

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ROBERT G. FRANKE and
SARA FRANKE BOWLING

PLAINTIFFS

V.

CASE NO. 4:09-CV-341 GTE

PARKSTONE LIVING CENTER, INC.,
d/b/a FOX RIDGE AT NORTH LITTLE ROCK

DEFENDANT

FOX RIDGE'S REPLY TO PLAINTIFFS'
RESPONSE TO FOX RIDGE'S MOTION TO DISMISS

The relevant dispositive facts are not subject to reasonable dispute, and they are apparent from the face of the complaint. No one can reasonably dispute that human immunodeficiency virus (“HIV”) could have been transmitted from Robert G. Franke to other residents if Parkstone Living Center, Inc. (“Fox Ridge”) had admitted him. *See* Pls’ Mem. in Opp. (Doc. No. 14) at 7 n. 4 (explaining that the Disability Rights Section of the Civil Rights Division of the U.S. Department of Justice recognizes that HIV can be “transmitted by sexual contact with an infected individual” and “exposure to infected blood or blood products”), 2 (acknowledging the risk by stating that “a person’s HIV status *rarely* poses a health concern in social and residential settings) (emphasis added). Nor can anyone reasonably dispute that HIV is a life-threatening disease. *See, e.g., Manani v. Filip*, 552 F.3d 894, 903 (8th Cir. 2009); *Kipp v. U.S.*, 88 F.3d 681, 684 (8th Cir. 1996); *Weaver v. Reagan*, 886 F.2d 194, 196 (8th Cir. 1989). In the light of these irrefutable facts, no one can reasonably dispute that Dr. Franke’s HIV posed a direct threat to the health or safety of residents or staff at Fox Ridge. As a result, this Court should dismiss.

This case does not concern whether children with HIV pose a direct threat to other children, as in *Doe v. County of Centre, PA*, 242 F.3d 437 (3d Cir. 2001), and *Doe v. Dolton Elem. Sch. Dist. No. 148*, 694 F. Supp. 440 (N.D. Ill. 1988). Nor does it concern whether

employees with HIV pose a direct to other employees, as in *E.E.O.C. v. Dolphin Cruise Line, Inc.*, 945 F. Supp. 1550 (S.D. Fla. 1996), and *Doe v. District of Columbia*, 796 F. Supp. 559 (D.D.C. 1992). This case concerns the proposed admission of an HIV-positive person to a regulated assisted-living facility with the responsibility for protecting other residents. In Arkansas, residents of an assisted-living facility like Fox Ridge benefit from a bill of rights the facility must enforce. See OLTC Regulation on Assisted Living Facilities Level II, § 603.1, attached as Exhibit 1. The facility must provide to its residents a safe and appropriate living environment while allowing them personal and private visitation and maintaining the confidentiality of their records. See *id.* at § 603.1 (G), (L), (O), (T). Dr. Franke is not a child whose social interactions Fox Ridge could restrict. Nor is he a prospective employee whose work-related activities would involve no more than casual contact with others. If Fox Ridge had admitted Dr. Franke and abided by its obligations both to Dr. Franke and other residents, for example, a resident who had a sexual relationship with Dr. Franke and contracted HIV as a result would likely not agree with plaintiffs that Fox Ridge had abided by its duties in screening applicants for admission to the facility.

Contrary to plaintiffs' argument, relevant federal law recognizes that HIV is dangerous to human beings. For example, in *Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999) (en banc), a case decided after *Bragdon v. Abbott*, 524 U.S. 624 (1998), the Eleventh Circuit held that an Alabama prison system's segregation of all HIV-positive inmates did not violate the Rehabilitation Act because their HIV posed a direct threat to other inmates. The court reasoned: "When the adverse event is the contraction of a fatal disease, the risk of transmission can be significant even if the probability of transmission is low: death itself makes the risk 'significant.'" *Onishea*, 171 F.3d at 1297. The Eleventh Circuit followed precedent from the

Fourth, Fifth, and Sixth Circuits holding that HIV can create a “significant risk” even when reported incidents of transmission are few or non-existent and the odds of transmission are small. *Id.* at 1297-99 (citing *Bradley v. University of Tex. M.D. Anderson Cancer Ctr.*, 3 F.3d 922, 924 (5th Cir. 1993); *Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1264-65 (4th Cir. 1995); *Estate of Mauro ex rel. Mauro v. Borgess Med. Ctr.*, 137 F.3d 398, 405, 407 (6th Cir.), *cert. denied*, 525 U.S. 815 (1998)). The court explained that this “more cautious rule protects from *well-founded* worries that deaths can result from a ruling that an HIV-positive plaintiff is qualified, and thus it avoids the absurd conclusion that Congress has decreed even a few painful deaths in service of the Rehabilitation Act’s noble goals.” *Id.* at 1298-99 (emphasis in original) (citing *Bragdon*, 524 U.S. 624). “Accepting proof of a theoretical possible method of transmission as sufficient recognizes—unlike the First Circuit’s approach—that saying a risk of an event is small does not mean that it will not happen. And each time the event occurs, it is real people—not cold ciphers—that suffer the consequences.” *Id.* at 1299. The Eleventh Circuit held “that when transmitting a disease inevitably entails death, the evidence supports a finding of ‘significant risk’ if it shows both (1) that a certain event can occur and (2) that according to reliable medical opinion the event can transmit the disease.” *Id.*

In this case, the complaint itself makes clear that Dr. Franke has a fatal communicable disease that could have been transmitted to other Fox Ridge residents. That fact means that Dr. Franke, when he applied for admission to Fox Ridge, had a communicable disease that posed a direct threat to the health and safety of others and that he was not qualified for admission to Fox Ridge as a result. *See Waddell v. Valley Forge Dental Assoc., Inc.*, 276 F.3d 1275 (11th Cir. 2001) (holding that, when transmission of HIV could theoretically occur, the risk is significant because, if it occurs, transmission is fatal); *Borgess Med. Ctr.*, 137 F.3d at 405, 407 (holding that

an HIV-positive surgical technician posed a direct threat even though the Centers for Disease Control calculated the odds of HIV transmission during a surgery at between 1 in 42,000 and 1 in 420,000). No amount of discovery can change that conclusion, and the Court does not need to review any evidence or conduct a trial to reach it. It is apparent from the face of the complaint.

Whether Fox Ridge would have the burden of proof at a trial on the issue of “direct threat” is irrelevant because all the dispositive facts are established by the complaint itself and Dr. Franke was not qualified for admission to Fox Ridge anyway. While the Eighth Circuit has said, in an employment-law context, that an employer has the burden of proving “direct threat” as an affirmative defense, *E.E.O.C. v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571 (8th Cir. 2007), plaintiffs would undoubtedly carry the burden of establishing first that Dr. Franke was a qualified individual under the law. *Waddell*, 276 F.3d at 1279-80. As a matter of law, Dr. Franke was not qualified for admission to Fox Ridge because he has HIV and, as a result, posed a significant risk to the health or safety of others in the facility. *See, e.g., Borgess Med. Ctr.*, 137 F.3d at 402-03. Plaintiffs make no attempt to distinguish the cases holding that a plaintiff cannot make a *prima facie* showing when a facility was prohibited from admitting or retaining the plaintiff as a resident in the first place. *See Winters ex rel. Winters v. Chugiak Senior Citizens, Inc.*, 531 F. Supp.2d 1075 (D. Alaska 2007); *Burlage v. Summerville Senior Living Inc.*, Case No. 1:07cv352, slip op. (E.D. Va. Apr. 18, 2008). And, finally, plaintiffs readily concede that Dr. Franke “is not seeking a reasonable accommodation,” Pls’ Mem. in Opp. (Doc. No. 14), at 2 n. 1, so they cannot survive the motion to dismiss based on an argument that Fox Ridge somehow could have eliminated, or reduced to an acceptable level, the undeniable risk posed by Dr. Franke’s HIV.

CERTIFICATE OF SERVICE

I certify that on this 4th day of August, 2009, I electronically filed with the Clerk of the Court the foregoing using the CM/ECF system, which shall send notification of such filing to the following:

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/s/ E. B. Chiles IV
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