
IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 27 1997

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

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' REPLY BRIEF

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INTRODUCTION

At the heart of the controversy in this case is whether the defendants should be permitted to conduct testing for sickle cell, pregnancy and syphilis, profoundly intimate conditions linked to sexual activity and reproduction, without articulating any justification. Such a result is contrary to case law, and ominous as a matter of public policy. If defendants succeed in vitiating the requirement that a legitimate explanation must be proffered for medical testing in the workplace, employers can secretly test employees for such conditions as HIV or the gene predisposing individuals to breast cancer in the course of general medical examinations, based on mere preference or proclivity for this information, without implicating constitutional privacy protections. At a time when genetic and biomedical tests have begun to proliferate, acceptance of defendants' arguments would validate unfettered use of tests unrelated to job performance or occupational hazards, and imposed without the knowledge or consent of employees to whom they are administered.

Defendants also deny that in the event these tests selectively trammelled privacy by race, national origin or gender, the intrusions can serve as the predicate for claims based on Title VII of the Civil Rights Act of 1964. Defendants

effectively consign constitutional privacy to the bottom of the hierarchy of employment rights and privileges.

ARGUMENT

I. THE CHALLENGED LABORATORY TESTING VIOLATED PLAINTIFFS' RIGHTS TO PRIVACY UNDER THE STATE AND FEDERAL CONSTITUTIONS.

A. Appellants' Privacy Rights in the Biochemical Information Obtained by Defendants Cannot be Deemed Extinguished or "De Minimis."

Without requiring defendants to articulate a legitimate interest in testing employees at Lawrence Berkeley Laboratory for sickle cell, syphilis and pregnancy, the court below found the intrusion on plaintiffs privacy to be "de minimis" as a matter of law, relying on *Plowman v. U.S. Dep't. of Army*, 698 F. Supp. 627 (E.D.Va. 1988). Neither *Plowman* nor any of the cases discussed in the State Defendant's Opposition Brief (State Opp.) and the Federal Defendant's Opposition Brief (Fed. Opp.) support deviation from the requirement, central to both state and federal privacy jurisprudence, that the government identify a legitimate interest in the testing.

A recent case, *Loder v. City of Glendale*, 14 Cal.4th 846, 59 Cal.Rptr.2d

696 (1997), highlights the significance of this requirement.¹ In *Loder*, the California Supreme Court barred suspicionless drug testing with advance notice of city employees seeking promotions, while sanctioning such testing of job applicants. This case strongly buttresses plaintiffs' claims that the defendants violated plaintiffs' privacy rights under the state and federal constitutions. Even as to job applicants, the Court required the government to articulate a sufficiently weighty state interest: "Accordingly, in determining the validity of the preemployment testing, we must consider the legitimacy and strength of the employer's interest in conducting such testing." *Loder*, 59 Cal.Rptr. at 729. Finding that "significant problems -- absenteeism, increased safety concerns, tardiness, reduced productivity, and increased risk of turnover -- typically posed by an employee who abuses drugs or alcohol" can create a "legitimate and substantial" government interest in preemployment testing," the Court authorized detection of substance abuse "before the employer finalizes any hiring decision." *Id.*

Contrary to defendants' characterization, *Loder* stands for the proposition

¹ As discussed in Appellants' Opening Brief, plaintiffs allege that the challenged medical testing violated their privacy rights under both the United States Constitution and the California State Constitution. Whether the claim is brought under federal or state constitutional law, the government must articulate a legitimate interest justifying the intrusion.

that even in the context of a preemployment physical, "[t]he disclosure of additional private information through testing a bodily substance" constituted an intrusion that was "not insignificant or de minimis" and "would not be permissible in the absence of reasonable justification." *Id.* See also *Yin v. State of California*, 95 F.3d 864, 871 (9th Cir. 1996), *cert. denied*, U.S. LEXIS 777; 65 U.S.L.W. 3568 (1997) ("Although Yin has a societally recognized expectation of privacy in not being subjected to a medical examination, several factors diminish -- but do not extinguish -- that expectation.") (emphasis added). Although the Court found the intrusion on job applicants' privacy rights to be lessened because the drug testing was performed in the course of general medical examinations, these rights were by no means extinguished. The court cautioned against reading its opinion in *Hill v. N.C.A.A.*, 7 Cal.4th 1, 26 Cal.Rptr.2d 834 (1994), to forego analysis of competing interests, stating that the elements articulated in the case "should not be interpreted as establishing significant *new* requirements or hurdles that a plaintiff must meet in order to demonstrate a violation of the right to privacy under the state constitution." *Loder*, 59 Cal.Rptr. at 724 (emphasis in original).

Unlike the City of Glendale, the defendants here cannot seriously maintain that testing for sickle cell, syphilis or pregnancy is justified by any legitimate

concern, since these tests yield information about sexual activity and reproduction, hardly legitimate areas of inquiry for an employer. Without any conceivable relation to a proper objective, the testing at LBL would fail scrutiny under *Loder*, even if had been conducted before the employees had begun work. Further, unlike the job applicants and employees in *Loder*, the individuals at LBL received no notice whatsoever that these tests would be performed.

A crucially important fact, obscured by the defendants' argument, is that the individuals who were tested at LBL were employees, not job applicants, and thus are comparable to the *Loder* employees for whom testing was prohibited. While noting that *Loder* had looked to the ADA's medical screening provisions for instruction, State Opp. at 25, defendants selectively disregard the equally instructive sections of the regulations accompanying the ADA. "A covered entity may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties..." 29 C.F.R. § 1630.14(b) (emphasis added). Similarly, the Interpretive Guidance to this section states that "An employer is permitted to require post-offer medical examinations before the employee actually starts working." 29 C.F.R. App. 1630.14. After that point, medical inquiries must be

job-related and consistent with business necessity. 42 U.S.C. § 12112(c)(4)(A).

The individuals who were tested at LBL were not job applicants. Each had begun his or her job duties prior to being tested. The pertinent section of *Loder*, then, is its rejection of drug testing of current employees, even with advance notice, where less intrusive means -- the observation of behavior -- were available. Similarly, any need which LBL succeeded in identifying for the laboratory testing could undoubtedly have been satisfied with far less intrusion.

B. Plaintiffs Were Not Notified of the Challenged Tests at the Time of the Examinations.

Asserting a statute of limitations defense, defendants argue that the challenged laboratory testing is indistinguishable from the medical examinations and questionnaires, and/or that the examinations and questionnaires provided constructive notice of the testing. Declarations of plaintiffs' medical experts, however, refute these assumptions. Nothing about the examination at LBL would have alerted plaintiffs to the possibility that such tests would be performed, when occupational physicians are themselves astonished to learn of their occurrence. Rec. at 85-171. Submitting to a general examination provides no warning that an employer might discover that an employee is pregnant, is currently engaging in sexual activity, or has an asymptomatic genetic trait.

Defendants have failed to find a single independent physician who supports occupational testing for syphilis, sickle cell or pregnancy, or who has actual knowledge of any other employer administering such tests. If, as plaintiffs' experts attest, these tests are simply never performed in an occupational setting, then filling out a medical history can hardly be construed as notice of the testing.² To hold as a matter of law that plaintiffs in an occupational setting relinquish all expectation of privacy through submission to a general exam disregards expert opinion that this sort of highly private information is well outside the scope of what could have been anticipated.

The test for sickle cell trait, for example, yielded information of significance exclusively in reproductive decision-making. "Offering carrier screening to assist couples in making reproductive decisions is not a neutral activity but, rather, implies that some action should be taken on the basis of the results of the test." S. Elias and G.J. Annas, *Generic Consent for Genetic Screening*, 330 NEW ENG. J. MED. 1611, 1613 (1994). Testing for sickle cell "can be considered uniquely private or personal information, even more personal than other medical

² Defendants' reference to a textbook which mentions that syphilis testing is of "accepted value" in a preventive health examination, State Opp. at 26, has no bearing on whether such a test is ever performed or expected in an occupational setting.

information such as human immunodeficiency virus (HIV) status or mental health, for at least three reasons: it can predict an individual's likely medical future; it divulges personal information about one's parents, siblings, and children; and it has a history of being used to stigmatize and victimize individuals." G.J. Annas *Editorial: Genetic Prophecy and Genetic Privacy -- Can We Prevent the Dream from Becoming a Nightmare?*, 85 AM. J. PUB. HEALTH, 1196, 1197 (1995).

It is unlikely that any employee would expect that an employer would perform a test generating information used solely in making decisions as to partner selection, birth control and abortion. In fact, the collected information on genetic carrier status is information that many people choose not to know, and not to incorporate into personal reproductive decisions. For example, when offered screening to identify carriers of cystic fibrosis, "very few couples chose to be tested." E.W. Clayton, *et al.*, *Lack of Interest by Nonpregnant Couples in Population-based Cystic Fibrosis Carrier Screening*, 58 AM. J. HUM. GENETICS, 617, 622 (1996); *see also* L.B. ANDREWS, ET AL., EDS., *ASSESSING GENETIC RISKS: IMPLICATIONS FOR HEALTH AND SOCIAL POLICY* (1994).

According to defendants' arguments, nonconsensual HIV testing by employers would be permissible in the course of a general occupational medical

examination, and individuals who answered medical history forms including questions about venereal disease would at that time be on notice of the HIV testing. What makes this result both morally objectionable and legally wrong is that employees simply do not expect to be tested for HIV by their employers without notice, since HIV status is profoundly personal, unrelated to any aspect of job performance, and testing to determine it is invariably done only by an individual's designated physician. Similarly, employees do not expect to be tested by their employers without notice for a gene predisposing individuals to breast cancer, even if they have filled out a questionnaire inquiring as to cancer history. The same is true of the tests performed at LBL. No employee would have expected the testing performed here with no warning.

Further, the profound difference between the therapeutic setting and the occupational setting appears to have eluded notice by defendants, who refer to the tested employees as "patients." State Opp. at 24, 27 and 28. The law provides no basis for this assumption. In California, as in the majority of jurisdictions, a physician-patient relationship does not exist in an occupational medical examination. *Hoesl v. United States*, 451 F. Supp. 1170, 1176 (N.D.Cal. 1978) (examining physician is not treating physician, and duty is to employer, not

employee); *Felton v. Schaeffer*, 229 Cal.App.3d 229, 279 Cal.Rptr. 713 (1991) (no physician-patient relationship between physician performing preemployment physical and examinee); *see generally*, D.G. Rischitelli, *The Confidentiality of Medical Information in the Workplace*, 37 J. OCCUP. & ENVT'L. MED., 583 (1995). Consistent with the absence of a negligence-based duty of care by a physician performing an occupational medicine examination is the expectation by an examinee in the same environment that the examination will not include a vast extension into reproductive matters, such as pregnancy, syphilis, and sickle cell trait, which have no connection to work performance.

Because the examination and questionnaire cannot constitute notice, LBL employees did not become aware of the scope of the search until they obtained their files and learned that they had been tested for syphilis, sickle cell and pregnancy. The statute of limitations period did not begin to run until plaintiffs had notice of the scope of the search, since it was the scope which violated their constitutionally protected privacy rights. It is well settled that a search must be reasonable both at its inception and in its scope. *O'Connor v. Ortega*, 480 U.S. 725, 729, (1987). "The search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively

intrusive." *Id.* at 1502 (citations omitted). In *O'Connor*, the United States Supreme Court found summary judgment inappropriate and remanded where facts were disputed as to reasonableness at inception and where no findings had been made about the scope and its reasonableness.

C. Plaintiffs Did Not Consent to the Testing of Their Blood and Urine for Pregnancy, Sickle Cell Trait and Syphilis.

Defendants suggest that plaintiffs somehow consented to the testing of their blood and urine for pregnancy, sickle cell trait and syphilis. *See Fed. Opp.* at 36; *State Opp.* at 31-32. Accepting a job, however, does not constitute consent to laboratory testing or waiver of constitutional privacy rights. To require waiver of medical privacy rights as a prerequisite to government employment, in the absence of a sufficient and legitimate government interest, would impose an unconstitutional condition. "The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Pickering v. Bd. of Educ.*, 391 U.S. 566, 568 (1968). Indeed, were it the case that simply accepting a job that one knows will include an invasion of privacy constitutes consent to this or any related invasion, an entire body of United States Supreme Court fourth amendment jurisprudence in which state and individual interests are balanced would have been

unnecessary. *See, e.g., Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (testing program was set out in regulations and "well known to covered employees"); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (toxicological testing "well known to covered employees").

Similarly, the right to privacy is not waived because plaintiffs submitted to medical examinations, filled out medical questionnaires, and provided blood and urine samples.³ The right to privacy is separately invaded by biochemical analysis. "The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests." *Skinner*, 489 U.S. at (emphasis added). "Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, . . . these intrusions must be deemed searches under the Fourth

³ Even using defendants' premise that plaintiffs should be compared to patients seeking diagnosis and treatment, *see* State Opp. at 24, 27, 28, it would certainly be a question of fact as to whether plaintiffs gave informed consent, where they were utterly unaware of the scope of the testing, and deny seeing any signs alerting them that these tests would be performed. *Truman v. Thomas*, 27 Cal.3d 285, 293-4, 165 Cal.Rptr. 308 (1980); *Cobbs v. Grant*, 8 Cal.3d 229, 104 Cal.Rptr. 505 (1972); *see also* Rec. at 167, 180, 188, 197, 204, 209, 216. Similarly, where testing is conducted for epidemiological research, "the general legal and ethical rule is that people participate in research only after they have given their informed consent." E.W. Clayton *et al.*, *Informed Consent for Genetic Research on Stored Tissue Samples*, JAMA, 1786, 1787 (1995); *see also* L.B. ANDREWS, ED., *ASSESSING GENETIC RISKS: IMPLICATIONS FOR HEALTH AND SOCIAL POLICY* (1994); W.E. Thar, *The Epidemiologist's Responsibilities to Research Subjects in the Occupational Setting*, 44 J. CLIN. EPIDEMIOLOGY 91S (1991).

Amendment. *Skinner*, 489 U.S. at 617 (emphasis added). "Where the Government requires its employees to produce urine samples to be analyzed for evidence of illegal drug use the collection and subsequent chemical analysis of such samples are searches that must meet the reasonableness requirement of the Fourth Amendment." *Von Raab*, 489 U.S. at 678-79 (emphasis added). As the California Supreme Court recently stated:

[T]he addition of a drug testing component to a routine medical examination does involve the disclosure of some additional private information about the individual . . . The disclosure of additional private information through testing a bodily substance obtained from an individual and the increased monitoring of the process . . . constitute intrusions upon the applicant's constitutional privacy interests that are not insignificant or de minimus -- intrusions that would not be permissible in the absence of reasonable justification.

Loder v. City of Glendale, 59 Cal.Rptr.2d 696, 729 (1997).

The federal defendant cites *Rise v. State of Oregon*, 59 F.3d 1556 (9th Cir. 1995), for the proposition that no privacy interest was invaded because plaintiffs "voluntarily" submitted to the medical examination. Fed. Opp. at 36. In *Rise*, the Ninth Circuit upheld a provision requiring blood sampling and DNA typing of convicted sex offenders after balancing the privacy interests of the convicted felons against the state's interest in identifying and prosecuting sex offenders. Thus, *Rise* is miscited for the proposition that the additional invasion of DNA typing needs

no justification at all: the state's interest in protecting society against sex crimes was asserted by defendants and weighed by the court in upholding the provision. *See also Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996) ("while obtaining and analyzing the DNA or saliva of an inmate convicted of a sex offense is a search and seizure implicating Fourth Amendment concerns, it is a reasonable search and seizure").⁴

A far more apposite case is *Hansen v. Cal. Dep't of Corrections*, 920 F. Supp. 1480 (N.D. Cal. 1996). In that case, a corrections officer signed an agreement explicitly consenting to random drug testing through urinalysis. This consent did not defeat her claim that an invasion subsequently imposed violated her state constitutional privacy rights: "What she insists she had not voluntarily agreed to, however, was the specific, deeply invasive component of the testing that

⁴ In balancing, the *Rise* court did note that the individual privacy interests of convicted sex offenders are reduced:

Chapter 669 authorizes DOC to acquire blood samples not from free persons or even mere arrestees, but only from certain classes of convicted felons in order to create a record for possible use for identification in the future. These persons do not have the same expectations of privacy in their identifying genetic information that "free persons" have.

Rise, 59 F.3d at 1560. Appellants trust that the Department of Justice does not mean to suggest that the medical privacy interests held by government employees are equivalent to those enjoyed by convicted sex offenders.

consisted of a staff person directly observing her urination. It is the legitimacy of her expectation of privacy with respect to that particular component of the testing that is the central issue" 920 F. Supp. at 1504. Here, plaintiffs insist that they never agreed to the dangerously intrusive laboratory testing for the intimate medical conditions of syphilis, sickle cell trait and pregnancy.

D. Constitutionally Permissible Invasions Must be Supported by a Legitimate Government Interest.

The United States Supreme Court has never implied that government employers have a legitimate interest in "employee wellness," unconnected to job performance, safety and/or criminal activity: "*Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms.*" *Von Raab*, 489 U.S. at 672; *see also Skinner*, 489 U.S. at 620-21 (citing interest in preventing "accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs"). Where the connection to legitimate employer concerns is not clear on the record, the nation's highest court has declined to uphold such inquiries. *Von Raab*, 489 U.S. at 678 (striking down portion of drug testing program where connection to safety interest too attenuated).

"More than mere rationality is required." *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978) The interest must be "important enough to justify the particular search at hand." *Vernonia Sch. Dist. 47 J v. Acton*, 113 S. Ct. 2386, 2394 (1995) (emphasis in original). Defendant-appellees have cited no case for the proposition that a vaguely worded government interest in "employee wellness" -- unrelated to job duties, safety or crimes -- can justify intrusive laboratory testing performed without notice.⁵ For example, in *Int'l Bhd. of Teamsters v. Dep't of Trans.*, 932 F.2d 1292 (9th Cir. 1991), random drug testing of truck drivers was upheld because it promoted a compelling interest in public safety, and drivers had notice of the scope of the intrusions. Similarly, in *ATU v. Cambria*, 691 F. Supp. at 902-04, the transit employees had "notice far in advance" that drug and alcohol

⁵ See *Amalgamated Transit Union (ATU) v. Cambria Cty. Transit Auth.* 691 F. Supp. 898 (W.D. Penn. 1988) (citing state interest in public safety in upholding drug testing of transportation employees); *Amalgamated Transit Union, Local 933 v. Oklahoma City*, 710 F. Supp. 1321 (W.D. Okla. 1988) (same); *Fowler v. New York Dep't of Sanitation*, 704 F. Supp. 1264 (S.D.N.Y. 1989) (same); *Int'l Bhd. of Teamsters v. Dep't of Trans.*, 932 F.2d 1292 (9th Cir. 1991) (same); *Wrightsell v. City of Chicago*, 678 F. Supp. 727 (N.D. Ill. 1988) (citing government interest in public safety and fitness for duty in upholding drug testing of police officers); *Anonymous Fireman v. City of Willoughby*, 779 F. Supp. 402 (N.D. Ohio 1991) (citing interest in protecting public from contraction of HIV in upholding HIV testing of firefighters and paramedics); *Plowman v. Dep't of Army*, 698 F. Supp. 627, 636 (citing interest in protecting surgical personnel from contraction of HIV in upholding test); *Fraternal Order of Police Lodge No. 5 v. City of Phila.*, 812 F.2d 105 (3d Cir. 1987) (citing need to select physically and mentally capable police officers for special investigations unit imposing dangerous and high stress situations in upholding personal questions of applicants); *Doe v. SEPTA*, 72 F.3d 1133 (3d Cir. 1995) (citing interest in detecting fraud by suppliers and consumer employees in upholding monitoring of prescription records).

testing would be performed. In *Wrightsell v. City of Chicago*, 678 F.Supp 727 (N.D. Ill. 1988), the court found that drug testing of police officers with notice of the search and its scope was permissible as part of a routine medical examination "where there is a clear nexus between the test and the employer's legitimate safety concern." *Id.* at 730-33. In each of these cases the government's interest was sufficient to support the search, and in no case were employees unaware of its scope.

Even where an employer has articulated a plausible interest in employee testing, it must still show that the interest justifies testing. In *Glover v. Eastern Neb. Com. Off. of Retardation*, 686 F. Supp. 243, 250-51 (D.Neb. 1988), *aff'd* 867 F.2d 461 (8th Cir. 1989), the court struck down employee testing for HIV and Hepatitis B to protect clients from contracting these diseases, finding that less intrusive measures existed to address risks. Similarly, in *Hawaii Psych. Ass'n v. Ariyoshi*, 481 F. Supp. 1028 (D. Haw. 1979), state review of psychiatric information contained in patient files was not justified by the legitimate interest in preventing Medicaid fraud, where there was no evidence that review of confidential information was necessary, and where less intrusive means were available.

The few cases that have considered employee health as a government interest support plaintiffs' claim that the privacy interests here cannot be counterbalanced by an interest in "wellness." In *United States v. Westinghouse*, 638 F.2d 570 (3d Cir. 1980), the Third Circuit found that although the National Institute of Occupational Safety and Health had a legitimate interest in occupational safety sufficient to permit review of medical files to investigate workplace exposures, the privacy interests of individual employees required affording them notice and the opportunity to protest. "[E]ach employee is entitled to make an individual judgment as to whether s/he regards the information as so sensitive that it outweighs that employee's interest in assisting NIOSH in a health hazard investigation that may benefit the employee." *Id.* at 581; *see also Ascolese v. SEPTA* (Ascolese II), 925 F. Supp. 351, 355-56 (E.D. Pa. 1996) (state interest in employee health could not support unauthorized pregnancy test).

Contrary to defendants' characterization, the Ninth Circuit in *Yin v. State of California*, 95 F.3d 864 (9th Cir. 1996), did not find a government interest in the "productivity and stability of its work force" entitling an employer to conduct examinations on employees unrelated to their performance, but instead relied on Yin's poor attendance record in upholding the examination requested of her. 95

F.3d at 873. Similarly, in *Local 1812 v. United States Dep't of State*, 662 F. Supp. 50 (D.D.C. 1987), HIV testing with advance notice was justified by the government's need to determine the ability of applicants to "function on a worldwide basis" where substantial medical evidence showed that HIV-positive individuals placed in certain foreign posts would be at significant medical risk due to inadequacy of medical care and poor sanitary conditions. Here, unlike *Yin* or *Local 1812*, no such "fitness for duty" rationale exists.

E. Constitutionally Permissible Invasions Require Procedures and Limitations Designed to Prevent the Use of Arbitrary and Unfettered Discretion by Public Officials.

The "reasonableness" deemed by the United States Supreme Court to support drug testing is premised on incorporation of procedures designed to prevent the use of "arbitrary discretion and oppressive interference with the privacy and personal security of individuals that the Fourth Amendment was designed to prevent." *Von Raab*, 489 U.S. at 672 n.2 (citing advance notice to employees and regulations limiting type of testing permitted to be done on samples); *see also Skinner*, 489 U.S. at 622, n.6, 626 (citing notice to employers, regulations limiting discretion in choosing employees for testing, regulations barring inquiries into private facts unrelated to alcohol or drug use); *Vernonia School Dist. 47J v. Acton*, 115 S.Ct.

2386, 2393 (noting that tests look only for drugs, and not for medical conditions, and that screenings are standard and do not vary with the individual). "[T]he circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically, and doubtless are well known to covered employees." *Von Raab*, 489 U.S. at 667; *see also Skinner*, 489 U.S. at 622. "A covered employee is simply not subject to the discretion of the official in the field." *Von Raab*, 489 U.S. at 667. On the other hand, where the examiner "was given free reign to inquire into any area he chose," without limitations, standards, guidelines or definitions, this Court has rejected such inquiries:

When the state's questions directly intrude on the core of a person's constitutionally protected privacy and associational interests . . . an unbounded, standardless inquiry, even if founded upon a legitimate state interest, cannot withstand the heightened scrutiny with which we must view the state's action.

Thorne v. City of El Segundo, 726 F.2d 459, 469-70 (9th Cir. 1983), *cert. denied*, 469 U.S. 979 (1984).

The testing at issue here is notably unconfined by procedures and limits, and cedes complete discretion to medical officials in the field. The employees at LBL were indeed subject to "the random or arbitrary acts of government agents," *Skinner*, 489 U.S. at 622, who were "given free reign to inquire into any area

[they] chose," *Thorne*, 726 F.2d at 469.

II. CONSTITUTIONALLY VIOLATIVE EMPLOYEE TESTING IMPOSED ON THE BASIS OF SEX, RACE AND/OR NATIONAL ORIGIN, VIOLATES THE CIVIL RIGHTS ACT OF 1964.

Defendants do not contest plaintiffs' assertion that different and inferior showers, toilets, office space and vending machines may serve as the basis for a challenge to "terms and conditions" of employment as discriminatory. Are disparities in allocation of constitutional rights, including freedom from unreasonable intrusions, less amenable to challenge under Title VII than disparities in allocation of office space or vending machines? Defendants' suggestion, if accepted, would mean that employers could selectively monitor the e-mail of African-American employees without violating Title VII, as long as the information was not used to demote, terminate, or take other job action. Employers could request information on the political affiliations of African-American employees exclusively, or could selectively perform surveillance on their activities outside of work and face no liability under Title VII. It would be both odd and alarming if Title VII were construed to elevate complaints about physical facilities over the abridgement of constitutional rights.

Defendants discount the impact of the challenged tests. Discrimination

against carriers of sickle cell trait has included narrowing of economic opportunities, including exclusion from military aircrews. *See* L.B. Andrews, MEDICAL GENETICS: A LEGAL FRONTIER 18-24 (American Bar Association, 1987); V.M. Voge, *et al.*, *Sickle Cell Anemia Trait in the Military Aircrew Population: A Report from the Military Aviation Safety Subcommittee of the Aviation Safety Committee, AsMA*, AVIATION, SPACE, AND ENVIR. MED. (1991). Having an unwanted genetic carrier status label affixed by an employer reduces future employment prospects and insurability. *See id.*

Perhaps even more important is the harm that occurs from being singled out for genetic testing, the sole purpose of which is "preventing others like them from being born. Surely, this is an extreme form of stigmatization." *See* R. Hubbard and M.S. Hennifin, *Genetic Screening of Prospective Parents and of Workers: Some Scientific and Social Issues*, 15 INT'L J. HEALTH SERV., 231 (1985). Testing for genetic traits associated with disabling conditions in the Caucasian population was apparently never conducted. Nonconsensual carrier screening of adults, carried out for reproductive or "eugenic" purposes, is suffused with stigma. Title VII's reach must surely extend to prohibiting racially based testing which imposes stigma.

III. PLAINTIFFS' PRIVACY RIGHTS, AND THE REQUIREMENT OF A LEGITIMATE GOVERNMENT INTEREST TO JUSTIFY THEIR INVASION, ARE CLEARLY ESTABLISHED.

The United States Supreme Court has cautioned that the qualified immunity defense does not "provide [a] license to lawless conduct Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate" *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). Government officials "are entitled to assert a qualified immunity defense . . . only if they can affirmatively show that 'their conduct was justified by an objectively reasonable belief that it was lawful.'" *Morgan v. Woessner*, 975 F.2d 629, 643 (9th Cir. 1992) (emphasis supplied). For purposes of evaluating a claim of qualified immunity, it is not necessary to show that "the very action in question has previously been held unlawful" *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Rather, a constitutional right is clearly established if its "contours [are] . . . sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Bator v. State of Hawaii*, 39 F.3d 1021, 1027 (9th Cir. 1994); *P.B. v. Koch*, 96 F.3d 298, 1301 (9th Cir. 1996).

Plaintiffs allege significant intrusions of their constitutional right to privacy

caused by, among others, defendant O'Leary. While the government here performed highly unusual testing, defendants "cannot use the absence of case law directly on point to shield them from liability. The unlawfulness of their conduct should have been apparent to them in light of preexisting case law." *Ostlund v. Bobb*, 825 F.2d 1371, 1374 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 2016 (1988). No case has ever suggested that government medical testing of public employees can be conducted without any justification. That surreptitious, standardless and unjustifiable government testing for medical conditions associated with procreation and reproductive decisions violates the federal right to privacy and is, well-established.

A. The Right to Medical Privacy Has Been Clearly Established for at Least Fifteen Years.

The Supreme Court has long recognized that the Constitution protects individuals' right to privacy, which includes "the individual interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *see also Roe v. Wade*, 410 U.S. 113, 152 (1973). Individuals have a privacy interest in medical information, including the personal information their body fluids contain. *Doe v. Attorney General*, 941 F.2d 780, 795-96 (9th Cir.

1991), *rev'd on other grounds*, 95 F.3d 29 (1995). "There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection. Information about one's body and state of health is a matter which the individual is ordinarily entitled to retain within the 'private enclave where he may lead a private life.'" *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3rd Cir. 1980)⁶; *see also Doe v. Attorney General*, 941 F.2d at 795-96 (citing *Westinghouse*).

At the time of the challenged testing, it was indisputable that the constitutional right to privacy is implicated when the government requires an individual to disclose personal information regarding sexual or reproductive matters. *See, e.g., Thorne*, 726 F.2d 459 (reversing district court's dismissal of plaintiff's privacy challenge to 1978 sexual inquiries); *Eastwood v. Dep't of Corrections*, 846 F.2d 627 (10th Cir. 1988) (rejecting qualified immunity defense to employee's claim that she was pressured to disclose private information regarding her sexual history); *Doe v. Attorney General*, 941 F.2d at 795-96

⁶ In determining whether a constitutional right is clearly established, "[t]he available decisional law includes cases from state courts, other circuits and district courts." *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989).

(information regarding HIV or AIDS status was within ambit of privacy protection afforded medical information in 1988); *Woods v. White*, 689 F. Supp. 874, 875 (W.D. Wis. 1988), *aff'd*, 899 F.2d 17 (7th Cir. 1990) ("it would have been clear to a competent public official in 1986 that individuals had a constitutional right to privacy in information relating to AIDS"); *Glover v. Eastern Neb. Com. Off. of Retardation*, 686 F. Supp. at 250 (enjoining policy requiring employees to submit to hepatitis and HIV testing as violative of Fourth Amendment rights); *Hawaii Psych. Ass'n v. Ariyoshi*, 481 F.Supp. 1028 (D. Haw. 1979) (psychiatric information protected because communications often involve family, marriage, parenthood, human sexuality and physical problems). *See also Lankford v. City of Hobart*, 27 F.3d 477 (10th Cir. 1994) (seizure and review of medical files violated constitutional right to privacy clearly established in 1990).

B. A Legitimate Governmental Interest Has Always Been Required to Justify an Intrusion Upon Privacy Rights.

The government has always been required to show that an intrusion upon medical or sexual privacy is justified by a legitimate government interest. *See Doe v. Attorney General*, 941 F.2d at 796; *Schowengerdt v. General Dynamics*, 823 F.2d 1328 (9th Cir. 1987); *Thorne v. City of El Segundo*, 726 F.2d 459. As in *Washington v. Lambert*, defendants' "reasons for taking such intrusive actions

were wholly insubstantial." 98 F.3d 1181 (9th Cir. 1996). Because the Secretary of Energy had no legitimate government interest in the testing, officials cannot but have known that the invasions were unlawful.

IV. PLAINTIFFS SEEK INJUNCTIVE AND DECLARATIVE RELIEF, AND THEIR CLAIMS ARE NOT MOOT.

The serious nature of the constitutional violations alleged, and the continued maintenance of the information collected through performing the tests render the federal defendants' claim of mootness inappropriate. This dispute must be settled to ensure that the challenged practices are not continued or revived, to provide injunctive relief necessary to prevent their recurrence and continuation, and to remedy the violations that have already occurred.

A. Defendants Have Not Met Their "Heavy Burden" of Demonstrating that There is No Reasonable Expectation that the Unlawful Conduct Will Be Repeated.

Defendant O'Leary's mootness claim rests on the fact that the Department of Energy's requirement for syphilis testing has been "defunct for over five years." Fed. Opp. at 29.⁷ However, the voluntary cessation of allegedly illegal conduct

⁷ In fact, DOE Order No. 5480.8A, effective June 26, 1992, does not eliminate its syphilis testing and other laboratory requirements, but specifies that "laboratory studies shall include . . . [u]rinalysis and serology when indicated" Def. Supp. Rec. at 00050. The elimination from relevant DOE orders of requirements related to serology and other laboratory studies did not occur until September 30, 1995. Rec. at 498.

does not make the case moot. *United States v. W. T. Grant*, 345 U.S. 629, 632 (1953). "The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." *Id.* Defendant's "burden is a heavy one." *W. T. Grant*, 345 U.S. at 633.

Here LBL apparently ceased involuntarily testing its employees for syphilis in 1993 in response to a Department of Energy appraisal citing cost related concern over its effectiveness. Rec. at 495. The cessation of unlawful syphilis testing due to cost does not eliminate the possibility that wrongful behavior will resume. In *United v. Concentrated Phosphate Export Ass'n*, the Supreme Court rejected defendants' claim that an amended regulation had made the challenged practices "uneconomical" and therefore moot, finding that it "cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in [defendants'] shoes." 393 U.S. 199, 203 (1968).

B. Subsequent Events Have Not Completely and Irrevocably Eradicated the Effects of the Conduct.

Defendants, including defendant O'Leary, continue to maintain or require maintenance of employee medical records. The continued existence of these records, which include illegally collected, highly sensitive and stigmatizing

information, deserves a remedy. Accordingly, plaintiffs seek the provision of notice to all past and present employees subjected to these practices, the opportunity for review of individual records, and expungement and destruction of records at the request of individual employees. Rec. at pp. 24-25.⁸ See *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); see also *Finberg v. Sullivan*, 658 F.2d 93, 98 (3rd Cir. 1980) (no mootness where subsequent events do not satisfy all of plaintiffs' claims).

Where necessary to vindicate rights secured by the Constitution, the federal courts are empowered to both order the expungement of government records and place restrictions on how information contained in government records may be used. *Chastain v. Kelley*, 510 F.2d 1232, 1235-36 (D.C. Cir. 1975); *Maurer v. Los Angeles County Sheriffs*, 691 F.2d 434, 437 (9th Cir. 1982). Expungement

⁸ Defendants apparently suggest that plaintiffs do not have claims for violation of their rights to privacy because plaintiffs' test results were negative with the exception of plaintiff Mark Covington, who did not file his medical documents under seal. No case cited by defendants suggests that whether the right to privacy has been violated depends upon particular medical results. See, e.g., *Skinner*, 489 U.S. 602 (1984); *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995); *Whalen v. Roe*, 429 U.S. 589 (1977). Case authority is to the contrary. *Ascolese v. Southeastern Penn. Transp. Auth.* (Ascolese I), 902 F. Supp. 533 (E.D. Pa. 1995) (privacy violation did not depend upon pregnancy test results, which were negative); *Ascolese v. Southeastern Penn. Transp. Auth.* (Ascolese II), 925 F. Supp. 351 (E.D. Pa. 1996) (same). Incidentally, that plaintiff Covington now chooses to identify himself as a person with sickle cell trait for the purposes of this lawsuit does not mean that he was not injured by the unjustified laboratory search of his blood and urine, and the compelled disclosure of his sickle cell status to his employer.

"may be essential to prevent future harm as a result of the original violation." *Reuber v. United States*, 750 F.2d 1039, 1068 (D.C. Cir. 1984) (Scalia, J., concurring).⁹

In *Whalen v. Roe*, the U.S. Supreme Court cautioned: "We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files." 429 U.S. 589, 605 (1977). Because of the nature of the records maintained by LBL, which include information on test results that could stigmatize or make individuals vulnerable to discrimination, "the existence of the records may at a later time become a detriment" *Paton v. La Prade*, 524 F.2d 862, 868 (3rd Cir. 1975). While plaintiffs "cannot point with mathematical certainty to the exact consequences" of the maintenance of the information obtained through the challenged screening and testing practices, "[t]he maintenance of such records results in 'injuries and dangers' that are 'plain enough,'" *id.*; particularly where the test results expose sexual activity, procreative decisions and immutable genetic

⁹ The federal defendants' reliance on *Kruse v. Hawai'i*, 68 F.3d 331 (9th Cir. 1995), is misplaced. In that case, the court deemed the underlying claim of a privacy violation stemming from a child protective services investigation related to drug use "simply wrong," and further found that the plaintiff had failed to show that the "information she seeks to have expunged even exists in her record." *Id.* at 335-36.

characteristics, as they do here.¹⁰

C. Declaratory Relief is Needed to Send an Important Message Regarding Privacy Rights in the Workplace.

Plaintiffs seek declaratory relief "to delineate important rights and responsibilities." *See Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1471 (9th Cir. 1984). In *Bilbrey*, declaratory relief regarding the unconstitutionality of searches of two students was appropriate even though the students were no longer at the school, and the individual defendant who authorized and participated in the searches was no longer employed. *Id.* at 1470-71; *see also Piphus v. Carey*, 545 F.2d 30, 32 (7th Cir. 1976), *rev'd on other grounds*, 435 U.S. 247 (1978) (declaratory relief appropriate even where challenged suspensions expunged from school records); *Bellnier v. Lund*, 438 F. Supp. 47, 55 (N.D.N.Y. 1977) (declaratory relief appropriate even when defendants immune from damages). Where "plaintiffs [have] been wronged," they "deserve[] to have their position vindicated" *Greater Los Angeles Council on Deafness v. Zolin*, 812 F.2d 1103, 1113 (9th Cir. 1987) (upholding denial of injunction where federal funding terminated, but remanding on claim for declaratory relief).

¹⁰ While defendant O'Leary implies that these records are maintained in a confidential manner, no formal discovery such as depositions regarding information maintenance or release of information was permitted by the court prior to dismissal of plaintiffs' claims.

Important social interests in medical privacy and the constitutional limitations on government medical testing are at stake. "[A] court declaration is a message not only to the parties but also to the public and has significant educational and lasting importance." *Bilbrey*, 738 F.2d at 1471. "The decision to grant declaratory relief 'should always be made with reference to the public interest.'" *Greater Los Angeles Council on Deafness v. Zolin*, 812 F.2d at 1112.

V. PLAINTIFFS HAVE SHOWN SUFFICIENT FACTS TYING THE FEDERAL DEFENDANTS TO THE CHALLENGED CONDUCT.

The federal defendants may be liable for plaintiffs' constitutional injuries under *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) or § 1983¹¹ even if they did not directly participate in the medical testing. Indeed,

[P]ersonal participation is not the only predicate for section 1983 liability. Anyone who 'causes' any citizen to be subjected to a constitutional deprivation is also liable. The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.

¹¹ Plaintiffs' § 1983 claim against the federal defendants, which alleges that the Department of Energy and LBL acted jointly in setting policies and implementing practices mandating illegal testing and information maintenance, follows "a well-established line of cases" holding that federal defendants "may be liable under § 1983 if they are found to have conspired with or acted in concert with state officials to some substantial degree." *Cabrera v. Martin*, 973 F.2d 735, 741, 742 (9th Cir. 1992) (emphasis added); *see also Merritt v. Mackey*, 932 F.2d 1317, 1323-24 (9th Cir. 1991); *Kletschka v. Driver*, 411 F. 2d 436, 448-49 (2d Cir. 1969).

Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978). A supervisory official may be liable if, "after learning of the violation through a report or appeal," he or she "failed to remedy the wrong." *Williams v. Smith*, 781 F.2d 319, 323 (2d Cir. 1986). A public official can be individually liable "even without overt participation in the offensive act" if the official implements a policy so deficient that it causes a constitutional violation. *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *see also Williams v. Smith*, 781 F.2d at 323 ("A supervisory official may be liable because he or she created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue."). "Lastly, a supervisory official may be personally liable if he or she was grossly negligent in managing subordinates who caused the unlawful condition or event." *Williams v. Smith*, 781 F.2d at 323-24.

Documents indicate Department of Energy officials significantly participated in the medical screening and document retention practices challenged by plaintiffs by monitoring LBL's employee medical program, promulgating orders regarding the medical examinations of LBL employees, conducting on-site reviews of practices and policies, issuing recommendations and directives, and adopting written policies controlling the retention of employee medical files. The federal

defendant may challenge plaintiffs' factual allegations. The extent of their actual participation is a factual issue to be decided at trial. *See Collins v. Jordan*, 102 F.3d 406, 417 (9th Cir. 1996). Dismissal was therefore improper.

A. Defendants O'Leary and DOES Fifty-One Through One Hundred Required Syphilis Testing of LBL Employees.

Department of Energy officials issued formal orders and directives which required that syphilis testing be initiated, and mandated its continued use. According to Department of Energy Order No. 5480.8 (effective May 22, 1981), "laboratory work shall include . . . serology [and] urinalysis . . . , and any other laboratory tests deemed necessary or desirable by the examining occupational medical physician." Def. Supp. Rec. at 00032. A subsequent order, No. 5480.8A, which became effective June 26, 1992, was in effect when defendant O'Leary took office in January of 1993. This order, which was suspended on September 30, 1995, modified the requirement for serology to specify that it be included "when indicated."¹² Def. Supp. Rec. at 00050. The order currently in effect, No. 440.1, was issued on September 30, 1995, and does not mandate the inclusion of serology. Rec. at 498-522. LBL was required to comply with

¹² No definition is provided for the qualifier "when indicated," and plaintiffs do not yet know what was intended by the phrase, and/or how it was administered.

Department of Energy directives. Rec. at 475-482.

As Secretary of the Department of Energy, defendant O'Leary administers the department and is authorized to issue orders, rules and regulations. *See* 42 U.S.C. §§ 7131, 7191, 7254, 7256. The orders and directives at issue here were devoid of procedures or any restrictions on the testing, failed to specify how positive results should be communicated to employees, did not bar all third party access to the information, and lacked requirements that notice of syphilis testing be communicated to employees and consent obtained. While Defendant O'Leary contends that the serology requirement was initiated for benign reasons, Rec. at 529, an interest in employee "wellness" is insufficient to justify nonconsensual syphilis testing by employers.

B. Defendant O'Leary and DOES Fifty-One through One Hundred Had Extensive Involvement with the Administration of LBL's Medical Program.

Department of Energy officials conducted on-site visits to LBL's Medical Department on many occasions, and apparently engaged in discussions with LBL officials regarding the components of employee medical examinations. These visits resulted in comprehensive and detailed reviews of the employee medical program, including written evaluations and directives. Written responses from LBL officials

indicated what "corrective action" would be taken to address the Department's recommendations and directives. Rec. at 351-371, 374-380, 413-436, 484-497.

The intensive review and on-site program appraisals permitted Department of Energy officials to acquire knowledge of how LBL was conducting its employee medical examinations, what tests were being administered, how information was stored, and whether and how it was disclosed to third parties. For example, the 1989 appraisal notes that serology and urinalysis were conducted as part of the comprehensive medical examination. Rec. at 426. During the 1991 appraisal "[p]olicy, practice, procedure, documents and reports, logs, and statistical data were reviewed. Medical records (patient charts) were examined. . . . Scope, content and conduct of programs were reviewed." Rec. at 442. Department of Energy reviewers apparently had access to employee medical charts including the results of syphilis, sickle cell and pregnancy testing. The involvement of federal officials in the testing program has continued through defendant O'Leary's tenure with the Department of Energy. Rec. at 523-533. Proposed defendant William R. Albers participated in periodic, on-site appraisals of LBL's medical program for many years. Rec. at 351-380. Indeed, he directed that "serologic tests be offered as part of the laboratory work on all periodic employee health exams,"

noting that "Drs. Stauffer and Budinger have indicated that they can incorporate serologic testing in their examinations without any difficulty. Cost impact is negligible." Rec. at 355.¹³ A 1985 report by Albers noted that the "previously identified deficiency in clinical laboratory testing has been adequately corrected," and further indicated that employees do not receive available, complete information on the content of the medical program. Rec. at 369.

The limited discovery permitted reveals that Dr. Albers personally encouraged, ratified, and had substantial knowledge of the medical tests being performed at LBL and its maintenance of employee medical information, making him a proper defendant under both § 1983 and *Bivens*.

C. Department of Energy Officials Mandated the Maintenance of Medical Information Obtained by LBL, Encouraged Use of Medical Information, and Failed to Ensure Confidentiality.

Pursuant to Department of Energy orders, the medical records of LBL employees are "government records," and detailed requirements exist for their indefinite retention. Rec. at 388. Documents produced by defendants indicate that medical personnel, researchers and others may have had access to employee

¹³ LBL officials responded that "[p]lans are well under way to implement this recommendation. A serology will be obtained on all new employees and at least once on each current employee. After this has been accomplished the results will be evaluated." Rec. at 358.

medical records, including the results of syphilis, sickle cell and pregnancy testing, for research purposes. 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 270 (emphasis supplied)).¹⁴

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¹⁴ These medical records have been subject to a moratorium on the destruction of records, issued to ensure that epidemiologic researchers have access to "certain basic data," including employee medical records. Rec. at 84.

CONCLUSION

The testing imposed by defendants, with no legitimate basis, violated plaintiffs' constitutionally protected privacy rights. Its race and sex-based deployment discriminated against them in violation of Title VII. Far from constituting an insignificant addition to the medical examinations, this testing resulted in defendants' obtaining an enormous amount of very personal information. This result, and its endorsement by the court below, should not be permitted to stand.

Dated: February 27, 1997

Respectfully submitted,

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By:



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Brief Format Certification Pursuant to Circuit Rule 32(e)(4)

Pursuant to Ninth Circuit Rule 32(e)(4), and Ninth Circuit Court Order dated February 12, 1997 and attached hereto, I certify that the reply brief is proportionately spaced, has a typeface of 14 points or more and contains 8195 words.

Dated: February 27, 1997

A handwritten signature in black ink, appearing to read "V. L. Loe", is written above a horizontal line.

Signature of Filing Party

FILED

FEB 12 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MARYA S. NORMAN-BLOODSAW, et al.,	)	No. 96-16526
	)	
Plaintiffs/Appellants,	)	
	)	
vs.	)	DC# CV-95-03220-VRW
	)	Northern California
	)	(San Francisco)
LAWRENCE BERKELEY LABORATORY, et al.,	)	
	)	
Defendants/Appellees.	)	ORDER
	)	
	)	

Appellants' motion to file a reply brief exceeding the limits of Ninth Circuit Rule 32 is granted. On or before February 27, 1997, appellants may file a brief with proportionately spaced typeface of 14 points or more, and not to exceed 8,400 words.

For the Court:

CATHY A. CATTERSON
Clerk of the Court



Jeffery L. Crocker
Deputy Clerk
Ninth Cir. R. 27-7/Appendix A,
General Orders for the
United States Court of Appeals

PROOF OF SERVICE

I, ANA ROSA JAUREGUI, declare:

I am a citizen of the United States, over 18 years of age, employed in the County of San Francisco, and not a party to the within action; my business address is 1663 Mission Street, 4th Floor, San Francisco, California 94103.

On February 27, 1997, I served the within

APPELLANTS' REPLY BRIEF (2 copies)

and

APPELLANTS' SUPPLEMENTAL EXCERPTS OF RECORD (1 copy)

on the following party in said action:

XX and by placing a true copy thereof enclosed in a sealed envelope with first class postage affixed in the designated area for outgoing mail addressed as set forth below:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 27, 1997 at San Francisco, California.



Ana Rosa Jauregui