Case Number: 2007-1550-F

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. briefing paper	Brief for the Appellees, John Doe, M.D. by Curtis Lavery v. Attorney General of the United States, et al. [partial] (5 pages)	07/23/1993	P6/b(6), b(7)(C)

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2007-1550-F
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RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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b(1) National security classified information [(b)(1) of the FOIA]
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Nos. 93-15253

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE, M.D., by CURTIS LAVERY,
Executor of his estate,

Plaintiff/Appellant,

v.

ATTORNEY GENERAL OF THE UNITED STATES, et al.,

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEES

FRANK W. HUNGER
Assistant Attorney General

MICHAEL J. YAMAGUCHI
United States Attorney

STEPHEN L. SCHIRLE
Assistant United States Attorney
(415) 556-6977

ROBERT ZENER
Appellate Litigation Counsel
(202) 514-1597
DEBORAH RUTH KANT
(202) 514-3518
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530-0001

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BRIEF FOR THE APPELLEES

STATEMENT OF THE ISSUE

Whether a federal agency, which is sending its employees and employment applicants to a clinic for mandatory physical examinations, violates the Rehabilitation Act when, based on the state of scientific knowledge in 1988, it (i) first suspends sending its employees and applicants to the facility and (ii) shortly thereafter allows them to use two other clinics along with the initial clinic, following the initial clinic's refusal to provide detailed assurances that there were no significant health risks when the agency had reason to believe that the physician performing the examinations had AIDS.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. 1291. The district court entered a final judgment in favor of the United States on December 28, 1992. Appellant filed a timely notice of appeal on February 4, 1993.

STANDARD OF REVIEW

The legal conclusions of the district court are reviewed de novo. Doe v. Attorney General, 941 F.2d 780, 783 (9th Cir. 1991). The district court's factual findings cannot be overturned unless clearly erroneous. Ibid.

STATUTE INVOLVED

Section 504 of the Rehabilitation Act of 1973 (as amended), 29 U.S.C. 794(a), bars discrimination based on disability on the part of the federal agencies. It provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service." Ibid.

STATEMENT OF THE CASE

1. Nature of the Case and Course of Proceedings Below.

Plaintiff, a physician,[1] performed physical examinations on FBI personnel and job applicants at a health care facility. The FBI requires its employees and its job applicants to undergo these routine physicals at the facility. In August of 1988, the FBI received information alleging that plaintiff had Kaposi's sarcoma, a standard symptom of HIV infection. The FBI made efforts to verify plaintiff's condition and assess the medical risk to its employees and job applicants, but was told only that there was no risk and that guidelines for infection control were followed. Dissatisfied with this response, the FBI suspended sending its personnel and applicants to the health care facility for the required physicals.

Thereafter, plaintiff filed suit seeking monetary and injunctive relief under the Rehabilitation Act and the Constitution. Subsequently, the FBI selected three health care facilities for the required physicals, including the one where plaintiff was employed. See Plaintiff's Trial Exhibits 5 & 6, Defendants' Exhibit A (Blanket Purchase Agreements dated 10/6/88); Tr. 252-54. The district court issued a preliminary injunction enjoining the FBI from disclosing plaintiff's condition or refusing to send agents or applicants to his

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[1] Plaintiff, Dr. Doe, has died, and the executor of his estate has been substituted as plaintiff. For the sake of convenience, we continue to refer to Dr. Doe as plaintiff.

facility, but rejected plaintiff's request that Dr. Doe's facility be the sole provider. See Order dated December 21, 1988 (preliminary injunction); Transcript of Hearing dated October 24, 1988 at 2-3, 16-19, 21. The district court explained that "this lawsuit" (which was not filed under seal) "has resulted in exposure of the problem" (i.e. plaintiff's disability became public) and as a result, "the cat is already out of the bag." Id. at 17; see also id. at 16-19. Therefore, the district court could not restore the status quo completely since it ruled it did not have authority to order the FBI to use only one provider, which would impinge on the patients' (FBI agents and applicants) right to select a physician. Ibid. Most employees chose to go to the other two facilities, as a result of which plaintiff's compensation was affected (he was paid on the basis of the number of examinations he performed).[2]

The district court dismissed the claim for damages under the Rehabilitation Act, on the ground that there is no private right of action against the government under section 504 of the Act. Doe v. Attorney General, 723 F. Supp. 452 (N.D. Cal. 1989). It also held that the FBI had not violated plaintiff's right of privacy. Finally, it dismissed the claim against the responsible individual FBI agent, on the ground of qualified immunity.

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[2] The district court found that the FBI had not breached its nondisclosure order. Instead, "[t]he matter first received public attention when this lawsuit was filed, and the public press printed stories about it." Doe v. Attorney General, 723 F. Supp. 452, 457 (N.D. Cal. 1989).

On appeal, this Court held that the injunctive claim was moot (Dr. Doe had become too ill to work), and affirmed the district court's dismissal of the privacy claim and the claim against the individual FBI agent. However, it held that there was a right of action for damages against the government under section 504. Doe v. Attorney General, 941 F.2d 780 (9th Cir. 1991). This Court made "no determination as to whether the FBI discriminated against Dr. Doe because he had AIDS, or whether the FBI discriminated against Dr. Doe because he refused to disclose information necessary to determine if he was 'otherwise qualified' for his job." Id. at 799 n.29.

On remand, the district court decided the case on the basis of the trial held previous to the appeal, plus additional filings. The district court entered judgment for the government, finding that "defendants did not act solely because of plaintiff's illness. Rather, defendants acted because plaintiff, the facility and the hospital did not answer the FBI's concerns about whether plaintiff had Kaposi's sarcoma and about the risks and prevention, but provided only conclusory statements. As a result of the minimal information provided by plaintiff, the facility and the hospital, defendants were also unable to determine whether plaintiff was 'otherwise qualified' to perform physical examinations for FBI agents and applicants." ER Tab 154 at 21, Finding of Fact at 21.[3]

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[3]"ER" refers to the excerpts of record filed with plaintiff's brief and Tr. refers to the trial transcript reproduced in Volumes II and III of the excerpts.

Plaintiff appeals this ruling.

2. Factual Background.

The facts of this case, as found by the district court after the trial are as follows. The Federal Bureau of Investigation ("the FBI" or "the Bureau") required that its employees and job applicants submit to routine physicals at the designated health care facility (ER Tab 154 at 4). The examinations were mandatory (Tr. 105, 124). These physicals included rectal, pelvic, oral, and gynecological exams (Tr. 29-30, 108, 160). Dr. Doe was a medical doctor who was employed by the health care facility to which the FBI sent its agents and applicants in the San Francisco area (ER Tab 154 at 3-4). Dr. Doe was the designated doctor who performed the physicals on the FBI employees and job applicants (ibid.). From December 1984 to August 1988, the FBI sent all these persons to the health care facility for annual and promotion physicals (ibid.). Dr. Doe performed approximately 30 to 40 examinations per month on FBI agents and applicants (Tr. 92).[4] See also Doe v. Attorney General, 723 F. Supp. at 453.

In August 1988, the FBI heard through a confidential source unsubstantiated information that plaintiff, Dr. Doe, had Kaposi's sarcoma, an AIDS-related illness (ER Tab 154 at 3). The ensuing sequence of events, which is crucial to an understanding of the

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[4] As a result of a protective order, references were made to Dr. Doe, the facility and the hospital, rather than the actual name of plaintiff and the two entities. Doe I, 941 F.2d at 782 n.1; 723 F. Supp. 452, 453 n.1 (N.D. Cal. 1988).

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case is described in detail in the district court's findings of fact.[5]

A. The FBI's Efforts To Obtain Information From Dr. Doe, The Facility, And The Hospital About Dr. Doe's Condition And Health Risks.

Following receipt of the allegations concerning Dr. Doe, FBI Special Agent P6/(b)(6), (b)(7)(c) met with the Director of the [001] facility, Nora Crans, and told her about the unsubstantiated information concerning Dr. Doe. He told her that the FBI was concerned about the health risk, if any, to the agents and applicants and about the reaction that agents would have concerning this information. He also said the FBI was concerned about the agents not having this information when they were getting their physical examinations. Tr. 231-232. Ms. Crans told Agent P6/(b)(6), (b)(7)(c) that it would be essential that he meet with Dr. Doe and that she was not in a position to resolve the matter. Tr. 233. District Court's Findings of Fact and Conclusions of Law, filed December 28, 1992 (hereinafter, "Findings of Fact") ER Tab. 154 at 4-5.

Agent P6/(b)(6), (b)(7)(c) then met with Dr. Doe, telling him about the unsubstantiated information he had received. Dr. Doe stated that he believed this information constituted a breach of medical ethics. Agent P6/(b)(6), (b)(7)(c) responded that the FBI was concerned about the health risk to their agent population. Tr. 233. Dr. Doe did not confirm or deny the information that someone on the staff had

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[5] These findings are at Tab 154 of Volume 1 of plaintiff's Excerpts of Record.

a communicable disease; however, he said that there was no medical risk. Tr. 234. Findings of Fact at 5.

Agent Young reported on both of his meetings to the Special Agent in charge of the San Francisco Office, P6/(b)(6), (b)(7)(c) Agent P6/(b)(6), (b)(7)(c) told the FBI nurse that until the issue could be resolved examinations would be suspended. Tr. 109. The district court found that this decision was made "because of defendants' concerns about a possible communicable disease and lack of information from plaintiff, the facility and the hospital." Findings of Fact at 6. The district court also found that Agent P6/(b)(6), (b)(7)(c) "was concerned * * * that the people compelled to see this physician by the FBI were not aware of the medical risks." Ibid.

On September 7, 1988, FBI Agents P6/(b)(6), (b)(7)(c) attended a meeting with administrators of the hospital and Dr. Doe. Findings of Fact at 6. One of the agents said information had come to the attention of the FBI that a member of the staff of the facility may have AIDS or an AIDS related disease; and that if this was accurate, asked what were the hospital's intentions. Id. at 6-7. The FBI agents also expressed their concern about the FBI's duty to its employees concerning the risk of possible transmission of the disease. Findings of Fact of 6-7. The agents also expressed their concern as to whether it was the FBI's duty to inform the employees of this information and its responsibility to other federal agencies which were using the facility. Tr. 245-246. Findings of Fact at 6-7.

Dr. Doe and others stated that if medical guidelines were followed there was no risk to FBI employees. Tr. 248. It was also suggested that through AIDS education any fears that FBI employees might have could be alleviated; it was suggested that the FBI avail their employees of that type of education. Tr. 248. No other information was provided by Dr. Doe or the hospital administrators to the FBI agents. Tr. 40-41 and 248. Findings of Fact at 7.

After some discussion, Agent (b)(6), (b)(7) again asked whether a health care worker with the facility had an AIDS related disease. Tr. 249. One of the administrators of the hospital responded by saying he didn't know. No one else responded. Id. Findings of Fact at 7.

At this point, the district court found, the FBI "lost confidence in plaintiff, the facility and the hospital because they were not responsive to the FBI's concerns and were not being candid." Findings of Fact at 7.

B. Dr. Doe's Condition, His Duty To Inform Patients Of His Condition And Monitoring Procedures.

Kaposi's Sarcoma is a malignancy that is primarily associated with HIV. It typically manifests itself as skin lesions. The lesions are usually purplish. The lesions can be raised above the skin or level with the skin. Tr. 168.

Dr. Doe had outbreaks of Kaposi's Sarcoma lesions at various times when he was examined by his personal physician, Dr. Steven Mehalko. Tr. 214, 218. However, at the time of examination, none of the lesions were open, exudating, weeping or traumatized.

Tr. 213-215, 221-222. He had skin lesions at least two different times; once in August of 1987 and second time in January of 1989. The duration of these lesions was approximately 6 to 8 weeks each time. Tr. 55-56.

Dr. Peter O'Hanley, appellees' expert, testified that the transmission of HIV from a health care worker with AIDS to a patient is remote if the physician follows proper procedures. Tr. 322, 330-332. According to plaintiff's expert, Dr. George Rutherford, the risk of transferring HIV from a health care worker infected with HIV performing routine physical examinations to an uninfected patient is small if the physician follows proper procedures. Tr. 162 and 171-172. See Pl. Brief at 23 n.30. Based on this testimony, the district court found the risk of transmission from a doctor with AIDS to a patient is remote "if appropriate medical procedures are followed." Findings of Fact at 8. The government does not challenge this finding.

The district court found that Dr. Doe followed appropriate procedures in performing physical examinations. Findings of Fact at 8. However, key to this case, the district court also found that "information about the risks and plaintiff's procedures were not disclosed to defendants at the time and were not explained until trial in this action." Findings of Fact at 9.

Dr. O'Hanley testified that a doctor who is infected with HIV should inform his patients of the infection. Tr. 295. Plaintiff's expert, Dr. Rutherford, also testified that physicians who are asked whether or not they have AIDS should

or monitoring by either the facility or the hospital. Tr. 69. He described the practice at both the facility and the hospital as one of "self monitoring" by each physician to ensure that they are in compliance with appropriate CDC or hospital guidelines. Tr. 170. Findings of Fact at 9-10.

However, during another part of his testimony, Dr. Doe testified that the facility is supervised by the hospital through unspecified infection control policies. Tr. 67. He was not conversant with the detailed infection control policies that the hospital uses to supervise the facility. Moreover, he testified that the hospital may have verification procedures in place, but he "was not conversant with those procedures." Tr. 67. Findings of Fact at 10.

3. The District Court Decision.

The district court found that the FBI "did not act solely because of Dr. Doe's handicap." Findings of Fact at 10. Instead, the district court found the FBI acted solely "because plaintiff, the facility and the hospital did not answer the FBI's concerns about whether plaintiff had Kaposi's Sarcoma and about the risks and prevention, but provided only conclusory statements." Ibid. The court found that "as a result of the minimal information provided by [Dr. Doe], [the FBI] was unable to determine whether plaintiff was 'otherwise qualified' to perform physical examinations for FBI agents and applicants." Findings of Fact at 10.

SUMMARY OF THE ARGUMENT

1. The Rehabilitation Act protects only "qualified" individuals with disabilities. Accordingly, the Act allows a government agency to make reasonable inquiries concerning the qualifications of an individual whose services it hires, even if those inquiries involve the individual's disability. Clearly, a doctor with AIDS would not be "qualified" to perform physical examinations if there were a significant risk of infection of patients. In this case, it was reasonable for the FBI -- given the state of knowledge concerning AIDS in 1988 -- to make inquiries as to whether Dr. Doe posed a significant health risk to its agents and applicants referred to him for physical examinations. And the evidence supported the district court's finding that the hospital did not adequately respond to the FBI's inquiries concerning the potential risk.

Plaintiff argues that there was in fact no risk, since Dr. Doe followed proper infection control procedures. However, the issue is not whether there was a risk, but rather whether the FBI had the right to inquire concerning the risk, and whether Dr. Doe and the hospital gave an adequate response to the inquiry. The district court correctly concluded that the FBI did have the right to make the inquiry, and the evidence supports the district court's finding that the response was not adequate.

2. This is not a "mixed motive" case, as plaintiff suggests. The "mixed motive" analysis was developed by the

Supreme Court under Title VII to deal with situations in which an employer charged with discrimination had one legitimate and one illegitimate motive for its allegedly discriminatory action. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In the present case, however, there was only one motivation -- assessing the health risk posed by a doctor performing physicals on FBI personnel. In deciding that the hospital had not been sufficiently candid on an issue of risk to patients, the FBI could (and indeed had to) consider not only the hospital's failure to adequately answer its inquiry, but also the information that Dr. Doe might have AIDS (for without this information there was no reason to make the inquiry in the first place). Conversely, if plaintiff is right, the FBI could not legitimately either make the inquiry it did, nor consider the information that Dr. Doe might have AIDS. Under neither view, however, is this a case of one legitimate and one illegitimate motive. The "mixed motive" issue is irrelevant.

ARGUMENT

I. THE FBI COULD REASONABLY REQUIRE THE CLINIC TO PROVIDE IT WITH CONCRETE ASSURANCES REGARDING PROTECTION OF ITS EMPLOYEES' HEALTH.

This case presents the narrow fact-bound issue of whether the FBI was reasonable, given the state of knowledge in 1988, to inquire into the health risks posed by a health care provider it believed to have AIDS. The Rehabilitation Act provides that "[n]o otherwise qualified individual" shall be subject to discrimination by the government solely by reason of disability.

29 U.S.C. 794(a). A physician is not "qualified" to see patients if he has a condition which poses a significant risk of infecting his patients. Cf. School Bd. v. Arline, 480 U.S. 273, 287-89 (1987) (school teacher with infectious disease). In this case, the district court correctly concluded that the FBI was merely trying to find out whether Dr. Doe was "qualified" to perform physical examinations on agents and applicants. Its conclusion that the FBI therefore had a right to make this inquiry is correct as a matter of law; and its finding that the answers given by the hospital were "minimal" and "conclusory," rendering the FBI "unable to determine whether [Dr. Doe] was 'otherwise qualified,'" are supported by the record and are not clearly erroneous. Findings of Fact at 10. The FBI had a right to terminate sending its agents and applicants to Dr. Doe for physical examinations, because it was unable to determine whether Dr. Doe was "qualified."

In Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 909 F.2d 820 (5th Cir. 1990), the Fifth Circuit held that a hospital did not commit handicap discrimination in violation of section 504 when it fired a nurse who refused to divulge his HIV status. The Fifth Circuit held that the hospital had a legitimate interest in the nurse's HIV status since it "might have monitored [his] health status and compliance with universal precautions on a periodic basis to determine whether he could adequately and safely fulfill his duties." Id. at 830. The Fifth Circuit also noted that the CDC guidelines recommended monitoring by a review

panel of health professional of the HIV-infected worker's work assignments. Ibid. Insuring compliance with universal precautions was especially important in light of evidence noted by the Fifth Circuit that "approximately five to ten percent of the time health care workers do not comply with recommended universal precautions." Ibid. In these circumstances, the Fifth Circuit sustained the district court's finding that the nurse was not "otherwise qualified" for his position because he had "prevented [the hospital] from knowing whether he had a handicap for which federal law required reasonable accommodations." Ibid.

The present case is similar. Upon receiving information Dr. Doe might have AIDS, the FBI sought assurances that the health of its employees would be protected. The FBI had a responsibility to seek such assurances. It had sent over 1,000 employees and applicants to this facility for physical examinations over a four-year period,[6] and was continuing to send them at the rate of 30-40 a month. The physical examination of FBI Special Agents and Agent applicants is mandatory; the option of choosing the physician to conduct these examinations is not left to the discretion of the Agents or applicants, but is determined by the FBI. 5 C.F.R. 339.301. In these circumstances, the FBI would have been derelict not to have sought assurances concerning the health of its agents and applicants.

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[6] This is a conservative estimate based on Dr. Doe's statement that he did 30-40 examinations per month. Plaintiff's Brief at 9; Doe I, 941 F.2d at 783.

Plaintiff argues that the FBI did not have to obtain such assurances, because there was no risk to the health of its agents and applicants. First, even assuming that this is true, this was not known to the FBI because plaintiff did not demonstrate this fact to the FBI, as we discuss more fully in Part II. Moreover, the record in this case establishes -- and the district court found -- that there is no risk of AIDS transmission from doctor to patient if the CDC guidelines are followed. ER Tab 154 at 8; Plaintiff's Br. 23 n.30. That leaves open the issue of whether the CDC guidelines were in fact followed on every occasion, and whether there would be any risk in the event there were any occasions on which they were not followed. That this was a legitimate issue is underlined by 1) the evidence noted in Leckelt that the guidelines are not in fact followed in every case (the testimony there was that they are not followed five to ten percent of the time, Leckelt v. Board of Comm'rs, 909 F.2d at 830), and 2) the testimony in this case that Dr. Doe was not in fact familiar with several aspects of the guidelines. Tr. 59-60, 67-70, 170.

The amicus brief of the California Medical Association argues that there is no risk even if the guidelines are not followed. CMA Brief at 12-27. However, the data they cite is not in the record.[7] Moreover, this extra-record data was not in

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[7] Amicus attempts to interject new evidence to be considered for the first time on appeal concerning the risk of transmission. CMA Brief at 13-27. The government objects to this portion of the amicus brief, which should be stricken. This Court is not a (continued...)

existence when the facts of this case occurred. The FBI made its decisions regarding Dr. Doe in August and September of 1988. The studies cited by the Association prior to that date relate only to the general mode of HIV transmission (CMA brief at and HIV transmission among family members and students (CMA brief at 15-16), and transmission from patients to doctors (CMA Brief at 17-18).[8] The issue of transmission from doctors to patients was separately studied, but the result of these studies were not published until at least three years after the events of this case. See CMA Brief at 20-25 (describing studies published in 1991, 1992, and 1993). Indeed, these studies were issued more than two years after the trial in this case. Similarly, the AIDS Commission report cited by the Association was issued in July, 1992. CMA brief at 23. And the CDC finding of "no risk" (if infection control procedures are followed) relied on by plaintiff (Pl. Br. at 21) was issued in 1991. Neither plaintiff nor the CMA explains how the FBI can be charged with violating the Rehabilitation Act by ignoring data that was not yet in existence. Nor do they explain why it is that the FBI was not

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[7](...continued)
trier of fact and should not evaluate new factual material. The result should be no different than if amicus attempted to intervene in an appeal of a judgment against a doctor in a medical negligence case by filing five declarations with its amicus brief claiming that the doctor acted within the standard of care.

[8] The association also cites guidelines and recommendations for infection control issued in 1986 and 1987 by the CDC and others. CMA Brief 18-20. These guidelines do not expressly address the issue of whether significant risk exists in those case where they are not followed.

Kaposi's Sarcoma and about the risks and prevention, but provided only conclusory statements." Findings of Fact at 10. In plaintiff's view, this finding is clearly erroneous because the evidence shows that 1) the FBI cared only about whether plaintiff had AIDS, and not about what precautions would be taken in the event he had AIDS, and 2) in any event, it was the FBI's fault the hospital did not provide detailed information about precautionary procedures, because the FBI never asked follow-up questions in response to the hospital's "conclusory statements."

As to the first point, the record contains ample evidence (as the district court found) that the FBI was concerned with the medical risk to the agency and applicant population. Tr. 232-33, 245-47, 251.[9] The record also contains ample evidence that the FBI wanted to explore the various options and consequences once it determined Dr. Doe's medical condition, and that it was frustrated by the hospital's and plaintiff's lack of candor. Tr. 243-44, 249, 257.[10] Whatever other evidence favoring plaintiff's

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[9] As Agent P6/(b)(6), (b)(7)(C) explained, "it was a health-related issue, in terms of an examining physician having a communicable disease in examining our agent population." Tr. 232. Agent P6/(b)(6), (b)(7)(C) further emphasized that "[the bureau] was very concerned * * * as to what risk this [the requirement of physicals] may put them [the agents] under to contagion of this disease." Tr. 245.

[10] Agent P6/(b)(6), (b)(7)(C) explained that one of the purposes of the September 9th meeting with hospital officials and Dr. Doe was "to seek their advice regarding the course of actions we should follow" if a health care worker did in fact have AIDS. Tr. 244. When the hospital personnel and Dr. Doe did not respond to the FBI's questions regarding whether the physician had AIDS, Agent P6/(b)(6), (b)(7)(C) testified that:

> I felt a loss of confidence in the people who

(continued...)

case may exist, the district court was entitled to give credence to the evidence favoring the government's case, and its findings based on this evidence are not clearly erroneous.

As to the second point, plaintiff seems to assume that it was the FBI's obligation to familiarize itself with the details of the CDC guidelines and then to ask the hospital specific questions concerning its compliance procedures. However, physical examinations and infection control procedures were not the FBI's area of expertise, while they were within the expertise of the hospital. Indeed, the CDC Guidelines had just been issued the previous year. The hospital could be expected to be familiar with them and to have compliance procedures in place; while the FBI -- which is not in the medical care business -- could not be

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[10] (...continued)

> were present at the meeting, not being responsive to my concern and to the * * * one of the purposes of our visit, announced purpose of the visit, and further that they were not being candid with us.

Tr. 249.

Agent (b)(6), (b)(7)C reiterated that the FBI authorized two other health care providers for the required physicals because, inter alia:

> Well, the one * * * the other one that would go to it is one previously stated, the one to my lack of confidence in the facility and Dr. Doe because of the fact I didn't feel they were being candid with us when we went to them to ask them for the advice we were asking and the verification of the information. There was no response forthcoming, and then a lawsuit was filed.

Tr. 257.

held to any such standard. In these circumstances, it was the obligation of the health care professional to provide meaningful information, rather than to grudgingly provide "conclusory statements" and expect the patient (or, in this case, the patients' representative) to have the expertise necessary to extract more meaningful follow-up information.

II. FAILURE TO RESPOND TO REASONABLE INQUIRIES REGARDING HEALTH RISK RENDERED PLAINTIFF UNQUALIFIED TO CONDUCT PHYSICAL EXAMINATIONS FOR FBI EMPLOYEES AND APPLICANTS.

The district court correctly concluded that "[a]n employer can consider the risks posed by a physician's contagious disease in determining whether he is 'otherwise qualified' to perform physical examinations." ER Tab 154 at 12. The district court was also correct in concluding that "[t]he 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 patients or coworkers." Ibid.

In School Bd. v. Arline, 480 U.S. 273, 287-89 (1987), the Supreme Court held that the defendant school board could consider the risks posed by the plaintiff's contagious disease in determining whether she was otherwise qualified to teach school. An "otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979). When the individual's handicap is in the nature of a contagious disease, this determination requires an individualized inquiry. School Bd. v. Arline, 480 U.S. at 287; Chalk v. United States Dist.

Court Cent. Dist. of California, 840 F.2d at 705; Martinez v. School Bd., 861 F.2d 1502, 1505 (11th Cir. 1988). This inquiry should examine:

> (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.

School Bd. v. Arline, 480 U.S. at 288.

Section 504 requires government agencies to make reasonable accommodations to an "otherwise qualified" handicapped employee. This indicates that the agency should accommodate the employee based on "what is known about the individual's handicapping condition." Langon v. Department of HHS, 749 F. Supp. 1, 6 (D.D.C. 1990). But, "where the only facts before the employer establish without contradiction that plaintiff is not 'otherwise qualified', the employer cannot be accused of discrimination * * *." Walker v. Attorney General, 572 F. Supp. 100, 102-03 (D.D.C. 1983). The government cannot be accused of discrimination where there is no indication the agency knew the full extent of Dr. Doe's handicapping condition or the nature of the risk prevention procedures utilized by the doctor, facility, and hospital. See Carter v. Casa Cent., 849 F.2d 1048 (7th Cir. 1988). Carter involved a complaint under Section 504 by a nurse who was denied a job after being diagnosed as having multiple sclerosis. In finding for the plaintiff, the Seventh Circuit

explained:

> We do not hold that an employer may not takes measures to be sure of an employee's ability to return to work under these circumstances. A handicapped person may be required to meet a job's necessary and legitimate physical requirements.
>
> * * * * *
>
> Consequently, we do not suggest that an employer must unquestioningly accept the employee's doctor's view. . . . We fully recognize that employers also have responsibilities to other employees and third parties.

Id. at 1055-56 (citation omitted). Unlike the facts in the present action, the plaintiff in Carter had communicated her illness and qualifications, along with a physician's report, to the defendant employer.

In Langon, the government/employer requested medical information from the plaintiff (an employee) for the purpose of determining the extent to which her handicap hampered her job performance and ability to commute to work. Langon v. Department of HHS, 749 F. Supp. at 1. Plaintiff refused to provide the government with medical records in support of her claim and she was eventually fired. Id. at 6. Later, plaintiff brought an action under the Rehabilitation Act of 1973. The district court found that the "plaintiff frustrated defendant's efforts to learn about her circumstances * * *." Ibid. The court held that the plaintiff had failed to establish a prima facie case of handicap discrimination under the Act. Id. at 3, 6-8.

In Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 909 F.2d at 822, administrators learned that a nurse, Leckelt, may have the AIDS virus. "Because they did not know whether the male nurse in question was seropositive for HIV antibodies, however, they did not decide what measure or measures would be appropriate in such a case." Ibid. The hospital requested Leckelt's HIV antibody test results, but Leckelt never gave them to the hospital. Id. at 824. Leckelt was terminated for his failure to submit the test results to administrators. Ibid.

The district court's finding that Leckelt failed to establish that he was discriminated against solely because of a handicapping condition was affirmed by the Fifth Circuit. Addressing whether Leckelt was "otherwise qualified" the Fifth Circuit applied Arline:

> Even though the probability that a health care worker will transmit HIV to a patient may be extremely low and can be be further minimized through the use of of universal precautions, there is no cure for HIV or AIDS at this time, and the potential harm of HIV infection is extremely high.

Leckelt v. Board of Comm'rs, 909 F.2d at 829. The Fifth Circuit then affirmed the district court's finding that Leckelt was not "otherwise qualified" because he prevented the hospital from knowing whether he had a handicap. Id. at 830.

Dr. Doe, the facility and the hospital gave the FBI no information for the FBI to make an assessment whether Dr. Doe was an "otherwise qualified" physician. Dr. Doe did not even answer the threshold question -- whether he had Kaposi's Sarcoma. See,

supra, text at 7-9. This precluded inquiry into other relevant areas in the "otherwise qualified" assessment. One area was how the disease affected Dr. Doe specifically. At the deposition and trial defendants learned for the first time that Dr. Doe had Kaposi's Sarcoma lesions at various times. He testified that he had skin lesions (for six to eight weeks) around August 1987 and January 1989. Tr. 168. Dr. Doe did not describe his own practices concerning CDC guidelines and whether his practices were monitored, and the extent of monitoring, by the facility and the hospital. Dr. Doe's failure in this regard may have resulted from his uncertainty of the application of the CDC guidelines and his lack of knowledge concerning monitoring and infection control procedures. See, supra , text at 11-12. In any event, he provided the FBI with no information on these subjects.

Moreover, neither the facility nor the hospital described to the FBI their infection control and monitoring procedures. See, supra, text at 7-9. CDC guidelines recommend that AIDS infected health care workers should have their work assignments and patient care duties reviewed by a panel of physicians. See, supra, text at 11. To assess whether plaintiff was "otherwise qualified" for a purchase of medical services, the FBI was entitled to a full understanding of the infection control procedures and monitoring procedures to determine what the procedures were and whether the physician complied with them. When this inquiry was frustrated, the FBI could legitimately

terminate or suspend sending its agents and applicants to the facility for physical examinations.

III. A MIXED MOTIVE ANALYSIS IS NOT APPLICABLE TO DR. DOE'S CLAIM.

Plaintiff argues that Dr. Doe's case should be viewed as a "mixed motive" case and be analyzed the same way mixed motive cases are analyzed under other civil rights statutes. Plaintiff thus argues that the statutory language "solely by reason of his disability" does not apply to a defendant's motives, but whether a handicapped individual meets "performance qualifications." Pl. Brief at 30. He further argues that the district court erred by not analyzing the government's motives in the same way the Supreme Court announced for Title VII "mixed motive" cases. Pl. Brief at 37-38. Plaintiff, however, is asking this Court to decide an important issue that is simply not presented by the facts of this case.

The "mixed motive" analysis in Title VII cases applies where there are at least two claimed motives, one of which is legitimate (e.g., poor performance), and one of which is illegitimate (e.g., race or sex). In those situations, if the illegitimate motive "played a motivating part" in the decision, then "mixed motive" analysis requires a finding of discrimination unless the employer can prove that it would have made the same decision even if the illegitimate motive had not been present. Price Waterhouse v. Hopkins, 490 U.S. 228, 244-5 (1989) (plurality opinion).

The present case is different. Here, two motives are alleged -- 1) Dr. Doe's handicapping condition, and 2) the failure of Dr. Doe and the hospital to respond adequately to the FBI's questions. Under the government's view of the case, there really are not two motives, but only one -- to assess the health risk. In order to do that, two questions are necessary. First, whether Dr. Doe had a contagious disease. If not, there was no need to inquire further. But if Dr. Doe did, the second question was what procedures were followed to eliminate or reduce the health risk. Assuming both questions had to be asked, both questions, or "motives" as plaintiff calls them, are legitimate. That is, the FBI had a legitimate concern for the health of its agents and applicants; and Dr. Doe and the hospital failed adequately to respond to that concern. Obviously, the information that Dr. Doe might have a handicapping condition was an integral part of that concern. If the concern was legitimate, and was unsatisfied by the conclusory answers the FBI received, then the FBI could (and did) legitimately consider Dr. Doe's handicap as an element of patient risk. In short, under the government's view of the case, there was really only one entirely legitimate motive (assessing the health risk), and the "mixed motive" analysis simply does not apply here as a factual matter.

Conversely, under plaintiff's view of the case, the FBI's concern for the health of its agents and applicants was not legitimate, and therefore the question or "motive" was not legitimate. Under plaintiff's view, it was illegitimate to make

inquiries and to be dissatisfied with conclusory responses, because the inquiries themselves were irrelevant to any health risk. In short, under plaintiff's view of the case, there was an entirely illegitimate "motive" for the FBI's action, and again, the "mixed motive" analysis does not apply.

Thus, neither the government nor plaintiff views this case as a mixture of illegitimate and legitimate motivation. Under neither view of the case is it necessary to reach the legal question of whether Title VII "mixed motive" analysis applies under the Rehabilitation Act.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

MICHAEL J. YAMAGUCHI
United States Attorney

STEPHEN L. SCHIRLE
Assistant United States Attorney
(415) 556-6977

ROBERT ZENER
Appellate Litigation Counsel
(202) 514-1597
DEBORAH RUTH KANT
(202) 514-3518
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530-0001

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STATEMENT OF RELATED CASES

Doe v. The Attorney General, 941 F.2d 780 (9th Cir. 1991) involving the first appeal in this proceeding is a related case.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 1993, I served the foregoing Brief For Appellees upon opposing counsel by causing a copy to be mailed, postage prepaid, to:

Matthew A. Coles
American Civil Liberties Union
Foundation of Northern California, Inc.
1663 Mission Street, Suite 460
San Francisco, CA 94103

Jo Anne Frankfurt
Employment Law Center, A Project of
the Legal Aid Society of San Francisco
1663 Mission Street, Suite 400
San Francisco, CA 94103

Kirke M. Hasson
John Poulos
Pillsbury, Madison & Sutro
235 Montgomery Street
P.O. Box 7880
San Francisco, CA 94102

Deborah Ruth Kant

DEBORAH RUTH KANT
Attorney