DOCUMENT RESUME

ED 334 455 CE 058 548

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TITLE Liability for Failure To Provide AIDS Training.
INSTITUTION North Carolina Univ., Chapel Hill. Institute of Government.
PUB DATE Jul 90
NOTE 6p.
AVAILABLE FROM Institute of Government, CB#3330, Knapp Bldg., University of North Carolina, Chapel Hill, NC 27599-3330 ($2.00).
PUB TYPE Collected Works - Serials (022) -- Reports - Research/Technical (143)
JOURNAL CIT Jail Law Bulletin; n14 Jul 1990

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS *Acquired Immune Deficiency Syndrome; Communicable Diseases; *Confidentiality; *Correctional Institutions; *Inservice Education; *Legal Responsibility; Prisoners; *Privacy; Professional Training; Public Health Legislation

ABSTRACT

The U.S. Constitution guarantees a right to privacy that requires deputies and jailers to avoid the unnecessary disclosure of sensitive information about a person. This privacy right especially covers Acquired Immune Deficiency Syndrome-related (AIDS) information, and it even protects the immediate family of persons infected with human immunodeficiency virus (HIV). The right to privacy is not absolute, but sheriffs and jailers must have a compelling reason before they reveal that a person is infected. This right to privacy is not surrendered or waived because an inmate tells a jail officer about his or her medical condition. HIV is not transmitted through everyday casual contact, and there is no reason for the information to be public. Federal courts will base their decisions about AIDS-related practices and policies on the most recent medical evidence. Deputies and jailers will come in contact with HIV-infected patients. Jailers who receive no training will make decisions based on ignorance and fear, and they will eventually violate prisoners' rights by disclosing the information. A department that does not train its officers on how HIV is transmitted, as well as the need for confidentiality, will be held civilly liable for those inevitable violations of privacy. (NLA)

★ JAIL LAW BULLETIN ★

A LAW BULLETIN published by the Institute of Government, The University of North Carolina at Chapel Hill

Number 14
July 1990

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Editor

Liability for Failure to Provide AIDS Training

Michael R. Smith

The recent case of *Doe v. Borough of Barrington*[1] offers a valuable lesson on the connection between training and the avoidance of civil liability. It is taught against the backdrop of AIDS, a subject that has generated more fear than training. The court held that a police officer violated an arrestee's constitutional right to privacy by disclosing to another person that the arrestee had AIDS.[2] In addition to finding that the officer who released the information was liable, the court ruled that his government employer also must answer for the violation. The local government was held responsible because it had failed to provide any training about AIDS or the need for confidentiality when dealing with HIV-infected arrestees.[3] This issue of the *Jail Law Bulletin* discusses the implications of the *Doe* decision for North Carolina sheriffs and their jailers. The case involved a police officer who violated an arrestee's right to privacy, but the same legal principles would apply if a jailer revealed an inmate's HIV status to another person.

Factual Background

On March 25, 1987, John Doe and his wife, Jane, along with a friend, James Tarvis, were driving in a pickup truck when they were stopped by police officers with the Borough of Barrington. John Doe was arrested for unlawful possession of a hypodermic needle. He was detained and the truck was impounded. Doe advised the police officers to be careful in searching him, as he had tested positive for HIV and had "weeping lesions" on his body.

Later the same day, Jane Doe and James Tarvis drove to the Doe residence in the neighboring Borough of Runnemede. They left Tarvis's car running in the driveway, and somehow it slipped into gear, rolling backward and crashing into a neighbor's fence. One of the neighbors was Rita DiAngelo, a local school employee. While two Runnemede police officers were investigating the accident, an officer from the Barrington Police Department, Detective Preen, arrived and talked

1. 729 F. Supp. 376 (D.N.J. 1990).

2. AIDS is a condition that severely damages a person's immune system, and it is caused by a virus known as the human immunodeficiency virus (HIV). If tests reveal antibodies to the virus in a person's blood, it means that the person has been infected. The person is referred to as HIV positive or HIV infected. Once a person has been infected with HIV, known popularly as the "AIDS virus," it attacks the immune system and opens the door to life-threatening illness. The health of an infected person deteriorates over time, gradually moving from apparent good health to serious illness and death. For example, a person who looks perfectly healthy may be HIV infected and can transmit the virus by engaging in high-risk behaviors. The final stage of the disease is a medical diagnosis of AIDS, often called "full-blown AIDS."

3. This case was decided on the basis of written materials filed with the court before trial, including deposition testimony and legal arguments. After finding that there was no disagreement about what had happened, the judge imposed liability without submitting the case to a jury. The judge entered judgment against the officer and the government because he decided that application of the relevant law to the facts required a finding of liability. The next step in the case would have been for a jury to decide how much money was owed as damages, but it recently was reported that the lawsuit has been settled for $55,000. *National Law Journal*, June 11, 1990.

with one of them, Officer Van Camp. Preen told Van Camp that Jane Doe's husband had been arrested earlier and that he had AIDS. Officer Van Camp relayed this information to his partner, Officer Russell Smith.

After Jane Doe and Tarvis left the area, Smith told the DiAngelos that Doe's husband "had AIDS and that, to protect herself, Rita DiAngelo should wash with disinfectant." Rita DiAngelo became upset, in part because her daughter attended the same school as the four Doe children. DiAngelo contacted other parents with children in the school, and, in addition, she contacted the media. The next day eleven parents removed their children from the school in a panic over attendance by the Doe children. Local newspapers and television stations covered the story, and at least one report mentioned the Doe family by name.

Jane Doe and her children sued Smith and the Borough of Runnemede in federal court under Section 1983 [42 U.S.C. § 1983], alleging that Smith violated their constitutional right to privacy when he told Rita DiAngelo that John Doe had AIDS. They argued that the disclosure had caused them to suffer "harassment, discrimination, and humiliation" and that they were "shunned by the community." The Doe family is seeking an award of money damages for its injuries.[4]

Constitutional Right to Privacy

The federal courts have struggled with whether there is a constitutional right to privacy, but the court in *Borough of Barrington* not only identifies a privacy right but casts substantial light on its contours. It holds that the Fourteenth Amendment protects against unauthorized disclosure by government officials of sensitive personal matters, including medical records and medical information. The court declares that AIDS-related information is especially sensitive, and "the privacy interest in one's exposure to the AIDS virus is even greater than one's privacy interest in ordinary medical records because of the stigma that attaches with the disease."[5] The result is that jail officers have a constitutional duty to avoid disclosing certain medical information, particularly the fact that a person is infected with HIV.[6]

Because revealing that a relative is HIV positive may cause the entire family to be ostracized, the court also holds that "[t]he right to privacy extends to members of the AIDS patient's immediate family."[7] In other words, the right to privacy not only protects John Doe, but it also covers Jane and the children. The court reached this conclusion after noting that the "hysteria surrounding AIDS extends beyond those who have the disease."[8] This is a highly significant step. It permits Doe and her children to sue Officer Smith and the Borough of Runnemede for a violation of their own right to privacy, not the privacy of John Doe. Each member of the family should recover for his or her own injuries, which multiplies the amount of liability caused by Officer Smith's single disclosure.

The right to privacy in medical information, like other constitutional protections, is not absolute. The information sometimes may be divulged, but only if the government's need to reveal it outweighs a person's interest in keeping it private. In other words, Officer Smith needed a compelling reason to justify telling Rita DiAngelo that John Doe was infected with HIV. According to Officer Smith, the reason was to prevent transmission of the virus by advising DiAngelo to wash her hands with disinfectant. The public's need to avoid the spread of a deadly disease is compelling, and in the appropriate case it might justify a disclosure. But telling DiAngelo about Doe's medical condition was unrelated to that goal. The medical evidence clearly showed that Doe could not transmit HIV to the DiAngelos through casual contact. In the absence of a very good reason for turning a public spotlight on such sensitive information, the court found that Officer Smith had violated Doe's right to privacy.

This case is also significant because the court embraces current medical knowledge and rejects fear as the basis for its decision. Officer Smith had argued that "infection through casual contact cannot be ruled out," because "there are no conclusive facts about

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4. John Doe died six months after Officer Smith revealed his condition to Rita DiAngelo. The lawsuit also named the Borough of Barrington and Rita DiAngelo as defendants. The pretrial motions that led to this decision did not involve those defendants, and for that reason, the court did not address their liability.

5. 729 F. Supp. 376, 384 (D.N.J. 1990).

6. Other federal courts have recognized a constitutional right to privacy that protects against the disclosure of medical information about AIDS. In Woods v. White, 689 F. Supp. 874 (W.D. Wis. 1988), for example, a federal court held that prison medical personnel violated an inmate's right to privacy by telling non-medical staff and other inmates that he had tested positive for HIV. *See* Doe v. Coughlin, 697 F. Supp. 1234 (N.D.N.Y. 1988)(right to privacy protects inmates against nonconsensual disclosure that they have tested HIV positive). One decision swims against this mild current, however, apparently finding that inmates have no constitutionally protected right to privacy in this information. Harris v. Thigpen, 727 F. Supp. 1564 (M.D. Ala. 1990).

7. 729 F. Supp. 376, 385 (D.N.J. 1990).

8. *Id.* at 384.

AIDS."[9] The court firmly rejected that argument. He subjectively may have believed that Doe could infect Rita DiAngelo simply by touching her, and he may have thought that washing with disinfectant could stop this casual spread of HIV. Officer Smith's personal beliefs, no matter how strongly and sincerely held, did not justify his disclosure, because they had been disproved by current medical research.[10] The court declared that objective medical evidence is what matters in evaluating the actions of public officers, and research had clearly established that HIV is not spread through casual contact.[11]

Liability of Officer Smith

The court ruled that Officer Smith was liable personally for revealing John Doe's medical condition to Rita DiAngelo. After finding that Jane Doe and her children had a right to keep that highly personal information to themselves, which was the most difficult hurdle to clear in this case, the court easily decided that Officer Smith had caused a violation of their privacy.

Qualified immunity is a valuable defense that sometimes shields public officers against personal liability. It protects them if a constitutional right is not clearly established at the time of their alleged misconduct, even if a court later finds that the right exists and interprets their action as a violation.[12] In this case qualified immunity might have shielded Officer Smith from liability, but for some reason the defense was not asserted, and, as a result, it was not considered by the court.[13]

Officer Smith raised another defense, however, arguing that Doe had waived his right to privacy and therefore could not complain about the disclosure. The argument was that a waiver occurred when Doe voluntarily told several police officers that he had tested positive for HIV, and this happened before Officer Smith talked to Rita DiAngelo. In rejecting this argument, the court found that Doe revealed his medical condition only because he thought the police might need to protect themselves against the possible transmission of HIV. The court noted that officers sometimes have more than casual contact with arrestees, as when they conduct frisk searches.[14] Doe divulged his medical condition to a few officers for their protection, a limited purpose, and he never authorized them to tell anyone else. If officers pass along confidential information that has been revealed for the public's protection, it will

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9. *Id.* at 381.

10. In another context, a leading federal court decision concluded that the risk of contracting HIV, even if scratched or bitten by persons who are infected, is "miniscule, trivial, extremely low, extraordinarily low, theoretical, and approaches zero." Glover v. Eastern Nebraska Community Office of Retardation, 867 F.2d 461, 464 (8th Cir. 1989).

11. The court emphasized that it "must take medical science as it finds it; its decision may not be based on speculation of what the state of medical science may be in the future." 729 F. Supp. at 381. This approach is consistent with the one taken by federal courts in other contexts. For example, one federal court of appeals declared that a trial court, in evaluating a personnel decision about an HIV-infected public employee, erred when it "rejected the overwhelming consensus of medical opinion and improperly relied on speculation for which there was no credible evidence." Chalk v. United States District Court, 840 F.2d 701, 708 (9th Cir. 1988).

12. Anderson v. Creighton, 483 U.S. 635 (1987); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

13. It might have been possible for Officer Smith to argue successfully that at the time he talked to Rita DiAngelo, in 1987, the courts had not clearly recognized a federal right to privacy in sensitive medical information. In Woods v. White, 689 F. Supp. 874 (W.D. Wis. 1988), however, the court suggested that the right to protect medical information against unwarranted disclosure had been recognized before 1986. That finding was not essential to the decision in *Woods*, as the court ultimately resolved the immunity issue by adopting an unusual approach. It held that qualified immunity did not protect medical personnel for the "[c]asual, unjustified dissemination of confidential medical information to non-medical staff and other prisoners," even if the exact contours of the right to privacy were not clear, because the disclosure fell far outside of their responsibilities. In this case, Officer Smith might have received qualified immunity by focusing narrowly on the federal right allegedly violated. Even if court decisions in 1987 had clearly identified a right to privacy that protected a person infected with HIV, for example, it probably was not clear that the right also protected the person's immediate family. The availability of qualified immunity as a defense depends on whether the asserted federal right was clearly established in the context of an officer's specific conduct. Anderson v. Creighton, 483 U.S. 635 (1987). In this case, again, the defense was not raised.

14. The court stated that disclosure should be encouraged because officers "may come into contact with hypodermic needles" while frisking an arrestee. It is likely that officers will be extremely careful in carrying out their duties if a person discloses that he or she is HIV infected. In promoting safety for officers, however, the court fails to mention an important point. Jailers should use safety precautions in dealing with all detainees, not just those who reveal that they are HIV-infected.

discourage others from disclosing sensitive information. For that reason, the court rejected Officer Smith's argument that Doe automatically waived his right to privacy by revealing his condition.

Liability of the Borough of Runnemede—Failure to Train

Jane Doe's lawsuit alleged that the Borough of Runnemede's failure to train its employees about AIDS and the importance of confidentiality caused a violation of her family's right to privacy. This was a difficult claim to prove.

Last summer in *City of Canton v. Harris*,[15] the U.S. Supreme Court narrowly limited the circumstances under which local governments may be held liable for failing to train their officers. It ruled that a county is not responsible unless its training program is so bad that it reflects a deliberate and complete lack of concern for the federal rights of others. Jane Doe had to identify a deficiency in Runnemede's training program and prove that it made a constitutional violation inevitable. In addition, she had to show that the violation of her privacy was caused directly by the inadequate training. The court found that she satisfied these stringent requirements and ordered Runnemede to pay because its AIDS training was completely inadequate. In fact, it was nonexistent.

The court reached the following conclusions before imposing liability against the Borough of Runnemede. It was obvious, even in 1987, that Officer Smith and other police officers would confront HIV-infected persons. They frequently came into contact with intravenous drug users, for example, a group that has a high proportion of infection. Officer Smith needed information about the disease and its method of transmission to protect himself when faced with blood or hypodermic needles. Given the hysteria and panic surrounding AIDS, "[t]he failure to instruct officers to keep information about AIDS carriers confidential was likely to result in disclosure and fan the flames of hysteria."[16] It was easy to anticipate the devastating consequences if Officer Smith disclosed that a person was HIV positive or had AIDS.

In holding the local government liable for its official policy of inadequate training, the court found that the police chief "made a conscious decision not to train [his] officers about the disease."[17] He knew that they would confront HIV-infected persons, and he was aware that other police chiefs had taken precautions to protect their officers.[18] Still, he provided his officers with no information about AIDS, and he did not develop a policy on the subject. If Officer Smith had received even the most basic training about AIDS, he would have known that John and Jane Doe presented no risk to the DiAngelos, and presumably he would not have divulged Doe's medical condition. Training would have emphasized the need to keep strictly confidential the identity of persons infected with HIV. The failure to provide this obvious training revealed an attitude of complete indifference to the federally protected rights of HIV-infected persons, and Runnemede is liable for the tragic violation of privacy inevitably caused by its policy.

Summary

The U.S. Constitution includes a right to privacy that requires deputies and jailers to avoid the unnecessary disclosure of highly sensitive information about a person. This privacy right especially covers AIDS-related information, and it even protects the immediate family of persons infected with HIV. The right to privacy is not absolute, but sheriffs and jailers must have a compelling reason before they reveal that a person is infected. This valuable right to privacy is not surrendered or waived just because an inmate tells a jail officer about his or her medical condition.

HIV is not transmitted through everyday casual contact, and there is no medical reason to tell everyone that a particular inmate is infected. Federal courts will base their decisions about AIDS-related practices and policies on the most recent medical evidence, not on the unreasonable fears of deputies and jailers.

It is virtually certain that deputies and jailers will come into contact with HIV-infected persons. Jailers who receive absolutely no training will make decisions based on ignorance and fear, and sooner or later one will violate a person's right to privacy by disclosing to others that he or she is infected. A department that does not train its officers on how HIV is transmitted, as well as on the need for confidentiality, will be held civilly liable for those inevitable violations of privacy.

15. 109 S. Ct. 1197 (1989).
16. 729 F. Supp. 376, 389 (D.N.J. 1990).
17. *Id.*
18. According to the court, the police chief "should have known that officers untrained as to the medical facts about AIDS would act out of panic, ignorance, and fear when confronted with a person having or suspected of having AIDS, and that such a confrontation was likely to occur." 729 F. Supp. at 389.

North Carolina Law

The decision in *Doe* is based on a violation of the federally protected right to privacy. It is important for sheriffs and jailers to understand that North Carolina law also requires them to keep information about a person's HIV status strictly confidential. General Statutes (G.S.) Section 130A-143 prohibits disclosing that a person is infected with HIV, although the statute contains a short list of exceptions, including release with a person's written consent and release to health care personnel who are providing medical care to a person.[19] The confidentiality requirements of G.S. 130A-143 protect the privacy of HIV-infected jail inmates, and they apply no matter how a jailer learns about an inmate's illness. There is no general exception that permits jailers to tell others about an inmate's sensitive medical condition. In other words, the actions of the officer in *Doe*—telling a third person that an arrestee is infected with HIV—violate both North Carolina law and federal law. In addition to potential civil liability, a person who violates the confidentiality provisions of G.S. 130A-143 is guilty of a misdemeanor.

19. The exceptions to confidentiality are narrow. G.S. § 130A-143 does not authorize medical personnel, including a local health director, to tell a sheriff that a jail inmate is HIV infected. There is a special exception to confidentiality for the Department of Correction (DOC), but it does not apply to county jails. The Division of Health Services has adopted a regulation that requires notification to the director of health services for DOC and the administrator of a prison unit "when any person confined in a state prison is determined to be infected with HIV." N.C. ADMIN. CODE tit. 10, r. 7A.0209(d)(7). The statutory exception for health care workers apparently would permit disclosure to a physician or nurse caring for an HIV-infected inmate at a county jail. N.C. GEN. STAT. § 130A-143(3).

Conclusions

This decision only represents the opinion of one federal court, and courts with federal jurisdiction over North Carolina may disagree with some of its conclusions.[20] The basic lessons from this decision are clear, however, and they are likely to be accepted by most courts. Sheriffs must provide AIDS training for their deputies and jailers, and the training must emphasize the need for confidentiality.[21] The court decided only that some training is necessary; it does not prescribe what information about HIV and AIDS must be included. In addition, each department should have written policies and procedures that cover the many medical, legal, and administrative issues associated with AIDS. It is even more likely today than in 1987 that jailers will encounter HIV-infected persons. Failure to provide at least minimal training ultimately will lead to a violation of a person's federal right to privacy, or some other protection, like an inmate's right to necessary medical care. If it does, and if the sheriff has completely ignored AIDS training, then it is likely that both the sheriff and the county will face liability.

20. For instance, it is possible that other courts will decide that the federal right to privacy does not protect the immediate family of HIV-infected persons. There may be other differences. The basic legal principles that it announces are consistent with other court decisions involving AIDS-related issues, though, and it seems likely that those principles will survive in other cases.

21. Sheriffs and jail administrators should look to their local health department for help in developing a training program on HIV infection and related confidentiality issues. The Division of Health Services regulations provide that "[t]he local health director shall ensure that the health plan for local jails include education of jail staff and prisoners about HIV, how it is transmitted, and how to avoid acquiring or transmitting this infection." N.C. ADMIN. CODE tit. 10, r. 7A.0209(d)(8).

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