









**LM:** No. In order to be protected by the ADA you either have to be disabled or have to be perceived as disabled. Someone with breast cancer is disabled, but someone with a gene that predisposes her to breast cancer is not disabled at all. Someone with a genetic predisposition that hasn't yet manifested itself in any way is not disabled. Disability-rights advocates have tried to argue that a woman with one of the two breast-cancer genes is *perceived* as disabled by a prospective employer who won't hire her, but that's a questionable argument. Employers don't perceive people with genes that predispose them to future disease as any less *capable* than anyone else. They perceive them as being an economic liability. Being an economic liability is not the same as being disabled. Being perceived as an economic liability is not covered by the ADA. That's why we need new legislation to protect against that kind of discrimination. Existing law doesn't do the job.

**Q: What has been NWI's involvement in promoting new legislation in that area?**

**LM:** I have personally been involved in trying to fight genetic discrimination for 13 years now, and we have made a lot of progress. There are about 31 states now that have laws prohibiting genetic discrimination by employers. Some of those laws are more effective than others, but in many states you do have protection. Most of those laws are quite recent. The Institute had a great deal to do with helping those laws get enacted. We've written a model statute, which has been the basis of the majority of the new state laws. We've helped train more local advocates than I can count. We've written testimony for all sorts of people from the ACLU to unions on this point. We've testified ourselves several times. The Institute is acknowledged as a leading national expert in this area, and we've functioned as a resource to state advocates from coast to coast. We're also working on federal legislation, and we're getting relatively close. On May 21, the Senate Health, Education, Welfare and Pensions Committee *unanimously* passed the Snowe/Kennedy Bill, which would outlaw genetic discrimination by employers. Passage of genetic discrimination legislation is virtually assured in the Senate this year. The question is whether the House will do the right thing, which is really a question of whether the House leadership will do the right thing. A compromise was reached in the Senate, but the question is whether the House, with its stronger Republican majority, will endorse that compromise. So whether or not the legislation passes this year is essentially up to the House Majority Leader, Tom DeLay. If DeLay does the right thing, and he might because President Bush might urge him to, we'll get genetic discrimination legislation this year. If the President doesn't lean on DeLay hard enough, we're going to lose it all.

**Q: So far we've discussed the NWI's work in relation to electronic monitoring and genetic testing. Both of these areas relate to privacy. Now I'd like to discuss a phenomenon that relates even more to employees' privacy and autonomy, that of employers trying to exert control over employees' behavior off the job. What are your thoughts on that?**

**LM:** There are two forces that lead employers to try to regulate off-duty behavior. The bigger one is concern about medical costs. Smoking, drinking, scuba diving and riding motorcycles are dangerous. Employees who do these things generally have higher medical costs than those who don't. Employers who are trying to hold down medical costs frequently tell employees not to do things in their private lives that might increase the company's medical costs. The concern is understandable, but for employers to tell employees what they can or can't do on their own time is not a legitimate way of cutting costs. The concern is particularly acute because everything we do affects our health. What does the employee eat? Does he or she practice safe sex? Get a good night's sleep? If employers are allowed to control things we do in our private lives when they affect medical costs, then nothing in our private lives is safe any more. The other force that drives employers to attempt to control employees' off-duty behavior is moralistic meddling. The relationship between an employer and an employee is contractual: you do the job, they give you money. As long as you do your job, they should have no complaint, but employers frequently forget that. They think that because they've got the power of the paycheck, that they're entitled to use it any way they want to. We had one case where the employer just didn't believe in drinking alcohol, and our client was fired for going to a bar on Friday night with a couple of friends and having two beers. He wasn't an alcoholic, he wasn't arrested for drunk driving, there was never even a suggestion that he ever came to work under the influence of alcohol or drank during the workday. He had two beers on a Friday night and it cost him his job because his boss was a teetotaler. Sometimes it's sex. There are more cases than you might imagine of employers who are surfing the web and somehow stumble across one of their employees in the nude on the Internet. It doesn't affect the company. The employer is just personally offended because they're perhaps sexually conservative, and the next thing you know the employee's been fired. All too often employers forget that they don't have the right to regulate their employees' sex lives or politics. Just because they have the power to do it, they think they have the right to do it.

**Q: How has NWI addressed this problem?**

**LM:** The Institute has been instrumental in passing 29 state laws that restrict or eliminate an employer's ability to discriminate based on legal off-duty behavior. Some of those laws are quite comprehensive. In Colorado, for example, employers are prohibited from

discriminating against an employee based on *any* legal off-duty behavior whatsoever. As a result, Colorado was one of the early states to have a law against discrimination based on sexual orientation because practicing gay sex has been legal in Colorado for quite some



from discriminating based on off-duty conduct. The starting point for reforming American workplace law is abysmal, and progress is slow. But in the long run we're winning.

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