



June 11, 2009

Equal Employment Opportunity Counselor for the Eastern Region  
Transportation and Security Administration  
Office of Civil Rights and Liberties (TSA-6)  
601 S. 12<sup>th</sup> Street  
Arlington, VA 22202

Dear Sir or Madam:

We represent Michael Lamarre who was wrongfully denied employment as a Transportation Security Officer (“TSO”) (baggage screener) at the Transportation Security Administration (“TSA”) based solely upon the fact that he is HIV positive.

Mr. Lamarre intends this letter—timely filed within 45 days of the discriminatory disqualification, pursuant to 29 C.F.R. § 1614.105(a)(2) (2009)—to initiate the TSA Equal Employment Opportunity informal complaint process to remedy this discrimination based upon a protected disability.

According to TSA policy, “TSA... applicants for employment... are to be treated in a fair, lawful, and nondiscriminatory manner, without regard to race color, national origin, religion, age, sex, disability, sexual orientation, status as a parent, or protected genetic information.” *See* [http://www.tsa.gov/assets/pdf/civil\\_rights\\_policy.pdf](http://www.tsa.gov/assets/pdf/civil_rights_policy.pdf).

Pursuant to TSA EEO procedures, “current or former TSA employees or applicants may raise any of the legal bases listed ... when initiating the EEO complaint process.” *See* [http://www.tsa.gov/what\\_we\\_do/civilrights/eo.shtm](http://www.tsa.gov/what_we_do/civilrights/eo.shtm).

Federal law makes clear that refusing to hire a qualified applicant simply because that person is HIV positive constitutes wrongful disability discrimination. *See generally*, Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.* (prohibiting discrimination on the basis of disability in federal employment); *Bragdon v. Abbott*, 524 U.S. 624, 637-39 (1998) (holding that discrimination on the basis of HIV status is disability discrimination).

As TSA was informed by Mr. Lamarre’s treating physician, Mr. Lamarre is fully qualified and able to perform the baggage screening duties of a TSO, and there is no basis to exclude HIV-positive applicants from this position. Accordingly, we ask TSA to reverse its decision to disqualify him. Failure to do so would violate TSA’s own antidiscrimination policies, and would implicate concerns of constitutional dimension.

## I. Background

Mr. Lamarre, 44, served his country in the Air Force from 1984-87. His military service included extensive, classified signal-intelligence and communications-collection missions during the Cold War. In 1987, he was honorably discharged.

In 1990, Mr. Lamarre was diagnosed with HIV. In the nearly 20 years since his diagnosis, his CD4+ t-cell count has ranged from 220-400, and, due to a healthy lifestyle and treatment, he has never developed AIDS. He has never been, nor is he at an abnormal risk to be, stricken with an opportunistic infection stemming from HIV.

For the last 20 years, Mr. Lamarre has worked full time in jobs that are as physically demanding, if not more demanding, than that of a TSO. In the early 1990s, Mr. Lamarre managed a salon, a position that required him to be on his feet for six hours per day. Thereafter, as a trainer for salon staff nationwide, Mr. Lamarre endured a demanding travel schedule: three weeks of every month, he was on the road in various U.S. cities, spending only weekends at home in South Florida. Starting in the late 1990s, Mr. Lamarre entered the sales realm of the salon industry, where he continues to work full time. In this position, he is on the road for six to ten hours per workday, driving from salon to salon, jumping in and out of his car, tracking down store managers, and selling hair-care products in a pressured, competitive environment. He also participates in hair-care products shows that require him to remain on his feet for the entirety of long days, traversing arenas and showrooms, and physically moving equipment and products.

Since shortly after his diagnosis 20 years ago, Mr. Lamarre has never been unemployed for a meaningful amount of time. Mr. Lamarre is in excellent shape, and remains very physically active. As an illustration, he recently biked 165 miles for a charity event over two days, pedaling from Miami to Key West in South Florida heat. He is currently training for a similarly taxing bicycle trip for charity.

Given his expertise in security, excellent employment history, physical capabilities, and status as a veteran, Mr. Lamarre decided to apply in mid-2008 to work for TSA in a part-time position. Mr. Lamarre scored adequately on the job-specific TSO-prerequisite tests administered by the TSA pursuant to the ATSA, 49 U.S.C. § 44935(f) (2009); and Public Law 107-71, Title I, § 111(d) (2009), and met every criterion by which he was evaluated according to the aforementioned governing laws and the qualifications listed on the TSA's website.

Accordingly, after demonstrating his proficiency through testing, Mr. Lamarre was awarded a face-to-face interview with a TSA representative. Following that successful interview, he was passed on to the next stage of the hiring process: a medical screening conducted by Comprehensive Health Services ("CHS"). At the screening, Mr. Lamarre disclosed his HIV status, and thereafter received, per TSA procedure, an "HIV Further Evaluation" form to be filled out by his physician.

Dr. Jennifer Bartczak, an infectious diseases and internal medicine specialist who Mr. Lamarre has seen for routine HIV-related check-ups every three or four months since 2006, performed the evaluation. Dr. Bartczak confirmed that Mr. Lamarre "is capable of meeting the [TSO] job requirements safely, efficiently, and effectively with respect to my medical specialty and this candidate's medical condition and/or diagnosis."

Nevertheless, on April 28, 2009, four days after his evaluation by Dr. Bartczak, the TSA/CHS informed Lamarre via letter that his "recent medical examination... has resulted in medical disqualification." The letter continued: "You did not meet the standards established for this position based on the following medical guideline: HIV—the effect of the treatment program, physical, emotional, and intellectual impact of the disease, and prognosis should be considered when

evaluating the capability of an individual to perform job tasks [TSA Medical Guidelines for Transportation Security Screeners, 2007 edition].”

## II. The TSA Violated its Own Policies by Disqualifying Mr. Lamarre

According to TSA policies, as stated on the agency’s website, the TSA “provides equal employment opportunity to both current and former employees as well as applicants for employment.” Further, the TSA’s Office of Civil Rights and Liberties purports to “ensure[ ] all employees...are treated in a fair and lawful manner without regard to...disability.”

Those proclamations ring empty in the case of Mr. Lamarre. TSA provided no grounds other than “medical disqualification” for denying Mr. Lamarre an opportunity to serve his country working for the TSA, and no support for its conclusion that Mr. Lamarre’s HIV status renders him unable to fulfill the duties required of a TSO. HIV infection cannot reasonably be asserted as sufficient to deem an applicant *per se* unfit for a TSO position. *See, e.g., Taylor v. Rice*, 451 F.3d 898 (D.C. Cir. 2006) (rejecting the U.S. Department of State’s policy categorically excluding HIV positive applicants from the Foreign Service).

Indeed, TSA’s own policy directs hirers to consider “the effect of the [HIV] treatment program; physical, emotional, and intellectual impact of the disease; and prognosis...when evaluating the capability of an individual to perform job tasks.” These guidelines were ignored here, as was Dr. Bartczak’s opinion that HIV did not impair Mr. Lamarre’s ability to perform the duties of the TSO job. For example, the TSA is supposed to consider “the effect of the [HIV] treatment program,” yet it failed to seek information from Dr. Bartczak, Mr. Lamarre, or any other source regarding the effects of Mr. Lamarre’s treatment. Had the TSA followed its own policy and considered that criterion, it would have discovered that Mr. Lamarre’s treatment has proved an emphatic success: he has not developed AIDS, and he has not missed, in the nearly 20 years of employment, any significant amount of work due to HIV. Similarly, the TSA failed to properly evaluate the “physical...impact” of HIV disease on Mr. Lamarre. Had the agency done so, it would have discovered that Mr. Lamarre has performed soundly in physically demanding jobs, is in excellent shape, and is fully capable of performing physical TSO duties.

The TSA also violated its policy by failing to properly evaluate the “emotional” and “intellectual” impact of HIV on Mr. Lamarre. Had the agency done so, it would have discovered that Mr. Lamarre has worked hard following his diagnosis nearly 20 years ago to maintain stable relationships and participate in activities that are fulfilling, both personally and to the community at large. Mr. Lamarre successfully finished the English proficiency exam in half the allotted time, and passed, with flying colors, the rest of the Screener Assessment Battery, which measures one’s aptitude for x-ray interpretation. TSA failed to recognize that HIV has caused no intellectual impairment that would affect Mr. Lamarre’s abilities as a TSO.

Finally, the TSA violated its own policy by failing to properly factor in Mr. Lamarre’s prognosis, which Dr. Bartczak confirmed is “good.” The TSA’s policy of considering prognosis is sound, because not every person with HIV is equally susceptible to suffer health problems. In fact, in 20 years, Mr. Lamarre has never suffered from an opportunistic illness. The TSA’s apparent abandonment, in this case, of that inquiry into prognosis—an inquiry that would have upheld Mr.

Lamarre's status as a prime candidate for a TSO position—violated both the letter and spirit of its own policies and the federal laws that animate them.

In summary, Mr. Lamarre meets every criteria established by the TSA for the position, and his HIV status does not negatively impact his ability to fully perform the duties of the job. Thus, the TSA's decision to disqualify Mr. Lamarre because of his HIV status constitutes discrimination on the basis of disability, in violation of the TSA's civil rights policy.

### **III. To Comply With Its Own Policies, and With the Constitution, the TSA Must Rescind Its Disqualification of Mr. Lamarre as a Potential TSO**

Since its creation in 2001, the federal government has trumpeted the TSA's importance in "protect[ing] the nation's transportation systems so you and your family can travel safely." It is indefensible, then, that Mr. Lamarre—an intelligent, physically-fit individual possessing excellent audio, x-ray reading, and English skills and NSA experience—would be discriminatorily disqualified from employment as a TSO simply because he is HIV-positive.

The TSA has offered no basis whatsoever, nor is any apparent, for summarily disqualifying Mr. Lamarre from consideration as a TSO applicant. Thus, in addition to violating its own hiring practices, the TSA discriminated against Lamarre vis-à-vis other candidates, thereby denying him equal protection of the law in violation of Amendment XIV of the Constitution of the United States.

Because Mr. Lamarre's HIV-status has no bearing on his ability to perform as a TSO and thus cannot legitimately form the basis for a federal employment decision, Mr. Lamarre hopes the agency will rescind his disqualification from employment, thereby bringing the agency back into compliance with its own policies and with the Constitution. He looks forward to an opportunity to more fully present the facts outlined here in the administrative process.

Please direct all communications regarding this case to us at the addresses listed below. You may contact lead counsel Robert Rosenwald at (786)363-2713 or via e-mail at [rosenwald@aclufl.org](mailto:rosenwald@aclufl.org).

Sincerely,



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To: **Lamarre, Michael**

SSN: **XXX-XX-2166**

Date: **04/28/2009**

Your recent medical examination, performed in conjunction with your application to become a Transportation Security Officer with the Transportation Security Administration, has resulted in medical disqualification. You did not meet the standards established for this position based on the following medical guideline:

**HIV** - The effect of the treatment program, physical, emotional, and intellectual impact of the disease, and prognosis should be considered when evaluating the capability of an individual to perform job tasks. [TSA Medical Guidelines for Transportation Security Screeners, 2007 edition]. 2) Must meet job-related standards that will be assessed in a pre-employment medical evaluation. [Transportation Security Officer (TSO) Qualifications & Evaluations on [www.usajobs.gov](http://www.usajobs.gov)]

Based on the current requirements of the job and the results from your recent medical evaluation it was determined that you could not perform the TSO job safely, effectively, and efficiently. Some of the critical requirements of the TSO position can be found by viewing the Vacancy Announcement on [www.usajobs.gov](http://www.usajobs.gov).

The process of medically certifying applicants for any position – in particular safety/security sensitive positions – is a complex one involving medical, legal, and administrative considerations. These screening jobs are physically demanding and all screeners must be medically able to perform the requirements of the job to ensure the safety and security of the traveling public and others.

The specific criteria for medical clearance to work as a Transportation Security Officer were developed by experts in Occupational Medicine and other specialty areas, and are based on the specific tasks that passenger/baggage screeners, leads, and supervisors must perform effectively to work in those positions.

The overall process of medical certification is designed to be compliant with relevant Federal and State laws, including legislation such as, but not limited to, the Aviation and Transportation Security Act (ATSA), the Rehabilitation Act, Health Insurance Portability and Accountability Act (HIPAA), and others.

Although you do not meet the requirements for the TSO position, it does not mean that you would not meet the requirements of other TSA jobs or those in the federal government. Other employment opportunities can be found at [www.usajobs.gov](http://www.usajobs.gov).

TSA thanks you for your interest in a TSO position and wishes you well in your future endeavors.

Sincerely,

Comprehensive Health Services



Candidate Name: Lamarre, Michael

Last 4 Digits of SSN: 2166

**MEDICAL CONDITION:**

This candidate is under consideration for a position as a Transportation Security Officer (Screener)(TSO) position at the Transportation Security Administration (TSA). His/her pre-employment medical screening, including a medical history review on 04/08/2009, revealed the following: **History of HIV**

**Paperwork Reduction Action Statement:**

The Transportation Security Administration (TSA) requires physical/medical examinations prior to an individual's appointment to a TSA Security Officer (Screener) position. TSA uses the following medical documents to obtain information relevant to an applicant's health status for purposes of making an employment decision. This is a mandatory collection of information if you wish to be considered for a TSA Security Officer (Screener) position. It is estimated that the total average burden per response associated with this collection is approximately 20 minutes. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The control number assigned to this collection is OMB 1652-0032, which expires 09/08.

**CANDIDATE SECTION:**

- Candidate must complete Candidate section, including signature
- Candidates will not receive further consideration in the TSO job application process if CHS does not receive ALL requested paperwork within 90 days of the candidate being placed on Further Evaluation for the position

1. Date of diagnosis: AUGUST 1990
2. What type of treatment did / do you receive Medications only
3. Have you been hospitalized in the past year?  YES  NO If yes, for what? \_\_\_\_\_

Candidate Signature: Michael Lamarre Date: 17 MAR 09

- Any expenses incurred remain your responsibility and will not be reimbursed by CHS or TSA

**HEALTH CARE PROVIDER SECTION:**

- Health Care Provider must verify candidate's identification with a government issued photo ID, e.g., driver's license or passport
- Health Care Provider must complete Health Care Provider section, including signature, printed name, contact number
- Health Care Provider must review, sign and date the attached "Transportation Security Officer (Screener) Job Requirements Overview" and determine candidate's ability to perform this job in relation to the above indicated condition

1. Diagnosis: 042 Date of diagnosis: 8/1990
2. Prognosis: Good
3. Current treatment: Stable
4. What medication is the candidate currently taking for HIV?

Medication:	Dose:	Frequency:
<u>Truvada</u>	<u>1</u>	<u>daily</u>
<u>Intellence</u>	<u>200mg</u>	<u>twice daily</u>
<u>Isentress</u>	<u>400 mg</u>	<u>twice daily</u>
<u>chryson</u>	<u>100mg</u>	<u>once</u>

5. Has the candidate been hospitalized for any associated medical problems in the last year?  YES  NO  
If yes, for what? \_\_\_\_\_
6. What are the candidate's Viral Load results (within the last 6 months)? 1/16/09 60
7. What is the candidate's T-Cell count (within the last 6 months)? 574 / 127  
Please also send results absolute CD4 count.
8. Any additional information: \_\_\_\_\_

Physician Signature: [Signature] Date: 4/24/2009  
 Please Print Physician Name: Jennifer Bartczak Medical Speciality: IM / ID  
 Phone Number: (954) 533-5382 FAX Number: (954) 533-8350

**FAX ALL SUPPORTING DOCUMENTATION, PROGRESS NOTES, AND RECENT DIAGNOSTIC TEST RESULTS INCLUDING ALL PAGES OF THIS FORM TO CHS. If unable to fax please call 866-416-5928.**

Fax # 703-288-5495



Candidate Name: Lamarre, Michael

Last 4 Digits of SSN: 2166

**Transportation Security Officer (TSO) Job Overview**

from Vacancy Announcement on www.usajobs.gov

**1. A TSO must be willing and able to:**

- Repeatedly lift and carry up to 70 pounds;
- Continuously stand for anywhere between one (1) to four (4) hours without a break to carry out screening functions;
- Walk up to two (2) miles during a shift;
- Continuously and effectively interact with the public, giving directions and responding to inquiries in a reasonable tone and manner;
- Maintain focus and awareness and work within a stressful environment which includes noise from alarms, machinery, and people, distractions, time pressure, disruptive and angry passengers, and the requirement to identify and locate potentially life threatening devices and devices intended on creating massive destruction; and
- Make effective decisions in both crisis and routine situations.

**2. TSO medical standards include but are not limited to:**

- Visual ability including two functioning eyes with:
  - Distance vision correctable to 20/30 or better in the best eye and 20/100 or better in the worse eye;
  - Near vision correctable to 20/40 or better binocular;
  - Color perception (e.g., red, green, blue, yellow, orange, purple, brown, black, white, gray).  
Note: color filters (e.g., contact lenses) for enhancing color discrimination are prohibited;
- Hearing (corrected or uncorrected) as measured by audiometry cannot exceed:
  - an average hearing loss of 25 decibels (ANSI) at 500, 1000, 2000 and 3000 Hz in each ear, and
  - single reading of 45 decibels at 4000 and 6000 Hz in each ear;
- Adequate joint mobility, dexterity and range of motion, strength, and stability to repeatedly lift and carry up to 70 pounds; and
- Blood pressure not to exceed 140 / 90.

**Physician Review**

Based on my findings and opinions presented in the Health Care Provider Section of this form, this candidate:

- Is capable of meeting the above job requirements safely, efficiently and effectively with respect to my medical specialty and this candidate's medical condition and/or diagnosis noted on Page 1.
- Is **NOT** capable of meeting the above job requirements safely, efficiently and effectively with respect to my medical specialty and this candidate's medical condition and/or diagnosis noted on Page 1.

Specify reason(s) and provide explanation based on the above reference number(s):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Physician Signature: \_\_\_\_\_

Date: 4/24/2009

Please Print Physician Name: Jennifer Bartozak

Medical Speciality: IM / ID

Phone Number: (954) 533-5382

FAX Number: (954) 533-8360

**Note: All data provided by the candidate's physician(s) are part of an initial medical evaluation. The final determination of medical suitability will be made by Transportation Security Administration medical staff based on the aggregate of all medical data acquired.**

AUTHORITY: 49 U.S.C. § 114(e). PRINCIPAL PURPOSE(S): This information will be used to determine your eligibility for employment as a Transportation Security Officer (TSO). ROUTINE USE(S): This information may be shared with contractors, grantees, or volunteers performing or working on a contract, service, grant, cooperative agreement, or job for the federal government, or for routine uses identified in the Office of Personnel Management's system of records notice, OPM/GOVT-10 Employee Medical File System Records (if hired) or OPM/GOVT-5 Recruiting, Examining, and Placement Records (if not hired). DISCLOSURE: Voluntary; failure to furnish the requested information may result in an inability to consider your application for employment. Failure to provide your SSN may result in a delay in determining your eligibility for employment as a TSO.