thought the virus became inactive during this period, but it is now known that the relative lack of symptoms is attributable to the virus' migration from the circulatory system into the lymph nodes. Cohen & Volberding, AIDS Knowledge Base 4.14. The migration reduces the viral presence in other parts of the body, with a corresponding diminution in physical manifestations of the disease. The virus, however, thrives in the lymph nodes, which, as a vital point of the body's immune response system, represents an ideal environment for the infection of other CD4+ cells. Staprans & Feinberg, Medical Management of AIDS 33-34. Studies have shown that viral production continues at a high rate. Cohen & Volberding, AIDS Knowledge Base 4.1-4; Staprans & Feinberg, Medical Management of AIDS 38. CD4+ cells continue to decline an average of 5% to 10% (40 to 80 cells/mm3) per year throughout this phase. Saag, AIDS: Etiology 207.

A person is regarded as having AIDS when his or her CD4+ count drops below 200 cells/mm3 of blood or when CD4+ cells comprise less than 14% of his or her total lymphocytes. U.S. Dept. of Health and Human Services, Public Health Service, CDC, 1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents and Adults, 41 Morbidity and Mortality Weekly Rep., No. RR-17 (Dec. 18, 1992); Osmond, AIDS Knowledge Base 1.1-2; Saag, AIDS: Etiology 207; Ward, Petersen, & Jaffe, Current Trends in the Epideminology of

> HIV/AIDS, in Medical Management of AIDS 3. During this stage, the clinical conditions most often associated with HIV, such as *pneumocystis carniniipneumonia*, Kaposi's sarcoma, and non-Hodgkins lymphoma, tend to appear. In addition, the general systemic disorders present during all stages of the disease, such as fever, weight loss, fatigue, lesions, nausea, and diarrhea, tend to worsen. In most cases, once the patient's CD4+ count drops below 10 cells/mm3, death soon follows. Cohen & Volberding, AIDS Knowledge Base 4.1-9; Saag, AIDS: Etiology 207-209.

After describing the progression of HIV in the human body, the Supreme Court determined that HIV is a "per se" impairment from the moment of infection 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 state of the disease.

The *Bragdon v. Abbott* decision was misquoted by the media and certain lawyers in holding that HIV was a "per se" disability. In fact, the Supreme Court decision states that it is not finding that HIV is a "per se" disability. What the *Bragdon v. Abbott* decision did hold is that HIV was a "per se impairment from the moment of infection."

After determining that HIV was an impairment from the moment of infection, the next and more difficult part of the disability definition to be determined was whether or not that impairment substantially limited one or more of the major life activities of such individual. In the *Bragdon v. Abbott* decision, the Supreme Court held that Ms. Abbott did have a substantial limitation on one or more of her major life activities in that she had a substantial limitation on the life activity of procreation. However, procreation became an increasingly difficult major life activity for HIV patients to demonstrate as being "substantially limited," especially when the individual was a gay male.

The description of HIV progression and its immediate impact on the immune system of the human body in the *Bragdon v. Abbott* decision will lend support to the determination that HIV is now a "per se" disability under the amended ADA. Unfortunately, many cases which were dismissed between the *Bragdon v. Abbott* decision and the amended ADA. Many HIV positive individuals were thrown out of court on summary judgment because they were unable to satisfy the second part of the first definition of disability. Examples of the outrageous decisions will follow.

6. ***Sutton v United Air Line.*** **119 S.Ct. 2139 (1999)**

As the Supreme Court and the lower federal courts began interpreting the meaning of the Americans with Disabilities Act, it became clear that the persons covered under the definition of "disability" were becoming fewer and fewer. In the *Sutton* Supreme Court decision, the Supreme Court determined that mitigating measures must be taken into consideration in determining whether or not a person with a physical or mental impairment is substantially limited in their major life activities. In *Sutton*, the Supreme Court expressed the "mitigating measures" element of the disability formula as follows:

> We conclude that respondent is correct that the approach adopted by the agency guidelines-that persons are to be evaluated in their hypothetical uncorrected state-is an impermissible interpretation of the ADA. Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures-both positive and negative-must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus "disabled" under the Act.

After *Sutton*, persons with HIV had to demonstrate substantial limitations on one or more major life activities after consideration of the effects of their medication. An individualized assessment was still required. It is interesting to note that in the *Sutton* decision, the Supreme Court clarified that HIV was not a *per se* disability. The Supreme Court stated as follows in the *Sutton* decision:

> Thus, whether a person has a disability under the ADA is an individualized inquiry. See *Bragdon v. Abbott*, 524 U.S. 624, 641-642, 118 S.Ct. 2196, 141 L.Ed.2d 540 (`1998) (declining to consider whether HIV infection is a *per se* disability under the ADA); 29 CFR pt. 1630, App.§ 1630.2(j) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual").

The *Sutton* decision was just one of many decisions which followed which made it more difficult for persons with HIV (and other physical and mental impairments) to fall within the protected class of a person with a disability under the ADA.

7. ***Cruz Carrillo v. American Eagle, Inc.*, 148 F.Supp.2d 142 (Puerto Rico 2001)**

The *Carrillo* case demonstrates some of the absurd decisions which were issued involving persons with HIV. The *Carrillo* case involved a flight attendant who brought a discrimination case against his former employer under the Americans with Disabilities Act. At the close of the plaintiff's case, the employer sought dismissal on the basis that the employee did not establish that he was a person with a disability under the ADA. The Court agreed and threw out the case claiming that the employee had not met his burden in introducing sufficient evidence to demonstrate that he was a person with a disability. Specifically, the Court held as follows, claiming that there was no evidence of a significant risk of infection of female partners by men with HIV:

> Cruz Carrillo has not met his 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.

In summary, the Court concluded that the employee had failed to show that his impairment substantially limited his asserted major life activity of reproduction. This is just one example of many cases where an HIV positive individual's case was dismissed on summary judgment or a motion to dismiss because the Court found that the HIV positive employee was not a person with a disability under the ADA.

A. **The ADA Amendments Act of 2008, 247 F.3d 229 (5th Cir. 2001)**

On January 1, 2009, the ADA Amendments Act of 2008 took affect. In short, the language of the ADA Amendments Act of 2008 indicates, without specifically naming HIV, that HIV infection should now be considered a disability under the ADA. Attached hereto as Exhibit "B" is a complete copy of the text of the ADA Amendments Act of 2008.

The ADA Amendment states that the mitigating measures affect of the Supreme Court decision in *Sutton v. United Airlines* is rejected.

Additionally, the "regarded as" prong of the definition of disability under the ADA should follow the reasoning of the Supreme Court decision in *School Board of Nassau County v. Arline* which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973 (i.e. the "regarded as" definition of handicapped).

With regard to the first definition of disability, that being a physical or mental impairment that substantially limits one or more major life activities of such individual, the ADA Amendment specifically states that a major life activity also includes the operation of a major bodily function, including, but not limited to functions of the immune system. Since HIV is a disease which primarily attacks the body's immune system, as described in detail in the *Bragdon v. Abbott* decision, it appears to be clear that not only is HIV a "per se" physical impairment from the moment of infection, but it is now a "per se" substantial limitation on a major life activity of the operation and functions of the immune system. Hence, HIV is a "per se" disability under the ADA.

The ADA Amendment goes on to state that the definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act to the maximum extent permitted by the terms of the Act. Moreover, an impairment that is episodic or is in remission is a disability if it would substantially limit a major life activity when active.

It is clear that the purpose of the ADA Amendments Act of 2008 is to broaden the scope and coverage of persons who are considered to have a disability under the ADA. By the express language of the ADA Amendments Act of 2008, without specifically stating any particular diseases, HIV appears to be a "disability" from the moment of infection.

The ADA Amendment Act of 2008 is not a retroactive law. It took affect January 1, 2009. Accordingly, in order to bring suit under the amended ADA, the discriminatory employment acts or violations of Title III under public accommodations, would have to occur after January 1, 2009 to be actionable. Of course, someone could bring an action for violation of the ADA which occurred prior to January 1, 2009, but falling within the definition of "disability" pre-Amendment is unlikely.

8. ***Flowers v Southern Regional Physician Services, Inc.*, 247 F.3d 229 (5th Cir. 2001)**

The *Flowers* case is an employment discrimination case brought under the ADA by an HIV positive employee. The significance of the *Flowers* decision is that

the Fifth Circuit Court of Appeals found that a cause of action for disability-based harassment is viable under the ADA. In doing so, the Fifth Circuit in *Flowers* set forth the elements of a disability-based harassment case as follows:

> A cause of action for disability-based harassment is "modeled after the similar claim under Title VII." *McConathy v. Dr. Pepper/Seven Up Corp.*, 131 F.3d 558, 563 (5th Cir. 1998). 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.
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> Moreover, the disability-based harassment must "be sufficiently pervasive or severe to alter the conditions of employment and create an abusive working environment." *McConath*y, 131 F.3d at 563 (internal quotations omitted) (quoting *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 806 (5th Cir. 1996)

Although the Fifth Circuit affirmed the final judgment entered on the jury verdict as to the employer's liability for disability-based harassment, the Fifth Circuit vacated the jury's damage award and remanded the case for the entry of an award of only nominal damages. Nevertheless the *Flowers* decision established the validity of a cause of action of disability-based harassment.

9. ***Cleveland v Policy Management Systems Corporation*, 119 S.Ct. 1597 (1999)**

In order for an individual to succeed on an employment discrimination case under the Americans with Disabilities Act, the employee must demonstrate that he or she was discriminated against because of his or her disability and that he or she is otherwise qualified to perform the essential functions of the job with or without reasonable accommodations.

Sometimes employees who lose their job also file for social security disability benefits. Many times they file for social security disability in an effort to get money to live. When an individual files for social security disability, they must represent to the social security administration that they are unable to perform any job in the national economy. However, the social security administration makes its determination on whether or not a person meets the definition of disability under the social security administration guidelines without consideration of reasonable

accommodations. Therefore, an employee could be able to perform the essential functions of the job with reasonable accommodations, while at the same time being able to qualify for disability under the social security administration regulations because they are unable to perform any work in the national economy regardless of consideration of reasonable accommodations. It should be noted that this is a fine line to walk. Most often when an individual files for social security disability or private disability, they make statements and representations which indicate that they are unable to do any job whether or not reasonable accommodations are provided.

If an employee is unable to perform any work with or without reasonable accommodations, then that employee is not "otherwise qualified" and is not able to maintain an employment discrimination case under the Americans with Disabilities Act or Texas State Law. However, the Fifth Circuit had created a presumption that an individual who qualified under the social security administration regulations for benefits was not "otherwise qualified" under the ADA.

In the United States Supreme Court case of *Cleveland v. Policy Management Systems Corporation,* the Supreme Court determined that the "presumption" was not appropriate and rejected such presumption. The Supreme Court stated that an ADA suit claiming that the plaintiff can perform her job with reasonable accommodations may well prove consistent with a SSDI claim that the plaintiff could not perform her own job (or other jobs) without it. "Hence, an individual may qualify for SSDI under the SSA's administration rules and yet, due to special individual circumstances, remain capable of "performing the essential functions" of her job."

The Supreme Court held that it would not apply a special legal presumption permitting someone who has applied for, or received, SSDI benefits to bring an ADA suit only in "some limited or highly unusual set of circumstances." Rather, a plaintiff who brings an ADA Title I employment case, must offer a sufficient explanation as to how he or she is "otherwise qualified" under the ADA while being eligible for disability benefits under the social security administration rules. The Supreme Court explained the burden as follows:

> When faced with a plaintiff's previous sworn statement asserting "total disability" or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless "perform the essential functions" of her job, with or without "reasonable accommodations."

Accordingly, it is possible for a plaintiff to maintain both an ADA Title I employment discrimination case, and receive social security disability benefits, but such circumstances are rare.

II. Insurance Law

1. *McNeil v Time Insurance Company*, 205 F.3d 179 (5th Cir.)

Texas law has long made it illegal for insurance companies to discriminate against an individual because of a handicap or disability. However, the question often presented was whether it was discriminating to have an insurance provision which limited benefits to a person who had a particular disease.

In *McNeil v. Time Insurance Company,* an insurance policy purchased by Mr. McNeil limited coverage for AIDS and AIDS related complex to $10,000 during the first two years of the policy but provided maximum benefits after that. Mr. McNeil purchased an insurance policy at a time when he was HIV negative or at least did not know of his HIV positive status. Subsequently, within the first two years of the policy, Mr. McNeil tested HIV positive and developed AIDS. He subsequently incurred more than $400,000 in hospital bills and then died.

The question in this case is whether or not the policy provision limiting benefits for AIDS and AIDS related complex to $10,000 violated the Texas Insurance Code or Title III of the Americans with Disabilities Act. For purposes of the case, the Court assumed that AIDS was a handicap and a disability.

The Court explained that the insurance company offered Mr. McNeil the same policy under the same terms that it offered everyone else. It did not treat him differently because he was handicapped, which is what the Court understood "discrimination" to mean. The Court concluded that the insurance policy did not violate the Texas Insurance Code.

The next question addressed by the Court was whether or not the insurance policy violated the public accommodation section of the Americans with Disabilities Act. Title III of the Americans with Disabilities Act prohibits the owner, operator, lessee, or lessor from denying the disabled access to or interfering with their enjoyment of the goods and services of a place of public accommodation. The Court held that Title III does not, however, regulate the content of the goods and services that are offered. The Court read Title III of the ADA to prohibit an owner of a place of public accommodation from denying the disabled access to the goods or services and from interfering with the disabled's full and equal enjoyment of the goods and services offered. However, the owner need not modify or alter the goods and services that it offers in order to avoid violating Title III of the ADA.

The Fifth Circuit Court of Appeals held that a policy provision which limited AIDS benefits to $10,000 did not violate the Texas Insurance Code or Title III of the ADA by stating as follows:

> It follows from our construction of the statute that Time has not violated Title III by offering a policy that limits the amount of coverage for AIDS to $10,000 over the first two years of the policy. The "good" in this case is the insurance policy that Time offered to the members of the Texas Optometric Association. To establish a Title III violation, Mr. McNeil is required to demonstrate that Time denied his son access to that good or interfered with his son's enjoyment of it. Mr. McNeil concedes that Time offered the policy to his son on the same terms as it offered the policy to other members of the association; that is, his son had non-discriminatory access to the good. Mr. McNeil has not alleged that Time interfered with his sons' ability to enjoy that policy as it was written and offered to the non-disabled public. Instead, Mr. McNeil's Tile III challenge is to a particular provision of the policy - the AIDS limitation. He is, in effect, challenging the content of the good that Time offered. Because Title III does not reach so far as to regulate the content of goods and services, and because it is undisputed this limitation for AIDS is part of the content of the good that Time offered, Mr. McNeil's Title III claim must fail.

The Fifth Circuit affirmed the district court's dismissal of Mr. McNeil's Title III claim.

A. **Texas Insurance Code Provisions**

Although the *McNeil* case described above holds that limiting insurance benefits for HIV and AIDS related claims does not violate the Texas Health Insurance Code and Title III of the ADA, there are a number of insurance code provisions which provide protection to persons with HIV. Chapter 544 of the Insurance Code prohibits discrimination. Specifically, Section 544.002 prohibits a person from refusing to insure or provide coverage to an individual, refuse to continue to insure or provide coverage to an individual, limit the amount, extent or kind of coverage available for an individual, or charge an individual a rate that is different from the rate charged to other individuals for the same coverage because of the individual's disability or partial disability. A copy of various insurance code provisions are attached hereto as Exhibit "C".

Title 8 of the Insurance Code prohibits the cancellation of an insurance policy because someone has been diagnosed as having AIDS or HIV, has been treated for AIDS or HIV, or is being treated for AIDS or HIV. The insurance company may cancel the insurance policy for failure to pay a premium or fraud or misrepresentation in obtaining coverage by not disclosing a diagnosis of AIDS or HIV related condition.

The Insurance Code in Chapter 545 provides extensive guidance in connection with HIV testing. An insurer may request or require an applicant to take an HIV related test in connection with the application. An insurer that requests or requires applicants to take an HIV related test must request or require the test on a non-discriminatory basis. Certain inquiries regarding previous tests are prohibited. If an applicant tests positive, certain notices and counseling must be provided. Confidentiality of test results is required. An HIV positive applicant can be denied private health insurance, life insurance, and long-term disability insurance coverage by private insurance companies.

There are two ways in which an HIV positive person may obtain health insurance in Texas. The first is to go to work for a small employer (defined as an employer who employs between two and fifty employees) who offers health insurance. Small employers must provide the same health benefit plan to each employee and dependant. A small employer cannot deny health insurance to certain employees based upon the employees health condition. Rule 26.7 of the Texas Administrative Code is attached hereto.

The second way in which an HIV positive person can obtain major medical health insurance in through the Texas Health Insurance Risk Pool. An HIV positive person is automatically eligible for the Texas Health Insurance Risk Pool as long as he or she is not excluded under specific provisions provided by the Pool's regulations (unrelated to health issues). The Texas Health Insurance Risk Pool is an excellent source for persons with HIV to obtain private health insurance. Of course, they must pay for it but there are different plans and deductibles for purchase. It is also important to remember that employees who have life insurance through their employer have thirty one (31) days to convert the life insurance to an individual policy upon termination of employment.

2. ***Union Bankers Insurance Company v Shelton*, 889 S.W.2d 278 (Tex. 1994)**

As discussed above, one of the grounds for cancelling an insurance policy for HIV or AIDS is if there was fraud or misrepresentation in obtaining coverage by not disclosing a diagnosis of an AIDs or HIV related condition. The Supreme Court of Texas in *Union Bankers Insurance Company v. Thomas D. Shelton* set forth the

elements which must be pled and proved in order for an insurance company to cancel a private policy based on misrepresentation. Specifically, the requirement that an insured intended to deceive the insurance company is well established in the common law of this State. The Supreme Court set forth five (5) elements which must be pled and proved before an insurer may cancel a policy because of misrepresentation. The Supreme Court set forth the five (5) elements as follows:

> It is now settled law in this state that these five elements must be pled and proved before the insurer may avoid a policy because of the misrepresentation of the insured: (1) the making of the representation; (2) the falsity of the representation; (3) reliance thereon by the insurer; (4) the intent to deceive on the part of the insured in making the same; and (5) the materiality of the representation.

An insured's intent to deceive must be shown in order for an insurance company to raise a defense of misrepresentation on the basis of a false statement by the insured in the application for any type of insurance. Additionally, the Court found that there is a cause of action for breach of the duty of good faith and fair dealing when the insurer wrongfully cancels an insurance policy. The Supreme Court sets forth this cause of action as follows:

> We hold that a cause of action for breach of the duty of good faith and fair dealing exists when the insurer wrongfully cancels an insurance policy without a reasonable basis. A cause of action is stated by alleging that the insurer had no reasonable basis for the cancellation of the policy and that the insurer knew or should have known of that fact.

In light of the decision in the above case, HIV positive individuals who have their private insurance policy wrongfully cancelled by the insurance company have a case for breach of contract and breach of duty of good faith and fair dealing. A private cause of action for breach of contract and breach of duty of good faith and fair dealing is preempted by ERISA in an employer provided policy.

III. <u>Confidentiality</u>

1. ***Santa Rosa Health Care Corporation v Garcia*, 964 S.W.2d 940 (Tex. 1998)**

Texas has long had an HIV confidentiality statute. In 1989 Texas adopted a statute dealing with HIV testing and HIV confidentiality. That statute is found in Section 81 of the Texas Health and Safety Code. The statute has remained primarily unchanged except for an increase in the potential damages since its inception. In order to appreciate the HIV confidentiality statute, you must begin with the

definitions of the statute. The most important defined term in the statute is "test result". Test result is defined in Section 81.101(5) of the Texas Health and Safety Code as follows:

> (5) "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.

Section 81.103 of the Texas Health and Safety Code states that 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 that section. Section 81.103 sets forth various exceptions to the general rule that a test result is confidential. There are nine stated exceptions to the HIV confidentiality statute. For example, one exception is that a test result may released to a physician, nurse or other health care personnel who have a legitimate need to know the test result in order to provide for their protection and to provide for the patient's health and welfare. Another exception is that a test result may be released to the person tested or a person legally authorized to consent to the test on the person's behalf. Finally, a test result may be released to the spouse of the person tested if the person tests positive for AIDS or HIV infection, antibodies to HIV or infection with any other probable positive agent of AIDS.

Section 81.104 sets forth various civil penalties for a person who violates the HIV confidentiality statute. The penalties include a civil penalty, actual damages, court costs, and attorney's fees. It is also important to note that each release or disclosure made is a separate violation. Finally, Section 81.104(e) states that "a defendant in a civil action brought under this Section is not entitled to claim any privilege as a defense to the action."

In *Santa Rosa Health Care Corp.* case, the hospital was sued by the spouse of an individual who may have had HIV or AIDS and may have infected the complaining party. The Supreme Court of Texas reviewed the HIV confidentiality statute and explained that since the hospital did not actually know whether the patient had tested HIV positive, the hospital was prohibited by the HIV confidentiality statute from warning the spouse of the individual. "Santa Rosa never tested Balderas for the HIV virus. As Santa Rosa had not tested Balderas for HIV, and therefore did not know whether he had tested positive or not, it was prohibited from notifying Garcia that she was at risk. In fact, if Santa Rosa had released the results to Garcia, it would have been subject to civil or criminal sanctions."

The Supreme Court of Texas held that the hospital had no statutory or common law duty to notify Garcia that she was at risk of contracting the HIV virus from Balderas. The Supreme Court further held that Santa Rosa had no common law duty to notify Garcia that she was at risk of contracting HIV from Balderas. The Supreme Court reviewed the HIV confidentiality statute in particular detail in order to find the hospital had no liability to the spouse who had brought suit under the express language of the HIV confidentiality statute.

2. ***New Times, Inc. v DOE*, 183 S.W.3d 122 (Tex. App. Dallas 2006)**

In the *New Times, Inc. v. John Doe* case, a Dallas newspaper wrote an article focused on alleged fiscal mismanagement among former and current leaders of the Dallas Cathedral of Hope Church. One allegation discussed in the article was an attempt by the church officials to include unpaid volunteers on the church's insurance. In the article, the reporter wrote that Jean Morris, a former director of administration at the church, alleges senior church leaders asked her to add volunteers such as John Doe, who was HIV positive, to the church's insurance policy even though only full-time, paid employees were eligible. The reporter did not contact John Doe for comment before the article was published. The reporter assumed, without confirming with John Doe, that his HIV status was not confidential. Although the reporter did not know at the time she researched and wrote the article, John Doe's HIV status had in fact been published due to his participation in the musical group, Positive Voices.

John Doe sued the newspaper for wrongful disclosure of test results in violation of the HIV confidentiality provision in the Texas Health and Safety Code. The Dallas Court of Appeals began its analysis of the case with the statutory definition of test result. Although the Court read the definition of "test result" as being broad and having been interpreted broadly in the *Santa Rosa Health Care Corp.* case, because there was no actual "test" taken from John Doe, the Dallas Court of Appeals determined that John Doe's interpretation of "test result" would extend the reading of the statute to situations completely unrelated to any testing under the act.

Accordingly, since no court has extended the act to include the express language of "test result" the Dallas Court of Appeals declined to do so. The Appellate Court ruled that John Doe take nothing because the disclosure of his test results was not within the broad definition of "test results" under the statute. The Dallas Court of Appeals held as follows:

> Our holding is limited to the circumstances of this case, in which appellants did not possess or have knowledge that appellee had or had not been tested for AIDS or HIV infection, and had no knowledge of

> or connection to appellee's medical care, history, records, or other health or medical information. *See* TEX. HEALTH & SAFETY CODE ANN. §81.101(5) (" 'test result' means any statement that indicates that an identifiable individual has or has not been tested for AIDS or HIV infection ..., including a statement or assertion that the individual is positive, negative, at risk, or has or does not have a certain level or antigen or antibody"); §81.103(a) ("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...").

It is also important to note that the Court discusses the potential damage amount if John Doe's HIV confidentiality rights were violated. The Court states that under John Doe's interpretation for a willful violation of the HIV confidentiality statute, damages could reach three billion dollars. This appears to be an opinion in which a court is looking at the end result and then fashioning its opinion to avoid a windfall by the plaintiff.

There are few HIV confidentiality cases reported in Texas. The *Santa Rosa Health Care Corp.* and the *New Times, Inc*. cases discussed above are two of the few cases discussing the HIV confidentiality statute. Additionally, there are no cases that explain the section of the statute which states that: "In a civil action no claim of privilege may be asserted". In that regard, practitioners should be careful about disclosing someone's HIV status in judicial proceedings. Since no claim of privilege is applicable, the judicial privilege may not apply.

Section 81.105 of the Texas Health and Safety Code states that a person may not perform a HIV test without obtaining the informed consent of the person to be tested.

Section 81.102 of the Texas Health and Safety Code states that a person may not require another person to under go an HIV test and then sets forth various exceptions to the general rule prohibiting HIV testing. Some of the common exceptions to the HIV testing statute is a medial test or procedure under the insurance code, a medical procedure to be performed on the person that could expose health care personnel to HIV and there is sufficient time to receive the test result before the procedure is conducted, and finally, if the medical procedure or test is necessary as a bona fide occupational qualification and there is not a less discriminatory means of satisfying the occupational qualification. An employer who alleges that a test is necessary as a bona fide occupational qualification has the burden of proving that allegation.

Section 81.103(d) explains the procedure by which someone tested for HIV may voluntarily release or disclose their test results to another person. The

authorization must be in writing, signed by the person tested or the person legally authorized to consent to the test, and must state the person or class of persons to whom the test results may be released or disclosed.

Section 81.108 states that the insurance code and the rules adopted by the State Board of Insurance govern all practices of insurers in testing applicants for HIV or AIDS.

Section 81.109 sets forth the rules requiring counseling for positive HIV test results.

IV. **Duty to Warn**

1. ***Thapar v Zezulka*, 994 S.W.2d 635 (Tex. 1999)**

This case involves the question of whether a mental health professional can be liable and negligent for failure to warn the appropriate third parties when a patient makes specific threats of harm to a readily identifiable person. Stated in another way, does Texas adopt the *Tarasoff* doctrine of California. The answer is "no".

The Texas Supreme Court described the *Tarasoff* doctrine as follows:

> The California Supreme Court first recognized a mental-health professional's duty to warn third parties of a patient's threats in the seminal case *Tarasoff v. Regents of University of California*. The court of appeals here cited *Tarasoff* in recognizing a cause of action for Thapar's failure to warn of her patient's threats. But we have never recognized the only underlying duty upon which such a cause of action could be based - a mental-health professional's duty to warn third parties of a patient's threats. Without considering the effect of differences in the development of California and Texas jurisprudence on the outcome of this issue, we decline to adopt a duty to warn now because the confidentiality statute governing mental-health professionals in Texas makes it unwise to recognize such common-law duty.

As you can see from above, the Texas Supreme Court has declined to adopt a duty to warn because the confidentiality statute governing mental health professionals in Texas makes in unwise to recognize such common law duty.

In refusing to follow the *Tarasoff* doctrine, the Supreme Court of Texas sites the *Santa Rosa Health Care Corporation* case and the Texas HIV confidentiality statute as support. The Supreme Court stated as follows:

> Zezulka complains that Thapar was negligent in not warning members of the Zezulka family about Lilly's threats. But disclosure by Thapar to one of the Zezulkas would have violated the confidentiality statute because no exception in the statute provides for disclosure to third parties threatened by the patient. We considered a similar situation in *Santa Rosa Health Care Corp. v. Garcia*, in which we concluded there is no duty to disclose confidential information when disclosure would violate the confidentiality statute. The same reasoning applies here. Under the applicable statute, Thapar was prohibited from warning one of his patient's potential victims and therefore had no duty to warn the Zezulka family of Lilly's threats.

The Texas Supreme Court refused to follow the *Tarasoff* doctrine and further declined to impose a common law duty on mental health professionals to warn third of their patient's threats. In light of the Texas Supreme Court's decision in the *Thapar* case, physicians and other health care professionals should be careful and understand their duties of confidentiality before they breach their client's HIV confidentiality protections. Of course, certain circumstances involving the intentional spread of HIV could put a physician, mental health professional, or attorney in a difficult position. In particular, a difficult ethical and legal situation could arise if the professional care provider is representing both parties to a sexual relationship and that professional learns that one party is HIV positive and that the second party is unaware of the HIV status of their sexual partner. Although there is no duty to warn in Texas, and same sex partners cannot be legal "spouses" for the exception under the HIV confidentiality statute, due to the limited case law under the HIV confidentiality statute, such professionals should proceed cautiously and obtain professional legal advice before deciding how to proceed in such a difficult situation.

V. **Criminal Law**

1. ***Weeks v State of Texas*, 834 S.W.2d 559 (Tex. App. Eastland 1992)**

It is well established in the medical community that HIV is not transmitted by saliva. HIV is transmitted by blood, semen, vaginal secretions and breast milk. However, when one of those infectious fluids is mixed with a non-infectious fluid, HIV transmission could occur. There are still some controversial figures which claim that HIV is transmitted by saliva. That is not a generally accepted medical principle.

In any event, there are a number of cases in Texas which have convicted an individual of attempted murder for attempting to infect a third party, usually a prison guard, with HIV by spitting on him. One such case is the *Weeks v. State* case. In that case, the prisoner spit twice in the face of a prison guard and stated that he was going

to take somebody with him when he went. The prison guard testified that the prisoner spit on him and that the prisoner's saliva covered his glasses, his lips and his nose. The prison guard testified that the saliva went up into his nose but the prison guard was uncertain as to whether any of the prisoner's saliva went into his mouth. The prisoner was charged and convicted of attempted murder for spitting on the prison guard. The Texas Court of Appeals decision states as follows:

> Under TEX. PENAL CODE ANN. § 15.01(a) (Vernon Supp. 1992), the essential elements of an attempt offense are that: a person, with specific intent to commit an offense, does an act amounting to more than mere preparation that tends, but fails, to effect the commission of the offense intended. To prove attempted murder, it is sufficient to show that the accused had the intent to cause the death of the complainant and that he committed an act, which amounted to more than mere preparation, that could have caused the death of the complainant but failed to do so. The State was required to prove that appellant's intent, when he spit on the officer, was to cause the officer's death; that appellant was infected with HIV at the time he spit on the officer; and that this act was more than mere preparation which tended, but failed, to effect the commission of the offense intended, which was the officer's death.

During the trial, controversial expert witnesses were introduced which claimed that HIV was theoretically transmissible through saliva. The Appellate Court upheld the attempted murder conviction by stating as follows:

> The jury chose to believe the witnesses who testified that HIV could be transmitted through saliva. If a rational trier of fact could have reached that result based upon the evidence in this particular case, it would be improper for this court to set aside the jury's verdict. While the evidence was highly controverted, there was sufficient evidence in the record, when considered in the light most favorable to the verdict, that appellant could have transmitted HIV by spitting.

The Weeks decision is just one of many cases in which an HIV positive prisoner was found guilty of attempted murder and sentenced accordingly. There are additional cases involving the intentional transmission of HIV in which a man's penis has been held to constitute a deadly weapon in order to obtain a criminal conviction for the intentional transmission of HIV.