October 9, 2014

Secretary Leonard J. Howie, III
Maryland Department of Labor, Licensing & Regulation
500 North Calvert Street
Baltimore, MD 21202-3651

Dear Mr. Howie:

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND

MAIN OFFICE
& MAILING ADDRESS
3600 CLIPPER MILL ROAD
SUITE 350
BALTIMORE, MD 21211
T/410-889-8555
F/410-366-7838

FIELD OFFICE
6930 CARROLL AVENUE
SUITE 410
TAKOMA PARK, MD 20912
T/301-270-2258

WWW.ACLU-MD.ORG

OFFICERS AND DIRECTORS
COLEMAN BAZELON
PRESIDENT

SUSAN GOERING
EXECUTIVE DIRECTOR

ANDREW FREEMAN
GENERAL COUNSEL

I write on behalf of the American Civil Liberties Union of Maryland and Greenbelt resident Brandon Smith, because the Hair Cuttery, a business that operates numerous licensed salons throughout the State of Maryland, has invoked a Maryland Department of Labor, Licensing & Regulation (DLLR) provision regarding cosmetology to justify its firing of Mr. Smith from his job based on his HIV-positive status, in violation of federal and state civil rights laws. We urge you to take immediate action to clarify for the Hair Cuttery, its parent companies, Creative Hairdressers, Inc. and the Ratner Companies, as well as all others subject to your oversight, that the regulation at issue may not be invoked to justify unlawful discrimination.

Brandon Smith and the Greenbelt Center Hair Cuttery Salon

Brandon Smith worked at the Greenbelt, Maryland Hair Cuttery, starting in January 2012, as a part time receptionist, while training to become a hair stylist. In February of 2013, having finished school, Mr. Smith was promoted to a Stylist position, and then to Assistant Manager of the salon in November 2013. He enjoyed an excellent employment record, got along well with his colleagues, and loved his work.

On July 24, 2014, Mr. Smith learned that he had tested positive for the Human Immunodeficiency Virus (HIV). The diagnosis was devastating to him, and when he reported to work that day he was understandably emotional. The salon's manager, Christina Stewart, came upon him crying in the break room before the start of his shift, and asked him what was wrong. He confided in Ms. Stewart the news of his diagnosis. Shortly thereafter, unbeknownst to Mr. Smith, Ms. Stewart reported his HIV status to corporate managers. Ten days later, Mr. Smith's employment with Hair Cuttery was terminated. The sole reason for the termination was the Hair Cuttery's contention that the Code of Maryland Regulations provision governing cosmetologists prohibits the salon from continuing to employ someone who tests HIV positive. As the Ratner Companies confirmed in writing:

> On July 24, 2014, Brandon disclosed to leadership that he tested positive for an infectious or contagious disease that presents a hazard to clients or others. Based on Title 09 Subtitle 22 Board of Cosmetologists, Chapter

1 General Regulations Authority: .03 Prohibitions, "The performance of services of any kind by a licensee or registrant who has an infectious or contagious disease that presents a hazard to clients," is prohibited in any full service or limited practice salon.

See Ratner Companies Conference Report, attached hereto, *citing* Code of Maryland Regulations (COMAR) 09.22.01.16.E(2).

The Hair Cuttery fired Brandon Smith notwithstanding the fact that he did *not* pose a significant risk to the health or safety of others, the applicable legal standard. In other words, it terminated his employment even though HIV is not a disease that, in any significant way, is transmitted during the performance of the acts of cosmetology or hair styling. In fact, Mr. Smith did not pose *any* meaningful risk of HIV transmission to Hair Cuttery clients or other staff. Thus, its citation to this COMAR provision notwithstanding, the Hair Cuttery fired Mr. Smith in violation of the Americans with Disabilities Act of 1990 (42 U.S.C. §12112) and Maryland anti-discrimination law (Md. Code, State Govt. Art., §§20-606).

AMERICAN CIVIL
LIBERTIES UNION OF
MARYLAND

To the extent, if any, that Hair Cuttery correctly understood COMAR 09.22.01.16.E(2) to require or allow its firing of Mr. Smith, the Maryland Board of Cosmetology would similarly be in violation of federal and state disability discrimination laws. The Maryland Board of Cosmetology may not categorically and unjustifiably exclude an entire class of capable individuals from a whole field of professional endeavor in this way.

The Law

The Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §12101, *et. seq.*,[1] is a federal civil rights statute the goal of which is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[.]" 42 U.S.C. § 12101(b)(1). It is a measure aimed at advancing equal citizenship for persons with disabilities. *Tennessee v. Lane*, 541 U.S. 509 (2004).[2] The ADA makes it unlawful for an employer to "discriminate

---

[1] Although we focus our discussion on the ADA, we note that Maryland anti-discrimination laws afford comparable protections for individuals with disabilities.

[2] In enacting the ADA, Congress found that "society has tended to isolate and segregate individuals with disabilities," thus creating "a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). Such individuals "continually encounter[ed] various forms of discrimination," *id.* § 12101(a)(5), and, as a group, "occup[ied] an inferior status in our society," *id.* § 12101(a)(6). Mindful of these inequities, Congress enacted the ADA "to address the major areas of discrimination faced day-to-day by people with disabilities," *id.* § 12101(b)(4), hoping "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals," *id.* § 12101(a)(8). *Dudley v. Hannaford Bros. Co.* 333 F.3d 299 (1st Cir. 2003).

against a qualified individual on the basis of disability[3] in regard to ... terms, conditions, and privileges of employment." 42 U.S.C. §12112(a).

The ADA provides an exception to its protections for individuals with disabilities where "[an] individual poses a "direct threat" to the health or safety of others." 42 U.S.C. §12182(b)(3). A direct threat is defined as "a significant risk to the health or safety of others that cannot be eliminated by modification of policies, practices, or procedures, or by the provision of auxiliary aids or services." *Id. see also* 28 C.F.R. §36.208(b).

AMERICAN CIVIL
LIBERTIES UNION OF
MARYLAND

In determining whether an individual poses a direct threat, one "must make an *individualized* assessment, based on reasonable judgment *that relies on current medical knowledge or on the best available objective evidence*, to ascertain: the nature, duration, and severity of the risk; *the probability that the potential injury will actually occur;* and whether reasonable modifications of policies, practices, or procedures, or by the provision of auxiliary aids or services." 28 C.F.R. §36.208(c) (emphasis added). In particular, one must examine data that "assess the level of risk," because "the question under the statute is one of statistical likelihood." *Bragdon v. Abbott,* 524 U.S. 624, 652 (1998). "[B]ecause few, if any, activities in life are risk free, . . . the ADA do[es] not ask whether a risk exists, but whether it is significant." *Id.* at 649 (citations and footnote omitted); see also H.R.Rep. No. 101-485 (III), at 46 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 469 ("The decision to exclude cannot be based on merely 'an elevated risk of injury.' This amendment adopted by the Committee sets a clear, defined standard which requires actual proof of significant risk to others."); *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.* 263 F.3d 208, 220 (2d Cir. 2001)("The risk can only be considered when it poses a significant risk, *i.e.,* high probability, of substantial harm; a speculative or remote risk is insufficient." (quotation omitted).

Applying this legal standard to HIV-positive persons, courts have held that, where the risk of HIV transmission in a particular setting is unsupported by medical evidence or otherwise speculative, a direct threat does not exist. *See, e.g., Doe v. County of Centre,* 242 F.3d 437, 450 (3d Cir. 2001) (holding, in a case involving an HIV-positive foster sibling, that a "remote and speculative risk" of HIV transmission was "insufficient for a finding of significant risk, and insufficient for the invocation of the direct threat exception."); *Abbott v. Bragdon*, 163 F.3d 87 (1st Cir. 1998)(holding on remand that an HIV-positive dental patient was not a direct threat to her dentist); *Chalk v. United States D.Ct. for the C.D. of Cal.*, 840 F.2d 701, 709 (9th Cir. 1988)(holding, in a case involving an HIV-positive teacher, that "it was error to require that every theoretical possibility of harm be disproved").

---

[3] Here, there can be no dispute that Brandon Smith is a person with disability, protected from discrimination under the ADA. Amendments to the ADA (Pub.L. No. 110-325, 122 Stat 3553 (2008) sec. 2(b)(1)) implemented on January 1, 2009 made clear – to extent it wasn't already -- that HIV infection is always a disability under the ADA. *See, e.g., Horgan v. Simmons*, 704 F.Supp.2d 814 (N.D.Ill. 2010).

As discussed below, Brandon Smith does not pose a significant risk to the health and safety of clients or coworkers as a hair stylist.

The Science

Courts have looked to the recommendations of the Centers for Disease Control and Prevention (CDC) for guidance in determining whether an individual poses a direct threat. *See, e.g., Bragdon*, 163 F.3d at 89 ("[T]he [CDC] Guidelines are competent evidence that public health authorities considered treatment of the kind that Ms. Abbott required to be safe, if undertaken using universal precautions.") The CDC has concluded that "[c]urrently available data provide no basis for recommendations to restrict the practice of [individuals] infected with HIV . . . who perform invasive procedures not identified as exposure-prone." *Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures,* M.M.W.R. vol. 40. Exposure-prone procedures are defined as follows:

AMERICAN CIVIL LIBERTIES UNION OF MARYLAND

> Characteristics of exposure-prone procedures include digital palpation of a needle tip in a body cavity or the simultaneous presence of [an individual's] fingers and a needle or other sharp instrument or object in a poorly visualized or highly confined anatomic site. Performance of such exposure-prone procedures presents a recognized risk of percutaneous injury to the [individual] and – if such injury occurs – the [individual's] blood is likely to contact the patient's body cavity, subcutaneous tissues, and/or mucous membranes. Thus, the CDC recommends that [individuals] with HIV . . . not perform exposure-prone procedures.

Id. (emphasis added). Moreover, the CDC states that "[i]nfected [health care workers] who adhere to universal precautions and who do not perform invasive procedures pose no risk for transmitting HIV . . . to patients." *Id.*

Applying this definition, courts have recognized that a wide range of activities are not exposure-prone, including firefighters who perform mouth-to-mouth resuscitation and first aid, *see, e.g., Roe v. District of Columbia*, 842 F.Supp. 563, 570 (D.D.C. 1993), and rough-housing by children, *see, e.g., County of Centre*, 242 F.3d at 450.

Cosmetological procedures are not exposure-prone procedures. Such procedures never involve the simultaneous presence of fingertips and sharp objects in a body cavity or a poorly visualized or confined anatomic site. Thus, consistent with the CDC's recommendations, which constitute objective evidence of standards of public health and safety, Mr. Smith can safely perform cosmetological procedures, especially where universal precautions are taken, as we are sure Hair Cuttery salons do at all times. Simply put, the statistical likelihood of Mr. Smith, during the course of styling a client's hair, accidentally drawing his own blood *and* accidentally drawing the blood of another individual

and commingling his blood with the other individual's blood, is virtually non-existent. Indeed, it is so minimal as to be purely hypothetical.

That HIV-positive cosmetologists do not pose a direct threat is also recognized by the United States Department of Justice, which issued guidance concerning the application of the ADA's direct threat provision to occupational training in cosmetology. It states:

> It is medically established that HIV can only be transmitted by sexual contact with an infected individual, exposure to infected blood or blood products, or perinatally from an infected mother to an infant during pregnancy, birth, or breastfeeding. HIV cannot be transmitted by casual contact. Thus, circumstances do not exist for the transmission of HIV in a school or workplace setting, including those involving . . . cosmetology . . .. *For example, a cosmetology school's refusal to admit a qualified applicant who is HIV-positive because of unfounded fears or beliefs about risks of transmission of HIV during work as a cosmetologist would violate the ADA.*

AMERICAN CIVIL
LIBERTIES UNION OF
MARYLAND

See Questions and Answers: The Americans with Disabilities Act and the Rights of Persons with HIV/AIDS To Obtain Occupational Training and State Licensing. Available online at: http://www.ada.gov/qahivaids_license.htm (emphasis added.)

It is notable that the Maryland regulation relied upon by the Hair Cuttery in its firing of Brandon Smith prohibits both a salon's performance of "[s]ervices on client with infectious or contagious disease" and services performed by an "[o]perator with infectious or contagious disease." Yet, Mr. Smith knows for a fact that the Hair Cuttery does not interpret the first part of this prohibition to limit the salon's performance of services on clients who might be HIV positive. Clients are not screened for HIV as a condition of having their hair cut, nor could they be legally. Indeed, the notion that this would ever occur shows just how absurd is Ratner's interpretation of this Maryland regulation to require its firing of Mr. Smith based upon his HIV positive status.

In light of current medical knowledge and the best available objective evidence, the risk of HIV transmission in the cosmetological setting is so remote and speculative as to provide no justification for Hair Cuttery's firing of Brandon Smith.

The Policy

To the extent, if any, that Hair Cuttery correctly understood (COMAR) 09.22.01.16.E(2) to require or allow Mr. Smith's firing due to his HIV positive status, the regulation furthers the very stereotypes that federal and state disability discrimination laws were intended to eradicate, while providing no meaningful advances in public health and safety.

In *School Board of Nassau County v. Arline,* 480 U.S. 273 (1987), the United States Supreme Court observed that "society's accumulated myths and

fears about disability and disease are as handicapping as are the [disability] and give rise to the same level of public fear and misapprehension as contagiousness." *Id.* at 284, 285; *see also* H.R. Rep. No. 101-485(III), at 45 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 468 ("A person with a disability must not be excluded, or found to be unqualified, based on stereotypes or fear. Nor may a decision be based on speculation about the risk or harm to others.").

Reasoned and medically sound judgment can take the place of irrational fears, as federal and state disability discrimination laws intended, only if the direct threat inquiry looks to whether there is a *significant* risk to the health or safety of others. There is, of course, some risk in all activity. In any situation, it is possible to imagine a scenario in which a potential for injury exists, but we do not live our lives cowed by fear of these remote and speculative risks. If individuals with disabilities were required to disprove the existence of any remote or speculative risk, they alone would face the burden of guaranteeing the impossible. *Cf. Bragdon*, 524 U.S. at 653 (rejecting the position that the absence of contrary evidence can be equated with positive data showing that a risk exists); *Chalk*, 840 F.2d at 707 (describing a requirement of proving the impossibility of HIV transmission as "an impossible burden of proof" and noting that "[l]ittle in science can be proved with complete certainty"); *see also* H.R. Rep. No. 101-485(III), at 45 ("The plaintiff is not required to prove that he or she poses no risk.").

AMERICAN CIVIL
LIBERTIES UNION OF
MARYLAND

Brandon Smith does not pose any meaningful risk of HIV transmission through his work as a stylist. It is precisely this type of circumstance – where the mistaken perception of risk has no correlation with the actual likelihood of harm – that the protections of federal and state disability discrimination laws are most necessary. Myths about the contagiousness of HIV must not be allowed to triumph over fact.

Conclusion

We trust that you share our concern about the Hair Cuttery's misuse of a Maryland DLLR regulation to justify unlawful discrimination, and that you will take immediate action to clarify that COMAR 09.22.01.16.E(2) does not apply to exclude HIV-positive persons from working in the field of cosmetology. Please contact me, or have your attorney contact me, at your earliest convenience to discuss your views on this matter.

Sincerely,

Deborah A. Jeon
Legal Director

Cc: Elizabeth Hartley Kimble, Esq.
Mr. Dennis Ratner
Ms. Susan Gustafson