

Judicial Disqualification: An Analysis of Federal Law

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(DRAFT: forthcoming 2010)

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Introduction

For centuries, impartiality has been a defining feature of the Anglo-American judge's role in the administration of justice. The reason is clear: in a constitutional order grounded in the rule of law, it is imperative that judges make decisions according to law, unclouded by personal bias or conflicts of interest. Accordingly, upon ascending the bench, every federal judge takes an oath to "faithfully and impartially discharge and perform all the duties" of judicial office;¹ and the Due Process Clause of the Fourteenth Amendment to the United States Constitution has been construed to guarantee litigants the right to a "neutral and detached," or impartial judge.² Moreover, in a democratic republic in which the legitimacy of government depends on the consent and approval of the governed, public confidence in the administration of justice is indispensable. It is not enough that judges *be* impartial; the public must *perceive* them to be so. The Code of Conduct for United States Judges therefore admonishes judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," and to "avoid impropriety and the appearance of impropriety in all activities."³

When the impartiality of a judge is in doubt, the appropriate remedy is to disqualify that judge from hearing further proceedings in the matter.

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II. Disqualification Under 28 U.S.C. §455

A. Overview

1. The Text of §455

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Sections (a) and (b) occupy the core of §455 and should be read together. The two sections divide the universe of disqualification into two halves: the general, catch-all category of section (a), which requires disqualification from any proceeding in which a judge's "impartiality might reasonably be questioned"; and a list of more specific grounds for disqualification in section (b).

The remainder of §455 is directed at implementing sections (a) and (b):

- Section (c) admonishes judges to keep abreast of their financial interests to ensure that they know when to disqualify themselves under (b)(4).
- Section (d) defines terms employed in sections (a) and (b).
- Section (e) provides parties with a limited opportunity to waive disqualification otherwise required by the catch-all section (a)—typically where the judge is poised to disqualify him or herself *sua sponte*—but does not permit the parties to waive disqualification required by the more specific provisions of section (b).
- Section (f) provides a limited opportunity for judges to avoid the need to disqualify themselves for financial interest under section (b)(4) through divestiture.

2. Interpretive Ground Rules

a. Interpreting §455(a) in relation to §455(b)

As embodied in §455, sections (a) and (b) are conceptually separate. Section (a) compels disqualification for the appearance of partiality, while section (b) “also” compels disqualification for bias, financial interest, and other specific grounds. In contrast, the Model Code of Judicial Conduct—after which §455 was originally modeled—unifies the two halves conceptually by characterizing the specific grounds for disqualification as a non-exclusive subset of circumstances in which a judge’s impartiality might reasonably be questioned.⁴ For the most part, this may be a distinction without a difference—disqualification is required if the specific or general provisions are triggered, regardless of whether the specific provisions are characterized as a subset of or separate from the general. On the other hand, by conceptualizing them separately, §455 can require disqualification under specific circumstances enumerated in section (b) that might not reasonably be characterized as calling a judge’s impartiality into question under section (a). For example, section (b)(4) requires judges to disqualify themselves for financial interest “however small,”⁵ which necessarily includes an interest so small that it could not reasonably call the judge’s impartiality into question.⁶

Any circumstance in which a judge’s impartiality might reasonably be questioned under section (a) requires disqualification even if the circumstance is not enumerated in §455(b).⁷ At the same time, when §455(b) identifies a particular situation requiring disqualification, it will tend to control any §455(a) analysis with respect to that specific situation. For example, §455(b)(5) requires disqualification when one of the parties is within the third degree of relationship to the judge. Consequently, a fourth-degree relationship to a party does not *by itself* create an appearance of partiality requiring disqualification under §455(a) — although disqualification under §455(a) might still be appropriate if, for example, the judge’s personal relationship with the fourth-degree relative was so close as to call the judge’s impartiality into question. As the Supreme Court explained, “[s]ection 455(b)(5), which addresses the matter of relationship specifically, ends the disability at the *third* degree of relationship, and that should obviously govern for purposes of §455(a) as well.”⁸

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B. Grounds for Disqualification

1. The General Standard: When Impartiality Might Reasonably be Questioned (§455(a))

a. Framework for analysis

Whereas §455(b)(1) requires disqualification for *actual* partiality—i.e., when a judge “has a personal bias or prejudice toward a party”—§455(a) requires disqualification for the *appearance* of partiality, i.e. when a judge’s “impartiality might reasonably be questioned.” Whether the judge is in fact impartial, while controlling disqualification under section (b)(1), is not dispositive of disqualification under section (a). The justification for making perceived partiality a grounds for disqualification is at least twofold: first, regardless of whether judges are partial in fact, public perceptions of partiality can undermine confidence in the courts; and second, disqualifying judges for outward manifestations of what could reasonably be construed as bias obviates the need to make subjective judgment calls about what is actually going on inside a judge’s heart and mind.

When Congress amended §455(a), it made clear that judges should apply an objective standard in determining whether to disqualify. A judge contemplating disqualification under §455(a), then, should not ask whether he or she believes he or she is capable of impartially presiding over the case. Rather, the question is whether a judge's impartiality might be questioned from the perspective of a reasonable person, and every circuit has adopted some version of the "reasonable person" standard to answer this question.⁹ In the context of denying a motion for his disqualification from *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, Justice Scalia noted that this reasonable person is aware "of all of the surrounding facts and circumstances."¹⁰ The Second Circuit has characterized the reasonable person as an "objective, disinterested observer," who is privy to full knowledge of the surrounding circumstances.¹¹

The Fourth Circuit has clarified that the hypothetical reasonable observer is not a judge, because judges, keenly aware of the obligation to decide matters impartially, "may regard asserted conflicts to be more innocuous than an outsider would."¹² The Seventh Circuit has likewise noted that an outside observer is "less inclined to credit judges' impartiality and mental discipline than the judiciary . . ."¹³ And relying on the Supreme Court's observation in *Liljeberg*, the Fifth Circuit has commented that "[p]eople who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges."¹⁴

At the same time, the hypothetical observer "is not a person unduly suspicious or concerned about a trivial risk that a judge may be biased."¹⁵ This reasonable observer must be "thoughtful" and "well-informed."¹⁶ The First Circuit has emphasized that a reasonable person does not draw conclusions on the basis of groundless suspicion:

[W]hen considering disqualification, the district court is *not* to use the standard of "Caesar's wife," the standard of mere suspicion. That is because the disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.¹⁷

Numerous cases have rejected disqualification under circumstances in which calling a judge's impartiality into question would require suspicion or speculation beyond what a reasonable person would indulge. The Second Circuit upheld a refusal to disqualify where the defendant alleged that the judge, a personal acquaintance, had grown unfriendly to him because of the defendant's public opposition to the Gulf War. The court reasoned that "a disinterested observer could not reasonably question [the judge's] impartiality based upon his alleged failure to return the plaintiff's greetings."¹⁸

Likewise, where a defendant moved for an Asian judge to disqualify himself because the defendant had been publicly critical of a prominent Asian, the Second Circuit opined that "it is intolerable for a litigant, without any factual basis, to suggest that a judge cannot be impartial because of his or her race and political background."¹⁹

Uninformed speculation and criticism—even if widely reported in the media—does not trigger disqualification under §455(a). In *United States v. Bayless*, a district judge was criticized in the media for granting a motion to suppress in a drug case, culminating in members of Congress calling for the judge's impeachment.²⁰ The judge subsequently reversed his earlier ruling, and the defendant argued that the judge should have disqualified himself. Although it was widely speculated that the judge had reversed his earlier ruling in response to the threats and criticism, the Second Circuit concluded that disqualification was unnecessary. The court observed that the need for disqualification "is to be determined 'not by considering what a straw poll of the only partly informed man-in-the-street would show[,] but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all

the relevant facts would recuse the judge.”²¹

Similarly, in *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, Justice Scalia, in explaining his decision not to disqualify himself, rejected the assertion that newspaper editorials calling his impartiality into question were dispositive. The reasonable observer must be “informed of all the surrounding facts and circumstances,” and in Justice Scalia’s view, the editorials in question, which lacked recognition and understanding of relevant precedent, were not so informed.²²

Just as a judge must disqualify herself under circumstances in which a reasonable person might question her impartiality even if she is impartial in fact, so too must she disqualify herself if a reasonable person might believe that the judge was aware of circumstances creating an appearance of partiality even if the judge was in fact unaware. In *Liljeberg v. Health Services Acquisition Corp.*,²³ the trial judge was a member of the board of trustees of a university that had a financial interest in litigation before the judge, but stated that he was unaware of the financial interest when he conducted a bench trial and ruled in the case. The court of appeals, nevertheless, vacated the judgment under Fed. R. Civ. P. 60(b) because the judge failed to disqualify himself pursuant to §455(a), and the Supreme Court agreed. Noting that the purpose of §455(a) is to promote public confidence in the integrity of the judicial process, the Court observed that such confidence “does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew.”²⁴

In 2002, the Supreme Court addressed a related issue in *Sao Paulo State of Federative Republic of Brazil v. Am. Tobacco Co., Inc.*²⁵ There, respondents sought the disqualification of the judge because his name had been associated with an earlier, similar suit prior to his appointment to the bench. In the earlier case, the judge was erroneously named in an amicus curiae brief as the president of the association that submitted the brief, although he had retired from that position six months prior to filing. Respondents argued that the inclusion of the judge’s name created an appearance of partiality on the part of the judge in the later case, despite the facts that the judge was unaware that his name was on the earlier brief, that he played no part in preparing the brief, and that he was only “vaguely aware” of the case.²⁶ The district judge declined to disqualify himself, but the circuit court reversed. The Supreme Court, in turn, reversed the circuit court, concluding that the circuit court had misapplied the reasonable person standard and overlooked the requirement that the reasonable person be aware of all relevant facts when determining the need for disqualification. In the Court’s view, the fully informed, reasonable person would not believe that the erroneous use of the judge’s name could call the judge’s impartiality into question.

Courts of appeals have likewise required disqualification when a reasonable observer might think that judges were aware of events or information that could impair their impartiality – even if they were not so-aware. The Seventh Circuit, for example, remanded a habeas case directing the judge to whom the case had been reassigned, to provide the petitioner the opportunity to challenge the dismissal of four claims by the previously assigned district judge. That judge had ruled on the habeas petition without realizing that he, as a state court judge years earlier, had been on the panel whose decision was now challenged.²⁷

In *In re Continental Airlines*,²⁸ the Fifth Circuit found a violation of §455(a) where a law firm for one of the parties appearing before the judge was considering him for employment, even though he was unaware of it. Quoting from *Liljeberg*, the court explained that §455(a) “does not call upon judges to perform the impossible.”²⁹ “To hold that §455(a) was violated . . . does not mean that [the judge] was required to stand recused before discovering that he was being considered for employment. Rather, when an offer of employment was received the day after his approval of \$700,000 in legal fees to the firm making the offer, [the judge] was ‘required to take the steps necessary to maintain public confidence in the judiciary.’”³⁰ In this case that meant

“either . . . reject[ing] the offer outright, or, if he seriously desired to consider accepting the offer, st[anding] recused and vac[at]ing the rulings made shortly before the offer was made.”³¹

1. 28 U.S.C. §453.
2. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).
3. Code of Conduct for United States Judges, Canon 2A.
4. Model Code of Judicial Conduct 2.11(a) (2007).
5. Section (b)(4) requires disqualification for financial interest, while section (d) defines “financial interest” as “however small”—in contrast to the ABA Model Code of Judicial Conduct, which defines applicable economic interests to exclude those that are “de minimis.” See ABA Model Rule 2.11 and Terminology.
6. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 n.8 (1988).
7. *Id.*
8. *Liteky v. United States*, 510 U.S. 540, 553 (1994).
9. See, e.g., *United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998), cert. denied, 119 S. Ct. 1793 (1999); *In re Hatcher*, 150 F.3d 631, 637 (7th Cir. 1998); *Baldwin Hardware Corp. v. Franksu Enter. Corp.*, 78 F.3d 550, 557 (Fed. Cir. 1996); *Blanche Rd. Corp. v. Bensalem Township*, 57 F.3d 253, 266 (3d Cir. 1995); *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992); *Vieux Carre Prop. Owners v. Brown*, 948 F.2d 1436, 1448 (5th Cir. 1991); *In re Barry*, 946 F.2d 913, 914 (D.C. Cir. 1991); *United States v. Nelson*, 922 F.2d 311, 319 (6th Cir. 1990); *Little Rock Sch. Dist. v. Arkansas*, 902 F.2d 1289, 1290 (8th Cir. 1990); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988); *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987); *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986); *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981).
10. *Cheney*, 124 S. Ct. at 1400 citing *Microsoft Corp. v. United States*, 530 U.S., at 1302.
11. *Unites States v. Bayless*, 201 F.3d 116, 126 (2d Cir. 2000).
12. *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998), cert. denied, 119 S. Ct. 1793 (1999).
13. *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990); see also *O’Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 988 (7th Cir. 2001).
14. *In re Faulkner*, 856 F.2d 716 (5th Cir.1998), quoting *Liljeberg*, 486 U.S. at 864-65; see also ^{United States v. Jordan}, 49 F.3d 152, 156 (5th Cir. 1995).
15. *Id.*
16. *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990). See also *United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995); *O’Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 988 (7th Cir. 2001).
17. *In re Allied-Signal Inc.*, 891 F.2d 967, 970 (1st Cir. 1989) (Breyer, J.) (citation omitted).
18. *Diamondstone v. Macaluso*, 148 F.3d 113, 121 (2d Cir. 1998).
19. *Macdraw, Inc. v. CIT Group Equip. Fin., Inc.*, 157 F.3d 956, 963 (2d Cir. 1998).
20. *Unites States v. Bayless*, 201 F.3d 116, 126 (2d Cir. 2000).
21. *Id.* at 127, citing *SEC v. Drexel Burnham Lambert Inc. (In re Drexel Burnham Lambert Inc.)*, 861 F.2d 1307, 1313 (2d Cir.1988)
22. *Cheney*, 124 S. Ct. at 1400 citing *Microsoft Corp. v. United States*, 530 U.S., at 1302.
23. 486 U.S. 847 (1988).
24. *Id.* at 860.
25. 535 U.S. 229 (2002).
26. *Id.* at 233.
27. *Russell v. Lane*, 890 F.2d 947 (7th Cir. 1989). See also *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 n.7 (9th Cir. 1992) (stating that district judge’s lack of actual knowledge of his former firm’s involvement in the litigation is irrelevant).
28. 901 F.2d 1259 (5th Cir. 1990).
29. *Id.* at 1262.
30. *Id.* (quoting *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 861 (1988)).
31. *Id.* at 1262-63. The court held, however, that the violation of §455(a) constituted harmless error.

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, 1182 (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.*, 333 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 815). 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-

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.

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

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 13 (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

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.

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 1585. 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

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 *Artline*:

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.

Artline, 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 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.

be 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.

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. 8:91-1599-26.

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



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October 25, 1994

THE BUREAU OF NATIONAL AFFAIRS, INC., WASHINGTON, D.C.

Volume 63, No.15

NEW COURT DECISIONS

Digests of Significant Opinions Not Yet Generally Reported

Attorneys

SANCTIONS—

Federal district court order imposing sanctions on government attorneys, without possibility of reimbursement from government, is within court's inherent authority to discipline attorneys for violating duty of candor and its discretion under Fed.R.Civ.P. 26(e) to redress flagrant discovery abuse.

(U.S. v. Shaffer Equipment Co., DC SWVa. No. 5:90-1195, 9/27/94)

At the outset of this action under the Comprehensive Environmental Response, Compensation and Liability Act, the United States appeared to have a good case for reimbursement of response costs incurred in connection with the cleanup of a contaminated site in West Virginia. Although the court is prepared to enter the proposed consent decrees, it feels compelled to comment on the vast discrepancy between costs incurred—some \$6.5 million—and the monetary settlement value of \$725,000 reflected in the consent decrees. The government's mismanagement of this entire matter sabotaged its potential recovery of response costs from responsible persons, leaving the bulk of these costs to be borne by the superfund as established by CERCLA.

Not the slightest in a series of blunders by the government were a several imprudent decisions by Robert E. Caron, the Environmental Protection Agency's "on scene coordinator." Caron has misrepresented his academic credentials and achievements throughout his career and subsequent to this case was convicted of perjury.

The United States admits that no small part of its mismanagement of this matter was the "Caron problem." Compounding this problem was the fact that the two U.S. attorneys involved in the case violated their duty of candor to this court by repeatedly obstructing defendants' attempts to uncover Caron's perjury and failing to reveal what they knew of Caron's misrepresentation once they learned of it. See *U.S. v. Shaffer Equipment Co.*, 11 F.3d 450, 62 LW 2404 (CA 4 1993).

This violation, in fact, compromised the United States to the extent that this court

dismissed the case and awarded attorneys' fees and costs to defendants.

On appeal, the Fourth Circuit found that the sanction of dismissal was too severe and remanded the case on that issue. However, the court agreed with this court that the two attorneys had violated their duty of candor to the court, "exposing themselves and their employer to sanctions." Neither attorney can claim ignorance of an attorney's duty of candor to the court.

The U.S. attorneys also flagrantly abused the discovery process. In failing to supplement defendants' discovery requests regarding Caron's credentials with information that one of the U.S. attorneys admitted was relevant, they violated Fed.R.Civ.P. 26(e).

Both attorneys violated Rule 26(e)(1) and 26(a)(2)(c) by failing to supplement information on an expert witness. Rule 26(e)(2) was ignored when the U.S. attorney failed to amend his prior objection to an interrogatory regarding Caron after he learned that the matter was indeed relevant and his previous objection to the questions was incorrect.

This court's discretion to impose sanctions for abuse of discovery is quite broad under its inherent power and under Rule 26(e), which itself furnishes fair warning of the court's power to impose sanctions. The rules permit the imposition of a sanction in the form of a fine, paid to the court and not to the opposing party. Monetary sanctions in the form of attorneys' fees for litigation abuse in this case would not be barred by sovereign immunity because a sufficiently explicit rule authorizing such an award exists, namely Rule 26(e).

The duty of candor to the tribunal is a widely recognized one within the legal profession, and government attorneys, like all attorneys, have a duty to conform to the ethical guidelines of their profession. In failing to conform, the two attorneys here were not acting within the directives of their employment and therefore cannot claim any exemption from sanction for their actions by way of sovereign immunity.

Despite the Fourth Circuit's opinion, the Department of Justice, Office of Professional Responsibility, has refused to find "misconduct" by the two attorneys, instead characterizing their behavior as "repeated

exercises of poor judgment." With the department's perfunctory treatment of the attorneys' behavior, it is no small wonder, but no excuse, that these attorneys behaved as they did. Quite frankly, it shocked this court to learn of the department's superficial investigation and evaluation of the conduct of these attorneys. We are dealing here with a hodgepodge of bureaucratic bungling and coverup of abysmal proportions.

Therefore, it is ordered that the attorneys shall pay from their personal funds the amounts of \$2,000 and \$2,500, respectively, to reimburse the superfund as sanctions for their breaches of ethical conduct in violating the duty of candor to the court. In determining the amount of sanction deemed appropriate, the court considered, among other things, the salary levels of these attorneys. Also, neither attorney shall seek reimbursement for these sanctions from their employer. See *Chilcutt v. U.S.*, 4 F.3d 1313, 62 LW 2251 (CA 5 1993).—Hallanan, J.

Banking and Finance

DIRECTORS AND OFFICERS—

Viability of Resolution Trust Corp.'s action against directors and officers of federally chartered financial institution is governed by state law and applicable state statute of limitations, not by federal common law.

(Resolution Trust Corp. v. Everhart, CA 4, No. 93-2634, 10/13/94)

A federally chartered and federally insured thrift was placed under RTC receivership in 1989. In 1992 the RTC sued several of the thrift's former directors and officers for losses allegedly caused by their negligence, gross negligence, and breach of fiduciary duty. The losses arose from loans made between 1981 and 1985. The district court granted summary judgment in favor of the officers, finding the claim barred by the Virginia statute of limitations.

RTC, as receiver, steps into the shoes of a failed savings bank, obtaining the rights of the institution that existed prior to receivership. RTC may pursue any claims the insti-