
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EQUAL EMPLOYMENT)	
OPPORTUNITY COMMISSION,)	Appeal from the
)	United States District Court,
)	Western District of Wisconsin
Plaintiff – Appellant,)	
)	No. 05 C 507
v.)	
)	The Honorable Barbara B. Crabb,
LEE'S LOG CABIN, INC.,)	Chief Judge
)	
Defendant – Appellee)	

BRIEF OF *AMICI CURIAE*

**AIDS FOUNDATION OF CHICAGO, AIDS LEGAL COUNCIL OF
CHICAGO, EQUIP FOR EQUALITY, HIVICTORIOUS, LEGAL
ASSISTANCE FOUNDATION OF METROPOLITAN CHICAGO, THE
ADAP ADVOCACY ASSOCIATION, AIDS ACTION FOUNDATION,
COMMUNITY HIV/AIDS MOBILIZATION PROJECT, HOUSING
WORKS, THE NATIONAL ASSOCIATION OF PEOPLE WITH AIDS,
AND THE NATIONAL MINORITY AIDS COUNCIL**

IN SUPPORT OF EEOC'S PETITION FOR REHEARING *EN BANC*

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 06-3278

Short Caption: EEOC v. Lee's Log Cabin, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

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AIDS Foundation of Chicago, AIDS Legal Council of Chicago, Equip for Equality, HIVictorious, Legal Assistance Foundation of Metropolitan Chicago, The ADAP Advocacy Ass'n, AIDS Action Foundation, Comty. HIV/AIDS Mobilization Project, Housing Works, The Nat'l Ass'n for People with AIDS, The Nat'l Minority AIDS Council

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Lambda Legal Defense and Education Fund, Inc.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: Scott Schoettes

Date: 11/19/08

Attorney's Printed Name: Scott A. Schoettes

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes [X] No []

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: Bebe J. Anderson / [Signature] Date: 11/19/08

Attorney's Printed Name: Bebe J. Anderson

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes [] No [X]

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INTRODUCTION

The panel decision creates new evidentiary burdens for people who are discriminated against because they have the human immunodeficiency virus (“HIV”), based on a false dichotomy between having HIV and being diagnosed with acquired immunodeficiency syndrome (“AIDS”). The flawed logic of the panel decision could eliminate antidiscrimination protections under the Americans with Disabilities Act for many people living with HIV. Rehearing *en banc* is needed in order to prevent such a dangerous and unjust result.

The panel ruled that a claim someone was discriminated against because she had HIV is not supported by evidence of the limitations her HIV infection imposes on her major life activities if her infection has been diagnosed as “AIDS.” That ruling is in error. First, someone infected with HIV has the impairment of “HIV infection” even if she has an AIDS diagnosis, and she may establish that her HIV infection is disabling by evidence of the effects of that impairment on her major life activities. Contrary to the panel’s ruling, the victim of discrimination need not be able to prove that the defendant knew the medical details of her diagnosis when it discriminated against her. Second, imposing such an evidentiary burden wrongly deprives many people whose HIV infection has been diagnosed as AIDS of the anti-discrimination protections afforded by the Americans with Disabilities Act (“ADA”).

Amici are eleven local, regional, or national organizations that work with and/or advocate on behalf of people living with HIV, collectively representing many thousands of individuals in the United States infected with HIV – including many living in Illinois, Indiana, and Wisconsin.¹ Through their long histories of serving and representing the interests of persons living with HIV, *amici* have gained insight into what it means to have HIV and the importance of protecting people living with HIV from discrimination. The correct application of the ADA to claims of discrimination due to HIV status is vitally important to people living with HIV and, therefore, to *amici*. *Amici* respectfully suggest that their understanding of the issues at stake in this litigation will provide helpful background and context for this Court.

ARGUMENT

I. Evidence an Individual Has AIDS, and That Major Life Activities Are Substantially Limited as a Result, Supports a Claim of HIV Discrimination.

Proof that an individual discriminated against because she is infected by HIV has been classified as having AIDS and that some of her major life activities are substantially limited by her advanced form of HIV infection (*i.e.*, AIDS) is simply not, as the panel here asserted, “a major alteration of ‘what the [discrimination] claim is’ and the ‘grounds upon which it rests.’” Op. at 9. As a matter of fact and of law, a claim of HIV-based discrimination can

¹ Brief descriptions of the *amici* are set forth in the attached Appendix.

be supported by evidence of the impact of “AIDS” on the HIV-infected individual. Therefore, the panel erred in affirming summary judgment for defendant Lee’s Log Cabin (“Log Cabin”) because it found the EEOC “reconfigure[d] its [disability discrimination] claim” by alleging the employer discriminated against Korrin Krause Stewart (“Stewart”) due to her HIV and then presenting evidence of how “AIDS” or “HIV/AIDS” affected her major life activities to establish that her HIV infection was a disability. *Id.* at 2; *see also id.* at 8; *id.* at 10 n.3.

The ADA prohibits taking adverse employment actions against a qualified individual with a disability because of the disability. 42 U.S.C. § 12112(a) (2008); *see also, e.g., Furnish v. SVI Sys., Inc.*, 270 F.3d 445, 448 (7th Cir. 2001). As relevant here, “disability” is defined as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” 42 U.S.C. § 12102(2) (2008).

The Supreme Court has ruled that, for purposes of the ADA’s definition of disability, “HIV infection” is an “impairment” and “HIV infection satisfies the statutory and regulatory definition of a physical impairment *during every stage of the disease.*” *Bragdon v. Abbott*, 524 U.S. 624, 637 (1998) (emphasis added). The Court discussed the then-current medical understanding of HIV infection, referring to the impairment at issue as “HIV disease” and “HIV infection,” with “AIDS” identified as a “stage” of “HIV infection.” *Id.* at 633-36; *see also, e.g., Doe v. County of Centre*, 242 F.3d 437,

447 (3d Cir. 2001) (finding, where plaintiffs' son had been diagnosed with AIDS, that "[the son's] HIV clearly constitutes a disability" under the ADA). Thus, although it is true not everyone infected with HIV is in the subset of HIV patients diagnosed with AIDS, all people with HIV have the impairment "HIV infection."² The EEOC did not "reconfigure" the factual basis for its discrimination claim, any more than a plaintiff who alleged she was discriminated against because she had cancer would have reconfigured her claim if her evidence showed she had "stage four cancer." See Op. at 20-21 (Williams, J., dissenting) ("AIDS is one stage of HIV (similar to what 'stage four cancer' might be to 'cancer') . . .").

Whether an individual with an impairment is disabled is determined by assessing whether the impairment substantially limits any major life activity of that individual. *Toyota Motor Manufacturing Inc. v. Williams*, 534 U.S. 184, 194 (2002) (ruling the ADA requires that a claimant establish that her impairment substantially limits a major life activity). Therefore, in *Bragdon*, the Court considered evidence of the impact of the respondent's HIV infection on respondent before concluding she was disabled by her HIV infection. 524 U.S. at 639-42.

To establish that disability discrimination has occurred, however, the plaintiff is not required to establish that *the defendant knew* the effects of the

² The medical understanding of the relationship between "HIV" and "AIDS" is discussed more fully in a separate *amicus* brief that groups providing medical care to people living with HIV seek to file.

plaintiff's impairment on one or more of her life activities, much less the diagnosis of the impairment. As this Court has stated, "liability for disability discrimination [under the ADA] does not require professional understanding of the plaintiff's condition. It is enough to show that the defendant knew of symptoms raising an inference that the plaintiff was disabled." *Sanglap v. LaSalle Bank, FSB*, 345 F.3d 515, 520 (7th Cir. 2003); *see also* Op. at 22 (Williams, J., dissenting) ("[W]e have never held that an employer who acts improperly on the basis of a disability need know the extent to which the disability has progressed to be held liable.").

The legal irrelevance, for purposes of establishing a claim of HIV-based discrimination, of whether the defendant knew the specific diagnosis or severity of the individual's HIV infection is apparent from cases evaluating such claims. In many of those cases, there is an inquiry into whether the individual's ability to reproduce has been substantially limited by HIV infection. It is safe to assume that the defendants in such cases neither knew nor cared about the impact of HIV infection on an individual's ability to reproduce, but that lack of knowledge did not preclude liability. For example, in *Bragdon*, the Court held the respondent was disabled by her HIV infection because it substantially limited her ability to reproduce, without any discussion of whether the dentist who refused to treat her knew she was affected in this way. 524 U.S. at 637-43; *see also, e.g., Contreras v. Suncoast Corp.*, 237 F.3d 756, 764 (7th Cir. 2001) (ruling on the sufficiency of

employee's evidence of the impact of his impairment on his ability to engage in sexual intercourse, without any indication by this Court that the employer needed knowledge of such an impact for disability discrimination to have occurred); *Birch v. Jennico 2*, No. 05-C-670-S, 2006 WL 1049477, at *3 (W.D. Wis. Apr. 19, 2006) (finding a genuine issue of material fact as to whether plaintiff's HIV infection substantially limited a major life activity, based solely on plaintiff's deposition testimony that his HIV condition substantially limited his major life activity of reproduction).

Here, it is undisputed that Log Cabin knew Stewart had the impairment of HIV infection before it refused to hire her, and there is evidence linking that knowledge to the adverse employment action. *See, e.g.*, *Op.* at 3-4 (discussing evidence of employer's notation of "HIV" on the front of Stewart's job application); *id.* at 11 n.3 ("It is undisputed that at the time Stewart applied for the job and throughout this litigation, Log Cabin knew that Stewart was HIV-positive . . ."). Thus, the situation is wholly unlike that in *Hedberg v. Indiana Bell Telephone Co.*, 47 F.3d 928, 931-32 (7th Cir. 1995) (cited in *Op.* at 5), in which the employer made an adverse employment action without any knowledge the employee had any impairment. There simply is no legal support for concluding that Log Cabin must know how far Stewart's HIV infection had progressed or the specific ways in which her HIV infection affected her ability to engage in major life activities to be liable under the ADA for refusing to hire someone with HIV.

II. Requiring People with AIDS to Establish the Defendant Knew the Severity of Their HIV Infection Will Deprive Them of the ADA's Protections Against Discrimination.

Under the reasoning of the panel in this case, people living with HIV may be discriminated against with impunity if, unbeknownst to the discriminator, their infection has been diagnosed as AIDS. The panel repeatedly asserts that, by presenting evidence of the impact of AIDS on Stewart's major life activities, the EEOC changed the factual basis for the discrimination claim, transforming a claim of discrimination based on HIV into a claim of discrimination based on AIDS. *See, e.g.*, Op. at 2; *id.* at 8; *id.* at 10 n.3.

Under the panel's unreasonable analysis, it is unclear how an individual diagnosed with AIDS can hope to successfully challenge discrimination based on her HIV infection where – as is most frequently the case – the employer does not know the medical details of her diagnosis. According to the panel, to prevail here the EEOC would have had to allege that discrimination due specifically to a narrower diagnosis of AIDS had occurred and prove that the employer knew Stewart had AIDS. *Id.* at 12 n.4 (“That Log Cabin did not know Stewart had AIDS is an alternative basis to affirm, assuming the EEOC's late attempt to reconstitute the claim should have been allowed.”). Of course, the EEOC could not have met that burden. *Id.* at 11 n.3 (“It is undisputed that at the time Stewart applied for the job and throughout this litigation, Log Cabin knew that Stewart was HIV-

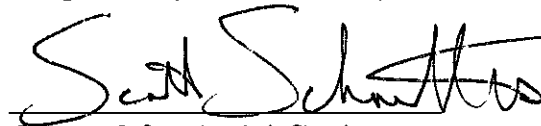
positive, *not* that she had AIDS.”) (emphasis in original). Because AIDS is simply a stage of HIV infection, EEOC could have prevailed under this novel scheme only if it had manipulated the medical evidence to delete all references to “AIDS.” Surely the Court is not suggesting that future plaintiffs insist that their physicians self-censor and distort their testimony – and medical records – in this way. No other court has applied the ADA to create these unreasonable barriers, and the panel erred in doing so.

CONCLUSION

By providing evidence of Stewart’s specific diagnosis, the severity of her HIV infection, and the ways her major life activities were limited by that infection, the EEOC did not “reconfigure” its claim that the employer discriminated against Stewart because she had HIV. The panel’s reasoning to the contrary improperly curtails the antidiscrimination protections available to people living with HIV. Therefore, the EEOC’s petition for rehearing *en banc* should be granted and the decision of the District Court granting summary judgment to Log Cabin should be reversed.

Dated: November 20, 2008

Respectfully submitted by:



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APPENDIX: DESCRIPTIONS OF *AMICI*

1. **AIDS Foundation of Chicago** (“AFC”) is a not-for-profit organization whose mission is to lead the struggle against HIV/AIDS and improve the lives of people affected by the epidemic. Founded in 1985 by community activists and physicians, the AFC is a local and national leader in the fight against HIV/AIDS. AFC collaborates with community organizations to develop and improve HIV/AIDS services; fund and coordinate prevention, care, and advocacy projects; and champion effective, compassionate HIV/AIDS policy.

2. **AIDS Legal Council of Chicago** (“Council”) was founded in 1987 to preserve, promote, and protect the legal rights of men, women and children in the metropolitan Chicago area living with HIV/AIDS. Each year the Council provides direct legal services to more than 1,000 people in need. The Council also educates the public about HIV-related legal issues, advocates for social policies that ensure fair treatment for all persons with HIV/AIDS, and works to promote laws and policies that will curb further spread of the disease. Because of its 20 years of experience in working with legal issues of confidentiality, privacy, and discrimination against persons living with HIV/AIDS, the Council believes that its views will assist this Court in reaching a decision that will promote the important public policies of confidentiality, privacy, and non-discrimination that are essential public health tools.

3. **Equip for Equality** (“EFE”), founded in 1985, is an independent, not for profit organization that administers the federally mandated Protection and Advocacy System for people with disabilities in the State of Illinois. EFE’s mission is to advance the human and civil rights of people with physical and mental disabilities in Illinois, including people living with HIV/AIDS. To this end, EFE provides legal representation to people with disabilities throughout the state, including numerous cases in federal court under the Americans with Disabilities Act. EFE’s public policy program promotes changes in legislation, public policies, and programs that benefit people with disabilities. Because of its unique perspective as the legal advocate for people with disabilities in Illinois, Equip for Equality believes its views will be of service to the Court.

4. **HIVictorious** is a statewide, nonprofit, non-stock corporation organized in 2005. HIVictorious has no employees and is completely volunteer driven. The organization educates the state of Wisconsin about HIV/AIDS prevention. In basing its decision on the distinction between HIV and AIDS, the Circuit Court has confused long-understood notions of what it means to be HIV-positive and to have AIDS. HIVictorious therefore has a significant interest in the proper resolution of this case.

5. **Legal Assistance Foundation of Metropolitan Chicago’s** HIV/AIDS Project is a six member legal advocacy team within the Legal Assistance Foundation of Metropolitan Chicago, the largest provider of free

civil legal service to people with low incomes in Cook County, Illinois. Each year, HIV/AIDS Project staff confer with over 700 clients who are impacted by HIV. Most HIV Project clients develop legal problems because of their poverty resulting from the loss of jobs due to their HIV disease or the side effects of the treatment of that disease. Moreover, the HIV Project represents clients who have lost jobs or housing due to discrimination or stigma associated with being perceived as being disabled due to HIV disease. Clients of the HIV Project have an interest in the proper resolution of this case because, as they seek to return to work, they require clarity in the law so that their rights are protected regardless of the stage of their HIV disease.

6. **The ADAP Advocacy Association** (“aaa+”) is a national nonprofit organization committed to promoting and enhancing the AIDS Drug Assistance Programs (ADAPs) and improving access to care for persons living with HIV/AIDS. aaa+ works with advocates, community, health care, government, patients, pharmaceutical companies and other stakeholders to ensure that access to services needed for persons living with HIV/AIDS to enjoy a healthy life. The rights afforded to people living with HIV/AIDS should be the same rights afforded to those living without the disease and that includes the right to be protected against discrimination based on their HIV status. In basing its decision on the distinction between HIV and AIDS, the District Court in this case has confused long-understood notions of what it means to be HIV-positive and to have AIDS. aaa+ therefore supports the

EEOC's efforts to reverse this damaging ruling.

7. **AIDS Action Foundation** is a national organization based in Washington, DC, dedicated to the development, analysis, cultivation, and encouragement of sound policies and programs in response to the HIV epidemic. AIDS Action advocates for effective legislative and social policies and programs for HIV prevention, treatment, and care. AIDS Action is dedicated to the development, analysis, cultivation, and encouragement of sound policies and programs in response to the HIV epidemic. AIDS Action has been instrumental in the development and implementation of major public health policies to improve the quality of life for the more than one million Americans who are HIV-positive. AIDS Action collaborates with the greater public health community to enhance HIV prevention programs and care and treatment services and to secure comprehensive resources to address community needs until the epidemic is over.

8. **Community HIV/AIDS Mobilization Project (CHAMP)** is a national, nonprofit, non-stock corporation organized in 2003. CHAMP is dedicated to bridging HIV/AIDS, human rights, and struggles for social and economic justice, and ensuring the development of a broad and effective range of HIV prevention options in the next decade. Our network of 13,000 supporters includes people living with HIV/AIDS and people working in HIV/AIDS research, prevention, treatment and care. We have and will continue to speak out on the rights of individuals with HIV/AIDS when such

persons have been treated discriminatorily based on their HIV status. This case raises just such an issue in the context of a potential employer refusing to hire an individual based on her HIV status. CHAMP therefore has a significant interest in the proper resolution of this case.

9. **Housing Works** is the nation's largest minority-controlled, community-based, nonprofit AIDS service organization. Housing Works currently employs 483 people and has provided health, housing, social, legal and prevention services to over 20,000 individuals since 1990. In addition to these services, Housing Works carries out advocacy, ranging from policy development and impact litigation to grassroots organizing and direct action on the local, state and national levels. Housing Works' Legal Department has successfully litigated numerous landmark cases regarding HIV/AIDS on behalf of tens of thousands of individuals living with the illness, particularly under the Americans with Disabilities Act. Housing Works believes that the Court's fundamental misunderstanding of HIV and AIDS in the context of an ADA claim could have disastrous consequences for Housing Works' clients and hundreds of thousands of similarly situated individuals.

10. **The National Association of People with AIDS ("NAPWA")**, founded in 1983, is the oldest national AIDS organization in the United States. NAPWA's mission is to advocate on behalf of all people living with HIV/AIDS in order to end the pandemic and the human suffering caused by HIV/AIDS. NAPWA strives to provide current and essential HIV and health

treatment information, improve individual ability to access HIV care and treatment, and advocate for the needs of both those with HIV and people at risk for HIV. NAPWA reflects the diversity of HIV/AIDS in America: more than 80% of NAPWA staff are people of color and living with HIV and the majority of NAPWA's Board of Directors are HIV-positive and represent the many communities impacted by the epidemic. These attributes make NAPWA especially qualified among national AIDS organizations to represent its constituency.

11. **The National Minority AIDS Council ("NMAC")** develops leadership in communities of color to address the challenges of HIV/AIDS. Since 1987, NMAC has advanced its mission through a variety of public policy education programs; national conferences; treatment and research programs and trainings; electronic and printed resource materials; and a website: www.nmac.org. NMAC represents a coalition of 3,000 faith/community-based organizations (F/CBOs) and AIDS service organizations (ASOs) delivering HIV/AIDS services in communities of color nationwide. NMAC's advocacy efforts are funded through private funders and donors only. This case raises issues important NMAC and its constituents, particularly around the rights of those living with HIV/AIDS and the development of sound HIV/AIDS policy. NMAC therefore has a significant interest in the proper resolution.

CERTIFICATE OF SERVICE

I, Scott A. Schoettes, hereby certify that on the 20th day of November, 2008, I served to the persons shown below the foregoing Brief of *Amici Curiae* AIDS Foundation of Chicago, AIDS Legal Council of Chicago, Equip for Equality, HIVictorious, Legal Assistance Foundation of Metropolitan Chicago, the ADAP Advocacy Association, AIDS Action Foundation, Community HIV/AIDS Mobilization Project, Housing Works, the National Association of People with AIDS, and the National Minority AIDS Council in Support of EEOC's Petition for Rehearing *En Banc*, by U.S. Mail, postage prepaid, as set forth below:

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