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HIV+ Surgical Tech: Removal From O.R. Is Not Disability Discrimination, Court Rules.

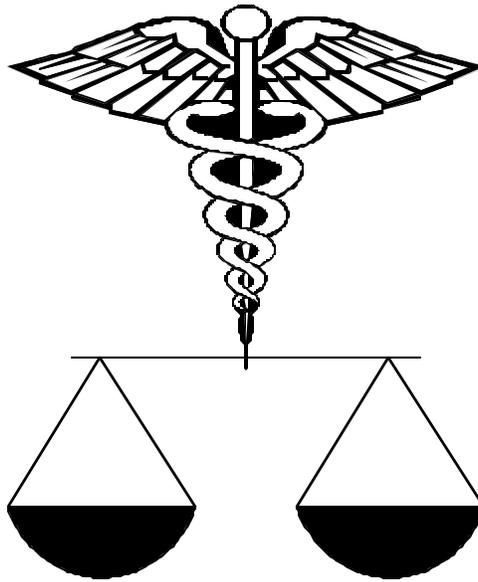
Long-term subscribers may recall we covered this subject in December, 1995. "HIV+ Surgery Tech: Removal From OR Ruled Not Disability Discrimination," (4)3, p. 1 Dec. '95.

In that story we reported a 1995 ruling by the U.S. District Court for the Western District of Michigan. In February, 1998 the U.S. Circuit Court of Appeals for the Sixth Circuit upheld that same lower-court ruling, in light of recent cases from the U.S. Supreme Court and other Federal Circuit Courts of Appeals around the nation.

The Circuit Court began by noting that the disability discrimination laws in employment are meant to protect persons with disabilities from deprivations based on prejudice, stereotypes or unfounded fear, while giving appropriate weight to the legitimate goal of preventing other persons from exposure to significant health and safety risks.

It has been taken for granted for some time that an HIV-positive worker is by law a person with a disability.

According to the court, few aspects of disability discrimination law give rise to the same level of public fear and misapprehension as the possibility of HIV contagion from an infected healthcare worker. The fact that some persons with



An HIV-positive healthcare worker is not considered qualified for a specific employment position if the worker poses a direct threat to the health or safety of patients which cannot be eliminated through reasonable accommodation.

HIV-positive healthcare workers may be excluded from exposure-prone procedures.

HIV may pose a health threat to others under certain circumstances does not justify exclusion of all persons with HIV from healthcare employment.

The law says in general terms that persons with contagious diseases must have their individual circumstances evaluated in light of the scientific evidence, rather than being victimized by discrimination based on mythology.

According to the court, an individual with a contagious disease is not qualified for a specific position and cannot invoke legal protection if excluded from the position, if the individual poses a direct threat to the health or safety of others that cannot be eliminated with reasonable accommodation.

Whether the possibility of disease transmission is a direct threat depends in general terms on how the disease is actually transmitted, the severity of the risk if the disease is passed on, and the probability the disease will be transmitted, the court pointed out.

Where there is no direct threat of an HIV-positive healthcare worker in a specific job transmitting HIV infection to a patient, it is unlawful disability discrimination to exclude the worker from the position based on the worker's HIV status.

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To assess whether this HIV-positive surgery tech posed a direct threat of passing HIV infection to a patient, the court looked at his job description and at guidelines from the Centers for Disease Control and Prevention.

This hospital's written job description for a surgical technician stated that on an infrequent basis the tech could be required to assist the surgeon by holding retractors, by manually drawing back muscle tissue and by assisting with suturing inside a body cavity.

The CDC's guidelines do not find a direct threat of HIV transmission from healthcare worker to patient in most medical and surgical procedures, even invasive procedures such as insertion of IV lines, the court noted. However, the court said the CDC has defined a class of exposure-prone invasive procedures which pose a direct threat which are off-limits to HIV-positive workers.

The court ruled it is not disability discrimination to exclude an HIV-positive healthcare worker from a job which entails participation in exposure-prone procedures as defined by the CDC.

In essence there must be a real threat of an HIV-positive worker's skin being poked or cut and the worker then bleeding unaware into a patient's body cavity or surgical wound, to justify the worker being excluded from the position on the basis of the worker's HIV status.

The court noted this worker was offered a position in the O.R. not involving a threat of HIV transmission, but had turned it down. **Estate of Mauro v. Borgess Medical Center, 137 F. 3d 398 (6th Cir., 1998).**