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# Is HIV Disability under the Americans with Disabilities Act: Unanswered Questions after Bragdon v. Abbott

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IS HIV A DISABILITY UNDER THE AMERICANS WITH  
DISABILITIES ACT: UNANSWERED QUESTIONS AFTER  
*BRAGDON v. ABBOTT*

CONNIE MAYER<sup>1</sup>

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I. INTRODUCTION

The condition known as acquired immunodeficiency syndrome (“AIDS”) was first reported to the Centers for Disease Control (CDC) in 1981.<sup>2</sup> By 1983, scientists had identified a new human retrovirus called HIV or Human Immunodeficiency Virus, that was responsible for AIDS.<sup>3</sup> Since that time, the number of persons with HIV infection and AIDS has grown and HIV/AIDS now effects every country in the

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<sup>2</sup>See Centers for Disease Control, Pneumocystis Pneumonia—Los Angeles, 30 MMWR 250 (1981); Centers for Disease Control: Kaposi's sarcoma and Pneumocystis pneumonia among homosexual men: New York City and California, 30 MMWR 305 (1981).

<sup>3</sup>Joyce W. Hopp & Elizabeth A. Rogers, *AIDS and the Allied Health Professions* 5-6.

world. In July 1996, an estimated 22 million persons across the world were living with HIV infection.<sup>4</sup> Medical experts now know that HIV is a progressive disease that attacks the body at the outset and even during the Early Disease Stage, or so-called "asymptomatic stage," HIV continues to have severe deteriorating physical effects. But during this "asymptomatic" stage, most individuals generally have no outward manifestations of the HIV disease.<sup>5</sup> This fact raises the issue of whether a person with HIV who is asymptomatic can be held to be "disabled" for purposes of the protections of the Americans With Disabilities Act.

Prior to the passage of the ADA in 1990, the term "individual with a handicap" had been clearly established under federal disability laws to include all people with HIV. Every reported decision under the Rehabilitation Act and the Fair Housing Amendment Act had determined that asymptomatic HIV was protected as a *per se* disability.<sup>6</sup> Prior to 1997, only a few Courts had faced the issue of whether a plaintiff with asymptomatic HIV was disabled under the ADA.<sup>7</sup> In 1997, the Fourth and First Circuit Courts of Appeal decided cases in direct conflict with one another, opening the door for the U. S. Supreme Court to review the issue of the definition of disability under the ADA because of the split created by these Circuit Court opinions.

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<sup>4</sup>AIDSCAP/Family Health International, Harvard School of Public Health, *The Status and Trends of the Global HIV/AIDS Pandemic*, July 1996, Vancouver, Canada.

<sup>5</sup>J. Kilby & M. Saag, *Natural History of HIV-1 Disease*, TEXTBOOK OF AIDS MEDICINE 49 (Merigan, Bartlett, and Bolognesi, Eds. 1999).

<sup>6</sup>See *Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990)("[W]e note that it is well established that infection with AIDS constitutes a handicap for purposes of the [Rehabilitation Act]"); *Cain v. Hyatt*, 734 F. Supp. at 679 (even when asymptomatic, "... HIV infection constitutes a substantial physical limitation upon major life activities"); *Baxter v. City of Belleville*, 720 F. Supp. 720, 725, 728-729 (S.D. Ill. 1989)(finding that HIV-positive persons are covered under the Fair Housing Act because they are infectious from first day of contracting disease and immunological deterioration begins on first day of becoming infected; and finding that the inability to reside in group residence due to public misapprehension about HIV adversely affects major life activities); *Thomas v. Atascadero Unified School District*, 662 F. Supp. 376, 376 (CD Cal. 1986) ("Persons infected with the AIDS virus suffer significant impairments of their major life activities ... Even those who are asymptomatic have abnormalities in their hemic and reproductive systems making procreation and childbirth dangerous to themselves and others.").

<sup>7</sup>See e.g. *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994)(person infected with HIV virus is an individual with a disability within the meaning of Rehabilitation Act, as in the ADA); *Gonzales v. Garner Food Services*, 89 F.3d 1523, 1526 (11th Cir. 1996)(noting that ADA regulations define disability to include HIV disease); *Anderson v. Gus Mayer Boston Store of Del.*, 924 F. Supp. 763, 774-75(E.D.Tex. 1996); *Sharrow v. Bailey*, 910 F. Supp. 187, 191 (M.D.Pa. 1995)("Individuals diagnosed as HIV-positive are considered disabled for purposes of the act, whether they are symptomatic or asymptomatic."); *U.S. v. Moruant*, 898 F. Supp. 1157, 1161 (E.D.La. 1995)("AIDS/HIV-positive are both disabilities under the Department of Justice regulations promulgated pursuant to the ADA."); *Hoepfl v. Barlow and Healthplus, Inc.*, 906 F. Supp. 317, 319 (E.D.Va. 1995)("It is now settled law that HIV-positive individuals are "disabled" within the meaning of the ADA."); *T.E.P. v. Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993); *Howe v. Hull*, 873 F. Supp. 72, 78 (N.D.Ohio 1994).

The two cases, *Abbott v. Bragdon*<sup>8</sup> and *Runnebaum v. NationsBank of Maryland, N.A.*<sup>9</sup> both involved plaintiffs who were HIV-positive but asymptomatic. The *Abbott* Court held that asymptomatic HIV was a disability and therefore the plaintiff who was seeking dental treatment was protected under the Americans With Disabilities Act.<sup>10</sup> The *Runnebaum* Court, on the other hand, took the opposite view and found that the plaintiff was not disabled within the meaning of the ADA and therefore was not protected from the alleged discriminatory firing by his employer.<sup>11</sup> This article explores the divergent analysis applied to the two cases and then discusses the Supreme Court's opinion in *Bragdon v. Abbott*. Finally, the article discusses what questions remain unanswered as a result of the *Bragdon v. Abbott* decision.

## II. MEDICAL BACKGROUND OF HIV

HIV is a human virus that can infect and replicate in numerous types of human cells.<sup>12</sup> Certain immune-system T-cells, white blood cells contain a surface protein known as CD4 and are particularly susceptible to HIV infection.<sup>13</sup> Infected T-cells (T-cells that are "CD4+") eventually die, and as the number of such cells decreases, the body's ability to fight infection also decreases. The infected individual's CD4+ cell count is thus "the best predictive marker of relative risk for developing HIV-related opportunistic diseases."<sup>14</sup> As a result, HIV disease is viewed as progressing in stages that correspond to a level of CD4+ cells or that result in an AIDS-defining condition in the patient.<sup>15</sup>

HIV disease begins with exposure to and infection by HIV. After infection, HIV immediately attacks the cells of the immune system. HIV attaches to the CD4 receptor on the surface of a T-cell and its membrane fuses with that of the host cell, injecting the viral genetic material into the host T-cell.<sup>16</sup> The host cell can then become a factory for the production of more copies of HIV's genetic material, and these copies spread to other cells.<sup>17</sup> Within two to four weeks after initial infection, high levels of circulating HIV can be detected.<sup>18</sup> As a result of this attack on the cells, HIV infection induces a chronic and progressive process with a broad spectrum of manifestations and complications from primary infection to life-threatening

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<sup>8</sup>*Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997).

<sup>9</sup>*Runnebaum v. NationsBank of Maryland, N.A.*, 123 F.3d 156(4th Cir. 1997).

<sup>10</sup>*Abbott v. Bragdon*, 107 F.3d at 949.

<sup>11</sup>*Runnebaum v. NationsBank*, 123 F.3d at 169.

<sup>12</sup>Paul A. Volberding, "Clinical Spectrum of HIV Disease," in *AIDS: Etiology, Diagnosis, Treatment and Prevention* 123, 124 (Vincent T. DeVita, Jr. et al. eds., 3d ed. 1992).

<sup>13</sup>*Id.*

<sup>14</sup>Kilby & Saag, *supra* note 5 at 49.

<sup>15</sup>*Id.*

<sup>16</sup>Hopp & Rogers, *supra* note 3, at 26-27.

<sup>17</sup>*Id.*

<sup>18</sup>Kilby & Saag, *supra* note 5 at 53.

opportunistic infections.<sup>19</sup> There is, in fact, a single, continuous disease process beginning with the initial exposure to the infection and terminating in the advanced forms of immune deficiency, with death resulting from the complex interactions between the HIV infection itself and the secondary opportunistic infections and malignancies.<sup>20</sup>

HIV disease is categorized by dividing the stages of the illness into five categories based CD4 count. The first stage of HIV disease is known as "acute retroviral seroconversion syndrome."<sup>21</sup> Within two to six weeks after initial infection, onset of symptoms usually occurs.<sup>22</sup> The most common symptoms include fevers, chronic abnormal enlargement of the lymph nodes, pharyngitis, and skin rash. Laboratory findings include anemia and thrombocytopenia.<sup>23</sup> Most symptoms diminish within two to three weeks but enlargement of the lymph nodes often persists throughout early HIV disease.<sup>24</sup>

The second and third stages of HIV disease are known, respectively, as Early Stage Disease (CD4 count between 500 and 750 cells/mm<sup>3</sup>) and Middle Stage Disease (CD4 count between 200 and 500 cells/mm<sup>3</sup>).<sup>25</sup> The progression through these two relatively asymptomatic stages is the longest interval of HIV disease, with a typical duration of 10 years.<sup>26</sup> Most individuals in the Early Disease Stage have no symptoms related to HIV, other than mild-to-moderate lymphadenopathy (enlargement of the lymph nodes) which usually persists from the time of acute infection.<sup>27</sup> A consistent pattern of irregularities in the blood and immune symptoms can also be detected with laboratory tests.<sup>28</sup> A range of skin disorders and oral lesions often begin in the Early Stage Disease and persist through the Middle Stage.<sup>29</sup> Other mild-to-moderate symptoms may begin to appear during the Middle Stage Disease such as fatigue, night sweats, and weight loss.<sup>30</sup>

As was noted above, CD4+ cell count is one of the most important markers of the disease's progression. Laboratory evidence demonstrates that CD4 cells decline steadily throughout Early Stage Disease. As HIV continues its attack on the immune

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<sup>19</sup>Maragret Fishl, *Introduction to the Clinical Spectrum of AIDS*, IN TEXTBOOK OF AIDS MEDICINE 139 (Merigan, Bartlett, & Bolognesi, eds. 1999).

<sup>20</sup>*Id.*

<sup>21</sup>Kilby & Saag, *supra* note 5 at 53.

<sup>22</sup>*Id.*

<sup>23</sup>*Id.* Thrombocytopenia is a platelet disorder which results in decreased platelet number causing a pattern of bleeding. Merck Manual 1209 (Robert Berkow & Andrew J. Fletcher eds., 16th ed. 1992).

<sup>24</sup>*Id.*

<sup>25</sup>*Id.* at 54-55.

<sup>26</sup>Kilby & Saag, *supra* note 5 at 49.

<sup>27</sup>*Id.* at 54.

<sup>28</sup>*Id.* at 54-55.

<sup>29</sup>*Id.*

<sup>30</sup>Mishl, *supra* note 19 at 142-3.

system, a person with HIV experiences a slow, progressive decline in CD4+ cells (an average of 40 to 80 cells/mm<sup>3</sup> per year).<sup>31</sup> Additionally, it has been demonstrated that high levels of viral replication are present even among stable, asymptomatic individuals.<sup>32</sup> This replication of the virus is present in every organ system in the body. As a result, clinicians recommend antiretroviral therapy to patients even at the earliest stage of the disease and constant monitoring of the condition is required.<sup>33</sup>

As the CD4+ count drops below 200 cells/mm<sup>3</sup>, the individual passes from the Middle Stage Disease to the Late Stage Disease which the CDC defines as AIDS.<sup>34</sup> Individuals with CD4 counts of less than 50 are in the final stage of AIDS known as Advanced HIV Disease.<sup>35</sup> Symptomatic HIV disease can range in duration from a brief period ending in death to a number of years. Symptoms at this stage include night sweats, chronic diarrhea, fever, weight loss, fatigue, and more frequent or severe skin and oral lesions.<sup>36</sup> “Nearly every organ system in the body can be affected,” and “the effect of symptoms on the patient ranges from minimal to devastating.”<sup>37</sup> When an individual with HIV reaches the final stages of the disease, CD4+ cells fall below 200 cells/mm<sup>3</sup> and continue to decline. Opportunistic infections such as pneumocystis carinii pneumonia, encephalitis, and B-cell lymphoma begin to appear.<sup>38</sup> When CD4+ counts drop below 50 cells/mm<sup>3</sup>, an increasing array of opportunistic infections must be treated.<sup>39</sup> Neurological disease processes become especially prevalent including central nervous system lymphoma and dementia. Involuntary weight loss, or “wasting,” are also common at this stage.<sup>40</sup>

With aggressive antiretroviral therapy and prophylactic treatments designed to fend off opportunistic infections, the late stage of HIV disease can be managed for some time despite the profound immunosuppression brought about by HIV.<sup>41</sup> Recently, the incidence of AIDS-related deaths at this late stage of HIV disease declined, suggesting that “advancements in treatment are extending the lives of the most immunosuppressed HIV-infected patients”.<sup>42</sup> However, death is still the expected occurrence at this stage of HIV disease and often death occurs because of an inability to control the opportunistic infections which the body cannot fight off.<sup>43</sup>

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<sup>31</sup>*Id.* at 141; Kilby & Saag, *supra* note 5 at 55.

<sup>32</sup>*Id.* at 54.

<sup>33</sup>*Id.* at 55; Mishl, *supra* note 19 at 142, 145-6.

<sup>34</sup>Kilby & Saag, *supra* note 5 at 55.

<sup>35</sup>*Id.* at 56.

<sup>36</sup>Mishl, *supra* note 19 at 142, Table 10.5.

<sup>37</sup>Kilby & Saag, *supra* note 5 at 55-6.

<sup>38</sup>*Id.* at 56.

<sup>39</sup>*Id.*

<sup>40</sup>*Id.*

<sup>41</sup>*Id.* at 56-57.

<sup>42</sup>Kilby & Saag, *supra* note 5 at 56.

<sup>43</sup>*Id.* at 56-57.

In addition to the physical attack on the immune system, HIV infection creates serious mental health problems even in the earliest "asymptomatic" stage of the disease.<sup>44</sup> Persons living with HIV/AIDS may experience the same psychological reaction as those experienced by other terminally ill patients—disbelief, denial, numbness, anger, depression and suicidal ideation.<sup>45</sup> Yet unlike other terminal illnesses, such as cancer, a diagnosis of AIDS carries with it stigmatization and disapproval of a whole society. This disapproval often results in social ostracism and discrimination that create additional psychological stress.<sup>46</sup> In addition to its effect on the psychology of patients, in the later stages of the disease most patients experience some cognitive and affective changes related to HIV infection of the brain. Differentiating between the effects of anxiety and depression on cognition and the effects of neurological problems on cognition is difficult but may be crucial to proper diagnosis, intervention and therapy.<sup>47</sup>

The mental health problems that are commonly experienced by persons living with AIDS include depression and anxiety, adjustment disorder, panic disorders, delirium and dementia.<sup>48</sup> Except for the last two, these problems exist in even the earliest stages of the HIV disease progression.

Given the reality of HIV disease, the issue is whether HIV, even in its earliest stages, meets the definition of disability for purposes of the ADA.

### III. DEFINITION OF DISABILITY

#### A. Statutory Definition

The ADA defines disability as follows: "the term 'disability' means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such impairment."<sup>49</sup> These definitions can be argued in the alternative.<sup>50</sup>

The first definition requires that one prove three basic elements in order to show that the plaintiff is protected by the ADA because of his or her disability. First, one must prove the existence of an impairment. Second, a major life activity must be

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<sup>44</sup>One study found that persons diagnosed with HIV experienced significantly higher levels of depression, anxiety, and obsessive-compulsive behavior than before their diagnosis. Ostrow, Joseph, Kessler, et al, *Disclosure of HIV Antibody Status: Behavioral and Mental Health Correlates*, 1 AIDS EDUCATION AND PREVENTION 1 (1989); See generally, Hopp & Rogers, *supra* note 3, at 134-145; Mukand, J. *Rehabilitation for Patients with HIV Disease* (McGraw-Hill: New York, 1991) pp.234-238; MARK G. WINORSKI, AIDS-RELATED PSYCHOTHERAPY 72-85 (1991).

<sup>45</sup>Mukand, *supra* note 44 at 218.

<sup>46</sup>*Id.* at p.221.

<sup>47</sup>*Id.* at p.230.

<sup>48</sup>See Mukand, *supra* note 44, at 218-223; WINORSKI, *supra* note 44, at 72-85; Hopp & Rogers, *supra* note 3, at 134-145.

<sup>49</sup>42 U.S.C. Sec. 12102(2)

<sup>50</sup>*Id.*

affected by the impairment. Finally, there must be a substantial limitation on the major life activity because of the impairment. The terms “impairment,” “major life activity,” and “substantial limitation” are not specifically defined in the statute but have been defined in the regulations promulgated to implement the ADA.<sup>51</sup>

The second definition of disability allows an individual to seek protection of the ADA if the person can show that he or she has a record or history of an impairment that at one time substantially limited a major life activity.<sup>52</sup> This provision attempts to protect people with a history of a disability such as individuals who have a history of cancer or mental illness.

The third definition of disability is designed to protect individuals from the myths and fears associated with disabilities. An individual will be protected under this third definition if the individual has an impairment that does not substantially limit their activities but the individual is treated as if he or she has a limitation or if the limitation exists because of the attitudes of others toward the impairment.<sup>53</sup> For example, if an employer refuses to hire a person because of a facial deformity, that individual may be protected under the ADA.

#### *B. Administrative Regulations under the ADA*

Congress gave the Equal Employment Opportunity Commission (EEOC) authority under 42 U.S.C. Section 12116 to issue regulations with respect to Title I of the ADA, the subchapter regarding employment.<sup>54</sup> Congress gave the Justice Department the authority to issue regulations with respect to Title II, the subchapter dealing with discrimination in places of public accommodation.<sup>55</sup> The fact that the different agencies were promulgating two sets of regulations defining disability may have lead to inconsistent definitions. The regulations and guidelines promulgated by these two agencies must be given deference by courts in interpreting the Americans with Disabilities Act.<sup>56</sup>

The EEOC has issued extensive regulations defining the terms used in Title I of the ADA (relating to employment discrimination) including the term “physical or mental impairment.” Although the EEOC regulations do not specifically refer to HIV, they do include in the definition of impairment a “physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive,

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<sup>51</sup>See 28 C.F.R. § 36.104; 29 C.F.R. 1630.2.

<sup>52</sup>29 C.F.R. § 1630.2(k); *See also* Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310, 1322 (E.D.Pa. 1994) the Court held that a “record of impairment” meant that the proponent had to show a history of an impairment that led directly to the facts that gave rise to the litigation.

<sup>53</sup>28 C.F.R. § 36.104; 29 C.F.R. § 1630.2.

<sup>54</sup>42 U.S.C. § 12132.

<sup>55</sup>42 U.S.C. § 12182.

<sup>56</sup>*See* Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) (holding that administrative guidelines that are promulgated by an explicit congressional grant must be given “controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”) *Id.* at 844.



genito-urinary, hemic and lymphatic, skin, and endocrine.”<sup>57</sup> While HIV is not specifically referred to in the EEOC regulations, as described in the above section, HIV attacks the hemic and lymphatic systems as soon as it enters the body and immediately begins to replicate itself and kill CD4 cells. Therefore, HIV should constitute a “disorder” affecting the hemic and lymphatic systems.

“Major life activities” are defined in the EEOC regulations as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”<sup>58</sup> A person is substantially limited if they are “unable to perform a major life activity that the average person in the general population can perform,”<sup>59</sup> and the factors that should be considered in making this determination are “(i) the nature and severity of the impairment; (ii) the duration or the expected duration of the impairment, and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.”<sup>60</sup>

The Justice Department regulations implementing Title III (discrimination in places of public accommodation) contain the same definition of “major life activities”<sup>61</sup> and “impairment” as found in the EEOC regulations<sup>62</sup> but also further provides that:

the phrase “physical or mental impairment” includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.<sup>63</sup>

Furthermore, the Justice Department regulations conclude that “asymptomatic HIV disease is an impairment that substantially limits a major life activity, either because of its actual effect on the individual with the disease or because the reactions of other people to individuals with HIV disease cause such individuals to be treated as disabled.”<sup>64</sup>

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<sup>57</sup>29 CFR § 1630.2(h)(1).

<sup>58</sup>29 CFR § 1630.2 (i).

<sup>59</sup>29 CFR § 1630.2(j)(1)(i).

<sup>60</sup>29 CFR § 1630.2(j)(2).

<sup>61</sup>28 C.F.R. § 36.104.

<sup>62</sup>See 28 CFR § 36.104(1)(i).

<sup>63</sup>29 CFR § 36.104(1)(i)(B)(2); 28 CFR 36.104(a).

<sup>64</sup>28 C.F.R. § 36.104, App. B (Department of Justice) (“The phrase physical or mental impairment includes ... HIV disease (whether symptomatic or asymptomatic) ...”); In addition to the Department of Justice, other agencies have been equally clear about whether HIV is a disability by directly including HIV infection in their interpretation of “impairment.” See e.g. 29 C.F.R. § 34.2 (Department of Labor); 34 C.F.R. § 1200.103 (National Council on Disability); 7 C.F.R. § 15e.103 (Department of Agriculture); 45 C.F.R. § 2301.103 (Arctic Research Commission ); 24 C.F.R. § 100, Subch. A, App. I § 100.201 (Department of

Thus, the regulations promulgated for the relevant titles of the ADA all support a finding that “asymptomatic HIV” is a disability deserving the protections of the ADA.

### C. Legislative History

Another source to look to in determining whether “asymptomatic” HIV disease is a disability for purposes of the ADA is the legislative history of the Americans with Disabilities Act. The Supreme Court has held that it is proper to look to legislative history for guidance in determining the intent of Congress if there is ambiguity in the interpretation of statutory language.<sup>65</sup> Even when “the language of the statute is clear, any lingering doubt as to its proper construction may be resolved by examining the legislative history.”<sup>66</sup>

On its face, the legislative history of the ADA indicates Congress’ intent to include individuals with asymptomatic HIV, *per se*, in the class of people protected by the ADA. The Congressional Record, House and Senate Committee Reports and a Justice Department memorandum issued in response to the issue of HIV and the ADA all expressly support this proposition. However, there is also support for the proposition that while asymptomatic HIV can be shown to be a disability, if the elements are proven, Congress did not intend for it to be a disability *per se*.

The Supreme Court has held that official committee reports are the “authoritative source for finding the Legislature’s intent.”<sup>67</sup> Committee reports from both the House and Senate clearly state that infection with the HIV virus should be considered an impairment within the meaning of the ADA:

It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments . . . The term includes, however, such conditions, diseases and infections as . . . infection with the Human Immunodeficiency Virus.<sup>68</sup>

However, while it seems clear that Congress intended HIV to qualify as an impairment under the ADA, it is less clear whether Congress intended “asymptomatic” HIV to be a *per se* disability. Physical and mental impairments are not protected disabilities unless and until they also substantially limit a major life activity. The official House Report to the ADA in a section titled “Explanation of the Legislation—Definition of the Term Disability” appears to find that HIV is a *per se* disability. As that report states:

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Housing and Urban Development) (adding HIV infection to list of physical and mental impairments).

<sup>65</sup>See *Green v. Beck Laundry Machine Co.*, 490 U.S. 504, 508 (1989)(concluding that “if the text is ambiguous, we seek guidance from the legislative history”); *United States v. Irvin*, 2 F.3d 72, 76-77(4th Cir. 1993)(“Because the relevant statutory language is susceptible to interpretations other than the one suggested by the Government and is therefore ambiguous, we turn to the legislative history for assistance in ascertaining the intent of Congress.”).

<sup>66</sup>See *United States v. Clark*, 454 U.S. 555, 561 (1982).

<sup>67</sup>*Garcia v. United States*, 469 U.S. 70,76 (1984).

<sup>68</sup>H.R. Rep. No. 101-485, pt. 2, at 51 reprinted in 1990 U.S.C.C.A.N. 303, 333. Part three of the House Report reiterates inclusion of HIV as an impairment. See H.R.Rep. No. 101-485, pt. 3, at 28, 1990 U.S.C.C.A.N. 445, 451.

[A] person who is a paraplegic will have a substantial difficulty in the major life activity of walking; a deaf person will have a substantial difficulty in hearing aural communications; and a person with lung disease will have a substantial limitation in the major life activity of breathing. As noted by the U.S. Department of Justice ... a person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term "disability" because of a substantial limitation to procreation and intimate sexual relationships.<sup>69</sup>

The House Report stands for the proposition that HIV infection, regardless of the manifestation of symptoms, is not only an "impairment" but is a "disability" protected by the ADA because of the assumption that procreation and intimate sexual relationships are major life activities that are substantially limited once a person is infected with the AIDS virus, regardless of the stage of that infection.<sup>70</sup>

On the other hand, the Senate Labor and Human Resources Committee Report on the definition of disability under the ADA (the "ADA Senate Report") states:

"It is the Committee's intent that the analysis of the term 'individual with handicaps' ... by the Department of Housing and Urban Development [HUD] of the regulations implementing the Fair Housing Amendments Act of 1988 apply to the definition of the term 'disability' included in this legislation."<sup>71</sup>

The HUD regulations implementing the Fair Housing Amendments Act of 1988 specifically discuss the question of whether persons infected with HIV "are understood to be persons with a 'handicap' protected by the Act."<sup>72</sup> The HUD

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<sup>69</sup>See H. Rep.-2 at 52. See also, S. Rep. at 22; H. Rep.-3 at 28 n. 18 (reaching the identical conclusion). The House Report expressly adopted a 1988 official legal memorandum of the Department of Justice which concluded that asymptomatic HIV was a disability under the Rehabilitation Act. The Preamble to the ADA Title III regulations cites and adopts this 1988 DOJ Memorandum which concludes that people with asymptomatic HIV are covered under the Rehabilitation Act, because HIV substantially limits the major life activities of procreation and intimate sexual relations. See 28 C.F.R. Part 36, App. B Section 36.104.

<sup>70</sup>Though remarks made by House members do not carry the weight of the official Committee Reports, it is clear from remarks made by several members of the House that they believed the ADA would make HIV a *per se* disability. For example, Representative Waxman stated: "People with HIV disease are those who have the spectrum of the disease—from asymptomatic HIV infection, to symptomatic HIV infection, to full-blown AIDS . . . All such individuals are covered under the first prong of the definition of disability in the ADA." 136 Cong. Rec. H4626 (daily ed. July 12, 1990); See also 136 Cong. Rec. H2626 (daily ed. May 22, 1990)(remarks of Rep. McDermott)("I am particularly pleased that this act will finally also extend necessary protection to people with HIV disease. These are individuals who have any condition along the full spectrum of HIV infection—asymptomatic HIV infection, symptomatic HIV infection, or full-blown AIDS."); 136 Cong. Rec. H4623 (daily ed. July 12, 1990)(remarks of Rep. Owens)("As I noted, the ADA will offer critical protection to people with HIV disease in a range of areas. People with HIV disease are individuals who have any condition along the full spectrum of HIV infection—asymptomatic HIV infection, symptomatic HIV infection, or full-blown AIDS,").

<sup>71</sup>S. Rep. No. 101-116, 101 st Cong., 1 st Sess. 21 (1989).

<sup>72</sup>54 Fed. Reg. 3232, 3245 (Jan. 23, 1989).

regulations refer to the holding in *School Board of Nassau County v. Arline*<sup>73</sup> and to many statements in the 1988 Act's legislative history indicating that HIV-infected persons are protected. "In light of these authorities," HUD says, it "has added [HIV] to the illustrative list of 'physical or mental impairments' in the final rule's definition of handicap."<sup>74</sup> "Physical or mental impairments" are distinct from "handicaps" in the 1988 Act's definition of "handicap"<sup>75</sup> just as "physical or mental impairments" are distinct from "disabilities" in the ADA's definition of "disability."<sup>76</sup> Physical or mental impairments of any kind are not handicaps or disabilities unless and until they also substantially limit a major life activity. The HUD analysis, therefore, stops short of defining HIV as a *per se* handicap. HUD recognizes HIV as an impairment, but not automatically as a handicap. The ADA Senate Report explicitly endorses this HUD analysis. According to this legislative history, HIV infection is not *per se* a disability, but rather one example among many of a physical impairment that may, in appropriate circumstances, trigger a finding of a disability.

Like the ADA Senate Report, the ADA House Education and Labor Committee, Judiciary Committee, and Energy and Commerce Committee Reports all explicitly endorse the HUD analysis which recognizes HIV as an impairment, but not as a disability or handicap. The Education and Labor Committee Report states: "It is the Committee's intent that the analysis of the term 'individual with handicaps' ... by the Department of Housing and Urban Development of the regulations implementing the Fair Housing Amendments Act of 1988 apply to the definition of the term 'disability' included in this legislation."<sup>77</sup> Like the ADA Senate Report, these sources of legislative history also treat HIV as an impairment that may trigger a disability, but do not treat HIV as a disability *per se*.

Therefore, taken as a whole, it seems clear that legislative history supports the proposition that Congress intended that HIV to qualify as an "impairment," but not necessarily as a *per se* disability.

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<sup>73</sup>See *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987) (holding that a person with a contagious disease is an "individual with a disability" for purposes of the Rehabilitation Act, assuming the disease substantially limits a major life activity and the person is "otherwise qualified"—i.e. there is no direct threat the health and safety of others).

<sup>74</sup>24 C.F.R. § 100.201.

<sup>75</sup>42 U.S.C. § 3602(h).

<sup>76</sup>42 U.S.C. § 12102(2).

<sup>77</sup>H. Rep. No. 101-485(II), 101 st Cong., 2d Sess. 50 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 332. The Judiciary Committee Report states that the "Committee intends that the analysis of ... the term 'handicap' contained in the primary regulations implementing the Fair Housing Amendments Act of 1988, apply to the definition of 'disability' in the ADA." H. Rep. No. 101-485(III), 101 st Cong., 2d Sess. 26-27, reprinted in 1990 U.S.C.C.A.N. 445, 449. The Energy and Commerce Committee Report states that the definition of disability in the ADA is intended to have "the same meanings given to the corresponding provisions used in the definition of ... the term 'handicaps' in section 802(h) of the Fair Housing Act, and in regulations issued under those statutes." H. Rep. No. 101-485(IV), 101 st Cong., 2d Sess. 36, reprinted in 1990 U.S.C.C.A.N. 512, 525.

IV. THE CIRCUIT COURT DECISIONS IN *ABBOTT* AND *RUNNEBAUM*

Between 1990 when the ADA was passed and 1997 when *Abbott v. Bragdon* and *Runnebaum v. NationsBank* were decided, several lower Courts and two circuits had held that HIV infection was a disability,<sup>78</sup> while the Fourth Circuit held it was not *per se* a disability.<sup>79</sup> The *Abbott* and *Runnebaum* cases brought attention to this split in opinion when the two cases were inconsistently decided in 1997.

In March of 1997, the First Circuit Court of Appeals upheld the lower court's decision that asymptomatic HIV was a *per se* disability under the ADA in a non-employment context.<sup>80</sup> In the *Abbott* case, Ms. Abbott sought dental treatment from Dr. Bragdon. At her first examination she made it known to the dentist that she was HIV-positive. At the time of the appointment she not exhibiting any outward symptoms of HIV disease.<sup>81</sup> Dr. Bragdon told her she needed to have a cavity filled but he was not willing to treat her in his office. He offered to perform the work at a hospital with no added fee for his services, though she would have been responsible for the hospital fees.<sup>82</sup> Ms. Abbott refused Dr. Bragdon's offer and filed an action under Title III of the ADA alleging discrimination on the basis of her disability.

In August of 1997, the Fourth Circuit once again held that asymptomatic HIV was not a disability under the ADA. In *Runnebaum v. NationsBank*<sup>83</sup> the Circuit Court of Appeals reviewed a claim filed pursuant to Title I of the ADA in which an asymptomatic HIV-positive man was fired after his employer learned he was HIV-positive. In that case, Runnebaum who had been diagnosed with HIV in 1988 but who was asymptomatic, was hired by NationsBank to work as a marketing coordinator in the private banking department.<sup>84</sup> Documentation indicated that Runnebaum had some difficulties on the job and in June 1992 he was transferred to the trust department to work in a sales position.<sup>85</sup> Runnebaum's new supervisor set

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<sup>78</sup>See e.g. *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994)(person infected with HIV virus is individual with a disability within the meaning of Rehabilitation Act, as in the ADA); *Gonzales v. Garner Food Services*, 89 F.3d 1523, 1526 (11th Cir. 1996)(noting that ADA regulations define disability to include HIV AIDS disease); *Anderson v. Gus Mayer Boston Store of Del.*, 924 F. Supp. 763, 774-75 (E.D. Tex. 1996); *Doe v. Kohn, Nast & Graf*, 862 F. Supp. 1310, 1321 (E.D.Pa. 1994); *Sharrow v. Bailey*, 910 F. Supp. 187, 191 (M.D.Pa. 1995)(Individuals diagnosed as HIV-positive are considered disabled for purposes of the act, whether they are symptomatic or "asymptomatic."); *U.S. v. Morant*, 898 F. Supp. 1157, 1161 (E.D.La. 1995)("AIDS/HIV-positive are both disabilities under the Department of Justice regulations promulgated pursuant to the ADA."); *Hoepfl v. Barlow and Healthplus, Inc.*, 906 F. Supp. 317, 319, n.7 (E.D.Va. 1995)("It is now settled law that HIV-positive individuals are "disabled" within the meaning of the ADA."); *T.E.P. v. Leavitt*, 840 F. Supp. 110,111 (D. Utah 1993); *Howe v. Hull*, 873 F. Supp. 72, 78 (N.D.Ohio 1994).

<sup>79</sup>*Ennis v. National Ass'n of Bus. and Educational Radio*, 53 F.3d 55 (4th Cir. 1995).

<sup>80</sup>*Abbott v. Bragdon*, 107 F.3d at 942.

<sup>81</sup>*Id.*, 107 F.3d at 937.

<sup>82</sup>*Id.* at 93.

<sup>83</sup>123 F.3d 156.

<sup>84</sup>*Id.* at 161.

<sup>85</sup>*Id.*

out in writing certain sales goals that she expected Runnebaum to meet.<sup>86</sup> In September 1992, Runnebaum went to a gay bar with his former supervisor, NationsBank's Senior Managing Officer, and at the bar disclosed his HIV status.<sup>87</sup> Sometime in November 1992, Runnebaum placed a prescription order for AZT which was paid for by the bank's health plan. The AZT was delivered to Runnebaum at work and on at least two occasions they were inadvertently opened by bank personnel.<sup>88</sup>

By November 1992, Runnebaum's supervisor, Ann Pettit, had become displeased with his job performance because he had not met his sales goals. However, she decided to give him an opportunity to "redeem himself" and assigned him the responsibility for planning and hosting a holiday reception that was important to the bank. In addition, she reduced the sales goals set out in her earlier memorandum.<sup>89</sup> Pettit learned in late November or early December that Runnebaum was HIV-positive. On January 12, 1993 Pettit fired Runnebaum claiming that he failed to complete assignments and failed to present a professional image.<sup>90</sup> He filed a complaint with the EEOC and then filed suit in Federal District Court claiming that NationsBank had violated his rights under the Americans With Disabilities Act in that he had been terminated because he was HIV-positive.<sup>91</sup>

Defendants in both the *Abbott* and *Runnebaum* cases claimed plaintiffs were not within the protections of the ADA because they were not disabled under the meaning of the statute.<sup>92</sup> Both Courts examined each of the elements of the first definition of disability, and on each issue reached conflicting decisions.

#### A. *Is Early Stage HIV an "Impairment?"*

Until 1997, most Courts had not seriously questioned that HIV infection is a physical impairment under federal disability discrimination laws.<sup>93</sup> The *Abbott* Court

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<sup>86</sup>*Id.*

<sup>87</sup>*Id.* at 162.

<sup>88</sup>*Runnenbaum*, 123 F.3d at 162.

<sup>89</sup>*Id.*

<sup>90</sup>*Id.* at 163.

<sup>91</sup>*Id.*

<sup>92</sup>*See Abbott v. Bragdon*, 107 F.3d at 939; *See Runnebaum v. NationsBank*, 123 F.3d at 165.

<sup>93</sup>Virtually every court since the passage of the ADA has found that HIV is a disability. See, e.g., *Abbott v. Bragdon*, 107 F.3d at 939-942 (1st Cir.1997); *Gates v. Rowland*, 39 F.3d 1439, 1445 (9th Cir.1994); *Harris v. Thigpen*, 941 F.2d 1495, 1524 (11th Cir.1991); *Severino v. North Fort Myers Fire Control District*, 935 F.2d 1179, 1181(11th Cir.1991); *Doe v. Garrett*, 903 F.2d 1455, 1458 (11th Cir.1990); *Hernandez v. Prudential Insurance Company of America*, 977 F. Supp. 1160, 1163-1165 (M.D.Fla.1997); *Anderson v. Gus Mayer Boston Store of Delaware*, 924 F. Supp. 763, 774-777 (E.D.Tex.1996); *D.B. v. Bloom*, 896 F. Supp. 166, 170 (D.N.J.1995); *Sharrow v. Bailey*, 910 F. Supp. 187, 191 (M.D.Pa.1995); *Austin v. Pennsylvania Dept. of Corrections*, 876 F. Supp. 1437, 1465 (E.D.Pa.1995); *Howe v. Hull*, 873 F. Supp. 72, 78 (N.D.Ohio 1994); *United States v. Morvant*, F. Supp. 1093-94 (E.D.La.1994); *Robinson v. Henry Ford Health Systems*, 892 F. Supp. 176, 179 (E.D.Mich.1994), *aff'd mem.*, 86 F.3d 1156 (6th Cir.1996); *Doe v. Kohn, Nast & Graf*, 862 F.

held “unhesitatingly that HIV-positive status, simpliciter, whether symptomatic or asymptomatic comprises a physical impairment under the ADA.”<sup>94</sup> The Court based its decision on EEOC regulations<sup>95</sup> which explicitly support this conclusion and cited to cases which “buttressed” the conclusion.<sup>96</sup>

In *Runnebaum*, however, the plurality equated “impairment” with “visible symptom.” The *Runnebaum* Court found that if no symptoms were manifesting themselves then there could be not diminishing effects on the individual.<sup>97</sup> Though nothing in the text of the statute or in the legislative history was shown to support a requirement that an impairment had to be visible or outwardly manifest, the *Runnebaum* Court found that asymptomatic HIV was not an impairment.

The Court first outlined its duty to interpret the statute and found that “whether asymptomatic HIV infection is an impairment is first and foremost a question of statutory interpretation.”<sup>98</sup> The Court noted that if the language of the statute is plain and unambiguous, then no duty of interpretation arises and the sole function of the Courts is to enforce the statute as written.<sup>99</sup> The Court added that when a word is not defined in the statute it should be construed in accordance with its ordinary and natural meaning.<sup>100</sup> Since the term “impairment” was not defined in the statute, the Court looked to Webster’s dictionary for a definition of the ordinary meaning of the term. Webster’s defined “impairment” as a “decrease in strength, value, amount, or quality.”<sup>101</sup> Based on that definition, the Court found that asymptomatic HIV was not an impairment. “Without symptoms, there are no diminishing effects on the individual.”<sup>102</sup>

The *Runnebaum* Court found that since the ordinary meaning of the term “impairment” was clear and unambiguous, there was no authority to turn to the

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Supp. 1310, 1319-1322 (E.D.Pa.1994); *Support Ministries for Persons With AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120, 129-132 (N.D.N.Y.1992); *Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Commission of Fairfield*, 790 F. Supp. 1197, 1209 (D.Conn.1992); *Doe v. District of Columbia*, 796 F. Supp. 559, 567 n. 10 (D.D.C. 1992); *Casey v. Lewis*, 773 F. Supp. 1365, 1370 (D.Az. 1991).

<sup>94</sup>*Abbott v. Bragdon*, 107 F.3d at 939.

<sup>95</sup>See 28 CFR 36.104 (stating that the phrase physical impairment “includes . . . HIV disease (whether symptomatic or asymptomatic). . .”)

<sup>96</sup>The Court cites *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994), a case decided under the Rehabilitation Act of 1973 which held that there is no distinction to be made, for purposes of the Act, between an individual with full-blown AIDS and one with asymptomatic HIV. The *Abbott* court also cited *Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990), *cert. den.*, 499 U.S. 904 (1991), also decided under the Rehabilitation Act, which noted that “it is well established that infection with AIDS constitutes a handicap for purposes of the Act.”

<sup>97</sup>*Runnebaum v. NationsBank*, 123 F.3d at 168.

<sup>98</sup>*Id.* at 167.

<sup>99</sup>*Id.*

<sup>100</sup>*Id.*, citing *Smith v. United States*, 508 U.S. 223, 228, 113 S. Ct. 2050, 2054 (1993).

<sup>101</sup>*Webster’s II New Riverside University Dictionary* 1131 (1986).

<sup>102</sup>*Runnebaum v. NationsBank*, 123 F.3d at 167.

legislative history.<sup>103</sup> However, the Court commented that the Committee Reports do not make it clear that *asymptomatic* HIV is *per se* an impairment and declined to consider the floor statements made by Sen. Kennedy and Representatives McDermott, Waxman, and Owens declaring that the collective intent of the 535-member Congress could not be ascertained by the comments of four members.<sup>104</sup>

The *Runnebaum* Court held that “[T]he plain meaning of “impairment” suggests that asymptomatic HIV infection will never qualify as an impairment: by definition asymptomatic HIV infection exhibits no diminishing effects on the individual.”<sup>105</sup> Since *Runnebaum* produced no evidence showing any diminishing effects as a result of his HIV, the Court found he did not meet the definition of “impairment” and should not be afforded the protections of the ADA.

#### B. What Major Life Activity is Affected?

With respect to the second issue, both plaintiffs alleged that their HIV infection had a profound impact on their ability to have children and to engage in normal sexual activities. Both Courts, therefore, reviewed whether reproduction and maintaining intimate sexual relationships constituted major life activities

The *Abbott* Court found that since the statute did not define the term “major life activity” it would use the dictionary to ascertain the ordinary meaning of the term.<sup>106</sup> As the Court stated:

The plain meaning of the word “major” denotes comparative importance. These definitions strongly suggest that the touchstone for determining an activity’s inclusion under the statutory rubric is its significance—and reproduction, which is both the source of all life and one of life’s most important activities, easily qualifies under that criterion.<sup>107</sup>

The *Abbott* Court also looked to the regulations and found that reproduction “fit comfortably within its sweep.”<sup>108</sup> The EEOC regulations specifically refer to disorders affecting reproduction as being within the purview of the protection of the ADA. Therefore, the Court found that the regulations supported a finding that reproduction is a major life activity:

Reproduction (and the bundle of activities that it encompasses) constitutes a major life activity because of its singular importance to those who engage in it, both in terms of its significance in their lives and in terms of its relation to their

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<sup>103</sup>See *Puerto Rico Dep’t of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) (stating that “unenacted approvals, beliefs, and desires are not laws”); *Pittston Coal Group v. Sebben*, 488 U.S. 105, 115, 109 S. Ct. 414, 420–21, 102 L.Ed.2d 408 (1988) (rejecting argument that legislative history at issue limited general statutory language).

<sup>104</sup>*Runnebaum v. NationsBank*, 123 F.3d at 169.

<sup>105</sup>*Id.*

<sup>106</sup>*Abbott v. Bragdon*, 107 F. 3d at 939.

<sup>107</sup>See, e.g., *The American Heritage Dictionary of the English Language* 1084 (3d ed.1992) (listing “greater than others in importance or rank” as the initial definition of “major”); *Webster’s Ninth New Collegiate Dictionary* 718 (1989) (defining “major” as “greater in dignity, rank, importance, or interest”).

<sup>108</sup>*Abbott v. Bragdon*, 107 F.3d at 940.



day-to-day existence. Mindful of this reality, and honoring what we believe to be Congress' intent, we hold that reproduction is a major life activity within the meaning of the ADA.<sup>109</sup>

The *Runnebaum* Court agreed that reproduction was a "fundamental human activity" but refused to find that it was a major life activity for purposes of the ADA. Once again, looking to the dictionary definition for guidance, the *Runnebaum* Court found the word "major" to mean "demanding great attention or concern."<sup>110</sup> Based on this definition of "major," the Court found that the definition suggested that not all life activities were covered, and that those activities which were relatively less significant than others would not qualify. The Court was "unconvinced" that "engaging in intimate sexual relations falls within the statutory rubric of the major life activities."<sup>111</sup>

Though neither Court definitively decided the issue, both Courts discussed whether there must be a showing that the major life activity is an activity that is significant in general or whether life activity must be shown to have particular significance to the individual. In both the *Abbott* and *Runnebaum* cases, the issue was whether the plaintiff must show that his or her own ability or decision to procreate was significantly affected by the disability and not just that, in general, procreation is affected by asymptomatic HIV infection.<sup>112</sup>

Both Courts agreed that the ADA requires an individualized inquiry on a case-by-case basis as to whether the plaintiff's impairment qualifies as a "disability" under the Act.<sup>113</sup> Both Courts also seem to agree that the need for the case by case analysis does not necessarily require a corresponding case-by-case inquiry into the connection between the plaintiff and the major life activity.<sup>114</sup> Once it is shown that reproduction is a major life activity, an individual plaintiff must show only that he or she is substantially limited in reproduction and not that reproduction is of particular importance to them individually. However, neither court reached the specific question as to whether the significance of the activity must be individualized or general. *Abbott* found reproduction and sexual activity is of "singular importance" and therefore did constitute a "major life activity"<sup>115</sup> while *Runnebaum* found that

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<sup>109</sup>*Id.* at 941.

<sup>110</sup>*Webster's Ninth New Collegiate Dictionary*, *supra* n. 99 at 718.

<sup>111</sup>*Runnebaum v. NationsBank*, 123 F.3d at 170.

<sup>112</sup>*Id.* at 169; *Abbott v. Bragdon*, 107 F.3d at 941.

<sup>113</sup>*Id.*

<sup>114</sup>*Abbott*, 107 F.3d at 941(Although it is true that analysis under the first subset of the ADA's definition of disability—"a physical or mental impairment that substantially limits one or more of the major life activities of [the plaintiff]"—calls for an individualized inquiry into whether the plaintiff is disabled), *see* 29 C.F.R. Pt. 1630, App. § 1630.2(j) (noting in the context of the ADA's employment discrimination regulations that "[s]ome impairments may be disabling for particular individuals but not for others"); *Katz v. City Metal Co.*, 87 F.3d 26, 32 (1st Cir. 1996); *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 55 F.3d 55, 59 (4th Cir. 1995)(the need for this case-by-case analysis of disability does not necessarily require a corresponding case-by-case inquiry into the connection between the plaintiff and the major life activity.").

<sup>115</sup>*Abbott v. Bragdon*, 107 F.3d at 942.

reproduction and sexual activity were not significant and therefore do not constitute “major life activities.”<sup>116</sup>

*C. What Constitutes Substantial Limitation?*

Once it has been shown that there is an impairment and a major life activity which is affected by that impairment, it must still be shown that the impairment results in a substantial limitation of the major life activity.

The *Abbott* Court reviewed the medical evidence which indicated that an HIV-positive pregnant woman faces an approximately 25% risk of transmitting the virus to her child without AZT therapy and an 8% risk of viral transmission with such therapy.<sup>117</sup> In the Court’s opinion “no reasonable juror could conclude that an 8% risk of passing an incurable, debilitating, and inevitably fatal disease to one’s child is not a substantial restriction on reproductive activity.”<sup>118</sup> Based on the medical evidence the Court determined that HIV-positive status is a physical impairment that substantially limits a woman’s major life activity of reproduction.<sup>119</sup>

Though the *Runnebaum* Court, had already determined that procreation was not a major life activity, the Court still considered the question as to what degree of limitation Runnebaum suffered in the event that procreation was found to be a major life activity. Assuming that procreation was a major life activity, the *Runnebaum* Court found that the plaintiff could not show that his ability to procreate was impacted by his HIV. The Court found that an individual may make a *lifestyle* choice as a result of being infected with HIV and may decide not to have children, but nothing inherent in the infection *prevents* him or her from having a child. The Court held:

We hold that asymptomatic HIV does not substantially limit procreation or intimate sexual relations for purposes of the ADA. . . . nothing inherent in the infection actually prevents either procreation or intimate relations. Asymptomatic HIV-infected individuals are able to, and indeed do, procreate and engage in sexual intimacies. We recognize that as a behavioral matter, asymptomatic HIV-infected individuals may refrain from having children or engaging in sexual relations “because of concerns that the offspring or partner will be infected with the virus.” But as a physical matter, nothing inherent in the virus substantially limits procreation or intimate sexual relations. The statutory language is plain: the impairment in question, not the individual’s reaction to the impairment, must “substantially limit[ ] one or more of the major life activities of such individual.” 42 U.S.C.A. § 12102(2)(A). This language

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<sup>116</sup>*Runnebaum v. NationsBank*, 123 F.3d at 171-2.

<sup>117</sup>*Abbott v. Bragdon*, 107 F.3d at 942.

<sup>118</sup>*Id.*

<sup>119</sup>The court was careful to hold that HIV substantially limited a *woman’s* reproductive activity. Since there is no transmission of the virus from father to fetus, it remains an open question as to whether the court would find a similar limitation in reproduction for a male plaintiff.

requires a causal nexus between the physical effect of the impairment and one of the major life activities.<sup>120</sup>

The conflicting *Abbott* and *Runnebaum* decisions leave every element set out in the first prong of the disability definition of the ADA in question. As a result, the Supreme Court granted certiorari in the *Abbott* case to decide the split in these decisions.

#### V. THE SUPREME COURT DECISION IN *BRAGDON V. ABBOTT*

On November 26, 1997 the United States Supreme Court granted the Petition for Certiorari filed by attorneys for Dr. Bragdon, the defendant in the *Abbott v. Bragdon* case. For the first time, the high Court agreed to decide issues central to the AIDS pandemic.<sup>121</sup> In announcing its decision to hear the appeal of *Abbott v. Bragdon*, the Court asked the parties to address three issues: (1) Do people with asymptomatic HIV have a disability *per se* under the ADA? (2) Is reproduction a major life activity within the meaning of the ADA? (3) Should Courts defer to the health-care provider's reasonable professional judgement as to whether a patient with an infectious disease poses a direct threat to the provider's own health or safety?<sup>122</sup>

On June 26, 1998 the Supreme Court, in a 5 to 4 decision, affirmed the lower court decision that Ms. Abbott met the definition of a disabled person under the first prong of the ADA definition of disability. However, the court left open several questions, among them the critical question as to whether asymptomatic HIV is a disability *per se*—*i.e.* is asymptomatic HIV an impairment, that by its very nature, *always* substantially limits a major life activity?

##### A. *Is Asymptomatic HIV an "Impairment"?*

Dr. Bragdon and Ms. Abbott did not substantially disagree as to whether HIV, whether symptomatic or asymptomatic, is a physical impairment. However, Dr. Bragdon argued that, based on regulatory and legislative history and a plain reading of the statute, there was no basis for holding that HIV was a disability *per se*.<sup>123</sup> However, there was no serious attempt to argue that HIV is not an impairment for purposes of the ADA.<sup>124</sup>

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<sup>120</sup>*Runnebaum v. NationsBank*, 123 F.3d at 172.

<sup>121</sup>See Michael Closen, *The Decade of Supreme Court Avoidance of AIDS: Denial of Certiorari in HIV-AIDS Cases and its Adverse Effects on Human Rights*, 61(4) ALB. L. REV. 897 (1998). As Dr. Closen points out, on more than 25 occasions since 1987, the Supreme Court has refused to grant writs of certiorari in HIV-AIDS cases.

<sup>122</sup>*Bragdon v. Abbott*, 118 S. Ct. 2196, 2200 (1998).

<sup>123</sup>See Petitioner's Brief, 1998 WL 4678 at 19.

<sup>124</sup>As the petitioner, Dr. Bragdon argued in his brief, it was Congress' intent to apply the definitions set forth in HUD regulations to the definition of "disability" under the ADA. S. Rep. No. 101-116, 101 st Cong., 1 st Sess. 21 (1989). In 1989, HUD added HIV to the illustrative list of "physical or mental impairments" in the final rule's definition of handicap. See 54 Fed. Reg. 3232, 3245 (Jan. 23, 1989). HUD regulations recognize HIV as an impairment, but not as a handicap *per se*. See Petitioner's Brief, *supra* n. 122 at 19-20.

Since it was essentially uncontested, the Supreme Court easily held that HIV infection is an impairment *per se* for purposes of the ADA.<sup>125</sup> The Court based its finding on regulations interpreting the Rehabilitation Act and on medical evidence about the disease itself. Interestingly, the court did not rely on EEOC regulations or Department of Justice regulations promulgated under the ADA itself. Those regulations specifically include in the definition of disability “. . . HIV disease (whether symptomatic or asymptomatic) . . .”<sup>126</sup>

The Court found that the ADA specifically provided in the statute that nothing in the ADA “shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. 790, et. seq.) or the regulations issued by Federal agencies pursuant to such title.”<sup>127</sup> Therefore, the court looked to the regulations issued pursuant to the Rehabilitation Act by the Department of Health, Education and Welfare in 1977. Though those regulations did not specifically refer to HIV, the Court reasoned that HIV had not yet been “discovered” as a disease and therefore would not have been included. However, based on medical evidence, the court found that “HIV infection does fall well within the general definition set forth by the regulations.”<sup>128</sup>

HIV infection is an incurable disease which, even before the onset of outward signs of illness, causes deterioration of the body’s ability to fight infections from many sources.<sup>129</sup> HIV creates abnormalities and deficiencies in the blood and immune systems.<sup>130</sup> When HIV enters the body, it multiplies and has an immediate and destructive effect on the blood (hemic) and lymphatic systems, which are critical to the body’s defense against infection.<sup>131</sup> Thus, even before the onset of overt symptoms, HIV infection causes a progressive destruction of the body’s blood, lymphatic and immune systems, diminishing the body’s capacity to fight infections.<sup>132</sup> The Court found that the term “asymptomatic phase” is a misnomer because clinical features persist from the very beginning of the infection including swollen lymph nodes, dermatological disorders, oral lesions, and bacterial infections.<sup>133</sup>

In finding that HIV infection is an impairment *per se*, the court held:

In light of the immediacy with which the virus begins to damage the infected person’s white blood cells and the severity of the disease, we hold it is an impairment from the moment of infection. . . . HIV infection must be regarded as a physiological disorder with a constant and

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<sup>125</sup>Bragdon v. Abbott, 118 S. Ct. at 2204.

<sup>126</sup>See n. 62, *supra*, and accompanying text.

<sup>127</sup>42 U.S.C. § 12201(a).

<sup>128</sup>Bragdon v. Abbott, 118 S. Ct. at 2203.

<sup>129</sup>*Id.* citing Greene, *Medical Management of AIDS*, 18-24 (M. Sande and P. Volberding eds., 5th ed., 1997).

<sup>130</sup>*Id.*

<sup>131</sup>*Id.*

<sup>132</sup>*Id.*

<sup>133</sup>*Id.* at 2204.

detrimental effect on the infected person's hemic and lymphatic systems from the moment of infection. HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease.<sup>134</sup>

Though the legislative history of the ADA supports a finding that HIV should be considered an "impairment" regardless of whether the individual is symptomatic or asymptomatic,<sup>135</sup> the Court did not review the legislative history in its discussion of the definition of "impairment." After finding that asymptomatic HIV was an impairment for purposes of the ADA, the court went on to discuss what constitutes a major life activity.

*B. What are Major Life Activities?*

The first prong of the ADA's definition of "disability" requires that an impairment "substantially limit one or more major life activities"<sup>136</sup> before the protections of the ADA apply. The statute is not triggered unless and until the claimant can show that the impairment impacts a major life activity and the degree of that impact raises to the level of "substantial limitation."

Abbott argued that the Court of Appeals correctly defined the word "major" when it found that the "plain meaning of the word 'major' denotes comparative importance" or "significance" and the term "life" is "notable for its breadth."<sup>137</sup> Abbott further argued that the phrase "life activities" encompasses a wide, expansive range and array of tasks, functions and pursuits which most people would engage in.<sup>138</sup> Congress could have chosen to use a narrower, more restrictive phrase such as "essential life activities" or "daily life activities." But the phrase "life activities" was specifically used to be broad enough to cover both the activities listed in the regulations<sup>139</sup> as well as other important basic life activities.

Abbott went on to argue that procreation, the life activity which creates life itself, is plainly a "major life activity."<sup>140</sup> Abbott pointed out that the Supreme Court has long recognized the importance of procreation, noting that it is "fundamental to the

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<sup>134</sup>*Id.*

<sup>135</sup>See n. 65-76 and accompanying text.

<sup>136</sup>42 U.S.C. § 12102(2)(a).

<sup>137</sup>Abbott v. Bragdon, 107 F.3d at 939-940; *See also* Doe v. Kohn, Nast & Graf, P.C., 862 F. Supp. at 1320 (finding that HIV is a disability, and noting that the "term 'major life activities' ... encompasses a lot [and includes] the various major activities embraced within the full scope of one's life").

<sup>138</sup>See Respondent's Brief, 1998 WL 47514 at 30.

<sup>139</sup>Abbott argued that the list of activities set out in the regulations were not exhaustive. *See* 28 C.F.R. § 36.104 ("major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working") (emphasis supplied); *see also*, 107 F.3d at 940(8a) (noting that the regulation "clearly ... indicates [that the] enumeration is not meant to be exclusive ...").

<sup>140</sup>Respondent's Brief, *supra* n. 137 at 17; *See* 107 F.3d at 939 ("reproduction, which is both the source of all life and one of life's most important activities, easily qualifies [as a major life activity]").

very existence and survival of the race.”<sup>141</sup> Accordingly, an individual’s interest in deciding whether or not to conceive and raise children and in actually doing so is a fundamental liberty interest, deserving of constitutional protection.<sup>142</sup> As Abbott pointed out in her brief:

Sexual relations is one of the most basic activities which humans engage in and, for the most part, is the *sine qua non* for reproduction. Decisions about sexual relations have always been fundamental to social ordering and lie at the heart of human relationships, intimacy, and socialization. Moreover, the inclusion of intimate sexual relations within the category of “major life activity” is consistent with the legislative history in which Congress specified that the term “major life activities” includes procreation and intimate sexual relations. H. Rep.–2 at 52.<sup>143</sup>

On the other hand, Bragdon argued that the focus of the ADA is on public, not private family life.<sup>144</sup> Bragdon argued that the purpose of the ADA was to bring people into the economic and social mainstream of American life.<sup>145</sup> Bragdon outlined the types of public accommodations covered under the ADA and said that this lengthy list of places is the “mainstream of American life” into which Title III of the ADA wants to bring people with disabilities.<sup>146</sup> Arguing that persons unable to conceive have no difficulty getting into this mainstream, Bragdon concluded that the activities of procreation and sexual intimacy are not the kind of activities that the ADA sought to encourage or protect.<sup>147</sup> Citing to *Krauel*<sup>148</sup> and to *Zatarain*<sup>149</sup>

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<sup>141</sup>See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

<sup>142</sup>See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 849 (1992). (fundamental liberty to make decisions about family and parenthood); *Carey v. Population Serv. Int’l*, 431 U.S. 678, 684 (1977). (“The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices.”); *Stanley v. Illinois*, 405 U.S. 645, 650 (1972). (unwed father’s due process right to companionship, care and custody of his children).

<sup>143</sup>Respondent’s Brief, *supra* n.137 at 17-18.

<sup>144</sup>Petitioner’s Brief, *supra* n. 122 at 14.

<sup>145</sup>*Id.* at 28 citing to H. Rep. 101-485(I), 101 st Cong., 2d Sess. 24, reprinted in 1990 U.S.C.C.A.N. 267, 268 (the ADA “will permit the United States ... to welcome individuals with disabilities fully into the mainstream of American society”); H. Rep. 101-485(II), 101 st Cong., 2d Sess. 22, reprinted in 1990 U.S.C.C.A.N. 303, 304 (the purpose of the ADA is “to bring persons with disabilities into the economic and social mainstream of American life”); H. Rep. 101-485(III), 101st Cong., 2d Sess. 23, reprinted in 199 U.S.C.C.A.N. 445, 446 (same); H. Rep. 101-485(IV), 101 st Cong., 2d Sess. 23, reprinted in 1990 U.S.C.C.A.N. 512, 512 (same).

<sup>146</sup>Petitioner’s Brief, *supra* n. 122 at 30.

<sup>147</sup>*Id.*

<sup>148</sup>*Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996).

<sup>149</sup>*Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D.La.1995) (unlike other activities on the regulatory list, a person is not “called upon to reproduce throughout the day, every day,” and treating reproduction as a major life activity under the ADA “would be a

Bragdon argued that sexual activity was not performed with the kind of frequency and regularity that Congress intended when it used the term "major life activity."<sup>150</sup>

The Supreme Court resolved this issue in favor of Abbott disagreeing with Bragdon's arguments regarding the nature of the protections afforded by the ADA. In dealing with the issue of "major life activity" the Court announced that it felt obligated to confine itself to an analysis of whether *reproduction* was a major life activity because "[F]rom the outset . . . the case has been treated as one in which reproduction was the major life activity limited by the impairment."<sup>151</sup> However, in dicta, the court noted that it had "little doubt that had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities."<sup>152</sup> Citing to the Court of Appeals decision, the court held that the definition of "major" denoted "comparative importance" suggesting that the standard to be used to determine whether an activity should be included as a major life activity is its significance.<sup>153</sup>

Based on this standard of "significance" the court had little difficulty finding that reproduction is a major life activity.<sup>154</sup> The Court found that reproduction and the intimate sexual relations surrounding it are central to the life process itself and therefore, are of the utmost significance to human survival.<sup>155</sup>

The Court specifically disagreed with the Dr. Bragdon's position that Congress intended the ADA to regulate aspects of a person's life that were public, not private. As described above, Bragdon had argued that the goal of the ADA was to provide a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."<sup>156</sup>

In addressing this public/private issue raised by Bragdon, the Court first looked to the ordinary definition of the word "major" and found that nothing in the definition that suggested that activities without a public, economic or daily dimension" are somehow unimportant or so insignificant as to be outside the meaning of the work "major."<sup>157</sup> The Court also reviewed the regulations to

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conscious expansion of the law ... beyond the province of this Court"), *aff'd*, 79 F.3d 1143 (5th Cir. 1996).

<sup>150</sup>Petitioner's Brief, *supra* n. 122 at 36-37.

<sup>151</sup>Bragdon v. Abbott, 118 S. Ct. at 2205.

<sup>152</sup>*Id.*; As Respondent Abbott argued in her brief, because HIV is an infectious, incurable, universally fatal disease, it inevitably limits substantially an array of major life activities. By setting an unexpected and premature endpoint on one's life, a fatal illness necessarily limits that life, and any life activities which require thinking about the future. Decisions about such matters as family, working, learning or education, even whether to buy a home, are restricted by the shortened nature of life itself. Thus, even in the implausible event that an individual with a fatal illness experienced neither any physical or psychological effect from the illness, simply by shortening life, the physical impairment would substantially limit many major life activities. Respondent's Brief, *supra* n. 129 at 18.

<sup>153</sup>Abbott v. Bragdon, 107 F.3d at 940.

<sup>154</sup>Bragdon v. Abbott, 118 S. Ct. at 2205.

<sup>155</sup>*Id.*

<sup>156</sup>42 U.S.C. Section 12101(b)(1) & (2).

<sup>157</sup>Bragdon v. Abbott, 118 S. Ct. at 2205.

determine if the regulations limited the meaning of the term “major” to just public activities. Again, the Court found no support for a limited reading of the term “major.” The Court found that the inclusion of other activities such as caring for one's self and performing manual tasks negate the reading that the Act only covers activities which are public or economic.<sup>158</sup> The Court concluded that reproduction and the sexual activities surrounding it are central to life and therefore fit into the definition of “major life activity.”

*C. What Constitutes Substantial Limitation?*

Even assuming that reproduction is a major life activity for purposes of the ADA, the protections of the ADA are not triggered until there is a showing that the major life activity identified has been substantially limited by the impairment alleged. In this context, Abbott argued that reproduction was substantially limited because an HIV-positive man and an HIV-positive woman risk infecting both their sexual partners as well as any children they conceive. Medical evidence revealed a 25% risk of transmission to the fetus by the mother without AZT treatment and an 8% risk to the fetus with the treatment. According to the Abbott's argument, even if a child is born uninfected, the fatal nature of HIV infection means that a parent is unlikely to live long enough to raise and nurture the child to adulthood. Obviously, this impacts on an individual's decision as to whether or not to have a child and, if so, how to raise the child. Additionally, Abbott argued even if an individual has no immediate plans to have children, he or she is substantially limited because future options are equally restricted.<sup>159</sup>

On the other hand, Dr. Bragdon argued that HIV infection did not *physically* limit reproduction but that the decision to not have children was a lifestyle choice and not due to the inability to have sex and become pregnant.<sup>160</sup> Citing to the *Runnebaum* case, Bragdon argued that an HIV positive woman, whether the infection is symptomatic or asymptomatic is not physically prevented from conceiving and having a child.<sup>161</sup>

The Court disagreed with Bragdon's argument and held:

The Act addresses substantial limitations on major life activities, not utter inabilities. Conception and childbirth are not impossible for an HIV victim but, without doubt, are dangerous to the public health. This meets the definition of a substantial limitation.<sup>162</sup>

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<sup>158</sup>*Id.*

<sup>159</sup>Respondent's Brief, *supra* n.137 at 22-24.

<sup>160</sup>See Petitioner's Brief, *supra* n. 114 p. 39 - 40. “Many asymptomatic women with HIV decide to become pregnant and have children, and most of their children are not infected with HIV. Many asymptomatic women with HIV decide not to have children. The difference between them is not physical, but decisions made according to their respective moral, religious, and cultural values. Physically, there is no substantial limitation on their abilities to reproduce, and therefore no disability under 42 U.S.C. s 12102(2)(A) . . .” *Id.* p. 41.

<sup>161</sup>*Id.*

<sup>162</sup>*Bragdon v. Abbott*, 118 S. Ct. at 2206.



Therefore, to satisfy the statutory standard of “substantial limitation” a claimant is not required to show that the major life activity is impossible to accomplish, just that there are substantial difficulties in doing so. The court found two bases to support its opinion that reproduction and sexual relations were substantially limited by HIV infection. First, there is at least a 20% risk of transmission of the HIV infection to male partners of women infected with the virus.<sup>163</sup> Second, the Court found that the risk of transmitting a dread and fatal disease to one's child, whether that risk is 25% without AZT therapy or 8% with the therapy, does represent a substantial limitation on reproduction.<sup>164</sup>

The Court also looked to the decisions of agencies who reviewed the question of whether asymptomatic HIV infection was a disability under the Rehabilitation Act and found that without exception, “every agency to consider the issue under the Rehabilitation Act found statutory coverage for persons with asymptomatic HIV.”<sup>165</sup> Likewise the court noted that case law fully supported the finding that asymptomatic HIV satisfied the Rehabilitation Act's definition of a handicap.<sup>166</sup>

Finally, the Court looked to the regulations promulgated by the Justice Department to implement the public accommodation provisions of Title III of the ADA. The Court found that Congress directed the Justice Department to promulgate regulations for the enforcement of the ADA and those regulations should be given deference.<sup>167</sup> As pointed out above, the Justice Department incorporated the definition of “handicap” verbatim from the regulatory definition under the Rehabilitation Act. Additionally, the Justice Department specifically added to the list of impairments HIV infection whether symptomatic or asymptomatic.<sup>168</sup> While this definition defines “impairment” and not necessarily “disability,” the technical assistance manual promulgated by the Department of Justice “concludes that persons with asymptomatic HIV infection fall within the ADA's definition of disability.”<sup>169</sup>

The court concluded that “reproduction and the sexual dynamics surrounding it” are major life activities that are substantially limited by HIV infection, whether the infection is symptomatic or asymptomatic.

#### *D. Did Abbott Present a Direct Threat to the Health and Safety of Others?*

The final question that the Court considered was whether Dr. Bragdon had the right to refuse to treat Ms. Abbott because her HIV infection presented a direct threat to his health and safety. Notwithstanding the protection given an individual with a disability pursuant to the ADA, the individual may not be protected if he or she poses a risk to the health of another.<sup>170</sup> In both Title I (employment) and Title III

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<sup>163</sup>*Id.* citing Osmond & Padian, *Sexual Transmission of HIV*, AIDS KNOWLEDGE BASE 1.9-8; Averkos & Battjes, *Female to Male Transmission of HIV*, 268 JAMA 1855, 1856 (1992).

<sup>164</sup>*Id.*

<sup>165</sup>*Id.* at 2207.

<sup>166</sup>*Id.* at 2208.

<sup>167</sup>*Bragdon v. Abbott*, 118 S. Ct. at 2209.

<sup>168</sup>*Id.*; See 28 C.F.R. 36.104(1)(iii).

<sup>169</sup>*Id.*

<sup>170</sup>42 U.S.C. Section 12182(b)(3).

(public accommodations), direct threat is defined as a significant risk to the health and safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.<sup>171</sup> The provision is based on the Supreme Court's holding in *School Board of Nassau County v. Arline*<sup>172</sup> and recognizes the need to balance an individual's right to be free from discrimination with the public's right to be free from significant health and safety risks.

The issue is not the mere existence of a risk but the significance of the risk.<sup>173</sup> The risk assessment must be based on medical or other objective evidence and must take into consideration certain factors set out in the regulations. The regulations provide that a provider must make an individualized determination based on current medical knowledge "to ascertain: the nature, duration and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk."<sup>174</sup>

In the *Arline* case, the Supreme Court reserved on the issue of whether courts should defer to the reasonable medical judgments of private physicians on which an employer had relied.<sup>175</sup> In *Bragdon v. Abbott*, Dr. Bragdon argued that a health care provider's good faith belief that a direct threat exists should be sufficient to avoid liability and that the lower court should have deferred to his medical judgment in refusing to treat Ms. Abbot. The Supreme Court rejected this argument and held that courts should assess the objective reasonableness of the views of health care professionals, and not simply defer to their individual judgments.<sup>176</sup> The Court concluded that the proper course was to remand the issue of direct threat to the lower court to determine whether there was sufficient objective evidence to show that asymptomatic HIV posed a significant risk that would threaten the health or safety of Dr. Bragdon.<sup>177</sup>

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<sup>171</sup>*Id.*; 42 U.S.C. Section 12111(3), 12113(b).

<sup>172</sup>*School Board of Nassau County v. Arline*, 480 U.S. 273, 107 S. Ct. 1123 (1987).

<sup>173</sup>*Bragdon v. Abbott*, 118 S. Ct. at 2210.

<sup>174</sup>28 C.F.R. Section 36.208(c).

<sup>175</sup>*School Board of Nassau County v. Arline*, 107 S. Ct. at 1131, n18.

<sup>176</sup>*Bragdon v. Abbott*, 118 S. Ct. at 2211.

<sup>177</sup>The First Circuit Court of Appeals recently issued a ruling on remand from the Supreme Court in which the court concluded that Dr. Bragdon failed to meet his burden of adducing evidence sufficient to raise a triable issue of fact on the significance of the risk posed by treating, in his office, a patient with asymptomatic HIV. The Court was careful to limit its ruling to the evidence previously submitted and relied on by Dr. Bragdon. With respect to the future use of the ruling as precedent, the court said: "The state of scientific knowledge concerning this disease is evolving, and we caution future courts to consider carefully whether future litigants have been able, through scientific advances, more complete research, or special circumstances, to present facts and arguments warranting a different decision." *Bragdon v. Abbott*, 163 F.3d 87 (1st Cir. 1999), *cert. den.*, 1999 WL 169516 (May 24, 1999)(No. 96-1643).

## VI. QUESTIONS NOT ANSWERED BY THE SUPREME COURT

The decision in *Bragdon v. Abbott* provided answers to some important questions but left unanswered many questions that will have to be resolved by courts in the future. While the Supreme Court addressed the issue of whether asymptomatic HIV is an impairment *per se*, it refused to address the question it asked counsel to brief--whether asymptomatic HIV is a "disability" *per se*.<sup>178</sup> While the majority clearly held that HIV is always a physical impairment, it refused to find that it was always a disability. Though the opinion suggests that HIV will usually be found to be a disability, the opinion makes it equally clear that courts are required to make a case-by-case assessment of whether the HIV significantly limits a major life activity.<sup>179</sup>

The lack of clarity provided by the ruling in *Bragdon v. Abbott* creates a problem from a public health perspective. Public health officials have long recognized that the best way to fight the AIDS pandemic is through education, early testing, early treatment and counseling.<sup>180</sup> The more secure a person feels about their legal protections, including freedom from discrimination and assurance of confidentiality, the more willing a person will be to submit to an HIV test to determine whether they are HIV positive. The failure of the Supreme Court to clearly state that HIV is always a disability, means that the individual can have no guarantee of legal protection from discrimination. This result may discourage persons from being tested if they cannot be assured that a positive result would afford them protections under the ADA. Instead of making it clear that these legal protections are to be afforded HIV-positive persons in every case, the court requires an individualized case-by-case analysis to determine whether an each individual is covered by the ADA. For each case, the court must determine what major life activity is effected and whether the HIV significantly limits participation in that activity.

In addition, the failure to make clear that HIV is always a disability for purposes of the ADA, may impact an employer's decision about the nature and extent of health insurance benefits to be provided for HIV treatment. The ADA prohibits employers from discriminating against disabled employees in terms of employee benefits including health and disability benefits.<sup>181</sup> The Equal Opportunity Employment Commission (EEOC) has consistently taken the position that health insurance plans that place a monetary cap on HIV treatment when other treatments are not capped is discriminatory under the ADA.<sup>182</sup> Of course, this result depends on the underlying

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<sup>178</sup>*Bragdon v. Abbott*, 118 S. Ct. at 2207, the Court held: "Respondent's HIV infection is a physical impairment which substantially limits a major life activity, as the ADA defines it. In view of our holding, we need not address the second question present, *i.e.* whether HIV infection is a *per se* disability under the ADA."

<sup>179</sup>*Abbott v. Bragdon*, 107 F.3d at 940.

<sup>180</sup>Gostin, Larry, *A Decade of a Maturing Epidemic: An Assessment of Directions for Future Public Policy*, 5 NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY 7 (1990).

<sup>181</sup>42 U.S.C. Section 12112(a); 29 C.F.R. 1630.4(f).

<sup>182</sup>*See e.g. EEOC v. Allied Services Division Welfare Fund*, 4 NATIONAL DISABILITY LAW REPORTER 1 (October 27, 1993)(Settlement included employer's agreement to rescind a \$5,000 lifetime cap on AIDS-related treatment.); *EEOC v. Connecticut Refining Co.*, NDLR (April 13, 1994)(Connecticut company entered into a conciliation agreement with EEOC whereby it agreed to delete the \$5,000 benefit limitation relating to AIDS and AIDS-related treatment.); *EEOC v. Tarrant Distributors, Inc.*, 750 F. Supp. 1249 (S.D.Tex. 1994)(Consent

assumption that persons with HIV are disabled for purposes of the ADA. If HIV is not always a disability, could benefits be limited or withheld for some HIV infected employees until they reach the later stages of the disease? If employees at the earliest stage of HIV can be denied health benefits for HIV treatment, they may be denied critical treatment which has now been shown to prolong the life of persons infected with HIV. The failure to find that HIV is a *per se* disability complicates the employer's decision regarding the nature and extent of their obligation to provide health care benefits and may undermine an employee's ability to claim the employer is obligated to provide health care for HIV treatment on the same basis that other diseases are covered.

On one hand, the opinion helped to clarify the meaning of "major life activities" in that the Court clearly rejected Bragdon's argument that "major life activities" was limited to basic daily activities that are done with frequency and regularity such as eating, breathing, and caring for oneself. The Court also made it clear that "major life activities" did not only include "public" activities but rather extended to private activities, as well. Finally, the Court recognized that "major" denotes activities that are "important" or "central" to the life process. This ruling did not limit the kinds of activities that courts could consider "major" in the way Bragdon had argued that the term should be limited.

The Court also clearly found that reproduction is a major life activity, a decision that will help HIV-positive persons in claiming the protections of the ADA and also may lead the way for the protection of persons seeking access to medical care for infertility problems. However, in finding that reproduction was a major life activity, the Court found that: "Reproduction *and the sexual dynamics surrounding it* are central to the life process itself (emphasis added)."<sup>183</sup> Did the court mean that having a sexual relationship alone is also central to the life process? Could a claimant who is HIV-positive claim the protections of the ADA on the basis of being unable to maintain a sexual relationship because of his/her HIV disease regardless of any desire to reproduce? Would a claimant who is unable to reproduce because of menopause still be able to claim the protections of the ADA on the basis that her HIV disease significantly limits her ability to have a sexual relationship?

The opinion notes that Ms. Abbott's testimony regarding her decision not to have children because of her HIV disease was important and unchallenged. Does the opinion, then, imply that a claimant must show she personally had reproductive plans that were interfered with because of the disability? Must a plaintiff show, not only that she is substantially limited in reproduction, but that reproduction is of particular importance to her individually? The extent to which the claimant must show that the "activity" claimed is personally significant and not just significant generally remains unclear from this opinion.

Justice Kennedy, who wrote the majority opinion in *Bragdon*, points out that there may be many types of activities that are significantly impacted by HIV. As he stated "had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities."<sup>184</sup> Justice

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order whereby company agreed to eliminate a cap on AIDS benefits); *EEOC v. Lee Data Corporation*, slip op. DV 9103874 (D.Cal. 1995)(company agreed to raise cap on AIDS benefits from \$100,000 to \$1 million).

<sup>183</sup>*Bragdon v. Abbott*, 118 S. Ct. at 2205.

<sup>184</sup>*Id.*

Ginsberg, who wrote a concurring opinion lists many activities that she found to be significantly impacted by HIV. For example, she noted that HIV “. . . inevitably pervades life’s choices: education, employment, family and financial undertakings. It affects the need for and. . . the ability to obtain health care because of the reaction of others to the impairment.”<sup>185</sup> According to Justice Ginsberg, these problems affect the ability of one to care for oneself, one of the definitions of “major life activity.”<sup>186</sup> However, it is unclear from the opinion how far the court will go in identifying “major life activities.” This more universal approach to defining “major life activities” comes close to defining asymptomatic HIV as a disability per se since HIV at any stage impacts anyone infected in the ways set forth in Justice Ginsberg’s concurring opinion.

Another question left open by this opinion is the question of the relevance of medication in lessening the impact of the effects of HIV and prolonging the life expectancy of the person infected. The EEOC has long taken the position that the determination of disability should be made without regard to the ameliorative effects of medication.<sup>187</sup> The Supreme Court recently decided three cases all involving an issue which had created a split in Circuit Court of Appeals opinions. All three cases addressed whether the determination that an individual is disabled, within the meaning of the ADA, should be made with or without consideration of mitigating measures such as medication or assistive devices?<sup>188</sup> In one of the cases, *Murphy v. United Parcel Service, Inc.*<sup>189</sup> the lower court found that Murphy, a truck mechanic with severe hypertension, was not disabled for purposes of the ADA because he experienced no substantial limitation in a major life activity when his condition was treated with medication.<sup>190</sup> The Supreme Court affirmed the lower court’s decision that Murphy was not disabled since he could function normally when his blood pressure was controlled by medication.<sup>191</sup> While the *Bragdon v. Abbott* case considered medication in its analysis of perinatal transmission,<sup>192</sup> it failed to address

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<sup>185</sup>*Id.* at 2213.

<sup>186</sup>*Id.*

<sup>187</sup>EEOC Compliance Manual, Section 902.5 (March 1995).

<sup>188</sup>*Murphy v. United Parcel Service*, 141 F.3d 1185 (10th Cir. 1998), *cert. granted* 119 S. Ct. 790 (1999); *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997), *cert. granted* 119 S. Ct. 790 (1999); *Albertsons, Inc. v. Kirkingburg*, 143 F.3d 1228 (9th Cir. 1998), *cert. granted* 119 S. Ct. 791 (1999); EEOC guidelines provide that the disability determination should be made on a case-by-case basis without regard to mitigating measures. The 6th and 10th Circuits have rejected that position while the 1st, 3rd, 7th, 8th, 9th and 11th Circuits have ruled that the determination must be made without considering the effects of medication or assistive devices. 67 U.S.L.W. 3663 (May 4, 1999).

<sup>189</sup>*Murphy v. United Parcel Service, Inc.*, 141 F.3d at 1192.

<sup>190</sup>*Id.*

<sup>191</sup>*Id.* at 2137.

<sup>192</sup>The Court discussed the #076 clinical trials in which it was shown that certain treatments of AZT during the third trimester of pregnancy can reduce the transmission of HIV from mother to baby from approximately 25% down to 8%. *Bragdon v. Abbott*, 118 S. Ct. at 2206. Even at 8% risk of transmission to the fetus, the court held that this risk was significant.

the bigger question of how the courts should assess the impact of medication in determining disability. New treatments for HIV include “drug cocktails” that have been effective in reducing the viral load of HIV to such a minimal level as to be almost non-existent for some period of time. How should the disability determination take into account the effect of medication on HIV disease? Even though the viral load may be quite small, the risk of transmission to a partner or to a fetus would still substantially limit the major life activity of procreation. Additionally, if the “disability” determination must be made after consideration of the ameliorative effects of medication, it is arguable that such a holding might discourage some individuals from taking medication that may improve their condition but make them ineligible for the protections afforded under the ADA.

Another critical question left unanswered relates to the direct threat defense raised by Dr. Bragdon. As stated above, Dr. Bragdon argued that even if Ms. Abbot was protected under the ADA that he had a right to protect his health and safety from the risk her HIV infection posed for him. The Court held that deference should be given to the opinions of public health officials but did not describe who qualifies as a public health official. The Court suggested that the opinions of the American Dental Association should not be relied on because it is not a public health agency.<sup>193</sup> However, the Court did not elaborate as to which organizations did qualify. The Court failed to elaborate as to how opinions of local, state or national health officials should be balanced and which one should be given greater weight in the vent of a disagreement between officials.

More importantly, though, there was a failure to analyze what constitutes a significant risk. Dr. Bragdon refused to treat Ms. Abbott in his office because of his belief that there was a risk of transmission. In forming his opinion, he relied on his knowledge of seven unconfirmed cases of dental transmission of HIV plus forty-two cases of occupational health transmission outside of dentistry.<sup>194</sup> In the main opinion, the Court found that it was unclear whether Bragdon knew that the seven dental cases had not been confirmed by CDC when he made his decision not to treat Ms. Abbott. According to the main opinion, if Dr. Bragdon was not aware that the cases were unconfirmed then they may have provided some support for his refusal to treat.<sup>195</sup> What was left unanswered was exactly what degree of risk would be deemed significant in the case of a fatal disease. Though the main opinion points out that no endeavor can be expected to be risk free, it still fails to elaborate what constitutes a “significant” risk. Since HIV is a fatal disease, does *any* probability of transmission, no matter how remote, constitute “significant risk” since the transmission would surely result in death? If that were the rule applied by courts, the protections afforded under the ADA to persons infected with HIV would be greatly undermined.

## VII. CONCLUSION

While the *Bragdon v. Abbott* decision resolved some issues and made clear that reproduction is a major life activity for purposes of the Americans With Disabilities

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“It cannot be said as a matter of law that an 8% risk of transmitting a dread and fatal disease to one’s child does not represent a substantial limitation on reproduction.” *Id.*

<sup>193</sup>*Bragdon v. Abbott*, 118 S. Ct. at 2212.

<sup>194</sup>*Id.* at 2217.

<sup>195</sup>*Id.* at 2212.

Act, many questions were left unanswered and unresolved. The court failed to directly address whether HIV disease is a disability *per se*. It failed to address what the role of public health officials should be or what probability of risk constitutes a “significant risk.”

As Justice Ginsberg noted in her concurring opinion, the third prong of the definition of disability, that the individual is perceived as having a disability, may be the real basis for a finding that HIV is *per se* a disability.<sup>196</sup> As discussed above, the third definition of the word “disability” is designed to protect individuals from the myths and fears associated with disabilities. A person is protected if the individual has an impairment and is treated as if he or she has a substantial limitation even though there is no limitation or the limitation exists because of the attitudes of others toward the individual with the impairment. Although the parties briefed the meaning of this third definition, the court did not consider its application in *Bragdon v. Abbott*. By not considering it, the court did not address whether the negative treatment that people experience is, in fact, the essence of what defines a disability in order to trigger the protections against discrimination for people with disabilities.

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<sup>196</sup>*Id.* at 2214.