Office of the Attorney General  
State of Maryland  

Opinion No. 92-018  

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HEALTH - COMMUNICABLE DISEASES - HEALTH OCCUPATIONS - MORTICIANS -  
CIVIL RIGHTS AND DISCRIMINATION - DISABILITY - DISCRIMINATORY PRACTICES  
INVOLVING BODIES INFECTED WITH HIV  

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Mr. Erich March  
President, Board of Morticians  

Dear Mr. March:  

Your predecessor, Mr. Robert Foard, asked our opinion on the scope of § 7-317(a)(27) of the Health-Occupations Article ("HO" Article), which subjects a licensed mortician to disciplinary action for "discriminat[ing]" against an individual who is infected with the human immunodeficiency virus ("HIV"). Specifically, Mr. Foard asked whether certain practices would constitute actionable discrimination under HO § 7-317(a)(27). These practices can be stated in the following factual examples:  

Case A: A funeral home that normally embalms bodies, upon learning that the deceased was HIV-positive, tells the next-of-kin that it will make funeral arrangements but will not embalm the body. The funeral home refers the next-of-kin to another funeral home if there is to be an embalming and a viewing.  

Case B: A funeral home, upon learning that the deceased was HIV-positive, accepts the body for final disposition but contracts the embalming out to another mortuary service and adds the extra cost to the bill. If the deceased were not HIV-positive, the funeral home would do the embalming.  

Case C: A funeral home informs the potential client that it will impose an extra charge for "handling" an HIV-positive body to be cremated.  

Case D: A funeral home states on its price list that embalming any body with a contagious disease entails an extra charge for contagious disease equipment.  

Case E: A funeral home, which normally embalms autopsied bodies, refuses to embalm an autopsied body that has a contagious disease and sends the body to another mortuary service, adding an extra charge to the bill.
For the reasons set forth below, we conclude that all five cases constitute prohibited discrimination under HO § 7-317(a)(27). Additionally, these practices violate the Maryland Public Accommodations Law and the Americans with Disabilities Act.

I

Background

The letter requesting our opinion describes in detail the process involved in embalming a body. Unquestionably, this is a highly invasive procedure that exposes an embalmer to risks of cuts and needle pricks. As the letter indicates, embalming an autopsied body poses a much more significant risk, because the embalmer is exposed to open body cavities, jagged bone edges, and bone slivers; moreover, for autopsied bodies the embalmer must perform 200 stitches with a needle to close the body cavity.

Understandably, these procedures cause concern to the morticians handling a body infected with a contagious disease, particularly AIDS. Accordingly, on September 12, 1990, the Board of Morticians adopted Guidelines for the Control of Human Immunodeficiency Virus Infection, as set forth by the Maryland Governor's Advisory Council on AIDS in May of 1989. Those guidelines state that since the majority of persons who are infected with HIV have no symptoms, the embalmer must consider every case as potentially infectious and therefore must exercise precautions including wearing “disposable double gloves, masks, goggles, gowns, waterproof aprons and waterproof shoe coverings.” Guidelines for Control of the Human Immunodeficiency Virus, Governor's Council on AIDS at 47 (“HIV Infection Control”). However, because these guidelines were not formally adopted as regulations of the Board of Morticians, compliance is voluntary, not mandatory. See 76 Opinions of the Attorney General ___ (1991) [Opinion No. 91-003, at 4 (January 23, 1991)]. Hence, you indicate that, in general, morticians who embalm bodies thought to be infected use greater precautions than when they embalm bodies not thought to be infected, despite the obvious risk of such a practice. [FN1]

*2 Indeed, as the letter explains, a mortician performing an autopsy on a noninfected body ordinarily wears street clothes, covered with an apron, two pairs of plastic gloves, and goggles. In contrast, when embalming an infected body, the mortician wears a disposable coverall garment designed to protect the embalmer from any accidental exposure to infected body fluids. Additionally, the embalmer takes special precautions with the body. These precautions include use of a disposable body pouch, a protective garment on the remains to contain any leakage of body fluids from incisions, and a fortified embalming solution to maximize disinfection. Waste from an infected body must be disposed of by the use of a certified medical waste disposal company. Finally, a transparent veil is placed on the open portion of the coffin to protect a viewer against exposure to any potentially infectious fluids that might have leaked from the orifices. [FN2] Your predecessor suggested that these added precautions result in an increase in costs that should be passed on to the consumer.
II

Discrimination on Basis of HIV Status

In 1989, the General Assembly enacted Chapter 789 of the Laws of Maryland, titled “Human Immunodeficiency Virus - Omnibus Bill,” a wide-ranging bill that, among other things, sought to protect people infected with HIV from discrimination by health care providers. [FN3] One provision of that legislation, codified as HO § 7-317(a)(27), provides as follows:

Subject to the hearing provisions of § 7-318 of this subtitle and except as to a funeral establishment license, the Board [of Morticians] may deny a license to any applicant, reprimand any licensee, place any licensee on probation, or suspend or revoke any license if the applicant or licensee:

(27) Refuses, withholds from, denies, or discriminates against an individual with regard to the provision of professional services for which the licensee is licensed and qualified to render because the individual is HIV positive.

In our view, HO § 7-317(a)(27) is clear in its mandate: A mortician is subject to disciplinary action if the mortician “discriminates” against an individual who is HIV-positive. Absent any indication that the General Assembly intended a special or unusually narrow meaning of the key term “discriminates,” we give the term its natural and ordinary meaning. See Washington National Arena v. Comptroller, 308 Md. 370, 375, 519 A.2d 1277, 1280 (1987). “Discrimination” means “a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored.” Baker v. California Land Title Co., 349 F. Supp. 235, 239 (C.D. Cal. 1972).

As we shall explain, the refusal to treat, or the imposition of higher costs for treating, an HIV-positive or otherwise infected body constitutes discrimination in violation of HO § 7-317(a)(27). There is no reasonable basis in science or law for treating HIV-positive bodies differently than bodies thought to be noninfected.

*3 While this opinion request was pending, the General Assembly enacted Chapter 154 (House Bill 388) of the Laws of Maryland 1992, which amends HO § 7-317(a) to add the following new ground for discipline, if the licensee:

(28) Except in an emergency life-threatening situation where it is not feasible or practicable, fails to comply with the Centers for Disease Control's guidelines on universal precautions.

The reference is to Centers for Disease Control ("CDC"). Recommendations For Prevention of HIV Transmission in Health Care Settings, 36 Morbidity and Mortality Weekly Rep. ("MMWR") 1 (1987); 36 MMWR 377 (1988). The guidelines adopted by the Governor's Advisory Council on AIDS are virtually identical to those promulgated by the CDC.

According to the concept of universal precautions embodied in these guidelines, all human blood and certain human body fluids are treated as if known to be infectious for HIV, hepatitis B virus ("HBV"), and other bloodborne pathogens. The CDC guidelines specifically promote the
use of universal precautions by morticians. See 36 MMWR at 8.

Chapter 154 makes mandatory practices that were previously voluntary and precludes a mortician from taking different precautions with an infected body than a body not thought to be infected. In short, morticians are legally obligated to don the protective clothes and adopt the protective procedures that have previously been used only when the mortician knew a body was infected. Failure to observe universal precautions with all bodies may subject a mortician to discipline.

Additionally, we direct your attention to regulations recently adopted by the Occupational Safety and Health Administration of the federal Department of Labor (“OSHA”) and thereafter adopted by the Maryland Occupation Safety and Health Office. See 56 Fed. Reg. 64175 (December 6, 1991); 19:10 Md. R. 930 (May 15, 1992); 19:6 Md. R. 682-684 (March 20, 1992). These regulations are intended to reduce occupational exposure to HIV, HBV, and other bloodborne pathogens by requiring health care workers to observe universal precautions. Under these regulations, all human blood and body fluids are to be treated as if infected. 29 C.F.R. § 1910.1030(b). These regulations require engineering and work practice controls to be implemented and personal protective equipment to be used. This personal protective equipment includes gloves, gowns, laboratory coats, face shields or masks and eye protection, and mouth pieces. Personal protective equipment will be considered “appropriate” only if it does not permit blood or other potentially infectious materials to pass through to or reach the employee's work clothes, street clothes, undergarments, skin, eyes, mouth, or other mucus membranes under normal conditions of use and for the duration of time that the protective equipment will be used. 29 C.F.R. § 1910.1030(d)(3). These regulations do not permit a mortician to treat a body known to be infected differently than any other body.

*4 Turning to the specific cases in your predecessor's letter, we are told that Board members generally agree that Case A - refusal to embalm - violates the statute. We are in accord. Unquestionably, embalming is a fundamental service provided by a funeral home. [FN4] Accordingly, a mortician's refusal to embalm because the deceased was HIV-positive is both a refusal to provide services and “discriminat[ion]” prohibited by HO § 7-312(a)(27).

Cases B and C present a slightly different problem. In these two cases, the mortician either contracts out the embalming to a different funeral home, charging a higher fee, or charges an additional “handling” fee if the body is to be cremated. These practices, too, constitute discrimination. In both cases, the mortician would be taking actions that increase the cost of the service solely because the deceased was HIV-positive.

An analogy to federal law is instructive. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, provides in general that “[n]o otherwise qualified individual with handicaps . . . shall, solely by reason of his or her handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .” 29 U.S.C. § 794(a). [FN5] The Rehabilitation Act imposes an affirmative
duty upon a doctor or an institution to treat an "otherwise qualified" handicapped individual. If a refusal to treat were based solely on the handicap, the refusal may violate the Act. See Glanz v. Vernick, 750 F. Supp. 39 (D. Mass. 1990) (patient for surgery infected with HIV was "otherwise qualified"; refusal to treat actionable under the Rehabilitation Act). [FN6]

The goal of HO § 7-317(a)(27) is analogous to that of the Rehabilitation Act: to prohibit discrimination against people infected with HIV and those who seek funeral services on their behalf. Embalming is a fundamental service provided by a mortician, and a mortician's refusal to provide this service solely because the deceased was HIV-positive is unjustifiable discrimination. [FN7] Additionally, since morticians are required to employ universal precautions with all bodies, there is no rational basis for charging a higher "handling" fee to the family or friends of the deceased because the body was HIV-positive.

We do recognize that adopting universal precautions may ultimately increase a mortician's cost of doing business. We are not suggesting that this increase in operating costs may not be passed on to the consumer. However, increased costs associated with universal precautions should be passed on to the universe of consumers, not to the small subset of consumers seeking services for those known to be infected with HIV.

Finally, cases D and E too constitute discrimination under HO § 7-317(a)(27). In these cases, the funeral home does not specifically single out HIV-infected bodies for disparate treatment but rather lumps together all bodies infected with any contagious disease and either charges an additional "handling" fee or contracts the embalming out to another funeral home.

*5 In Case D, the increased fee is for additional contagious disease equipment. In light of newly enacted HO § 7-317(a)(28) and the pertinent OSHA and MOSH regulations, such equipment is required with all bodies. Thus, the additional fee is unnecessary and discriminatory. [FN8]

In our view, it makes no difference that HIV is not being singled out. While on its face treating all contagious diseases alike does not appear to discriminate specifically against HIV-positive individuals, the effect of the categorization is the same: A person who is HIV-positive suffers from discrimination solely because of that fact. In our view, such disparate treatment amounts to discrimination under HO § 7-317(a)(27).

A similar analysis applies to Case E. Assuming that the funeral home is qualified to perform embalming services, which presumably it is as a consequence of licensure, HO § 7-317(a)(27) does not allow the funeral home to contract out and charge more for that service solely because a body is categorized as contagious. The net effect, like in Case D, is that an additional charge for a service is imposed solely because of the fact that a body is HIV-infected.
III

Public Accommodations Law

We have been advised by counsel to the Maryland Human Relations Commission that Article 49B's prohibition of discrimination in public accommodations based on handicap applies to funeral homes. Article 49B, § 5. HIV infection is a “handicap,” according to the Human Relations Commission. COMAR 14.03.02.02. See generally 76 Opinions of the Attorney General ___ (1991) [Opinion No. 91-027, at 14 (June 25, 1991)].

In pertinent part, a public accommodation is defined as “a retail establishment, whether offering goods, services, entertainment, recreation, or transportation.” Article 49B, § 5(d)(1)(iii). Since a funeral home provides services to consumers, the Human Relations Commission maintains that a funeral home is a public accommodation within the meaning of the Public Accommodation Law and thus is subject to the jurisdiction of the Human Relations Commission. We agree.

Indeed, a similar approach was applied by the New York Human Relations Commission in Dimiceli and Sons Funeral Home v. New York City Comm'n on Human Rights, No. 19527/86 (Sup. Ct. January 9, 1987), reprinted in New York Law Journal, January 14, 1987, at 12. In this case, also involving discrimination against persons infected with HIV, the trial court upheld a New York Human Relations Commission decision that a funeral home's practice of inflating fees for services and requiring families of the deceased to pay for “unnecessary” precautions was discrimination under the New York Human Rights Act. In Dimiceli, the defendants did not deny that HIV infection was a “handicap” under the applicable statute, but rather argued that the term “physically handicapped” did not encompass those persons who are already dead. The court, rejecting that argument, wrote as follows:

There is adequate precedent for affording the individual dignity and freedom from discrimination not only in those activities and services performed during one's life, but also in those activities and services performed at one's death.


Accordingly, not only would the five practices that you presented to us violate HO § 7-317(a)(27), they would also be actionable under Article 49B, § 5.

IV

Americans With Disabilities Act

Title III of the Americans With Disabilities Act (“ADA”), 42 U.S.C. § 12181 et seq., prohibits discrimination against persons with disabilities in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. 42 U.S.C. § 12182. HIV infection, whether or not
it has developed into AIDS, is a "disability" under the ADA. 28 C.F.R. § 36.104. A funeral parlor is expressly included within the definition of "public accommodation." 42 U.S.C. § 12181(7)(F). Although in this situation the deceased is the disabled individual, the ADA prohibits discrimination against an individual because of the individual's association with someone else known to be disabled. 42 U.S.C. § 12182(b)(1)(E); 28 C.F.R. § 36.205. Thus, the family or friends of the deceased, as the victims of discrimination, would have standing to bring an action.

Under the ADA a funeral home is to make reasonable modifications in policies, practices, and procedures to avoid discrimination. 42 U.S.C. § 12181(b)(2)(A)(iii). While the issue is subject to debate, in our view adherence to universal precautions by morticians, in lieu of special precautions when a body is thought to be HIV-positive, is precisely the type of reasonable change in practice to avoid discrimination that the ADA contemplates. Funeral homes may only be excused from compliance if they can demonstrate that taking such steps would result in an "undue burden." 42 U.S.C. § 12182(b)(2)(A)(iii). It is unlikely that the use of added precautions such as disposable gloves is a demonstrably undue burden, particularly in light of newly enacted HO § 7-317(a)(28), which mandates the use of universal precautions.

Finally, ADA regulations prohibit a public accommodation from imposing a surcharge on a particular individual or group of individuals with a disability to cover the costs of reasonable modifications in policies, practices, and procedures, if such modifications are required to provide that group with the nondiscriminatory treatment required by the ADA. 28 C.F.R. § 36.301(c). Consequently, the imposition of a surcharge or "handling fee" for an HIV-infected body would be actionable under the ADA. The vice is not passing on added costs, but rather forcing people with a particular disability, HIV infection, to bear a disproportionate share of those costs. The cost of universal precautions should be treated as just another cost of doing business, spread among all of an establishment's customers.

V

Conclusion

*7 In summary, it is our opinion that the funeral home practices involving a refusal of service to, or the imposition of higher charges on, HIV-positive individuals, including the five examples identified in your predecessor's request to us, violate HO § 7-317(a)(27). Moreover, all five practices also violate the Maryland Public Accommodations Law and the Americans With Disabilities Act.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

Mary O'Malley Lunden
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[FN1]. A mortician is not always informed that the deceased was infected with a contagious disease. Sometimes the fact of infection might not be known at all.

[FN2]. HIV is transmitted from person to person “by sexual contact, by contact with contaminated needles, from mother to baby, by transfusion of infected blood or blood products, and from infected blood or bloody body fluids in contact through breaks in the skin or mucous membranes.” HIV Infection Control at 1. The Governor's Advisory Council reports “no documented spread of HIV by ordinary household, social or office contacts.” Id. Thus, a person simply viewing a body is at no risk. Moreover, as we understand it, once a body has been embalmed there is virtually no risk of transmission even if there were direct contact.

[FN3]. Other provisions of Chapter 789 were intended to provide information and protection to those at risk of infection and to set forth guidelines for health care workers with regard to counseling, testing, and notification. Additionally, Chapter 789 made it a crime for an individual to knowingly transfer HIV to others and approved attendance at AIDS education programs as a sentencing option.

[FN4]. Indeed, to be licensed as a mortician, an applicant must pass a written and practical examination demonstrating an ability to embalm. HO § 7-305(d); COMAR 10.29.02.03.

[FN5]. We are not suggesting that funeral homes in this State are subject to the Rehabilitation Act. Individual morticians should direct inquiries to their counsel to determine whether the Act applies to them.

[FN6]. Of course, HIV status may be relevant to a determination of whether treatment is advisable. See, e.g., Doe v. New York University, 666 F.2d 761, 767 (2d Cir. 1981).

[FN7]. We recognize that nonpretextual circumstances may arise that legitimately warrant contracting out embalming work— for example, staff shortages. Contracting out the embalming of an HIV-positive deceased does not violate HO § 7-317(a)(27) if the reason for doing so is unrelated to the deceased's HIV status.

[FN8]. Charging an additional fee only to families of contagious decedents in all likelihood also violates the Americans With Disabilities Act. See Part IV below.