IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 96-16526

MARYA S. NORMAN-BLOODSAW, *et al.*, individually and on behalf of all others similarly situated,

Plaintiffs and Appellants,

vs.

LAWRENCE BERKELEY LABORATORY, et al.

Defendants and Appellees.

Appeal from the Judgment of the
United States District Court for the
Northern District of California
HONORABLE VAUGHN WALKER, JUDGE
No. C-95-3220 VRW

APPELLANTS' OPENING BRIEF

Vicki Laden*
Claudia Center
Jennifer Middleton
The EMPLOYMENT LAW CENTER,
A Project of the LEGAL AID SOCIETY
OF SAN FRANCISCO
1663 Mission Street, Suite 400
San Francisco, CA 94103
Telephone: (415) 864-8848
* Counsel of Record

Lenard G. Weiss, State Bar No. 034039
Eugene M. Pak, State Bar No. 168699
STEEFEL, LEVITT & WEISS
One Embarcadero Center, Suite 3000
San Francisco, CA 94111
Telephone: (415) 788-0900

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATES CASES

FEDERAL STATUTES

STATE STATUTES

STATE CONSTITUTION PROVISIONS

EEOC DECISIONS

LEGISLATIVE HISTORY

OTHER SOURCES

INTRODUCTION AND STATEMENT OF THE CASE

This appeal presents two legal questions of first impression in the Ninth Circuit: do employees have constitutionally protected privacy interests which prevent employers from conducting screening, without notice or consent, for highly intimate medical conditions and genetic characteristics that are not job-related? If so, does an employer who selects employees by race and gender for screening, abridging constitutional privacy protections along race and gender lines, violate Title VII of the Civil Rights Act of 1964 as well? These legally and socially significant issues arise in the following factual setting.

Plaintiffs and appellants are present and former clerical and administrative employees of Lawrence Berkeley Laboratory, some of whom work in office buildings in downtown Berkeley. Excerpt of Record, hereinafter "Rec." at 167-171, 179-222. Lawrence Berkeley Laboratory (LBL) is a facility operated by the Regents of the University of California for the U.S. Department of Energy under a contractual agreement. For more than a decade, as a condition of employment, all employees were required to submit to a medical examination, which was performed during the first few months after employees had begun work. Rec. at 38-46. Periodically, certain employees received additional medical examinations. Rec. at 196-222, *see also* Rec. at 30.

At the time of the physical examinations, employees filled out a standard medical history form which included questions regarding "menstrual disorders", "venereal disease" and sickle cell anemia. Rec. at 27-37. During the

examination, blood and urine samples were taken for what employees believed to be routine screening. In the spring and summer of 1995, plaintiffs learned for the first time, after requesting and reviewing their employee medical files, that without knowledge or consent they had been screened for syphilis, that women had been screened for pregnancy, and that African-American employees had been screened for sickle cell trait and disease, although non-African-American employees had not been similarly tested for genetic characteristics or conditions. Rec. at 167-171, 179-222.[1] No relationship whatsoever was alleged by defendants between the subsequent, highly intimate tests for syphilis, sickle cell and pregnancy, and the jobs of the tested employees, nor have defendants identified any government interest in performing these very personal tests. It is undisputed that the information which was collected through the testing continues to be maintained at LBL.

Although plaintiffs were not permitted to conduct any formal discovery, in the initial document exchange plaintiffs received records which indicate that the U.S. Department of Energy regarded LBL employee medical files as "valuable epidemiologic research records" Rec. at 84, 270. Plaintiffs have been unable to learn how information is secured, who has had access to it, and whether any use has been made of it.

On September 13, 1995, plaintiffs filed this action on behalf of themselves

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[1] Plaintiffs subsequently learned that the syphilis testing was apparently discontinued on April 6, 1993, testing for sickle cell trait and disease on June 16, 1995, and pregnancy testing on December 12, 1994. Rec. at 27-33.

and other similarly situated employees, alleging that the surreptitious medical testing violated plaintiffs' rights to privacy guaranteed both by the United States Constitution and the California Constitution; challenging the race and gender-based testing as violative of Title VII of the Civil Rights Act of 1964, and claiming that LBL violated the Americans with Disabilities Act (ADA), by conducting non-job related testing of employees. Plaintiffs requested relief including notice to potentially affected employees, and expungement of this information at their request. Rec. at 1-26. In its answer, filed November 13, 1995, defendants LBL, its officials, and the Regents, admitted testing certain employees for syphilis, sickle cell and pregnancy.

Initial disclosures of documents were exchanged on December 11, 1995, but defendants refused to accede to plaintiffs' requests to conduct discovery in advance of the scheduled case management conference. No case management conference was held prior to dismissal of the action. In late 1995, after a number of current or former employees had obtained their records, it emerged that although the initial test for syphilis was not performed along race or national origin lines, repeated testing for syphilis was targeted at non-Caucasian employees. On February 2, 1996, plaintiffs moved to amend their complaint in order to include a claim for discrimination in syphilis screening in violation of Title VII, and to clarify certain class allegations. Rec. at 47-77, 167-171, 179-222.

The federal defendant, Hazel O'Leary, Secretary of the United States Department of Energy, filed a motion to dismiss on December 15, 1995. On

January 26, 1996, the state defendants moved for judgment on the pleadings or, in the alternative, summary judgment. The two dispositive motions were heard together with plaintiffs' motion for leave to file an amended complaint on March 22, 1996. On June 10, 1996, the Honorable Vaughn R. Walker, United States District Judge, issued an order granting defendants' motions in full, dismissing all of plaintiffs' claims, and granting plaintiffs leave to amend the complaint only if they could allege unauthorized disclosure of the results of the tests. Rec. at 285-314. Plaintiffs were barred from pursuing further discovery, and in its absence, could not so amend. Judgment was entered on July 30, 1996, disposing of all of plaintiffs' claims. Rec. at 315-316.

STATEMENT OF JURISDICTION

Jurisdiction in the district court was founded on 28 U.S.C. § 1331, 28 U.S.C. § 1337, 28 U.S.C. § 1343(a)(3), 28 U.S.C. 1343(a)(4), 28 U.S.C. § 2201, 28 U.S.C. § 2202, 42 U.S.C. § 12133, and 42 U.S.C. § 2000e-5(f). Final judgment in this matter, disposing of all claims against all parties, was entered on July 30, 1996, granting defendants' motions to dismiss under Fed. R. Civ. P. 12(c) (judgment on the pleadings) and 56(c) (summary judgment). Notice of appeal was filed on August 2, 1996. Appellate jurisdiction is established under 28 U.S.C. § 1291. Appellants seek attorneys fees for this appeal under 42 U.S.C. § 12205, 42 U.S.C. § 1988, 28 U.S.C. § 2412, Cal. Code Civ. Pro. § 1021.5, 42 U.S.C. § 2000e-5(f), and other laws.

ISSUES PRESENTED FOR REVIEW

1. Did the lower court err by finding that plaintiffs' claims for violation of their right to privacy, guaranteed by the California Constitution, are barred by the statute of limitations?

2. Did the lower court err by granting summary judgment to defendants, dismissing plaintiffs' claim for violation of their state constitutional right to privacy because the intrusion on plaintiffs' privacy was "de minimis"?

3. Did the lower court err by finding that plaintiffs' claims for violation of their right to privacy, guaranteed by the United States Constitution, are barred by the statute of limitations?

4. Did the lower court err by granting summary judgment to defendants, dismissing plaintiffs' claims for violation of their federal constitutional right to privacy because the intrusion on plaintiffs' privacy was "de minimis"?

5. Did the lower court err by finding plaintiffs' claims under Title VII of the Civil Rights Act of 1964 to be time-barred?

6. Did the lower court err in dismissing plaintiffs claims under Title VII by finding that plaintiffs had failed to state legally cognizable claims?

7. Did the lower court err in finding that plaintiffs could not amend to allege additional Title VII violations unless they could show disclosure or other adverse effects occurring within the 300-day limitations period?

8. Did the lower court err by finding that plaintiffs' claims under the Americans with Disabilities Act are time-barred?

STANDARD OF REVIEW

Each of the issues identified above was raised and discussed in Plaintiffs' Opposition to University Defendants' Motion for Judgment on the Pleadings Or, In The Alternative, For Summary Judgment, and ruled on in the district court's Order of June 10, 1996, Rec. at 285-314.

An appellate court reviews a grant of summary judgment *de novo*. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1261 (1996). The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.* A dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is a ruling on a question of law and is reviewed *de novo*. *Stone v. Travelers Corp.*, 58 F.3d 434, 436-37 (9th Cir. 1995). Review is limited to the contents of the complaint. *Argabright v. United States*, 35 F.3d 472, 474 (9th Cir. 1994). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *National Wildlife Federation v. Espy*, 45 F.3d 1337, 1340 (9th Cir. 1995). A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

SUMMARY OF ARGUMENT

Plaintiffs are present and former clerical and administrative employees at

LBL who were tested for syphilis, sickle cell and pregnancy without their knowledge or consent. The tests were conducted on blood and urine samples taken during employee medical exams which were performed after employees had begun their job duties at LBL. Defendants moved for dismissal or, in the alternative for summary judgment, on all of plaintiffs claims alleging violations of the following: the United States and California Constitutions, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* The district granted the state defendants' motion to dismiss the Title VII claims; the federal and state defendants' motions for summary judgment on the federal and state privacy claims; and the state defendants' motion to dismiss the Americans with Disabilities Act claim.

A. The District Court Erred in Granting Summary Judgment Dismissing Plaintiffs' State Constitutional Privacy Claims.

Plaintiffs enjoyed a reasonable expectation of privacy under the factors set out in *Hill v. N.C.A.A.*, 7 Cal. 4th 1, 26 Cal.Rptr.2d 834 (1994). Plaintiffs had no advance notice that their blood and urine samples would be screened for syphilis, sickle cell and pregnancy, and such testing is not customarily performed in an occupational setting. Neither the medical history form which plaintiffs completed, nor the physical examination itself, included such highly intrusive inquiries, impinging on reproductive and sexual decisionmaking, so as to constitute constructive notice that the subsequent tests would be performed. Thus, plaintiffs did not discover that their privacy rights had been violated until they received their medical files in 1995. Plaintiffs' claims are not time-barred.

Nothing about the setting of the exam operated to diminish plaintiffs' expectation of privacy in the intimate medical information which was revealed. Further, no important governmental purpose for performing the tests has ever been articulated. Hence, the tests violate plaintiffs' state constitutional privacy rights.

B. The District Court Erred in Granting Summary Judgment Dismissing Plaintiffs' Federal Constitutional Privacy Claims.

The tests performed on previously drawn blood and urine samples for pregnancy, syphilis, and pregnancy constitute separate searches which must meet the "reasonableness" requirement of the Fourth Amendment, and survive scrutiny under the balancing test set out in *Vernonia School District 47J v. Acton*, 115 S. Ct. 2386 (1995). The questions included in the medical history form were significantly different and less intrusive than the tests that were subsequently performed, and did not constitute notice. Plaintiffs' claims are not time-barred.

Furthermore, the tests intruded upon both informational and decisional privacy and invaded core privacy interests. The information which was collected has a substantial potential for harm from disclosure, and plaintiffs need not demonstrate additional disclosure by the government. Plaintiffs' legitimate expectations of privacy were not diminished, nor were their rights extinguished by consent or waiver.

C. The District Court Erred in Dismissing Plaintiffs' Claims under Title VII of the Civil Rights Act of 1964.

Plaintiffs were not placed on notice by the medical history form that a violation of Title VII had occurred. Requiring more intrusive medical disclosure

from employees on the basis of race and sex is discrimination in a term or condition of employment, and plaintiffs need not allege further job detriment. Similarly, the testing adversely affected plaintiffs' status as employees in violation of Title VII. By depriving employees of their constitutionally protected rights, or invading them selectively on the basis of race or gender, defendants have committed violations of Title VII.

D. The District Court Erred in Dismissing Plaintiffs' Claims Under the Americans with Disabilities Act.

Filling out the medical history form and submitting to a routine medical examination did not provide plaintiffs with notice of ADA violations, including non-job-related examinations and medical recordkeeping violations.

ARGUMENT

I. The District Court Erred in Dismissing Plaintiffs' Claims Under the California State Constitutional Right to Privacy.

Article I, section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Emphasis added.) The phrase "and privacy" was added to the California Constitution by an initiative adopted by the voters in 1972. A voter-approved constitutional amendment is to be interpreted and applied in a manner consistent with the intent of the voters, which may be ascertained by the language of the initiative measure and the official ballot pamphlet. *Legislature v. Eu*, 54 Cal.3d 492, 504, 286

Cal.Rptr. 283 (1991). The ballot pamphlet argument supporting the Privacy Initiative of 1972 states:

> The proliferation of government snooping and data collecting is threatening to destroy our traditional freedoms. . . . The right of privacy . . . prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us. *Fundamental to our privacy is the ability to control circulation of personal information.* . . . The proliferation of government and business records over which we have no control limits our ability to control our personal lives. Often we do not know that these records even exist and we are certainly unable to determine who has access to them. . . . The average citizen . . . does not have control over what information is collected about him. Much is secretly collected.

(quoted in *White v. Davis*, 13 Cal.3d 757, 774-775, 120 Cal.Rptr. 94 (1975)) (emphasis in original). In short, "government snooping[,] . . . the secret gathering of personal information, [and] the overbroad collection and retention of unnecessary personal information by government and business interests" are among the principal mischiefs at which the Privacy Initiative was directed. *White v. Davis*, 13 Cal.3d at 775; *see also Hill v. N.C.A.A.*, 7 Cal. 4th 1, 17-18, 26 Cal.Rptr.2d 834 (1994) (quoting *White*).

It is difficult to envision a government practice that falls more squarely within the ambit of the Privacy Initiative of 1972 than the actions challenged here. Without the consent or knowledge of the individuals tested, the government screened their bodily fluids to detect intimate medical conditions. Unknown to the individuals tested, the government collected the results of this screening, maintaining them in individual files. Plaintiffs were shocked and horrified when,

in 1995, they discovered this information in their files. Rec. at 167-171, 179-222. In dismissing plaintiffs' claims under the state Constitution, the district court disregarded the intent of the voters of California, who more than twenty years ago outlawed the collection and stockpiling of unnecessary personal information by the government. The dismissal should be reversed.

A. Plaintiffs Were Not Put on Notice of the Invasion of Their State Constitutional Right to Privacy Imposed by the Testing of Their Blood and Urine for Intimate Medical Conditions Until They Inspected Their Files.

Whether a violation of the state constitutional right to privacy has occurred depends upon several fact-based elements. The elements of a claim for invasion of the right: (1) the existence of a legally protected privacy interest; (2) a reasonable expectation of privacy; and (3) conduct by the defendant constituting a serious invasion. *Hill v. N.C.A.A.*, 7 Cal.4th at 39-40. Under the discovery rule governing this state law claim, a cause of action does not accrue, and the statute does not begin to run, until the plaintiff knows, or should know, all material facts essential to show the elements of her cause of action. *Manguso v. Oceanside Unified Sch. Dist.*, 88 Cal.App.3d 725, 728, 152 Cal.Rptr. 27 (1979); *Cain v. State Farm Mutual Automobile Ins. Co.*, 62 Cal.App.3d 310, 132 Cal.Rptr. 860 (1976).

The district court reasoned that plaintiffs were put on notice of any state constitutional violation at the time of the medical examination and questionnaire, and that their state constitutional claims are thereby time-barred. This conclusion

ignores prevailing case law. The violation of constitutional rights caused by the screening of blood and urine hours or days after plaintiffs filled out the medical questionnaire and submitted to the medical examination,[2] and a possible claim arising out of the examination or questionnaire itself involve altogether different facts as to the key elements of the privacy claim. Under prevailing state constitutional law, the two events result in distinct conclusions.

For example, whether a reasonable expectation of privacy exists depends upon various factors such as advance notice, customs, practices, justification, physical settings and the presence of an opportunity to consent. *Hill v. N.C.A.A.*, 7 Cal.4th at 36-40. In this case, it is undisputed that plaintiffs had advance notice of the examinations themselves. However, plaintiffs allege they had no advance notice of the screening of their blood and urine for intimate and, in some cases, genetic conditions. Similarly, the physical setting of the examination and the filling out of a questionnaire, with plaintiffs present, offered a modicum of influence as well as the opportunity to protest a particular procedure. The subsequent screening stripped the plaintiffs of all control over the invasion's scope, denying them the opportunity to protest particular tests.

Plaintiffs also submitted evidence that screening blood and urine for pregnancy, sickle cell trait and syphilis without notice or consent within the occupational setting is far outside social customs and community norms:

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[2] The date on Ms. Norman-Bloodsaw's questionnaire indicates that it was filled out more than two weeks before the laboratory screening was completed. Rec. at 282-284.

> It is not consistent with good medical practice for an employer to conduct sickle cell screening. This point was recently reiterated in a report issued by the Institute of Medicine in 1993. . . .The sickle cell screening LBL conducted was not job-related and had no justification as part of any employer-run medical program. Rec. at 85-103 (Decl. of James Bowman, M.D., ¶¶ 7-8).
>
> Since the early 1970s guidelines have been established which require the informed consent of adults who are tested for sickle cell. Thus, employees should not have been tested for sickle cell without individualized notice and informed consent. Rec. at 85-103 (Decl. of James Bowman, M.D., ¶ 9).
>
> I am not aware of any employer which has routinely screened employees for pregnancy or sickle cell or which has conducted these tests in the absence of a connection to occupational exposure. I am similarly unaware of any employer that has routinely screened employees for syphilis. Rec. at 104-118 (Decl. of Mark Cullen, M.D., ¶ 7).
>
> I am unaware of any other employer which has conducted syphilis screening of its employees. No rational reason could support such screening. Rec. at 157-166 (Decl. of Vicki Alexander, M.D., ¶ 10).

See generally Rec. at 85-166. There is no evidence in the record supporting the proposition that a medical questionnaire customarily places an individual on notice of the scope or intrusiveness of subsequent laboratory testing. Indeed, plaintiffs submit that common experience suggests otherwise.

The nature and extent of the invasion of the privacy interest are also entirely distinguishable. The medical questionnaire allegedly filled out by each plaintiff does not inquire as to whether the employee is pregnant -- the form includes a box labeled "menstrual disorders" that can be checked "yes." The laboratory search

included testing for pregnancy.[3] The medical questionnaire does not inquire as to sickle cell trait; one question inquires as to the disease, sickle cell anemia. The laboratory search included testing for sickle cell trait, which adults may not know they carry. *See* Rec. at 129-151 (Decl. of James P. Keogh, M.D., ¶ 8). While adults with sickle cell anemia almost always know of their condition, sickle cell trait is an invisible, asymptomatic, genetic characteristic. Sickle cell trait raises sensitive issues of partner selection and reproductive decisionmaking: intimate decisions that may or may not include confidential genetic testing and counseling. Finally, while the questionnaire provides a check box labelled "venereal disease," it does not inquire as to specific sexually transmitted diseases. The laboratory search included testing for syphilis, a perinatally transmitted condition.[4]

Perhaps more striking than these important factual distinctions between the questionnaire and the laboratory work is the vast difference in reach. The questionnaire reached only that information that: (1) the employee had knowledge of at the time he or she filled out the questionnaire; and (2) the employee voluntarily revealed in filling out the questionnaire. The laboratory testing reached the intimate medical information sought, regardless of whether the individual had knowledge of this information, or consented to revealing it in the questionnaire.

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[3] Under the district court's analysis, a male employee who confessed to a case of *tinea cruris* (jock itch) would be placed on notice of surreptitious testing for low sperm count.

[4] Were the district court's analysis to hold sway, anyone filling out a questionnaire with a "venereal disease" box would be deemed notified of nonconsensual HIV testing.

Indeed, for reasons related to the deepest and most personal beliefs and viewpoints, many individuals do not seek information about asymptomatic genetic characteristics, and/or do not choose to consider it in making reproductive decisions. For an employer to expose such information without notice or consent, and to include it in records that the individuals might some day review, constitutes a serious and disturbing infringement of privacy.

Implicit in the district court's opinion is that plaintiffs should have brought their action under the state Constitution within one year of filling out the medical questionnaire and submitting to the medical examination. At that time, however, plaintiffs did not have all material facts essential to show the elements of their cause of action for the invasion imposed by the laboratory testing. Whether the invasion imposed by the examination and questionnaire would have been actionable in and of itself is a different question from whether the subsequent laboratory testing is actionable; the answers to these questions are likely not the same. The district court's curious application of the discovery rule would encourage a broad array of preemptive lawsuits by plaintiffs, clogging the courts and subjecting attorneys to the risk of Rule 11 sanctions.

B. The Testing of for Intimate Medical Conditions Invaded Plaintiffs' State Constitutional Right to Privacy.

1. Plaintiffs Have a Privacy Interest in the Medical and Genetic Information Contained in Their Bodily Fluids and Exposed by Defendants.

Under California case law, it is well-settled that the state constitutional right to privacy encompasses a privacy interest in sensitive medical information:

> A person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected. . . . The state of a person's gastrointestinal tract is as much entitled to privacy from unauthorized public or bureaucratic snooping as is that person's bank account, the contents of his library or his membership in the NAACP. We conclude the species of privacy here sought to be invaded falls squarely within the protected ambit, the expressed objectives of Article I, section 1.

Division of Medical Quality v. Gherardini, 93 Cal.App.3d 669, 678-79, 156 Cal.Rptr. 55 (1979); *see also Cutter v. Brownbridge*, 183 Cal.App.3d 836, 842, 228 Cal.Rptr. 545 (1986) ("The 'zones of privacy' created by Article I, section 1, extend to the details of one's medical history."); *Pettus v. Cole*, 49 Cal.App.4th 402, 57 Cal.Rptr.2d 46 (1996) (detailed medical information revealed by employee to psychiatrist appointed by employer protected by state Constitution).

"Informational privacy is invaded by . . . the chemical analysis of [ ] urine . . . . Courts have long recognized that 'chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic.'" *Loder v. City of Glendale*, 47 Cal.App.4th 592, 601, 34 Cal.Rptr.2d 94 (1994), *rev. granted*, 38 Cal.Rptr.2d 342 (Feb. 16, 1995) (citations omitted); *see also Luck v. Southern Pacific Trans. Co.*, 218 Cal.App.3d 1, 267 Cal.Rptr. 618, 626-27 (1990). Accordingly, where a defendant, by collecting and testing urine, obtained information about the plaintiffs' internal medical state, the California Supreme Court found a legally protected privacy interest. *Hill v. N.C.A.A.*, 7 Cal.4th at 40.

Defendants' invasion is particularly egregious here where the specific tests

performed interfered with plaintiffs' right to make reproductive decisions and conduct intimate activities free from government observation or intrusion. *See Fults v. Superior Court*, 88 Cal.App.3d 902, 904, 152 Cal.Rptr. 210 (1979) ("well established zone of privacy" encompasses one's sexual relations); *Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252, 274-75, 172 Cal.Rptr. 866 (1981) (right to privacy includes reproductive decisionmaking); *Planned Parenthood Affiliates v. Van de Kamp*, 181 Cal.App.3d 245, 277, 226 Cal.Rptr. 361 (1986) ("right to sexual privacy has been delineated in a variety of contexts"):

Pregnancy testing by a government employer intrudes upon the right to make decisions regarding family planning, pregnancy, abortion and childbirth free from government or employer scrutiny. "Surely no aspect of a woman's medical profile is more sensitive in terms of privacy interests than her obstetrical-gynecological history." *Planned Parenthood Affiliates v. Van de Kamp*, 181 Cal.App.3d at 281. Discovery that a woman is pregnant can reveal extra-marital sexual relationships, fertility, that she is probably not a virgin, and that, if she does not deliver a child within nine months, she may have had an abortion. Government testing for syphilis, a disease that can be sexually or perinatally transmitted, similarly affects reproductive and sexual autonomy. Genetic testing for sickle cell trait, an asymptomatic condition, provides information significant to reproductive decisionmaking, and has been associated historically with discriminatory policies. Rec. at 85-103, 119-151.

2. Plaintiffs Have a Reasonable Expectation of Privacy in the Medical and Genetic Information Contained in Their Bodily Fluids.

"[I]t is reasonable for employees to expect that details of their personal lives . . . will be shielded from scrutiny by their employers." *Pettus v. Cole*, 49 Cal.App.4th at __, 57 Cal.Rptr.2d at 73. As the California Supreme Court noted in *Hill*, reasonable expectations of privacy are generally not diminished in the employment setting. 7 Cal.4th at 54. Indeed, except where jobs involve special physical, ethical or mental requirements -- requirements defendants have not alleged here -- the expectation of privacy is not diminished. *Loder v. City of Glendale*, 47 Cal.App.4th at 602.[5]

Additional facts support plaintiffs' expectation of privacy. Plaintiffs allege they had no advance notice of the subsequent screening of their blood and urine for intimate medical conditions. Plaintiffs were given no opportunity to consent or object to the laboratory testing. Indeed, plaintiffs were not even provided with after-the-fact notice of the testing or its results. Further, screening blood and urine for pregnancy, sickle cell trait and syphilis without notice or consent within the occupational setting is not consistent with good medical practice, and is far outside social customs and community norms. *See* Rec. at 85-166.

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[5] The district court noted that defendants "assert that LBL attempts to educate its employees about the risks that radiation poses to employee's reproductive capabilities and to fetuses." Rec. at 290. There is no evidence that the plaintiffs faced occupational hazards threatening reproductive capacities or fetuses. "There is clearly no justification for Lawrence Berkeley Laboratory's routine screening of these administrative and clerical employees." Rec. at 119-128. (Declaration of Neil Hotzman, M.D., ¶ 10.) Indeed, defendants do not maintain that the testing of plaintiffs was related to job hazards.

Filling out the questionnaires and submitting to the physical examination did not diminish plaintiffs' reasonable expectation of privacy in information subsequently obtained by the government through laboratory testing. In *Pettus v. Cole*, the plaintiff requested paid disability leave, and underwent a psychiatric evaluation conducted by psychiatrists under contract to his employer. The psychiatrists provided the employer with the full contents of their evaluations, including sensitive personal information regarding his medical status, sleep patterns, and his sex drive. 49 Cal.App.4th at __, 57 Cal.Rptr.2d at 72. Nevertheless, the court found that there was no diminished expectation of privacy:

> [T]he detailed psychiatric information . . . exceeded the scope of disclosure to which *Pettus* may be deemed to have consented either expressly or impliedly when he requested disability leave, submitted to psychiatric evaluation, and orally acknowledged that Dr. Cole would be reporting back to Du Pont.

Id. at 73. The court also noted that an annual physical examination to which *Pettus* submitted did not diminish expectations of privacy because it was not the same type of examination. *Id.* at 73 n.26.

Under *Pettus*, plaintiffs here cannot be deemed to have a diminished expectation of privacy in the intimate medical information revealed by the three tests. Indeed, *Pettus* retained an expectation of privacy in the sensitive information revealed during the psychiatric evaluation even though he placed his mental status at issue, the information was obtained with his knowledge, and he knew that his employers would learn at least some of the information he revealed. In this case, plaintiffs were not even aware of the screening for intimate medical conditions.

And, like the annual physical in *Pettus*, any information obtained through the medical questionnaire is distinct from the information exposed by the laboratory work conducted later.

3. Defendants' Laboratory Work Exposing Intimate Medical and Genetic Information Seriously Interfered with Plaintiffs' Privacy Rights.

The actions of the government defendants in exposing intimate medical and genetic information seriously interfered with plaintiffs' privacy rights. *See Hill v. N.C.A.A.*, 7 Cal.4th at 38 ("coercive government power" more dangerous than actions of private persons). The apparent testing of all employees over many years adds to the magnitude and seriousness of the invasion. The greater the number of persons subjected to testing, the more serious the intrusion. *Loder v. City of Glendale*, 47 Cal.App.4th at 603.

The *maintenance* of this private information in government files further violates the state right to privacy.[6] In striking down a reporting law as applied to voluntary nonabusive behavior, a California appellate court noted:

> The recordkeeping envisioned by the reporting law is a violation of informational privacy . . . . There is no reason to . . . retain records of voluntary conduct, and there is no compelling state interest to justify the privacy violation. There is no apparent law enforcement purpose for the recording of voluntary behavior . . . *[S]ince there is no provision for the purging of such records from the government's computers, the recordkeeping only creates a serious potential for the type of long-term records of personal*

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[6] The district court dismissed plaintiffs' claim under the state Constitution, and granted leave to amend only if the plaintiffs could allege *disclosure* of the information collected. Plaintiffs were not permitted discovery as to access, use and misuse of information.

data that was condemned by our Supreme Court in White.

Planned Parenthood v. Van de Kamp, 181 Cal.App.3d at 281 (emphasis added).

The district court found the invasion imposed by the laboratory testing *de minimis* in light of the intrusiveness of the medical questionnaire and examination. Rec. at 302. A similar analysis was soundly rejected in *Loder v. City of Glendale*, 47 Cal.App.4th at 604. In that case, the city pointed to the medical evaluation and questionnaire completed by all job applicants, *including questions regarding alcohol and drug use*, in support of its argument that the invasion imposed by the drug testing was not serious. Deeming the city's argument "quite remarkable," the court stated: "[T]he fact that the questions asked in the course of the medical examination also violate the ADA does nothing to lessen the seriousness of the drug testing program's intrusion on protected privacy rights." *Id.*

The district court's suggestion that plaintiffs somehow waived their privacy rights by filling out the medical questionnaire or submitting to the medical examinations is contrary to prevailing case law. Waivers of constitutional rights are not lightly found, and must be narrowly rather than expansively construed. *Heda v. Superior Court*, 225 Cal.App.3d 525, 530, 275 Cal.Rptr. 136 (1990); *Vinson v. Superior Court*, 43 Cal.3d 840, 842, 239 Cal.Rptr. 292 (1987) (filing sexual harassment case did not constitute waiver of sexual privacy rights); *Lantz v. Superior Court*, 28 Cal.App.4th 1852, 1855, 34 Cal.Rptr.2d 358 (1994). That information sought covers "the same area," see Rec. at 301 (June 10, 1996 Order), as information disclosed does not abrogate plaintiffs' right to privacy. *Fults v.*

Superior Court, 88 Cal.App.3d 899, 152 Cal.Rptr. 210 (1979) (that petitioner willingly answered question regarding sexual relations as to a certain time period did not waive interest as to additional information regarding other time periods).

4. Defendants Have Offered No Justification for the Invasion of Plaintiffs' Privacy Interests Imposed by the Laboratory Work.

An important or compelling governmental interest would be required to justify the invasions of privacy alleged here. *See Hill v. N.C.A.A.*, 7 Cal.4th at 34-37. The only justification offered by defendants for the laboratory testing for pregnancy, sickle cell trait and syphilis is a statement by medical director Henry H. Stauffer, M.D.: "In my opinion, such tests were consistent with good medical practices." Rec. at 27-37. Plaintiffs submitted evidence overwhelmingly rejecting this assertion. Rec. at 85-166. The district court was forced to acknowledge "defendants' failure to provide an undisputed legitimate governmental purpose for the three tests." Rec. at 302.[7]

II. The District Court Erred in Dismissing Plaintiffs' Federal Constitutional Privacy Claims.

The district court dismissed plaintiffs' claims for relief alleging violations

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[7] The Department of Energy's current implementation guide for contractors requires LBL to provide collected and analyzed employee health data to the Office of Epidemiologic Studies, and emphasizes that "[t]he medical records of contractor employees are considered valuable epidemiologic research records." Rec. at 223-276. A California appellate court commented on another recordkeeping scheme as follows: "The Attorney General contended that the reporting of voluntary conduct was important for social science research. We decline to justify governmental investigations and computer files of voluntary sexual behavior as a contribution to a future academician's database. *Planned Parenthood Affiliates v. Van de Kamp*, 181 Cal.App.3d at 281 (1986).

of the right to privacy protected by the United States Constitution. The district court based its ruling on both the one-year statute of limitations governing these claims, and the merits of plaintiffs' privacy interests.

A. Plaintiffs' Claims Did Not Accrue Until They Became Aware That Tests for Pregnancy, Sickle Cell Trait, and Syphilis Had Been Performed.

The court below acknowledged that, under the law of this Circuit, the one year statute of limitations period began to run when the plaintiffs knew or had reason to know of the injury upon which their action was premised. Rec. at 293. However, the court refused to apply the discovery rule to the date when plaintiffs learned that their blood and urine samples had been tested for pregnancy, sickle cell trait, and syphilis. The court reasoned that because the challenged tests had been conducted on blood and urine samples taken during a medical examination of which plaintiffs were aware, and during which plaintiffs filled out medical history forms, the tests did not constitute a separate "event" on which a privacy claim could be based. According to the district court, awareness of the exam and of the inquiries on the medical history forms constituted "notice of the claim," and the statute began to run on the date the examination was performed. Rec. at 298. Therefore, although defendants were unable to articulate a legitimate government purpose for these tests, summary judgment was appropriate.

1. New Tests Conducted on Previously Drawn Blood and Urine Constitute Discrete Intrusions Subject to Constitutional Scrutiny.

Relying heavily on *Plowman v. U.S. Dep't of Army*, 698 F. Supp. 627 (E.D. Va. 1988), the court reasoned that by consenting to the taking of a blood or

urine sample, a person implicitly consents to tests for other conditions subsequently conducted on the sample. *Plowman* does not stand for this proposition. Indeed, the *Plowman* court explicitly stated that it was not deciding this issue, and proceeded to analyze the subsequent test as a separate intrusion subject to constitutional scrutiny. *Id.* at 629, n.6, 634-637.

Three district courts have held that subsequent tests for sensitive medical conditions, conducted without notice or consent on blood and urine samples obtained in connection with a routine physical examination, constitute separate intrusions or searches, and are subject to constitutional limitations. In *Anonymous Fireman v. The City of Willoughby*, 779 F. Supp. 402, 415 (N.D.Ohio 1991), the court held that an HIV test constitutes a separate search under the Fourth Amendment, even if performed on previously drawn blood, and must be subjected scrutiny under the balancing test recently iterated in *Vernonia School District 47J v. Acton*, 115 S.Ct. 2386, 2390, 132 L.Ed. 2d 564 (1995).

Following *Anonymous Fireman*, the court in *Hill v. Evans*, 1993 U. S. Dist. LEXIS 19878 (M.D. Ala. 1993), held that an HIV test performed on previously drawn blood constitutes a separate search under the Fourth Amendment. Accordingly, a court must determine whether the subsequent test, performed without informed consent, is reasonable under the Fourth Amendment in light of the government's interest in the test. *Id.* at *14.

In this case, the district court concluded that subsequent tests for intimate conditions were not intrusions distinct from the physical examinations, in part

because the tests were "done in the context of an overall general medical examination, where there are a number of intrusions into personal health matters." Rec. at 301. In *Ascolese v. Southeastern Pennsylvania Transp. Auth.* (Ascolese II), 925 F. Supp 351 (E.D. Pa. 1996), the defendant similarly argued that plaintiff's expectation of privacy was reduced because the challenged pregnancy testing was performed along with other tests in the context of periodic medical exams. *Id.* at 356. Rejecting defendant's argument, the court found that pregnancy testing represented a far greater and qualitatively different intrusion on plaintiff's privacy. Where the test had no connection to public safety, the intrusion upon an employee's privacy is quite different from those to which employees routinely submit. *Id.* at 357. Accordingly, the pregnancy test had to be reviewed separately from the other components of the routine physical exam.

2. Neither The Physical Examinations Nor The Medical History Questionnaires Put Plaintiffs On Notice of the Subsequent Testing.

As the district court acknowledged, the statute of limitations on plaintiffs' federal constitutional privacy claims began to run at the point when plaintiffs became aware, or should have become aware, that the challenged intrusion had occurred. However, the court concluded that the required physical examination and medical history questionnaires constituted notice as to the subsequent tests performed on blood and urine samples taken during the examination.

The court erred in holding that plaintiffs' federal constitutional privacy claims accrued at the time of the physical examinations, before they discovered that the tests at issue had been conducted. As discussed above, the medical history

questionnaire did not inquire whether a female employee was pregnant. It did not inquire whether an employee was a carrier of sickle cell trait. It did not specifically inquire as to whether an individual had syphilis. Moreover, as the district court noted in *Ascolese II*, tests for sensitive conditions such as pregnancy constitute a form of intrusion upon an employee's privacy quite different from normal components of a routine employment-related medical examination. 925 F. Supp. at 357. Finally, as leading experts emphasized, these tests are virtually never performed in an occupational setting. Rec. at 85-166. Thus, no reasonable person would have anticipated that he might be subjected to such highly intrusive, non job-related tests in the course of an employment-related medical exam.

B. Defendants' Testing For Pregnancy, Sickle Cell Trait, And Syphilis Significantly Invaded Plaintiffs' Federally Protected Privacy Interests.

A medical test conducted on a previously drawn biological sample must comply with the reasonableness requirement contained in the Fourth Amendment. *Anonymous Fireman*, 779 F. Supp. at 415. Thus, it must survive scrutiny under a balancing test in which the intrusion on an individual's Fourth Amendment interests is weighed against the government's legitimate interests in conducting the search. *Vernonia School District 47J v. Acton*, 115 S. Ct. 2386, 2390, 132 L.Ed. 2d 564 (1995). In conducting this balancing, a court considers the following factors: (1) the nature of the privacy interest and whether it gives rise to a legitimate expectation of privacy; (2) the character of the intrusion, which depends on the manner in which it is carried out and the information it discloses; (3) the "nature and immediacy of the governmental concern at issue"; and (4) "the

efficacy of this means for meeting it." *Id.* at 2391-94.

To survive constitutional scrutiny, the government's need for the information must be weighed against the character and extent of the intrusion. *Doe v. Attorney General*, 941 F.2d 780, 796 (9th Cir. 1991), *vacated on other grounds*, 116 S. Ct. 2543 (1996); *see also United States v. Westinghouse*, 638 F.2d 570, 578 (3rd Cir. 1980). Instead, the court relied on *Plowman* to find that because the tests were part of a comprehensive medical examination to which plaintiffs had consented, any additional intrusion occasioned by the tests was *de minimus* and need not be justified by any government interest. Rec. at 301-302. The district court failed to balance the government's need for the information against the nature and character of the intrusion as required by *Vernonia* and *Westinghouse*.

1. Unlike the Physical Exam, the Laboratory Testing Invaded Core Privacy Interests.

The tests at issue in this case intruded upon two federally protected privacy interests recognized in *Whalen v. Roe*: the individual's interest in avoiding disclosure of personal matters; and the interest in independence in making certain kinds of important decisions. 429 U.S. 589, 599-600, 97 S. Ct. 869 (1977). "The more fundamental the rights on which the State's activities encroach, the more weighty must be the State's interest in pursuing that course of conduct". *Thorne v. City of El Segundo*, 726 F.2d 459, 469 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 380 (1984). The *Thorne* court further observed that procreation and marriage choices are "at the core of rights protected by the constitution's guarantees of privacy and free association," as is information relating to sexual activity. Unlike

the medical history inquiries, the subsequent tests represented direct intrusions on core rights, and implicated both privacy interests to which *Whalen* afforded constitutional protection. Compelled disclosure of the type of information revealed by the tests interferes with plaintiffs' ability to make sexual and reproductive decisions free of government intrusion. *See Eisenstadt v. Baird*, 405 U.S. 438, 453, 97 S. Ct. 1029 (1972); *Thorne v. City of El Segundo*, 726 F.2d at 469.

Certain types of medical information associated with stigma and the potential for harms such as discrimination, deserve enhanced protection.

> Society's moral judgments about the high-risk activities associated with the disease [HIV], including sexual relations and drug use, make the information of the most personal kind. Also, the privacy interest in one's exposure to the AIDS virus is even greater than one's privacy interest in ordinary medical records because of the stigma that attaches with the disease. The potential for harm in the event of a nonconsensual disclosure is substantial.

Doe v. Borough of Barrington, 729 F. Supp. 376, 384 (D.N.J. 1990). *See also Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991). Similarly, in *Faison v. Parker*, the court found that information concerning the plaintiff's mental health and HIV status were "deserving of a high degree of protection." 823 F. Supp. 1198, 1201-02 (E.D.Pa. 1983).

Syphilis testing, like testing for HIV, reveals information concerning the presence of a sexually and perinatally transmitted disease which affects reproductive decisionmaking and which has historically been associated with

significant stigma.[8] Disclosure of the presence or absence of syphilis impinges on an individual's right to seek or decline medical treatment. *See Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 271, 110 S. Ct. 2841 (1990). While individuals with sickle cell disease usually experience symptoms alerting them to its presence, sickle cell trait is an asymptomatic condition about which an individual may not want to know, or to have influence reproductive decisionmaking. The disclosure of an immutable genetic characteristic has significant potential for harm.[9]

Plaintiffs were denied the opportunity to conduct discovery in order to ascertain who had access to the information which was collected as a result of the testing, and whether any additional disclosure, in fact, occurred. It is not necessary, however, that plaintiffs allege further disclosure of information, since it is the compelled disclosure of information to the government which is at issue.

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[8] K. F. Acuff and R. R. Faden, *A History of Prenatal and Newborn Screening Programs: Lessons for the Future*, in AIDS, WOMEN AND THE NEXT GENERATION 61 (1991).

[9] As the Rhode Island State Supreme Court recently noted: "This Court is aware of the great promise of DNA research in health care as well as the potential for abuse and misuse of genetic information. Legitimate privacy concerns continue to be raised, such as the dangers of unauthorized access to data banks that can lead to disclosure of genetic information and possible genetic information by entities such as insurance companies and employers." *State v. David Morel*, 676 A.2d 1347, 1356 (R.I.Sup.Ct. 1996). *See also* CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, GENETIC INFORMATION: DISCRIMINATION AND PRIVACY ISSUES, 96-808A (Oct. 3, 1996); Kathy L. Hudson, Karen H. Rothenberg, *et al.*, *Genetic Discrimination and Health Insurance: An Urgent Need for Reform*, 270 *Science* 391, Oct. 1995; Joseph S. Alper and Marvin R. Natowicz, *Genetic Discrimination and the Public Entities and Public Accommodations Titles of the Americans with Disabilities Act*, 53 AM. J. HUM. GENET. 26 (1993); Elaine Draper, *Genetic Secrets: Social Issues of Medical Screening in a Genetic Age*, HASTINGS CTR. REP. July/Aug. 1992.

See generally Vernonia, 115 S. Ct. 2386; *Whalen*, 429 U.S. 589; *Schowengerdt v. General Dynamics*, 823 F.2d 1328 (9th Cir. 1987); *Fraternal Order of Police, v. City of Philadelphia*, 812 F.2d 105 (3d Cir. 1987); *American Federation of Gov't Employees v. HUD*, 924 F. Supp. 225 (D.D.C. 1996); *American Federation of Gov't Employees v. Perry*, 1996 U.S. Dist. LEXIS 16175 (Feb. 23, 1996); *Anonymous Fireman*, 779 F. Supp. 402.

2. Plaintiffs had a Legitimate Expectation of Privacy with Respect to the Information Disclosed by the Tests.

Whether a legitimate expectation of privacy exists depends upon whether "the type of medical information requested has customarily been supplied. . . ." *Fraternal Order of Police v. City of Philadelphia*, 812 F.2d at 113-114 (3rd Cir. 1987). "When employees are aware that disclosure of otherwise confidential information has historically been required by those in similar positions, their expectation of privacy in that type of information is reduced." *Id.* at 114. Testing for syphilis, sickle cell trait and pregnancy have virtually never been performed in the context of employment, in the absence of a relationship to occupational exposure. Rec. at 85-166. *See also Ascolese II*, 925 F.2d at 356-57 (no diminished expectation of privacy by fact that challenged pregnancy testing occurred in context of periodic medical exams).

3. The Challenged Tests Were Imposed Without Notice or an Opportunity to Decline Testing.

Plaintiffs were not provided notice that these highly intimate tests would be performed. Rec. at 167-171, 179-222. They were "not afforded an opportunity

to make an informed employment decision based on the knowledge that they might be required to submit to intrusive government intervention on the job." *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1519 (D.N.J. 1986). Moreover, tests applied as a prerequisite for continued employment are hardly to be considered voluntary:

> [W]e reject the suggestion that the government can condition its selection of new employees on the applicants' waiver of their constitutional rights. . . This is equally as applicable to employees' privacy rights as to their First Amendment rights.

Fraternal Order of Police, 812 F.2d at 111-12. *See also American Federation of Government Employees v. HUD*, 924 F. Supp. 225 (D.D.C. 1996). "The incentive of employment is a powerful one and cannot be used to accomplish indirectly that which could not be done directly." *McKenna v. Fargo*, 451 F. Supp. at 1377.

4. No Government Interest was Offered to Justify the Challenged Tests.

The district court conceded that the government failed to identify "an undisputed legitimate governmental purpose for the three tests at this stage in the proceedings." Rec. at 18. Without any conceivable justification for a government employer to conduct testing for syphilis, sickle cell trait and pregnancy, the balance tips sharply in favor of plaintiffs' interests. In weighing competing interests, a court considers "whether a nexus exists between the information sought and the employees' work responsibilities." *American Federation of Government Employees v. Perry*, 1996 U.S. Dist. LEXIS 16175 *15 (D.D.C. 1996). As in

Schowengerdt, in which an employee's office was searched to investigate his sexual activities, the tests at issue here had "no bearing on job performance," and "would be reasonable only if relevant to [the] job. . .." *Schowengerdt*, 823 F.2d at 1336.

Although LBL's medical director may have misguidedly believed that the tests were in the best interests of employees, "employers do not have a cognizable interest in dictating a course of medical treatment for employees who suffer non-industrial injuries. That is a matter for the employees to decide, in consultation with their own health care providers -- medical professionals who have their patients' best interests at heart." *Pettus v. Cole*, 49 Cal.App.4th (1996). In short:

> Advances in medical technology make it possible to uncover disorders, including epilepsy and diabetes, by analyzing chemical compounds in urine. Plaintiffs have a significant interest in safeguarding the confidentiality of such information whereas the government has no countervailing legitimate need for access to this personal medical data.

Capua, 643 F. Supp. at 1515. *See also Lankford v. City of Hobart*, 27 F.3d 477 (10th Cir. 1994).

5. Submitting to a Physical Examination and Completing the Medical History Questionnaires Did Not Waive Plaintiffs' Privacy Interests.

The district court's Order suggests that plaintiffs waived their privacy rights in the information collected through the challenged tests by undergoing the physical examination or completing the medical history questionnaire. Persuasive authority supports the contrary conclusion. For example, in *Fraternal Order of Police*, 812 F.2d 105 (3d Cir. 1987) plaintiffs challenged certain questions

included in a questionnaire used by the police department in selecting applicants. They were not deemed to have waived their privacy interest by answering other questions contained in the questionnaire. Similar selective challenges to questionnaires and other inquiries have been successful. *See American Federation of Government Employees v. Perry*, 1996 U.S. Dist. LEXIS 16175; *Shoemaker v. Handel*, 608 F. Supp. 1151, 1159-60 (D.N.J. 1985).

Courts have been extremely reluctant to find waiver. The terms of a collective bargaining agreement cannot create waiver: "[I]f mandatory AIDS testing is otherwise an unreasonable search and seizure, it cannot be considered reasonable because a provision in a collective bargaining agreement provides for mandatory AIDS testing." *Anonymous Fireman*, 779 F. Supp. at 415. Similarly, entering into a conciliation agreement which was a matter of public record by law does not waive the constitutional right to privacy. *Doe v. City of New York*, 15 F.3d 264, 269 (2d Cir. 1994); *see also Sheets v. Salt Lake County*, 45 F.3d 1383 (10th Cir. 1995) (no waiver of privacy rights in diary turned over to law enforcement officers for limited purpose). Waiver of medical privacy is found only where strict requirements have been met. *See Chesna v. U.S. Dep't of Defense*, 850 F. Supp. 110 (D.Conn. 1994) (waiver found where plaintiff signed a written consent for the government to obtain his medical records, and was advised of his right to have a lawyer present; right to refuse to answer questions; and the purpose of the investigation and its routine uses). Filling out a medical history questionnaire or submitting to a required physical examination can hardly

operate as a waiver of privacy rights as to all information collected through subsequent testing. Since nothing operated to extinguish plaintiffs' constitutionally protected interests, the district court erred in denying discovery and granting summary judgment dismissing plaintiffs' federal privacy claims.

III. The District Court Erred In Dismissing Plaintiffs' Claims Under Title VII of the Civil Rights Act of 1964.

It is unlawful under the Civil Rights Act of 1964 for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, . . . sex, or national origin" or to "limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, . . . sex, or national origin." 42 U.S.C. § 2000e-2(a)(1), (a)(2). Consistent with these provisions, employers may not single out certain employees on the basis of their sex, race and national origin for more intrusive disclosure of intimate medical information, nor may employers selectively invade the constitutional rights of women and minorities.

While conceding that the plaintiffs "have sufficiently demonstrated that the tests were conducted on only certain individuals," the district court failed to discern any discrimination in the terms and conditions of employment, or any race- or sex-based classification that would tend to deprive an employee of employment opportunities or to otherwise adversely affect his or her status as an employee. Rec. at 307-311. Appellants contend that the selective imposition, on prohibited

bases, of surreptitious laboratory searches of employees' blood and urine, exposing intimate medical information, and the recording and maintenance of this information in employer files, constitutes discrimination.

A. Plaintiffs Were Not Put on Notice of the Race and Sex-Based Testing of Their Blood and Urine Until They Inspected Their Files.

Under established federal law, the limitations period for filing Title VII claims begins to accrue "when the plaintiff knows or reasonably should know that the discriminatory act has occurred." *Cervantes v. IMCO, Halliburton Services*, 724 F.2d 511, 513 (5th Cir. 1984). The employee must be notified of the specific act for the limitations period to begin. *Id.* at 514; *McConnell v. Gen. Tel. Co. of California*, 814 F.2d 1311, 1317 (9th Cir. 1987). In this case, plaintiffs offered evidence that they were not notified of the race- and sex-based laboratory testing until they reviewed their files in 1995. Rec. at 167-171 and 179-222.

1. Sex-Based Discrimination.

Plaintiffs allege that females were subjected to medical testing revealing additional and intimate medical information, while similarly situated males were not. According to the district court, the plaintiffs were notified of any sex-based Title VII violation at the time they filled out the medical questionnaires, because the questionnaires included a box to check for "menstrual disorders." Rec. at 306.

A quick review of the medical questionnaire relied upon by the district court reveals that this document did *not* place plaintiffs notice of such claims. The questionnaire seeks background information on the health status of all employees, male and female, and includes the following boxes for individuals to check:

Men: Prostate gland disorders	Women: Menstrual disorders
	Women: Abnormal Pap smears

Have you had surgery on the following organs or parts of your body:

Men: Testicles	Women: Ovaries
Men: Prostate gland	Women: Uterus

Rec. at 280-284. Both male and female employees were subjected to sex-specific medical inquiries. Under the principles of *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 103 S. Ct. 2622 (1983) and its progeny, it is clear that an employer may provide insurance coverage for health services used only by women, such as pap smears and pregnancy care, as well as services used only by males, such as prostate cancer treatments, without violating Title VII. Indeed, it is only where a sex-based condition is singled out for exclusion that a Title VII violation might be found. *See, e.g., United Teachers v. Board of Educ.*, 712 F.2d 1349 (9th Cir. 1983).

In the case of the questionnaire, both males and females apparently revealed equivalent amounts of medical information by answering comparable, sex-specific questions. As with insurance coverage, the inclusion of sex-specific questions directed to females and males does not automatically indicate a Title VII violation. The laboratory testing operated in a completely different fashion. Only women were subjected to an additional search of their urine, one exposing significant medical information, without their knowledge or consent. Only women were required to reveal additional, intimate information related to their reproductive status in violation of their state and federal rights of privacy. Similarly situated

males were not required to reveal such information, nor to endure violations of their constitutional rights. Accordingly, the violation of Title VII imposed by the sex-based nature of the laboratory testing program could only be known by plaintiffs upon review of their medical files in 1995, and comparison of them with the files of other employees. The administrative charges were timely filed.

2. Pregnancy-Based Discrimination.

Plaintiffs allege discrimination on the basis of pregnancy in violation of Title VII. The Pregnancy Discrimination Act provides that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy. . . ." 42 U.S.C. § 2000e(k) (emphasis added). The medical questionnaire asked no question regarding pregnancy. An inquiry as to "menstrual disorders" on a medical questionnaire simply does not place an employee on notice that she will be subjected to additional medical screening on the basis of pregnancy.[10] The administrative charges were timely filed.

3. Race-Based Discrimination.

In this case, plaintiffs allege that they were singled out on the basis of their African-American race for testing for sickle cell trait and disease, and that they were thus subjected to additional, genetic screening not imposed on non-African-

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[10] Just as a swollen prostate is a condition distinct from infertility, a menstrual disorder is distinct from pregnancy. Indeed, a menstrual disorder may not even be "related to" pregnancy. *See Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674, 679 (8th Cir. 1996) ("The plain language of the PDA does not suggest that 'related medical conditions' should be extended to apply outside the context of 'pregnancy' and 'childbirth.'") (infertility not "related condition").

American employees. Plaintiffs did not learn of this screening until they inspected their medical files, and compared them with the files of non-African-American employees.

According to the district court, the plaintiffs were notified of any race-based Title VII violation caused by the laboratory testing at the time they filled out the medical questionnaires, because these questionnaires included a box to check for "sickle cell anemia." Rec. at 306. The court's analysis presumes that the disease "sickle cell anemia" is a proxy for African American race. This is not the case. Sickle cell trait and disease occurs not only in African-American individuals, but also in individuals of other ethnic and racial backgrounds. Rec. at 85-103, 119-128. That sickle cell anemia is more common in African-Americans than in some other populations is not enough to place employees on notice of the race-based genetic screening.[11] Concluding otherwise undermines the remedial purposes of the Act. *See Sangster v. United Air Lines*, 633 F.2d 864, 867 (9th Cir. 1980) ("we refuse to give the strained interpretation urged by [defendants] as to when [plaintiff's] right of action accrued and thus to deny her redress.").

4. Race and National Origin Discrimination in Syphilis Testing.

In their proposed first amended complaint, plaintiffs allege that African-American and Latino employees were disproporationately targeted for repeated

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[11] Under this reasoning, a box for high blood pressure or heart disease places males on notice of sex discrimination in medical testing because males disproportionately experience these conditions. A box for cystic fibrosis would place white employees on notice of race discrimination because the condition is most common among Caucasian populations.

syphilis testing on the basis of race and national origin. The district court ruled that plaintiffs could amend to allege this claim but that the repeated syphilis testing must have occurred within the 300-day period of when it was performed. Rec. at 310-313. Plaintiffs were unable to so amend because the repeated testing did not take place within the 300 days.

On remand from this appeal, plaintiffs should be permitted to add this claim. As with the pregnancy testing and the race-based sickle cell screening, plaintiffs were not placed on notice of the repeated testing until they reviewed their files in 1995. More importantly, plaintiffs did not learn that discrimination had occurred, resulting from the disproportionate syphilis testing of African-American and Latino employees, until much later, when numerous individuals had obtained their medical files. Plaintiffs contest the proposition that the "venereal disease" box place them on notice that they would be subjected to race or national origin-based testing for syphilis. The administrative charges were timely filed.

B. Singling Out Individuals on the Basis of Race and Sex for Constitutionally Violative Medical Disclosures is Unlawful Under Title VII.

According to the district court, plaintiffs have not alleged or shown "any connection between these discontinued confidential tests and plaintiffs' employment terms or conditions." Rec. at 309. The lower court failed to recognize that subjecting employees to heightened scrutiny of intimate medical characteristics on the basis of race and gender indeed constitutes discrimination in a term and condition of employment. The trial court also failed to credit the intangible,

nonpecuniary harms imposed on plaintiffs by the testing, including the adverse impact of being unlawfully singled out for an invasion of constitutionally protected rights. Plaintiff's claims under Title VII should be restored.

1. By Requiring Heightened Disclosure of Medical Information, the Race- and Sex-Based Testing of Plaintiffs' Blood and Urine Constituted Discrimination in the Terms and Conditions of Employment.

The plain language of 42 U.S.C. § 2000e-2(a)(1) prohibits discrimination with respect to the terms and conditions of employment, and does not require any additional injury to state a claim. In this case, defendants targeted plaintiffs for unique burdens: African Americans employees were singled out for screening for immutable genetic conditions, and female employees were solely subjected to screening related to reproductive capacity. *See International Union v. Johnson Controls*, 499 U.S. 187, 111 S.Ct. 1196 (1991) (fetal protection policy discriminated against women because it did not apply to reproductive capacity of male employees). In so doing, defendants imposed an additional condition of employment on plaintiffs which it did not impose on other, similarly situated employees: submission to a medical surveillance program uniquely invasive of plaintiffs' individual privacy rights.

Requiring more intrusive medical disclosure from employees on the basis of race and sex is discrimination in a term or condition of employment, and therefore violates Title VII on its face. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849 (1971) (aptitude test requirement) *Carroll v. Talman Fed'l Sav. & Loan*, 604 F.2d 1028 (7th Cir. 1979) (requirement that female employees wear

uniform); *Blount v. Alabama Coop. Extension Serv.*, 869 F. Supp. 1543, 1552 (M.D. Ala. 1994) (transfer requirement); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981) (requirement that waitresses wear revealing uniforms).

The district court dismissed plaintiffs' mental anguish and fears of misuse as "hyperbole, speculation, and conjecture." Rec. at 309. However, Title VII's prohibition "is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Harris v. Forklift Systems*, 510 U.S. 17, 114 S. Ct. 367, 370 (1993).[12] Indeed, "[e]very kind of disadvantage resulting from racial prejudice in the employment setting is outlawed." *White v. Univ. of Arkansas*, 806 F.2d 790, 793 (8th Cir. 1986). Employer medical testing that discriminates on the basis of race, sex and national origin is easily within the "entire spectrum of disparate treatment" in employment. The lower court discounted the importance of the violations of trust, dignity, privacy and equal treatment imposed on female and African-American employees.

Decades of case law support plaintiffs' position that Title VII outlaws

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[12] The district court sought to distinguish this language by pointing to the requirement in *Harris* that sexual harassment be "sufficiently severe or pervasive to alter the conditions of the victim's employment." Rec. at 309. The court failed to recognize that in this case, an explicit condition of employment, as indicated by the offer letters, was that workers disclose a certain degree of sensitive medical information. To require women and African Americans alone to disclose, involuntarily, more sensitive, personal, medical information than others is an alteration of that condition of their employment.

discrimination in its evolving context; tangible job detriment is not necessary. For example, discriminatory holiday parties, lockers, showers, toilets, employee lounges, office space, and even vending machines may be challenged as discriminatory under Title VII. *See, e.g. Lynch v. Freeman*, 817 F.2d 380 (6th Cir. 1987) (unsanitary condition of toilets); *United States v. Medical Soc. of South Carolina*, 298 F. Supp. 145, 156 (D. S.C. 1969) (segregation in lounges, toilets, dressing rooms and lockers); *Johnson v. Ryder Truck Lines*, 12 F.E.P. Cases 895 (W.D. N.C. 1975) (Christmas party); EEOC Decision 71-2330, 3 F.E.P. Cases 1248 (June 1, 1971) (maintenance of vending machines benefiting white social club). Indeed, terms and conditions of employment encompass such intangibles as the benefits of a working environment free of racial discrimination, and the advantages of a position that permits use of one's own expertise, regardless of any financial concerns. *Clayton v. White Hall Sch. Dist.*, 875 F.2d 676, 679-80 (8th Cir. 1989); *White v. Univ. of Arkansas*, 806 F.2d at 793 ("if an employer requires black employees to meet a higher standard [for promotion], the statute is violated even if they actually meet it and get the jobs in question."); *Rodriguez v. Bd. of Educ. of Eastchester Union.*, 620 F.2d 362 (2nd Cir. 1980) (job transfer stated "terms and conditions" claim, even without loss in salary, benefits, seniority or tenure); *Stint v. Pullman-Standard*, 530 F.2d 77, 92 (5th Cir. 1977) ("plaintiffs need not show that they were assigned to *less desirable* departments").

As the Eighth Circuit explained, in finding that the exclusion of black firefighters from informal "supper clubs" violated Title VII:

> This language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow. Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting. But today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues.

Firefighters Inst. v. City of St. Louis, 549 F.2d 506, 514 (8th Cir. 1977) (internal quotation omitted). Plaintiffs have stated claims under Title VII.

2. The Race and Sex-Based Testing of Plaintiffs' Blood and Urine Constituted Unlawful Classification in Violation of Title VII.

Title VII prohibits an employer from segregating or classifying an employee on the basis of race, sex, or national origin. Unlawful classifications are not limited to those triggering a tangible loss in job title, salary or benefits; they need only "tend to deprive" an individual of job opportunities or "otherwise adversely affect his status as an employee." 42 U.S.C. § 2000e-2(a)(2).

Federal civil rights law and equal protection jurisprudence have long forbidden various forms of classification solely because they impose adverse psychic harm. The assignment of police officers, salespeople and personnel recruiters to particular neighborhoods or groups of clients solely on the basis of

race or national origin, for instance, is prohibited.[13] While the salary, benefits, and job description of the assignments may be identical, these classifications are yet unlawful because they impart stigmatic harm: "The Department concluded that Negroes as a class are suitable only for the [predominantly black] zone appropriately numbered 13. This is the kind of badge of slavery the thirteenth amendment condemns." *Baker v. City of St. Petersburg*, 400 F.2d 294, 300 (5th Cir. 1988).

In this case, the testing of all African-American employees for sickle cell trait and disease, and the disproportionate testing of African-American and Latino employees for syphilis label these employees as more likely to be carriers of sexually transmitted disease as well as genetic traits deemed undesirable, on the basis of race and national origin, and thus adversely affect the status of plaintiffs. *See Rogers v. Equal Employment Opportunity Commission*, 454 F.2d 234 (5th Cir. 1971), *cert denied*, 406 U.S. 957 (1972) (noting that Title VII sought to eliminate the psychic harm of discriminatory practices).

The inherently invidious nature of classifications based on sex and pregnancy is also well-established, demonstrating the adverse effect of such classifications on plaintiffs' status as employees. "Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment

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[13] *See Knight v. Nassau Cty. Civil Service Comm'n*, 649 F.2d 157 (2nd Cir. 1981) (assignment of black personnel specialist to minority recruitment); *Allen v. City of Mobile*, 331 F. Supp. 1134 (S.D. Ala. 1971) (assignment of black officers to "black" cases and predominantly black neighborhoods); EEOC Decision No. 70350, 2 F.E.P. Cases 498 (Dec. 16, 1969) (assignment of black salesman to "all Negro accounts").

opportunity." *International Union v. Johnson Controls*, 499 U.S. at 211. Women facing an employer's mandatory pregnancy testing program encounter the stereotyped presumption that they are bearers of children, and may not belong in the workplace. The Pregnancy Discrimination Act was enacted "to protect female workers from being treated differently from other employees simply because of their capacity to bear children." *Id.* at 205. The legislative history makes clear that "distinctions based on pregnancy are *per se* violations of Title VII." H.R. Rep. No. 948, 95th Cong., 2nd. Sess. 3 (1978). Accordingly, the United States Supreme Court has held that an explicit classification on the basis of the potential for pregnancy violates Title VII on its face. *Johnson Controls*, 499 U.S. at 198-99.

Likewise, courts considering challenges to segregated union locals reject the notion that quantifiable job detriment is a necessary element of a violation, and find segregation to be *per se* violative of Title VII regardless of any tangible impact on job opportunity.[14] In finding that segregated unions by their very

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[14] *Williams v. New Orleans S.S. Ass'n*, 466 F. Supp. 662, 679 (E.D. La. 1979) *rev'd and remanded on other grounds*, 673 F.2d 742 (5th Cir. 1982) (where it has not been demonstrated that discrimination presently exists, separate locals are a *per se* violation because employment discrimination "could, in the future, arise from segregated locals"); *Musicians' Protective Union Local No. 274 v. American Fed. of Musicians*, 329 F. Supp. 1226 (E.D. Penn. 1971) (despite fact that individual musicians obtain jobs through their own efforts rather than through the union, segregated locals are *per se* violation). *See also Baily v. Ryan Stevedoring Co.*, 528 F.2d 551, 557 (5th Cir. 1976) (despite evidence that black union members obtained same wages, number of jobs, and equal working conditions, segregated locals represent a "real possibility for discriminatory treatment" and violate Act); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 435, 457 (5th Cir. 1971) (although district court "discerned no situation in which specific lodge

nature would "tend to deprive any individual of employment opportunities," Judge Goldberg of the Fifth Circuit wrote:

> [T]he unions cannot make such a showing, even granting that present longshoremen, whether black or white, are paid the same wages, have equal numbers of representatives on the contract negotiating committee, and, under a common seniority and hiring hall system, could be assured of an equal chance of obtaining longshore work. . . Many black people who are about to embark upon a career will be dissuaded from becoming longshoremen because of the extra burden which attaches to that profession in the form of the psychic discomfort of segregation. That extra obstacle, in other words, tends to deprive them of their opportunity to become longshoremen.

Equal Employment Opportunity Comm'n v. Intern'l Longshoremen's Ass'n, 511 F.2d 273, 277-78 (5th Cir. 1975).

Just like segregated unions, pregnancy classifications, and race-based job assignments, the race and sex-based classifications here *inherently* adversely affect plaintiffs' status as employees. The classifications required plaintiffs to bear a badge of disease and stigma not borne by other employees, and forced plaintiffs to submit to unwarranted personal invasions not required of their fellow workers. As the United States Supreme Court most recently stated, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand Constructors v. Pena*, __ U.S. __, 115 S.Ct. 2097, 2114 (1995) (emphasis supplied).

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membership affects employment opportunities," existence of "'separate but equal' locals has had, and may continue to have, post-Act deleterious effects on blacks").

3. Defendants' Violation of Plaintiffs' Constitutional Rights on the Basis of Sex and Race Constitutes an Adverse Effect.

By depriving LBL employees of their constitutionally protected rights, or invading them selectively on the basis of race or gender, the state defendants violated Title VII. Abrogation of constitutional rights conducted along race or gender lines imposes a classification which materially affects the status of tested employees. The privacy rights invaded by defendants are ones which have been pronounced "fundamental," and "at the core of the rights protected by the [United States] constitution's guarantees of privacy and free association." *Thorne v. City of El Segundo,* 726 F.2d at 469.

Respect for employees' constitutional rights is a basic privilege of employment enjoyed by government employees. Denial of that privilege on a discriminatory basis has been found to violate Title VII. In *Chandler v. Fast Lane*, a federal district court found a Title VII violation where the employer's racially discriminatory employment policies violated plaintiffs' fundamental right to associate with African-American employees. 868 F. Supp. 1138, 1143 (E.D.Ark. 1994), *citing Loving v. Virginia,* 388 U.S. 1, 87 S. Ct. 1817 (1967). Courts reviewing maternity leave policies under the sex and pregnancy discrimination provisions of Title VII have weighed their impact upon "one of the most basic civil rights" of female employees, the right, as described by the United States Supreme Court in *Skinner v. Oklahoma,* "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." As the Sixth Circuit stated:

> [M]aternity leave rules directly affect "one of the most basic civil rights of man." To exclude such a basic civil right from protection against invidious employment termination would be contrary to the policy to which Title VII is directed. . . .

Jacobs v. Martin Sweets Co., 550 F.2d 364, 370 (6th Cir. 1977), *citing Skinner v. Oklahoma*, 316 U.S. 535 (1942). *See also McGinnes v. U.S. Postal Service*, 512 F. Supp. 517, 526 n.12 (N.D.Cal. 1980) (interference with plaintiff's First Amendment rights raised sufficient threat of injury to permit injunctive relief under Title VII).

In this case, the invasion of plaintiffs' constitutional rights exposed them to stigma and discrimination, a harm courts have deemed substantial and cognizable. For example, the Eleventh Circuit found injury in the collection of information regarding HIV status, noting "society's moral judgments," "the stigma that attaches with the disease," and "the potential for harm in the event of a nonconsensual disclosure. . .." *Harris v. Thigpen*, 941 F.2d at 1514. *See also Doe v. Borough of Barrington*, 792 F. Supp. at 384; *Ascolese v. Southeastern Pa. Transp. Auth.* (Ascolese I), 925 F. Supp. 351 (E.D. Pa. 1996); *Capua v. City of Plainfield*, 643 F. Supp. at 1515. Indeed, the dangers which attend the stockpiling of highly personal information are such that courts have concluded that even legitimately collected, properly secured data should not be indefinitely maintained. *McKenna v. Fargo*, 451 F. Supp. at 1391-92.

What is more, courts have long held that a violation of a constitutional right, by itself, is sufficient to constitute "irreparable harm," regardless of any actual damage. "When the right the plaintiff is allegedly deprived of constitutes an

important aspect of a person's identity," irreparable injury occurs; in fact, "[m]oney damages are inadequate." *Gutierrez v. Mun. Ct. of S.E. Judicial Dist.*, 838 F.2d 1031, 1045 (9th Cir. 1988), *vacated on other grounds*, 490 U.S. 1016 (1989).

IV. The District Court Erred in Dismissing Plaintiffs' Claims Under the Americans With Disabilities Act of 1990.

The district court claims that plaintiffs should have filed their claims under the Americans with Disabilities Act within one year of their filling out the medical questionnaire and submitting to the medical examination. For the reasons outlined above, the questionnaire did not place plaintiffs on notice of the subsequent ADA violation imposed by the laboratory testing, and the plaintiffs' statute of limitations regarding the testing of blood and urine did not begin to run until they reviewed their medical files in 1995. Moreover, the ADA limits medical recordkeeping by an employer to the results of job-related examinations consistent with business necessity. 42 U.S.C. § 12112(d). In this case, defendants maintained records of the results of the unlawful[15] laboratory testing for syphilis, sickle cell trait and disease, and pregnancy. The employees were not on notice of this maintenance of information, constituting a continuing violation of the Act, until they reviewed their medical files in 1995. Rec. at 167-171, 179-222. Plaintiffs' claims under the ADA are not time-barred.

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[15] The district court did not address the merits of plaintiffs' ADA claim. Under the ADA, an employer may not "require a medical examination . . . unless such examination . . . is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d). Defendants do not attempt to meet this standard.

Finally, information collected through the laboratory search must, consistent with the ADA, be maintained in confidential medical files, and may not be used for any purpose inconsistent with the Act. *See* 42 U.S.C. § 12112(d)(3)(B), (C). Although the defendants assert that they have maintained the records confidentially, with no disclosure of information, defendants have failed to describe the procedures by which a third party might gain access to the records, and the enforcement of any rules, policies, regulations or procedures to prevent third parties from gaining access to the records. Given plaintiffs' limited access to discovery, summary judgment was premature.

CONCLUSION

For the reasons discussed above, the district court erred in dismissing plaintiffs' claims under the California State Constitution, Art. I, Sec. 1; the United States Constitution; Title VII of the Civil Rights Act of 1964; and the Americans with Disabilities Act of 1990. The district court's ruling should be reversed.

Respectfully submitted,

The Employment Law Center, A Project
of the Legal Aid Society of San Francisco

Vicki Laden
Jennifer Middleton
Claudia Center

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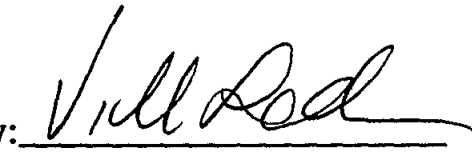
By: 
Vicki Laden
Counsel for Plaintiffs