Commissioner Morris L. Thigpen
Department of Corrections
101 South Union Street
Montgomery, Alabama 36130

Department of Corrections -
Employer/Employees -
A.I.D.S.

Certain actions can be
taken when an employee of
the Department of
Corrections tests positive
for AIDS.

Dear Mr. Thigpen:

This opinion is issued in response to your request
for an opinion from the Attorney General.

QUESTION

...[W]hat action, if any, [could] the DOC...
take with respect to an employee who tested
positive for AIDS.

FACTS AND ANALYSIS

The Code of Alabama does not specifically address
this question. Further, there are no current Alabama
cases which would answer your question. Therefore, we
have to look to other districts and states to find a
solution. There, some states and federal districts are
attempting to deal with this question. It is an area of
the law that is rapidly evolving.
Particularly, there is an ever increasing number of AIDS cases coming out of courts across this country. These cases are beginning to show a pattern of non-discrimination against AIDS victims.

While there is currently no state legislation dealing specifically with your request, there is federal legislation which offers some guidance. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, mandates non-discrimination in programs funded by federal grants. Therefore, Section 504 would apply to programs specifically funded within institutions such as DOC. This section prohibits discrimination against otherwise handicapped employees. In order to be protected under this provision, the employee has to show that he is "handicapped" and that he is otherwise qualified. Since merit employees of the state would be "otherwise qualified," they would only have to show they were handicapped to be protected from discrimination if they work for a program in DOC that is federally funded.

A handicapped individual is defined by the statute as being a person who (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. 29 U.S.C. § 706(7)(B).

The Human Rights Commissions of at least six different states have recognized AIDS as a handicap. They are California, Florida, Massachusetts, New York, New Jersey, and Texas. The Department of Justice has acknowledged that the disabling effects of AIDS on its victims qualified that condition as a handicap. In School Board v. Arline, 107 S.Ct. 1123 (1987), a teacher was fired basically because she had a relapse of tuberculosis. The Supreme Court treated that disease as a handicap, and ruled that the school board wrongly discharged Arline. Under the logic applied in Arline, an AIDS victim would be treated as a handicapped person if he/she were suffering from the symptoms of the disease.
Until the law becomes more settled, employers should keep in mind several factors. First, an employment decision to exclude an employee with AIDS which is based solely on a fear of the reaction of his/her coworkers would probably be discriminatory. Secondly, a fear of the spread of AIDS could just be a pretext on the part of the employer and a court would look beyond this pretext to test the rationality of the employer's decision. Third, some state courts have indicated that they would protect AIDS victims from discrimination. (See, e.g. Shuttleworth v. Broward County, 639 F.Supp. 654 (S.D. Fla. 1986).) Finally, recent medical studies have shown that a person afflicted with the human immunodeficiency virus (HIV), or the virus which AIDS victims are suffering from, may suffer a wide range of adverse health effects different from those who have been diagnosed as having AIDS or AIDS related complex, a milder form of AIDS. AIDS and the Law, William H. L. Darnette, M.D., J.D., Wiley Law Publications, John Wiley and Sons (1987).

A recent decision by the Ninth Circuit indicates that an employee with AIDS who is capable of performing his job despite the disease, and who does not present a significant risk of harm to others, is entitled to remain in his position. Chalk v. United States District Court, Central District of California, 832 F.2d 1158 (9th Cir. 1987).

CONCLUSION

DOC employees who have tested positive for AIDS have to be taken on case-by-case to determine what action can be taken.

Sincerely,

DON SIEGELMAN,
ATTORNEY GENERAL

BY-

DAVID B. KARN
ASSISTANT ATTORNEY GENERAL