BY FACSIMILE TRANSMISSION

November 23, 2009[1]

Stephen Llewellyn
Executive Officer, Executive Secretariat
Equal Employment Opportunity Commission
131 M Street, NE, Suite 4NW08R, Room 6NE03F
Washington, DC 20507
Fax: 202-663-4114

Re: Equal Employment Opportunity Commission
Proposed Rulemaking – RIN 3046-AA85: "Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended"

Dear Mr. Llewellyn:

This letter is submitted in response to the Equal Employment Opportunity Commission's Proposed Rulemaking to revise its Americans with Disabilities Act ("ADA") regulations and interpretive guidance – RIN 3046-AA85. Since its founding in 1870, the Association of the Bar of the City of New York has grown to over 23,000 members who work to promote the public good by advocating for legal reform. The membership of the Association's Special Committee on AIDS includes experts with comprehensive knowledge of HIV-related law and policy issues. The Committee on Legal Issues Affecting People with Disabilities focuses on a variety of issues that affect people with disabilities at the local, state, national and international levels. The Civil Rights Committee is the committee of the New York City Bar Association that focuses generally on civil rights issues. The Labor and Employment Committee brings together lawyers from many facets of labor and employment law, including neutrals, members of the plaintiff's and defense bars and lawyers in both the public and private sectors, to address the legal and policy issues arising in employment and labor law.

We generally support the proposed rule. The proposed regulations and interpretive guidance comport with Congress's intent, when enacting the ADA Amendments Act of 2008 ("the ADAAA"), that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[2]

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[1] This letter was submitted by facsimile transmission on November 23, 2009, but incorrectly was dated "September" 23, 2009. This is the identical letter, except that it is correctly dated.

[2] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

I. Comments on Proposed Revisions to Section 1630.2(j) ("Substantially limits")

A. Omission of the phrase "condition, manner and duration"

We support the elimination of the "condition, manner and duration" factors which were in the prior Equal Employment Opportunity Commission ("EEOC") regulations. Those factors are not set forth in the ADA as originally enacted nor as amended. The elimination of these EEOC-created factors appears consistent with the clear intent of Congress that the term "substantially limits" be defined less restrictively and that the agency should not promote extensive analysis of whether an impairment substantially limits a major life activity.[3]

B. Inclusion of examples of "impairments that will consistently meet the definition of disability" (proposed § 1630.2(j)(5))

The effect of the changes to the ADA is to make it "easier to establish disability under [the ADA Amendment Act's] more generous standard[s]."[4] The ADAAA makes clear that Congressional intent is for the ADA to "provide broad coverage."[5] Prior to the enactment of the ADA, courts had applied the definition of a handicapped individual under the Rehabilitation Act so as not to require extensive analysis in many cases, and in the ADAAA Congress clearly reiterated its intention that the term "disability" be interpreted consistently with that approach.[6] The inclusion of a nonexhaustive list of "impairments that will consistently meet the definition of disability" is in accord with that Congressional intent.

The proposed regulations state that "[b]ecause of certain characteristics associated with [impairments that will consistently meet the definition of disability], the individualized assessment of the limitations on a person can be conducted quickly and easily, and will consistently result in a determination that the person is substantially limited in a major life activity."[7] This list is illustrative, not exhaustive.[8] Moreover, it is not a list of *per se* disabilities and nothing in the proposed rule precludes an employer from challenging whether an individual's alleged impairment – even if listed in Section 1630.2(j)(5) – meets the definition of a disability. However, as required by the ADAAA, the rule is clear that analysis of whether the disability definition is met "should not demand extensive analysis."[9]

The appropriateness of the EEOC's inclusion of examples of impairments that will consistently meet the definition of disability can be illustrated by considering HIV infection.[10] Under the Rehabilitation Act, HIV infection consistently was found to meet the definition of a handicap.[11] That conclusion was reached without extensive analysis, and in many cases the issue

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[3] *See id*. at §§ 2(a)(1), (3)-(8), 122 Stat. at 3553-54; *id*., §§ 2(b)(1), (4)-(6), 122 Stat. at 3554.
[4] 154 Cong. Rec. S8840 (daily ed. Sept. 16, 2008) (statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act).
[5] *See* Pub. L. No. 110-325, §§ 2(a)(1),(4), (5), 122 Stat. at 3553-54; *id*., § 2(b)(1), 122 Stat. at 3554; 42 U.S.C. § 12102(4)(A) (as amended by ADAAA).
[6] Pub. L. No. 110-325, § 2(a)(3), 122 Stat. at 3553.
[7] 74 Fed. Reg. at 48441, § 1630.2(j)(5)(i).
[8] *See id*., §§ 1630.2(j)(5)(i),(ii), (iii).
[9] *See* Pub. L. No. 110-325, § 2(b)(5), 122 Stat. at 3554.
[10] *See* 74 Fed. Reg. at 48441, §§ 1630.2(j)(5)(i), 1630.2(j)(5)(i)(F).
[11] *See Bragdon v. Abbott*, 524 U.S. 624, 644 (1998) (citing cases).

was not disputed by the defendant.[12] However, more restrictive interpretations of the ADA resulted in extensive consideration of whether a plaintiff with HIV infection was substantially limited in a major life activity, often focusing on limitations in the major life activity of reproduction.[13] In some cases, courts determined whether or not a person alleging discrimination based on HIV infection was "disabled" based on the person's gender, sexual orientation, and/or plans with respect to having children.[14]

It is consistent with Congressional intent that the EEOC adopt regulations and interpretive guidance that will result in an approach mirroring the pre-ADA approach under the Rehabilitation Act, with some impairments being found to be disabilities without dispute or much analysis. Including examples of impairments that will consistently meet the disability definition helps achieve that goal and should help re-direct the focus in disability discrimination cases to "whether entities covered under the ADA have complied with their obligations" under the law.[15]

C. Discussion of the major life activity of "working" (proposed § 1630.2(j)(7))

We support the agency's proposed discussion of the major life activity of working. As the proposed rule states, most individuals who are substantially limited in the major life activity of "working" will be substantially limited in another major life activity, but no one needs to be substantially limited in more than one activity in order to be "disabled."[16] The revised regulatory discussion of "working" properly complies with Congress's directive that a "high level of limitation" is not needed in order to be substantially limited in a major life activity.[17]

II. Comments on Proposed Revisions to Section 1630.2(l) ("Regarded as")

Congress clearly intended that the perception that someone has an impairment – whether or not accurate – comes within the "regarded as" prong of the definition. Congress also clearly intended that the "regarded as" prong should be read broadly, as it was by the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).[18] In *Arline*, the Court explained that reactions to aspects of an impairment – in that case, contagiousness – may precipitate adverse employment actions and that the ADA provides protection in such circumstances.[19]

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[12] *See, e.g., Martinez ex rel. Martinez v. School Bd. of Hillsborough County, Fla.*, 861 F.2d 1502, 1506 (11th Cir. 1988); *Glanz ex rel. Vadnais v. Vernick*, 756 F. Supp. 632, 635 (D. Mass. 1991); *Local 1812, Am. Fed. of Gov't Employees v. U.S. Dep't of State*, 662 F. Supp. 50, 54 (D.D.C. 1987); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 377 (C.D. Cal. 1986).

[13] *See, e.g., Cruz Carrillo v. AMR Eagle, Inc.*, 148 F. Supp. 2d 142, 144-45 (D.P.R. 2001); *EEOC v. General Electric Co.*, 17 F. Supp. 2d 824, 827-31 (N.D. Ind. 1998); *see also* 154 Cong. Rec. H8297-98 (Sept. 17, 2008) (statement of Rep. Baldwin).

[14] *See, e.g., Blanks v. Southwestern Bell Communications, Inc.*, 310 F.3d 398 (5th Cir. 2002) (finding male plaintiff not disabled largely based on his testimony about future children); *Rodriguez v. Manpower TNT Logistics, Inc.*, 2006 U.S. Dist. LEXIS 68735 (D.P.R. Sept. 21, 2006) (finding female plaintiff to be disabled); *Cruz Carrillo*, 148 F. Supp. 2d 142 (finding that male plaintiff did not establish that he was disabled); *see also* 154 Cong. Rec. H8297-98.

[15] *See* Pub. L. No. 110-325, § 2(b)(5), 122 Stat. at 3554.

[16] *See* 74 Fed. Reg. at 48442, § 1630.2(j)(7)); 42 U.S.C. § 12102(4)(C) (2009) (as amended by ADAAA).

[17] *See* Pub. L. No. 110-325, § 2(b)(5), 122 Stat. at 3554; *see also id*., §§ 2(b)(1), (4), (6), 122 Stat. at 3554; 42 U.S.C. §§ 12101(4)(A), (B).

[18] *See* Pub. L. No. 110-325, § 2(b)(3), 122 Stat. at 3554.

[19] *Arline*, 480 U.S. at 282-85.

Similarly, actions taken based on an employee's or job applicant's symptoms of an impairment or use of mitigating measures are actions prohibited by the ADA.

III. Comments on Use of the Terms "HIV" and "AIDS"

We strongly recommend that the agency use consistent terminology to refer to HIV infection within the final regulations and interpretive guidance. The common use of both the terms "HIV" and "AIDS" to refer to "HIV infection" has resulted in some confusion in the disability discrimination context. We recommend the use of the term "HIV infection" – rather than "HIV and AIDS" or "HIV or AIDS" – throughout.

Judges in the Seventh Circuit Court of Appeals recently misinterpreted the medical relationship between "HIV" and "AIDS," treating them as two separate and distinct medical conditions.[20] In fact, as the U.S. Supreme Court ruled in 1998, "HIV infection satisfies the statutory and regulatory definition [under the ADA] of a physical impairment during every stage of the disease."[21] And according to the Centers for Disease Control and Prevention ("CDC"), acquired immunodeficiency syndrome ("AIDS") – which is caused by the human immunodeficiency virus ("HIV") – is generally understood to be an advanced stage of "HIV infection."[22] Anyone with HIV has the impairment of "HIV infection," including people who have been diagnosed with "AIDS."

By avoiding the terms "HIV and AIDS" and "HIV or AIDS," the agency will help reduce the risk that employers and courts improperly will consider HIV and AIDS to be two distinct impairments under the meaning of the ADA. Additionally, the use of "HIV infection" throughout could increase the general understanding of the relationship between HIV and AIDS. Specifically, we request the following changes:

- Section 1630.2(i)(2) should be reworded to read "Human Immunodeficiency Virus (HIV) infection affects functions of the immune system and reproductive functions;"
- Section 1630.2(j)(5)(F) should be reworded to read "HIV infection, which substantially limits functions of the immune system;" and
- In the Appendix, the statement "the Human Immunodeficiency Virus (HIV) affects functioning of the immune system"[23] should be changed to read "Human Immunodeficiency Virus (HIV) infection affects functioning of the immune system," to reflect the fact that the "impairment" at issue – comparable to the examples of "cancer" and "diabetes" – is "HIV infection."

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[20] *EEOC v. Lee's Log Cabin, Inc.*, 546 F.3d 438 (7th Cir. 2008) (upholding grant of summary judgment to employer, based in part on the basis that evidence of the disabling effects of AIDS on the job applicant did not support the EEOC's claim that the applicant had been discriminated against because she had HIV), *amended by* 554 F. 3d 1102 (7th Cir. 2009).

[21] *Bragdon*, 524 U.S. at 637.

[22] *See* CDC, *1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents and Adults***,** MMWR 41 (RR-17) app. B (1992), *available at* http://wonder.cdc.gov/wonder/help/AIDS/MMWR-12-18-1992.html; *see also*, *e.g.*, *Bragdon*, 524 U.S. at 633-36 (describing then-current understanding of progression of HIV infection).

[23] 74 Fed. Reg. at 48446, app., § 1630.2(i).

We thank the agency for considering the comments expressed here as part of its rulemaking process. The undersigned would be happy to respond to any requests for clarification of any of the comments and positions set forth above.

Respectfully submitted,

AIDS Committee
Bebe J. Anderson, Chair

Legal Issues Affecting People with Disabilities Committee
Dennis R. Boyd, Chair

Civil Rights Committee
Peter T. Barbur, Chair

Labor & Employment Law Committee
Katherine H. Parker, Chair