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Notes

Revised Agenda and Discussion Draft for June 19 Roundtable at Georgetown University Law Center

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HIV LAW & POLICY STUDY

Health policy and legal protections for persons with HIV

A Project of the Federal Legislation Clinic, Georgetown University Law Center

Project Director
Timothy M. Westmoreland

Project Staff
Chai R. Feldblum
R. Scott Foster
Althea Gregory

June 17, 1998

Todd Summers
Deputy Director
White House Office of National AIDS Policy
808 17th Street, NW
Suite 820
Washington, DC 20006

Dear Mr. Summers:

Enclosed please find a discussion draft of the document prepared by Jeff Levi for the June 19th Roundtable on "After Bragdon v. Abbott: Issues and Options in Public Health Policy." We apologize for the late date on which you are receiving this document. I have also enclosed a revised agenda for the event.

If you have any questions about the Roundtable, or need any special assistance, please let me know. Otherwise, we look forward to seeing you on Friday.

Sincerely,

Scott Foster

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A project supported by the Henry J. Kaiser Family Foundation, Menlo Park, CA



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AFTER BRAGDON V. ABBOTT: ISSUES AND OPTIONS IN PUBLIC HEALTH POLICY

AGENDA FOR ROUNDTABLE JUNE 19, 1998

**Georgetown University Law Center
600 New Jersey Avenue, NW
Room 588**

- 8:30 a.m. CONTINENTAL BREAKFAST
- 9:00 a.m. *Welcome and Overview -- Tim Westmoreland*
- 9:10 a.m. *Summary of Papers Commissioned for May Roundtable on
"How Disability Discrimination Laws Apply to People with AIDS
in an Era of More Effective Therapies"*
-- Chai Feldblum and Larry Gostin
- See Discussion Drafts and Summaries of:
1) *Definition of Disability Under Federal Anti-Discrimination Law:
Implications for People with AIDS and HIV Infection*, by Chai Feldblum;
2) *Health Coverage for People with HIV/AIDS*, by Anne Lewis;
3) *Discrimination in the HIV/AIDS Epidemic: A Fifty-State Survey of Anti-
Discrimination Laws*, by Larry Gostin and David Webber; and
4) *Potential Outcomes of the Disability Issue in Bragdon v. Abbott*, by Ben Klein
(one page document).
- 10:15 a.m. BREAK
- 10:30 a.m. *Potential Effect of Bragdon v. Abbott on HIV/AIDS Public Health Policy*
-- Jeff Levi
(See Discussion Draft of *After Bragdon v. Abbott: Issues and Options in Public
Health Policy*)
- 11:30 a.m. Response to Potential Public Health Effects raised by Abbott
* Federal Level
* State Level
* Community Advocacy
(Government officials and AIDS advocates will be invited to respond)

(CONTINUED ON REVERSE SIDE)

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**Georgetown University Law Center
600 New Jersey Avenue, NW
Room 344**

1:00 p.m.	BREAK FOR LUNCH
1:15 p.m.	WORKING LUNCH on complexities of outreach and early treatment access: * Low-income people * Racial and ethnic minorities * IV drug users * Women (Roundtable participants will be invited to respond)
2:30 p.m.	BREAK
2:45 p.m.	<i>Preparing a Strategy and Timeline for Dealing with Public Health Issues raised by <u>Abbott</u></i> -- Tim Westmoreland, moderating
4:45 p.m.	ADJOURN

After Bragdon v. Abbott:

Issues and Options in Public Health Policy

Jeffrey Levi
Center for Health Policy Research
George Washington University

DRAFT....DO NOT QUOTE, CITE OR REPRODUCE

The unfortunate assumption of this paper is that the Supreme Court's ruling in Bragdon v. Abbott will in some way seriously erode the protections of the Americans with Disabilities Act for people living with HIV infection. That assumption is based less on a learned reading of the Court and more on a belief that preparing for the worst is the wisest strategy.

The degree to which the Court limits the ADA's protections will make a difference in terms of *legal* strategies that must be pursued in the future. But *any* decision, no matter how narrow, that *appears* to limit protections will have dramatic implications for the public health far beyond its direct effect. This is due to the fact that so much of the public health response to HIV is dependent on the cooperation and support of those living with or at risk for HIV, through interventions such as voluntary testing, partner notification, and participation in prevention programs. That cooperation has been inspired in no small part by the perception that the ADA's protections will mitigate the risk of discrimination that might result from revealing one's HIV status or risk factors. Any diminution of that protection, no matter how limited, could undermine this fragile balance of trust between the HIV affected community and the public health community.

This paper is meant to provoke thought and discussion, not offer definitive solutions (fortunately). It also might be criticized for painting a relatively grim picture. But that helps to assure that the full extent of a potential loss will be considered and, indeed, the underlying situation facing people with HIV or at risk for HIV is also grim. What follows, then, is an attempt to suggest the answers to two questions:

(1) What are some of the potential public health implications of an adverse Supreme Court decision?

(2) What are some of the potential public health responses or solutions to an adverse Supreme Court decision?

Public Health Implications:

The stigma associated with HIV and AIDS has long been recognized as a major factor in both the public's response to this epidemic and the response of those at risk for or living with HIV/AIDS.¹ Whether the Court rules narrowly or broadly in Abbott, any decision that is interpreted as a defeat for advocates for people living with HIV will have dramatic implications for the perception and reality of HIV-related stigma. The fear of discrimination that has been such a motivating factor for people at risk for HIV will be further legitimized.

From a public health perspective, a cascade of ill-effects could follow – all of which, I believe, could occur even with a very narrow (but negative) decision, since so much of these implications have more to do with the perception or fear of stigma and discrimination rather than the routine reality of discrimination and stigma.

We are likely to see, at least in the short term, a decline in the number of people at risk for HIV who learn their status through counseling and testing, for fear that learning one's status will open one to new forms of discrimination. This could mean delayed diagnosis of HIV and thus delayed entry into care and diminished benefit from early treatment interventions. This will exacerbate an already serious problem: that people learn their HIV status relatively late in disease progression. This also means less access to the behavioral counseling associated with HIV testing for those who are positive or

¹ See, for example, "The Impact of Homophobia and other Social Biases on AIDS," A Special Report by the Public Media Center, October 1995; and, Scott Burris, "Driving the Epidemic Underground? A New Look at Law and the Social Risk of HIV Testing," *AIDS & Public Policy Journal*, Summer 1997, pp.66-78.

negative. This highlights the importance of maintaining and perhaps expanding the availability of anonymous testing.

We are likely to see, at least in the short term, a decline in the number of people who seek care once they learn their status. The availability of anonymous testing sites might allow some to learn to their status; but fear of disclosure once they enter the care system might delay seeking treatment. Pursuing medical record confidentiality protections might mitigate this problem. In addition, if the Court legitimizes discrimination in care provision for those with early HIV infection, then even those who wish to obtain care may find it more difficult to access, providing yet another cause of delayed care.

In either case, this means that more people will have undiagnosed and/or untreated HIV disease. Those who are not in treatment may be more likely to spread HIV infection, either because they are unaware of their status or because they are not accessing a reinforced prevention message as part of their care. This is compounded by the additional concern of an individual having undiagnosed and untreated opportunistic infections that may be communicable diseases (e.g., tuberculosis).

If early HIV infection is not protected under the ADA, for those in care the fear of discrimination in the workplace may result in lower adherence levels to complex treatment regimens, since fear of disclosure may cause individuals with HIV to hide the fact that they need to take their medicines. This could result in development of more resistant strains of HIV.

Efforts by health departments and the Centers for Disease Control and Prevention to increase HIV-related surveillance may be stymied by an adverse Court decision. One of

the principal arguments made against HIV names reporting, for example, is the fear of discrimination. This has been dismissed by some proponents of names reporting as unwarranted given the ADA's legal protections (along with state laws). But if the Court restricts in any way these protections (and calls into question the state protections that use the federal definition), public health officials favoring names reporting (or any form of HIV surveillance, for that matter) will be hard pressed to make their case.

Among those at risk for but not infected with HIV, or who do not know their status, continued participation in prevention programs is critical. Participation in these programs has always been hampered, to some degree, by fear of being identified with a stigmatized condition. This may well become a larger factor if there is an adverse decision by the Court.

It may also become difficult to recruit individuals into clinical trials for new HIV-related treatments. With diminished legal protection, individuals may choose to take as low a profile as possible, which includes limiting the number of places where one's status is on file. This may delay our ability to learn about new and promising treatments.

Finally, the willingness of HIV-negative individuals to participate in clinical trials for a preventive vaccine may also decline, due to similar fears of discrimination. Since participation in a trial may render an individual HIV antibody positive, without a firm legal basis for anti-discrimination protection individuals may not be willing to sign up for these trials, which are critical to the public health.

This is not meant to be a complete or comprehensive accounting of the potential implications of an adverse decision. But it should be clear that these should be of grave concern to the public health and scientific communities. And it is those broader

communities – not just the HIV community – that must develop an appropriate and strong response should the Abbott decision limit anti-discrimination protections for people living with HIV.

Public Health Responses:

A. Immediate response to an adverse decision. The public response to the Court's decision will be critical in framing the impact of a negative decision. While the HIV community will want to and need to hear from its leaders about the decision, the bulk of the response (whether the decision is positive or negative) should come from the public health leadership inside and outside government. Political players at all levels should take their lead from public health. For this ultimately must be framed as a public health-related decision, not an HIV or AIDS-related decision. Thus, we should be hearing primarily from health leaders – the Surgeon General and the CDC, not the Office of National AIDS Policy or the Office of HIV/AIDS Policy; state health department directors, not state AIDS directors; the APHA and the AMA, not AIDS Action Council; state Attorneys General, not the Human Rights Campaign. This can be a difficult form of self-censorship, but the immediate response to the decision will frame the perceptions (in the HIV community and the country at large) and the politics (in Congress and state legislatures) of any further steps that might need to be taken in the months ahead.

If the decision upholds the full breadth of the ADA, then the response is relatively simple: this is a victory for public health, and all parties can applaud the Supreme Court for having the vision to stand up for public health.

If the decision is negative, but made on relatively narrow grounds, it will be important both to decry any loss of protection while emphasizing the narrowness of the impact so that this is not perceived as a broad defeat for ADA-related protections for people with HIV. This will be a difficult balancing act, but this is as important particularly in terms of the message heard by those living with or at risk for HIV.

If the decision is broad and negative, the public health leadership must join together in denouncing the decision as the threat to the public health that it is. This will lay a critical foundation for any legislative, administrative or social fixes that must follow, which all must be framed in the context of protecting the public health. Angry rhetoric about an adverse decision that includes charges of AIDS-phobia, homophobia or other forms of stigma may well be true, but will only heighten the political tensions that may undermine an ability to fix the problem in the name of public health. In fact, the AIDS community's response should focus on the public health damage of a negative decision: how this will undermine the AIDS community's prevention efforts and campaigns to encourage people to be tested, hurting society-at-large, not just those with HIV.

It will also be critical for the non-HIV public health leadership to demonstrate to those at risk for HIV that immediate steps will be taken to try to remedy this adverse decision – so that critical public health interventions (seeking testing, care, and prevention services) are not undermined. This means that in the short time between now and the Court's decision, the public health leadership of the federal, state, and local governments and the public health organizations outside government must arrive at a consensus on an agenda that shows that strong and forceful steps will be taken to remedy

the problem. These may include some of the short-term and long-term measures suggested below.

B. Short-term steps. Given the inter-relatedness of many state anti-discrimination laws with the language of the ADA, it will be critical for state officials (especially Attorneys General) to immediately declare that they do not accept the Supreme Court's interpretation of the ADA to necessarily apply to state laws – and that they will take all steps necessary (in court and in legislatures) to clarify that broader intent of their state laws. Health department officials must make clear how such an effort is critical to the success of their anti-HIV public health efforts.

Federal and state health officials must clarify that the Supreme Court's decision requires several steps on their part to regain the confidence of those at risk in public health interventions related to HIV. First, they should announce the expansion of anonymous testing in all jurisdictions (including those that currently restrict it), so that people will not be afraid to take that initial step toward diagnosis. Second, they should withdraw any policy proposals for the institution of names-based HIV surveillance until the legal situation can be clarified.

These public health leadership statements should be endorsed by the President, Secretary Shalala, and the Governors – but it should be clear that they are looking to the non-political health leadership on this issue. It should not be turned into a political issue.

C. Long-term steps: Depending on the nature of the decision, different types of fixes may be appropriate. Clearly, legislative options should be considered, both at the

federal level and at the state level.² In both instances, however, it should be remembered that legislation always comes with risks. The trade-offs that may be demanded in exchange for anti-discrimination protections (e.g., HIV-specific laws regarding criminalization of transmission or so-called mandatory partner notification) may not be worth the effort. But if a decision is made that legislative solutions are needed at the state level, the federal health leadership can provide mechanisms to encourage this – from drafting model state anti-discrimination laws to providing financial incentives (through increased federal funding) to jurisdictions with stronger protections, such as making a precondition of federal funding passage of anti-discrimination legislation.

A smaller legislative fix would be related to confidentiality of medical records. Without broad anti-discrimination protections, this becomes a more important issue – and may be a necessary antecedent to convincing people that it is safe to seek care for HIV.

But above all, the public health leadership at all levels of government and those outside government must undertake a campaign to address the underlying cause of why this case even went to court in the first place: the stigma associated with HIV and the behaviors related to HIV. (This is different from using the politics of stigma to denounce a negative Court decision.) Even with allegedly strong legal protections in place, it is stigma that is preventing people from seeking the testing, treatment, and prevention services they need. Only a full-scale social marketing effort that addresses the underlying causes of that stigma (homophobia, attitudes towards sex in general, attitudes toward drug users, etc.) will resolve this problem. It is something that the public health

² I will not address the issue of HIV-specific vs. general legislative approaches. This is a complex legal, political, and practical question, one that will be driven at least in part by the nature of the Court's decision.

community should have taken on before, but is more critical now for a multitude of reasons, including: the perceived and real (if the case is lost) fragility of anti-discrimination protections; the fact that even with strong legal protections, it is the social climate that drives behavior more than statutory sanctions and it is negative behaviors that drive people with HIV or at risk for HIV underground; with new treatments, addressing the large number of people who do not know their HIV status and could be benefiting from early intervention is even more important, and part of any anti-stigma campaign should be one that creates a positive climate for HIV testing; the increased likelihood of vaccine trials requires a climate that encourages participation and thus identification with this epidemic; and the continued steady rate of new HIV infections speaks to the need for greater outreach on prevention, participation in which will likely increase as HIV is destigmatized.

This is simply an outline of implications and steps that can be taken if the Court rules unfavorably in the Abbott case. They are meant to stimulate discussion...but discussion that must not be too prolonged, since an immediate and active response to the Court's decision will be critical if the implications of an adverse decision are to be mitigated as much as possible.



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Definition of Disability Under Federal Anti-Discrimination Law: Implications for People with AIDS and HIV Infection

SUMMARY

From the earliest years of the AIDS epidemic, people with AIDS and HIV infection have experienced discrimination -- in areas such as employment, education, housing, and health care. From the 1980s through 1992, the sole legal recourse available to such individuals lay in a few sections of federal law and in some state laws. The federal law covered the federal government itself, businesses that had contracts with the federal government, and entities that received federal financial assistance (sections 501, 503, and 504 of the Rehabilitation Act of 1973, respectively.)

Courts that heard cases of AIDS and HIV discrimination under the Rehabilitation Act rarely questioned the assertion by plaintiffs that they were covered under federal law as "handicapped individuals." Consistent with the general trend in Rehabilitation Act cases in the 1970s and 1980s, courts rarely closely scrutinized whether plaintiffs met the exact definition of "handicapped individual" set forth in the law: that is, a person with a "physical or mental impairment that substantially limited a major life activity" of the individual, or someone regarded as having such an impairment. Instead, courts focused on whether the alleged discrimination had, indeed, occurred *because* of the handicap, or if all parties agreed the adverse action had been taken because of the handicap, whether such action was nonetheless *justified*.

Thus, in Rehabilitation Act cases alleging discrimination based on AIDS or HIV infection, courts almost invariably assumed that the individuals with AIDS or HIV infection who were bringing the cases were covered under federal law as "handicapped individuals." Indeed, courts rarely distinguished between plaintiffs with AIDS and plaintiffs with asymptomatic HIV infection -- they simply presumed both groups were covered under the law. And, in most cases, all parties agreed the adverse action at issue had been taken *because of* the plaintiff's AIDS or HIV status -- and the case revolved solely around whether such action was *justified*. In many cases, plaintiffs won (primarily in cases dealing with children or teachers in school), and in some cases, plaintiffs lost (primarily in cases challenging mandatory HIV testing in agencies such as the State Department and in the health care worker arena.)

This situation has changed dramatically with cases brought under the Americans with Disabilities Act of 1990 (ADA) -- a law that became effective in 1992. Starting in approximately 1994 and 1995, courts began concluding in numerous cases that individuals with a range of physical and mental impairments -- including individuals with cancer, epilepsy, diabetes and schizophrenia -- were not persons with "disabilities" for purposes of the ADA. In these cases,

courts have closely scrutinized whether a particular impairment *substantially* limits, as compared to somewhat limits, a major life activity, and whether a particular life activity is, indeed, a *major* life activity. In addition, many courts have analyzed whether an individual is substantially limited in the major life activity of *working* -- even if the person's impairment more logically affects some other life activity (such as lifting or bending.) Thus, in these cases, courts have concluded that unless an individual with an impairment is precluded from doing a range of jobs, or an entire class of jobs, that individual is not substantially limited in working and hence is not a person with a disability under the ADA.

This trend in ADA cases of closely scrutinizing whether an individual with an impairment is sufficiently limited in a major life activity to qualify as a person with a "disability" has been applied to plaintiffs with AIDS, and specifically, to plaintiffs with asymptomatic HIV infection. In 1995, the Fourth Circuit Court of Appeals ruled that whether HIV infection was a disability had to be decided on a case-by-case basis (*Ennis*), and in 1997, the Fourth Circuit ruled that a particular plaintiff with asymptomatic HIV infection claiming employment discrimination was not covered under the ADA (*Runnebaum*). While several district courts, and courts of appeals, have ruled that people with asymptomatic HIV infection are covered under the ADA, few of those courts engaged in extensive analysis regarding *how* such individuals are actually covered under the words of the statute. Courts that have engaged in such an analysis have usually concluded that people with HIV infection are covered because they are substantially limited in the major life activity of reproduction. Whether reproduction is a major life activity for purposes of the ADA, and whether all people with HIV infection are inherently substantially limited in that activity, are questions currently before the Supreme Court in the case of *Bragdon v. Abbott*.

The enclosed paper traces the development of the general concept of disability in America and the reflection of those changes in federal law. The initial approach to disability was one of pity, charity and exclusion; while those attitudes have remained in society, an approach of achieving medical and vocational rehabilitation became prominent in the mid-1900s. The concept that people with disabilities deserve civil rights is a more recent, and revolutionary, approach that required a different definition of "handicap" than had previously existed in federal rehabilitation laws. The paper describes how courts applied the new definition of "handicapped individual" under sections 501, 503, and 504 of the Rehabilitation Act, and traces the story of coverage of AIDS and HIV infection in federal disability law through judicial, Congressional, and administrative actions. Finally, the paper details how courts have applied the definition of disability in a restrictive manner under the ADA and the implications of those restrictions for people with asymptomatic HIV infection.



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DEFINITION OF DISABILITY UNDER FEDERAL ANTIDISCRIMINATION LAW: IMPLICATIONS FOR PEOPLE WITH AIDS AND ASYMPTOMATIC HIV-INFECTION

Chai R. Feldblum

**** Please Do Not Copy or Distribute ****

Discussion Draft

May 13, 1998

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***** DISCUSSION DRAFT *****

DEFINITION OF DISABILITY UNDER FEDERAL ANTI-DISCRIMINATION LAW: IMPLICATIONS FOR PEOPLE WITH AIDS AND ASYMPTOMATIC HIV-INFECTION

Chai R. Feldblum

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I. INTRODUCTION

Acts of discrimination against people with AIDS or HIV infection, or against those with whom they associate, have occurred with consistency since the beginning of the HIV epidemic. Sales clerks, lawyers, and doctors who are HIV infected have been dismissed from their jobs; children with HIV and AIDS have been barred from

classrooms and day care centers; dentists and doctors have refused to provide treatment to those with AIDS or HIV infection; and funeral homes have refused to bury those who have died of AIDS or HIV.

Since 1973, the federal Rehabilitation Act has prohibited discrimination against people with "handicaps" on the part of the federal government, by entities that receive federal contracts, and by entities that receive federal financial assistance. In 1988, Congress passed a law reaffirming the broad scope of the Rehabilitation Act; in 1989, Congress passed a law prohibiting discrimination against people with handicaps in the sale or rental of private housing; and in 1990, Congress passed the Americans with Disabilities Act, a sweeping law prohibiting discrimination against people with disabilities in private employment, public accommodations, and state and local programs.

During each of the Congressional debates on these three laws, Congress considered the applicability of such laws to people with AIDS and HIV infection. And in each case, Congress reaffirmed that people with AIDS and HIV infection were intended to be covered by the anti-discrimination provisions of the law.

Based on the legislative history of recent Congressional enactments, therefore, one would expect protection against discrimination for people with AIDS and HIV infection to be well established by 1998. Instead, an overwhelming number of judicial opinions over the past six years have concluded that people with a wide variety of medical conditions -- ranging from epilepsy to cancer to manic depression -- are not covered under federal disability anti-discrimination law. In the past few years, such rulings have begun to appear with regard to people with AIDS and HIV infection as well. And, some time between May and July of 1998, the Supreme Court will issue its opinion in the case of *Bragdon v. Abbott*, concerning whether a woman with HIV infection is covered under the Americans with Disabilities Act (ADA).

How has this happened? This paper attempts to offer some answers to that question, and to explore some options for responding to the current situation. The paper first traces the development of federal laws dealing with disability, the concept of disability incorporated in such laws, and the manner in which people with AIDS and HIV infection were treated in the early years of anti-discrimination law, both by federal

agencies and by Congress. The paper then explores how the concept and definition of disability in anti-discrimination law has been shaped by courts interpreting such laws and analyzes the impact of the current judicial state of affairs on people with AIDS and asymptomatic HIV infection. By tracing the development of judicial interpretation of the terms "handicap" and "disability" in federal anti-discrimination laws, the paper seeks to offer some reasons for the current restricted judicial definition of disability and some possible options for administrative, judicial, or legislative response.

II. THE CONCEPT OF DISABILITY IN FEDERAL LAW: FROM THE 1700'S TO THE 1970'S

Many people in America today may have heard of the Americans with Disabilities Act (ADA) and may have a general idea that people with disabilities have a "right" not to be discriminated against as customers and employees. Certainly, there has been a fair amount of print and television coverage regarding the ADA, including news articles, books, and television programs, dealing either sympathetically with the issue of discrimination or detailing various "outrageous" examples of alleged discrimination.¹

For centuries, however -- in this country, as well as in other countries -- the concept of "disability" was not synonymous with the concept of "civil rights." To the contrary, people with disabilities were viewed for years with pity and revulsion, and later, as medical technology increased, as objects of rehabilitation and cure. The government's relationship over the years with regard to people with disabilities reflected these common, public attitudes regarding disability. Moreover, the public's *current* perceptions of who people with disabilities are, and what such people are capable of, are still shaped by these years of history.

There are several accounts of the public's perception of people with disabilities, and the resulting governmental policies towards people with disabilities. A 1983 report from the U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, and a 1984 book by Richard Scotch, *From Good Will to Civil Rights: Transforming*

Federal Disability Policy, are both excellent and useful accounts of this history from the perspective of modern civil rights theory.²

As these and others accounts note, in colonial America, people with disabilities were viewed primarily in terms of their dependency. Wherever possible, people with disabilities were cared for by their relatives, who often hid them out of shame.³ For those who had no family support, colonial governments established "poor laws" which provided subsistence to people who were poor, elderly, or disabled. All such individuals were viewed primarily in terms of their dependency on community support.⁴ Indeed, the key qualification to receiving aid was *dependency* -- the inability to provide for oneself. The aid itself was generally offered on an individual basis, allowing recipients to remain in their own homes or the homes of neighbors.⁵

As society expanded and changed, governmental support for dependent people with disabilities also expanded. By the 1820s, the small communities that had supported people with disabilities in private homes were rapidly disappearing.⁶ In response, state and local governments began constructing large almshouses, in which people who were poor, old, sick, disabled, or simply idle drifters were given a disciplined daily regimen and an exacting routine.⁷

Starting in the 1830s, states also began to erect asylums for people who were mentally ill. New medical science had determined that insanity was curable, and doctors believed the best treatment for those who were mentally ill was to remove them completely from the community at the earliest sign of irregularity.⁸ The insane asylums were thus designed to "cure" people who were mentally ill by depriving them of stimulus or emotion.⁹

Although various reform movements sprung up during the 1800's to address deplorable conditions in the almshouse, by the end of the 1800s people with physical disabilities were living in yet more almshouses, which they shared with abandoned children, drifters, petty criminals and a growing number of immigrants who were poor.¹⁰ Whatever route they took to the almshouse, all inmates were subject to the same public judgment: these people were helpless, useless, and indolent.¹¹ Although people with disabilities, including mentally ill individuals who were institutionalized, might also have garnered feelings

of pity and compassion, the overriding assumption with regard to such individuals was that they were unable to *function* effectively in society.¹²

This approach to people with disabilities meant that people with a range of medical conditions, who were able to function in society despite their medical conditions, were not considered “disabled.” They might well have been considered “sick” or “ill,” of course, but they were not considered *disabled*. The sine qua non of disability was *inability* to *function* in society. Hence, individuals with disabilities were to be pitied, excluded, and/or taken care of outside of the mainstream of society.

By the end of World War I, a new form of governmental approach to disability had emerged-- an approach that focused on work rehabilitation and reintegration into society. In 1918, Congress passed the Smith-Sears Veterans' Rehabilitation Act, the first federal statute to mandate vocational rehabilitation programs for disabled veterans.¹³ Two years later, Congress passed the Smith-Fess Act, which extended vocational rehabilitation programs to civilians with physical disabilities.¹⁴ Numerous states enacted their own vocational rehabilitation programs as well,¹⁵ private industry entered the effort over time,¹⁶ and various advocacy groups were established to achieve greater access to education and employment for people with disabilities.¹⁷

This governmental and private approach towards rehabilitating people with disabilities has been termed the “medical model” of disability.¹⁸ Unlike the exclusionary model of earlier years, the paramount goal of this model was to reintegrate the person with the disability into the mainstream of society. The model presumed, however, that integration required changing the person with the *disability*, not changing any aspect of the surrounding *society* that might have made it difficult for the person with a disability to function in that society. Moreover, to the extent a person with a disability could not be reintegrated into society, on society’s own existing terms, that person remained excluded from much of mainstream society.¹⁹

While earlier definitions of disability had thus focused on a person’s dependency and complete inability to function in society, a new definition of disability emerged for purposes of the medical and rehabilitation model. This definition focused on the impact the person’s disability had on his or her capacity to *work*, and on whether such a

person would *benefit* from vocational rehabilitation programs in terms of employability. Thus, the Vocational Rehabilitation Act of 1920 defined a “handicapped individual” as: “any individual who (A) has a physical or mental disability which for such individual *constitutes or results in a substantial handicap to employment* and (B) can reasonably be expected to *benefit in terms of employability* from vocational rehabilitation services . . .”²⁰ This definition remained essentially unchanged up to the Vocational Rehabilitation Act of 1973.²¹

The medical and rehabilitation model of disability -- which, of course, co-existed with continuing models of pity and exclusion regarding disability -- began to be challenged in the 1960s. During this time, the modern civil rights movements for African-Americans and for women gathered momentum. These movements were premised on the belief that all individuals deserved to be treated equally and with dignity in our society, regardless of race, gender or religion.²² During this time, people with disabilities began to demand more autonomy in their lives as well, starting an “independent living” movement²³ and rejecting society’s attitudes of pity, charity, or rehabilitation.²⁴

When Congress began its reauthorization of federal rehabilitation programs in 1972, the rehabilitation/medical model of disability still prevailed in both the country and Congress for purposes of governmental action. Yet, traces of a new attitude towards people with disabilities existed as well.²⁵ Section 501 of the Rehabilitation Act of 1973 required every department in the executive branch to develop an “affirmative action program plan for the hiring, placement, and advancement of handicapped individuals,”²⁶ with the Equal Employment Opportunity Commission (EEOC) mandated to issue regulations implementing the section.²⁷ Section 503 of the bill provided that, in any procurement contract exceeding \$2,500, the federal agency entering into the contract was required to include a provision that “in employing persons to carry out such contract, the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with handicaps.”²⁸ The Department of Labor was authorized to issue regulations under this section.²⁹

While such provisions could be seen as a continuation of a “help the handicapped” model, similar provisions regarding affirmative action

had been passed by Congress with regard to race and gender in a *civil rights* context.³⁰ Moreover, while coverage for people with disabilities had not been included in the Civil Rights Acts of 1964 and 1968,³¹ a new section of the Rehabilitation Act did include an explicit anti-discrimination provision. This section, section 504, provided that: “no otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”³²

Section 504 was patterned directly on almost identical provisions in Title VI of the Civil Rights Act of 1964 (prohibiting discrimination based on race in any program or activity receiving federal financial assistance), and Title IX of the Education Amendments of 1972 (prohibiting discrimination based on sex in any educational program or activity receiving federal financial assistance).³³ Indeed, as Richard Scotch documents, staff members of the Senate Labor and Public Welfare Committee simply borrowed the language of Section 504 from that of Title IX (a provision several of the staff people had worked on the previous year), without giving much thought to what anti-discrimination protection based on handicap would mean in practice.³⁴

Extensive thought as to what discrimination based on handicap meant, and indeed, what the term “handicap” should be understood to include, took place over the following four years as government agencies worked to develop implementing regulations for Sections 501, 503, and 504 of the Rehabilitation Act.³⁵ In particular, attorneys writing the regulations implementing Section 504 for the Department of Health, Education and Welfare (HEW) broke significant new theoretical ground with regard to anti-discrimination protection based on handicap.³⁶ The work of these attorneys -- who included Martin Gerry, John Wodatch, Ann Beckman, and Ed Lynch, reflected beliefs about people with disabilities that stood in stark contrast to the beliefs that historically underlay either the exclusionary model, the charity model, or the medical/rehabilitation model of disability.

First, HEW attorneys did not believe people with disabilities should be seen as objects of pity, charity, or rehabilitation. At bottom,

these attorneys did not believe people with disabilities were so radically *different* from any other group in society.³⁷ Presumably, these attorneys assumed people with disabilities included the same range of people with strong abilities and weak abilities (and, for that matter, with nice personality traits and obnoxious personality traits) as any other group of people. Thus, they believed people with disabilities deserved the same right to participate in the mainstream of society, and the same respect, as did any other individual in society.

Second, these attorneys assumed many people with disabilities were *better able to function* in society, including in the employment arena, than was often presumed by members of society, including employers. Under this view, it was myths, fears, and stereotypes about people with disabilities that often hampered such individuals' involvement and advancement in society, not the objective reality of any real impact their physical or mental impairments had on their ability to function, perform, and contribute to society.

Finally, the attorneys writing the Section 504 HEW regulations recognized that actual limitations that flow from an individual's physical or mental impairment often result from the manner in which *society* itself was structured, and were not inherently derivative of the impairment itself. For example, people who use wheelchairs will be more limited in their ability to advance in employment if society builds most of its office buildings with steps rather than ramps. This limitation in employment flows not simply from such individuals' physical inability to climb stairs, but rather, flows from the *interaction* between the physical limitation of such individuals *and* society's choices regarding architecture.³⁸ As a result of this understanding, the attorneys developing the Section 504 regulations created an obligation on recipients of federal funds to affirmatively change some of the limitations created by society itself.³⁹

One of the many issues attorneys drafting the HEW regulations dealt with was the definition of "handicap." It became apparent to them that the definition Congress had included in the Rehabilitation Act for that term was too narrow for the civil rights purposes of Section 504. Under that definition, a handicapped individual was "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B)

can reasonably be expected to benefit in terms of employability from vocational rehabilitation services . . .”⁴⁰ As noted above, this definition was developed in response to, and was perfectly suited to, a medical/rehabilitation model of disability. To the HEW attorneys, however, this definition inappropriately excluded a wide range of individuals who experienced discrimination based on physical or mental impairments that did not constitute, in any real sense (i.e., simply on their own), a “substantial handicap to employment,” nor were these the type of impairments that necessarily needed or would benefit from vocational rehabilitation services.

Members of Congress addressed this problem in the Rehabilitation Act Amendments of 1974.⁴¹ In a section entitled “Technical and Clarifying Changes,” the Report of the Senate Labor and Public Welfare Committee noted that the existing definition of handicapped individual “has proven to be troublesome in its application to provisions of the Act such as sections 503 and 504 because of its orientation toward employment and its relation to vocational rehabilitation services.”⁴² As the Report observed:

It was clearly the intent of the Congress in adopting section 503 (affirmative action) and section 504 (nondiscrimination) that the term “handicapped individual” in those sections was not to be narrowly limited to employment (in the case of section 504), nor to the individual’s potential benefit from vocational rehabilitation services under titles I and III (in the case of both sections 503 and 504) of the Act.⁴³

Congress did not repeal the existing definition of handicapped individual for purposes of most of the Rehabilitation Act. Rather, Congress simply added a new definition designed to apply solely to Titles IV and V of the Act, which would include sections 501, 503, and 504. Thus, following passage of the 1974 Act, the definitions section of the Rehabilitation Act read as follows:

(A) *Except as otherwise provided in subparagraph*

(B), the term “handicapped individual” means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services . . .

(B) For purposes of Titles IV and V of this Act, the term “handicapped individual” means any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.⁴⁴

Given this new definition of “handicapped individual” for purposes of sections 501, 503, and 504 of the Rehabilitation Act, the governmental agencies with implementation authority for those sections (the EEOC, the Department of Labor, and HEW, respectively) provided additional guidance on the definition of “handicapped individual” in their regulations. The regulations issued by HEW in 1977 received the most attention,⁴⁵ and indeed, formed the basis of coordination regulations issued by the Department of Justice several years later for use by all federal agencies.⁴⁶

The HEW regulations defined a “physical or mental impairment” broadly:

Physical or mental impairment means--

(i) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin and endocrine; or

(ii) any mental or psychological disorder, such as

mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.⁴⁷

In an Appendix to the regulations, HEW noted it had not "set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list."⁴⁸ The agency did, however, offer examples of conditions that would be covered as impairments, including: "orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and . . . drug and alcohol addiction."⁴⁹

Under the new statutory definition, a physical or mental impairment had to "substantially limit one or more major life activities" in order to qualify as a handicap. Based on its assessment that a precise definition of the term "substantially limits" would not be possible, HEW chose not to define the term and to rely instead on a common-sense interpretation of the term.⁵⁰ The agency also chose not to define "major life activities." Instead, it set forth an illustrative list of major life activities: "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."⁵¹ The agency stressed the term "major life activities" included, but was not limited to, these illustrative functions.⁵²

The HEW regulations explicitly assumed the new definition of "handicapped individual" would cover individuals beyond those with "traditional handicaps." Indeed, in response to commentators to the proposed regulations, who argued HEW should have limited the definition of handicap to more traditional and serious impairments, the agency responded: "The Department continues to believe . . . that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps."⁵³

The broad definition of handicap reflected in HEW's regulations and guidance was consistent with the beliefs regarding people with

disabilities held by the attorneys drafting those regulations. For these attorneys, disability (or handicap) was not consonant with an inability to function in the world generally, or in employment specifically. To the contrary, in their minds, the very purpose of a civil rights provision was to protect individuals with a *range* of physical or mental impairments, many of whom were quite capable of functioning in the world (including in employment) and were limited primarily because others held myths or stereotypes regarding their impairments, or because selected physical structures or procedures in society did not take their impairments into account. The qualifying phrase in the statute--“substantially limits a major life activity”--was thus understood as simply precluding coverage of very minor impairments (such as broken fingernails or the common cold). By contrast, any mental or physical impairment that affected one’s life in any significant way was understood to be covered under the civil rights protection of the law.

Although the HEW regulations received the most attention at the time of their issuance, the regulations issued by the Department of Labor (DOL) to implement section 503 for federal contractors, and to implement section 504 for entities receiving federal funds through the Department of Labor, deserve special attention for purposes of this paper.⁵⁴ In both those regulations, the Department of Labor imported into the definition of handicap the assumption that, for an impairment to meet the statutory definition of substantially limiting a major life activity, the impairment would affect the person’s ability to *work*.

Thus, the DOL regulations implementing section 503 defined a “handicapped individual” as follows:

“Handicapped individual” means any person who (1) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. *For purposes of this part, a handicapped individual is “substantially limited” if he or she is likely to experience difficulty in securing, retaining, or advancing in employment because of a handicap.*⁵⁵ (emphasis added)

In an Appendix to the regulations, the agency noted that “life activities” could be considered to include “communication, ambulation, selfcare, socialization, education, vocational training, employment, transportation, adapting to housing etc.”⁵⁶ However, the agency added that “[f]or the purpose of section 503 of the Act, primary attention is given to those life activities that affect employability.”⁵⁷

The agency’s additional guidance on “substantially limits” again emphasized the effect a physical or mental impairment would have on an individual’s capacity to work:

The phrase “substantially limits” means the degree that the impairment affects employability. A handicapped individual who is likely to experience difficulty in securing, retaining, or advancing in employment would be considered substantially limited.⁵⁸

DOL’s regulations implementing section 504 followed more closely the format used by HEW in its regulations. Thus, for example, the agency used HEW’s definition of “physical or mental impairment,” and included HEW’s illustrative list of such impairments.⁵⁹ Unlike HEW, however, the agency again provided a definition of “substantially limits” that focused, in part, on the impact of an individual’s impairment on that person’s employability:

Substantially limits means the degree that the impairment affects an individual becoming a beneficiary of a program or activity receiving Federal financial assistance or affects an individual’s employability. A handicapped individual who is likely to experience difficulty in securing, retaining, or advancing in employment would be considered substantially limited.⁶⁰

The assumption on the part of the Department of Labor that an individual’s impairment should limit his or her ability to work, or should make such an individual a beneficiary of federal programs, in order to

meet the statutory definition of "substantially limits a major life activity" might have made sense for purposes of section 503, which requires federal contractors to engage in affirmative action in hiring persons with handicaps. It is not clear, however, why this assumption was imported into the non-discrimination component of section 503 (which the agency set forth in its regulations)⁶¹ or into the non-discrimination provision of section 504.

In any event, the Department of Labor provided no explanation, in either its section 503 or its section 504 regulations, for its requirement that a covered impairment should affect an individual's ability to work in order for the individual to be considered a "handicapped individual." It appears as if, unlike the drafters of the HEW regulations, the drafters of the DOL regulations might have held a different concept of disability. This view would have been more consonant with the earlier view of disability, which assumes people with disabilities are more likely to become beneficiaries of governmental programs or are more likely to be unable to function effectively in the workplace. While, of course, people with severe disabilities may experience such effects, the view of disability reflected in DOL's regulations was clearly more constricted than the view expressed in HEW's regulations.

Despite the DOL regulations' focus on employability, most cases brought by people with disabilities, throughout the late 1970's and into the 1980s, relied on either HEW's regulations or its successor regulations. (Most of these cases were brought under section 504 of the Rehabilitation Act.)⁶² In almost all these cases, there was little analysis by the courts as to whether a particular plaintiff's impairment met the statutory definition of "substantially limits a major life activity." Rather, courts tended to accept easily that a plaintiff was a member of the protected class (i.e., a "handicapped individual"), and would then move to the merits of the case.

Thus, individuals with a wide range of physical or mental impairments -- impairments that were not so severe that they limited the individuals' ability to work or otherwise function in daily life -- were allowed to proceed with claims under Section 504. These included individuals with:⁶³ retinitis pigmentosa, vision in only one eye, impaired hearing and use of hearing aids, depressive neurosis, manic depressive

syndrome, epilepsy, congenital limb deficiency, multiple sclerosis, cerebral palsy, degenerative spinal condition, chronic lower back syndrome with disc disease, limited mobility of arm and shoulder, osteoarthritis in the hip, artificial leg, learning disabilities, diabetes, heart disease, Parkinson's disease, lung disease, asthma, absence of a kidney, hepatitis B carrier, narcolepsy, birth defects, sterility, asbestosis, Crohn's disease, alcoholism, and drug addiction.⁶⁴ As a district court noted in 1984, "[v]ery few cases spend much time on this issue [of who is a handicapped individual], as the issue usually requires little analysis."⁶⁵

In many of these Section 504 cases, of course, the courts ultimately ruled against the plaintiffs on the merits. In some cases, the courts ruled the plaintiff was unable to prove the adverse action had occurred *because* of his or her handicap.⁶⁶ In other cases, in which there was no dispute that the adverse action had been taken because of the plaintiff's handicap, the courts ruled the plaintiff was unable to prove he or she was qualified or eligible for the position or benefit in question despite his or her handicap.⁶⁷

There were two types of cases in which courts did question whether the plaintiff was a handicapped individual. The first were cases in which courts concluded that plaintiffs did not have a real *impairment* -- but rather simply had unusual physical characteristics. Thus, for example, in *de la Torres v. Bolger*, 781 F.2d 1134, 1138 (5th Cir. 1986), the court concluded left-handedness was "a physical characteristic, not a chronic illness, a disorder or deformity"; in *Tudyman v. United Airlines*, 608 F.Supp. 739, 745-46 (C.D.Cal. 1984), the court concluded muscular build was not an impairment; and in *Steven v. Stubbs*, 576 F.Supp. 1409 (N.D.Ga. 1983), the court concluded transitory illnesses with no permanent effect on the plaintiff's health was not an impairment.⁶⁸

The second type of case in which a plaintiff's coverage under the law was questioned or denied were those in which courts focused on whether a plaintiff's impairment affected his or her ability to *work*. While these cases were the exception, rather than the rule, in Rehabilitation Act cases, it is useful to review these cases in some detail in light of the importance this approach would later take in judicial interpretations of "disability" under the ADA.

The leading case in this area is *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980), a case brought under section 503 of the Rehabilitation Act. Under section 503, at the time, individuals did not have a private right of action and thus this case arose out of a charge filed with the State of Hawaii Department of Labor and referred to the U.S. Department of Labor (DOL).⁶⁹ George Crosby, the claimant, was denied employment by a general construction contractor after a pre-employment physical examination revealed he had a congenital back anomaly. The contractor's physician informed E.E. Black Ltd., the prospective employer, that Crosby was a poor risk for heavy labor and Crosby was not hired.⁷⁰ Crosby filed a complaint which was referred to DOL.

Crosby's complaint was investigated by DOL's Office of Federal Contract Compliance Programs (OFCCP). OFCCP concluded E.E. Black had violated section 503 and it issued an administrative complaint against the company. The complaint was heard by an Administrative Law Judge (ALJ) who ruled that DOL had proven Crosby was perceived to have an impairment and that he had experienced difficulty in obtaining employment because of that perception. However, the ALJ ruled the Department had not proven that "the perceived impairment substantially limited a major life activity of Mr. Crosby in this case, employment," and hence the ALJ concluded Crosby was not a "handicapped individual" protected under section 503.⁷¹ According to the ALJ, Congress was not attempting to protect people with any impairment, "merely the most disabling."⁷²

The OFCCP filed exceptions to the ALJ's order with the Assistant Secretary of Labor, Donald Elisburg. Elisburg reversed the ALJ's order, finding that Crosby was a "handicapped individual" under the law. Taking a more expansive view of the statutory phrase "substantially limits a major life activity," the Assistant Secretary explained that:

[Protection] under the Act is extended to every individual with an impairment which is a current bar to employment which the individual is currently capable of performing. . . . It is sufficient that the impairment is a current bar to the employment of one's choice with a federal contractor

which the individual is currently capable of performing.⁷³

E.E. Black filed for judicial review of the Assistant Secretary's decision, arguing (among other things) that the Assistant Secretary had adopted an incorrect standard for determining when an impairment substantially limits a major life activity. In beginning his analysis of this claim, the district court judge stated the following:

As noted, 29 U.S.C. §706(7) partially defines a handicapped individual as one who "has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment" That section also provides that a handicapped individual is one who has a "physical or mental impairment which substantially limits one or more of such person's major life activities" 41 C.F.R. §60-741.2 provides that "a handicapped individual is 'substantially limited' if he or she is likely to experience difficulty securing, retaining, or advancing in employment because of a handicap."⁷⁴

Of course, as the discussion above will have alerted any careful reader of statutory text, the *first* definition of handicapped individual that the district court quotes *does not even apply* to individuals charging discrimination under section 503.⁷⁵ Nevertheless, perhaps one can understand the judge's confusion in light of the fact that DOL's regulation implementing section 503, 41 C.F.R. §60-741.2, had itself imported an analysis of limitations in employability into the statutory language of "substantially limits a major life activity" -- language that (ironically) had been formulated by Congress specifically to create a *second* definition of "handicapped individual" for sections 501, 503 and 504 that would be *distinct from* the first definition.

In any event, the district court judge essentially "split the difference" between the ALJ and the Assistant Secretary. He characterized the Assistant Secretary's approach as too extreme, noting that such an approach would "include within the coverage of the Act any individual who is capable of performing a particular job, and is rejected

for that particular job because of a real or perceived physical or mental impairment.”⁷⁶ This, the court concluded, could not have been the result intended by Congress. As the court explained:

If it were, Congress would not have used the terms substantial handicap or substantially limits--they would have said “any handicap to employment” or “in any way limits one or more of such person’s major life activities.” The Assistant Secretary’s definition ignores the word substantial. Such a definition contravenes the statutory language and is therefore invalid.⁷⁷

Of course, the term “employment” is used in the statute only as part of the *first* definition of “handicapped individual,” not the second definition. Moreover, the HEW regulations *had* essentially interpreted the statutory requirement to mean “in any way limits one or more of such person’s major life activities”--the alternative offered by the district court. But since the court was applying DOL’s section 503 regulations, not HEW’s section 504 regulations, the effect of the individual’s impairment on the individual’s ability to advance in employment took front and center stage in the court’s analysis.

The court also rejected the ALJ’s definition of “substantially limits a major life activity” as too restrictive. This approach, according to the court, would “drastically reduce the coverage of the Act” by excluding any person whose impairment was unlikely “to affect his employability generally.”⁷⁸ As the court explained:

A person, for example, who has obtained a graduate degree in chemistry, and is turned down for a chemist’s job because of an impairment, is not likely to be heartened by the news that he can still be a streetcar conductor, an attorney or a forest ranger. A person who is disqualified from employment in his chosen field has a substantial handicap to employment, and is substantially limited in one of his major life activities. The definitions contained in the Act are personal and must be evaluated by looking

at the particular individual. A handicapped individual is one who “has a physical or mental disability which for *such individual* constitutes or results in a substantial limitation to employment . . . (Emphasis added). It is the impaired individual that must be examined, not just the impairment in the abstract.”⁷⁹

What a lovely piece of statutory interpretation. Unfortunately, the judge is interpreting a definition which, by the explicit terms of the statute, *never even applies* to any individual bringing a claim under section 503 of the Rehabilitation Act.⁸⁰ Notwithstanding that minor, technical difficulty, the district court judge proceeded to lay out several factors courts should use in engaging in the “case-by-case determination of whether the impairment or perceived impairment of a rejected, qualified job seeker constitutes, for that individual, a substantial handicap to employment.”⁸¹ The important factors, according to the court, would be the number and types of jobs from which the impaired individual would be disqualified and the geographical area to which the individual reasonably has access.

Crosby himself fared well under the court’s analysis. The judge decided that, “in evaluating whether there is a substantial handicap to employment, it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process.”⁸² (Remember the chemist example? Presumably, in the judge’s mind, if one’s particular impairment precludes you from getting one job as chemist, all jobs as chemists will probably be precluded to you as well.) The judge noted that Crosby had been disqualified from all of E.E. Black’s apprentice carpenter positions because of the heavy lifting involved. “Had all firms offering similar positions involving heavy lifting used the same criteria as Black, Mr. Crosby would have been disqualified from all such jobs.”⁸³ Hence, Crosby was clearly “substantially limited in his goal of becoming a journeyman” (which required 8,000 hours in the field).⁸⁴

While the mistaken approach in *E.E. Black* never became the norm in cases brought under sections 501, 503 and 504, a few courts in subsequent years relied on the *E.E. Black* analysis to rule that plaintiffs

were not covered as “handicapped individuals” under section 501 or 504 of the Rehabilitation Act. These cases created a small body of precedent that, many years later, judges in ADA cases would turn to in rejuvenating an approach that focuses on an individual’s ability to work.

Four years after *E.E. Black* was decided, a district court judge considered the case of a flight attendant who exceeded United Airline’s weight requirement because of his avid body building (and hence low percentage of body fat and high percentage of muscle). This case, *Tudyman v. United Airlines*, 608 F.Supp. 739 (C.D.Cal. 1984), was brought under *section 504*, not section 503, of the Rehabilitation Act.⁸⁵ According to the court, the plaintiff’s argument was that “because the weight restriction prevents him from obtaining a job, for which he would otherwise be qualified, the requirement transforms him into a handicapped individual as it is his body composition that prevents him from meeting this requirement.”⁸⁶

In rejecting this argument, the district court noted that “the only court to analyze the definition of handicapped status at any length” was *E.E. Black*.⁸⁷ Using much of the *E.E. Black* analysis, the district court concluded “that the inability to obtain a single job does not render one ‘handicapped.’”⁸⁸ Thus, the court held Tudyman was not a handicapped individual under section 504 because “[a] person who exceeded the maximum weight for a United flight attendant because he is an avid body builder is not limited in a major life activity--he is only prevented from having a single job.”⁸⁹ The court rejected the *E.E. Black* court’s assumption that ““all employers offering the same job or similar jobs would use the same requirement or screening process.””⁹⁰

The court also rejected the idea that Tudyman could be covered because he was *perceived* to have an impairment that limited his activities. As the court explained:

For the same reason that the failure to qualify for a single job does not in and of itself constitute a limitation on a major life activity, refusal to hire someone for a single job does not in and of itself constitute perceiving the plaintiff as a handicapped individual. If this were the case, then anyone who failed to obtain a job because of a single

requirement which may not be essential to the job would become a handicapped individual because the employer would thus be viewing the applicant's failure as a handicap. This Court refuses to make the term handicapped a meaningless phrase.⁹¹

In each of the next two years, two courts of appeal would endorse the *E.E. Black* court's analysis with regard to claims brought under section 501 of the Rehabilitation Act. In *Jasany v. U.S. Postal Service*,⁹² the Sixth Circuit addressed the case of a person with a mild case of strabismus (crossed eyes), who contended the only job he could not do because of his impairment was to operate a particular machine at the post office. (This happened to be the machine he was hired to operate.) Again, in praise of *E.E. Black*, the court of appeals noted that the court in that case "carefully considered the definition of a handicapped individual in 29 U.S.C. §706(7)," and concluded that "an impairment that interfered with an individual's ability to do a particular job, but did not significantly decrease that individual's ability to obtain employment otherwise, was not substantially limiting within the meaning of the statute."⁹³ Because the parties had stipulated that "Jasany's condition had never had any effect whatsoever on any of his activities, including his past work history and ability to carry out his other duties at the post office apart from operation of the LSM-ZMT [the machine in question]," the Sixth Circuit concluded the district court had erred in finding that Jasany was a "handicapped person" within the meaning of the law. The court of appeals ultimately affirmed the district court's judgment in favor of the defendant, on the grounds that Jasany was not qualified to perform the duties for which he had been hired by the Post Office.

In *Forrisi v. Bowen*,⁹⁴ the Fourth Circuit had occasion to apply the *E.E. Black* analysis. In that case, Forrisi had been hired as a utility systems repairer and operator by a government agency. The job required the occupant to climb stairways and ladders for emergencies and for routine maintenance. Forrisi told his supervisor that his acrophobia precluded him from climbing to certain heights, but that he could still do the job if his employer made some adjustments to accommodate his fears. Instead, the government agency terminated Forrisi because he was

“‘medically unable to perform the full range of the duties of his position.’”⁹⁵

Quoting *E.E. Black*, the court of appeals noted that:

The question of who is a handicapped person under the Act is best suited to a ‘case-by-case determination,’ . . . as courts assess the effects of various impairments upon varied individuals. . . The inquiry is, of necessity, an individualized one -- *whether the particular impairment constitutes for the particular person a significant barrier to employment*. Relevant to the inquiry are ‘the number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access, and the individual’s job expectations and training.’ (quoting *Jasany*). (emphasis added).⁹⁶

Note how the Fourth Circuit uses the phrase “whether the particular impairment constitutes for the particular person a significant barrier to employment” with no apparent awareness that this qualifying requirement is part of the *first* definition of handicapped individual, which by the explicit terms of the statute, is not intended to apply to any individual bringing a claim under section 501. Moreover, unlike the DOL regulations, the EEOC regulations implementing section 501 had never imported a requirement that an individual’s impairment must adversely affect his or her employability to satisfy the “substantially limits a major life activity” component of the *second* definition. Nevertheless, the combination of DOL’s importation of such a requirement into its section 503 regulations, and the *E.E. Black* court’s sloppy textual analysis of the definition of handicapped individual, managed to create a few rulings under both sections 501 and 504 that focused the key inquiry for coverage on whether an impairment affects an individual’s ability to *work* generally.

Thus, for example, in the *Forrisi* case, the Fourth Circuit noted that it “must identify the degree to which [the government agency] could consider Forrisi’s acrophobia to restrict his ability to work without, in the

statutory sense, considering the acrophobia to be a substantial limitation in violation of §706(7)(B)(iii) [third prong of the definition].” The court noted that several courts had concluded that an employer does not necessarily regard an employee as handicapped “simply by finding the employee to be incapable of satisfying the singular demands of a particular job,” but rather, must perceive the employee’s impairment “to foreclose generally the type of employment involved.”⁹⁷ In this case, the government agency perceived Forrisi as being “unsuited for one position in one plant--and nothing more.”⁹⁸ Because the Rehabilitation Act “seeks to remedy perceived handicaps that, like actual disabilities, extend beyond this isolated mismatch of employer and employee,” Forrisi was not covered as a handicapped individual.⁹⁹

Despite this line of cases, most claims brought under section 504 were not subject to searching inquiries regarding the person’s coverage as a “handicapped individual,” and very few cases focused on whether the person’s impairment constituted, for him or her, a substantial barrier to employment.¹⁰⁰ Thus, as courts began to hear claims regarding people with a new medical condition -- AIDS and HIV infection -- such individuals were also easily considered people with handicaps under the law. The societal and political ramifications of such decisions, however, generated responses both in federal agencies and in Congress. The actions of those entities, together with the continuing action of the courts, constitute the next significant episode in the development of the definition of “handicap” under the Rehabilitation Act and the definition of “disability” under the ADA.

III. TREATMENT OF PEOPLE WITH AIDS AND HIV INFECTION UNDER FEDERAL DISABILITY LAW: THE 1980’S

In July 1981, the New York Times reported that a strange new cancer had been seen in 41 young gay men in New York, Los Angeles and San Francisco.¹⁰¹ While the new disease had several names at first, in July 1982, the Centers for Disease Control termed the disease Acquired Immune Deficiency Syndrome (AIDS) and reported [numbers].¹⁰² By that time, it had become clear that this new infectious and fatal disease was affecting members of the public who were already

stigmatized in society -- gay men, black Haitians, needle-using drug addicts. Intense fear about "catching" an infectious, fatal disease, coupled with negative value judgments about the people who were primarily afflicted with the disease, combined to create fertile grounds for discrimination against those who had "the AIDS virus." Even so-called "innocent victims" of the disease -- children and people with hemophilia -- were not immune from discrimination.

In the early years of the epidemic, the scientific and medical profession began to distinguish between people infected with HIV,¹⁰³ people with AIDS-Related-Complex,¹⁰⁴ and people with "full-blown AIDS."¹⁰⁵ Those who engaged in discrimination, however, did not make such nuanced distinctions, and simply acted adversely against those who, in their minds, "had AIDS."

Most individuals who experienced discrimination on the basis of AIDS or HIV during the first decade of the epidemic had little legal recourse. During this time, federal law prohibited discrimination based on handicap by the federal government (section 501 of the Rehabilitation Act), by entities who entered into procurement contracts with the federal government (section 503 of the Rehabilitation Act), and by entities who received federal financial assistance (section 504 of the Rehabilitation Act). While there were many entities covered under section 504, such as public schools and hospitals that received Medicare and Medicaid funding, the majority of private entities in the country were not covered. In some states, laws existed that provided some protection to those who experienced discrimination on the basis of handicap, but many states did not have effective anti-discrimination laws.¹⁰⁶

The early cases that raised claims of discrimination based on AIDS or HIV status thus arose primarily in the context of children and teachers in public schools,¹⁰⁷ health care workers in hospitals,¹⁰⁸ and HIV testing programs in governmental agencies.¹⁰⁹ In almost all these cases, the courts accepted, with very little (or no) analysis, the claim that the plaintiffs were individuals with a "handicap" for purposes of section 504 coverage.¹¹⁰ In this regard, plaintiffs with AIDS and HIV infection were treated similarly to plaintiffs in other section 504 cases. As noted above, in those cases, the focus was on whether discrimination had occurred *because* of the plaintiff's handicap, and if so, whether the discrimination

was nevertheless justified. In most cases dealing with AIDS/HIV, there was rarely a dispute between the parties as to whether ~~the~~ adverse action had occurred *because* of the plaintiffs' medical condition. Rather, the contested point was whether that adverse action was *justified* because of safety or some other asserted concern. On this issue, *some* plaintiffs won and some lost.¹¹¹ It was a rare case, however, for a court even to focus on whether the plaintiff was HIV-infected, had AIDS-Related-Complex, or had AIDS.

The first time an extensive parsing of the definition of "handicapped individual" occurred with regard to people with AIDS and HIV infection was in 1986, in response to a request by the Department of Health and Human Services (HHS) to the Department of Justice. In March 1986, Ronald E. Robertson, the General Counsel of HHS, asked DOJ for a legal ruling concerning coverage under Section 504 of people with had AIDS or ARC, or of people who tested positive for AIDS antibodies. As Robertson noted in his letter to DOJ, the Office of Civil Rights at HHS had "received complaints in which workers employed in hospitals or clinics allege that they have been discriminated against by their employers because they fall within or are regarded as falling within these categories."¹¹²

DOJ's response to HHS was delivered officially as a memorandum from Assistant Attorney General Charles J. Cooper on June 25, 1986, and became known as the "Cooper Opinion." The opinion itself was written by Gary Lawson, an attorney in DOJ's Office of Legal Counsel.¹¹³ In answering the question posed by HHS, Lawson -- a lawyer trained in strict textual analysis -- focused on the statutory definition of "handicapped individual" in a more searching manner than almost any court considering a Section 504 claim ever did. Indeed, the Cooper Opinion itself observed that "[i]n most section 504 cases . . . the defendant usually concedes that the plaintiff is handicapped and was treated differently for that reason, but defends his action on the ground that he had good reason to single out the plaintiff for different treatment"¹¹⁴

In contrast, defendants in ADA cases now tend to contest a plaintiff's coverage as a person with a disability in the majority of cases brought under the law. Hence the analysis in these ADA cases tracks

more closely the general (although not specific) approach taken in the Cooper Opinion. Thus, although the specific analysis of that opinion was rejected a short year later by the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), the opinion is illuminating to us for more than simply historical purposes.

After providing a summary of the scientific knowledge regarding AIDS as of 1986, the Cooper Opinion analyzes whether people with AIDS, ARC, or people who test positive for antibodies to HTLV-III/LAV (the precursor name for HIV), were "handicapped" for purposes of section 504 coverage. The opinion concludes that AIDS is a "physiological disorder or condition" affecting the "hemic and lymphatic" systems -- and therefore is an impairment. The opinion also concludes that this impairment "substantially limits the major life activity of resisting disabling and ultimately fatal diseases," and hence that AIDS is a handicap for purposes of section 504.¹¹⁵

The Cooper Opinion also concludes, however, that the mere "ability to transmit a disease" is not itself a handicap.¹¹⁶ Starting with the hypothetical of a carrier of a disease who is himself immune to the disease, the opinion easily concludes that such a person does not have an impairment. As Lawson explains: "An immune carrier does not have a 'physical or mental impairment' because the carrier's condition -- the presence within his body of the active infectious agent -- has no adverse physical consequences for him."¹¹⁷ The opinion then concludes that, even if such a carrier had an "impairment" and suffered some minor disabling effects as a result of that impairment, that person would still not have a "handicap" for purposes of the statute because the carrier's impairment would not substantially limit any major life activity. Again, as Lawson explains: "The carrier is fully capable of performing all major life activities, including those listed in the HHS regulations, i.e., 'caring for [him]self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.'"¹¹⁸

The implications of the legal, textual analysis of the Cooper Opinion were thus as follows: A person who was seropositive, had AIDS or ARC, and was discriminated against *because of* an entity's fear of that person's *communicability* was not protected under Section 504 because "communicability alone is not a handicap" and section 504 prohibits

discrimination based solely on the basis of handicap. Nor was such a person protected under the third prong of the definition of handicap (the “regarded as” prong) -- as long as the *perception* of the entity was that the person might *communicate* an infectious disease (something which is not itself a handicap). By contrast, if as a *factual* matter, discrimination occurred against a person with AIDS or ARC because the entity believed the person could not participate in a program or job “as a result of the disabling effects of the disease,” that person would be covered.¹¹⁹ Likewise, people who were seropositive, or even people who were seronegative, could be covered under the “regarded as” prong of the definition if the entity perceived the person as having “no capacity to resist disease,” rather than if the entity perceived the person as being capable of communicating a disease.¹²⁰

Six months after the Cooper Opinion was issued, the Supreme Court heard arguments in the case of *School Board of Nassau County v. Arline*. At issue in that case was whether the definition of “handicapped individual” included individuals with contagious diseases (a point contested by the school board) and whether the ability to transmit a contagious disease could ever be considered a handicap under section 504 (a point contested by the Department of Justice relying on the Cooper Opinion.) Although the *Arline* case involved a woman with tuberculosis, the implications for people with AIDS and HIV infection of both challenges presented in the case were widely understood by advocates for people with AIDS/HIV.

The Supreme Court answered both questions in the affirmative. First, the Court found nothing in the statutory definition of “handicapped individual” to indicate that contagious diseases were intended to be excluded and concluded that Arline’s hospitalization in 1957 sufficed to establish that she had a “record of an impairment” as required by the second prong of the definition.¹²¹ Second, in response to the argument that Arline’s employer had fired her from her job because of fear of her contagiousness, not because of her hospitalization in 1957, the Court simply pronounced that it did “not agree . . . that, in defining a handicapped individual under section 504, the contagious effects of a disease can be meaningfully distinguished from the disease’s physical effects on a claimant,” and that “[i]t would be unfair to allow an

employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.”¹²²

The Court noted that the United States had argued that “it is possible for a person simply to be a carrier of a disease, that is, to be capable of spreading a disease without having a ‘physical impairment’ or suffering from any symptoms associated with the disease,” and that this was true in the case of people infected with the AIDS virus.¹²³ Based on this premise, the Court explained, “the United States concludes that discrimination solely on the basis of contagiousness is never discrimination on the basis of a handicap.”¹²⁴

This argument was, indeed, the exact argument developed by Lawson for the Cooper Opinion. The Court, however, chose not to engage at any length with the statutory language to answer the argument developed in that opinion. Rather, the Court skirted the issue by simply pronouncing:

The argument [of the United States] is misplaced in this case, because the handicap here, tuberculosis, gave rise both to a physical impairment, and to contagiousness. 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 contagiousness, a handicapped person as defined by the Act.¹²⁵

Although this sentence is a bit dense, unpacking the sentence reveals that the Court is offering two alternative ways in which people who are carriers of HIV can potentially be covered under the definition of handicap. First, as medical knowledge develops, it may be that such individuals will be understood to have a real “physical impairment” -- that is, a serious enough impairment of their immune system that they would be covered under the first prong of the definition. Alternatively, even if the simple status of being a carrier of the AIDS virus would never be considered by medical science to be an actual physical impairment,

such individuals might still be covered under the *third* prong of the definition solely because of their ability to infect others. That is, the fear of *others* to the perceived contagiousness of HIV-infected individuals, and the actions of others to exclude such individuals from jobs or services, would result in such individuals being covered under the third prong of the definition of handicap.

In light of the current trend in ADA cases, in which courts have spent pages analyzing whether a particular "physical impairment" sufficiently qualifies as a "disability," the simplicity and breeziness with which the Supreme Court interchangeably uses the terms "physical impairment" and "handicap" is almost breathtaking in its naivete. For example, the Court seems to assume HIV-infected individuals would be covered under the first prong of the definition as long as medical science determines their condition is a "physical impairment." What major life activity that impairment would substantially limit is not noted at all. Nonetheless, the Court's approach was not surprising. In light of the general, widespread practice of the time, in which courts deciding section 504 cases did not subject plaintiffs to searching inquiries regarding whether a particular impairment substantially limited a major life activity, and given that the only life activities the clerks could probably come up with revolved around sex and procreation -- why get into all this unnecessarily?

Moreover, the second alternative proposed by the Court -- that contagiousness on its *own* could generate coverage for the HIV-infected individual -- was indeed the basis of the latter part of its opinion with regard to Gene Arline. The Court noted that Arline met the statutory definition of being limited in a major life activity, even if the school board had discriminated against her *solely* because of fear of her contagiousness, because an individual could have an impairment which does not "diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."¹²⁶ Rejecting the Solicitor General's argument that such reasoning would allow plaintiffs to make "a totally circular argument which lifts itself by its bootstraps,"¹²⁷ the Court concluded that the argument was not circular, but direct. As the Court explained: "Congress plainly intended the Act

to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work."¹²⁸

Viewed with the hindsight of the past six years of judicial interpretation of the definition of "disability" under the ADA, the Court's opinion in *Arline* can be challenged as woefully inadequate. On one hand, the opinion could be challenged as inadequate because it failed to establish more clearly the broad meaning of the terms "substantially limits" and "major life activity" in a manner that would have forestalled some of the judicial analysis under the ADA. For example, the Court could have explained why Arline's hospitalization in 1957 qualified as a record of an impairment that "substantially limited a major life activity" -- and could have provided a broad meaning for each of those terms. (In recent cases under the ADA, courts have rejected that hospitalization for an impairment automatically qualifies as substantially limiting a major life activity.)¹²⁹ Moreover, if the Court really meant what it said with regard to coverage under the third prong, it could have forestalled many ADA cases that have returned to the logic of cases such as *E.E. BLACK*, *Jasany*, and *Forrisi* by stating that such cases were no longer good law under its analysis of the third prong. (Of course, this assumes two things: First, that the Court was aware of these cases, a doubtful proposition in itself, and second, assuming the Court became aware of those cases, that Justice Brennan could have continued to hold a majority for his full opinion if he had played out his analysis of the third prong so as to reject those cases so clearly.)

On the other hand, the *Arline* opinion could also be seen as problematic because it failed to adequately warn advocates (and hence, ultimately Congress) of the possible need of rethink use of such terms as "substantially limits" and "major life activities" if the goal was to achieve broad coverage of individuals with a range of physical or mental impairments. To the contrary, the Court's broad reading of the third prong of the definition seem to put to rest any residual fears that might have existed among advocates in light of the *E.E. Black* line of cases.

In any event, when the Court's opinion was issued in *Arline*, it was hailed as a major victory for people with disabilities. Moreover, although Members of the Court had firmly believed they deferred on the question of whether people with HIV infection were covered under

Section 504, the opinion was hailed by advocates as a victory for people with AIDS and HIV infection as well.

Members of Congress who opposed granting civil rights protection to people with AIDS and HIV infection certainly read the Court's opinion in *Arline* as conferring the protection of Section 504 on such individuals. Three days after the Court issued its opinion in *Arline*, Senators Robert Dole and xxx Armstrong introduced a bill to amend the definition of "handicapped individual," for purposes of sections 503 and 504, to exclude any individual with a "contagious disease." The bill was referred to the Senate Labor and Human Resources Committee, chaired by Senator Edward Kennedy (D-MA) -- and the Committee took no action on the bill.

Several months later, however, the Senate Labor and Human Resources Committee began consideration of the Civil Rights Restoration Act of 1987 (CRRA), a bill designed to restore the broad meaning of "program or activity" under laws such as Section 504.¹³⁰ This bill, introduced and supported primarily by Democrats, resulted in Section 504 being brought up for consideration and analysis by the Senate and the House. During consideration of the CCRA by the Senate Committee, Senator Gordon Humphrey offered an amendment to exclude individuals with "contagious diseases" from coverage under Section 504.¹³¹ The explicit goal of the amendment, defeated in the Committee by a vote of 2-14, was to overturn the Supreme Court's decision in *Arline*. As the Senate Committee Report explained:

The amendment sought to overturn *Arline*, by stating that individuals with contagious diseases are not considered to be handicapped for purposes of section 504 ... [T]he amendment represents a complete retreat from the principles for which section 504 stands: protection of handicapped individuals from discrimination based not only on the handicap itself, but from irrational fears and prejudices of others.¹³²

When the full Senate began consideration of the Civil Rights Restoration Act several months later, Senator Humphrey again stood

poised to offer his amendment on the Senate floor. Instead, however, Senator Humphrey and Senator Tom Harkin, Chair of the Senate Subcommittee on Disability reached a compromise. The two Senators jointly offered an amendment, patterned directly on a provision that had been added by the Senate a decade earlier with regard to drug addicts and alcoholics, stating that individuals with contagious diseases who posed a *direct threat* to others would not be covered under Section 504.¹³³ This provision was understood by advocates for people with AIDS and HIV as a codification of the Supreme Court's decision in *Arline*, designed to allay fears that Section 504 would require employers to hire individuals with contagious diseases who posed clear risks to others.¹³⁴

The compromise provision drafted by the advocates specifically included the term "contagious disease *or infection*."¹³⁵ The addition of the latter phrase (which did not appear in Senator Humphrey's original amendment) was intended to clarify that individuals who were simply infected with a contagious disease -- such as those infected with HIV -- were considered individuals with handicaps for purposes of Section 504, as long as they did not pose a direct threat to others. Although most courts at that point were still not subjecting any plaintiffs in section 504 cases, including plaintiffs with HIV infection, to any searching inquiry regarding the impact of their impairments on major life activities, such clarification was deemed useful by advocates in light of the legal analysis that had been presented in the Cooper Opinion. Moreover, although the Supreme Court had rejected much of the reasoning of that opinion in its *Arline* opinion, it had not ruled definitively on whether people with asymptomatic HIV infection were covered under Section 504.

In explaining why they were acquiescing in the compromise provision added by Senators Harkin and Humphrey,¹³⁶ many Members of the House of Representatives specifically noted they were pleased that HIV-infected individuals were included in the provision -- thus signaling Congress' assumption that such individuals were *otherwise* covered under Section 504's definition if they did not pose a direct threat to others. Most Members did not, however, point out any particular major life activity that HIV infection substantially limited, nor did they explain how this activity would be substantially limited. Rather, they simply noted that the amendment's plain language clearly presumed such

individuals would be covered by the law if they did not pose a “direct threat” to others. In the meantime, those Members of Congress who *opposed* civil rights coverage for people with AIDS and HIV infection bemoaned the fact that such individuals would now remain covered under Section 504. These Members too never specifically noted what major life activity would be limited for people with AIDS or HIV infection.¹³⁷

Congress ultimately passed the final version of the Civil Rights Restoration Act in March 1988, overriding President Ronald Reagan’s veto of that legislation.¹³⁸

The Supreme Court’s opinion in *Arline* in 1987, and the legislative history surrounding Congressional passage of the “direct threat” provision in the Civil Rights Restoration Act in 1988, went a significant way in allaying concerns of legal advocates -- generated largely by the Cooper Opinion -- that people with asymptomatic HIV-infection might not be covered under section 504. Moreover, the issuance of a report by a Presidential Commission on the HIV Epidemic, which occurred in 1988, helped set into motion two additional events that helped reinforce the belief that people with HIV infection were clearly covered under federal anti-discrimination law.

President Ronald Reagan had created a commission, chaired by Admiral XXX Watkins, to advise him on “the medical, legal, ethical, social, and economic impact” of the HIV epidemic. In June 1988, the Commission released its report and recommendations.¹³⁹ Among many issues that it addressed, the Commission observed that, throughout its investigation of the spread of HIV, it had been “confronted with the problem of discrimination against individuals with HIV seropositivity and all stages of HIV infection, including AIDS.”¹⁴⁰ It further noted that “HIV-related discrimination [was] impairing this nation’s ability to limit the spread of the epidemic,” as individuals were afraid to come forward for testing and treatment, and that “discrimination against persons with HIV infection in the workplace setting, or in the areas of housing, schools, and public accommodations, is unwarranted because it has no public health basis.”¹⁴¹

In responding to this issue, the Commission first pointed out that a huge gap existed in federal law for many people with HIV and AIDS

who experienced discrimination by private entities that did not receive any federal funds. Some advocates for people with AIDS/HIV had urged the Presidential Commission to recommend a new federal law prohibiting discrimination based on any stage of HIV disease -- from asymptomatic HIV infection to AIDS. However, responding to (mostly private) recommendations by both advocates for people with disabilities and advocates for people with AIDS, the Commission instead noted the lack of anti-discrimination protection in the private sector for persons with disabilities generally.¹⁴²

In its final recommendations, the Commission called for legislation that would provide "comprehensive anti-discrimination protection for *all* persons with disabilities, including people with HIV infection."¹⁴³ As the Commission explained: "[P]ersons with HIV infection should be considered members of the group of persons with disabilities, not as a separate group unto themselves. Persons with HIV infection deserve the same protections as all other persons with disabilities, including those with cancer, cerebral palsy and epilepsy."¹⁴⁴ The Commission also referred to the ADA that had been introduced in 1988 as a model for the type of law it was calling for.¹⁴⁵

Because passing such a law would take some time, the Commission also presented recommendations regarding Section 504, the federal law currently providing protection based on handicap. The Commission described the Supreme Court's opinion in *Arline*, and noted that the Court did not address the question of whether asymptomatic carriers of HIV were covered under Section 504 because the facts of the case didn't require the Court to reach that specific question. But, the Commission observed, "the lower courts have consistently held that the range of HIV-related impairments, including asymptomatic HIV infection, are covered under Section 504,"¹⁴⁶ and that "the Commission supports the position that Section 504 coverage applies to people who are HIV positive yet asymptomatic."¹⁴⁷

The Commission also noted, however, that DOJ had issued an opinion in 1986 concluding that discrimination based solely on fear of contagion was not covered under Section 504. "The absence of any further statement from the DOJ has created confusion and uncertainty about its position," observed the Commission. Hence, it recommended

the following:

The DOJ . . . should issue a follow-up memorandum expressing support for the *Arline* decision and withdrawing its earlier opinion that fear of contagion is not a basis for Section 504 coverage. In addition, the DOJ memorandum should take the lead in endorsing lower court rulings by clarifying that persons who are HIV-infected yet asymptomatic, as well as persons with symptomatic HIV infection are covered by Section 504.¹⁴⁸

The Commission's approach in calling for a broad-based disability anti-discrimination law, rather than for an AIDS/HIV-specific law, was consonant with the approach adopted by that point by most political advocates for people with AIDS/HIV in Washington. In 1987, efforts had been made by such advocates to persuade the House of Representatives -- under the leadership of Congressman Henry Waxman -- to pass legislation prohibiting discrimination based on AIDS or HIV infection.¹⁴⁹ That legislation had encountered opposition on two fronts: public opposition from Members of Congress who did not wish to extend such protection to people with AIDS and HIV, and private opposition from advocates for people with disabilities who did not believe people with AIDS and HIV should receive civil rights protection that was not yet extended to all people with disabilities.

In light of both the political realities and ethical considerations of the time, the decision was made by advocates of people with AIDS/HIV to support broad-based disability anti-discrimination legislation, such as the ADA, rather than AIDS/HIV-specific legislation. The utility of that decision was experienced by both advocates of people with AIDS/HIV and by advocates of people with disabilities. The former group benefited by the fact that the political will existed in Congress to pass general disability-rights legislation, in which people with AIDS and HIV infection would not be expressly excluded, while the political will did not appear to exist to pass an AIDS/HIV-specific anti-discrimination bill. The latter group benefited from being able to use a Presidential Commission convened by a Republican President in response to the

exigencies of the AIDS epidemic to advance their cause of a broad-based disability anti-discrimination law.

For example, the general disability community benefitted from the response of Vice-President George Bush to the Commission's recommendations themselves. Asked for his response to the Commission's anti-discrimination recommendations, then-Presidential candidate Bush responded positively [we need the quote.]¹⁵⁰ It is far from clear that Vice-President Bush realized at the time how sweeping the Commission's recommendations actually were with regard to disability generally, as opposed to with regard to people with AIDS and HIV specifically. Nevertheless, his perceived need to respond to the AIDS epidemic in an election year apparently resulted in his positive response to the Commission's recommendations -- a response that was subsequently used by advocates of people with disabilities as a statement by President Bush "on the record" in favor of a broad-based law such as the ADA.

Similarly, a key example of the utility of the decision to support broad-based disability anti-discrimination laws, rather than AIDS/HIV specific laws, was quickly apparent to advocates of people with HIV/AIDS. During the spring and summer of 1988, Congress was considering the Fair Housing Amendments Act of 1987 (FHAA). The Fair Housing Act of 1968, as amended, prohibited discrimination in the sale or rental of private housing on the basis of race, religion, color or sex.¹⁵¹ The main thrust of the FHAA was to strengthen the enforcement mechanisms of the law for these protected classes.¹⁵² In addition, the FHAA included, for the first time, people with disabilities under the civil rights coverage of the Fair Housing Act.¹⁵³

It was widely assumed by Members of Congress, and by legal advocates, that people with AIDS and HIV infection were covered under the definition of "handicap" used in the FHAA.¹⁵⁴ Such an assumption made sense given the extensive legislative history that had accompanied the "direct threat" provision in the Civil Rights Restoration Act, and the fact that courts were consistently applying such coverage in cases brought by people with AIDS and HIV infection under section 504.¹⁵⁵ To reinforce this conclusion, however, the Report of the House Judiciary Committee to the FHAA explicitly noted -- in its explanation of the need

to add protection for people with handicaps to the Fair Housing Act -- that “[p]eople with Acquired Immune Deficiency Syndrome (AIDS) and people who test positive for the AIDS virus have been evicted because of the erroneous belief that they pose a health risk to others.”¹⁵⁶ Moreover, in its explanation of the definition of “handicap” in the FHAA, the Report explained that the definition was almost identical to that used for purposes of Section 504. (The one change was exclusion of current drug users or addicts.) In noting that “[t]he Committee intends that the definition [of handicap] be interpreted consistent with regulations clarifying the meaning of a similar provision found in Section 504 of the Rehabilitation Act,”¹⁵⁷ the Report noted that such regulations had not attempted to set forth a definitive list of covered physical and mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, and because such conditions may not even have been discovered when the legislation was passed. For example, the Report noted, “AIDS and infection with the Human Immunodeficiency Virus (HIV) are covered under this Act, although such conditions were not even discovered when Section 504 was passed in 1973.”¹⁵⁸

Any doubt that Congress presumed people with AIDS and HIV infection would be covered under the FHAA was dispelled by the efforts of some Members of Congress to *exclude* such individuals explicitly from the law. Thus, during consideration of the FHAA by the House Judiciary Committee, Congressman William Dannemeyer offered an amendment to exclude from the definition of handicap any person with “any infectious, contagious, or communicable disease whether or not such disease causes a physical or mental impairment.”¹⁵⁹ As a substitute to that amendment, the Committee added a provision that dwellings need not be made available to an individual “whose tenancy would constitute a direct threat to the health or safety” of others.¹⁶⁰

When the full House of Representatives took up the bill, Congressman Dan Burton offered an amendment that provided the term “handicap” would “not include any current infection with the etiologic agent for the acquired immune deficiency syndrome.”¹⁶¹ Congressman Dannemeyer offered an addition to Burton’s amendment, providing the term “handicap” *also* would not include “any infectious, contagious, or

communicable disease whether or not such disease causes a physical or mental impairment.”¹⁶² Congressman Dannemeyer explained these amendments were necessary to ensure landlords would have the freedom to deny housing to individuals infected with HIV.¹⁶³

During the debate on these two amendments, all participants evidenced the presumption that both people with AIDS, and people with asymptomatic HIV infection, would be covered under the FHAA if these amendments were defeated.¹⁶⁴ Indeed, it was precisely the need to protect both people with AIDS and people with asymptomatic HIV infection that spurred Members of Congress to oppose the two amendments.¹⁶⁵ Several Members of Congress referred to the Presidential Commission report that had urged civil rights protection for individuals with symptomatic and asymptomatic HIV infection, and to Vice President Bush’s endorsement of the report.¹⁶⁶

Both the Burton and Dannemeyer amendments were rejected by the House of Representatives -- with a recorded vote being rejected by an insufficient number of Members of the House standing in favor of such a vote.¹⁶⁷ In August 1988, both the House of Representatives and the Senate passed the FHAA,¹⁶⁸ and in September 1988, President Ronald Reagan signed the bill into law.¹⁶⁹

Passage of the FHAA was viewed by advocates not only as a victory for coverage of people with AIDS and HIV infection, but also a solidification of the view that HIV infection itself was covered under the terms of Section 504, and now the Fair Housing Act. Moreover, the call by the Presidential Commission for a revised opinion from the Department of Justice regarding such coverage materialized in the issuance of such an opinion in September 1988, the same month Congress passed the FHAA.

Soon after the Presidential Commission report and recommendations had been issued in June 1988, Arthur B. Culvahouse Jr., Counsel to the President, requested an opinion from DOJ “on the application of section 504 . . . to individuals infected with . . . HIV . . . in light of *School Board of Nassau County v. Arline*.”¹⁷⁰ In addition, President Reagan directed the Attorney General “to review all existing federal anti-discrimination law applicable in the HIV-infection context and to make recommendations with respect to possible new

legislation.”¹⁷¹

In response to the request from Culvahouse, Douglas Kmiec, Acting Assistant Attorney General forwarded an opinion to the White House in September 1988. The Kmiec Opinion concluded that:

[S]ection 504 protects symptomatic and asymptomatic HIV-infected individuals against discrimination in any covered program or activity on the basis of any actual, past, or perceived effect of HIV infection that substantially limits a major life activity so long as the HIV-infected individual is “otherwise qualified” to participate in the program or activity, as determined under the “otherwise qualified standard set forth in *Arline*.”¹⁷²

The Kmiec Opinion also noted that its conclusions differed from, and superseded to the extent of the difference, the Cooper Opinion of 1986.¹⁷³ The Kmiec Opinion explained that its conclusions incorporated the “subsequent legal developments” of the Supreme Court’s opinion in *Arline*, and the Congressional passage of the Civil Rights Restoration Act, as well as “subsequent medical clarification” from Surgeon General C. Everett Koop.¹⁷⁴

Much of the nuance of the Kmiec Opinion’s analysis of “substantially limits a major life activity” was lost on legal observers at the time -- most of whom focused primarily on what appeared to be the following, bottom line of the opinion:

Accordingly, in light of our previous discussion of the application of the general provisions of section 504 to HIV-infected persons, *we conclude that all HIV-infected individuals who are not a direct threat to the health or safety of others and are able to perform the duties of their jobs are covered by section 504.* (emphasis added)¹⁷⁵

The Kmiec Opinion thus seemed to answer definitively and affirmatively the question of whether asymptomatic HIV-infected individuals were covered under section 504. In reality, however, the

Kmiec Opinion had subjected the question of whether asymptomatic HIV-infected individuals were covered under section 504 to the type of searching inquiry that *currently* characterizes most judicial opinions under the ADA -- but which was still quite foreign at the time to judicial opinions dealing with claims under section 504. Hence, the Opinion's careful, and at times, tortuous analysis of *how* people with asymptomatic HIV infection *could* legitimately be viewed as meeting the statutory requirements of "substantially limits a major life activity" got swept away by the apparent blanket conclusion that "all" HIV-infected individuals who are "otherwise qualified" are covered by the law. With the hindsight of the past six years of judicial opinions under the ADA, including opinions challenging the coverage of HIV-infected individuals under that law, it is well worth revisiting the analysis of the Kmiec Opinion in some detail. Indeed, the analysis employed in the Kmiec Opinion to conclude asymptomatic HIV infected individuals could be covered under Section 504 presages some of the arguments Justices of the Supreme Court would pose ten years later during oral argument in the case of *Bragdon v. Abbott*.¹⁷⁶

One of the first conclusions stated by the Kmiec Opinion was that, based on the medical information available to the DOJ, "HIV infection is a physical impairment which in a given case may substantially limit a person's major life activities."¹⁷⁷ Echoing the language of the Supreme Court in *Arline*, the Opinion noted:

By virtue of the fact that the handicap here, HIV infection, gives rise both to disabling physical symptoms and to contagiousness, it is unnecessary to resolve with respect to any other infection or condition which gives rise to contagiousness alone whether that singular fact could render a person handicapped. In other words, the medical information available to us undetermines [sic? undermines?] the accuracy of the assumption or contention referenced in *Arline* that carriers of the AIDS virus are without physical impairment.¹⁷⁸

The Opinion attached a letter addressed to Mr. Kmiec from

Surgeon General Koop as evidence of the medical information that had been furnished to DOJ's Office of Legal Counsel. Surgeon General Koop began his letter to Mr. Kmiec as follows:

I was pleased to be able to convey to you, at our meeting of July 20, 1988, our medical and public health concerns regarding discrimination and the current HIV epidemic. These concerns will be greatly affected by the extent to which HIV infected individuals understand themselves to be protected from discrimination on account of their infection.

Protection of persons with HIV infection from discrimination is an extremely critical public health necessity because of our limited tools in the fight against AIDS. . . . [T]he primary public health strategy is prevention of HIV transmission. This strategy requires extensive counseling and testing for HIV infection. If counseling and testing are to work most effectively, individuals must have confidence that they will be protected fully from HIV related discrimination.¹⁷⁹

While these concerns of Surgeon General Koop might be relevant to legislators who are deciding whether or not to extend anti-discrimination protection to people with HIV infection, they were irrelevant to DOJ's Office of Legal Counsel lawyers who were deciding the technical, legal question of whether asymptomatic HIV infected individuals met the statutory definition of an individual with handicaps. For those lawyers, it was the *second* half of Dr. Koop's letter that contained the relevant information:

During our meeting you and members of your staff raised a number of perceptive questions concerning the nature of HIV infection including the pathogenesis of the virus and its modes of transmission. Your interest in the scientific aspects of HIV infection is welcome, since it is our belief

that any legal opinion regarding HIV infection should accurately reflect scientific reality. As I sought to emphasize during the meeting, much has been learned about HIV infection that makes it inappropriate to think of it as composed of discrete conditions such as ARC or “full blown” AIDS. HIV infection is the starting point of a single disease which progresses through a variable range of stages. In addition to an acute flu-like illness, early stages of the disease may involve subclinical manifestations, i.e., impairments and no visible signs of illness. The overwhelming majority of infected persons exhibit abnormalities of the immune system . . .

Accordingly, from a purely scientific perspective, persons with HIV infection are clearly impaired. They are not comparable to an immune carrier of a contagious disease such as Hepatitis B. Like a person in the early stages of cancer, they may appear outwardly healthy but are in fact seriously ill.¹⁸⁰

The Koop Letter was all the lawyers at DOJ needed to conclude that “the type of impairment described in the Surgeon General’s letter fits the HHS definition of ‘physical impairment’ because it is a ‘physiological disorder or condition’ affecting the ‘hemic and lymphatic’ systems.”¹⁸¹ The key question to which the Kmiec Opinion then turned, therefore, was “whether the physical impairment of HIV infection substantially limits any major life activities.”¹⁸²

The Opinion first noted that it could certainly be argued that asymptomatic HIV infection does not directly affect any of the major life activities listed in the HHS regulations. (These major life activities are caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and walking.) The Opinion then stated its belief, however, that “at least some courts would find *a number of other equally important matters* to be directly affected. Perhaps the *most important* such activities are procreation and intimate sexual activities.”¹⁸³

The Opinion noted that the major life activity of procreation was the “fulfillment of the desire to conceive and bear healthy children.”¹⁸⁴ Thus, the Opinion explained:

HIV-infected individuals cannot, whether they are male or female, engage in the act of procreation with the normal expectation of bringing forth a healthy child. Because of the infection in their system, they will be unable to fulfill this basic human desire. There is little doubt that procreation is a major life activity and that the physical ability to engage in *normal* procreation -- procreation free from the fear of what the infection will do to one's child -- is substantially limited once an individual is infected with the AIDS virus.¹⁸⁵

The Kmiec Opinion emphasized that this limitation -- the physical inability to bear healthy children -- was “separate and apart from the fact that asymptomatic HIV-infected individuals will choose not to attempt procreation.”¹⁸⁶ The Opinion characterized that choice as a “secondary decision,” similar to “many major life decisions” that “infected individuals will make differently.” It placed that decision in the same category as it placed the fact that “an asymptomatic HIV-infected individual's intimate relations are also likely to be affected by HIV infection.” As the Opinion explained, “[t]he “life activity of engaging in sexual relations is threatened and probably substantially limited by the contagiousness of the virus.”¹⁸⁷

Presaging an argument that would be raised ten years later during the Supreme Court argument in *Bragdon v. Abbott*, the Kmiec Opinion then noted the following:

Finding limitations of life activities on the basis of the asymptomatic individual's responses to the knowledge of infection might be assailed as not fully persuasive since it depends upon the conscience and good sense of the person infected. The causal nexus, it would be argued, is not between the physical effect of the infection (as specified

in the Koop Letter) and life activities, but between the conscience or normative judgment of the particular infected person and life activities. Thus, it might be asserted that there is nothing inherent in the infection which actually prevents either procreation or intimate relations.¹⁸⁸

The Kmiec Opinion offered three responses to this charge. First, in a footnote, it noted that the argument was “disingenuous at least insofar as infection physically precludes the normal procreation of healthy children.”¹⁸⁹ [Go Tim!] Second, it postulated that “in any case where the evidence indicates that the plaintiff HIV-infected individual *has* in fact changed his or her behavior,” -- for example, “where the plaintiff represents that procreation has been foregone” -- “the court might well find a limitation of major life activity.”¹⁹⁰ (emphasis added.) Third, the Opinion essentially skirted the argument completely by stating: “Moreover, courts may choose to pass over such factual questions since the Supreme Court has stated an alternative rationale for finding a life activity limitation based on the reaction of others to the infection. We turn to that rationale next.”¹⁹¹

The alternative rationale was, of course, the one based on the third prong of the definition of a handicapped individual, as formulated by the *Arline* Court: “that a handicapped individual includes someone who is regarded by others as having a limitation of major life activities whether they do or not.”¹⁹² As the Court had explained, even an impairment that does not in fact substantially limit a person’s functioning could “nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment.”¹⁹³ As the Kmiec Opinion explained, the effect of the Court’s interpretation in *Arline* is that “the perceived impairment need not directly result in a limitation of a major life activity, so long as it has the indirect effect, due to the misconceptions of others, of limiting a life activity (in *Arline*, the activity of working).”¹⁹⁴

Again presaging a difficult argument that would later dominate judicial interpretations under the ADA -- and offering its rebuttal of such an argument -- the Kmiec Opinion (in a footnote) observed that the

Arline Court “appears not to accept the distinction between being perceived as having an impairment that itself limits a major life activity (*the literal meaning of the statutory language*) and having a condition the *misperception of which results in limitation of a life activity*.”¹⁹⁵ Perhaps out of respect to the previous Solicitor General (SG) of the Department of Justice, the Kmiec Opinion explained that this may have been the distinction the SG was attempting to draw during his oral argument in *Arline*. That is, as the Kmiec Opinion explained, the SG was trying to suggest that “there was a difference between being perceived as having a handicap that precludes work and being perceived as contagious, which does not physically preclude work, except that because of the perception, no work is offered.”¹⁹⁶ According to the SG, the former perception is legitimately covered by the third prong of the statutory definition, while the latter perception results in a “totally circular argument which lifts itself by the bootstraps.”¹⁹⁷ Indeed, this distinction between the two perceptions had been clearly laid out in the Cooper Opinion, with that opinion rejecting the latter perception as failing to meet the *literal terms* of the statute.¹⁹⁸

The Kmiec Opinion notes that the Supreme Court’s response to the SG’s argument was the following:

The argument is not circular, however, but direct. Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one’s ability to work.¹⁹⁹

The Opinion then correctly observes that “of course this last statement returns the Court to the statute’s literal meaning,” and thus is not a real rejoinder to the SG’s argument. But, the Opinion notes, the Court *did* present a valid justification for departing from the statute’s literal terms -- but did so in footnote 9 of the opinion, rather than in footnote 10 where the SG’s argument was addressed. As the Kmiec Opinion explains:

The only justification for departing from that [literal]

meaning [of the statute] occurs not in footnote 10 of *Arline*, but in footnote 9, where the court relied on legislative history which does indicate that at least some Members of Congress believed that the perception of a physical disability by others does not have to include the belief that the perceived condition results in a limitation of major life activities, but simply that the perception of the condition by others in itself has that effect. *Id.* at 1128 n.9 (physically repulsive aspects of cerebral palsy, arthritis, and facial deformities).²⁰⁰

The Kmiec Opinion then noted that a district court in California had recently concluded that “if an individual or organization limits an HIV-infected individual’s participation in a section 504 covered activity because of fear of contagion, a major life activity of the individual is substantially limited.”²⁰¹ In that case, *Doe v. Centinela Hospital*,²⁰² an HIV-infected individual had challenged his exclusion from a specific drug rehabilitation program. As the Kmiec Opinion again observed, the aspect of the Supreme Court’s opinion in *Arline* on which the district court in *Centinela Hospital* rested “departs from the literal meaning of the statutory text in favor of legislative history.”²⁰³ Nevertheless, the Opinion concluded, “we do not question that the district court in *Centinela Hospital* fairly reads *Arline* to support a finding that the reaction of others to the contagiousness of an HIV-infected individual *in itself* may constitute a limitation on a major life activity.”²⁰⁴

Finally, the Kmiec Opinion reviewed the “direct threat” provision added by Congress to the Civil Rights Restoration Act, and concluded that both the language and the legislative history of that provision reinforced its conclusion that HIV-infected individuals were covered under section 504. The Opinion noted that “[t]he amendment’s language draws no distinction between asymptomatic and symptomatic individuals and, notably, applies to a contagious disease or infection.”²⁰⁵ Moreover, the Opinion observed, “[t]here was no disagreement expressed concerning the amendment’s applicability to asymptomatic HIV-infected individuals, and a number of legislators expressly stated that such persons were covered.”²⁰⁶ The Opinion quoted from a number of such

statements, including at some length from Representative Ted Weiss' statement:

[Chief] Justice Rehnquist stated that Congress should have stated explicitly that individuals with contagious diseases were intended to be covered under section 504. Congress has done so now with this amendment, stating clearly that individuals with contagious diseases or infections are protected under the statute as long as they meet the "otherwise qualified" standard. This clarity is particularly important with regard to infections because individuals who are suffering from a contagious infection--such as carriers of the AIDS virus or carriers of the hepatitis B virus--can also be discriminated against on the basis of their infection and are also individuals with handicaps under the statute.²⁰⁷

Congressman Weiss' statement was typical of the comments made by various Members of Congress, in that all such comments simply *stated* that people infected with HIV were covered as "individuals with handicaps" under section 504 -- with no analysis as to *how* such coverage was actually achieved under the words of the statutory definition.

Interestingly, the Kmiec Opinion is somewhat sloppy in its summary and analysis of Congressional comments on the "direct threat" provision. For example, the subsection in which this provision is analyzed in the Kmiec Opinion is titled "Coverage of *All* HIV-Infected Individuals (*Subject to the Stated Limitations*)."²⁰⁸ It is unclear, however, whether the "stated limitations" are simply that HIV-infected individuals must be "otherwise qualified," or whether the "stated limitations" also include the fact that such individuals must still meet the statutory definition of handicap. The text of the section itself seems to assume that only the *former* limitation exists. For example, the first paragraph of the section concludes with the following sentence (this is the same sentence quoted above as the opinion's "bottom line"):

Accordingly, *in light of our previous discussion* of the

application of the general provisions of section 504 to HIV-infected persons, *we conclude that all HIV-infected individuals who are not a direct threat to the health or safety of others and are able to perform the duties of their jobs are covered by section 504.*²⁰⁹

Of course, as our review of the opinion's discussion regarding the application of section 504 to HIV-infected individuals has demonstrated, that previous section never stated unequivocally that "all" people with HIV infection are covered under Section 504 as long as they are otherwise qualified. To the contrary, the Kmiec Opinion had spent six pages parsing out how such individuals *might* be covered under the statutory definition, with no guarantee of whether this coverage would ultimately be derived by the courts from the first prong or the third prong of the definition of "handicapped individual." And indeed, many of the potential logical pitfalls in arguing coverage under either prong had been clearly elucidated in the opinion's analysis. Thus, the Kmiec Opinion's blanket statement-- "we conclude that *all* HIV-infected individuals who are *not* a direct threat to the health or safety of others and are able to perform the duties of their jobs *are* covered by section 504"-- seems somewhat at odds with the more nuanced statements of the opinion's earlier discussion.

This sloppiness in language may, of course, have been unintentional. Or, this language may have been an intentional effort by disability advocates within DOJ (who were not necessarily the same lawyers who were drafting the Opinion within the Office of Legal Counsel) (OLC) to offer the most absolute statement they could regarding coverage of HIV-infected individuals under Section 504 that they could get the OLC lawyers to accept.

Regardless of the genesis of the blanket statement, the result of this statement was that the Kmiec Opinion was widely hailed by advocates of people with AIDS/HIV as a clear ruling that people with asymptomatic HIV infection were covered under section 504. For example, in a summary of the actions of the Reagan Administration with regard to the AIDS epidemic, this author had the following to say about the Kmiec Opinion:

The Justice Department did act positively on one aspect of AIDS and HIV infection in the final months of the Reagan Administration. In September 1988, the Justice Department issued a new memorandum on the coverage of people with AIDS and HIV infection under Section 504. In this memorandum, the Justice Department acknowledged that the Supreme Court in *Arline* had rejected the Department's earlier argument that discrimination based on the fear of contagiousness was not covered under Section 504. The Justice Department then went further and concluded that people with asymptomatic *HIV infection* (as contrasted to people with full AIDS) were also covered under Section 504. The Justice Department drew on both the statutory definitions in Section 504, as well as on the legislative history accompanying the Civil Rights Restoration Act, in arriving at its conclusions.

Although the Justice Department position was no different than that already reached by several courts, its memorandum remains of critical importance. The issue of coverage of HIV infection under Section 504 continues to be addressed in litigation. This memo places the Department squarely on record as stating that people with HIV infection are covered under Section 504. As such, the memo will be an important and useful tool in future litigation.²¹⁰

Indeed, in several cases alleging discrimination based on asymptomatic HIV infection under section 504, the Kmiec Opinion was cited for the simple proposition that people with HIV infection were covered under section 504. And, in most cases, coverage of people with HIV infection under Section 504 was accepted without much more analysis or dispute by the courts.²¹¹

The actual, more tortured, analysis of the Kmiec Opinion regarding coverage of people with asymptomatic HIV infection would

lie dormant for almost seven years. At that point, the judicial trend of subjecting *all* plaintiffs with impairments in ADA cases to more searching inquiries regarding whether their impairment “substantially limited a major life activity” would spill over into HIV cases and ultimately erupt in the Supreme Court case of *Bragdon v Abbott*.

IV. THE ADA: DEFINITION OF DISABILITY AND COVERAGE OF AIDS AND HIV INFECTION

Back in 1989, advocates for people with AIDS/HIV and advocates for people with disabilities generally -- all blissfully unaware of what the future would hold for the definition of disability -- were working to convince Congress to extend protection to people with disabilities in the areas of private employment, private businesses, and activities of state and local governments. The first version of such a law, the Americans with Disabilities Act of 1988, was drafted largely by Robert Burgdorf of the National Council on the Handicapped, was introduced by Senators Lowell Weicker, Tom Harkin, Edward Kennedy, Robert Dole and ten other Senators, and received a joint hearing by the Senate Labor and Human Resources Committee and the Subcommittee on Select Education of the House Committee on Education and Labor.²¹² No action was taken on the bill, however, by the time the 100th Congress recessed in October 1988.

A second version of the ADA, drafted primarily by Robert Silverstein from Senator Tom Harkin's staff, was introduced by Senators Harkin, Kennedy, Dole and 31 other Senators in May 1989.²¹³ This draft served as the basis for the final ADA passed by Congress a little over a year later, in July 1990. The two versions of the ADA differed in many significant ways, with Silverstein's version hewing much more closely than Burgdorf's to the language and structure of the Section 504 regulations.

One particular difference of note was the definition of “disability” under the two versions. In Burgdorf's version, discrimination was prohibited “on the basis of handicap,” which was defined as “because of a physical or mental impairment, perceived impairment, or record of impairment.” These terms were then defined as follows:

(2) *Physical or Mental Impairment* -- The term “physical or mental impairment” means --

- (A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more systems of the body, including the following--
 - (I) the neurological system;
 - (II) the musculoskeletal system;
 - (III) the special sense organs, and respiratory organs, including speech organs;
 - (IV) the cardiovascular system;
 - (V) the reproductive system;
 - (VI) the digestive and genitourinary systems;
 - (VII) the hemic and lymphatic systems;
 - (VIII) the skin;
 - (IX) the endocrine system; or
- (B) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(3) *Perceived Impairment* -- The term “perceived impairment” means not having a physical or mental impairment as defined in paragraph (2), but being regarded as having or treated as having a physical or mental impairment.

(4) *Record of Impairment* -- The term “record of impairment” means having a history of, or having been misclassified as having, a physical or mental impairment.²¹⁴

Silverstein’s version of the ADA, by contrast, used a definition of disability that mirrored almost exactly the definition of handicap in the section 504 regulations:

(2) *Disability* -- The term “disability” means, with respect to an individual--

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.²¹⁵

Silverstein’s version also moved references to people with alcoholism, drug addiction, and contagious diseases and infections out of the definition of disability and into a separate section under “Defenses.” Thus, section 103(b) of the bill specified that the term “qualification standards” includes a requirement that “an individual with a currently contagious disease or infection not pose a direct threat to the health or safety of other individuals in the workplace.”²¹⁶ Political advocates for people with disabilities in Washington preferred Silverstein’s approach because, as a strategic matter, it seemed smarter to use a definition of disability that had fifteen years of experience behind it, rather than to attempt Congress to adopt a new, untested definition.²¹⁷ Moreover, although there had been, as noted above, a few adverse judicial opinions under Section 504 that had rejected coverage for plaintiffs with some impairments, those opinions were the exception, rather than the rule, in litigation under the Rehabilitation Act. And, to the extent those cases were troubling, the Supreme Court’s recent decision in *Arline*, with its expansive interpretation of the third prong of the definition of “handicap,” seemed to ensure that *any* person who had been discriminated against because of *any* condition would automatically be covered under that prong of the definition -- because the limitation caused by the exclusionary action would *itself* result in the necessary limitation on a major life activity.

Advocates for people with AIDS and HIV infection were also not troubled with accepting the existing section 504 definition for purposes of the ADA. In light of the Department of Justice Kmiec Opinion, the *Arline* decision, and the line of Section 504 cases covering people with HIV infection, the definition itself seemed secure enough to ensure

coverage of people with HIV infection and AIDS. Advocates for people with HIV/AIDS were more concerned with whether coverage for such individuals would *remain* in the law, anticipating efforts to exclude such individuals during passage of the legislation. Assuming that hurdle could be overcome, the actual mechanics of ensuring coverage did not seem particularly difficult.²¹⁸

To further reinforce the fact that people with HIV infection were covered under the ADA's definition of disability, the Report from the Senate Labor and Human Resources Committee expressly referenced coverage of individuals with HIV infection. Moreover, it chose to state its belief that HIV-infected individuals are covered under the *first* prong, rather than the third prong, of the definition. The Report did not explain *how* people with HIV infection were substantially limited in a major life activity, but simply referenced the Kmiec Opinion for that analysis:

A physical or mental impairment does not constitute a disability under the first prong of the definition for purposes of the ADA unless its severity is such that it results in a "substantial limitation of one or more major life activities. . . . As noted by the U.S. Department of Justice, "Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals," Sept. 27, 1988, at 9-11, a person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term "disability."²¹⁹

As a general matter, the Senate Report did not discuss at length how different impairments substantially limited major life activities. Rather, the Report noted that "major life activities" included functions "such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."²²⁰ These are the same activities originally listed in HEW's Section 504 regulations. The Report then noted:

For example, a person who is paraplegic will have a substantial difficulty in the major life activity of walking;

a deaf person will have a substantial difficulty in aural communications; and a person with lung disease will have a substantial limitation in the major life activity of breathing.²²¹

The Senate Report seemed to indicate that the only impairments that would not meet the statutory definition of “substantially limits a major life activity” would be “minor, trivial impairments,” or physical limitations that are not different from those of the average person. As the Report explained:

Persons with minor, trivial impairments, such as a simple infected finger are not impaired in a major life activity. A person is considered an individual with a disability for purposes of the first prong of the definition when the individual’s important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. . . . [W]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.²²²

The Senate Report also indicated its approval of the Supreme Court’s analysis in *Arline* regarding the purpose and scope of the third prong of the definition. It noted that the third prong is designed to “protect individuals who have impairments that do not in fact substantially limit their functioning,” but that, as the *Arline* Court noted, “could nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment.”²²³ [Report at 23, quoting *Arline*, 408 U.S. at 283.] Individuals who would be covered under this prong, according to the Senate Report, were individuals with “medical conditions that are under control” (such as controlled diabetes or epilepsy), and people “who are rejected for a particular job for which they apply because of findings of a back abnormality on an x-ray, notwithstanding the absence of any symptoms.”²²⁴ This latter category was precisely the fact situation in

E.E. Black, although that case was not cited nor directly rejected by the Senate Report.

The Senate Report summarized coverage under the third prong as follows:

A person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity's negative attitudes toward disability *is being treated as having a disability which affects a major life activity*. For example, if a public accommodation, such as a restaurant, refused entry to a person with cerebral palsy because of that person's physical appearance, that person would be covered under the third prong of the definition. Similarly, if an employer refuses to hire someone because of a fear of the "negative reactions" of others to the individual, *or because of the employer's perception that the applicant had a disability which prevented that person from working*, that person would be covered under the third prong.²²⁵

The first two sentences of this paragraph are consistent with the *Arline* Court's analysis, and the Kmiec Opinion's observation of that analysis, that notwithstanding the technical words of the definition in the third prong, a covered entity need not regard an individual as being limited in any major life activity *other* than the activity the entity is excluding the person from, and that the entity's exclusionary *action* automatically results in the entity regarding that individual as limited in the major life activity from which the individual is being excluded. By contrast, the last phrase in the paragraph -- "or because of the employer's perception that the applicant had a disability which prevented that person from working" -- would ultimately become one of the main ways courts deciding ADA cases would restrict the scope of the third prong.²²⁶

In any event, no general attack on coverage of people with AIDS and HIV infection ever materialized in the Senate. While some Senators were unhappy with the Act's coverage of such individuals,²²⁷ the only

individuals excluded from the ADA were those addicted to drugs,²²⁸ transvestites,²²⁹ and a group with selected mental and sexual disorders.²³⁰ Apparently, Senators felt the issue had been dealt with sufficiently by including the same "direct threat" provision in the ADA that was included in previous legislation.

The Senators were also clearly aware of the wide range of physical and mental impairments that would be covered under the ADA. Sponsors of the ADA emphasized that the coverage of the law would be similar to the coverage that existed under Section 504 -- and that individuals with a range of "non-traditional" handicaps would be covered. It was understood that individuals with medical conditions such as epilepsy, diabetes, cancer, AIDS, and HIV infection would all be covered under the law. Moreover, it was understood that individuals with a range of emotional illnesses would also be covered -- hence prompting Senator Armstrong's initial effort to exclude over [30] types of emotional disorders listed in the DSM-III.²³¹

When the House of Representatives took up consideration of the ADA from October 1989 to May 1990, the fact that the ADA would cover such a wide range of individuals became one of the favorite attack points of the National Federation of Independent Businesses (NFIB), a lobby group representing small businesses. NFIB circulated material stating that "over 900 disabilities" would be included under the law, and calling on Congress to list all the covered disabilities in the law.²³² Several Members of Congress also focused on the fact that the third prong of the definition would cover *anybody* who was simply regarded as having a disability.²³³

The Report of House Education and Labor Committee was essentially identical to the Senate Labor and Human Resources Report. Like the Senate Report, the House Labor Report stated that people with HIV infection were covered under the first prong of the definition. The House Labor Report also relied on the Kmiec Opinion, although it stated more clearly that HIV-infected individuals were covered under the first prong of the definition "because of a substantial limitation to procreation and intimate sexual relations."²³⁴ And unlike the Senate Labor Report, the House Labor Report concluded that people with controlled conditions were also covered under the first prong of the definition: "[P]ersons with

impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.”²³⁵ With regard to the third prong of the definition, the House Labor Report essentially repeated the Senate Labor Report.

The House Judiciary Report is the only report that focused in any great detail on the major life activity of “working.” Christopher Bell, who was working at the time at the EEOC, felt strongly that the issues raised by the *E.E. Black* case and its progeny needed to be addressed. Bell agreed that an individual rejected from a job because of myths or stereotypes surrounding his or her disability should be covered under the third prong of the definition, regardless of whether the employer’s views were shared by others in the field. Thus, in its discussion of the third prong, the House Judiciary Report states:

Thus, a person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this third test, whether or not the employer’s perception was shared by others in the field, and whether or not the person’s physical or mental condition would be considered a disability under the first or second part of the definition.²³⁶

Bell also felt strongly, however, that if an individual had an impairment that manifested itself *only* at work, and only at very *unique* types of work or places of work, that individual should not be considered a person with a disability under the first prong of the definition. In other words, Bell assumed that most serious impairments (like epilepsy, diabetes, impairments of limbs etc.) would be covered under the first prong of the definition as substantially limiting some major life activity *other* than working. But if there was some impairment that would limit an individual *only* at work, and not elsewhere, then the “class of jobs” analysis of the *E.E. Black* court should appropriately be applied: a person with such an impairment would be “substantially limited” in the major life activity of “working” only if the unique impairment actually precluded the individual from a wide range of jobs.

Essentially reflecting Bell's position (as modified by Arlene Meyerson?), the House Judiciary Report included the following analysis in its discussion of the first prong of the definition:

A person with an impairment who is discriminated against in employment is also limited in the major life activity of working. However, a person who is limited in his or her ability to perform only a particular job, because of circumstances unique to that job site or the materials used, may not be substantially limited in the major life activity of working. For example, an applicant whose trade is painting would not be substantially limited in the major life activity of working if he has a mild allergy to a specialized paint used by one employer which is not generally used in the field which the painter works.

However, if a person is employed as a painter and is assigned to work with a unique paint which caused severe allergies, such as skin rashes or seizures, the person would be substantially limited in a major life activity, by virtue of the resulting skin disease or seizure disorder. . . . In such a case, a reasonable accommodation to the employee may include assignment to other areas where the particular paint is not used.²³⁷

It is striking -- in light of later case development under the ADA -- how easily the House Judiciary Report assumes a person with a severe allergic reaction resulting in skin rashes or seizures would be considered to be substantially limited in some major life activity, other than work. Such an assumption is not surprising, however, given the line of section 504 cases on which Congress could rely. Thus, it is also not surprising that the House Judiciary Report gives us no further elucidation on *how* skin rashes and seizures would substantially limit a major life activity. Such elucidation was simply uncommon in litigation at that time.

In the Judiciary Committee, and when the ADA reached the floor of the House of Representatives, there was a narrow attack on people

with AIDS and HIV infection who worked in food handling jobs. An amendment was offered by Congressman xxx Chapman allowing an employer "to refuse to assign . . . any employee with an infectious or communicable disease of public health significance to a job involving food handling. . . ."²³⁸ After an intense and spirited debate, the Chapman amendment was narrowly passed by the House of Representatives, by a vote of 199-187.²³⁹ During the following two months, an extensive effort at educating and lobbying Congress ensued to remove this provision from the final version of the ADA. Any Member of Congress who had not previously been aware that the ADA, as written, covered people with AIDS and asymptomatic HIV infection certainly became aware of that fact by the conclusion of that educational and lobbying effort.²⁴⁰ That effort was ultimately successful and the final provision adopted in the ADA protected employees with AIDS and HIV infection in food handling jobs.²⁴¹

In July 1990, the Senate and House of Representatives passed the final version of the ADA, and the bill was signed into law by President George Bush on July 26, 1990.²⁴² Press reports that accompanied passage of the ADA often mentioned that the law would provide anti-discrimination protection to people with AIDS and HIV infection,²⁴³ and advocates for such individuals were delighted with the bill's passage. The decision these advocates had made a few years earlier not to pursue AIDS/HIV-specific legislation seemed clearly to have been the correct decision.

The comfort that lawyers representing people with AIDS and HIV infection had with the statutory definition of "disability" under the ADA was reinforced when the EEOC issued its implementing regulations for Title I of the ADA,²⁴⁴ and the DOJ issued its implementing regulations for Title III of the ADA.²⁴⁵ The EEOC, after stating in its guidance that some impairments would be disabling for some individuals, but not others, went on to state that: "Other impairments, however, such as HIV infection, are inherently substantially limiting."²⁴⁶ While the EEOC guidance did not explain how such infection was inherently substantially limiting, the Kmiec Opinion had essentially provided that explanation already -- every person with HIV is necessarily limited in the life activity of bearing a healthy child.

The DOJ expressly referred to the Kmiec Opinion in its guidance regarding HIV infection. DOJ noted that the Kmiec Opinion had “concluded that asymptomatic HIV disease is an impairment that substantially limits a major life activity, either because of its actual effect on the individual with HIV disease or because the reactions of other people to individuals with HIV disease cause such individuals to be treated as if they were disabled.”²⁴⁷ Hence, technically, DOJ’s guidance assumed people with HIV infection would be covered either under the first prong, or the third prong, of the definition of disability. However, since DOJ’s regulation included “symptomatic and asymptomatic HIV disease” among its list of covered impairments²⁴⁸ -- a list many lawyers considered essentially a list of covered disabilities -- most advocates construed DOJ’s regulation as clearly assuming people with HIV infection were covered under the first prong of the definition.

While most advocates did not distinguish, at the time, between the approach of the EEOC and DOJ to the definition of disability generally, the differences in the approaches of the two agencies have taken on greater significance over time. The DOJ regulations, written under the leadership of John Wodatch, mirrored almost exactly the Section 504 regulations -- including with regard to the definition of disability. Thus, the DOJ regulations provided definitions only for the terms “disability,” “physical or mental impairment,” “major life activity,” “has a record of such an impairment,” and “is regarded as having such an impairment” -- all of which were almost identical to the definitions provided in the Section 504 regulations.²⁴⁹ The agency did include a few sentences in its guidance regarding the determination of whether an impairment “substantially limits” a major life activity, picked up from the Senate Labor Report to the ADA. For example, the DOJ explained: “A person is considered an individual with a disability for purposes of Test A, the first prong of the definition, when the individual’s important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.”²⁵⁰ But as a general matter, the DOJ guidance primarily emphasized that the definition of disability had a long history under previous laws. As DOJ’s guidance noted:

Congress adopted this same basic definition of “disability” first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988, for a number of reasons. It has worked well since it was adopted in 1974. There is a substantial body of administrative interpretation and judicial deference on this definition. Finally, it would not be possible to guarantee comprehensiveness by providing a list of specific disabilities, especially because new disorders may be recognized in the future, as they have since the definition was first established in 1974.²⁵¹

By contrast, the EEOC regulations laid greater emphasis on the individualized assessments that would be required to determine whether a person had a disability under the ADA. As the EEOC explained in its guidance:

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual’s life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of an individual’s major life activities. . .

The determination of whether or not an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others. . .²⁵²

The emphasis by the EEOC on the need for individualized determinations of the existence of a disability was reflected, as well, in its regulations. Unlike the Section 504 regulations, the EEOC Title I regulations included, for the first time, a definition for the term “substantially limits.” The first part of the definition explained that

“substantially limits” means:

- (I) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner, or duration under which an individual can perform a 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.²⁵³

The regulations then set forth “factors [that] should be considered in determining whether an individual is substantially limited in a major life activity,” including:

- (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.²⁵⁴

Finally, in the third part of the definition, the regulations noted that “with respect to the major life activity of ‘working,’” the term substantially limits means:

significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.²⁵⁵

The regulations also stated that, in addition to the factors noted above for determining whether an impairment substantially limits a major life activity, the following additional factors could be considered in determining whether an individual was substantially limited in the major

life activity of “working”:

- (A) The geographical area to which the individual has reasonable access;
- (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
- (C) The job from which an individual has been disqualified because of an impairment, and the number and types of others jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).²⁵⁶

The emphasis by the EEOC on ensuring that, in each individual case, the impairment of the individual must be shown to substantially limit one or more of such individual’s major life activities seemed, at least to this author, a logical extension of Christopher Bell’s approach to the definition of disability. As Special Assistant to Evan Kemp, Chairman of the EEOC, Bell was one of the principal authors of the EEOC regulations. Moreover, as Bell’s efforts during passage of the ADA indicated, Bell believed it was particularly important to clarify when and how individuals with unique impairments could (or could not) be substantially limited in the life activity of working.

Despite the difference in tone between the EEOC and DOJ regulations, most advocates were not particularly distressed by the EEOC’s emphasis on an individualized assessment. Obviously, an impairment had to substantially limit a major life activity (that is what the statutory definition called for, after all), but most serious medical conditions were presumed to be able to meet this statutory requirement, whether an individualized assessment occurred or not.

By contrast, advocates were less pleased the EEOC had expended

such a significant amount of regulatory language on “substantially limited in the major life activity of working.” This entire section was designed for a situation that was going to occur very rarely -- that is, when an individual had an impairment that was so unique it manifested itself *only* at work. And although the agency had noted in its guidance that “[i]f an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working,”²⁵⁷ there was some concern this admonition could get lost amidst the extensive regulatory language and guidance.

But while advocates were not pleased the EEOC’s regulations went on at length regarding substantial limitations in the life activity of working, and that the guidance for that section had included citations to *Forrisi*, *Jasany*, and *E.E. Black*,²⁵⁸ at least the EEOC had clarified that these cases applied solely to those extremely rare situations in which an impairment limits an individual *only* at work. Moreover, in its guidance to the third prong of the definition, the EEOC had also clearly noted that “[a]n individual rejected from a job because of the ‘myths, fears and stereotypes’ associated with disabilities would be covered under this part of the definition of disability, whether or not the employer’s or other covered entity’s perception were shared by others in the field.”²⁵⁹

Finally, both the EEOC and DOJ noted in their guidance that the existence of a disability had to be assessed without regard to the availability of mitigating measures. For example, the DOJ Guidance provided that “persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.”²⁶⁰ The EEOC, following its step-by-step approach, first stated that the “existence of an *impairment* is to be determined without regard to mitigating devices such as medicines, or assistive or prosthetic devices. . . . For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine.” (emphasis added).²⁶¹ The agency also noted that the “determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis, without regard to mitigating measures

such as medicines, or assistive or prosthetic devices.”²⁶²

In any event, by July 1991, when the EEOC and DOJ regulations were issued, the landscape looked quite favorable for people with AIDS and asymptomatic infection -- with regard to the legal recourse available to them if they experienced discrimination. Both the EEOC and the DOJ had clearly stated that people with HIV infection were covered under the first prong of the definition of disability. Much still needed to be done to provide individuals with AIDS and HIV infection ways to extend their lives and ways to enhance the physical quality of their lives. And much still needed to be done to fight the underlying feelings of prejudice and fear that people with AIDS and HIV infection still inspired in the average American. But, at least, the technical legal protection for such individuals appeared secure.

V. JUDICIAL INTERPRETATIONS OF THE DEFINITION OF “DISABILITY” UNDER THE ADA

We fast forward seven years to 1998. In the previous year, the editors of the National Disability Law Reporter had surveyed ADA cases and had found that, in 110 cases in 1995 and 1996, the question had been raised as to whether the plaintiff met the statutory definition of disability under the ADA. Of equal import, the survey found that, in only *six* of those cases, had the judges definitively found the plaintiffs met the statutory definition.²⁶³ The editors also noted that challenges to a plaintiff’s coverage under the law were appearing with increasing frequency, as compared to earlier years of ADA litigation.²⁶⁴ The editors opined that “what was once touted as ‘the most comprehensive civil rights legislation passed by Congress since the 1964 Civil Rights Act’ has become increasingly narrowed to the point where it is in danger of becoming ineffective.”²⁶⁵ By 1997, legal commentators had begun to comment as well on the judicial trend of concluding that individuals with a wide range of serious impairments -- from epilepsy to diabetes to cancer -- did not meet the statutory definition of “disability.”²⁶⁶

An analysis of this judicial trend reveals that courts have arrived at a restricted definition of disability through three principal methods. *First*, many courts analyze whether a plaintiff is substantially limited in

the major life activity of working, even when the plaintiff's impairment can logically be understood as limiting some activity other than working. The courts then conclude that the plaintiffs do not have a disability because they are not limited in a broad enough range of jobs to be considered "substantially limited" in "working."

Second, regardless of the major life activity the plaintiff has identified, the courts invest a significant amount more in the terms "substantially limits" and "major life activity" than occurred under Section 504 litigation. Under this extra scrutiny, impairments must be so severe that they do more than simply "affect" a life activity -- they must seriously hamper that life activity. Moreover, for some courts, the unambiguous words of the statute require that the effect on the life activity be shown without taking into account the mitigating effects of medication that the individual may take to control the impairment. Finally, not every important life activity is considered by the courts to be a sufficiently "major" life activity to meet the statutory definition..

Third, the concept that the third prong of the definition would serve to protect individuals with a range of impairments who were not covered under the first and second prongs has not materialized in most ADA cases. To the contrary, the literalist reading of the third prong of the definition that DOJ concluded the *Arline* Court had rejected -- i.e., that an individual must be perceived as having a limitation in a major life activity *other* than the activity the individual has been excluded from -- has reappeared with vigor in lower court decisions interpreting the ADA. In addition, the focus on assessing whether the individual's impairment substantially limits the individual in a range of jobs has been imported into the third prong as well.

Each of these three modes for restricting the scope of the definition of disability is discussed below, followed by an assessment of how these modes of interpretation of disability are affecting coverage of AIDS and HIV infection.

1. Major Life Activity of Working

A case concerning a law professor upset with the lowly increments of his salary provides us a good glimpse of how the major life

activity of working has been misunderstood and misused by the courts. See *Redlich v. The Albany Law School of Union University*, 899 F. Supp. 100 (N.D.N.Y. 1995) Allan Redlich had a stroke in 1983, which impaired the use of his left leg, arm, and hand. Redlich's allegation was that he had received lower salary increases since his stroke in 1983 because of "discriminatory bias against him as a disabled individual."²⁶⁷

There was no dispute in the case that Redlich's limbs had been significantly affected by the stroke. Indeed, Redlich alleged he had "lost all use of [his] left hand, arm, and leg and walked with a limp."²⁶⁸ Given that the law school was seeking summary judgment, the court had to accept Redlich's allegations as true.

The typical manner in which a case of this kind would have unfolded under Section 504 in the 1980s would have been as follows. The court would have concluded, in about one sentence, that Redlich had a handicap. The court might have explained this conclusion by stating that Redlich had a physical impairment that substantially limited his ability to lift things and walk, or as was even more likely, would have stated the defendant did not dispute Redlich had a handicap. If the court had so chosen (although it would not have been that usual), the court might have also cited several other cases where individuals with similar impairments were covered under Section 504.²⁶⁹

The issue for summary judgment, then, would have been whether Redlich had adduced sufficient evidence, such that a material issue of fact existed, with regard to whether he had experienced discrimination in his salary *because of* his handicap. Based on the facts of the case, it is doubtful Redlich would have survived summary judgment on that question. The court in this case found the defendant had "articulated a valid non-discriminatory reason for its employment decisions regarding the incremental salary increases of the plaintiff."²⁷⁰ The Dean determined each faculty member's salary based on teaching, scholarship, and community service. As the court noted:

The Deans who determined the plaintiff's salary during the relevant time period cited a need for better preparation for class, the employment of better teaching techniques, weak student evaluations, inadequate community service

involvement, and insufficient scholarship production. Deans Belsky and Baker ranked the plaintiff in the lower third of all faculty for each year, and his salary increases were in accordance with their assessment of the plaintiff.²⁷¹

Under ordinary Section 504 jurisprudence, therefore, this case may have resulted in summary judgment for the defendant, based on the grounds that no reasonable jury could find that the challenged employment action occurred because of Redlich's handicap. Under ADA jurisprudence, however, the district court reasoned as follows. The court easily concluded that Redlich "had a physical impairment and/or a record of a physical impairment."²⁷² The next step was for the court to "determine whether there is a material factual issue as to whether such impairment substantially limited a major life activity."²⁷³ The court listed the nine major life activities referenced in both HHS' §504 regulations and the EEOC's ADA regulations (e.g., caring for one's self, performing manual tasks, walking, seeing etc.), and announced that "[t]he relevant 'major life activity' at issue in this case is 'working.'"²⁷⁴ The court then explained that the regulations to the ADA define "substantially limits" with respect to "working" as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities."²⁷⁵

Given this framework, the court easily concluded it could find "no material factual issue as to whether the physical impairment of the plaintiff substantially affected the major life activity of working, such that he was significantly restricted in his ability to perform the class of job in which he was engaged, that of law professor."²⁷⁶ Indeed, the court drew on all the evidence Redlich and his witnesses had submitted for the record regarding his ability to publish, teach a full class load, and participate in faculty governance. As the court summarized its position:

Plaintiff even described his performance as superior during the relevant time period. The plaintiff also admits that there was no impairment of his ability to work as a

law professor, after his rehabilitation, much less a serious impairment. Thus, it is clear to the Court that the plaintiff has raised no material question of fact as to whether his physical impairment substantially limited a major life activity.²⁷⁷

The legal analysis in *Redlich* is not an aberration or an outlier in ADA litigation. To the contrary, over the past several years, this approach has been used by the courts in case after case. Moreover, in any number of cases, it is the *plaintiff* who often argues that he or she is limited in the major life activity of working, rather than limited in some other life activity. A brief summary of three representative cases from different circuit courts of appeals provides a flavor of this line of argument and the types of cases in which they appear.

In *Ellison v. Software Spectrum*, 85 F.3d 187 (5th Cir. 1996), Phyllis Ellison was diagnosed with breast cancer in 1993, had a lumpectomy, and received daily radiation treatment for six weeks. Ellison did not miss any work during the treatment period, but was given a modified work schedule by her employer that allowed her to receive the treatments. In 1994, Ellison's employer restructured and Ellison and three other employees were informed they had 30 days to find other positions in the company or leave. Two weeks later, a vacancy developed in the company for which Ellison was next in line; she was offered the position and accepted it.

Five months later, Ellison filed suit, claiming violations of the ADA and the Family Medical Leave Act (FMLA), and intentional infliction of emotional distress under state law. In the district court, the only major life activity for which Ellison claimed a substantial limitation was working.²⁷⁸ The court set forth at length the EEOC regulations regarding being substantially limited in working and concluded that the evidence did not "create a material fact issue on whether [Ellison's] cancer and treatment 'substantially limited' her major life activity of working."²⁷⁹ The court conceded that Ellison's "ability to work was affected" -- based on Ellison's description of the "nausea, fatigue, swelling, inflammation, and pain she experienced as a result of the treatment and the medication she was given for her allergic reaction to

the radiation.”²⁸⁰ Nevertheless, according to the appellate court, “as reflected in the above-quoted statute and regulations, far more is required to trigger coverage under §12102(2)(A)” (the first prong of the definition), and Ellison failed to meet those stringent requirements.²⁸¹

In *Bolton v. Scrivner*, 36 F.3d 939 (8th Cir. 1994), the plaintiff suffered work-related injuries to his right shoulder and to both feet. As a result, he experienced significant pain and numbness and was limited in his ability to lift weights or stand for long periods of time. When Bolton attempted to return to his job as an order selector in a grocery warehouse, his request was denied based on the assessment of the company’s doctor that Bolton was unable to perform the functions of his previous job.

The Tenth Circuit affirmed a summary judgment decision in favor of the employer. The court noted it was assuming that “Bolton’s evidence demonstrates a relatively severe impairment, of long-term duration, producing a permanent or long-term impact.”²⁸² But that was not sufficient for the court. It noted that Bolton had argued he was substantially limited in the life activity of *working*. Thus, it was not sufficient for Bolton to put in evidence solely on the nature and severity, the duration, and the impact of his impairment; rather, he needed evidence regarding the three factors the EEOC regulations had identified as critical to showing a limitation in the life activity of working. With regard to those factors, the court concluded the plaintiff’s evidence “does little to show that Bolton is restricted from performing a class of jobs.”²⁸³ The fatal flaws, as the court saw it, was that “[t]he evidence does not address Bolton’s vocational training, the geographical area to which he has access, or the number and types of jobs demanding similar training from which Bolton would also be disqualified.”²⁸⁴

Finally, in *Olson v. GE Astrospace*, 101 F.3d 947 (3rd Cir. 1996), John Olson had worked for GE for several years, during which time he was hospitalized for depression. (Olson was ultimately diagnosed with multiple personality disorder.) In 1991, Olson was laid off from GE along with hundreds of others in a reduction-in-force. A year later, Olson applied for a new opening with GE. He interviewed with his former supervisor, and they discussed Olson’s former and current health status. Olson was apparently one of the final contenders for the job, but

the position ultimately went to someone else.

Olson sued under the ADA, claiming he had been denied the job because of his disability of “depression, sleep disorder, and multiple personality disorder.”²⁸⁵ The appellate court set out the *McDonnell Douglas* burden-shifting scheme applicable to ADA cases, but then noted that “before the burden-shifting can even begin, Olson must show that he is a member of a protected class.”²⁸⁶ The court carefully quoted the statutory definition of “disability,” the EEOC’s definition of “major life activities,” and the first two parts of the EEOC’s definition of “substantially limits.” The court then stated:

Our task is to determine if a person who claims a disability under the ADA is “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.” 29 C.F.R. §1630.2(j)(3)(I). An “inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.” *Id.*²⁸⁷

The appellate court noted the district court had concluded that Olson did not meet the definition of “disability” under the ADA. The Third Circuit quoted the district court as stating:

considered separately or together, neither plaintiff’s hospitalization nor his alleged emotional condition are enough to classify him as disabled for purposes of establishing a prima facie case under the ADA. Plaintiff has not demonstrated how, if at all, his alleged condition has impacted his life. On the contrary, plaintiff has indicated that he works, goes to school full time and regularly engages in recreational activities. The court therefore concludes that plaintiff has not made a prima facie showing that he is disabled.²⁸⁸

The Third Circuit agreed with the reasoning of the district court:

[W]e agree with the district court's conclusion that Olson did not show that he was either disabled . . . within the meaning of the ADA. The evidence recited by the district court that reflects Olson's ability to function normally despite what appears to be serious psychological and emotional problems defeats that part of Olson's ADA claim. Accordingly, the evidence that was apparently offered to demonstrate Olson's fitness as an employee ironically establishes that he was not substantially limited in a major life activity. Therefore he can not establish that he is disabled . . .²⁸⁹

While the appellate court noted the irony in its analysis, the court was oblivious to the fact that this irony existed *solely* because it and the district court were inappropriately assessing the impact of Olson's impairment on the life activity of working, rather than the impact of his impairment on such life activities as sleeping or cognitive thinking.

This type of analysis -- in which courts focus on the impact of an impairment on an individual's ability to perform a range of jobs, and not on a host of other life activities that the impairment more logically affects -- is pervasive in cases brought under Title I of the ADA. It is as if the legislative change in the definition of "handicapped individual" had never occurred in 1974, and as if the *first* definition of that term -- i.e., an individual who has a "disability which for such individual constitutes or results in a substantial handicap to employment"-- is the operative definition for employment cases under the ADA. An illuminating (and frightening) example of the extent to which Title I employment claims have become synonymous, in some courts' minds, with the requirement that a plaintiff be substantially limited in working, can be seen in this brief paragraph appearing in a case brought under Title II by an individual born with one arm who was denied a renewal of his license as an armed security guard:

Defendants rely on *Bolton v. Scrivner* . . . in asserting that Plaintiff is not disabled because his anatomical loss does not substantially limit him in the major life activity of

“working.” This may be true. However, Plaintiff does not assert that his ability to work has been impaired. Such an analysis is germane only to Title I, the employment provision, of the ADA. The relevant statutory provision at issue in this case is Title II of the ADA, which covers discrimination by public entities.²⁹⁰

The district court in that case, *Stillwell v. Kansas City, Missouri Board of Police Commissioners*, held the plaintiff did have a disability for purposes of the ADA because the plaintiff had stated “that due to the loss of his left hand he has always had to adjust the way he performs manual tasks in comparison to most people.”²⁹¹ This is precisely how the assessment of disability should proceed in Title I, as well as Title II, cases -- does the individual have a physical or mental impairment that causes that person to function somewhat differently with regard to ordinary life activities? The person is not required to be *dysfunctional*, but rather to function differently because of the impairment.

The resonance of the requirement that an individual be unable to work

-- in a whole range of jobs, no less -- in order for the person to meet the ADA’s definition of disability seems to reflect the power of the historical image that a “disabled person” is a person who is unable to work and unable to function in society. This image makes sense to people because, otherwise, why would society provide cash payments for those who qualify for *disability* benefit plans? The idea that the ADA is designed to prohibit discrimination against people with disabilities who *can* work, and hence, for example, are not seeking disability cash benefits, does not seem to have penetrated the minds of some judges.²⁹²

The power of the historical image of the disabled, non-functional person is apparent in many cases where courts have concluded that the plaintiff is not a person with a disability under the ADA. Usually this image is subliminal -- animating the court’s analysis without any express recognition of its existence or effect. At times, however, the image becomes express. For example, the First Circuit Court of Appeals in *Katz v. City Metal Co.*, 87 F.3d 26 (1st Cir. 1996) reversed a district court ruling that a plaintiff who had a heart attack and alleged he was

impaired in his ability to “breathe, walk, perform manual tasks, care for himself and work,” was, as a matter of law, not disabled under the ADA. As quoted by the appellate court, the district court had ruled as follows:

The question is whether it produced a permanent disability that he can't perform his work. It's obvious he's a salesman, and he's still selling. . . . In order for the Plaintiff to recover in this case, the Plaintiff must make a showing that he has some type of permanent impairment, physical impairment in one or more of life's major activities. There's been no showing of that in this case.

The only evidence is that he had a blocked artery that was opened by a balloon angioplasty. . . . People recover from heart attacks and go on with life's functions. I know, I've done it, and I had an artery that was completely blocked and not reopened. Because I went through a rehab program . . . now I can perform. I'm playing tennis. I'm doing aerobic exercises every other day. I can perform fully in my life's functions as a Judge where there's a lot more stress than some other vocations. . . .

I have decided it as a matter of law. I have decided the Plaintiff failed to prove that he had a permanent disability resulting from his heart attack.²⁹³

District court judges are not usually this blatant in expressing their personal views (and hence, perhaps, not as likely to be overturned by appellate courts). But the perspective expressed by the district court judge in *Katz* is quite real -- and shared by many individuals in the general public. For example, in *Foreman v. The Babcock & Wilcox Company*, 117 F.3d 800 (5th Cir. 1997), in which the Fifth Circuit affirmed a ruling that an individual with a pacemaker was not a person with a disability, the appellate court quoted at length from the deposition testimony, including this exchange:

Q. [To the supervisor]: Let me ask you this. At that time did you consider Earl [the plaintiff] disabled, unable to return to employment?

A. No. Absolutely not. Any medical statements that we had said that he only had restrictions being around . . . electrical equipment. Beyond that, the doctors' statements said he could perform any other function. Earl, himself . . . said he was strong as an ox, strong in the back, that he could do anything. And that he, himself, felt he could do any job either inside or outside of B&W, for that matter. I had no reason to believe he was disabled. I have known lot [sic] of people who have had pacemakers. Never considered them disabled.²⁹⁴

The plaintiff in *Foreman* was requesting a modification of his job (to avoid electrical equipment) that, based on the facts of the case, would probably have required modifying the essential functions of his job -- and, thus, would not have been required under the ADA. Indeed, in many cases in which courts have concluded that plaintiffs are not people with disabilities, the fact situations seemed to indicate either that discrimination did not occur *because of* disability, or if adverse action was clearly taken on the basis of disability, the person was not qualified.

In cases where the courts are more sympathetic to the plaintiffs' claims, the courts seem to make an effort to shape the precedent in their circuit to accommodate the particular plaintiff. Yet, even in these cases, the courts get caught in the web of "substantially limited" in the life activity of "working." For example, in *Webb v. Garelick Manufacturing Co.*, 94 F.3d 484 (8th Cir. 1996), Jim Webb brought suit after being terminated from his management position. Two years prior to his termination, Webb was diagnosed with focal dystonia in his right hand, "an untreatable, severe [and painful] condition that is aggravated and accelerated by writing and other repetitive, precision hand motions."²⁹⁵ Within a year, he was experiencing pain in both hands. Webb's company ignored all his requests for accommodation and ultimately fired Webb on the grounds that he was unable to perform his job.

The district court held that Webb was not disabled because

“Webb’s impairment did not prevent him from working in other occupations in the general labor pool;” his impairment “only precluded him from those occupations involving handwriting and other repetitive hand motions.”²⁹⁶ The Eight Circuit expressed its discomfort with the district court’s “sweeping holding,” which “suggests that a plaintiff can never demonstrate disability as long as there is any other job she can perform.”²⁹⁷

The appellate court did not, however, focus on how Webb’s impairment substantially limited his major life activity of writing and of performing a range of manual tasks. Instead, the court explained that a plaintiff under the ADA “need not demonstrate that her impairment restricts her ability to perform all jobs,” but simply must show that her impairment “prevents performance of a certain class of jobs.”²⁹⁸ Citing *Jasany* for the proposition that “[a] person’s expertise, background, and job expectations are relevant factors in defining the class of jobs used to determine whether an individual is disabled,” the appellate court concluded as follows:

Fundamentally, the ADA is concerned with preventing substantial personal hardship in the form of significant reduction in a person’s real work opportunities. A court must ask “whether the particular impairment constitutes for the particular person a significant barrier to employment.” *Forrisi v. Bowen* . . . In this case, the district court did not conduct the necessary, individualized assessment of the extent to which Webb’s hand condition limited his meaningful opportunities for employment. The court should have determined what class of jobs was relevant for its disability analysis with respect to Webb, taking into consideration the job from which Webb was fired and the specialized skills that he developed in his twenty-four years with Garelick. The court also should have considered whether Webb was significantly restricted in his ability to perform that class of jobs as compared to the average person with his supervision and production skills. If the court determines that Webb has been so

restricted, then Webb is disabled within the meaning of the ADA.²⁹⁹

So much for the good old days of litigation when it would have taken most district courts one sentence to state that Webb was a “handicapped individual” for purposes of coverage under Section 504. And imagine being the lawyer making the case for this individualized assessment, and then turning around and explaining why your client is, nevertheless, fully qualified for the position that he is “significantly restricted in his ability to perform”,³⁰⁰ with just a few reasonable accommodations that will not impose an undue hardship on the employer.

Of the cases I have read thus far in which the EEOC’s regulation on “substantially limited in working” has been invoked by the courts (approximately 50 to 60 cases), I have found only *one* that possibly meets the scenario Chris Bell painted as the *reason* for having the EEOC regulation focusing on “working” in the first place: a situation in which an individual has an impairment that manifests itself *solely* in the workplace.³⁰¹ By contrast, in most cases in which the courts have considered whether a plaintiff’s impairment substantially affects his or her ability to do almost *all* jobs (in the worst cases), or a limited class of jobs (in the more sophisticated cases), the impairment actually limits a life activity *other* than working.

It is a *rare* court that, like the Seventh Circuit in *Homeyer v. Stanley Tulchin Associates*, 91 F.3d 959 (1996), reverses a district court’s motion to dismiss (based on the conclusion that an individual with chronic severe allergic rhinitis and sinusitis can “plead no facts demonstrating she was ‘disabled’ within the meaning of the ADA), and admonishes the defendant that:

It cannot be . . . that every plaintiff that merely links an existing disability to the workplace is limited to an “ability to work” analysis, for then every “disability” claim asserted in an action against an employer would collapse into an “ability to work” analysis. . . . Homeyer did not allege that her “disability” was only tied to the workplace;

rather, she alleged that her breathing was generally impaired by her respiratory condition and was aggravated by the ETS [environmental smoke environment] at [her workplace]. . . . Given Homeyer's allegations, she should be given the opportunity to prove that she is "disabled" because her ability to breathe, separate and apart from her ability to work, is impaired.³⁰²

The common-sense *Homeyer* analysis is the exception, rather than the rule, in ADA litigation today. Moreover, even when courts apply such an approach, they highlight some of the additional obstacles that stand in the way of ADA plaintiffs getting in the courthouse door. For example, in *Katz v. City Metal Co.*, discussed above, Katz was a scrap metal salesman who had a heart attack and was terminated five weeks later. Katz was discharged from the hospital after a one-week stay, and went to his office the following week. According to the appellate court's description, "Katz was unable to walk to the company's office on the second floor," and the cold weather "restricted his breathing which, in turn, made walking more difficult." Because Katz was on temporary disability leave, he went to Miami to recuperate -- where he soon received a phone call informing him he was terminated.

During the trial, the district court stated that Katz could not prove he was disabled without the testimony of his doctor, but refused to grant a continuance to allow Katz's doctor to testify. The district court ultimately granted the defendant's motion for judgment as a matter of law based on the conclusion that Katz was not disabled because "he's still selling." (Katz finally got a job selling bonds for the State of Israel.)³⁰³

The First Circuit admonished the district court that it need not have considered the "permutations" of the EEOC's requirements with regard to being substantially limited in working, since the EEOC advises that "if an individual is substantially limited in a major life activity other than working, or is so regarded, 'no determination shall be made as to whether the individual is substantially limited in working.'"³⁰⁴ The appellate court then noted that it had "no doubt that a rational jury could conclude, even without expert testimony, that Katz had a condition

affecting the cardiovascular system and therefore that he had a physical impairment under the ADA.”³⁰⁵ But, then court than noted: “We think, however, that it is a very close question whether Katz offered sufficient evidence to prove that that impairment ‘substantially limited’ his major life activities, his scheduled expert medical witness having proved unavailable.”³⁰⁶ The immediate effects after surgery were not sufficient, according to the court, because Katz needed to prove that “those limitations were permanent or persisted on a long-term basis.”³⁰⁷

The First Circuit’s approach in Katz highlights a second obstacle plaintiffs under the ADA now face under the first prong of the definition: searching inquiries by the courts as to whether their impairments *really substantially* limit their major life activities, and whether the life activities they identify are *major* enough.

2. “Substantially Limits” and “Major Life Activities”

In cases brought under Sections 501, 503 and 504, defendants rarely challenged a plaintiff’s claim that she or he was handicapped. Thus, courts rarely had the opportunity to consider, in any depth, what it meant to be “substantially limited” in a life activity, or what life activities were major. By contrast, over the past six years, challenging a plaintiff’s status as a person with a “disability” has become one of the initial lines of defense for defendants. Combined with the EEOC’s extensive regulatory definition of “substantially limits,” and its admonition that “[m]any impairments do not impact an individual’s life to the degree that they constitute disabling impairments,”³⁰⁸ this line of defense has invigorated a searching inquiry into whether a plaintiff is “sufficiently disabled” to be considered disabled.

A review of a representative number of cases provides us a glimpse into the outcomes of these searching inquiries. For example, in *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 (5th Cir. 1995), Tamela Dutcher sustained serious injury to her right arm in a gun accident. After extensive repair surgery, Dutcher began training as a welder, hoping to prevent deterioration in the use of her arm. Soon after being hired as a welder, Dutcher requested a transfer to the fab shop, “an assignment requiring little or no climbing, because of difficulties she experienced

due to the injury to her arm.”³⁰⁹ Dutcher’s request was denied. She ultimately secured a position in the fab shop (due, the court makes clear to us, to her father’s influence with the welding superintendent), was then laid off in a RIF, and ultimately not reinstated to the fab shop. The district court entered summary judgment for the employer, finding that Dutcher’s impairment did not qualify as a disability.

The court of appeals noted that “[a] physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA.”³¹⁰ After quoting the EEOC’s regulatory definition of “substantially limits,” the court noted it would “first examine whether Dutcher’s impairment substantially limits a major life activity other than working.”³¹¹ The court noted that Dutcher contends “she has difficulty picking up little things from the floor, that she has trouble holding things high or real tight for long periods of time, and that she sometimes has problems turning the car’s ignition.”³¹² Despite these assertions, the court concluded that Dutcher could “take care of the normal activities of daily living.”³¹³ As the court explained:

It is undisputed that [Dutcher] can feed herself, drive a car, attend her grooming, carry groceries, wash dishes, vacuum, and pick up trash with her impaired hand. . . . Dutcher admits that she has trained herself to “do everything . . . [she is] supposed to do” and that she can do “all of the basic things” she needs to do in life with her arm. Her medical expert testified that Dutcher can do lifting and reaching as long as she avoids heavy lifting and repetitive rotational movements. While her medical expert offered the opinion that her arm is impaired, this fact, as we noted above, is not disputed. More relevant to today’s inquiry is that there was no evidence offered on which a jury could find that this impairment substantially limited a major life activity.³¹⁴

(The Fifth Circuit then turned to what it called Dutcher’s “strongest argument”—that her employer’s actions “demonstrate that her impairment affects the major life activity of working.”³¹⁵ The court then

found, however, that “Dutcher presents no evidence that her disability prevents her from performing an entire class of jobs,” since her injured arm “adversely affects only the functioning in a welding position requiring substantial climbing.”³¹⁶)

In *Ryan v. Grae & Rybicki*, 1998 WL 50127 (2nd Cir. 1998), Jessica Ryan was fired from her job as a legal secretary after repeated reprimands for poor work performance. Ryan sued, alleging discrimination based on her disability of ulcerative colitis of the rectum. As a result of her condition, Ryan had “experienced frequent and painful diarrhea, stomach cramps, and rectal bleeding.”³¹⁷ The district court granted the employer’s motion for summary judgment on the ground that Ryan was not disabled under the ADA. Alternatively, the court held that Ryan was terminated for a legitimate non-discriminatory reason.

The Second Circuit affirmed on the ground that Ryan did not have a disability under the ADA, thus removing the necessity (according to the appellate court) of reviewing the district court’s alternative holding.³¹⁸ In prefacing its review of the first holding, the Second Circuit explained:

Although almost any impairment may, of course, in some way affect a major life activity, the ADA clearly does not consider every impaired person to be disabled. Thus, in assessing whether a plaintiff has a disability, courts have been careful to distinguish impairments which merely *affect* major life activities from those that substantially *limit* those activities.³¹⁹

Ryan argued that her colitis substantially limited her major life activity of “elimination of waste,” as well as “her ability to care for herself.”³²⁰ The appellate court rejected both arguments. It assumed, without deciding, that elimination of waste was a major life activity, but concluded that Ryan was not “substantially limited” in that activity. While the “nature and severity” of Ryan’s impairment weighed in favor of finding a substantial limitation, the court concluded that the “duration” and “permanent or long-term impact” of the impairment (the two other factors required by the EEOC regulations) weighed against such a finding. While Ryan’s colitis admittedly had “no cure and will trouble

her for the rest of her life,” the colitis “is symptomatic only at certain times, and can be asymptomatic for long periods.”³²¹ Moreover, “any residual effects of her colitis may be felt only for three to four months a year.” Thus, the court concluded, Ryan had failed to raise a triable issue of fact “whether her colitis will have significant residual effects on her ability to control her elimination of waste.”³²²

The court of appeals also concluded Ryan had failed to raise a triable issue of fact as to whether her colitis substantially limited her ability to care for herself. Although the court noted that when her colitis was symptomatic “Ryan always must be near a restroom and at times soils herself,” it observed that “even when her colitis is symptomatic, Ryan is still able to get dressed, groom herself and make her way to work.”³²³ Thus, the court concluded, “although [Ryan’s] colitis affects her ability to care for herself in some respects, the severity of the limitation caused by her colitis is limited.”³²⁴ Again, the duration and expected long-term impact of the colitis weighed against a finding of substantial limitation.

Such individualized assessments necessarily results in individuals with the same impairment being covered as individuals with disabilities in some cases, but not in others. This fact was acknowledged by the Second Circuit, as it cited two cases in which colitis was found to be a disability and two cases in which it had not been so found.³²⁵ Nevertheless, the Second Circuit noted that this was the appropriate approach under the ADA. Citing *Ennis v. National Ass’n of Bus. & Educ. Radio Inc.*, 53 F.3d 55, 59 (4th Cir. 1995), in which the Fourth Circuit concluded that whether HIV infection was a covered disability under the ADA required an individualized assessment, the Second Circuit admonished that “[b]ecause the determination whether an impairment ‘substantially limits’ a major life activity is fact specific, our decision does not mean that colitis may never impose such a limitation.”³²⁶

Indeed, the varied results in cases under the ADA as to whether an impairment *substantially* limits a major life activity often seem to depend more on the court’s belief in the *merits* of the plaintiff’s underlying claim than it does on the specific effects of the plaintiff’s impairment on his or her life. Compare *Farmer v. National City Corp.*,

1996 U.S. Dist. LEXIS 20941, *15 (S.D. Ohio 1996) (plaintiff was terminated with seven other employees after departmental restructuring; court refuses to adopt a “per se” rule for coverage of cancer and concludes that plaintiff with prostate cancer “failed to identify any ‘major life activity’ which has been affected by either the cancer or the resulting impotence or incontinence;”); *Howard v. Navistar Int’l*, 904 F. Supp. 922 (E.D. Wis. 1995) (plaintiff with lateral epicondylitis of the right elbow was accommodated numerous times by employer, complained throughout his employment, and finally left the job and sued; court concludes that “the uncontroverted evidence shows that [plaintiff] is able to care for himself and perform all normal day-to-day activities (including shooting pool in a tavern pool league) without difficulty); and *Soileau v. Guilford of Maine*, 105 F.3d 12 (1st Cir. 1997) (plaintiff with depression was terminated for his negative attitude at work and his failure to carry out duties; court concludes that even assuming “dubitante, that a colorable claim may be made that ‘ability to get along with others’ is a major life activity under the ADA,” no substantial limitation of that life activity existed here because “the evidence does not establish that Soileau had particular difficulty interacting with others, except for his supervisor,” and although plaintiff’s “underlying disorder (dystymia) will be a life-long condition, Soileau has failed to adduce any evidence that his impairment--the acute, episodic depression--will be long term.”) with *Braverman v. Penobscot Shoe Company*, 859 F.Supp. 596 (D.ME 1994) (plaintiff with prostate cancer terminated first day back at work following leave for radiation treatment; plaintiff argued that his major life activities had been limited at the time of termination because he “had just missed a significant amount of work due to radiation treatment, and the treatment had caused various intestinal, rectal, anal, and urinary difficulties; court concludes that a “question of material fact obviously remains about whether this constitutes a substantial limit on [plaintiff’s] major life activities”); and *Mark v. Burke Rehabilitation Hospital*, 1997 U.S. Dist. LEXIS 5159 (S.D.N.Y. 1997) (plaintiff with lymphoma fired from medical staff position because he would not postpone a chemotherapy treatment in order to cover for another doctor during her vacation; plaintiff’s hospitalization for his cancer makes him disabled because he has a “record of a physical

impairment”; the Court in *Arline* found that an impairment serious enough to require hospitalization is an impairment that substantially limits major life activities.) There are plenty of cases, however, in which there are no blatant defects in the merits of the case, and yet the courts apply the same exacting scrutiny. See, e.g., *Matczak v. Frankford Candy and Chocolate Company*, 950 F.Supp. 693, 696 (E.D. PA 1997) (plaintiff with epilepsy terminated following a seizure; although plaintiff’s epilepsy “prohibits him from performing some manual tasks, such as climbing heights or working around machinery . . . none of these tasks seems to cause plaintiff’s impairment to rise to the level that it can be said that they substantially limit his ability to perform life’s functions.”)

Strict, individualized scrutiny of whether a plaintiff’s impairment substantially limits a major life activity has also resulted in a number of courts rejecting the argument (accepted by the *Mark* court) that the Court’s *Arline* decision establishes that a hospitalization for an impairment is sufficient to prove that the impairment substantially limits major life activities. As the Fifth Circuit explained in *Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1997), in which it rejected the argument that plaintiff’s alcoholism was a disability:

The quoted language from *Arline* [“[t]his impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment”] cannot be construed to obviate the requirement, explicit in the ADA and its implementing regulations, that purported conditions be examined to ascertain whether a specific condition substantially limited a major life activity. The ADA requires an individualized inquiry beyond the mere existence of a hospital stay. . . . To accept [plaintiff’s] reading [of *Arline*] would work a presumption that any condition requiring temporary hospitalization is disabling--a presumption that runs counter to the very goal of the ADA.³²⁷

Other courts have similarly concluded that mere hospitalization

is insufficient to establish a disability for purposes of the ADA. *See, e.g., Demming v. Housing and Redev. Auth.*, 66 F.3d 950, 955 (8th Cir. 1995) (cancer); *Sanders v. Arneson Products, Inc.*, 91 F.3d 1351, 1354 (9th Cir. 1996), cert. denied, 117 S.Ct. 1247 (1997) (psychological impairment).

As a logical outgrowth of the courts' obsessive focus on whether an individual with an impairment is truly and actually *substantially limited* in some major life activity, some courts also have rejected the EEOC's (and DOJ's) positions in their guidance that the mitigating effects of medication on an impairment should not be considered when determining whether an individual's impairment substantially limits his or her major life activities. The divergent positions of the agencies and these courts quite logically coincide with the divergent pictures held by the agencies and the courts with regard to the "individual with a disability" the ADA is intended to cover.

In the assessment of the EEOC and the DOJ, a person with a disability is either an individual who has some physical or mental impairment which interferes with some functions of life, but which impairment still allows the person to function well (in society generally, as well as in employment specifically), or a person who has a physical or mental impairment which ordinarily would *severely* restrict the individual's capacity to function -- except that by dint of medication, or vocational rehabilitation, or sheer will power -- the person is able to function quite well, in employment as well as in other settings. Under this view of people with disabilities, therefore, the only *logical* position to take is one that does *not* take into account the mitigating effects of medication in determining whether an individual has a "disability" for purposes of the statute.

By contrast, the picture many courts are constructing of the people with disabilities intended to be covered under the ADA is the picture reflected in the first definition of the Rehabilitation Act, developed for purposes of vocational rehabilitation programs, and the picture perpetuated by the Department of Labor regulations to sections 503 and 504: an individual whose impairment *currently* causes such individual to "experience difficulty in securing, retaining, and advancing in employment."³²⁸ Under this view, it is perfectly logical to *ignore* the

ameliorating effects of medication, since the use of such medication has the result that the individual is no longer substantially limited in advancing in employment -- or for that matter, no longer substantially limited in performing *any* major life activity.

In cases under the ADA, the courts have divided on the question whether to take into account the effects of medication in determining whether an individual is substantially limited in a major life activity. In early cases under the ADA (as under Section 504), courts simply referred to the agency guidance on this issue and dealt with the question briefly. For example, in *Sarsycki v. United Parcel Service*, 862 F.Supp. 336 (W.D.Okl. 1994), a plaintiff with insulin-dependent diabetes was prohibited from driving a UPS truck because of UPS' blanket policy against allowing individuals with such conditions from operating motor vehicles on public highways. Although UPS contended Sarsycki did not have a disability for purposes of the ADA, the court dealt with that argument with the following brief analysis:

Here, the parties do not dispute that without medication Sarsycki would be unable to perform major life activities. The expected medical testimony of UPS' medical expert is that lack of insulin for a diabetic creates loss of judgment, confusion, and blackouts. Similarly, the testimony of Sarsycki's medical expert would be that without insulin Sarsycki would get sick, have multiple symptoms, and eventually lapse into a coma and die. Further, the undisputed facts indicate Sarsycki will have this condition for the duration of his life. The Court finds this testimony sufficient to establish that Sarsycki has a disability as defined under the first prong of the statutory definition.³²⁹

By the time the Eleventh Circuit was faced in 1997 with the question whether to take into account the mitigating effects of medications, several courts had ruled the EEOC's guidance was contrary to the explicit terms of the ADA. Nevertheless, in *Harris v. H & W Contracting Co.*, 102 F.3d 516 (11th Cir. 1997), the Eleventh Circuit

followed the EEOC's guidance as consistent with both the language of the ADA and its legislative history. The plaintiff, Ellen Harris, had Graves' disease, an endocrine disorder affecting the thyroid gland. The disorder had been fully controlled since 1973 through the use of medication, and since 1989, Harris had worked as a comptroller of a company. In 1992, Harris experienced a panic attack, and was subsequently hospitalized for eight days in a psychiatric ward. During that hospitalization, Harris learned her illness had been caused by her being overdosed by her thyroid medication, due to a change in the manufacture of the drug. Once the dosage was corrected, Harris' thyroid condition no longer limited her ability to work or perform other normal activities. When Harris returned to work, however, she discovered a new comptroller had been hired, and she was soon asked to find employment elsewhere.

The district court entered summary judgment for the employer, holding Harris could not show she had a "disability" within the meaning of the ADA. The Eleventh Circuit reversed. The company argued, on appeal, that Harris could not be a person with a disability because she had been "unimpeded in her life activities since first experiencing thyroid problems in 1973."³³⁰ The appellate court observed that "[t]he Company's position . . . is not a frivolous one," since "[a]t first glance, it is difficult to perceive how a condition that is completely controlled by medication can substantially limit a major life activity."³³¹ The court then noted that the EEOC's guidance was completely contrary to the company's position. Using a *Chevron* analysis, the court considered whether the ADA was "silent or ambiguous" on the issue, and whether "the agency's answer is based on a permissible construction of the statute."³³² The court answered both questions in the affirmative. It noted, first, that:

[T]here is no direct conflict between the interpretation contained in the appendix to the regulations and the statute itself. There is nothing inherently illogical about determining the existence of a substantial limitation without regard to mitigating measures such as medicines or assistive or prosthetic devices, and there is nothing in

the language of the statute itself that rules out that approach.³³³

In light of that assessment, the appellate court noted the question became one of Congressional intent. On that question, the court found that “[a] review of the relevant House and Senate reports reveals that the interpretation . . . contained in the appendix to the applicable federal regulations is firmly rooted in the ADA’s legislative history.”³³⁴ Thus, because EEOC’s guidance was “based on a permissible construction of the statute and [was] supported by the statute’s legislative history,” the court concluded it could not disregard the agency’s guidance.³³⁵

One other circuit court of appeals has adopted the view of the *Harris* court, although without extensive analysis. In *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), the Eight Circuit affirmed a jury verdict in favor of a plaintiff who experienced total permanent blindness in one eye due to glaucoma. Citing the EEOC guidance and the Eleventh Circuit ruling in *Harris*, the court noted that although the plaintiff’s “brain has mitigated the effects of his impairment,” its “analysis of whether he is disabled does not include consideration of mitigating measures.”³³⁶ The Ninth Circuit has mentioned the EEOC guidance in passing, without rejecting the agency’s interpretation. In *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362 (9th Cir. 1996), the court held that a plaintiff diagnosed with “organic mental syndrome” was not a person with a disability because his impairment was not severe enough to substantially limit his ability to work. As evidence, the court pointed to the fact that the plaintiff spent significant time pursuing real-estate and sign-making businesses. In response to the plaintiff’s argument that “this work constituted ‘mitigating measures,’ akin to treatment, that enabled him to overcome his impairment,” the Ninth Circuit stated simply that “under the EEOC regulations, we are not to consider mitigating measures.”³³⁷

Finally, the Sixth Circuit initially rejected the EEOC guidance and ruled the determination of disability should be made after taking into account mitigating measures (see *Gilday v. Mecosta County*, 124 F.3d 760, 767-68 (6th Cir. 1997)), but then amended its decision after denial of rehearing and denial of rehearing en banc. In the later decision,

Gilday v. Mecosta County, 1997 U.S.App. LEXIS 33306 (6th Cir. 1997), Judge Karen Nelson Moore presented a thoughtful and comprehensive analysis of the issue and concluded “the EEOC’s interpretation of the statute is the correct one.”³³⁸

One court of appeals has taken the opposite view of the Eleventh Circuit in *Harris*. In *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997), the Tenth Circuit concluded that two plaintiffs with uncorrected vision of 20/200 in the right eye and 20/400 in the left eye, who were commercial airline pilots for regional commuter airlines, and who wished to become pilots with United Airlines, were not individuals with disabilities under the ADA. According to the court, the portion of the EEOC’s guidance which requires that the limitation an impairment imposes on a major life activity (here, the life activity of seeing) must be assessed without regard to mitigating measures was “in direct conflict with the plain language of the ADA.”³³⁹ As the court explained:

The determination of whether an individual’s impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual. In making disability determinations, we are concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures.³⁴⁰

This opposing view started appearing in lower court decisions with more regularity in 1994 and 1995, reflecting the general judicial trend of focusing on the meaning and scope of “substantially limits.” One of the early cases, *Coughlan v. H.J. Heinz Company*, 851 F.Supp. 808 (N.D.Tex. 1994), provides a good example of the analysis used by the early courts -- and followed by the later ones. In *Coughlin*, the plaintiff had insulin-dependent diabetes and claimed he was rejected for a position as a regional grocery sales manager because of that disability. The court rejected the EEOC’s guidance which suggested every insulin-dependent diabetic is a person with a disability because, without the insulin, the person would be substantially limited in several major life

activities. The court reasoned as follows:

[T]he EEOC's interpretative guidance states that a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication. This gloss reads "limits" right out of the statute because an insulin-dependent diabetic who takes insulin could perform major life activities and would therefore not be limited. Because the EEOC gloss requires determination of a "disability" regardless of an insulin-dependent diabetic's limitation, it is at odds with the statute.³⁴¹

Because the EEOC's guidance was inconsistent with the statute itself, according to the court, the statutory text trumped the agency interpretation. While some courts have mentioned that EEOC's interpretation appears in its guidance, rather than in its regulation, the deciding factor for all courts has been that the agency interpretation (be it in a guidance or a regulation) should not be followed because it is inconsistent with the unambiguous text of the ADA. *See, e.g., Deckert v. City of Ulysses*, 1995 U.S. Dist. LEXIS 14526, *16 ((D.Kansas 1995) (plaintiff with diabetes; "The ADA creates a specific method through which the court is to determine the existence of a 'disability,' . . . and to the extent 29 C.F.R. Part 1630 App. would alter this definition by creating a 'checklist' of approved disabilities, it is invalid."); *Schluter v. Industrial Coils*, 928 F.Supp. 1437, 1444 (W.D. Wisc. 1996)(plaintiff with insulin-dependent diabetes; "the EEOC's interpretation is in direct conflict with the language of the statute that requires plaintiffs in ADA cases to show that an impairment 'substantially limits' their lives."); *Murphy v. United Parcel Service*, 946 F. Supp. 872 (D. Kan. 1996) (plaintiff with high blood pressure; "[b]ecause the plain language of the ADA conflicts with the EEOC's Interpretive Guidance, the court concludes [plaintiff's] impairment should be evaluated in its medicated state."); and *Wilking v. County of Ramsey*, 1997 U.S. Dist. LEXIS 17840 (D. Minn. 1997) (plaintiff with depression; "the EEOC's interpretation is in direct conflict with the language of the statute requiring plaintiffs

in ADA cases to show that an impairment ‘substantially limits’ a major life activity,” and therefore “the beneficial effects of [plaintiff’s] medication will be considered.”)

Even if a majority of circuits (and the Supreme Court) ultimately decide that the mitigating effects of medication should *not* be considered in determining limitations on life activities, the trend in the courts of strictly analyzing the plaintiff’s condition to determine if the impairment *substantially* limits, as compared to simply affects, a life activity will presumably continue. Moreover, an additional trend in the courts -- of questioning whether certain life activities fit the statutory requirement of being *major* life activities -- will probably continue as well.

The argument that an identified life activity is not a “major” life activity for purposes of the ADA has not arisen as frequently as the argument that the plaintiff’s impairment does not substantially limit the plaintiff in the life activity of working, or the argument that the impairment does not substantially limit some other concededly major life activity. Nevertheless, the argument as to whether a life activity is a major life activity under the ADA is one of the issues in *Abbott v. Bragdon*, currently pending before the Supreme Court.

In *Abbott v. Bragdon*, 107 F.3d 934 (1997), a case dealing with an HIV-infected woman, the First Circuit concluded that, although “the question is very close,” reproduction is a major life activity “because of its singular importance to those who engage in it, both in terms of its significance in their lives and in terms of its relation to their day-to-day existence.”³⁴² In *Pacourek v. Inland Steel Co.*, 916 F.Supp. 797 (N.D.Ill. 1996), in a case dealing with an infertile woman fired for excessive absences (that she alleged were due to her fertility treatments), the district court similarly concluded that reproduction is a major life activity for the purposes of the ADA, observing that “[m]any, if not most, people would consider having a child to be one of life’s most significant moments, and the inability to do so, one of life’s greatest disappointments.”³⁴³ The *Pacourek* court relied partly on a case decided under §501 of the Rehabilitation Act, *McWright v. Alexander*, 982 F.2d 222, 226-7 (7th Cir. 1992), in which, consistent with the general trend under Rehabilitation Act litigation, the defendant never disputed that the plaintiff, who was unable to bear children, had a handicap.³⁴⁴

Several courts, however, have rejected the argument that reproduction is a major life activity, including two circuit courts of appeal. Several early cases dealt with women who were infertile. In *Zatarin v. WDSU Television*, 881 F.Supp. 240, 243 (E.D.La. 1995), the district court concluded that finding reproduction to be a major life activity would be “inconsistent with the illustrative list of major life activities provided in the ADA regulations,” because “[r]eproduction is not an activity engaged in with the same degree as frequency as the listed activities.” In *Krauel v. Iowa Methodist Center*, 95 F.3d 674 (8th Cir. 1996), the court ruled that the plaintiff who was infertile was not a person with a disability based on an intertwining of two rationales: that reproduction was not among the examples provided by the regulation of listed activities, and that people who are infertile are still able to function well in society. As the court in *Krauel* reasoned:

Although Krauel is unable to conceive without medical intervention, she has the ability to care for herself, perform manual tasks, walk, see, hear, speak, breathe, learn, and work. It is undisputed that her infertility in no way prevented her from performing her full job duties as a respiratory therapist. We conclude, then, that to treat reproduction and caring for others as major life activities under the ADA would be inconsistent with the illustrative list of activities in the regulations, and a considerable stretch of federal law.³⁴⁵

Even life activities that seem very similar to the listed activities have not always been held by the courts to be major life activities. In one of the more astonishing cases (given the merits of the case), the Fifth Circuit concluded in *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35 (5th Cir. 1996), that a plaintiff with asbestosis, who had lung capacity that was 50% of normal, was not limited in a “major” life activity. Robison worked for Global Marine for ten years as a rig mechanic and engineer, and was then laid off, along with most of the rig’s crew, when the rig was taken out of service. After the layoff, Robison’s name was placed on a list of employees eligible to be recalled. All other crewmen

on Robison's rig were hired back except for Robison. Moreover, the company had 20-25 openings for which Robison was qualified, but he was never hired back. Robison's file contained a reference to his pulmonary problems. Robison filed suit against Global Marine, and a jury found he has been discriminated against based on his disability.

The Fifth Circuit reversed the jury verdict, on the grounds that Robison did not have a disability for purposes of the ADA. The only problem Robison experienced, the court noted, was shortness of breath while climbing stairs (or climbing ladders on the ship). While breathing is a major life activity, the court reasoned, "climbing is not such a basic, necessary function and this court does not consider it to qualify as a major life activity under the ADA."³⁴⁶ Moreover, "[s]everal instances of shortness of breath when climbing stairs do not rise to the level of substantially limiting the major life activity of breathing."³⁴⁷ Thus, because climbing was not a *major* life activity, and because shortness of breath in selected circumstances was not a *substantial limitation* of a concededly major life activity (breathing), Robison was not a person with a disability under the ADA.

The overall approach of some courts in this regard can be exemplified by a statement by a district court in Texas, holding that a plaintiff with leukemia, who was demoted and whose salary was reduced at the time he started his chemotherapy treatment, was not a person with a disability:

Boyle [the plaintiff] had no disability--actual, historic, or perceived. He was not disabled; he was critically ill. This law covers conditions, temporary or permanent, affecting a specific functional capacity that are essentially incurable with current medical science.³⁴⁸

3. Regarded As Having a Disability

What about the safety valve of the third prong of the definition--being "regarded as having such an impairment"? Following the Supreme Court's decision in *Arline*, in which the "regarded as" prong was given a broad reading, it would have seemed any plaintiff who was denied a

job because of an impairment would be able to argue he or she was regarded as being substantially limited in the life activity of working. Indeed, both the legislative history to the ADA and the EEOC regulations emphasized that, in such situations, an individual would fall under the third prong of the definition, regardless of whether the employer's perception was shared by others in the field.³⁴⁹

Moreover, if the individual was denied some service or benefit other than employment, that person too would fall under the third prong of the definition--because he or she would then be viewed as being substantially limited in the major life activity of receiving whatever benefit or service he or she had been excluded from. As the DOJ's Kmiec Opinion had made clear, the Court in *Arline* rejected the argument that this approach was circular, and offered a reading of the definition that, while perhaps not consistent with a strict textual analysis, was nonetheless legitimate in light of congressional intent.³⁵⁰

In some early cases under the ADA, this approach did work. Moreover, even in some later cases, courts found that plaintiffs who were not covered under the first or second prong of the definition were covered under the third prong. For example, in *Taylor v. U.S. Postal Service*, 946 F.2d 1214 (6th Cir. 1991), the plaintiff had a degenerative disease in his back and knees, which limited his ability to do repetitive lifting. The Postal Service concluded that Taylor's medical restrictions precluded him from performing the essential functions of the letter carrier position.

The magistrate ruled that Taylor did not have a physical impairment that substantially limited one or more major life activities, and was not perceived as having such an impairment. On appeal, Taylor argued only that he was covered under the second and third prongs of the definition, and did not pursue his claim that he was covered under the first prong.³⁵¹ The Sixth Circuit did not address, at any length, whether Taylor was covered under the second prong of the definition, simply stating that "unless we read *Arline* as establishing the nonsensical proposition that any hospital stay is sufficient to evidence a 'record of an impairment,' which we decline to do, the case offers us little guidance."³⁵² The court did, however, use *Arline* for its analysis of the third prong. The court cited *Jasany*, *E.E. Black*, *Forrisi*, and *Tudyman*,

and noted that some of these courts had rejected the argument that a plaintiff rejected from one job would be perceived as being substantially limited in working. Nevertheless, the court concluded:

In this case we believe Taylor has established that he was “regarded as having” a physical impairment and that this perception substantially limited his ability to work. We acknowledge that a per se rule that permitted every unsuccessful applicant who was rejected due to a job requirement to be deemed handicapped under the Act “would stand the Act on its head.” *Forrisi*, 794 F.2d at 935. However, a per se rule that never permitted an unsuccessful job applicant to prove he was perceived as being handicapped by pointing to the fact that he did not possess a so-called job requirement due to a physical impairment would likewise stand the Act on its head. How else would a person who, for example, had a cosmetic disfigurement ever prove that he was handicapped under the Act except by pointing to the fact that an employer did not hire him for that reason. See *Arline*, 480 U.S. at 283 n. 10 (cosmetic disfigurement listed in regulations as illustrative of a physical impairment covered by the Act.³⁵³

The approach of the *Taylor* court has not, however, been the dominant trend in cases under the ADA. In case after case, courts have imported the analysis of “substantially limited in working” from the first prong of the definition into the third prong -- requiring that plaintiffs prove that the employer regarded them as being substantially limited in doing a range of jobs or class of jobs. These courts almost always cite *Jasany* and *Forrisi*, and then go on to cite the growing body of cases under the ADA that have followed those two courts. See, e.g., *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993) (plaintiff with insulin-controlled diabetes and plaintiff with impaired vision in left eye rejected from city driving jobs; impairments held not to be covered under the first prong or the third prong of the definition; “[a]n employer’s

belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation on his ability to work in general.”); *Ellison v. Software Spectrum*, 85 F.3d 187, 192 (5th Cir. 1996)(plaintiff with breast cancer terminated and then rehired for another position; plaintiff not covered under first or third prong; “an employer does not necessarily regard an employee as having a substantially limiting impairment simply because it believes she is incapable of performing a particular job; ‘the statutory reference to a substantial limitation indicates instead that an employer regards an employee as [substantially limited] in his or her ability to find work by finding the employee’s impairment to foreclose generally the type of employment involved,’” quoting *Forrisi* and citing 29 C.F.R. §1630.2(j)(3)(I)); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885 (6th Cir. 1996) (plaintiff with multiple sclerosis (and some history of work problems) claimed she was reassigned and “demoted” because of her disability; since “by her own admission,” none of her impairments limited her activity in any way, she does not have a disability under the first prong; with regard to the third prong, “while the defendant may have perceived that Kocsis’ health problems were adversely affecting her job performance, there is no evidence that defendant regarded Kocsis as being unable to care for herself or to perform all the duties of her job.”); *Ryan v. Grae & Rybicki*, 1998 WL 50127, *5 (2nd Cir. 1998) (plaintiff with colitis fired from job as legal secretary for poor performance; plaintiff’s impairment not a disability under the first prong; plaintiff’s argued that defendant regarded her as being substantially limited in working; plaintiff’s claim rejected because she failed to present evidence that her employer “perceived her to be incapable of working in a broad range of jobs suitable for a person of her age, experience and training because of her disability.”)

The third prong is still used by some courts in ADA cases to establish coverage for plaintiffs. A number of these cases, however, seem to be in situations in which the court rejected coverage for the plaintiff because of the high standard required to receive coverage under the first or second prongs of the definition, and yet believes the plaintiff’s case may have some merit. For example, in *Katz v. City Metal Co.*, 87 F.3d

26 (1st Cir. 1996), the court had ruled it was a debatable question as to whether a jury, without testimony from Katz's medical doctor, could find the effects of his heart attack substantially limited Katz in the life activities of walking and breathing. But the court, nevertheless, reversed the judgment as a matter of law the district judge had granted the defendant, on the grounds that Katz had also alleged he was "perceived by his employer to be disabled and was fired because of it," and that "the jury certainly did not need medical testimony in making its own judgment as to what the employer may have perceived, rightly or wrongly, about Katz's condition."³⁵⁴ Similarly, in *Olson v. General Electric Astrospace*, 101 F.3d 947 (3rd Cir. 1996), in which the plaintiff with depression and multiple personality disorder was held not to be covered under the first or second prongs of the definition,³⁵⁵ the court nevertheless concluded that, viewing the facts in the light most favorable to the plaintiff, a reasonable fact-finder could conclude that the supervisor "perceived Olson to be disabled" and that this perception affected the supervisor's recommendation.³⁵⁶

4. Implications for Cases Dealing with AIDS and Asymptomatic HIV Infection

The trend in the courts of subjecting plaintiffs to searching inquiries as to whether their impairment really and truly substantially limits a real and true major life activity has had an impact on litigation involving people with AIDS and HIV infection. In many of the early ADA cases, in which people with AIDS or HIV infection alleged instances of discrimination, the facts of the case either strongly indicated the plaintiff's medical condition had been the cause of the discriminatory action, or the defendants agreed the action had been taken based on the plaintiff's AIDS or HIV status, but that such action was justified. In most of these cases, the courts easily found, without significant analysis, that the plaintiffs were individuals with disabilities under the ADA.³⁵⁷ Indeed, at times, the defendants did not contest this particular point.³⁵⁸

As time went on, however, courts began hearing cases in which the facts did not clearly and incontrovertibly indicate that the plaintiff had been discriminated against because of his or her AIDS or HIV status,

or because of the AIDS or HIV status of a person with whom the plaintiff had associated. In these cases, courts began applying the same strict scrutiny with regard to coverage that similarly situated plaintiffs with other medical conditions were receiving. In response to those decisions, and in response to the general judicial trend of engaging in such scrutiny, even courts upholding coverage of plaintiffs with AIDS or HIV infection began setting forth elaborate analyses of how the particular plaintiff before them met the statutory definition of "disability."

The first adverse decision regarding coverage of AIDS and HIV infection occurred in the case of *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio*, 53 F.3d 55 (4th Cir. 1995). Joan Ennis was hired as a bookkeeper by the defendant (NABER) in 1990. At that time, Ennis had just adopted a child infected with HIV. NABER's management had numerous problems with Ennis' job performance, with memoranda to her personnel file documenting that supervisors "repeatedly reprimanded Ennis about inaccuracies in data entry, excessive socializing, excessive personal phone calls, and tardiness."³⁵⁹ After Ennis failed to perform a specific job request, NABER suspended Ennis for two days and recorded the event in a memo to her file which concluded that "should she violate her job duties at any time in the future her employment may at that time, without further discussion or notification, be terminated."³⁶⁰

Ennis filed suit, alleging that NABER's suspension was prompted by the defendant's desire to have Ennis leave the job so as to avoid the impact of her son's HIV condition on NABER's insurance rates. NABER moved for summary judgment on the grounds that Ennis' discharge "was in no way related to her son's condition or its insurance coverage, but solely the consequence of her poor work performance."³⁶¹ The district court granted the defendant summary judgment, concluding that "Ennis had established a prima facie case of discrimination, but that she failed to present evidence, sufficient to create a triable issue, that the legitimate, nondiscriminatory reason that NABER proffered to explain Ennis' discharge was a pretext for discrimination."³⁶²

On appeal, NABER argued the district court had erred in finding that Ennis was a member of the protected class. NABER argued that Ennis had failed to establish "either that HIV-positive status is a

disability under the statute or that [her son's] condition was 'known' to the employer."³⁶³ In analyzing this argument, the Fourth Circuit first concluded that "the plain language of the provision [ADA's definition of disability] requires that a finding of disability be made on an individual-by-individual basis."³⁶⁴ This conclusion was based on the fact that "[t]he term 'disability' is specifically defined, for each of subparts (A), (B), and (C), 'with respect to [the] individual,'" and on the fact that "the individualized focus is reinforced by the requirement that the underlying impairment substantially limit a major life activity of the individual."³⁶⁵

Applying this analysis to the case of HIV-infection, the Fourth Circuit reasoned as follows:

There is no evidence in the record before us that A.J. is impaired, to any degree, or that he currently endures any limitation, much less a substantial limitation, on any major life activity. His mother has candidly admitted that her son suffers no ailments or conditions that affect the manner in which he lives on a daily basis. J.A. at 544. And there is no evidence that A.J. has a record of, or has been regarded as having, an impairment that substantially limits a major life function. Were we to hold that A.J. was disabled under the ADA, therefore, we would have to conclude that HIV-positive status is per se a disability. The plain language of the statute, which contemplates case-by-case determinations of whether a given impairment substantially limits a major life activity, whether an individual has a record of such a substantially limiting impairment, or whether an individual is being perceived as having such a substantially limiting impairment, simply would not permit this a [sic] conclusion. However, because the record as to any limitations on A.J.'s major life functions, or perceptions of any such limitations, may be less than fully developed at this stage of the litigation, we will assume for the purposes of this case that A.J. was disabled under the Act.

Given the court's final holding in the *Ennis* decision -- that "the evidence of Ennis' poor performance was so substantial and persuasive that no reasonable jury could find by a preponderance of the evidence that she was performing her job adequately"³⁶⁶ -- the court could have simply stated that, for purposes of the case before it, it would presume a child with HIV infection was covered under the Act. Instead, the *Ennis* court's explicit emphasis on the need for an individualized assessment of *every* plaintiff with an impairment has been cited by numerous courts who have subjected plaintiffs to individualized searching scrutiny.³⁶⁷ Moreover, the *Ennis* court opened the door to rulings that HIV infection was, indeed, not a covered disability for a particular individual.

Courts within the Fourth Circuit, and the Fourth Circuit itself, *en banc*, soon arrived at that conclusion in specific cases. In *Cortes v. McDonald's Corp.*, 955 F.Supp. 541 (E.D. N.Car. 1996), Cortes, who was HIV-infected, had a few run-ins with the management at the McDonalds restaurant where he worked, including being placed on 30-day probation for using abusive language. After having an argument with a co-worker, Cortes walked out of his job, saying "I quit." When Cortes tried to return to work, his supervisor refused.

The district court granted the defendant's summary judgment motion, on the grounds that Cortes was not a person with a disability, nor was Cortes regarded as a person with a disability by his employer. With regard to the first prong of the definition, the court noted that *Ennis* requires an individualized assessment by the court of an impairment's effect on the plaintiff's life activities. The district court also noted that the Fourth Circuit, in *Runnebaum v. NationsBank of Md.*, 95 F.3d 1285 (4th Cir. 1996) (later vacated and reheard *en banc*) had concluded that reproduction was not a major life activity. Thus, the court concluded Cortes did not meet the first prong of the definition of disability.

The district court then concluded that Cortes also did not meet the third prong of the definition. According to the court, "Cortes has produced no evidence that either [supervisor] regarded Cortes as having a disability that substantially hindered his major life activities or that they believed his death may be imminent."³⁶⁸ Indeed, noted the court, Cortes' manager "seemed 'sympathetic and concerned' for plaintiff when he learned plaintiff was HIV-positive, and he assured plaintiff that he

wanted him to continue to work full-time at McDonald's."³⁶⁹

A plaintiff's ability to establish coverage under the third prong of the definition thus clearly depends on whether an employer, or another entity who has excluded the individual, concedes the exclusion has occurred *because of* the medical condition. If such a concession occurs, a plaintiff still faces two possible hurdles in using the third prong: first, the plaintiff may be forced to show he or she was regarded as limited in a range of jobs, not just in one job; and second, the court may conclude (despite *Arline's* analysis) that it is circular to be regarded as substantially limited in a life activity from which one has been excluded -- solely *because* one has been excluded from that activity. However, if an employer or other entity does not even concede the medical condition caused the adverse, discriminatory action -- and indeed, as in *Cortes*, offers a legitimate, non-discriminatory reason for the action that is not a pretext -- the courts will never even proceed to those two hurdles.

The Fourth Circuit, *en banc*, ultimately ruled that a plaintiff with HIV infection was not covered under either the first or third prongs of the definition of disability. In *Runnebaum v. NationsBank of Md.*, 95 F.3d 1285 (4th Cir. 1996), a panel of the Fourth Circuit had reversed a district court grant of summary judgment to the defendant, on the grounds that the plaintiff had put forth enough evidence to create a "genuine issue of material fact as to whether he was fired because he was regarded as having a disability."³⁷⁰ The Fourth Circuit *en banc* vacated the panel decision and affirmed the district court's grant of summary judgment. *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997).

The plaintiff in *Runnebaum* was hired by NationsBank in 1991 and, according to the court's recitation of the facts, had a professional career that was plagued by "unexplained absenteeism, chronic tardiness, and lengthy lunch periods," as well as "inappropriate behavior," such as treating potential clients in a condescending manner and inappropriate joking at meetings.³⁷¹ According to the court, Runnebaum was ultimately fired because "he had failed to meet his sales goals . . . as well as failed to perform required duties and exhibit proper decorum."³⁷²

Runnebaum had informed one of the managers at NationsBank that he was HIV positive, and two packages of AZT, that Runnebaum

had delivered to his office, were twice inadvertently opened by bank personnel. After his termination, Runnebaum sued, alleging he had been discriminated against on the basis of his HIV status.

Six judges of the Fourth Circuit first reaffirmed their holding in *Ennis* that “a finding that Runnebaum has a disability under this provision must be made on an individualized basis.”³⁷³ (In a footnote, the court noted that some impairments, such as blindness and deafness, will always limit life activities, and in such cases, an individualized assessment is not necessary.)³⁷⁴ As the first step in the individualized assessment, the court concluded that asymptomatic HIV infection “is simply not an impairment: without symptoms, there are no diminishing effects on the individual.”³⁷⁵ The court noted that “[e]xtending the coverage of the ADA to asymptomatic conditions like Runnebaum’s, where no diminishing effects are exhibited, would run counter to Congress’ intention as expressed in the plain statutory language.”³⁷⁶ Because the statutory language was so clear, the court noted that resort to the legislative history was both unnecessary and inappropriate.

The court then concluded that, even if asymptomatic HIV infection were an impairment, Runnebaum failed to prove that this impairment substantially limited one or more of his major life activities. The court expressed doubt that procreation and intimate sexual relations fell within the “statutory rubric of major life activities,” but that in any event, “asymptomatic HIV does not substantially limit procreation or intimate sexual relations for purposes of the ADA.”³⁷⁷ While the court discussed the *Kmiec* Opinion at some length, and used its speculation about whether an individual’s choice not to engage in the activities is relevant to the determination of whether HIV infection itself limits procreation and sexual relations, the court did not focus on the part of the *Kmiec* Opinion that found that the ability to bear a healthy child is inherently limited by HIV infection.³⁷⁸

The court also held that Runnebaum did not fall under the third prong of the definition because “the record establishes that NationsBank did not consider HIV-positive employees to have an impairment that substantially limits one or more of the major life activities.”³⁷⁹ To the contrary, as the court pointed out, “the record reveals, and Runnebaum does not dispute, that NationsBank employs several individuals it knows

to be infected with HIV.”³⁸⁰

Although the Fourth Circuit is the only court of appeals to have held definitively that a person with HIV infection is not a person with a disability, several recent judicial opinions that have resulted in coverage for such individuals -- such as *Abbott v. Bragdon* -- have focused on an individualized assessment of the HIV-positive plaintiff. The question is whether the picture of a person with a disability who is able to function well in society, and in employment, as the quintessential person covered by the ADA is slowly being replaced by a picture of an individual with an impairment who is sufficiently “disabled” in the minds of the courts that he or she fits the image of the “person with a disability.”

VI. Where Do We Go From Here?

To a round table at Georgetown University Law Center -- to contemplate options . . .

ENDNOTES

1. See, e.g., [Scott -- list four or five news articles with parantheticals. Give overall number of articles from 1988-1998 from Nexis search. For books, give Olson's book and one other. For tv coverage -- can we get cite to 60 Minutes; 20/20, and Dateline episodes?].
2. Other useful historical accounts of people with disabilities in this country include: David Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic (1971); Gary Albrecht, The Disability Business: Rehabilitation in America (1992); and Wolf Wolfensberger, The Origin and Nature of Our Institutional Models (1975). A comprehensive and articulate analysis of this history can also be found in Jonathan Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1347 (1993). The following account draws from these sources and from a description prepared by Grail P. Walsh.
3. See U.S. Commission on Civil Rights, Accommodating the Spectrum (1983), 18; David Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic (1971), xiii.
4. "The colonists . . . were more concerned with the financial effects of all adverse conditions, not their idiosyncratic attributes." Rothman 4-5.
5. See Rothman 30-31; Gary Albrecht, The Disability Business: Rehabilitation in America (1992), 96.
6. See Rothman 57.
7. In the nineteenth-century almshouse, inmates were awakened in common rooms by a loud bell and took their meals in a large mess under a half-hour time limit. During the day, they were put to work to discourage idleness, and their comings and goings were strictly monitored. See Rothman 186-87, 191-92. This ordered regimen presented a sharp contrast with the few public almshouses which had been constructed during the late 1700s in the larger towns. These earlier establishments functioned as large, crowded households, in which the inhabitants structured their own lives and were subject to minimal supervision. See Rothman 42-43; Accommodating the Spectrum at 19.
8. See Rothman 130, 132.
9. See Rothman 137-38.
10. See Rothman 198-200, 290-91.
11. See Rothman 292.
12. Of course, the more people with physical and mental disabilities were kept out of sight in asylums and almshouses, the easier it became to question if they needed to exist at all. In the early 1900s, notions of Social Darwinism gave rise to a eugenics movement which promoted the idea that individuals with disabilities were

a threat to the nation's genetic stock and a cause of social disorder. See Carl Degler, In Search of Human Nature: The Decline and Revival of Darwinism in American Social Thought (1991) at 42-45; Accommodating the Spectrum at 19-20.. Nor was this an isolated stream of social thought. Acceptance of eugenics was quite fashionable among the American elite and their counterparts abroad. "The first International Congress of Eugenics, held in London in 1912, saw Winston Churchill as an English vice president, along with the American vice presidents: Gifford Pinchot, the well-known conservationist, and Charles W. Eliot, the president of Harvard University." Degler at 43.

The eugenicists favored governmental intervention to resolve the dangers posed by people with physical and mental disabilities, involuntary state-ordered sterilization of people with disabilities. See Degler 42; ATS 19. Sterilization of people with disabilities was first widely promoted in the 1890s, and many states passed laws authorizing involuntary sterilization procedures. See Wolfensberger 40-41. Such state activity was ultimately upheld as constitutional by the Supreme Court in the case of Buck v. Bell, 274 U.S. 200 (1927), which authorized the forced sterilization of "a feeble-minded white woman." Id. at 207.

The eugenics movement was largely discredited by the 1920s. See ATS 20; Degler 141-43, 148-50.

13. Vocational Rehabilitation Act, ch. 107, 40 Stat. 617 (June 27, 1918). See Scotch 19; ATS 21. These programs were administrated by state departments of education with partial funding from the federal government. See Scotch 19-20. This law had been preceded by laws that provided vocational training, and some rehabilitation, to soldiers and veterans. See National Defense Act, ch. 134, 39 Stat. 166 (June 3, 1916)(providing vocational training for enlisted men); Smith-Hughes Vocational Education Act, ch. 114, 39 Stat. 929 (Feb. 23, 1917)(expanding vocational education and rehabilitation for soldiers and veterans.) See also Scotch 19-20; Albrecht 102.

14. Pub. L. No. 66-236, 41 Stat. 735 (1920). See Scotch 20; ATS 21;

15. Within the year and a half following enactment of the Veterans' Rehabilitation Act, thirty-four states enacted their own vocational rehabilitation programs. See Scotch 21.

16. Albrecht at 81, 141-42.

17. The first such organizations included Disabled American Veterans and the National Mental Health Association, both formed in 1920, and the American Foundation for the Blind, formed in 1921. See Scotch 33. The number of advocacy organizations increased after World War II. Id. at 34.

18. See Albrecht 72-73; see also Jonathan Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1347 (1993)

19. See Albrecht 72. Jonathan Drimmer criticizes the medical model as one in which a person's disability acts as "a fundamental negation of her personhood as well as her citizenship, and all she can strive for is to minimize the 'symptoms' of her disability through rehabilitation in an effort to participate in the community to the greatest degree allowable." Drimmer at 1347.

20. Need cite to 1920 Act. (emphasis added).
21. Pub. L. No. 93-112, §7(6), 87 Stat. 355, 361 (1973), codified at 29 U.S.C. §706(8) (19xx).
22. Scotch, *supra* note , at 24-27.
23. At the University of Illinois, in the late 1960s, four students with disabilities who were originally housed in an off-campus facility moved closer to campus by modifying a building to provide them access. In 1970, twelve students with disabilities at U.C. Berkeley secured a governmental grant to help students with disabilities live as full participants in campus life. The program provided services ranging from residential counseling to wheelchair repair. The Berkeley experiment was widely imitated, and the independent living movement grew. See Joseph Shapiro, No Pity: People With Disabilities Forging a New Civil Rights Movement (1993), 46-58.
24. Scotch, at 34-37; Edward V. Roberts, *Into the Mainstream: The Civil Rights of People with Disabilities*, CIV. RTS. DIG., Winter 1979.
25. The rehabilitation program itself was expanded to promote independent living among all individuals with disabilities, regardless of whether they intended to enter the mainstream of employment. Scotch at 49.
26. Need cite to bill; 29 U.S.C. sec. 791.
27. Cite.
28. Cite to original bill; 29 U.S.C. sec. 793. In later amendments, the amount of the procurement contract was increased to 10,000. Cite.
29. There should be a cite to the statute. Also, pursuant to Executive Order No. 11,558, the Secretary of Labor was authorized to issue regulations under this section. (That's the no. cited by the court in E.E. Black. But I cite No. 11,758 in my chapter in Burgdorf, p. 88, note 66. Check it out.)
30. Cite. Try -- Executive Order 11,246, 3 C.F.R. 339, 340 (1964-65 comp.)
31. Cite to those two laws.
32. P.L. No. 93-112, §504, 87 Stat. at 394, 29 U.S.C. §794. This provision is colloquially referred to as "Section 504." A similar civil rights provision had been passed as early as 1948, when Congress enacted a law prohibiting discrimination on the basis of handicap in the civil service. See Pub. L. No. 80-617, 62 Stat. 351 (June 10, 1948), codified at 5 U.S.C. § 7153, redesignated at 5 U.S.C. § 7203. Few actions, however, appear to have been brought under this provision before the late 1970s. [verify]
33. Cite to US Code.
34. See Scotch, *supra* note , at 41-59.

35. Richard Scotch provides a detailed and engrossing description of both the politics and substance of the regulation-writing process. *Id.* at .
36. See Feldblum, *The (R)evolution of Physical Disability Law*.
37. This point would be made very clearly several years later in *Accommodating the Spectrum*. See . See also Burgdorf at . Robert Burgdorf and Christopher Bell were the authors of *Accommodating the Spectrum* on behalf of the U.S. Commission on Civil Rights. Both would go on to play major roles in the development of the ADA.
38. See Feldblum, *Gostin piece*. And quote from the Rag.
39. These requirements included making reasonable accommodations in employment; providing auxiliary aids and services, and modifying policies and procedures in benefit programs; and creating physical access to buildings. Each of these requirements also came with qualifications; modifications that required an undue hardship or an undue burden, or that fundamentally altered the nature of the program were not required. See, e.g., CFR cites; see also Feldblum, *Gostin piece*; Feldblum, *Revolution piece*.
40. Cite to 1973 Act.
41. P.L. 93-516, finish cite.
42. Senate Report No. 93-1297, 93rd Cong., 1st Sess., USCCAN at 6388.
43. *Id.*
44. H.R. 17503, 93rd Cong. 2nd Sess. (1974), codified at 29 U.S.C. sec. 706(7) (emphasis added).
45. Cite to Fed Register, plus CFR cite.
46. In 1978, Congress amended Section 504 of the Rehabilitation Act to bring within that section's anti-discrimination mandate any "program or activity conducted by any Executive agency." Pub. L. No. 95-602, sec. 119, 92 Stat. 2982 (1978). The Department of Justice (DOJ) was also given authority to issue coordination regulations for all other federal agencies. [check--happened in 1978?]
47. 45 C.F.R. 84.3(j)(2)(I).
48. 45 C.F.R. Pt. 84, App. A at 310.
49. *Id.*
50. *Id.* [we need exact quote.]
51. 45 C.F.R. 84.3(j)(2)(ii).

52. Id.
53. 45 C.F.R. pt. 84, App. A. at 352.
54. Cite to regs. The regulations issued by the EEOC to implement section 501 were essentially identical to those issued by HEW with regard to the definition of "handicap." [Check this.]
55. 41 C.F.R. sec. 60-741.2 (emphasis added). It looks as if these regs came out in 1978 (after HEW's regs): 43 Fed. Reg. 49,276 (1978).
56. 41 C.F.R. Part 60-741, App. A.
57. Id.
58. Id.
59. 29 C.F.R. 32.3.
60. Id.
61. 41 C.F.R. sec. 60-741.4(a). Moreover, as noted, the EEOC's regulations implementing section 501 -- which also includes an affirmative action component -- did not include the same focus on the impairment's effect on employability.
62. In 19xx, the Department of Health, Education, and Welfare became the Department of Health and Human Services (HHS). In addition, in 19xx, the Department of Justice issued coordination regulations for all federal agencies that were identical to the original HEW regulations with regard to the definition of a handicapped individual.
63. The examples of these cases are taken from Burgdorf, at 137-140.
64. Give cite and then impairment covered.
65. *Tudyman v. United Airlines*, 608 F.Supp. 739, 743 (C.D.Cal. 1984). In support of this proposition, the Tudyman court cited: [Fill in cases.] Of course, each of the impairments at issue in these cases *would* be subject to searching analysis now under the ADA trend. Indeed, the analysis subsequently engaged in by the Tudyman court would help support that ADA trend. See *infra* at xxx and xxx.
66. See, e.g., [need about 5 cases]. (There should be at least some cases that were dismissed on summary judgment.)
67. See, e.g., [same].

68. These courts also all rejected arguments that the plaintiffs were covered under the “regarded as” prong of the definition of handicapped individual. These cases were decided prior to the Supreme Court’s opinion in *School Bd. of Nassau County v. Arline*, in which the Court provided further guidance regarding that prong of the definition.

69. 497 F.Supp. at 1092.

70. *Id.* at 1091-2.

71. *Id.* at 1093 (referring to U.S. Dept. of Labor v. E.E. Black Ltd., No. 77-OFCCP-7R (U.S. Dept. of Labor, Sept. 13, 1978)).

72. *Id.*

73. *Id.* at 1094 (quoting U.S. Dept. of Labor v. E.E. BLACK Ltd., No. 77-OFCCP-7R (U.S. Dept. of Labor, Feb. 26, 1979)). The Assistant Secretary also found that Crosby was a qualified handicapped individual, because he was capable of performing the job he was seeking. *Id.* at 1095. The Assistant Secretary ordered Black to offer Crosby a job as an apprentice carpenter and to stop using “non-job related physical qualifications” to screen out qualified handicapped individuals. *Id.*

74. *Id.* at 1099.

75. One of the first, and most significant, lessons taught in the Georgetown Federal Legislation Clinic is: *never* gloss over initial phrases such as “*Except as provided for in subsection (b).*” Apparently Judge King, the district court judge in this case, missed that lesson.

76. *Id.* at 1099.

77. *Id.*

78. *Id.* (Citing ALJ’s language).

79. *Id.*

80. Cite full definition: “Except as provided for in subsection (b)” See also *supra* note 74.

81. 497 F.Supp. at 1100.

82. *Id.*

83. *Id.* at 1102.

84. *Id.*

85. 608 F.Supp. 739, 741-742. United Airlines contested it was covered under section 504, on the grounds that its employment program did not receive federal financial assistance. The court, however, declined to grant the company summary judgment on that questions because the issue of program specificity required a concrete set of facts that were lacking at the time. *Id.*

86. *Id.* at 743.

87. *Id.* at 745.

88. *Id.* at 745.

89. *Id.* at 746.

90. *Id.* at 745, n.6.

91. *Id.* at 746.

92. 755 F.2d 1244 (Sixth Cir. 1985).

93. *Id.* at 1248. Interestingly enough, the court of appeals correctly observed that the *E.E. Black* court had analyzed the *second* definition of handicapped individual (subsection (B)(I)) in conjunction with the *first* definition (subsection (A)). *Id.* at 1248, n.2. The problematic aspect of that analysis, however, was not commented upon by the Sixth Circuit. Instead, the court noted that “*Black* represents the most comprehensive examination by a court to date of the §706(7) definition of ‘handicapped.’” *Id.* at 1249.

94. 794 F.2d 931 (4th Cir. 1986).

95. *Id.* at 933.

96. *Id.*

97. *Id.* at 934. The only courts the Fourth Circuit cited were *E.E. Black*, *Tudyman*, and *de la Torres*.

98. *Id.* at 935.

99. *Id.*

100. [From 1980 to 1989, xxx number of cases filed under section 504; only xxx number cited EE Black or used that analysis.]

101. Cite.

102. Cite. Morbidity and Mortality Report.

103. The Human Imm. Virus was identified as the cause of AIDS in 198x, and an antibody test to identify the presence of HIV in the blood was developed in 198x.
104. Cite.
105. Cite.
106. Cite -- Wegner piece? (Did we ever find that cite??)
107. See, e.g., Ray (1987); Atascadero (1986); Chalk (1988). Also, cases from Burgdorf, p. 140, n. 176.
108. See, e.g., Leckelt (); others?
109. See, e.g., Local 1812; others?
110. See, e.g., FILL IN.
111. See, e.g. .
112. Cooper Memo, BNA, D-1.
113. The following year, Gary Lawson went on to clerk for Justice Antonin Scalia during the Supreme Court 1986-87 Term, the same year this author clerked for Justice Harry Blackmun. At the time Lawson wrote the DOJ memo, the Supreme Court had already granted certiorari in the case of *School Board of Nassau County v. Arline*, 772 F.2d 759 (11th Cir. 1985), cert. granted, No. 85-1277 (April 21, 1986) -- a fact mentioned in Lawson's memo. See Cooper Memo at D-7. Lawson's memo was severely critical of the reasoning employed by the 11th Circuit in *Arline*, see Cooper Memo at D-9, n. 70 and D-15, n. 105, and Lawson recused himself from working on the *Arline* case when it was heard by the Supreme Court. The reasoning employed by Justices Scalia and Rehnquist in their dissent in *Arline*, however, tracked precisely Lawson's analysis regarding Congressional authority under *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). See Cooper Memo, D-15 to D-16; compare *Arline* at xx..
114. Cooper Memo at D-10.
115. Id. at D-7. Lawson also noted that since "AIDS by definition involves the presence of an opportunistic disease, such a *P. carinii* pneumonia, that frequently will entail substantial limitations on major life activities." Id.
116. Id. at D-8.
117. Id.
118. Id. at D-8, D-9. Earlier in his memo, Lawson had rejected the "bootstrapping" argument that "a condition qualifies as an impairment whenever an employer regards it as relevant to the plaintiff's job

qualifications.” Id. at D-6. As Lawson argued: “[T]he condition must either *be* an impairment . . . or must be regarded by the employer as an impairment -- i.e., the condition falsely perceived by the employer, if real, would constitute an ‘impairment’ and thus meet the statutory definition.” Id. Although the invalidity of a “bootstrapping” argument was expressly rejected by the Supreme Court in *Arline*, 408 U.S. at 283, n. 10, questions regarding the validity of such arguments have reappeared in force in ADA cases. *See infra* Section III.

119. D-10.

83. Id. at D-10 and n. 74.

121. *Arline*, 480 U.S. 273, 281.

122. Id. at 282.

123. Id. at 282, n.7.

124. Id.

125. Id.

126. Id. at 283.

127. Id. at 283, n. 10.

128. Id.

129. *See infra* notes xx and accompanying text.

130. Cong. Rec. Cite. In *Grove City College v. Bell*, 465 U.S. 555 (1984), a case brought under Title IX of the Education Amendments of 1972, the Supreme Court had interpreted the term “program or activity” in a severely restrictive manner. As a result, three other laws that used the identical term of “program or activity,” including Section 504 of the Rehabilitation Act, were in danger of having the scope of their coverage severely restricted as well.

131. Cite Senate Committee Report.

132. Cite.

133. 134 Cong. Rec. S.256-57 (Jan. 28, 1988). After HEW issued its implementing regulations to section 504 in 1977, a controversy erupted over the agency’s coverage of alcoholics and drug addicts as individuals with handicaps. *See supra*. A year after the regulations were issued, the House of Representatives excluded alcoholics and drug addicts from coverage under Section 504. H.R. Rep. No. 1149, 95th Cong., 2nd Sess. 22 (1978). After debate in the Senate, however, a compromise provision was enacted which maintained

coverage for alcoholics and drug addicts, but required that such individuals not pose a “direct threat” to others. 124 Cong. Rec. 30,322-27 (1978); H.R. Conf. Rep. No. 1780, 95th Cong., 2nd Sess. 102 (1978).

134. 134 Cong. Rec.. at S.1738-40 (Mar. 2, 1988); add two more statements. See generally, Feldblum, CRRA memo (on file with author).

135. Cite Cong. Rec.

136. See 134 Cong. Rec. H. 574 (Mar. 2, 1988) (Statement of Cong. Owens); id. at H.572-3 (Statement of Cong. Weiss); id. at H.575 (Statement of Cong. Waxman); id. at E.487 (Statement of Cong. Hoyer); ADD OTHER CITES FROM CRRA MEMO. The compromise existed in the fact that a special statutory provision on people with contagious diseases and infections was now added to the law, within a potentially confusing statutory definition. See Burgdorf, at (noting confusion in court decisions regarding drug addicts and alcoholics).

137. [We need to check this.] See, e.g., (check for Dannemeyer statements in H. 1039-1072, Mar. 22, 1988); H.1051-52, Mar. 22 (Statement of Cong. McEwen).

138. See 134 Cong. Rec. S.2399-2438 (Mar. 17); S.2718-22, 2682-86 (Mar. 21); S.2733-765; H.1039-72 (Mar. 22.)

139. Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic, June 1988 (v).

140. Id. at 119.

141. Id. at 119.

142. Id. at 121.

143. Commission Report at 121 (emphasis added).

144. Id.

145. Id. at .

146. p. 122, citing cases

147. Id. at .

148. Id. at .

149. See H.R. 3425? Tim -- do you remember the number?? Scott--look in Cong. Rec. for fall 1987.

150. Check W. Post and NY Times for the story.
151. Cite.
152. Cite these sections; see also Feldblum, FHAA Memo at .
153. Cite.
154. 134 Cong. Rec. H4612 (June 22) (Statement of Schroeder); id. at H4601 (Weiss); id. at H.4689 (June 23)(Pelosi); id. at H4900 (Bryant).
155. See supra .
156. Report at 18.
157. p. 22
158. pg 22, n. 55.
159. Judiciary Report at 28.
160. Id.; add statutory cite.
161. 134 Cong. Rec. H16496 (June 29, 1988).
162. 134 Cong. Rec. H4919.
163. Id. at H16498 ("The amendment I am now offering . . . will say . . . that we do not [include in] the definition of a handicapped person . . . a person with a contagious disease . . . including the virus for AIDS).
164. Id. at H16496-504.
165. See, e.g., id. at 16500 ("The need to protect asymptomatic HIV-infected persons from housing discrimination is acute.") (Statement of Cong. Waxman); id. at 16501 ("It is important to underscore that this definition clearly intends to include persons with AIDS and all who are infected with the HIV virus, whether or not they show symptoms of the disease.") (Statement of Cong. Owens).
166. See, e.g., id. at 16497 ("Many of us read with interest the report of the Watkins Commission . . . specifically endorsing this kind of antidiscrimination provisions. . . We noted with interest Vice President Bush has endorsed the protection against discrimination of people with the AIDS virus or with AIDS) (Statement of Cong. Frank); id. at 16498 (Statement of Cong. Waxman).

167. The Dannemeyer amendment was rejected by a division vote of 7-89; the Burton amendment was rejected by a division vote of 10-84. *Id.* at 16504. Congressman Burton offered an identical amendment on a motion to recommit the bill with instructions; that amendment failed by a recorded vote of 63-334. *Id.* at 16510.

168. Pub. L. 100-430, 1988 U.S.C.C.A.N. 2173.

169. *Id.*

170. Kmiec Memo at 405:1.

171. *Id.* (citing Memorandum for the Attorney General from President Ronald Reagan (Aug. 5, 1988)). The Kmiec Memo stated it would “defer to others in the Department to make the policy determinations necessary to recommend legislation, and, in keeping with the tradition of this Office [of Legal Counsel], confine our analysis to matters of legal interpretation.” When DOJ did offer its recommendations for new legislation, it supported broad-based legislation such as the ADA, rather than AIDS-specific legislation. See Testimony of AGThornburgh on ADA.

172. Kmiec Opinion, at 405:1-2.

173. *Id.* at 405:2, n. 4.

174. *Id.*

175. *Id.* at 405:11. Moreover, at the time of the opinion’s release, many legal observers (particularly this author) were most interested in whether the DOJ would conclude that the concept of reasonable accommodation remained a part of the analysis of whether people with AIDS and HIV infection posed a direct threat to others -- a point that was not made explicitly in the statutory language added to the Civil Rights Restoration Act. The Kmiec Opinion concluded that a requirement of providing reasonable accommodation to people with AIDS and HIV infection, in order to mitigate any possible risk of transmission of HIV, did apply to the new provision. *Id.* at 405:13-18.

176. Cite.

177. *Id.* at 405:2, n. 3.

178. *Id.*

179. *Id.* at 405:18.

180. *Id.*

181. *Id.* at 405:5.

- 182. Id. at 405:5-6.
- 183. Id. at 405:6 (emphasis added).
- 184. Id.
- 185. Id. at 405:7 (emphasis in original).
- 186. Id.
- 187. Id.
- 188. Id.
- 189. Id. at 405:7, n. 13.
- 190. Id. at 405:7.
- 191. Id.
- 192. Id.
- 193. Id., quoting 107 S.Ct. at 1129.
- 194. Id. at 405:8.
- 195. Id. at 405:8, n. 14 (emphasis added).
- 196. Id.
- 197. Id.
- 198. Cooper memo reprinted at D-8 n. 67
- 199. Id.
- 200. Id. at 405:8 at n.14.
- 201. Id.
- 202.
- 203. Id. at n. 15.

204. Id. (emphasis added).

205. 405:11

206. Id.

207. Id. at 405:12, citing 134 Cong. Rec. H573 (daily ed. March 2, 1988).

208. 405:11 (emphasis added).

209. Id. (emphasis added). Moreover, at the time of the opinion's release, many legal observers (particularly this author) were most interested in whether the DOJ would conclude that the concept of reasonable accommodation remained a part of the analysis of whether people with AIDS and HIV infection posed a direct threat to others -- a point that was not made explicitly in the statutory language added to the Civil Rights Restoration Act. The Kmiec Opinion concluded that a requirement of providing reasonable accommodation to people with AIDS and HIV infection, in order to mitigate any possible risk of transmission of HIV, did apply to the new provision. Id. at 405:13-18.

210. Feldblum, AIDS and HIV Infection, in *One Nation Indivisible: The Civil Rights Challenge for the 1990s* (1989) at 472-473 (emphasis in original).

211. See, e.g. [cases].

212. The bill was introduced on April 28, 1988 in the Senate, S. 2345, 100th Cong. 2d Sess., 134 Cong. Rec. S5089 (daily ed. April 28, 1988), and the identical bill was introduced the following day in the House of Representatives, H.R. 4498, 100th Cong., 2d Sess., 134 Cong. Rec. H2757 (daily ed. April 29, 1988).

213. S. 933, 101st Cong., 1st Sess., 135 Cong. Rec. S4984-98 (daily ed. May 9, 1989). An identical bill was introduced in the House of Representatives by Congressman Steny Hoyer and 45 cosponsors. H.R. 2273, 101st Cong., 1st Sess., 135 Cong. Rec. H1791 (daily ed. May 9, 1989).

214. S. 2345, sec. 3 (2)-(4), 134 Cong. Rec. S5111 (daily ed. April 28, 1988).

215. Get Cong. Rec. cite; check wording.

216. Get Cong. Rec. cite; check wording.

217. See Feldblum, article in Gostin book, at xx.

218. Advocates for people with AIDS/HIV thus organized extensive support for maintaining coverage for such individuals in the bill. Before the Senate's consideration of the ADA, over 50 organizations, representing AIDS, disability, civil rights, and religious groups, sent letters to every Senator urging that the ADA continue to protect "people with AIDS and HIV infection." XX Cong. Rec. 19869-70 (Sept. 7, 1989); See also letter from Consortium of Citizens with Disabilities, urging no "weakening amendments" to the ADA. Id.

219. ~~Senate~~ Report at 22.

220. Id. at 22.

221. Id.

222. Id. at 23.

223. Id. at 23 (*quoting Arline*, 408 U.S. at 283).

224. Id. at 24.

225. Report at 24 (*citing Arline*; *Doe v. Centinela Hospital*; and *Thornhill v. Marsh.*) (emphasis added.)

226. See *supra* Section V(C).

227. Id. at xxx (Helms grumbling).

228. These individuals were excluded three times, under three separate amendments. See Cong Rec. ; see generally Feldblum, Labor Lawyer at 21-23.

229. Cong. Rec.

230. Cong Rec. Cite. This provision originally would have excluded gay people “whether or not they had AIDS.” It was modified to exclude simply “homosexuality” from the definition of “disability.” See Feldblum, Labor Lawyer, at 24-25.

231. Cong. Rec. cite, Senate passage of ADA.

232.

233. For example, when Congressman Dannemeyer asked this author if he would be covered under the ADA because a lot of people “thought he was crazy,” my reply was: [Fill in quote.”] Judiciary Committee hearing.

234. House Labor Report at 52.

235. Report at 52.

236. House Judiciary Report at 30.

237. Report at 29.

238. Xx Cong. Rec. H10911 (May 17, 1990). Congressman William Dannemeyer had wished to offer an amendment excluding *all* people with AIDS and HIV infection from coverage under the ADA. See Cong.

Rec. Cite -- Dannemeyer complaining. (On vote on the rule.) The House Rules Committee, however, which holds the power to decide what amendments can be offered for consideration by the House of Representatives, disallowed that amendment. *Id.*

239. *Id.* at H10917.

240. See xx Cong. Rec. 17046-53 (reprinting letters opposing the Chapman amendment.)

241. *Id.* at 17033-xx (need pages with votes.) (requiring Surgeon General to issue list of contagious diseases and infections that could be transmitted through food handling); see Fed. Reg. (Issuance of list without HIV included.)

242. Cite.

243. Cite a few articles.

244. Cite.

245. Cite.

246. Interpretive Guidance to 29 C.F.R. 1630.2(j).

247. Interpretive Guidance to 28 C.F.R. §36.104.

248. 28 C.F.R. §36.104.

249. Compare 28 C.F.R. §36.104 with xxx.

250. Interpretive Guidance to 28 C.F.R. §36.104. Compare Senate Labor Report at .

251. *Id.*

252. Guidance to 1630.2 (j).

253. 29 C.F.R. §1630.2(j)(1).

254. 29 C.F.R. §1630.2(j)(2)

255. 29 C.F.R. §1630.2(j)(3)(I).

256. 29 C.F.R. §1630.2(j)(3)(ii).

257. Interpretive Guidance to 29 C.F.R. §1630.2(j)(3).

258. Id. See *supra* for descriptions of those cases.
259. Interpretive Guidance to 29 C.F.R. §1630.2(l).
260. Id.
261. Guidance to 29 C.F.R. §1630.2(h) Physical or Mental Impairment.
262. Guidance to 29 C.F.R. §1630.2(j) Substantially Limits.
263. NATIONAL DISABILITY LAW REPORTER, DEFINING "DISABILITY" UNDER THE ADA: 1997 UPDATE ii (1997).
264. Such challenges arose in far fewer decisions (sixty) in the prior four-year period -- in which only twelve were plaintiffs found to have been disabled. Id.
265. Cite.
266. See Locke, Shrinking Class; James Frierson, *Heads You Lose, Tails You Lose: A Disturbing Trend in Judicial Disability*, 1997 LAB. LAW J. 419 (July, 1997).
267. Id. at 100. Redlich also explained he had not discovered the disparity in the salary increases until 1994, because of the Dean's absolute policy of secrecy regarding faculty salaries. Id.
268. Id. at 106.
269. See, e.g. .
270. Id. at 108.
271. Id.
272. Id. at 106.
273. Id.
274. Id.
275. Id. (citing 29 C.F.R. §1630.2(j)(3)(I)).
276. Id.
277. Id.

278. 85 F.3d 187, 189. In the appellate court, Ellison tried to argue that all her major life activities would have been substantially limited had she not undergone radiation treatment. The appellate court refused to consider her argument, however, because it had not been raised in the district court. *Id.* at 189, n. 2.

279. *Id.* at 191.

280. *Id.*

281. *Id.*

282. 36 F.3d at 944, n.3.

283. *Id.* at 944.

284. *Id.*

285. 101 F.3d 947, 950 (3rd Cir. 1996).

286. *Id.* at 952.

287. *Id.*

288. *Id.*

289. *Id.* at 953. The district court also concluded, and the appellate court affirmed, that Olson did not have a record of an impairment. As quoted by the Third Circuit, the district court had explained: "Plaintiff has apparently misunderstood what is meant by 'a record of an impairment.' That subsection . . . is intended to ensure that people are not discriminated against because of a history of disability. This . . . is satisfied if a record relied on by an employer indicates that the individual has . . . had a substantially limiting impairment. . . . it is absolutely necessary for the plaintiff to show that the impairment . . . substantially limits one or more of the individual's major life activities. . . . Neither a diagnosis of multiple personality disorder nor a history of testing for sleep disorders will satisfy that burden. Plaintiff would have to show that, while those disorders were active, they substantially limited one of life's major life activities. He has not done so. *Id.*

290. *Stillwell v. Kansas City, Missouri Board of Police Commissioners*, 872 F. Supp. 682, 685 (W.D. Mo. 1995).

291. *Id.*

292. Of course, this problem is compounded by the fact that, for years, the main litigation in which judges encountered people with disabilities concerned the receipt of disability benefits. In addition, since many individuals who have received disability benefits often want to return to work and/or wish to challenge a discriminatory action that precipitated their leaving work -- the confusion continues to reign.

- 293. *Katz v. City Metal Co.*, 87 F.3d 26, 29 (1st Cir. 1996) (quoting district court).
- 294. *Foreman v. The Babcock & Wilcox Company*, 117 F.3d 800, 807 (5th Cir. 1997).
- 295. *Webb v. Garelick Manufacturing Co.*, 94 F.3d 484, 485 (8th Cir. 1996).
- 296. *Id.* at 486.
- 297. *Id.*
- 298. *Id.*
- 299. *Id.* at 487.
- 300.
- 301. *See Byrne v. Bd. of Education*, 979 F.2d 560 (7th Cir. 1992) (teacher allergic to aspergillus fumigatus, which existed in some, but not all, of the school buildings).
- 302. *Homeyer v. Stanley Tulchin Associates*, 91 F.3d 959, 962, n.1 (1996).
- 303. *Katz*, 87 F.3d at 29.
- 304. *Id.* at 30 n. 3 (quoting 29 C.F.R. Pt. 1630, at 403).
- 305. *Id.* at 30.
- 306. *Id.*
- 307. *Id.* at 31.
- 308. 29 C.F.R. §1630.2(j) and Interpretive Guidance.
- 309. *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 725 (5th Cir. 1995).
- 310. *Id.* at 726.
- 311. *Id.* at 726 (citing EEOC guidance).
- 312. *Id.* at 726, n. 11.
- 313. *Id.* at 726.
- 314. *Id.*

315. *Id.* at 727.

316. *Id.*

317. *Ryan v. Grae & Rybicki*, 1998 WL 50127 *1 (2nd Cir. 1998).

318. *Id.* at *6.

319. *Id.* at *3 (emphasis added).

320. *Id.* at *4.

321. *Id.*

322. *Id.*

323. *Id.* at *5 (citing *Dutcher* for the proposition that “caring for oneself” encompasses normal activities of daily living, including feeding oneself, driving, grooming, and cleaning home).

324. *Id.*

325. *Id.* at *5 (Add cites to cases).

326. *Id.*

327. *Burch v. Coca-Cola Co.*, 119 F.3d 305, 317 (5th Cir. 1997).

328. DOL regs (see *supra* note 55).

329. 862 F.Supp. at 339.

330. *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520 (11th Cir. 1997).

331. *Id.* at 520.

332. *Id.* at 521, quoting *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

333. *Id.* at 521.

334. *Id.*

335. *Id.*

336. *Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997).

337. *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996).
338. *Id.* at *7. The *Gilday* opinion also includes citations to the various courts that have decided the issue, one way or the other. *Id.* at *7, n.2.
339. *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997).
340. *Id.* Interestingly enough, the Tenth Circuit cited the Sixth Circuit opinion in *Gilday* as support for its position. However, the panel cited the earlier (and withdrawn) *Gilday* opinion, rather than the later one which reached an opposite conclusion -- despite the fact that the later opinion appeared on September 2, 1997, and the Tenth Circuit opinion was released November 26, 1997.
341. *Coughlan v. H.J. Heinz Company*, 851 F.Supp. 808, 813 (N.D.Tex. 1994).
342. *Abbott v. Bragdon*, 107 F.3d 934, 941 (1st Cir.1997).
343. *Pacourek v. Inland Steel Co.*, 916 F.Supp. 797, 804 (N.D.Ill. 1996).
344. See also (other cases finding reproduction is a major life activity).
345. *Krauel v. Iowa Methodist Center*, 95 F.3d 674, 677 (8th Cir. 1996).
346. *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir. 1996)(quoting *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 758 n.2 (5th Cir. 1996).
347. *Id.*
348. *EEOC v. Boyle*, 959 F.Supp. 405, 409 (S.D.Tex. 1997)
349. See supra .
350. See supra .
351. *Taylor v. U.S. Postal Service*, 946 F.2d 1214, 1216, n. 1 (6th Cir. 1991).
352. *Id.* at 1217.
353. *Id.*
354. *Katz v. City Metal Co.*, 87 F.3d 26, 32 (1st Cir. 1996).
355. See supra .
356. *Olson v. General Electric Aerospace*, 101 F.3d 947, 955 (3rd Cir. 1996).

357. See, e.g., *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994) (applying definition of disability under the Rehabilitation Act and the ADA in claim under 42 U.S.C. § 1983); *Howe v. Hull*, 873 F. Supp. 72, 78 (N.D. Ohio 1994); *United States v. Morvant*, 843 F. Supp. 1092, 1094 (E.D. La. 1994).

358. See, e.g., *Robinson v. Henry Ford Health Systems*, 892 F.Supp. 176, 180-81 (E.D. Mich. 1994); *Doe v. Univ. Maryland Medical System Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995); *D.B. v. Bloom*, 896 F. Supp. 166, 169-70 (D. N.J. 1995); *Mauro v. Borgess Medical Center*, 1998 WL 75258 (6th Cir. 1998); see also *Minnesota v. Clausen*, 491 N.W.2d 662, (interpreting Minnesota statute substantially identical to ADA).

359. *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio*, 53 F.3d 55, 56 (4th Cir. 1995).

360. *Id.* at 56.

361. *Id.* at 57.

362. *Id.*

363. *Id.* at 59.

364. *Id.*

365. *Id.* at 59, citing Forrisi (add others).

366. *Id.* at 62.

367. See, e.g., .

368. *Cortes v. McDonald's Corp.*, 955 F.Supp. 541, 546 (E.D. N.Car. 1996).

369. *Id.*

370. *Runnebaum v. NationsBank of Md.*, 95 F.3d 1285, 1297 (4th Cir. 1996).

371. *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 161-62 (4th Cir. 1997).

372. *Id.* at 162.

373. *Id.* at 166.

374. *Id.* at 166, n.5.

375. *Id.* at 167.

376. *Id.* at 168.

377. Id. at .

378. See ; compare .

379. Cite.

380. Clte.

Judicial Application of the Definition of Disability To Claimants with HIV/AIDS

Case Description	HIV/AIDS Covered No Analysis/Dispute	HIV/AIDS Covered Detailed Analysis	HIV/AIDS Not Covered Detailed Analysis	Outcome
<i>Thomas v. Atascadero Unified School Dist</i> 662 F. Supp 376 (C.D. Cal. 1986) Five year old HIV-positive boy excluded from kindergarten class after having bitten another child in a classroom skirmish	"[Plaintiff] is a 'handicapped person' within the meaning of § 504 of the Rehabilitation Act of 1973." (citing C.F.R. and NY precedent)			Preliminary injunction entered prohibiting school district from excluding plaintiff
<i>Local 1812 v. United States Dep't of State</i>, 662 F. Supp 50 (D. D.C. 1987) Dep't of State initiated mandatory HIV testing for Dep't employees working abroad, seeking to limit service of HIV-positive employees to countries where adequate healthcare was available. Plaintiffs alleged discrimination based on perceived disability.	State Dep't conceded HIV-positive employees were disabled, not merely regarded as disabled, but argued they were not "otherwise qualified" to serve in countries with inadequate healthcare.			Union's motion for preliminary injunction denied; ruling in favor of the Dep't, the court stated: "the Department of State has demonstrated serious ground for concern about the additional risk that disease will develop from placement of HIV carriers in many foreign posts and that medical care at such posts will be inadequate to diagnose and treat medical problems that may develop in any infected person."

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<i>Ray v. School Dist. of Desoto Co.</i>, 666 F. Supp 1524 (M.D. FL. 1987) HIV-positive brothers excluded from elementary school, offering "either homebound instruction or 'separate but equal full-time isolation instruction"	Court assumes plaintiffs covered under § 504 without discussion			Preliminary injunction entered prohibiting exclusion of plaintiffs from public schools: "The Court ... finds Plaintiffs have carried their burden ... of establishing the likelihood that they will prevail on the merits of this case" (citing <i>Arline</i>)
<i>Chalk v. Central Dist. of Calif.</i>, 840 F.2d 701 (9th Cir. 1988) HIV-positive teacher barred from teaching in classroom	"The district court ruled that [plaintiff] was handicapped within the meaning of the [Rehab] Act, and the Department does not contest that ruling on appeal." (citing <i>Arline</i>)			Preliminary injunction entered requiring school district to reinstate plaintiff in teaching position
<i>Leckelt v. Board of Comm'n of Hosp. Dist. No. 1</i>, 909 F.2d 820 (5th Cir. 1990) Male nurse, known to live with an HIV-positive man, fired for refusing to submit to HIV testing. Plaintiff alleged discrimination based on perceived disability.	"For purposes of this appeal, we assume that seropositivity to HIV antibodies is an impairment protected under section 504 and that [defendant] treated Leckelt as though he had such an impairment."			Affirmed district court finding that plaintiff was not "otherwise qualified" due to the inability of hospital to know plaintiff's HIV status and design appropriate work standards for plaintiff
<i>T.E.P. v. Leavitt</i>, 840 F. Supp 110 (D. Utah 1993) Utah statute prohibited and declared void marriage by persons with AIDS	"Disability has been defined as a 'physical or mental impairment that substantially limits one or more of the major life activities. AIDS is such a physical impairment.'" (internal citations omitted)			Summary judgment granted on grounds that the state statute was preempted by the ADA

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<i>Howe v. Hull</i>, 873 F. Supp. 72 (N.D. Ohio 1994) Defendant refused to provide medical treatment to HIV-positive plaintiff.	"A disability is defined as 'a physical or mental impairment that substantially limits the person in one or more major life activities. AIDS and HIV infection are both disabilities within the meaning of the ADA.'" (internal citations omitted)			Defendant enjoined from refusing to treat HIV-positive patients.
<i>Doe v. Kohn Nast</i>, 862 F. Supp. 1310 (E.D. Pa. 1994) HIV-positive attorney received inadequate work assignments and ultimately was fired after firm learned of his HIV status		Court concludes HIV is a physiological disorder that, under the Act, is a physical impairment that substantially limits the major life activities of sexual intimacy and procreation. (citing Act and C.F.R.)		Defendant's summary judgment motion denied given that plaintiff met threshold burden of establishing prima facie case [No further rulings in case reported]
<i>United States v. Morvant</i>, 898 F. Supp. 1157 (E.D. La. 1995) Dentist refused to treat patients with HIV/AIDS, referring the patients to another dentist who specialized in treating people with HIV/AIDS	"AIDS/HIV-positive [sic] are both disabilities under the Department of Justice regulations promulgated pursuant to the ADA."			Summary judgment granted to DoJ enjoining dentist from refusing to treat people with HIV/AIDS
<i>Doe v. University of Md. Med. Sys. Corp.</i>, 50 F.3d 1261 (4th Cir. 1995) Hospital terminated plaintiff with HIV from surgical residency program when plaintiff refused to accept alternate residencies in non-surgical fields.	"The parties do not dispute that infection with HIV is a disability."			Plaintiff not "otherwise qualified" due to risk of transmission during performance of exposure-prone surgical procedures

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<i>Enns v. Nat'l Assoc. of Bus. & Educ. Radio</i>, 53 F.3d 55 (1995) Mother who had adopted asymptomatic HIV-positive child fired for poor work performance (according to the employer) or in alleged attempt to restrain health insurance costs (according to plaintiff). Summary judgment entered in trial court in favor of defendants.		Court found no evidence in the record of impairment or a limitation of a major life activity of the child and concluded that to hold the child has a disability would make HIV a per se disability in contradiction of the plain language of the statute. Nonetheless, the court assumes plaintiff is disabled "because the record as to any limitations ... may be less than fully developed at this stage of the litigation."		Summary judgment in favor of defendants affirmed due to insufficiency of evidence supporting allegation of discrimination; plaintiff fired for being bad worker, not because she adopted an HIV-positive child
<i>D.B. v. Bloom</i>, 896 F. Supp 166 (D. N.J. 1995) Dentist refused to treat patient with HIV, referring patient to facility providing services for indigent and mentally ill	"[Plaintiff] is, by virtue of his HIV status, a person with a disability." (citing C.F.R.)			Default judgment entered in favor of plaintiff, ordering dentist to initiate HIV non-discrimination policy
<i>Hoepfl v. Barlow</i>, 906 F. Supp. 317 (E.D. Va. 1995) HIV-positive woman seeking treatment for ruptured breast implants told by defendant that "he would 'not touch an HIV patient with a ten-foot pole.'" Plaintiff brought suit after relocating to another state.	"It is now settled law that HIV-positive individuals are 'disabled' within the meaning of the ADA." (citing case precedent and C.F.R.)			Defendant's motion to dismiss granted due to plaintiff's lack of standing; plaintiff, having moved to another state, demonstrated no benefit from injunctive remedy given no likelihood of treatment by defendant

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<i>Sharrow v. Bailey</i>, 910 F. Supp 187 (M.D. Pa. 1995) Defendant delayed performing surgery on HIV-positive plaintiff until protective suits for surgical team were available the following day	"Individuals diagnosed as HIV-positive are considered disabled for purposes of the act, whether they are symptomatic or asymptomatic." (citing C.F.R.)			Defendant's motion to dismiss for failure to state claim denied [No further rulings in case reported]
<i>Anderson v. Gus Mayer Boston Store of Del.</i>, 924 F. Supp. 763 (E.D. Tex. 1996) Employer switched to new insurance provider in order to lower premium costs, aware that an HIV-positive employee was likely to be, and ultimately was, denied coverage by new provider		"Conditions such as AIDS, HIV, blindness, and deafness, inter alia, have been determined by the courts to be per se disabilities. In other words, it has been established both that these conditions impact a major life activity and that this impact is substantially impairing of a given activity. Other conditions that are not on these lists must be resolved on a case-by-case basis."		Summary judgment entered in favor of plaintiff that employer had discriminated with regard to provision of benefits; defendants allowed to brief issue of undue hardship [No further rulings in case reported]
<i>Bullock v. Gomez</i>, 929 F. Supp. 1299 (C.D. Cal. 1996) Prison denied overnight spousal visits to HIV-positive inmates in effort to prevent spread of HIV	"The regulations implementing the ADA include, as a physical or mental impairment, 'HIV disease (whether symptomatic or asymptomatic).'" (citing C.F.R.)			Defendants' motion for summary judgment denied as plaintiff raised genuine issues of fact regarding policy as applied to plaintiff [No further rulings in case reported]
<i>Kotev v. First Colony Life Insur. Co.</i>, 927 F. Supp. 1316 (C.D. Cal. 1996) Husband of HIV-positive wife denied insurance due to possibility of transmission	"A person who is HIV positive or has AIDS is considered disabled under the ADA." (citing C.F.R.)			Defendants' motion to dismiss arguing Title III applies only to physical places, not to service providers, denied [No further rulings in case reported]

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<i>EEOC v. AIS Corp.</i>, 937 F. Supp. 1503 (D. N.M. 1996) Manager with AIDS transferred to another location because of other employees' discomfort; manager ultimately terminated for being unable to return from temporary sick leave	"Defendants concede that [plaintiff] was a disabled person within the meaning of the ADA."			Defendants' motion for summary judgment denied as plaintiff raised genuine issues of fact regarding defendant's motivations for transferring and terminating plaintiff [No further rulings in case reported]
<i>Cortes v. McDonald's Corp.</i>, 955 F. Supp. 541 (E.D. N.C. 1996) Plaintiff alleged on-the-job mistreatment after disclosure of his HIV status			Plaintiff's HIV status not a disability as no evidence presented that plaintiff was limited in any major life activity and "plaintiff agreed that there is nothing he could do before he got HIV that he is incapable of doing now." Court noted Fourth Circuit in <i>Ennis</i> already precluded HIV as per se disability.	Summary judgment entered in favor of defendants, based on plaintiff's failure to meet statutory requirement that every individual show a substantial limitation in a major life activity
<i>Doe v. Montgomery Hosp.</i>, 1996 U.S. Dist. LEXIS 18965 (E.D. Pa. 1996) Asymptomatic HIV patient alleged discriminatory treatment by defendant hospital based on HIV status		For purposes of motion, court finds jury could find patient substantially limited in major life activity of procreation due to plaintiff's affidavit that he has refrained, and will continue to refrain, from attempts to procreate due to his HIV status		Summary judgment entered in favor of defendants due to lack of evidence that defendant denied plaintiff care or gave plaintiff unequal care due to his HIV status
<i>Greenway v. Buffalo Hilton Hotel</i>, 951 F. Supp. 1039 (W.D. N.Y. 1997) Plaintiff fired for discipline problems alleged discriminatory treatment based on his HIV status	In providing an instruction to the jury, court equated HIV-positive status with disability: "Do you find ... an inference of discrimination ... because of his disability, namely, [plaintiff's] HIV positive status."			Defendants' motion for judgment n.o.v. denied, upholding jury's finding that plaintiff was fired because of his HIV status, not because of asserted discipline problems

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<i>Abbott v. Bragdon</i>, 107 F.3d 934 (1st Cir. 1997) Dentist refused in-office treatment to asymptomatic HIV positive patients		HIV is a physical impairment that substantially limits plaintiff's major life activities of sexual intimacy and procreation given substantial risk of transmission to partner or child		Summary judgment in favor of plaintiff affirmed, rejecting defendant's claim of direct threat
<i>Cloutier v. Prudential Insur. Co.</i>, 964 F. Supp. 299 (N.D. Cal. 1997) Defendant declined insurance to HIV-negative plaintiff with HIV-positive partner	"Plaintiff's partner, who is HIV-positive, has a cognizable physical disability."			Defendant's motion for summary judgment based on denial of §501(c) safe-harbor [No further rulings in case reported]
<i>World Insur. Co v. Branch</i>, 966 F. Supp. 1203 (N.D. Ga. 1997) Defendant, HIV-positive, stated on insurance application that he did not have HIV; insurer sued for rescission of contract and defendant counter-claimed contesting validity of \$5,000 "AIDS cap" in policy	"[I]t is clear that, as an individual with AIDS, defendant is disabled under the ADA." (citing case precedent)			Defendant insured's summary judgment motion granted due to insurer's lack of explanation why AIDS coverage was limited when many other disabilities are capped at \$2,000,000 [No further rulings in case reported]
<i>Parks v. Female Health Care Assoc.</i>, 1997 U.S. Dist. LEXIS 7426 (N.D. Ill. 1997) After learning of plaintiff's HIV-positive status, defendant failed to execute offer of employment	Failing to address whether plaintiff had disability, parties and court appear to assume HIV is a disability and argue regarding the threat plaintiff could pose to patients			Defendant's motion to dismiss denied as plaintiff, with opportunity, might present sufficient evidence of being "otherwise qualified"

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<i>Punnebaum v. Nationsbank of Maryland</i>, 123 F.3d 156 (4th Cir. 1997) Employee fired for failing to meet sales goals and other improper behavior alleged discrimination based on asymptomatic HIV status			First holding that "asymptomatic HIV infection is simply not an impairment: without symptoms, there are no diminishing effects on the individual," court goes on to conclude that, even where it is an impairment, "as a physical matter, nothing inherent in the virus substantially limits procreation or intimate sexual relations."	Entry of summary judgment in favor of defendant affirmed
<i>Hernandez v. Prudential Insur. Co.</i>, 977 F. Supp. 1160 (M.D. FL. 1997) Employee alleged discriminatory harassment based on his HIV status and failure to accommodate his need for medical leave		While defendant conceded HIV was an impairment, and while "it is unclear whether HIV-positive status should be a per se disability under the ADA," plaintiff was substantially limited in ability to procreate and to care for himself		Defendant's summary judgment motion denied since jury could find defendant's actions motivated by discriminatory intent based on HIV status
<i>Hamlyn v. Rock Island County Metro. Mass Transit Dist.</i>, 986 F. Supp. 1126 (C.D. Ill. 1997) Reduced fare program for persons with disabilities excluded riders whose sole disability was AIDS	"AIDS is a disability under federal law. Both the Americans with Disabilities Act ... and the Rehabilitation Act ... have been held by the federal courts to prohibit discrimination against persons with AIDS."			Summary judgment granted in favor of plaintiff, and defendant enjoined from excluding AIDS from fare program

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<i>Mauro v. Borgess Medical Center</i>, 137 F.3d 398 (6th Cir. 1998) Operating room technician suspected of being HIV-positive refused to accept alternate position and was fired	Failing to address whether plaintiff had disability, parties and court appear to assume HIV is a disability and argue regarding the threat plaintiff could pose to patients in surgery			Summary judgment for defendant affirmed, based on direct threat posed by plaintiff to patients
<i>Poe v. Mutual of Omaha Insurance Co.</i>, 1998 U.S. Dist. LEXIS 4894 (N.D. Ill. 1998) Defendant capped plaintiffs' insurance benefits for coverage involving HIV/AIDS treatment	"For purposes of this motion [to dismiss], Mutual assumes asymptomatic HIV positive status constitutes a disability as defined by the ADA. Mutual notes, however, that appellate courts are divided on this issue.... [citing <i>Runnebaum</i> and <i>Abbott</i>] This issue is therefore not properly before the court."			Defendants' motion to dismiss denied, concluding Title III encompasses substantive review of plaintiffs' insurance policies that provided disparate coverage as between disabled and non-disabled persons with seeking identical treatment [No further rulings in case reported]
<i>U.S. v. Happy Time Day Care Ctr.</i>, No. 97-C-439-C (W.D. Wis. Apr. 14, 1998) 3 year old boy with HIV denied day care by defendants, three separate facilities		While HIV "is a <i>per se</i> physical impairment," reproduction is not a major life activity for a 3-yr old boy. Instead, boy was limited in his ability to care for himself, <i>i.e.</i>, fend off colds and other infections.		Defendants' motion for summary judgment denied, rejecting defendants' claim that boy could never show he was disabled under the ADA [Consent decrees subsequently entered (unreported)]