

June 23, 2008

BY FACSIMILE TRANSMISSION

Hon. Nancy Pelosi  
Speaker  
Office of the Speaker  
H-232, U.S. Capitol  
Washington, DC 20515  
Fax: (202) 225-4188

Re: Lambda Legal Statement In Support of the ADA Amendments Act of 2008

Dear Speaker Pelosi:

Lambda Legal Defense and Education Fund, Inc. (Lambda Legal) urges Congress to pass the ADA Amendments Act of 2008, as reported out of the U.S. House Judiciary and House Education and Labor Committees, without amendments. The ADA Amendments Act is vitally needed to restore civil rights protections that Congress intended the Americans with Disabilities Act (ADA) to provide.

Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work. Lambda Legal has represented the interests of individuals living with HIV in discrimination lawsuits brought under the ADA since the Act went into effect. With headquarters in New York City and regional offices in Atlanta, Chicago, Dallas, and Los Angeles, we have represented individuals throughout the country who have experienced discrimination based on their HIV status.

The passage of the ADA was a momentous event for people living with disabilities in the United States. With strong bipartisan support, Congress prohibited discrimination on the basis of disability, so that people with disabilities could enjoy equal opportunities to work and to participate in all aspects of community life. Very importantly, the law provided persons subjected to unfair treatment because of a disability – actual or perceived – a means of enforcing their right to be free from such discrimination.

But unfortunately – and at times tragically – in the years since its passage courts have narrowed significantly the protective reach of the ADA. Increasingly, people with disabilities are blocked from even the opportunity to establish that they have experienced discrimination, due to restrictive interpretations of what it means to be “disabled” under the

Act.<sup>1</sup> These restrictive rulings have allowed employers and others to treat people with disabilities unfairly.

In our legal advocacy on behalf of people living with HIV, we have seen first hand how far court interpretations have shifted the ADA's focus away from the alleged misconduct and onto a detailed examination of how "disabled" the person is. The ADA was intended to protect people living with HIV from being discriminated against based on HIV infection.<sup>2</sup> Yet, people with HIV who have been fired or not hired because they have HIV are denied the protections of the ADA due to disputes over whether they meet a narrowly interpreted definition of the term "disability." Ironically, as many people living with HIV are better able to work and remain in the workforce thanks to more effective medications, they face an increased risk that an employer can discriminate against them with impunity, because a court might conclude that they fail to meet the definition of "disabled."

Under the reasoning of some court decisions, whether or not an employer can be liable for discriminating against someone because he or she has HIV might turn on whether the person is male or female,<sup>3</sup> is of childbearing age, is gay or heterosexual, or had planned to have children.<sup>4</sup> This is a clear perversion of the intent of the ADA. It is also a terrible irony, given that gay men continue to be at highest risk for HIV. Even when the courts allow the case to proceed to the real issue – whether an adverse action was taken because the person has or was perceived as having HIV – typically the person meant to be protected from discrimination must first go through the demeaning process of providing testimony about highly personal, intimate matters that are wholly irrelevant to whether he or she experienced discrimination based on HIV infection.<sup>5</sup>

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<sup>1</sup> See, e.g., *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002); *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999).

<sup>2</sup> See, e.g., H.R. Rep. No. 101-485, pt. 3, at 28 n.18 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 451 n.18 ("Persons infected with the Human Immunodeficiency Virus are considered to have an impairment that substantially limits a major life activity, and thus are considered disabled under this first test of the definition."); see also, e.g., *id.*, pt. 2, at 52 & 106 (1990), reprinted in 1990 U.S.C.C.A.N. at 334 & 389; *id.*, pt. 3, at 76, reprinted in 1990 U.S.C.C.A.N. at 498.

<sup>3</sup> Compare *Rodriguez v. Manpower TNT Logistics, Inc.*, 2006 WL 2726871 (D.P.R. Sept. 22, 2006) (finding that female plaintiff's "testimony that her decision not to have more children was based on the possibility of passing the medical condition to the child brings her within the protection of the ADA"), with *Cruz Carrillo v. AMR Eagle, Inc.*, 148 F. Supp. 2d 142 (D.P.R. 2001) (finding that male plaintiff failed to establish that he was disabled because he failed to introduce medical evidence that HIV substantially limits a man's ability to reproduce and his testimony that the HIV infection "removed his incentive to reproduce" was not sufficient evidence).

<sup>4</sup> See, e.g., *Blanks v. S.W. Bell Communications, Inc.*, 310 F.3d 398 (5<sup>th</sup> Cir. 2002) (affirming grant of summary judgment to employer, finding plaintiff with HIV not "disabled" largely because he testified that he did not want to have any more children); *Gutwaks v. Am. Airlines, Inc.*, 1999 WL 1611328 (N.D. Tex. Sept. 2, 1999) (granting employer's motion for summary judgment, finding plaintiff with HIV not "disabled" because he "admits he does not currently, nor has he ever, desired to father children.>").

<sup>5</sup> See, e.g., *id.*; *Lederer v. BP Prods. N. Am.*, 2006 WL 3486787 (S.D.N.Y. Nov. 20, 2006) (deciding employer's motion for summary judgment in part based on review of plaintiff's sworn statements concerning his intentions with respect to marriage and fathering children).

Such legal proceedings and rulings clearly are not what Congress intended when it passed the ADA. These hurdles faced by people with HIV seeking to exercise their rights under the ADA are illustrative of the hurdles faced by a great many disabled individuals in our country. For far too many, the ADA has not stopped employers from making adverse decisions based on disability, and courts have allowed such discrimination to continue.

The ADA Amendments Act will restore the ADA to Congress's original intent in several important respects. The ADA Amendments Act redefines "disability" to make it clear that the restrictive interpretations used by the Supreme Court in *Toyota Motor Manufacturing v. Williams* and *Sutton v. United Airlines* and by numerous lower courts cannot be applied. The revised definition, the directive that ameliorative effects of mitigating measures must not be considered in determining whether the definition is met, and the specific directive that the definition of "disability" must be construed broadly will mean that many more people with disabilities will be protected by the Act. Thus, the ADA Amendments Act harmonizes the ADA with other civil rights laws – returning the focus to whether the individual has been treated less favorably on the basis of disability.

All Americans deserve equal opportunities to work and to be judged based on their performance. **Lambda Legal strongly urges Congress to pass the ADA Amendments Act, with no amendments, to end unfair discrimination against all people with disabilities.**

Sincerely,

A handwritten signature in black ink, appearing to read "Bebe J. Anderson", with a long horizontal flourish extending to the right.

Bebe J. Anderson  
HIV Project Director