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Secondary Break: Dealing With AIDS in Professional Sports After the Initial Response to Magic Johnson

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UNIVERSITY OF MIAMI ENTERTAINMENT & SPORTS LAW REVIEW

ARTICLES

SECONDARY BREAK: DEALING WITH AIDS IN PROFESSIONAL SPORTS AFTER THE INITIAL RESPONSE TO MAGIC JOHNSON

TRACEY E. GEORGE*

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I stood at a podium at The Great Western Forum — the place where I had some of my greatest moments as a Laker — and spoke from my heart. I said that because I had tested HIV-positive, I was retiring from the NBA I also said I was going to beat the disease. And I will.

- Earvin "Magic" Johnson¹

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1. Magic Johnson with Roy S. Johnson, *I'll Deal With It*, SPORTS ILLUS., Nov. 18, 1991, at 16, 19 (describing his retirement at a nationally televised press conference on November 7, 1991).

I. INTRODUCTION

After a brilliant twelve-year career and at the height of his mastery of the sport, Los Angeles Laker Earvin "Magic" Johnson stunned the professional sports world by announcing his retirement, on November 7, 1991, at the age of 32, from professional basketball. During a routine blood test as part of a life insurance policy application, he had tested positive for "HIV" — human immunodeficiency virus — the virus which leads to AIDS. Johnson's revelation sent shockwaves through large segments of American society because of his charisma both on and off the court and because of the powerful AIDS message he drove home.²

Recognizing Johnson's commanding media presence and sweeping popularity, many AIDS activists urged him to become a public symbol of the reality of AIDS — the dangers it poses and the ways its spread can be prevented. Indeed, Johnson indicated at the press conference that he "was going to become a spokesperson in the fight against the human immunodeficiency virus and an advocate for practicing safe sex by using condoms."³

The day after Johnson declared he was retiring from basketball, *The New York Times* proposed he seek a new job — United States President. With a headline supporting "Magic Johnson, as President," the *Times* editorial staff lauded him for taking a leadership role in the battle against AIDS while the current president — George Bush — failed to take on such responsibility.⁴ Even President Bush, however, appreciated Johnson's potential and named him to the National AIDS Commission — hitching his wagon to the star.⁵

2. As one measure of the far-reaching influence of Johnson's disclosure that he was infected with the AIDS virus, consider the number of inquiries to the Centers for Disease Control (CDC) toll-free AIDS hotline: prior to November 7, 1991, an average of 3,000 calls was received each day; in the following month that number skyrocketed to 25,000. *Magic Johnson: To All Those Who Thought They Couldn't Get AIDS, a Great Athlete Brought a Grim Message: Think Again*, PEOPLE, Dec. 30, 1991, at 40.

Another sign that Magic jolted many Americans by his illness is the increase in the number of requests for HIV tests across the country immediately after November 7: 60% in the New York Metropolitan area and as much as a tenfold increase in some smaller cities. *Id.*

In addition, Johnson's message also appeared to reach a global audience. *The Economist*, a British publication widely circulated in Europe, carried a story entitled simply "Magic Johnson: The New Face of AIDS." *ECONOMIST*, Nov. 16, 1991, at 31.

3. Johnson, *supra* note 1, at 19.

4. *Magic Johnson, as President*, N.Y. TIMES, Nov. 9, 1991, at 22.

5. See, e.g., *Johnson Agrees To Join Commission on AIDS*, N.Y. TIMES, Nov. 16, 1991, at 32.

Johnson resigned from the AIDS Commission on Sept. 25, 1992, claiming President

Initially, then, Johnson was widely heralded for his courage in revealing his illness to the public and for his commitment to increasing AIDS awareness. To many he became a hero twice: first as a basketball player *extraordinaire* and second as a person of courage and optimism.⁶ But Johnson was not able to stay on the bench for long. Fairly soon after his retirement, Johnson began to have second thoughts about his decision to leave basketball permanently;⁷ he was still healthy, showing neither HIV symptoms nor AZT (or Zidovudine, the drug used to delay the onset of AIDS) side effects, and he missed the sport that made him "Magic."⁸

The 1992 National Basketball Association (NBA) All-Star Game provided him with an opportunity to take the floor again — and anyone who expressed doubts that he was in good enough health to play was silenced by his performance, astounding enough to net him the All-Stars' Most Valuable Player award.⁹ While he did not come off the Lakers' bench¹⁰ to participate in the NBA

Bush had given only lip service to the commission's work. *A Magic Bullet Against AIDS*, BOSTON GLOBE, Sept. 29, 1992, at 18.

6. Johnson, however, has not been without his critics. Tennis great Martina Navratilova balked at the notion that Johnson was a hero for having contracted the AIDS virus as a result of sexual promiscuity. Arguing that "a very big-time double standard" exists in America, Navratilova contended that if a woman athlete tested HIV-positive under similar circumstances, "they'd call her a slut," not a hero. Sally Jenkins, *Salvos at the Garden: Both Monica Seles and Martina Navratilova Fired Away in New York*, SPORTS ILLUS., Dec. 2, 1991, at 58.

Others, while not as cynical as Navratilova, have argued that while Johnson's behavior since he learned he had HIV has been admirable, we shouldn't lionize him. Robert Lipsyte, *Backtalk: Celebrate Magic, but There's More Work to be Done*, N.Y. TIMES, Feb. 16, 1992, at L11. See also Dave Anderson, *Sorry, but Magic Isn't a Hero*, N.Y. TIMES, Nov. 14, 1991, at B19 (suggesting that Johnson made a public announcement of his condition not out of courage but because he had no choice).

7. For a discussion of Magic's second thoughts, see Tony Kornheiser, *Risk Factor: Playing with Magic Is Not Quite Playing with Fire*, WASH. POST, Feb. 4, 1992, at E1.

8. And as one player noted, even if Magic played at only 50 percent of his most recent performances, he would still be a competitive professional basketball player.

9. Again, Magic was not without his critics on his decision to participate in the All-Star Game, and the NBA was also criticized for allowing him to do so. The concern voiced most frequently, even by Johnson's close buddies such as Philadelphia 76er Charles Barkley, was that the All-Star Game was a reward for a great performance over *that* particular season; Johnson did not play during the regular season. As Orlando Magic guard Scott Skiles put it, "It has nothing to do with him being HIV-positive. But Magic hasn't played all season. What if some obvious choice — like Michael Jordan — broke his leg before the season, and by the All-Star Game said he was ready? Would that be fair?" Kornheiser, *supra* note 7, at E1.

Moreover, some predicted that Johnson's presence would overshadow the performance of others — which it clearly did. The latter concern, however, may be misplaced, because the big stars always outshine the other players.

10. Although he retired, he is listed on the Lakers' injured reserve.

1992 playoffs,¹¹ as some had predicted, he reaffirmed his plan to play in the Summer Olympic Games in Barcelona, Spain.¹²

By deciding to play basketball again, however, Johnson drew attention *away* from his AIDS awareness message and *towards* the threat he poses as an HIV-carrier to other players, the risk that he may expose them to HIV in a fairly physical contact sport. Johnson is the first openly HIV-positive professional basketball player (or athlete in any major American sports league) to play competitively.

Among the first public expressions of fear were those voiced by three individuals from down under. Two members of the Australian national basketball team broadcast in late January that they might not play in the Barcelona Olympics if Magic Johnson was on the United States team.¹³ One player, Ray Borner, even declared that he would pass up the chance to win the gold if it meant being on the same court as Magic.¹⁴ Moreover, the medical director for Australia's Olympic committee called for a boycott of any team on which Johnson was playing.¹⁵

The response by Olympic officials and AIDS researchers to these pronouncements was rapid and disapproving. The International Olympic Committee (IOC) reaffirmed that HIV-infected athletes such as Johnson would be allowed to play in the Olympics. Prince Alexandre de Merode, chairman of the IOC's medical commission, explained that "there is so little risk of contamination" and accused the Australian team of being "slightly hysterical."¹⁶ Even the chief executive of Australia's governing body for basketball denounced the players' and physician's remarks, apparently

11. While he certainly did a fine job as an announcer for the playoffs, he would have been much more impressive on the court. The Lakers certainly could have used his assistance and leadership.

12. He was selected for the U.S. team in the summer of 1991 prior to his HIV-positive results.

13. *Australia Official "Embarrassed" Over AIDS Comments*, UPI, Jan. 28, 1992, available in LEXIS, NEXIS library, UPI file.

14. *Id.* Of course, many sports commentators scoffed at Borner's comments given the likelihood that Australia will not even survive the first round. See, e.g., Jan Hubbard, *Magic's the Silver Lining in AIDS Cloud*, SPORTING NEWS, Feb. 3, 1992, at 36 ("In my view, [his] observation makes Borner an immediate candidate for a urine test. Australia playing for the gold? Somebody must be spiking his lager. Australia's and Borner's chances of playing for a gold medal are roughly equivalent to their chances of hearing Elvis sing the Australian National Anthem before the game.").

15. Elisabeth Ryan Sullivan, *Australia Stirred by HIV Issue*, WASH. POST, Feb. 4, 1992, at E7.

16. Randy Harvey, *IOC Board Approves Magic for Barcelona*, L.A. TIMES, Feb. 4, 1992, at C3.

mortified by their inflammatory statements.¹⁷

Health experts roundly dismissed the athletes' fears as "ridiculous in that there's no risk. There's no possibility of transmission through playing basketball."¹⁸ One doctor said you are more likely to be struck by lightning in an open field on a sunny day. Another contended that the chance of being infected by playing basketball is roughly the same as being kicked to death by a duck. Even the NBA's consultant on AIDS, Dr. David E. Rogers, a Cornell University professor of medicine and vice chair of the National AIDS Commission, believed such fears were overblown: "The risks of someone passing the disease along during athletic competition are small. In 10 years of studying the disease, there is no evidence of it ever happening. The chances are infinitesimal."¹⁹

Despite such vociferous dismissals, however, the concerns raised by the Australians are shared by a significant minority of those in the sporting world. Jose Francisco Puello Herrera, a physician who serves as president of the Central American and Caribbean Sports Organization (CACSO), which represents twenty-nine nations, took issue with the IOC's rapid reaffirmation of Johnson's eligibility to play in the Barcelona summer games. Speaking to a conference on AIDS and sports in San Juan, Puerto Rico, Puello Herrera contended that "Johnson should not participate for the welfare of the sport and the athletes."²⁰

Some players and coaches within the NBA also *privately* expressed reservations about Johnson's involvement, though few would voice them publicly.²¹ One member of the U.S. Olympic

17. UPI, *supra* note 13. In addition, Basketball Australia, the governing body of amateur and professional basketball in Australia, invited Johnson to captain a USA all-star team in a pre-Olympic tournament against the Australian national team. *Magic Invite*, USA TODAY, Jan. 29, 1992, at 1B.

18. Carol Herwig, *Experts Frustrated by Athletes' Continued Ignorance*, USA TODAY, Feb. 13, 1992, at C7 (quoting Dr. Mitchell Katz, chief of research for the San Francisco Public Health Department's AIDS office).

19. Jack McCallum, *Orlando, Si, Barcelona . . . ?*, SPORTS ILLUS., Jan. 20, 1992, at 56.

20. *Around the NBA*, WASH. POST, Mar. 1, 1992, at D9. Puello Herrera, a Dominican neurosurgeon, also serves as head of the Dominican Republic's Olympic Committee. Interestingly, twelve HIV-positive athletes were allowed to participate in the Central American and Caribbean Games in Mexico in 1990. They were allowed to play, explained Puello Herrera, because they competed in events where there was only a remote possibility that others would come in contact with their blood (i.e., individual events as opposed to contact sports). *Id.* See also Joey Matthews, *Sports Official Objects to Magic in Olympics*, WASH. TIMES, Mar. 1, 1992, at C7.

21. One reservation voiced by Pistons physician Ben Paolucci was not the risk of transmission but of a mixed message. "The message is sent out originally that we've got a very serious problem that people don't understand . . . Now that Magic has it, everyone understands that this is a very serious problem . . . Now, after getting us to the point

team admitted, "I don't see how any of us could feel we were completely safe if he got injured and started bleeding."²² Furthermore, the risks of bloody crashes on the basketball court are not that remote. In the 1991-92 season, during a game in Utah, Jazz forward Karl Malone had a bloody collision with Detroit Pistons guard Isiah Thomas. Thomas bled profusely afterwards, extensively enough that the Jazz's team physician was concerned about Thomas' HIV status.²³

In fact, it may be Magic's immense popularity that initially silenced those who were opposed to his participation — or at least those who had some concerns about it.²⁴ As one executive of an Eastern Conference team claimed, "I know this much, [i]f it was anybody but Magic in this situation, there would be no question. He *would not* be playing."²⁵

While medical authorities might again dismiss these concerns as the product of irrational and uninformed hysteria,²⁶ the anxiety of non-infected players is an important concern in the formulation of a policy to deal with HIV and sports.²⁷ It is easy to criticize

where we're almost panicking, then all of a sudden they say he is going to play." Thom Loverro, *It's Showtime for Magic: Johnson's Return Brings Controversy*, WASH. TIMES, Feb. 9, 1992, at C1.

22. McCallum, *supra* note 19, at 56 (quoting an anonymous U.S. Olympian).

23. *Id.*

24. Journalist Robert Lipsyte contends that in fact "[m]any of the All-Stars did not want to play against Magic, but peer pressure, the news media juggernaut and standard jock macho shut them up." Lipsyte, *supra* note 6, at 11. While Lipsyte provides no evidence that "many" felt this way, it would appear that at least a few did.

25. McCallum, *supra* note 19, at 57. Ironically, perhaps, some experts hoped that by playing in the All-Star Game Johnson would "break down barriers" so that players could play without such misplaced fear. Larry Tye, *Experts Say Fears Unfounded: Johnson Poses Virtually No Threat to Spread AIDS on Court*, BOSTON GLOBE, Feb. 9, 1992, Sports, at 52.

26. Dr. John Bartlett, chief of infectious diseases at Johns Hopkins School of Medicine, calls such statements "a first-class example of AIDS hysteria." He adds, "I can't understand how someone with knowledge of this disease could have any fears of this. People who know about the disease and think that the virus can be transferred by playing basketball are not thinking straight." Loverro, *supra* note 21, at C1.

Dr. David Rogers, vice chair of the National Commission on AIDS and an NBA consultant, has placed the negative responses to Johnson's HIV infection in the context of responses to other plagues that have beset society. While player reactions — fear and a desire to separate the ill person — are consistent with those in the past, they are still the product of misinformation or a lack of information. Rogers suggests that if the response to this epidemic continues along the same path as responses to previous plagues, then players will be less afraid as they become more informed. Tye, *supra* note 25, at 52.

27. As sports commentator Tony Kornheiser illuminated, when asking whether an HIV-infected player should be allowed to play, "The short answer should be that if his doctors say he can play without any significant risk to his health . . . then he ought to be allowed to play. But there is no short answer. It's not just about Magic's health. It's about the other players too." Kornheiser, *supra* note 7, at E1. Even to the extent that experts

players for their trepidation and ignorance, but it is important to remember that they are the ones who are exposed to the risk, however slight that risk may be.²⁸

Such worries, together with Magic's disclosure, were probably the forces that finally led the major professional sports leagues to consider the issues surrounding athletes and HIV. In January of 1992, representatives of Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL) met to discuss AIDS as it relates to professional sports. In addition, the leagues and the teams within the leagues have adopted a wide variety of guidelines for dealing with AIDS.²⁹

While these four groups, as well as scattered other sports organizations, are beginning to tackle the complex issues raised by HIV in the athletic context, their plans are still in the earliest phases. Thus, this is an opportune time to set forth the issues triggered by the presence of an HIV-infected player in contact sports.

An analysis of the legal and policy concerns arising from the participation of HIV-positive athletes in sports is especially timely in light of Magic Johnson's recent attempt to play professional basketball again. After successfully playing on the winning U.S. Olympic basketball team, Johnson announced his return to the Lakers on September 29, 1992, citing his good health and desire to play, and win, again.³⁰ Nevertheless, after playing in five exhibition games, Johnson announced his retirement for a second time just four days shy of the new season.

claim these players are not putting their health at risk, we must take the players' reactions into consideration: "This is new ground, and it must be handled fairly, without scapegoating Magic or anybody else." *Id.* at E7.

28. Consider, for example, the claim of experts that while HIV is present in all body fluids of an infected person, it cannot be transmitted through saliva or sweat because of the very low level present. One player's response to such a conclusion: "That's easy for you to say. You're not in those huddles with all that sweat." Hubbard, *supra* note 14, at 36 (quoting *The Los Angeles Times*).

29. Thom Loverro, *Pro Leagues Encourage Discussions on AIDS*, WASH. TIMES, Feb. 9, 1992, at C4. The NFL, for example, issued guidelines to clubs in December of 1991 on a variety of AIDS issues, and some teams have offered voluntary testing. Team doctors from the NHL and the NBA met in separate meetings to discuss appropriate precautions. *Id.* at C4. The Major League Baseball Players Association and the 26 clubs have agreed to hold AIDS awareness sessions for players. S.F. EXAMINER, Apr. 19, 1992, at D5.

American sporting organizations are not the only ones taking action in this area. The Canadian Academy of Sports Medicine is working on a national education plan for athletes worried about contracting the AIDS virus during sporting events. *Canadian Sports Body to Release AIDS Study*, TORONTO STAR, Jan. 24, 1992, at C6.

30. DuPree, "Magic Back in Business with Lakers," U.S.A. TODAY, Sept. 30, 1992, at C1.

Johnson left the NBA again not because of health problems, but due to the negative reactions of several NBA players, including Karl Malone of the Utah Jazz and Gerald Wilkins of the Cleveland Cavaliers, that were made public in a November 1, 1992 *New York Times* article. The following day, in a statement released through the Lakers, Johnson stated that "[i]t has become obvious that the various controversies surrounding my return are taking away from both basketball as a sport and the larger issue of living with H.I.V., for me and the many people affected."³¹ Magic Johnson's experience provides a compelling reason to examine the issues at hand.

Not only will this consideration prove helpful to the major sports leagues as they plow ahead, it will influence the eventual and inevitable policy formulation by amateur organizations, college and high school athletic associations, and even YMCA's and other local organizations.³² Moreover, this examination offers an interesting arena in which to test the employment law ramifications of HIV.

Before facing these questions, however, we should first consider the disease itself — what it is and how it can be transmitted.

II. AIDS & HIV: THE DISEASE AND THE DANGERS³³

*We all die of something, and the only thing that changed for Magic Johnson when he tested positive for the AIDS virus is that he now knows what he will probably die from, if not necessarily when.*³⁴

A. The Disease

According to recent estimates, between 1 million and 1.5 mil-

31. Martinez, "‘Controversies’ Cause Johnson to Quit Again," N.Y. TIMES, Nov. 3, 1992, at A1.

32. It is difficult to imagine a scene in which an outsider tries to join a pick-up game at a local black-top court and is asked whether he is HIV-positive, but policies affecting the stars do seem to trickle down.

33. The information in this section is drawn generally from the following sources: ROBERT M. JARVIS ET AL., AIDS LAW IN A NUTSHELL (1991); David W. Webber, *AIDS in the Workplace*, in AIDS and the LAW 45 (Wiley Law Publications Editorial Staff eds., 2d ed. 1992); Evelyn M. Gentemann, Comment, *After School Board of Nassau County v. Arline: Employees with AIDS and the Concerns of the ‘Worried Well,’* 37 AM. U. L. REV. 867 (1988); Thea F. Silverstein et al., *Confronting the Medical-Legal Issues of AIDS*, 10 WHITTIER L. REV. 401 (1988); Jerry Adler et al., *Living with the Virus*, NEWSWEEK, Nov. 18, 1991, at 63.

34. Adler et al., *supra* note 33, at 63.

lion people in America and roughly 10 million in the world³⁵ share a fatal characteristic with Magic Johnson — they are infected with HIV, the virus which causes Acquired Immune Deficiency Syndrome (AIDS). Johnson, unlike the vast majority of these people, knows he is infected.

Originally identified as a disease of the gay male community,³⁶ we now recognize that the virus afflicts all sectors of society. Instead, it has struck people of different socioeconomic groups, destroyed adults and children, men and women,³⁷ blacks and whites.³⁸ While the gay male community has been especially devastated by AIDS, the largest increases in infection over the past two years have been among heterosexual males and females.³⁹

In the decade since AIDS was originally described and identified, scientists have learned a good deal more about it. They have discovered the virus that leads to this breakdown of the human immune system and aptly called it "human immunodeficiency virus" (HIV). They learned that the virus works by infecting and destroying a subgroup of white blood cells called T-4 lymphocytes (T-cells), the body's key defense to illness, and by incorporating itself into the person's DNA, thereby replicating itself and spreading throughout the body.

In addition to discovering the cause of AIDS, medical researchers have developed a test which reliably indicates the presence of HIV in the blood. This test decreases the spread of the virus by preventing the use of contaminated blood and by allowing persons to learn that they are infected. Researchers have developed other measures which can slow the spread of HIV: simple rules, which, if followed, would practically eliminate any risk of infection to presently HIV-negative persons. Moreover, for those persons who are HIV-positive, there are now drugs available which

35. JARVIS ET AL., *supra* note 33, at 23-24. See also NATIONAL COMMISSION ON ACQUIRED IMMUNE DEFICIENCY SYNDROME, *AMERICA LIVING WITH AIDS*, 13 (1991).

36. See RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC* (1987).

37. Although an increasing number of women have been diagnosed as HIV-positive, infected men outnumber infected women six to one. Adler et al., *supra* note 33 at 64.

38. For example, among Americans currently afflicted with AIDS, over half are black or hispanic. Johnson, *supra* note 1, at 19.

39. Approximately 6% of the 196,000 Americans with full-blown AIDS contracted the disease through heterosexual intercourse. *ECONOMIST*, *supra* note 2, at 31 (citing research by the Centers for Disease Control in Atlanta). While this group is only a small proportion of Americans currently suffering from AIDS, medical experts expect the figure to increase, based on the fact that last year, while total AIDS cases increased 12%, heterosexual AIDS cases increased 40%. *Id.*

slow the replication of the virus in the blood and delay the onset of AIDS. Medical research has even improved the ability to counter some of the fatal opportunistic infections to which AIDS victims are susceptible. Yet, despite the significant time, money, and skill invested in AIDS research over the last ten years, doctors have still failed to achieve their primary objective: finding a cure.

Without a cure, individuals infected with HIV remain infected their entire lives. Given the amazingly long period of latency of the virus, however, not all infected persons feel sick. That is, despite their infection by the AIDS virus, they will feel healthy and exhibit no symptoms. They may even be unaware of their illness. But, meanwhile, the virus silently "erodes the immune system 'the way the surf works on a beach,'" according to Dr. Michael Gottlieb, the Los Angeles immunologist who published the first clinical description of AIDS patients.⁴⁰ At some point the immune system reaches a breaking point, and the infected individual is struck by one of the characteristic infections of AIDS. It is only then that he or she is added to the list of persons who have AIDS.

How long does this erosion take? Statistics compiled for the years before drugs such as AZT were developed indicate that the median interval is between ten and eleven years, but given the current availability of AZT, the upper limit could be much higher. How much higher is unknown. What we do know is that once an infected person develops one of the characteristic AIDS illnesses, his or her chances of surviving for more than three years is around one in ten.⁴¹

This discussion reveals three factors which explain why HIV in the employment context is and will continue to be a significant concern: the long latency of HIV; the good health which an infected person can enjoy for ten years or longer; and the fact that until an infected person dies, he or she may pass the virus on to someone else.

B. *The Stages of the Disease*

In order to consider policy alternatives, it is helpful to differentiate between the stages of HIV illness identified by Leonard in 1985 and updated by Gentemann in 1988:⁴²

40. Adler et al., *supra* note 33, at 63 (quoting Gottlieb).

41. *Id.*

42. See Arthur S. Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11, 20 (1985); Gentemann, *supra* note 33, at 876.

STAGE 1:

Seropositive — test positive on a series of lab tests aimed at confirming the presence in the blood of HIV antibodies; no symptoms.

STAGE 2:

ARC — AIDS-Related Complex; begin to show non-life threatening symptoms.⁴³

STAGE 3:

AIDS I — begin to suffer from more serious illnesses but still able to carry out daily routines.⁴⁴

STAGE 4:

AIDS II — show more marked weakening; unable to carry out basic tasks without assistance.

The above model reveals that AIDS is simply the endstage of complications brought on by HIV infection. The virus knocks out all of the victim's defenses to disease, leaving the person open to attacks by the most trivial — and serious — of illnesses. The marked differences in the health and capabilities of an HIV-infected person at the various stages of the illness underscore the need for a policy that does not treat all HIV-infected persons alike.

C. *The Transmission of HIV*

As discussed earlier, HIV is a blood-borne retrovirus transmitted through exchange of body fluids.⁴⁵ The only documented cases of spread of HIV from one person to another have been through sexual contact, needle sharing,⁴⁶ blood products and transfusion, and prenatal and natal exposure. There have been no reported cases of the AIDS virus being transmitted through casual, physical contact. Pertinent to the discussion at hand, there have been no

43. These include enlarged lymph nodes, oral thrush, shingles, weight loss, persistent fevers, night sweats, persistent cough, diarrhea, and fatigue. Leonard, *supra* note 42, at 18-n.38.

44. It is at this stage, when an HIV-infected person develops one of the distinctive infections of AIDS, that the individual is included on the list of those with AIDS. The most common infections associated with AIDS include pneumocystis carinii pneumonia (PCP), cytomegalovirus, cryptococcal meningitis, Kaposi's sarcoma, and mycobacterium avium complex. Adler et al., *supra* note 33, at 64.

45. See *supra* text accompanying notes 33-40.

46. Drug users who became infected through the sharing of needles constitute the second largest group of AIDS cases in the U.S., immediately behind gay men. Adler et al., *supra* note 33, at 63.

confirmed cases of HIV transmission through sports contact.⁴⁷ Moreover, unless an infected athlete has a bleeding wound or other skin lesion, the World Health Organization concludes that there is no risk of HIV transmission via sports.⁴⁸

One fact that surprises many people is that, despite its deadliness, the disease is very difficult to catch. The virus cannot survive for more than a few minutes outside the human body and has been transmitted, to the best of our knowledge, only through infected blood, semen, or vaginal secretions.⁴⁹ The reason it has spread so quickly is a function not of its contagiousness, but of its long latency and the ability of an infected person to pass it on as long as he or she lives.

How would HIV, theoretically, be transferred from an infected player to a healthy player in the sports context? First, the HIV-infected athlete would have to suffer an injury and bleed extensively. Additionally, he or she would probably need a significant concentration of the virus in his or her blood, which is more likely to occur in the later stages of the disease (AIDS I and AIDS II) when the athlete would probably not have the requisite stamina for arduous physical activity.⁵⁰

Even if the athlete is severely cut and has a high concentration of the nucleic acid virus, another athlete must also have an open wound, and a substantial amount of blood would have to fall into that wound.⁵¹ Remember, the virus cannot survive for more than a few minutes after exposure to the air,⁵² thus the timing of the contact between the wounds leading to the transfer of blood would need to be precise. The bottom line, argues one expert, is that "[n]othing is without risk, but this is getting close."⁵³

47. Loverro, *supra* note 21, at C1 (quoting Chuck Fallis, spokesman for the Centers for Disease Control).

48. *Id.*

49. Adler et al., *supra* note 33, at 63.

50. Loverro, *supra* note 21, at C1. "Just because you have blood from an HIV positive person doesn't necessarily mean that the HIV got into that particular sample Every inch of your body is not involved with the HIV virus.' The healthier a person is, the less the number of cells infected with the virus." (quoting an unidentified NBA team doctor). *Id.*

51. Tye, *supra* note 25, at 52.

52. Researchers at the Centers for Disease Control "feel that it is very unlikely that it would be transmitted [through physical contact during sporting play], because the virus is so unstable and short-lived in the open air, and it would take huge amounts of blood for such a transfer." Loverro, *supra* note 21, at C1 (quoting Centers for Disease Control spokesman Chuck Fallis).

53. Tye, *supra* note 25, at 52 (quoting Dr. Martin Hirsch, head of AIDS research at Massachusetts General Hospital).

Because there are no documented cases of athletes becoming infected while participating in sporting events, how can doctors be so sure that it is practically impossible to be infected in this manner? Many of the same researchers once rejected the notion that patients could be infected by their dentist, yet Kimberly Bergalis,⁵⁴ the young Florida woman who died after contracting HIV from her dentist, certainly proved them wrong. The doctors do not make their claims based on abstract reasoning alone. They substantiate their claims with studies of cases involving the transmission of HIV through contaminated needles. When blood from an infected individual comes into contact with blood from another person via a shared needle, the risk of the second person being infected is only one in 300.⁵⁵ Exposure through shared needles is a worst case scenario, because all of the factors that increase the likelihood of transmission are present, particularly blood to blood contact and lack of exposure to air. The odds resulting from these studies thus demonstrate the difficulty of catching HIV.

All of which is not to imply that it is *impossible* to become infected through sports. *The Lancet*, a respected British medical journal, reported on one suspected case of such a transmission in 1990. A group of doctors wrote to the journal suggesting that a patient might have contracted the AIDS virus after colliding with an infected drug user during a soccer game in Italy. Numerous efforts have failed to confirm the case.⁵⁶

Evidence therefore indicates that the risk of becoming infected during sporting play is low to nonexistent, and what experts term an "acceptable" risk. The notion of acceptable risk is discussed below.⁵⁷

D. AIDS and Athletes

The NBA consultant on AIDS believes that the rate of HIV infection is probably the same among athletes as it is in the general population in the United States, roughly one in every 1000.⁵⁸ We have many reasons, however, to suspect that the rate of infection among professional male athletes in the United States may be much higher. One group that is at special risk of HIV-infection is

54. See, e.g., Bruce Lambert, *Kimberley Bergalis Is Dead at 23: Symbol of Debate over AIDS Tests*, N.Y. TIMES, Dec. 9, 1991, at D9.

55. Tye, *supra* note 25, at 52.

56. *Id.*

57. See *infra* notes 100-102 and accompanying text.

58. Tye, *supra* note 25, at 52.

made up of people who have unprotected sex with multiple partners and whose partners include prostitutes. Magic Johnson certainly fell within this group — he is not even sure from whom he contracted the virus — and a surprising number of jocks share Johnson's past sexual habits.⁵⁹

While most athletes would not claim the level of sexual promiscuity attained by Wilt Chamberlain,⁶⁰ they will admit to "sleeping around" — extensively. "Let's face it," says Seattle SuperSonics forward Eddie Johnson, "athletes are whores. We're paid to use our bodies. So sex becomes the same thing after the games. We become like dogs sometimes, and we all talk about the same women in every city. Just walk outside the locker room in any arena. The women are all there waiting."⁶¹ And what if one of these women is the one who infected Johnson?⁶² "It has been common practice for some pro players to share the favors of groupies who beguiled them,"⁶³ so it is possible that another player has already acquired HIV from the same person as Magic did. George Andrews, Magic's former agent, commented graphically on the fear that Magic's retirement announcement instilled in other players, stating, "About five or six other players are puking in the sinks right now what with the way some of these guys share women."⁶⁴ Atlanta Hawks forward Dominique Wilkins declared, "This has to scare everybody. The more I think about it, the more scared I am. In fact, I'm scared to death."⁶⁵

Of course, some observers have responded that the NBA is a special case. "The NBA's five times worse than any other sport,"

59. According to Johnson, "I was the one most NBA players looked up to when it came to women. I lived the kind of social life that most guys in the league wanted to lead." Johnson, *supra* note 1, at 22.

60. In his recently published autobiography, Chamberlain reveals that since the age of 15, he has had sex with as many as 20,000 different women, or an average of 1.37 women a day for 40 years. WILT CHAMBERLAIN, *A VIEW FROM ABOVE* 251 (1991). See also John Garrity, *Wilt Chamberlain: He Seeks His Place in a World Where Guards Dominate and Sex Isn't Safe*, SPORTS ILLUS., Dec. 9, 1991, at 22, 24; E.M. Swift, *Dangerous Games: In the Age of AIDS, Many Pro Athletes Are Sexually Promiscuous, Despite the Increasing Peril*, SPORTS ILLUS., Nov. 18, 1991, at 40.

61. Swift, *supra* note 60, at 40.

62. It is possible that the woman who infected Johnson does not, as of this writing, know she is infected. Because Johnson tested negative for the AIDS virus in 1988, he caught the disease fairly recently, perhaps from a woman who still frequents locker rooms.

63. John Elson, *The Dangerous World of Wannabes: Magic Johnson's Plight Brings Fear into Pro Locker Rooms Across the Country and Spotlights the Riskiest Athletic Perk: Promiscuous Sex*, TIME, Nov. 25, 1991, at 77.

64. Swift, *supra* note 60, at 41.

65. *Id.*

reports one agent.⁶⁶ But New York Mets infielder Kevin Elster describes a situation in baseball not all that different from the one in basketball: "You can get sex every night. On the road. At home. It doesn't matter. We're next in line, I guess, after the gays and drug users. The Magic thing has put fear into all of us."⁶⁷ Moreover, Dexter Manley of the Tampa Bay Buccaneers claimed that such was also the case for professional football players, even those who are not the team stars.⁶⁸ In addition, the NHL was shaken by a Montreal doctor's comment to a journalist, at a World AIDS Day conference in December 1991, that he had a 24-year-old female patient who died of AIDS two years earlier and who reported she had slept with no less than fifty professional hockey players.⁶⁹

The possibility that professional athletes may be at especially high risk of HIV infection has at least two ramifications for policymaking. First, sports teams may have infected employees to deal with more often than the average employer does, and second, athletes are in special need of education as to the dangers of AIDS and the means of preventing its spread.

Armed with the basic facts on the disease and its risks to athletes, both from athletic competition and from lifestyles encouraging frequent, casual sexual encounters, we turn now to the legal issues attendant to AIDS in the professional sports context.

III. THE LEGAL ISSUES SURROUNDING AIDS AND SPORTS: A HYPOTHETICAL

In order to reveal all the legal issues raised by the possibility of HIV-infected players participating in major league sports,⁷⁰ let us consider a hypothetical case:⁷¹

Johnny All-American plays football for an NFL team, the California Coyotes. He was picked in the first round of the draft and has started each of the past two seasons. Since the beginning of the current season two months ago, however, he has inexplicably lost

66. Frank Deford, *A Magical Mystery Tour*, NEWSWEEK, Dec. 23, 1991, at 59, 60.

67. Swift, *supra* note 60, at 40.

68. *Id.*

69. Ann McLaughlin, *A National Scare: A Casual AIDS Comment Unleashes a Wave of Concern*, MACLEANS, Dec. 16, 1991, at 62.

70. I should make it clear that I will not be considering all possible issues surrounding athletes and AIDS. Instead, I am focusing on men's professional sports and specifically the four American major leagues: MLB, NBA, NFL, and NHL.

71. This hypothetical is modeled after one used by David Webber to illustrate the issues of AIDS in the more general employment context. See Webber, *supra* note 33, at 50-52.

weight, though his athletic performance has not been affected.

Recently, during a practice scrimmage, he collided with another player, deeply cutting his arm. He bled profusely at the time but sustained no lasting injury. The other player and a trainer helped him off the field and patched the wound.

Now, however, some of the players and members of the support staff have expressed concern to the Coyotes' management about the possibility that Johnny has HIV and about the risks of his continued play. Does the team have the right to inquire if Johnny has HIV? May they require that he be tested?

Let us say that Johnny *has* been diagnosed as having HIV and has admitted such. May the team's management treat him differently than they treat the other players? May they refuse to renew his contract on the grounds that he will experience job-related disability in the future?

Several of the Coyotes owners as well as some NFL officials have expressed concern that the employment of an HIV-positive player may hurt the sport's image with the American public, decreasing revenues. Is this a valid reason to release Johnny from his contract or at least drop him from the active roster?

Of course, the owners are not the only ones worried by Johnny's illness. In a meeting, the other players and coaching staff express concern that if Johnny has HIV infection, another bloody collision could expose them to the AIDS virus. May the team discipline players who refuse to play with Johnny? May players or trainers take legal action against the California Coyotes for violating their rights to a safe workplace?

Finally, if Johnny reveals his HIV diagnosis to the team, are they liable if that information is disseminated to others? Would such a revelation violate his privacy rights?

This hypothetical uncovers the many thorny issues raised by AIDS in athletics. To date, no published attempts have been made to address the legal issues as they arise in the sports setting, but a small number of good examinations of the rights of HIV-infected employees in general have been offered. I will use these to provide the answers to the questions I pose.

IV. AIDS AND EMPLOYMENT LAW: EMPLOYERS VS. EMPLOYEES, THE WELL VS. THE SICK

Faced with a disease which leaves no survivors, society is desperately searching for ways to prevent its spread. The severity of these preventive measures, however, should not exceed the

risks posed by AIDS.

*An individual's civil rights, especially his right to work or attend school, should not be infringed upon unless he poses intolerable risks to others. But what is an intolerable risk when we are dealing with a deadly virus?*⁷²

In the early 1980s, when AIDS was first diagnosed and named, and throughout that decade, the statutory protection for infected employees was minimal. The only possible protection against employer discrimination was the Federal Rehabilitation Act of 1973,⁷³ specifically section 504,⁷⁴ which provides that an employer who received federal funds cannot discriminate against an otherwise qualified handicapped individual solely because of her handicap.⁷⁵ But to take action under section 504, the infected person's employer had to be a federal contractor,⁷⁶ a beneficiary of federal funds,⁷⁷ or a federal agency.⁷⁸ For this reason, the Act held out hope for only a small percentage of infected people,⁷⁹ leaving the many HIV-positive employees who experienced job discrimination without any legal remedy.⁸⁰

In 1990 Congress passed the Americans with Disabilities Act (ADA)⁸¹ which forbids disability discrimination in employment⁸² (as well as public services, accommodation, and telecommunications) and, unlike the Rehabilitation Act, applies to *all* employers

72. Gentemann, *supra* note 33, at 868-69.

73. Rehabilitation Act of 1973, Pub. L. No. 93-112 §§ 501, 503-504, 87 Stat. 355, 393-94 (codified as amended at 29 U.S.C. §§ 791, 793-794 (1988)).

74. *Id.* § 794.

75. *Id.* This section provides in pertinent part:

No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Id. § 794(a).

76. *Id.* § 793.

77. *Id.* § 794.

78. *Id.* § 791.

79. For discussions of how the Rehabilitation Act could be used by AIDS sufferers, see Gentemann, *supra* note 33, at 907-09; Leonard, *supra* note 42, at 29-34; Robert P. Wasson, Jr., *AIDS Discrimination Under Federal, State, and Local Law After Arline*, 15 FLA. ST. U. L. REV. 221, 232-54 (1987).

80. The number of reports of employment discrimination against infected persons has been high. See Philip J. Hiltz, *New Study Says AIDS Bias Grows Faster than Disease*, N.Y. TIMES, June 17, 1990, § 1, at 20.

81. Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C.A. § 12101-213 (West Supp. 1992)). This paper offers a very limited consideration of the ADA, focusing on its protection of HIV-positive employees. For a more extensive discussion of the Act, refer to HENRY H. PERRITT, JR., *AMERICANS WITH DISABILITIES ACT HANDBOOK* (2d ed. 1991).

82. Subchapter I of the Act covers employment discrimination.

with more than fifteen employees, not merely those receiving federal monetary support.⁸³

Who is an "American with Disability?" The ADA defines a disabled person as an individual for whom one of the following is true:

1. has a physical or mental impairment that substantially limits one or more major life activities of such individual
2. has a record of such an impairment
3. is regarded as having such an impairment.⁸⁴

While not explicitly mentioning HIV (or any specific disability) in defining a handicapped person for purposes of the Act, the ADA's legislative history clearly indicates an intention to include the AIDS virus under its auspices.⁸⁵ After lengthy discussion and dispute,⁸⁶ Congress concluded that "a person infected with the [AIDS virus — HIV] is covered under the first prong of the definition of the term 'disability' because of a substantial limitation to procreation and intimate sexual relations."⁸⁷

Additional evidence that persons with HIV infection are protected by the ADA may also be deduced from judicial interpretation of the coverage of the Rehabilitation Act. In *School Board of Nassau County v. Arline*,⁸⁸ the United States Supreme Court ruled that communicable diseases are included within the meaning of handicapped as used in the 1973 Act.⁸⁹ Although the plaintiff in this instance did not suffer from HIV but rather from recurring tuberculosis,⁹⁰ the Court did not limit its interpretation to that ill-

83. The Act became effective for employers of 25 or more employees on July 26, 1990 and for those with 15 or more two years later.

84. 42 U.S.C.A. § 12102(2)(West Supp. 1991).

85. An amendment to the Act explicitly refers to persons who are infected with a communicable disease. *Id.* § 12113(d)(2). This provision allows restaurant owners or food service companies to limit or prohibit food handling by infected employees, provided the employer offers an alternate employment opportunity. The intent of the amendment's proponents was to allow removal of an HIV-infected food service worker, even in those cases when the employee does not pose a direct risk of infection to others (and thus would not be covered by the "direct threat" provisions of the ADA). Clearly, by providing for such a specific exception, Congress considered HIV-positive persons to be protected by the Act. *See Webber, supra* note 33, at 55-56.

86. Indeed, attempts to exclude persons with infectious or communicable diseases from the ADA were unsuccessful. *See, e.g.*, 136 CONG. REC. H4613 (daily ed. July 12, 1990) (statement by Rep. Dannemeyer opposing the inclusion of persons with communicable diseases).

87. HOUSE COMM. ON EDUCATION AND LABOR, H.R. REP. NO. 845, 101st Cong., 2d Sess., pt. 2, at § 2 (1990).

88. 480 U.S. 1024 (1987).

89. *Id.* at 1132.

90. In fact, recurring tuberculosis is a more highly contagious disease than HIV.

ness but rather included all communicable diseases. Court commentators argued that HIV was necessarily included.⁹¹ Since the ADA's definition of a disabled person is lifted directly from the Rehabilitation Act, we would expect application of the Rehabilitation Act to carry over to the ADA.

Today, then, the ADA provides the primary means of protecting the employment rights of persons infected with HIV or suspected of being so infected. We can consider each of the questions arising from our hypothetical with an eye to the ADA.

Can a team inquire about a player's HIV status or require the player to be tested for the presence of HIV antibodies?

The ADA does *not* forbid medical testing by employers; however, it does require that such tests be aimed at some job-related concern and that they be carried out in a non-discriminatory manner.⁹² Since the physical health of players is a key component of athletic competition, team owners would have an easier time than many other employers demonstrating that HIV status is job-related.

In order to single out a particular player for inquiry, as the Coyotes wish to do to Johnny, a team would have to identify specific problems in the player's work performance that could be a result of the disability.⁹³ Since no diminution in his play has occurred, the Coyotes may have difficulty establishing a right to test Johnny. To bypass this legal hurdle, they merely need to implement team-wide testing, which probably would not violate the ADA.⁹⁴

Beyond discrimination concerns, testing raises issues of confi-

91. See generally Gentemann, *supra* note 33.

92. 42 U.S.C.A. § 12112(d)(4)(A) (West Supp. 1992). This section provides:

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

Id. See also JARVIS ET AL., *supra* note 33, at 66.

93. Webber, *supra* note 33, at 51.

94. Medical testing of athletes has been more extensively explored in the drug testing context. For a discussion of the legal rights and issues involved in drug testing of athletes, see generally Stephen F. Brock & Kevin M. McKenna, *Drug Testing in Sports*, 92 DICK. L. REV. 505 (1988); J. Otis Cochran, *Drug Testing of Athletes and the United States Constitution: Crisis and Conflict*, 92 DICK. L. REV. 571 (1988); David J. Sisson & Brian D. Trexell, *The National Football League's Substance Abuse Policy: Is Further Conflict Between Players and Management Inevitable?*, 2 MARQ. SPORTS L.J. 1 (1991); Glenn M. Wong & Richard J. Ensor, *Major League Baseball and Drugs: Fight the Problem or the Player?*, 11 NOVA L. REV. 779 (1987).

dentiality and privacy. Employees may try to invoke a variety of common law and statutory privacy doctrines against employer attempts to test, but the current status of private sector privacy rights is unclear. In addition, some states have adopted AIDS confidentiality protections applicable to private employment.⁹⁵

Are sports teams interested in implementing league-wide HIV antibody tests? The answer is probably yes; at least many sports commentators believe they would. Mandatory testing has been discussed by some sports team owners though not yet broached with players.⁹⁶ If the leagues choose to adopt HIV testing as policy (instead of working it into their next collective bargaining agreement), the unions may challenge, consistent with their interests in protecting employee rights, the policy as inappropriate. While players may be concerned about competing against an HIV-positive individual, they understandably desire privacy with respect to their own HIV status.

May a team treat an HIV-infected player differently than the other players? May the team refuse to renew a player's contract on the grounds that he is HIV-positive?

Under the ADA, the short answer to both questions is clearly no. However, we should consider this question in light of the four stages of the disease discussed earlier⁹⁷ as well as the specific protections of the ADA. With respect to the latter, the key question in any dispute over the exclusion of a disabled person is "whether that person is qualified to participate in the activity Being qualified is a function of the mental and physical abilities that the disabled person has and the degree of risk that their participation will pose to others."⁹⁸ Thus, qualification is dependent upon both

95. See NATIONAL LAWYERS' GUILD AIDS NETWORK, AIDS PRACTICE MANUAL app. A (3d ed. 1991). The significance of such state privacy protections to major league sports can be seen in the case of Minnesota Vikings defensive tackle Keith Millard, who declined to submit to urinalysis aimed at detecting illicit and performance-enhancing drugs, on the grounds that such testing violated his rights under Minnesota statutes prohibiting the random testing of workers. The team backed down. Elliott Almond, *Millard Reportedly Stymied NFL Drug Policy*, L.A. TIMES, Jan. 23, 1992, at C6. See also Sisson & Trexell, *supra* note 94, at 23-25.

96. Almond, *supra* note 95, at C6. Asked whether the NFL would instigate mandatory testing in response to Johnson's revelation, Commissioner Paul Tagliabue responded that it would not, as "[t]he medical evidence is that there is an infinitesimal risk of transmitting HIV through contact sports." Chris Dufresne, *NFL Is Expected To Suspend Plan B*, L.A. TIMES, Jan. 25, 1992 at C8.

97. See *supra* text accompanying notes 42-45.

98. JARVIS ET AL., *supra* note 33, at 48.

the capabilities of the HIV-positive player and the degree of danger in which he or she places other players.

In the AIDS and sports context, whether the player has the mental and physical ability to play will vary greatly depending on what stage of the disease he or she is in. For both our hypothetical player Johnny and Magic Johnson, the answer appears to be that they *are* qualified; they are able to compete at the professional level and consistent with previous performances. However, given the nature of the virus, the answer today may not be the answer tomorrow. That is, not all HIV-positive players will have the requisite ability to play.

In contrast, the answer to the question of degree of risk does not change as dramatically from a yes to a no over time. Though a person poses more risk the sicker she gets, that risk still appears to be an inadequate ground upon which to refuse to hire an HIV-positive player. Current scientific evidence places the risk at an acceptable level⁹⁹ — practically zero. The United States Supreme Court has ruled that in cases involving contagious diseases, the question of risk should be resolved on the basis of the available medical evidence and the recommendations of public health officials.¹⁰⁰ Both weigh heavily against any fear of transmission through sporting events. Because the risk must be a “significant” one that directly threatens the health and safety of other employees and cannot be reasonably accommodated,¹⁰¹ the risk here clearly would not justify team owners discriminating against an HIV-infected team member.

99. Some players and commentators claim that no level of risk is acceptable. Orlando Magic guard Scott Skiles stated that although he “heard a doctor say the transfer risk was ‘very, very, very, very low’. . . that’s still too high.” Kornheiser, *supra* note 7 at E7. But in everyday life we take risks. We simply decide which risks are worth taking and which are significant enough to avoid. In basketball, for example, players glide through the air aiming for the basket, but risking the chance of being undercut and thereby injured. *Id.* Under our system of law, simply because one person believes that any risk of HIV transmission is too much, he cannot put that burden on the HIV-infected person.

100. For an application of this rule to the AIDS virus, see *Chalk v. U.S. Dist. Court Cent. Dist. of California*, 840 F.2d 701 (9th Cir. 1988) in which the Ninth Circuit ruled that, under the Rehabilitation Act, a school teacher diagnosed with AIDS could not be reassigned to non-classroom duties. Since only a substantial risk would justify discriminating against the teacher, and health officials agree no such risk exists in the school setting, the school was deemed to have violated the teacher’s rights.

101. 42 U.S.C.A. 12113 (West Supp. 1991).

May sports teams claim damage to image as a reason to refuse to allow HIV-infected players play?

Given the negative taint of AIDS and its association with sexual promiscuity and drug use, many owners of professional sports teams may fear the impact of an HIV-positive player on their carefully groomed images.¹⁰² Charles Grantham, executive director of the National Basketball Players Association, declared, "This [the AIDS controversy] and the drug area present two of the most obvious problems that both us and the league must deal with."¹⁰³ Again, however, the ADA is fairly straightforward on the matter: an employer may not use the fear of image tarnishment as a basis for discriminating against an employee.

Can the team censor healthy players who refuse to play with an infected teammate?

The reaction of teammates to an infected player poses several problems for the employer. First, if groups of players and trainers protest Johnny's continued participation because of their fears concerning AIDS, their actions may be protected by federal labor law. The United States Supreme Court has long held that concerted employee action to protest over health or safety concerns is to be treated as protected activity under provisions of the National Labor Relations Act.¹⁰⁴ According to the Court, employers may not take disciplinary action against employees who engage in such conduct.¹⁰⁵ What is not as clear is how far such protest may go. Commentators disagree over whether employees could actually refuse to work as part of the protest.¹⁰⁶

Healthy players probably do not have a claim of unsafe workplace, however. "Because the employees' concern about the risk of HIV infection resulting from [playing with Johnny] is not a rea-

102. Ironically, though, NBC utilized Magic's participation in the Summer Olympics as an advertising tool to entice people to watch the games on television.

103. Deford, *supra* note 66, at 60.

104. Section 7 of the NLRA provides that:

[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

(emphasis added) NLRA §7, 29 USC §157.

105. See JARVIS ET AL., *supra* note 33, at 75. See also Webber, *supra* note 33, at 51.

106. Compare JARVIS ET AL., *supra* note 33, at 75 (workers who refuse to work may be protected by federal labor law) with Webber, *supra* note 31, at 51 (refusal to work may be disciplined).

sonable one in light of well-established medical and scientific standards, the employees' refusal to work would not be protected under occupational safety laws."¹⁰⁷

In conflict with the rights of non-infected players to protest is the right of the HIV-infected player to a non-hostile work environment. If the team tolerates hostile player and staff reactions to the infected player, that player may be able to claim discrimination based on the resulting negative atmosphere.¹⁰⁸ Thus, it behooves the team to educate players, in order to prevent such a double-bind.

V. SUGGESTED HIV POLICY FOR PROFESSIONAL SPORTS TEAMS

*[F]or all the noise, where is the start of a public policy toward HIV and AIDS in sports?*¹⁰⁹

By considering the conflict surrounding Johnson's retirement and return, the nature and transmission of the AIDS virus, and the legal issues implicated by an HIV-positive member of professional sports team, we have reflected upon the many important factors which should guide an HIV policy for sports teams. At first glance these factors may appear to place team owners in a Catch-22. On the one hand, they must not discriminate against HIV-positive players; on the other, they must respect the worries of the non-infected. In my view, a four-part policy (education, testing, safety, coordination) could allow teams to remain within legal boundaries as well as protect their interest in the health of their players. All parts are needed, as they are interdependent, and some have already been considered or adopted by the leagues.

1. Education

Teams should institute educational sessions to raise awareness of HIV transmission issues among players. Such education would

107. Webber, *supra* note 33, at 51-52.

108. In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1985), the U.S. Supreme Court concluded that Title VII's prohibition against gender discrimination in employment included "'hostile environment' harassment." *Id.* at 65. Courts also have recognized a cause of action arising from a discriminatory work environment based on race, religion, and national origin. See cases cited in *Meritor Savings Bank*, 477 US at 66. The EEOC and the federal judiciary have held "that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 65. Since the ADA's provisions are modeled after Title VII and the ADA shares Title VII's goal of equal employment opportunity, the ADA should also be read to prohibit a work environment hostile to the physically challenged.

109. Lipsyte, *supra* note 6, at 11.

serve to avoid disruption resulting from teammates' negative reactions to a player with HIV. It would also help prevent those same team members from contracting the virus through unsafe sex practices.

Such a program would not be an onerous burden on teams. Their employees regularly meet for informational training sessions, and the leagues have sufficient resources to seek out good educational programs. Moreover, knowledge is an effective tool in this area. Not only do we have extensive evidence that educating people generally helps decrease fears and increase appropriate caution, we also have some limited proof that it has helped in the case of athletes.¹¹⁰ "Those NBA players who have been given decent information about the disease are perfectly comfortable . . . [with Johnson playing, but] [t]hose that know less about it are concerned and worried."¹¹¹

2. Nonmandatory, anonymous testing

All teams should offer nonmandatory, anonymous testing,¹¹² again a relatively inexpensive undertaking for professional sports associations, which have doctors on staff and access to labs. Players would need to be assured that they would be treated with confidentiality and without discrimination. Moreover, the team should provide appropriate information through its education sessions so that infected players would not fear seeking medical assistance.

Why should teams offer such testing? Beyond the obvious humanitarian reasons, they will be able to discern the extent of the problem if enough players are tested and will also increase the chances that players will seek appropriate medical attention. Of course, if the tests are not completely private, most players will

110. Consider again the comments made by Borner of the Australian national team. In that case, the chief executive of the governing body of Australian basketball, David Wooley, concluded that ignorance prompted the remarks. But, interestingly, Wooley also mentioned that Australia had implemented an AIDS awareness program, though he did not discuss its content or means of implementation, and that he was disappointed to see these two players still make such unfounded statements. UPI, *supra* note 13.

The comments are not necessarily a bad reflection on the Australian program, although they may demonstrate that it needs expansion and improvement. Given that the team's physician, Dr. Brian Sando, told the players that there was a health risk in playing with Magic and encouraged them to boycott games against the USA team, we should be surprised that only two players reacted as they did.

111. Tye, *supra* note 25, at 52 (quoting Dr. Rogers, NBA AIDS consultant).

112. Such testing would not violate the ADA. The Act allows employers to carry out "voluntary medical examinations . . . which are part of an employee health program available to employees at that work site." 42 U.S.C.A. sec. 12112 (c)(4)(B) (West Supp. 1992).

likely avoid confronting the issue.

3. General common sense infection procedures

After the announcement by the International Olympic Committee (IOC) that Magic would be allowed to play in the summer games, the Federation Internationale de Basketball Amateur (FIBA), basketball's international governing body, passed a rule stating, "Players who are bleeding must leave the court and can only re-enter the court if the bleeding has stopped."¹¹³ Such a rule also has been proposed by Dr. Rogers for the NBA: "If people bleed, they probably should be taken out of the game until their bleeding stops, and the wound probably should be protected."¹¹⁴

These rules are intended to prevent the spread of any disease, not only HIV; they are common sense infection control procedures. All contact sports should follow these guidelines for the general good health of the team. Fear of AIDS may simply provide the impetus to adopt such common sense infection control procedures.

4. Coordinate policies with other sporting organizations

For these components — education, testing, safety precautions — to be effective, they need to be consistent across leagues, in both professional and amateur settings, and on an international and national level. Since players hone their skills through these stages, they should not be given different messages in different arenas lest the message be undermined. Moreover, if we have sufficient reason to adopt an HIV policy at the professional sports team level, we certainly must at the college, high school, and amateur levels.¹¹⁵

The beauty of this four-point policy, I believe, is that it could be agreed upon by players and team owners; it would confront legal as well as social issues; and it could improve the general health of athletes.

113. McCallum, *supra* note 19, at 56. And, in fact, De Merode, chair of the IOC's medical commission, indicated that the observance of such rules was a presumption in the approval of Johnson, and other HIV-positive players, for participation in the Olympics. Harvey, *supra* note 16, at C3.

114. Tye, *supra* note 25, at 52. The National Collegiate Athletic Association also has encouraged such precautions in its Sports and Medicine Handbook.

115. Dr. Gary Wadler, an internist and sports medicine expert, warns, "Don't be deluded into thinking this is just a problem with the pros. Ben Johnson [a Canadian sprinter who was stripped of a world record and an Olympic gold medal after he tested positive for steroids] was the tip of the iceberg that extended down to at least 250,000 high school athletes; Magic may provide the same model." Lipsyte, *supra* note 6, at 11.

Perhaps nobody in the history of the NBA has ever run the fast break so artistically and effectively as Magic Johnson, converting with precision passes the smallest openings into easy scoring opportunities. Characteristically, upon discovering he had the HIV virus, Johnson's first impulse — as well as that of many in professional sports — was to look for the fast break. Some progress came from his action, of course, but the easy score, a total solution, has so far been denied.

We are, however, still in transition, and the secondary break may still be open to us if we will only take it. No doubt Magic Johnson will seek to take advantage of this still fluid situation, for he knows how much harder it is to score when the defenses are set. What remains to be seen is whether we will be willing and able to handle his assist.