

Saint Louis University Public Law Review

Volume 17
Number 1 *Reading, Writing, and Reform the
Roles of State and Federal Government in
Education (Vol. XVII, No. 1)*

Article 12

1997

The Supreme Court Opens Its Mind, and Medical Books, and Refuses 'You Can Walk, You Can Talk, You Don't Seem Sick Enough' Approach to Asymptomatic HIV Coverage Under the Americans with Disabilities Act

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Recommended Citation

Walker Embry, Rebecca (1997) "The Supreme Court Opens Its Mind, and Medical Books, and Refuses 'You Can Walk, You Can Talk, You Don't Seem Sick Enough' Approach to Asymptomatic HIV Coverage Under the Americans with Disabilities Act," *Saint Louis University Public Law Review*: Vol. 17 : No. 1 , Article 12. Available at: <https://scholarship.law.slu.edu/plr/vol17/iss1/12>

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**THE SUPREME COURT OPENS ITS MIND, AND MEDICAL BOOKS,
AND REFUSES ‘YOU CAN WALK, YOU CAN TALK, YOU DON’T
SEEM SICK ENOUGH’ APPROACH TO ASYMPTOMATIC HIV
COVERAGE UNDER THE AMERICANS WITH DISABILITIES ACT**

I. INTRODUCTION

Asymptomatic Human Immunodeficiency Virus (HIV) coverage under the Americans with Disabilities Act (ADA)¹ is a contentious issue. Because of the growing number of HIV positive persons in our workplaces,² the national emphasis on equal opportunities for persons with disabilities,³ and the controversial nature of the issue, recent court decisions and analysis are of great interest at this time.

In a controversial 1997 decision, the Fourth Circuit held in *Runnebaum v. NationsBank of Maryland* that asymptomatic HIV⁴ was not a disability protected by the ADA.⁵ After being fired from NationsBank of Maryland (NationsBank), Mr. Runnebaum, an HIV positive individual, filed suit against

1. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1995).

2. NATIONAL INSTITUTE OF ALLERGY AND INFECTIOUS DISEASES, *How HIV Causes AIDS*, August 1996, at 2 [hereinafter INSTITUTE]. The literature cites statistical projections that by the year 2000, there will be between 40 and 110 million HIV positive persons worldwide; Jay Greene, *Employers Learn to Live with AIDS*, H. R. MAGAZINE, Feb. 1998, at 96; *AIDS Presents New Challenges for Employers*, EMPLOYEE BENEFIT PLAN REV., March 1998, at 35; *Management Attorney Discusses Corporate Response to HIV*, AIDS PY & LAW, April 3, 1998, at 6.

3. 42 U.S.C. § 12101(b)(1) (expressing the goal of the Act to be a “clear and comprehensive national mandate” to assist with protecting persons with disabilities in the workplace).

4. Asymptomatic HIV refers to a person diagnosed with HIV, but having no symptoms. MILLER & KEANE, ENCYCLOPEDIA & DICTIONARY OF MEDICINE, NURSING, & ALLIED HEALTH 106 (3d ed. 1983); “HIV disease is characterized by a gradual deterioration of immune function. Crucial immune cells called CD4+T cells are disabled and killed during the typical course of infection. During HIV infection, the number of CD4+T cells in a person’s blood progressively declines. When the person’s count falls below 200/mm (with a healthy persons count ranging from 800 to 1200) then he/she becomes particularly vulnerable to the opportunistic infections and cancers that typify AIDS, which is the end stage of HIV disease.” Institute, *supra* note 2. “Symptom” refers to a physiological effect of a physiological condition that is perceptible by the person with HIV. Robert A. Kushen, *Asymptomatic Infection with the AIDS Virus as a Handicap Under the Rehabilitation Act of 1973*, 88 COLUM. L. REV. 563 n.2 (1988).

5. *Runnebaum v. NationsBank*, 123 F.3d 156, 166-167 (4th Cir. 1997).

NationsBank alleging termination in violation of the ADA.⁶ On August 15, 1997, the Court of Appeals for the Fourth Circuit affirmed the district court's initial grant of summary judgment for NationsBank; thus holding that asymptomatic HIV was not a disability covered under the ADA.⁷

However, in a June 1998 decision, the Supreme Court fired back by finding that asymptomatic HIV is a disability covered under the ADA.⁸ After being denied in-office dental repair, Ms. Abbott filed a suit under the ADA against her dentist.⁹ The district court, appellate court, and the Supreme Court all agreed that plaintiff's asymptomatic HIV status did meet the ADA requirements to afford her protection against discrimination based on her disability.¹⁰

This casenote will review the legislative history of the ADA with specific emphasis on legislative definitions of key elements.¹¹ Additionally, this casenote will examine the decisions by the Fourth Circuit, the Supreme Court, and other courts decisions which have determined asymptomatic HIV coverage under the ADA.

II. HISTORY

A. *Rehabilitation Act of 1973*

The Rehabilitation Act of 1973 was created in an effort to provide employment and educational opportunities to individuals with disabilities by prohibiting discriminatory practices.¹²

The Rehabilitation Act defines an individual with a disability as "any individual who (i) has a physical or mental impairment which substantially

6. *Runnebaum*, 123 F.3d at 163. *Runnebaum* also alleged violation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1974). This note will focus only on the analysis of the holding regarding the allegation of violation of the ADA.

7. *Id.* at 161. It is crucial to note that qualifying under ADA does not guarantee that the person will retain his/her employment. If protected under the ADA, then the employer must proceed through a disability-particular process to attempt to retain the employee by accommodating for the disability. ADA protection does not guarantee protection from being fired. During the process of determining discrimination, "whether the plaintiff is otherwise qualified for the job or can be made so with reasonable accommodation" is the focus. *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 863 (1st Cir. 1998). "[The defendant] will have every opportunity to demonstrate that [plaintiff] is unable to perform one or more of the essential functions of the job." *Id.* "The burden will be on [plaintiff] to demonstrate that he is qualified for the job." *Id.*

8. *See Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196 (1998). At the time of publication, the United States Reports had yet to paginate decision.

9. *Id.* at 2201.

10. *Id.*

11. *See generally Runnebaum*, 123 F.3d 156.

12. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-795g (Supp.1993).

limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment".¹³

The Department of Health and Human Services (HHS) (formerly the Department of Health, Education and Welfare), and the Department of Labor (DOL) guide the enforcement regulations of section 794 of the Act.¹⁴ Section 794 provides that "no otherwise qualified individual with a disability . . ., shall, solely by reason of her or his disability, be excluded for the participation in, . . ., or be subjected to discrimination under any program or activity receiving Federal financial assistance [.]"¹⁵

A "physical or mental impairment", under HHS and DOL regulations for the Act, is defined as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory; including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine."¹⁶ The HHS declined to list specific diseases and conditions that would be considered physical or mental impairments because of the impossibility of including all covered disabilities.¹⁷

The HHS list noted that in order to be classified as having a physical or mental impairment, the disability must "substantially limit a major life activity; such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."¹⁸

B. *Americans With Disability Act (ADA)*

The ADA was enacted in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[.]"¹⁹ The ADA reflects almost identical language and standards created under the Rehabilitation Act, but is broadened to include private employers.²⁰

The ADA's definitions of "impairment" and "major life activity" are the same as the definitions under the Rehabilitation Act, and were intended to be equivalent.²¹ But, the list of major life activities was not intended to be

13. 29 U.S.C. § 706(8)(B) (Supp. 1993).

14. Rhonda K. Jenkins, *Square Pegs, Round Holes: HIV and the Americans With Disabilities Act*, 20 S. ILL. U. L.J. 630, 637 (1996).

15. 29 U.S.C. § 794(a) (Supp.1993).

16. Jenkins, *supra* note 14, at 640, *citing* 45 C.F.R. § 84.3 (j)(2)(i)(1995); 29 C.F.R. § 32.3 (b)(1)(ii) (1995).

17. *Id.*

18. *Id.*, *citing* 45 C.F.R. § 84.3(j)(2)(ii)(1995).

19. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b)(1) (1990).

20. Jenkins, *supra* note 14 at 642.

21. *Id.* at 643.

exhaustive and does include, but is not limited to other activities such as sitting, standing, lifting, and reaching.²²

Records from Congressional hearings prior to the enactment of the ADA suggest that all stages of HIV were intended to be covered by the ADA; “It is not possible to include in the legislation a list of all the specific conditions, diseases, infections that would constitute physical or mental impairments . . . , particularly in light of the fact that new disorders may develop in the future. The term includes, however, such conditions, diseases, infections as: . . . , infection with the Human Immunodeficiency Virus[.]”²³

C. *Runnebaum v. NationsBank of Maryland; Fourth Circuit*

1. Facts:

Mr. Runnebaum was diagnosed with HIV in 1988 and was asymptomatic at the time the case was heard.²⁴ In 1993, Mr. Runnebaum was fired from NationsBank for alleged failure to complete assignments and failure to present a professional image. As support for NationsBank’s termination action, Mr. Runnebaum’s supervisor stated in her deposition that she had decided to fire him before she became aware of his HIV infection.²⁵

Mr. Runnebaum filed suit against NationsBank alleging termination in violation of the ADA.²⁶ The district court was faced with determining if Runnebaum had established a prima facie case of discrimination due to disability because of his termination.²⁷ The district court granted summary judgment for NationsBank on claims of discrimination under the ADA.²⁸ But, a divided panel of the Fourth Circuit Court of Appeals reversed the grant of summary judgment in favor of Runnebaum in holding that he had established a prima facie case and created a genuine issue of material fact.²⁹

The Fourth Circuit Court of Appeals reheard the case, en banc, and affirmed the district court’s initial grant of summary judgment for NationsBank; thus holding that asymptomatic HIV is not a disability covered under the ADA.³⁰ To determine if the plaintiff with asymptomatic HIV was a member of the protected class, and therefore, could qualify for the protection of the ADA, the court analyzed two factors: the definition of impairment under

22. *Id.*

23. S. REP. NO. 116, 101st Cong., 1st Sess. 21 (1989).

24. *Runnebaum*, 123 F.3d at 162.

25. *Id.* at 163.

26. *Id.*

27. *Id.* at 161.

28. *Id.* at 163.

29. *Id.* at 161.

30. *Runnebaum*, 123 F.3d at 162.

the ADA and whether such impairment substantially limits one or more of the major life activities as defined by the ADA.³¹

2. *Runnebaum* Majority:

In *Runnebaum*, the Fourth Circuit set a controversial mark by holding that asymptomatic HIV was not a disability covered by the ADA.³² In reaching the holding, the court reasoned that asymptomatic HIV infection was not an impairment because there were no diminishing effects on the individual.³³ The court looked to the dictionary for a definition of impairment.³⁴ “Extending the coverage of the ADA to asymptomatic conditions like *Runnebaum*’s, where no diminishing effects are exhibited, would run counter to Congress’s intention as expressed in the plain statutory language.”³⁵ Discounting the argument that Congress intended for asymptomatic HIV infection to be considered an impairment, the court found the statutory meaning of “impairment” to be plain and unambiguous, and therefore, held that there was “. . . no reason to resort to the legislative history to ascertain Congress’s intent”.³⁶

The court went on to analyze the “substantial limitation on the major life activity” prong, even though it had refused to find the prerequisite “impairment”.³⁷ The court recognized that procreation and intimate sexual relations were the major life activities substantially limited by *Runnebaum*’s asymptomatic HIV infection.³⁸ Nevertheless, the court attacked these as major life activities on three grounds. First, the court recognized that procreation is a fundamental human activity, but denied that it qualifies as a major life activity contemplated by the ADA.³⁹ Second, the court found nothing inherent in the HIV infection actually prevented procreation or intimate sexual relations even though individuals may refrain because of fear of infecting partners and children with the virus.⁴⁰ Third, the court found nothing in the record to suggest that *Runnebaum*, a homosexual, was interested in procreating by fathering a child.⁴¹

The court held that asymptomatic HIV infection was not a disability under the statute and, even if it were, asymptomatic HIV infection did not

31. *Id.* at 170.

32. *Id.* at 167-72.

33. *Id.*

34. *Id.*

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

36. *Id.* at 170-72 (*citing* *Garcia v. United States*, 469 U.S. 70, 75 (1984)).

37. *Id.* at 170.

38. *Id.* at 171-72.

39. *Id.* at 172.

40. *Id.*

41. *Id.*

substantially limit one or more of the major life activities contemplated by the ADA.⁴²

3. *Runnebaum* Dissent:

The dissenters were troubled the majority ignored NationsBank's concession to Runnebaum's disability.⁴³ The dissent pointed out that Runnebaum brought the suit against the bank under the ADA.⁴⁴ At the time the district court granted summary judgment, NationsBank had not contested that asymptomatic HIV infection was a disability under the ADA guidelines.⁴⁵ The dissent found that since NationsBank regarded Runnebaum as disabled, that was sufficient evidence to create an issue of material fact under the ADA.⁴⁶

The dissent criticized the majority's opinion because a record on the issue of disability was never fully developed⁴⁷, and, despite the underdeveloped record, the majority still asserted that "the facts pertaining to this issue [disability] are sufficiently developed."⁴⁸ Because of the undeveloped record on Runnebaum's disability, it was not surprising to the dissent that the majority found insufficient evidence to support a finding that Runnebaum was disabled.⁴⁹

Regardless of NationsBank's concession of Runnebaum's disability, the dissenters maintained there was sufficient support for Runnebaum's disability claim to prevail over summary judgment because of the two prong ADA test.⁵⁰ The dissenters argued the first prong involving "impairment" was met despite the majority findings.⁵¹ The majority ignored the physical effects HIV has upon the body even during the early, asymptomatic stage.⁵²

The dissenters disagreed with the majority's finding that asymptomatic HIV was not an impairment because there were no diminishing effects on the

42. *Runnebaum*, 123 F.3d at 177.

43. *Id.* at 176.

44. *Id.*

45. *Id.* at 176.

46. *Id.*; Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 (2)(C) (1990) (defining the term disability as "being regarded as having such an impairment.").

47. *Runnebaum*, 123 F.3d at 176.

48. *Id.*

49. *Id.* at 178-179. The dissenters maintained that the case should, at the very least, be remanded for further proceedings on the issue of disability. But, the dissenters pointed out that in the past ADA cases on review for summary judgment were treated as if the disability requirements were met if the record was less than fully developed. *Id.*, citing *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 60 (4th Cir. 1995).

50. *Id.* at 178.

51. *Id.*

52. *Id.* at 179.

individual.⁵³ The dissent agreed that “to impair” meant “to diminish”, but disagreed that asymptomatic HIV lacked diminution since the virus attacks the victim’s immune system immediately.⁵⁴ The dissent referred to medical information indicating that even though an individual was asymptomatic, the virus continued to reproduce and wear away the immune system (believed to be focused in the lymph system during the asymptomatic stage) until the final and fatal stages of the disease.⁵⁵

The dissent argued that the majority failed to properly consider a significant amount of legislative history and administrative interpretation which clearly contradicted the majority’s interpretation of impairment.⁵⁶ They asserted that the House and Senate committee reports expressly stated that HIV virus was to be considered an impairment.⁵⁷

The dissenters maintained that the second, and final, prong of the ADA requirements was met because asymptomatic HIV was an impairment that substantially limited one or more of the major life activities of the individual.⁵⁸ The dissent cited the House Committee Report stating that HIV substantially limited procreation and intimate sexual relationships.⁵⁹ The majority was criticized for distinguishing between substantial limits of an impairment as a physical matter from substantial limits of an impairment as a behavioral matter.⁶⁰ So, according to the majority, a disability only qualified under the

53. *Id.* at 181.

54. *Id.* at 180, citing Christine Gorman, *Battling the AIDS Virus: There’s Still No Cure, But Scientists and Survivors Make Striking Progress*, TIME, Feb. 12, 1996, at 64 (During the first stage “thousands of HIV particles are reproducing themselves” in CD4 cells) Martin A. Nowak, *AIDS Pathogenesis: From Models to Viral Dynamics in Patients*, 10 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME & HUMAN RETROVIROLOGY S1, S1 (Supp. 1 1995).

55. *Runnebaum*, 123 F.3d at 162, citing Michael S. Saag, *Natural History of HIV-1 Disease*, TEXTBOOK OF AIDS MEDICINE 45, 46; Gorman, *supra* note 54, at 64, 65).

56. *Id.* at 180.

57. *Id.* at 181-82, citing H. R. REP. NO. 485, 101st Cong., 1st Sess. 51 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 333 “It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments. . . The term includes, however, such conditions, diseases, and infections as . . . infection with the Human Immunodeficiency Virus. . .” Part Three of the House Report reiterated “[a]lthough the definition [of impairment] does not include a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments, examples include. . . infection with the Human Immunodeficiency Virus.” See also S. REP. NO. 116, 101st Cong., 1st Sess. 22 (1990), reprinted in 1990 U.S.C.C.A.N. 445,451.

58. *Id.* at 183-84.

59. *Id.* at 184, citing H. R. REP. NO. 485, 101st Cong., 1st Sess. 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334. This legislative history confirms that procreation and intimate sexual relationships are major life activities and that they are substantially limited by HIV.

60. *Id.* at 184. “No reasonable juror could conclude that an 8% risk of passing an incurable, debilitating, and inevitably fatal disease to one’s child is not a substantial restriction on reproductive activity.” *Id.* at 185, quoting *Abbott v. Bragdon*, 107 F.3d 934, 942 (1st Cir. 1997). The dissenters were also amazed at the majority’s bold assertions about Runnebaum’s intimate

ADA if the person was physically incapable of performing the activity.⁶¹ The dissent pointed out that this interpretation had no authority in legislative history.⁶²

The dissenters maintained that the majority intended to create a per se rule excluding persons with asymptomatic HIV from ever qualifying for ADA protection.⁶³ “The majority’s decision amounts to an outright repeal of Congress’s effort through the ADA to fight discrimination against those with asymptomatic HIV.”⁶⁴

D. Other Circuit Courts:

The Ninth and Eleventh Circuits have ruled that a person with either asymptomatic or symptomatic HIV infection is an individual with a disability within the meaning of the ADA.⁶⁵ The Ninth Circuit held that the physical

sexual relations with his lover. Runnebaum had no occasion to testify about the effect of HIV on his sexual relations, so the dissent stated, “I would not presume to know the status of Runnebaum’s “intimate sexual relations” merely because he has a boyfriend.” *Id.*

61. *Id.*

62. *Id.* The dissent further pointed out that the majority’s claim that there is nothing inherent in the virus that substantially limits procreation or intimate sexual relations is “against common sense.” *Id.* It is the physical effects of HIV that make it substantially limiting; individuals with HIV have a significant chance of infecting their partners if they engage in intimate sexual activities, and this prospect of spreading HIV is a substantial limitation. *Id.*, citing Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, to Arthur B. Culvahouse, Jr., Counsel to the President Sept. 27, 1988, reprinted in 8 FAIR EMPL. PRAC. MANUAL (BNA) No. 641 at 405:1, 405:7 (Stating “[i]t is HIV’s physical effects, however, upon procreation and intimate sexual relations that make it substantially limiting.”).

63. *Runnebaum*, 123 F.3d at 176.

64. *Id.* at 190.

65. *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994); *Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991). During a discussion involving an individual with insulin-dependent diabetes mellitus, The First Circuit said, “it seems more consistent with Congress’s broad remedial goals in enacting the ADA, and it also makes more sense, to interpret the words “individual with a disability” broadly, so the Act’s coverage protects more types of people against discrimination. *Arnold*, 136 F.3d at 862. The Second Circuit held that an individual suffering from panic disorder with agoraphobia failed to show that his condition substantially limited a major life activity of “everyday mobility”. *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144, 152-153 (2nd Cir. 1998). The court cited *Runnebaum* that a case-by-case inquiry was not necessary and the focus should be on the impairment and the limiting effect, not the importance of the activity to the individual. *Id.* at 151. The Seventh Circuit has not yet ruled on asymptomatic HIV coverage under the ADA either, but the court included in an opinion expert scientific testimony that “a person who is infected with HIV at first suffers no symptoms of any AIDS-related illness while the virus is replicating itself in sequestered sites within the body. . . . an infected person’s exposure to additional HIV, other viruses, or foreign proteins shortens this asymptomatic period, provokes increased replication of HIV, and leads to a quicker death from an AIDS-related illness. . . . less than two percent, of persons infected with HIV develop an AIDS-related illness within one year, and the approximate average time between HIV infection and development of an AIDS-related illness is between seven and ten years. A person in this stage of

impairment to the individual was not the issue, but rather the contagious effect of the HIV infection should be the focus.⁶⁶ The court reasoned that there should not be a distinction between asymptomatic and symptomatic HIV.⁶⁷ The Ninth and Eleventh Circuits based their holdings on the language in the ADA regulation that specifically stated “HIV disease” as a physical or mental disability covered under the ADA.⁶⁸

Similarly, the First Circuit held that asymptomatic HIV was covered by ADA, but approached the issue with a different analysis centered on “major life activity.”⁶⁹ The court held that reproduction was a major life activity as indicated by the language of the ADA and by the regulations which stated that the list of activities was not exclusive.⁷⁰ Not only did “reproduction” appear under the portion of the regulations dealing with physical impairments, but the court maintained that reproduction belongs on the list of activities because it is “one of the most natural of endeavors and fits comfortably within its sweep.”⁷¹

E. Bragdon v. Abbott; Supreme Court

1. Facts:

The Supreme Court recently decided the long awaited issue of asymptomatic HIV and ADA coverage and found that asymptomatic HIV is a disability intended for ADA protection under the guidelines.⁷² In *Bragdon*, the plaintiff, Ms. Abbott, was an asymptomatic HIV infected person seeking dental care.⁷³ The defendant dentist, Dr. Bragdon, knew that Ms. Abbott was infected with HIV because she had disclosed the information on her patient form.⁷⁴ Dr. Bragdon needed to fill Ms. Abbott’s cavity, but the office policy was to fill cavities of HIV-infected persons in a hospital, at no extra cost, rather than in the office.⁷⁵ Ms. Abbott declined and filed suit against Dr. Bragdon under the

AIDS has a reduced number of red blood cells and certain white blood cells called lymphocytes.” *Gruca v. Alpha Therapeutic Corporation*, 51 F.3d 638 at 641, 642 (7th Cir. 1995). The Tenth Circuit held that airline pilots’ vision impairment did not substantially limit their major life activity of seeing under the ADA because mitigating or corrective measures utilized by the individual should be taken into account; whether the impairment affects the individual in fact. *Sutton v. United Air Lines*, 130 F.3d 893, 902 (10th Cir. 1997).

66. *Gates*, 39 F.3d at 1446.

67. *Id.*

68. *Id.*; see also *Harris*, 941 F.2d at 1524.

69. See *Bragdon*, 118 S. Ct. 2196.

70. *Abbott*, 107 F.3d at 939, 940.

71. *Id.*

72. See *Bragdon*, 118 S. Ct. 2196.

73. *Id.* at 2201.

74. *Id.*

75. *Bragdon*, 118 S. Ct. at 2201.

ADA for discrimination against her based on her asymptomatic HIV disability.⁷⁶

The district court ruled for Ms. Abbott finding that her HIV infection was sufficient to allow her protection under the ADA.⁷⁷ The court of appeals affirmed, holding that her disability was a disability under the ADA even though her infection was at the early, asymptomatic stage.⁷⁸ The Supreme Court granted certiorari to review whether asymptomatic HIV infection was a disability under the ADA and whether the Court of Appeals cited sufficient material in the record to determine that Ms. Abbott's HIV posed no direct threat to the health and safety of her dentist.⁷⁹

2. *Bragdon* Majority:

The Court carefully proceeded through the three prong analysis in finding that asymptomatic HIV is a disability under the ADA.

First, in determining whether Ms. Abbott's infection constituted a physical impairment, the Court looked to the Department of Health, Education, and Welfare's first regulations interpreting the Rehabilitation Act of 1977.⁸⁰ The Court noted that the Department had purposefully not included a list of all specific disorders out of fear that the list would not be comprehensive.⁸¹ The Court further noted that HIV was not identified on a list accompanying the regulations as commentary containing specific disorders which were considered physical impairments possibly because HIV was not identified as the cause of AIDS until as late as 1983.⁸²

The majority looked at the disability and the effects of an HIV infection on the person in order to determine if it was an impairment. The Court found that the infection fell significantly within the "physical impairment" definition set forth by the regulations because of the "unalterable course" the disease followed when it attacked and killed white blood cells, eventually destroying the person's ability to fight infection.⁸³ Further, because research indicated that in the initial stage the HIV infection immediately assaulted the immune system and caused the person to suffer a sudden and drastic decline in white blood cells, the Court found that there was no latency period in HIV.⁸⁴

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* Only the issue of asymptomatic HIV being afforded ADA coverage is discussed in this article.

80. *Bragdon*, 118 S. Ct. at 2202.

81. *Id.* at 2202-3.

82. *Id.* at 2203.

83. *Id.*

84. *Bragdon*, 118 S. Ct. at 2203-4.

The Court recognized that there was a period after the initial stage that was believed to be asymptomatic.⁸⁵ However, the Court noted that although at one time it was believed that the virus was inactive during this period, the virus was actually moving from the circulatory system to the lymph nodes.⁸⁶ While the virus may decline in some parts of the body, alleviating some symptoms, it was concentrating on destroying the body's immune response system in the lymph nodes.⁸⁷ Citing the immediacy of the damage on the person's white blood cells and the severity of the disease, the Court held that the HIV was an impairment "from the moment of infection."⁸⁸ Therefore, the first prong of the test was met.

The second prong requires that the impairment affect a major life activity. Like the lower courts⁸⁹, the Supreme Court focused on "reproduction" as the major life activity affected and stated that "reproduction and the sexual dynamics surrounding it are central to the life process itself."⁹⁰ The majority rejected the argument that Congress intended ADA only to cover parts of a person's life which have "public, economic, or daily character."⁹¹ Because the ADA must be interpreted consistently with regulations involved in implementing the Rehabilitation Act and because the regulations did not provide a list defining specific covered major life activities, the Court found that reproduction could not be held as any less important than "working or learning" which were included on an illustrative list.⁹²

The third, and final, prong of the analysis involved whether Ms. Abbott's physical impairment was a substantial limitation on the major life activity of reproduction. The Court consulted statistical studies and found that her ability to reproduce was substantially limited in two ways.⁹³ First, an HIV infected woman who tried to become pregnant imposes a significant risk of HIV infection on the male.⁹⁴ Second, an HIV infected woman risks infecting her child during gestation and birth.⁹⁵ Recognizing that some precautions could be taken to lower the risk of transmission to the child, the Court stated that it was not the impossibility of conception and childbirth by an HIV infected person

85. *Id.* at 2204.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Bragdon*, 118 S. Ct. at 2205.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 2206.

94. *Bragdon*, 118 S. Ct. at 2206. Recent studies indicate a 20% risk of infection.

95. *Id.* 1994 studies indicate a 25% chance of transmitting HIV to the child.

that was at issue, but rather, the danger to the public health was enough to meet the requirement of substantial limitation.⁹⁶

3. *Bragdon* Dissent:

Chief Justice Rehnquist, Justice Scalia, and Justice Thomas concurred with the judgment in part and dissented in part.⁹⁷ The dissent emphasized the importance of the requirement of an individualized assessment of a person's disability.⁹⁸ Justice Rehnquist noted that the ADA's wording specifically stated that disability determination should be made "with respect to an individual".⁹⁹

The dissent focused on whether Ms. Abbott's major life activities included reproduction prior to her becoming HIV infected.¹⁰⁰ The dissent was not satisfied that her reproduction was impaired because there was no evidence that she was planning on having children.¹⁰¹

Further, the dissent stated that since the record indicated that HIV infected persons were still able to have intercourse, give birth, and perform the tasks necessary to raise the child, then the choice not to engage in this was voluntary and not a "limit" on one's own life activities".¹⁰² The dissent did not believe that asymptomatic HIV limited Ms. Abbott's ability to perform any of the tasks necessary to have a child or raise a child.¹⁰³ Additionally, the dissent feared a slippery slope effect under this holding; accepting Ms. Abbott's argument would render all persons with a genetic predisposition for a debilitating disease "disabled" *now* even though the effects are only a possibility and even if disease did occur, would occur in the future.¹⁰⁴

III. AUTHOR'S ANALYSIS

A. *Runnebaum*

The holding in *Runnebaum* was one step back from the steady progress made from the Rehabilitation Act of 1973 and Americans with Disabilities Act of 1990. The legislature and judiciary must work together in order to protect

96. *Bragdon*, 118 S. Ct. at 2206. Petitioner, Dr. Bragdon, presented research indicating that antiretroviral therapy can lower the risk of transmission during gestation and birth to 8%. *Id.* The Court dismissed this alternative and discussed the realism of this to a family with the added costs of undergoing antiretroviral therapy and long term care for the infected child. *Id.*

97. *Id.* at 2214.

98. *Id.*

99. *Bragdon*, 118 S. Ct. at 2214.

100. *Id.* at 2215.

101. *Id.*

102. *Id.* at 2216.

103. *Id.* at 2215, 2216.

104. *Id.* at 2216.

persons with disabilities in order to allow them “the same aspirations and dreams as other American citizens”.¹⁰⁵ Four factors, counter to the majority opinion, will be explored; (1) a diagnosis of HIV is sufficient for ADA disability requirements, (2) HIV is an impairment that substantially affects major life activities involving the reproductive and immune systems, (3) the sexual orientation of the person has nothing to do with the affect of the disease on the reproductive system, and (4) the legislature intended for “life” activities to be covered instead of mere vocational/employment activities.

Both asymptomatic and symptomatic HIV were intended to be covered by the ADA; this is clear by the legislative history described in *Runnebaum* and the Ninth Circuit’s holding.¹⁰⁶ No further analysis should ever exist. If a person sees a physician, participates in the blood testing, and receives a diagnosis of HIV, then that person should be eligible for ADA protection.

An HIV infection affects the reproductive system.¹⁰⁷ The *Runnebaum* majority argued that there was really nothing wrong with Mr. Runnebaum’s reproductive system; he could still reproduce.¹⁰⁸ Such an assertion is ignoring the harsh reality of the virus. If he procreates, he is at risk of passing along an infection which will most likely result in death¹⁰⁹ for himself, partner, and/or child.

“Once afflicted, the patient’s prognosis for survival is grim - the two year mortality rate for the disease is close to ninety percent. Over seventy-five percent of all patients diagnosed as having AIDS before January 1984 are known dead.”¹¹⁰

“AIDS has become a major cause of death among women and children, representing the seventh leading cause of death among children, ages 1-4”.¹¹¹

105. S. REP. NO. 116, 101st Cong., 1st Sess. 20 (1989). Dr. I. King Jordan testified that passage of the ADA “is necessary to demonstrate that disabled people can have the same aspirations and dreams as other American citizens. Disabled people know their dreams can be fulfilled.” *Id.*

106. See S. REP. NO. 116, 101st Cong., 1st Sess. 22; See also *Gates*, 39 F.3d at 1446.

107. AIDS CLINICAL TRIALS UNIT & THE MIDWEST AIDS TRAINING & EDUCATION CENTER - EASTERN MISSOURI, HIV IN WOMEN & THEIR NEWBORNS: TREATMENT AND PREVENTION STRATEGIES 11 (1997) [hereinafter CLINICAL TRIALS].

108. *Runnebaum*, 123 F.3d at 171.

109. “In the United States, 513,486 cases of people with AIDS had been reported to the Centers for Disease Control and Prevention (CDC) as of Dec. 31, 1995. Among these individuals, 319,849 had died by the end of 1995.” INSTITUTE, *supra* note 2, at 1.

110. Gregory M. Shumaker, *AIDS: Does it Qualify as a “Handicap” Under the Rehabilitation Act of 1973?*, 61 NOTRE DAME L. REV. 572, 575 (1986).

111. CLINICAL TRIALS, *supra* note 107, at 11. Each year in the U.S., approximately 7000 infants are born to women with HIV. Of these, 1000 to 2000 infants are estimated to be HIV-infected based on a perinatal transmission rate of 15-30 percent. *Id.* “HIV is also transmitted from mother to infant during pregnancy, labor and delivery or postpartum through breast feeding.

The *Runnebaum* majority also argued that since Mr. Runnebaum was homosexual his reproductive system is not affected.¹¹² The majority reasoned that choosing not to use his reproductive system was distinguishable from it actually being unusable.¹¹³ An individual's homosexuality should not give the judiciary permission to make rulings based on procreation options.

During the Senate Hearings, problems were anticipated regarding the scope of the "major life activity" classification.¹¹⁴ Therefore, there was discussion about what activities should be included, without specifically listing all possible activities. By doing so, Congress hoped to avoid the exclusion of proper impairments and activities.¹¹⁵ One specific example that was given in an attempt to differentiate between those impairments covered and not covered was: persons with minor, trivial impairments such as an infected finger are not impaired in a major life activity.¹¹⁶ Surely, the majority in *Runnebaum* was not grouping a person with HIV infection with a person with an infected finger.

Asymptomatic HIV passes the "major life activity" prong on two equally significant levels; ability to reproduce and ability to fight infection. We sustain life, personally and vocationally, through our ability to fight infection.¹¹⁷ Therefore, not only is reproduction a major life activity substantially limited by HIV, but ability to fight infection is as well.¹¹⁸

According to current estimates, approximately 65-70 percent are infected at or around the time of delivery, with the remainder during the pregnancy." *Id.*

112. *Runnebaum*, 123 F.3d at 172.

113. *Id.* at 172.

114. See S. REP. NO. 116, 101st Cong., 1st Sess. 20 (1989).

115. *Id.* at 23.

116. *Id.*

117. *Runnebaum*, 123 F.3d at 180, 181. As suggested by the dissent, the inability to fight infection is an impairment of a major life activity. *Id.* "AIDS is a devastating condition that causes a breakdown of the human immune system, leaving the victim incapable of defending against certain unusual fatal illnesses." Patricia A. Curylo, *AIDS and Employment Discrimination: Should AIDS be Considered a Handicap?*, 33 WAYNE L. REV. 1095, 1096-7, citing Leonard, *Employment Discrimination Against Persons With AIDS*, 19 CLEARINGHOUSE REV. 1292 (1986); Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11 (1986). "The two most common opportunistic infections found in AIDS victims are Pneumocystis Pneumonia (PCP) and Kaposi's Sarcoma (KC)." See Curylo, 33 WAYNE L. REV. at 1096-7, 30 CENTERS FOR DISEASE CONTROL: MORBIDITY & MORTALITY WEEKLY REP. 250 (June 5, 1981). "PCP is a severe pneumonia that causes respiratory problems, weight loss, and general malaise. KS is a rare form of cancer that results in skin lesions, mucous membrane lesions, severe weight loss, and fever. Because AIDS victims have a diminished cellular immunity, these and other infections spread quickly and dangerously throughout the body. In all instances, death eventually occurs." *Id.*

118. "In the United States, opportunistic infections reduce the quality and duration of life for approximately 1 million persons who have HIV infection." USPHS/IDSA, *Guidelines for the Prevention of Opportunistic Infections in Persons Infected with Human Immunodeficiency Virus: A Summary*, MORBIDITY & MORTALITY WKLY. REP., July 14, 1996, at 1.

The *Runnebaum* majority suggested that Congress was contemplating “employment/vocational” activities, not reproduction.¹¹⁹ If Congress had meant for ADA’s major life activities to include only major “employment/vocational” activities, as the majority suggested, then Congress would have used that language. The ADA is an Act intended to protect persons with disabilities in the workplace, in their vocation. Therefore, it can be assumed that Congress would be aware of employment/vocation-specific language. If Congress intended to use employment language, it would have. Instead, the legislature used “life” activity.¹²⁰ Reproduction creates life. Congress intended reproduction to be covered.

Runnebaum’s holding allowed the ADA to fail persons with disabilities by not accomplishing the intended purpose of “eliminating discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life”.¹²¹ It demonstrated that there are parts of our country that still do not truly understand disabilities, and some courts are not prepared to offer fair treatment to persons with disabilities. This wide-spread lack of understanding of HIV was the basis for the urgent need for the Supreme Court holding allowing persons infected with asymptomatic HIV the opportunity to be protected under the ADA.

B. Supreme Court Holdings

A prior Supreme Court holding in *School Board of Nassau County, Florida v. Arline* gave a preview of how the Court would rule when faced with including asymptomatic HIV under the ADA.¹²² As *Arline* foreshadowed, the Court properly upheld the First, Ninth, and Eleventh Circuits by ruling that asymptomatic is a disability within the meaning of the ADA.¹²³

The Supreme Court applied similar reasoning in *Bragdon* to what it used 10 years earlier in *Arline*.¹²⁴ In *Arline*, the Court held that a person suffering from the contagious disease of tuberculosis was a handicapped person within the meaning of 504 of the Rehabilitation Act of 1973.¹²⁵ The Court reasoned that the fact that a person with an impairment was also contagious did not eliminate that person from coverage under the Act. The Court reasoned that to allow an employer to rationalize discrimination by distinguishing between a disease’s contagious effects on others and its physical effects on a patient would be contrary to the purpose of the Act¹²⁶, the legislative history, and

119. *Runnebaum*, 123 F.3d at 170.

120. 42 U.S.C. § 12102(2)(A)(1990).

121. 42 U.S.C. § 12102(1990).

122. *School Board of Nassau County, Fla. v. Arline*, 480 U.S. 273 (1987).

123. *Abbott*, 107 F.3d at 943; *Gates*, 39 F.3d at 1446; *Harris*, 941 F.2d at 1524.

124. *See Arline*, 480 U.S. 273.

125. *Id.*

126. 29 U.S.C. § 706 (7)(B).

would be inconsistent with the Act's basic purpose to ensure that persons with disabilities are not denied employment because of the prejudice or ignorance of others.¹²⁷ The Act was intended to replace such fearful reactions with "actions based on reasoned and medically sound judgments" as to whether contagious persons with disabilities were otherwise qualified to do the job.¹²⁸

Even though the symptoms between tuberculosis and HIV are different, the Court's reasoning was similarly applied. In *Arline*, the Court focused on legislative intent, the basic purpose of protective legislation like the Rehabilitation Act of 1973, not distinguishing between the physical effects of the disability on the person from the possible physical effects on others, and replacing prejudice and ignorance with medically sound judgment.¹²⁹ *Bragdon* focused on the legislative intent of the Rehabilitation Act and included all degrees of advancement of HIV disease¹³⁰, the severe physical effects of the disease internally (as opposed to external symptomology),¹³¹ and the effect on the person's major life activity by increasing the risk of harm to self and others by engaging in reproductive/sexual activities.¹³²

In *Arline*, the Court found that Congress intended to protect individuals with disabilities, like tuberculosis, by including in the definition of "physical impairment" a list of body systems that, when affected, constitutes an impairment.¹³³ Since "respiratory" was within the list and because tuberculosis affects the individual's respiratory system, the Court reasoned "physical impairment affecting one or more of such person's major life activities" was met.¹³⁴

Similarly, in *Bragdon*, through a more stringent analysis, the Court reasoned that because asymptomatic and symptomatic HIV impair reproduction and because "reproductive system was listed by Congress¹³⁵ as a body system that when affected constitutes a physical impairment,¹³⁶ asymptomatic HIV fell within the meaning of the ADA.

The Court in *Arline* held it was not fair to distinguish the physical effects of the disability on the person from the possible physical effects on others.¹³⁷ However, in *Runnebaum*, the Fourth Circuit majority distinguished between the effects HIV had on the individual's reproductive system and the effects the

127. *Arline*, 480 U.S. at 284.

128. *Id.* at 285.

129. *Id.* at 281-285.

130. *Bragdon*, 118 S. Ct. at 2202-3.

131. *Id.* at 2203-4.

132. *Id.* at 2206.

133. *See*, 45 C.F.R. § 84.3(j)(2)(i)(1985).

134. *Arline*, 480 U.S. at 282.

135. 29 C.F.R. § 706 pt.1630.2(h),(i) (Supp.1993).

136. *Bragdon*, 118 S. Ct. at 2202-6.

137. *Arline*, 480 U.S. at 282.

HIV could have on others, like offspring and partners.¹³⁸ Likewise, *Bragdon's* dissent also improperly attempted to distinguish between the effects the individual was having at the time due to their asymptomatic HIV status, and the possible future effects of procreating.¹³⁹ The *Bragdon* dissent improperly attempted to narrow the scope of the phrase "major life activity substantially impaired" by requiring an individualized inquiry and allowing only persons previously reproducing or intending to use their reproductive system to qualify.¹⁴⁰ This outdated thinking aligned nicely with *Runnebaum's* majority view and suggests that several Justices probably are not ready to grant a homosexual male ADA protection because he may not be planning on having children.

Fortunately, just as in *Arline*, the majority was not persuaded and remained consistent in *Bragdon* and did not allow a distinction between the current effects of the disability on the person and possible future effects on others during reproduction.¹⁴¹ Therefore, in *Bragdon*, the Court specifically rejected *Runnebaum's* reasoning, that the effect that HIV has on others is not substantially limiting to the infected person, and granted ADA coverage.

Additionally, in *Arline*, the Court looked to the basic purpose of the Acts and found that Acts like the Rehabilitation Act of 1973 are in place to "ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others."¹⁴² The basic purpose of the Americans with Disabilities Act was to further advance the goals of the Rehabilitation Act of eliminating discrimination of individuals with disabilities by including private employers as liable entities.¹⁴³

Accordingly, the Court in *Bragdon*, by including individuals with asymptomatic HIV, has furthered the goal of eliminating discrimination and providing much needed protection for HIV individuals from ignorance of others. People discriminating against HIV positive individuals do not care if the individual's HIV is symptomatic or asymptomatic; the level of discrimination will be the same, so, the Court has provided a level of equal protection to individuals suffering during any stage of advancement of the virus.

Lastly, the Court in *Arline* upheld replacing prejudice and ignorance with medically sound judgment.¹⁴⁴ The Court noted 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

138. *Runnebaum*, 123 F.3d at 171-2.

139. *Bragdon*, 118 S. Ct. at 2215-16.

140. *Id.* at 2215.

141. *Id.* at 2206.

142. *Arline*, 480 U.S. at 284.

143. *Jenkins*, *supra* note 14, at 642.

144. *Arline*, 480 U.S. at 285.

impairment.”¹⁴⁵ In *Runnebaum*, the Fourth Circuit completely omitted and ignored the medical fact that the immune system is affected by HIV, regardless of the asymptomatic or symptomatic stage.¹⁴⁶ In *Bragdon*, the Court went to great lengths to explore and understand sophisticated, recent medical studies. The studies explained the medical effects and stages of HIV, and specifically, the effects on the immune and reproductive systems.¹⁴⁷

By applying medically sound judgment, there was recognition that the individual’s immune system was under attack, which constituted an affected body system and deterioration/impairment of the major life activities of fighting off infection and reproduction.¹⁴⁸ In making medically sound judgments, there was focus on new developments in HIV that were not around during previous cases nor when Acts, like the Rehabilitation Act, were being created.¹⁴⁹ This allowed new data to be considered so the individual with HIV was properly represented in the judicial system by recent medical knowledge, not by outdated material that omitted recent clinical findings about the disease or by outdated prejudice and fears.

Applying the reasoning used in *Arline*, the Court in *Bragdon* properly found asymptomatic HIV to be a disability within the meaning of the ADA. The Court properly offered protection to a class of persons intended to be covered under the purpose of ADA. The Court’s holding is supported by clear legislative intent and was correctly made in an effort to prevent distinction between current physical effects of the HIV and the possible future physical effect. A Court finally applied medically sound judgment to understand the effects of HIV on the immune system and reproductive system instead of relying on prejudice and ignorance.

IV. CONCLUSION

“AIDS is now the leading killer of people aged 25-44 in this country. Worldwide, an estimated 27.9 million people had become HIV-infected through mid-1996, and 717 million had developed AIDS, according to the World Health Organization (WHO). Various projections indicate that, by the year 2000, between 40 and 110 million people worldwide will be HIV-infected.”¹⁵⁰ With a statistical projection of a minimum of 40 million persons worldwide being infected with HIV, it was imperative that the Supreme Court take action. “Promoting employment of individuals with handicaps is part of a

145. *Id.* at 284.

146. *See generally Runnebaum*, 123 F.3d at 156.

147. *Bragdon*, 118 S. Ct. at 2203-2207.

148. *Arline*, 480 U.S. at 285.

149. The Rehabilitation Act was adopted in 1973, while the first cases of HIV were discovered in June, 1981. Shumaker, *supra* note 110, at 574.

150. INSTITUTE, *supra* note 2, at 1-2.

broader goal of creating social equality for such individuals by guaranteeing them equal rights and equal access to all facets of society”.¹⁵¹

Despite the destructive result of the 1997 decision in *Runnebaum* to the HIV and disabled communities, the Supreme Court refused to approach the asymptomatic HIV issue with the same “you can walk, you can talk, you don’t seem sick enough” dismissive attitude postured by the Fourth Circuit majority. The Court recognized that individuals with asymptomatic HIV are in need of protection from discrimination, in the workplace or in the doctor’s office. The ADA was intended to provide this protection. The support from the highest Court protected a large percentage of our country’s disabled population that is vulnerable to prejudice.

Both the country and individuals may benefit when persons with disabilities are represented in the workplace.¹⁵² Allowing asymptomatic HIV persons to be run off from employment without protection, as in *Runnebaum*, directly contradicts the goal of the ADA. Finally, the Supreme Court opened its mind, and medical books, and did not allow this to happen.

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151. Kushen, *supra* note 4, at 565.

152. The ADA was enacted in 1990 to provide a clear national mandate to stop discrimination against persons with disabilities. S. REP. NO. 116, 101st Cong., 1st Sess. 22 (1989). Furthermore, the tax-base and taxpayers of the country are benefited by having persons with disabilities as taxpayers rather than recipients of tax money through Social Security Disability Insurance (SSDI) monthly payments.