

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 89-8

Date issued: July 7, 1989

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- QUESTION PRESENTED -

Whether North Dakota's Human Rights Act, N.D.C.C. ch. 14-02.4, as amended by Senate Bill No. 2051, 51st Leg. (1989), applies to discrimination against individuals infected with Human Immunodeficiency Virus (HIV), including individuals with asymptomatic infections and individuals regarded as having HIV infections.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that North Dakota's Human Rights Act, N.D.C.C. ch. 14-02.4, as amended by Senate Bill No. 2051, 51st Leg. (1989), applies to discrimination against HIV-infected individuals, including individuals with asymptomatic infections and individuals regarded as having HIV infections.

- ANALYSIS -

North Dakota's Human Rights Act (NDHRA) prohibits discrimination on the basis of the presence of any "physical or mental handicap." N.D.C.C. ch. 14-02.4. Consequently, if an HIV (Human Immunodeficiency Virus) infection constitutes a "handicap," as that term is used in NDHRA, then discrimination based on the presence of an HIV infection is prohibited by NDHRA.

With the enactment of Senate Bill No. 2051, the Legislative Assembly added the following definition of "handicap" to NDHRA:

"Handicap" means an impairment that substantially limits one or more major life activities. The term includes having a record of such an impairment or being regarded as having such an impairment.

Senate Bill No. 2051, ' 1, 51st Leg. (1989).

The Interim Judiciary Committee, sponsor of Senate Bill No. 2051, provided the following explanation of the derivation of this definition:

The definition [of handicap] is essentially the same as that

contained in the federal Rehabilitation Act of 1973 [29 U.S.C. ' 706(8)(B)], which has been consistently interpreted as including HIV infection status as a handicapping condition. The committee was concerned that listing a specific condition as a handicap may result in future issues concerning whether a particular condition is included in the definition if it is not specified. Thus, the definition does not include a specific reference to HIV infection.

Report of the North Dakota Legislative Council, 51st Leg. 149 (1989).

Because the definition of "handicap" in NDHRA is derived from the definition of "individual with handicap" contained in section 504 of the federal Rehabilitation Act of 1973, 29 U.S.C. ' 794, judicial interpretations of the federal Rehabilitation Act of 1973 may be persuasive authority in interpreting NDHRA. See Amerada Hess Corp. v. Conrad, 410 N.W. 2d 124, 129 (N.D. 1987).

Several federal and state courts have indicated that the term "individual with handicap," as defined in the federal Rehabilitation Act, includes HIV-infected individuals. Local 1812, American Federation of Government Employees v. United States Dep't of State, 662 F. Supp. 50 (D.D.C. 1987) (concluding that HIV-infected individuals are handicapped within the meaning of section 504 of the federal Rehabilitation Act of 1973 because known carriers of an HIV infection are perceived to be handicapped); Thomas v. Atascadero Unified School Dist., 662 F. Supp. 376 (C.D. Cal. 1986) (holding that an HIV-infected child was handicapped within the meaning of section 504 of the federal Rehabilitation Act of 1973); Dist. 27 Community School Bd. v. Board of Educ. of City of New York, 130 Misc. 2d 398, 502 N.Y.S.2d 325, 336 (N.Y. Sup. Ct. 1986) (holding that children with HIV infection are handicapped within the meaning of the federal Rehabilitation Act). The decisions of these courts, indicating that HIV-infected individuals are "individuals with handicaps," support the conclusion that HIV-infected individuals are also "handicapped" for the purposes of NDHRA.

This interpretation of NDHRA is also supported by its legislative history. Because NDHRA does not explicitly include HIV-infected individuals within its scope, the statute could be considered ambiguous and its legislative history may be considered in interpreting the statute, N.D.C.C. ' 1-02-39(3). The legislative history of Senate Bill No. 2051 shows that the Legislature intended to include HIV-infected individuals within the scope of NDHRA.

The chairman of the Legislative Council assigned a study of the legal issues associated with AIDS to the Interim Judiciary Committee in 1987. Report of the North Dakota Legislative Council, 51st Leg. 143 (1989). This study led to the introduction of Senate Bill No. 2051 to the 1989 Legislature. The relevant portion of the Interim Judiciary Committee's report notes the following:

The committee, in an effort to address issues regarding the scope of the coverage provided by Chapter 14-02.4, reviewed the

legislative history of the chapter's enactment and recent federal and state court decisions and the decisions of state agencies charged with enforcing antidiscrimination laws relating to the scope and meaning applied to "handicap." The committee concluded that Chapter 14-02.4 was intended to be broadly applied and therefore would provide protection against discrimination on the basis of AIDS, ARC, or a person's HIV infection status. The committee also concluded that amending Chapter 14-02.4 to provide a definition of handicap would be appropriate.

On the broader issue of the coverage of Chapter 14-02.4, the committee concluded that its actions on this issue would provide some evidence regarding legislative intent in this area. The committee concluded that nothing need be done legislatively because Chapter 14-02.4 as presently constituted provides protection for those infected with the HIV, including those with AIDS, ARC, and those who are asymptomatic.

Id. at 148. Therefore, according to its legislative history, NDHRA prohibits discrimination against HIV-infected individuals.

Also, application of the basic principles of NDHRA and the federal Rehabilitation Act indicate that those acts cover HIV-infected individuals. An HIV-infected individual will be considered "handicapped" under both the federal Rehabilitation Act and NDHRA if the following conditions are met:

1. The HIV infection, by itself, constitutes a physical or mental impairment; and
2. The impairment substantially limits a major life activity.

See 29 U. S. C. ' 706(8)(B); Senate Bill No. 2051, ' 1, 51st Leg. (1989).

Of course, whether an HIV infection constitutes a physical impairment or substantially limits a major life activity is a factual determination that must be made by the courts on an individual basis in cases where that issue is raised. However, the current judgment of the medical community, including the opinion of public health officials, appears to be that HIV infection is a physical impairment that substantially limits a major life activity.

Recent statements by Dr. C. Everett Koop, Surgeon General of the Public Health Service, for example, support the conclusion that HIV-infected individuals, including individuals with asymptomatic infections, are physically impaired:

[M]uch has been learned about HIV infection that makes it inappropriate to think of it as composed of discrete conditions such as ARC [AIDS Related Complex] or "full blown" AIDS. HIV infection is the starting point of a single disease which progresses through a variable range of stages. In addition to an

acute flu-like illness, early stages of the disease may involve subclinical manifestations i.e., impairments and no visible signs of illness. The overwhelming majority of infected persons exhibit detectable abnormalities of the immune system. Almost all, [sic] HIV infected persons will go on to develop more serious manifestations of the disease and our present knowledge suggests that all will die of HIV infection barring premature death from other causes.

Accordingly, from a purely scientific perspective, persons with HIV infection are clearly impaired. They are not comparable to an immune carrier of a contagious disease such as Hepatitis B. Like a person in the early stages of cancer, they may appear outwardly healthy but are in fact seriously ill.

Letter from Dr. C. Everett Koop to Douglas Kmiec (July 29, 1988) (discussing HIV epidemic) (emphasis supplied).

Further, public health officials have concluded that the physical impairment of an HIV infection will result in the limitation of at least one major life activity, i.e., procreation:

Based on the medical knowledge available to us, we believe that it is reasonable to conclude that the life activity of procreation -- the fulfillment of the desire to conceive and bear healthy children -- is substantially limited for an asymptomatic HIV-infected individual. In light of the significant risk that the AIDS virus may be transmitted to a baby during pregnancy, HIV-infected individuals cannot, whether they are male or female, engage in the act of procreation with the normal expectation of bringing forth a healthy child. Because of the infection in their system, they will be unable to fulfill this basic human desire. There is little doubt that procreation is a major life activity and that the physical ability to engage in normal procreation -- procreation free for the fear of what the infection will do to one's child -- is substantially limited once an individual is infected with the AIDS virus.

Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Council, U.S. Dept. of Justice, to Arthur B. Culvahouse, Jr., Counsel to the President, at 10-11 (Sept. 27, 1988) (footnote omitted) (concluding that section 504 of the federal Rehabilitation Act of 1973 protects any otherwise qualified HIV-infected individual against discrimination in any covered program or activity on the basis of any actual, past, or perceived effect of HIV infection that substantially limits any major life activity).

Major life activities of HIV-infected individuals may also be limited based on the reaction of others to the infection. The United States Supreme Court, in analyzing the federal Rehabilitation Act, observed that an impairment which

does not substantially limit a person's functioning "could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 283 (1987) (footnote omitted). For example, if an individual or organization limits an HIV-infected individual's participation in an activity covered by the federal Rehabilitation Act because of fear of contagion, a major life activity of the individual is substantially limited. See Doe v. Centinela Hospital, No. CV 87-2514 (C.D. Cal. June 30, 1988) (holding that reaction of others to contagiousness of an HIV-infected individual may constitute a limitation of a major life activity). This same analysis should apply to NDHRA because it is based upon the federal act. Consequently, because it appears that all HIV infections, including asymptomatic infections, constitute physical impairments which substantially limit major life activities, it seems likely that a court would conclude that all HIV-infections qualify as "handicaps" for NDHRA purposes.

The one remaining issue is whether NDHRA protects against discrimination individuals who are perceived as having HIV infections. By definition, the term "handicap" in NDHRA includes individuals "regarded as having" an impairment which substantially limits one or more major life activities. Senate Bill No. 2051, 51st Leg. (1989). Therefore, because NDHRA protects individuals with an HIV infection, it also prohibits discrimination against individuals regarded as having HIV infections.

Based upon the foregoing discussion, it is my opinion that NDHRA, as amended by Senate Bill No. 2051, applies to discrimination against HIV-infected individuals, including individuals with asymptomatic infections and individuals regarded as having HIV infections.

- EFFECT -

This opinion is issued pursuant to N. D. C. C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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