

NATIONAL WORKRIGHTS
INSTITUTE
ANNUAL REPORT
2005



Bringing Human Rights to the Workplace

NATIONAL WORKRIGHTS INSTITUTE

Bringing Human Rights to the Workplace



Lewis L. Maltby, President

Jeremy Gruber, Legal Director

Eleanor Roosevelt Society

Richard Sachs, Chair

National Advisory Council

Richard Trumka, Co-Chair

Theodore St. Antoine, Co-Chair

The National Workrights Institute was founded with the vision of extending human rights into the workplace. While the United States generally does well at protecting human rights from government abuse, we have failed to protect these same rights in the workplace. The Institute's mission is to correct this historic mistake.

Despite the difficult political climate, the Institute made significant progress in 2005.

One high point was the enactment of Rhode Island's new state law prohibiting video surveillance in workplace locker rooms and bathrooms. This is only the second such law in the United States, and is stronger than the California law that preceded it. The Institute was intimately involved in every stage of this law's development. The Rhode Island legislature enacted our model statute without a single change. We also helped train the bill's sponsors and supporters on the legal and policy issues surrounding video surveillance and provided strategic guidance as the bill moved through the legislature. We are building on this success in 2006 by helping build a coalition in Massachusetts to enact similar legislation.

We also made substantial progress in our campaign to outlaw genetic discrimination. At the close of 2004, the federal Genetic Nondiscrimination Act had passed the Senate and had 45 co-sponsors in the House of Representatives. During 2005, we acquired 121 new co-sponsors in the House.

During 2005, the Institute was honored at a reception held in Washington at the National Woman's Democratic Club. Special guest speakers included AFL-CIO President John J. Sweeney and Congressman Rush Holt. Among those attending were the Executive Director of the ACLU Washington Legislative Office, the Director of Americans for Democratic Action, representatives of the National Labor College, national unions, and several members of Congress. It was a truly exciting day for the Institute as we build upon our reputation.

Thank you to our members, whose support makes our work possible.

Lewis L. Maltby
President



NATIONAL WORKRIGHTS INSTITUTE

Bringing Human Rights to the Workplace



“Where, after all, do human rights begin? In small places close to home... the factory, farm or office... unless those rights have meaning there, they have little meaning anywhere.”

Eleanor Roosevelt

remarks to the United Nations, 1953



“You feel like you have no rights. You’re all alone. It’s the most helpless feeling you can imagine.”

Anita Epolito

Threatened with termination after 14 years on the job for legal off-duty activity.



“If the National Workrights Institute did not exist, we would have to create it.”

Congressman Rush Holt

GENETIC DISCRIMINATION



Recent advances in genetic science have identified the genes linked to breast cancer, Alzheimer's, and other serious diseases. Ultimately, this may lead to cures. Currently, however, it is only possible to identify those among us who carry these genes.

This creates the potential for widespread discrimination. One of the greatest dangers is employment discrimination. Because employers pay for much of employees' health care, they have a financial incentive to avoid hiring people who carry genes linked to serious illnesses.

Genetic discrimination has already begun and will grow more frequent unless we act now to make it illegal.

The Institute has been a leader in the effort to enact laws banning genetic discrimination. To date, 32 states have enacted statutes outlawing genetic discrimination. Most of these laws were based on the Institute's model statute and we provided guidance and support to state legislators and public interest groups across the country.

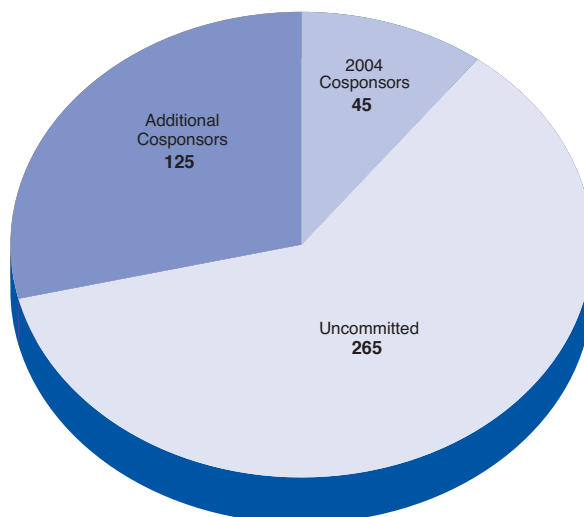


The Institute has now turned its focus to enacting federal legislation. Our first step was to organize a coalition of many groups to work together on this legislation, the Coalition for Genetic Fairness. The Coalition now has 150 members. At the end of 2004, the Genetic Information Nondiscrimination Act (GINA) had passed the Senate unanimously and had 45 co-sponsors in the House of Representatives.

The Coalition spent 2005 in the time consuming and unglamorous work of persuading additional members of the House to support GINA. This is especially challenging because few members of the House generally support privacy or workplace rights. Through persistence we were able to persuade 125 additional members of the House to become co-sponsors. This raises the total number of co-sponsors to 170. We are now more than halfway to obtaining majority support in the House. President Bush has promised to sign the Genetic Information Nondiscrimination Act if Congress passes it.

This progress was made possible by the publication of the Coalition's special report, *Faces of Genetic Discrimination*. This report tells the stories of real people who have been discriminated against because of the genes that they carry, such as Gary Avery, who was secretly tested by Burlington Northern Railroad in an effort to deny him workers compensation for carpal tunnel syndrome. Putting human faces on the issue shows legislators that the problem is real. The Institute played a leading role in creating this report. *Faces of Genetic Discrimination* is available on the Institute's website (www.workrights.org).

Cosponsors of H.R. 1227





EMPLOYER CONTROL OF PRIVATE LIVES

This issue re-entered the public eye in 2005 when the Weyco Company (in Okemos, Michigan) fired several long-term employees for smoking in their own homes. This generated a great deal of media attention, including an episode of 60 Minutes in which Institute President Lewis Maltby appeared and stories on CNN and CNBC in which Institute Legal Director Jeremy Gruber appeared.



Weyco's action also sparked a response in the Michigan legislature as Senator Bernero introduced legislation to ban employment discrimination on the basis of legal off-duty behavior that does not affect job performance. Similar legislation was introduced in Pennsylvania.

The Institute played the leading role in supporting both of these legislative initiatives. Our newly updated legislative brief is the primary reference for legislators and activists on this issue. We also helped draft both bills and advised local groups, such as the ACLU, about policy and strategic issues.

DRUG TESTING



Drug testing is among the most widespread invasions of privacy in the workplace today. Literally millions of Americans are affected. Drug testing is sold to employers and the public as a necessary tool to increase workplace safety and productivity. In reality, it is an invasive procedure, sometimes performed under strip-search conditions, that reveals nothing about a person's ability to perform their job.

There is little that can be done in the private sector from a legal perspective. The Supreme Court has held that it is legal for employers to subject employees to drug testing, even on a random basis. But there is a great deal that can be done to educate the employer community. One of the Institute's final projects at the ACLU was writing, "Drug Testing- A Bad Investment". This comprehensive analysis of all the available data on drug testing showed that drug testing does nothing to improve safety or productivity, and may even reduce them. As an independent organization, the Institute has continued taking this message to employers, primarily through the business press. For example, Institute President Lewis Maltby participated in a major article in *Staffing Management* entitled "Drug Testing ROI", which examined whether drug testing improves an employer's bottom line. While other public interest groups oppose drug testing on privacy grounds, the Institute is the only organization to educate employers about the failure of drug testing on pragmatic grounds.

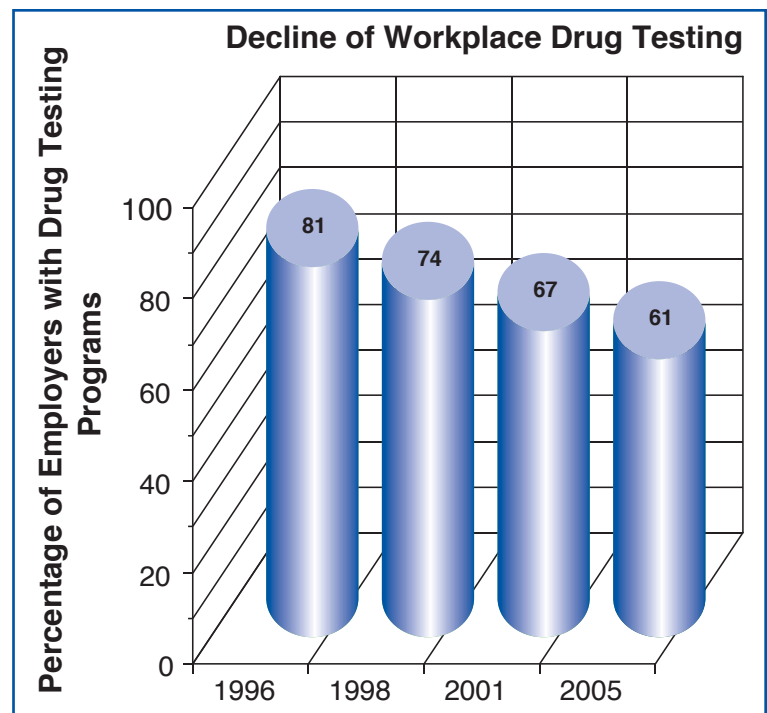
Our work is having an impact. As employers learn more about drug testing, they use it less often. The number of employers using drug testing has declined by 25% over the last 5 years.

Drug testing is less prevalent in government agencies because public employees are protected by the fourth amendment's prohibition against random searches. Government employees can only be tested without cause if they perform safety-sensitive jobs.

The law regarding applicants for public employment is not clear. A California case, *Loder v. City of Glendale*, held that applicants could be subjected to drug tests without cause. In 2000, the Institute participated in *Robinson v. City of Seattle*, in which the Washington Supreme Court held that applicants for public employment could not be tested without cause. With only two cases, reaching diametrically opposed conclusions, the law has remained unsettled for the last five years.

In 2005, the Institute, working with the ACLU of Oregon, struck a blow for public employee privacy, filing suit on behalf of Janet Lanier, who was denied employment as a librarian because she refused to submit to a drug test. In *Lanier v. City of Woodburn*, the Oregon Supreme Court held that it was an invasion of privacy to force applicants for non-sensitive jobs to take a drug test.

This does not resolve the issue, but it changes the legal landscape dramatically. Attorneys will now tell public employers that the majority of cases hold that testing applicants without cause is illegal. This will cause many, perhaps most, such employers to drop plans for indiscriminate applicant testing. It also greatly increases the likelihood that we will prevail in legal challenges where employers proceed with such plans.





ARBITRATION

As employers continue to increase their use of arbitration to resolve employment disputes, it is critical that arbitration be conducted in a fair manner. This is a continual challenge because arbitration systems are generally designed by employers themselves, who have incentives to shape the process to their advantage.

CLASS ACTIONS

One tactic employers are using in increasing numbers is class action waivers, in which the employment contract states that employees may only file arbitration claims on an individual basis. They are precluded from filing as a group or class. In some cases, however, an employer takes an action that violates the rights of many employees, but each individual's damages are relatively low. For example, several large employers have recently been caught forcing hourly employees to work extra time without pay in violation of federal wage and hour laws. While the total amount illegally taken from the employees was many millions of dollars, the lost pay for an individual employee might be only \$1,000, far less than the cost of hiring an attorney. In such cases, denying the employee the ability to file a class action effectively allows the employer to continue its illegal conduct forever.

The Institute spent much of 2005 attempting to prevent the American Arbitration Association from enforcing class action waivers. This was a challenge, since we were attempting to persuade the Association to adopt higher due process standards than the law requires.

We first participated in a working group of AAA staff members and outside experts that studied the issue. Unfortunately, the vast majority of outside experts were from the management community and unanimously opposed us. AAA staff was unwilling to take a bold step under these circumstances.

Institute President Maltby then met independently with AAA's general counsel, President, and Board of Directors. Unfortunately, in the absence of any law invalidating class action waivers, we were unable to persuade AAA to adopt such a ban at this time.

We are turning our energy to the courts. We have approached the National Employment Lawyers Association to participate in litigation brought by their members challenging the enforceability of class action waivers.

The first project in this collaboration is a special research report studying the economics of class actions. This report will examine the costs of bringing employment actions and the amount received by successful employee/plaintiffs in actual cases. We believe this study will demonstrate that it would have been financially impossible for the employees in those cases to achieve justice on an individual basis. The bulk of the research for this project was completed in 2005. The report will be published in 2006. This report will not only be useful in litigation, but will provide the basis to renew our dialogue with AAA.

ARBITRATION *(continued)*



DUE PROCESS

The other major issue of 2005 was the extent to which employers can change AAA's employment arbitration rules in their favor. AAA has carefully written rules (which the Institute helped draft) that ensure that both sides in employment arbitration receive a fair hearing. Rule 1 requires that all the other rules must be followed.

Last year, however, several of AAA's major employer clients proposed changing Rule 1 to allow the parties to agree to modify the other rules. Since such "agreements" would come from "take it or leave it" employment contracts, this proposal would effectively allow employers to completely rewrite AAA's employment rules to their own advantage.

This time the Institute prevailed. There were several independent arbitrators on the working group that considered the proposal. All agreed with our position that the proposal was unfair. Faced with this unanimity, and having their own concerns, AAA staff declined to accept the proposal. All employers using AAA will be required to follow the association's due process rules. This is an important victory for the more than 3 million employees covered by AAA plans.





ELECTRONIC SURVEILLANCE

On June 30, the state of Rhode Island enacted legislation banning video surveillance in workplace locker rooms and bathrooms. The Institute and the ACLU of Rhode Island led this effort. The Institute provided the in-depth expertise on legal and policy issues, while the ACLU provided the on-the-ground lobbying expertise. In an unprecedented development, the Rhode Island legislature adopted the Institute's model act verbatim, without a single change.



This new statute is the strongest workplace privacy law ever enacted. Previous monitoring statutes either only require the employer to give notice of monitoring or allow video monitoring when the employer has evidence of misconduct. Misconduct exceptions, while not entirely wrong in principle, are in practice a gaping hole that can virtually eliminate the intended protection. Instead of allowing surveillance only when there is hard evidence of criminal conduct, such as drug use, misconduct exceptions end up legitimizing video surveillance of innocent people using the toilet based on little more than rumors. The Rhode Island law requires employers who believe illegal conduct is taking place in a protected area to go to the police. If the police are satisfied that the evidence is solid, they are authorized to conduct surveillance, subject to the Constitutional requirement of probable cause.

Our success in Rhode Island is beginning to spread. We are now working in Massachusetts with the ACLU, NELA, National Lawyers' Guild, and the Service Employees International Union on similar legislation.

FEDERAL LEGISLATION

Our federal legislation prohibiting video surveillance of workplace locker rooms and bathrooms (Employee Changing Room Privacy Act, H.R. 582) is also moving forward. At the end of 2004, the bill had just been introduced. It had only 2 Congressional sponsors (Tom Petri-Republican of Wisconsin, and Rob Andrews- Democrat of New Jersey). The only organizations supporting the bill were the Institute and the Communications Workers of America (CWA).

Since then, we have acquired 13 additional co-sponsors. In addition, we have persuaded several additional organizations to support the bill, including the American Civil Liberties Union and the Service Employees International Union.

In the current Congress, Republican support is essential. The Institute reached out to pro-privacy conservatives through former Congressman Bob Barr, with whom we worked closely on the proposed Notice of Electronic Monitoring Act (NEMA). Through Barr, we were able to speak to a coalition of conservative groups headed by Grover Norquist. While these groups were sympathetic to the objective of eliminating improper video surveillance, they are reluctant to break with their long tradition of opposing regulation of business. We will continue our dialogue with them while looking for other approaches to conservative members of Congress.



ELECTRONIC SURVEILLANCE *(continued)*

LITIGATION

While the issue of video surveillance will ultimately be decided in the legislatures, it is important to do what is possible in the courts. In *Nelson v. Salem State College*, Gail Nelson sued her employer for secretly videotaping her undressing in her office to change clothes after work. The trial court dismissed Nelson's case. On her appeal to the Massachusetts Supreme Court, Nelson's attorney asked the Institute for help. While he could address the specific legal issues involved in the appeal, the overarching problem was that the trial court did not understand the magnitude of the threat to privacy posed by modern surveillance technology. To address this problem, the Institute submitted an amicus brief educating the Supreme Court on the growth in both the capability of surveillance technology, the extent to which it is being used, and the loss of privacy that will result if the courts allow this growth to continue without legal oversight. This brief contains new legal arguments and groundbreaking research that will be useful in other cases. We are now awaiting the decision in this case.

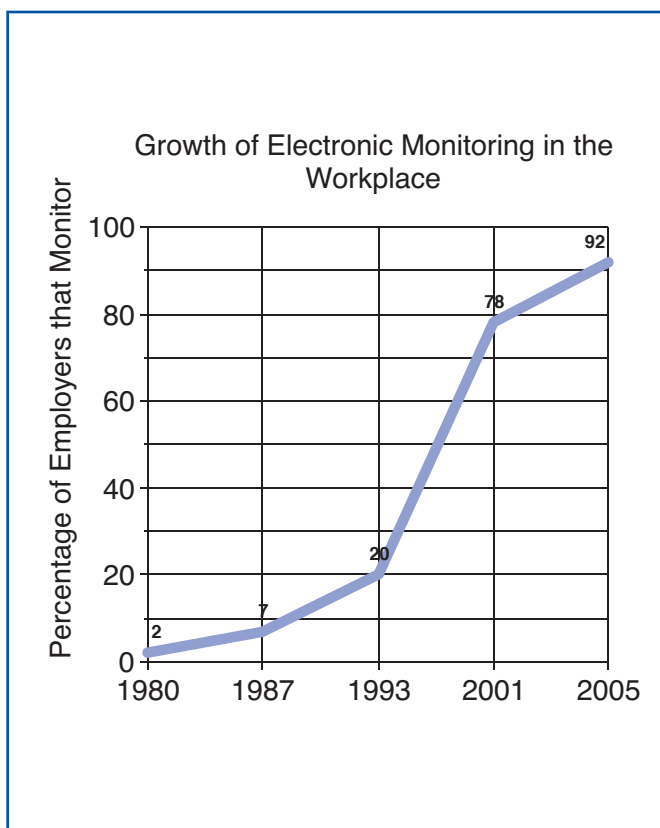
In the meantime, we have shared the brief with other attorneys who are working on similar cases.

GPS

In 2004, the Institute became the first human rights organization to address the emerging issue of the use of global positioning systems by employers, especially the use of GPS to track employees in their private lives.

In 2005, the Institute took this work one step further with the creation of a set of best practices for employers who use GPS. These guidelines include such basic principles as providing notice to employees that they are being tracked and allowing employees to turn off the GPS system during non-working hours.

We shared these principles with both the employer community, primarily through a company that provides GPS software to large employers, and with labor, through AFSCME and the International Brotherhood of Teamsters (whose members are most likely to be subject to GPS tracking).





CRIMINAL RECORDS

From 2002 to 2004, the Institute served as an advisor to the United States Justice Department in its project to produce a report on the use of criminal records outside the criminal justice system. DOJ wanted a civil rights perspective included in the preparation of the report and the Institute was considered to have the greatest depth of expertise on this subject of any civil rights organization.



The project's original objective was to identify obstacles to employer access to criminal records and recommend eliminating them. The Institute, however, was able to convince the other members of the advisory panel that employers frequently misuse criminal records in making hiring decisions. For example, many employers have adopted a zero-tolerance policy under which anyone who has ever been convicted of any offense is permanently barred from employment in any capacity. Such a policy is not only unfair, but undermines our national objective of helping former offenders rehabilitate themselves. It also violates Title VII of the Civil Rights Act of 1964, which requires that there be a connection between the nature of the offense and the nature of the job before the conviction can be a bar to employment. Many of the other members of the panel were unaware of these practices and of their inconsistency with federal law.

The final report was issued on December 15, 2005. Because of the Institute's efforts, it was far more balanced than it would otherwise have been. The report explicitly warns employers about abuses of criminal records, such as zero tolerance, and alerts employers to the potential liability that can arise from such misuse.

RIGHT TO ORGANIZE



In addition to continuing our support for the Employee Free Choice Act (which would allow workers to join a union simply by signing a membership form) the Institute began working with organized labor and other progressive groups on a new initiative in 2005 to strengthen the right to organize, the Worker Freedom Act (WFA). The Worker Freedom Act is model state legislation that prohibits employers from forcing employees to listen to speeches regarding matters other than the employee's work.

WFA would protect employees from being forced to listen to one-sided anti-union presentations during an organizing campaign. Under current law, employers are allowed to force employees to attend meetings at which one-sided (and sometimes untrue) anti-union presentations are made. Meanwhile, the union is not even allowed on the premises to tell its side of the story. WFA would make representation elections fairer by prohibiting employers from holding mandatory meetings. Employers could still express their views to employees, but could not force employees to attend these meetings. Management would still have the upper hand, because WFA would not eliminate employers' ability to deny union representatives access to the facility. But the process would be much fairer than it is today.

WFA would also protect workers from other forms of forced speech. It is becoming increasingly common for employers to try to force their religious views on employees. Prayer breakfasts and other company sponsored religious meetings during working time are being held. In some cases, employees are required to attend. In other cases, the meetings are officially voluntary, but employees have little choice but to attend (much like "voluntary" school prayer). These practices are amplified by the more than 3,000 corporate chaplains, some of whom have conversion as an explicit part of their mission. While there is some protection against workplace proselytizing under federal anti-discrimination laws, this protection is grossly inadequate.

Drafting this legislation presents a number of challenges. For example, the law must prohibit employers from using their economic power to force their religious and political views on employees but not interfere with employers' right to express their views. It must also allow employers to require executives to attend meetings at which legal and political developments that affect the company are discussed. Because this concept is new, there is no established language for these statutes.



The National Workrights Institute took the initiative to draft the model act that will serve as the basis for this state legislation. We formed a small working group of legal experts, including former National Labor Relations Board General Counsel Fred Feinstein, to craft the model act. At the end of 2005, this task was complete. We look forward to working with unions and other progressive groups to enact this model legislation in 2006. The foundation of this effort will be the empirical research documenting the scope of the problem that the Institute has conducted.



PUBLIC EDUCATION

Public education continues to be the foundation of our work. Most Americans are completely uninformed about the state of human rights in the workplace. Educating the public and policy makers about the lack of rights builds support for our agenda.

The Institute continued our ongoing participation in public education through the media in 2005. Institute staff participated in over 200 media interviews for print, television, radio and the Internet. These included CBS News, ABC News, CNBC, CNN, MSNBC, Associated Press, New York Times, Washington Post, Boston Globe, Chicago Tribune, Los Angeles Times, Christian Science Monitor, Wall Street Journal, and National Public Radio (All Things Considered). One of our interviews with the Associated Press alone led to publication in 25 separate news sources. Institute staff have even participated in a number of international news stories including such sources as the BBC and our letters to the editor have appeared in a number of high profile publications such as the New York Times. Many of these articles are available on our website. Some of our television appearances are now available from the Institute on DVD.



In 2005, the Institute initiated a new education vehicle for our members and other interested people. The first issue of Workrights News, our biannual newsletter, was published in May of 2005. Workrights News supplements our monthly e-mail messages and annual report.

In addition Institute staff have participated in numerous public speaking engagements and presentations. Most notably, we held briefings for the EEOC, U.S. House of Representatives and U.S. Senate regarding our research on due process and ADR. In addition we made presentations to the United States Department of Health and Human Services, Leadership Conference on Civil Rights, and the National Employment Lawyers Association, among others. Institute staff regularly speak at academic confer-

ences including such universities as the New School, NYU and Columbia, bar associations, and business associations such as the Connecticut Business and Industry Association.

We authored numerous articles in 2005 ranging from American Bar Association publications, to the Legal Times, to trade journals such as the IHRIM Journal. We have authored numerous materials on workplace related issues for the U.S. Congress and state legislators, policy makers and other policy oriented non-profit organizations.

The National Workrights Institute website (www.workrights.org) continues to be a significant part of our public education programming. Regularly updated, our website is visited each year by well over 100,000 members of the public, news media, legislators and policy makers alike.



NATIONAL WORKRIGHTS INSTITUTE

166 Wall Street
Princeton, New Jersey 08540
Tel: (609) 683-0313 Fax: (609) 683-1787
www.workrights.org

Lewis L. Maltby, President
Jeremy E. Gruber, Legal Director

National Advisory Council
Richard Trumka, Co-chair
Theodore St. Antoine, Co-chair

Eleanor Roosevelt Society
Richard C. Sachs, Chair