WORKPLACE EXPOSURE TO AIDS

I. INTRODUCTION

The mere mention of "AIDS" causes hysteria in some people. Persons with AIDS often are ostracized when their illness is discovered. The general public currently knows little about this disease and how it is spread.

Most people avoid those with AIDS. In the workplace, however, people may be required to come into contact with someone with AIDS involuntarily and often unknowingly. This comment attempts to reconcile the duty of the employer to provide its employees with a safe and healthy workplace with the right to privacy of persons with AIDS.

II. WHAT IS AIDS?

"AIDS" is an acronym for acquired immune deficiency syndrome. When the AIDS virus enters the blood stream, it suppresses the immune system by attacking white blood cells. The human body reacts to the virus by generating antibodies. A blood test can detect these antibodies usually within two to twelve weeks after infection. The actual symptoms of AIDS may not manifest themselves for a long time after the person is infected with the virus. More importantly, an infected person may remain virtually healthy but capable of infecting others. Other infected persons develop AIDS-Related Complex (ARC), which has less severe symptoms than AIDS. Still other infected persons develop classic AIDS which destroys the body's immune system and allows otherwise con-

1. In a nationwide survey of 100 mid-size corporations, at least 20% had experienced at least one case of acquired immune deficiency syndrome (AIDS) among their employees and half of that 20% reported two or more cases. 126 Lab. Rel. Rep. (BNA) 198 (Nov. 30, 1987).
2. U.S. DEP'T OF HEALTH & HUMAN SERVS., SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 9 (Apr. 1987) [hereinafter SURGEON GEN.'S REP.]. AIDS cases first were reported in the United States in 1981. Id. at 5. The AIDS virus has been named human immunodeficiency virus (HIV), human T-lymphotropic virus type III (HTLV-III), or lymphadenopathy-associated virus (LAV). Id. at 9.
3. Id. at 10.
4. Id. Before positive antibody test results are obtained, the infected individual can pass the virus to others. Id.
5. Id. at 12.
6. See SURGEON GEN.'S REP., supra note 2, at 10.
7. Id. at 10-11. Symptoms of AIDS-Related Complex (ARC) may include loss of
trollable infections to invade the body and cause additional diseases.\textsuperscript{8} There presently exists neither a cure for AIDS nor a vaccine to prevent it.\textsuperscript{9}

AIDS is an infectious, contagious disease. It is not spread, however, like measles or chicken pox.\textsuperscript{10} AIDS may be acquired during contact, sexual or otherwise, with an infected person's blood or semen and possibly vaginal secretions.\textsuperscript{11} In addition, intravenous drug users often acquire AIDS when they share syringes and needles containing the contaminated blood of a human immunodeficiency virus (HIV) carrier.\textsuperscript{12}

"There is no known risk of nonsexual infection in most situations encountered in our daily lives."\textsuperscript{13} Examples of such daily activities include sharing food, towels, cups, razors and toothbrushes, as well as kissing.\textsuperscript{14}

Health care workers (HCWs) are exposed to patients' bodily fluids or may get stuck accidentally with a contaminated needle.\textsuperscript{15} Nevertheless, their risk of HIV infection is extremely low.\textsuperscript{16} Of 750 HCWs having direct contact with a patient's bodily fluids, only three who accidentally had stuck themselves with a contaminated needle tested positive for the AIDS virus.\textsuperscript{17}

Because of the stigma attached to AIDS, the current public health service practice is to protect the privacy of the infected individual and to maintain the strictest confidentiality concerning the individual's health records.\textsuperscript{18} This practice leaves HCWs with only
two choices: (1) to accept the minute risk of deadly infection as part of the routine performance of their jobs, or (2) to presume every patient may be an AIDS virus carrier and to take appropriate precautionary measures.

III. EMPLOYER'S DUTY TO INDIVIDUALS COMING INTO CONTACT WITH A PERSON WITH AIDS IN THE WORKPLACE—INTRODUCTION

Current medical literature indicates that AIDS cannot be spread through casual contact. As noted, however, individuals in certain occupations such as those in the health care industry are susceptible to contracting AIDS through exposure to another's bodily fluids. This comment will explore the duty, if any, owed by employers to these individuals in such a situation. There are two major sources of an employer's duty to its employees: (1) the Occupational Safety and Health Act (OSHA) and (2) state common-law tort duties.

IV. OCCUPATIONAL SAFETY AND HEALTH ACT

OSHA was enacted with the primary purpose of ensuring a safe and healthful working condition for every worker in the Nation. Absent an applicable specific standard, the employer's general duty is to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." This standard may be broken into five components: (1) "freedom from"; (2) "recognized"; (3) "hazards"; (4) which "cause or are likely to cause"; (5) "death or serious physical harm." Each component will be addressed in that order.

22. The burden of proof for each element falls on the Secretary of Labor. Failure to prove an element will result in vacation of the citation. See, e.g., Whirlpool Corp. v. Occupational Safety & Health Review Comm'n, 645 F.2d 1096, 1101-02 (D.C. Cir. 1981) (Secretary did not prove there was a feasible method of abatement); Bristol Steel & Iron Works, Inc. v. Occupational Safety & Health Review Comm'n, 601 F.2d 717, 723-24 (4th Cir. 1979) (while the court believed the citation was proper, the Secretary did not meet the burden of proving that a "reasonably prudent employer familiar with steel erection would have protected against the hazard of falling by the means specified in the citation"); National Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n, 489 F.2d 1257, 1267-68 (D.C. Cir. 1973) (Secretary had not satisfied the bur-
A. Freedom From

The term "free" does not impose strict liability on employers, but imposes only a duty capable of achievement.\textsuperscript{23} The Secretary of Labor has the burden of proving that an employer has not freed the workplace of a recognized hazard, \textit{i.e.}, must specify the particular steps the employer should have taken to avoid an OSHA citation and demonstrate the feasibility and likely utility of those measures.\textsuperscript{24} "Feasible" has been held to mean economically and technologically capable of being done,\textsuperscript{25} as recognized by safety experts.\textsuperscript{26}

\begin{itemize}
  \item[24.] \textit{National Realty}, 489 F.2d at 1267-68 (Secretary did not satisfy burden of proof as to what the company should have done to prevent the hazard, even though the court believed it likely that the instances of equipment riding were preventable). \textit{See also Whirlpool Corp.}, 645 F.2d at 1099, 1101, where an employee fell through a screen which separated an overhead conveyor from employees working below. Although the Secretary's witnesses testified that a heavier gauge screen would be safer than that used, they did not testify as to whether complete screen replacement was feasible. The employer's witness testified that it was architecturally infeasible to completely replace the screen. \textit{See also Pelron Corp.}, 1986 Empl. Safety & Health Guide (CCH) ¶ 27,605, at 35,872-74 (employer's extensive employee training program, including the hiring process, and the procedure to avoid runaway reactors in pressure vessels leading to an explosion was not proven by Secretary to be inadequate); Cerro Metal Prod. Div., 1986 Empl. Safety & Health Guide (CCH) ¶ 27,579, at 35,830-32 (employer had a rule regarding deenergization of the press during maintenance, there had been a recent safety meeting concerning the rule, the supervisors had seen one of the maintenance employees deenergize the press and had no reason to believe it would be energized again before completion of the maintenance, and surviving employee testified he knew the rule; Secretary failed to show what further feasible steps the employer could have taken to render the workplace "free" of cited hazard).
  \item[25.] \textit{Baroid Div.}, 660 F.2d at 447 (citing American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981)). For example, a suggested method of abatement, to protect employees ("mud men") from working in areas where natural gas was not vented at a safe distance, was to require monitoring of the mud men at every unvented drilling site, coupled with a mandatory evacuation plan. The court determined that, because every mud man worked at several drilling sites within a given time period and the employer employed numerous mud men, this was not economically feasible. \textit{Id.} Another method—training mud men to monitor gas accumulations themselves through smelling, coupled with a mandatory evacuation requirement—prompted a remand to determine whether this measure was feasible. \textit{Id.} at 448. \textit{See also American Smelting & Ref. Co. v. Occupational Safety & Health Review Comm'n}, 501 F.2d 504 (8th Cir. 1974), in which air sampling tests were thought to be a more efficient and practical way to detect the hazard than biological monitoring. \textit{Id.} at 515. Where "hazards are recognized but not
A number of factors are considered to determine whether a workplace is "free" from recognized hazards which cause or are likely to cause death or serious physical harm. One factor is the employer's safety training program.

An employer's safety training program generally will be considered adequate when the safety instructions are communicated to all affected employees and when the employer holds periodic safety meetings to reinforce those instructions.\textsuperscript{27} An example of an adequate safety training program was illustrated in \textit{Cerro Metal Products Division},\textsuperscript{28} where an employee was crushed while attempting to repair the loader of a press, when his assistant energized the press after having initially de-energized it. The employer had a safety rule requiring de-energization of the press before repairs. That rule was explained in a safety manual given to all employees. Documents referring to the rule were posted at the press and in the repair office. Several months before the accident, both employees involved attended a safety meeting where the rule was discussed.\textsuperscript{29} No evidence indicated that supervisors were aware of any violations of the rule, and there were no previous accidents or injuries to indicate noncompliance with the rule.\textsuperscript{30} Since the Secretary of Labor did not show in what manner the employer's training program was inadequate, the OSHA citation was vacated.\textsuperscript{31}
An employer's safety training program will be considered inadequate in the absence of enforcement. In *Ramco Well Service, Inc.*, a general duty clause violation for failing to require safety belts for employees ascending a derrick was upheld. Although there was a verbal safety rule requiring the use of safety belts, employees frequently broke the rule and no one had ever been fired for breaking it. Similarly, in *Hennage Creative Printers*, an employee got his hand and arm caught in a press. Although the employer had a work rule prohibiting operation of the press with the guard gates raised, it was not enforced. The employer knew the work rule was not always followed. Thus, the OSHA violation was upheld.

Where an employer does not have written safety rules and does not hold safety meetings, the safety training likely will be deemed inadequate. In *General Dynamics Corp. v. Occupational Safety & Health Review Commission* an employer was cited for a violation of the general duty clause for failing to provide adequate safety instructions on the procedure for supporting vertically standing steel plates after an employee died when a 3,500 pound web frame fell on him. It was undisputed that the frame fell because certain braces were removed before the frame was securely welded. The employer contested the OSHA citation on the ground of "unauthorized and

incidents of employees—including supervisory employees—entering the baler [demonstrated] that [the employer] did not effectively monitor employee compliance or discipline employee non-compliance." *Id.* at 33,345. The safety training program was not considered adequate, and the OSHA violation was upheld. *Id.* at 33,346.

32. 1982 Empl. Safety & Health Guide (CCH) ¶ 26,293. See also Young Sales Corp., 5 O.S.H. Cas. (BNA) 1564 (1977). There, an employer violated the general duty clause by not adequately enforcing its instructions that employees not walk on corrugated asbestos roof sheets. *Id.* at 1565. Even a foreman responsible for providing the safety instructions testified that he would not hesitate to jump on the sheeting in order to get off a catwalk located a foot above the roof. Also, the nature of the employer's work sometimes required the employees to walk directly on the sheeting. *Id.* at 1566. Accordingly, chicken ladders or walk boards across the sheeting were required to afford a safer walking surface. *Id.* at 1566-67.

33. 6 O.S.H. Cas. (BNA) 1391 (1978).

34. *Id.* at 1392-93.

35. *Id.* at 1399.

36. *Id.*

37. 599 F.2d 453 (1st Cir. 1979). See also *Ramco Well Serv., Inc.*, 1982 Empl. Safety & Health Guide (CCH) ¶ 26,293 (no employee training; verbal safety rule not enforced); K-Mart, 1982 Empl. Safety & Health Guide (CCH) ¶ 26,333, at 33,345 (two years had passed since the initial training with no interim reminders and employees employed after initial session not instructed to remain out of the machines at all times).

38. *General Dynamics*, 599 F.2d at 456-57.

39. *Id.* at 457. It also was "undisputed that the [braces] . . . should not be removed until the web frame [had] been tack welded to the bulkhead on at least one side and also tack welded to the longitudinals." *Id.* (footnote omitted).
idiosyncratic" employee behavior. The court noted that there was "no written rule, . . . no safety meetings had been held, . . . and supervisors were uncertain as to the degree of welding needed . . . ." The employer's Chief of Safety did not know if the proper procedure had been communicated to the employees. In addition, employees testified that they had not been instructed regarding the proper use of braces. In upholding the OSHA citation, the court found that the safety training was inadequate and that there was sufficient evidence to conclude that this inadequacy, not the idiosyncratic employee behavior, resulted in the occurrence of the hazard.

The adequacy of an employer's supervision is another factor. In Brennan v. Occupational Safety & Health Review Commission the employer was cited for a violation of the general duty clause for, among other things, not properly supervising a laboratory technician who electrocuted himself while conducting an experiment. The parties did not dispute that the technician was a long-time, experienced employee who had had an accident-free record and had never been observed doing anything unreliable or unsafe. The court noted that the employee had been supervised at least daily and that such supervision had in the past sufficed to preserve the employee's accident-free record and his regular compliance with electrical industry standards. The Secretary made no showing as to the appropriateness of more frequent supervision or the feasibility of having the laboratory set-up for each test inspected by a supervisor prior to being energized, when periodic or routine tests were conducted by experienced technicians. The court therefore concluded that the Occupational Safety and Health Review Commission's (the Commission's) rejection of the OSHA violation based on

40. Id. at 459. When such a defense is raised, the issue of an employer's training and supervision automatically arises as part of the employer's showing that it took all feasible steps to avoid the occurrence of the hazard. Id.
41. Id. at 465.
42. 599 F.2d at 466-67.
43. Id. at 467. The court noted that to prove idiosyncratic behavior once the general inadequacy of safety training is established, the employer must show that the "employees who caused the hazard were in fact adequately trained." Id. at 466. This employer did not make such a showing.
44. 502 F.2d 946 (3d Cir. 1974).
45. Id. at 948-49. There was evidence that on the date of the accident the employee, unknown to the employer, was under some unusual emotional stress. Id. at 949-50.
46. Id. at 949.
47. Id. at 952.
48. 502 F.2d at 952.
inadequate supervision was appropriate.\(^4^9\)

Yet another factor is the employer's overall safety practices, including the use of safety equipment and work procedures. In *American Smelting & Refining Co. v. Occupational Safety & Health Review Commission*\(^5^0\) the employer was charged with exposing employees to hazardous concentrations of lead, in violation of the general duty clause.\(^5^1\) The company supplied respirators, but most employees did not use them.\(^5^2\) The company also maintained a biological testing program. The court noted that the testing program only revealed the hazard; it did not eliminate it.\(^5^3\) Therefore, the court concluded that air sampling tests were a more efficient and practical way to prevent the employees from being exposed to hazardous levels of lead.\(^5^4\) The OSHA citation was affirmed.\(^5^5\)

**B. Recognized**

The next component of the general duty clause is "recognized." Recognition can be shown by reference to an industry standard, knowledge of the employer, or reference to issued general

\(^{49}\) *Id.* But see *K-Mart*, 1982 Empl. Safety & Health Guide (CCH) \$ 26,333, where employees, including the supervisors, consistently entered a machine despite training and warnings from service personnel never to place body parts in it. The Occupational Safety and Health Review Commission (the Commission) found that the number of incidents of employees entering the machine demonstrated that the employer did not effectively monitor the employees' compliance with safety instructions and did not discipline employee noncompliance. *Id.* at 33,345. See also *Ramco Well Serv., Inc.*, 1982 Empl. Safety & Health Guide (CCH) \$ 26,293 (no supervision or enforcement of verbal safety rule regarding safety belts).

\(^{50}\) 501 F.2d 504 (8th Cir. 1974). See also *Continental Oil Co. v. Occupational Safety & Health Review Comm'n*, 630 F.2d 446, 447, 449 (6th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981) (employer did not require manned deliveries or automatic detection devices to detect accidental overflows of petroleum products); *Inland Steel Co.*, 9 O.S.H. Cas. (BNA) 2192, 2194 (1981) (OSHA citation vacated because at least four employees kept a lookout for potential dangers of unexpected overflows of molten steel for a fellow employee and because employees had protective clothing); *Armstrong Cork Co.*, 8 O.S.H. Cas. (BNA) 1070, 1071, 1074, *aff'd mem.*, 636 F.2d 1207 (3d Cir. 1980) (employer replaced switch on papermaking machinery with a spring-loaded switch for safety reasons but did not inspect the switch to ensure it was properly functioning and that machine could not be used without depressing the switch); *Ross Island Sand & Gravel Co.*, 4 O.S.H. Cas. (BNA) 1797, 1798 (1976) (employer's furnishing of life jackets to employees, informing them of need for their use, and reprimanding for neglecting to wear them satisfies general duty clause).

\(^{51}\) *American Smelting*, 501 F.2d at 505.

\(^{52}\) *Id.* at 506.

\(^{53}\) *Id.* at 514-15.

\(^{54}\) *Id.* at 515.

\(^{55}\) *American Smelting*, 501 F.2d at 515.
safety regulations.\textsuperscript{56}

1. Industry Recognition.—The District of Columbia Circuit, in National Realty \& Construction Co. v. Occupational Safety \& Health Review Commission,\textsuperscript{57} determined that industry recognition would be measured by the "common knowledge of safety experts who are familiar with the circumstances of the industry or activity in question."\textsuperscript{58}

A hazard recognized by the industry can be proven by a number of sources besides a safety expert. In Young Sales Corp.,\textsuperscript{59} for example, the major manufacturers of corrugated sheeting provided written warnings that employees should not walk directly on the sheeting because it was very brittle.\textsuperscript{60} In K-Mart\textsuperscript{61} industry recognition was established when a machinery serviceman routinely instructed his customers that employees should never enter the machine.\textsuperscript{62} In St. Joe Minerals Corp. v. Occupational Safety \& Health Review Commission\textsuperscript{63} industry recognition was established when the American National Standards Institute (ANSI) recognized that operating a freight elevator with a bypassed interlock system was dangerous.\textsuperscript{64}

\textsuperscript{56} See, e.g., Baroid Div. v. Occupational Safety \& Health Review Comm'n, 660 F.2d 439, 446 (10th Cir. 1981) (petroleum industry generally and the employer particularly recognized that accumulation of natural gas near a drilling rig creates fire and explosion hazards); Ramco Well Serv., Inc., 1982 Empl. Safety \& Health Guide (CCH) ¶ 26,293 (industry standards required climbing devices or belts when ascending a derrick; employer had a verbal safety rule). But see Toms River Chem. Corp., 6 O.S.H. Cas. (BNA) 2192, 2192 (1978) (Commission did not find that exposure to low levels of phosgene was a recognized hazard because "neither [the] employer's experience nor published criteria on the allowable limits of phosgene exposure indicated conclusively that the phosgene exposures in [the] employer's plant could cause death or serious physical harm to employees").

\textsuperscript{57} 489 F.2d 1257 (D.C. Cir. 1973).

\textsuperscript{58} Id. at 1265 n.32. In Voegele Co. v. Occupational Safety \& Health Review Comm'n, 625 F.2d 1075 (3d Cir. 1980), the employer contended the slightly slanted roof should be considered flat and thus no protective equipment was necessary; the safety expert testified he would have issued a citation for failing to provide protective equipment even if the roof had been flat. Id. at 1079.

\textsuperscript{59} 5 O.S.H. Cas. (BNA) 1564 (1977).

\textsuperscript{60} Id. at 1565.

\textsuperscript{61} 1982 Empl. Safety \& Health Guide (CCH) ¶ 26,333.

\textsuperscript{62} Id. at 33,344.

\textsuperscript{63} 647 F.2d 840 (8th Cir. 1981).

\textsuperscript{64} Id. at 845 n.8. An American National Standards Institute (ANSI) standard, as well as an insurance industry publication and testimony concerning the procedure in other shipyards, was used in Bethlehem Steel Corp. v. Occupational Safety \& Health Review Comm'n, 607 F.2d 871, 874 (3d Cir. 1979), to indicate industry recognition of the hazard of operating a crane when wind gusts exceeded 40 miles per hour.

The industry standard applied must be for the correct industry. In Donovan v. Missouri Farmers Ass'n, 674 F.2d 690 (8th Cir. 1982), for example, the Eighth Circuit
If an employer fails to take reasonable precautions against hazards generally known in the particular industry, an employer may be held to a higher standard than that of actual practice.\(^6\) In *Southern Railway Co.*,\(^6\) for example, the company used a universal warning system to prevent locomotives from being struck while maintenance work was being done on them.\(^6\) The warning system was not effective because the employees failed to follow the rules. Locomotives commonly were bumped during maintenance, a fact of which the employer was aware. Moreover, the company knew of a more effective means of preventing the bumping during maintenance.\(^6\) The Commission found that an employer could be required to upgrade work practices and safety precautions above that considered customary or reasonable by an industry.\(^6\)

2. **Employer Recognition.**— Employer recognition can be established if the particular employer has actual knowledge of the hazard. This component of the general duty clause can be demonstrated in a variety of ways, such as by the warnings of an independent engineering firm or an employee,\(^7\) accident reports,\(^7\) warnings to employees,\(^7\) and safety measures taken.\(^7\)

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reversed an OSHA citation for failing to monitor the chemical composition of the atmosphere in the basement pit of a country grain elevator. The experts based their testimony on experience with larger terminal elevators and an informal survey indicated no country grain elevator in the area had oxygen-monitoring equipment. The court concluded that employers utilizing country grain elevators had not had adequate warning of a duty to implement atmospheric testing. *Id.* at 692.


66. 3 O.S.H. Cas. (BNA) 1657 (1975).

67. *Id.* at 1660.

68. *Id.*

69. *Id.* at 1658. *But see* Donovan v. Missouri Farmers Ass'n, 674 F.2d 690, 692 (8th Cir. 1982) where the court declined to hold country grain elevators to a higher standard because of the inadequacy of a warning of a duty to implement atmospheric testing.

70. *See e.g.*, St. Joe Minerals Corp. v. Occupational Safety & Health Review Comm'n, 647 F.2d 840, 845 (8th Cir. 1981) (bypassing an electrical protective device of a freight elevator, thereby permitting it to be operated with the doors and gates open).

71. *See e.g.*, Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 234 (5th Cir. 1974) (prevalence of employees' foot injuries should have made employer aware of need to comply with general protective equipment regulation); American Airlines, Inc., 6 O.S.H. Cas. (BNA) 1252, 1254 (1977) (revealing foot injuries from dropped cargo). *But see* Donovan v. General Motors Corp., 764 F.2d 32, 36-37 (1st Cir. 1985) (history of foot injuries does not constitute actual knowledge).

72. *See e.g.*, PBR, Inc. v. Secretary of Labor, 643 F.2d 890, 895 (1st Cir. 1981) (employees warned to be careful of the undercutter).

73. Armstrong Cork Co., 8 O.S.H. Cas. (BNA) 1070, 1071, *aff'd mem.*, 636 F.2d 1207 (3d Cir. 1980) (installation of a spring-loaded switch as a safety measure). *See also* Ryder, 497 F.2d at 234 (employer instituted safety shoe program); American Airlines, Inc., 6
An employer also can be held to recognize a hazard that is obvious. In Donovan v. Missouri Farmers Association, for example, the Eighth Circuit found that an unventilated, almost completely enclosed, pit without ready means of exit in case of emergency was an obvious hazard and thus warranted a safety belt with a lifeline for workers entering the pit.74 The Eighth Circuit also used the decision to give country grain elevator owners notice that "the toxic effects of decomposing grain in confined spaces . . . constitute recognized hazards to the safety of employees."75

3. General Safety Regulations.—Employers sometimes contest application of a general safety standard to a hazard in the workplace. They claim the regulation is so vague as to be unconstitutional in not giving them notice that a hazard is recognized and the regulation is applicable. In McLean Trucking Co. v. Occupational Safety & Health Review Commission76 such a claim was made with respect to application of the general protective equipment standard.77 The Fourth Circuit said that a general OSHA regulation has an external and objective test—whether a reasonable person would have protected against the hazard by the means specified—as under the general duty clause.78

C. Hazard

The third component of the general duty clause is "hazard." A safety hazard has been defined as a "condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur."79 To illustrate, in Baroid Division v. Occupational Safety & Health Review Commission the court concluded that a substantial accumulation of gas near an oil rig was a hazard, as was failure to use a gas separator mechanism where a

O.S.H. Cas. (BNA) 1252, 1253 (1977) (employer offered payroll deduction plan to encourage purchase of safety shoes). But see General Motors Corp., 764 F.2d at 34, 36-37 (employer encouraged, but did not require, auto parts warehouse employees to buy steel-toed shoes; no actual knowledge since there was no significant risk of harm).

74. 674 F.2d 690, 693 (8th Cir. 1982).
75. Id. at 692-93.
76. 503 F.2d 8 (4th Cir. 1974).
77. Id. at 10 (applying 29 C.F.R. § 1910.132 (1974)).
78. Id. at 10. See also Bristol Steel & Iron Works, Inc. v. Occupational Safety & Health Review Comm'n, 601 F.2d 717, 722-23 (4th Cir. 1979) (applying 29 C.F.R. § 1926.28(a) (1979)); Voegele Co. v. Occupational Safety & Health Review Comm'n, 625 F.2d 1075, 1078-79 (3d Cir. 1980) (applying 29 C.F.R. § 1926.28(a) (1980)).
pocket of pressurized natural gas is encountered.  

In *McLean Trucking Co.* the court found that there was a hazard of foot injuries for dockmen because freight carried by the employees or placed on dollies or forklifts could drop or fall on an employee's foot. A similar finding was made in *American Airlines, Inc.* where workers in their day-to-day duties sometimes dropped cargo which resulted in foot injuries.

**D. Cause or Likely to Cause**

The fourth component of the general duty clause is "cause or likely to cause." Once again the District of Columbia Circuit laid the foundation upon which to analyze this component. In *National Realty & Construction Co. v. Occupational Safety & Health Review Commission* the court rejected a mathematical probability test. Instead, the test was stated as follows: "If evidence is presented that a practice could eventuate in serious physical harm upon other than a freakish or utterly implausible concurrence of circumstances, the Commission's expert determination of likelihood should be accorded considerable deference by the courts." The potential for injury may be indicated by an employee's death or by common sense.

An employee need not die or be seriously injured in order to satisfy the "cause or likely to cause" component of the OSHA standard. For example, in *Babcock & Wilcox Co. v. Occupational Safety & Health Review Commission* the court determined that the employer violated the general duty clause when molten steel was poured despite the presence of water on the floor of the steel plant. Molten steel and water may cause an explosion if combined, a fact recog-
nized in the steel industry. Although no explosion had occurred, the likelihood of serious injuries were one to occur could not be denied.

E. Death or Serious Physical Harm

"Death or serious physical harm" is the final component of the general duty clause. In many cases, an investigation leading to an OSHA citation usually occurs as a result of an employee death. Those cases clearly meet this component and the courts devote virtually no discussion to it.

Likewise, some cases clearly meet the criterion of "serious physical harm." In *Hennage Creative Printers*, for instance, an employee was seriously injured when his hand and arm were caught in a press. An employee in *Carlyle Compressor Co. v. Occupational Safety & Health Review Commission* was seriously injured when a four and one-half pound, twelve-inch long shaft was expelled at high speed from a machine. And, in *K-Mart* an employee was crushed, although not fatally, when he climbed inside a cardboard box compactor. Typically, these cases, like the casualty cases, require but receive little analysis by the courts.

Injuries which may seem trivial in comparison to those listed above also have qualified as being severe enough. For example, in *Ryder Truck Lines, Inc. v. Brennan*, the Fifth Circuit noted that avoidance of minor injuries, as well as major ones, was intended by OSHA. Accordingly, the court upheld an OSHA citation for failing to require foot protection for dock workers to avoid foot

91. Id. at 1163.
92. Id. at 1165. See also *Kelly Springfield*, 729 F.2d 317, where an employer's dust collection system caused an explosion. Despite the fortunate absence of injuries, the court held that the hazard was one which would "cause or be likely to cause" death or serious physical harm. Therefore, the OSHA citation was upheld. Id. at 325.
93. See, e.g., *PBR, Inc. v. Secretary of Labor*, 643 F.2d 890, 893 (1st Cir. 1981) (employee was killed when he was drawn into the chain of a machine used to revitalize railroad tracks); *General Dynamics Corp. v. Occupational Safety & Health Review Comm'n*, 599 F.2d 453, 457 (1st Cir. 1979) (employee died when a 3500 pound frame fell on him); *Titanium Metals Corp. v. Usery*, 579 F.2d 536, 539 (9th Cir. 1978) (employee fatally burned); *Young Sales Corp.*, 5 O.S.H. Cas. (BNA) 1564, 1565 (1977) (employee died after falling through a roof over 70 feet to the ground); *Armstrong Cork Co.*, 8 O.S.H. Cas. (BNA) 1070, 1071, aff'd mem., 636 F.2d 1207 (3d Cir. 1980) (employee fatally crushed when a papermaking machine's switch was broken).
94. 6 O.S.H. Cas. (BNA) 1391 (1978).
95. 683 F.2d 673 (2d Cir. 1982).
96. 1982 Empl. Safety & Health Guide (CCH) ¶ 26,333.
97. 497 F.2d 230 (5th Cir. 1974).
98. Id. at 233.
V. OSHA AND AIDS

OSHA has yet to issue final regulations concerning exposure to AIDS. Application of OSHA currently depends on whether the components of the general duty clause can be met. This comment now will address the components of the general duty clause, together with the general protective equipment regulation, in the context of workplace exposure to AIDS.

A. Freedom From

AIDS is acquired through contact with an HIV-infected individual's bodily fluids. Employees such as HCWs are occasionally exposed to AIDS. Therefore, employers whose workers are exposed to bodily fluids must take measures to "free" the workplace of the recognized hazard which causes or is likely to cause death or serious physical harm.

Measures to "free" a workplace of recognized hazards must be economically and technologically feasible. One measure which an employer can take is to adequately train the employees. Employees should be made aware of how AIDS is transmitted, under what circumstances they may be at risk of being exposed to the AIDS virus, and what measures should be taken to minimize that risk. The employer must reinforce its safety training with written instructions and periodic meetings. In addition, the employer must supervise its employees to ensure compliance with the safety rules and punish noncompliance with discipline or discharge.

Aside from an "awareness" campaign, the employer must use

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99. Id. at 234. *See also* Arkansas-Best Freight Sys., Inc. v. Occupational Safety & Health Review Comm'n, 529 F.2d 649 (8th Cir. 1976) (foot injuries); McLean Trucking Co. v. Occupational Safety & Health Review Comm'n, 503 F.2d 8 (4th Cir. 1974) (same).
103. *Id.* at 13-14.
104. *See supra* note 25 and accompanying text.
105. *See supra* note 27 and accompanying text.
106. *See supra* note 37.
107. *See supra* note 27 and accompanying text.
109. *See supra* notes 32-33 and accompanying text.
safety equipment and implement appropriate work procedures.\textsuperscript{110} The Secretary of Labor has suggested a number of precautions to “free” HCWs from the risk of exposure to bodily fluids containing the AIDS virus.\textsuperscript{111} The suggested precautions include treating all bodily fluids and tissues as if they were infected with the AIDS virus.\textsuperscript{112} If a procedure has the potential for skin contact with blood or mucous membranes, then appropriate barriers to skin contact, such as gloves, should be worn.\textsuperscript{113} If there is the potential for splashes or splatter of blood or fluids, face shields, protective eyewear, and surgical masks should be worn.\textsuperscript{114} The precautions identify three categories of tasks according to the risks of potential exposure.\textsuperscript{115}

Since the courts defer to the Commission’s assessment of general duty clause violations,\textsuperscript{116} it is likely that compliance with the precautions will demonstrate that the employer has taken feasible measures to provide a workplace “free” of recognized hazards. In fact, a Connecticut hospital which did not take adequate measures to ensure that protective equipment was available to employees, did not conduct safety training programs for all of its employees, and did not ensure that containers of bodily fluids were properly labelled was cited for violating the general protective equipment regulation and the general duty clause.\textsuperscript{117}

\textsuperscript{110.} See supra note 50.


\textsuperscript{112.} 52 Fed. Reg. at 41,819. If all bodily fluids and tissues are treated as infectious, nothing would be gained by identifying seropositive patients and workers. \textit{Id.} at 41,820.

\textsuperscript{113.} \textit{Id.} at 41,819-20.

\textsuperscript{114.} \textit{Id.} at 41,820.

\textsuperscript{115.} \textit{Id.} at 41,821. Each employer is to evaluate the working conditions and tasks that employees are expected to encounter. \textit{Id.} at 41,820. Category I tasks involve exposure to blood, bodily fluids or tissues and protective measures are required for employees engaged in such tasks. Category II tasks involve no exposure to blood, bodily fluids, or tissues, but employment may require performing unplanned category I tasks; protective measures should be readily available for every employee engaged in category II tasks. Category III tasks involve no exposure to blood, bodily fluids, or tissues and category I tasks are not a condition of employment (e.g., handling of implements or utensils, use of public or shared bathroom facilities or telephones, and personal contacts such as handshaking); no protective equipment is required. \textit{Id.} at 41,821.


B. Recognized

Recognition of a hazard can be shown by reference to an industry standard or by knowledge of the employer. The Secretary of Labor’s and the Secretary of Health and Human Services’ joint advisory notice published in the Federal Register in October 1987 certainly would qualify as safety expert knowledge, a method of demonstrating industry recognition. The advisory notice contained information as to the modes of transmission and measures to reduce the risk of exposing HCWs to the AIDS virus.

This advisory notice also satisfies the alternative employer recognition requirement for health care employers since it was mailed to approximately 500,000 health care employers. A health care employer likely would not succeed in refuting “recognition” since the hazard has been identified and the employer would have notice that both the general duty clause and the general protective equipment regulation would be used to ensure a safe working environment for HCWs exposed to bodily fluids.

As noted earlier, the industry standard applied must be for the correct industry. Therefore, while the advisory notice may serve as “recognition” for the health care industry and the advanced no-

See also 230 Daily Labor Rep. A-7, at 1-3 (Nov. 30, 1988) (WESTLAW, BNA-DLR database) (six California health care facilities cited by OSHA for blood exposure violations). Compare Stepp v. Indiana Employment Sec. Div., 3 Indiv. Empl. Rights Cas. (BNA) 133, 135 (Ind. Ct. App. 1988), in which the court held that the employee had no basis under OSHA for refusing to handle AIDS specimens. The employer issued a safety manual, provided protective equipment, and conducted seminars and meetings concerning AIDS safety measures. Id. at 133-34. The employee had not presented evidence that these measures were ineffective. Id. at 135.

118. See supra note 56 and accompanying text.
120. National Realty, 489 F.2d at 1265 n.32.
121. 52 Fed. Reg. at 41,819. The advisory notice stated there was no evidence of HIV transmission via casual contact. Id. at 41,819. Even with HCWs, HIV infection is transmitted only through mucous membrane or parenteral exposure to blood or other bodily fluids. Id. The notice indicated that all bodily fluids should be treated as infectious. Id. Employers were directed to evaluate and categorize tasks according to the level of exposure to bodily fluids, establish mandatory work practices and protective equipment for the high exposure tasks, and monitor the effectiveness of the work practices and protective equipment. Id. at 41,821. Employers also were instructed to train employees who perform high exposure tasks concerning modes of transmission, tasks requiring protective equipment, and how to use the protective equipment. Id.
122. Id. at 41,818. The letter and advisory notice were printed in the Federal Register in their entirety.
123. 52 Fed. Reg. 45,438, 45,438 (1987) (“OSHA will require adherence to existing regulations and will apply the General Duty clause in order to protect health-care workers from the risks of blood-borne diseases.”).
124. See supra note 64.
tice of proposed rulemaking may serve as recognition by other industries exposed to bodily fluids, it is unlikely that an employer in a "normal" industry, such as a typical office or plant, would be held to "recognize" a hazard because those employees would not be exposed to bodily fluids except in a freak accident. The general duty clause would not apply in such circumstances.

C. Hazard

A hazard is a "condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur." HCWs are at a hazardous risk of contracting the AIDS virus, particularly through mucous membrane or parenteral (including open wound) exposure to blood or bodily fluids. Not only is there no cure for AIDS and no vaccine to prevent it, but infection with the AIDS virus can lead to a number of life-threatening conditions, including cancer. Consequently, skin contact with infected blood or bodily fluids presents a likelihood of causing death or serious injury and is therefore a hazard.

On the other hand, a hazard would not be found for "normal" working environments where exposure to bodily fluids is not a working condition. In such a situation, it is inconceivable that the general duty clause could be enforced.

D. Cause or Likely to Cause

This component is not dependent upon probabilities. Rather, the test is whether "a practice could eventuate in serious physical harm upon other than a freakish or implausible concurrence of circumstances." The District of Columbia Circuit, in National Realty & Construction Co. v. Occupational Safety & Health Review Commission, 52 Fed. Reg. at 45,440. Employees at risk include, but are not limited to, nurses, physicians, dentists and other dental workers, emergency room personnel, laboratory and blood bank technologists and technicians, phlebotomists, dialysis personnel, paramedics, emergency medical technicians, medical examiners, morticians, hospital housekeepers, hospital laundry workers, firefighters, and law enforcement officers. Id. Baroid Div. v. Occupational Safety & Health Review Comm'n, 660 F.2d 439, 444 (10th Cir. 1981).

125. 52 Fed. Reg. at 45,440. Employees at risk include, but are not limited to, nurses, physicians, dentists and other dental workers, emergency room personnel, laboratory and blood bank technologists and technicians, phlebotomists, dialysis personnel, paramedics, emergency medical technicians, medical examiners, morticians, hospital housekeepers, hospital laundry workers, firefighters, and law enforcement officers. Id. Baroid Div. v. Occupational Safety & Health Review Comm'n, 660 F.2d 439, 444 (10th Cir. 1981).


said the Commission's expert determination of likelihood, if there is
evidence that the occurrence is not "freakish or implausible,"
should be "accorded considerable deference by the courts." HCWs routinely are exposed to bodily fluids. Because OSHA has
determined that the general duty clause and the protective equip-
ment regulation will be used to protect HCWs from exposure to AIDS, it is likely that the courts will consider even the less than
one percent risk sufficient to satisfy this component of the gen-
eral duty clause.

Once again, because there is "no known risk" in normal work-
place situations, the general duty clause would not be applicable
where there is no exposure to bodily fluids. Exposure to bodily
fluids in such an environment would be considered a "freakish" occurrence.

E. Death or Serious Physical Harm

As noted, there presently is no cure for AIDS and no vaccine to
prevent it. Once infected with the AIDS virus, death is sure to
follow. Thus, it is clear that the "death or serious harm" compo-
nent of the OSHA standard would be satisfied.

While OSHA theoretically protects employees exposed to bod-
ily fluids possibly containing the AIDS virus, the employee must
nevertheless rely upon the Secretary of Labor when it comes to en-
forcement of the general duty clause.

VI. No Private Cause of Action Under OSHA

Even though an employee may believe that OSHA has been viol-
ated, that employee has no private cause of action to enforce it. In
Taylor v. Brighton Corp. the court held that OSHA does not pro-
vide a private course of action. The court reasoned that because
Congress did not expressly provide for a private cause of action and
because Congress did provide for a screening mechanism—the Sec-
retary of Labor—Congress could not have intended that employees
individually pursue their claims in court. The court held to this

131. Id.
135. 616 F.2d 256 (6th Cir. 1980).
136. Id. at 262. See also Donovan v. Occupational Safety & Health Review Comm'n, 713 F.2d 918 (2d Cir. 1983); Byrd v. Fieldcrest Mills, Inc., 496 F.2d 1323 (4th Cir. 1974); Russell v. Bartley, 494 F.2d 334 (6th Cir. 1974); Otto v. Specialties, Inc., 386 F.
stance even after the Secretary of Labor urged that an implied private cause of action should be found because the Secretary did not have the resources necessary to adequately handle employee complaints.\textsuperscript{137} The court rebuffed the Secretary by suggesting that the Secretary make his arguments to Congress, not to the courts.\textsuperscript{138}

OSHA authorizes the Secretary of Labor to conduct inspections,\textsuperscript{139} to issue or not issue citations,\textsuperscript{140} to impose penalties,\textsuperscript{141} and to resolve disputes before the Commission.\textsuperscript{142} This enforcement power is exclusive.\textsuperscript{143} Because an employee cannot individually enforce an OSHA violation, an alternative vehicle for ensuring a safe workplace is provided by the common law.

\section*{VII. Common-Law Duty to Provide a Safe Workplace}

Long before the enactment of OSHA, the common law imposed on employers a duty to provide their employees with a safe working environment. If not for workers' compensation laws, an employee could bring a tort action in state court for damages or an injunction. It is argued that workers' compensation laws have had a negative impact on an employee's attempts to ensure that employers provide a safe workplace.

Many, if not all, workers' compensation laws provide that the rights and remedies under such laws are exclusive for employers and employees covered by the laws.\textsuperscript{144} There are countless cases reaffirming this premise.

In \textit{Kottis v. United States Steel Corp.}\textsuperscript{145} the court held that an in-
jured employee's remedy was limited to the Indiana Workers' Compensation Act. In that case an administratrix brought an action under a "dual capacity" theory to recover additional damages, alleging that the employer was both the owner of the land and the manufacturer of the crane on which the accident occurred and thus owed duties to the employee as an invitee and for defects in its products.

The Indiana Workers' Compensation Act provided that it was exclusive of all other remedies except against a person other than the employer and not in the same employ. The court in Kotits noted that the employer's failure to provide a safe workplace was probably the cause of a substantial proportion of industrial accidents, one of the most important common-law actions which the workers' compensation remedy was designed to replace. The court reasoned that allowing an additional remedy would be extremely detrimental to the workers' compensation scheme. The appellate court, therefore, affirmed the trial court's summary judgment in favor of the defendant employer.

Furthermore, the inadequacy or lack of a workers' compensation award for particular injuries does not entitle plaintiffs to a common-law action. As long as the injury, disease, or infection arose out of employment, workers' compensation is the exclusive remedy, unless the employer injured the specific employee with an actual, specific, and deliberate intent to do so. Generally, an employer's motion to dismiss will be granted.

146. Id. at 24.
147. Id. at 23.
148. IND. CODE ANN. § 22-3-2-6 (Burns 1986).
149. Kotits, 543 F.2d at 24. See IND. CODE ANN. § 22-3-2-6 (Burns 1986).
150. Kotits, 543 F.2d at 26. The court surveyed a number of cases where the courts had refused to permit actions based on other statutory or common-law duties arising in the course of the employer-employee relationship. Id. at 25 & n.3. The court could find no basis for granting the additional remedies here, where the employment relationship predominated. Id. at 26.
151. Id. at 23, 26. See also Byrd v. Fieldcrest Mills, Inc., 496 F.2d 1323 (4th Cir. 1974). The plaintiff in Byrd brought an action alleging her intestate's death in the course of employment was due to the employer's negligent violation of OSHA. Dismissal of the case was affirmed, however, because the death was compensable exclusively under the state workers' compensation act. Id.
153. Id. § 68.00, at 13-1.
154. See Vann v. Dow Chem. Co., 561 F. Supp. 141 (W.D. Ark. 1983). There, the plaintiffs sued the employer for damages because the employer allegedly allowed them to come into contact with a chemical containing hazardous substances, without warning and without a proper safety apparatus. Id. at 142. As a result of their alleged exposure, the plaintiffs claimed they suffered from sterility, carcinogenicity, and mutagenicity. Id.
Not all courts take such a strict view of the exclusivity bar. In *McCarthy v. Department of Social & Health Services*,\(^{155}\) for example, an employee sought industrial insurance benefits for obstructive lung disease due to workplace exposure to tobacco smoke.\(^{156}\) Her claim was denied because the disease was neither the result of an industrial injury nor "an occupational disease within the contemplation of the Washington Industrial Insurance Act."\(^{157}\)

The employee then sought private relief.\(^{158}\) The court addressed the question of whether the exclusivity provisions of the state workers' compensation act barred the private cause of action. The court noted that generally the exclusivity provisions of a workers' compensation act bar private causes of action when the particular disease is within the coverage provisions of the act.\(^{159}\) The court found that the employee should be given the opportunity to show that her disease was not within the act. If she succeeded in this proof, she could maintain her private cause of action; if the disease was found to be within the act, her private cause of action would be barred by the exclusivity provisions.\(^{160}\)

Employees, however, may have a private action even if the work-related injury is covered by the state workers' compensation act. That is, private relief still may be available if the particular act allows the employee to elect coverage prior to an accident or if the employer fails to comply with the terms of the act.

For example, in *Arvas v. Feather's Jewelers*,\(^{161}\) the employer asserted the exclusivity of the workers' compensation act in response to an employee's allegations that the employer failed to provide a safe workplace. Since the employer had not complied with the terms of the act, however, the court said the employee had a choice

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\(^{155}\) See generally 1C A. Larson, *The Law of Workmen's Compensation* § 41.33(a) (1988) and cases cited therein concerning occupational diseases.

\(^{156}\) 571 S.W.2d 691, 693 n.1 (Mo. App. 1978) (plaintiff's back injury did not fall within the definition of "accident" under the act and thus was not compensable under the act; plaintiff's only remedy was in tort).
between maintaining a civil action or applying for workers’ compensation benefits.\textsuperscript{162} In addition, the employer’s failure to comply with the act precluded its use of contributory negligence as a defense.\textsuperscript{163} The judgment for the plaintiff was affirmed.\textsuperscript{164}

Failure to comply with a workers’ compensation law is but one example of a circumstance where an employee can maintain a common-law action. An employee also may pursue a private claim if the employer is not a subscriber to the workers’ compensation program.\textsuperscript{165}

Accidental injuries, however, sustained as a result of an employer’s gross, wanton, wilful, deliberate, intentional, reckless, culpable or malicious negligence, breach of statute, or other misconduct will not be excepted from the exclusivity provision.\textsuperscript{166} The exception lies when there is a conscious and deliberate intent to inflict an injury.\textsuperscript{167} Therefore, an intentional removal of a safety device or toleration of a dangerous condition may set the stage for a later accident, but the accident would be deemed covered by the workers’ compensation program and not actionable as an intentional infliction of harm.\textsuperscript{168}

Some workers’ compensation statutes, however, permit private causes of action for wilful, wanton, or reckless misconduct.\textsuperscript{169}

\begin{thebibliography}{99}
\bibitem{162} Id. at 92, 582 P.2d at 1305.
\bibitem{163} Id. The employee admitted she considered the area dangerous and exercised extra caution when in the area. Id. at 90, 582 P.2d at 1303.
\bibitem{164} Id. at 92, 582 P.2d at 1305. \textit{See also} Circle K Corp. v. Rosenthal, 118 Ariz. 63, 574 P.2d 856 (1977). In Circle K a store clerk was shot by an armed robber. He sued his employer for negligently failing to provide him with a reasonably safe workplace. Id. at 63, 574 P.2d at 856. The Arizona workers’ compensation statute provided that, where an employer complies with the statute, an employee could elect to reject workers’ compensation and retain the right to sue, as long as the employee filed written notice to the employer before injuries were sustained. Id. at 66 n.2, 574 P.2d at 859 n.2. The employee had not provided such notice to the employer, but neither had the employer complied with the terms of the act, i.e., the posting requirements concerning the right to reject workers’ compensation coverage. Therefore, the court held the employee was entitled to reject the workers’ compensation act and maintain a common-law action. Id. at 66-67, 574 P.2d at 859-60.
\bibitem{165} \textit{See} Harrison v. Harrison, 597 S.W.2d 477 (Tex. Civ. App. 1980), where an employee was injured when a log fell from a pile of logs on a trailer. Id. at 481. The employee could not receive workers’ compensation benefits because, although the employer was eligible under the act, it was not a subscriber. Therefore, the employee could bring suit for injuries sustained during the course of employment. Id. at 481 n.1.
\bibitem{166} 2A A. Larsson, \textit{The Law of Workmen’s Compensation} § 68.13, at 13-10 and cases cited at n.11 (1988).
\bibitem{167} Id.
\bibitem{168} Id. at 13-45.
employee in these situations has the burden of proving that the em-
ployer’s misconduct was wilful, wanton, or reckless.170

Exclusivity may not apply when an injunction is sought to pro-
tect against occupational hazards. In Shimp v. New Jersey Bell Tele-
phone Co.,171 for example, an employee sought an injunction against
cigarette smoking in the workplace. The court found the exclusivity
 provision of the New Jersey Workmen’s Compensation Act did not
apply because it was designed to remedy situations where the hazard
had ripened to injury, not to situations where an injunction was
sought to get rid of the hazard before injury occurred.172 The court
considered medical evidence of the hazards of tobacco smoke to
smokers and nonsmokers alike.173 The court found that the em-
ployees’ right to a safe working environment made it clear that
smoking must be forbidden in the work area.174 Because of the ir-
reparable harm that exposure to tobacco smoke causes, the court
enjoined smoking in the offices and in the adjacent customer service
area.175

not apply to assault and battery); Readinger v. Gottschall, 201 Pa. Super. 134, 138, 191
A.2d 694, 696 (1963) (physical ejectment of employee not covered by workers’ compen-
sation act).

Cir. 1983). The plaintiff there was employed in the employer’s dishroom. Because of a
broken garbage disposal, a bucket was placed under the hole where the disposal was
located to catch the scraps. Not all of the scraps fell in the bucket and the floor became
wet and slippery. The plaintiff slipped on food scraps and fell, causing a vertebral frac-
ture. Id. at 93.

The plaintiff filed suit, claiming that her case fell within an exception to the workers’
compensation bar, for injuries caused by wilful, wanton or reckless misconduct. Id. The
appellate court reversed the jury verdict for the plaintiff because she had failed to give
the reasons why two other employees allegedly fell in the dishroom or to submit evi-
dence that the employer was aware of those incidents. Id. at 93-94.

172. Id. at 524, 368 A.2d at 412.
173. Id. at 527-30, 368 A.2d at 413-15.
174. Id. at 531, 368 A.2d at 416.
175. 145 N.J. Super. at 531, 368 A.2d at 416. See also Smith v. Western Elec. Co., 643
S.W.2d 10 (Mo. App. 1982), where an employee sought an injunction to prevent his
employer from exposing him to tobacco smoke in the workplace. Id. at 11. The em-
ployee contended that exposure to tobacco smoke was a health hazard and violated the
employer’s duty to provide a safe workplace. Id. The appellate court reversed the trial
court’s dismissal of the case. Id. at 14. In doing so, the court relied on the employer’s
own recognition of smoking as a health hazard in adopting a smoking policy. Id. at 12.
By failing to exercise its control and to assume its responsibility to eliminate the hazard-
ous condition caused by tobacco smoke, the employer had breached its duty to provide a
reasonably safe workplace. Id. at 13. The court held that the employee was entitled to
injunctive relief because the exposure to tobacco smoke was increasingly deleterious to
the employee’s health and was causing irreparable harm for which money damages
could not adequately compensate. Id.
Despite the numerous hurdles to jump before an employee can maintain, let alone prevail in, a private action, a few cases do survive. Because these cases do not discuss the workers' compensation aspects, it is unclear whether the actions survive because the employee has elected not to be covered by the workers' compensation program, because the employer has not complied with the program, or because there are express exceptions to the exclusivity provision. Regardless of the reasons for their success, these cases illustrate several important principles.

First, while the employer has a duty to provide a safe workplace, this duty is directed to the employees in general. It is not a duty which can be invoked based on the peculiarities of an individual employee. For example, in *Bernard v. Cameron & Colby Co.*, the plaintiff claimed the employer failed to provide a safe workplace because she was assigned to a smoking work area, even though she was allergic to tobacco smoke. The appellate court denied her tort claim for breach of the duty to provide a safe workplace because she had not alleged that tobacco smoke exposure created an unsafe working condition but merely alleged that she personally suffered problems with smoke.

Second, the violation of an OSHA regulation may be used as evidence of negligence or negligence per se. In *Carroll v. Getty Oil Co.*, for instance, one of the plaintiff's allegations was failure to comply with federal and state safety regulations, including title 29 of the Code of Federal Regulations, section 1910.212. The court noted that under Delaware law, conduct in violation of a statute, ordinance, rule, or regulation enacted for the safety of others and having the force of law constituted negligence per se.

177. Id. at 321, 491 N.E.2d at 605. She sought money damages and reinstatement to a position in a smoke-free area. Id.
178. Id. at 323, 491 N.E.2d at 606. The appellate court refused to take judicial notice of the general hazards of secondhand smoke when the plaintiff had not raised the issue before the trial judge. Id. See also *Gordon v. Raven Sys. & Research, Inc.*, 462 A.2d 10, 14-15 (D.C. 1983) (employee had not furnished scientific evidence of the deleterious effects of tobacco smoke on nonsmokers in general; employer does not have a duty to adapt its workplace to the particular sensitivities of an individual employee).
180. Id. at 411 (citing 29 C.F.R. § 1910.212 (1987)). The OSHA regulations had been adopted by reference by the Delaware Department of Labor. Id. at 412. Part of the plaintiff's glove was caught by a machine and his hand was pulled into the machine, resulting in partial amputation of two fingers as well as damage to another finger. Id. at 411.
181. Id. at 412. To prove negligence per se the plaintiff in *Carroll* had to show (1) that the statute, ordinance, rule, or regulation at issue embodied a standard of conduct
VIII. **The Common Law and Workplace Exposure to AIDS**

Even though an employer has a duty to provide a safe workplace, it is not easy for an employee to enforce that duty. The first course of action for an employee who works with bodily fluids and whose employer provides inadequate or no protective equipment should be to seek an injunction. Because it is recognized that exposure to bodily fluids increases the risk of contracting AIDS and that AIDS leads to a number of life-threatening conditions, prevention of unnecessary exposure is vital.

Courts following *Shimp v. New Jersey Bell Telephone Co.* likely will allow injunctive relief. Medical literature discussing the irreparable harm caused by AIDS is sufficient to provide notice to employers. Because preventive and foreseeable measures, such as protective equipment, are available to the employer, an injunction would be appropriate.

Courts taking a strict view, such as the approach taken by the court in *Vann v. Dow Chemical Co.* concerning the scope of workers’ compensation exclusivity, also may take the view that its scope contemplates injunctions as well as actions for damages. Employees exposed to bodily fluids would be forced either to take the risk of contracting AIDS or to take self-help measures such as furnishing their own protective equipment.

If an injunction is not available as a remedy, the employee may seek damages. As noted in the previous section, though, workers’ compensation laws usually short-circuit a private action for damages. While an employee in some states can elect workers’ compen-
sation or elect to retain the right to sue, this alternative should not be forced on an employee just because of the nature of the job and the negligence of the employer. Sometimes an employee may be able to bring a private cause of action because an employer has not complied with the workers' compensation law or because of an exception to the workers' compensation law. If a private action can be brought, violation of an OSHA regulation, e.g., protective equipment regulation, could be used as evidence of negligence or negligence per se.

Regardless of the circumstances by which an employee receives compensation for acquiring AIDS in the workplace, the bottom line is that neither workers' compensation nor an action for damages is truly a sufficient remedy for a death sentence from AIDS.

In supposedly nonrisk occupations where there is no exposure to bodily fluids or blood, it is unlikely an employer would be held to violate the duty to provide a safe workplace simply by employing a person with AIDS or having such a person as a client. The duty generally is viewed as one to eliminate preventable hazardous conditions.184 Due to the absence of risk of contracting AIDS through normal activities, it is doubtful that the mere presence of an employee or a client with AIDS would constitute a hazard. Also, the employer may not be aware of the presence of an AIDS carrier. Because symptoms may not manifest themselves for a long time185 and some states have passed statutes prohibiting preemployment screening for AIDS,186 an employer may not find out about the AIDS carrier unless that individual informs the employer. Regardless of whether a statute permits or precludes testing of employees, if there is no risk of transmission, then the employer should not test the employees.

The privacy of the person with AIDS is an essential consideration when discussing the employer's duty to provide a safe workplace in the AIDS context. The need for co-workers to know that an

185. See supra text accompanying note 5.
HIV-infected person is in their midst must be balanced against the infected individual’s right to privacy.

IX. PRIVACY CONSIDERATIONS

A. Case Law

The majority of states recognize a cause of action vindicating the right to privacy, with several states codifying the right. Moreover, a number of states recognizing a common-law right to privacy have adopted the following Restatement (Second) of Torts definition with regard to an invasion of privacy claim for publicity given to one's private life:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public. Employees rarely are successful in privacy actions against employers. The principal reason for this lack of success has been the following statement contained in the commentary to section 652D of the Restatement: "[I]t is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons."

189. RESTATEMENT (SECOND) OF TORTS § 652D comment a, at 384 (1977). See Davis, 627 F. Supp. at 419, where an employee voluntarily sought counseling from a psychotherapist providing services to the employer's employees as a fringe benefit. Id. The psychotherapist determined the employee was dangerous to himself and others and, according to state law, determined it was his responsibility to divulge the employee's confidences to protect the employee and others. The psychotherapist called the company's corporate manager who in turn contacted the personnel supervisor. The personnel supervisor informed the plant superintendent as well as the union representative, because the psychotherapist recommended removal from the job. Id. at 420.

The employee filed suit, claiming the employer had unreasonably publicized facts concerning his private life. The court restated comment a to § 652D of the Restatement and found that, because only two nonmanagement personnel were told about the employee's confidences, the limited disclosure was not sufficient to constitute a cause of action. Id. at 421-22. The court also found that the employer's disclosures were abso-
Not all common-law employer-employee privacy actions, however, are expressly founded on the Restatement. In Eddy v. Brown,\(^1\) for example, the plaintiff filed suit against his employer for disclosures made to his co-workers about his psychiatric problems and evaluation.\(^2\) The court noted that while an investigation into a person's private concerns could subject one to liability, the information about the plaintiff's psychiatric visits was part of his employment medical records and was of legitimate concern to his supervisor.\(^3\) The court described the elements of the tort of unreasonable publicity of one's private life as having three elements: (1) publicity (2) which is unreasonable and (3) is given as private fact.\(^4\) Because only a small number of co-workers were told about the plaintiff's psychiatric condition, the court held that the invasion of privacy count must fail—it did not amount to publication in the sense of disclosure to the general public.\(^5\)

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\(^1\) Id. 715 P.2d 74 (Okla. 1986).

\(^2\) Id. at 75.

\(^3\) Id. at 77.

\(^4\) Id. The court addressed only the first element. Id. at 78.

\(^5\) 715 P.2d at 78. It is unclear whether the employees had a need to know about the plaintiff's psychiatric condition. Apparently the court did not believe the circumstances of disclosure were important in that it relied on case law to the effect that publication in the workplace at staff meetings and discussions between defendants and other employees was different from public disclosure. Id. at 78 n.13. The plaintiff in Eddy claimed these disclosures violated his privacy. The court held that because the employer's conduct was not extreme or outrageous, a criterion which must be met before a privacy action can be maintained, and because the only information disclosed was that contained in the employee's employment record, no privacy action could be maintained. Id. at 77-78. See also Valencia v. Duvall Corp., 132 Ariz. 348, 350, 645 P.2d 1262, 1264 (1982) (company-designated physician's disclosure of medical information, contained in
The leading case where a state privacy statute was involved in an employer-employee situation is *Bratt v. International Business Machines Corp.* In *Bratt* the Supreme Judicial Court of Massachusetts answered four certified questions from the First Circuit concerning libel and invasion of privacy claims under state law. The pertinent statute provided that "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy." The Massachusetts court concluded that disclosure of private facts about an employee to fellow employees could constitute sufficient publication under the statute. Legitimate countervailing business interests in certain situations, however, might render the disclosure of personal information "reasonable," and hence not actionable. The Massachusetts court established a balancing test: in determining whether there was a violation of the statute, courts should balance "the employer's legitimate business interest in obtaining and publishing the information against the substantiality of the intrusion on the employee's privacy resulting from the disclosure.

After receiving the answers to the certified questions, the First employment records, to the employee's personal physician was not extreme or outrageous).

195. 785 F.2d 352 (1st Cir. 1986).
196. For the Massachusetts opinion, see 392 Mass. 508, 467 N.E.2d 126 (1984).
197. The employee had advised his supervisor that he was suffering from bad nerves, headaches, and an inability to sleep. 785 F.2d at 359-63. At the supervisor's suggestion, he saw a general practitioner retained by the company. *Id.* at 355. The general practitioner called the supervisor, opining that the employee was paranoid and needed immediate psychiatric attention. The supervisor told her supervisor who in turn told the upper-level manager who had been meeting with the employee concerning various grievances. The upper-level manager made a memorandum of the conversation. *Id.* at 356.

Thereafter, when the employee was informed that his latest grievance had been denied, he became distraught. *Id.* The supervisor made an appointment with a psychiatrist for the employee. *Id.* The supervisor then informed the upper-level manager who wrote a memorandum of the event, noting that the employee appeared to have a serious mental health problem warranting communication with the employee’s psychiatrist to obtain, within the company, an expert appraisal of the employee’s condition. *Id.* This memorandum was sent to two IBM managerial supervisors. *Id.*

198. Mass. Gen. Laws Ann. ch. 214, § 1B (West 1983 & Supp. 1988). In addition, IBM’s manager’s manual provided that prior approval of an employee would be obtained before disclosing or seeking medical information except in an emergency or where disclosure was required by law and that confidential medical information would not be provided to managers or personnel without an employee’s prior consent. 785 F.2d at 356.

199. 392 Mass. at 519, 467 N.E.2d at 134.
200. *Id.* at 520, 467 N.E.2d at 135.
201. *Id.* at 521-22, 467 N.E.2d at 135-36.
Circuit applied them to the facts of the case. In addressing dissemination of medical information by the manager to other employees, the appellate court upheld the trial court's summary judgment because there was not a wide disclosure and the disclosure was made to supervisors, that is, people responsible for finding the employee a job and handling his complaints.

The Massachusetts statute also came into play in Cronan v. New England Telephone Co., a privacy claim brought in the context of an AIDS diagnosis. The employee, forced to disclose the reason for his request for sick leave, divulged that he had been diagnosed as having ARC. The supervisor subsequently divulged the information to his superiors, who in turn informed large groups of employees who worked with the plaintiff. The court, relying on the same statute and standard as set forth in Bratt, i.e., balancing the employer's legitimate business interest in obtaining and publishing the information against the substantiality of the intrusion, found the allegations sufficient to withstand a motion to dismiss.

These cases give little solace to the person with AIDS interested in keeping his or her diagnosis private. As in Cronan v. New England Telephone Co. and Valencia v. Duvall Corp., an employee may have to tell the employer the medical reasons that cause frequent absences. Once the employer has that information, the sufficiency of a privacy claim is dependent upon whether the court focuses on the recipients of the information or on the outrageousness of the information. If the focus is on the recipients of the information and the information is disseminated to employees in the workplace, probably no cause of action will lie. If the focus is on the outrageousness of the information, the employee with AIDS may prevail,

202. 785 F.2d at 358-61. See supra note 197.
203. 785 F.2d at 360. As to the company allowing the company-retained general practitioner to disclose the diagnosis to management without the employee's permission, the appellate court overruled the summary judgment because the internal regulations of the company imposed a heavy duty on the company to show that its business interest in obtaining the information warranted a violation of its own rules. Id. at 360-61. The court concluded that the company had not yet satisfied its burden of proving that its business interest outweighed the intrusion on the employee's privacy. Id. at 361.
205. Id. at 1273.
206. Id. at 1274. The plaintiff received threats as a result of the disclosures. Id.
207. Id.
211. See, e.g., Valencia, 132 Ariz. at 348, 645 P.2d at 1262.
particularly if threats like those in *Cronan* are made. The case law, however, is weighted against the employee with AIDS. More needs to be done to protect such an individual's privacy, particularly in view of the irrational reactions many people have to the disease. Some states have taken legislative action to address this problem.

**B. AIDS Confidentiality Statutes**

A few states have recognized the devastating effects disclosure of an AIDS diagnosis has on an individual by enacting laws imposing strict confidentiality requirements for employers concerning AIDS blood tests. While the statutes are far more expansive than the employment situation, they do attempt to make up for the courts' current unwillingness to impose liability for the publication of private facts in the workplace.

California, Delaware, Florida, Maine, Massachusetts, and Texas have statutes prescribing disclosure of AIDS test results without the subject's written consent. California and Texas provide for maintenance of a civil action and a civil penalty up to $5,000 as well as making it a misdemeanor to disclose test results. The Maine statute allows a civil action for damages, injunctive relief, and imposes a penalty of up to $5,000. Disclosure in Florida makes one guilty of a misdemeanor in the first degree. Violations of confidentiality in Delaware are punishable by fines of $25 to $200. Conversely, the Massachusetts statute does not contain a liability provision. Presumably one could bring an action in Massachusetts under the general privacy statute at issue in *Bratt*.

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219. 785 F.2d 352 (1st Cir. 1986).
Under these statutes an employer cannot obtain AIDS test results without the employee's written consent. Also, if the test results are revealed to the employer, the employer is precluded from informing other individuals in the workplace of that fact. The employer would not have the option of balancing "legitimate business interests" with the privacy of the individual—the privacy interests are supreme.

C. Alternatives to Compromising Privacy

Alternatives to compromising the privacy of a person with AIDS do exist. In occupations where there is a risk of exposure to bodily fluids or blood, the best approach is to treat everyone as if he or she has AIDS, i.e., always take precautions such as wearing gloves, face shields, and protective eyewear. If precautions are taken at all times, no benefit is gained by identifying specific persons with AIDS. Also, if worker practices and protection were upgraded only following a positive test, the workers would be inadequately protected during the time required for testing.  

X. Summary

An employer owes a statutory and common-law duty to provide an employee with a safe workplace. While AIDS is a sexually contagious disease, it is not contagious through casual, nonsexual contact. Thus, an employer does not need to know whether an individual has been diagnosed as having AIDS to fulfill the duty to provide a safe workplace. An employer who does discover that an individual has AIDS, whether accidentally, through employment medical records, or by being told by the employee, may be liable for an invasion of that individual's privacy for disclosing that diagnosis.

In employment situations where individuals come into contact with bodily fluids, the risk of exposure to the AIDS virus would be eliminated if protective equipment were worn, or alternatively, if

222. See SURGEON GEN.'S REP., supra note 2, at 13, 21.
persons with AIDS were excluded from the workplace. The right to a safe workplace, however, must be balanced against the right not to be discriminated against based on a handicap and the right to receive health care treatment. After balancing these rights, the employer’s duty boils down to the furnishing of protective equipment and implementing procedures to assure that such equipment is used. By treating each person as potentially having AIDS by wearing gloves and face shields, employees who are potentially exposed to the AIDS virus will be protected. Privacy need not be compromised.

While an employer has the duty to provide a safe workplace, enforcement of that duty often is less than satisfactory. For instance, under OSHA, an employee does not have the right to enforce OSHA through a private cause of action. The discretion to enforce the statute lies with the Secretary of Labor. Even if a situation meets all of the criteria for imposition of an OSHA citation, the employee’s only recourse is to request an inspection. If, after inspection, the Secretary does not issue an OSHA citation, there is nothing further under OSHA which an employee can do.

Fallback to enforcement of the common-law duty to provide a safe workplace also has its drawbacks. Workers’ compensation laws invariably provide the exclusive remedy for work-related injuries. A few exceptions to exclusivity can be found, for example, when the occupational disease is not covered within the provisions of the act, when the act gives the employee a choice as to coverage, when the employer fails to comply with the terms of the act, or when there are express exceptions for wilful violations. Then and only then can an employee bring a private cause of action against the employer for compensation. These opportunities are not frequent and are unsatisfactory in that the damage already has occurred.

The most beneficial relief for an employee exposed to bodily fluids containing the AIDS virus is an injunction, to force an employer to provide adequate protective equipment before an injury is sustained. States are loath to grant injunctive relief unless irreparable harm is being caused for which money damages cannot adequately compensate. In Shimp v. New Jersey Bell Telephone Co. an injunction was issued because the employees were exposed to tobacco smoke, which results in irreparable harm to the employees’
The principal harm resulting from exposure to tobacco smoke is an increased risk of cancer. Although cancer is life-threatening, there are treatments available and surgery can be performed; in other words, there is hope for survival. Currently, for persons with AIDS, there is no hope for survival. There is only the prospect of an unpleasant death. Surely if an injunction is appropriate in a cigarette smoking situation, it is even more appropriate in an AIDS situation.

XI. Conclusion

Given adequate education concerning transmission of AIDS, through public service announcements, industry bulletins, and workplace discussion groups, some of the hysteria concerning the disease may be abated. Employers with employees in high risk occupations must ensure that the Department of Labor/Department of Health and Human Services guidelines are followed. Failure to follow those precautions in protecting individuals from exposure to bodily fluids should subject employers to OSHA fines, injunctions, or liability to employees if such a cause of action is not barred by the workers' compensation law.

Invasion of personal privacy is not justified by the need to protect employees; there are alternative methods of protecting individuals from exposure to the virus. Failure to obtain or to divulge personal medical information to employees, thus, should not expose an employer to liability. Disclosure of an AIDS diagnosis to coworkers is an unnecessary and unreasonable invasion of privacy that should be compensable in tort.

Debra A. Abbott

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226. See also Smith, 643 S.W.2d 10, where the court said the plaintiff had stated a cause of action for which injunctive relief could be granted because the employees' exposure to tobacco smoke would cause irreparable harm for which money damages could not compensate. Id. at 13.