

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by  
Stephen W. Cooper, Commissioner,  
Department of Human Rights,

Complainant,

FINDINGS OF

FACT,

CONCLUSIONS

OF LAW

VS.

AND ORDER

Di Ma Corporation and  
Richard Carriveau,

Respondents.

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck at 10:00 a.m. on October 11, 1990 at the Law Enforcement Center, 807 Courthouse Square, in the City of St. Cloud, Minnesota. The hearing continued on October 15, 1990 at St. Paul Ramsey Medical Center in the City of St. Paul, Minnesota. The record remained open through December 3, 1990 when the last written memorandum was filed.

Erica Jacobson, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Complainant. James H. Manahan, Attorney at Law, Manahan, Bluth, Green, Friedrichs & Marsh Law Office, Chartered, Suite 500, Nichols Office Center, 410 Jackson Street, P.O. Box 287, Mankato, Minnesota 56002-0287, appeared on behalf of the Respondents.

Pursuant to Minn. Stat. 363.071, subd. 2, this Order is the final decision in this case and under Minn. Stat. 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. 14.63 - 14.69.

STATEMENT OF ISSUES

The issues to be determined in this contested case proceeding are whether or not the Respondents unlawfully discriminated against the Charging Party, Lyle Pierce by discharging him from employment due to a disability and if so, what relief should be granted.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

1. Lyle J. Pierce is a gay male who resides in St. Cloud, Minnesota. At all times relevant herein he has tested positive for antibodies to the human immune-deficiency virus (HIV) but he does not have and has not had acquired immune deficiency syndrome (AIDS) or any symptoms or complications of AIDS. (T. 15, 39).

2. Di Ma Corporation owns and operates three adult bookstores in southern Minnesota and Wisconsin including one in St. Cloud. Richard Carriveau is the president of Di Ma Corporation and the general manager of the St. Cloud bookstore. (T. 53, 72). The bookstore sells adult magazines, adult videos, novelties and paraphernalia. The store has a back room where customers can watch sexual films in small booths. (T. 81).

3. Mr. Pierce has had three terms of employment at the book store. He was first employed as a sales clerk from 1981 through 1983 at which time he was fired. He also worked for approximately six months in 1984 as a sales clerk and then voluntarily quit. His third period of employment ran from December 18, 1986 through May 15, 1989 at which time he was fired. (T. 11-12).

4. The duties of a sales clerk includes sales, putting stock away, transfer of inventory, maintenance of video equipment and cleaning up inside and outside the store. (T. 13, 60). The manager of the store has the same duties plus ordering supplies, doing a quarterly inventory and checking on the clerks. (T. 13). Patrons sometimes masturbate while watching the films at the store and the semen has to be cleaned up by employees. (T. 83).

5. During 1981 Mr. Carriveau asked Mr. Pierce if he was gay and Mr. Pierce replied that he was. (T. 13-14). Mr. Pierce was fired in 1983 because he was talking with customers and friends too much while working and because he was hanging around outside the store when he was off-duty. (T. 42-3, 73). Mr. Carriveau received several letters in 1983 and 1984 complaining about Pierce's conduct. (Ex. B-E; T. 74-80).

6. During 1987 the manager of the bookstore, Mark DeMars advised Mr. Pierce and another gay sales clerk that they would be required to have an AIDS test at the expense of Di Ma Corporation. Mr. Carriveau believes that if one of his employees has AIDS he might catch it himself. (T. 62). He believes that gay people are likely to have AIDS and therefore wanted employees he believed to be gay to be tested for AIDS. (T. 62-3). He instructed Mr. DeMars to require the AIDS test. (T. 63; T. 100-01). Mr. Carriveau referred to gays as "AIDS-ridden cocksuckers" when talking to Mr. DeMars. (T. 101). Mr. Pierce tested positive for the HIV virus, however, he altered the test results so that it showed a negative result and submitted it to Mr. Carriveau. (T. 15-16).

7. In flay of 1988 Mr. Carriveau promoted Mr. Pierce to manager of the St. Cloud bookstore. (T. 12).

8. During the fall of 1988 Mr. Pierce lost approximately 50 pounds through dieting. Mr. Carriveau noticed the weight loss and asked Mr. Pierce if AIDS was eating him up. He also told Mr. Pierce that he wasn't as sharp as he used to be and asked if AIDS was eating his brain. (T. 17). Mr. Carriveau made similar comments on a weekly basis. Mr. Carriveau told Mr. Pierce that he

could no longer ride in the company car because he didn't want AIDS germs on him or his family. (T. 18).

9. Early in 1989 Mr. Pierce came down with a cold which wouldn't go away. Mr. Carriveau asked Mr. Pierce if he was unable to get rid of the cold because he had AIDS. (T. 19).

10. Mr. Pierce would get coffee for Mr. Carriveau, usually every morning. so. Carriveau told him that he wanted his coffee in a little plastic ziplock bag or paper bag so that Pierce wouldn't get AIDS germs on it. (T. 19; T. 102).

11. In late February of 1989 Mr. Carriveau told Mr. Pierce that he was misbehaving on the job by talking to customers too much and told him that if he signed a letter of resignation effective two weeks later he would give Pierce pay for two weeks vacation plus another three weeks severance pay in order to avoid an unemployment hearing. Mr. Pierce signed the letter of resignation indicating that his last day would be March 9, 1989. (Ex. 3; T. 48).

12. Mr. Pierce's job performance during the two-week period preceding March 9, 1989 was good and on March 9 Mr. Carriveau told him that he could remain on the job if he signed an undated open-end letter of resignation which Mr. Pierce did. (T. 31; T. 84; Ex. 4).

13. While Mr. Pierce was on vacation in April of 1989, someone came into the bookstore and told Mr. Carriveau that Mr. Pierce was a "carrier." (T. 20). Mr. Carriveau confronted Mr. Pierce when he returned from vacation and began asking him on a daily basis to get an AIDS test. (T. 21).

14. Later in April of 1989 Mr. Carriveau put a note on the bulletin board in the bookstore advising Lyle to have his AIDS test mailed to him by his doctor.

15. At the end of April 1989 Mr. Carriveau left a note for Mr. Pierce on a note pad at the bookstore which stated: "Lyle, make appointment for AIDS test or I will today.'" (Ex. 1).

16. Mr. Carriveau circled May 15, 1989 on a calendar at the bookstore and wrote on the calendar that "Lyle's AID test has to be in by that date." On May 12, Mr. Carriveau wrote: "Last day if not." (Ex. 2; T. 64-5). Mr. Carriveau meant that May 12 would be Lyle's last day if he failed to submit test results on May 15. (T. 64-65).

17. Mr. Pierce stalled on taking the AIDS test because he needed the job and believed that Mr. Carriveau would fire him if he tested positive. He also felt that the job was one he could do if he did get sick. (T. 25).

18. On May 15, 1989 Mr. Pierce reported to work at his usual time and Mr. Carriveau asked him if he had his AIDS test results. Mr. Pierce said no and told Mr. Carriveau that he didn't believe it had anything to do with his job. Mr. Carriveau replied "Well I do", discharged him from employment and told him he could pick up his check that afternoon. (T. 27-28; T. 65).

19. Mr. Pierce applied for unemployment compensation after he was fired. (T. 66). Mr. Carriveau submitted a written statement to the Department of Jobs

and Training in which he stated that Mr. Pierce had voluntarily quit his job. He also denied requiring Lyle to get an AIDS test. (T. 67; Ex. 8). At the unemployment hearing Mr. Carriveau testified that he did require Pierce to have an AIDS test. (T. 87). Mr. Pierce was awarded unemployment benefits. (Ex. 9).

20, A person who tests HIV positive on a standard antibody test has the HIV virus in his system, but may have no symptoms whatsoever. (T. 122-23). AIDS is the end stage of a long period of HIV infection where the immune system has been damaged by the virus over time to the point where the person has developed an infection or tumor indicative of severe immune deficiency. (T. 123). The period from HIV infection to the development of AIDS is estimated to be eleven years. However, it is unknown whether all those infected with the HIV virus will develop AIDS. (T. 123, 125). A person diagnosed as having AIDS can currently expect to live for approximately two years. (T. 125).

21. A person who has the HIV virus can spread the virus through intimate sexual contact, blood sharing, or having babies, even though they have no symptoms. (T. 124). Specifically, the virus can be spread through insertive intercourse with anal sex (being the riskiest, and vaginal sex being riskier than oral sex. It can also be spread through blood exposure, such as by blood transfusions, IV drug use or by health care workers being exposed to contaminated needles. A mother can also infect her fetus prior to birth. (T. 128-29).

22. There have been no documented cases of casual transmission of the HIV virus such as by being in the same room or car with an infected person, or by taking a cup of coffee or money from an infected person. (T. 130). An HIV positive person could clean up semen from a floor or wall without a risk of transmission of the virus. (T. 131).

23. A person who is HIV positive has no significant impairment in the

early stages of infection and can safely perform any job with the exception of invasive surgery. (T. 128). Approximately 90 percent of HIV positive persons are employed when diagnosed. (T. 131).

24. Mr. Pierce earned \$7,070.23 working for Di Ma Corporation from January 1 to May 14, 1989. He earned a net profit of \$3,243 from September 3, 1989 to December 31, 1989 working as a newspaper delivery man for the St. Paul Pioneer Press. From September 17, 1989 to December 31, 1989, Pierce earned \$2,319.57 as a cook at Joyce's Cafe in St. Cloud. He also collected unemployment benefits during 1989 in the amount of \$3,716. (Ex. 5).

25. During 1990 Mr. Pierce earned \$2,272.13 as a cook at Joyce's Cafe through October 13, 1990. His profit from newspaper delivery of the Pioneer Press from January 1, 1990 through October 13, 1990 was \$8,398.75. (Ex. 5).

26. Just prior to being discharged on May 15, 1989 Mr. Pierce had obtained a car loan. When he was fired he was forced to refinance the loan since he could no longer make the monthly payments. As a result he incurred additional interest in the amount of \$1,002.14. (Ex. 12).

27. Di Ma Corporation and Richard Carriveau have substantial financial resources.1/

28. The parties have waived the requirement for personal service and service by registered or certified mail set out at Minn. Stat. 363.071, subd. 2. (T. 153).

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CQNCLUSIONS QF LAW

1. The Administrative Law Judge has jurisdiction in this matter pursuant to Minn. Stat. 14.50 and 363.071.

2. The Complainant gave proper notice of the hearing in this matter and has fulfilled all relevant substantive and procedural requirements of law or rule.

3. Respondent is an employer as defined in Minn. Stat. 363.01, subd. 15.

4. Minn. Stat. 363.03, subd. 1 (1988), provides, in part, as follows:

Subdivision 1. Employment. Except when based on a bona fide occupational qualification, it is an unfair employment practice:

(2) for an employer, because of . . . disability . . . .

(b) to discharge an employee;

5. Minn. Stat. 363.01, subd. 25 (1988) defines "disability" as follows:

. Disability" means any condition or characteristic that renders a person a disabled person. A disabled person is a person who (1) has a physical, sensory or mental impairment which substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.

Sealed Ex. 6 is the corporate balance sheet and 1989 corporate state and federal income tax returns. Sealed Ex. 7 is the 1989 W-2 for Mr. Carriveau and Sealed Ex. 10 is Mr. Carriveau's 1989 individual state and federal income tax returns.

6. That the Charging Party has been and is able and qualified to perform the job duties of manager of the Respondent's bookstore despite being HIV positive.

7. That the Charging Party presently has a physical impairment which substantially limits one or more major life activities.

8. That the Charging Party has been regarded by the Respondents as having a physical impairment which substantially limits a major life activity.

9. The Charging Party, Lyle Pierce, has been shown to be disabled within the meaning of the above definition.

10. The Complainant has proved a prima facie case of employment discrimination.

11. The Respondents have advanced legitimate nondiscriminatory reasons for the Charging Party's discharge, namely, misconduct and insubordination.

12. The Complainant has proved by a preponderance of the evidence that the reasons advanced by the Respondents are mere pretexts and that the Respondents discriminated against the Charging Party by discharging him from employment.

13. The Respondents have not proved that the absence of an HIV infection is a Bona fide occupational qualification for the position of manager in its bookstore.

14. Minn. Stat. 363.02, subd. 5, provides as follows:

Subd. 5. Disability. Nothing in this chapter shall be construed to prohibit any program, service, facility or privilege afforded to a person with a disability which is intended to habilitate, rehabilitate or accommodate that person. It is a defense to a complaint or action brought under the employment provisions of this chapter that the person bringing the complaint or action has a disability which in the circumstances and even with reasonable accommodation, is defined in section 363.03, subdivision 1, clause (6), poses a serious threat to the safety or health of the disabled person or others. The burden of proving this defense is upon the respondent.

15. The Respondents have not proved that the Charging Party has a disability which in the circumstances poses is a serious threat to the health or safety of the Charging Party or others.

16. That Respondent, Richard Carriveau, aided and abetted the discriminatory act within the meaning of Minn. Stat. 363.03, subd. 6, and is jointly and severally liable for damages.

17. The reasons for the above Conclusions of Law are set out in the Memorandum which follows and which is incorporated into these Conclusions of Law by reference.

1 8. Any Finding of Fact which is more appropriately classified as a Conclusion of Law is hereby adopted as such.

Pursuant to the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

(1) The Respondents, DiMa Corporation and Richard Carriveau, shall cease and desist from discriminating on the basis of disability in its employment practices.

(2) The Charging Party, Lyle I Pierce, shall be immediately reinstated to the position of manager of the Respondent's St. Cloud bookstore.

(3) As an alternative to immediate reinstatement the parties may jointly agree that the Respondent shall provide monthly front pay to the Charging Party until reinstatement occurs. The amount of front pay shall be agreed to by the parties based upon this record.

(4) The Respondent shall pay total damages to the Charging Party in the amount of \$44,749.21 calculated as follows:

(A) The Respondents shall pay treble compensatory damages to the Charging Party in the amount of \$27,351.99.

(B) The Respondents shall pay prejudgment interest on the backpay award to the Charging Party in the amount of \$397.22.

(C) Each Respondent shall pay punitive damages to the Charging Party in the amount of \$8,500 or a total of \$17,000.

(5) The Respondents shall pay a civil penalty in the amount of \$25,000 to the Commissioner of Human Rights made payable to "State Treasurer --

General Fund."

Dated this 7th day of December, 1990.

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GEORGE A. BECK  
Administrative Law Judge

Reported: Karen M. Torell  
Janet R. Shaddix & Associates  
888-7687  
Transcript Prepared.

MEMORANDUM

This contested case proceeding is brought under the Minnesota Human Rights Act (MHRA). The Act provides that it is an unfair employment practice for an employer to discharge an employee because of a disability. The Commissioner of Human Rights alleges that Richard Carriveau and Di Ma Corporation fired the Charging Party, Lyle Pierce from his position of manager at the St. Cloud bookstore because of a disability, namely, because he has an HIV infection. The claim is one of disparate treatment.

The Minnesota Supreme Court has adopted the three-part analysis first set out in McDonnell Douglas Corp 411 U.S. 792 (1973) for the adjudication of cases under the Minnesota Human Rights Act. Danz v Jones, 263 N.W.2d 395 (Minn. 1978); Sigurdson, Supra 386 N.W.2d 715, 719-20 (Minn. 1986). The McDonnell Douglas analysis consists of a prima facie case, an answer by the employer and a rebuttal. First, the complainant must present a prima facie case of discrimination by a preponderance of the evidence. Sigurdson, Supra, 386 N.W.2d at 720. The specific elements of a prima facie case are modified to fit varying factual patterns and employment contexts. Hubbard v - United Press international, 330 N.W.2d 428, 442 (Minn. 1983).

Prima-Facie Case/Disability

In a disability discrimination case the Complainant must show that (1) the Charging Party is disabled within the meaning of Minn. Stat. . 363.01, subd. 25; (2) that he was qualified for the position of manager; (3) that he was discharged; and (4) that a nondisabled person was assigned to do the same work. Hubbard, Supra, 330 N.W. 2d at 442; State v. Metropolitan Airport Commission, 358 N.W.2d 432, 433 (Minn. Ct. App. 1984). However, proof that the discharged employee was replaced by a person not a member of his class is not an indispensable element of a prima facie case. Metropolitan Airport Commission, supra, at 433. EEOC y. Minneapolis Electric Steel Casting-Co., 552

F.Supp. 957, 964 (D.Minn. 1982); 3 Larson, Employment  
discrimination 15 86.40. an HIV  
The ultimate question is whether or not a person without  
infection would  
be discharged in similar circumstances. The above-described  
elements of a  
prima facie case are a means of shifting the burden of  
production to an  
employer, absent direct proof of discrimination. However, a  
prima facie case  
is also proved when direct evidence of discrimination is  
presented. State, by  
Cooper v. Hennepin County 441 N.W.2d 106, 110 n. I (Minn. 1989).

The Complainant has established a prima facie case under  
either the direct  
or indirect method of proof. There is no dispute that the  
Charging Party was  
discharged. The record shows that he was qualified to hold  
the position of  
manager. He had been promoted to manager a year before he was  
fired. Although  
he had some problems on the job during February of 1989,  
his behavior  
subsequent to that was good? He clearly was able to do the  
job. The central  
matter in dispute is whether the Charging Party is disabled.  
An analysis of  
the statutes and case law compels the conclusion that Mr.  
Pierce has a  
disability as defined in the statute in that his HIV infection  
is a physical

impairment which substantially limits one or more major life activities.2/

The presence of the virus means that the carrier can exhibit several asymptomatic (but diagnosable) abnormal immune functions that indicate an impaired ability to fight infection and hence an increased risk of future symptomatic disability. Also, the contagious nature of the infection substantially limits reproduction and the ability to engage in sexual intercourse, both major life activities. The virus can be transmitted from mother to fetus and from one sexual partner to another. Note, Asymptomatic Infection \_with the AIDS Virus as a Handicap under the Rehabilitation Act of 1973, 88 COLUM. L. REV. 563, 572 (1988); (T. 129, 141). The Respondent argues that Mr. Pierce is not substantially limited in any activity because his condition is one that is only picked up in the laboratory and his job performance is not affected in any way. Job performance, however, is not the sole test. The job performance of most disabled persons is equal to that of non-disabled persons. The employer also suggests that there is no indication in the record that the Charging Party wanted to have children or that his ability to engage in "safe sex" was limited in any way.

However, several courts have concluded that asymptomatic HIV infection is a, disability or handicap. In Benjamin \_ R. v. Orkin Exterminating Co. 390 S.E.2d 814 (W.Va. 1990), the West Virginia Supreme Court interpreted a similarly worded definition of "handicap" in its Human Rights Act to include persons who test positive for the HIV infection but have no symptoms. The Respondent asserts that this decision rests upon a determination that the major life activity of "socialization" was substantially limited based upon the facts of that case. However, the court in addition to recognizing the impairment of socialization, also noted the Surgeon General's determination that the overwhelming majority of infected persons exhibit detectable abnormalities of the immune system and that, like a person in the early stages of cancer, they

may appear healthy but are in fact seriously ill. 390 S.E.2d at 817. The Respondents cite Burgess v. Your House of Raleigh Inc. , 326 N.C. 205, 388 S.EE 2D 134 (1990) as authority that asymptomatic HIV infection does not limit a major life activity. However, in that case the state's statutory definition excluded "working" as a major life activity.

Other courts have found a substantial limitation of a major life activity. In Cain v. Hyatt, 734 F.Supp. 671 (E.D.Pa. 1990), the court noted that an HIV carrier cannot procreate without endangering the lives of the offspring and the other parent and concluded that this significant injury to the reproductive system impeded a major life activity. 734 F.Supp. at 679. The court also noted that HIV infection and AIDS have engendered such prejudice and apprehension that their diagnosis results in a social death in which people are shunned socially and excluded from public life. The court characterized

2/ Because the Minnesota Legislature defined disability using the same language as used in the definition of "handicapped individual" in 7 of the Rehabilitation Act of 1973 (29 U.S.C. sec. 706(7)(B)), the federal case law is instructive. Fugua v. Unisys Corp., 716 F.Supp. 1201, 1204-05 (D.Minn. 1989). State, by Hennepin County, 425 N.W.2d 278, 283 (Minn. Ct. App. 1988). A number of states also have adopted the same definition.

this social exclusion as the curtailing of a major life activity. 734 F.Supp. at 679-80. In September of 1988 the U.S. Justice Department reversed its earlier position and issued a memorandum concluding that asymptomatic carriers of HIV are handicapped since their physical impairment ("a physiological disorder of the hemic and lymphatic systems") affects major life activities. Smith, AIDS and the law: protecting the HIV-Infected Employee from Discrimination, 57 TENN.L.REV. , 539, 552-53. See also, Raytheon Co., y Calif, Fair Empl. & Housing Comm. 212 Cal.App. 3d 1242, 261 Cal.Rptr. 197, 201 (Cal. App. 2 Dist. 1989) (dicta states that condition does not: have to be presently disabling in order to qualify as a physical handicap); Chalk v. U.S. District Court, 840 F.2d 701 (9th Cir. 1988).

Although the Respondent argues that the major life activities of reproduction and sexual intercourse are not job related, that is not the test under the statutory definition. The "major life activities" limitation is intended to ensure that the statutory protection is available only to those who are truly handicapped, so that it cannot be claimed by anyone whose disability is minor and whose relative severity of impairment is widely shared, e.g., a minor back injury. Fuqua, supra, 716 F.Supp. at 1207.

The record indicates that an HIV infection is anything but a minor disability. Whether or not this Charging Party wished to have children or felt limited in engaging in sexual intercourse is beside the point. The focus is properly on the seriousness of the impairment as demonstrated by a restriction of major life activities.

However, the findings of a disability in this case does not rest solely upon Minn. Stat. 363.01, subd. 25(1). It is even more clear that Mr. Pierce has been regarded by his employer as having an impairment under subd. 25(3). Mr. Carriveau treated the Charging Party as though he, had a contagious disease which rendered him unsafe to work with. Work is a major life activity. 45 C.F.R. 84.3(j)(2)(i-ii); 29 C.F.R. 15 32. 3; 34 C.F.R. 104.3(j)(2)(ii); Hennepin Co., Supra, 425 N.W. at 283. An HIV infection can be expected to draw

a similar response from all employers absent statutory protection. Cariveau wouldn't allow Pierce to ride in the company car because he had "AIDS germs"; he asked Pierce to bring him coffee in a bag so he wouldn't get AIDS germs; he told Pierce he wasn't as sharp as he used to be because AIDS was eating his brain; and he asked if Pierce was unable to get rid of a cold because he had AIDS.

The Respondent argues that shunning a person who may be contagious is entirely different from regarding him as disabled.

However, the U.S. Supreme Court indicated in *School Board of Nassau County Florida v. Arline*, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987) that such distinctions are not appropriate. In *Arline* the employer argued that it had fired a teacher because her tuberculosis was contagious but not because of the disease's physical effects. The Court stated that "It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment." 107 S.Ct. at 1128. Similarly, in this case the employer should not be permitted to assert its fear of contagion as an excuse for its discharge of a person with a disabling disease/ If the employment

3/ The Supreme Court noted in *Arline* that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. It also observed that few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. 107 Sup. Ct. at 1129.

action arises from a disability, it is irrelevant whether it results from a mistaken perception of the employee or an aversion to having him in the work place. The conclusion that the Charging Party is disabled is further supported by the legislative directive that the MHRA be construed liberally to accomplish its purposes. Minn. Stat. 363.11.

In Arline the Court specifically indicated that it was not reaching the case of whether an AIDS carrier was handicapped in the absence of diminished physical impairment. 107 S.Ct. at 1128, n. 7. However, a number of lower courts have determined that an asymptomatic HIV carrier or a person with AIDS is disabled when he is regarded as having an impairment. In Massachusetts an AIDS victim qualifies as a protected handicapped person based solely upon an employer's erroneous perception of him as someone who is contagious to coworkers. Cronan v N.E. Tel. Co. 41 F.E.P. 1273, 1276 (Sup. Ct. 1986). The definition of "handicapped person" in the Massachusetts statute is the same as the Minnesota definition of "disability." 41 F.E.P. at 1275. In Doe v. Continela Hospital, 57 U.S.L.W. 2034 (D.C. Cal. 1988), an asymptomatic HIV carrier who was discharged from a hospital program due to fear of contagion was found to be perceived as handicapped by the defendant hospital under the Rehabilitation Act. In Poff v. Caro, 549 A.2d 900 (N.J. Super. Ct. 1987), the Court observed that a person with AIDS is handicapped and found a refusal to rent to homosexuals because of a fear of AIDS to be discriminatory. The court stated that distinguishing between actual handicaps and perceived handicaps makes no sense since prejudice based upon an opinion formed before the facts are known will result in discrimination as surely as where a medical disability is known or obvious. See also, District 27 community School board v Board of Education, 130 Misc 2d 398, 502 N.Y.S.2d 325, 336 (Sup. 1986) (automatically excluding students with AIDS from school would be treating them as though they had an impairment); Cain, supra, 734 F.Supp. at 680, 1221.

Accordingly, it is concluded that the Complainant has established the

elements of a prima facie case under the McDonnell Douglas analysis. Additionally, the Complainant has provided direct evidence of discrimination which supports a prima facie case. The comments made by Mr. Carriveau to Mr. Pierce and others make it clear that he suspected Pierce was HIV positive. He clearly (did not want someone with the virus as an employee. The offensive language used by Carriveau did nothing to mask his obvious antipathy towards people with HIV infections. When he was told that Pierce was infected with the virus, he demanded that Pierce be tested. When the Charging Party did not submit test results by the deadline established by Carriveau, he was fired. Mr. Carriveau did not indicate any other reason to Pierce for his firing than his failure to submit test results. Those events constitute direct evidence of discrimination.

#### Nondiscriminatory Reasons/Pretext

Once a prima facie case is established, the respondent is obligated to present evidence showing a legitimate nondiscriminatory reason for its discharge of the employee. Sigurdson, supra, 386 N.W.2d at 720; Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255-256 (1981). DiMa's burden is a light one; it need not prove that it was motivated by the reason offered. Burdine, supra, 450 U.S. at 254. The issue at this stage is whether there is evidence that the employer's actions were related to a legitimate business purpose. Furnco Construction (Oro. v. Waters, 438 U.S.

567 , 577 ( 1 978) . If the employer fulfills its burden, the third step of the analysis requires the Complainant to show that the reason offered by the employer is actually a pretext for discrimination. The Complainant satisfies the burden of showing that the Respondent's reasons are pretextual by showing that the employer's explanation is unworthy of credence. *Burdine, Supra* , 450 U.S. at 256; See *Anderson v. Hunter Keith Marshall & Company* 401 N.W.2d 75, 79 (Minn. Ct. App. 1987) Aff'd in part, rev'd in part, 417 N.W.2d 619 (Minn. 1988). The Complainant retains the ultimate burden of persuading the factfinder by a preponderance of the evidence that the employer intentionally discriminated against the charging Party. *Sigurdson, supra* , 386 N.W.2d at 720.

As a legitimate nondiscriminatory reason for firing the Charging Party, the Respondent states that the failure to submit test results was only the "straw that broke the camel's back" and that the Charging Party's prior misconduct on the Job was a predominant factor in his discharge. The record does contain evidence that Mr. Pierce engaged in misconduct during his employment such as talking too much to customers and friends in the store and hanging around the parking lot during hours when he was not on duty. He was in fact discharged in 1983 for this misconduct although Mr. Carriveau later rehired him. It also can be surmised that some of this conduct surfaced again in February of 1989 which led to Mr. Carriveau asking Mr. Pierce to sign two letters of resignation. However, Mr. Pierce's employment history with the Respondent indicates that he was able to improve his performance when necessary. The Respondent's testimony that misconduct by Mr. Pierce was continual during 1989 seems exaggerated. Mr. Carriveau was unable to testify as to misconduct during any specific time period (T. 92) and could not cite specific examples. (T. 94). Pierce testified that his job performance from March through his discharge was fine and that he was not criticized by Mr.

Carriveau. Mr. DeMars, who was manager of the bookstore until May of 1988, testified that Mr. Pierce was generally a good employee. It is concluded that Pierce's job performance from late February to May of 1989 was good.

At any rate, even if Mr. Pierce had engaged in some misconduct during 1989, the sequence of events beginning in April of that year clearly indicate that he was fired not for misconduct but rather upon failing to present the results of an AIDS test to Mr. Carriveau. Mr. Carriveau asked the Charging Party on a daily basis to get an AIDS test, put a note on the bulletin board telling him to do so, left a note directing him to make an appointment for a test, and finally told him that May 12, 1989 was his last day if he did not submit test results on May 15, 1989. When Mr. Carriveau fired the Charging Party he told him that he believed that AIDS test results were related to his job as a manager. As the Complainant points out, job performance may have explained a firing in February of 1989, but not in May. Additionally, the Complainant need only establish that the illegal discriminatory motive was a substantial causative factor, a burden easily satisfied by this record. Anderson, supra, 417 N.W.2d at 624 The assertion of misconduct as a reason for the discharge is a pretext.

The Respondent also argues that Mr. Pierce was not fired for having an HIV infection but rather for being insubordinate in not submitting test results for AIDS. Several states, including Wisconsin, have enacted statutes that restrict the use of serologic test results in decisions regarding employment. Several states, including Iowa, have amended their discrimination laws to include coverage of AIDS and AIDS-related conditions. 3A Larson, Employment

Discrimination, 108.12. As the Respondent points out, Minnesota has not done so. Also, a new federal statute, The Americans with Disability Act of 1990, 42 U.S.C. 12101, et seq, specifically provides:

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature (or severity) of the disability, unless such examination (or inquiry) is shown to be job-related and consistent with business necessity.

42 U.S.C. 12112(c)(4)(A).

The Respondent points out that there is no similar requirement in Minnesota and argues that one cannot be added by administrative decree.<sup>4/</sup> However, even if Minnesota law does not prohibit such a test, it does not follow that failure of an employee to submit to the test is a complete defense from employer in an employment discrimination case.

The Respondents cite as support for its requirement of an AIDS test the case of *LecKelt v. Board of Commissioners of Hospital District No. 1*, 909 F.2d 820 (5th Cir. 1990). In that case a hospital fired a licensed practical nurse who refused to submit HIV antibody test results. The nurse was a gay male whose roommate was a hospital patient believed to have AIDS. The nurse routinely administered medication by injection, changed dressings, performed catheterizations, administered enemas and started IVs. He was occasionally assigned to the intensive care unit, the emergency room, or the surgical recovery room. 909 F.2d at 821. The plaintiff was unable to demonstrate that the employer's requirement of an AIDS test was a pretext. The reason for this was the strong evidence that supported the requirement. The hospital had preexisting infection control policies which required reporting of exposure to infectious diseases followed by testing and restrictions where appropriate. An

employee handbook specified termination as a possibility for violations of the policy. 909 F.2d at 826. In short, the test requirement was job related because at least some of the nurse's duties provided potential opportunities for HIV transmission to patients. Accordingly, the hospital was justified in knowing his HIV status to determine if measures were necessary to protect patients or employees.

There is no similar justification in this case. No testimony, medical or otherwise, was presented to establish that being free of HIV infection was in any way a legitimate job requirement or a bona fide occupational qualification to be a bookstore manager. No evidence indicates that there is any probability that the infection would be transmitted in the course of Mr. Pierce's job duties. Mr. Carriveau did testify he observed Mr. Pierce emerge "red-faced" and "sweaty" from the back room. From this he inferred that sexual activity had taken place. (T. 83). Mr. Pierce never admitted to such conduct and there

4/ It should be noted that it is not clear that such testing is constitutional where it is unrelated to job duties. Glover v Eastern Neb. Community office of Retardation, 867 F.2d 461 (8th Cir. 1989) (mandatory testing for AIDS and hepatitis B constituted unreasonable search and seizure in violation of employees' fourth amendment rights where risk of disease transmission was miniscule).

was no corroboration of the Respondent's testimony. There was no testimony that sexual activity involving the Charging Party was observed by anyone. Even if it occurred, it was certainly not job related activity and could ha" happened in the course of any type of employment. It would certainly be unfair to allow employers to discriminate equally against one who handles patient IVs in a health facility and the manager of a bookstore whether a person's condition is a threat to others must be determined on a case-by-case basis. A second crucial distinction between this case and Leckelt is that under the Rehabilitation Act a plaintiff must show that the handicap was the sole reason for discharge, while under Title VII or the MHRA it need only be shown that the protected classification was a factor influencing the decision. Leckelt was unable to show that he was discriminated against solely because of a perception that he was infected with HIV in light of his failure to comply with a job-related test requirement supported by written policies and medical testimony. 909 F.2d at 826. In this case, even if the failure to submit test results was a factor in the firing the Charging Party, he may still prevail by showing that his disability was a substantial causitive factor.

The appropriate focus of this case is not whether or not an employer can require an HIV or AIDS test in Minnesota. Rather, the particular facts of this case must be analyzed to decide whether the record indicates that the Charging Party was fired because he was suspected of having an HIV infection or being a "carrier." Prior to April of 1989 Mr. Carriveau was content to merely ask Mr. Pierce in a derogatory manner about whether or not he had AIDS. However, when he was told in April of 1989 that Mr. Pierce was "a carrier" he clearly became more alarmed about the situation. Both the Charging Party (T. 16, 25, 30) and Mr. DeMars offered convincing testimony that Mr. Carriveau would have fired Lyle Pierce if he had presented postive test results. Mr. DeMars, who worked for Mr. Carriveau for four years testified that he believes Lyle would have been fired if he submitted positive test results in 1987. On cross-examination

Mr. DeMars testified that although he could not say for sure what Mr. Carriveau was thinking, his understanding, after working for Mr. Carriveau for four years, was that if someone had a positive AIDS test they would be fired. (T. 107-08).

Although the record indicates that Mr. Carriveau never explicitly said he would fire Lyle Pierce if he tested HIV positive, the facts do not logically support any other conclusion. Mr. Carriveau's contention that his intent upon receiving a positive test result was simply to seek medical advice as to how contagious the disease is and what he should do to protect himself does not seem credible in light of his obvious fear for his personal health as expressed in his words to and actions concerning Mr. Pierce. It seems apparent that Mr. Carriveau could have sought medical advice prior to or without testing if he had no intent to fire Pierce. The Administrative Law Judge concludes that the reasons advanced by DiMa Corporation and Mr. Carriveau for firing the Charging Party are mere pretexts. The Complainant has proved by a preponderance of the evidence that Pierce was fired because of his disability, namely, being HIV positive.

#### Damages

Since discriminatory action on the part of the employer has been established the matter of what damages are appropriate must be considered. Minn. Stat. 363.071, subd. 2 deals with the award of damages and provides in

part, as follows:

Subd. 2. Determination of discriminatory practice. The administrative law judge shall make findings of fact and conclusions of law, and if the administrative law judge finds that the respondent has engaged in an unfair discriminatory practice, the administrative law judge shall issue an order directing the respondent: to cease and desist from the unfair discriminatory practice found to exist and to take such affirmative action as in the judgment of the administrative law judge will effectuate the purposes of this chapter. The order shall be a final decision of the department. The administrative law judge shall order any respondent found to be in violation of any provision of section 363.03 to pay a civil penalty to the state. This penalty is in addition to compensatory and punitive damages to be paid to an aggrieved party. The administrative law judge shall determine the amount of the civil penalty to be paid, taking into account the seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the respondent. Any penalties imposed under this provision shall be paid into the general fund of the state. In all cases where the administrative law judge finds that the respondent has engaged in an unfair discriminatory practice, the administrative law judge shall order the respondent to pay an aggrieved party, who has suffered discrimination, compensatory damages in an amount up to three times the actual damages sustained. In all cases, the administrative law judge may also order the respondent to pay an aggrieved party, who has suffered discrimination, damages for mental anguish or suffering and reasonable attorney's fees, in addition to punitive damages in a amount not more than \$8,500. Punitive damages shall be awarded pursuant to section 549.20. In any case where a political subdivision is a respondent, the total of punitive damages awarded an aggrieved party may not exceed \$8,500 and in that case if there are two or more respondents the punitive damages may be apportioned among them. Punitive damages may only be assessed against a political subdivision in its capacity as a corporate entity and no regular or ex officio member of a governing body of a political subdivision shall be personally liable for payment of punitive damages pursuant to this subdivision. In addition to the aforesaid remedies, in a case involving discrimination in

(a) employment, the administrative law judge may order the hiring, reinstatement or upgrading of an aggrieved party, who has suffered discrimination, with or without back pay, admission or restoration to membership in a labor organization, or admission to or participation in an apprenticeship training program, on-the-job

training program, or other retraining program, or any other relief the administrative law judge deems just and equitable.

Fifteen years ago the Minnesota Supreme Court stated that the purpose of the Minnesota Human Rights Act was "to place individual!; discriminated against in the same position they would have been in had no discrimination occurred."

Brotherhood of Railway and Steamship Clerks v. Balfour , 303 Minn. 178, 195, 229 N.W.2d 3, 13 (1975). In this case the Charging Party seeks to be reinstated to his position as manager of the St. Cloud bookstore. In order to put Mr. Pierce in the position he would have been in had no discrimination occurred, he must be returned to his former job. There is a presumption in the federal case law in favor of reinstatement where it is sought by an employee who has been discriminated against. Farber v. Massilon Board of Education, 908 F.2d 65, 70 (6th Cir. 1990); Ford v. Nicks, 866 F.2d 865, 875 (6th Cir 1989). In this case Mr. Pierce remains qualified for the position and he has been unable to find work that pays as well as the position he held with the Respondents. There is no indication here that the Charging Party would face a hostile working environment from fellow employees or customers.

Alternatively, the parties may agree that the Charging Party will receive front pay instead of immediate reinstatement. Farber, supra 908 F.

2d at 71 Weatherspoon v Andrews & Co., 32 F.E.P 1226 (D. Colo. 1983). The parties could agree to the monthly amount of the front pay based upon this record. The Charging Party would be entitled to receive the monthly front pay until reinstated. Briseno v. Central Technical Community College-Area, 739 F.2d 344 (8th Cir. 1984); King v. Staley, 849 F.2d 1143 (8th Cir. 1988). The Respondents made no argument in opposition to the request for reinstatement.

There is a strong presumption in favor of an award of back pay to victims of employment discrimination. Albemarle Paper Co v. Moody , 422 U.S. 405

(1975). In this case the Charging Party did his best to mitigate his damages by seeking other employment. As a result his wage loss in 1989 was only \$3,001.39. (Ex. 5). The Charging Party's 1990 earnings includes \$2,272.13 earned as a cook at Joyce's Cafe, as well as \$8,398.75 earned as a carrier for the St. Paul Pioneer Press through October 13, 1990. Additionally, it is assumed that the Charging Party has earned \$306.15 per week profit from the St. Paul Pioneer Press from October 13, 1990 to the date of this Order. His 1990 income is therefore \$13,120.08 to the date of this Order. The wages that Mr. Pierce would have earned at DiMa Corporation for 1990 are computed by multiplying his 1989 average weekly wage of \$372.12 by the number of weeks to the date of this Order, namely, 49 weeks. His income with Respondents therefore would have been \$18,233.88. His wage loss for 1990 through the date of this Order therefore is \$5,113.80. His total wage loss to the date of this Order amounts to \$8,115.19. Additionally, Mr. Pierce testified that when he lost his job with the Respondents and his income dropped significantly, he was forced to refinance a car loan which he had just obtained. As a result he incurred additional interest in the amount of \$1,002.14. This expense is directly attributable to the discriminatory discharge and is therefore compensable.

Prejudgment interest may be included with a back pay award in cases brought under Chapter 363. State by Cooper v. Hower County. Social Services 434 N.W.2d 494, 500 (Minn. Ct. App. 1989). Interest on a back pay award places

the Charging Party in the position he would have been absent discrimination by compensating him for the loss of use of money. Peaues v. Mississippi State Employment Service, 899 F.2d 1449, 1453 (5th Cir. 1990) . 2 Larson, Employment Discrimination, 55.37(b)(iii). Behlar v. Smith, 719 F.2d 950, 954 (8th Cir. 1983). The Minnesota Court of Appeals has stated that prejudgment interest on back pay awards by administrative agencies should be calculated by reference to Minn. Stat. 334.01, subd. 1 which provides for interest at the rate of six percent per annum. Interest at that rate calculated on a weekly basis from the date of discharge to the date of this Order amounts to \$397.22.

The statute quoted authorizes an award of compensatory damages in an amount up to three times the actual damages sustained in an appropriate case. The statute does not provide specific standards for an award. It is in the discretion of the Administrative Law Judge as to whether the compensatory damages should be trebled. The Court of Appeals has indicated that the standard for an award of treble damages is lower than that for punitive damages. State- bv Cooper v. Moorhead-State University, 455 NA.2d 79, 84 (Minn. Ct. App. 1990). In the Moorhead case the court affirmed the trebling of compensatory damages for an award of \$115,106.97. In this case the back pay award is modest because of the Charging Party's efforts to find other employment. The Complainant also points out that in order to bring this case and seek the relief he is entitled to under the MHRA, the Charging Party has suffered public disclosure of his status as a carrier of the HIV virus. He can expect a more difficult time finding employment, housing and friends because of this disclosure. He may well suffer the "social death" described in Cain v. Hyatt, supra. He must now contend with the unjustified fears and prejudices of others in addition to the uncertainty of his disability. Ray v. School District of DeSoto County 666 F.Supp. 1524, 1535 (M.D. Fla. 1987); Arline, supra, 107 Sun Ct. at 1129 and n. 13. Given the facts and circumstances of

this case, its serious nature, and the absence of any claim for mental suffering by the Charging Party, the trebling of compensatory damages is entirely justified. This results in an additional award of \$18,234.66.

The Complainant also seeks an award of punitive damages in the amount of \$8,500 against each Respondent. The limiting language of the statute in regard to political subdivisions makes it clear that an award up to \$8,500 against each nonpublic respondent is authorized in the appropriate case. The statute provides that punitive damages shall be awarded pursuant to Minn. Stat. 549.20. That statute provides, in part, as follows:

Subdivision 1. (a) Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights and safety of others.

(b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

(1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or

indifference  
rights or

(2) deliberately proceeds to act with  
to the high probability of injury to the  
safety of others.

against  
agent

Subd. 2. Punitive damages can properly be awarded  
a master or principal because of an act done by an  
only if:

and the

(a) the principal authorized the doing  
manner of the act, or

principal  
that the

(b) the agent was unfit and the  
deliberately disregarded a high probability  
agent was unfit, or

capacity  
planning  
acting in

(c) the agent was employed in a managerial  
with authority to establish policy and make  
level decisions for the principal and was  
the scope of that employment, or

of the  
ratified or  
character and

(d) the principal or a managerial agent  
principal, described in clause (c),  
approved the act while knowing of its  
probable consequences.

measured  
purpose of  
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misconduct,  
defendant,  
it, the  
and of  
of the  
number

Subd. 3. Any award of punitive damages shall be  
by those factors which justly bear upon the  
punitive damages, including the seriousness of  
the public arising from the defendant's  
profitability of the misconduct to the  
duration of the misconduct and any concealment of  
degree of the defendant's awareness of the hazard  
its excessiveness, the attitude and conduct  
defendant upon discovery of the misconduct, the

and level of employees involved in causing or  
concealing the misconduct, the financial condition of the  
defendant, and the total effect of other punishment likely  
to be imposed upon the defendant as a result of the  
misconduct, including compensatory and punitive damage awards  
to the plaintiff and other similarly situated persons,  
and the severity of any criminal penalty to which the  
defendant may be subject.

The facts of this case provide clear and convincing  
evidence that the Respondents intentionally disregarded and were willfully  
indifferent to the Charging Party's rights under the MHRA to be free from  
discrimination in employment. Under Minn. Stat. sec. 549.20, subd. 2, a  
principal is liable for punitive damages where a managerial agent approved the act.  
In this case Mr. Carriveau, the Chief Executive Officer and a substantial  
shareholder in DiMa Corporation committed the acts in question. Either Mr.  
Carriveau or DiMa Corporation or both may therefore be assessed punitive damages.

Among the factors cited in Minn. Stat. 549.20,  
subd. 3 are the

seriousness of the hazard to the public arising from the defendant's misconduct. The discrimination in this case is intentional and obvious. Should such conduct be condoned it would have serious consequences for the HIV positive population in this state who would be subject to irrational discrimination by employers. The statute also directs a consideration of the concealment of the misconduct by the defendant. In this case Mr. Carriveau advised the Department of Jobs and Training that Mr. Pierce had not been required to submit AIDS test results. This was an outright lie. Additionally, Mr. Carriveau apparently failed to provide his entire file to the Department of Human Rights as requested while indicating that he had. (T. 96, p. 7). The Respondents' attitude and conduct after the discriminatory discharge was therefore reprehensible. This conduct merits an award of punitive damages. There is no doubt in this case that the Respondents were fully aware of the intentional discrimination which was taking place and took no action to reconsider, even though they were advised by the Charging Party that his disability had no relationship to his job duties. The financial condition of both Respondents is sufficient to support an award of punitive damages in the maximum amount. (Finding of Fact No. 27).

The intentional disregard of the MHRA and Respondents willful indifference to the rights of the Charging Party are underscored by the outrageous facts of this case. Mr. Pierce's disability had no effect on his ability to do his job. Nonetheless, he was subjected to continual harassment and embarrassment at the hands of Mr. Carriveau because he was suspected of having an HIV infection. Mr. Carriveau's conduct simply added to the enormous emotional trauma already faced by a person who is HIV positive. Carriveau asked Pierce if "AIDS was eating his brain", he told him he could no longer ride in the company car because of his "AIDS germs", he was asked if his inability to shake a cold was due to AIDS. Carriveau told Pierce that he wanted his coffee in a

bag so that Pierce wouldn't get AIDS germs on it. Mr. Carriveau's directions to Pierce to take an AIDS test were made public when he posted a note on the bulletin board advising him to get an AIDS test and wrote notes on a calendar to the same effect. Less egregious conduct in Cain v. Hyatt, supra, merited an award of \$50,000 in punitive damages. 734 F.Supp. at 686-87. In this case the shocking and insensitive conduct on the part of Mr. Carriveau clearly supports an award of the maximum punitive damages against each Respondent.

Finally, the Commissioner of Human Rights urges that -a civil penalty should also be awarded. The statute requires that the Administrative Law Judge order a civil penalty where discrimination is found.

The penalty is specifically stated to be in addition to compensatory and punitive damages paid to the aggrieved party. The civil penalty is paid to the general fund of the State of Minnesota rather than to the Charging Party. The civil penalty looks to the harm inflicted on society as a whole as well as to the public support necessary for the enforcement of human rights which includes funding for the Department of Human Rights, the Office of the Attorney General, and the Office of Administrative Hearings. The statute sets out specific guidelines to be considered including the seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the Respondent. These factors have been discussed above in regard to punitive damages.

The Complainant seeks a civil penalty of \$50,000. The financial resources of the Respondents do not preclude a sizable civil penalty. In discussed above, the discriminatory discharge in this case was certainly intentional.

Additionally, it is hard to believe that Mr. Carriveau was not aware that his treatment of the Charging Party was in violation of state anti-discrimination law. Given the extensive publicity in recent years about AIDS, it's hard to understand why Mr. Carriveau would not at least have made an effort to secure accurate medical information about him infections before firing Mr. Pierce. The violation is serious and flagrant. Persons with HIV infections are particularly vulnerable persons, especially in regard to employment. As the Complainant points out the public harm caused by the Respondents' action must consider what would happen if persons with the Charging Party's disability lost their income and medical insurance. The state is likely to have to pay for the medical care and living expenses of those who lose their employment. (T. 136-37). Considering all of these factors, including the damages awarded to the Charging Party, a civil penalty in the amount of \$25,000 is appropriate and supported by the record.

#### Summary

This case is an example of intentional discrimination by an employer carried out in the most offensive manner. Richard Carriveau fired Lyle Pierce because he accurately suspected that he had an HIV infection. His treatment of IV. Pierce was indefensible. The employer had no concern for the safety of other employees or customers nor did he take the time to see if any reasonable medical opinions supported his concern about Lyle Pierce's HIV infection. Richard Carriveau's concern was merely for his own personal safety based upon his irrational fear of AIDS. In acting upon his fear he added significantly to the already heavy burden borne by Mr. Pierce because of his disability. The employer's main defense is that it is entitled to test employees for an HIV infection and fire them for insubordination if they refused to provide test results. To permit an employer to impose such a requirement where testing is not related to the job duties or supported by informed medical opinion would be

to erect a barrier protecting an employer from charges of discrimination on the basis of disability. Such a testing requirement would surely cause many persons with an HIV infection to quit and others to be fired even though they were safely able to do their job in spite of their disability. From a public health standpoint, it is important that persons who suspect they might have an HIV infection be free of employment discrimination, so that they do not fear testing which could lead to precautions against the spread of the disease. Orkin Exterminating, supra, 390 S.E.2d at 819.

To countenance discrimination such as that set out in this case is to permit fear and prejudice to prevail over reason. The seriousness with which the Legislature views discrimination is made clear by its declaration that it "threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy." Minn. Stat. 363.12, subd. 1. The Minnesota Supreme Court has observed that the essence of the Minnesota Human Rights Act is societal change and the abolishment of pernicious societal prejudices and biases that impede equal opportunity in our democracy. Wirig v. Kinney Shoe Corp. 461 N.W.2d 374, 378 (Minn. 1990). The Minnesota Human Rights Act requires that when employment decisions are made each citizen of the state must be judged on his or her own individual qualifications rather than according to stereotypes or prejudicial beliefs about a class. The relief ordered in this case is directed at ensuring that the Charging Party is viewed according to his capabilities rather than his disability. The outrageousness of the Respondents' conduct, as well as the resulting serious harm, fully justifies the substantial damages awarded in this matter.

G.A.B.