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December 14, 1987

The Honorable Peter Goudinoff
Arizona State Representative
State Capitol - House Wing
Phoenix, Arizona 85007

Re: I87-159 (R86-005)

Dear Representative Goudinoff:

In your letter of January 20, 1986, you asked three questions:

1. Do Arizona's statutory antidiscrimination provisions apply to victims of Acquired Immune Deficiency Syndrome ("AIDS");
2. Is there statutory protection for individuals with positive HTLV-III test results; and
3. Is it legal in Arizona to require an AIDS test for employment?

In answer to question 1, we believe AIDS falls within the definition of "handicap" in the employment discrimination portions of the Arizona Civil Rights Act. However, because handicapped employees must meet many other and varied criteria before they can establish a claim under the Act, whether or not an individual AIDS victim would be protected can only be decided on a case-by-case basis.

As to question 2, if an employer perceives a positive HTLV-III or HIV test result as a handicap, then the tested employee would be "handicapped" within the meaning of the Act. The employee would have to meet the other criteria in order to claim protection.^{1/}

^{1/}It should be emphasized that this statutory coverage applies only to employment relationships.

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As to question 3, while the law defining a private employer's right to require its employees to submit to physical testing is sparse, it appears that medical testing by private employers will be allowed unless there is intentional infliction of emotional distress by means of extreme and outrageous conduct. A public employer is also limited by fourth amendment considerations.

We discuss each question in turn.

1. AIDS is a Handicap Within the Meaning of the Arizona Civil Rights Act

The Arizona Civil Rights Act provides:

"Handicap" means a physical impairment that substantially restricts or limits an individual's general ability to secure, retain, or advance in employment

A.R.S. § 41-1461(4). There are several exceptions not relevant here.

This definition has not been interpreted by the Arizona courts, and interpretations of AIDS as a "handicap" or not a "handicap" in other jurisdictions have been based on statutory language different from Arizona's. In the absence of judicial guidance, one must look to the plain, ordinary meaning of the words of the statute. Skyview Cooling Company v. Industrial Commission of Arizona, 142 Ariz. 554, 691 P.2d 320 (App. 1984).

First, to be a handicap, AIDS must be a "physical impairment." The common definition of "impair" is "to make worse, do harm to, or to diminish in quantity, value, excellence, or strength; to deteriorate or lessen." Webster's Third New International Dictionary (Unabridged) 1976, p. 1131.

AIDS is caused by a retrovirus known as human T-Lymphotropic Virus Type III (HTLV-III), lymphadenopathy-associated virus, or human immunovirus (HIV). Board of Education of the City of Plainfield v. Cooperman, 105 N.J. 587, 523 A.2d 655, 656 (1987). HIV infection may result in three outcomes: (a) AIDS itself, from which victims usually die within two years of diagnosis; (b) ARC, or AIDS-Related Complex, a milder form of immunodeficiency; and (c) most commonly,

asymptomatic infection. Id. With the onset of AIDS, the virus disables the body's immune system and renders the victim vulnerable to opportunistic, life-threatening diseases.

These characteristics of AIDS indicate a condition which diminishes a person in "excellence or strength," and which causes a person to "deteriorate." Thus, we conclude AIDS is a physical impairment.

Second, a handicap must be an impairment which "substantially limits or restricts an individual's general ability to secure, retain, or advance in employment." "Substantial" is most relevantly defined as "that specified to a large degree or in the main." Webster's at p. 2280. Thus, the language suggests that to be a "handicap," the impairment must cause more than any or some limitation on employment opportunities, but must do so "in a large degree." The most relevant definition for "general" in Webster's is "not limited to a particular class, type, or field." This suggests (along with "substantially") that the legislature intended to exclude from the definition of "handicap" physical impairments which diminish an individual's capacity only in the performance of a particular kind of job. On the other hand, the words "secure, retain, or advance" suggest that the legislature did not intend "handicap" to be so narrowly defined as to include only impairments so severe that they would limit access even to simple, entry-level-type jobs.

The opportunistic diseases associated with AIDS are sufficiently serious and debilitating to constitute a substantial limitation on employment opportunities. The average AIDS patient lives only 18 months after diagnosis; more than 85% die within three years. Osborn, The AIDS Epidemic: An Overview of the Science, 2 Issues in Sci. & Tech 40, 43 (1986). Most people with AIDS contract Pneumocystis carinii pneumonia or Kaposi's sarcoma (a cancer). The rest suffer from one or more opportunistic infections such as cryptoccal meningitis, candidiasis of the esophagus, toxoplasmosis, and cryptosporidiosis. United States Public Health Service, AIDS Information Bulletin (November 1985).

In addition, many employers and their employees, particularly those involved in health care, personal service, and food service, perceive (to a large extent erroneously) that AIDS is contagious through the kinds of casual contact probably

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occurring in those occupations.^{2/} Statement by James O. Mason, M.D., Dr. P.H., Acting Assistant Secretary for Health, United States Public Health Service, November 14, 1985. It can reasonably be concluded that an AIDS patient's impairment, especially as perceived, is a "substantial" limitation to employment opportunities in more than a narrow spectrum of jobs. AIDS, therefore, meets the second criterion for a handicap under the Arizona Civil Rights Act.

Judicial authority is sparse. Thomas v. Atascadero Unified School District, 662 F.Supp. 376 (1987) involved school admissions, not employment, but it interpreted the same definition of "handicapped individual" as applies in the employment sections of the federal Rehabilitation Act of 1973. Such an individual is:

any person who (i) has a physical or mental disability which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. § 706(7)(B). The Atascadero court decided that a student with AIDS was a "handicapped person." 662 F.Supp. at 381. As regards the employment area, Arizona's definition of handicapped individual tracks the federal definition closely enough for Atascadero to be relevant.

^{2/}Although there have been a few documented cases of transmission to health care workers, these incidents occurred when workers did not follow prescribed Centers for Disease Control precautions for handling of blood and body fluids. Update: Evaluation of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infection in Health-Care Personnel -- United States, 34 Morbidity & Mortality Weekly Rep. 575, 576-77 (1987). AIDS has never been spread within families where sharing of cups, spoons and toothbrushes, hugging and rough-housing between siblings have occurred. Transmission has been documented between sexual partners, needle-sharing intravenous drug users, and perinatally and through breast milk from mother to child. There is no medical documentation of AIDS transmission via the casual contact of sharing workspace, shaking hands or sharing telephones and work tools.

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Between the date the Atascadero court made its decision and the case's publication date, the Supreme Court decided School Board of Nassau County, Florida v. Arline, 480 U.S. _____, 107 S.Ct 1123, 94 L.Ed.2d 307 (1987). A Florida school board dismissed Gene Arline, a school teacher, because of recurring tuberculosis. The court held that "a person suffering from the contagious disease of tuberculosis can be a handicapped person within the meaning of the § 504 of the Rehabilitation Act of 1973" 480 U.S. at _____, 107 S.Ct. at 1132, 94 L.Ed.2d at 322. The court then remanded the case to district court to determine whether Ms. Arline was "otherwise qualified" for her job under the Act.

The Arline Court examined Congressional motivation behind the Rehabilitation Act to reach its conclusion. It reasoned:

Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious. The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of "handicapped individual" is broad, but only those individuals who are both handicapped and otherwise qualified are eligible for relief. The fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified."

Id. at _____, 107 S.Ct. at 1129-1130, 94 L.Ed.2d at 319 (emphasis in original). Although AIDS is difficult to transmit, it is a contagious disease.

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The Court explicitly declined to consider whether asymptomatic HIV carriers were handicapped.^{3/} Although the Arline Court reserved judgment on asymptomatic carriers, its decision clearly extends the federal Act definition of handicapped individual to people with the contagious diseases of AIDS or ARC. Because the United States Supreme Court based its decision on the federal definition of handicapped individual and because the Arizona Civil Rights Act definition closely resembles the federal Rehabilitation Act as applied to employment, Arline is persuasive authority in employment cases involving AIDS or ARC.

Although it seems clear, then, that AIDS is a "handicap" under the Arizona Civil Rights Act, it does not follow that any particular AIDS victim cannot be excluded from any particular job. The Arizona Act protects only "qualified handicapped individuals." A qualified handicapped individual is defined in terms of very specific reasonable-accommodation criteria.

A.R.S. § 41-1463(B)(1) provides in relevant part:

It is an unlawful employment practice for an employer:

1. To fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual . . . because of such individual's . . . handicap

However, A.R.S. § 41-1463(M) qualifies this prohibition:

For the purposes of this section . . . with respect to employers or employment practices involving handicap, "individual" means a qualified handicapped individual.

^{3/}The Arline Court declined to decide whether asymptomatic carriers such as HIV-seropositive individuals "could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the [Rehabilitation] Act." Id at _____, n. 7, 107 S.Ct. at 1128, n. 7, 94 L.Ed.2d at 317, n. 7.

In turn, "qualified handicapped individual" means a person with a handicap who with reasonable accommodation is capable of performing the essential functions of the particular job in question within the normal operation of the employer's business in terms of physical requirements, education, skill and experience.

A.R.S. § 41-1461(7) (emphasis added).

Again, under A.R.S. § 41-1461(8), "reasonable accommodation" is very specifically defined:

"Reasonable accommodation" means an accommodation which does not:

- a. Unduly disrupt or interfere with the employer's normal operations.
- b. Threaten the health or safety of the handicapped individual or others.
- c. Contradict a business necessity of the employer.
- d. Impose undue hardship on the employer, based on the size of the employer's business, the type of business, the financial resources of the employer and the estimated cost and extent of the accommodation.

Even assuming that the employer has the burden of proving that it is unable to reasonably accommodate (see, Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985), interpreting the federal Rehabilitation Act), it is impossible to say, even though an AIDS victim may have a "handicap," that a given AIDS victim is a "qualified handicapped individual" to whom Arizona's antidiscrimination provisions will apply.

Given Arizona's specific definition of "reasonable accommodation," one must look beyond the feasibility of accommodating the usually negligible, but occasionally genuine,

risk of AIDS contagion in the workplace. The same seriousness of the disease and its opportunistic infections which brings AIDS within the definition of "handicap" also makes it difficult for the employer to "reasonably accommodate." An employer may have to accommodate problems created by absences, effect of symptoms on job performance, and health risks to the handicapped employee; it depends on the situation whether these factors will unduly interfere, threaten health, contradict a business necessity, or impose an undue hardship. Whether each AIDS victim is a "qualified handicapped individual" can only be made on a case-by-case basis, taking into account not only the medical status of the employee, but also the characteristics of the employment and the employer.

2. There Exists Some Protection for Individuals with Positive HIV Test Results

A positive HIV test result means only that the antibody against the HIV virus exists; it does not indicate whether the person will later develop AIDS. Medical researchers have developed several tests for detecting antibodies to the AIDS virus in human blood.^{4/} The most common antibody test, known as the ELISA or "enzyme-linked immunosorbent assay" test, is highly sensitive and highly specific; that is to say, it produces relatively few false negatives or false positives.^{5/} Merritt, Communicable Disease and Constitutional Law: Controlling AIDS, 61 N.Y.U.L.Rev. 739 (Nov. 1986) at n. 30. Scientists experienced in the field of testing urge that any positive ELISA test should be confirmed by repeating the ELISA analysis and then subjecting the specimen to a more sophisticated test, such as the Western blot test. The result of such a regimen is highly accurate compared to other screening methods used in medical practice. Id.

^{4/}Antibodies may take up to six months to appear after the virus has entered the body; this is known as a "window period." Because of this window period, a negative test result may not mean lack of infection if exposure has occurred within six months of the test.

^{5/}False negatives are test results of individuals who actually have the antibody but do not test positive for it; false positives are positive test results from individuals who do not have the antibody present in their blood.

The presence of HIV antibody is obviously not a "handicap" as defined by the Arizona Act, because it does not affect the worker's health. If, however, the employer excludes an otherwise qualified person from employment because the employer perceives that a positive test result means that the employee has AIDS or exhibits its handicapping attributes, then the employer perceives that the employee has a handicap. Many state handicap laws, and the federal Rehabilitation Act, specifically provide that discrimination because of perceived handicap or a record of handicap is illegal in the same way that discrimination because of actual present handicap is. See, e.g., 29 U.S.C. § 706(7)(B).

Arizona has no explicit "perceived handicap" provision. A Washington state court has concluded that it would be inconsistent to permit an employer to discriminate intentionally against an employee because of a handicap an employee does not have (and for which, by definition, reasonable accommodation could be made), but not permit an employer to discriminate against a person who actually has the handicap. Barnes v. Washington National Gas Company, 22 Wash.App. 576, 591 P.2d 461 (1979). The Barnes court was asked to rule on the validity of agency regulations which made discrimination on the basis of "perceived handicap" a violation of the state civil rights act even though no analogous language appeared in the legislation. The court reasoned:

It would be an anomalous situation if discrimination in employment would be prohibited against those who possess the handicap but would not include within the class a person "perceived" by the employer to have the handicap.

. . . .

[The] intent of the law is to protect workers against such prejudgment based upon insufficient information.

591 P.2d at 465.

Similarly, if AIDS is a "handicap" within the meaning of the Arizona Civil Rights Act, then persons arbitrarily discriminated against merely on the basis of positive HIV test

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results should be protected under that same Act. Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985), requires that the basis for an employer's contention that it cannot reasonably accommodate to be grounded in objective fact, not speculation. Given the medical consensus that AIDS is not spread by casual contact, reasonable accommodation should be possible in all but the most sensitive health and personal service employment. Again, this would need to be evaluated on a case-by-case basis.

3. At Present Private Employers are Limited in Seeking an AIDS Test Only if Their Conduct is Extreme and Outrageous. A Government Employer's Right to Perform Medical Testing is Additionally Limited by the Fourth Amendment.

Arizona recognizes a common law right of privacy against intrusion by individuals, including employers. Invasion of this right is actionable, however, only where the requirement of the tort of intentional infliction of emotional distress is met; that is, there is a requirement of extreme and outrageous conduct. Valencia v. Duval Corporation, 132 Ariz. 348, 645 P.2d 1262 (App. 1982) (employer's and employer's physician's inquiry to employee's private physician concerning valley fever diagnosis not actionable because not outrageous).

At present, no other provisions of Arizona law restrict private employers who request that applicants or employees submit to AIDS testing, although their ability to act on the results of such a test is limited. As analyzed above, persons infected with AIDS or ARC are protected as handicapped under the Arizona Civil Rights Act, and those perceived as being infected are also likely to be protected. It is unlawful under A.R.S. § 41-1463 "[t]o fail or refuse to hire or to discharge any individual . . . because of such individual's . . . handicap" This prohibition creates a dilemma for the employer, for even if it may lawfully test anyone and everyone, under the Civil Rights Act it may not use the test results wholesale to limit employment eligibility or to justify discharge.

Again, few cases provide guidance. One successful defense of an AIDS testing program provides a useful starting point, however. The United States Department of State instituted a testing program to determine country assignments of foreign service officers and their families. Local 1812, American Federation of Government Employees v. United States Department of State, 662 F.Supp. 50 (1987). The D.C. District

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Court cited the state department's policy of assigning those seropositive for HIV but asymptomatic individuals to

posts in 19 foreign countries which do not present unusual health hazards [to the affected individuals] and where adequate medical care is believed to be available. Individuals in more serious condition are limited to United States service. No employee will be separated, and benefits will not be affected, by a finding of HIV infection.

Id. at 52. Because the testing program was directed at protecting employees unfit for stationing under questionable sanitary and medical conditions, the Local 1812 court refused to grant an injunction barring such mandatory testing. Id. Additionally, the court tacitly approved of the manner of testing, designed to protect the privacy of those tested. Id. at 53. Finally, the district court rejected claims under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 to 796i, as it agreed with the agency's assessment that HIV seropositivity or AIDS infection is genuinely relevant to qualification of employees for longterm overseas placement. In other words, individuals who test positive for HIV may not be "otherwise qualified" to serve in countries lacking in adequate medical care.^{6/}

On the other hand, New York's Court of Appeals has recently held under that state's Human Rights Law, that a job applicant with an asymptomatic back condition could not be disqualified for police work if presently able to perform the required duties; employment could not be denied based on speculation on possible future disability. City of New York v. State Division of Human Rights (Granelle), 43 E.P.D. ¶ 37,257 (1987). Under this line of reasoning, only a positive AIDS or ARC diagnosis might disqualify a person from employment if he was incapable of performing required strenuous physical work, as the mere presence of HIV in one's system does not predict whether and when a given individual may fall ill.

^{6/}Factually, foreign service AIDS testing is an easy case to decide, as assignment to many nations requires at a minimum live serum vaccination, which itself might unduly endanger someone with a compromised immune system.

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Thus, the present state of the law indicates that an employer cannot refuse to hire or discharge an employee with a positive AIDS test result unless the person is presently not qualified for the particular demands of the job.

Turning now to the public sector, public employers cannot require searches in violation of United States Constitution, Amendment IV. The Fourth Amendment applies to state action and requires that public interest in the information discovered must overcome the individual's reasonable expectation of privacy from state intrusion. Div. 214 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264 (7th Cir. 1976), cert. denied 429 U.S. 1029 (1976). Because AIDS transmission to co-workers and the public during the course of employment is remote, in most instances, the government generally would not have a strong interest in discovering an employee's HIV infection status. Again, however, the hazards of a given occupation to both the individual and the public could very well tip the balance to favor testing; a case-by-case analysis must be done.

In conclusion, the use of AIDS testing to make employment decisions will be subject to the limitations of the state Civil Rights Act and, where applicable, the federal Rehabilitation Act. Additionally, public sector employers are subject to Fourth Amendment privacy restrictions.

Sincerely,



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Attorney General

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