

b. *Bias and Conflict of Interest*

A litigant's right to have her case heard before an impartial judge is protected by the Due Process Clause of the Fifth Amendment and sections 144 and 455 of title 28 of the U.S. Code. These constitutional and statutory provisions enable litigants to request that a judge recuse herself on grounds of bias or conflict of interest. District court orders denying such requests may be reviewed on appeal or in mandamus proceedings. Because remedies are in place to address bias and conflicts of interest, chief judges have dismissed complaints of such conduct filed under the Act on the grounds that they are related to the merits of a matter that was or should have been raised and resolved in the underlying litigation.²⁴⁴

By its terms, § 144 empowers a litigant to disqualify a judge by filing a "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party."²⁴⁵ Section 455(a), in contrast, directs a judge to disqualify herself from "any proceeding in which his impartiality might reasonably be questioned,"²⁴⁶ while § 455(b) requires disqualification in certain specific circumstances.²⁴⁷

Although the text of sections 144 and 455 appears to create a relaxed standard for disqualification that would be relatively easy to satisfy, judicial construction has limited the statutes' application, so that recusal is rare, and reversal of a district court's refusal to recuse is even rarer. First, the courts have counterbalanced the need to preserve the appearance of impartiality, with the judges' obligation not to recuse themselves except where absolutely necessary.²⁴⁸ Second, the courts have limited the scope of evidence demonstrative of bias: this evidence may not be based on attitudes formed by the judge in light of her experience with the litigants in present or past proceedings,²⁴⁹ on

²⁴⁴ See *supra* notes 35-37 and accompanying text.

²⁴⁵ 28 U.S.C. § 144 (1988).

²⁴⁶ 28 U.S.C. § 455(a) (1988).

²⁴⁷ Such circumstances include: where the judge has a personal bias; where the judge or his former firm served as counsel in the matter when the judge was in practice; where the judge has a financial interest in the matter; and where the judge is related to a party, lawyer, witness or someone with a financial interest in the matter. See § 455(b)(1)-(5).

²⁴⁸ Many courts have spoken in terms of the judge's duty to sit when disqualification is not warranted as being as great as the duty not to sit when disqualification is warranted. See *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976); *Rosen v. Sugarman*, 357 F.2d 794, 797 (2d Cir. 1966); *In re Union Leader Corp.*, 292 F.2d 381, 391 (1st Cir. 1961); *Tucker v. Kerner*, 186 F.2d 79, 85 (7th Cir. 1950); *Grand Entertainment Group, Ltd. v. Arazy*, 676 F. Supp. 616, 619 (E.D. Pa. 1987).

²⁴⁹ See, e.g., *Easley v. University of Mich. Bd. of Regents*, 906 F.2d 1143, 1146-47

attitudes expressed in the judge's prior opinions or rulings;²⁵⁰ or on the judge's activities or views expressed prior to ascending the bench.²⁵¹ Evidence of bias against a lawyer, rather than a party, may likewise be insufficient.²⁵² Third, some circuits have denied petitions for mandamus challenging a judge's refusal to disqualify herself, on the grounds that the issue is properly resolved only on appeal.²⁵³ At the same time, at least one circuit has rejected appeals challenging the judge's refusal to disqualify herself, on the grounds that the issue is properly resolved only in a petition for mandamus.²⁵⁴

Notwithstanding the gauntlet of impediments to recusal under sections 144 and 455, courts of appeals have occasionally ordered the disqualification of judges with biases or conflicts of interest too obvious to ignore.²⁵⁵ Two of the best known series of cases have concerned

(6th Cir. 1990) (upholding judge's refusal to recuse despite the fact that the judge graduated from the law school that was a party in the action); *United States v. Pritchard*, 875 F.2d 789, 791 (10th Cir. 1989) (upholding judge's refusal to recuse despite the judge's prior judicial contacts with defendant); *Securities Exch. Comm'n v. Drexel Burnham, Inc. (In re Drexel Burnham Lambert, Inc.)*, 861 F.2d 1307, 1316 (2d Cir. 1988) (upholding judge's refusal to recuse despite criticism of defense counsel and the judge's wife's interest in the sale of the business in which the defendant is litigating the action).

²⁵⁰ See, e.g., *United States v. Haldeman*, 559 F.2d 131, 133 (D.C. Cir. 1976) (upholding a judge's refusal to recuse despite the defendant's claim that the opinions expressed by the judge while the judge presided over the defendant's criminal proceedings created bias); *Wounded Knee Legal Defense/Offense Comm. v. FBI*, 507 F.2d 1281, 1285 (8th Cir. 1974) (upholding a judge's refusal to recuse despite the defendant's claim that the judge had personal bias against the defendant from dealing with the defendant in other criminal cases).

²⁵¹ See, e.g., *Laird v. Tatum*, 409 U.S. 824, 839 (1972) (denying a motion for a justice to recuse himself on grounds that his past decisions as an employee of the executive branch created no bias).

²⁵² See, e.g., *Gilbert v. City of Little Rock*, 722 F.2d 1390, 1398-99 (8th Cir. 1983) (upholding a judge's refusal to recuse despite claims of extrajudicial bias against the attorney of one of the parties); *Davis v. Board of Sch. Comm'rs*, 517 F.2d 1044, 1052 (5th Cir. 1975) (upholding judge's refusal to recuse despite claims of extrajudicial bias against the attorney of one of the parties).

²⁵³ See *In re City of Detroit*, 828 F.2d 1160, 1166 (6th Cir. 1987); *City of Cleveland v. Krupansky*, 619 F.2d 576, 578-79 (6th Cir.), cert. denied, 449 U.S. 834 (1980); *Green v. Murphy*, 259 F.2d 591, 594 (3d Cir. 1958).

²⁵⁴ See *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991); *Taylor v. O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989).

²⁵⁵ Cases ordering disqualification because of bias include: *Johnson v. Mississippi*, 403 U.S. 212, 215-16 (1971) (disqualifying judge because of revealed bias against civil rights workers); *Berger v. United States*, 255 U.S. 22, 28-36 (1921) (disqualifying judge because of bias against American citizens of German ancestry); *United States v. Holland*, 655 F.2d 44, 47 (5th Cir. 1981) (disqualifying judge because of revealed bias against the defendant); *Roberts v. Bailar*, 625 F.2d 125, 128-30 (6th Cir. 1980) (disqualifying judge because of the judge's friendship with the plaintiff); *Nicodemus*

judges whose biases were not necessarily extrajudicial in origin, but were sufficiently extreme to cause the appellate courts to ignore the general rule excluding such evidence from consideration.

One series of cases, involving Chief Judge Willis Ritter, in the District of Utah, spanned nearly two decades.²⁵⁶ In the 1955 decision of *United States v. Hatahley*,²⁵⁷ the court of appeals reversed Judge Ritter's judgment charging the United States with unauthorized destruction of the plaintiffs' horses and burros and observed that the case "was tried in an atmosphere of maximum emotion and a minimum of judicial impartiality."²⁵⁸ The Supreme Court reversed and remanded for new proceedings consistent with the Court's opinion.²⁵⁹ Following retrial, the court of appeals reversed Judge Ritter again:

A casual reading of the two records leaves no room for doubt that the District Judge was incensed and embittered, perhaps understandably so, by the general treatment over a period of years of the plaintiffs and other [Native Americans] in southeastern Utah by the government agents From his obvious interest in the case . . . we are certain that the feeling of the presiding Judge is such that, upon retrial, he cannot give the calm, impartial consideration which is necessary for a fair disposition of this unfortunate matter, and he should step aside.

. . . .

v. Chrysler Corp., 596 F.2d 152, 156-57 (6th Cir. 1979) (disqualifying judge because of statements made against the defendant); *United States v. Thompson*, 483 F.2d 527, 527 (3d Cir. 1973) (disqualifying judge for statement that it was his policy to sentence selective service violators to 30 months if they were "good people"); *Occidental Petroleum Corp. v. Chandler*, 303 F.2d 55, 57 (10th Cir. 1962) (disqualifying judge because of actions taken in court against defendant that demonstrated bias); *Connelly v. United States Dist. Court*, 191 F.2d 692, 696-97 (9th Cir. 1951) (disqualifying judge because judge's remarks during trial demonstrated hostility toward the plaintiff); *Whitaker v. McLean*, 118 F.2d 596, 596 (D.C. Cir. 1941) (disqualifying judge because of admitted bias against Communists).

Cases ordering disqualification because of conflict of interest include: *Moody v. Simmons*, 858 F.2d 137, 139-43 (3d Cir. 1988) (disqualifying a judge because his daughter was employed by one of the parties in the action that he was presiding over and because he was represented by the defendant's law firm in a personal injury action); *Texaco, Inc. v. Chandler*, 354 F.2d 655, 657 (10th Cir. 1965) (disqualifying judge because the plaintiff's attorney was representing him in another action); *Rapp v. Van Dusen*, 350 F.2d 806, 813-14 (3d Cir. 1965) (disqualifying judge because he had previously employed the defendants' counsel).

²⁵⁶ Judge Ritter is the focus of an article by attorney Brent Ward, analyzing the effectiveness of mandamus as a means of judicial administration. See Ward, *supra* note 6, at 233-36.

²⁵⁷ 220 F.2d 666 (10th Cir. 1955).

²⁵⁸ *Id.* at 670.

²⁵⁹ See *Hatahley v. United States*, 351 U.S. 173, 180-82 (1956).

[W]e suggest that when the case is remanded to the District Court, the Judge who entered the judgment take appropriate preliminary steps to the end that further proceedings in the case be had before another Judge.²⁶⁰

Upon remand, Judge Ritter announced that he did not "intend to follow" the court of appeals' suggestion that he step aside,²⁶¹ whereupon the United States petitioned the Tenth Circuit for a writ of mandamus.²⁶² The writ was granted.²⁶³

In 1976, the court of appeals granted another mandamus petition seeking the disqualification of Judge Ritter.²⁶⁴ The judge had become noticeably warmer to defense counsel and colder to government counsel midway through an antitrust proceeding, beginning at the point the judge first became aware that defense counsel, in the counsel's capacity as president of the state bar, had opposed six bar resolutions objecting to Judge Ritter's behavior in other cases.²⁶⁵ The court of appeals wrote:

The final question, and that which disturbs us most, is whether in the light of the total facts and viewing the future of this case in the light of Section 455(a), there exists a reasonable likelihood that the cause will be tried with the impartiality that litigants have a right to expect in a United States district court. Unfortunately, we cannot predict that it will be.²⁶⁶

The following year the Tenth Circuit reversed a directed verdict by Judge Ritter for the plaintiff in a contract dispute in which a basketball team sued its former coach.²⁶⁷ Although the basis for reversal was that the facts as adduced at trial did not support the directed verdict, the court felt compelled to comment on Judge Ritter's demeanor:

In the circumstances, it is not necessary for us to discuss the defendants' claims of many errors based on admission and rejection of evidence and on restriction of cross-examination. It is enough to say that the trial was not conducted in an impartial

²⁶⁰ *United States v. Hatahley*, 257 F.2d 920, 925-26 (10th Cir.), *cert. denied*, 358 U.S. 899 (1958).

²⁶¹ *United States v. Ritter*, 273 F.2d 30, 32 (10th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960).

²⁶² *See id.*

²⁶³ *See id.*

²⁶⁴ *United States v. Ritter*, 540 F.2d 459, 464 (10th Cir.), *cert. denied*, 429 U.S. 951 (1976).

²⁶⁵ *See id.* at 460-61.

²⁶⁶ *Id.*

²⁶⁷ *See Eckles v. Sharman*, 548 F.2d 905, 909 (10th Cir. 1977).

manner. In a new trial, judicial conduct similar to that appearing in the record before us, hopefully, will not be repeated.

....

... The conduct of the trial by Judge Ritter indicates that he has a strong personal bias and prejudice incompatible "with the impartiality that litigants have a right to expect in a United States district court."²⁶⁸

In the same year that *Eckles* was decided, the court of appeals reversed Judge Ritter again in *Webbe v. McGhie Land Title Co.*²⁶⁹

Here, the trial judge, without reading the depositions, and based on the oral argument of counsel for Webbe and Kitt, announced that the insurance company was "stuck" before even permitting counsel for the insurance company to address the court. To us there is not a reasonable likelihood that the trial judge in the instant case, having now been reversed for granting summary judgment, could later preside over the trial of this matter in a fair and impartial manner²⁷⁰

In the fall of 1977, the United States took the unprecedented step of petitioning the Tenth Circuit for a writ of mandamus barring Judge Ritter from hearing any case in which the United States was a party. By way of explanation, the petition alleged that:

[Judge Ritter] invents and follows his own rules, is swayed by his own preconceptions of legal procedure, and is determined that no outside force—not the arguments of counsel, not the holdings of this Court—shall interfere with the conduct of his court. He feels no responsibility to the litigants to explain or justify his decisions. He brooks no argument and does not tolerate even well-mannered opposition to his views. He attempts to make his decisions in such a way that this Court will be unable to correct his errors.²⁷¹

Judge Ritter died before the petition was decided.

A second series of cases involved Judge Miles Lord of the District

²⁶⁸ *Id.* at 910-11 (quoting *United States v. Ritter*, 540 F.2d 459, 464 (10th Cir. 1976)).

²⁶⁹ 549 F.2d 1358 (10th Cir. 1977).

²⁷⁰ *Id.* at 1361.

²⁷¹ *Ward, supra* note 6, at 234 (quoting *Petition of the United States for Writ of Mandamus or Prohibition* at 2-3, *United States v. Ritter* (10th Cir.) (No. 77-1829), *dismissed as moot*, Aug. 11, 1978).

In *Liteky v. United States*,¹⁸⁴ the Supreme Court, speaking through Justice Scalia, opined that “[p]artiality’ does not refer to all favoritism, but only to such as is, for some reason, wrongful or inappropriate.”¹⁸⁵ Favoritism is wrongful or inappropriate, and likely to require disqualification, only if it is “undeserved, or . . . rests upon knowledge that the [judge] ought not to possess . . . or . . . is excessive in degree.”¹⁸⁶ Put another way, a judge who forms an opinion of a litigant over the course of judicial proceedings or who develops a view of the law as a result of her experience on the bench has not compromised her impartiality.¹⁸⁷ To the contrary, she has done her duty as a judge.¹⁸⁸ The traditional rule has thus been that only extrajudicial bias constitutes grounds for disqualification.¹⁸⁹

As the Supreme Court recognized in *Liteky*, however, such a rule is overly simplistic.¹⁹⁰ Inappropriate bias can be exhibited in the course of judicial proceedings where “even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment.”¹⁹¹ By the same token, not all extrajudicial “bias” is inappropriate; the fact that a judge’s thinking is influenced by her “view of the law acquired in scholarly reading,” for example, is not a basis for recusal.¹⁹²

¹⁸⁴ 114 S. Ct. 1147 (1994).

¹⁸⁵ *Id.* at 1156.

¹⁸⁶ *Id.* at 1155.

¹⁸⁷ See *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (2d Cir. 1943) (“Impartiality is not gullibility. Disinterestedness does not mean child-like innocence.”).

¹⁸⁸ See *Liteky*, 114 S. Ct. at 1155 (“The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings”).

¹⁸⁹ See Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. Pa. L. Rev. 243, 295-96 (1993).

¹⁹⁰ See *Liteky*, 114 S. Ct. at 1156 (noting that extrajudicial source is neither necessary nor sufficient to constitute grounds for recusal).

¹⁹¹ *Id.* at 1155; see also Geyh, *supra* note 189, at 296-302 (describing two series of cases concerning judges “whose biases were not necessarily extrajudicial in origin, but were sufficiently extreme to cause the appellate courts to ignore the general rule excluding such evidence from consideration”).

¹⁹² *Liteky*, 114 S. Ct. at 1157.

A SURVEY OF ISSUES TO BE COVERED LATER

Take a look at the syllabus. Civil Procedure studies procedural devices and issues in the order that they are ordinarily called into play in civil litigation. We begin at the beginning of a lawsuit, with the filing of the complaint, and end with the conclusion of the trial and post-trial motions. In the second half of the course, you will go back to the beginning and address issues that the parties must confront *before* the complaint is filed, or shortly thereafter, such as: in which state may plaintiff file suit?; in which court system, state or federal? Logically speaking, it might make sense to study the second half first, and indeed some of the older, more traditional casebooks do just that. We do not. I share our casebook authors' view that the subjects at issue in the second half of Civil Procedure are sufficiently complex that they are better left for later, after you've gotten your feet wet. Even so, a basic awareness of those later issues *now* will aid your understanding of some issues that arise in the first part of the course. So here goes. If you get confused—at least as far as personal and subject matter jurisdiction are concerned, rest assured that those subjects will be studied in greater detail later.

I. In which state or states may plaintiff sue defendant?

In your garden variety auto-accident case, a New Jersey plaintiff collides with a Maryland defendant in Pennsylvania. May plaintiff sue defendant in New Jersey? Maryland? Pennsylvania? How about Alaska? I hear it's lovely there.

The answer turns in part on whether the courts of one or more of these states have **personal jurisdiction** over the defendant. Personal jurisdiction is a doctrine more or less rooted in the fourteenth amendment to the United States Constitution, which provides that no state may deprive a person of life, liberty or property without due process of law. When a court hears a case and enters judgment against the defendant — for damages, say — the state court has “deprived a person” of his “property.” Whether it has done so “without due process of law” depends on the circumstances. “Due process” is really just another way of saying “fair process,” and in the Supreme Court's view, it is ordinarily fair for a court to deprive a defendant of his property only if the defendant has at least minimal contact with the state where the court is located.

If, for example, our hypothetical New Jersey plaintiff filed suit against the Maryland defendant in Alaska state court, where defendant has never been, it would be unfair to subject defendant to the authority of the Alaska courts, because he has absolutely nothing to do with Alaska — by what right can some judge in Alaska make defendant schlep across the country to defend himself, and decide whether defendant owes plaintiff damages? The Alaska suit would be dismissed for lack of personal jurisdiction. On the other hand, defendant *does* have ties to his home state of Maryland, and to Pennsylvania where he drove and crashed his car, and suits filed in those states would probably not be dismissed for lack of personal jurisdiction. Whether suit would be proper in New Jersey would depend on the nature and extent of defendant's contacts there.

Even though the illustration used here concerns state court litigation, personal jurisdiction is for the most part equally applicable in federal court. The question is likewise the same: whether defendant has sufficient contact with the state in which the federal court sits, to permit the court to exercise jurisdiction over the defendant's person.

II. How do you know which judicial district to sue defendant in?

In the federal and state court systems, the states are subdivided into judicial districts. In which district or districts can plaintiff file suit? The issue is one of **venue**. In the federal system, venue is governed by statute. Pursuant to that statute, venue is proper in any district where the defendant resides or where significant events giving rise to the suit occurred. In our hypothetical auto accident suit, venue would be proper in Pennsylvania and Maryland, but probably not New Jersey or Alaska.

III. How do you go about notifying defendant that he's being sued?

If you want to sue a guy, you've got to let him know first. It's the fourteenth amendment due process clause again. It would be unfair to let a court deprive a defendant of his property by entering a judgment against him without first giving him notice of the suit. The issue is one of **service of process**. FRCP 4 details how the notice is to be given.

IV. In what judicial system may plaintiff file suit – state or federal?

A. State court subject matter jurisdiction

With rare exception, plaintiff can always sue defendant in state court. The state courts are courts of general jurisdiction, meaning that they have **subject matter jurisdiction** over all cases – not just cases raising issues of state law, but cases arising under a federal statute or the U.S. Constitution too. It doesn't matter that the damages plaintiff seeks are minimal – the state courts have subject matter jurisdiction and can hear the dispute.

B. Federal court subject matter jurisdiction

The federal courts, on the other hand, are courts of limited jurisdiction. Article III, Section 2 of the United States Constitution, together with three federal statutes, limit the subject matter jurisdiction of the federal courts to three classes of cases (there are a couple of other, specialized grants of subject matter jurisdiction too narrow to worry about).

1. Diversity Jurisdiction: The Constitution permits Congress to grant the courts subject matter jurisdiction over suits arising out of state law between citizens of different states. Congress has granted the courts such jurisdiction with two important limitations: first, the suit must involve an amount in controversy of over \$75,000; second, there must be *complete* diversity between the parties.

Complete diversity means that no plaintiff may share citizenship with any defendant. For example, the requirements of diversity jurisdiction would be satisfied if our New Jersey plaintiff sued the Maryland defendant in federal court for state common law negligence (provided that plaintiff alleged at least \$75,000 in damages), because they are citizens of different states. If, however, our hypothetical auto accident litigation involved three drivers, and the New Jersey plaintiff sued two defendants in the same case — one driver from Maryland and another driver from New Jersey, the federal courts would lack subject matter jurisdiction. Yes, there is minimal diversity (plaintiff is from a different state than one of the defendants), but the statute requires complete diversity, and complete diversity is lacking because the plaintiff and one of the defendants are citizens of the same state.

Note that complete diversity requires *only* that no plaintiff be a citizen of the same state as any defendant. It does *not* require that co-plaintiffs be citizens of different states, or that co-defendants be citizens of different states. Thus, for example, if two New Jersey plaintiffs sued two Maryland defendants for state common law negligence in federal court, the requirements of complete diversity would be met.

2. Federal Question Jurisdiction

The federal courts also have subject matter jurisdiction over suits arising out of federal law — the U.S. Constitution, treaty, or federal statute. If the case arises out of federal law, it doesn't matter that the parties are from different states, or that the amount in controversy is less than \$75,000. Thus, if our New Jersey plaintiff sued a New Jersey defendant for \$10,000 in damages arising out of a violation of the Federal antitrust statute, the federal courts would have subject matter jurisdiction.

3. Supplemental Jurisdiction

This is the trickiest form of federal subject matter jurisdiction. It used to be called “pendent and ancillary jurisdiction.” Here’s an illustration of the problem that supplemental jurisdiction addresses. A New Jersey defendant commits a single, illegal, anti-competitive act, giving our New Jersey plaintiff two claims for relief: one arising under the federal antitrust statute, and the other arising under state common law tortious interference with business. The court has subject matter jurisdiction over the federal antitrust claim — there is federal question jurisdiction, and the fact that the parties are both from New Jersey is irrelevant. But what about the state common law claim? There is no federal question there, and no diversity between the parties. Plaintiff could file both claims in the same state court action, but an important federal question could be at issue in the antitrust claim that the federal courts may be better suited to decide. In the alternative, plaintiff could file two separate suits — the common law claim in state court and the federal question claim in federal court — but that seems like a real waste of scarce judicial resources, given that both claims rose out of the same incident.

Supplemental jurisdiction provides a solution. It grants the federal district courts subject matter jurisdiction over all claims a plaintiff files against a defendant, provided that at least one of those claims is supported by federal question jurisdiction, and the other claims arise out of the same “case”, meaning the same operative facts, as the federal question claim. In such cases, the federal court’s subject matter jurisdiction over the non-diverse state law claims is “supplemental” to its primary subject matter jurisdiction over the federal question claim, because the two claims are related.

Supplemental jurisdiction will also come to the rescue of the New Jersey plaintiff if he files a single federal court action against *two* New Jersey defendants, in which he alleges the federal antitrust claim against one and the state common law claim against the other. As long as the two claims arose out of the same incident, the federal court’s primary subject matter jurisdiction over the federal question claim gives it supplemental jurisdiction over the state claim — even though the state claim, standing alone, could not be litigated in federal court because it does not present a federal question and is between non-diverse parties.

Supplemental jurisdiction can help out defendants too. Suppose, for example, that our New Jersey plaintiff got into a car accident with two Maryland drivers, but sued only one of them for common law negligence in federal district court for \$500,000 damages. If you’re the defendant who was sued, you might want to drag the driver who wasn’t sued into the litigation and file a claim against him, on the theory that if you end up being liable to the plaintiff, then the other driver should be liable to you for at least part of what you end up having to pay to plaintiff. The problem, however, is that you are a Maryland litigant filing a state common law claim against another Maryland litigant in federal court. Once again, supplemental jurisdiction permits the claim. Even though your claim against the other driver is supported neither by diversity nor federal question jurisdiction, it arose out of the same operative facts as plaintiff’s claim against you, and plaintiff’s claim against you was supported by diversity jurisdiction.

Please note that subject matter jurisdiction and personal jurisdiction are different! Personal jurisdiction concerns the due process rights of the defendant and the constitutional authority of the court to exercise its coercive authority over him. Subject matter jurisdiction concerns the constitutional power of the court to hear the subject matter of the dispute.

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Appeal from the United States District Court for the Central District of California.

Before SNEED, SKOPIL and POOLE, Circuit Judges.

POOLE, Circuit Judge:

Petitioner Vincent L. Chalk is a certified teacher of hearing-impaired students in the Orange County Department of Education.¹ In February of 1987, Chalk was diagnosed as having Acquired Immune Deficiency Syndrome (AIDS). Subsequently, the Department reassigned Chalk to an administrative position and barred him from teaching in the classroom. Chalk then filed this action in the district court, claiming that the Department's action violated § 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794 (West Supp.1987), as amended, which proscribes recipients of federal funds from discriminating against otherwise qualified handicapped persons.

Chalk's motion for a preliminary injunction ordering his reinstatement was denied by the district court, and Chalk brought this appeal.² After hearing oral argument, we issued an order reversing the district court and directing it to issue the preliminary injunction. *Chalk v. United States Dist. Court*, 832 F.2d 1158 (9th Cir.1987).

1. "Orange County Department of Education" is an informal name which refers to the system of secondary schools run by the office of the Orange County Superintendent of Schools. We will adopt this common usage and refer to the defendant as the Department.

2. We have jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1) (1982).

3. HIV (Human Immunodeficiency Virus) is the viral agent that causes AIDS.

In this opinion, we now set forth in full the reasons underlying our reversal.

FACTS AND PROCEEDINGS BELOW

Petitioner Chalk has been teaching hearing-impaired students in the Orange County schools for approximately six years. In February 1987, Chalk was hospitalized with pneumocystis carinii pneumonia and was diagnosed as having AIDS. On April 20, after eight weeks of treatment and recuperation, he was found fit for duty and released to return to work by his personal physician, Dr. Andrew Siskind. The Department, however, placed him on administrative leave pending the opinion of Dr. Thomas J. Prendergast, the Director of Epidemiology and Disease Control for the Orange County Health Care Agency. On May 22, Dr. Prendergast informed the Department that "[n]othing in his [Chalk's] role as a teacher should place his students or others in the school at any risk of acquiring HIV³ infection."⁴

Chalk agreed to remain on administrative leave through the end of the school year in June. On August 5, Chalk and representatives of the Department met to discuss his return to the classroom. The Department offered Chalk an administrative position at the same rate of pay and benefits, with the option of working either at the Department's offices or at his home, and informed him that if he insisted on returning to the classroom, it would file an action for declaratory relief. Chalk refused the offer. On August 6, the Department filed an action in the Orange County Superior Court, and Chalk filed this action in the district court seeking a preliminary and permanent injunction barring the Department from excluding him from classroom duties.⁵ By

4. Dr. Prendergast did not at that time make any recommendation regarding Chalk's return to work. On August 11, after reviewing Chalk's medical records and the nature of his classroom duties, Dr. Prendergast cleared him to return to work.

5. Chalk originally filed suit under the name "John Doe." On October 28, Chalk's true name was substituted by stipulation of the parties. On November 18, we ordered the caption of this appeal amended accordingly.

agreement of counsel, the Department has not pursued the state court action; instead, it filed a counterclaim in the district court.

On August 18, Chalk moved for a preliminary injunction ordering the Department to reinstate him to his classroom duties pending trial. At a hearing on September 8, the district court denied the motion. Following the ruling, the Department reassigned Chalk to an administrative position coordinating grant applications and educational materials for the hearing-impaired program. A panel of this court denied Chalk's emergency petition for a writ of mandamus, but granted his alternative motion for an expedited appeal. Chalk then filed an emergency motion for an injunction pending appeal. We heard oral argument on November 10, and on November 18 we issued an order reversing the district court with this fuller statement of our reasons to follow.

STANDARD OF REVIEW

[1, 2] The grant or denial of a motion for a preliminary injunction lies within the discretion of the district court, and its order will be reversed only if the court relied on an erroneous legal premise or otherwise abused its discretion. *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir.1982); *Wright v. Rushen*, 642 F.2d 1129, 1132 (9th Cir.1981); *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1200 (9th Cir.1980) (*L.A. Coliseum*). To determine whether there has been an abuse of discretion, the reviewing court must consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971). An order is reversible for legal error if the court did not apply the correct preliminary injunction standard, see *Benda v. Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers*, 584 F.2d 308, 314-15 (9th Cir.1978), cert. dismissed, 441 U.S. 937, 99 S.Ct. 2065, 60 L.Ed.2d 667 (1979), or if the court misapprehended the law with respect

to the underlying issues in the litigation, see *Sports Form*, 686 F.2d at 752; *L.A. Coliseum*, 634 F.2d at 1200. An abuse of discretion may also occur when the district court rests its conclusions on clearly erroneous findings of fact. *Sports Form*, 686 F.2d at 752. A finding of fact is clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 383 U.S. 864, 895; 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

APPLICATION OF THE PRELIMINARY INJUNCTION STANDARD

[3, 4] The basic function of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits. *L.A. Coliseum*, 634 F.2d at 1200. The moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. *Id.* at 1201; *Benda*, 584 F.2d at 314-15. "These are not separate tests, but the outer reaches 'of a single continuum.'" *L.A. Coliseum*, 634 F.2d at 1201 (quoting *Benda*, 584 F.2d at 315). We will examine each of the elements in turn.

1. Probable Success on the Merits

[5] Chalk bases his claim on section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended (the Act), which provides:

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

As the district court recognized, the Supreme Court recently held that section 504 is fully applicable to individuals who suffer from contagious diseases. *School Bd. of Nassau County v. Arline*, — U.S. —,

107 S.Ct. 1123, 94 L.Ed.2d 307 (1987).⁶ *Arline* involved a school teacher who was discharged after contracting tuberculosis. She sued the school authorities claiming unlawful discrimination in violation of section 504. The trial court held that although Arline suffered a handicap, she was not a "handicapped person" within the meaning of the Act, stating that it could not "conceive that Congress intended contagious diseases to be included within the definition of a handicapped person." 107 S.Ct. at 1125. Alternatively, the trial court held that even if Arline fell within that definition, she was not "qualified" to teach elementary school. *Id.* The Court of Appeals for the Eleventh Circuit reversed, holding that persons with contagious diseases were within the Act's coverage. *Arline v. School Board of Nassau County*, 772 F.2d 759, 764 (11th Cir.1985). The Supreme Court granted certiorari and affirmed the court of appeals in an opinion by Justice Brennan. Chief Justice Rehnquist, joined by Justice Scalia, dissented.

In its opinion, the Court addressed the question which is of central importance to this case: under what circumstances may a person handicapped with a contagious disease be "otherwise qualified" within the meaning of section 504? Relying on its earlier opinion in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979), the Court said:

An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap. In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions. Accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on a grant-

ee, or requires a "fundamental alteration in the nature of [the] program."

Arline, 107 S.Ct. at 1131 n. 17 (citations omitted).

In applying this standard to the facts before it, the Court recognized the difficult circumstances which confront a handicapped person, an employer, and the public in dealing with the possibility of contagion in the workplace. The problem is in reconciling the needs for protection of other persons, continuation of the work mission, and reasonable accommodation—if possible—of the afflicted individual. The Court effected this reconciliation by formulating a standard for determining when a contagious disease would prevent an individual from being "otherwise qualified":

A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk. The Act would not require a school board to place a teacher with active, contagious tuberculosis in a classroom with elementary school children.

Id. at 1131 n. 16.

The application of this standard requires, in most cases, an individualized inquiry and appropriate findings of fact, so that "§ 504 [may] achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks." *Id.* at 1131. Specifically, *Arline* requires a trial court to make findings regarding four factors: "(a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." *Id.* Findings regarding these factors should be

⁶The district court ruled that Doe was handicapped within the meaning of the Act, and the Department does not contest that ruling on appeal. See *Arline*, 107 S.Ct. at 1127-30 & n. 7.

The Department stipulated that it was a program receiving Federal financial assistance and thus subject to the Act.

based "on reasonable medical judgments given the state of medical knowledge," and courts should give particular deference to the judgments of public health officials. *Id.*

Chalk submitted in evidence to the district court, and that court accepted, more than 100 articles from prestigious medical journals and the declarations of five experts on AIDS, including two public health officials of Los Angeles County. Those submissions reveal an overwhelming evidentiary consensus of medical and scientific opinion regarding the nature and transmission of AIDS. AIDS is caused by infection of the individual with HIV, a retrovirus that penetrates chromosomes of certain human cells that combat infection throughout the body. Individuals who become infected with HIV may remain without symptoms for an extended period of time.⁷ When the disease takes hold, however, a number of symptoms can occur, including swollen lymph nodes, fever, weight loss, fatigue and night sweats. Eventually, the virus destroys its host cells, thereby weakening the victim's immune system. When the immune system is in a compromised state, the victim becomes susceptible to a variety of so-called "opportunistic infections," many of which can prove fatal.⁸

Transmission of HIV is known to occur in three ways: (1) through intimate sexual contact with an infected person; (2) through invasive exposure to contaminated blood or certain other bodily fluids; or (3) through perinatal exposure (i.e., from mother to infant). Although HIV has been isolated in several body fluids, epidemiologic evidence has implicated only blood, semen, vaginal secretions, and possibly breast milk in transmission. Extensive and numerous studies have consistently found

7. It is not yet known what percentage of individuals who test positive for HIV will actually develop AIDS, but estimates range between 30 and 90 percent.

8. The vast majority of opportunistic infections that prey upon AIDS patients are not transmissible to others with uncompromised immune systems. Some opportunistic infections, however, such as tuberculosis, may be communi-

no apparent risk of HIV infection to individuals exposed through close, non-sexual contact with AIDS patients.

Based on the accumulated body of medical evidence, the Surgeon General of the United States has concluded:

There is no known risk of non-sexual infection in most of the situations we encounter in our daily lives. We know that family members living with individuals who have the AIDS virus do not become infected except through sexual contact. There is no evidence of transmission (spread) of AIDS virus by everyday contact even though these family members shared food, towels, cups, razors, even toothbrushes, and kissed each other.

U.S. Public Health Service, *Surgeon General's Report on Acquired Immune Deficiency Syndrome* at 18 (1986) (hereinafter *Surgeon General's Report*). The Surgeon General also specifically addressed the risk of transmission in the classroom setting:

None of the identified cases of AIDS in the United States are known or are suspected to have been transmitted from one child to another in school, day care or foster care settings. Transmission would necessitate exposure of open cuts to the blood or other body fluids of the infected child, a highly unlikely occurrence. Even then, routine safety procedures for handling blood or other body fluids ... would be effective in preventing transmission from children with AIDS to other children in school....

Casual social contact between children and persons infected with the AIDS virus is not dangerous.

Surgeon General's Report at 23-24. These conclusions are echoed by such medical authorities as the United States Centers

ble in a classroom setting. There is no evidence, nor does the Department contend, that Chalk is currently suffering from any opportunistic infections. If he should later develop a communicable infection, it would, of course, be proper for the Department to treat him as it would any other teacher with a communicable infection. See *Arline*, 107 S.Ct. at 1131 n. 16, and discussion *infra* at 711.

for Disease Control, the American Medical Association and the Institute of Medicine of the National Academy of Sciences. In its *amicus* brief in support of Chalk's appeal, the American Medical Association summarized the medical evidence and concluded that "there is no evidence in the relevant medical literature that demonstrates any appreciable risk of transmitting the AIDS virus under the circumstances likely to occur in the ordinary school setting." *Amicus* Brief of the A.M.A. at 28 (emphasis in original).⁹

The only opposing medical opinion submitted by the Department was that of one witness, Dr. Steven Armentrout, that "there is a probability, small though it is, that there are vectors of transmission as yet not clearly defined." Deposition of Armentrout at 919.¹⁰ He elaborated on his opinion as follows:

I believe, sincerely believe that there is a significant, and significant here—it's significant even though it's small, potential for transmission of AIDS in ways which we have not yet determined and, therefore, may pose a risk ... If they don't occur now, it is my firm belief that with the almost inevitable mutation of the virus, they will occur. And when that does occur, they certainly could be—there can be a potential threat.

Id. at 916-17. Asked whether there was a scientific basis for such a hypothesis, Dr. Armentrout indicated that he had "no scientific evidence that would enable me to answer that or to have an opinion.... What we're saying is that we haven't proved scientifically a vector." *Id.* at 923.

The district judge addressed each of the four *Arline* factors in his ruling. He found that the duration of the risk was long and the severity was "catastrophic," but that scientifically established methods

of transmission were unlikely to occur and that the probability of harm was minimal. Reporter's Transcript, September 8, 1987, at 32-34. He therefore concluded that Chalk "may very well win ultimately." R.T. at 37. Nonetheless, the district judge expressed skepticism about the current state of medical knowledge. He was troubled that there might be something yet unknown to science that might do harm. He said:

Now, here, according to present knowledge, the risk probably is not great because of the limited ways that medical science believes the disease is transmitted. But, of course, if it is transmitted the result is horrendous.

It seems to me the problem is that we simply do not know enough about AIDS to be completely certain. The plaintiff has submitted massive documentation tending to show a minimal risk.... But in any event, the risk is small—risk of infection through casual contact.... The incubation period is reported to be seven years. We have been studying this only for six. And I do not in any sense mean to be an alarmist. I—I reiterate, I think the risk is small. The likelihood is that the medical profession knows exactly what it's talking about. But I think it's too early to draw a definite conclusion, as far as this case is concerned, about the extent of the risk.

R.T. at 33-34 (emphasis added).

This language demonstrates that the district court failed to follow the legal standards set forth in *Arline* and improperly placed an impossible burden of proof on the petitioner. Little in science can be proved with complete certainty, and section 504 does not require such a test. As authoritatively construed by the Supreme Court, section 504 allows the exclusion of an em-

9. Six other entities and two public health officials submitted *amicus* briefs in support of Chalk's appeal: the State of California, the California Teachers Association, the Disability Rights and Education Fund, the Employment Law Center of the Legal Aid Society of San Francisco, the Los Angeles Unified School District, the Western Law Center for the Handicapped, and Drs. Shirley L. Fannin, M.D. and Martin D. Finn, M.D.

10. Dr. Armentrout was not deposed in connection with this case. The testimony that the Department submitted was a deposition taken in connection with *Racine Educational Association v. Racine Unified School District*, Case No. 8650279, Wisconsin Department of Industry, Labor and Human Relations.

ployee only if there is "a significant risk of communicating an infectious disease to others." *Arline*, 107 S.Ct. at 1131 n. 16 (emphasis added).¹¹ In addition, *Arline* admonishes courts that they "should defer to the reasonable medical judgments of public health officials." *Id.* at 1131. The district judge ignored these admonitions. Instead, he rejected the overwhelming consensus of medical opinion and improperly relied on speculation for which there was no credible support in the record.¹²

That Chalk demonstrates a strong probability of success on the merits is supported by the three published opinions brought to our attention dealing with AIDS discrimination under section 504. In *Thomas v. Atascadero Unified School Dist.*, 662 F.Supp. 376 (C.D.Cal.1987), the court granted a preliminary injunction prohibiting the school district from excluding a child with AIDS from the classroom, despite the child's involvement in a biting incident. The court found that:

The overwhelming weight of medical evidence is that the AIDS virus is not transmitted by human bites, even bites that break the skin. Based upon the abundant medical and scientific evidence before the Court, Ryan poses no risk of harm to his classmates and teachers. Any theoretical risk of transmission of the AIDS virus by Ryan in connection with his attendance in regular kindergarten class is so remote that it cannot form the basis for any exclusionary action by the School District.

662 F.Supp. at 380. Following the entry of the preliminary injunction, the parties in that case stipulated to the entry of a permanent injunction. *Id.* at 378.

In *Ray v. School Dist. of DeSoto County*, 666 F.Supp. 1524 (M.D.Fla.1987), the court followed *Thomas* and granted a preliminary injunction prohibiting the district

from excluding three seropositive¹³ brothers from the classroom. The court rejected the "future theoretical harm" of transmission of the AIDS virus in the classroom as unsupported by the weight of medical evidence. 666 F.Supp. at 1535. Significantly, Dr. Armentrout was one of two doctors who testified for the defendants in *Ray*, see *id.* at 1533-34, and his opinion was implicitly rejected.

The third case, *District 27 Community School Bd. v. Board of Educ.*, 130 Misc.2d 398, 502 N.Y.S.2d 325 (Sup.Ct.1986), concerned the New York City Board of Education's policy of determining on a case-by-case basis whether the health and development of children with AIDS permitted them to attend school in an unrestricted setting. Two school districts challenged the policy, seeking an injunction prohibiting the Board from admitting any child with AIDS into the classroom. After a five-week trial, the court upheld the policy in an exhaustive opinion. One of the central conclusions was that the transmission of the AIDS virus in the classroom setting was "a mere theoretical possibility" and that exclusion of AIDS victims on that basis would violate section 504. 502 N.Y.S.2d at 335-37.

Plaintiff's position is also supported by *New York State Ass'n of Retarded Children v. Carey*, 612 F.2d 644, 650 (2d Cir. 1979), in which the Second Circuit affirmed a district court ruling that the segregation of carriers of hepatitis B by the New York City Board of Education violated section 504. The court said:

[T]he Board was unable to demonstrate that the health hazard posed by the hepatitis B carrier children was anything more than a remote possibility. There has never been any definite proof that the disease can be communicated by non-parenteral routes such as saliva. Even assuming there were, the activities that

11. Where there is a significant risk, *Arline* further requires a court to determine if any reasonable accommodation will eliminate that risk. *Id.* As no significant risk is posed here, this is not a case involving the standards or limits of accommodation and we do not reach those issues.

12. The district judge recognized the weaknesses in Armentrout's testimony, saying: "It is true that he doesn't document what he believes. It may be just a hunch." R.T. at 34.

13. "Seropositive" denotes persons who have tested positive for the HIV virus, but who have not yet exhibited symptoms of AIDS.

occur in classroom settings were not shown to pose any significant risk that the disease would be transmitted from one child to another.

612 F.2d at 650. Chalk presented evidence to the district court here that hepatitis B and AIDS are transmitted in similar ways, but that hepatitis B is transmitted much more easily. See *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace*, 34 Morbidity and Mortality Weekly Report 681 (Nov. 15, 1985).

Viewing Chalk's submissions in light of these cases, it is clear that he has amply demonstrated a strong probability of success on the merits. We hold that it was error to require that every theoretical possibility of harm be disproved.

2. Irreparable Injury

[6] Having demonstrated a strong probability of success on the merits, Chalk next had to demonstrate that he was threatened with the possibility of irreparable injury. *L.A. Coliseum*, 634 F.2d at 1187; *Benda*, 584 F.2d at 314. The district court held that Chalk's proof on this element was insufficient:

I cannot conclude that there is any irreparable injury to plaintiff if he must wait pending trial. He has a job offered and he can do that job until we can determine by medical testimony the extent of the risk and whether or not it's justified for the court to order the school board to put this man back in the classroom. But I cannot—I simply cannot do it on the basis of the present record.

R.T. at 37-38.

We believe this determination was clearly erroneous. In making its finding, the court focused on the monetary loss to Chalk and concluded that he was no worse off than before the reassignment. This approach failed to consider the nature of the alternative work offered Chalk. Chalk's original employment was teaching hearing-impaired children in a small-classroom setting, a job for which he developed special skills beyond those normally re-

quired to become a teacher. His closeness to his students and his participation in their lives is a source of tremendous personal satisfaction and joy to him and of benefit to them. The alternative work to which he is now assigned is preparing grant proposals. This job is "distasteful" to Chalk, involves no student contact, and does not utilize his skills, training or experience. Such non-monetary deprivation is a substantial injury which the court was required to consider. See *Finot v. Pasadena City Bd. of Educ.*, 250 Cal.App.2d 189, 202-03, 58 Cal. Rptr. 520, 529 (1967) (teacher's reassignment from classroom duty to home teaching, imposed in retaliation for an exercise of first amendment rights, was a "legally remediable detriment").

Several cases support petitioner's claim that his non-monetary deprivation is irreparable. The most striking parallel is *E.E.O. C. v. Chrysler Corp.*, 546 F.Supp. 54 (E.D. Mich.1982), *aff'd*, 733 F.2d 1183 (6th Cir. 1984), where the court granted a preliminary injunction ordering reinstatement of employees terminated in violation of the Age Discrimination in Employment Act. The court acknowledged that the loss of income and its effects were compensable after trial and did not constitute irreparable harm. 546 F.Supp. at 69-70. Nonetheless, irreparable injury was found in the consequent emotional stress, depression and reduced sense of well-being, which constituted "psychological and physiological distress ... the very type of injury Congress sought to avert." *Id.* at 70. See also *Ray*, 666 F.Supp. at 1534 (excluded seropositive children suffered severe emotional distress, including anxiety, feelings of anger, resentment, and fear of social rejection, resulting in minor physiological disorders; irreparable injury found); *E.E.O.C. v. City of Bowling Green*, 607 F.Supp. 524, 527 (W.D.Ky.1985) (age discrimination resulted in anxiety and emotional problems and an inability to keep up with current matters; irreparable injury found); *Oshiver v. Court of Common Pleas*, 469 F.Supp. 645, 653 (E.D.Pa.1979) (nervous and emotional problems brought on by age and sex discrimination constituted irreparable injury).

Chalk's injury here is quite similar, and it likewise falls within the realm of non-compensable injury which Congress contemplated in enacting section 504. As stated by the Supreme Court in *Arline*:

Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious. The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments.

Arline, 107 S.Ct. at 1129 (footnotes omitted).

The Department argues that a mere "transfer" to a comparable job or location is not irreparable harm, citing *L.A. Coliseum*. That case is factually quite different. There, the Los Angeles Coliseum Commission sought a preliminary injunction barring the National Football League from enforcing its veto power to prevent the Oakland Raiders from moving to Los Angeles. Two factors demonstrated a lack of irreparable harm. First, plaintiffs had not shown any immediate harm, since the move was still in the negotiation stage and the threatened veto was not imminent. *L.A. Coliseum*, 634 F.2d at 1201. Second, the injury was not irreparable because only loss of income was at stake, a loss which could be compensated by damages after trial. *Id.* at 1202.

We believe that the discrimination cases cited above provide a more appropriate analogy. Here, plaintiff is not claiming future monetary injury; his injury is emotional and psychological—and immediate. Such an injury cannot be adequately compensated for by a monetary award after trial.

An additional factor favoring a preliminary injunction here arises from the very nature of Chalk's affliction. Studies and statistics of etiology and terminus of AIDS show that although the time during which such a person may be quick and productive varies, the virus is fatal in all recorded cases. Presently Chalk is fully qualified and able to return to work; but his ability to do so will surely be affected in time. A delay, even if only a few months, pending trial represents precious, productive time irretrievably lost to him.

We therefore conclude that the district court's finding that Chalk had not demonstrated any possibility of irreparable injury was clearly erroneous and must be reversed.

3. *The Balance of Hardships*

[7, 8] Having demonstrated a strong probability of success on the merits and the possibility of irreparable injury, Chalk has shown all that is necessary for a preliminary injunction to issue. Nonetheless, we will also briefly address the claimed injury on the part of the Department, since "at least a minimal tip in the balance of hardships must be found even when the strongest showing on the merits is made." *L.A. Coliseum*, 634 F.2d at 1203-04.

Even under the balance of hardships standard, plaintiff's injury outweighs any harm to the defendant. Defendant's asserted injury is based entirely on the risk to others posed by plaintiff's return to the classroom. As discussed above, this theoretical risk is insufficient to overcome plaintiff's probability of success on the merits, and it is likewise insufficient to outweigh the injury which plaintiff is likely to suffer. See *Ray*, 666 F.Supp. at 1535 ("actual, ongoing injury to Plaintiffs ... clearly outweighs the potential harm to others"); cf. *Kling v. County of Los Angeles*, 633 F.2d 876, 880 (9th Cir.1980) (plaintiff with Crohn's disease denied admission to medical school; denial of preliminary injunction reversed where defendant would suffer no harm pending outcome), *on appeal after remand*, 769 F.2d 532 (9th Cir.),

rev'd on other grounds, 474 U.S. 936, 106 S.Ct. 300, 88 L.Ed.2d 277 (1985).

In denying the preliminary injunction, the district court concluded that Chalk's injury was outweighed by the fear that his presence in the classroom was likely to produce:

The plaintiff desires to teach despite all these circumstances [i.e., that the results could be "so disastrous if ... by any chance the risk should prove to have been unjustified"]. Counsel has recognized that he doesn't have a constitutional right to do so. On the other hand, he has a statutory right not to be discriminated against. He has a statutory right to go back to the school if he is otherwise qualified.

But I think I have a right—in fact, an obligation to compare on the one hand the trauma on the plaintiff if he is held out from the school for a period of months until we can have a trial in this action. The trauma on him, on the one hand, with the trauma on the children and parents in being required to submit to what they are likely to conclude is an unacceptable risk.

R.T. at 35–36.¹⁴

We recognize that the public interest is one of the traditional equitable criteria which a court should consider in granting injunctive relief. See *L.A. Coliseum*, 634 F.2d at 1200. Here, however, there is no evidence of any significant risk to children or others at the school. To allow the court to base its decision on the fear and apprehension of others would frustrate the goals of section 504. "[T]he basic purpose of § 504 [is] to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others." *Arline*, 107 S.Ct. at 1129. The Supreme Court recognized in *Arline* that a significant risk of transmission was a legitimate concern which could justify exclusion if the risk could not

14. The district court apparently miscalculated the reaction of at least some of Chalk's students and their parents. The mothers of five of Chalk's students joined amicus Disability Rights Education and Defense Fund in support of Chalk's appeal, and Chalk was greeted with hugs

and eliminated through reasonable accommodation; however, it soundly rejected the argument that exclusion could be justified on the basis of "pernicious mythologies" or "irrational fear." *Id.* at 1129–30 & n. 12. See also *Ray*, 666 F.Supp. at 1535:

The Court recognizes the concern and fear which is flowing from this small community, particularly from the parents of school age children in DeSoto County. However, the Court *may not* be guided by such community fear, parental pressure, and the possibility of lawsuits. "These obstacles, real as they may be, cannot be allowed to vitiate the rights ..." of [the Ray children]. *New York State Association for Retarded Children, Inc. v. Carey*, 466 F.Supp. 479, 485 (E.D.N.Y.1978), *aff'd*, 612 F.2d 644 (2d Cir.1979).

Nonetheless, we recognize that the parties and the district court will have to deal with the apprehensions of other members of the school community, as well as with the inexorable progress of Chalk's disease. Although the time frame is unpredictable, given the current state of medical knowledge, the course of petitioner's condition is reasonably certain. Chalk's immune system will deteriorate over time, leaving him increasingly susceptible to opportunistic infections. These infections do not cause AIDS, nor do they increase the risk of transmission of the AIDS virus, but some of them may themselves be communicable to others in a classroom setting.¹⁵ The district court is in the best position, guided by qualified medical opinion, to determine what reasonable procedures, such as periodic reports from petitioner's doctors, will best give assurance to the Department, the community and the court that no significant risk of harm will arise in the future from Chalk's continued presence in the classroom.

and homemade gifts upon his return to work following our order of November 18. See *AIDS Teacher Returns Amid Hugs, Smiles*, Los Angeles Times, November 24, 1987, p. 3.

15. See footnote 8, *supra*.

CONCLUSION

We conclude that petitioner met all of the requirements necessary to receive a preliminary injunction. We therefore reverse the district court's order and remand this action with direction to enter a preliminary injunction ordering defendants forthwith to restore petitioner to his former duties as a teacher of hearing-impaired children in the Orange County Department of Education. This panel will retain jurisdiction over any subsequent appeal.

REVERSED and REMANDED

SNEED, Circuit Judge, concurring separately:

I concur in Judge Poole's opinion. Confronted with some uncertainties about scientific truth, judges, perhaps above all others, should act on the basis of that which is known, or, where this is not possible, on the basis of that which those best qualified to speak *say* is known. Judge Poole has set out clearly what those best qualified say they know, and we have no choice but to accept their version of the truth. We can neither await ultimate validation nor reject their version on the basis of our awareness that the truths of medical science are frequently revised in the light of new data.

No doubt the possible catastrophic consequences of a substantial alteration of the current truth unduly influenced the district judge. His calculus was impermissibly flawed, however. Chalk, on the basis of current, and perhaps permanent, truth, demonstrated high probability of success, and on the basis of the same truth showed that the balance of hardships tipped sharply in his favor. This was his burden and he successfully carried it.



* Motions Calendar 11-20-87.

Guy LEWIS, Jr., Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE,
Defendant-Appellee.

No. 87-1783.

United States Court of Appeals,
Ninth Circuit.

Submitted Nov. 20, 1987.*

Decided Feb. 29, 1988.

Appeal was taken from order of the United States District Court for the Eastern District of California, Edward J. Garcia, J., which dismissed civil rights action. The Court of Appeals held that trial court's written judgment of dismissal was not an implicit rejection of previously filed motion for reconsideration, made following oral dismissal, so that court lacked jurisdiction over appeal taken before denial of motion to reconsider.

Dismissed.

1. Federal Courts ⇐668

Trial court's judgment entered after defendant filed motion for reconsideration following court's oral dismissal was not an implicit denial of the motion to reconsider where there was nothing in the judgment to reflect the district court's consideration of arguments raised in the motion to reconsider, so that notice of appeal filed before denial of motion to reconsider did not give Court of Appeals jurisdiction. Fed.Rules Civ.Proc.Rules 58, 59, 60(b), 79(a), 28 U.S.C. A.

2. Federal Civil Procedure ⇐2658

Fact that defendant made motion to reconsider after district court's oral announcement of its decision but before there was a written order or separate entry of judgment did not make the motion ineffective on grounds that it was premature. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

1. Why do we need injunctions? Why not say to the Orange County Department of Education: Look, you can give Chalk a desk job, or for that matter fire him if you want to, but if you do and it turns out that you've violated his rights under the Federal Rehabilitation Act, you're going to have to pay him lots of money in damages. And if you keep it up after that, he'll be back for more.

2. Chalk's lawsuit sought a preliminary and a permanent injunction against the Department. What is the difference, and why are both devices necessary?

3. What are the factors the court identifies as relevant to its analysis of whether a preliminary injunction was appropriate? Are each of the factors of equal importance? How do they interrelate?

4. Is the court of appeals at liberty to reverse a district court order denying a preliminary injunction whenever it disagrees with the outcome of the lower court's multifactor analysis? What is the standard of review the court of appeals is supposed to apply in such cases? Why do you suppose that is?

5. The court's analysis of whether Chalk should have been granted a preliminary injunction focusses on three factors: 1) probable success on the merits; 2) irreparable injury; and 3) balance of hardships. Typically, a fourth factor is also included: the public interest. See WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2948 (1995). In point of fact, the Chalk court does identify and discuss the public interest as a relevant factor, but does not dignify it with its own, separately numbered subsection. Is that simply an oversight, or does the court undervalue the public interest here? The district court was obviously influenced by the risk--small though it may be--that AIDS could be transmitted by means as yet unknown, which if true could be catastrophic to the school children in Chalk's care. In the district judge's view, that small risk of catastrophe outweighed the hardship to Chalk of consigning him to a desk job until trial. Why is that an abuse of discretion?

6. Compare FRCP 65(a) and (b). What is the difference between a preliminary injunction and a temporary restraining order (TRO)? Why do we need TROs when we have preliminary injunctions? Would Chalk have been entitled to a TRO had he sought one? Why? In what kinds of circumstances are TROs appropriate? Why are TROs so temporary?

respect to the existence and waiver of a physician/patient privilege, the court notes that there is nothing explicit or implicit in the *Federal Rules of Civil Procedure* which compels the result desired by plaintiff.⁴ Rule 26(a), Fed.R.Civ.Proc., states that “[p]arties may obtain discovery” by one of the methods set forth in the rules. The Rules themselves do not limit discovery to the methods set forth in the Rules. *Doe*, 99 F.R.D. at 128. The seminal case on discovery under the Federal Rules of Civil Procedure, *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), involved access to memoranda or notes of attorneys generated in *ex parte* interviews with witnesses. Private interviews by attorneys have been recognized as a “time-honored” method for conducting discovery. *International Business Machines Corp. v. Edelstein*, 525 F.2d 37, 42 (2nd Cir.1975). Cases implying that the methods of evidence gathering in the Rules are the sole means of conducting discovery find no support in the text of the Rules. See, e.g., *Garner v. Ford Motor Co.*, 61 F.R.D. 22 (D.Alaska 1973).

Based on the reasoning and the cited authorities above, the court concludes that plaintiff’s motion should be denied. The South Carolina Supreme Court would not, in this court’s opinion, fashion the type of public policy physician/patient privilege plaintiff requests. Even if such a policy were recognized, plaintiff has waived the protection of the privilege by filing a lawsuit putting at issue the quality of decedent’s medical care. There is no basis for asserting a limited waiver. A limited waiver is not permitted in other duly recognized

4. The state circuit court in *Mincey*, p. 8, implies that discovery in cases before the state courts may only be obtained by the methods specifically set forth in the South Carolina Rules of Civil Procedure.
5. In their brief, defendants Shenoy and Anesthesiologists of Columbia, P.A., argue alternatively that three of the doctors involved in the case have no professional relationship with the decedent and would not be covered by any physician/patient privilege even if one were found to exist. John E. Mahaffey, M.D., an anesthesiologist at MUSC, William B. Armstrong, M.D., a pathologist at Richland Memorial Hospital, and

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privileges, and such a limited waiver would give plaintiff improper influence over physician witnesses and improper access to defendants’ preparation of their case.⁵ Finally, the Federal Rules of Civil Procedure govern the discovery conducted in this case. Nothing in those Rules prohibits informal interviews of the type which plaintiff seeks to prohibit. The court is, therefore, constrained to deny plaintiff’s motion for a protective order. Rule 26(c), Fed. R.Civ.Proc.

IT IS SO ORDERED at Columbia, South Carolina, this 7th day of August, 1991.



THE TORRINGTON COMPANY,
Plaintiff,

v.

Mark YOST, Defendant.

Civ. A. No. 8:91-1599-20.

United States District Court,
D. South Carolina,
Greenville Division.

Sept. 23, 1991.

An employer filed an action against its former worker alleging a breach of the worker’s agreement not to divulge secret or confidential information. Worker filed motion to dismiss for failure to join his current employer as indispensable party.

Demi B. Jones, Pharm.D., a pharmacologist with the State Law Enforcement Division [SLED], were asked to examine the decedent by the Coroner investigating decedent’s death. These physicians were not retained by plaintiff or the decedent. The Coroner has authorized these doctors to speak to counsel for the defendants and the plaintiff if the doctors so desire.

The court need not resolve the issue of who is or is not a treating physician for purposes of applying a physician/patient privilege given the court’s disposition of the matter. Nonetheless, the court finds defendants’ argument as to these three doctors persuasive.

The District Court, Herlong, J., held that: (1) current employer was indispensable party to trade secrets action, but (2) dismissal was appropriate, because joinder would destroy diversity but was necessary for a proper determination.

Motion granted.

1. Federal Civil Procedure ¶217

A worker's current employer was an indispensable party to an action by his former employer alleging violation of an agreement not to divulge secret or confidential information; current employer had a contract with the worker, its interest in worker's fulfillment of that contract would be adversely affected if the worker were enjoined from continuing to work in his current position, and there was a real possibility that the worker could be subject to inconsistent obligation if his current employer were not joined. Fed.Rules Civ. Proc.Rule 19(a), 28 U.S.C.A.

2. Federal Civil Procedure ¶1748

Dismissal of an employer's diversity action against its former employee for breach of a noncompetition agreement was required where joinder of worker's current employer was necessary for complete adjudication but joinder would destroy diversity jurisdiction; relief sought by former employer could have significant impact on current employer, there was no reasonable means of protecting worker and current employer from prejudice they would suffer if current employer were not a party, any judgment for current employer was likely to be inadequate if current employer were not made a party, and an alternative forum existed. Fed.Rules Civ.Proc.Rules 19, 19(b), 28 U.S.C.A.

Thornwell F. Sowell, J. Mark Jones, Columbia, S.C. (John M. Calimafde, Paul H. Blaustein and Zoltan Kerekes, New York City, and Robert T. Boyd, Torrington, Conn., of counsel), for plaintiff.

1. Joinder is feasible when "A person ... is subject to service of process and whose joinder will not deprive the court of jurisdiction over the

Elizabeth A. Carpentier, Columbia, S.C., and Donald M. Barnes, Washington, D.C., for defendant.

ORDER

HERLONG, District Judge.

This is a trade secrets case. From 1982 to 1990, the defendant, Mark Yost ("Yost"), worked for the plaintiff, The Torrington Company ("Torrington"), manufacturing various types of bearings. While at Torrington, Yost signed an agreement not to divulge any secret or confidential information of Torrington. After leaving Torrington, Yost went to work for INA Bearing Company, Inc. ("INA") which produces the same type of bearings as Torrington. On June 4, 1991, Torrington filed suit against Yost seeking, among other things, an injunction limiting Yost's employment at INA for eighteen (18) months, and actual damages from the alleged use of Torrington's trade secrets. Yost moved to dismiss under Rule 19 of the Federal Rules of Civil Procedure for failure to join Yost's new employer, INA, as an indispensable party. Yost contends that INA's absence will prejudice him and impair INA's interests.

The issue before this court is whether INA is an indispensable party to this action under Rule 19. For the reasons set forth below, the court concludes that INA, Yost's new employer, is an indispensable party whose joinder would deny the court of diversity jurisdiction. Therefore, this case must be dismissed.

Fed.R.Civ.P. 19 requires a two-step analysis. The first part of the rule, subdivision (a), identifies the persons who should be joined if feasible. If joinder is not feasible, then subdivision (b) is applied to decide whether the case should be dismissed.

Under subdivision (a), a person should be joined when feasible¹ if nonjoinder would under (a)(1) deny complete relief to the parties present, or under (a)(2), impair the absent person's interest or prejudice the

subject matter of the action...." Fed.R.Civ.P. 19(a).

persons already parties by subjecting them to a risk of multiple or inconsistent obligations.

[1] In the matter *sub judice*, 19(a)(2) is the pertinent subsection. Clearly subsection (a)(2) applies, and INA should be joined if feasible. INA has an employment contract with Yost, and its interest in his fulfilling that contract would be adversely affected if Torrington were granted an injunction preventing Yost from continuing to work for INA in his current position. In addition, there is a real possibility that if INA were not joined, Yost may be subject to inconsistent obligations. In order to obey a court order enjoining him from working for INA (or enjoining him from working on certain projects at INA), Yost may have to breach his employment contract with INA. Because Yost may be prejudiced if INA is not joined and INA has an interest which may be impaired in its absence, under Rule 19(a) the court is required to join INA as a party if feasible.

[2] The sole basis for federal court jurisdiction in this action is diversity of citizenship. 28 U.S.C. § 1332. Both INA and Torrington are Delaware corporations. Joinder of INA would destroy diversity jurisdiction. Therefore, it is not feasible to join INA, and the court must consider Rule 19(b) to determine whether the action should proceed with the parties before it, or should be dismissed.

Rule 19(b) contains four factors which must be considered when deciding whether to dismiss the action: (1) to what extent a judgment rendered in the person's absence may be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

The first factor weighs heavily in favor of dismissal. Torrington contends that INA is not an indispensable party and is at most a joint tortfeasor who would not be prejudiced by not being joined. In support

of this position, Torrington points to *General Transistor Corp. v. Prawdzik*, 21 F.R.D. 1 (S.D.N.Y.1957) as a similar case involving trade secrets in which the new employer was not joined, and was held not to be an indispensable party. In *General Transistor*, however, the plaintiff was merely seeking a temporary injunction preventing the individual defendant from "continuing to disclose any secret matter..." 21 F.R.D. at 2. In the case at bar, Torrington is seeking to enjoin Yost from "working or consulting for INA for a period of eighteen (18) months, at any plant which makes thrust bearings or any supplier or subcontractor or tool designer involved with thrust bearings." Torrington is also asking the court to compel Yost "and those in privity with him, and those who became aware of any such injunction: ... To return to Torrington, all documents, computerized and non-verbal disclosures, and physical embodiments of Torrington's trade secrets and confidential information." The potential impact upon the new employer is significantly greater in the case here than in *General Transistor*. In addition, the risk that Yost would be subjected to inconsistent obligations is significant. As already discussed, if the court limits the type of work Yost may do for INA, Yost may have inconsistent obligations to an order of the court and to INA.

The second factor requires the court to consider the feasibility of protective provisions. The drastic remedy of dismissal need not be invoked if the court can fashion relief so that neither the parties nor the person not joined is prejudiced. Torrington contends that if the court merely enjoins Yost from working at INA plants which manufacture the bearings in question, Yost could still work for INA. There is no evidence before the court, however, that such a protective provision would protect Yost from breaching his employment contract. Even if such a provision protects Yost, it would not protect INA. INA would be limited in the manner in which it could use its employee. There is no reasonable means of protecting Yost and INA from

the prejudice they would suffer if INA were not a party.

Third, it is doubtful that any judgment Torrington receives would be adequate if INA were not made a party. Torrington's complaint is replete with references to INA. If Yost has revealed trade secrets to INA as Torrington fears, INA will be able to continue profiting from them if INA is not a party in this action. Even if Torrington is completely successful in this suit, if INA is not a party, INA cannot be prevented from using Torrington's trade secrets information.

Finally, another forum exists for the plaintiff. Torrington will not be left without a remedy if this action is dismissed. Torrington can sue both Yost and INA in state court.

The grounds for dismissal in this case are overwhelming. INA is clearly an indispensable party. Each of the four factors of Rule 19(b) indicates that dismissal is appropriate. If Torrington wishes to continue with this suit, it must do so in state court and join INA. For the foregoing reasons, this case is dismissed pursuant to Rule 19, Fed.R.Civ.P.

IT IS SO ORDERED.



William RAINEY, et al.

v.

WAL-MART STORES, INC.

Civ. A. No. 90-2599.

United States District Court,
W.D. Louisiana,
Alexandria Division.

Oct. 7, 1991.

Following removal from state court, defendant in personal injury action sought to compel plaintiff to submit to physical

examination. The District Court, Little, J., held that no basis was shown for requiring plaintiff to travel 270 miles, one way, for the physical examination.

Motion denied.

1. Evidence ⇐10(2)

Court would take judicial notice of fact that Jena, Louisiana, is approximately 270 miles from New Orleans.

2. Federal Civil Procedure ⇐1658

No basis was shown for requiring plaintiff in personal injury action to travel 270 miles, one way, to be examined by physician of defendant's choosing in another district.

Paul J. Tellarico, Neblett, Beard & Arsenault, Alexandria, La., for plaintiff.

Gregory S. Erwin, Bolen, Edwin, et al., Alexandria, La., for defendants Wal-Mart Stores, Inc. and Nat. Union Fire Ins. Co. of Pittsburgh, Pa.

RULING

LITTLE, District Judge.

[1] Counsel for defendant has asked for an expedited decision on a motion to compel the plaintiff to submit to a physical examination in New Orleans. Plaintiff, a LaSalle Parish resident, filed a suit for damages sustained after slipping in a Wal-Mart store. Wal-Mart removed the case to the federal court in the Western District of Louisiana, Alexandria Division. Defendant would like plaintiff examined by an orthopaedic surgeon in New Orleans. The court takes judicial notice of the fact that Jena, Louisiana is approximately 270 miles from New Orleans. Simple math dictates that the round trip distance is 540 miles. The travail of travel aggravates the plaintiff, not the experience of examination.

[2] Neither lawyer has provided the court with any citation of authority to assist the court in making its determination. There is ample authority, readily available, to support plaintiff's reluctance to journey to New Orleans. Rule 35 accords the court

STRAWBRIDGE v. CURTISS
Supreme Court of the United States, 1806.
7 U.S. (3 Cranch) 267, 2 L.Ed. 435.

This was an appeal from a decree of the Circuit Court for the district of Massachusetts, which dismissed the complainants' bill in chancery, for want of jurisdiction. Some of the complainants were alleged to be citizens of the state of Massachusetts. The defendants were also stated to be citizens of the same state, excepting Curtiss, who was averred to be a citizen of the state of Vermont, and upon whom the subpoena was served in that state.

The question of jurisdiction was submitted to the court, without argument.

MARSHALL, CH. J., delivered the opinion of the court.--The court has considered this case, and is of opinion, that the jurisdiction cannot be supported.

The words of the act of congress are, "where alien is a party, or the suit is between a citizen of a state where the suit is brought, and a citizen of another state." The court understands these expressions to mean, that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.

But the court does not mean to give an opinion in the case where several parties represent several distinct interests, and some of those parties are, and others are not, competent to sue, or liable to be sued, in the courts of the United States.

Decree affirmed.