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The Supreme Court and the Americans with Disabilities Act
The View from 1999

Introduction

When Congress adopted the Americans with Disabilities Act (ADA) in 1990, it gave people with disabilities a powerful tool to challenge the discrimination and exclusion that still existed in far too many areas of public and private life. No longer could employers, government agencies, or places of public accommodation simply ignore people with disabilities. Nor could they exclude people with disabilities on the basis of unfounded myths, fears, and stereotypes. Instead, Congress promised, the many entities covered by the statute would now be required to cleanse their decision-making processes of irrational stereotypes or the inertial force of "the way we've always done things." People with disabilities would be entitled to demand nondiscriminatory treatment and reasonable accommodations that would accord access to the same opportunities—the same chance to work hard, do one's best, and show one's talents—as anyone else.

But as with all civil rights laws, the effectiveness of the ADA depends crucially on the construction given to it by the courts. Those involved in the struggle to expand opportunities for people with disabilities should be all too familiar with this point. After Congress enacted the Rehabilitation Act of 1973 and the Education for All Handicapped Children Act of 1975 (EAHCA), early Supreme Court decisions like *Southeastern Community College* v. *Davis* (1979), and *Hendrick Hudson Board of Education* v. *Rowley* (1982) threatened to undermine the effectiveness of those statutes significantly. After absorbing the initial disappointment that attended those setbacks, committed advocates for people with disabilities were forced to take a step back, carefully evaluate the Court's opinions, and come up with new strategies to realize the promise of those landmark laws. Thanks to creative lawyering and passionate efforts to educate judges about the problem of disability discrimination, people with disabilities were able to turn the tide in the courts and ensure that the Rehabilitation Act and the EAHCA would remain the forces for positive change they were intended to be.

With this experience in mind, disability rights advocates awaited with some trepidation the courts' first decisions interpreting the Americans with Disabilities Act. And the initial returns in the lower courts seemed to confirm advocates' worst fears. As two recent studies have confirmed, individuals filing employment discrimination cases under the ADA have been among the least successful claimants in the federal courts. More than 90% of their suits have failed—a measure of futility exceeded only by prisoners who file lawsuits to challenge their conditions of confinement (Colker 1999; ABA Commission on Mental and Physical Disability Law 1998).

ADA plaintiffs have been unsuccessful, in large part, because lower courts have taken a very narrow view of the statute's protections. Many courts have viewed the ADA as limited to a narrow group of people they have labeled the "truly disabled." Some have

gone further and carved out a series of exceptions to the Act that had no apparent warrant in the statutory text (Burgdorf 1997).

Surveying these distressing results in the lower courts, many advocates pinned their hopes on the Supreme Court. But for eight years, the Court stood silent. When the Court accepted a half dozen ADA cases for review in its 1998-1999 Term, the Court appeared to be moving aggressively to put its own stamp on the law. Advocates hoped that the High Court would reverse the trend of restrictive interpretations the lower courts had placed on the statute.

Reasons for Optimism—The Court's 1998 Decisions

Advocates had some reason for optimism. In two decisions in the spring of 1998, the Court had issued its first-ever rulings on the interpretation of the Americans with Disabilities Act. In one case, *Bragdon* v. *Abbott*, the Court ruled that a woman with asymptomatic HIV infection was protected by the statute. By accepting the Administration's argument that the statute protects people with asymptomatic HIV, the Court forcefully vindicated Congress's plain intent. At the time the ADA was enacted, both its supporters and its opponents clearly agreed on one thing—that the statute would protect people with HIV, whether or not their conditions had advanced to the "symptomatic" stage. But some lower courts had ruled that the condition is not a "disability" in its early stages, and that employers, government agencies, and places of public accommodation were therefore free to discriminate against people with asymptomatic HIV infection. The Court's rejection of that flawed approach marked a major victory for people with HIV who are trying to continue to live normal, productive lives.

In its other 1998 case, *Pennsylvania Department of Corrections* v. *Yeskey*, the Court unanimously rejected the effort by some lower courts to carve out areas of state government operation that would be exempt from the ADA's requirement of nondiscrimination. Once again siding with the plain intent of Congress, the Court ruled the statute applies to everything that a state and local government does. States are not free to discriminate against qualified individuals with disabilities in any aspect of their operations.

Mixed Results—The Court's 1999 Decisions

With the spring 1998 experience in mind, many advocates believed that the Supreme Court would continue to adopt a generous construction of the ADA's protection against disability-based discrimination. Now that the dust has settled after the 1998-1999 Term, however, the picture appears to be far more mixed. The Court's *Olmstead* and *Cleveland* decisions gave strong support to the efforts of people with disabilities to live empowered, independent lives. But the Court's *Sutton*, *Murphy*, and *Albertsons* decisions

reflected a disturbingly narrow view of the protections afforded by the Americans with Disabilities Act.

On the positive side, it is difficult to overstate the historic significance of the Supreme Court's decision in *Olmstead* v. *L.C.* For decades, disability rights advocates had fought to eliminate the unnecessary isolation of people with disabilities in institutional living settings set apart from the community. In *Olmstead*, the Court held for the first time that such unnecessary segregation constitutes disability-based discrimination that can be challenged under the ADA.

Endorsing the core claims of the disability rights movement—and the position urged by the Administration—Justice Ruth Bader Ginsburg's opinion for the Court found the "unjustified institutional isolation of persons with disabilities" intolerable for two reasons. First, it fosters prejudice against people with disabilities by "perpetuat[ing] unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." Second, unnecessary institutionalization directly denies access to the bounty of opportunities available in community life. Institutionalization can deprive people with disabilities of the opportunity to pursue an education or occupation, to start a family, and to become involved in civic affairs. Accordingly, the Court held, states may not place people with disabilities in isolated institutional settings without strong professional or administrative justification. Though the Court recognized that states must have some leeway to "maintain a range of facilities and to administer services with an even hand," its recognition of the harms of unnecessary isolation marks a major victory for the efforts of people with disabilities to make their own way in our free society.

The Court's unanimous decision in *Cleveland* v. *Policy Management Systems* also struck a blow for empowerment and independent living. At issue in *Cleveland* was something called the "judicial estoppel" doctrine, which is best illustrated by the following scenario: A person loses her job because of disability-based discrimination. She files a lawsuit under the ADA to get her job back. In the meantime, she looks for a new job but can't find one. Lacking any means of supporting herself, she applies for Social Security Disability Insurance (SSDI).

In dozens of cases just like this one, lower courts ruled that people who applied for Social Security Disability Insurance had waived their right to get their jobs back under the ADA. Pointing to the plaintiffs' representations on their SSDI application that a disability had rendered them unable to work, these courts ruled that those representations "estopped" the plaintiffs from asserting that they were "qualified individuals with a disability" entitled to relief under the ADA. Those lower-court decisions placed people who experience disability-based discrimination on the horns of a dilemma: Continue to try to get their job back, and give up their only possible means of support in the meantime; or put food on the table by applying for SSDI, and give up any attempt to get their job back.

In an opinion by Justice Stephen Breyer, the Court put an end to that disempowering dilemma. The Court recognized a key point that underlies the ADA—that sometimes it's nothing but discrimination that makes someone "unable" to work. People with disabilities who are trying to find productive work should not be denied a remedy simply because they need to rely on government support to make ends meet while they are looking for a job. A rule that required SSDI recipients to forfeit their right to seek workplace accommodations under the ADA would condemn people with disabilities to lives of permanent dependency. The Court should be applauded for rejecting such a rule.

But three other cases decided by the Court last spring are more disturbing. One case, *Albertsons*, is particularly significant for the federal government. The plaintiff, Hallie Kirkingburg, was a truck driver whose vision was monocular. Although a Department of Transportation regulation generally requires drivers of commercial motor vehicles to have 20/40 or better vision in both eyes, the Department had waived the requirement based on Kirkingburg's safe driving record and his promise to submit to periodic examinations. But his employer, Albertsons supermarkets, was not so accepting. When it discovered his monocular vision, Albertsons fired Kirkingburg. Albertsons said that it would not hire any truck driver who was unable to meet the Department of Transportation's general vision standard, regardless of whether the Department had issued a waiver to that driver.

The Supreme Court endorsed Albertsons' decision to exclude Kirkingburg. Although the ADA generally requires employers to prove the existence of safety risks based on an individualized inquiry into the plaintiff's abilities and the best available objective evidence, the Court found such an inquiry unnecessary in Kirkingburg's case. Concluding that the Department of Transportation had no basis for believing that people with monocular vision could safely drive commercial motor vehicles, the Court characterized the Department's waiver program as experimental. Even if the Department grants waivers in some cases, the Court said; employers should not be forced to take part in the Department of Transportation's experiment. The *Albertsons* decision is particularly troubling, for it allows employers to make a broad-gauged judgment that *all* people with a given condition are unqualified for a job without making an individualized determination of the abilities of the *particular* applicant who has that condition—even when a regulatory agency has determined that the applicant would pose no undue risk.

Perhaps the most widely publicized cases of the Term involved the ADA's definition of "disability"—the central provision that identifies the people who may invoke the protections of the statute. In *Sutton* v. *United Air Lines* and *Murphy* v. *United Parcel Service*, the Court ruled that a person does not have a present "disability" unless his or her condition "substantially limits" one or more "major life activities" *even when any medications or other mitigating measures he or she uses are taken into account.*

The *Sutton* case involved twin sisters who had visual impairments that were correctable by wearing eyeglasses, and the *Murphy* case involved a person with medicated hypertension, but the Court's ruling denying ADA protection could affect people with any number of other impairments that Congress plainly meant to cover under

the statute: people with epilepsy that is currently controlled by medication; people with diabetes that is controlled by regular administration of insulin; people who are receiving treatment for depression; people who use prosthetic limbs to walk or hearing aids to hear. If courts treat these mitigating measures as erasing any limitations imposed by the underlying conditions, then many people who suffer irrational stereotypes and prejudice could be deprived of any remedy under the ADA.

Looking Ahead

The Supreme Court's most recent Term contained both victories and setbacks for people with disabilities. Many in the disability rights community have understandably focused on the setbacks. Many fear that the restrictive decisions in *Sutton*, *Murphy*, and *Albertsons*, taken to their logical conclusions, will deprive a large number of deserving claimants of the protections of the Americans with Disabilities Act.

There are reasons to believe that the Court's restrictive decisions will not have the devastating effects that some predict. Notwithstanding *Sutton* and *Murphy*, the ADA still protects people with past and perceived disabilities—even if they have no current impairment at all. Many people who experience discrimination on the basis of currently controlled conditions will be protected under these prongs of the statute. Even if not, they may still invoke the ADA's coverage by showing that their medications or assistive devices do *not* in fact eliminate the limitations imposed by their conditions; indeed, people who experience serious side effects may be able to show that the medications *themselves* impose substantial limitations sufficient to justify statutory protection. The *Albertsons* decision, too, may be understood as resting on the Court's assessment of the highly experimental nature of the particular waiver program at issue; it need not be read as a general license for employers to exclude people with disabilities who have obtained waivers from generally applicable safety rules.

But there is no denying that the Court's decisions place significant obstacles in the path of people with disabilities who attempt to vindicate their rights. The role of the Administration in making good on the promises of the Americans with Disabilities Act therefore remains of vital importance.

- Through test-case litigation and well-considered *amicus* participation, the Department of Justice and the Equal Employment Opportunity Commission should take the lead in urging lower courts not to read *Sutton* and *Murphy* as denying coverage to people who have conditions that continue to provoke prejudice and discrimination despite medical treatment. The Administration should also continue its vigorous defense of the challenges to the ADA's constitutionality that are pending at all levels of the federal court system.

- Federal agencies whose regulations (like the one in *Albertsons*) exclude people with identified medical conditions from important opportunities should subject

those regulations to careful scrutiny. Any exclusion must be based on careful objective judgments, rather than on archaic stereotypes.

- The federal government must continue to work to make *Olmstead*'s promise a reality by helping states move more quickly toward community-based alternatives to institutionalization.

Perhaps the greatest lesson we should draw from the recent Supreme Court cases, however, is of the inherent limits of the Americans with Disabilities Act. The ADA's comprehensive civil rights protections remain vitally important—both as a statement of our Nation's core principles, and as a front-line guarantor of access to opportunities. But civil rights law cannot be the only vehicle by which we attempt to guarantee opportunity, empowerment, and independent living to all people with disabilities. We must supplement ADA enforcement with creative new strategies to reduce the stubbornly high unemployment rate among people with disabilities, and we must work to eliminate the disempowering incentives that still mark many areas of the law.

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INSTRUCTIONS FOR FIELD OFFICES: ANALYZING ADA CHARGES AFTER SUPREME COURT DECISIONS ADDRESSING "DISABILITY" AND "QUALIFIED"

Background

The Supreme Court over the past two terms has issued several ADA decisions involving the determination of:

(1) whether a person has a "disability" as defined by the ADA. (See Bragdon v. Abbott, 524 U.S. 624 (1998); Sutton v. United Airlines, Inc., 527 U.S. ___, 67 U.S.L.W. 4537 (June 22, 1999); Murphy v. United Parcel Service, Inc., 527 U.S. ___ (1999); and Albertsons, Inc. v. Kirkingburg, 527 U.S. ___ (1999); and

(2) whether a person with a disability is "qualified." (See Cleveland v. Policy Management Systems Corp., 119 S. Ct. 1597 (1999); and Albertsons, Inc. v. Kirkingburg, 527 U.S. ___ (1999).

Since these cases involve fundamental issues that are addressed in many ADA charges, the Office of Legal Counsel has prepared these instructions for the field to aid in gathering and analyzing evidence.

Last year, the Supreme Court broadly interpreted the terms "impairment," "major life activity," and "substantial limitation" in Bragdon, holding that a woman with asymptomatic HIV infection had an ADA "disability." Consistent with the Court's approach, the EEOC will continue to give a broad interpretation to these terms.

This year, the Supreme Court held in Sutton and Murphy that the determination of whether a person has an ADA "disability" **must take into consideration whether the person is substantially limited in a major life activity when using a mitigating measure**, such as medication, a prosthesis, or a hearing aid. A person who experiences no substantial limitation in any major life activity when using a mitigating measure does not meet the ADA's first definition of "disability" (a physical or mental impairment that substantially limits a major life activity). In Albertsons, the Court extended this analysis to individuals who specifically develop compensating behaviors to mitigate the effects of an impairment. In so ruling, the Supreme Court rejected the Commission's position that the beneficial effects of mitigating measures should not be considered when determining whether a person meets the first definition of "disability."

In all of these cases, the Supreme Court emphasized that, consistent with EEOC's position, the determination of whether a person has a "disability" **must be made on a case-by-case basis**. The Court stated that it could not be assumed that everyone with a particular type of impairment who uses a particular mitigating measure, automatically was included -- or excluded -- from the

ADA's definition of "disability." Nor does the definition of "disability" depend on general information about the limitations of an impairment. Rather, one must assess the specific limitations, or lack of limitations, experienced by a Charging Party (CP) who uses a mitigating measure or compensating behavior to lessen or eliminate the limitations caused by an impairment.

The Court also emphasized that the disability determination must be based on a person's **actual condition at the time of the alleged discrimination**. Therefore, if a CP **did not use a mitigating measure at that time**, an Investigator must determine whether s/he was substantially limited in a major life activity based solely on his/her actual condition. For the purpose of determining whether a CP meets the definition of "disability," speculation regarding whether the person would have been substantially limited if s/he used a mitigating measure is irrelevant.

The instructions below, consistent with these Supreme Court decisions, modify previous field instructions and emphasize the individualized analysis that must be used in determining whether a particular CP has an ADA "disability."

- Part One addresses each of the three definitions of "disability" as they apply to CPs who use mitigating measures. (Pages 2-16) It also highlights certain issues relating to **any** "regarded as" case. (Pages 12-16)

- Part Two addresses special issues that may arise when a Respondent claims to rely on federal safety standards in determining that a CP is not "qualified" because of a disability. (Pages 16-17)

- Part Three discusses the relationship between application for, or receipt of, disability benefits and a determination of whether a CP is "qualified." (Pages 17-19) (A summary of the decisions in Albertsons and Cleveland is found on pages 16 and 17, respectively.)

If an Investigator is uncertain whether a CP who uses a mitigating measure is substantially limited in a major life activity, s/he should contact the OLC ADA Division attorney assigned to the field office.

PART ONE: THE THREE DEFINITIONS OF "DISABILITY"

First Definition of "Disability": CP Has a Substantially Limiting Impairment

All of the questions below seek information about a CP's condition at the time of the alleged discrimination.

In determining whether a CP, or a potential CP, has a physical or mental impairment that substantially limits a major life activity, an Investigator must do the following:

I. **Identify the CP's physical or mental impairment(s).**

II. **Ask whether the CP uses a *mitigating measure* to control or eliminate symptoms or limitations of the impairment.**

A. Ask the CP to identify the precise mitigating measure used (e.g., medication, insulin, prosthetic limb, hearing aid).

- If a CP uses more than one mitigating measure (e.g., a CP uses two medications) be sure to get information on how well each mitigating measure controls a CP's symptoms, its respective side effects, and whether the two medications together cause limitations because of the interaction with one another.

B. Ask the CP to identify any behaviors s/he may have specifically developed to cope with the limitations of an impairment.

- For example, an individual with monocular vision might have developed specific compensating behaviors in head or eye movements to see effectively at long distances.

C. If the CP is **not** using a mitigating measure, then discuss what limitations, if any, the CP experiences in performing a major life activity due to the impairment.

III. **Ask whether the mitigating measure or compensating behavior *fully or only partially* controls the symptoms or limitations of the impairment.**

A. A number of questions should be asked to determine whether a mitigating measure fully controls, partially controls, or has little effect in controlling the symptoms and limitations of an impairment. Examples include:

1. Describe what symptoms and limitations you experienced before using the mitigating measure (e.g., 3 seizures a week; frequent and severe headaches, blurred vision, urination, thirst, and other symptoms of high levels of blood sugar (hyperglycemia) for a person with diabetes; chronic, severe shaking due to Parkinson's disease; ability to hear only certain high-pitched sounds).

- This question seeks information to establish what **major life activity(ies)** may be affected by the CP's impairment, despite the

use of a mitigating measure or compensating behavior. Remember that **major life activities are broadly defined and that the list of major life activities in the EEOC regulations and enforcement guidances is not exhaustive.**

- Bragdon took an expansive view of the terms "major life activity" and "substantial limitation." Investigators should continue to consult the Compliance Manual and EEOC guidances for additional information on identifying major life activities and assessing whether a CP is substantially limited. (Also, see Sutton, 67 U.S.L.W. 4537, 4542 (June 22, 1999) for a discussion of "substantial limitation.")

- See pages 7-9 for a listing of some of the major life activities that you should review with a CP to determine if s/he still experiences limitations in performing them, despite the use of a mitigating measure.

2. How well does the mitigating measure control the symptoms and limitations identified above?

- Does the mitigating measure control the symptoms or limitations *all of the time or only some of the time*? (e.g., medication has reduced the number of seizures from 3 per week to 1 per week; the treatment of diabetes through diet, medication, and insulin has limited the frequency and severity of the incidents of hyperglycemia; the shaking only occurs when the CP is tired and is not as severe as it used to be; the hearing aid enables the CP to hear low and high-pitched sounds, but not words).

  - A CP who uses a prosthetic hand or arm may continue to experience substantial limitation in the major life activity of performing manual tasks because the device does not permit fine motor manipulation.

- If a CP uses a behavior specifically developed to compensate for a limitation resulting from an impairment, how well does that behavior compensate for the limitation? Do any limitations remain for which the compensating behavior is ineffective?

  - For example, a CP with monocular vision might be able to turn his/her head to compensate sufficiently for a decrease in his/her field of vision. This will not compensate for the

loss of depth perception. To deal with that limitation, a CP may have learned to judge long distances by relying on monocular cues such as linear perspective, overlay of contours, and distribution of highlights and shadows. However, *this* behavior may not compensate for limitations in seeing at shorter distances. Therefore, a CP who uses certain compensating behaviors might still experience limitations in performing numerous tasks involving close range vision. The limitation in close range vision is relevant to determining whether the CP is substantially limited in seeing or any other major life activities.

3. How long has the CP been using the mitigating measure or compensating behavior?

   - If a CP has been using a mitigating measure or compensating behavior for only a short period, initially it may not be very effective in controlling the limitations.

   - Whether a mitigating measure, over time, might become more effective involves speculation. The Supreme Court's decisions make it clear that the determination of whether a CP is substantially limited, even with the use of a mitigating measure or compensating behavior, must rest on evidence of how well the measure or behavior **actually worked at the time of the alleged discrimination**.

4. Does the mitigating measure tend to become less effective under certain conditions? If certain conditions interfere with the effectiveness of a mitigating measure, how often and for how long a period do these conditions arise? For example:

   - If the CP is under great stress, or is tired, does the mitigating measure work as well?

   - Do adverse weather conditions or other environmental changes affect the effectiveness of a mitigating measure?

   - Do illnesses, such as a cold or the flu, change the effectiveness of a mitigating measure?

   - For women, do monthly hormonal changes impact the effectiveness of a mitigating measure?

5. Does the mitigating measure tend to be effective only for awhile?

   - For example, while a CP with bipolar disorder who uses medication does not experience severe symptoms of the disorder for a period of time, he then experiences symptoms for several weeks and undergoes a severe manic episode. Following the manic episode, the CP again experiences few or no symptoms while using the mitigating measure.

   - Mitigating measures used to treat degenerative illnesses, such as Parkinson's disease, may only work for a period of time before the condition worsens, making the mitigating measure ineffective.

6. Has the CP had to change mitigating measures because previous ones became less effective? If yes, how many previous mitigating measures has the CP used, and what happened when each one became less effective? How long did each mitigating measure remain effective? Is the current mitigating measure different from previous ones so that it is less likely to fail? Or conversely, is there any indication that the current mitigating measure is becoming less effective?

7. Are there any symptoms or limitations that are unaffected by the mitigating measure? If yes, what are they and how severely do they limit the CP from engaging in a major life activity?

8. Has the impairment caused any complications that are not controlled by a mitigating measure and may substantially limit a major life activity?

   - For example, complications from diabetes may result in substantial limitations in major life activities. This can include complications such as eye disease (seeing); nerve damage (sitting, standing, walking, eating); blood vessel disease (walking); and difficulties with reproduction. These are all complications that are not controlled by insulin.

IV. Ask whether the *mitigating measure itself causes any limitations* in performing a major life activity.

A. Investigators need to ask CPs whether they experience any symptoms, side effects, or limitations in performing certain activities **as a result of using a mitigating measure**. If a CP does experience limitations, the Investigator needs to probe their severity and duration.

- If a CP uses medication, it is critical to identify the specific medication and the specific side effects caused by it. Not all medications produce the same side effects. Moreover, the same medication does not produce the same side effects in all individuals.

B. If a CP uses two or more mitigating measures, and they are not substantially limiting by themselves, determine if the combined negative effects of all the mitigating measures together substantially limit one or more major life activities.

- For example, a CP with Attention Deficit Disorder (ADD) and depression may take medications to treat each condition. Each medication, by itself, affects the ability to sleep (a major life activity), but does not substantially limit it. However, the combined effect of the two medications substantially limits the CP's ability to sleep.

C. A number of major life activities may be severely affected by a mitigating measure. (These major life activities may also be directly affected by the impairment *despite* the use of a mitigating measure.)

1. *Thinking, concentrating, and other cognitive functions* may be substantially limited when a CP uses certain drugs to treat many different impairments, including psychiatric illnesses and epilepsy. It may take much greater effort to engage in cognitive functions because the medication causes a person to feel groggy, disoriented, or slow. Or, a CP may have difficulty with memory because of certain medications.

2. *Walking, standing, and lifting* may be substantially limited even with the use of a prosthetic foot, leg, arm, or hand.

   - For neurological reasons, some people experience "pain" or "discomfort" from a missing limb. Also, significant pain may accompany wearing a prosthetic device. The remaining limb may experience serious problems resulting from over-use to compensate for the missing limb. A CP may need to minimize the amount of walking in order to wear the prosthetic leg for longer periods. Or, a person using a prosthetic leg may be able to walk without significant problems, but can only wear the leg for 8 hours per day, and then must rely on a wheelchair or crutches for mobility.

   - A prosthetic limb may cause serious chafing, rubbing, blisters, and ulcers, depending on a number of factors, including the materials used, the tightness of the fit, how the amputation occurred, and what body part the prosthetic device is replacing. These side

effects could affect the ability to wear the prosthetic device for prolonged periods and/or affect the CP's ability to engage in walking, standing, or lifting, as well as the major life activities of *performing manual tasks and caring for oneself.*

3. *Eating* is a major life activity that may be affected by the use of a mitigating measure if a CP is required to adhere to substantial dietary restrictions because of medication or a device. Or, a CP may be less able to eat or may have to maintain a rigid eating schedule because of certain medications or devices. Certain medications can cause severe nausea, which in turn will affect a CP's ability to eat. An Investigator should ask whether a CP's ability to eat and/or eating habits had to be altered, and if so in what ways.

   - Both food and lack of food can cause severe short and/or long-term medical problems for people with diabetes. They must consider the impact on the disease of everything they eat, how much they eat, and when they eat.

4. *Caring for oneself* may be substantially limited as a result of using a mitigating measure.

   - Medication and prosthetic devices may cause extreme fatigue, which in turn may affect a CP's ability to care for him/herself.

   - For CPs with diabetes, the ability to care for themselves may require significant changes and/or disruptions to their daily activities to control the frequency and severity of incidents of high blood sugar (hyperglycemia) and low blood sugar (hypoglycemia). The serious short and long-term consequences of hyperglycemia include headaches, blurry vision, breathing difficulties, eye disease, kidney disease, nerve damage, blood vessel disease, and death; the consequences of hypoglycemia include disorientation, weakness, nervousness, seizure, coma, and death. To avoid these serious consequences, CPs with diabetes must be constantly vigilant in closely controlling blood sugar levels. This involves monitoring body signals for fluctuations in blood sugar levels, checking blood sugar levels mechanically, and, based on those levels, adjusting food intake, physical activity, and medications (including insulin and oral medications). People with diabetes must maintain a delicate balance between these elements in order to avoid hyperglycemia and hypoglycemia.

- There also may be a significant impact on the ability to care for oneself as a result of experiencing a medical episode. The inability of a mitigating measure to prevent such an episode may cause so much fear that it seriously affects a CP's ability to care for himself. For example, a CP with epilepsy may have had traumatic experiences having a seizure in public where strangers reacted badly. As a result, a CP may not be able to go out alone to run routine errands or buy groceries, requiring that someone familiar with his epilepsy always accompany him. Alternatively, a CP may fear possible injury from a seizure, and therefore may be unable to engage in basic activities of caring for oneself, such as cooking and bathing, unless another person is present.

- A person who wears a prosthetic limb may have to curtail activities that are part of caring for oneself, such as household chores and grocery shopping, because the limb can only be worn for a certain period of time.

5. *Sleeping* may be affected by certain medications. Some may cause extreme drowsiness, while others have the opposite effect.

6. *Performing manual tasks* may be affected by certain drugs which can interfere with fine motor skills.

7. *Reproduction* may be affected by use of a mitigating measure. Many medications prescribed to control seizures or psychiatric illnesses can cause birth defects, thus creating a substantial limitation in procreation. (See Bragdon.)

8. *Working* may be affected by use of a mitigating measure. Investigators should always review this major life activity last. For a discussion on the impact of the Supreme Court decisions on identifying a class of jobs or broad range of jobs in various classes, see pages 14-16.

V. Relevant witnesses for gathering this information

- After reviewing all of the questions above with the CP, the Investigator should interview other relevant witnesses who may be able to corroborate or supplement the CP's information. These would include:

  - family members, friends, and coworkers;

  - rehabilitation specialists who work with the CP to address functional

limitations; and

- doctors (if they have knowledge about the CP's specific functional limitations).

VI. Based on the evidence collected from asking these and other relevant questions, does the CP who uses a mitigating measure have a substantially limiting impairment?

A. A CP meets the first definition of "disability" where, despite, or because of, the use of a mitigating measure, the CP is substantially limited in performing a major life activity.

B. Determining whether a CP meets this definition does not rest on identifying a multitude of major life activities that are **merely affected** by CP's impairment, even with the use of a mitigating measure. Rather, such a determination depends on evidence that shows that the CP is **substantially limited** in performing at least one major life activity.

C. Problems in performing numerous tasks may signal a substantial limitation in performing a specific major life activity.

- For example, **a CP with epilepsy may be substantially limited in caring for herself** because she cannot live independently due to the fact that her epilepsy necessitates assistance with running a household (e.g., preparing meals, cleaning, bathing, grocery shopping). Even if running a household is not a separate major life activity, it is part of the major life activity of caring for oneself.

D. Always look for evidence concerning the length of time a CP has experienced limitations, the frequency with which they occur, and their severity in order to determine whether the CP is substantially limited.

Second Definition of "Disability": CP Has a Record of a Substantially Limiting Impairment

I. In all charges where a CP indicates that s/he uses a mitigating measure, the Investigator should determine whether the CP has a *record* of a disability for the period before the CP began using the mitigating measure.

A. The Investigator should ask questions about what limitations the CP experienced in performing major life activities because of the impairment prior to using a

mitigating measure.

B. Questions should seek detailed information and include the following:

1. What major life activities were limited or precluded prior to using a mitigating measure?

   - For example, if a CP with epilepsy has been seizure-free for a substantial period of time and there are few or no side effects from medication, detailed information needs to be obtained concerning CP's seizures, and their impact on performing major life activities, before CP began using the current medication.

2. How long did the CP experience these limitations prior to using a mitigating measure?

3. Was the CP precluded from or limited in performing a major life activity all of the time or only some of the time? That is, were any limitations present only during certain periods? If limitations in performing a major life activity were episodic rather than constant, how often and for how long a period did these limitations occur? How severe were the limitations when they did occur?

   - For example, a CP with major depression may have experienced episodes of severe depression that lasted several months before taking medication.

4. Before using a mitigating measure that effectively controls the symptoms or limitations of an impairment, did the CP try any unsuccessful mitigating measures?

   - In certain situations, it may take months to find the right medication, or group of medications, to control the symptoms or limitations of an impairment. During this period, the CP may have been substantially limited in performing a major life activity.

C. Additional questions include:

1. Can the CP provide information on any "records" or files that document a former substantially limiting impairment or an erroneous record of a substantially limiting impairment (e.g., school records, Dept. of Veterans Affairs documents, workers' compensation records, vocational or other rehabilitation records, medical files)?

2. Was the Respondent aware of the CP's record or history of a disability?

- The Respondent does *not* need to be aware of the CP's record of a substantially limiting impairment for coverage purposes. However, there must be evidence that the Respondent acted on the basis of the CP's record of a disability in order to find that discrimination occurred.

II. Based on the evidence collected from asking these and other relevant questions, does the CP have a record of a substantially limiting impairment prior to using a mitigating measure?

- A CP meets the second definition of "disability" where, prior to using a mitigating measure that effectively controls the symptoms and limitations of an impairment, the CP was substantially limited in performing a major life activity.

Third Definition of "Disability": CP is Regarded as Having a Substantially Limiting Impairment

I. If an Investigator determines that there is insufficient evidence to establish that a CP who uses a mitigating measure or compensating behavior is covered under the first two definitions of "disability," or is uncertain whether a CP meets one of the first two definitions, then the Investigator should assess whether the Respondent regarded the CP as having a substantially limiting impairment.

II. An Investigator should take the following steps to determine if the CP meets this definition:

A. Identify **the impairment** that Respondent knew or believed the CP to have.

B. Identify **the reason** given by the Respondent **to disqualify, terminate, or in any way affect an employment opportunity of the CP.** Examples of possible reasons that a Respondent might offer include:

- failure to meet a physical qualification standard (e.g., hearing or lifting requirements);
- inability to work under stressful conditions;
- insufficient stamina or endurance to work effectively;

- concerns that the CP might pose a health or safety risk to self or others; and

- failure to obtain required licenses.

C. Determine whether the Respondent believes that the **CP's impairment is the cause of the perceived problem**. For example, is there evidence that the Respondent believes that CP's impairment is the reason that s/he: (1) failed to meet a qualification standard, (2) cannot tolerate stressful working conditions, (3) has insufficient stamina or endurance to work; (4) poses a health or safety risk, or (5) cannot obtain a required license?

D. Determine whether the Respondent's reason for disqualifying the CP involves performance of a **major life activity** (e.g., the *perceived* inability to lift 5 pounds involves the perception that the CP is unable to perform the major life activity of lifting).

1. To show that a Respondent regarded a CP as having a disability, the Respondent's reason for disqualifying the CP must involve or relate to performance of a major life activity.

   - For example, the perceived inability to stand more than a few minutes involves the major life activity of standing; the perceived inability to work under stressful conditions involves the major life activity of working).

2. While in many cases the Respondent's reason for disqualifying the CP may indicate a belief that the CP cannot engage in the major life activity of working, Investigators should first determine whether any other major life activity is implicated (e.g., walking, breathing, standing).

   - See (F) below for further instructions on the major life activity of working.

E. Determine whether the Respondent believed that the CP was **substantially limited** in performing the major life activity.

1. **Actions speak louder than words**. This means that Investigators should carefully scrutinize the CP's disqualification and the events that led up to it. Because Respondents are likely to deny that they regarded a CP as having a disability, it is important to assess whether the Respondent's actions indicate otherwise.

- For example, medical leave or workers' compensation files may contain evidence relevant to the issue of whether the Respondent perceived that a CP was substantially limited in performing a major life activity.

2. Review the chronology of events to see if there is a connection between the Respondent's awareness of the CP's impairment (or perceived impairment) and the Respondent's subsequent actions.

3. Determine whether the Respondent's underlying reason for disqualifying the CP is related to **myths, fears, stereotypes or other attitudes about a particular disability** (e.g., myths about a person's frailty due to a medical condition or fears about rising health insurance costs).

   - For example, does the Respondent believe that a person with a moderate hearing loss cannot be a secretary because a hearing aid will not allow her to hear phones and clients needing assistance.

F. If **working is the major life activity at issue**, an Investigator must determine whether the Respondent's reason for disqualifying the CP indicates a belief that the CP is substantially limited in working, i.e., unable to work in a **class of jobs or broad range of jobs in various classes**.

1. If the Respondent can show that its reason for disqualifying the CP applies to something unique about the Respondent's job or workplace, then the Respondent only viewed the CP as unable to work in one specific job.

   - In Sutton, the Supreme Court determined that a global airline pilot is only one job and not a class of jobs. Since United Airlines only viewed Sutton as unable to work as a "global pilot," it did not regard her as unable to work in the **class of pilot jobs**, which would include other types of positions, such as regional pilots, pilot instructors, and freight pilots.

   - In Murphy, the Supreme Court determined that UPS's mechanics job, which required the ability to drive commercial vehicles, was a single job and not representative of the **class of mechanics jobs**. Thus, according to the Court, UPS only viewed Murphy as unable to perform its unique job requiring a mechanic to drive a commercial vehicle, and not as unable to work in the class of mechanics jobs, which would include diesel mechanics, automotive mechanics, gas-engine repairers, and gas-welding equipment mechanics -- none of which requires an individual to

drive commercial vehicles.

2. The fact that a CP is unable to satisfy a Respondent's physical or other job requirement does not alone constitute sufficient evidence that the Respondent regards the CP as substantially limited in working.

   - Therefore, the Investigator should carefully question the CP to determine whether the Respondent said or did anything to suggest that the CP was viewed as substantially limited in the ability to perform a class or broad range of jobs.

   - The Investigator also should seek evidence from the Respondent as to whether it viewed the job from which the CP was disqualified as representative of a class or broad range of jobs.

     - For example, a CP with epilepsy who does not actually have a substantially limiting impairment may be covered under the "regarded as" definition if evidence shows that the Respondent has a generalized fear of seizures, and not a specific fear about the consequences of a seizure due to something unique about the Respondent's job or workplace.

     - Similarly, if a Respondent has a generalized fear that a person with a psychiatric illness may become violent, without any objective information regarding this particular CP, then the Respondent is acting on generalized fears and misconceptions that would indicate the Respondent believes the CP could not work in most jobs.

   - *Respondents may claim that the CP's inability to meet a physical or other job requirement shows that the CP is not "qualified." This claim involves the merits of the charge and must be analyzed separately from the determination of whether the Respondent regarded the CP as having a disability. The Supreme Court's decision in Albertsons (see page 16) underscores the necessity of assessing each qualification standard to determine whether it is valid and whether a CP is "qualified."*

3. Investigators should assess whether the Respondent's reasons for disqualifying the CP would also result in his/her disqualification from other jobs in the Respondent's workplace.

- Investigators should document how many jobs in the Respondent's workplace, and what kind of jobs, were also closed to the CP based on the Respondent's reasoning.

- For example, if a Respondent had all of the different types of mechanic jobs discussed in (F)(1) above, and refused to hire a CP for any of them because of his/her disability, then the Respondent could be regarding the CP as substantially limited in working in the class of mechanics jobs.

III. Based on the evidence collected from asking these and other relevant questions, did the Respondent regard the CP as having a substantially limiting impairment?

- A CP meets the third definition of "disability" where a Respondent regards a CP as having a substantially limiting impairment.

PART TWO: IS A CP "QUALIFIED" IF S/HE FAILS TO MEET A FEDERAL REGULATORY SAFETY STANDARD?

After determining that a CP meets one of the definitions of "disability," the next issue is whether the CP is "qualified." In Albertsons, the Supreme Court determined that an employer can require a CP to meet an applicable federal safety standard, even if the standard can be waived under an experimental program. *The following instructions apply to any CP who meets the ADA definition of "disability," regardless of whether s/he uses a mitigating measure.*

In cases where Respondents allege that a CP cannot meet a federally-mandated safety standard, Investigators need to do the following:

I. Carefully review a Respondent's claim that a CP is not qualified because s/he fails to meet a federally-mandated safety requirement.

A. Does the regulatory requirement **absolutely** prohibit the Respondent from hiring the CP due to a disability? Does the regulation apply to the particular position the CP holds or desires, and/or does it apply to the CP's specific disability? Or, is the Respondent **voluntarily** choosing to adopt a federal safety standard?

B. If a Respondent is required by federal law to impose a safety standard on a CP that results in screening out the CP based on disability, does the regulatory requirement establish any exceptions, waivers, or other mechanisms by which the CP would meet the safety concerns embodied in the regulatory requirement?

1. If there is an exception, waiver, etc., is it part of the regulatory requirement? Does a person who qualifies for the exception, waiver, etc. meet the safety requirements of the federal regulation, or does the exception, waiver, etc. constitute an exemption from meeting the regulation's safety requirements?

2. For example, in Albertsons, the Supreme Court determined that an employer does not have to follow an **experimental** waiver program designed to permit persons with monocular vision to qualify for DOT certification to operate commercial motor vehicles. This type of waiver program did not modify the general safety standard that precludes persons with monocular vision from obtaining certification. Rather, the waiver program was designed to obtain data to determine if changes should be made in the general safety standard.

   - The type of program at issue in Albertsons would be different from a waiver program **based on data already collected that has shown that people qualifying for the waiver meet the generalized safety requirements.** Furthermore, an employer could not require an individual to meet the general safety standard if the waiver program **specifically modified the general safety standard**.

II. **A Respondent cannot disqualify a CP for failure to meet a general safety standard if the CP receives a waiver from, or is eligible for an exception to, that standard. A Respondent must give deference to the waiver or exception if it is predicated on maintaining safety, constitutes or contains an alternative way to maintain safety, and modifies the general safety standard.**

PART THREE: WHAT IMPACT DOES A CP'S APPLICATION FOR, OR RECEIPT OF, DISABILITY BENEFITS HAVE ON A DETERMINATION AS TO WHETHER A CP IS "QUALIFIED?"

In Cleveland, the Supreme Court adopted EEOC's position that application for, or receipt of, Social Security Disability Insurance (SSDI) benefits does not automatically preclude an individual from meeting the ADA's definition of "qualified."

I. **There is no inherent conflict between being eligible for SSDI benefits and meeting the ADA's definition of "qualified."**

   A. Thus, there is no presumption that application for, or receipt of, SSDI benefits

defeats a CP's claim that s/he is "qualified" as defined by the ADA.

B. The analysis used by the Supreme Court to compare an application for SSDI benefits and a CP's claim that s/he is "qualified" **also would apply to applications for other types of disability benefits**, such as Long Term Disability benefits or workers' compensation.

C. A CP must be able to explain his/her statements on the benefits application that s/he is unable to work, and thus qualifies for benefits, while also maintaining that s/he can perform the essential functions of the position at issue in the ADA charge, with or without reasonable accommodation.

- For example, because SSDI and the ADA serve different purposes, they use different approaches to assess whether a person can work. Therefore, it is possible for a CP to meet the ADA's definition of "qualified" and also be eligible for SSDI benefits.

D. Below is a general summary of the steps to follow in an ADA investigation involving the receipt of disability benefits. For more detailed information on questions to ask and evidence to seek, Investigators should refer to the EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person is a "Qualified Individual with a Disability" Under the ADA.

II. Investigators should do the following:

A. Review the CP's application for disability benefits. Determine if there appears to be any discrepancies between claims made on the application and the CP's contention that s/he is "qualified." Carefully review apparent discrepancies to determine whether they can be explained by differences in definitions or formulas.

- For example, a CP's claim of "total disability" does not necessarily indicate that s/he cannot perform the essential functions of a job, with or without reasonable accommodation. To the contrary, "total disability" is a Social Security term that, in this context, only means that s/he meets the criteria for SSDI benefits.

B. In reviewing the CP's application for disability benefits, determine whether the CP was merely checking off boxes or fully describing his/her disability and ability to work. To the extent that there appears to be a discrepancy in finding a CP to be "qualified," greater weight should be given to a CP's narrative description of his/her disability and ability to work on a benefits application form than information captured when a CP checked off a box.

C. Determine whether the CP can perform the essential functions of the position at issue, **with or without reasonable accommodation.**

- In many of these cases, a CP's ADA charge will include an allegation of denial of reasonable accommodation. Whether a person can work with reasonable accommodation generally is not a consideration in determining whether a person is eligible for disability benefits.

- For example, the Social Security Administration does not consider whether a person could work if given a reasonable accommodation, but focuses only on an SSDI applicant's ability to work without accommodation. If the CP could have performed the essential functions with a reasonable accommodation, then there is no conflict between statements made on the SSDI application and a CP's claim to be "qualified."

D. Determine whether the CP's condition changed over time. If it did, then a statement about the CP's disability on a benefits application might not reflect his/her ability to perform the essential functions, with or without reasonable accommodation, at the time of the Respondent's employment decision.

- For example, a CP alleges that s/he was wrongfully terminated in January. The following June, the CP filed an SSDI application. If the CP could have performed the essential functions in January, but by June his/her disability had deteriorated so that s/he could no longer work, the CP would still be "qualified" during the relevant period of time for the ADA charge.

If an Investigator has questions about anything in these Instructions, please contact the OLC ADA Division attorney assigned to your field office.

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

Chai R. Feldblum

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Discussion Draft

May 13, 1998

DRAFT

DEFINITION OF DISABILITY UNDER FEDERAL ANTI-DISCRIMINATION LAW: CAN STATUTORY TEXT MATTER TOO MUCH?

Chai R. Feldblum

I. INTRODUCTION

One late afternoon, in October 1987, I sat across the table from Robert Burgdorf discussing how the Americans with Disabilities Act (ADA)[1] should be drafted. Burgdorf, then a staff person for the National Council on the Handicapped, had drafted a version of a bill, based on

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numerous field hearings the Council had held over the previous years, and based on his own extensive knowledge of disability anti-discrimination law. In his draft of the bill, Burgdorf had provided legal redress for any individual who had experienced discrimination "because of a physical or mental impairment, perceived impairment, or record of impairment."

I, and several other legal and political advocates, argued with Burgdorf that the manner in which he was extending anti-discrimination coverage to people with disabilities was politically unwise and legally unnecessary. Why use a new definition in the ADA? Why not use the definition of "handicap" that the courts had been applying for years under sections 501, 503, and 504 of the Rehabilitation Act of 1973?

Under the existing legal definition, a handicap was defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual," a "record of such an impairment," or "being regarded as having such an impairment." Courts deciding Sections 501, 503, and 504 cases over the past fifteen years had applied this definition to include individuals with a wide range of serious medical conditions. While there existed a few outlier cases in the Rehabilitation Act case law, I and others believed the reasoning in those cases had been rejected by the Supreme Court in the recent case of *School Board of Nassau County v. Arline.*

Moreover, as a political matter, the best way to ensure momentum for the ADA was to assure Congress that the proposed law was simply extending the requirements of Section 504 of the Rehabilitation Act, which applied only to entities receiving federal financial assistance, to the rest of the private sector. Changing the definition of who was covered under the law would be seen as a radical legal move, jeopardizing support for the bill. The legal and political advocates prevailed, and the ADA's definition of disability was taken directly from the definition that applied to Sections 501, 503, and 504 of the Rehabilitation Act.

Fast forward ten years to October 1997. I am sitting across the table from a Deputy Assistant Solicitor General, discussing the pending Supreme Court case of *Bragdon v. Abbott*. The question in the case is whether a woman with asymptomatic HIV infection has a physical impairment that substantially limits one or more of her major life activities. I explain how courts applying the definition of "handicap" under Section 504 of the Rehabilitation Act took a broad view of that definition, and had held that individuals with a range of serious medical conditions, including asymptomatic HIV infection, were covered under the law. I explain, in significant detail, how Congress patterned the ADA on Section 504, and indeed, how Congress was particularly aware that the ADA would protect people with HIV infection. I discuss the conceptual reasons for why, as a matter of anti-discrimination law, it makes sense for the definition of disability to be understood broadly.

"All this is quite interesting," says the lawyer from the Solicitor General's office. "But I wonder if that's what Congress *wrote* in the law."

The goal of this paper is to explore what happens when Congress intends one result and writes words that lean strongly to a different result. The focus of the paper is the definition of disability under the ADA during the past eight years. An overwhelming number of judicial opinions decided under the ADA have concluded that people with a wide variety of medical conditions -- ranging from epilepsy to cancer to manic depression -- are not covered under the law. And while the Supreme Court ultimately decided, in *Bragdon v. Abbott*, that Sidney Abbott -- the plaintiff in the case who was HIV-infected -- could invoke the protections of the law, the manner in which the Court decided that case was far different from the manner in which those of us who worked for passage of the ADA would have envisioned.

The lower courts that are deciding ADA cases, and the Supreme Court, are painstakingly applying the actual words of the statute: the physical or mental impairment must "substantially limit" a "major life

activity." Well, isn't that what courts are supposed to do? We all know statutory text matters. Remember the classic admonition of statutory interpretation: "Read the text. Read the text. Read the text." And the importance of drafting statutory text is clearly emphasized in the Georgetown Federal Legislation Clinic,[2] where students research, negotiate, and draft legislative language on an on-going basis.

But can statutory text matter too much? What happens when Congress appears to have had a relatively clear intent, and has captured that intent less than clearly in the statutory text it has used? Do the rules of statutory interpretation bend in such circumstances? Or would that be a complete perversity of the essential enterprise of statutory interpretation? If Congress did not capture its intent accurately the first time, why not require Congress to go back and express its intent more accurately the second time?

These are not new questions in the field of statutory interpretation. But it is interesting to consider these questions in the context of a concrete example where intent and text appear to have diverged significantly. To me, this example exists quite dramatically in the definition of disability under the ADA. Exploring this example offers an opportunity to consider the rules of statutory interpretation in the real-life context of Congressional politics and interest-group advocacy. Moreover, exploring the story behind the definition of disability could well provide a better guide to courts faced with applying the definition of disability under the ADA in future years.

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 and may have a general idea that people with

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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[3] or detailing various "outrageous" examples of alleged discrimination.[4]

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

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[3]*See, e.g., Dateline: A Just Cause; Americans With Disabilities Act has helped disabled people get fair treatment, despite rumors of frivolous lawsuits* (NBC television broadcast, Aug. 24, 1998) (asserting that 'outrageous' cases filed under the ADA are limited and do not outweigh the benefits of the Act); Lisa Patterson, *Praising an Act of Access: For Many Handicapped People, The Americans With Disabilities Act Has Had a Positive Impact*, MORNING NEWS TRIB. (TACOMA, WASH.), July, 25, 1998, at B1 (stating that the ADA has been effective in accomplishing its goals of increasing access for people with disabilities); *Court Rules ADA Protects Inmates*, STAR TRIB. (MINNEAPOLIS-ST. PAUL), June 16, 1998, at A4 (reporting that the Supreme Court found prisoner suits under the ADA valid and not 'outrageous' abuses of the law); Mark Johnson, *An Act of Freedom for the Disabled*, ORANGE COUNTY REG., Sept. 14, 1997, at G1 (discussing how the ADA has positively effected the lives of many residents). For books praising the ADA, *see, e.g.,* DON FERSH AND PETER W. THOMAS, COMPLYING WITH THE AMERICANS WITH DISABILITIES ACT: A GUIDEBOOK FOR MANAGEMENT AND PEOPLE WITH DISABILITIES (1993); JOSEPH P. SHAPIRO, NO PITY : PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993).

[4]*See, e.g.,* Michael Grunwald, *U.S. Launches Drive For Disabled Golfer; Justice Dept. Invokes ADA in Martin Case,* WASH. POST, Aug. 19, 1998, at A2 (discussing the case of a disabled golfer seeking permission to ride a cart during pro tournaments; stating that the ADA was "never intended to benefit professional athletes"); Melanie Payne, *Confusion Posing Barrier to Wider Impact From Americans With Disabilities Act*, BUFFALO NEWS, Aug. 23, 1998, at A10 (noting areas of confusion in the ADA that make implementation difficult, such as the definition of disability and citing the existence of frivolous lawsuits); Patti Murphy, *A Barrier-Free Environment is Still Elusive Eight Years After Passage of the Americans With Disabilities Act,* PITTSBURGH POST-GAZETTE, July 21, 1998, at G3 (discussing the difficulty of complying with the mandates of the ADA); Walter Olson, *Still Crazy*, 30 REASON 49, May 1, 1998 (recounting "outrageous" cases filed under the Americans With Disabilities Act). A Westlaw search of all newspapers and wires revealed 48,870 cites to the Americans With Disabilities Act since January 1, 1988. For a critical discussion of the ADA, *see, e.g.,* WALTER K. OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE (1997).

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*,[5] and a 1984 book by Richard Scotch, *From Good Will to Civil Rights: Transforming Federal Disability Policy*,[6] are both excellent and useful accounts of this history from the perspective of modern civil rights theory.[7]

As these and other 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.[8] 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

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[5]U.S. COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM 18 (1983) [*hereinafter* ACCOMMODATING THE SPECTRUM].

[6]RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 19 (1984).

[7]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.

[8]*See* ACCOMMODATING THE SPECTRUM, *supra* note 3, at 18; ROTHMAN, *supra* note 3, at xiii.

community support.[9] 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.[10]

As society expanded and changed, governmental support for dependent people with disabilities also expanded. By the 1820's, the small communities that had supported people with disabilities in private homes were rapidly disappearing.[11] 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.[12]

Starting in the 1830's, 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.[13] The insane asylums were thus designed to "cure" people who were mentally ill by depriving them of stimulus or emotion.[14]

Although various reform movements sprung up during the 1800's

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[9]"The colonists . . . were more concerned with the financial effects of all adverse conditions, not their idiosyncratic attributes." ROTHMAN, *supra* note 3, at 4-5.

[10]*See id.* at 30-31; ALBRECHT, *supra* note 3, at 96.

[11]*See* ROTHMAN, *supra* note 3, at 57.

[12]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 id.* at 186-87, 191-92. This ordered regimen presented a sharp contrast with the few public almshouses which had been constructed during the late 1700's 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 id.* at 42-43; ACCOMMODATING THE SPECTRUM, *supra* note 4, at 19.

[13]*See* ROTHMAN, *supra* note 3, at 130, 132.

[14]*See id.* at 137-38.

to address deplorable conditions in the almshouse, by the end of the 1800's 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.[15] Whatever route they took to the almshouse, all inmates were subject to the same public judgment: these people were helpless, useless, and indolent.[16] 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.[17]

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

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[15]*See id.* at 198-200, 290-91.

[16]*See id.* at 292.

[17]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 1900's, 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 42-45 (1991); ACCOMMODATING THE SPECTRUM, *supra* note 4, 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, *supra* 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 id.* at 42; ACCOMMODATING THE SPECTRUM, *supra* note 4, at 19. Sterilization of people with disabilities was first widely promoted in the 1890's, and many states passed laws authorizing involuntary sterilization procedures. *See* WOLFENSBERGER, *supra* note 3, at 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 1920's. *See* ACCOMMODATING THE SPECTRUM, *supra* note 4, at 20; DEGLER, *supra* at 141-43, 148-50.

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 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.[18] Two years later, Congress passed the Smith-Fess Act, which extended vocational rehabilitation programs to civilians with physical disabilities.[19] Numerous states enacted their own vocational rehabilitation programs as well,[20] private industry entered the effort over time,[21] and various advocacy groups were established to achieve greater access to education and employment for people with disabilities.[22]

This governmental and private approach towards rehabilitating

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[18]Vocational Rehabilitation Act, ch. 107, 40 Stat. 617 (1918). *See* SCOTCH, *supra* note 4, at 19; ACCOMMODATING THE SPECTRUM, *supra* note 4, at 21. These programs were administrated by state departments of education with partial funding from the federal government. *See* SCOTCH, *supra* at 19-20. This law had been preceded by laws that provided vocational training, and some rehabilitation, to soldiers and veterans. *See* National Defense Act, Pub. L. 64-85, 39 Stat. 166 (1916) (providing vocational training for enlisted men); Smith-Hughes Vocational Education Act, Pub. L. 64-347, 39 Stat. 929 (1917) (expanding vocational education and rehabilitation for soldiers and veterans); *see also* SCOTCH, *supra* at 19-20; ALBRECHT, *supra* note 3, at 102.

[19]Pub. L. No. 66-236, 41 Stat. 735 (1920). *See* SCOTCH, *supra* note 14, at 20; ACCOMMODATING THE SPECTRUM, *supra* note 4, at 21.

[20]Within the year and a half following enactment of the Veterans' Rehabilitation Act, 34 states enacted their own vocational rehabilitation programs. *See* SCOTCH, *supra* note 14, at 21.

[21]ALBRECHT, *supra* note 3, at 81, 141-42.

[22]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, *supra* note 14, at 33. The number of advocacy organizations increased after World War II. *Id.* at 34.

people with disabilities has been termed the "medical model" of disability.[23] 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.[24]

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 "persons disabled" as "any person who by reason of a physical defect or infirmity, whether congenital or acquired by accident, injury, or disease, is, or may be expected to be, totally or partially handicapped,"[25] but then redefined "physically disabled individual" in 1954 as "any individual who is under a physical or mental disability which *constitutes or results in a substantial handicap to employment*, but which is of such a nature that vocational rehabilitation services may reasonably be expected to render him fit to engage in a remunerative

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[23]*See* ALBRECHT, *supra* note 3, at 72-73; *see also* Drimmer, *supra* note 3, at 1347.

[24]*See* ALBRECHT, *supra* note 3, at 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, *supra* note 3, at 1347.

[25]Pub. L. No. 66-236, § 2, 41 Stat. 735, 735 (1920).

occupation."[26] This latter definition remained essentially unchanged up to the Vocational Rehabilitation Act of 1973.[27]

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 1960's. 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.[28] During this time, people with disabilities began to demand more autonomy in their lives as well, starting an "independent living" movement[29] and rejecting society's attitudes of pity, charity, or rehabilitation.[30]

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.[31] Section 501 of the Rehabilitation Act of 1973 required every department in the executive branch to develop "an affirmative

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[26]Pub. L. No. 565, § 11, 68 Stat. 652, 660 (1954) (emphasis added). **[check pub.l.no.]**

[27]Pub. L. No. 93-112, §7(6), 87 Stat. 355, 361 (1973), *codified at* 29 U.S.C. §706(8) (1985).

[28]SCOTCH, *supra* note 14, at 24-27.

[29]At the University of Illinois, in the late 1960's, 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, 12 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* SHAPIRO, *supra* note 1, at 46-58 .

[30]SCOTCH, *supra* note 14, at 34-37; Edward V. Roberts, *Into the Mainstream: The Civil Rights of People with Disabilities*, CIV. RTS. DIG., Winter 1979, at 23.

[31]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, *supra* note 14, at 49.

action program plan for the hiring, placement, and advancement of handicapped individuals,"[32] with the Equal Employment Opportunity Commission (EEOC) to develop and recommend "policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services."[33] 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 handicapped individuals."[34] The Department of Labor (DOL) was authorized to issue regulations under this section.[35]

While such provisions could be seen as a continuation of a "help the handicapped" model, similar provisions regarding affirmative action had been enacted by the executive branch with regard to race and gender in a *civil rights* context.[36] Moreover, while coverage for people with disabilities had not been included in the Civil Rights Acts of 1964 and 1968,[37] a new section of the Rehabilitation Act did include an explicit anti-discrimination provision. This section, Section 504, provided that: "no otherwise qualified handicapped individual in the United States . .

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[32]Pub. L. No. 93-112, § 501, 87 Stat. 355, 391 (1973), *codified at* 29 U.S.C. § 791(d) (1985).

[33]*Id.* § 501, 87 Stat. 355, 391, *codified at* 29 U.S.C. § 791(c) (1985). The Secretary shall then recommend that State agencies adopt and implement the procedures promoted by the EEOC. *Id.*

[34]*Id.* § 503, 87 Stat. at 393, *codified at*, 29 U.S.C. § 793 (1985). In later amendments, the amount of the procurement contract was increased to $10,000. Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 505(a), 106 Stat. 4344, 4427 (1992).

[35]Rehabilitation Act of 1973, Pub. L. No. 93-112, § 503(a), 87 Stat. 355, 393 (1973). Pursuant to Executive Order, the Secretary of Labor was authorized to issue regulations under this section. Exec. Order No. 11,758, 3 C.F.R. 841 (1971-1974).

[36]Exec. Order No. 11,246, 3 C.F.R. 339, 340 (1964-65 comp.).

[37]Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 72 (1968).

. 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.[38]

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),[39] and Title IX of the Education Amendments of 1972 (prohibiting discrimination based on sex in any educational program or activity receiving federal financial assistance).[40] 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.[41]

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.[42] In particular, attorneys writing the regulations implementing Section 504 for the Department of Health,

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[38]Rehabilitation Act of 1973, Pub. L. No. 93-112, §504, 87 Stat. 355, 394 (1973), *codified at* 29 U.S.C. § 794 (1985). 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 (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 1970's.

[39]Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (1964), *codified at* 42 U.S.C. § 2000d (1994).

[40]Pub. L. No. 92-318, § 901(a), 86 Stat. 235, 373 (1972), *codified at* 20 U.S.C. § 1681(a) (1994).

[41]*See* SCOTCH, *supra* note 14, at 41-59.

[42]Richard Scotch provides a detailed and engrossing description of both the politics and substance of the regulation-writing process. *Id.* at 60-81.

Education and Welfare (HEW) broke significant new theoretical ground with regard to anti-discrimination protection based on handicap.[43] 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.[44] 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.

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[43] *See* Chai R. Feldblum, *The (R)evolution of Physical Disability Antidiscrimination Law: 1976-1996*, 20 MENTAL & PHYSICAL DISABILITY LAW REP. 613 (1996) [*hereinafter (R)evolution*].

[44] This point would be made very clearly several years later in ACCOMMODATING THE SPECTRUM. *See* ACCOMMODATING THE SPECTRUM, *supra* note 3, at 93 (arguing that the handicapped-normal dichotomy is in reality a continuum in which all members of society are placed in accordance with social context); *see also* ROBERT L. BURGDORF, JR., DISABILITY DISCRIMINATION IN EMPLOYMENT LAW 2 (1995) (asserting that there exists a "spectrum of abilities" and not "two separate and distinct classes" made of those that are disabled and those that are not). 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.

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.[45] 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.[46]

One of the many issues attorneys drafting the HEW regulations

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[45]*See* Chai R. Feldblum, *Antidiscrimination Requirements of the ADA*, *in* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 35, 36 (Lawrence O. Gostin & Henry A. Beyer, eds. 1993) [*hereinafter Antidiscrimination Requirements*]. As an anonymous writer wrote in The Disability Rag:

> Average people, who have no disabilities yet, look at our lives and see deprivation. But they misunderstand its cause.
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> They discover we can't get into their cars to go out in the evenings. They see that we have to be helped up and down curbs, that we can get into only a few nice restaurants without help. They've heard from us that the college we attended held its classes up steps we had to be carried up and down. They notice that we still don't have a job, even though we earned a degree . . . .
>
> We must tell them in a way that will make them see that the problem is not our personal disabilities, but the design of those cars, city sidewalks, restaurants, university classrooms, office buildings and condominiums. When they're not designed for us to use, of course they can't give our lives "quality!" **[cite? 1985 article]**

[46]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.*, 42 Fed. Reg. 22,676 (1977) (promulgating HEW final rule); *see also* Feldblum, *Antidiscrimination Requirements*, *supra* note 41, at 45-47, 49-50; Feldblum, *(R)evolution*, *supra* note 39, at 614.

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,**[which 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. . . ."[47] 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.[48] 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 [S]ections 503 and 504 because of its orientation toward employment and its relation to vocational rehabilitation services."[49] As the Report observed:

> It was clearly the intent of the Congress in adopting [S]ection 503 (affirmative action) and [S]ection 504 (nondiscrimination) that the term "handicapped individual" in those sections was not to be narrowly limited to employment (in the case of [S]ection 504), nor

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[47]Rehabilitation Act of 1973, Pub. L. No. 93-112, § 7(6), 87 Stat. 355, 361 (1973).

[48]Pub. L. No. 93-516, 88 Stat. 1617 (1974).

[49]S. REP. NO. 1297, 93rd Cong., 1st Sess. 16, *reprinted in* 1974 U.S.C.C.A.N. 6373, 6388.

> to the individual's potential benefit from vocational rehabilitation services under titles I and III (in the case of both [S]ections 503 and 504) of the Act.[50]

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.[51]

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

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[50] *Id.*

[51] H.R. 17503, 93rd Cong., 2d Sess. (1974), *codified at* 29 U.S.C. § 706(7) (1985) (emphasis added).

regulations. The regulations issued by HEW in 1977[52] received the most attention, and indeed, formed the basis of coordination regulations issued by the Department of Justice several years later for use by all federal agencies.[53]

The HEW regulations defined a "physical or mental impairment" broadly:

> *Physical or mental impairment* means --
>
> (A) 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
>
> (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[54]

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."[55] The agency did, however, offer

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[52]42 Fed. Reg. 22,676 (1977), *codified at* 45 C.F.R. Pt. 84 (1997).

[53]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." Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 119, 92 Stat. 2955, 2982 (1978). The Department of Justice (DOJ) was also given authority to issue coordination regulations for all other federal agencies. **[cite]**

[54]42 Fed. Reg. 22,678 (1977), *codified at* 45 C.F.R. § 84.3(j)(2)(i) (1997).

[55]*Id.* at 22,685, *reprinted at* 45 C.F.R. Pt. 84, App. A at 334.

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."[56]

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.[57] 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."[58] The agency stressed the term "major life activities" included, but was not limited to, these illustrative functions.[59]

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."[60]

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[56]*Id.*

[57]The agency stated: "Several comments observed the lack of any definition in the proposed regulation of the phrase "substantially limits." The Department does not believe that a definition of this term is possible at this time." *Id.*

[58]*Id.* at 22,678, *codified at* 45 C.F.R. § 84.3(j)(2)(ii).

[59]*Id.*

[60]*Id.* at 22,685-86, *reprinted at* C.F.R. Pt. 84, App. A. at 334.

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 to implement Section 503 for federal contractors, and to implement Section 504 for entities receiving federal funds through the Department of Labor,[61] deserve special attention for purposes of this paper. 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

[61] 43 Fed. Reg. 49,240 (1978), *codified at* 41 C.F.R. Pt. 60-741 (1997). 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." *Id.*

> 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.*[62]

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."[63] However, the agency added that "[f]or the purpose of [S]ection 503 of the Act, primary attention is given to those life activities that affect employability."[64]

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.[65]

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,"

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[62] *Id.* at 49,276, *codified at* 41 C.F.R. § 60-741.2 (emphasis added).

[63] *Id.* at 49,282, *codified at* 41 C.F.R. § 60-741.2(p) (1997).

[64] *Id.* at 49,282.

[65] *Id.* This guidance has since been amplified and codified at 41 C.F.R. § 60-741.2(q) (1997).

and included HEW's illustrative list of such impairments.[66] 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.[67]

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)[68] 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

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[66]45 Fed. Reg. 66,709-10, *codified at* 29 C.F.R. § 32.3 (1997).

[67]*Id.* at 66,710, *codified at* 29 C.F.R. § 32.3.

[68]42 Fed. Reg. 49,277, *codified at* 41 C.F.R. § 60-741.4(a) (1997). 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.

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 1980's, relied on either HEW's regulations or its successor regulations. (Most of these cases were brought under Section 504 of the Rehabilitation Act.)[69] 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:[70] 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, asthma, absence of a kidney, hepatitis B

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[69]In 1979, 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.

[70]The examples of these cases are taken from BURGDORF, *supra* note 40, at 137-140.

carrier, narcolepsy, birth defects, sterility, asbestosis, Crohn's disease, alcoholism, and drug addiction.[71] 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."[72]

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

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[71] *Doherty v. S.College of Optometry*, 659 F. Supp. 662 (W.D. Tenn. 1987) (retinitis pigmentosa); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977) (vision in only one eye); *Strathie v. Dep't of Transp.*, 547 F. Supp. 1367 (E.D. Pa. 1982) (impaired hearing and use of hearing aids); *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402 (5th Cir. 1983) (depressive neurosis); *Gardner v. Morris*, 752 F.2d 1271 (8th Cir. 1985) (manic depressive syndrome); *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987) (epilepsy); *Wolff v. S. Colonie Cent. Sch. Dist.*, 534 F. Supp. 758 (N.D.N.Y. 1982) (congenital limb deficiency); *Pushkin v. Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981) (multiple sclerosis); *Bolthouse v. Continental Wingate Co*, 656 F. Supp. 620 (W.D. Mich. 1987) (cerebral palsy); *Daubert v. United States Postal Serv.*, 733 F.2d 1367 (10th Cir. 1984) (degenerative spinal condition); *Dancy v. Kline*, 639 F. Supp. 1076 (N.D. Ill. 1986) (chronic lower back syndrome with disc disease); *Prewitt v. United States Postal Serv.*, 662 F.2d 292 (5th Cir. 1981) (limited mobility of arm and shoulder); *Coley v. Secretary of Army*, 689 F. Supp. 519 (D. Md. 1987) (osteoarthritis in hip); *Ward v. Mass. Bay Transp. Auth.*, 550 F. Supp. 1310 (D. Mass. 1982) (artificial leg); *Colin K. v. Schmidt*, 715 F.2d 1 (1st Cir. 1983) (learning disabilities); *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619 (9th Cir. 1982) (diabetes); *Bailey v. Tisch*, 683 F. Supp. 652 (S.D. Ohio 1988) (heart disease); *Chiari v. City of League City*, 920 F.2d 311 (11th Cir. 1983) (Parkinson's disease); *Ackerman v. Western Elec. Co.*, 643 F. Supp. 836 (N.D. Cal. 1986) (asthma); *Poole v. South Plainfield Bd. of Educ.*, 490 F. Supp 948 (D. N.J. 1980) (absence of kidney); *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644 (2d Cir. 1979) (hepatitis B carrier); *Ross v. Beaumont Hosp.*, 687 F. Supp. 1115 (E.D. Mich. 1988) (narcolepsy); *Bowen v. American Hosp. Ass'n*, 476 U.S. 610 (1986) (birth defects); *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992) (sterility); *Fynes v. Weinberger*, 677 F. Supp. 315 (E.D. Pa. 1985) (asbestosis); *Kling v. County of L.A.*, 633 F.2d 876 (9th Cir. 1980) (Crohn's disease); *Fuller v. Frank*, 916 F.2d 558 (9th Cir. 1990) (alcoholism); *Cushing v. Moore*, 970 F.2d 1103 (2d Cir. 1992) (drug addiction).

[72] *Tudyman v. United Airlines*, 608 F.Supp. 739, 744 (C.D. Cal. 1984). In support of this proposition, the *Tudyman* court cited: *Longoria v. Harris*, 554 F. Supp 102 (S.D. Tex. 1982); *Grube v. Bethelehem Area Sch. Dist.*, 550 F. Supp. 418 (E.D. Pa. 1982); *Vickers v. Veterans Admin.*, 549 F. Supp 85 (W.D. Wash. 1982); *Bey v. Bolger*, 540 F. Supp 910 (E.D. Pa. 1982). 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* notes 88-93 and accompanying text.

occurred *because* of his or her handicap.[73] 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.[74]

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*,[75] the court concluded left-handedness was "a physical characteristic, not a chronic illness, a disorder or deformity"; in *Tudyman v. United Airlines*,[76] the court concluded muscular build was not an impairment; and in *Steven v. Stubbs*,[77] the court concluded transitory illnesses with no permanent effect on the plaintiff's health was not an impairment.[78]

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

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[73]*See, e.g., Bailey*, 683 F. Supp. at 657-58 (finding that adverse action suffered by the employee was not based on handicap); *Ross*, 687 F. Supp. at 1118-19 (same); *Bowen*, 476 U.S. at 630-36 (same).

[74]*See, e.g., Doherty*, 659 F. Supp. at 670 (holding that plaintiff was not "otherwise qualified"); *Wolff*, 534 F. Supp. at 762 (same); *Pushkin*, 658 F.2d at 1391 (same); *Daubert*, 733 F.2d at 1367 (same).

[75]781 F.2d 1134, 1138 (5th Cir. 1986).

[76]608 F. Supp. 739, 745-46 (C.D. Cal. 1984).

[77]576 F. Supp. 1409 (N.D. Ga. 1983).

[78]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*, 480 U.S. 273 (1987), in which the Court provided further guidance regarding that prong of the definition.

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.[79] 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.[80] Crosby filed a complaint which was referred to DOL.

Crosby's complaint was investigated by DOL's Office of Federal Contract Compliance Programs (OFCCP).[81] 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.[82] According to the ALJ, Congress was not attempting to protect people with any impairment, "'merely the most disabling.'"[83]

The OFCCP filed exceptions to the ALJ's order with the Assistant

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[79]497 F. Supp. at 1092.

[80]*Id.* at 1091-2.

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[82]*Id.* at 1093 (*citing U.S. Dep't of Labor v. E.E. Black, Ltd.*, No. 77-OFCCP-7R (U.S. Dep't of Labor, Sept. 13, 1978)).

[83]*Id.*

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.[84]

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

[84] *Id.* at 1094 (*quoting U.S. Dep't. of Labor v. E.E. Black, Ltd.*, No. 77-OFCCP-7R (U.S. Dep't 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.*

advancing in employment because of a handicap.[85]

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.[86] Nevertheless, perhaps one can understand the judge's confusion in light of the fact that DOL's regulation implementing Section 503,[87] 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."[88] 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."

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[85] *Id.* at 1099.

[86] 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.

[87] 41 C.F.R. § 60-741.2.

[88] *Id.* at 1099.

> The Assistant Secretary's definition ignores the word substantial. Such a definition contravenes the statutory language and is therefore invalid.[89]

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.'"[90] 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

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[89] *Id.*

[90] *Id* (citing ALJ's language).

> limitation to employment. . . ." It is the impaired individual that must be examined, not just the impairment in the abstract.[91]

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.[92] 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."[93] 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."[94] (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

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[91] *Id.* (emphasis added).

[92] The complete statutory definition can be found *supra* note 63 and accompanying text.

[93] 497 F. Supp. at 1100.

[94] *Id.*

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.'"[108]

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.'[109]

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.

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[108] *Id.* at 933.

[109] *Id.* (quoting *Jasany*) (emphasis added).

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."[110] In this case, the government agency perceived Forrisi as being "unsuited for one position in one plant -- and nothing more."[111] 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.[112]

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.[113] Thus, as courts began to hear claims regarding people

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[110] *Id.* at 934. The only cases the Fourth Circuit cited were *E.E. Black*, *Tudyman*, and *de la Torres*.

[111] *Id.* at 935.

[112] *Id.*

[113] A Westlaw online search revealed that from 1980 to 1989, 930 cases were filed under Section 504 of the Rehabilitation Act. Only 22 of those cases cited *E.E. Black*.

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.[114] 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.]**[115] 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

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[114]Lawrence K. Altman, *Cancer Seen in 41 Homosexuals*, N.Y. TIMES, July 3, 1981, at A20.

[115]U.S. Department of Health and Human Services, Centers for Disease Control, *Morbidity and Mortality Weekly Report*, June 5/July 3, 1981.

profession began to distinguish between people infected with HIV,[116] people with AIDS-Related-Complex,[117] and people with "full-blown AIDS."[118] 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

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[116]The human immunodeficiency virus ("HIV"), first called "human T-cell leukemia/lymphoma virus" and later "human T-cell lymphtrophic virus," was identified as the cause of AIDS in 1983 through a series of studies and experiments. EVE K. NICHOLS, MOBILIZING AGAINST AIDS 14, 102 (1989). See also, Bragdon v. Abbott, 118 S.Ct. 2196, 2203 (1998) (*citing* Barre-Sinoussi et al., *Isolation of aT-Lymphotropic Retrovirus from a Patient at Risk for Acquired Immune Deficiency Syndrome (AIDS)*, 220 SCIENCE 868 (1983); Gallo et al., *Frequent Detection and Isolation of Cytopathic Retroviruses (HTLV-III) from Patients with AIDS and at Risk for AIDS*, 224 SCIENCE 500 (1984); Levy et al., *Isolation of Lymphocytopathic Retroviruses from San Francisco Patients with AIDS*, 225 SCIENCE 840 (1984)). An antibody test to identify the presence of HIV in the blood was developed in 1983 and patented on May 28, 1985. *See* NICHOLS, *supra* at 103.

[117]Although the term is largely obselete, "AIDS-Related-Complex" is defined as

> [a] term formerly used to describe a variety of chronic symptoms and physical findings found in HIV-infected people whose conditions did not meet the CDC case surveillance definition of AIDS. Symptoms included chronic swollen glands, recurrent fevers, unintentional weight loss, chronic diarrhea, lethargy, minor altercations of the immune system, and oral thrush.

Id. at 321.

[118]"Full-blown AIDS" or acquired immunodeficiency syndrome is defined as "a severe manifestation of infection with human immunodeficiency virus." *Id.*

handicap, but many states did not have effective anti-discrimination laws.[119]

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,[120] health care workers in hospitals,[121] and HIV testing programs in governmental agencies.[122] 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.[123] 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

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[119]**Cite -- [Chai: Wegner piece not useful; other ideas?]**

[120]*See, e.g., Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1986) (5-year old boy with HIV excluded from kindergarten); *Ray v. Sch. Dist. of Desoto Co.*, 666 F. Supp. 1524 (M.D. Fl. 1987) (brothers with HIV excluded from elementary school); *Chalk v. Central Dist. of Calif.*, 840 F.2d 701 (9th Cir. 1988) (teacher with HIV barred from teaching in classroom); *see also* BURGDORF, *supra* note 40, at 140, n.176 (listing additional cases).

[121]*See, e.g., Leckelt v. Board of Comm'n of Hosp. Dist. No. 1*, 909 F.2d 820 (5th Cir. 1990) (discussing termination of nurse suspected of having HIV fired for refusal to submit test results).

[122]*See, e.g., Local 1812 v. United States Dep't of State*, 662 F. Supp. 50 (D. D.C. 1987) (analyzing State Department requirment that employees working abroad be tested for HIV).

[123]*See, e.g., Thomas*, 662 F. Supp. at 381 (concluding summarily that HIV is covered, citing Rehabilitation Act regulations and New York precedent); *Local 1812*, 662 F. Supp. at 54 (finding with no analysis that HIV was covered given court's focus on whether employees "otherwise qualified" even though disabled).

won[124] and some lost.[125] 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."[126]

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.[127] In answering the question posed by HHS, Lawson

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[124]*See, e.g., Thomas*, 662 F. Supp. at 382 (enjoining school district from excluding boy with HIV); *Ray*, 666 F. Supp. at 1537 (enjoining school district from excluding children with HIV).

[125]*See, e.g., Local 1812*, 662 F. Supp. at 54 (finding that, although disabled, HIV positive employees not "otherwise qualified" to work in countries where adequate healthcare unavailable); *Leckelt*, 909 F.2d at 830 (finding that nurse's failure to disclose HIV status rendered him not "otherwise qualified" due to concerns of transmission to patients).

[126]Memorandum from Assistant Attorney General Cooper on Application of Section 504 of Rehabilitiation Act to Persons with AIDS, June 25, 1986, *reprinted at* BNA Daily Labor Report No. 122, at D-1, D-1 [*hereinafter* "Cooper Opinion"].

[127]The following year, Gary Lawson went on to clerk for Justice Antonin Scalia during the Supreme Court's 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*, 475 U.S. 1118 (1986) -- a fact mentioned in Lawson's memo. *See* Cooper Opinion, *supra* note 114, at D-7. Lawson's

-- 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 [S]ection 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. . . ."[128]

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*,[129] 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

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memo was severely critical of the reasoning employed by the 11th Circuit in *Arline*, *see id.* at D-9, n. 70; 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 Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981). *Compare* Cooper Opinion, *supra* note 116, at D-15 to D-16 *with Arline*, 480 U.S. at 289 (Rehnquist, J., dissenting).

[128]Cooper Opinion, *supra* 116, at D-10.

[129]480 U.S. 273 (1987).

that AIDS is a handicap for purposes of Section 504.[130]

The Cooper Opinion also concludes, however, that the mere "ability to transmit a disease" is not itself a handicap.[131] 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."[132] 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.'"[133]

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

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[130]*Id.* at D-7. Lawson also noted that since "AIDS by definition involves the presence of an opportunistic disease, such as *P. carinii* pneumonia, that frequently will entail substantial limitations on major life activities." *Id.*

[131]*Id.* at D-8.

[132]*Id.*

[133]*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*, 480 U.S. at 283, n. 10, questions regarding the validity of such arguments have reappeared in force in ADA cases. *See infra* Section III.

"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.[134] 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.[135]

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 of both challenges presented in the case for people with AIDS and HIV infection 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

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[134]Cooper Opinion, *supra* note 116, at D-10.

[135]*Id.* at D-10 and n. 74.

second prong of the definition.[136] 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 [S]ection 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."[137]

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.[138] 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."[139]

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,

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[136] *Arline*, 480 U.S. at 281.

[137] *Id.* at 282.

[138] *Id.* at 282, n.7.

[139] *Id.*

> 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.[140]

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

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[140] *Id.*

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."[141] Rejecting the Solicitor General's argument that such reasoning would allow plaintiffs to make "a totally circular argument which lifts itself by its bootstraps,"[142] 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."[143]

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

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[141] *Id.* at 283.

[142] *Id.* at 283, n. 10.

[143] *Id.*

terms.[144] 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 William Armstrong and Robert Dole introduced a bill to amend the definition of "handicapped individual," for purposes of Sections 503

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[144]In recent cases under the ADA, courts have rejected that hospitalization for an impairment automatically qualifies as substantially limiting a major life activity. *See infra* note 333 and accompanying text.

and 504, to exclude any individual with a "contagious disease."[145] 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.[146] 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.[147] 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 [S]ection 504. . . . [T]he amendment represents a complete retreat from the principles for which [S]ection 504 stands: protection of handicapped individuals from discrimination based not only on the handicap itself, but from irrational fears and

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[145]S. 673, 100th Cong., 1st Sess., 133 CONG. REC. 5,027 (1987).

[146]133 CONG. REC. 3,744 (1987) (statement of Sen. Kennedy introducing S. 557, the Civil Rights Restoration Act of 1987)). 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 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.

[147]S. Rep. No. 64, 100th Cong., 2d Sess. 27 (1988), *reprinted at* 1988 U.S.C.C.A.N. 3, 29.

prejudices of others.[148]

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.[149] 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.[150]

The compromise provision drafted by the advocates specifically included the term "contagious disease *or infection.*"[151] 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

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[148]*Id.* at 28, *reprinted at* 1988 U.S.C.C.A.N. at 30.

[149]134 CONG. REC. 383-84 (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. 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., 2d 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., 2d Sess. 102 (1978).

[150]134 CONG. REC. at 2,860-62 (1988) (statement of Sen. Harkin); *id.* at 2930 (statment of Rep. Hawkins); *id.* at 3,043-44 (statement of Rep. Hoyer). *See generally*, Chai Feldblum, *Civil Rights Restoration Act of 1988: Coverage of Contagiuos Diseases Under Section 504* (memorandum prepared on behalf of the American Civil Liberties Foundation, AIDS & Civil Liberties Project) (on file with author).

[151]*Id.* at 425 (introduction of amendment) (emphasis added).

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,[152] 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

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[152] *See id.* at 1,394 (statement of Sen. Inouye); *id.* at 2,937-38 (statement of Rep. Owens); *id.* at 2,936-37 (statement of Rep. Weiss); *id.* at 2,939 (statement of Rep. Waxman); *id.* at 3,043-44 (statement of Rep. Hoyer); *id.* at 2,947-48 (statement of Rep. Edwards); *id.* at 3,280 (statement of Rep. Miller). 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, *supra* note 38, at 401-10 (noting confusion in court decisions regarding drug addicts and alcoholics).

infection.[153]

Congress ultimately passed the final version of the Civil Rights Restoration Act in March 1988, overriding President Ronald Reagan's veto of that legislation.[154]

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.[155]

President Ronald Reagan had created a commission, chaired by Admiral James D. 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.[156] 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."[157] 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

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[153]*See, e.g.*, 134 CONG. REC. 4,757 (1988) (statement of Rep. Dannemeyer); *id.* at 4,768 (statement of Rep. McEwan).

[154]*See id.* at 4,225-76 (Senate debating); *id.* at 4,33-71 (Senate overriding veto); *id.* at 4,752-91 (House debating and overriding veto).

[155]REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC (June 1988) [*hereinafter* COMMISSION REPORT].

[156]COMMISSION REPORT *supra* note __, at v.

[157]*Id.* at 119.

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."[158]

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.[159]

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."[160] 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."[161] 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.[162]

Because passing such a law would take some time, the

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[158]*Id.* at 119.

[159]*Id.* at 121.

[160]*Id.* (emphasis added).

[161]*Id.*

[162]*Id.* at 123.

Commission also presented recommendations regarding Section 504 of the Rehabilitation Act, 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,[163] and that "[t]he Commission supports the position that Section 504 coverage applies to people who are HIV positive yet asymptomatic."[164]

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.[165]

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

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[163] *Id.* at 122 (citing cases).

[164] *Id.* at 123.

[165] *Id.*

political advocates for people with AIDS/HIV in Washington DC. 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.[166] 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, endorsing the Commissions' report and recommendations.[167] It is far from clear that Vice-President Bush

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[166]*See* 133 CONG. REC. 20,102-3 (1987) (statement of Rep. Waxman).

[167]*See Reagan Spurning Tougher Move: Orders Anti-Bias Rules on AIDS*, N.Y. TIMES, Aug. 3, 1988, at 1.

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 disability 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).[168] 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.[169] The main thrust of the FHAA was to strengthen the enforcement mechanisms of the law for these protected classes.[170] In addition, the FHAA included, for the first time, people with disabilities under the civil rights coverage of the Fair Housing Act.[171]

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.[172] 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

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[169]Pub. L. No. 90-284, 82 Stat. 72 (1968).

[170]Pub. L. No. 100-430, § 8, 102 Stat. 1619, 1625-35 (1988); *see also* Chai R. Feldblum & Cedric Merlin Powell, *Fair Housing Amendments Act of 1988,* May 1989 (memorandum prepared on behalf of the American Civil Liberties Foundation) (on file with author).

[171]Pub. L. No. 100-430, § 6(a), 102 Stat. 1619, 1620 (1988).

[172]134 Cong. Rec. 15,667 (1988) (statement of Rep. Schroeder); *id.* at 15,654-55 (statement of Rep. Weiss); *id.* at 15,862 (statement of Rep. Pelosi); *id.* at 16,478 (statement of Rep. Bryant).

fact that courts were consistently applying such coverage in cases brought by people with AIDS and HIV infection under Section 504.[173] 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."[174] 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,"[175] 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."[176]

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

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[173] *See supra* notes __ and accompanying text.

[174] H.R. Rep. No. 711, 100th Cong., 2d Sess. 18 (1988), *reprinted at* 1988 U.S.C.C.A.N. 2173, 2179.

[175] *Id.* at 22, *reprinted at* 1988 U.S.C.C.A.N. at 2183.

[176] *Id.* at 22, n.55, *reprinted at* 1988 U.S.C.C.A.N. at 2183, n. 55.

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."[177] 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.[178]

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."[179] 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."[180] Congressman Dannemeyer explained these amendments were necessary to ensure landlords would have the freedom to deny housing to individuals infected with HIV.[181]

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.[182] 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

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[177] *Id.* at 28, *reprinted at* 1988 U.S.C.C.A.N. at 2189.

[178] *Id.* (*codified at* 42 U.S.C. § 3604(f)(9) (1994)).

[179] 134 CONG. REC. 16,496-97 (1988).

[180] *Id.* at 16,498.

[181] *Id.* ("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").

[182] *Id.* at 16,496-504.

amendments.[183] 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.[184]

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.[185] In August 1988, both the House of Representatives and the Senate passed the FHAA,[186] and in September 1988, President Ronald Reagan signed the bill into law.[187]

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

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[183]*See, e.g., id.* at 16,500 ("The need to protect asymptomatic HIV-infected persons from housing discrimination is acute.") (statement of Rep. Waxman); *id.* at 16,501 ("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 Rep. Owens).

[184]*See, e.g., id.* at 16,497 ("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 Rep. Frank); *id.* at 16,498 (statement of Rep. Waxman).

[185]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 16,504. 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 16,510.

[186]Pub. L. 100-430, 102 Stat. 1619 (1988).

[187]*Id.*

recommendations had been issued in June 1988, Arthur B. Culvahouse Jr., Counsel to the President, requested an opinion from DOJ "on the application of [S]ection 504 . . . to individuals infected with . . . HIV . . . in light of *School Board of Nassau County v. Arline*."[188] 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."[189]

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*.[190]

The Kmiec Opinion also noted that its conclusions differed from, and superseded to the extent of the difference, the Cooper Opinion of

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[188]Memorandum from Douglas W. Kmiec, Acting Asst. Att'y Gen. Kmiec, Office of Legal Counsel, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), *reprinted in* 8 Fair Empl. Prac. Manual (BNA) No. 641 at 405:1 [*hereinafter* Kmiec Opinion].

[189]*Id.* (*citing* Memorandum for the Attorney General from President Ronald Reagan (Aug. 5, 1988)). The Kmiec Opinion 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 A.G. Thornburgh on ADA. *See* H.R. Rep. No. 485(II), 101st Cong, 2d Sess. 48 (1990), *reprinted at* 1990 U.S.C.C.A.N. 303, 330.

[190]Kmiec Opinion, *supra* note 175, at 405:1-2.

1986.[191] 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.[192]

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 [S]ection 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 [S]ection 504.*[193]

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

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[191] *Id.* at 405:2, n. 4.

[192] *Id.*

[193] *Id.* at 405:11 (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.

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*.[194]

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."[195] 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.[196]

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[194] *Id.* at 405:4-8.

[195] *Id.* at 405:2, n. 3.

[196] *Id.*

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.[197]

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

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[197] *Id.* at 405:18.

> 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.[198]

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."[199] The key question to which the Kmiec Opinion then turned, therefore, was "whether the physical impairment of HIV infection

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[198] *Id.*

[199] *Id.* at 405:5.

substantially limits any major life activities."[200]

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."[201]

The Opinion noted that the major life activity of procreation was the "fulfillment of the desire to conceive and bear healthy children."[202] 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.[203]

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

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[200] *Id.* at 405:5-6.

[201] *Id.* at 405:6 (emphasis added).

[202] *Id.*

[203] *Id.* at 405:7 (emphasis in original).

procreation."[204] 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."[205]

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.[206]

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

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[204] *Id.*

[205] *Id.*

[206] *Id.*

healthy children."[207] 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."[208] 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."[209]

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."[210] 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."[211] 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)."[212]

Again presaging a difficult argument that would later dominate judicial interpretations under the ADA -- and offering its rebuttal of such

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[207] *Id.* at 405:7, n. 13.

[208] *Id.* at 405:7 (emphasis added).

[209] *Id.*

[210] *Id.*

[211] *Id.* (*quoting Arline*, 107 S.Ct. at 1129).

[212] *Id.* at 405:8.

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.*"[213] 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."[214] 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."[215] 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.[216]

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

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[213] *Id.* at 405:8, n.14 (emphasis added).

[214] *Id.*

[215] *Id.*

[216] Cooper Opinion, *supra* note 116, at D-8, n. 67.

work.[217]

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 nine of the opinion, rather than in footnote ten 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).[218]

The Kmiec Opinion then noted that a district court in California recently had concluded that "if an individual or organization limits an HIV-infected individual's participation in a [S]ection 504 covered activity because of fear of contagion, a major life activity of the individual is substantially limited."[219] In that case, *Doe v. Centinela Hospital*,[220] an HIV-infected individual had challenged his exclusion

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[217] *Id.*

[218] *Id.* at 405:8, n.14.

[219] *Id.*

[220] 1998 U.S. Dist. LEXIS 8401 (C.D. Cal. 1988).

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."[221] 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."[222]

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."[223] 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."[224] 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 [S]ection 504. Congress has done so now with this amendment, stating clearly that individuals with contagious diseases or

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[221]Kmiec Opinion, *supra* note 175, at 405:8, n. 15.

[222]*Id.* (emphasis added).

[223]*Id.* at 405:11.

[224]*Id.*

> 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.[225]

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*)."[226] 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 [S]ection 504 to HIV-infected persons, *we conclude* that *all* HIV-infected

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[225] *Id.* at 405:12 (*citing* 134 CONG. REC. H573 (daily ed. Mar. 2, 1988)).

[226] *Id.* at 405:11 (emphasis added).

> 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 [S]ection 504.*[227]

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 [S]ection 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

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[227] *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.

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.[228]

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. In most cases, coverage of people with HIV infection under Section 504 was accepted without much more analysis or dispute by the courts.[229]

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

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[228]Chai R. Feldblum, *AIDS and HIV Infection*, *in* ONE NATION INDIVISIBLE: THE CIVIL RIGHTS CHALLENGE FOR THE 1990'S 466, 472-73 (Reginald C. Govan & William L. Taylor eds., 1989) (emphasis in original).

[229]*See supra* notes __ and accompanying text.

Senate Labor and Human Resources Committee and the Subcommittee on Select Education of the House Committee on Education and Labor.[230] 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 thirty-one other Senators in May 1989.[231] 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 --
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> (A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more systems of the body, including the following --
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> (i) the neurological system;
> (ii) the musculoskeletal system;
> (iii) the special sense organs, and respiratory

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[230]The bill was introduced on April 28, 1988 in the Senate, S. 2345, 100th Cong., 2d Sess., 134 CONG. REC. 9,375 (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. 9,600 (1988).

[231]S. 933, 101st Cong., 1st Sess., 135 CONG. REC. 8,505 (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. 8,709 (1989).

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.[232]

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

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[232]S. 2345, §§ 3 (2)-(4), 134 CONG. REC. 9,379 (1988).

(C) being regarded as having such an impairment.[233]

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 101(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."[234] 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.[235] 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. 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

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[233]S. 933, § 3(2), 134 CONG. REC. 8,510 (1988).

[234]*Id.* § 101(b)(2)(B), 134 CONG. REC. 8,510 (1988).

[235]*See* Feldblum, *Antidiscrimination Requirements, supra* note 41, at 37.

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.[236]

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."[237]

As a general matter, the Senate Report did not discuss at length how different impairments substantially limited major life activities.

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[236]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." 135 CONG. REC. 19,869-70 (1989); *see also* Letter from Consortium of Citizens with Disabilities, *id.* (urging no "weakening amendments" to the ADA).

[237]S. Rep. No. 116, 101st Cong., 2d Sess. 22 (1988).

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."[238] 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.[239]

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.[240]

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[238] *Id.*

[239] *Id.*

[240] *Id.* at 23.

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.'"[241] 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."[242] 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

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[241] *Id.* at 23 (*quoting Arline*, 480 U.S. at 283).

[242] *Id.* at 24.

would be covered under the third prong.[243]

> 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.[244]
>
> 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,[245] the only individuals excluded from the ADA were those addicted to drugs,[246] transvestites,[247] and a group with selected mental and sexual disorders.[248]

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[243] *Id.* at 24 (*citing Arline*; *Doe v. Centinela Hospital*; and *Thornhill v. Marsh*) (emphasis added).

[244] *See supra* section V(C).

[245] 135 CONG. REC. 19,864-67, 19,870 (1989) (statements of Sen. Helms criticizing coverage of HIV infection under the Act).

[246] 42 U.S.C. § 12114 (1994). These individuals were excluded three times, under three separate amendments. *See generally* Chai R. Feldblum, *The Americans with Disabilities Act Definition of Disability*, 7 LABOR LAWYER 11, 21-23 (1991) [*hereinafter Definition of Disability*].

[247] 42 U.S.C. § 12208 (1994). *See* 135 CONG. REC. 19,864 (1989) (containing colloquy regarding amendment to exclude transvestites from coverage under the Act).

[248] 42 U.S.C. § 12211(b) (1994). *See* 135 CONG. REC. 19,884-85 (1989). 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, *Definition of Disability*, *supra* note 233, at 24-25.

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 a range of emotional disorders listed in the DSM-III.[249]

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.[250] Several Members of Congress also focused on the fact that the third prong of the definition would cover *anybody* who was simply regarded

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[249]135 CONG. REC. 19,853 (1989); *see also id.* at 20,571-76 (statement of Sen. Armstrong subsequent to the Act's passage).

[250]Contending that "[i]t is simply ridiculous to expect individual business owners to know which disabilities are covered and therefore must be accommodated," the NFIB lobbied strongly for an inclusive list. BURGDORF, *supra* note 40, at 148 (*citing Americans With Disabilities Act of 1989: Hearings on H.R. 2273 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary,* 101st Cong., 1st Sess. 89-90 (1990)). The number of disabilities to be included, 900, was taken from congressional floor debates over the defintion of disability to be included in the bill. *Id.* (*citing* 136 Cong. Rec. H2621 (daily ed. May 22, 1990) (remarks of Rep. McCollum).

as having a disability.[251]

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."[252] 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: "persons 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."[253] 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 at the time was working 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. In its discussion of the third prong, the House Judiciary Report states:

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[251]For example, when Congressman Dannemeyer asked this author if he would be covered under the ADA because people "sincerely questioned . . . [his] thinking capacity," my reply was: "You would have to prove that you were considered to be mentally disabled in order to get under the protection. I don't know if you want to come into court and do that." *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 74 (1989).

[252]H.R. Rep. No. 485(II), 101st Cong, 2d Sess. 52 (1990), *reprinted at* 1990 U.S.C.C.A.N. 303, 334.

[253]*Id.*

> 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.[254]

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

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[254]H.R. Rep. No. 485(III), 101st Cong., 2d Sess. 30 (1990), *reprinted at* 1990 U.S.C.C.A.N. 445, 453.

> 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.[255]

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 Jim Chapman allowing an employer "to refuse to assign . . . any employee with an infectious or communicable disease of public health significance to a job involving

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[255] *Id.* at 29, *reprinted at* 1990 U.S.C.C.A.N. at 451.

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.[271]

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.[272]

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

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[271] *Id.* § 1630.2(j)(1).

[272] *Id.* § 1630.2(j)(2)

AIDS and HIV infection.

A. 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.*[285] 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."[286] 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."[287] 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 1980's 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.[288]

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[285]899 F. Supp. 100 (N.D.N.Y. 1995).

[286]*Redlich*, 899 F. Supp. 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.*

[287]*Id.* at 106.

[288]*See, e.g., Prewitt v. U.S. Postal Serv.*, 662 F.2d 292, 297 (5th Cir. 1981) (finding applicant with "limited mobility of his left arm and shoulder" handicapped under Rehabilitation Act).

he is disabled. . . .[313]

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

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[313]*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 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.

> 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.[314]

The district court in that case, *Stillwell v. Kansas City, Missouri Board of Police Commissioners,*[315] 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."[316] 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 *dys*functional, 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

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[314] *Stillwell v. Kansas City, Missouri Bd. of Police Commissioners*, 872 F. Supp. 682, 685 (W.D. Mo. 1995).

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[316] *Id.*

benefits, does not seem to have penetrated the minds of some judges.[317]

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.*,[318] 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,"[319] 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

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[317]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. **[CLEVELAND reference]**

[318]87 F.3d 26 (1st Cir. 1996).

[319]*Katz*, 87 F.3d at 30.

> 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.[320]

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*,[321] 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

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[320] *Id.* (*quoting* district court **[cite]**).

[321] 117 F.3d 800 (5th Cir. 1997).

considered them disabled.[322]

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.*,[323] 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."[324] 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."[325] The Eighth Circuit expressed its discomfort with the

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[322]*Foreman*, 117 F.3d at 807.

[323]94 F.3d 484 (8th Cir. 1996).

[324]*Webb*, 94 F.3d at 485.

[325]*Id.* at 486.

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."[326]

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."[327] 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

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[326] *Id.*

[327] *Id.*

restricted, then Webb is disabled within the meaning of the ADA.[328]

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. 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",[329] 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.[330] 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*,[331] reverses a district court's motion to dismiss (based on the conclusion that an individual with chronic severe allergic rhinitus and simusitis can "plead no facts demonstrating she was 'disabled' within the meaning of the ADA), and admonishes the

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[328]*Id.* at 487.

[329]*Id.*

[330]*See Byrne v. Bd. of Educ.*, 979 F.2d 560 (7th Cir. 1992) (discussing teacher allergic to aspergillus fumigatus, which existed in some, but not all, of the school buildings).

[331]91 F.3d 959 (1996).

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 **??? check** 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.[332]

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.*,[333] 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

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[332]*Homeyer*, 91 F.3d at 962, n.1.

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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."[334]

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.'"[335] 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."[336] 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."[337] 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."[338]

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.

B. "Substantially Limits" and "Major Life Activities"

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[334]*Katz*, 87 F.3d at 29. Katz finally got a job selling bonds for the State of Israel. *Id.*

[335]*Id.* at 31, n. 3 (*quoting* 29 C.F.R. Pt. 1630, at 403 (1995)).

[336]*Id.* at 30.

[337]*Id.*

[338]*Id.* at 31.

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,"[339] this line of defense has invigorated a searching inquiry into whether a plaintiff is "sufficiently disabled" to be considered disabled under the ADA.

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*,[340] 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."[341] 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."[342]

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[339]29 C.F.R. Pt. 1630, App. at 350.

[340]53 F.3d 723 (5th Cir. 1995).

[341]*Dutcher*, 53 F.3d at 725.

[342]*Id.* at 726.

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."[343] 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."[344] Despite these assertions, the court concluded that Dutcher could "take care of the normal activities of daily living."[345] 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.[346]

The Fifth Circuit then turned to what it called Dutcher's "strongest argument" -- that her employer's actions "demonstrate that her

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[343]*Id.* at 726 (*citing* EEOC guidance).

[344]*Id.* at 726, n. 11.

[345]*Id.* at 726.

[346]*Id.*

impairment affects the major life activity of working."[347] 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."[348]

In *Ryan v. Grae & Rybicki*,[349] 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."[350] 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.[351] 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

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[347] *Id.* at 727.

[348] *Id.*

[349] 135 F.3d 867 (2d Cir. 1998).

[350] *Ryan*, 135 F.3d at 868.

[351] *Id.* at 872.

limit those activities.[352]

Ryan argued that her colitis substantially limited her major life activity of "elimination of waste," as well as "her ability to care for herself."[353] 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."[354] 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."[355]

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."[356] Thus, the court concluded, "although [Ryan's] colitis affects her ability to care for herself in some respects, the severity of the

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[352]*Id.* at 870 (emphasis added).

[353]*Id.* at 870-71.

[354]*Id.* at 871.

[355]*Id.*

[356]*Id.* (*citing Dutcher* for the proposition that "caring for oneself" encompasses normal activities of daily living, including feeding oneself, driving, grooming, and cleaning home).

limitation caused by her colitis is limited."[357] 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.[358] 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.*,[359] 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."[360]

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.[361] There are plenty of cases, however, in

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[357] *Id.*

[358] *Id.* at 872 (*citing Branch v. City of New Orleans*, 1995 U.S. Dist. LEXIS 6548 (E.D. La. May 8, 1995), *aff'd*, 78 F.3d 582 (5th Cir. 1996); *Jones v. Hodel*, 711 F. Supp. 1048, 1049 (D. Utah 1989)). **[which ones found diability?]**

[359] 53 F.3d 55, 59 (4th Cir. 1995).

[360] *Id.*

[361] *Compare Farmer v. National City Corp.*, 1996 U.S.Dist. LEXIS 20941, *15 (S.D. Ohio 1996) (plaintiff 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*

which there are no blatant defects in the merits of the case, and yet the courts apply the same exacting scrutiny.[362]

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v. Navistar Int'l, 904 F. Supp. 922 (E.D. Wis. 1995) (plaintiff with lateral epicondylitis of right elbow was accommodated numerous times by employer, complained throughout 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 Me.*, 105 F.3d 12 (1st Cir. 1997) (plaintiff with depression terminated for negative attitude at work and 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 Co.*, 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 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 Hosp.*, 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 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.).

[362]*See, e.g.*, *Matczak v. Frankford Candy and Chocolate Co.*, 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

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.*,[363] 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.[364]

Other courts have similarly concluded that mere hospitalization is insufficient to establish a disability for purposes of the ADA.[365]

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perform life's functions.").

[363]119 F.3d 305 (5th Cir. 1997).

[364]*Burch*, 119 F.3d at 317.

[365]*See, e.g., Demming v. Housing and Redevelopment 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."[366] 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

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[366]29 C.F.R. § 32.3 (1997).

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*,[367] 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.[368]

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

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[367]862 F. Supp. 336 (W.D.Okl. 1994).

[368]*Sarsycki,* 862 F. Supp. at 339.

to the explicit terms of the ADA. Nevertheless, in *Harris v. H & W Contracting Co.*,[369] 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."[370] 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."[371] 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."[372] The court answered both questions in the affirmative. It

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[369]102 F.3d 516 (11th Cir. 1997).

[370]*Harris*, 102 F.3d at 520.

[371]*Id.*

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

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.[373]

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."[374] 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.[375]

One other circuit court of appeals has adopted the view of the *Harris* court, although without extensive analysis. In *Doane v. City of Omaha*,[376] the Eighth 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."[377] The Ninth Circuit has

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[373] *Id.*

[374] *Id.*

[375] *Id.*

[376] 115 F.3d 624 (8th Cir. 1997).

[377] *Doane*, 115 F.3d at 627.

mentioned the EEOC guidance in passing, without rejecting the agency's interpretation. In *Holihan v. Lucky Stores, Inc.*,[378] 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."[379]

Finally, the Sixth Circuit initially rejected the EEOC guidance and ruled the determination of disability should be made after taking into account mitigating measures,[380] but then amended its decision after denial of rehearing and denial of rehearing en banc. In the later decision, *Gilday v. Mecosta County*,[381] 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."[382]

One court of appeals has taken the opposite view of the Eleventh Circuit in *Harris*. In *Sutton v. United Air Lines, Inc.*,[383] 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

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[378]87 F.3d 362 (9th Cir. 1996).

[379]*Holihan*, 87 F.3d at 366.

[380]*See, Gilday v. Mecosta County*, 124 F.3d 760, 767-68 (6th Cir. 1997).

[381]1997 U.S.App. LEXIS 33306 (6th Cir. 1997).

[382]*Gilday*, 1997 U.S.App. LEXIS 33306 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.

[383]130 F.3d 893 (10th Cir. 1997).

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."[384] 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.[385]

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*,[386] provides a good example of the analysis used by the early courts -- and followed by the later ones. In *Coughlan*, 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:

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[384]*Sutton*, 130 F.3d at 902.

[385]*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.

[386]851 F. Supp. 808 (N.D. Tex. 1994).

> [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.[387]

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 the 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.[388]

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[387] *Coughlan*, 851 F. Supp. at 813.

[388] *See, e.g., Deckert v. City of Ulysses*, 1995 U.S. Dist. LEXIS 14526, *16 ((D.Kan. 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 Serv.*, 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

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*, a recent ADA case decided by the Supreme Court in 1998. **[ABBOTT]**

In *Abbott v. Bragdon*,[389] 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."[390] In *Pacourek v. Inland Steel Co.*,[391] 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

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be considered.").

[389]107 F.3d 934 (1997).

[390]*Abbott*, 107 F.3d at 941.

[391]916 F. Supp. 797 (N.D. Ill. 1996).

so, one of life's greatest disappointments."[392] The *Pacourek* court relied partly on a case decided under Section 501 of the Rehabilitation Act, *McWright v. Alexander*,[393] 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.[394]

Several courts, however, have rejected the argument that reproduction is a major life activity, including two circuit courts of appeal. One of the early cases dealing with women who were infertile was *Zatarin v. WDSU Television*,[395] In this case 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."[396] In *Krauel v. Iowa Methodist Center*,[397] 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

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[392]*Pacourek*, 916 F. Supp. at 804.

[393]982 F.2d 222, 226-27 (7th Cir. 1992).

[394]*See also Doe v. District of Columbia*, 796 F. Supp. 559, 568 (D. D.C. 1992) (holding that reproduction is major life activity under Rehabilitation Act); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 379 (C.D. Cal. 1987) (same).

[395]881 F. Supp. 240, 243 (E.D.La. 1995).

[396]*Zatarin*, 881 F. Supp. at 243.

[397]95 F.3d 674 (8th Cir. 1996).

> 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.[398]

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.*,[399] that a plaintiff with asbestosis, who had lung capacity that was 50% of the normal ramge, was not limited in a "major" life activity. Robinson 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, Robinson's name was placed on a list of employees eligible to be recalled. All other crewmen on Robinson's rig were hired back except for Robinson. Moreover, the company had twenty to twenty-five openings for which Robinson was qualified, but he was never hired back. Robinson's file contained a reference to his pulmonary problems. Robinson 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 Robinson did not have a disability for purposes of the ADA. The only problem Robinson 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

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[398] *Robinson*, 95 F.3d at 677.

[399] 101 F.3d 35 (5th Cir. 1996).

major life activity under the ADA.'"[400] 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."[401] 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), Robinson 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.[402]

C. 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

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[400] 101 F.3d at 37 (*quoting Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 758 n.2 (5th Cir. 1996)).

[401] *Id.*

[402] *EEOC v. Boyle*, 959 F. Supp. 405, 409 (S.D.Tex. 1997).

under the third prong of the definition, regardless of whether the employer's perception was shared by others in the field.[403]

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.[404]

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*,[405] 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.[406] 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

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[403] *See supra* notes __ and accompanying text.

[404] *See supra* notes 127-130 and accompanying text.

[405] 946 F.2d 1214 (6th Cir. 1991).

[406] *Taylor*, 946 F.2d at 1216, n.1.

impairment,' which we decline to do, the case offers us little guidance."[407] 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).[408]

However, the approach of the *Taylor* court has not 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

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[407] *Id.* at 1217.

[408] *Id.*

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.[409]

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.*,[410] 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

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[409]*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 first prong or third prong of 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*, 135 F.3d 867, 869 (2d Cir. 1998) (plaintiff with colitis fired from job as legal secretary for poor performance; plaintiff's impairment not a disability under first prong; plaintiff 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.").

[410]87 F.3d 26 (1st Cir. 1996).

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."[411] Similarly, in *Olson v. General Electric Astrospace*,[412] 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,[413] the court 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.[414]

D. 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 argued 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

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[411] *Katz*, 87 F.3d at 32.

[412] 101 F.3d 947 (3rd Cir. 1996).

[413] *See supra* notes __ and accompanying text.

[414] *Olson*, 101 F.3d at 955.

ADA.[415] Indeed, at times, the defendants did not contest this particular point.[416]

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. National Association of Business & Education Radio*.[417] 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."[418] After Ennis failed to perform a specific

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[415]*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).

[416]*See, e.g., Robinson v. Henry Ford Health Sys.*, 892 F. Supp. 176, 180-81 (E.D. Mich. 1994); *Doe v. University of Md. Med. Sys. 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 Med. Ctr.*, 1998 WL 75258 (6th Cir. 1998); *see also Minnesota v. Clausen*, 491 N.W.2d 662 (Minn. 1992) (interpreting Minnesota statute substantially identical to ADA).

[417]53 F.3d 55 (4th Cir. 1995).

[418]*Ennis*, 53 F.3d at 56.

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."[419]

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."[420] 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."[421]

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."[422] 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."[423] 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

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[419] *Id.*

[420] *Id.* at 57.

[421] *Id.*

[422] *Id.* at 59.

[423] *Id.*

individual."[424]

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

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[424] *Id.* (*citing Forrisi, Byrne v. Board of Educ., Welsh v. City of Tulsa,* and *Chandler v. City of Dallas*).

that she was performing her job adequately"[425] -- 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.[426] Moreover, the *Ennis* court opened to 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.*,[427] Cortes, who was HIV-infected, had a few run-ins with the management at the McDonalds restaurant where he worked, including being placed on thrity 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

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[425]*Id.* at 62.

[426]*See, e.g.*, Reeves v. Johnson Controls World Services, Inc., 140 F.3d 144 151 (2d Cir. 1998); Sutton v. United Air Lines, Inc., 130 F.3d 893, 897 (10th Cir. 1997); Halperin v. Abacus Tech. Corp., 128 F.3d 191, 197 (4th Cir. 1997); Ryan v. Grae & Rybicki, P.C., 135 F.3d 867, 872 (2d Cir. 1998); Runnebaum v. NationsBank of Md., 123 F.3d 156, 164 (4th Cir. 1997); Runnebaum v. NationsBank of Md., 95 F.3d 1285, 1290 (4th Cir. 1996); Torcasio v. Murray, 57 F.3d 1340, 1353 (4th. Cir. 1995); Monroe v. Wal-Mart Stores, Inc., 1998 WL 158963, 4 (N.D. Ill. 1998); Conner v. Colony Lake Lure, 1997 WL 816511, 5 (W.D.N.C. 1997); Reichle v. Walsh Offshore, Inc., 1997 WL 728104, 2 (E.D. La. 1997); Parker v. Geneva Enter., Inc., 997 F.Supp. 706, 709 (E.D. Va. 1997); Hirsch for Estate of Hirsch v. National Mall & Serv. Inc., 989 F. Supp. 977, 981 (N.D. Ill. 1997); Hernandez v. Prudential Ins. Co. of Am., 977 F. Supp. 1160, 1164 (M.D. Fla. 1997); Shiflett v. GE Fanuc Automation Corp., 960 F. Supp. 1022, 1028 (W.D.Va. 1997); Cortes v. McDonald's Corp., 955 F. Supp. 541, 544 (E.D.N.C. 1996); Burke v. Commonwealth of Va., 938 F. Supp. 320, 322 (E.D. Va. 1996).

[427]955 F. Supp. 541 (E.D. N.C. 1996).

effect on the plaintiff's life activities. The district court also noted that the Fourth Circuit, in *Runnebaum v. NationsBank of Maryland*,[428] 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."[429] 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."[430]

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*

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[428]95 F.3d 1285 (4th Cir. 1996) (later vacated and reheard en banc).

[429]*Cortes*, 955 F. Supp. at 546.

[430]*Id.*

Maryland,[431] 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."[432] The Fourth Circuit *en banc* vacated the panel decision and affirmed the district court's grant of summary judgment. *Runnebaum v. NationsBank of Maryland*.[433]

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 absteeism, 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.[434] 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."[435]

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."[436] As the first step

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[431]95 F.3d 1285 (4th Cir. 1996).

[432]*Runnebaum*, 95 F.3d at 1297.

[433]123 F.3d 156 (4th Cir. 1997) (en banc).

[434]*Runnebaum*, 123 F.3d at 161-62.

[435]*Id.* at 162.

[436]*Id.* at 166. 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. *Id.* at 166, n.5.

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."[437] 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."[438] 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."[439] 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.[440]

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."[441] To the contrary, as the court pointed out, "the record reveals, and Runnebaum

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[437] *Id.* at 167.

[438] *Id.* at 168.

[439] *Id.* at 171.

[440] *Compare id.* at 170-72 *with* Kmiec Opinion, *supra* note 173, at 405:7.

[441] *Runnebaum*, 123 F.3d at 174.

does not dispute, that NationsBank employs several individuals it knows to be infected with HIV."[442]

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."

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VI. Bragdon v. Abbott

See attached article on *Bragdon*.

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[442] *Id.*