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Beyond 43 Million: The "Regarded As" Prong of the ADA and HIV Infection - A Tautological Approach

Brian K. Esser

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Beyond 43 Million: The "Regarded As" Prong of the ADA and HIV Infection - A Tautological Approach

Keywords

Bragdon v. Abbott, Americans with Disabilities Act of 1990 ("ADA"), HIV, AIDS, United States v. Happy Time Day Care Center

COMMENTS

BEYOND 43 MILLION: THE “REGARDED AS” PRONG OF THE ADA AND HIV INFECTION—A TAUTOLOGICAL APPROACH

BRIAN K. ESSER*

TABLE OF CONTENTS

Introduction..... 472

I. The ADA and *Bragdon v. Abbott*..... 475

 A. Drafting the ADA..... 475

 B. *Bragdon v. Abbott*..... 480

II. *United States v. Happy Time Day Care Center* and Other Past and Future Plaintiffs for Whom the *Bragdon* Approach is Not Useful..... 484

III. AIDS-Phobia and the “Regarded As” Prong..... 491

IV. The “Regarded As” Prong as a Solution for Remedying Discrimination..... 496

Conclusion..... 502

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INTRODUCTION

On March 30, 1998, the United States Supreme Court heard oral arguments in *Bragdon v. Abbott*,¹ the Supreme Court's first case in which Acquired Immunodeficiency Syndrome ("AIDS") and Human Immunodeficiency Virus ("HIV")² were issues before the Court. On April 13, 1998, a judge in the Western District of Wisconsin decided a motion for summary judgment in *United States v. Happy Time Day Care Center*³ that demonstrated a loophole in the Supreme Court's then-unannounced decision in *Bragdon*.⁴ The issue before both courts was

1. 118 S. Ct. 2196, 2213 (1998) (holding that asymptomatic HIV infection is a disability for the purposes of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1994)).

2. HIV is the virus that causes AIDS. See generally F. Barre-Sinoussi et al., *Isolation of a T-Lymphotropic Retrovirus from a Patient at Risk for Acquired Immune Deficiency Syndrome (AIDS)*, 220 SCIENCE 868 (1983) (concluding that HIV causes AIDS); Robert C. 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) (observing a causative link between HTLV-III virus and AIDS); Jay A. Levy et al., *Isolation of Lymphocytotropic Retroviruses from San Francisco Patients with AIDS*, 225 SCIENCE 840 (1984) (noting strong suggestions that two retroviruses may cause AIDS).

The Supreme Court's decision in *Bragdon* provides an excellent background on the science of HIV disease. See *Bragdon*, 118 S. Ct. at 2204. Justice Kennedy carefully and thoughtfully describes the progression from exposure to the virus to the condition known as AIDS, writing:

A person is regarded as having AIDS when his or her CD4+ count [a kind of white blood cell, also known as T cells] drops below 200 cells/mm³ of blood or when CD4+ cells comprise less than 14% of his or her total lymphocytes. During this stage, the clinical conditions most often associated with HIV, such as *pneumocystis carinii* pneumonia, Kaposi's sarcoma, and non-Hodgkins lymphoma, tend to appear. In addition, the general systemic disorders present during all stages of the disease, such as fever, weight loss, fatigue, lesions, nausea, and diarrhea, tend to worsen. In most cases, once the patient's CD4+ count drops below 10 cells/mm³, death soon follows.

Id. (citations omitted).

Former Surgeon General C. Everett Koop, in 1988, observed that it is "inappropriate to think of [HIV disease] 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." Letter from C. Everett Koop, Surgeon General, to Douglas W. Kmiec, Acting Assistant Attorney General (July 29, 1988), reprinted in *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong. 367-68 (1989). Accordingly, this Comment will not draw arbitrary distinctions among the various phases of HIV disease and instead, will treat HIV infection as a singular phenomenon.

3. 6 F. Supp. 2d 1073 (W.D. Wis. 1998) (holding that HIV infection is a disability for the purposes of the ADA).

4. See *id.* at 1080 (holding that plaintiff could not establish a disability under the theory established by the First Circuit Court of Appeals in *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997)). The circuit court in *Bragdon* held that HIV impaired the plaintiff's major life activity of reproduction, thus bringing plaintiff within the protections of the ADA. See *Bragdon*, 107 F.3d at 949. The Supreme Court essentially affirmed the First Circuit's theory in *Bragdon v. Abbott*, 118 S. Ct. 2196, 2213 (1998).

whether asymptomatic HIV infection is a disability⁵ for purposes of the Americans with Disabilities Act of 1990 (“ADA”).⁶

Both courts held that HIV could be a disability for the purposes of the ADA, but for markedly different reasons.⁷ These differing reasons arise because of the dissimilarities between the plaintiffs. The Supreme Court in *Bragdon* involved a woman of child-bearing age;⁸ the district court in *Happy Time Day Care* involved a three-year-old boy.⁹ The Supreme Court in *Bragdon* found that the plaintiff was substantially limited in her major life activity of reproduction.¹⁰ The district court in *Happy Time Day Care* could not consider this argument—three-year-old boys do not reproduce.¹¹ Thus, the district court was forced to examine other major life activities affected by the boy’s HIV infection and consider other theories of disability to determine whether the boy might be disabled for purposes of the ADA.¹²

Using the maxim that similar cases should be treated similarly and dissimilar cases should be treated differently,¹³ is it appropriate that asymptomatic HIV plaintiffs must rely on differing theories of disability for ADA protection? This Comment argues that it is not appropriate. Although different, the two plaintiffs share one overarching commonality: they were both the victims of discrimination on the basis of their HIV infection. If the plaintiffs’ allegations are true, the defendants in both cases allowed HIV

5. See *Bragdon*, 118 S. Ct. at 2200 (noting that the Supreme Court granted certiorari to review whether the HIV-infected plaintiff was actually disabled); *Happy Time Day Care*, 6 F. Supp. 2d at 1074 (framing the issue as whether the plaintiff is disabled for the purposes of the ADA).

6. 42 U.S.C. § 12101(b)(1) (1994) (declaring that one purpose of the ADA is to provide a national mandate for eliminating discrimination against the disabled).

7. See *Bragdon*, 118 S. Ct. at 2207 (holding that plaintiff’s HIV infection substantially impaired her ability to reproduce); *Happy Time Day Care*, 6 F. Supp. 2d at 1075 (holding that plaintiff’s HIV infection might substantially impair his major life activity of caring for himself and that the defendants might have regarded him as disabled).

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

9. See *Happy Time Day Care*, 6 F. Supp. 2d at 1080 (noting that it is inherently illogical to inquire as to whether a three-year-old child is substantially impaired as to the major life activity of reproduction).

10. See *Bragdon*, 118 S. Ct. at 2206-07 (deciding that although the plaintiff was still able to reproduce, danger to her partner and child limited the activity).

11. See *Happy Time Day Care*, 6 F. Supp. 2d at 1080 (observing that it is illogical for the court to inquire whether an individual who is not yet capable of “a major life activity” is limited by an external factor from engaging in that activity).

12. See *id.* at 1081, 1083 (allowing the plaintiff to proceed on theories that his HIV infection substantially impaired his major life activity of caring for himself and that the defendant regarded him as disabled).

13. See ARISTOTLE, NICOMACHEAN ETHICS 1033A-1131B; ARISTOTLE, A POLITICS 1280A-1280B (defining justice as treating like cases in a like manner and unlike cases in an unlike manner).

infection to influence their decision about offering public accommodations to the plaintiffs, thus engaging in discriminatory activity.¹⁴ These cases are alike and should be treated similarly.

By failing to treat HIV infection as a per se disability, the Supreme Court sanctions the unequal application of the ADA to HIV-infected individuals by the lower courts.¹⁵ The *Bragdon* decision could allow some courts to treat reproduction as the only major life activity affected by HIV infection.¹⁶ This could foreclose the litigation of other, novel major life activities.¹⁷ Ironically, the *Bragdon* decision could have the paradoxical effect of prohibiting discrimination against some HIV-infected individuals who are “disabled” while failing to protect HIV-infected individuals who are not “disabled” from discrimination based on age, sexual orientation, or reproductive dysfunction.¹⁸ To avoid these uncertainties, future plaintiffs should abandon the manipulable language of the “actual disability” prong of the ADA in favor of uniform treatment of HIV infection under the “regarded as” prong.¹⁹

The “regarded as” prong of the ADA clarifies as discrimination any instance in which a disease or physical impairment, whether real or imaginary, limiting or not limiting, is a factor in the decision-making processes of an employer or a public or private accommodation.²⁰ The “regarded as” prong of the ADA creates a tautology whereby the protections of the statute are triggered by the offense itself—the act

14. See *Bragdon*, 118 S. Ct. at 2201 (describing how the defendant dentist refused to fill an HIV-positive plaintiff's cavity unless the procedure was performed in a hospital and the plaintiff paid all of the hospital costs); *Happy Time Day Care*, 6 F. Supp. 2d at 1077-78 (recounting how the defendant day care centers refused to provide the plaintiff with day care after the plaintiff's aunt revealed that he was HIV-infected).

15. There is disagreement among the members of the Supreme Court as to the meaning of *Bragdon*. In *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), Justice O'Connor construed *Bragdon* to mean that “whether a person has a disability is an individualized inquiry.” *Id.* at 2147. However, in *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999), Justice Souter used *Bragdon* to imply that “some impairments may invariably cause a substantial limitation of a major life activity” *Id.* at 2169; cf. Catherine J. Lanctot, *Ad Hoc Decision Making and Per se Prejudice: How Individualizing the Determination of “Disability” Undermines the ADA*, 42 VILL. L. REV. 327, 336-37 (1997) (demonstrating how ambiguities in the ADA created a split in the circuits leaving only some HIV-infected individuals protected by the ADA).

16. See *infra* notes 76-78 and accompanying text (discussing the failure of the Court to list other major life activities that may fall within the ADA).

17. See *infra* notes 76-78 and accompanying text (noting also that a “disability” under the ADA is determined on a case by case basis).

18. See *infra* Part II (analyzing the types of plaintiffs whose claims may not fall within the *Bragdon* holding).

19. See *infra* Part III (identifying the “regarded as” prong of the ADA as an alternative prong for future HIV-infected plaintiffs).

20. See *infra* Part IV (deeming the “regarded as” prong as the most appropriate remedy for discrimination).

of discrimination—and not because the victim happens to meet some particular criterion.²¹

Part I of this Comment outlines the origins and basic provisions of the ADA and gives a critical analysis of *Bragdon v. Abbott*. Part II examines why the court in the Western District of Wisconsin was unable to find the plaintiff disabled under the “actual disability” prong, and identifies other actual and potential plaintiffs for whom the Supreme Court decision in *Bragdon* is not a solution. Part III discusses society’s past and present responses to the HIV disease and the AIDS epidemic and how these responses can be applied to the “regarded as” prong of the ADA. Part IV examines the “regarded as” prong of the ADA in more detail and proposes it as a solution to the problems faced by the district court in *Happy Time Day Care*—problems that plaintiffs will need to contend with in the future.

I. THE ADA AND *BRAGDON V. ABBOTT*

Although HIV infection and AIDS existed at the drafting of the ADA, and Congress contemplated the inclusion of HIV and AIDS, courts have struggled with how to account for HIV infection in the ADA’s definition of disability.²² The Supreme Court attempted to settle this issue in *Bragdon*,²³ however, more questions than answers have resulted from the litigation in *Bragdon*.

A. *Drafting the ADA*

The ADA finds its major antecedent in Section 504 of the Rehabilitation Act of 1973 (“Rehabilitation Act”).²⁴ The Rehabilitation Act bans disability-based discrimination²⁵ in federal

21. See *infra* notes 184-98 and accompanying text (arguing that the focus of ADA analysis should be whether a defendant’s negative reactions to plaintiff’s disability is the primary source of defendant’s behavior).

22. See Rhonda K. Jenkins, Note, *Square Pegs and Round Holes: HIV and the Americans with Disabilities Act*, 20 S. ILL. U. L.J. 637, 646-47 (1996) (arguing that because the ADA borrowed language from the Rehabilitation Act, the “relatively new phenomenon and [] completely unique disease concept” of HIV does not fit well into the ADA definition of disability).

23. See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2207 (1998) (holding that for plaintiff, a woman of child-bearing age, HIV infection is a disability because it limits her major life activity of reproducing).

24. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a) (1994). Section 504 provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, 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 . . .” *Id.*

25. The original language of the statute used the term “handicap” instead of “disability.” In 1992, Congress amended the language of the Rehabilitation Act by substituting “handicap” with “disability.” See Rehabilitation Act Amendments of

programs.²⁶ When activists sought to expand the Rehabilitation Act to include all realms of daily life, some people with disabilities lobbied Congress to amend the Civil Rights Act of 1964²⁷ to include disability.²⁸ Many legislators, however, believed that the Civil Rights Act of 1964 was not written adequately to address all of the issues faced by people with disabilities,²⁹ and others feared that new debate over the Civil Rights Act of 1964 might weaken rather than expand its scope.³⁰ As a result of these concerns, a free-standing civil rights bill for people with disabilities emerged.³¹ Congress acted swiftly on the

1992, Pub. L. No. 102-569, § 102(p) (32), 106 Stat. 4344, 4360.

26. See 29 U.S.C. § 794(a)-(b) (1994) (prohibiting discrimination against otherwise qualified individuals with disabilities by any government agency or private entity that receives federal assistance).

During the years between the passage of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, Congress also dealt with discrimination on the basis of disability in education, voting accessibility, the airline industry, and housing. See Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975), *amended and renamed* Individuals with Disabilities Education Act of 1990 ("IDEA"), Pub. L. No. 101-476, 104 Stat. 1141 (codified as amended at 20 U.S.C. §§ 1400-1485 (1994)) (giving all children with disabilities the right to public education); Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 28 U.S.C. §§ 3601-3619 (1994)) (protecting disabled persons from discrimination in housing); Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435, 98 Stat. 1678 (1984) (codified as amended at 42 U.S.C. § 1973ee (1994)) (improving access to voting for handicapped and elderly); Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 773 (1975), *amended and renamed* Developmental Disabilities Assistance and Bill of Rights Act, Pub. L. No. 98-527, 98 Stat. 2662 (1984) (codified as amended at 42 U.S.C. §§ 6000-6083 (1994)) (granting mentally retarded persons rights to habilitation and protection from harm); Air Carrier Access Act, Pub. L. No. 99-435, 100 Stat. 1080 (1986) (codified as amended at 49 U.S.C. § 41705 (1994)) (establishing airline procedures to provide accommodations to the disabled). See generally Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 427-28 (1991) (describing the progression of anti-discrimination statutes from the Rehabilitation Act of 1973 to the ADA).

27. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1965) (codified at 42 U.S.C. §§ 2000a-2000h-6 (1994)) (prohibiting discrimination based on race, color, religion, national origin, or sex).

28. See Burgdorf, *supra* note 26, at 429 (explaining that attempts to amend the Civil Rights Act of 1964 to include disability continued through the mid-1980s).

29. See *id.* at 429-31 (writing that some commentators asserted that discrimination on the basis of disability had unique aspects not shared with discrimination on the basis of race and gender). People with disabilities sometimes require certain accommodations to participate in protected activities—no such accommodations are required to eliminate race or gender discrimination. See Robert L. Burgdorf Jr. & Christopher G. Bell, *Eliminating Discrimination Against Physically and Mentally Handicapped Persons: A Statutory Blueprint*, 8 MENTAL & PHYSICAL DISABILITY L. REP. 64, 66-69 (1984).

30. See Burgdorf, *supra* note 26, at 429.

31. See *id.* at 432 (writing that the proposal for a free-standing civil rights bill to protect people with disabilities first appeared in legal literature in 1984). This proposal appeared in Burgdorf and Bell's article. See Burgdorf & Bell, *supra* note 29.

Current efforts to pass a civil rights law prohibiting discrimination on the basis of sexual orientation have also dispensed with the idea of amending existing civil rights

ADA—it was introduced first into the Senate on April 28, 1988,³² and then approved by overwhelming majorities by both houses of Congress on July 13, 1990.³³

The ADA applies to three kinds of covered entities: employers,³⁴ public programs,³⁵ and public accommodations.³⁶ The definition of disability is identical for all three kinds of covered entities,³⁷ as is the framework of analysis.³⁸ Virtually all employers, public programs, and public accommodations are included in the ADA's list of covered entities.³⁹

Congress did not write the ADA to remedy discrimination only on the basis of certain disabilities. The ADA does not list any particular conditions or impairments that are to be considered disabilities.

legislation and instead are focusing on a free-standing model, like the ADA. *See* Employment Non-Discrimination Act of 1999, S. 1276, 106th Cong. (1999); Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. (1999) (both are unenacted bills prohibiting discrimination in employment on the basis of sexual orientation).

32. *See* Americans with Disabilities Act of 1988, S. 2345, 100th Cong. (1988), 134 CONG. REC. S9357 (daily ed. Apr. 28, 1988) (introduced by Sen. Harkin). The ADA was introduced into the House of Representatives the next day, April 29, 1988. *See* Americans with Disabilities Act of 1988, H.R. 4498, 100th Cong. (1988), 134 CONG. REC. H9600 (daily ed. Apr. 29, 1988) (introduced by Rep. Kasich).

33. *See* 136 CONG. REC. H17251, 17280 (daily ed. July 12, 1990) (reporting that the House of Representatives passed the ADA in a vote of 377 to 28); 136 CONG. REC. S17,177, 17203 (daily ed. July 13, 1990) (reporting that the Senate passed the ADA in a vote of 91 to 6). *See generally* Burgdorf, *supra* note 26, at 433-34 (describing the passage of the ADA). President Bush signed the ADA on July 26, 1990. In his remarks upon signing, President Bush commented,

[The ADA] signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life. As the Declaration of Independence has been a beacon for people all over the world seeking freedom, it is my hope that the Americans with Disabilities Act will likewise come to be a model for the choices and opportunities of future generations around the world.

Statement by President George Bush Upon Signing S. 933, 1990 PUB. PAPERS 1070, 1071 (July 26, 1990), *reprinted in* 1990 U.S.C.C.A.N. 601, 602.

34. *See* 42 U.S.C. § 12111 (1994) (defining “covered entity” for employment purposes as an employer with 15 or more employees, an employment agency, a labor organization, or a joint management committee).

35. *See id.* § 12131 (defining “public program” as a state or local government, a department or agency of a state or local government, the National Railroad Passenger Corporation, or any commuter authority).

36. *See id.* § 12181 (defining “public accommodation” as a range of stores, service providers, educational institutions, and places of recreation).

37. *See id.* § 12102(2) (defining “person with a disability” for the entire ADA).

38. *See id.* § 12111(8); *id.* § 12131(2); *id.* § 12182(a) (all three frameworks of analysis using a comparable standard to evaluate discrimination on the basis of disability).

39. *See* Burgdorf, *supra* note 26, at 454-56, 465, 470-72. As a result of the comprehensive definition of covered entity, the term “covered entity” will be used in this Comment to refer interchangeably to employers, public accommodations, and public programs to avoid the implication that this Comment refers only to one kind of covered entity.

Instead, the ADA takes a “big tent” approach, thereby allowing anyone who fits the definition set forth by the statute to take refuge under it. The ADA defines disability as:

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such impairment; or
- (C) being regarded as having such impairment.⁴⁰

The definition of disability used by the ADA is not original; Congress borrowed it from the Rehabilitation Act.⁴¹ This definition is important because it expresses the congressional intent not to limit the class of those eligible to sue under the ADA (except persons with conditions specifically excluded⁴² in the statute itself).

Specifically, legislators were concerned about the comprehensiveness of any list of conditions.⁴³ Congress intended the ADA definition of disability to be flexible enough to be responsive to new conditions, diseases, and impairments as they emerged and affected the population.⁴⁴

Despite the relative newness of HIV and AIDS at the drafting of the ADA, the legislative history contains many examples of the impact of the AIDS epidemic on American lives.⁴⁵ The record also reflects an intent by legislators to include AIDS and HIV infection as conditions covered by the ADA.⁴⁶ Congress did not map out how an individual

40. 42 U.S.C. § 12102(2)(A)-(C).

41. See *Bragdon v. Abbott*, 118 S. Ct. 1296, 2202 (1998) (commenting that the definition of “disability” in the ADA is almost verbatim the definition of “handicapped individual” in the Rehabilitation Act).

42. *But see* 42 U.S.C. § 12211 (excluding sexual orientation, as well as certain sexual disorders and mental illnesses, from the list of impairments that could be considered disabilities under the statute).

43. See H.R. REP. NO. 101-485(II), at 51 (1989), *reprinted in* 1990 U.S.C.C.A.N. 303, 333 (describing Congress’ concern that in positing a list of protected disabilities, other disabling conditions that emerged later might be excluded).

44. See *id.*, *reprinted in* 1990 U.S.C.C.A.N. 303, 333 (discussing reasons for not developing a list of conditions covered by the ADA and then giving a non-exclusive list of covered conditions, among them HIV infection).

45. See *Americans with Disabilities Act of 1989: Hearing on S. 933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong. 102 (1989) (statement of Betty and Emory Corey) (describing the Coreys’ difficulties in finding a funeral home that would provide services and a burial for their six-year-old foster daughter who died of AIDS); *Americans with Disabilities Act of 1988: Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources and Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong. 76-78 (1988) (statement of Belinda Mason) (describing discrimination that she faced on a daily basis because of her HIV positive status, and describing discrimination faced by other rural residents who were infected with HIV or were associated with people infected with HIV).

46. See *Americans with Disabilities Act of 1989: Hearing on S. 933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong. 825-26 (1989) (statement of Hon. Lowell Weiker, Jr.) (emphasizing that the ADA has

with HIV or AIDS would establish a prima facie claim under the ADA, but did include in the legislative history a Department of Justice memorandum determining that HIV infection and AIDS could be found to be disabilities for the purposes of the Rehabilitation Act under an actual or "regarded as" disabled theory.⁴⁷ As a result of the ambiguity as to how HIV should best be litigated under the ADA, i.e., under an actual or "regarded as" theory, some commentators have suggested that the ADA be amended to mention specifically AIDS and HIV infection as per se disabilities.⁴⁸

support from every segment of the disability community, including those infected with HIV); *Americans with Disabilities Act of 1988: Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources and Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong. 39-41 (1988) (statement of Adm. James Watkins, Chairperson, President's Commission on the Human Immunodeficiency Virus Epidemic) (insisting that comprehensive legislation prohibiting discrimination on basis of HIV seropositivity status is critical in addressing HIV epidemic); H.R. REP. NO. 101-485(II), at 51 (1989), *reprinted in* 1990 U.S.C.C.A.N. 303, 333 (explaining congressional intent in not positing a list of protected disabilities, yet providing an exemplary list of conditions covered, among them HIV infection); H.R. REP. NO. 101-485(III) at 28 n.18, *reprinted in* 1990 U.S.C.C.A.N. 445, 451 n.18 (quoting from memorandum written by the then Acting Assistant Attorney General that concluded HIV is an impairment under the "first test of the definition" because it substantially limits a major life activity); S. REP. NO. 101-116, at 19 (1989) (referring to the Presidential Commission on the HIV Epidemic's recommendation for comprehensive anti-discrimination protection for people with symptomatic or asymptomatic HIV infection); *id.* at 22 (listing HIV infection among the conditions that the ADA is intended to cover).

Congress so clearly intended that HIV infection be covered by the ADA that it used individuals infected with HIV as examples when describing prohibited, discriminatory activities. *See* H.R. REP. NO. 101-485(II), at 65, *reprinted in* 1990 U.S.C.C.A.N. 303, 347 (stating that under the ADA an employer could not transfer an employee with HIV to a different job without the employee's consent); H.R. REP. NO. 101-485(II), at 79, *reprinted in* 1990 U.S.C.C.A.N. 303, 361 (explaining that excluding people who currently use illegal drugs from the definition of "disability" does not exclude people who take experimental drugs for epilepsy, mental illness or AIDS if those drugs are taken under the supervision of a physician); H.R. REP. NO. 101-485(II), at 106, *reprinted in* 1990 U.S.C.C.A.N. 303, 389 (providing the example that a drug treatment center could refuse to treat someone who is not a drug addict but could not refuse to treat a drug addict who is HIV positive); H.R. REP. NO. 101-485(III), at 39, *reprinted in* 1990 U.S.C.C.A.N. 445, 461 (providing as an example of prohibited activity under the association prong of the ADA an employer who discharges an employee because the employee does volunteer work for people with AIDS).

47. *See* Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), *reprinted in Americans with Disabilities Act of 1988: Hearings on S. 933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong. 338-68 (1989) (interpreting the Supreme Court's decision in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), to extend disability coverage to symptomatic or asymptomatic HIV infection either under actual or "regarded as" disabled theory).

48. *See* Jeffrey A. Mello, *Limitations of the Americans with Disabilities Act in Protecting Individuals with HIV from Employment Discrimination*, 19 SETON HALL LEGIS. J. 73, 112-13 (1994) (suggesting that Congress amend the ADA to specify that HIV infection is a per se disability or that state and local legislators pass laws to have the same effect).

B. *Bragdon v. Abbott*

Bragdon is the first Supreme Court case that dealt directly with HIV or AIDS.⁴⁹ Sidney Abbott, a Maine resident who was infected with HIV but displayed no symptoms of infection,⁵⁰ sought to have a cavity filled by a dentist, Dr. Randon Bragdon.⁵¹ After Dr. Bragdon told Ms. Abbott that he would only fill the cavity in a hospital at her expense,⁵² Ms. Abbott filed a lawsuit⁵³ claiming that she suffered discrimination because of an actual disability, her HIV infection.⁵⁴ The federal district court in Maine agreed and granted Ms. Abbott summary judgment.⁵⁵ The First Circuit affirmed,⁵⁶ and the Supreme Court affirmed in part and remanded for more proceedings to determine whether Ms. Abbott posed a "direct threat" of infection to Dr.

See, e.g., Chai Felblum, Seminar, Litigating ADA claims after *Bragdon v. Abbott*, National Lesbian and Gay Lawyers Association's Lavendar Law Conference (Oct. 16, 1998) (speaking as an ADA drafter, Prof. Feldblum remarked, "[w]e messed up," because language of the statute can be manipulated so as to not protect certain HIV-infected individuals).

49. *See* Jenkins, *supra* note 22, at 640 (commenting that as of 1996, the Supreme Court had not heard a case determining whether HIV infection is a physical disability for purposes of ADA).

50. The Supreme Court noted in *Bragdon* that the term "asymptomatic HIV infection" is a misnomer. *See* *Bragdon v. Abbott*, 118 S. Ct. 1296, 2204 (1998). The Court stated that "after the symptoms associated with the initial stage subside, the disease enters what is referred to sometimes as its asymptomatic phase. The term is a misnomer, in some respects, for clinical features persist throughout, including lymphadenopathy, dermatological disorders, oral lesions, and bacterial infections."
Id.

This is not new information. In 1988, Surgeon General C. Everett Koop expressed a similar sentiment in a letter to Acting Assistant Attorney General Douglas W. Kmiec. *See* Letter from C. Everett Koop, Surgeon General, to Douglas W. Kmiec, Acting Assistant Attorney General (July 29, 1988), reprinted in *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong. 367-68 (1989) (stating that "from a purely scientific perspective, persons with HIV infection are clearly impaired Like a person in the early stages of cancer, they appear to be outwardly healthy but are in fact seriously ill.").

51. *See* *Bragdon*, 118 S. Ct. at 2201 (reciting circumstances leading to ADA claim).

52. *See id.* (stating that plaintiff would have to pay hospital costs in addition to normal dentist's fees).

53. *See generally* *Abbott v. Bragdon*, 912 F. Supp. 580 (D. Me. 1995).

The Washington Post reports that the events culminating in the Supreme Court case were not an accident. Dr. Bragdon had been outspoken about his views that health care workers must take special precautions when treating patients infected with HIV. *See* Joan Biskupic, *Is HIV Covered by Disability Act?: Justices to Hear Case Against Dentist Who Refused Office Care*, WASH. POST, Mar. 29, 1998, at A3 (describing the events leading up to the lawsuit). Also, Ms. Abbott was part of a nation-wide movement challenging health care professionals who refuse to treat people infected with HIV. *See id.*

54. *See* *Bragdon*, 912 F. Supp. at 595.

55. *See id.* at 586 (holding that plaintiff was, as a matter of law, disabled for the purposes of the ADA).

56. *See* *Abbott v. Bragdon*, 107 F.3d 934, 942 (1st Cir. 1997) (holding that HIV infection is a disability for fecund women).

Bragdon.⁵⁷

In *Bragdon*, the Supreme Court addressed two major issues that lower courts had considered and on which they had reached conflicting results: whether asymptomatic HIV infection is an impairment;⁵⁸ and whether reproduction is a major life activity as contemplated by the ADA.⁵⁹

Utilizing the best available medical knowledge about HIV, Justice Anthony Kennedy, in his majority opinion, described the debilitating effects of HIV on bodily systems⁶⁰ and even questioned the accuracy of the term “asymptomatic phase.”⁶¹ Justice Kennedy specifically referred to HIV’s destructive impact at the cellular level, writing “infection with HIV causes immediate abnormalities in a person’s blood, and the infected person’s white cell count continues to drop throughout the course of the disease, even when the attack is concentrated in the lymph nodes.”⁶² Using a very common-sense approach, and after looking at the realities of HIV disease, Justice Kennedy concluded,

[i]n light of these facts, HIV infection must be regarded as a physiological disorder with a constant and detrimental effect on the infected person’s hemic and lymphatic systems from the moment of infection. HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease.⁶³

After establishing that all stages of the HIV infection are impairments, Justice Kennedy then examined whether Ms. Abbott was impaired as to a major life activity. Justice Kennedy expressed

57. See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2213 (1998) (holding that plaintiff was disabled for purposes of ADA and remanding for a determination of whether plaintiff posed significant risk of transmitting HIV to defendant).

58. Compare *Rinnebaum v. NationsBank of Md.*, 123 F.3d 156, 169 (4th Cir. 1997) (holding that asymptomatic HIV infection is never an impairment), with *Bragdon*, 107 F.3d at 939 (holding that asymptomatic HIV infection is an impairment).

59. Compare *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102 (S.D. Iowa 1995) (holding that reproduction is not a major life activity), with *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797 (N.D. Ill. 1996) (holding that reproduction is a major life activity).

Also at issue in *Bragdon* was the question of when someone poses a “direct threat” of infection to co-workers and service providers. This issue, however, is beyond the scope of this Comment.

60. See *Bragdon*, 118 S. Ct. at 2204 (discussing the effects of HIV infection on the hemic and lymphatic systems).

61. See *id.* (referring to the term “asymptomatic” as a misnomer because “clinical features persist throughout”).

62. *Bragdon*, 118 S. Ct. at 2204.

63. *Id.*

willingness to consider other activities,⁶⁴ but Ms. Abbott had identified reproduction as the major life activity that her HIV infection impaired.⁶⁵ Accordingly, Justice Kennedy limited review to issues raised at the trial level.⁶⁶

Previously, courts were split as to whether reproduction qualified as a major life activity for the purposes of the ADA.⁶⁷ Justice Department regulations give a partial list of major life activities, suggesting activities such as walking, sitting, standing, and reaching, but they provide no guidelines for determining other qualifying activities.⁶⁸ Justice Kennedy rejected arguments that major life activities had to meet any specific set of criteria.⁶⁹ Instead, Justice Kennedy simply, and sensibly, observed that “reproduction and the sexual dynamics surrounding it are central to the life process itself.”⁷⁰

64. *See id.* at 2204-05 (acknowledging other possible major life activities). Specifically Justice Kennedy writes,

Given the pervasive, and invariably fatal, course of the disease, its effect on major life activities of many sorts might have been relevant to our inquiry. Respondent and a number of *amici* make arguments about HIV’s profound impact on almost every phase of the infected person’s life. . . . We have little doubt that had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities.

Id. (citations omitted). *Amici* argued other substantially impaired activities include caring for one’s self, sexual activity, and living life. *See* Brief for AIDS Action Council, Supporting Respondents, *Bragdon v. Abbott*, 118 S. Ct. 2196 (No. 97-156), *available in* 1998 WL 47252, at *23-28 (arguing that “virtually everything involved in caring for oneself day to day, from the profound to the trivial, is altered forever by an HIV diagnosis”); Brief for Infectious Diseases Society of America, Supporting Respondents, *Bragdon v. Abbott*, 118 S. Ct. 2196 (No. 97-156), *available in* 1998 WL 47250, at *7-11 (arguing that HIV infection substantially limits one’s ability to care for oneself because of strict drug regimens, parasites such as cryptosporidium, inability to use vaccinations that contain live viruses or bacteria, and constant attention to other factors that might depress an individual’s immune system).

65. *See Abbott v. Bragdon*, 912 F. Supp. 580, 586 (D. Me. 1995) (commenting that plaintiff, who identified reproduction as her major life activity, was substantially impaired by HIV infection).

66. *See Bragdon*, 118 S. Ct. at 2205 (limiting review to whether HIV infection substantially impairs reproduction).

67. *See supra* note 59 and accompanying text.

68. *See* 28 C.F.R. § 35.104(2) (1999) (giving a non-exhaustive list of “major life activities” and not providing a framework for determining other “major life activities”); 28 C.F.R. § 36.104(2) (1999) (same); 29 C.F.R. § 1630.2(i) (1999) (same).

The Supreme Court questioned whether any agency had been delegated the authority to interpret the term “disability.” *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2145 (1999) (parsing the grants of agency authority). Because the Court determined that this issue did not need to be decided to resolve the dispute, the Court did not decide what deference should be given to these regulations. *See id.* at 2146 (declining to rule on the issue).

69. *See Bragdon*, 118 S. Ct. at 2205 (observing that the breadth of the word “major” in “major life activity” precludes attempts to limit it to “public, economic, or daily” activities).

70. *See id.* at 2205.

Therefore, reproduction qualified as a major life activity under the definition of the ADA.

Finally, Ms. Abbott had to demonstrate that her HIV infection substantially impaired her ability to reproduce. Justice Kennedy clarified that "impaired" does not mean "rendered impossible."⁷¹ Ms. Abbott did not have to demonstrate that reproduction was impossible for her, but merely that her ability to conceive and bear a healthy child without risk to the father or the child was limited.⁷² Citing the best available research, Justice Kennedy found that a twenty percent risk of HIV transmission to the father⁷³ and eight percent risk of HIV transmission to the child, with AZT therapy,⁷⁴ was a substantial impairment on Ms. Abbott's ability to reproduce and therefore, she was eligible for protection under the ADA.⁷⁵

Although the Supreme Court reached a conclusion that determined Ms. Abbott's HIV infection to be covered by the ADA, not all people infected with HIV will benefit from the *Bragdon*

71. *See id.* at 2206 ("The [ADA] addresses substantial limitations on major life activities, not utter inabilities.").

72. *See id.* (formulating the test for whether plaintiff's ability to reproduce was substantially impaired).

73. *See id.* (referring to studies that indicate the likelihood of HIV transmission from an infected woman to an uninfected man during unprotected intercourse).

74. *See id.* (referring to studies that indicate the likelihood of HIV transmission from an infected mother to her unborn child with AZT therapy). Azidothymidine, commonly known as AZT, is sold under the brand name Retrovir and referred to by scientists as "Ziduidine." *See* Caitlin C. Ryan & Ronald Bogard, *Medical Basics, in AIDS BENCHBOOK SUPPLEMENT 1*, 12 (Michele A. Zavos ed., 1994). AZT first became available in 1987. *See id.* AZT, like other commonly known HIV drugs such as ddI, ddC, d4T and 3TC, is a nucleoside analog reverse transcriptase inhibitor that interferes with HIV's ability to transfer its genetic material into DNA and infect a healthy cell. *See* Janine Maenza & Charles Flexner, *Combination Antiretroviral Therapy for HIV Infection* (last modified May 19, 1999) <<http://www.aafp.org/afp/980600ap/maenza.html>> (describing how nucleoside reverse transcriptase inhibitors work, as well as discussing proper dosing, side effects, and cost).

75. *See Bragdon*, 118 S. Ct. at 2207 (holding that Ms. Abbott is actually disabled under the ADA and declining to rule on whether HIV infection is a per se disability under ADA).

Justice Kennedy was not persuaded that the slight statistical risk of infection to the child was not a limitation, thus stating that "it cannot be said as a matter of law that an 8% risk of transmitting a dread and fatal disease to one's child does not represent a substantial limitation on reproduction." *See id.* at 2206.

This decision was consistent with the vast weight of precedent holding that HIV infection is a disability for the purposes of the ADA. *See* *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994); *Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990); *Austin v. Pennsylvania Dep't of Corrections*, 876 F. Supp. 1437, 1465 (E.D. Pa. 1995); *EEOC v. Chemtech Int'l Corp.*, No. Civ. A. H-94-2848, 1995 WL 608355 at *1, 4 A.D. Cases 1466, 7 N.D.L.R.P. 193 (S.D. Tex. July 21, 1995); *Robinson v. Henry Ford Health Sys.*, 892 F. Supp. 176, 180 (E.D. Mich. 1994); *Howe v. Hull*, 873 F. Supp. 72, 78 (N.D. Ohio 1994); *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1318-20 (E.D. Pa. 1994); *T.E.P. v. Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993); *Doe v. District of Columbia*, 796 F. Supp. 559, 568 (D.D.C. 1992); *Glanz v. Vernick*, 756 F. Supp. 632, 635 (D. Mass. 1991).

decision. Justice Kennedy carefully observed that other activities could be major life activities affected by HIV infection, but he neither listed any specific activities⁷⁶ nor set out any criteria to determine a major life activity.⁷⁷ Although the *Bragdon* decision did not foreclose the possibility that HIV infection is a disability for purposes of the ADA, it failed to hold that HIV infection is a per se disability and did not establish a framework of analysis that all future plaintiffs could use.⁷⁸

II. *UNITED STATES V. HAPPY TIME DAY CARE CENTER*⁷⁹ AND OTHER PAST AND FUTURE PLAINTIFFS FOR WHOM THE *BRAGDON* APPROACH IS NOT USEFUL

Happy Time Day Care is an example of an HIV-infected plaintiff who encountered difficulty in tailoring his case to the language of the ADA.⁸⁰ While *Bragdon* was pending before the Supreme Court, Judge Barbara Crabb in the Western District of Wisconsin considered *Happy Time Day Care*,⁸¹ a case that, regardless of *Bragdon's* outcome, did not fall neatly within the usual ADA framework. L.W., a three-year-old boy infected with HIV, lived with his aunt Rosetta McNuckle in Beloit, Wisconsin.⁸² L.W.'s aunt, who worked nights and slept during the morning and early afternoon, needed day care for L.W. during these times.⁸³ McNuckle obtained a list of day care providers from Rock County Human Services and began to inquire about day care from the listed providers.⁸⁴ McNuckle disclosed her nephew's HIV status to each of three day care centers she contacted, Defendants Kiddie Ranch, ABC Nursery, and Happy Time Day Care Center. All three declined to take L.W. into their day care programs.⁸⁵

76. Justice Kennedy observes that it is "legalistic" to limit the discussion of major life activities affected by HIV infection to reproduction and suggests that other plaintiffs might present other activities as well. *See Bragdon*, 118 S. Ct. at 2205. Justice Kennedy did not, however, present even a partial list of other possible major life activities, or mention which activities had been suggested by amici to be major life activities impacted by HIV infection. *See id.*; *see also supra* note 64 (discussing major life activities that amici suggested were activities impacted by HIV infection).

77. *See Bragdon*, 118 S. Ct. at 2205 (establishing that "major" suggests comparative importance, and rejecting the notion that major life activities must have an economic or public aspect, but not establishing any test for a major life activity).

78. *See id.* at 2207 (declining to rule that HIV infection is a per se disability and affirming that disability for the purposes of the ADA is an individualized inquiry).

79. 6 F. Supp. 2d 1073 (W.D. Wis. 1998).

80. *See id.* at 1073.

81. *See id.* at 1084.

82. *See id.* at 1077 (describing plaintiff's living situation).

83. *See id.*

84. *See id.*

85. *See id.* at 1077-78 (describing McNuckle's attempts to find day care for her nephew).

This case is a clear example of discrimination on the basis of disability—HIV status. Nevertheless, L.W. was required to demonstrate that because of his HIV infection he was a member of a protected class.⁸⁶ Judge Crabb had difficulties finding that L.W. fit the language of the ADA's actual disability prong because most courts previously relied on reproduction as the major life activity impaired by HIV infection.⁸⁷ As a three-year-old boy, L.W. could not reproduce and therefore, Judge Crabb could not rely on the First Circuit's formulation of disability used for Ms. Abbott in *Bragdon*.⁸⁸

Judge Crabb instead chose to examine other potential major life activities: living, growing, and socializing.⁸⁹ Judge Crabb ultimately found that a genuine issue of disputed fact existed as to whether L.W. was impaired in his ability to care for himself,⁹⁰ but rejected arguments that L.W. was impaired as to growing and socializing⁹¹ and also rejected living as a major life activity.⁹² Although Judge Crabb did not dismiss the plaintiff's claim altogether, she had difficulty finding that the plaintiff met the class requirements under the actual disability prong because he was incapable of reproducing.⁹³

86. *See id.* at 1078 (stating that plaintiff must first establish that he has a disability under the ADA).

87. *See id.* at 1080-81 (holding that L.W., as a child, cannot reproduce and therefore, cannot be substantially impaired in the major life activity of reproduction).

88. *See id.* at 1080 (determining that major life activity must be an activity available to that individual).

89. *See id.* at 1081 (considering major life activities other than reproduction for an HIV-infected three-year-old boy).

90. *See id.* (finding that a genuine issue of material fact existed as to whether plaintiff's HIV status impaired his ability to care for himself in the form of fighting infections). *But cf. Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995) (holding that a plaintiff cannot "bootstrap" or argue that she is limited in an activity particular to the bodily system that is impaired). The *Zatarain* court used this reasoning to hold that a condition in plaintiff's reproductive system could not be argued to impair her major life activity of reproducing. *See id.* at 243.

91. *See Happy Time Day Care*, 6 F. Supp. 2d at 1081 (accepting growing and socializing as major life activities but finding that plaintiff grew at a proportional rate to his peers and that he socialized normally).

92. *See id.* at 1081-82 (holding that to identify "living" as a major life activity is "tautological" and too expansive).

93. *See id.* at 1081 (determining that a three-year-old child cannot claim reproduction as his major life activity impaired by HIV infection); *see also Knapp v. Northwestern Univ.*, 101 F.3d 473, 481 (7th Cir. 1996) (finding that not all impairments affecting a major life activity are substantially limiting). Judge Crabb, however, also found a triable issue of fact as to whether the defendants regarded L.W. as impaired. *See Happy Time Day Care*, 6 F. Supp. 2d at 1083-84; *see also School Bd. of Nassau v. Arline*, 480 U.S. 273 (1987) (finding that the negative reactions of others can be substantially limiting); *cf. 28 C.F.R. pt. 36, app. B*, at 621 (1999) (stating that "[t]he perception of the private entity or public accommodation is a key element of this test").

Interestingly, courts heard several cases during the 1980s involving school children infected with HIV. *See Martinez v. School Bd. of Hillsborough County*, 861 F.2d

L.W. is not the only young HIV-infected individual to have difficulty demonstrating his inclusion in the class of those defined as actually disabled by the ADA. In *Ennis v. National Ass'n of Business & Educational Radio, Inc.*,⁹⁴ an association case,⁹⁵ the mother of a child infected with HIV was fired for failing to perform the duties of her job.⁹⁶ The plaintiff, Ennis, claimed that the defendant, the National Association of Business and Educational Radio sought to exclude her and her HIV-infected son, A.J., from their insurance policy to avoid paying high premiums for the catastrophic cost of care that A.J. would require.⁹⁷ Because the court heard this case on appeal from a motion for summary judgment, the record was not well developed as to how A.J. was substantially impaired as to a major life activity.⁹⁸ As a result, the court noted that it would be forced to determine that HIV infection is a per se disability for the purposes of the ADA.⁹⁹ Holding that a case-by-case approach is the appropriate method for

1502, 1506 (11th Cir. 1988) (deciding without analysis that plaintiff who is HIV-infected has a disability for purposes of the Rehabilitation Act and therefore, cannot be denied access to a public education); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 381-82 (C.D. Cal. 1987) (finding that the plaintiff who was infected with HIV has a disability for purposes of Rehabilitation Act and is eligible to attend kindergarten with other children); *Ray v. School Dist. of DeSoto County*, 666 F. Supp. 1524, 1538 (M.D. Fla. 1987) (granting preliminary injunction of parents of children infected with HIV to admit children into regular classroom settings). These cases were brought under the Rehabilitation Act and the Education for All Handicapped Children Act. See *Martinez*, 861 F.2d at 1504; *Thomas*, 662 F. Supp. at 381. Although the definitions of "handicap" used in those statutes were virtually identical to the definition of disability used in the ADA, courts hearing such cases assumed that HIV infection or AIDS was a handicap and did not scrutinize the plaintiffs' claim that they were members of a protected class. See *Thomas*, 662 F. Supp. at 382; see also *District 27 Community Sch. Bd. v. Board of Educ.*, 502 N.Y.S.2d 325, 341 (Sup. Ct. 1986) (holding that automatically excluding from school those children "handicapped" with AIDS violated the Rehabilitation Act).

94. 53 F.3d 55 (4th Cir. 1995).

95. The ADA protects anyone who has an association with someone who has a disability from discrimination on the basis of that association if the covered entity has knowledge of that association. See 42 U.S.C. § 12112(b)(4) (1994).

"Association" is not limited to relatives and spouses but has been defined by Department of Justice regulations to include people who do volunteer work with people with disabilities and other companions of people with disabilities. See 28 C.F.R. pt. 36, app. B, at 633 (1999) (describing which individuals are covered by the association prong of the ADA); 29 C.F.R. pt. 1630, app., at 360 (1999) (providing an example of volunteer work).

96. See *Ennis*, 53 F.3d at 56 (discussing reasons given by defendant for plaintiff's dismissal).

97. See *id.* at 57 (giving the plaintiff's explanation of situation).

98. See *id.* at 60 (noting that the record was not well developed at this stage of the litigation).

99. See *id.* (stating that because no evidence existed in the record that the plaintiff was impaired or was regarded as having an impairment, if the court held that the plaintiff was disabled, the court then would have to conclude that HIV-positive status is a per se disability).

determining a disability,¹⁰⁰ the court assumed for the purposes of this case that A.J. was disabled under the ADA because it could decide the case on other grounds.¹⁰¹

L.W. and A.J. are two examples of children who found it difficult to present their cases under the current ADA as it relates to HIV infection. Children represent a small but important portion of those living with HIV in the United States.¹⁰² Although advances in medical science have reduced the number of pediatric AIDS cases, children are frequently the victims of the most invidious forms of discrimination on the basis of HIV status.¹⁰³ Children, however, are not the only potential plaintiffs for whom reproduction is a contentious issue.

Some commentators have suggested that other segments of the population should be precluded from positing reproduction as the major life activity affected by their HIV infection.¹⁰⁴ Post-menopausal women,¹⁰⁵ impotent men,¹⁰⁶ those who avail themselves of new

100. See *id.* at 59 ("We believe that the plain language of the provision requires that a finding of disability be made on an individually-individual basis.").

101. See *id.* at 57 (affirming the lower court's decision because the plaintiff failed to present enough evidence to show that defendant employer's proffered reason for her discharge was a pretext for discrimination).

102. See Ann Kurth, *An Overview of Women and HIV Disease*, in UNTIL THE CURE: CARING FOR WOMEN WITH HIV 1, 2 (Ann Kurth ed., 1993) (noting that from 1981 to 1992 pediatric AIDS cases remained approximately 1.5% of total AIDS caseload); *Pediatrics (Screening) Report Calls for Routine Prenatal HIV Testing*, HEALTH LETTER ON THE CDC, Nov. 2, 1998, available in 1998 WL 8783612 (reporting that as result of AZT treatment, the number of new pediatric AIDS cases due to transmission during pregnancy dropped by approximately 43% between 1992 and 1996); David Brown, *Routine Prenatal Testing Urged: Panel Favors End to Pre-Test Counseling That Some Doctors Find a Barrier*, WASH. POST, Oct. 15, 1998, at A3 (reporting that between 400 and 2,000 babies are born with HIV infection each year in United States).

According to the Centers for Disease Control and Prevention ("CDC"), 8,461 or 1.2% of the total reported AIDS cases have been among children under five. See CENTERS FOR DISEASE CONTROL AND PREVENTION, 10 HIV/AIDS SURVEILLANCE REPORT 11 (Year-end ed., No. 2) (1998) [hereinafter HIV/AIDS SURVEILLANCE REPORT].

103. See Achy Obejas, *Ryan's Town Remembers It's Been More Than a Decade Since AIDS Struck Fear of the Unknown in the Collective Heart of Kokomo, Indiana. Its Citizens, Vilified by the Media, Still Carry Scars of Guilt and Resentment*, CHI. TRIB., Oct. 28, 1998, available in 1998 WL 2910642 (profiling Ryan White's home town, Kokomo, Indiana, ten years after he was expelled from school, and examining invidious discrimination he faced from his classmates and their parents).

104. See Theresa A. Schneider, Note, *Stretching the Limits of the ADA: Asymptomatic HIV-Positive Status as Disability in Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), 77 NEB. L. REV. 206, 221 (1998) (arguing that certain groups, because of age or sexual orientation, do not reproduce and therefore, should not be allowed to identify reproduction as a major life activity for purposes of ADA).

105. According to the CDC, there are about 2,500 cases of AIDS among women 55 and over and heterosexual contact is responsible for 69% of these cases. See Andrea Fine, *Here's Another Face of HIV, and This One's Old and Wrinkled*, CHI. TRIB., Nov. 2, 1997, available in 1997 WL 3606195 (discussing HIV infection among older people). During an eleven month period ending in April 1997, the number of AIDS cases diagnosed among seniors 65 and older in Florida rose 13%, double the rate of

advances in reproductive science,¹⁰⁷ and people with reproductive disorders potentially face similar hurdles. Gay men and lesbians face specific obstacles in their attempts to argue that their reproduction is impaired. In a recent Fourth Circuit case, *Runnebaum v. NationsBank of Maryland, N.A.*,¹⁰⁸ the court remained skeptical of an openly gay bank employee's argument that his HIV infection impaired his ability to reproduce.¹⁰⁹ One commentator went so far as to say that a finding that homosexual men reproduce is an "absurdit[y]."¹¹⁰

These peripheral debates as to who should be allowed to claim reproduction as a major life activity are not without merit. The First

increase among adolescents. See Diane C. Lade, *Support on Way for HIV Seniors*, SUN-SENTINEL, Feb. 18, 1998, at 1A, available in 1998 WL 3247128 (discussing HIV infection rates among Florida senior citizens).

Older people, men and women, are not immune to HIV infection. In fact, the contrary is true. Because of their age, the immune systems of older people are weaker, thus making it easier for them to contract HIV. See William A. Woolery, *Occult HIV Infection: Diagnosis and Treatment of Older Patients*, GERIATRICS, Nov. 1, 1997, at 51-56 (informing doctors of existence of HIV among older people, how to diagnose HIV infection among older people, and how to treat HIV infection among older people). Additionally, older women are more likely to develop vaginal "disruptions" during intercourse, which increases the likelihood of HIV transmission. See *id.* See generally Edward Helmore, *Carefree Sex Rides into the Sunset*, EVENING STANDARD, June 30, 1998, at 23 (discussing how post-menopausal women in South Florida nursing homes do not feel that they need to use condoms during sexual intercourse because they can no longer become pregnant).

Men and women age 65 or older have constituted 9,284 or 1.3% of the total cases of AIDS in the United States. See HIV/AIDS SURVEILLANCE REPORT, *supra* note 102, at 16.

106. See John Gallagher, *What Goes Up Must Come Down*, THE ADVOCATE, June 23, 1998, at 60 (writing that protease inhibitors and Viagra, a popular drug used to treat impotency, should not be taken together).

107. See Lisa Frazier, *Seeking a Safe Path Toward Fatherhood; Process Aims to Help HIV Patients*, WASH. POST, Apr. 18, 1999, at A1 (outlining a new and relatively inexpensive process, called "sperm washing," which removes HIV from semen to allow the female partners of men infected with HIV to conceive and bear healthy children).

108. 123 F.3d 156 (4th Cir. 1997) (en banc).

109. See *id.* at 172 (implying that gays and lesbians have no interest in procreating and therefore, are not disabled).

110. See Schneider, *supra* note 104, at 221. Schneider writes:

Without this individualized inquiry, absurdities would naturally result. For example, homosexual men . . . that are asymptomatic HIV positive could similarly argue that their major life activity of reproduction is limited by their infection. However, since sexual orientation . . . , not their infection, has precluded reproduction, any argument that reproduction is a major life activity for them is clearly unreasonable.

Id. (citations omitted). This proposition is so ludicrous as to almost be self-refuting. Homosexuality does not render men sterile. Gay men can reproduce in a number of ways from donating sperm to lesbian couples to using surrogates. See generally Heather Conrad & Kate Colwell, *Creating Lesbian Families*, in DYKE LIFE 149, 155-56 (Karla Jay ed., 1995) (describing phenomenon of lesbian couples who use sperm from gay male friends and warning them to consider legal implications and possibility of HIV transmission); Dan Savage, *Status is . . . for Gay Men the Baby*, N.Y. TIMES, Nov. 15, 1998, § 6 (Magazine), at 95 (arguing that babies acquired via adoption or surrogacy have become a status symbol for gay men).

Circuit, when it addressed *Abbott v. Bragdon*¹¹¹ prior to review by the Supreme Court, limited its holding writing that “HIV-positive status is a physical impairment that substantially limits a *fecund woman’s* major life activity of reproduction.”¹¹² Although not expressly limiting its holding to fecund women, the Supreme Court simply announced that the “[r]espondent’s HIV infection is a physical impairment which substantially limits a major life activity”¹¹³ The Supreme Court thereby retained an individualized inquiry of analysis. The Court did not require, however, that a plaintiff demonstrate an interest in reproducing,¹¹⁴ only that a plaintiff was capable of reproducing. But because some people are physically incapable of reproducing, courts still may exclude reproduction as a major life activity for broad segments of the population.¹¹⁵

Furthermore, the Supreme Court in *Sutton v. United Air Lines, Inc.*,¹¹⁶ held that medical conditions should be considered in their mitigated or medicated states.¹¹⁷ Although ADA regulations state that conditions should be considered in their unmitigated states,¹¹⁸ the Supreme Court found these regulations to be contrary to the express language of the statute and refused to give the regulations any

111. 107 F.3d 934 (1st Cir. 1997), *aff’d*, 118 S. Ct. 2196 (1998).

112. *Bragdon*, 107 F.3d at 942 (emphasis added).

113. *Bragdon*, 118 S. Ct. at 2207. The Supreme Court, when framing the issue wrote: “The final element of the disability definition in subsection (A) is whether respondent’s physical impairment was a substantial limit on the major life activity she asserts.” *Id.* at 2205.

114. *See id.* at 2206 (holding that the definition of disability does not turn on personal choice but on the presence or absence of a limitation on a major life activity).

115. *See Schneider*, *supra* note 104 (arguing that groups for whom it is impossible to reproduce and groups who have no interest in reproduction should not be allowed to claim reproduction as a major life activity).

116. 119 S. Ct. 2139 (1999).

117. *See id.* at 2143 (holding that the determination of whether a person has a disability must be made with reference to measures that mitigate the individual’s impairment).

The Supreme Court granted certiorari to resolve the split in the circuits. *Compare Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1998) (holding that medically controllable conditions should be considered in their unmitigated state), *with Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 866 n.10 (1st Cir. 1998) (suggesting that whether a condition is considered in its mitigated or unmitigated state depends on severity of condition), *and Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 906 (10th Cir. 1997) (holding that conditions must always be considered in their mitigated state). The Third, Ninth, Seventh, and Eleventh Circuits had reached a similar conclusion while the Eighth, Fifth, and Sixth Circuits had shown a willingness to reach a similar conclusion to that of the Tenth Circuit.

118. *See* 29 C.F.R. pt. 1630, app., at 350 (1999) (stating that conditions, impairments and disorders should be considered in their unmitigated states). The Department of Justice and the EEOC give examples of an epileptic and diabetic who should be considered disabled regardless of whether the condition is controllable through medication. *See id.*

deference.¹¹⁹ The ramifications of this decision could affect plaintiffs infected with HIV who take protease inhibitors,¹²⁰ respond well to them, and achieve an undetectable viral load.¹²¹ These individuals, by all obvious standards, have regained their health entirely, and the undetectability of HIV in their blood stream seems to indicate that HIV infection is, for certain individuals, a “medically controllable condition.”¹²² Although this conclusion is medically dubious,¹²³ if a judicial community can muster a significant plurality in *Runnebaum* to hold that asymptomatic HIV infection is not an impairment,¹²⁴ then it is not implausible that a court will hold in the future that HIV infection is a medically controllable condition that must be considered in its mitigated state.

119. See *Sutton*, 119 S. Ct. at 2147 (1999) (holding that regulations requiring courts to consider conditions in their unmitigated state are expressly contrary to the plain language of the statute, and that courts must disregard these regulations).

This decision seems even more capricious when viewed in light of House and Senate Reports that specifically indicate mitigating measures such as medications and devices are not to be considered when making a disability assessment. See H.R. REP. NO. 101-485(III), at 28 (1990) (“The impairment should be assessed without considering whether mitigating measures . . . would result in less-than-substantial limitation.”); S. REP. NO. 101-116, at 23 (1989) (“[W]hether a person has a disability should be assessed without regard to the availability of mitigating measures . . .”).

120. Protease inhibitors are a class of antiviral drugs that interfere with HIV’s ability to assemble new copies of itself. See Maenza & Flexner, *supra* note 74 (discussing how protease inhibitors work, their cost, proper dosing, combination therapies, and common side effects). The most common of these is Crixivan (indinavir) but others include Fortovase or Invirase (saquinavir), Norvir (ritonavir), and Viracept (nelfinavir). See *id.* The triple drug “cocktail” therapy usually combines two reverse transcriptase inhibitors, AZT class drugs, and one protease inhibitor. See *id.*

121. See *id.* at 2 (delineating the current goal of antiretroviral therapy to be to decrease the number of copies of HIV in patient’s blood stream, or viral load, to undetectable levels within four to six months).

122. See Thamer E. Temple, *Employers Prepare: Hope for AIDS Victims Means Conflict in Your Workplace*, 41 LAB. L.J. 694, 695 (1990) (noting that AIDS has transformed from a deadly epidemic into a chronic, manageable disease); Elizabeth Kastor, *The New ‘Miracle’ AIDS Drugs: A Dose of Hope and Hard Reality; Researchers Caution That Treatment Has Mixed Results*, WASH. POST, Sept. 5, 1996, at A1 (reporting that optimism about success of triple drug therapies has led some to speculate that HIV infection will become a “manageable” disease despite the fact that many people do not respond to new drug treatments).

The high cost of the drugs, as much as \$12,000 per year, and the difficulty in maintaining the strict requirements of when to take the drugs make it difficult for many to observe their treatment regimens. See David Brown, *Poverty Entangles Promise of Powerful Treatment*, WASH. POST, Sept. 1, 1997, at A1 (describing the barriers to treatment faced by those people who live in poverty).

123. See Grace Brooke Huffman, *Review of protease inhibitors for use in HIV-1 infection (Tips from Other Journals)*, AM. FAM. PHYSICIAN June 1, 1997, at 2825, available in 1997 WL 10150889 (commenting that long term effects of protease inhibitors are unknown); Laurie Garrett, *The Virus at the End of the World*, VANITY FAIR, Mar. 1999, at 103-07 (documenting the temporary success of multiple drug therapies).

124. See *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 169 (4th Cir. 1997) (holding that asymptomatic HIV infection is not an impairment).

Each of these groups—children, infertile people, gay men and lesbians, and people responding well to protease inhibitors—stands to suffer, not gain, from the Supreme Court's holding in *Bragdon*. Each of these groups will be forced to engage in costly, time-consuming, and uncertain litigation to determine whether the activities they substitute in place of reproduction do in fact constitute major life activities.¹²⁵

III. AIDS-PHOBIA AND THE "REGARDED AS" PRONG

Although the actual disability prong proved a difficult fit for L.W.,¹²⁶ proving an actual disability is only one option in meeting the class requirements for ADA protections.¹²⁷ The "regarded as" prong of the ADA is a powerful alternative to the actual disability prong because it addresses society's and the covered entity's fears about disease and illness.¹²⁸ AIDS and HIV infection fit nicely within the framework of the "regarded as" prong because of the intensely negative social responses they receive.¹²⁹

The most tragic aspect of L.W.'s situation, and that of others described above, is that he actually is ill¹³⁰ with a fatal disease.¹³¹ A strategy in ADA litigation to avoid legal liability, however, is to prove that the plaintiff does not meet the requirements of the protected class.¹³² L.W.'s situation is not uncommon, as amici in *Bragdon* argued.¹³³ According to the amici, courts have twisted the language of

125. See *United States v. Happy Time Day Care Ctr.*, 6 F. Supp. 2d 1073, 1081 (W.D. Wis. 1998) (noting that many diseases, such as the AIDS virus, cause related medical problems that, when viewed in isolation, may not be classified as a disability under the ADA, but would cause substantial limitations on major life activities if considered over an extended period of time).

126. See *id.* at 1080-82 (concluding that the plaintiff might be limited in the major life activity of caring for himself after rejecting several other possibilities of major life activity classifications).

127. See 42 U.S.C. § 12102(2)(A)-(C) (1994) (defining disability for purposes of the ADA as having an actual physical or mental disability substantially limiting a major life activity, having a record of disability, or being regarded as being disabled).

128. See *infra* notes 136-43 and accompanying text (discussing the "regarded as" prong in literature, legislative language, and case law).

129. See *infra* notes 147-60 and accompanying text (elaborating on the stigma associated with HIV infection and its consequences).

130. See *Happy Time Day Care*, 6 F. Supp. 2d at 1075-77 (describing the plaintiff's poor health status).

131. See *id.* at 1076-77 (noting that the plaintiff had only a 50% chance of reaching his ninth or tenth birthday, and that he surely would die before reaching puberty).

132. See *Lanctot*, *supra* note 15, at 332 (demonstrating that many judges engage in an overly probing analysis to find that plaintiffs, with conditions commonly thought to be disabling, are not disabled).

133. See Brief for AIDS Action Council, Supporting Respondents, *Bragdon v. Abbott*, 118 S. Ct. 2196 (No. 97-156), available in 1998 WL 47252, at *22 n.65 (arguing that courts distorted the definition of disability to exclude many conditions

the ADA,¹³⁴ which is identical to that of the Rehabilitation Act, to achieve different results.¹³⁵

The solution to discourage courts from distorting the definition of actual disability to avoid finding plaintiffs disabled under the ADA¹³⁶ is to sidestep the “actual” disability test in favor of the “regarded as” disabled test.¹³⁷ The explicit language of the ADA addresses people who are regarded as disabled, whether or not they have a disabling condition, and tailors a remedy for them.¹³⁸ In using the “regarded as” language, Congress, as with the rest of the ADA’s definition of disability, relied on the definition used in the Rehabilitation Act.¹³⁹ In construing the Rehabilitation Act’s definition of “regarded as” disabled, the Supreme Court noted in *School Board of Nassau County v. Arline*¹⁴⁰ that “Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”¹⁴¹

The Supreme Court acknowledged in *Arline* that Congress had two

commonly thought of as disabling).

134. *See id.*

135. *Compare* Reynolds v. Brock, 815 F.2d 571, 574 (9th Cir. 1987) (holding that a person with epilepsy is disabled for purposes of the Rehabilitation Act), *and* Bentivegna v. United States Dep’t of Labor, 694 F.2d 619, 621 (9th Cir. 1982) (noting that diabetic plaintiff is disabled for purposes of Rehabilitation Act), *and* Pushkin v. University of Colo., 658 F.2d 1372, 1376 (10th Cir. 1981) (noting that a person with multiple sclerosis is disabled for purposes of Rehabilitation Act), *and* Fynes v. Weinberger, 677 F. Supp. 315, 321 (E.D. Pa. 1985) (concluding that plaintiffs with asbestos-related disease are disabled for purposes of Rehabilitation Act), *with* Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 (5th Cir. 1996) (ruling that a woman with breast cancer is not disabled for purposes of ADA), *and* Kocsis v. Multi-Care Management, Inc., 97 F.3d 876, 884 (6th Cir. 1996) (concluding that plaintiff with multiple sclerosis is not disabled for the purposes of ADA), *and* Matczak v. Frankford Candy & Chocolate Co., 950 F. Supp. 693, 696 (E.D. Pa. 1997) (holding that the plaintiff with epilepsy is not disabled for purposes of ADA), *rev’d*, 136 F.3d 933 (3d Cir. 1997) (reversing district court’s holding that the epileptic claimant was not disabled), *and* Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1446 (W.D. Wis. 1996) (determining person with insulin-dependent diabetes is not disabled for purposes of ADA).

136. *See* Jenkins, *supra* note 22, at 648 (warning that the ADA’s elastic language can be stretched to include or exclude asymptomatic HIV infection).

137. *See* Schneider, *supra* note 104, at 226 (arguing that asymptomatic HIV infection does not meet the criteria for an actual disability for the purposes of the ADA and should be considered under the “regarded as” test).

138. *See* 42 U.S.C. § 12102(2)(C) (1994) (defining “disability” as being perceived as having an impairing condition).

139. *See id.* § 12201(a) (explaining that “[n]othing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act . . . or the regulations issued by Federal agencies pursuant to such title”) (citation omitted).

140. 480 U.S. 273 (1987).

141. *Arline*, 480 U.S. at 284. The Supreme Court held that a school teacher was “regarded as” disabled due to her “contagious” nature and because she had been hospitalized for repeated relapses of tuberculosis. *See id.* at 281.

motives in passing the Rehabilitation Act: to remove actual barriers to employment and access to services, and to address invidious discrimination based on “myths and fears” about disabilities and disease.¹⁴² The Supreme Court recognized that society has negative reactions to disease¹⁴³ and acknowledged that Congress intended to address these reactions. Admittedly, society’s response to HIV and AIDS is no longer what it once was.¹⁴⁴ Fear and death are no longer monolithic in the literature on AIDS. Conservative columnist Andrew Sullivan, himself infected with HIV, argues that with the advent of protease inhibitors AIDS is no longer a death sentence.¹⁴⁵ Sullivan and other HIV-infected people have contemplated the realities of their death and regained their health.¹⁴⁶

Still, others argue that the days of AIDS as a “special” disease are limited.¹⁴⁷ AIDS, like few other diseases in history, has engendered intense negative social responses. Societies generally fear disease because it forces people to confront disability, dependence, and death.¹⁴⁸ Because HIV is transmitted only through the exchange of

142. See *id.* at 284.

143. See *id.* at 282. See generally SUSAN SONTAG, *ILLNESS AS METAPHOR* (1979) (describing the social construction of disease and arguing for a purely scientific view of disease free of negative emotions).

144. See Linda C. Fentiman, *AIDS as a Chronic Illness: A Cautionary Tale for the End of the Twentieth Century*, 61 ALB. L. REV. 989, 989 (1998) (arguing that the social construction of HIV is changing in light of changing demographics of HIV infection); Wendy E. Parmet & Daniel J. Jackson, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 AM. J.L. & MED. 7, 7-9 (1997) (arguing that the changing social construction of HIV disease has removed the stigma of HIV infection and has removed its disabling consequences).

145. See Andrew Sullivan, *When Plagues End*, N.Y. TIMES, Nov. 10, 1996, § 6 (Magazine), at 52 (contemplating the end of a plague for those with the resources to continue expensive regimens of antiviral medication).

146. See *id.* at 58 (describing the response of some people to antiviral medication and the fact that their deaths have been delayed). Sullivan observed the impact of new drug therapies:

I had grown used to the shock of seeing someone I knew suddenly age 20 or 30 years in a few months; now I had to adjust to the reverse. People I had seen hobbling along, their cheekbones poking out of their skin, their eyes deadened and looking down, were suddenly restored into some strange spectacle of health, gazing around as amazed as I was to see them alive.

Id. at 59. From these transformations, Sullivan makes the following observations.

A difference between the end of AIDS and the end of many other plagues: for the first time in history, a large proportion of the survivors will not simply be those who escaped infection, or were immune to the virus, but those who contracted the illness, contemplated their own deaths and still survived.

Id. at 58.

147. See Fentiman, *supra* note 144, at 989 (predicting that AIDS will no longer be a special disease); Parmet & Jackson, *supra* note 144, at 8-9 (arguing that the changing social construction of HIV disease will affect the legal status of HIV disease as a disability).

148. See Allan M. Brandt, *AIDS and Metaphor: Toward the Social Meaning of Epidemic Disease*, 55 SOC. RES. 413, 414-15 (1988) (separating the biological phenomenon of

bodily fluids, and most commonly during sexual activity or intravenous drug use,¹⁴⁹ society has been even more reluctant to discuss AIDS and AIDS education.¹⁵⁰ People with AIDS continue to be divided between “innocent” victims, such as children and those who are infected through blood transfusions and infected blood products, and, by implication, the non-innocent—gay men, sexually active people, drug users, and prostitutes.¹⁵¹ Statements such as Pat Buchanan’s in 1983 that “[t]he poor homosexuals—they have declared war on Nature, and now Nature is exacting an awful retribution,”¹⁵² live on in popular memory. Mythically, AIDS is still a disease of poverty, perversion, and addiction; AIDS is not a disease that affects suburban families.¹⁵³

Coupled with the ignorance of who contracts HIV is ignorance of how HIV is contracted. Nearly twenty years have passed since AIDS was first identified.¹⁵⁴ At that time, the modes of transmission were unknown.¹⁵⁵ Today more information about the disease and modes of transmission is available, but this information is not reaching significant sectors of the population.¹⁵⁶ In fact, misinformation about

the disease from the emotions and reactions that the disease incites).

149. The CDC identifies that men who have sex with men, people who use injecting drugs, recipients of blood, tissue, or coagulants, infants of HIV-infected mothers, and people who have sexual contact with people in other high risk categories are those at highest risk of exposure to HIV. *See* HIV/AIDS SURVEILLANCE REPORT, *supra* note 102, at 42 (listing the major forms of HIV transmission).

150. *See* Brandt, *supra* note 148, at 427 (arguing that programs such as AIDS education are seen as endorsing teenage premarital sex and homosexuality, while needle exchange programs are seen as endorsing drug use).

151. *See* Kurth, *supra* note 102, at 4 (describing images in popular culture of the typical person infected with HIV).

152. *See* Brandt, *supra* note 148, at 429 (quoting N.Y. POST, May 24, 1983).

153. The CDC reports that 48% of the total reported adult and adolescent AIDS cases were found among men who have sex with men, and 26% of reported cases fell into the category of injecting drug users. *See* HIV/AIDS SURVEILLANCE REPORT, *supra* note 102, at 14. From the 33 states that report HIV cases, 33% of people who have been infected with HIV are men who have sex with men and 17% are injecting drug users. *See id.* at 15.

AIDS affects members of racial minorities in far greater proportions. An estimated 58.6% of the 270,841 people living with AIDS in the United States in 1997 were black or Hispanic. *See id.* at 34.

AIDS is primarily an urban phenomenon. In the central counties of metropolitan areas with 500,000 or more people, the AIDS rate from December 1997 to December 1998 was 24.7 cases per 100,000. *See id.* at 11. In the outlying counties of metropolitan areas of 500,000 or more the rate was 6.5 per 100,000. *See id.* The rate for metropolitan areas of 50,000 to 500,000 was 10.3 per 100,000. *See id.* The rate for non-metropolitan areas was 6.3 per 100,000. *See id.*

154. *See* RANDY SHILTS, AND THE BAND PLAYED ON 61-68 (1987) (describing how the first cases of the disease were reported).

155. *See id.* at 68 (relating the uncertainty of public health experts about the modes of transmission of the newly identified disease).

156. *See* Lynda Richardson, *Wave of Laws Aimed at People With H.I.V.*, N.Y. TIMES, Sept. 25, 1998, at A1 (noting the need for the general public to receive accurate

HIV is increasing according to a national phone survey.¹⁵⁷ The results of the survey indicated that in 1991, forty-eight percent of the country erroneously believed that HIV could be contracted by sharing a drinking cup with an infected person.¹⁵⁸ By 1998, fifty-five percent of those surveyed erroneously believed that the virus could be contracted this way.¹⁵⁹ Although three-quarters of those surveyed believe that people with HIV are treated unfairly,¹⁶⁰ twenty-nine percent of people surveyed also believe that large groups of people who are HIV-infected deserved to be infected.¹⁶¹ This lack of empathy has dangerous consequences, among them the concern held by one-quarter of those surveyed that most infected individuals do not care if they infect others.¹⁶²

Many courts have recognized the gravity and intensity of hostilities toward people with AIDS.¹⁶³ Several courts have recognized a condition sometimes known as "AIDS-phobia," the rational or irrational fear that a person has contracted HIV from a potential exposure to the virus, and have even awarded monetary damages in tort actions.¹⁶⁴ Enough empirical and anecdotal evidence exists to

information about the transmission of HIV).

157. *See id.* at A25 (highlighting data from a national phone survey conducted by researchers at the University of California at Davis about the American public's views and knowledge of AIDS).

158. *See id.*

159. *See id.* The same study also showed that today 41% erroneously believe that HIV can be contracted through public toilets, compared with 34% in 1991.

160. *See id.*

161. *See id.* This striking lack of empathy is also reflected in the commonly held assertions that half of those surveyed believe that HIV infection is the fault of the infected person. *See id.*

162. *See* Richardson, *supra* note 156, at A1 (suggesting that the recent wave of criminal transmission statutes can be attributed to the fear that HIV-infected individuals are a dangerous threat to the rest of the population). As a result of similar fears, 29 states now have criminal transmission statutes making it a crime to knowingly transmit HIV. *See id.* at A1.

163. *See* Chalk v. United States Dist. Ct., 840 F.2d 701, 703 (9th Cir. 1988) (ruling on a case involving a teacher with AIDS who was removed from teaching duties); Doe v. Borough of Barrington, 729 F. Supp. 376, 378 (D.N.J. 1990) (recounting facts that a police officer told people at the scene of an accident to wash with disinfectant because the husband of a woman involved in the accident had AIDS); Poff v. Caro, 549 A.2d 900, 902 (N.J. Super. Ct. Law Div. 1987) (reciting facts that landlord refused to rent an apartment to three gay men for fear of AIDS).

164. *See* Faya v. Alamaraz, 620 A.2d 327, 339 (Md. 1993) (holding that plaintiffs could proceed on a claim of intentional infliction of emotional distress against the estate of an HIV-infected surgeon who performed surgery on them and did not inform plaintiffs of his condition). *Cf.* Carroll v. Sisters of Saint Francis Health Servs., Inc., 868 S.W.2d 585, 594 (Tenn. 1993) (recognizing plaintiff's fear of exposure to HIV, yet holding that plaintiff could not maintain a claim for negligent infliction of emotional distress in the absence of real exposure). *See generally* Mandana Shahvari, Comment, *AfrAIDS: Fear of AIDS as a Cause of Action*, 67 TEMP. L. REV. 769 (1994) (describing causes of action in several courts based on the fear of exposure to and possible contraction of AIDS).

allow judges to entertain the rebuttable presumption that an otherwise qualified individual was denied employment or services on the basis of the covered entity's negative attitudes towards HIV infection and AIDS.¹⁶⁵

IV. THE "REGARDED AS" PRONG AS A SOLUTION FOR REMEDYING DISCRIMINATION

The legislative history of the ADA,¹⁶⁶ Department of Justice opinions regarding § 504 of the Rehabilitation Act,¹⁶⁷ § 504 case law,¹⁶⁸ Equal Employment Opportunity Commission ("EEOC") regulations construing the ADA,¹⁶⁹ expert opinion,¹⁷⁰ and early ADA case law¹⁷¹

165. See *supra* notes 156-62 and accompanying text (discussing results of a national phone survey which demonstrates that large portions of the American public are ignorant of HIV's modes of transmission).

166. See *supra* notes 46-47 and accompanying text (providing legislative history of ADA with respect to HIV).

167. See *supra* note 47 (discussing the Department of Justice interpretation of ADA coverage to include HIV infection).

168. See *Chalk*, 840 F.2d at 701 (recognizing high probability of success on the merits, based on claim that HIV constitutes a handicap under the Rehabilitation Act); *Doe v. Centinela Hosp.*, 57 U.S.L.W. 2034 (C.D. Cal., June 30, 1988) (perceiving HIV-infected plaintiff as having a disability); *Local 1812 v. Department of State*, 662 F. Supp. 50, 54 (D.D.C. 1987) (stating that plaintiff infected with HIV is disabled and also could be perceived as disabled); *Ray v. School Dist. of DeSoto County*, 666 F. Supp. 1524, 1538 (M.D. Fla. 1987) (holding that person with HIV infection is disabled); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 381 (C.D. Cal. 1986) (same). See generally *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong. 612-22 (1989) (prepared statement of Chai R. Feldblum, Legislative Counsel, ACLU AIDS Project) (examining § 504 case law and finding that asymptomatic HIV infection has been found to be a disability for the purposes of the Rehabilitation Act).

169. See 28 C.F.R. § 35.104(1)(ii) (1999); 28 C.F.R. § 36.104(1)(iii) (1999) (both stating that the phrase "physical or mental impairment" includes symptomatic or asymptomatic HIV disease); 28 C.F.R. pt. 35, app. A, at 478 (1999) (commenting that the regulations were modified to state explicitly that symptomatic and asymptomatic HIV infection are covered by the ADA in response to ADA committee reports, case law, and official legal opinions analyzing § 504); 28 C.F.R. pt. 36, app. B, at 619 (1999) (same); 28 C.F.R. pt. 35, app. A, at 478 (1999) (stating that asymptomatic HIV infection severely limits an individual's major life activity either because of the infection's "actual effect on the individual" or because it causes the individual to be treated by others as disabled); 28 C.F.R. pt. 36, app. B, at 619 (same); 29 C.F.R. pt. 1630, app., at 349 (1999) (noting that HIV infection is inherently and substantially limiting and therefore covered by ADA).

The Department of Justice and the Equal Employment Opportunity Commission ("EEOC"), like Congress, used HIV infection in many of their examples of prohibited activities under the ADA. See 28 C.F.R. pt. 36, app. B, at 633 (1999) (explaining that if a day care center declines to admit a child because the child's sibling is HIV-infected, then the day care center has violated the association prong of the ADA); 29 C.F.R. pt. 1630, app., at 360 (1999) (using as an illustration of prohibited activity under the association prong, the example of an employer who discharges an employee who does volunteer work for people with AIDS because the employer fears that the employee may contract HIV); 29 C.F.R. pt. 1630, app., at 365 (stating that an employer cannot require employees to be tested for HIV or cancer

uniformly support a finding that asymptomatic HIV should be a disability for the purposes of the ADA. In light of recent decisions such as *Runnebaum*,¹⁷² and the loopholes in *Bragdon*,¹⁷³ plaintiffs such as L.W. must litigate major life activities other than reproduction under the “actual disability” prong¹⁷⁴ or pursue the “regarded as” prong of the disability test.¹⁷⁵ Despite poor interpretations from the courts, the “regarded as” prong is the most logical choice for plaintiffs such as L.W. in light of the liberal way the EEOC and Department of Justice regulations interpret it.

The Department of Justice and the EEOC have defined “regarded as having such an impairment” to mean a person who:

- (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such a limitation; [“exaggerated-limitations definition”]
- (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; [“negative-attitudes definition”] or
- (3) Has none of the impairments defined in paragraphs(h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.¹⁷⁶

The Court in *Sutton* addressed, in part, the definition of “regarded as” disabled in the ADA. Writing for the majority, Justice O’Connor specifically mentions the exaggerated-limitations definition and the third definition given by the EEOC.¹⁷⁷ Justice O’Connor, however,

unless such testing is job-related and necessary for business); 29 C.F.R. pt. 1630, app., at 367 (explaining that disparate treatment occurs when employers have a policy of not hiring people with AIDS despite their qualifications).

170. See Milton Bordwin, *AIDS: Not Just a Medical Problem*, OR. ST. B. BULL. at 15, 16 Feb.-Mar. 1996, available in WESTLAW 56-MAR ORSBB 15 (opining that employers generally cannot discriminate against employees with HIV or AIDS or mere perception of AIDS); Chai R. Feldblum, *Americans with Disabilities Act: Selected Employment Requirements*, Q217 ALI-ABA VIDEO L. REV. 29, 44 (1992), available in WESTLAW Q217 ALI-ABA 29 (stating in unequivocal terms that HIV infection, whether symptomatic or asymptomatic, is covered by the ADA); Robert B. Fitzpatrick & E. Anne Benaroya, *Americans with Disabilities Act and AIDS*, 8 LAB. LAW. 249, 269 (1992) (concluding that because the ADA is ambiguous, employers should not base hiring decisions on an employee’s HIV status).

171. See *supra* note 75 (citing prior case law interpreting ADA).

172. 123 F.3d 156 (4th Cir. 1997).

173. 118 S. Ct. 2196 (1998).

174. See *supra* note 64 (discussing how HIV substantially limits major life activities).

175. See Schneider, *supra* note 104, at 226 (arguing that certain holdings stating that people with asymptomatic HIV infection are actually disabled for the purposes of the ADA warps the “actually disabled” test, and that these plaintiffs should alternatively argue that they are regarded as disabled).

176. 29 C.F.R. § 1630.2(l)(1)-(3) (1999).

177. See *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2149-50 (1999).

does not consider whether the EEOC's negative-attitudes definition is an appropriate reading of the statute.¹⁷⁸

Of these three definitions, the exaggerated-limitations and negative-attitudes definitions apply to L.W., who has an impairment for the purposes of the ADA.¹⁷⁹ As Judge Crabb has held, however, L.W. may or may not be substantially impaired as to a major life activity and therefore, may not be actually disabled.¹⁸⁰ Under the exaggerated-limitations definition, the plaintiff must demonstrate that a covered entity regarded the plaintiff as being substantially impaired as to a major life activity. Many courts have forced plaintiffs to demonstrate that the covered entity regarded them as being impaired as to a major life activity.¹⁸¹ These plaintiffs frequently failed because no covered entity would admit that they regarded the plaintiff as being disabled, and rarely are the facts sufficiently strong that they speak for themselves in this regard.¹⁸²

Justice O'Connor writes,

There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.

Id.

178. *See id.*

179. *See* *Bragdon v. Abbott*, 118 S. Ct. 2196, 2196 (1998) (holding that asymptomatic HIV infection is a physical impairment for the purposes of the ADA).

180. *See* *United States v. Happy Time Day Care Ctr.*, 6 F. Supp. 2d 1073, 1075 (W.D. Wis. 1998) (holding that although a reasonable jury might find that the plaintiff was substantially limited in his ability to care for himself it cannot be said as a matter of law that L.W. is so impaired).

181. *See* *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 153 (2d Cir. 1998) (formulating the "regarded as" test as requiring the individual to show that the employer regarded the employee as having an impairment that substantially limited major life activity); *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 172-74 (4th Cir. 1997) (formulating the "regarded as" test as protecting "individuals who are regarded or perceived . . . as having an impairment that substantially limits one or more major life activities . . ."); *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 541 (9th Cir. 1997) (rejecting plaintiff's assertion that defendant employer regarded her as being substantially limited in her ability to lift or work because the employer must perceive the impairment as "substantially limiting and significant") (citing *Gordon v. E.L. Hamm & Assocs., Inc.*, 100 F.3d 907, 913 (11th Cir. 1996)); *Zuppardo v. Suffolk County Vanderbilt Museum*, 19 F. Supp. 2d 52, 57 (E.D.N.Y. 1998) (requiring the employee to demonstrate that the employer regarded the employee as having an impairment that substantially limited a major life activity); *EEOC v. General Elec. Co.*, 17 F. Supp. 2d 824, 828-29 (N.D. Ind. 1998) (requiring evidence that employer perceived employee to be substantially limited as to major life activity or disabled to meet requirements of "regarded as" test); *Cortes v. McDonald's Corp.*, 955 F. Supp. 541, 546 (E.D.N.C. 1996) (same).

182. *See* *Runnebaum*, 123 F.3d at 172-74 (finding no evidence that the relevant decision-maker regarded the plaintiff as having an impairment that substantially limited his major life activity); *Thompson*, 121 F.3d at 541 (finding that despite defendant's awareness of plaintiff's carpal tunnel syndrome, there was no evidence that defendant regarded plaintiff as being disabled); *Zuppardo*, 19 F. Supp. 2d at 57

Judge Crabb had harsh words for this approach:

Requiring plaintiff to show that defendants believed L.W.'s HIV status substantially limited one of his major life activities . . . would undermine the Supreme Court's declaration that no meaningful distinction should be drawn between the myths, fears and ignorance surrounding contagious diseases and the actual effects such stigmatizing conditions have on individuals who suffer from them. Thus, the relevant inquiry is whether the allegedly prejudicial reactions of defendants substantially limited one of L.W.'s major life activities. Just as the negative reaction of an employer to a contagious disease can substantially limit an individual's ability to work, the ability of L.W. to learn has been substantially limited because defendants' misapprehensions and fears have prevented him from enrolling in day care.¹⁸³

Judge Crabb seems to realize that the day care center operators' misperceptions of L.W.'s physical capabilities is not useful, much less relevant, to the inquiry of whether L.W. was the victim of disability-based discrimination.¹⁸⁴ The emphasis in this analysis should be whether the covered entity committed an act of discrimination against the plaintiff.¹⁸⁵ This analysis is supported not only by the

(finding that defendant was aware of plaintiff's mental illness, but finding no evidence that defendant regarded plaintiff as disabled); *General Electric*, 17 F. Supp. 2d at 831 (finding no evidence that plaintiff's supervisors regarded him as impaired as to a major life activity); *Cortes*, 955 F. Supp. at 546 (finding no evidence that defendants thought that plaintiff's HIV infection was an impairment or that plaintiff's death was imminent).

183. *Happy Time Day Care*, 6 F. Supp. 2d at 1084 (citation omitted).

184. *See id.* at 1084 (writing that the relevant inquiry is whether the defendants' "prejudicial actions" limited the plaintiff's major life activities); *see also* *Breitenfeldt v. Long Prairie Packing Co.*, 48 F. Supp. 2d 1170, 1179 (D. Minn. 1999) (referring to congressional intent when determining that the alleged harassment plaintiff received after revealing his impaired vision qualified him as being "regarded as" disabled even though he was not actually disabled).

185. *See Happy Time Day Care*, 6 F. Supp. 2d at 1084 (determining that the analysis should focus on the defendant's prejudice against plaintiff).

Judge Posner commented on the seeming incongruity of the "regarded as" prong with the rest of the statute, which is devoted to providing access and aid to actually disabled people, not those perceived as disabled. In *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538 (7th Cir. 1995), Posner wrote:

[A]lthough at first glance peculiar, [the "regarded as" prong of the ADA] actually makes a better fit with the elaborate preamble to the Act, in which people who have physical or mental impairments are compared to victims of racial and other invidious discrimination. Many such impairments are not in fact disabling but are believed to be so, and the people having them may be denied employment or otherwise shunned as a consequence. Such people, objectively capable of performing as well as the unimpaired, are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic.

Id. at 541; *see also* *Penny v. United Parcel Serv., Inc.*, 128 F.3d 408, 414 (6th Cir. 1997) (observing that the ADA protects against discrimination of individuals with disabilities).

negative-attitudes definition of “regarded as” disabled given by the EEOC,¹⁸⁶ but also by other guidance from the EEOC describing how to examine ADA claims,¹⁸⁷ as well as the legislative history of the ADA.¹⁸⁸

EEOC and DOJ regulations are very specific in describing how courts should make inferences of discrimination.¹⁸⁹ Specifically, if someone is denied public accommodation or access to a public benefit, and the covered entity cannot legitimately justify the denial, then it can be inferred that the individual would qualify under the “regarded as” test.¹⁹⁰ This “regarded as” test recognizes that the problem of discrimination lies with the covered entity’s assumptions and not with whether the covered entity perceived the person as substantially impaired as to a major life activity.¹⁹¹

The Supreme Court gave this approach credence in *Arline*. In *Arline*, the Court concluded that impairments might 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.”¹⁹² Again, the Court’s emphasis is not on whether the covered entity perceived the individual as having specific impairments, but whether the covered entity mistreated the individual based upon negative reactions to the individual’s disability.¹⁹³

186. See 29 C.F.R. § 1630.2(l)(1)-(3) (1999) (defining “regarded as” disabled).

187. See 28 C.F.R. pt. 36, app. B, at 621 (1999) (permitting an inference of discrimination in the absence of legitimate reasons for refusing accommodation, and allowing such individuals to qualify for coverage under the “regarded as” test). *But see Runnebaum*, 123 F.3d at 172-74 (finding no evidence that the relevant decision-maker regarded plaintiff as having an impairment that substantially limited major life activity and making no inference of discrimination); *Cortes*, 955 F. Supp. at 546 (E.D.N.C. 1996) (same).

188. See H.R. REP. NO. 101-485(II), at 31 (1989), *reprinted in* 1990 U.S.C.C.A.N. 303, 313 (quoting *Americans with Disabilities Act of 1988: Hearings on S. 2345 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources and Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong. 40 (1989) (statement of Adm. James Watkins, Chairperson, President’s Commission on the Human Immunodeficiency Virus Epidemic) (commenting on the disabling effects of HIV because of the negative reactions HIV-infected people receive)).

189. 28 C.F.R. pt. 35, app. A, at 480 (1999) (describing the types of inferences the “regarded as” prong allows courts to make); 28 C.F.R. pt. 36, app. B, at 621 (same).

190. See 28 C.F.R. pt. 35, app. A, at 480; 28 C.F.R. pt. 36, app. B, at 621 (both discussing permissible inferences based on public entity’s illegitimate refusal to admit person with actual or perceived physical or mental condition).

191. See 28 C.F.R. pt. 35, app. A, at 480; 28 C.F.R. pt. 36, app. B, at 621 (both focusing “regarded as” analysis on public entity).

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

193. See *id.* (placing emphasis on the role that fears surrounding disability play in the “regarded as” test of the Rehabilitation Act).

The “regarded as” prongs of the Rehabilitation Act and the ADA are so expansive that they can be used whether the plaintiff has a disability or not. In *Miller v. Spicer*,

Although Justice O'Connor did not mention this approach in *Sutton*,¹⁹⁴ she did cite to the specific language in *Arline* that gave rise to the ADA's "regarded as" prong.¹⁹⁵ *Arline's* construction of the phrase "regarded as" is still authoritative; Justice O'Connor did not question *Arline* in her reference to the ADA's "regarded as" test.¹⁹⁶

Detractors might argue that this is not an objective standard; however, AIDS-phobia and hysteria exist objectively. If the ADA's covered entities fear the possible consequences of this approach, all they have to do is what the ADA requires: not consider diseases, conditions, and physical impairments when making employment decisions.¹⁹⁷ Furthermore, all of the ADA defenses are still available to such covered entities. The only restriction placed on defendants under this approach is the inability to claim that someone they terminated on the basis of their HIV status is not disabled and therefore, not a member of the protected class.

This "regarded as" prong approach focuses the legal analysis not on who is a member of the class, which under the ADA is supposed to be an expansive class and not a limited one,¹⁹⁸ but on the alleged act of discrimination itself.

822 F. Supp. 158 (D. Del. 1993), an emergency room surgeon perceived the plaintiff, who suffered from a severed tendon, as gay. *See id.* at 160. The surgeon refused to operate on the plaintiff unless the plaintiff could inform the surgeon of his HIV status. *See id.* at 161. The plaintiff did not know his HIV status and as a result, the surgeon refused to operate. The plaintiff sued the surgeon and the hospital under the Rehabilitation Act, and prevailed against the hospital but not against the surgeon because of a technicality in the Rehabilitation Act. *See id.* at 162-66. Thus, this case illustrates that a plaintiff can be regarded as disabled despite the fact that he or she has no impairment.

194. *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2149-50 (1999) (failing to mention the "negative-attitudes" definition).

195. *See id.* at 2150 (citing *Arline's* reasoning that myth and fear are as handicapping as actual physical impairments).

196. *See id.* at 2149-50. Given Justice O'Connor's readiness to declare that the EEOC's interpretation requiring conditions to be considered in their unmitigated states is contrary to the plain language of the statute, she would have done the same to the *Arline* framework had she intended it to be rejected entirely. *See id.* at 2146-47 (rejecting the EEOC's interpretations of the statute as contrary to the express language of the ADA).

197. *See Mello, supra* note 48, at 118 (arguing that the best way for employers to avoid liability under the ADA is to not discriminate against employees infected with HIV).

198. *But see Sutton*, 119 S. Ct. at 2147 (observing that Congress indicated that 43 million Americans have disabilities and limiting the definition of disability contained within the ADA to cover only a class of individuals of approximately that size).

CONCLUSION

The empirical data about AIDS-phobia and misinformation about AIDS¹⁹⁹ permit courts today to draw inferences about discriminatory intent by covered entities. As AIDS education increases and as society's responses to AIDS and HIV infection change, so will the reaction infected people receive from co-workers, service providers, and the courts.²⁰⁰ Some day, L.W. and a million other Americans will not be disabled by HIV as a result of the negative attitudes of others. That day is not yet here. Until then, the courts must find a solution that remedies the loophole in *Bragdon*, which fails to protect people who are too young, too old, suffer from other reproductive impairments, or could be construed as intrinsically having no interest in reproducing.²⁰¹ The solution is the "regarded as" prong of the definition of disability under the ADA.

By emphasizing the covered entity's actions,²⁰² coupled with a powerful ability for courts to infer discriminatory intent,²⁰³ the ADA turns back into what it was intended to be: a broad remedial statute.²⁰⁴ The ADA is a rare piece of legislation in today's political climate because it was intended to transform society.²⁰⁵ Just as the Civil Rights Act of 1964 was designed to eliminate discrimination on the basis of race and sex, the ADA was designed to eliminate all discrimination on the basis of any disability.²⁰⁶ HIV and AIDS existed in 1990 when Congress debated the ADA. HIV and AIDS were not written out of the ADA like homosexuality, transvestitism, kleptomania, and pyromania.²⁰⁷ HIV disease must not be written out

199. See *supra* Part III (discussing AIDS-phobia and "regarded as" prong of ADA).

200. See Fentiman, *supra* note 144, at 989 (arguing that the changing social construction of HIV will spell the demise of AIDS as a special disease).

201. See *supra* Part II (discussing *Bragdon's* failure to protect certain plaintiffs).

202. See 29 C.F.R. § 1630.2(l)(2) (1999) (identifying the attitudes and actions of others as being substantially limiting even when the physical or mental impairment itself does not substantially limit a major life activity); see also Feldblum, *supra* note 170, at 38-39 (explaining that purpose of third prong of ADA's definition of disability is to scrutinize employer's discriminatory actions).

203. See 28 C.F.R. pt. 35, app. A, at 480 (1999); 28 C.F.R. pt. 36, app. B, at 621 (permitting inferences of discrimination).

204. See *Penny v. United Parcel Serv., Inc.*, 128 F.3d 408, 414 (6th Cir. 1997) (observing that ADA is "broad remedial statute").

205. See *supra* note 6 (discussing Congress' intent to provide a national mandate for eliminating disability discrimination).

206. See Steven S. Locke, *The Incredible Shrinking Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 141-42 (1997) (discussing how the "regarded as" prong of the ADA's definition of disability mirrors the goals of Title VII).

207. See 42 U.S.C. § 12211 (1994) (stating that under this chapter, the term

by the courts via loopholes²⁰⁸ or by determinations that HIV infection is not a disability.²⁰⁹

“disability” does not include homosexuality, bisexuality, transvestitism, pedophilia, exhibitionism, voyeurism, gender identity disorders, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders stemming from current illegal drug use).

208. See *supra* Part II (discussing the loopholes created in *Bragdon* and *Happy Time Day Care*).

209. See *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 169 (4th Cir. 1997) (holding that asymptomatic HIV infection is not a disability).