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# AIDS AND ATHLETICS

*Matthew J. Mitten\**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	5
II.	TRANSMISSION OF HIV DURING ATHLETIC EVENTS .....	7
III.	MANDATORY HIV TESTING OF ATHLETES .....	12
	A. Constitutional Claims .....	13
	1. State Action Requirement .....	13
	2. Supreme Court Mandatory Substance Testing Cases .....	14
	3. HIV Testing .....	15
	a. <i>Preventing HIV Transmission to Others</i> .....	17
	b. <i>Preventing Harm to HIV Positive Athletes</i> .....	20
	c. <i>Preserving the Integrity of Athletic Competition</i> .....	21
	B. Statutory Claims .....	22
IV.	EXCLUSION OF INDIVIDUALS WITH AIDS OR HIV INFECTION FROM ATHLETIC COMPETITION .....	23
	A. Rehabilitation Act of 1973 .....	25
	1. Preventing Harm to HIV Positive Athletes ...	28
	2. Preventing HIV Transmission to Other Athletes .....	30
	3. Excluding "Solely By Reason of Handicap" ..	33
	B. Americans With Disabilities Act .....	35
V.	CONCLUSION .....	39

## I. INTRODUCTION

In November, 1991, Earvin "Magic" Johnson, the Los Angeles Lakers superstar player, retired from the National Basketball Associ-

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ation (NBA) because he tested positive for Human Immunodeficiency Syndrome (HIV).<sup>1</sup> HIV is generally believed to cause Acquired Immune Deficiency Syndrome (AIDS), a disease that inevitably is fatal.<sup>2</sup> Thereafter, Johnson returned to basketball and won the Most Valuable Player award at the 1992 NBA All-Star Game and led the United States men's basketball team to the gold medal in the 1992 Summer Olympics.<sup>3</sup> In September, 1992, Johnson announced his decision to rejoin the Lakers, making him the first player to play a professional sport while known to be HIV positive.<sup>4</sup>

Prior to the beginning of the 1992 NBA season, Johnson again retired because of opposing players' concerns that competing against him would expose them to the risk of HIV infection.<sup>5</sup> These fears were exacerbated by a cut on Johnson's arm suffered during a preseason basketball game.<sup>6</sup> Even prior to this incident, one Australian Olympic basketball team member said if his team were scheduled to play the United States for the gold medal, he would prefer to skip the game and accept the silver medal rather than play against Magic Johnson.<sup>7</sup>

Several athletes publicly have expressed concerns about perceived health risks from playing contact sports with HIV positive athletes.<sup>8</sup> Despite assurances from medical experts that the risk of HIV transmission during an athletic event is extremely low, they fear

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1. Mark Heisler, *Lakers Star Decides to Retire Despite Good Medical Status*, *HOU. CHRON.*, Nov. 3, 1992, at 1B.

2. *America Living with AIDS*, Report of the National Commission on Acquired Immune Deficiency Syndrome (1991), at 1, 11-15 [hereinafter 1991 AIDS Report]; Dana G. Seltzer, *Educating Athletes on HIV Disease and AIDS*, *THE PHYSICIAN AND SPORTSMEDICINE*, JAN. 1993, at 109, 110-11; David Perlman, *HIV is Never Truly Latent*, *S.F. CHRON.*, Mar. 25, 1993, at A2; Sheryl Stolberg, *Studies Rebut Controversial AIDS Theory*, *L.A. TIMES*, Mar. 11, 1993, at A18.

3. Michael Kinsley and Steve Meyerhoff, *AIDS & Sports*, *THE SPORTING NEWS*, Nov. 9, 1992, at 17.

4. Mark Heisler, *Johnson Runs Risk, Returns to Lakers*, *HOU. CHRON.*, Sept. 30, 1992, at 1C.

5. *Primetime Live: Earvin "Magic" Johnson*, Transcript #270 (ABC television broadcast Nov. 5, 1992) [hereinafter Transcript #270]; Bill Sullivan, *Negative Mood Indicated a Resistance to Comeback*, *HOU. CHRON.*, Nov. 3, 1992, at 1B.

6. Transcript #270, *supra* note 5.

7. Elizabeth R. Sullivan, *Australia Stirred by HIV Issue; Officials Say Johnson Welcome Despite Few Players' Aversion*, *WASH. POST*, Feb. 4, 1992, at E7.

8. *Lone Wolf's Battler*, *SPORTS ILLUSTRATED*, May 24, 1993, at 9; Gery Dulac, *Athletes' AIDS Hysteria Baffles Experts; It's Fear of the Unknown that Leads to Concern in Sports Arena*, *THE GAZETTE (MONTREAL)*, Feb. 21, 1991, at C5; Chris Mortonsen, *Future NFL Players, What Are Your Opinions*, *THE SPORTING NEWS*, Jan. 20, 1992, at 1B. A recent study of three hundred college athletes, approximately 75% of whom are football or soccer players, revealed that 45% of them are willing to participate in sports with known HIV positive athletes, 10%

HIV infection could occur from exposure to an HIV positive athlete's blood during a game.<sup>9</sup> Blood frequently is spilled during contact sports, and blood from an HIV positive athlete may be transmitted to another athlete through an open wound, abrasion, or exposed mucous membrane.<sup>10</sup>

Magic Johnson's initial decision to play a contact sport while known to be HIV positive and subsequent retirement from the NBA because of competing players' fears raises several important legal issues. This article initially will discuss the primary means of HIV transmission and the efforts of athletic governing bodies and teams to minimize the risks of HIV infection during athletic competition. The legality of mandatory HIV testing of athletes will then be examined. Finally, the legality of excluding individuals known to be HIV positive from participating in contact sports will be addressed.

## II. TRANSMISSION OF HIV DURING ATHLETIC EVENTS

The 1991 Report of the National Commission on Acquired Immune Deficiency Syndrome (1991 AIDS Report) estimates there are "at least one million Americans silently infected with HIV."<sup>11</sup> By the end of 1990, more than 100,000 people in the United States had died from AIDS.<sup>12</sup> In ten years, AIDS has claimed more American lives than the Korean and Vietnam wars combined.<sup>13</sup>

The 1991 AIDS Report explains:

When considering prevention strategies to alter the course of the HIV epidemic it is important to keep in mind the manner in which the virus is transmitted. The limited modes of transmission of HIV have been well documented. HIV can be transmitted through sexual contact; by the sharing of contaminated injection equipment; through exposure to infected blood or blood products and, during gestation or at birth, from an infected mother to a newborn. Breastfeeding has also been identified as a potential mode of transmission.<sup>14</sup>

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are unwilling, and 45% are not sure about such athletic participation. Leonard H. Calabrese, et al, *HIV and Sports: What is the Risk?*, THE PHYSICIAN & SPORTSMEDICINE, Mar. 1993, at 178.

9. *Nightline: The Risk of AIDS Transmission in Sports*, Transcript #2991 (ABC television broadcast Nov. 9, 1992) [hereinafter Transcript #2991].

10. World Health Organization Consensus Statement—Consultation on AIDS and Sports [hereinafter WHO Consensus Statement], reprinted in 267 JAMA 1311, 1312 (1992).

11. 1991 AIDS Report, *supra* note 2, at 3.

12. *Id.* at 11.

13. *Id.* at 1.

14. *Id.* at 20.

Members of certain groups are at high risk of exposure to HIV infection. Homosexual and bisexual men have an increased risk of HIV exposure because they commonly have multiple sexual partners.<sup>15</sup> Intravenous drug users, including athletes who inject themselves with steroids,<sup>16</sup> may contract HIV infection by sharing contaminated needles or other injection equipment.<sup>17</sup> Hemophiliacs and blood transfusion recipients risk infection from contaminated blood, but careful screening and testing have significantly reduced the likelihood of HIV transmission through the blood supply.<sup>18</sup>

Based on the incidence of HIV infection in the general population, several amateur and professional athletes probably are HIV positive.<sup>19</sup> HIV infection continues to increase at an alarming rate.<sup>20</sup> Consistent with a general population trend, it is anticipated that more athletes will become HIV positive because of off-field conduct, such as sexual promiscuity and intravenous drug use.<sup>21</sup>

To date, there are no proven cases of HIV transmission through athletic competition.<sup>22</sup> There have been no reported instances of HIV infection from exposure to sweat<sup>23</sup> or saliva,<sup>24</sup> both of which commonly occur during an athletic event. There is, however, a theoretical risk of HIV transmission from exposure to contaminated blood during athletic competition.

A 1989 joint report by the World Health Organization and International Federation of Sports Medicine concludes: "There is a possible very low risk of HIV transmission if an infected athlete with a

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15. *Id.* at 26-27.

16. There is one reported case of a bodybuilder who became infected with HIV by using a contaminated needle to inject himself with anabolic steroids. Robert J. Johnson, *HIV Infection in Athletes*, POSTGRADUATE MEDICINE, Nov. 15, 1992, at 73.

17. 1991 AIDS Report, *supra* note 2, at 31-33.

18. *Id.* at 20; *AIDS Transfusion Risk*, HOU. CHRON., Oct. 26, 1992, at 7B.

19. The Centers for Disease Control estimate that approximately one of every 100 men and one of every 600 women in the United States are HIV positive. 1991 AIDS Report, *supra* note 2, at 12-13. Medical experts believe there are HIV infected players at the high school, college and professional levels. Marsha F. Goldsmith, *When Sports and HIV Share the Bill, Smart Money Goes on Common Sense*, 267 JAMA 1311 (1992).

20. 1991 AIDS Report, *supra* note 2, at 3, 11-15.

21. Carol Krucoff, *AIDS Time-Out; Assessing the Risk of HIV Transmission in Sports*, WASH. POST, Mar. 10, 1992, at Z20.

22. Johnson, *supra* note 16; Goldsmith, *supra* note 19; Krucoff, *supra* note 21. It is interesting to note that no documented instances of exposure to HIV infection occurred during the Gay Games in 1982, 1986, and 1990, during which many HIV positive athletes competed in a variety of sports. Goldsmith, *supra* note 19, at 1313.

23. WHO Consensus Statement, *supra* note 10; Johnson, *supra* note 16, at 73.

24. WHO Consensus Statement, *supra* note 10; Seltzer, *supra* note 2, at 112; Peter Rosen, *The Impact of AIDS: A Modern Day Plague*, 65 DENV. U. L. REV. 117, 119 (1988).

bleeding wound or a skin lesion comes into direct contact with another athlete who has a skin lesion or exposed mucous membrane that could possibly serve as a portal of entry for the virus."<sup>25</sup>

There has been one report of possible HIV transmission when two Italian soccer players collided and both sustained bleeding head wounds.<sup>26</sup> Some medical experts doubt that the minimal blood exchange occurring during this contact caused HIV transmission.<sup>27</sup>

The United States Olympic Committee (USOC) has characterized the risk of HIV transmission from sports participation as "remote."<sup>28</sup> An American Academy of Pediatrics policy statement recommends that HIV positive athletes be discouraged from playing sports involving blood exposure, such as football or wrestling, but concludes: "[I]n the absence of any proven risk, involuntary restriction of an infected athlete is not justified."<sup>29</sup>

Dr. Jim Montgomery, the USOC's chief medical officer during the 1992 Summer Olympics, has noted studies indicating that the AIDS virus "probably is dead" within thirty seconds after exposure

25. WHO Consensus Statement, *supra* note 10.

26. Five medical personnel sent the following letter to the editor of a British medical journal:

Sir, — We report a case of HIV-1 seroconversion after an injury during a football match. During a football match in December, 1989, a 25-year-old man collided with another player, a drug abuser who was HIV-1 seropositive. The contact caused in both players a severe skin wound of the eyebrows with copious bleeding. 2 months after the incident the 25-year-old's serum was found to be HIV-1 seropositive by ELISA and western blot. A year before the injury he had been seronegative. A mononucleosis-like syndrome developed 1 month before HIV-1 antibodies were found. He denied homosexual contact or drug abuse; he had not had blood transfusions, injections, or dental care; and he had not been to Africa or the Caribbean. For the previous 4 years he had a stable relationship with a woman who is HIV-1 seronegative and he had never had sex with other women. A test for HIV-1 antigen was negative. His CD4 count was 873/ml, and CD8 count 617/ml (ratio 1.41). He was seronegative for syphilis, hepatitis A and B, and Epstein-Barr virus, cytomegalovirus, and herpes simplex virus. In April, 1990, he had no fever, malaise, fatigue, diarrhea, lymphadenopathy or oral candidal manifestations.

In the absence of other risk factors, this case is compatible with acquisition of HIV-1 infection by traumatic contact with a seropositive man.

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21100 Varese, Italy

DONATO TORRE  
CARMEN SAMPIETRO  
GIORGIO FERRARO  
CLAUDIA ZEROLI  
FILIPPO SPERANZA

335 THE LANCET 1105 (1990).

27. Goldsmith, *supra* note 19, at 1311.

28. Krucoff, *supra* note 21.

29. *Id.*

to air in an open wound.<sup>30</sup> Dr. Robert Cantu, current president of the American College of Sports Medicine, has estimated the risk of HIV transmission through sports contact as "infinitesimally small" and the possibility of "getting it from exposure to blood on the field of play is very, very low."<sup>31</sup>

Although no documented cases of HIV infection from exposure to blood on the playing field exist, there are several confirmed instances of HIV infection from contaminated blood in the health care field. The Centers for Disease Control recently reported that at least thirty-two health care workers have accidentally been infected through contact with HIV positive patients or their blood products.<sup>32</sup>

Dr. David Rogers, professor of medicine at Cornell University and Vice Chairman of the National Commission on AIDS, does not believe the risks of HIV transmission in sports and in the health care field are comparable. He states:

In the health-care cases, the infection in virtually every instance was caused by the transmission of large amounts of blood through hollow-bore needles. With cuts or scratches, the risk is as close to zero as possible. When two people bleed, they bleed out, not in. It's hard to imagine an exchange of enough blood to cause infection.<sup>33</sup>

In a joint report from which the United States Olympic Congress derived its policy of HIV transmission prevention, three sports medicine specialists concluded: "[E]ven if there has been contact with blood, we can compare it with the risk of health care workers, where the probability of transmission is reported to be low, only .035%."<sup>34</sup>

United States professional or amateur sports governing bodies currently do not categorically exclude HIV positive athletes from

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30. John Jeansonne, *Doc's Fear Refuted by USOC; Says Magic Isn't an AIDS Threat*, *NEWSDAY*, Jan. 24, 1992, at 172.

31. Krucoff, *supra* note 21.

32. *32 Medical Workers Infected With AIDS Virus by Patients*, *HOU. CHRON.*, Oct. 30, 1992, at 4A.

33. Scorecard, *SPORTS ILLUS.*, Nov. 30, 1992, at 13. Dr. Johnson, a Johns Hopkins medical school specialist, also has opined:

It takes a fair dose of HIV to infect somebody; and if you think about it, two cuts that knock up against each other are bleeding outward. A cut is not a vacuum. It doesn't suck blood into it. The probability of one cut soaking up enough blood and internalizing it to give a good enough dose just seems quite unlikely to me.

Kinsley & Meyerhoff, *supra* note 3, at 17.

34. Goldsmith, *supra* note 19, at 1313. Data on health care professionals exposed to HIV infection by needle stick show there is about one seroconversion for every 250 accidental exposures. Johnson, *supra* note 16, at 74.

specific sports. The National Collegiate Athletic Association<sup>35</sup> (NCAA) and National Federation of State High School Associations<sup>36</sup> (NFSHSA) recommend against excluding athletes from "participating in any sport merely because they are infected with the HIV virus." A December 1991 NCAA survey indicated that only two responding member schools would bar athletes from competing in any sport if they tested positive for HIV, while seven other schools would restrict participation only in certain sports.<sup>37</sup>

Professional and amateur sports governing bodies have implemented precautions to reduce the risk of HIV transmission during athletic competition. The NBA requires bleeding players to leave the game until the bleeding stops and the wound is bandaged.<sup>38</sup> The NCAA recommends that bleeding players should be removed from games or practices and not be permitted to return without medical staff approval.<sup>39</sup> Several state high school athletic associations have adopted or are considering a similar rule.<sup>40</sup>

The Occupational Safety and Health Administration<sup>41</sup> (OSHA) requires, and the NCAA<sup>42</sup> recommends, that health care personnel follow certain universal precautions established by the Centers for Disease Control (CDC) in treating injuries involving blood and bodily fluids. All blood effectively is treated as if contaminated with HIV. These precautions include cleaning blood-stained surfaces and clothing with a bleach and water solution, covering open wounds, wearing

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35. *AIDS and Intercollegiate Athletics*, N.C.A.A. PAMPHLET (Aug. 1992) [hereinafter NCAA PAMPHLET].

36. *AIDS/Athletics: Is There a Risk?*, NATIONAL FEDERATION TARGET PROGRAM, INC. (Oct. 1992) [hereinafter NFSHSA PAMPHLET].

37. Christopher A. McGrew, *AIDS/HIV Policies: Universal Precautions Must Increase*, NCAA SPORTS SCIENCE EDUCATION NEWSLETTER, Fall 1992, at 1 [hereinafter NEWSLETTER].

38. *Hepatitis B Vaccine*, U.S.A. TODAY, May 5, 1992, at 10C.

39. NCAA Guideline 2H, 1992-93 NCAA SPORTSMED. HANDBOOK 26 [hereinafter SPORTSMED. HANDBOOK]. The NCAA's Executive Committee has directed each individual sport's rules committee to adopt a statement regarding aggressive treatment of bleeding athletes and determine how to integrate it into their respective sports. The NCAA Committee on Competitive Safeguards and Medical Aspects of Sports has developed blood treatment guidelines. Wallace I. Renfro, *Blood-treatment Guidelines Mailed*, THE NCAA NEWS, Dec. 30, 1992, at 1.

40. Doug Mitchell, *UIL to Draft HIV Safety Guidelines*, HOU. POST, Sept. 17, 1992, at B1; Maurice Patton, *Awareness of AIDS Leads Florida to Adopt Infectious-Disease Policy*, USA TODAY, Aug. 11, 1992, at 8C. The National Federation of State High Associations recently adopted a rule requiring bleeding players to leave a game. *High Schools Take Action On Bleeding*, THE NCAA NEWS, Jan. 20, 1993, at 2.

41. 29 C.F.R. § 1910.1030 (1992). The Seventh Circuit recently upheld the legal validity of OSHA's rule on occupational exposure to bloodborne pathogens. *American Dental Ass'n v. Martin*, 984 F.2d 823 (7th Cir. 1993).

42. SPORTSMED. HANDBOOK, *supra* note 39, at 24-25.



rubber gloves during medical treatment, and immediately disposing of blood-stained treatment articles.<sup>43</sup> The 1991 NCAA survey, however, revealed that responding college and university adherence to the CDC's universal precautions was low despite significant familiarity with them.<sup>44</sup>

Many sports associations are providing AIDS awareness and prevention programs for their players. The NBA, National Football League (NFL), and Major League Baseball (MLB) are offering AIDS prevention seminars and distributing literature to players, coaches, and team employees.<sup>45</sup> The NCAA and NFSHSA have distributed information pamphlets regarding AIDS to their members and athletes.<sup>46</sup>

### III. MANDATORY HIV TESTING OF ATHLETES

Because of the medical consensus that the risk of HIV transmission during athletic competition is extremely low, virtually no professional or amateur sports governing bodies require mandatory HIV testing. The NFL does not advocate mandatory HIV testing because of data suggesting that "the risk for H.I.V. acquisition in the NFL is more due to the behaviors off the field."<sup>47</sup> Neither the NCAA<sup>48</sup> nor NFSHSA<sup>49</sup> recommend mandatory HIV testing for athletes in any sport.

Some states require HIV testing for boxers competing within their jurisdiction. For example, Nevada and Oregon require HIV testing for boxers.<sup>50</sup> Similarly, Top Rank, Inc., a boxing promoter, requires all fighters on its cards to be tested for HIV.<sup>51</sup>

To date, no athletes have brought legal challenges to mandatory HIV testing practices, presumably because of the reluctance of athletic governing bodies and teams to implement such a requirement as

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43. *Id.*

44. NEWSLETTER, *supra* note 37, at 1.

45. Kinsley and Meyerhoff, *supra* note 3, at 17.

46. NCAA PAMPHLET, *supra* note 35; NFSHSA PAMPHLET, *supra* note 36.

47. *Football; H.I.V. Tests Stay Voluntary*, N.Y. TIMES, May 29, 1992, at B13.

48. SPORTSMED. HANDBOOK, *supra* note 39, at 24.

49. NFSHSA PAMPHLET, *supra* note 36.

50. Transcript #2991, *supra* note 9. The World Boxing Organization recently stripped Ruben Palacio of Colombia of his featherweight crown and barred him from further competition after he tested positive for HIV before a fight in England. Gerald Eskanazi, *Positive AIDS Test Floors a Champion*, N.Y. TIMES, Apr. 17, 1993, at 34. *See also* Arlene Schulman, *Boxing's Brutal Intimacies Require a Careful Look at AIDS*, N.Y. TIMES, May 9, 1993, at 21.

51. *Boxers Will be Tested For AIDS, Arum Says*, L.A. TIMES, Nov. 15, 1991, at C8.

a condition of participation. Athletes have challenged mandatory testing for recreational and performance enhancing drugs.<sup>52</sup> Individuals also have challenged mandatory HIV testing outside the context of athletics.<sup>53</sup> The factors identified in these cases appear applicable to whether required HIV testing for athletes is legal.

An athlete's consent to HIV testing as a condition of participation in an athletic program will not necessarily preclude a legal challenge to mandatory testing. Although free and voluntary consent validates an otherwise unconstitutional search,<sup>54</sup> coercing an athlete to submit to HIV testing to be eligible for the team or an athletic scholarship is not a valid waiver of one's constitutional rights.<sup>55</sup>

### A. Constitutional Claims

#### 1. State Action Requirement

Most athlete challenges to drug testing have been based on the United States Constitution. As a threshold matter, a drug testing program must constitute "state action" for federal constitutional protections to apply. Drug testing imposed by state athletic governing bodies<sup>56</sup> or a public school<sup>57</sup> satisfies this requirement.

Courts have held that the actions of the United States Olympic Committee<sup>58</sup> and its individual sports governing bodies<sup>59</sup> do not constitute state action. The United States Supreme Court recently held that the NCAA is not a state actor for constitutional purposes.<sup>60</sup> Private schools are not state actors.<sup>61</sup> Drug testing by a professional sports league or team may not satisfy the state action requirement.<sup>62</sup>

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52. See, e.g., *Schail v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1312-1313 (7th Cir. 1988).

53. See, e.g., *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820, 831-32 (5th Cir. 1990); *People v. Adams*, 597 N.E.2d 574 (Ill. 1992).

54. *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

55. *Schail*, 864 F.2d at 1312-313; *Derdeyn v. University of Colorado*, 832 P.2d 1031, 1035 (Colo. Ct. App. 1991), cert. granted, (July 7, 1992).

56. *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), cert. denied, 479 U.S. 986 (1986).

57. *Brooks v. East Chambers Consol. Indep. School Dist.*, 730 F. Supp. 759 (S.D. Tex. 1989), aff'd, 930 F.2d 915 (5th Cir. 1991).

58. *DeFrantz v. United States Olympic Comm'n*, 492 F. Supp. 1181 (D.D.C.), aff'd, 701 F.2d 221 (D.C. Cir. 1980).

59. *Laffer v. Athletic Bd. of Control*, 536 F. Supp. 104 (W.D. Mich. 1982).

60. *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988).

61. *Id.* at 461.

62. See, e.g., *Neeld v. American Hockey League*, 439 F. Supp. 459 (W.D.N.Y. 1977). Some courts have found actions by a professional sports team to constitute state action. See, e.g.,

Even if they are not covered by the United States Constitution, mandatory substance testing policies of private associations, teams, and schools may be subject to state constitutional law<sup>63</sup> or federal<sup>64</sup> and state statutory constraints.<sup>65</sup>

## 2. Supreme Court Mandatory Substance Testing Cases

Athletes have claimed that mandatory drug testing violates the Fourth Amendment's guarantee against unreasonable searches and seizures. The Supreme Court has held that the taking and chemical analysis of a person's blood or urine is a search for Fourth Amendment purposes.<sup>66</sup>

In *New Jersey v. T.L.O.*,<sup>67</sup> the Supreme Court held: "The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'"<sup>68</sup> This balance generally requires that the search be conducted pursuant to a warrant issued by a neutral magistrate upon a showing of probable cause.<sup>69</sup> An individualized suspicion of wrongdoing is not always necessary to sustain the validity of a search.<sup>70</sup> In some instances, special governmental needs beyond normal law enforcement may justify departure from traditional safeguards.<sup>71</sup>

In *Skinner v. Railway Labor Executives Association*,<sup>72</sup> the Supreme Court upheld the validity of federally mandated blood and urine testing of railroad employees directly involved in major train accidents. The Court found the employees to be engaged in "safety-sensitive tasks" with the potential for "great human loss."<sup>73</sup> The

Hertel v. City of Pontiac, 470 F. Supp. 603 (E.D. Mich. 1979); Ludtke v. Kuhn, 461 F. Supp. 86, 93-96 (S.D.N.Y. 1978). See generally Daniel R. Gregus, *The NFL's Drug-Testing Policies: Are They Constitutional?*, 10 THE ENTERTAINMENT AND SPORTS LAWYER 1, 2-3 (Winter 1993).

63. See, e.g., *Hill v. National Collegiate Athletic Ass'n*, 273 Cal. Rptr. 402 (Cal. Ct. App.), cert. granted, 276 Cal. Rptr. 319 (1990).

64. See *infra* notes 131-139 and accompanying text.

65. See *infra* notes 140-142 and accompanying text. See also *Bally v. Northeastern Univ.*, 532 N.E.2d 49 (Mass. 1989).

66. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 615-16 (1989); *Schmerber v. California*, 384 U.S. 757, 767-68 (1966).

67. 469 U.S. 325 (1985).

68. *Id.* at 337 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)).

69. *Skinner*, 489 U.S. at 617.

70. *T.L.O.*, 469 U.S. at 351.

71. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989).

72. 489 U.S. 602 (1989).

73. *Id.* at 619, 628.

Court observed that forty-five train accidents occurred between 1975 and 1983 resulting from errors by alcohol or drug-impaired employees.<sup>74</sup>

The Court held that the compelling public interest in ensuring employee and public safety outweighed the intrusion upon the employees' privacy interests.<sup>75</sup> The Court observed that those subjected to testing are engaged in activities "fraught with such risks of injury to others that . . . can have disastrous consequences."<sup>76</sup>

In *National Treasury Employees Union v. Von Raab*,<sup>77</sup> the Court upheld mandatory testing of certain customs agents for illegal drug use. Agents holding positions where they carried firearms or directly participated in drug interdiction were required to be tested.<sup>78</sup> Promotions of drug users to such positions potentially created "extraordinary safety . . . hazards;" thus, the government's compelling interest in avoiding such hazards outweighed the agents' privacy interests.<sup>79</sup> The Court expressed concern that drug impaired agents may take bribes, engage in unsympathetic law enforcement, or exercise poor judgment in using deadly force.<sup>80</sup>

### 3. HIV Testing

Outside the context of athletics there have been several challenges to mandatory HIV testing on federal and state constitutional grounds. Most challenges are based on the Fourth Amendment's protection against unreasonable searches.<sup>81</sup> Consistent with *Skinner* and *Von Raab*, courts balance the individual's privacy interest against a state actor's justification for mandatory testing.

In determining the nature and extent of intrusion into an individual's privacy, courts consider several factors. A blood test generally is necessary to determine whether one is infected with the AIDS

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74. *Id.* at 607.

75. *Id.* at 632.

76. *Id.* at 628.

77. 489 U.S. 656 (1989).

78. *Id.* at 660-61.

79. *Id.*

80. *Id.* at 668-70.

81. Courts have rejected claims that mandatory HIV testing violates the equal protection and due process clauses. The Supreme Court has held that a rational basis is necessary to justify discrimination against handicapped persons. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). The state's strong interest in preventing the spread of AIDS has been held to justify the mandatory testing of individuals at high risk of contracting or spreading HIV. *See, e.g., Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820, 831-32 (1990); *People v. Adams*, 597 N.E.2d 574 (Ill. 1992).

virus.<sup>82</sup> The taking and testing of blood involves a physical intrusion of one's person which infringes any reasonable expectation of privacy.<sup>83</sup> Although the taking of blood is not judicially considered to be a significant physical intrusion,<sup>84</sup> chemical analysis of a person's blood "can reveal a host of private medical facts" about him or her.<sup>85</sup>

An AIDS blood test is designed to detect the presence of the HIV antibody.<sup>86</sup> The initial screening test is known as enzyme linked immunosorbent assay (ELISA).<sup>87</sup> An initial negative blood test does not absolutely rule out HIV infection.<sup>88</sup> A false negative may be an inherent characteristic of the test or result from the latency period between initial exposure to HIV and development of the HIV antibody which may be as long as one year or more.<sup>89</sup> A second test known as the Western blot test generally is used to confirm an initial positive test result.<sup>90</sup> This two-part testing system, however, may produce a false positive test result.<sup>91</sup>

A person who has been involuntarily tested for AIDS and is informed of a positive result may suffer a severely damaging psychological reaction. As one court observed, "[a] report of a positive HIV test . . . is a very foreboding kind of message and the reaction of patients to this news is devastation."<sup>92</sup> Another court noted that a positive test result "has been compared to receiving a death sentence."<sup>93</sup>

An individual identified as HIV positive may be stigmatized and subject to social disapproval.<sup>94</sup> It has been stated that "AIDS is the

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82. *Doe v. Roe*, 526 N.Y.S.2d 718, 720-21 (Sup. Ct. 1988). See generally Susan J. Levy, Note, *The Constitutional Implications of Mandatory Testing for Acquired Immunodeficiency Syndrome - AIDS*, 37 EMORY L.J. 217, 227-28 (1988).

83. *Skinner v. Railway Labor Executive Ass'n*, 489 U.S. 602, 615 (1989).

84. *Id.* at 624.

85. *Id.* at 617.

86. Seltzer, *supra* note 2, at 113-14.

87. *Id.*

88. Seltzer, *supra* note 2, at 113-14; Levy, *supra* note 82, at 228.

89. Seltzer, *supra* note 2, at 114.

90. *Id.*

91. The Elisa and Western blot battery of tests has a false-positive rate of approximately 1: 135,000. Seltzer, *supra* note 2, at 114.

92. *Anonymous Fireman v. City of Willoughby*, 779 F. Supp. 402, 413 (N.D. Ohio 1991).

93. *Doe v. Roe*, 526 N.Y.S.2d at 722.

94. Legislatures and courts have taken steps to ensure that the identification of HIV positive blood donors remains confidential to protect them from stigmatization and to maintain an adequate voluntary blood supply. See, e.g., *Watson v. Lowcountry Red Cross*, No. 91-2053, 1992 W.L. 207052 (4th Cir. Nov. 2, 1992); *Irwin Memorial Blood Ctrs. v. Superior Court*, 229 Cal. App. 3d 151 (1991). See generally Sharon L. Dieringer, Note, *Blood Donation: A Gift of Life or a Death Sentence?*, 22 AKRON L. REV. 623, 639-41 (1989).

modern day equivalent of leprosy.”<sup>95</sup> One court observed that HIV-positive individuals are “widely stereotyped as indelibly miasmatic, untouchable, physically and morally polluted.”<sup>96</sup> Persons who are HIV positive may be unfairly discriminated against or excluded from certain activities.<sup>97</sup> They also may be falsely labeled as a homosexual or intravenous drug user.<sup>98</sup>

Courts have suggested that an individual has a diminished expectation of privacy regarding one's HIV positive status if he or she currently exhibits symptoms of AIDS<sup>99</sup> or there is a reasonable medical basis for suspecting exposure to HIV.<sup>100</sup> A person's employment within, or involvement with, a highly regulated industry or activity also may create a diminished expectation of privacy of his or her HIV positive status.<sup>101</sup>

Governments and public entities have asserted two primary justifications for mandatory HIV testing: 1) avoiding the spread of HIV infection to others; and 2) ensuring that a person is physically fit to perform an activity without exposing himself or herself to significant health risks. Schools have relied upon similar justifications, as well as a need to maintain the integrity of athletic competition, to support mandatory drug testing of athletes.

#### a. *Preventing HIV Transmission to Others*

Courts have upheld mandatory HIV testing of individuals perceived to have a high risk of transmitting HIV to others. Criminal sex offenders, such as prostitutes, can be required to undergo mandatory testing because they are at a high risk of contracting and transmitting HIV.<sup>102</sup> Persons convicted of illegal possession of hypodermic needles are subject to mandatory testing because HIV is commonly spread by needle-sharing drug users.<sup>103</sup> Prisoners also have been re-

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95. *Rasmussen v. South Florida Blood Serv.*, 500 So. 2d 533, 537 (Fla. 1987).

96. *Cain v. Hyatt*, 734 F. Supp. 671, 680 (E.D. Pa. 1990).

97. *Anonymous Fireman v. City of Willoughby*, 779 F. Supp. 402, 413 (N.D. Ohio 1991); *Doe v. Roe*, 526 N.Y.S.2d at 721-22.

98. *Doe v. Roe*, 526 N.Y.S.2d at 721-22.

99. *Anonymous Fireman*, 779 F. Supp. at 416.

100. *Leckelt v. Bd. of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820, 832 (5th Cir. 1990).

101. *Anonymous Fireman*, 779 F. Supp. at 415-16.

102. *Matter of Juveniles A, B, C, D, E*, 847 P.2d 455 (Wash. 1993); *People v. Adams*, 597 N.E.2d 574 (Ill. 1992); *Love v. Superior Court*, 226 Cal. App. 3d 736 (1990).

103. *People v. C.S.*, 583 N.E.2d 726 (Ill. Ct. App. 1991), *cert. denied*, 602 N.E.2d 461 (Ill. 1992).

quired to undergo mandatory HIV testing as part of efforts to stop the spread of AIDS.<sup>104</sup>

Courts have ruled that mandatory HIV testing of persons engaged in activities presenting medically significant opportunities for HIV transmission to others is constitutional. Involuntary testing of firemen<sup>105</sup> and even surgical patients<sup>106</sup> has been held to be permissible based on medical testimony that there is a significant risk of HIV transmission during invasive medical procedures involving such persons.

Courts generally have refused to approve involuntary HIV testing of persons with a low risk of transmitting HIV or individuals participating in activities presenting an insignificant danger of HIV transmission. In *Doe v. Roe*,<sup>107</sup> the court held that a parent has no obligation to submit to involuntary HIV testing to retain custody of a child. The court found no compelling reason to test because there is no risk of HIV infection through close personal nonsexual contact or sharing of household functions.<sup>108</sup>

In *Glover v. Eastern Nebraska Community Office of Retardation*,<sup>109</sup> the Eighth Circuit invalidated mandatory testing of state employees having direct contact with mentally retarded clients. The court characterized the risk of HIV transmission to clients as a result of a client biting or scratching an HIV positive staff member as "extraordinarily low . . . approaching zero."<sup>110</sup>

These cases reveal that most courts heavily rely on medical testimony concerning the likelihood of HIV transmission under the circumstances in determining the constitutionality of mandatory HIV testing to protect others from HIV infection. Some courts have upheld required HIV testing because of the potential deadly harm from

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104. *Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991); *Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989).

105. *Anonymous Fireman v. City of Willoughby*, 779 F. Supp. 402 (N.D. Ohio 1991).

106. *Plowman v. United States Dep't of the Army*, 698 F. Supp. 627 (E.D. Va. 1988).

107. 526 N.Y.S.2d 718 (Sup. Ct. 1988).

108. *Id.* at 725.

109. 867 F.2d 461 (8th Cir.), *cert. denied*, 493 U.S. 932 (1989).

110. *Id.* at 463. *See also* *Barlow v. Ground*, 943 F.2d 1132 (9th Cir. 1991). In *Barlow*, the Ninth Circuit held that involuntary testing of a prisoner who bit a policeman and drew blood was unconstitutional. The court found no justification for testing because there are no documented cases of HIV transmission from a bite and the potential for transmission by saliva is "remote." *Id.* at 1138. *But see* *Syring v. Tucker* 498 N.W.2d 370 (Wisc. 1993) (compelling blood testing of woman who bit social worker); *Johnetta v. Municipal Court*, 218 Cal. App. 3d 1255 (1990) (upholding involuntary HIV testing of prisoner who bit policeman).

HIV infection despite medical evidence of extremely low probabilities of transmission under the circumstances.<sup>111</sup>

Mandatory testing of athletes to protect against HIV transmission to others during athletic competition probably is unconstitutional. Athletes, as a group, do not present a high risk of transmitting HIV to others. HIV infection is not transmitted by casual contact, sweat, or saliva.<sup>112</sup> The medical consensus is that the risk of HIV transmission from exposure to contaminated blood during an athletic event is extremely low, particularly if the CDC's universal precautions are strictly followed.<sup>113</sup>

Courts generally strike down mandatory testing of an athlete's bodily fluids absent demonstrated evidence that testing is necessary to protect the health and safety of other participating athletes.<sup>114</sup> These courts have found no compelling justification for mandatory testing without such evidence.<sup>115</sup> Although HIV infection usually develops into AIDS, a fatal disease, there is no compelling justification for involuntary testing of all athletes given the medical consensus concerning the extremely low probability of HIV transmission during athletic competition.

Mandating HIV testing of athletes would unduly infringe upon their reasonable expectations of privacy. Even if a blood test is part of an athlete's standard physical examination, a blood analysis for HIV infection is a "search."<sup>116</sup> Athletics generally are not pervasively regulated by the government,<sup>117</sup> and athletes do not appear to have a

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111. *Leckelt v. Board of Comm'rs of Hosp. Dist.*, No. 1, 909 F.2d 820, 829 (5th Cir. 1990). One court upheld mandatory testing although the risk of transmission was "extremely low" because: "The current state of medical knowledge of AIDS is evolving, that medicine is still 'unraveling the mysteries' of the disease, and that the available evidence is insufficient to determine conclusively that HIV cannot be transferred through a bite." *Johnetta*, 267 Cal. App. 3d at 1280.

112. See *supra* notes 23, 24, and 108 and accompanying text.

113. See *supra* notes 25-34 and 41-43 and accompanying text.

114. *Brooks v. East Chambers Consol. Indep. School Dist.*, 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991); *Horsemen's Benevolent and Protective Ass'n, Inc. v. State Racing Comm'n*, 532 N.E.2d 644 (Mass. 1989); *Hill v. National Collegiate Athletic Ass'n*, 273 Cal. Rptr. 402 (Cal. Ct. App.), *cert. granted*, 276 Cal. Rptr. 319 (1990). *But cf. Dimeo v. Griffin*, 943 F.2d 679, 684 (7th Cir. 1991) (en banc) ("plausible dangers" to participant safety justifies random testing of jockeys).

115. *Horsemen's*, 532 N.E.2d at 651-52; *Hill*, 273 Cal. Rptr. at 417-18.

116. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 615 (1989); *Anonymous Fireman v. City of Willoughby*, 779 F. Supp. 402, 413 (N.D. Ohio 1991).

117. *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 198 n.18 (1988). *But see Schail v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988) (finding "extensive" state regulation of interscholastic sports).



diminished expectation of privacy concerning their blood composition. Moreover, if involuntary testing reveals an athlete's HIV positive status, unjustified exclusion from a sporting event may result. Because of the extensive media coverage of sports, a prominent athlete's HIV positive status may be widely publicized against his or her wishes, resulting in public ostracism and false innuendo.<sup>118</sup>

Arguably, HIV testing should be mandatory to enable HIV negative athletes to make an informed decision to participate in athletics against known HIV positive athletes. Involuntary HIV testing, however, is not necessary to accomplish this objective. Schools and athletic teams should warn all participants that some competitors may be HIV positive and that there is a theoretical possibility of exposure to HIV infection during a contact sport if blood is spilled. Athletes could then decide whether to participate in a given sport based on medical expert opinions of the likelihood of HIV transmission under the circumstances.

Mandatory HIV testing apparently will not reduce the risk of HIV infection in athletic competition without disclosure of its results to a person other than the one tested. Informing athletic administrators, coaches or other participants of someone else's HIV test results would be an invasion of privacy if done without proper authorization. Moreover, HIV testing would not eliminate the risk of HIV transmission to others unless HIV positive athletes were excluded from a sport. Such exclusion may be illegal,<sup>119</sup> and mandatory HIV testing should not be used to facilitate it.<sup>120</sup>

#### b. Preventing Harm to HIV Positive Athletes

In some instances, courts have recognized identification and protection of a potential HIV victim as a justification for mandatory testing. In *Local 1812, American Federation of Government Employees v. United States Department of State*,<sup>121</sup> the court upheld

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118. For example, Arthur Ashe, a renowned former tennis player, reluctantly announced he had AIDS despite efforts to keep his health condition private. He was forced to reveal his condition after learning that a national newspaper was planning to publish a story stating he had AIDS. See Dan Daly, *Going Public With Tragedy; After AIDS News Broke, Ashe Simply Had No Choice*, WASH. TIMES, Apr. 9, 1992, at D1; George E. Curry, *Ashe Tells of AIDS Struggle, Tennis Great Blames 1983 Blood Transfusion*, CHI. TRIB., Apr. 9, 1992, at C1. Ashe recently died from AIDS. Ira Berkow, *Ashe's Legacy is the Gift for Inspiration*, N.Y. TIMES, Feb. 8, 1993, at B7.

119. See *infra* notes 143-269 and accompanying text.

120. See *infra* notes 131-142 and accompanying text.

121. 662 F. Supp. 50 (D.D.C. 1987).

mandatory testing to identify and prevent HIV positive personnel from being placed in foreign posts where medical care for HIV infection is inadequate. Other courts have observed that the determination of HIV infection resulting from required testing may enable the victim to receive treatment which may prolong his or her lifespan.<sup>122</sup>

The laudable concern for an HIV positive athlete's well-being appears to support only voluntary testing rather than an invasion of privacy resulting from involuntary testing. It is doubtful that the reasoning of the court in *Local 1812* justifies mandatory testing of athletes because they, unlike people in some foreign countries, generally have access to quality health care. More importantly, a mere desire to test all athletes to determine the need for medical treatment of HIV infection may not satisfy the "compelling need" standard of *Skinner* and *Von Raab*.<sup>123</sup>

Courts have upheld mandatory drug testing to protect athletes from harming themselves during athletic competition.<sup>124</sup> Courts generally require proof that an athlete's use of particular drugs may harm himself or herself.<sup>125</sup> Thus, at a minimum, it appears that supporting medical evidence is necessary to justify mandatory HIV testing to prevent harm to an HIV positive person from athletic participation.<sup>126</sup> Even then it is questionable whether a compelling need exists for such testing. Appropriate warnings regarding the medical risks of playing a given sport while HIV positive and offering voluntary testing appear to be better alternatives that do not invade an athlete's privacy.

### c. *Preserving the Integrity of Athletic Competition*

Courts are divided on whether preserving the integrity of athletic competition justifies drug testing of athletes. Some courts have held

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122. *Anonymous Fireman v. City of Willoughby*, 779 F. Supp. 402, 417 (N.D. Ohio 1991); *People v. Adams*, 597 N.E.2d 574, 581 (Ill. 1992).

123. *See, e.g., Bolden v. Southeastern Pennsylvania Transp. Auth.*, 953 F.2d 807, 823 (3d Cir. 1991) (en banc) ("Neither the Supreme Court nor this court has endorsed the proposition that compulsory, suspicionless drug testing may be conducted to prevent an employee from causing harm to himself, rather than to others.").

124. *See, e.g., Schail v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988).

125. *Id.* at 1320.

126. After *Skinner* and *Von Raab*, courts have rejected harm to the athlete himself or herself as a justification for drug testing without proof that such harm has been caused by drug use. *See Brooks v. East Chambers Consol. Indep. School Dist.*, 730 F. Supp. 759, 761, 764 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991); *Derdeyn v. University of Colorado*, 832 P.2d 1031, 1034 (Colo. Ct. App. 1991), *cert. granted*, (July 7, 1992). *Hill v. National Collegiate Athletic Ass'n*, 273 Cal. Rptr. 402 (Cal. Ct. App.), *cert. granted*, 276 Cal. Rptr. 319 (1990).

that maintaining fair competition is not "a sufficiently compelling reason" to justify the invasion of an athlete's privacy by drug testing.<sup>127</sup> Other courts have rejected this rationale based on evidence that drug testing does not advance the goal of equitable competition.<sup>128</sup> A few courts have upheld drug testing of athletes as necessary to maintain the integrity of athletic competition.<sup>129</sup>

Mandatory HIV testing of athletes appears unnecessary to maintain the quality and integrity of athletic competition. Unlike the use of performance enhancing drugs, such as steroids, HIV infection does not provide the victim with a physical advantage. Testing for HIV and disclosure of the results may adversely affect the quality of athletic competition. Some players may be reluctant to compete vigorously against a known HIV positive athlete in a contact sport.<sup>130</sup>

### B. Statutory Claims

The Americans with Disabilities Act (ADA)<sup>131</sup> prohibits covered employers from requiring pre-employment medical examinations and inquiring whether employees are disabled unless the disabilities are job related and consistent with business necessity.<sup>132</sup> Medical examinations required after an offer of employment has been extended, but before the applicant begins work, are permissible if all entering employees are examined, and the information obtained is kept confidential.<sup>133</sup> If the examination results are used to screen out certain disabled employees, the exclusionary criteria must be job related, consistent with business necessity, and performance of essential job functions cannot be accomplished with reasonable accommodations.<sup>134</sup>

Requiring professional athletes to undergo mandatory HIV testing as a condition of participating in a sport may violate the ADA. Considering HIV infection is a covered disability under the ADA,<sup>135</sup> a court probably would require that employer knowledge of an em-

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127. *Horsemen's Benevolent and Protective Ass'n, Inc. v. State Racing Comm'n*, 532 N.E.2d 644, 651 (Mass. 1989).

128. *Hill*, 273 Cal. Rptr. at 418-21.

129. *See, e.g., Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986).

130. *See supra* notes 5-8 and accompanying text.

131. 42 U.S.C.A. §§ 12101-12213 (West Supp. 1992).

132. 42 U.S.C.A. § 12112(d) (West Supp. 1992).

133. 42 U.S.C.A. § 12112(d)(3) (West Supp. 1992).

134. 42 U.S.C.A. § 12112(4)(A) (West Supp. 1992); 29 C.F.R. § 1630.14(b)(3) (1992).

135. *See infra* notes 245-246 and accompanying text.

ployee's HIV infection be necessary to ensure that precautions are taken to protect the health of the HIV positive employee or others.<sup>136</sup>

Mandatory HIV testing is permissible if necessary to prevent an HIV positive athlete from posing a direct threat to the health or safety of the athlete or others.<sup>137</sup> To satisfy this requirement, an HIV positive athlete's participation in a sport must create a "significant risk of substantial harm" that cannot be eliminated or reduced by reasonable accommodation.<sup>138</sup> This determination must be based on a reasonable medical judgment relying on the most current medical knowledge and/or best available objective evidence.<sup>139</sup>

Some states have statutes forbidding mandatory HIV testing except under certain circumstances that appear to cover athletes. For example, a Texas statute generally prohibits mandatory HIV testing.<sup>140</sup> The statute permits HIV testing to determine a "bona fide occupational qualification."<sup>141</sup> Test results are confidential, but may be disclosed to medical personnel having a legitimate need to know the results.<sup>142</sup>

#### IV. EXCLUSION OF INDIVIDUALS WITH AIDS OR HIV INFECTION FROM ATHLETIC COMPETITION

An athlete with AIDS or HIV infection may challenge his or her exclusion from a particular sport as illegal discrimination against a

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136. The ADA and its regulations governing medical testing by employers are similar to the regulations covering employers under the Rehabilitation Act of 1973. *Cf.* 42 U.S.C.A. § 12112(d) (West Supp. 1992) and 29 C.F.R. §§ 1630.13, 1630.14 (1992) with 45 C.F.R. §§ 84.11(a)(3), 84.13(a), and 84.14 (1992). In *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820 (5th Cir. 1990), the Fifth Circuit held a nurse's refusal to disclose the results of his HIV test prevented a hospital from knowing his HIV status and establishing necessary precautions to prevent HIV transmission. The court held that necessary job-related HIV testing does not violate the Rehabilitation Act of 1973. *Id.* at 824. *See also* *Local 1812, American Fed'n of Gov't Employees v. United States Dep't of State*, 662 F. Supp. 50, 53-54 (D.D.C. 1987) (HIV testing does not violate the Rehabilitation Act if HIV infection is a relevant occupational consideration).

137. 42 U.S.C.A. § 12113(b) (West Supp. 1992); 29 C.F.R. § 1630.15(b)(2) (1992). *Cf. Doe v. Attorney General of the United States*, 1992 WL 447971, at \*5 (N.D. Cal. Dec. 28, 1992) ("The [Rehabilitation] Act permits an employer to make inquiry about an individual's disability if the information sought is relevant to his ability to do the job or to the safety of . . . co-workers.").

138. 29 C.F.R. § 1630.2(r) (1992). *See also infra* notes 189-193 and 246-251 and accompanying text.

139. 29 C.F.R. § 1630.2(r) (1992).

140. TEX. HEALTH & SAFETY CODE ANN. § 81.102 (West 1992).

141. TEX. HEALTH & SAFETY CODE ANN. § 81.102(4)(A) (West 1992).

142. TEX. HEALTH & SAFETY CODE ANN. § 81.103 (West 1992).

handicapped person. Such exclusion may be actionable under the United States Constitution pursuant to 42 U.S.C. § 1983, federal statutes or state law.

Most challenges to the exclusion of HIV infected athletes probably will be brought under the Rehabilitation Act of 1973 (Rehabilitation Act)<sup>143</sup> or the ADA,<sup>144</sup> as more fully discussed below. However, several other possible grounds for challenge are briefly mentioned here.

In *Cleburne v. Cleburne Living Center, Inc.*,<sup>145</sup> the Supreme Court held that handicapped persons are not a suspect or quasi-suspect class justifying heightened scrutiny of challenged discrimination on equal protection grounds. An athletic team or governing body whose action constitutes state action<sup>146</sup> and is subject to the constraints of the United States Constitution can justify the exclusion of handicapped athletes from a sport if its decision is rationally related to a legitimate objective.<sup>147</sup> Exclusion of HIV positive athletes must further the goals of reducing the risk of HIV transmission to others during a sporting event<sup>148</sup> or protecting an infected athlete from a significant personal health risk by participating in the sport.<sup>149</sup>

Courts have ordered schools to permit handicapped interscholastic athletes to participate in athletics under the Individuals with Disabilities Education Act.<sup>150</sup> Some states have education statutes that prohibit discrimination against handicapped elementary and high school athletes.<sup>151</sup> Courts have construed state human rights statutes

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143. See *infra* notes 154-229 and accompanying text.

144. See *infra* notes 230-69 and accompanying text.

145. 473 U.S. 432 (1984).

146. See *supra* notes 56-62 and accompanying text.

147. *Cleburne*, 473 U.S. at 446.

148. See, e.g., *Harris v. Thigpen*, 941 F.2d 1495, 1516-517 (11th Cir. 1991) (blanket segregation of HIV positive prisoners must be rationally related to goal of reducing transmission of HIV infection). For cases discussing whether the exclusion of handicapped athletes from athletic programs denies equal protection of the laws, see *Grube v. Bethlehem Area School Dist.*, 550 F. Supp. 418, 423 (E.D. Pa. 1982); *Neeld v. American Hockey League*, 439 F. Supp. 459, 461-62 (W.D.N.Y. 1977). See generally Matthew J. Mitten, *Amateur Athletes With Disabilities or Physical Abnormalities: Who Makes the Participation Decision?*, 71 NEB. L. REV. 987 (1992).

149. See, e.g., *Larkin v. Archdiocese of Cincinnati*, No. C-1-90-619 (S.D. Ohio, Sept. 5, 1990) (high school's acceptance of unanimous physician recommendations that athlete with heart condition not play football does not deny equal protection of law).

150. 20 U.S.C.A. § 1401-1461 (West Supp. 1992). See generally Robert E. Shepherd, *Why Can't Johnny Read or Play?*, *The Participation Rights of Handicapped Student-Athletes*, 1 SETON HALL J. SPORT L. 163, 195-98 (1991).

151. N.Y. EDUC. LAW § 3208-a (McKinney Supp. 1993). See *Kampmeier v. Harris*, 411 N.Y.S.2d 744 (App. Div. 1978) (ordering high school to permit visually impaired athlete to play basketball).

to prohibit unjustified discrimination against HIV positive persons in places of public accommodation.<sup>152</sup> These statutes may prohibit the exclusion of HIV positive athletes from participating in athletic events held in places of public accommodation, such as in stadiums and arenas.

In the past, professional athletes have successfully relied upon employment discrimination laws to challenge professional sports league by-laws categorically prohibiting athletes with physical impairments from playing a sport without proper justification.<sup>153</sup> Unwarranted discrimination against HIV positive professional athletes may be found to violate these laws in the future.

#### A. *Rehabilitation Act of 1973*

Section 504(a) of the Rehabilitation Act<sup>154</sup> provides in relevant part:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .<sup>155</sup>

The purpose of the Rehabilitation Act is to provide a "guarantee of equal opportunity"<sup>156</sup> and "even handed treatment of qualified handicapped persons."<sup>157</sup> The Act is primarily intended to provide the handicapped with an opportunity to participate fully in activities in which they have the physical capability and skill to perform.<sup>158</sup>

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152. See, e.g., *Minnesota v. Clausen*, 491 N.W.2d 662 (Minn. Ct. App. 1992) (Minnesota Human Rights Act).

153. In *Neeld v. American Hockey League*, 439 F. Supp. 459 (W.D.N.Y. 1977), the court enjoined enforcement of a league by-law prohibiting one-eyed athletes from playing hockey. The court found that the by-law violated New York's Human Rights Law prohibiting discrimination of employees based on disability unless the characteristic is a bona fide occupational qualification. *Id.* at 462. There was no evidence that blindness in one eye substantially detracted from plaintiff's ability to play hockey. *Id.*

154. 29 U.S.C.A. §§ 701-796i (West 1985 & Supp. 1992).

155. 29 U.S.C.A. § 794 (West Supp. 1992).

156. 29 U.S.C.A. § 701 (West Supp. 1992).

157. *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979).

158. *Id.* at 405. The objective of the Act is to prevent discrimination based on an assumed "inability to function in a particular context." *Id.* For a discussion of the beneficial rehabilitative effects of athletic participation by handicapped persons, see generally Glen M. Davis et al., *Sports And Recreation For the Physically Disabled*, in *SPORTS MEDICINE* 186 (R. Strauss ed. 1984).

Regulations promulgated under the Rehabilitation Act by the Department of Education<sup>159</sup> and the Department of Health and Human Services<sup>160</sup> prohibit elementary, secondary schools, colleges, and universities from discriminating against qualified handicapped athletes. Qualified handicapped athletes must be given an "equal opportunity for participation" in interscholastic and intercollegiate athletics.<sup>161</sup>

Handicapped athletes have obtained judicial orders under the Rehabilitation Act requiring schools to permit them to participate in team sports.<sup>162</sup> Courts have held that handicapped athletes may recover damages under the Rehabilitation Act for unlawful exclusion from a sport.<sup>163</sup> To prevail under the Act, a handicapped athlete must establish that he or she is: 1) an "individual with handicaps"; 2) "otherwise qualified" to participate; 3) who has been excluded solely by reason of handicap; 4) from a program or activity receiving federal funds.<sup>164</sup>

The athletic programs of most schools are covered by the Act even if they do not receive any direct federal funding. If any part of the school receives federal financial assistance, all of its operations and programs are covered by the Act.<sup>165</sup> The Rehabilitation Act defines an "individual with handicaps" as any person who: "i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; ii) has a record of such an impairment; or iii) is regarded as having such an impairment."<sup>166</sup>

The Act protects persons who are actually handicapped, labeled as handicapped after recovery from their former condition, or per-

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159. 34 C.F.R. §§ 104.37(c) and 104.47(a) (1992).

160. 45 C.F.R. §§ 84.37(c) and 84.47(a) (1992).

161. See *supra* notes 6 and 7 and accompanying text. The Individuals With Disabilities Education Act, 20 U.S.C. §§ 1401-1485, and the Amateur Sports Act of 1978, 36 U.S.C. §§ 371-396, also ensure equal participation opportunities in athletic programs for handicapped persons. See generally, Glenn Wong, *ESSENTIALS OF AMATEUR SPORTS LAW* 261-66 (1988).

162. See, e.g., *Grube v. Bethlehem Area School Dist.*, 550 F. Supp. 418, 425 (E.D. Pa. 1982); *Wright v. Columbia Univ.*, 520 F. Supp. 789, 795 (E.D. Pa. 1981).

163. *Poole v. South Plainfield Bd. of Educ.*, 490 F. Supp. 948, 949 (D.N.J. 1980).

164. See *Harris v. Thigpen*, 941 F.2d 1495, 1522 (11th Cir. 1991); *Doe v. New York Univ.*, 666 F.2d 761, 774 (2d Cir. 1981); *Sharon v. Larson*, 650 F. Supp. 1396 (E.D. Pa. 1986); *Bento v. I.T.O. Corp.*, 599 F. Supp. 731 (D.R.I. 1984); *Wright*, 520 F. Supp. at 793.

165. 29 U.S.C.A. § 794(b) (West Supp. 1992).

166. 29 U.S.C.A. § 706(8)(B) (West Supp. 1992). See also 34 C.F.R. § 104.3(j) (1992) and 45 C.F.R. § 84.3(j) (1992) (same definition for "handicapped persons").

ceived as handicapped.<sup>167</sup> The Act's regulations define "physical impairment" as:

[A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine . . . .<sup>168</sup>

The regulations do not list specific diseases or conditions that constitute a "physical impairment," but courts have defined this term broadly.<sup>169</sup>

A physical impairment must "substantially limit one or more of such person's major life activities."<sup>170</sup> The term "substantially limits" is not defined in the Rehabilitation Act or its regulations. The regulations define "major life activities" to include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>171</sup> Courts have held that persons afflicted with AIDS<sup>172</sup> or infected with HIV<sup>173</sup> are covered by the Rehabilitation Act because they have physical impairments that substantially limit one or more of their major life activities.

In *Southeastern Community College v. Davis*,<sup>174</sup> the Supreme Court held that an educational institution may require a person to possess "reasonable physical qualifications" to participate in its programs and activities. Although "mere possession of a handicap is not a permissible ground for assuming an inability to function," a school need "not lower or substantially modify its standards to accommodate a handicapped person."<sup>175</sup> An individual is "otherwise qualified"

167. S. REP. No. 1297, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 6373, 6388-389.

168. 34 C.F.R. § 104.3(j)(2)(i)(A) (1992) and 45 C.F.R. § 84.3(j)(2)(i)(A) (1992). See 34 C.F.R. § 104.3(j)(2)(i)(B) (1992) and 45 C.F.R. § 84.3(j)(2)(i)(B) (1992) for the definition of "mental impairment."

169. See generally Anna Phipps Engh, Note, *The Rehabilitation Act of 1973; Focusing on the Definition of a Handicapped Individual*, 30 WM. & MARY L. REV. 149 (1988) (listing handicapping conditions under Act).

170. 29 U.S.C.A. § 706(8)(B) (West Supp. 1992); 34 C.F.R. § 104.3(j) (1992); 45 C.F.R. § 84.3(j) (1992).

171. 34 C.F.R. § 104.3(j)(2)(ii) (1992) and 45 C.F.R. § 84.3(j)(2)(ii) (1992).

172. See, e.g., *Doe v. Dolton Elementary School Dist.* No. 148, 694 F. Supp. 440, 445 (N.D. Ill. 1988).

173. See, e.g., *Harris v. Thigpen*, 941 F.2d 1495, 1522-523 (11th Cir. 1991); *Doe v. District of Columbia*, 796 F. Supp. 559, 568 (D.D.C. 1992); *Casey v. Lewis*, 773 F. Supp. 1365, 1370 (D. Ariz. 1991).

174. 442 U.S. 397, 414 (1979).

175. *Id.* at 405, 413.



if "able to meet all of a program's requirements in spite of his handicap."<sup>176</sup>

Specifically, the Court in *Davis* held that the Rehabilitation Act does not require a college's nursing program to admit an applicant with hearing problems. The Court found that the applicant could not satisfy a legitimate physical qualification necessary for patient safety during the program's clinical phase.<sup>177</sup> In *Alexander v. Choate*,<sup>178</sup> the Supreme Court clarified *Davis* by holding that while a school is not "required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones."

### 1. Preventing Harm to HIV Positive Athletes

A legitimate justification for excluding a handicapped athlete from a particular sport is a physical inability to perform or function effectively with or without reasonable accommodation. The handicapped athlete would have extreme difficulty satisfying the *Davis* requirement of physical capability of performing an activity in spite of a handicap, and therefore the handicapped athlete may not be "otherwise qualified" under the Rehabilitation Act.<sup>179</sup>

An athlete with AIDS, or who is symptomatic for HIV disease, may not be physically able to participate in strenuous sports because his condition adversely affects his ability to compete at the necessary level of intensity.<sup>180</sup> Exclusion from certain athletic activities under such circumstances appears permissible if based on a medically proven physical incapacity to satisfy the demands of the sport.

Nevertheless, an HIV positive person does not necessarily have diminished physical capabilities. One court cited medical evidence that asymptomatic HIV infection "does not impair a person's

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176. *Id.* at 406, 407 n.7.

177. *Id.* at 407-08.

178. 469 U.S. 287, 300 (1985).

179. See *supra* notes 174-176 and accompanying text. See *Wolff v. South Colonie Cent. School Dist.*, 534 F. Supp. 758 (N.D.N.Y.), *aff'd*, 714 F.2d 119 (2d Cir. 1982) (upholding exclusion of student with severe congenital limb deficiency from school trip because unable to satisfy activity's physical requirements). Accord *Gilbert v. Frank*, 949 F.2d 637, 643 (2d Cir. 1991) (handicapped person not "otherwise qualified" if medical evidence shows physical inability to perform job's essential functions); *Florence v. Frank*, 774 F. Supp. 1054, 1061 (N.D. Tex. 1991) ("If the plaintiff's handicap would prevent him from doing the job in question, he cannot be found to be 'otherwise qualified'").

180. *Johnson, supra* note 16, at 79.

strength, agility or ability to breath [sic]."<sup>181</sup> For example, Magic Johnson performed with significant skill while playing in the 1992 NBA All Star Game and Summer Olympics.<sup>182</sup> Thus, it does not appear that asymptomatic HIV infection alone justifies exclusion or restriction based on an athlete's assumed inability to physically engage in a given sport.<sup>183</sup>

Neither the Rehabilitation Act nor its implementing regulations directly address whether risk of harm to one's self is a legally valid reason for exclusion if a handicapped athlete has the physical skill to play a given sport. Decisions to exclude handicapped persons from athletic activities must be based on "reasonable medical judgments."<sup>184</sup> If all examining physicians recommend against participation in a given sport by an athlete with AIDS or HIV infection to avoid a significant health risk to that athlete, exclusion appears justified under the Rehabilitation Act.<sup>185</sup> If reasonable physicians differ in their participation recommendations based on conflicting evaluations of the risks of harm to an athlete with AIDS or HIV infection, the athlete should be permitted to decide whether to participate in the sport.<sup>186</sup>

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181. *Doe v. District of Columbia*, 796 F. Supp. 559, 563 (D.D.C. 1992).

182. *See supra* note 3 and accompanying text.

183. Initial research indicates that moderate exercise promotes a heightened immune system response and may help forestall the active onset of AIDS. Johnson, *supra* note 16, at 75, 79. However, regular highly intense exercise combined with the extensive travel and psychological stress of professional sports may weaken a professional athlete's immune system. *Id.* *See also* Amber Stenger, *Watching Magic's Comeback*, THE PHYSICIAN AND SPORTSMEDICINE, Nov. 1992, at 15.

184. *School Board of Nassau County, Fla. v. Arline*, 480 U.S. 273, 288 (1987). *See also infra* notes 188-191 and accompanying text.

185. *See, e.g., Larkin v. Archdiocese of Cincinnati*, No. C-1-90-619 (S.D. Ohio filed Sept. 5, 1990) (upholding exclusion of athlete with heart condition from high school football based on unanimous physician recommendations against playing because of increased risk of sudden death).

186. Most courts hold that a school's exclusion of a handicapped athlete from a sport based on the team physician's recommendation violates the Rehabilitation Act if other competent medical authority approves participation. *See, e.g., Grube v. Bethlehem Area School Dist.*, 550 F. Supp. 418 (E.D. Pa. 1982); *Wright v. Columbia Univ.*, 520 F. Supp. 789 (E.D. Pa. 1981); *Poole v. South Plainfield Bd. of Educ.*, 490 F. Supp. 948 (D.N.J. 1980). *But see Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977) (upholding athlete's exclusion from a contact sport based on team physician's recommendation despite participation approval from other physicians). *See generally* Matthew J. Mitten, *Amateur Athletes With Handicaps or Physical Abnormalities: Who Makes the Participation Decision?*, 71 NEB. L. REV. 987 (1992).

## 2. Preventing HIV Transmission to Other Athletes

The justification most likely to be asserted for excluding a person with AIDS or HIV infection from contact sports is preventing transmission of the disease to other athletes during competition. Many athletes fear they could become infected with HIV by contact with an HIV positive athlete's blood.<sup>187</sup>

In *School Board of Nassau County, Fla. v. Arline*,<sup>188</sup> the Supreme Court explained: "[T]he [Rehabilitation] Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasonable and medically sound judgments. . . ." <sup>189</sup> In determining whether an individual is "otherwise qualified," one is entitled to an "opportunity to have [one's] condition evaluated in light of medical evidence."<sup>190</sup> The decision to exclude an individual from a particular program or activity must be based on "reasonable medical judgments given the state of medical knowledge."<sup>191</sup>

The Court held that a person who creates "a significant risk of communicating an infectious disease to others" is not "otherwise qualified" if reasonable accommodation will not eliminate this risk.<sup>192</sup> The Court ruled that the following factors should be considered:

(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.<sup>193</sup>

In *Doe v. Dolton Elementary School District No. 148*,<sup>194</sup> a federal district court held that the exclusion of an elementary school student with AIDS from regular classes and extracurricular activities violated the Rehabilitation Act. The court, however, ordered the student not to participate in school-sponsored contact sports<sup>195</sup> to prevent "a significant risk of infecting teachers and fellow students"

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187. See *supra* notes 5-10 and accompanying text.

188. 480 U.S. 273 (1987).

189. *Id.* at 285.

190. *Id.*

191. *Id.* at 288.

192. *Id.* at 288 n.16.

193. *Id.* at 288.

194. 694 F. Supp. 440 (N.D. Ill. 1988).

195. *Id.* at 449.

with HIV.<sup>196</sup> The court did not cite or rely upon any medical evidence finding a significant risk of HIV transmission during contact sports.

The decision in *Dolton Elementary School* conflicts with the holding in *Arline* that exclusion of handicapped persons be based on "reasonable medical judgments given the state of medical knowledge."<sup>197</sup> Although exclusion or restrictions necessary to permit others' safe participation in an athletic contest are permissible under the Rehabilitation Act,<sup>198</sup> they must have a medically sound basis. Consistent with *Arline*, lower courts have invalidated the categorical exclusion of HIV positive persons from an activity without medical evidence that a significant risk of HIV infection exists after reasonable accommodation.<sup>199</sup>

In *Doe v. District of Columbia*,<sup>200</sup> a federal district court held that refusing to consider an HIV positive applicant for a position as a fireman violated the Rehabilitation Act. The court applied the four *Arline* factors and concluded that plaintiff's employment as a firefighter would not pose a direct threat to the health or safety of others.<sup>201</sup> Regarding the nature of the risk, the court found the only potential means of transmitting HIV infection during fire-fighting activities is by blood-to-blood contact.<sup>202</sup> Regarding the probability of transmission, the court relied upon medical evidence that the risk is "so remote as to be unmeasurable."<sup>203</sup> The court found the duration of the risk of HIV transmission to be ongoing.<sup>204</sup> The court found the severity of the risk to be ultimate death from AIDS-related complications.<sup>205</sup>

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196. *Id.* at 445.

197. *School Board of Nassau County, Fla. v. Arline*, 480 U.S. 273, 288 (1987).

198. *Grube v. Bethlehem Area School Dist.*, 550 F. Supp. 418, 419 (E.D. Pa. 1982). *See also* *Cavallaro v. Ambach*, 575 F. Supp. 171 (W.D.N.Y. 1983) (upholding rule prohibiting 19-year-old with neurological handicap from wrestling because advantage in physical maturity may cause injury to younger wrestlers); *Mahan v. Agee*, 652 P.2d 765 (Okla. 1982) (same).

199. *Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991) (blanket segregation of prisoners); *Doe v. District of Columbia*, 796 F. Supp. 559 (D.D.C. 1992) (refusal to hire fireman); *Casey v. Lewis*, 773 F. Supp. 1365 (D. Ariz. 1991) (exclusion of prisoners from food preparation). *Accord* *Aviles v. United States*, 696 F. Supp. 217, 220 (E.D. La. 1988) (dicta noting that mandated retirement of HIV positive Coast Guard personnel is "questionable").

200. 796 F. Supp. 559 (D.D.C. 1992).

201. *Id.* at 568-569. *See supra* note 193 and accompanying text.

202. *Doe*, 796 F. Supp. at 568-69.

203. *Id.* at 569.

204. *Id.*

205. *Id.*

The court's analysis in *Doe v. District of Columbia* appears applicable to whether HIV positive athletes may be excluded from certain sports. The medical consensus is that HIV is not transmitted by casual non-sexual contact or exposure to saliva or sweat.<sup>206</sup> Thus, there is no legal justification for excluding HIV positive athletes from non-contact sports such as tennis, golf, or most track and field events.

The only potential means of HIV transmission during a sporting event appears to be direct exposure to contaminated blood during a contact sport or treatment of a bleeding wound.<sup>207</sup> Public health organizations and AIDS medical experts agree that the theoretical risk of blood-borne HIV transmission during a sporting event is extremely low and does not justify categorical exclusion from any sport.<sup>208</sup>

Reasonable accommodations should enable safe participation in most contact sports by HIV positive athletes. For example, stopping play if an athlete is bleeding, permitting return to play only after bleeding is stopped, requiring all open wounds to be bandaged, and promptly disinfecting blood-stained playing surfaces, equipment, and clothing should significantly reduce any risk of HIV transmission during athletic competition.<sup>209</sup>

Although the probability of HIV transmission during a sporting event is extremely low in most sports, it is higher in sports where contact with an unprotected part of an athlete's body frequently occurs, such as in boxing, karate, or wrestling.<sup>210</sup> An increased risk of HIV transmission also may exist in sports like basketball, hockey, soccer, and football.<sup>211</sup> A sport-specific consideration of probability of HIV transmission thus seems appropriate.

The *Doe* court held that the "duration and severity of the risk warrants little weight" if the probability of transmission is "extremely remote."<sup>212</sup> This conclusion appears erroneous because it de-emphasizes two *Arline* factors important in determining whether an HIV positive person legally may be excluded from a sport to prevent the spread of an infectious disease to others.<sup>213</sup> Courts should accord

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206. See *supra* notes 23-24 and accompanying text.

207. See *supra* notes 25-34 and accompanying text.

208. See *supra* notes 25-36 and accompanying text.

209. See *supra* notes 41-43 and accompanying text.

210. The United States Olympic Committee has classified boxing, tae kwon do, and wrestling as sports in which the risk of HIV transmission is the highest. Krucoff, *supra* note 21.

211. *Id.*

212. 796 F. Supp. at 569.

213. See *supra* note 193 and accompanying text.

appropriate weight to the continuing risk of HIV infection and inevitable fatal consequences of AIDS in determining whether an HIV positive athlete may be excluded from a particular sport.<sup>214</sup>

An HIV positive athlete with the requisite physical ability and skills may be excluded from a sport only if medical evidence establishes that his or her participation poses a significant risk of harm to others based on full consideration of all four *Arline* factors. If this risk can be eliminated by making reasonable accommodations, the athlete is "otherwise qualified" to participate in the sport under the Rehabilitation Act.

### 3. Excluding "Solely By Reason of Handicap"

An HIV positive athlete also must establish exclusion from a sport "solely by reason of handicap" to prevail under the Rehabilitation Act.<sup>215</sup> A school or team may rebut this element by establishing a "substantial justification" for excluding the athlete from a sport based upon reasons other than his or her mere possession of a handicap.<sup>216</sup>

Magic Johnson retired from the NBA because of his fellow players' concern that they would expose themselves to the possibility of HIV infection by playing against him.<sup>217</sup> Consideration of certain players' medically unfounded fears or perceptions regarding HIV transmission is not a substantial justification for excluding an HIV positive athlete from a sport.<sup>218</sup> In determining the transmission risk of a contagious disease, the *Arline* Court stated: "[C]ourts normally should defer to the reasonable medical judgments of public health officials."<sup>219</sup> The Rehabilitation Act prohibits medically unjustified discrimination against handicapped people.

Opposing players, however, may not play a sport as vigorously for fear of blood-to-blood contact with a known HIV positive athlete. It is arguable that an athlete known to be HIV positive may have an

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214. *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820, 829 (5th Cir. 1990) (while considering *Arline* factors court emphasized that potential harm of HIV infection is "extremely high" because no known cure for AIDS exists).

215. See *supra* notes 155 and 164 and accompanying text.

216. See, e.g., *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977); *Grube v. Bethlehem Area School Dist.*, 550 F. Supp. 418, 423 (E.D. Pa. 1982); *Wright v. Columbia Univ.*, 520 F. Supp. 789, 793 (E.D. Pa. 1981).

217. See *supra* notes 5-7 and accompanying text.

218. *Doe v. District of Columbia*, 796 F. Supp. 559, 570 (D.D.C. 1992); *Casey v. Lewis*, 773 F. Supp. 1365, 1371 (D. Ariz. 1991).

219. *School Board of Nassau County, Fla. v. Arline*, 480 U.S. 273, 288 (1987).

unfair competitive advantage in a contact sport.<sup>220</sup> For example, Karl Malone expressed a reluctance to guard Magic Johnson closely during a basketball game.<sup>221</sup> A reduction in the quality of team play is not required to enable a handicapped athlete to participate in a sport,<sup>222</sup> but a reasonable accommodation must be made to enable an HIV positive athlete to participate.<sup>223</sup> Education programs and appropriate precautions to reduce the risk of HIV transmission by blood-to-blood contact are reasonable accommodations that should help reduce athletes' reluctance to compete against HIV positive athletes<sup>224</sup> and prevent the latter from unwarranted exclusion from a sport.

A school also may fear tort liability if a known HIV positive athlete is permitted to play a sport and transmits HIV to another player during athletic competition. Schools must use reasonable care to ensure the safety of participants in athletic events.<sup>225</sup> Courts have observed that entities entrusted with the care of others have a duty to protect them against exposure to HIV.<sup>226</sup>

Permitting HIV positive athletes to participate in contact sports consistent with the medical consensus that no justification exists for excluding them should create an implied immunity from tort liability for the school if accidental HIV transmission results during athletic competition.<sup>227</sup> Allowing a tort action against the school based solely on a refusal to exclude a known HIV positive athlete from a sport

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220. *D'Amico v. New York State Board of Law Examiners*, 1993 WL 43443, at \*3 (W.D.N.Y. Feb. 17, 1993) ("The purpose of the ADA is to place those with disabilities on an equal footing and not to give them an unfair advantage.").

221. See *supra* note 5 and accompanying text.

222. *Grube*, 550 F. Supp. at 419.

223. *Alexander v. Choate*, 469 U.S. 287, 300 (1985).

224. See generally Tracy E. George, *Secondary Break: Dealing With AIDS in Professional Sports After the Initial Response to Magic Johnson*, 9 U. MIAMI ENT. & SPORTS L. REV. 215, 236-38 (1992) (noting benefits of AIDS education programs to professional sports teams and players). Education efforts by public health officials helped alleviate rival schools' concerns about playing high school basketball against a team with a player known to be HIV positive. Lone Wolf's Battler, *SPORTS ILLUSTRATED*, May 24, 1993, at 9.

225. See generally JOHN C. WEISTART & CYM H. LOWELL, *THE LAW OF SPORTS* § 8.05 (1979).

226. *Anonymous Fireman v. City of Willoughby*, 779 F. Supp. 402, 412 (N.D. Ohio 1991); *Harris v. Thigpen*, 727 F. Supp. 1564, 1571-572 (M.D. Ala. 1990), *rev'd on other grounds*, 941 F.2d 1495 (11th Cir. 1991).

227. See, e.g., *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1208-209 (1991) (employer tort liability for compliance with Title VII ban against sex-specific fetal protection policies "remote at best"); *Farmers Union v. WDAY, Inc.*, 360 U.S. 525 (1959) (Federal Communications Act of 1934 barred libel action against broadcaster for defamatory statement by political candidate).

after providing appropriate warnings to players and following the CDC's recommended precautions would inappropriately impose liability for complying with the Rehabilitation Act.

Schools and professional teams should warn all athletes of the possibility of HIV transmission during contact sports and follow the CDC's universal precautions and applicable athletic governing body rules to minimize the risk of such infection.<sup>228</sup> Failure to do so may be actionable under state tort law. Professional athletes who contract HIV on the playing field may be covered by workmen's compensation.<sup>229</sup>

### *B. Americans With Disabilities Act*

The ADA is patterned after the Rehabilitation Act.<sup>230</sup> In passing the ADA, Congress recognized that approximately 43,000,000 Americans are afflicted with a physical or mental disability.<sup>231</sup> Congress found that "discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem."<sup>232</sup>

Three sections of the ADA are particularly relevant in the context of athletics. The ADA applies to public entities<sup>233</sup> and employers with fifteen or more employees engaged in industries affecting interstate commerce.<sup>234</sup> Persons that own, lease, or operate a place of public accommodation also are subject to the ADA.<sup>235</sup> A place of public accommodation includes "a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation."<sup>236</sup> Virtually all public and private grade schools, high schools, colleges, universities, professional teams, and operators of sporting events held in facilities open to the public are subject to the ADA.

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228. See *supra* notes 41-43 and accompanying text. It is also advisable to counsel HIV positive athletes of the possibility of infecting others during a contact sport and to recommend alternative sports compatible with the athlete's interests and physical abilities.

229. See generally JOHN C. WEINSTART & CYM H. LOWELL, *THE LAW OF SPORTS* § 8.13 (1979) (discussing workmen's compensation claims by professional athletes).

230. The ADA is not to be construed to apply a lesser standard than the standards applied under the Rehabilitation Act. 42 U.S.C.A. § 12201(a) (West Supp. 1992). The ADA's regulations are required to be consistent with corresponding regulations in the Rehabilitation Act. 42 U.S.C.A. § 12134(b) (West Supp. 1992). In addition, the ADA regulations are not to be construed to apply a lesser standard. 28 C.F.R. § 36.103(a).

231. 42 U.S.C.A. § 12101(1) (West Supp. 1992).

232. 42 U.S.C.A. § 12101(2) (West Supp. 1992).

233. 42 U.S.C.A. §§ 12131 and 12132 (West Supp. 1992).

234. 42 U.S.C.A. § 12111(5)(A) (West Supp. 1992).

235. 42 U.S.C.A. § 12182(a) (West Supp. 1992).

236. 42 U.S.C.A. § 12181(7)(L) (West Supp. 1992).



The ADA prohibits a covered employer, such as a professional sports team, from discriminating against a "qualified individual with a disability because of the disability of such individual."<sup>237</sup> Discrimination includes: 1) excluding a qualified professional athlete from a sport because of a known disability;<sup>238</sup> 2) not making reasonable accommodations for a known disability of an "otherwise qualified" professional athlete that would not impose undue hardship on an employer;<sup>239</sup> and 3) using qualification standards that screen out a professional athlete with a disability that are not job-related for the subject position and consistent with business necessity.<sup>240</sup>

A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position."<sup>241</sup> The ADA's definition of "disability"<sup>242</sup> is the same as the Rehabilitation Act's definition of "individual with handicaps."<sup>243</sup> A "disability" is "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of such an impairment; or being regarded as having such an impairment."<sup>244</sup>

The ADA's legislative history specifically lists HIV infection as a physical impairment.<sup>245</sup> Courts probably will find that HIV infection is a covered "disability" under the ADA because this condition is covered by the Rehabilitation Act.<sup>246</sup> Thus, HIV positive professional athletes are entitled to the protections of the ADA.

The ADA also prohibits discrimination on the basis of disability in the "full and equal enjoyment" of places of public accommodation, such as in athletic stadiums, arenas, and parks.<sup>247</sup> Qualified disabled athletes cannot be denied the benefits of participation in an athletic program offered by a public entity, such as by a public elementary

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237. 42 U.S.C.A. § 12112(a) (West Supp. 1992).

238. 42 U.S.C.A. § 12112(b)(4) (West Supp. 1992).

239. 42 U.S.C.A. § 12112(b)(5)(A) (West Supp. 1992).

240. 42 U.S.C.A. § 12112(b)(6) (West Supp. 1992).

241. 42 U.S.C.A. § 12111(8) (West Supp. 1992).

242. 42 U.S.C.A. § 12102(2) (West Supp. 1992).

243. See *supra* note 166 and accompanying text.

244. 42 U.S.C.A. § 12102(2) (West Supp. 1992).

245. See S. Rep. No. 116, 101st Cong., 1st Sess. 22 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 51 (1990); *id.* pt. 3, at 28.

246. See *supra* note 173 and accompanying text.

247. 42 U.S.C.A. § 12182(a) (West Supp. 1992); 42 U.S.C.A. § 12181(7)(L) (West Supp. 1992); 28 C.F.R. § 36.104 (1992) (defining "place of public accommodation").

school, high school, or university.<sup>248</sup> Unjustified exclusion of HIV positive athletes from public facilities or publicly operated athletic programs violates the ADA.

The employment<sup>249</sup> and public accommodations<sup>250</sup> sections of the ADA permit the exclusion of disabled persons from certain activities if they pose a "direct threat to the health and safety" of others that cannot be eliminated with reasonable accommodation. The ADA's employment and public accommodations regulations provide that whether an individual poses a direct threat to the health and safety of others requires an individualized assessment based on a reasonable medical judgment relying on current medical knowledge or the best available objective evidence.<sup>251</sup> These same principles apply to the ADA's public services section.<sup>252</sup> The regulations adopt the *Arline*<sup>253</sup> factors by requiring that the nature, duration, severity of the risk, likelihood of potential injury, and chance that reasonable accommodations will mitigate the risk all be considered.<sup>254</sup>

According to the interpretive guidelines for the ADA's employment regulations, employment cannot be denied to a disabled individual, like a professional athlete, "merely because of a slightly increased risk."<sup>255</sup> The guidelines further provide that "[t]he risk can only be considered when it poses a significant risk, i.e., high probability of substantial harm; a speculative or remote risk is insufficient."<sup>256</sup> Discrimination is justified if based on objective medical evidence that a disabled individual poses "a high probability of substantial harm to others."<sup>257</sup> Generalized or irrational fears and stereotypes are not to be used to disqualify a disabled person from employment.<sup>258</sup> The ADA's public accommodations regulations are also to be interpreted in a similar manner.<sup>259</sup>

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248. 42 U.S.C.A. § 12132 (West Supp. 1992).

249. 42 U.S.C.A. §§ 12111(3), 12113(a) and (b) (West Supp. 1992).

250. 42 U.S.C.A. § 12182(b)(3) (West Supp. 1992).

251. 28 C.F.R. § 36.208(b) and (c) (1992); 29 C.F.R. § 1630.2(r) (1992).

252. Cathy J. Jones, *College Athletics: Illness or Injury and the Decision to Return to Play*, 40 BUFF. L. REV. 113, 191-92 (1992).

253. See *supra* note 193 and accompanying text.

254. 28 C.F.R. § 36.208(b) and (c) (1992); 29 C.F.R. § 1630.2(r) (1992).

255. 29 C.F.R. pt. 1630, app., at 414 (1992).

256. *Id.*

257. 29 C.F.R. pt. 1630, app. at 415 (1992).

258. *Id.*

259. 28 C.F.R. pt. 36, app. B. at 585-86 (1992).

In *Anderson v. Little League Baseball, Inc.*,<sup>260</sup> a federal district court held that a youth baseball league policy prohibiting coaches in wheelchairs from being on the field violated the ADA. The court noted Congress's concern that the "extent of non-participation of individuals with disabilities in social and recreational activities is alarming."<sup>261</sup> The court recognized the "need to balance the interests of people with disabilities against legitimate concerns for public safety."<sup>262</sup>

Applying the *Arline* factors incorporated in the ADA's public accommodations regulations, the court found that plaintiff's on-field coaching in a wheelchair does not pose a direct threat to the health and safety of others.<sup>263</sup> The court enjoined enforcement of the baseball league's policy because it unjustifiably discriminated against the plaintiff.<sup>264</sup>

The factors governing the legality of excluding an athlete with AIDS or HIV infection from a given sport under the ADA are similar to those relevant under the Rehabilitation Act.<sup>265</sup> Assuming the HIV infected athlete possesses the necessary physical skills to play the subject sport, such an athlete has a legal right to participate unless objective medical evidence indicates that a significant risk of harm exists to the athlete<sup>266</sup> or others that cannot be eliminated by reasonable accommodation.<sup>267</sup> The same remedies are available under the ADA and Rehabilitation Act.<sup>268</sup> Accordingly, tort immunity for permitting HIV positive athletes to participate in a given sport or liability for failing to warn or take adequate precautions to minimize the risk of HIV transmission during a sporting event should be the same under the Rehabilitation Act and ADA.<sup>269</sup>

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260. 794 F. Supp. 342 (D. Ariz. 1992).

261. *Id.* at 344.

262. *Id.* at 345.

263. *Id.*

264. *Id.*

265. *Cf.* *Galloway v. Superior Court*, 1993 WL 80808 (D.D.C. Mar. 16, 1993) (categorical exclusion of blind persons from jury duty violates the Rehabilitation Act and the ADA).

266. One commentator's comparison and analysis of the ADA and Rehabilitation Act and their corresponding regulations indicates that risk of harm to the athlete himself or herself may not be a legitimate reason for excluding a disabled person from an athletic event under the ADA. Jones, *supra* note 252, at 191-97.

267. *D'Amico v. New York State Bd. of Law Examiners*, 1993 WL 43443 (W.D.N.Y. Feb. 17, 1993) (finding ADA violation because defendant failed to make reasonable accommodation for plaintiff's handicap).

268. See 29 U.S.C.A. § 794a (West 1985); 42 U.S.C.A. §§ 12117(a), 12133, and 12188(a) (West Supp. 1992). See also *supra* notes 162-163 and accompanying text.

269. See *supra* notes 227-229 and accompanying text.

## V. CONCLUSION

AIDS is a deadly disease that is spreading throughout the general population. Like everyone else, athletes risk exposure to HIV infection if they engage in promiscuous sexual behavior or intravenous drug use. Many amateur and professional athletes probably are knowingly or unknowingly infected with HIV.

Some athletes fear possible exposure to HIV infection during athletic competition against HIV positive persons. This concern exists despite assurances from public health organizations and medical experts that the probability of HIV transmission from blood-to-blood contact during sporting events is extremely remote. To alleviate athletes' fears and help reduce the spread of HIV infection, sports leagues and organizations are offering AIDS education and prevention programs.

Few athletic governing bodies and no medical or public health organizations advocate mandatory HIV testing for athletes. Involuntary HIV testing would infringe on an athlete's privacy and expose an HIV positive athlete to possible ostracism and discrimination. Test results also could be used to exclude HIV positive athletes from sporting events without a valid reason. There is no overriding compelling justification for mandatory HIV testing because the medical consensus is that the probability of HIV transmission during athletics is minimal.

With the possible exception of boxing,<sup>270</sup> HIV positive athletes generally are not categorically excluded from participation in any sport by athletic governing bodies or medical organizations. Exclusion without a legitimate reason would violate the Rehabilitation Act, ADA, and various state laws. These laws prohibit unwarranted discrimination against HIV positive athletes having the physical ability to participate in the subject sport.

Medical experts agree that the probability of HIV transmission during contact sports is quite low, but courts should accord appropriate weight to the deadly consequences of HIV infection in determining whether participation restrictions in certain sports are permissible. Strict adherence to the CDC's universal precautions, which assume that all blood is infected with HIV, is a reasonable accommodation that should enable HIV positive athletes to participate safely in most sports without imposing substantial costs on athletic teams.

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270. See *supra* note 50 and accompanying text.

All athletes should be educated regarding the means of HIV transmission and warned about the possibility of exposure to HIV infection during athletic competition. HIV positive athletes should be informed of any health risks to themselves and others from their participation in a given sport. Athletic governing bodies and teams should follow precautions recommended by medical organizations and AIDS experts to minimize the risks of HIV transmission during sporting events. A responsible and informed joint effort is necessary to reduce the spread of AIDS and enable HIV positive athletes to participate fully in recreational and athletic activities compatible with their physical capabilities.