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ASYMPTOMATIC HIV UNDER THE ADA: THE INVISIBLE, YET LEGITIMATE DISABILITY¹

INTRODUCTION

On July 26, 1990, Congress took a giant step toward equal opportunities for persons with disabilities by enacting the Americans with Disabilities Act (ADA or Act),² a statute designed to prevent discrimination and provide certain protections to persons with disabilities.³ Congress found that there needs to be protections for persons with disabilities because, as part of a discrete and insular minority, these individuals suffer from discriminatory treatment and societal stereotypes due to their disabilities.⁴

The ADA prohibits discrimination against individuals with disabilities.⁵ Since its enactment, however, many questioned what constitutes a

1. This Comment was drafted before the Supreme Court's recent decision in *Bragdon v. Abbott*, 118 S. Ct. 2196, 2205 (1998), in which the Court held that an individual with asymptomatic HIV has a disability under the Americans with Disabilities Act. *See id.* at 2207. This Comment analyzes the law prior to this decision and argues that individuals with asymptomatic HIV, just like those with AIDS, have a disability. While this Comment applies an analysis similar to the Court's, it also includes additional arguments for why an asymptomatic individual has a disability under the ADA. These additional arguments are of particular significance in light of the Supreme Court's statement that there may be other grounds upon which asymptomatic HIV is a disability under the ADA. *See id.* at 2205.

2. 42 U.S.C. §§ 12101-12213 (1994). The Act is divided into the following titles: Title I - employment discrimination, Title II - state and local government services, Title III - public accommodations, Title IV - telecommunications, and Title V - retaliation and coercion. *See* JOHN PARRY, REGULATION, LITIGATION AND DISPUTE RESOLUTION UNDER THE AMERICANS WITH DISABILITIES ACT 2 (1996).

3. *See* 29 C.F.R. App. § 1630 (1998). The ADA is compared to the Civil Rights Act of 1964 because its purpose is to provide persons with disabilities the same employment opportunities available to others; however, unlike the Civil Rights Act, which prohibits attention to personal characteristics, the ADA requires employers to determine if there is a way to "remove the barrier" caused by the disability. *See id.*

4. *See* 42 U.S.C. § 12101(a); *see also* PARRY, *supra* note 2, at 2.

5. *See* 42 U.S.C. §§ 12111, 12132, 12182 (1994). The employment section of the statute generally states that employers are prohibited from discriminating against a person who is disabled, but otherwise qualified in the context of "job

disability due to the broad, and at times, ambiguous wording used to define a disability.⁶ One such question arose in the context of Human Immunodeficiency Syndrome (HIV) infection in regard to individuals who show no outward symptoms. These individuals are asymptomatic. The issues surrounding whether asymptomatic HIV is a disability have received heightened attention because of the changing aspects of the HIV virus in recent years.⁷ Acquired Immune Deficiency Syndrome (AIDS), once associated almost exclusively with homosexuals and illegal drug users,⁸ is becoming increasingly prevalent in every spectrum of our society.⁹ The United Nations' AIDS office reports that thirty million people worldwide have the HIV virus.¹⁰ Yet, while more people are

application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* § 12112(a) (1994). The ADA lists specific instances when discrimination can occur in this context, which include:

- (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee; . . .
- (3) utilizing standards, criteria, or methods of administration—
 - (A) that have the effect of discrimination on the basis of disability; or
 - (B) that perpetuate the discrimination of others who are subject to common administrative control; . . .
- (5)(A) not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual . . .
- (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant

Id. § 12112(b).

6. See *id.* § 12102(2) (1994); Mark Parenti, *Three Years of the Americans with Disabilities Act: Lessons for Employers*, 6 NLCPI WHITE PAPER, No. 1, 1 (Oct. 1995).

7. See JAMES G. FRIERSON, *EMPLOYER'S GUIDE TO THE AMERICANS WITH DISABILITIES ACT 211* (2d ed. 1995).

8. See Wendy E. Parmet & Daniel J. Jackson, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 AM. J.L. & MED. 7, 43 n.2 (1997).

9. See Justin Gillis, *Ruling Shows How Far Nation Has Evolved on Epidemic*, WASH. POST, June 26, 1998, at A16.

10. See Geoffrey Cowley, *Is AIDS Forever?*, NEWSWEEK, July 6, 1998, at 60. The reason for the increase in the total number of cases is not because there was an increase in the number of new cases diagnosed in recent years, but rather because persons originally diagnosed are able to live much longer than previously

contracting the virus, the nature of the virus' impact is changing because death is no longer imminent.¹¹ Instead, many people who are HIV-positive can maintain active lifestyles for years after their initial diagnosis and may have no physical symptoms for up to fifteen years.¹² Because HIV-positive individuals are becoming more common in the workforce, it is necessary to determine whether the ADA protects HIV-positive individuals, especially those without symptoms.¹³

The statute on its face does not state whether asymptomatic HIV-positive individuals are disabled under the ADA. Therefore, one must look to the legislative history, agency regulations, and case law to interpret the Act. Initially, the federal courts consistently found HIV-positive individuals, even when asymptomatic, to be disabled under the Act. This pattern changed when the Fourth Circuit found that an asymptomatic HIV-positive individual had no physical impairment that may be deemed disabling by the ADA.¹⁴ The United States Supreme Court took notice of the inconsistency in the circuits and granted certiorari to hear arguments from a case out of the First Circuit, *Bragdon v. Abbott*,¹⁵ thereby rendering the landmark ruling that an individual with asymptomatic HIV has a disability under the ADA.¹⁶

This Comment analyzes the definition of a disability under the ADA, focusing on why asymptomatic individuals with the HIV virus qualify as disabled, independent of the Supreme Court's recent holding. Part I provides background on the nature of the HIV virus, the Federal Rehabilitation Act, and the Americans with Disabilities Act. Part II discusses the pertinent administrative guidelines and federal court decisions addressing this issue. Part III considers different approaches to determine

thought. See FRIERSON, *supra* note 7, at 210.

11. See Parmet & Jackson, *supra* note 8, at 7.

12. See FRIERSON, *supra* note 7, at 211. People who are infected with the HIV virus are now able to live longer and fuller lives after the original diagnosis because of the medication available. See *id.* This means more people are able to remain in the workforce with the HIV virus. See *id.*

13. See *id.* at 210.

14. See *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 169-70 (4th Cir. 1997).

15. 118 S. Ct. 554 (1997). The Supreme Court listened to arguments limited to three questions - two of which are relevant to the ADA's protection of asymptomatic individuals with HIV: (1) Is reproduction a major life activity under the ADA? (2) Does an asymptomatic individual with HIV have a *per se* disability in terms of the ADA? See *Bragdon*, 118 S. Ct. at 554.

16. See *Bragdon*, 118 S. Ct. at 2213.

whether such an individual has a disability under the ADA. This section looks at the elements necessary to find a disability, focusing on whether there is a physical impairment, whether the virus affects a major life activity, and whether there is a substantial limitation on that activity. Additionally, this section discusses when the effects of people's perceptions of an individual can render a person disabled. Part IV addresses whether the ADA protects an asymptomatic individual in light of the language of the Act, legislative history, congressional intent, federal court decisions, and the interpretative guidelines promulgated by the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ). This Comment concludes that an individual with the HIV virus, albeit displaying no signs of the disease, is disabled within the meaning of the term "disability" under the ADA. Due to the nature of the virus, he or she has a physical impairment that substantially limits a major life activity.

I. BACKGROUND: HIV AND THE ADA

A. HIV Infection

The Human Immunodeficiency Virus (HIV) is the retrovirus that causes the illness, Acquired Immune Deficiency Syndrome (AIDS).¹⁷ When HIV infects a person, the virus penetrates and disables white blood cells within the body.¹⁸ Although the virus permeates the body of an individual, he or she may not show any indication of the illness.¹⁹

There are three different stages that an individual experiences once he or she has become infected with HIV.²⁰ These stages "form a spectrum of related conditions" that eventually prove fatal in many instances.²¹ During the first stage, when a person is initially infected, he or she generally will show no outward symptoms.²² Although an individual is asymptomatic during this period, he or she can still infect other persons

17. See GLAXO, INC., CARING FOR PATIENTS WITH HIV INFECTION 15 (1989).

18. See *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990) (HIV is the causative agent of AIDS in that it "penetrates and then disables white blood cells which normally check the growth of parasitic infections in the body.").

19. See FRIERSON, *supra* note 7, at 211.

20. See *id.* at 211.

21. See *Cain*, 734 F. Supp. at 679.

22. See FRIERSON, *supra* note 7, at 211.

with the virus through the exchange of bodily fluids.²³ Sexual partners and unborn children are especially vulnerable to infection.²⁴ The second stage of the virus is called AIDS Related Complex (ARC).²⁵ During this stage, the individual begins to develop general systemic symptoms.²⁶ These symptoms can include loss of appetite, fever, weight loss, diarrhea, skin rashes, and swollen lymph nodes.²⁷ The final stage of the virus is when the individual develops AIDS.²⁸ AIDS causes a person's immune system to break down, resulting in "infection by a variety of opportunistic bacterial, fungal, protozoan, and viral pathogens."²⁹ In simpler terms, the individual is susceptible to diseases that a healthy person would be able to combat.

B. Overview of the Federal Legislation Related to Disabilities

1. The Rehabilitation Act of 1973

The first piece of federal legislation enacted by Congress for persons with disabilities in the workplace was the Rehabilitation Act of 1973 (Rehabilitation Act).³⁰ This statute prohibited entities from discriminating against a person due to his or her disability when the individual is otherwise qualified.³¹ Unfortunately, the protection provided by the Rehabilitation Act is limited. The Rehabilitation Act only applies to federal government agencies and organizations that receive federal funds or contracts that exceed a certain amount.³²

23. *See id.*

24. *See id.*

25. *See id.*

26. *See* GLAXO, INC., *supra* note 17, at 14.

27. *See* FRIERSON, *supra* note 7, at 211. These symptoms, which are commonly associated with other diseases, are more severe when associated with AIDS. *See id.*

28. *See id.*

29. GLAXO, INC., *supra* note 17, at 13. Common symptoms associated with AIDS are persistent cough and fever, shortness of breath, as well as blotches and bumps on skin. *See* FRIERSON, *supra* note 7, at 212.

30. *See* 29 U.S.C. §§ 791-794 (1994).

31. *See id.* § 794. The Rehabilitation Act refers to disabled persons as "handicapped." A "handicap" under the Rehabilitation Act is exactly the same thing as a "disability" under the ADA. *See* 29 C.F.R. App. § 1630.1 (1998).

32. *See* 29 U.S.C. § 794. Section 504 of the Act provides that,

[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the par-

2. *The Americans with Disabilities Act of 1990*

In order to expand the limited protection given to individuals with disabilities, Congress enacted the Americans with Disabilities Act in 1990.³³ The ADA broadened the protections that persons with disabilities receive by increasing the scope of entities covered. *All* employers with fifteen or more employees, places of public accommodations, and public entities are included under the Act.³⁴ The ADA does not override the Rehabilitation Act; rather, it builds on it.³⁵ Because the ADA extends the reach of those who must abide by the Rehabilitation Act, all sources interpreting the Rehabilitation Act apply to the ADA as well.³⁶

Under the ADA, employers and public entities are prohibited from discriminating against a "qualified individual with a disability."³⁷ Such a qualified individual with a disability is a person who can perform the essential requirements of a position or activity with or without reasonable accommodations or modifications.³⁸ The ADA likewise extends this prohibition against discrimination based on an individual's disability to places of public accommodations.³⁹ Anyone who owns, leases, or operates a public accommodation cannot discriminate against an individual because of a disability "in the full and equal enjoyment of the goods,

ticipation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any executive agency or by the United States Postal Service.

Id. § 794(a). See also PARRY, *supra* note 2, at 1.

33. 42 U.S.C. §§ 12101-12213 (1994). The term "Americans" is not meant to refer only to American citizens, but includes all employees, even those who are not citizens of this country. See 29 C.F.R. App. § 1630.1(a).

34. See 42 U.S.C. § 12111(5)(A) (stating that an employer is a person involved in commerce who has at least fifteen employees for at least twenty weeks per year); 42 U.S.C. § 12182 (stating that no individual shall be discriminated against on the basis of a disability by anyone who owns, leases, or operates a public accommodation); 42 U.S.C. § 12132 (stating that no public entity shall discriminate against a qualified individual with a disability).

35. See 42 U.S.C. § 12201; see also 42 U.S.C. §§ 12101-12213; 29 U.S.C. §§ 791-794; PARRY, *supra* note 2, at 2.

36. See 42 U.S.C. §§ 12111(5)(A), 12182(a), 12201; 29 U.S.C. § 794(a); see also *Coleman v. Zatechka*, 824 F. Supp. 1360, 1367 (D. Neb. 1993); PARRY, *supra* note 2, at 1.

37. See 42 U.S.C. §§ 12112, 12132; see also Parenti, *supra* note 6, at 2-3.

38. See 42 U.S.C. §§ 12111(8), 12131; see also Parenti, *supra* note 6, at 2-3 (citing 42 U.S.C. § 12111(8)).

39. See 42 U.S.C. § 12182.

services, facilities, privileges, advantages, or accommodations.”⁴⁰

However, the ADA articulates specific defenses to claims of discrimination. An employer can argue that there would be an “undue hardship” on the employer to accommodate the individual⁴¹ or that the individual would be a “direct threat to others.”⁴² There are similar provisions in the public accommodations and services subchapter of the ADA.⁴³ An entity does not have to make modifications or take steps to ensure the inclusion of persons with disabilities when it would “fundamentally alter the nature of . . . [the] goods, services, facilities, privileges, advantages, or accommodations.”⁴⁴ In addition, an entity is not required to take steps that would result in an undue burden.⁴⁵

For individuals with HIV to be protected under the ADA, they must be deemed members of a protected class.⁴⁶ In order for an HIV-positive individual to be within the class protected by the ADA, he or she must have a disability as defined in the statute.⁴⁷ A person has a disability if his or her situation falls within one of the following three prongs of the definition of disability: “(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 an impairment.”⁴⁸

40. *Id.*

41. *See* 42 U.S.C. § 12112(b)(5)(A); *see also* Parenti, *supra* note 6, at 29 (quoting 42 U.S.C. § 12111(10)(A)). Undue hardship is defined as “an action requiring significant difficulty or expense.” 42 U.S.C. § 12111(10)(A). The ADA lays out four factors to determine when an accommodation would be an undue hardship for the employer. *See* 42 U.S.C. § 12111(10)(B)(i-iv). The factors include the nature and cost of the accommodation and the overall impact that the accommodation would have on the employer. *See id.*

42. 42 U.S.C. § 12113(b). For purposes of the ADA, a direct threat is defined as “significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” *Id.* § 12111(3).

43. *See id.* § 12182(b)(2)(A).

44. *Id.* § 12182(b)(2)(A)(ii).

45. *See id.* § 12182(b)(2)(A)(iii).

46. *See* *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 164 (4th Cir. 1997).

47. *See id.* at 166; 42 U.S.C. § 12102(2).

48. 42 U.S.C. § 12102(2).

II. JUDICIAL AND ADMINISTRATIVE INTERPRETATIONS OF THE TERM "DISABILITY"

The controversy over whether the ADA protects a person with HIV who has no outward symptoms focused on whether such a person has a disability under the statute. Governmental entities, such as the EEOC and the DOJ have promulgated regulations to interpret the provisions of the ADA.⁴⁹ These regulations help determine who is protected under the ADA, and more specifically, what is considered a disability under the Act.⁵⁰ The regulations give considerable attention to the first prong of the definition of a disability, whether a person has a physical or mental impairment which substantially limits a major life activity.⁵¹ The regulations divide the first prong into three different subsections.⁵² Each subsection must be satisfied in order to qualify as disabled under the first prong.⁵³ The first subsection is a physical or mental impairment.⁵⁴ A physical impairment is defined to include a physiological disorder which affects the "neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic" body systems.⁵⁵ The DOJ regulations expressly list HIV as one of the impairments included in this definition.⁵⁶ The regulations specifically list both symptomatic and asymptomatic HIV as impairments under the ADA.⁵⁷

The second subsection requires that the impairment affect a major life

49. See 29 C.F.R. §§ 1630.1-1630.16 (1998); 28 C.F.R. §§ 36.101-36.608 (1998). The EEOC has jurisdiction over Title I - employment, while the DOJ has jurisdiction over Title III - public accommodations. See also The Department of Health, Education, and Welfare (HEW) regulations interpreting the Rehabilitation Act. 45 C.F.R. §§ 84.1 - 84.56 (1997). The Supreme Court held the HEW regulations as particularly significant in the interpretation of a disability, because at the time they were promulgated, HEW was the agency "responsible for coordinating the implementation and enforcement of § 504." *Bragdon v. Abbott*, 118 S. Ct. 2196, 2202 (1998).

50. See 29 C.F.R. § 1630.2(g) (1998).

51. See *id.* § 1630.2.

52. See *id.* § 1630.2(g)-(j).

53. See 42 U.S.C. § 12102.

54. See 29 C.F.R. § 1630.2(h).

55. *Id.*

56. See 28 C.F.R. § 36.104 (1998).

57. See *id.*

activity.⁵⁸ "Major life activities" are activities which the average person can perform "with little or no difficulty."⁵⁹ Although a specific list of activities is given, the list is not exhaustive.⁶⁰ Lastly, under this prong, the limitation of the major life activity must be substantial.⁶¹ In order to be substantially limited, one of two situations must occur; either the person cannot perform a major life activity that the average person is able to perform,⁶² or the person is considerably restricted in regard to the manner, condition, or duration under which he can perform the activity.⁶³

Prior to *Bragdon v. Abbott*, the only United States Supreme Court decision to address whether an individual has a disability arose under the Rehabilitation Act. In *School Board of Nassau County v. Arline*,⁶⁴ the plaintiff was a schoolteacher who was fired when she suffered a relapse of tuberculosis.⁶⁵ Arline brought an action against the school board claiming its actions against her violated Section 504 of the Rehabilitation Act.⁶⁶ The Court focused on the fact that in 1974, Congress amended the definition of the term disability to include a person who has a record of an impairment or who is regarded as having an impairment.⁶⁷ The Court recognized that Congress was concerned with protecting individuals against the "effects of erroneous but nevertheless prevalent perceptions about the handicapped."⁶⁸ Based on this, the Court

58. See 29 C.F.R. § 1630.2(g).

59. *Id.* § 1630.2(i). These regulations define major life activities to include the following: "[C]aring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." *Id.*

60. See 29 C.F.R. App. § 1630.2(i).

61. See *id.* § 1630.2(j).

62. See *id.* § 1630.2(j)-(i).

63. See *id.* § 1630.2(j)(2). There are certain factors which should be considered in order to determine whether there is a substantial limitation to a major life activity. These factors are as follows: "(i) The nature and severity of the impairment; (ii) The duration or 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." *Id.*

64. 480 U.S. 273 (1987).

65. See *id.* at 276. The plaintiff had been working for Nassau County for approximately thirteen years at the time she suffered her third relapse of tuberculosis. See *id.*

66. See *id.*

67. See *id.* at 279.

68. *Id.*

found that Arline had a handicap.⁶⁹ Although she did not meet the first prong because she was not suffering from tuberculosis at the time, she did have a record of an impairment because she had been hospitalized for her tuberculosis.⁷⁰ In explaining that the contagiousness of Arline's illness and the actual impairment to her could not be distinguished, the Court stressed that contagious diseases can render a person regarded as disabled because other people perceive the individual as having a disability.⁷¹ The Court stated, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness."⁷² Based on this decision, it would seem that any contagious disease, whether symptomatic or asymptomatic, could render a person disabled.⁷³ However, the Court specifically refrained from answering the question of whether a "carrier of a contagious disease such as AIDS" could have a handicap under the Rehabilitation Act.⁷⁴

Numerous federal circuit and district court decisions addressed the issue of whether an individual with asymptomatic HIV is disabled.⁷⁵ The courts arrived at varying conclusions by analyzing the definition of a disability and looking to congressional intent.

Under both the Rehabilitation Act and the ADA, numerous courts found that HIV alone is enough to constitute an actual disability under the first prong of the definition.⁷⁶ As early as 1990, the Eleventh Circuit,

69. See *Arline*, 480 U.S. at 281.

70. See *id.*

71. See *id.* at 282.

72. *Id.* at 284.

73. See Robert A. Kushen, Comment, *Asymptomatic Infection with the AIDS Virus as a Handicap under the Rehabilitation Act of 1973*, 88 COLUM. L. REV. 563, 567 (1988).

74. See *Arline*, 480 U.S. at 282, n.7.

75. See *Abbott v. Bragdon*, 107 F.3d 934, 937 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998); *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 167 (4th Cir. 1997); *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994) (holding an individual who is HIV-positive has a disability under the "regarded as" prong).

76. See, e.g., *Doe v. Kohn, Nast & Graf*, 862 F. Supp. 1310, 1321 (E.D. Pa. 1994); *Cain v. Hyatt*, 734 F. Supp. 671, 678 (E.D. Pa. 1990); *Abbott*, 107 F.3d at 949 (holding that the HIV-positive plaintiff who was asymptomatic had an actual disability under the statute).

in *Doe v. Garrett*,⁷⁷ found a plaintiff with HIV "handicapped" under the Rehabilitation Act.⁷⁸ In this case, the plaintiff was serving in the Navy when he was informed that he had tested positive for HIV.⁷⁹ The court pointed out that the plaintiff did not display any outward symptoms.⁸⁰ Once the Navy became aware of the plaintiff's condition, it told him that he could no longer be on active duty.⁸¹ The court found that the plaintiff's claim could not succeed under the Rehabilitation Act because uniformed military personnel were exempt.⁸² Nevertheless, the court explicitly stated, "we note that it is well established that infection with AIDS constitutes a handicap for purposes of the Act."⁸³

At approximately the same time as the *Garrett* decision, the United States District Court for the Eastern District of Pennsylvania decided a similar issue in *Cain v. Hyatt*.⁸⁴ This case involved determining whether an attorney at a law firm who tested positive for HIV had a disability under the Pennsylvania Human Relations Act (PHRA).⁸⁵ The plaintiff, Clarence Cain, claimed that his employer discharged him in violation of the PHRA.⁸⁶ The district court determined that Cain had a physical impairment which substantially limited a major life activity.⁸⁷ The nature

77. 903 F.2d 1455 (11th Cir. 1990).

78. *See id.* at 1459. The United States Court of Appeals for the Seventh Circuit consists of Alabama, Florida, and Georgia. *See* 28 U.S.C. § 41 (1994).

79. *See Garrett*, 903 F.2d at 1457.

80. *See id.*

81. *See id.*

82. *See id.* at 1461.

83. *Id.* at 1459.

84. 734 F. Supp. 671 (E.D. Pa. 1990).

85. *See Cain v. Hyatt*, 734 F. Supp. 671, 672 (E.D. Pa. 1990). The Pennsylvania Human Relations Act is a state statute that protects employees from discrimination based on a non-job-related disability. *See id.* at 672. It has interpretative regulations defining a "handicapped or disabled person" as the same definition of a disability under the ADA and Rehabilitation Act. *See id.* at 677.

86. *See id.* at 672. The plaintiff, Clarence Cain, was an attorney who had graduated from the University of Virginia and was in Hyatt's "Fast Track Regional Partner Program." *See id.* at 673. After working for Hyatt Legal Services for over a year, Cain was diagnosed with AIDS. *See id.* at 673-74. After this diagnosis, Cain informed his immediate supervisor of his condition and several days later he was fired. *See id.* at 676. Although Cain had displayed some problems interacting with clients and other attorneys, his supervisor specifically informed Cain that his dismissal was not only because of the aforementioned problems, but also because he had AIDS. *See id.*

87. *See id.* at 679.

of the HIV infection itself led the court to find that HIV creates a physical impairment because it "disables white blood cells, including lymphocytes," creating a physiological disorder.⁸⁸ The court then found that this physical impairment substantially limited a major life activity because a person with HIV can transmit the infection to his or her offspring.⁸⁹

The court looked to the Supreme Court's decision in *Stanley v. Illinois*⁹⁰ for guidance in determining whether reproduction is a major life activity. In *Stanley*, the Court recognized reproduction as an essential and precious right, when it said, "The rights to conceive and to raise one's children have been deemed 'essential' . . . 'basic civil liberties of man,' . . . and '[r]ights far more precious . . . than property rights.'" ⁹¹ Other major life activities that the court found to be affected were the ability to pursue a career, and interaction or socialization with others.⁹² Due to the belief that AIDS is a highly contagious disease, persons who are HIV-positive are stigmatized.⁹³ People's fear of an individual with a contagious disease can be as debilitating as the actual disability.⁹⁴ In Cain's case, he lost his job and lost the ability to socialize and interact with others due to people's fear of the illness.⁹⁵ Therefore, this physical impairment caused a substantial limitation in the major life activity of working and interaction with others, as well as reproduction.⁹⁶

The Eastern District of Pennsylvania reiterated this point in the ADA context in *Doe v. Kohn, Nast & Graf*.⁹⁷ As in *Cain*, the plaintiff was an attorney on a partnership track.⁹⁸ Approximately a year and a half after

88. *See id.*

89. *See id.*

90. 405 U.S. 645, 651 (1972).

91. *Id.* at 651.

92. *See Cain*, 734 F. Supp. at 680.

93. *See id.*

94. *See id.* (quoting *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987)).

95. *See id.* at 680.

96. *See id.* The court's holding that the plaintiff was substantially limited in interacting with others satisfies part (c) of the definition of a disability because the plaintiff was "regarded as having such an impairment." 42 U.S.C. § 12102(c) (1994).

97. 862 F. Supp. 1310 (E.D. Pa. 1994).

98. *See id.* at 1314. The plaintiff's success at the firm was evident because his immediate supervisor often praised his performance and he was given a substantial bonus shortly after he began. *See id.*

the plaintiff started working for the firm, he discovered he was HIV-positive.⁹⁹ The firm started treating the plaintiff differently after suspecting that the plaintiff was infected with HIV.¹⁰⁰ The plaintiff was effectively fired several months later, although the firm claimed he resigned voluntarily.¹⁰¹ The plaintiff claimed that the firm discharged him due to his HIV-positive status, thereby violating the ADA.¹⁰²

Similar to *Cain*, the court in *Kohn, Nast & Graf* held that the plaintiff had a disability, which resulted in adverse treatment by his employer.¹⁰³ The court found that a physical impairment existed because EEOC regulations include hemic and lymphatic disorders as physical impairments.¹⁰⁴ After defining a physiological disorder as "an abnormal functioning of the body or a tissue or organ,"¹⁰⁵ the court noted that a person can have a disability under the definition of the ADA, despite the fact that others would not consider the individual disabled "in the usual, common, lay sense of the word."¹⁰⁶

The plaintiff in *Kohn, Nast & Graf* claimed that he was disabled under the statute because his ability to procreate was substantially limited.¹⁰⁷ The court determined that the plaintiff had a substantial limitation on the major life activity of procreation by looking to the EEOC regulations on major life activities.¹⁰⁸ The court found that the regulations did not specifically preclude reproduction as a major life activity.¹⁰⁹ The court used *Cain* to support a finding that reproduction could be a major life activity.¹¹⁰ Therefore, the plaintiff met his burden of a *prima facie* case of discrimination based on a disability.¹¹¹

The First Circuit decision, *Abbott v. Bragdon*,¹¹² strongly supported

99. See *id.* This is unlike the plaintiff in *Cain*, who had AIDS when he was discharged by his employer. See *Cain*, 734 F. Supp. at 673-74.

100. See *Kohn, Nast & Graf*, 862 F. Supp. at 1315.

101. See *id.* When the plaintiff returned to the firm from a trip, he found his office locks changed and his belongings in a box. See *id.*

102. See *id.* at 1313.

103. See *id.* at 1321.

104. See 29 C.F.R. § 1630.2(h) (1998); see also *id.*

105. *Kohn, Nast & Graf*, 862 F. Supp. at 1319.

106. *Id.*

107. See *id.* at 1318.

108. See *id.* at 1320-21.

109. See *id.*

110. See *Kohn, Nast & Graf*, 862 F. Supp. at 1320-21.

111. See *id.*

112. 107 F.3d 934 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998). In this

these district court holdings in its analysis of asymptomatic HIV as a disability under the ADA in a non-employment context.¹¹³ In this case, Ms. Abbott visited Dr. Bragdon's office for a dental examination, at which time she made it known that she was HIV-positive.¹¹⁴ Dr. Bragdon informed her that she would need to have a cavity filled at the hospital, not his office, due to her condition.¹¹⁵ Consequently, Ms. Abbott would need to pay additional fees to the hospital.¹¹⁶ As a result, Ms. Abbott brought a disability discrimination action under the ADA.¹¹⁷

Relying on the definition of a disability under the ADA, the First Circuit found that an individual with HIV, whether symptomatic or asymptomatic, has a disability under the Act.¹¹⁸ Looking to the EEOC regulations implementing Title III of the ADA,¹¹⁹ the court found "unhesitatingly" that HIV infection, whether or not there are symptoms associated with it, is a physical impairment under the ADA.¹²⁰

The First Circuit found that reproduction is a major life activity and that Ms. Abbott is substantially limited in reproduction in her individual situation.¹²¹ Applying the plain meaning of "major," the court concluded that the key to determining what is a major life activity is to look at what activities are significant to a person.¹²² Since reproduction is "the

case, the claim is not against an employer, but rather a dentist who operates a public accommodation under Title III. *See id.* at 937. According to the ADA, it is unlawful for a person who operates a place of public accommodation to discriminate against a person in the enjoyment of "goods, services, facilities, privileges, advantages, or accommodations" because of their disability. *See* 42 U.S.C. § 12182(a) (1994). The same analysis applies as in the employment context to determine whether an individual is disabled. *See id.* § 12102.

113. *See Abbott*, 107 F.3d at 942. The following states comprise the First Circuit: Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. *See* 28 U.S.C. § 41 (1994).

114. *See Abbott*, 107 F.3d at 937. At the time of the dental appointment, Ms. Abbott was not manifesting any outward symptoms. *See id.*

115. *See id.*

116. *See id.*

117. *See id.* at 938.

118. *See id.* at 942.

119. *See Abbott*, 107 F.3d at 939; *see also* 28 C.F.R. § 36.104 (1998).

120. *See Abbott*, 107 F.3d at 939.

121. *See id.* at 940.

122. *See id.* The court declined to answer whether it must make a case-by-case inquiry into the particular import of the major life activity to the individual. *See id.* at 941.

source of all life," and a basic right to all persons, it undoubtedly falls under this category.¹²³ Without question, reproduction is substantially limited in a person with HIV, as due to the nature of the disease, there is a risk of transmitting this infection to any offspring.¹²⁴ Additionally, the court referred to legislative history that demonstrates Congress intended for HIV-positive individuals to be disabled.¹²⁵

The question of whether an HIV-positive individual has a disability has largely been analyzed under the first prong of the definition provided in the ADA and the Rehabilitation Act. However, there has also been a question of whether an individual with this infection can qualify as disabled under the third prong of the definition, when one is regarded as disabled.¹²⁶

The Ninth Circuit answered this question in the affirmative in *Gates v. Rowland*.¹²⁷ Prison inmates who were HIV-positive were separated from other inmates and were denied opportunities to participate in work programs.¹²⁸ A prison inmate claimed that this adverse treatment violated Section 504 of the Rehabilitation Act.¹²⁹ Unlike previous cases discussed, the Ninth Circuit did not evaluate HIV infection under the first

123. *See id.*

124. *See id.* at 942. The court had no reservations about finding that a person with HIV is substantially limited in reproduction, as it said, "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." *Id.* Although the risk of transmission to offspring is reduced from twenty-five percent to eight percent due to AZT therapy, the EEOC guidelines state that in determining a disability under the ADA, one should consider the individual's condition without medication. *See id.*; 29 C.F.R. App. § 1630.2(h) (1998).

125. *See Abbott*, 107 F.3d at 942-43 (citing H.R. REP. NO. 101-485 (III), at 28 n.18 (1990)). Materials showing legislative intent include a memorandum put out by the DOJ which stated that individuals with HIV are covered under the Rehabilitation Act. *See* Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), reprinted in DAILY LAB. REP. (BNA) No. 195, at D-1 (Oct. 7, 1988) [hereinafter Kmiec Memorandum].

126. *See* 42 U.S.C. § 12102(2)(B)-(C) (1994) (stating that an individual may have a disability when he or she has a record of a disability or is regarded as being disabled).

127. 39 F.3d 1439 (9th Cir. 1994).

128. *See id.* at 1444.

129. *See id.* at 1442. The Ninth Circuit includes the states of Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Guam, and Hawaii. *See* 28 U.S.C. § 41 (1994).

prong of the Rehabilitation Act's definition of disability; rather, it focused on the third prong, which states that anyone who is regarded as having a disability is protected under the ADA.¹³⁰

In *Gates*, the Ninth Circuit looked first to the holding in *Arline* which stated that people's reactions to contagious diseases are just as disabling as the actual physical effects.¹³¹ In 1988, the Ninth Circuit had applied the *Arline* analysis to a teacher with AIDS, in *Chalk v. United States*.¹³² The court in *Gates* then extended the *Chalk* decision to hold that HIV infection itself, without symptoms, is enough to constitute a disability under the third prong.¹³³ The court predicated its decision on the basic premise that it is not the physical effects of a contagious disease on an individual that cause the disability, but rather the risk of transmission and the reaction this causes in others.¹³⁴ Therefore, the fact that a person is asymptomatic with a contagious disease does not preclude such an individual from being disabled under the Rehabilitation Act.¹³⁵

Even though the First, Ninth, and Eleventh Circuits found that a person with HIV, whether or not symptomatic, is protected under the Rehabilitation Act and ADA, not every court found this to be the case.¹³⁶ The Fourth Circuit in *Runnebaum v. NationsBank of Maryland*, focused its attention on the first prong of the ADA's definition of a disability and concluded that no disability exists for a person who is HIV-positive when he or she has no outward symptoms.¹³⁷ The Fourth Circuit's reasoning is that such an individual has no physical impairment which substantially limits a major life activity.¹³⁸

The first Fourth Circuit case on the issue was *Ennis v. National Asso-*

130. See *Gates*, 39 F.3d at 1446.

131. See *id.* at 1445-46; *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 283 (1987).

132. 840 F.2d 701, 704-12 (9th Cir. 1988). See *Gates*, 39 F.3d at 1446 (discussing *Chalk v. United States*, 840 F.2d 701 (9th Cir. 1988)).

133. See *Gates*, 39 F.3d at 1446.

134. See *id.*

135. See *id.*

136. See generally *Ennis v. Nat'l Ass'n of Bus. and Educ. Radio, Inc.*, 53 F.3d 55 (4th Cir. 1995); *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997) (holding that a plaintiff with asymptomatic HIV does not have a disability under the ADA).

137. See *Runnebaum*, 123 F.3d at 167-72.

138. See *id.* at 169.

ciation of Business and Educational Radio, Inc.¹³⁹ At the time that the plaintiff, Joan Ennis, was hired by the National Association of Business and Educational Radio, Inc. (NABER), she adopted a son who was infected with HIV.¹⁴⁰ Ennis was terminated approximately three years later and she brought an action under the ADA against NABER claiming it discharged her due to her son's HIV-positive status.¹⁴¹

The court decided that to determine whether an individual has a disability, a case-by-case determination must be made, focusing on the individual's specific situation.¹⁴² The court determined that no evidence existed to indicate that Ennis' son had an impairment, nor that he was substantially limited in any major life activity, as he did not seem to suffer any ailments which affected his daily activities.¹⁴³ This case, however, did not make a strong statement regarding HIV and the ADA. The Fourth Circuit held that, assuming *arguendo* that Ennis' son was disabled, she still could not win on an ADA claim.¹⁴⁴ Ennis could not establish a *prima facie* case of discrimination in an ADA claim because she was not meeting the legitimate expectations of NABER.¹⁴⁵

The Fourth Circuit's definite statement that asymptomatic HIV is not a disability under the ADA came in the recent case of *Runnebaum*.¹⁴⁶

139. 53 F.3d 55 (4th Cir. 1995).

140. *See id.* at 57.

141. *See id.* Ennis claimed that the reason she was fired was because NABER was afraid its health insurance rates would increase as a result of any health problems her son might develop in the future due to his HIV infection. *See id.* The ADA protects not only the individual who actually has the disability, but also any individuals who have a relationship or association with a disabled person. *See* 42 U.S.C. §§ 12112(b)(4), 12182(b)(1)(D) (1994).

142. *See Ennis*, 53 F.3d at 59. The Fourth Circuit's jurisdiction includes the states of Maryland, North Carolina, South Carolina, Virginia, and West Virginia. *See* 28 U.S.C. § 41 (1994).

143. *See Ennis*, 53 F.3d at 60.

144. *See id.* at 62.

145. *See id.* at 58, 62. Her inability to meet NABER's expectations was evident from her supervisor's poor evaluations of her. *See id.* at 62.

146. 123 F.3d 156 (4th Cir. 1997). This was a 6-5 decision on an *en banc* hearing. *See id.* In the original Fourth Circuit decision, which was vacated December 3, 1996, the court denied summary judgment for NationsBank because Runnebaum provided sufficient evidence that he was regarded as being impaired. *See id.* The court also stated that Runnebaum met NationsBank's legitimate expectations, so that there was a genuine issue of material fact as to whether he was discriminated against. *See Runnebaum v. NationsBank of Md.*, 95 F.3d 1285, 1297 (4th Cir. 1996).

The plaintiff, William Runnebaum, brought suit against NationsBank, claiming the bank fired him because of his HIV-positive status, thereby violating the ADA.¹⁴⁷ Runnebaum was initially employed by NationsBank in 1991 as a marketing coordinator, but by the following year had been promoted to a sales position.¹⁴⁸ Throughout his employment, NationsBank claimed it was often unhappy with his performance.¹⁴⁹ Although Runnebaum was diagnosed as HIV-positive in 1988, he showed no symptoms from the infection and none of his colleagues were aware of his condition until September of 1992, when Runnebaum told a co-worker.¹⁵⁰ Throughout the rest of 1992, Runnebaum's performance failed to improve and he was unable to meet expected sales goals.¹⁵¹ In January of 1993, Runnebaum's supervisor terminated his employment.¹⁵² His supervisor asserted that Runnebaum's HIV status was not a factor in her decision; rather, he was fired because of his inability to meet NationsBank's legitimate expectations.¹⁵³

The court held that to establish a *prima facie* case of discrimination in a wrongful discharge context, a plaintiff must prove four points by a preponderance of the evidence.¹⁵⁴ First, the plaintiff must be a member of a protected class.¹⁵⁵ Second, an employer must have discharged the plaintiff.¹⁵⁶ Third, at the time of discharge, the plaintiff must have been

147. See *Runnebaum*, 123 F.3d at 163.

148. See *id.* at 161.

149. See *id.* at 162. Prior to moving to the sales position, Runnebaum was documented as engaging in improper behavior, characterized by such conduct as "unexplained absenteeism, chronic tardiness, and lengthy lunch periods." *Id.* at 161. After the move to the sales position, there is evidence that Runnebaum continued to have performance problems, including his conduct at client meetings. See *id.* at 162.

150. See *id.*

151. See *id.* at 162-63.

152. See *Runnebaum*, 123 F.3d at 163.

153. See *id.* Runnebaum claims that he was not aware that NationsBank was unhappy with his performance because he did not receive any written or verbal warnings. See *id.*

154. See *id.* at 164 (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)).

155. See *id.* A member of a protected class in regard to the ADA is any individual that is protected by the statute. See *id.* at 165. Those individuals that are disabled according to the ADA are members of the Act's protected class. *Id.*

156. See *id.*

meeting the legitimate expectations of the employer.¹⁵⁷ Finally, the discharge must "raise a reasonable inference of unlawful discrimination."¹⁵⁸

The Fourth Circuit, in holding that Runnebaum did not establish a *prima facie* claim of discrimination under the ADA, first looked to the necessary elements a plaintiff must prove.¹⁵⁹ The court first inquired whether Runnebaum was a member of a protected class due to a disability within the meaning of the ADA.¹⁶⁰ Focusing on the first prong of the definition, the court divided the definition into two parts; physical impairment and substantial limitation on a major life activity.¹⁶¹ In analyzing whether HIV infection constituted a physical impairment under the ADA, the court interpreted the statutory language of the Act.¹⁶² Since the term, "impairment" was not specifically defined in the ADA, the court looked to its natural meaning in the dictionary, finding that in order for something to be impaired, it had to be made worse than it previously was.¹⁶³ Based on this definition, the court found that a person who is asymptomatic simply could not be impaired as there are no adverse effects to that individual.¹⁶⁴

Assuming *arguendo* that an impairment existed, the court moved its analysis to the second element of the prong. The court looked at whether there was any major life activity involved which was substantially limited by the HIV infection.¹⁶⁵ Here again, "major life activity" is not defined in the Act, so the court looked to the dictionary meaning of the word "major."¹⁶⁶ The court conceded that procreation is a fundamental

157. *Runnebaum*, 123 F.3d at 164.

158. *Id.*

159. *See id.*

160. *See id.* at 165.

161. *See id.* at 167. The court found that there was insufficient evidence concerning the third prong of the definition - whether Runnebaum was regarded as having a disability. *See id.* at 173-74.

162. *See Runnebaum*, 123 F.3d at 167.

163. *See id.* at 168. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 603 (1986) defines impair as to "make worse by or as if by diminishing in some material respect," while BLACK'S LAW DICTIONARY 677 (5th ed. 1981) describes the term as "to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." *See Runnebaum*, 123 F.3d at 168.

164. *See Runnebaum*, 123 F.3d at 168.

165. *See id.* at 170.

166. *See id.* WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 718 (1988) defines major as "demanding great attention or concern" and WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1363 (1986) defines it as

human activity, but hesitated to find either procreation or intimate sexual relations to be major life activities.¹⁶⁷ The court reasoned, however, that even assuming either of these activities is a major life activity, asymptomatic HIV does not substantially limit the performance of such activities, as there is nothing inherent in the infection itself which actually limits these activities.¹⁶⁸ Rather, it is a person's "conscience or normative judgment" which keeps him from engaging in these activities.¹⁶⁹ If the person's reaction to his own condition causes a substantial limitation, then the individual has not met the statutory requirement in the definition.¹⁷⁰ In other words, a person with HIV who chooses to abstain from engaging in sexual relations or who chooses not to reproduce because of the risks involved with both activities is only limited because of the individual's conscious decision, not any *inherent limitation* from the impairment itself.¹⁷¹ The court concluded that Runnebaum failed to meet three of his four requirements for a *prima facie* case of discrimination under the ADA. He did not establish that he was a member of a protected class, that he had met the legitimate expectations of his employer, or that there was a reasonable inference of unlawful discrimination.¹⁷²

III. ANALYSIS: THE DEFINITION OF "DISABLED" UNDER THE ADA

Before the Supreme Court settled the issue in *Bragdon v. Abbott*, the federal courts proceeded in opposite directions with equally strong convictions. At one extreme lay the Fourth Circuit's decision holding that an employee with asymptomatic HIV is not protected by the ADA. At the other extreme was the Ninth Circuit's holding that a patient treated by a dentist is protected by the ADA, even if she has no outward symptoms of the HIV infection. Some courts interpreted the definition nar-

"greater in dignity, rank, importance, or interest." *Runnebaum*, 123 F.3d at 170.

167. See *Runnebaum*, 123 F.3d at 170-71 (citing to Amicus Curiae brief for EEOC at 17 and Amicus Curiae brief for Whitman-Walker Clinic, Inc. at 19-20).

168. See *id.* at 171-72.

169. See *id.* at 171 (quoting Kmiec Memorandum, *supra* note 125, at D-1).

170. See *id.* at 172. In order to meet the requirement of the definition, a person must show what the court calls a "casual nexus" between the condition and the limitation, such as when a person who is paralyzed is substantially limited in his ability to walk due to the paralysis alone. See *id.*

171. See *id.*

172. See *Runnebaum*, 123 F.3d at 175.

rowly, due to a likely belief that expanding the number of people protected would be contrary to congressional intent. Other courts, however, interpreted the definition broadly, thereby increasing the number of individuals protected under the ADA. The main controversy focused on whether a person with asymptomatic HIV has an actual disability under the first prong of the ADA's definition of a disability, requiring a person to have a physical or mental impairment that substantially limits a major life activity.¹⁷³ To determine whether an individual with asymptomatic HIV has an actual disability, it is necessary to address each aspect of the definition separately before drawing a conclusion.

A. Physical Impairment

To determine whether asymptomatic HIV is a physical impairment under the ADA, the first place to look for guidance is Titles twenty-eight and twenty-nine of the Code of Federal Regulations.¹⁷⁴ These regulations were promulgated by the DOJ and the EEOC, respectively.¹⁷⁵ Although interpretative regulations promulgated by administrative agencies and governmental entities may not have the force and effect of law, they are entitled to some weight due to the agency's expertise.¹⁷⁶ The regulations provide that the definition of a physical impairment includes hemic and lymphatic disorders or physiological conditions.¹⁷⁷ By the very nature of the illness, HIV infection is an impairment. It affects both the hemic and lymphatic bodily systems by disabling white blood cells and lymphocytes.¹⁷⁸ Asymptomatic HIV is the first stage of a "spectrum of related conditions" which may progress to the symptomatic illness of ARC and then to full-blown AIDS over a period of time.¹⁷⁹ Even if there are no outward symptoms, by its very nature, HIV produces a physiological disorder of several bodily systems. Furthermore, the finding that asymptomatic HIV is included as an impairment in the ADA is strongly supported by the DOJ regulations.

173. See 42 U.S.C. § 12202(2)(A) (1994).

174. See 28 C.F.R. § 36.104 (1998); 29 C.F.R. § 1630.2 (1998).

175. See *id.* These regulations are interpretative as neither the DOJ nor the EEOC has substantive rulemaking authority. See 42 U.S.C. § 2000e-4 (1994); 28 U.S.C. §§ 501-530A (1994).

176. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944).

177. See 28 C.F.R. § 36.104; 29 C.F.R. § 1630.2(h).

178. See *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990) (quoting *Doe v. Dolton Elem. Sch. Dist. No. 148*, 694 F. Supp. 440, 444 (N.D. Ill. 1998)).

179. See *Cain*, 734 F. Supp. at 679.

These regulations expressly include HIV infection, both symptomatic and asymptomatic, in a list of impairments covered under the term.¹⁸⁰ Both the First and the Ninth Circuits applied this regulation in finding that the asymptomatic plaintiff had an impairment.¹⁸¹

Apart from promulgating regulations, the DOJ sent out a memorandum which provides guidance on Congress' intent regarding the Rehabilitation Act.¹⁸² The DOJ memorandum stated in very specific terms that HIV-infected individuals, both symptomatic and asymptomatic, are protected under the Act.¹⁸³ The DOJ based its decision on statements made by the Surgeon General of the Public Health Service at that time, Dr. C. Everett Koop.¹⁸⁴ Dr. Koop stated that HIV and the various stages of the condition are all part of one disease that may begin without any visible symptoms.¹⁸⁵ Even though the initial stage may not include any outward symptoms, most people experience "detectable abnormalities of the immune system,"¹⁸⁶ constituting an impairment because the virus

180. See 28 C.F.R. § 36.104(1)(iii). There is also a list of impairments provided which do not fall under the ADA, including such conditions related only to psychological, environmental, economic, cultural backgrounds, as well as simple personality or physical characteristics, such as eye or hair color. See 29 C.F.R. App. § 1630.2(h). Specific illnesses listed which do not constitute an impairment include compulsive gambling, kleptomania, pyromania, and disorders resulting from illegal drug use. See *id.* § 1630.3(d). The fact that asymptomatic HIV does not fall under any of these non-disability categories only further bolsters the argument that HIV infection is an impairment as defined under the ADA because it was not specifically excluded as were other illnesses.

181. See *Abbott v. Bragdon*, 107 F.3d 934, 939 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998); *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994).

182. See Kniec Memorandum, *supra* note 125, at D-1.

183. See *id.* But see Memorandum from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, to Ronald E. Robertson, General Counsel of the Department of Health and Human Services (June 1986), *reprinted in* DAILY LAB. REP. (BNA) No. 122, at D-1 (June 25, 1986). This earlier memo by Charles Cooper made the statement that there is no protection for HIV-positive individuals under the Rehabilitation Act until those individuals suffer adverse health consequences which may be considered an impairment under the Act. This position has since been overturned with the publication of the 1988 Department of Justice memorandum, which takes the opposite position stating that HIV-positive individuals, even without symptoms, are disabled under the Act. See Kniec Memorandum, *supra* note 125, at D-2, D-3.

184. See Kniec Memorandum, *supra* note 125, at D-2.

185. See *id.*

186. *Id.* Dr. Everett Koop compared impairment of a person in the early

produces a physiological disorder affecting both the hemic and lymphatic bodily systems.¹⁸⁷ Therefore, Dr. C. Everett Koop and the DOJ found that "from a purely scientific perspective," asymptomatic individuals with HIV have a physical impairment under the statute.¹⁸⁸

On the other hand, the Fourth Circuit believed that broadening the protections of the ADA to the plaintiff in *Runnebaum* would actually be contrary to legislative intent.¹⁸⁹ By applying the plain language definition of "impairment" as found in the statute, the court found that there must be "diminishing effects" from a condition.¹⁹⁰ According to the court, the onset of asymptomatic HIV would not cause these diminishing effects to the individual and thus, there could be no impairment.¹⁹¹ The court stated that applying the protections of the ADA to a person who was not characterized as displaying any "diminishing effects" would actually be contrary to Congress' intent.¹⁹² The analysis the court used is questionable because it completely ignored medical findings of the debilitating effects of the HIV virus to the hemic and lymphatic systems. Additionally, the Fourth Circuit did not believe that there was sufficient legislative history to give it proper guidance. Although there are committee reports that include "infection with Human Immunodeficiency Virus" as a physical impairment,¹⁹³ the reports do not distinguish between symptomatic and asymptomatic HIV.¹⁹⁴ However, one can assert that the committee's use of the phrase "infection with" as opposed to AIDS or symptomatic HIV arguably shows its intent to include asymptomatic infection.

Alternatively, the court saw no reason to refer to the committee reports because it considered the meaning of "impairment" to be "plain

stages of HIV with that of an individual who has just developed cancer. *See id.* Even though such an individual may appear fine to most people, he or she is, in reality, very sick. *See id.*

187. *See id.*

188. *See id.*

189. *See Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 168-69 (4th Cir. 1997).

190. *See id.* at 168.

191. *See id.* Of particular importance in finding no impairment existed is the fact that asymptomatic HIV is only the initial stages of the infection and a person can remain without symptoms for a significant period of time. *See id.*

192. *See id.*

193. *See H.R. REP. NO. 101-485*, pt. 2, at 551 (1990).

194. *See Runnebaum*, 123 F.3d at 169.

and unambiguous."¹⁹⁵ However, the court did not explain why it was necessary for it to consult an outside source, a dictionary, in order to determine the precise meaning of the word "impairment," if the word was already "plain and unambiguous" on its face. Perhaps, inadvertently, the court avoided referring to the committee reports because they would not support the court's decision.

B. Major Life Activity

Not only must a person have an impairment to be protected under the ADA, but this impairment must also affect a major life activity.¹⁹⁶ Therefore, it must be determined whether the HIV infection affects any major life activities of the person who is infected with the virus.¹⁹⁷ The main argument has been that HIV infection affects reproduction because of the possibility of transmission to offspring.¹⁹⁸ Additionally, the reproduction argument often encompasses intimate sexual relations because of the possibility that the partner will become infected with the virus.¹⁹⁹ The EEOC regulations list major life activities, but the list is not exhaustive.²⁰⁰ At first glance, the activities listed seem to refer to only such basic human functions as walking, seeing, speaking, and hearing.²⁰¹ Yet, on a reading of the interpretative guidelines to the regulations, other major life activities which are not as apparent are listed, such as "sitting, standing, lifting, [and] reaching."²⁰² Based on the reading of the regulations, in conjunction with the interpretative guidelines, the DOJ determined that procreation and intimate personal relations are also major life activities.²⁰³ The DOJ's statement, however, did not give a definitive

195. *See id.* at 168.

196. *See* 42 U.S.C. § 12102(2) (1994).

197. *See id.*

198. *See, e.g.,* *Abbott v. Bragdon*, 107 F.3d 934, 940 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998); *Doe v. Kohn, Nast & Graf*, 862 F. Supp. 1310, 1321 (E.D. Pa. 1994); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404 (N.D. Ill. 1994) (holding that an individual is substantially limited in reproduction because of the risk of transmission of the virus to any offspring).

199. *See* Brief of the Equal Employment Opportunity Commission as Amicus in Support of the Appellant at 10, *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997) (No. 94-2200).

200. *See* 29 C.F.R. § 1630.2(i) (1998).

201. *See id.*

202. 29 C.F.R. App. § 1630.2(i).

203. *See* Kmiec Memorandum, *supra* note 125, at D-1.

answer to this issue, as the DOJ's memo simply stated, "[W]e believe it is reasonable to conclude,"²⁰⁴ and postulated that it was likely that courts would find procreation and intimate relations to be major life activities.²⁰⁵ Because there is no specific list of what constitutes a major life activity, courts were left on their own to make this determination, with differing outcomes.²⁰⁶

Several courts found reproduction and intimate sexual relations to be major life activities under the ADA.²⁰⁷ In *Kohn, Nast & Graf*, the court found that the ADA covered reproduction and intimate sexual relations, by relying on the non-exhaustive aspect of the EEOC guidelines and applying a broad interpretation of major life activities.²⁰⁸ The court applied a broad interpretation because it found it significant that Congress used the term "major *life* activities," as opposed to a narrower description, such as "major *work* activities."²⁰⁹ Because Congress intended to include activities outside of the job context, the court had no difficulty concluding that reproduction and intimate sexual relations fit within the purview of major *life* activities.²¹⁰

The First Circuit, in *Abbott*, gave a thorough discussion of whether reproduction should be a major life activity, including in this group of activities "intimate sexual activity, gestation, giving birth, childrearing, and nurturing familial relations."²¹¹

204. *Id.* at D-3.

205. *See id.* at D-2.

206. *See, e.g.,* *Abbott v. Bragdon*, 107 F.3d 934, 940 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998) (concluding that reproduction constitutes a major life activity); *Zatarin v. WDSU-Television, Inc.* 881 F. Supp. 240, 243 (E.D. La. 1995) (holding that reproduction is not a major life activity because it is not consistent with the listed activities in the regulations); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404 (N.D. Ill. 1994) (stating that reproduction can be a major life activity for purposes of the ADA).

207. *See Abbott*, 107 F.3d at 940; *Doe v. Kohn, Nast & Graf*, 862 F. Supp. 1310, 1320 (E.D. Pa. 1994) (stating that "the language of the statute does not preclude procreating as a major life activity, but may well include it.").

208. *See Kohn, Nast & Graf*, 862 F. Supp. at 1320.

209. *See id.* (emphasis added).

210. *See id.*

211. *Abbott*, 107 F.3d at 939.

In holding that reproduction constitutes a major life activity,²¹² the court focused on congressional intent.²¹³ The court first looked to the fact that procreation is considered a fundamental right in reasoning that Congress most likely meant to include it in the ADA.²¹⁴ Next, the court looked to the dictionary definition of "major," to deduce that the plain meaning of the word allows reproduction to be an activity included in the ADA.²¹⁵ The court further reasoned that because the EEOC guidelines defined a physical impairment to exist when there is a disorder of the reproductive system, the legislative intent must have been for reproduction to be a major life activity.²¹⁶ The court refuted the defendant's argument that reproduction is not analogous to the listed life activities because it is a lifestyle choice and it is not engaged in with as much frequency as the activities listed, such as walking and speaking.²¹⁷ In rejecting the defendant's argument as unsubstantiated, the court stated that one could make the same argument about any activity.²¹⁸

Another view is that reproduction is not a major life activity under the ADA.²¹⁹ This position has been articulated in cases involving women

212. *See id.* at 941. The court, after giving a strong analysis in favor of reproduction being covered under the ADA, stated that "the question is very close." *Id.* This qualifying statement is difficult to understand considering the court's strong argument in favor of including reproduction and its firm disagreement with the defendant's position. *See id.*

213. *See id.* at 939.

214. *See id.* The court found it likely that Congress recognized the importance of procreation when it drafted the ADA because procreation is a precious right. *See id.* (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (stating reproduction is a "basic civil right")).

215. *See id.* at 939-40. "Major" is defined as "greater in dignity, rank, importance, or interest." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 718 (1989).

216. *See Abbott*, 107 F.3d at 940; *see also McWright v. Alexander*, 982 F.2d 222, 226 (7th Cir. 1992) (holding that a person who has a reproductive disorder is covered under the Rehabilitation Act); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404 (N.D. Ill. 1994) (holding in regard to an infertile individual, that reproduction constitutes a major life activity because the EEOC guidelines provide that a person has a physical impairment when there is a disorder of the reproductive system, which leads to the conclusion that reproduction is a major life activity).

217. *See Abbott*, 107 F.3d at 941.

218. *See id.* All activities in which humans engage are, in essence, voluntary. Although some people may choose not to speak, like a monk who takes a vow of silence, there is no question that speaking is a major life activity. *See id.*

219. *See, e.g., Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102, 106

who claim they have a disability because of infertility, relying on reproduction as a major life activity.²²⁰ In a U.S. District Court decision, *Zatarin v. WDSU-Television, Inc.*, two arguments were postulated for the exclusion of reproduction as a major life activity for infertility. First, the district court stated that the impairment and the life activity should be separate, so that an individual cannot "bootstrap" the effect of the major life activity onto the impairment.²²¹ Under this theory, an individual cannot bring an action claiming, for example, that the physical impairment is to his speech organs and the major life activity affected is speaking. However, this argument is only effective for a claim of infertility and not HIV because the physical impairment for HIV is to the hemic and lymphatic systems, not the reproductive system.²²²

The second argument in *Zatarin* why reproduction should not qualify under the ADA is based on the frequency of the activity.²²³ The court decided that reproduction is not analogous to the examples of major life activities provided in the regulations because reproduction is not engaged in as often as the examples, such as walking and speaking, which a person performs every day.²²⁴

Using a similar analysis, another district court held that reproduction is not comparable to the list of activities because it involves a lifestyle choice.²²⁵ This argument emphasizes that the activities listed in the

& n.1 (S.D. Iowa 1995) (holding reproduction is not a major life activity for purposes of the ADA); *Zatarin v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995). *But see* *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 170-71 (4th Cir. 1997) (hesitating to answer the question of whether reproduction and intimate sexual relations are major life activities).

220. *See Zatarin*, 881 F. Supp. at 243; *Krauel*, 915 F. Supp. at 106 & n.1 (S.D. Iowa 1995). *But see* *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404 (N.D. Ill., 1994).

221. *See Zatarin*, 881 F. Supp. at 243.

222. The bootstrapping argument can be used to support asymptomatic HIV claims because it shows that Congress intended for reproduction to be a major life activity. The reasoning for the aforementioned argument is that if reproduction were not a major life activity, then there would be no need to make the bootstrapping argument at all. *See also* *Abbott v. Bragdon*, 107 F.3d 934, 940 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998) (stating that the drafters must have determined reproduction to be a major life activity because reproductive disorders are included as a physical impairment).

223. *See Zatarin*, 881 F. Supp. at 243.

224. *See id.*

225. *See Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102, 106 (S.D.

regulations, such as walking and speaking, are performed naturally and virtually subconsciously unless an individual has a disability.²²⁶ The court concluded that reproduction, on the other hand, is an activity in which not everyone chooses to engage.²²⁷

However, the latter two arguments are weak, as they can be easily refuted by reading the listed activity of working. Not everyone chooses to work, and for some people, the decision to work is a lifestyle choice.²²⁸ Nevertheless, the *Zatarin* court vehemently stated, "Treating reproduction as a major life activity under the ADA would be a conscious expansion of the law, which is beyond the province of this Court."²²⁹ The court uses strong language, especially in light of the fact that the Supreme Court ruled that procreation is a precious fundamental right.²³⁰

C. Substantial Limitation

A person must show that the major life activity which is affected by the impairment is "substantially limited."²³¹ A person is substantially limited in the performance of an activity when either the person cannot perform the activity at all, or when the person is "significantly restricted" in his ability to perform as compared to "the average person in the general population."²³² In interpreting whether a person has been substantially limited, one should consider such factors as the degree, duration, and impact of the impairment.²³³

Iowa 1995).

226. *See id.* at 106 & n.1.

227. *See id.*

228. *See Abbott*, 107 F.3d at 940.

229. *Zatarin*, 881 F. Supp. at 243.

230. *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

231. *See* 42 U.S.C. § 12102(2)(A) (1994).

232. 29 C.F.R. § 1630.2(j)(1)(ii) (1998). In order to be significantly restricted in a major life activity, the restriction must be in regard to "the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." *Id.*

233. *See* 29 C.F.R. § 1630.2(j)(2). The regulations state the following:

The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

The nature and severity of the impairment;

The duration or expected duration of the impairment; and

The permanent or long term impact, or the expected permanent or

In holding that a person with asymptomatic HIV is substantially limited in reproduction and intimate sexual relations, the main consideration has been that a person with HIV has a twenty-five percent risk of transmitting the disease to a child, as well as a concern of infecting a partner.²³⁴ Individuals with HIV have been warned not to "have unprotected . . . sexual intercourse and are recommended not to have children."²³⁵ Furthermore, the DOJ agrees that HIV-positive individuals are substantially limited in reproduction because both males and females with HIV cannot reproduce with the same expectations for a healthy child that a person without the HIV virus would have.²³⁶

The Fourth Circuit, on the other hand, argued that HIV-positive individuals are not substantially limited in either reproduction or intimate sexual relations.²³⁷ Rather, an individual with HIV often makes the *conscious choice* not to have children or to abstain from sexual relations due to the risks associated with these activities.²³⁸ According to this position, reproduction is not substantially limited because there is nothing in the infection that precludes or hinders reproduction and sexual relations.²³⁹ The language of the ADA requires that it is the impairment which causes the limitation, not "the individual's reaction to the impairment."²⁴⁰ While it is true that an individual may be limited in procreation or sexual relations arising out of a conscious decision, the Fourth Circuit did not consider that an individual is substantially limited because of the possible transmission of the virus to a child or a partner.

Although a person with HIV may decide to abstain from having chil-

long term impact of or resulting from the impairment.

Id.

234. See *Abbott v. Bragdon*, 107 F.3d 934, 942 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998).

235. Brief of Amicus Curiae, Whitman-Walker Clinic Legal Services Department, at 20, *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997) (No. 94-2200) (citing *State v. Clausen*, 491 N.W.2d 662, 666 (Minn. Ct. App. 1992)).

236. See *Kniec Memorandum*, *supra* note 125, at D-3.

237. See *Runnebaum*, 123 F.3d at 172.

238. See *id.*

239. See *id.* An example of an impairment that actually causes the substantial limitation would be the loss of the ability to walk due to paralysis. The court asserts that HIV, in contrast, does not itself prevent any activity, but rather it is the knowledge that a person carries the HIV infection which causes him or her to possibly refrain from reproduction and sexual relations. See *id.*

240. *Id.*

dren or engaging in intimate sexual relations, this is not necessarily a voluntary decision. Rather, this abstention is, in essence, mandatory because of the high risk of passing on this possibly fatal illness to another and the moral overtones associated with taking such a chance. Alternatively, if a person were to reproduce, the twenty-five percent risk of transmission is itself a substantial limitation.

An analysis of the legislative history of the ADA may also provide clues as to whether Congress intended to include individuals with asymptomatic HIV in the class protected by the ADA as well. Committee reports and statements made by members of Congress regarding the enactment of the ADA also contain the legislative intent of Congress. In *Kohn, Nast & Graf*, the court supported its analysis by statements made by Congressmen Owens (D-New York) and Waxman (D-California) indicating their convictions that the provisions of the Act protect a person who has HIV, even if there are no visible symptoms.²⁴¹ Both members believed that HIV is only the initial stage in a "continuum of disease among those who are HIV infected," ranging from asymptomatic HIV to full-blown AIDS.²⁴²

D. Case-By-Case Analysis or Per Se Disability?

Another consideration for an ADA claim is whether a condition is a per se disability or whether courts should perform case-by-case analysis to determine if that individual meets the criteria for a disability.²⁴³ There was disagreement over whether HIV can be a per se disability or must

241. See *Doe v. Kohn, Nast & Graf*, 862 F. Supp. 1310, 1320 n.7 (E.D. Pa. 1994).

242. *Id.* at 1320 & n.7. Congressman Owens (D-New York), in discussing whether someone in the early stages of HIV is covered stated, "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. These individuals are covered under the first prong of the definition of disability in the ADA . . ." 136 CONG. REC. H4623 (daily ed. July 12, 1990). Congressman Waxman (D-California) similarly stated, "As medical knowledge has increased, specialists in the field increasingly recognize that there exists a continuum of disease among those who are HIV infected. All such individuals are covered under the first prong of the definition of disability in the ADA." 136 CONG. REC. H4646 (daily ed. July 12, 1990).

243. See *Hernandez v. Prudential Ins. Co. of Am.*, 977 F. Supp. 1160, 1163 (M.D. Fla. 1997).

be determined on an individualized basis.²⁴⁴ Subsequent to the *Ennis* decision, the Fourth Circuit held that the ADA's definition of a disability requires the judiciary to make its inquiry on an "individualized basis."²⁴⁵ Because the provision in the statute consistently refers to "individual," whether a person with HIV has a disability must be determined by this individualized method.²⁴⁶ The court based its decision on the premise that a condition may not affect everyone in the same way.²⁴⁷ Certain factors may play a role in how a condition affects an individual, such as the existence of other impairments that contribute to the effect of the condition.²⁴⁸ There are certain impairments, however, that will be substantially limiting on every individual because of the nature of the impairment, such as blindness and deafness.²⁴⁹ District courts have found that HIV and AIDS are included in the conditions which are considered *per se* disabilities.²⁵⁰ The argument that HIV is included as a *per se* disability is bolstered by the interpretative guidelines to the EEOC regulations which state that HIV is an "inherently substantially limiting" impairment.²⁵¹

Although some courts specifically held that a case-by-case analysis should be used to determine whether a person has a disability, the result of the courts' analyses have, nevertheless, implicated that HIV is a *per se* disability.²⁵² The First Circuit is a good example. Although the First

244. See *id.* (stating that "[i]t is unsettled whether HIV and AIDS are *per se* disabilities.").

245. See *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 166 (4th Cir. 1997).

246. See *Ennis v. Nat'l Ass'n of Bus. and Radio, Inc.*, 53 F.3d 55, 59 (4th Cir. 1995).

247. See 29 C.F.R. App. § 1630.2(j) (1998).

248. See *id.*

249. See Brief of Amicus Curiae, Whitman-Walker Clinic Legal Services Department, at 17, *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997) (No. 94-2200).

250. See *Anderson v. Gus Mayer Boston Store of Del.*, 924 F. Supp 763, 774-75 (E.D. Tex. 1996). "Conditions such as AIDS, HIV, blindness, and deafness, *inter alia*, have been determined by the courts to be *per se* disabilities." *Id.* (citing, *inter alia*, *Robertson v. Granite City Comm. Unit School District*, 684 F. Supp. 1002, 1006-07 (S.D. Ill. 1988); H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 18 n.18 (1990)).

251. See 29 C.F.R. App. § 1630.2(j).

252. See, e.g., *Abbott v. Bragdon*, 107 F.3d 934, 942 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998); *Doe v. Kohn, Nast & Graf*, 862 F. Supp 1310, 1321

Circuit stated that an "individualized inquiry" is required to determine an actual disability,²⁵³ it continued, "We thus hold that HIV-positive status is a physical impairment that substantially limits a fecund woman's major life activity of reproduction."²⁵⁴ The First Circuit noted that this decision is consistent with the legislative intent of the ADA that it should protect HIV-positive individuals.²⁵⁵ Both of these statements lead the reader to the conclusion that the First Circuit made HIV a per se disability. In fact, HIV status should be a per se disability because, unlike some disorders, HIV affects all its victims in the same way, substantially limiting them in their ability to procreate.

E. "Regarded As" Prong

Should a court not be persuaded that an individual has an actual disability as defined in the ADA, the plaintiff has yet another possible path to secure ADA protection. The third prong of the definition of a disability states that a person has a disability if he or she is regarded as having an impairment that substantially limits a major life activity.²⁵⁶ The Supreme Court decision in *Arline* made it clear that the Rehabilitation Act may protect an individual who suffers from a symptomatic contagious illness when that individual is regarded as being disabled.²⁵⁷ Even though the Supreme Court declined to consider whether asymptomatic infection, such as HIV, could render a person disabled under the Act, it is logical to conclude that an asymptomatic individual with a contagious disease, like a symptomatic individual, may have a disability.²⁵⁸ The

(E.D. Pa. 1994) (concluding, in effect, that HIV is a per se disability).

253. See *Abbott*, 107 F.3d at 941 (stating that the first subsection under the definition of a disability requires an individualized inquiry).

254. *Id.* at 942.

255. See *id.* at 942-43.

256. See 42 U.S.C. §§ 12102(a), (c) (1994).

257. See Kushen, *supra* note 73, at 567. The Supreme Court's decision in *Arline* was incorporated into the ADA under the perceived disability in Section 12102(c). See Brief of Amicus Curiae, Whitman-Walker Clinic Legal Services Department, at 9, *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997) (No. 94-2200).

258. See, Kushen, *supra* note 73, at 567. In discussing the question of whether an asymptomatic individual is covered, the court stated:

This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of the con-

Supreme Court premised its finding that an individual can be disabled when he has a symptomatic contagious disease on the consideration that negative attitudes from other people could be so disabling that they substantially limit one's ability to interact with others and work.²⁵⁹ This rationale would seem to apply to all contagious diseases, whether or not there were any actual impairments associated with the illness.²⁶⁰

The *Arline* decision was extended in the Rehabilitation Act context in several circuits, not only to a teacher who had full-blown AIDS,²⁶¹ but also to individuals who are HIV-positive.²⁶² However, at issue is whether these circuits have misinterpreted the "regarded as" prong. In *Gates*, the Ninth Circuit held that, following *Arline*, there was no difference between full-blown AIDS and asymptomatic HIV for deciding whether a person is regarded as having a disability.²⁶³ The court's analysis was questionable. The Ninth Circuit stated that it is the contagious effect of the condition which renders a person disabled in this situation, so that logically, it is irrelevant whether the individual has any visible symptoms.²⁶⁴ The Ninth Circuit deduced that because a person who is HIV-positive has a contagious infection, he or she is disabled under the "regarded as" subsection.²⁶⁵ However, the purpose of this prong is to take into consideration the impact of other people's perceptions. If an individual is considered disabled under the "regarded as" prong without consideration of his or her particular situation, the whole purpose of the prong is defeated.

In contrast to the Ninth and Eleventh Circuits, the Fourth Circuit took a case-by-case view of the "regarded as" prong.²⁶⁶ Where the Ninth and Eleventh Circuits found that a person is regarded as disabled when he has a contagious illness without any further inquiry, the Fourth Circuit

tagiousness, a handicapped person as defined by the Act.
School Bd. of Nassau County v. Arline, 480 U.S. 273 n.7 (1987).

259. See *Arline*, 480 U.S. at 283.

260. See Kushen, *supra* note 73, at 567.

261. See *Chalk v. United States*, 840 F.2d 701 (9th Cir. 1988).

262. See *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994); *Harris v. Thigpen*, 941 F.2d 1495, 1522-24 (11th Cir. 1991).

263. See *Gates*, 39 F.3d at 1446. In *Gates*, the plaintiffs were segregated from other inmates and denied access to certain programs because they were HIV-positive. See *id.*

264. See *Gates*, 39 F.3d at 1446.

265. See *id.*

266. See *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997).

stressed that one must focus on the perceptions of the particular people working with the HIV-positive individual.²⁶⁷ The Fourth Circuit is in accordance with the purpose of the third prong in that if the plaintiff is unable to prove his co-workers perceived him or her as having an impairment which substantially limits a major life activity, then he is not "regarded as" disabled.²⁶⁸

In sum, the circuits are in conflict over the interpretation of the "regarded as" prong. Some courts view HIV as a *per se* disability because of the contagious effects of the condition which render the person "regarded as" disabled. Other courts, however, seem to adhere closer to the wording of the statute and to determine the effects of individuals' reactions by looking to the claimant's situation.

IV. COMMENT: IS AN ASYMPTOMATIC INDIVIDUAL WITH HIV DISABLED?

With the confusion and disagreement surrounding the question of whether an asymptomatic HIV individual is protected by the ADA, the Supreme Court's decision to hear arguments in the *Bragdon* case was to clarify the issue and to promote uniform application of the ADA. Close consideration of this issue is imperative because it is important that the ADA should apply to those for whom it was intended, while at the same time, "every addition broadens the scope of the ADA's protected class, creating the potential for innumerable additional claims."²⁶⁹ In determining the existence of a disability, it is essential to rely on the plain language of the statute, the corresponding regulations providing guidance on interpretation, and legislative intent. Based on this analysis, it is logical to conclude, irrespective of the Supreme Court's ruling, that individuals with asymptomatic HIV are disabled under the ADA.

The language of the statute and the EEOC regulations alone lead to the conclusion that an HIV-positive individual, regardless of physical symptoms, is disabled under the ADA. HIV is a physical impairment as it is a physiological disorder which affects both the hemic and lymphatic bodily systems by the very nature of the infection.²⁷⁰ The fact that the DOJ lists both symptomatic and asymptomatic HIV as impairments

267. *See id.* at 172.

268. *See id.* at 173.

269. Brief Amicus Curiae of the Equal Employment Advisory Council, at 10, *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998) (No. 97-156).

270. *See Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990).

strengthens this conclusion.²⁷¹ The Fourth Circuit had no need to look beyond the regulations to dictionaries because the regulations are more specific to the ADA. In addition, HIV infection should meet the Fourth Circuit's definition of "impairment" as a deterioration because the infection "penetrates and then disables white blood cells that normally check the growth of parasitic infections in the body."²⁷²

Secondly, the HIV infection affects the major life activities of reproduction and intimate sexual relations. Even though the regulations do not list reproduction and sexual relations, this list is not exhaustive.²⁷³ It has been argued that reproduction and sexual relations are not analogous to the activities listed because people do not engage in sexual relations and reproduction with the same frequency as the activities listed, and that sexual relations and reproduction are lifestyle choices.²⁷⁴ Both of these arguments may easily be refuted. Nowhere in the statute or regulations does it state that the activity must be performed often or by everyone. The only requirement is that the activity be "major."²⁷⁵

Reproduction fits into the category of major life activities.²⁷⁶ It is a basic fundamental activity necessary for the existence of the human species, which is evidenced by the fact that the Supreme Court stated it to be a "basic civil right."²⁷⁷ Not only is reproduction necessary to keep our population from disappearing, it is also an essential element of the basic family unit, the building block of our society. The family provides the necessary emotional support and strength for an individual to prosper. Furthermore, the family unit has also been essential to the advancement

271. See 28 C.F.R. § 36.104 (1998).

272. *Cain*, 734 F. Supp. at 679.

273. See 29 C.F.R. § 1630.2(i) (1998).

274. See *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102, 106 (S.D. Iowa 1995); *Zatarin v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995).

275. See *Abbott v. Bragdon*, 107 F.3d 934, 940-41 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998).

276. See *id.* at 940. The other argument expressed as to why reproduction should not be considered a major life activity is usually held in the infertility context when plaintiffs argue that since a disorder with the reproductive system is generally considered to be an impairment, reproduction should necessarily be a major life activity. This argument has been rejected because it is bootstrapping the impairment to the major life activity. See *Zatarin*, 881 F. Supp. at 243. However, this is not an issue for HIV individuals, because the bodily systems affected are the hemic and lymphatic systems. See *id.* at 243.

277. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

of humankind. In early times, the human beings who thrived were the ones who lived and worked together. Therefore, because reproduction is the building block of the family structure and family is of such significance, reproduction is a major life activity.

There may be concern that including reproduction as a major life activity will open the door to numerous reproductive disability claims under the ADA, claims which may not be as meritorious as claims brought by HIV-positive individuals. Recognizing these additional claims may interpret the statute as overly broad and frustrate Congress' intent.²⁷⁸ However, not all conditions are per se disabilities and often, the determination of whether an individual has a disability under the ADA will be made on a case-by-case basis. Furthermore, if the physical impairment is related to the reproductive system, as with infertility and impotence, a court of appeals has held that the major life activity cannot be reproduction because this would be "bootstrapping" the major life activity onto the impairment.²⁷⁹ Finally, due to the ever-changing technological developments today, infertility can often be overcome.

Lastly, by relying on the factors listed in the regulations, one can make a legally sound conclusion that reproduction is substantially limited when an individual has the HIV infection.²⁸⁰ The Fourth Circuit's argument that it is not the actual virus which substantially limits procreation, but rather a person's conscious decision to refrain from reproduction and sexual relations, is misguided.²⁸¹ As noted earlier, the substantial limitation on reproduction is the result of the risk of producing offspring who are also infected with the virus.²⁸² An HIV-positive individual has an eight percent risk of transmission with medication, which rises to a twenty-five percent risk without medication.²⁸³ Even if one only considers the eight percent risk, this substantially limits an individ-

278. Differentiating strictly reproductive disability claims from asymptomatic HIV under the ADA is an important consideration because it is estimated that there are approximately forty-nine million women in childbearing years who are infertile in the United States alone. See *Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit* at 9 (No. 97-156).

279. See *Zatarin*, 881 F. Supp at 243.

280. See 29 C.F.R. § 1630.2(j)(2) (1998).

281. See *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 171 (4th Cir. 1997).

282. See *Abbott v. Bragdon*, 107 F.3d 934, 942 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998).

283. See *id.*

ual. The individual is significantly restricted in his or her ability to procreate compared to the rest of the population, as required in the regulations.²⁸⁴

Furthermore, intimate sexual relations is a major life activity because it is one of the closest interactions two people can have. The basis for such an activity is interaction with others. For this reason, it is analogous to other activities enumerated in the EEOC regulations, such as working and talking, which also involve interaction.²⁸⁵ Sexual activity is substantially limited because unprotected sexual intercourse carries the risk of infecting the partner. Additionally, as discussed above, protection during sexual intercourse is, in a sense, mandatory for HIV-positive individuals because of the moral overtones associated with potentially exposing an individual to the illness.

Even if reproduction and intimate sexual relations are not major life activities, there are several other activities which HIV affects that may be considered major life activities. One such activity is traveling.²⁸⁶ A person with HIV is limited in his ability to travel because of the risk of contracting bacterial infections.²⁸⁷ Additionally, some foreign countries require vaccines that may be dangerous to HIV-positive individuals.²⁸⁸ Traveling is also limited because asymptomatic individuals are often on drug regimens which require them to stay close to their physicians.²⁸⁹ Furthermore, the life activity of "caring for oneself" is affected because persons with HIV need to see physicians more frequently.²⁹⁰

Even though a person with HIV falls under the first prong of the definition of disability under the ADA, the question of whether such a person falls under the third prong, also known as the "regarded as" prong, is not as clear. Although the Supreme Court's analysis in *Arline* suggests

284. See 29 C.F.R. § 1630.2(j)(1)(ii).

285. See *id.* § 1630.2(i).

286. See *Anderson v. Gus Mayer Boston Store of Del.*, 924 F. Supp. 763, 777 n.37 (E.D. Tex. 1996).

287. See Brief of Amicus Curiae, Whitman-Walker Clinic Legal Services Department, at 23, *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997) (No. 94-2200) (citing *Anderson*, 924 F. Supp. at 777 n.37 (E.D. Tex. 1996)).

288. See Brief of Amicus Curiae, Whitman-Walker Clinic Legal Services Department, at 23, *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997) (No. 94-2200).

289. See *id.*

290. See *Hernandez v. Prudential Ins. Co. of Am.*, 977 F. Supp. 1160, 1164 (M.D. Fla. 1997).

that a person with a contagious symptomatic disease may be disabled because he or she is perceived as having a disability,²⁹¹ the court did not lay down a per se rule. The Ninth Circuit misinterpreted the Supreme Court's analysis when it stated in *Gates* that it is the contagiousness of a condition which is the basis for a disability.²⁹² Rather, the Fourth Circuit was correct in holding that in order to find a person with HIV disabled under the perceived disability prong, the analysis must focus on the *particular* employer involved and his personal perceptions regarding the contagiousness of an illness.²⁹³

It is now well-known that the HIV virus can only be transmitted through bodily fluids, not through casual contact alone. Society does not have the "level of public fear and misapprehension" as it once did about HIV.²⁹⁴ A person cannot argue that simply because someone is aware of an individual's HIV status, that he or she perceived that individual as disabled.²⁹⁵ It is less likely that for HIV-positive individual to be perceived as disabled than a person with a highly contagious disease, such as hepatitis or tuberculosis. With asymptomatic HIV, the individual must prove that the surrounding individuals are aware of his or her condition. Furthermore, people must view the individual as not only carrying an infectious disease, but also being substantially limited in a major life activity. Proving the individual is regarded as substantially limited in a major life activity is especially difficult when an asymptomatic condition is involved. Unlike a symptomatic contagious disease, in which the illness is apparent and people may view the condition as interfering with daily activities, it is less likely that people will view an asymptomatic illness as interfering with any major life activities. Although an HIV-positive individual may be able to succeed under the "regarded as" prong, the individual may have difficulty showing that in the particular situation, he or she was perceived as having an impairment that substantially limited a major life activity.

Lastly, due to the inherently substantially limiting nature of the virus and the legislative history commenting on this disease, HIV status, both

291. See *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 283 (1987).

292. See *Gates v. Rowland*, 39 F.3d 1439, 1447 (9th Cir. 1994).

293. See *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 172 (4th Cir. 1997).

294. See *Arline*, 480 U.S. at 284.

295. See *Runnebaum*, 123 F.3d at 172.

symptomatic and asymptomatic, should be a per se disability. Unlike other impairments which may affect people differently, the HIV infection substantially limits everyone, so no individualized inquiry is necessary.²⁹⁶ The age of the individual should not pose a barrier to a per se rule. A young child is disabled because he or she is substantially limited in reproduction, even if the child has not yet gained the capability to reproduce. On the other hand, an older woman in today's society is still capable of reproducing long after she has experienced menopause because of advanced medical technology, such as in vitro fertilization. The Fourth Circuit claimed there must be a case-by-case determination, but in essence, it established a per se rule that an individual with asymptomatic HIV is not disabled under the ADA by holding that such a person does not even have an impairment.²⁹⁷ In addition, legislative history supports the per se rule with statements such as those made by U.S. House Representatives and the DOJ memorandum.²⁹⁸ This legislative history shows that Congress intended for asymptomatic HIV to be a disability. Therefore, it should be a per se rule that a person with asymptomatic HIV is disabled under the ADA because he or she has a physical impairment which substantially limits a major life activity.

CONCLUSION

The purpose of the ADA is to protect persons with disabilities from discrimination.²⁹⁹ A main issue that surfaced since the ADA's enactment is exactly what constitutes a disability. Recently, there has been concern about reading the statute overbroadly and extending coverage to persons whom were not intended to be protected under the Act. This concern extends to asymptomatic individuals with HIV because the number of ADA claims brought by such individuals is increasing. This is due to the fact that the number of individuals with the HIV virus continues to rise.³⁰⁰ At the same time, the nature of the illness has changed to the

296. See Brief of Amicus Curiae, Whitman-Walker Clinic Legal Services Department, at 17, *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997) (No. 94-2200).

297. See *Runnebaum*, 123 F.3d at 176 (Michael, C.J., dissenting).

298. See, e.g., *Doe v. Kohn, Nast & Graf*, 862 F. Supp. 1310, 1320 n.7 (E.D. Pa. 1994); Kmiec Memorandum, *supra* note 125, at D-2, D-3 (stating that asymptomatic HIV is a disability under the ADA).

299. See PARRY, *supra* note 2, at 2.

300. There are over 230,000 Americans who have HIV and it is estimated that the number of persons affected in North America will be over one million by

extent that an individual may live for ten years or longer before any physical symptoms begin to appear. The concern relating to broadening the protections of the ADA is exemplified in the Fourth Circuit's decision in *Runnebaum*, where the court held that the HIV-positive plaintiff was not disabled.³⁰¹ However, by reading the plain language of the ADA and referring to the EEOC and the DOJ regulations, as well as the legislative history, one must deduce that an individual with the HIV virus, even in the early stages of the disease, without outward symptoms, has a disability under the Act. An individual has a physical impairment from the nature of the virus, and he or she is substantially limited in reproduction and intimate sexual relations because there is a risk of passing on the virus to a partner and any offspring. A senior attorney with the EEOC,³⁰² speaking at a conference on HIV/AIDS, viewed the Fourth Circuit's holding with skepticism, when he said,

Although the U.S. Court of Appeals for the Fourth Circuit, in a fractured August decision, held that asymptomatic HIV is not a disability under the ADA, employers would be "foolish" to rely upon that case When in doubt, treat HIV-positive employees or employees with AIDS as having an ADA-recognized disability, to avoid problems down the road.³⁰³

Not only can an individual with HIV be disabled under the ADA, but infection with the HIV virus should be a per se disability because HIV is a potentially fatal illness which is "inherently substantially limiting."³⁰⁴ Thus, the Supreme Court, in its analysis, came to the correct decision that the ADA provides to all HIV-positive individuals the same protection against discrimination as persons who are disabled "in the usual, common, lay sense of the word."³⁰⁵

2000. See DAVID M. STUDDERT & TROYEN A. BRENNAN, *HIV Infection and the Americans with Disabilities Act: An Evolving Interaction*, 549 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 84, 85 (Alan W. Heston & Neil A. Weiner eds., 1997).

301. See *Runnebaum*, 123 F.3d at 174.

302. Peter Petesch, an attorney for the EEOC, spoke at the National Business and Labor Conference on HIV/AIDS in September 1997. *AIDS: Jumble of Laws Affecting HIV Are Examined During CDC Conference*, DAILY LAB. REP. (BNA) No. 190, at A-3 (Oct. 1, 1997).

303. *Id.*

304. See 29 C.F.R. App. § 1630.2(j) (1998).

305. *Doe v. Kohn, Nast, & Graf*, 862 F. Supp. 1310, 1319 (E.D. Pa. 1994).

EPILOGUE

Section 12101(b) of the ADA states that a purpose of this statute is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."³⁰⁶ The Supreme Court of the United States was instrumental in effecting the aforementioned goal articulated by Congress when the Court rendered the landmark decision of *Bragdon v. Abbott*³⁰⁷ on June 25, 1998. *Bragdon* was significant because it extended the protections of the ADA to individuals with the HIV virus.³⁰⁸ The Court ruled that the respondent, an HIV-positive individual who had no symptoms during the time at issue, possessed a disability under section 12102(2)(A) of the ADA, thereby qualifying for protection under the Act.³⁰⁹ The Court determined that the respondent was, in fact, "disabled" because she had a physical impairment that substantially limited a major life activity.³¹⁰

In reaching its conclusion that an asymptomatic individual with HIV has a disability under the ADA, the Court considered each of the three subsections of Section 12102(2)(A) separately: (1) physical impairment; (2) major life activity; and, (3) substantial limitation.³¹¹ First, the Court found the respondent, Ms. Abbott, to have a physical impairment of the hemic and lymphatic systems from the time she initially contracted HIV due to the "immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease."³¹²

Second, the Court determined that reproduction is a major life activity

306. 42 U.S.C. § 12101(b) (1994).

307. 118 S. Ct. 2196 (1998). This case involved a dentist who refused to treat a patient in his office because she was HIV-positive. *See id.* at 2201.

308. *See* Joan Biskupic & Amy Goldstein, *Disability Law Covers HIV, Justices Hold*, WASH. POST, June 26, 1998, at A1.

309. *See Bragdon*, 118 S. Ct. at 2201. This was the first ruling by the Supreme Court involving the federal Americans with Disabilities Act. *See Biskupic & Goldstein, supra* note 308, at A1.

310. *See Bragdon*, 118 S. Ct. at 2204. Note that the third question presented to the Court involving whether the respondent posed a direct threat to the dentist, which would allow the dentist to refuse to treat the patient under the provisions of the ADA, has been remanded back to the First Circuit. *See id.* at 2213. The First Circuit must examine this issue more thoroughly in light of the Supreme Court's analysis of sources upon which the First Circuit relied. *See id.*

311. *See id.* at 2202.

312. *Id.* at 2204.

under the ADA.³¹³ The defendant dentist argued that the ability to reproduce and bear children cannot be a major life activity under the ADA because it does not have “a public, economic, or daily character.”³¹⁴ However, the Court was persuaded that reproduction is analogous to other major life activities listed in agency regulations, including working and learning.³¹⁵ In addition, the Court stated that reproduction is the major life activity considered because that is what the respondent raised in supporting her ADA claim.³¹⁶ However, the Court did not rule out any other major life activities, as it stated, “Given the pervasive, and invariably fatal, course of the disease, its effect on major life activities of many sorts might have been relevant to our inquiry.”³¹⁷

Third, the Court looked to medical evidence to determine that an HIV-infected individual is substantially limited in the ability to reproduce.³¹⁸ The substantial limitation requirement found in the third subsection of section 12102(2)(A) is satisfied because a person’s ability to reproduce is limited in two ways. First, the Court concluded that an infected female may transmit the virus to a male with whom she has sexual relations.³¹⁹ Second, an HIV-positive female also may transmit the HIV virus to her unborn child.³²⁰ The Court’s finding that the risk to a male partner substantially limits an infected female is particularly significant because it indicates that the Court included intimate sexual relations as encompassed in the reproduction process. In support of its decision based on the definition of a disability, the Court looked to agency regulations that find asymptomatic HIV to be a “disability” within the meaning of the ADA.³²¹

Also of significance, the Court stated that in view of its holding, it would not address the second question of whether HIV infection itself is a per se disability.³²² The Court’s holding, coupled with the fact that the virus attacks all individuals in the same way, leads one to believe that asymptomatic HIV is a disability for all individuals infected with the

313. *See id.* at 2205.

314. *Id.*

315. *See Bragdon*, 118 S. Ct. at 2205.

316. *See id.*

317. *Id.* at 2204-05.

318. *See id.* at 2206.

319. *See id.*

320. *See Bragdon*, 118 S. Ct. at 2206.

321. *See id.* at 2205.

322. *See id.* at 2207.

illness, without a need for a case-by-case determination.

The effects of the Court's decision in *Bragdon* will be life-changing to some, and will extend to a substantial portion of our country's society. The most obvious groups affected by the ruling are the 525,000 individuals in the United States with asymptomatic HIV,³²³ as well as those who must abide by the statute. Public and private entities, including employers and places of public accommodations, such as doctors' offices, hospitals, schools, and restaurants, cannot discriminate against individuals with HIV due to their infection with the virus.³²⁴ The ADA mandates that reasonable accommodations, if necessary, must be made for individuals with HIV,³²⁵ such as allowing an employee to modify his or her work schedule for a periodic doctor's appointment. Because the Court determined that reproduction is a major life activity, the ADA may provide protections to those with solely reproductive disorders, such as infertility, provided that the individual meets the three subsections of section 12102(2)(A).³²⁶

The benefits associated with the Supreme Court's ruling extend beyond those entities bound by the ADA. As a result of the *Bragdon* decision, individuals may feel less hesitant about submitting to testing for the HIV virus because now they can feel confident that, if they are HIV-positive, they are protected from discrimination by the ADA.³²⁷ Infected individuals may not be terminated from employment or evicted from their homes as a result of a positive HIV test.³²⁸ Once individuals are aware they have HIV, they can receive medical care and assist in preventing the spread of the virus. The Court's acknowledgement that the HIV virus itself is a disability may play a role in a future decision by the federal government that HIV-positive individuals qualify for

323. See Justin Gillis, *Ruling Shows How Far Nation Has Evolved on Epidemic*, WASH. POST, June 26, 1998, at A16.

324. See 42 U.S.C. §§ 12112, 12132, 12182 (1994). Because the Court was interpreting the definition of the term "disability" in the general provisions of the ADA, the ruling, although in the context of public accommodations under Title III, has the same impact on all other titles of the Act. See 42 U.S.C. § 12102.

325. See 42 U.S.C. §§ 12111-12112, 12131-12132; see also 42 U.S.C. § 12182(b)(2)(A) (referring to making "reasonable modifications").

326. Petition for Writ of Certiorari to United States Court of Appeals for the First Circuit at 9 (No. 97-156).

327. See Biskupic & Goldstein, *supra* note 308, at A17.

328. See *id.*

Medicaid.³²⁹

For those who are concerned with broadening the parameters of protection under the ADA, it is important to keep in mind that merely having a disability is not sufficient to litigate a successful claim under the ADA. A successful discrimination claim requires the plaintiff to establish both that he is disabled and that he was unlawfully discriminated against.³³⁰ Therefore, provided an employer does not discriminate against a disabled employee, that employer can successfully defend against an ADA discrimination claim.

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329. *See id.*

330. *See Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 164 (4th Cir. 1997).