

# Dodgy Defenses

How do employers who discriminate against applicants with HIV try to justify their actions? Lambda Legal's HIV Project Director **Scott Schoettes** counts the ways.

**WITH ENACTMENT OF THE** Americans with Disabilities (ADA) Amendments Act in 2009, a major weapon was removed from the arsenal of employers and others accused of discriminating against people living with HIV (PLWH). For years, defendants had argued—often successfully—that a plaintiff with HIV did not qualify for the ADA's protections, because s/he did not have an impairment that “substantially limits a major life activity.” The Amendments Act, however, made clear that PLWH are covered under the ADA and that differential treatment of PLWH, whether in employment or in receiving a host of other services, is illegal.

So, post-ADA Amendments Act, HIV discrimination litigation focuses on whether the defendant's conduct was discriminatory, right? Not quite. Unfortunately, there are a number of other tools and subterfuges that defendants will use in an effort to cover up discriminatory acts and/or escape liability under the ADA. Many of these attempted defenses were on display in *Roe v. City of Atlanta*, a Lambda Legal case in which an applicant was rejected for employment as a police officer with the City of Atlanta after they discovered he is HIV-positive. What kinds of things did the defendant try to claim excused its behavior?

**“You can't trust him—he's a liar!”** Attempting to discredit the plaintiff is nothing new as a litigation tactic, but—because of the confidential nature of one's personal medical information—it is a charge to which plaintiffs with HIV are particularly vulnerable. As is often the case, the employer in *Roe* claimed that not only did the plaintiff fail to affirmatively announce his HIV status when he applied for the job—but that he also didn't list it on the form *Roe* completed prior to the medical examination they conducted. Never mind that *Roe* was under no obligation to reveal this information prior to being made an offer of employment—in fact, the police department was in violation of the ADA when they asked about HIV and tested him for it—or that he took pains not to sign anything indicating that he was providing every detail of his medical history. The City of Atlanta still tried

to paint him as untrustworthy. This is a dilemma that many job applicants with HIV face: if I am inappropriately asked about my status, do I reveal this information and make myself a target for discrimination, or do I keep it to myself and risk later being branded as dishonest and deceitful? It can be a no-win situation. Generally speaking, the best course of action is to answer honestly those questions your employer is entitled to ask and to feel free to keep private those things that are irrelevant to your employment application.

**“We didn't even know he had HIV.”** Believe it or not, defendants will make this claim despite the fact they have tested the applicant for HIV and obtained a positive result. As happened in *Roe*, the

employer sends the applicant to an “independent” doctor who evaluates the person's fitness to perform the job. The doctor conducts the inquiry about HIV—in this case, even runs an HIV test on the plaintiff's blood without his knowledge—and then reports back to the employer that the applicant is not medically qualified. That way, the employer makes the hiring decision—based on the “expert” opinion of the doctor it hired—but can attempt to disclaim any knowledge of the disability that serves as the basis for the claim of discrimination. Thankfully, employers are not allowed to isolate themselves in this way—they are ultimately held responsible

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## MEET OUR LAWYERS

### SCOTT SCHOETTES // HIV PROJECT DIRECTOR

**HOW DID YOU COME TO WORK AT LAMBDA LEGAL?** After the death of Matthew Shepard, I wanted to be a part of changing the environment that could lead to such a tragedy. Eight years later, I had completed law school and put some time in at a big law firm when the opportunity with Lambda Legal presented itself. It was precisely what I had envisioned when I embarked upon this second career.

**WHAT IS YOUR ROLE AT LAMBDA LEGAL?** I lead our efforts to secure, protect and advance the civil rights of people living with HIV. I love the variety of work involved in my job, because HIV-related issues intersect with so many substantive areas of the law—from employment to healthcare (and other public accommodations), family law to immigration—it really runs the gamut.

**WHAT HAVE BEEN THE HIGHLIGHTS OF YOUR WORK SINCE YOU ARRIVED HERE?** Two things of which I am particularly proud occurred earlier this year. In January, we filed an amicus brief with the U.S. Supreme Court, explaining the importance of the Patient Protection and Affordable Care Act to people living with HIV and our ability to get a handle on the HIV/AIDS epidemic. In February, we convinced the Eleventh Circuit Court of Appeals to reverse the decision of a trial court, clearing the way for a man living with HIV to proceed with his claims against the Atlanta Police Department, which had denied him the opportunity to serve as a police officer because of his HIV status. On the policy side, playing a small part in ending the travel and immigration ban against people living with HIV was particularly gratifying.

**IS THERE ANYTHING THAT THE LAMBDA LEGAL COMMUNITY MIGHT BE SURPRISED TO LEARN ABOUT YOU?** In 1998, I was on the national tour of “West Side Story,” playing Action (sometimes Riff) in 46 of the 50 United States and three Canadian provinces. (I was an actor/dancer/singer in my first career.)

**WHAT DO YOU DO TO UNWIND WHEN YOU'RE NOT AT WORK?** When I can make the time, you might find me playing a weekend tournament with the North American Gay Volleyball Association (NAGVA) or on the beach in Chicago. Not sure I “unwind” when I play—my competitive edge is a bit too sharp to allow for that—but it is a great way to stay in shape and work out some leftover aggression!



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for sufficiently guiding and monitoring the quality of the evaluation conducted by the doctors with whom they contract. In other words, under the ADA, employers aren't allowed to “outsource” disability discrimination.

**“He doesn't really want the job.”** Again relying on the doctor as the bearer of bad news in a twisted game of “telephone,” the employer has the doctor tell the applicant that the employer doesn't hire people with HIV. Then, if the applicant accepts the determination of this doctor—who has been *paid* by the employer to test the applicant for HIV—the employer later claims the applicant “abandoned the application process.” In Roe's case, the Atlanta police department claimed this even though Roe made subsequent and additional efforts to convince the City's doctor that his HIV would not in any way disqualify him or prevent him from performing the job of police officer. Under the City's “abandonment” theory, Roe

should have instead pled his case directly with the police department—which allegedly knew *nothing* (see above) about why he was found not medically qualified!

**“We don't discriminate based on HIV status; but if we did . . .”** Defendants are at their most cynical here, recognizing that they shouldn't—and professing that they don't—discriminate based on HIV status, while simultaneously relying on outdated misconceptions about living with HIV and deeply entrenched fears about the transmission of HIV to justify their actions. Usually this takes the form of a claim that the HIV-positive plaintiff, in whatever context is at issue, presents a “direct threat” to the health of safety and others. The defendant in *Roe* pressed this argument, albeit with a slightly different gloss: the City claimed that though it could not prove that Roe's HIV presented a direct threat to others, Roe would not be able to prove that it *didn't* present such a threat. And because the district

court discounted the evidence Roe presented to make this required initial showing—not to mention that it's almost impossible “to prove a negative” to a point of absolute certainty—the defendant almost prevailed with this argument.

If it had not been for Lambda Legal's decision to represent Roe on appeal to the Eleventh Circuit Court of Appeals—where we succeeded in getting the district court's summary judgment decision reversed—there would have been yet one more decision on the books against a plaintiff living with HIV.

At Lambda Legal, we recognize that we have our work cut out for us. We will continue to eradicate harmful precedents and stamp out defenses that turn disability law on its head for people living with HIV. Lambda Legal's HIV Project isn't going anywhere until the battle against HIV discrimination has been won once and for all! **L**



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