Touro Law Review

Volume 15 | Number 2 Article 22

1999

To Heal Another or to Protect Oneself?: HIV Under the ADA in Light of Bragdon v. Abbott

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TO HEAL ANOTHER OR TO PROTECT ONESELF?: HIV UNDER THE ADA IN LIGHT OF *BRAGDON v. ABBOTT*

I. INTRODUCTION

During a routine dental appointment, petitioner, Dr. Bragdon, informed respondent, Ms. Sidney Abbott, that she had a cavity which could only be filled in a hospital setting.[1] Petitioner maintained an infectious disease policy, which respondent claimed violated the Americans with Disabilities Act [hereinafter "ADA"].[2] The United States District Court ruled in favor of respondent and the Court of Appeals affirmed.[3] Petitioner appealed to the Supreme Court which affirmed in part and remanded in part for further proceedings.[4]

In order to state a claim under the ADA,[5] respondent needed to show that she had a "physical or mental impairment that substantially limit(ed) one or more of the major life activities . . . ."[6] Once this was shown, it was possible under the ADA for her to be assured of antidiscrimination[7] in her request

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[1] Bragdon v. Abbott, 118 S. Ct. 2196, 2201 (1998).

[2] *Id. See also* 42 U.S.C. § § 12101-12213 (1994).

[3] Abbott v. Bragdon, 912 F. Supp. 580 (D. Maine 1995); *see also* Abbott v. Bragdon, 107 F.3d 934 (1st Cir. 1997).

[4] *Bragdon,* 118 S. Ct. 2196 (1998).

[5] 42 U.S.C. §§ 12101-12213.

[6] *Id.* at § 12102(2). Section 12102(2) provides in pertinent part: "The term 'disability' means, with respect to the individual –(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id.* Ms. Abbott stated her claim under part (A) of this provision. *Bragdon,* 118 S. Ct. at 2201.

[7] 42 U.S.C. § 12182(a) (1994). Section 12182(a) provides in pertinent part: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." *Id.*

for services.[8] However, the discrimination would be allowed if petitioner could prove that a "significant risk to the health or safety of others [could not] be eliminated by reasonable accommodation."[9]

Respondent claimed that her human immunodeficiency virus [hereinafter "HIV"] positive status constituted a physical impairment under the ADA,[10] and that this status substantially limited the major life activity of procreation.[11] The first prong of her three-pronged claim, that her HIV positive status constituted a disability for the purposes of stating a claim under the ADA, required her to prove that asymptomatic HIV was considered a "disability."[12] The second prong, that reproduction is a "major life activity,"[13] has had differing results in the Circuit Courts of the United States.[14] The third prong ties the first two together when the physical impairment substantially limits a major life activity.

The Supreme Court granted certiorari to resolve three issues: 1) whether reproduction is a major life activity within the meaning of the ADA,[15] 2) whether asymptomatic individuals infected with HIV are *per se* disabled within the meaning of the ADA,[16] and 3) whether courts should defer to the professional judgment of a

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[8] *Id.* at § 12181(7). Section 12181(7) provides in pertinent part: "The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce -- (F) . . . professional office of a health care provider . . . ." *Id.*

[9] *Id.* at § 12111(3). Section 12111(3) provides in pertinent part: "The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.*

[10] Bragdon v. Abbott, 118 S. Ct. 2196, 2201 (1998).

[11] *Id.* at 2204.

[12] *See supra* note 6.

[13] *See infra* note 32.

[14] *See* Pacourek v. Inland Steel, 916 F. Supp. 797 (E.D. Ill. 1996) (finding that reproduction was a major life activity); Erickson v. Board of Governers, 911 F. Supp. 316 (N.D. Ill. 1995) (finding that reproduction was a major life activity). *But see* Zatarain v. WDSU-Television, Inc., 881 F. Supp 240 (E.D. La. 1995), *aff'd,* 79 F.3d. 1143 (5th Cir. 1996) (holding that reproduction was not a major life activity).

[15] *Bragdon,* 118 S. Ct. at 2205.

[16] *Id.* at 2201.

private health care provider and current medical knowledge when deciding whether an invasive procedure must be performed on an infected patient in the provider's office.[17]

II. LEGISLATIVE AND JUDICIAL HISTORY

A. *Legislative History*

The ADA[18] was preceded by the Rehabilitation Act [hereinafter "Act"] of 1973.[19] Both pieces of legislation address the issue of disabilities in the workplace. While the Act was intended to increase vocational opportunities for disabled Americans[20], the ADA was enacted to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[21]

The passage of the Rehabilitation Act in 1973 "prohibit[ed] a federally funded state program from discriminating against a handicapped individual solely by reason of his or her handicap."[22]

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[17] *Id.* at 2210-11.

[18] 42 U.S.C. §§ 12101-12213 (1994).

[19] 29 U.S.C. § 701(c) (1994). Section 701(c) provides in pertinent part:

> It is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter shall be carried out in a manner consistent with the principles of—(1) respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities; (2) respect for the privacy rights, and equal access (including the use of accessible formats), of the individuals; (3) inclusion, integration, and full participation of the individuals; (4) support for the involvement of a parent, a family member, a guardian, an advocate, or authorized representative if an individual with a disability requests, desires or needs such support; and (5) support for individual and systemic advocacy and community involvement.

Id.

[20] *See infra* note 21.

[21] Katz v. City Metal Co., Inc., 87 F.3d 26, 30 (1st Cir. 1996).

[22] 29 U.S.C. § 701 (1994). *See also* School Board of Nassau County v. Arline, 480 U.S. 273, 275 (1986).

Although this legislation was primarily focused on increasing vocational opportunities for handicapped individuals,[23] it included an antidiscrimination provision modeled after the Civil Rights Act of 1964.[24] This provision prohibited discrimination solely on the basis of the individual's handicap.[25] Additionally, Senator Hubert Humphrey stated in 1977 that this Act enlisted all programs receiving federal funds in the effort "to share with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted."[26]

The definition of "disability" in the Act centered around an individual's ability to work.[27] However, this proved to be too

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[23] 29 U.S.C. § 701 (1994). Section 701 provides in pertinent part:

> The purposes of this chapter are—(1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society . . . (2) to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with significant disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living.

Id.

[24] *Arline*, 480 U.S. at 277-78.

[25] 29 U.S.C. § 794 (1994). Section 794(a) provides in pertinent part:

> No otherwise qualified individual with a disability in the Unites States, as defined in section 706(20) [FN1] of this title, shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by an Executive agency or by the United States Postal Service.

Id.

[26] 123 CONG. REC. 13515 (1977) (statement of Sen. Humphrey) *cited in Arline*, 480 U.S at 277.

[27] 29 U.S.C. § 705(20) (1994). Section 705(20) provides in pertinent part:

> Individual with a disability (A) In general-Except as otherwise provided in subparagraph (B), the term "individual with a disability" means any individual who—(i) has a physical or mental impairment which for such individual

narrow a definition to address discrimination in the other areas addressed in the legislation,[28] like housing, education and health care.[29] Consequently, in 1974, Congress expanded the definition of "handicapped individual" in an attempt to ameliorate this problem.[30] Regulations promulgated by the Department of Health and Human Services [hereinafter "DHHS"] further define such terms as "physical impairment"[31] and "major life activity."[32] Yet, the scope of this legislation continued to target federally funded programs.[33] Therefore, individuals and programs not receiving federal assistance were not necessarily prohibited from discriminating against individuals on the basis of their handicap.

In 1990, Congress passed the ADA.[34] Where the Rehabilitation Act focused on vocational rehabilitation with an antidiscriminatory provision,[35] the ADA was enacted to "provide a clear and comprehensive national mandate for the elimination of

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> constitutes or results in a substantial impediment to employment; and (ii) can benefit in terms of an employment outcome from vocational rehabilitation services . . . .

Id.

[28] *Arline,* 480 U.S. at 279. Since the Act specified "any program or activity receiving Federal assistance," the Act, by it's own language, did not preclude discrimination that does not receive any federal assistance.

[29] *Id.*

[30] *Id.* at 278-79. *See also* 29 U.S.C.A. § 705(20)(B). Section 705(20)(B) provides in pertinent part: "[A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment." *Id.*

[31] 45 C.F.R. § 84.3(j)(2)(i) (1998). This section provides in pertinent part: "[P]hysical or mental impairment' means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine . . . ." *Id.*

[32] 45 C.F.R. § 84.3(j)(2)(ii). This section provides in pertinent part: "'[M]ajor life activities' means functions such as functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.*

[33] *See supra* note 22 and accompanying text.

[34] 42 U.S.C. § 12101-12213 (1994).

[35] School Board of Nassau County v. Arline, 480 U.S. 273, 277 (1987).

discrimination against individuals with disabilities."[36] The ADA utilized the term "disability" instead of "handicap"; nevertheless, it was the intent of Congress to simply remain current with the statute's language, rather than create a new definition.[37] Another distinction between the Act and the ADA relates to whom the statutes apply. Where the Rehabilitation Act applies to federally funded state programs,[38] the ADA provides broader coverage.[39] The ADAs coverage ensures equal access to those with disabilities in places of "public accommodation."[40] This is particularly important in tracing the case law leading up to the Supreme Court decision in *Bragdon v. Abbott*.[41] The importance

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[36] 42 U.S.C. § 12101. *See also* Katz v. City Metal Co., Inc., 87 F.3d 26, 30 (1st Cir. 1996).

[37] Erickson v. Board of Governors, 911 F. Supp. 316, 322 (N.D. Ill. 1995).

[38] 29 U.S.C. § 701(c) (1994). Section 701(c) provides in pertinent part: "It is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter shall be carried out in a manner consistent with the principles . . . ." *Id.*

[39] 42 U.S.C. § 12101. Section 12101 provides in pertinent part:

> It is the purpose of this chapter (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Id.

[40] 42 U.S.C. § 12182(a). Section 12182(a) provides in pertinent part: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." *Id.*

[41] 118 S. Ct. 2196 (1998).

centers around the right of Ms. Abbott to sue Dr. Bragdon as his dental practice is considered a place of "public accommodation"[42]

Furthermore, in the early 1990s there was a limited amount of case law on the newly passed ADA.[43] Because of this limitation and the practically identical construction and language, the standards and regulations of the Rehabilitation Act, except where explicitly different, were held to apply to the ADA.[44]

B. *Judicial Application*

This note reviews the judicial application of the ADA related to two issues[45] decided by the Supreme Court in the *Bragdon* case. The lower courts applied these issues in two separate contexts – employment[46] and public accommodations.[47] Both are significant because they lay the groundwork for the jurisdictional splits

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[42] 42 U.S.C. § 12181(7). Section 12181(7) provides in pertinent part: "The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce . . . .(F). . . .professional office of a health care provider, ..." *Id.*

[43] Erickson v. Board of Governers, 911 F. Supp. 316, 322 (N.D. Ill. 1995).

[44] United States v. Morvant, 898 F. Supp. 1157, 1160 (E.D. La. 1995).

[45] Bragdon v. Abbott, 118 S. Ct. 2196 (1998). The first issue "whether reproduction is a major life activity within the meaning of the ADA" was applied in the context of the workplace in the lower courts. *See* Zatarain v. WDSU-Television, Inc., 881 F. Supp. 240 (E.D. La. 1995), *aff'd*, 79 F.3d 1143 (5th Cir. 1996); *Erickson*, 911 F. Supp. 316; Pacourek v. Inland Steel, 916 F. Supp. 797 (N.D. Ill. 1996); Krauel v. Iowa Medical Center, 95 F.3d 674 (8th Cir. 1996). The second issue "whether asymptomatic individuals infected with HIV are *per se* disabled within the meaning of the ADA" was applied in the lower courts both as a workplace discrimination and public accommodation discrimination issue. *See Morvant*, 898 F. Supp. 1157; Runnebaum v. Nationsbank, 123 F.3d 156 (4th Cir. 1997). *See also* School Board of Nassau County v. Arline, 480 U.S. 273 (1987).

[46] *See* Katz v. City Metal Co. Inc., 87 F.3d 26 (1st Cir. 1996); *Krauel*, 95 F.3d 674; *Pacourek*, 916 F. Supp. 797; Hernandez v. Prudential Insurance Co. of America, 977 F. Supp. 1160 (M.D. Fla. 1997); Ennis v. NABER, 53 F.3d 55 (4th Cir. 1995); *Erickson*, 911 F. Supp. 316; Runnebaum v. Nationsbank, 123 F. 156 (4th Cir. 1997).

[47] *See Morvant*, 898 F. Supp. 1157; Abbott v. Bragdon, 107 F.3d 934 (1st Cir. 1996).

resolved by the *Bragdon* Court.[48] In both contexts, the burden of proof lies with the plaintiff to prove a "disability" within the meaning of the ADA.[49] In the case of employment discrimination, the plaintiff must also prove that with or without "reasonable accommodation"[50] the plaintiff was able to perform the essential functions of the job and that the employer discharged the plaintiff in whole or in part because of the disability.[51] Furthermore, when a case relates to discrimination in a place of "public accommodation,"[52] there are two additional requirements for a plaintiff to prove.[53] First, plaintiff must show that the alleged facility, office, etc. is a place of "public accommodation."[54] Second, plaintiff must prove denial of full and equal treatment, services, etc. because of the "disability."[55] Both the Act and the ADA define "disability" as "a physical or mental impairment which substantially limits one or more of the major life activities of [an] individual."[56]

C. *Dissent in the Legal Community*

Whether an HIV positive individual is covered by the ADA and protected from discrimination depends on whether the condition

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[48] Bragdon v. Abbott, 118 S. Ct. 2196 (1998).

[49] *See Katz*, 87 F.3d at 30; *Morvant*, 898 F. Supp. at 1161.

[50] 42 U.S.C. § 12111(9) (1994). Section 12111(9) provides in pertinent part:

> The term "reasonable accommodation" may include --(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id.

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

[52] *See supra* note 8 and accompanying text.

[53] *Morvant*, 898 F. Supp. at 1161.

[54] *See supra* note 8 and accompanying text.

[55] *Morvant*, 898 F. Supp. at 1161.

[56] *See supra* note 6.

is covered within the definition of "physical impairment,"[57] as well as if that "physical impairment"[58] affects a "major life activity".[59] In *Bragdon,* the Court granted certiorari to determine whether an individual with asymptomatic HIV was *per se* disabled under the ADA.[60]

When HIV has produced visible symptoms affecting one or more body systems, the condition fits squarely within the definition of "physical impairment" as defined by the DHHS[61] or the definition of "substantially limits" as defined by the Equal Employment Opportunity Commission [hereinafter "EEOC"].[62] Yet, when the individual is HIV positive and asymptomatic, the clarity is lost.

Without definitional clarity, individuals must rely on a court's interpretation of the definition in order to determine if the law provides protection. Because a determination of disability is made on a case by case basis,[63] it is necessary to analyze cases where the plaintiff was HIV positive and asymptomatic in order to have the proper context to understand the *Bragdon* decision.

In the 1995 decision of *Ennis v. NABER,*[64] the Fourth Circuit court assumed "disability" for an asymptomatic HIV infected individual for the purposes of the litigation.[65] Yet, in the 1997 decision of *Runnebaum v. Nationsbank,*[66] the Fourth Circuit held that an individual with asymptomatic HIV would not be considered to have a disability under the ADA.[67]

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[57] *See supra* note 31.

[58] *See id.*

[59] *See supra* note 32.

[60] Bragdon v. Abbott, 118 S. Ct. 2196, 2207 (1997) (declining to address whether HIV infection is a *per se* disability).

[61] *See supra* note 31.

[62] 29 C.F.R. § 1630.2(j) (1998). Section 1630.2(j) provides in pertinent part: "[I]mpairments, however, such as HIV infection, are inherently substantially limiting." *Id.*

[63] Ennis v. NABER, 53 F.3d 55 (4th Cir. 1995).

[64] *Id.*

[65] *Id.* at 60.

[66] 123 F.3d 156 (4th Cir. 1997).

[67] *Id.* at 161.

These cases are distinguished by their analysis of the HIV infected individual as "disabled." In *Ennis*, the court assumed, without analysis, that plaintiff's adopted son was disabled within the meaning of the ADA,[68] while also holding that she did not carry her burden to prove a prima facie case of disability.[69] Yet, in *Runnebaum* the court held that asymptomatic HIV did not qualify as a disability under the ADA scheme.[70] In order to dispose of the case in *Ennis*, the court did not need to analyze HIV as a "disability". However, in order to make a determination in *Runnebaum,* analysis of whether or not HIV is a "disability" was necessary for the outcome of the case.[71]

Other circuit courts have held that HIV is a "disability" under the ADA. In the 1994 case of *Gates v. Rowland,*[72] the Ninth Circuit concluded that an individual with HIV infection was "disabled" under the ADA.[73] The First Circuit held that an individual infected with HIV was *per se* disabled under the ADA[74]. The First Circuit relied on the specific language of the EEOC regulation[75] whereby "HIV disease (whether symptomatic or asymptomatic)" was considered within a long list of physical and mental impairments.[76] Lastly, the Eleventh Circuit also held that HIV positive individuals were disabled within the meaning of the Rehabilitation Act as they are "regarded as having a physical impairment."[77]

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[68] *Ennis,* 53 F.3d at 60.

[69] *Ennis,* 53 F.3d at 62.

[70] *Runnebaum,* 123 F.3d 156.

[71] *Id.* at 165-70.

[72] 39 F.3d 1439 (9th Cir. 1994).

[73] *Id.* at 1446.

[74] Abbott v. Bragdon, 107 F.3d. 934, 939 (1st Cir. 1997).

[75] 28 C.F.R. § 35.104(B)(ii) (1998). Section 35.104(B)(ii) provides in pertinent part: "The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as . . . .HIV disease (whether symptomatic or asymptomatic) . . . ." *Id.*

[76] *Id.*

[77] Harris v. Thigpen, 941 F.2d 1495, 1524 (1991). The court noted that the Supreme Court in *Arline* had not decided whether those with asymptomatic diseases were considered to be physically impaired within the meaning of the statute. *Id.* at 1523. Additionally, as noted above the regulations and case law

Federal district courts have also decided that asymptomatic HIV positive individuals are disabled within the meaning of the ADA. The court in *T.E.P. v. Leavitt,*[78] held that those infected with HIV were disabled within the meaning of the Rehabilitation Act of 1973.[79] In 1995, the court deciding *United States v. Morvant*[80] relied on a Department of Justice regulation[81] and held that asymptomatic HIV disease was a disability under the ADA.[82] Similarly, when the court decided *Howard v. Hull,*[83] it concluded that both AIDS and HIV infection were disabilities under the ADA.[84]

A finding that asymptomatic HIV is a "physical impairment" under the ADA does not carry the burden of showing that asymptomatic HIV is a "disability." Whether or not a "physical . . . impairment substantially limits one or more of the major life activities"[85] determines if the ADA protects those with asymptomatic HIV.[86] Herein lies another jurisdictional split;

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under the Rehabilitation Act were largely adopted with the passage of the ADA. *See supra* note 40 and accompanying text. *See also* Doe v. Garrett, 903 F.2d 1455, 1459 (11th Cir. 1990) (noting that "infection with AIDS constitutes a handicap for the purposes of the Act.").

[78] 840 F. Supp. 110 (D. Utah 1993).

[79] *Id.* at 110.

[80] 898 F. Supp. 1157 (E.D. La. 1995).

[81] 28 C.F.R. § 36.104 (1998). Section 36.104 provides in pertinent part:

> Disability means . . . . (iii) [t]he phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

Id.

[82] *Morvant,* 898 F. Supp. at 1161.

[83] 873 F. Supp. 72 (N.D. Ohio 1994).

[84] *Id.* at 78.

[85] *See supra* note 6 and accompanying text.

[86] *Id.*

namely, whether reproduction is considered a "major life activity."[87]

Bragdon involves a respondent who claimed that the risk of infecting her sexual partners and offspring substantially limited her ability to reproduce.[88] The First Circuit court cites *Stanley v. Illinois*[89] in finding that Congress likely intended for reproduction to be considered a "major life activity" when it promulgated the ADA.[90] Similarly, the federal district court in the Eastern Division of Pennsylvania relied on *Stanley v. Illinois* when it found that the risk of transmission to offspring was a "significant injury to the reproductive system [and] impe[ded] a major life activity."[91] The federal district court in the Middle Division of Florida found there was sufficient evidence in the record to permit a jury to find that the HIV positive plaintiff was "substantially limited" in the "major life activity" of reproduction.[92] This same court also found that the plaintiff was "substantially limited" in his ability to care for himself, which is a "major life activity" from the list illustrated by the EEOC.[93]

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[87] *See* Abbott v. Bragdon, 107 F.3d 934, 939 (1st Cir. 1997) (deducing that the drafters of the ADA considered reproduction to be a major life activity); *see also* Pacourek v. Inland Steel Co., 916 F. Supp. 797, 804 (N.D. Ill. 1996) (finding that reproduction was a major life activity); Erickson v. Board of Governors of State Colleges, 911 F. Supp. 316, 323 (N.D. Ill. 1995) (finding that reproduction was a major life activity); Cain v. Hyatt, 734 F. Supp. 671, 679 (E.D. Pa. 1990) (finding that reproduction was a major life activity). *But see* Krauel v. Iowa Medical Center, 95 F.3d 674, 677 (8th Cir. 1996) (holding that reproduction was not a major life activity); Zatarain v. WDSU-Television, Inc., 881 F. Supp. 240, 243 (E.D. La. 1995) (holding that reproduction was not a major life activity).

[88] *Bragdon*, 118 S. Ct. at 2204.

[89] Stanley v. Illinois, 405 U.S. 645 (1972). This case elucidates the importance in American jurisprudence of family and related matters through a litany of case illustrations.

[90] *Abbott*, 107 F.3d at 939.

[91] *Hyatt*, 734 F. Supp. at 679.

[92] Hernandez v. Prudential, 977 F. Supp. 1160, 1164 (M.D. Fla. 1997).

[93] *Id* at 1165. The plaintiff in this case was not asymptomatic during the time of the alleged discrimination. *Id.* at 1165. He suffered from a variety of symptoms related to his HIV infection. *Id. See also supra* note 31.

In 1996, the Federal district court in the Eastern District of Illinois held that reproduction was a "major life activity" as it related to the reproductive disorder of infertility[94]. Within the context of infertility, there was jurisdictional dissension as to whether reproduction could suffice for the "major life activity" prong of a prima facie case of discrimination under the ADA.[95]

The federal district court in the Eastern District of Louisiana held that infertility could not meet both the "physical impairment" prong and the "major life activity" prong of a claim of disability under the ADA.[96] The court found that infertility is clearly a physical impairment that affects the reproductive system,[97] one of the specified body systems listed by the EEOC.[98] However, the use of this same body system to meet the "major life activity" element of proof was deemed to be the plaintiff's attempt to "bootstrap a finding of substantial limitation of a major life activity on to a finding of substantial impairment."[99] Furthermore, the court reasoned that reproduction is not an activity consistent with the list of activities enumerated by the EEOC[100] because it was not engaged in with the same degree of regularity as those in the EEOC list.[101]

The EEOC list focuses on those activities of daily living which are typically engaged in on a daily basis.[102] To allow reproduction to be included in this list, reasoned the court, would be to expand the meaning of the ADA which is beyond the

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[94] Pacourek v. Inland Steel, 916 F. Supp. 797, 801 (E.D. Ill. 1996).

[95] *See Pacourek,* 916 F. Supp. 797 (E.D. Ill. 1996) (finding that reproduction was a major life activity); Erickson v. Board of Governers, 911 F. Supp. 316 (N.D. Ill. 1995) (finding that reproduction was a major life activity); Zatarain v. WDSU-Television, Inc., 881 F. Supp. 240 (E.D. La. 1995), *aff'd,* 79 F.3d 1143 (5th Cir. 1996) (holding that reproduction was not a major life activity); Krauel v. IMMC, 95 F.3d 674 (8th Cir. 1996) (holding that reproduction was not a major life activity).

[96] *Zatarain,* 881 F. Supp. at 243.

[97] *Id.*

[98] *See supra* note 31.

[99] *Zatarain,* 881 F. Supp. at 243.

[100] *See supra* note 32.

[101] *Zatarain,* 881 F. Supp. at 243.

[102] *Id.*

jurisdiction of the judiciary.[103] The Eighth Circuit followed the *Zatarain v. WDSU-Television, Inc.* court when it found that treating reproduction as a major life activity would be to "stretch the federal law."[104]

Conversely, the United States district court in the Eastern District of Illinois disputed this reasoning and held that reproduction is a major life activity.[105] The court in *Erickson v. Board of Governers*[106] specifically disputed the *Zatarain* court's reasoning in finding that reproduction is an activity that one engages in with the same degree of frequency as the other listed activities.[107] In so finding, the court simply identified that reproduction is a broader process than conception and gestation.[108] For both men and women, the reproductive systems are continually engaging in processes to achieve conception.[109]

Similarly, the court in *Pacourek v. Inland Steel*[110] identified that holding reproduction as a major life activity was clearly consistent with the intention of the ADA.[111] The court based its holding on the inclusion of "reproduction" in the illustrated list of body systems for "physical impairment."[112] The court found that the main purpose of the reproductive system is procreation; therefore, to not also find reproduction as a major life activity is to make the inclusion of this system in the list moot.[113]

It is important to note that the contextual framework for each ADA claim may influence the reasoning of the court. The four cases cited above show dissent in the judiciary when reproduction is identified as a "major life activity" as it relates to infertility.

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[103] *Id.*

[104] Krauel v. IMMC, 95 F.3d. 674, 677 (8th 1996).

[105] *See* Pacourek v. Inland Steel, 916 F. Supp. 797 (E.D. Ill. 1996); Erickson v. Board of Governers, 911 F. Supp. 316 (N.D. Ill. 1995).

[106] 911 F. Supp. 316 (N.D. Ill. 1995)

[107] *Id.* at 322.

[108] *Id.*

[109] *Id.*

[110] 916 F. Supp. 797 (E.D. Ill. 1996)

[111] *Id.* at 801.

[112] *Id.*

[113] *Id. But see* Bragdon v. Abbott, 118 S. Ct. 2196, 2215 (1998) (Rehnquist, C.J., dissenting).

The *Bragdon* case, however, focuses on reproduction as an impaired "major life activity" as it relates to the potential transmission of HIV to both partner and unborn child.

The *Zatarain* court struggles to allow the use of reproduction as a "major life activity" because of the use of the same body system for the "physical impairment" prong of the prima facie case. Yet, the *Runnebaum* court also disputes the use of reproduction as a "major life activity" within the context of HIV related concerns.[114] This court reasons, that one infected with HIV can, in fact, reproduce.[115] This court finds that the choice to forego the risk of infection to an unborn child is unpersuasive as a substantial limitation to the "major life activity" of reproduction.[116]

The third issue for which the Supreme Court granted certiorari relates to the degree of deference given to a health care professional's judgment when making decisions related to invasive procedures on infectious patients.[117] The First Circuit in *Abbott v. Bragdon* decided that the relevant medical knowledge at the time of the dentist's decision did not support the dentist's argument of a "direct threat."[118] In a similar case, the Fifth Circuit held that a dentist who was referring all HIV positive patients to another dentist under the guise of a specialty referral, was in violation of the ADA.[119] The court found that the infected patients could have been treated in his office with the use of the same level of precaution given to non-infected patients without a direct threat to the dentist or his staff.[120] It is precisely this type of discrimination that the Act and ADA were passed to address.[121]

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[114] *Runnebaum,* 123 F.3d 156, 171 (4th Cir. 1997).

[115] *Id.*

[116] *Id. See also Bragdon,* 118 S. Ct. at 2216 (Rehnquist, C.J., dissenting)

[117] *Bragdon*, 118 S. Ct. at 2210.

[118] 42 U.S.C. § 12111(3) (1994). § 12111(3) provides in pertinent part: "The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.*

[119] United States v. Morvant, 898 F. Supp. 1157, 1161 (E.D. La. 1995).

[120] *Id.*

[121] Cain v. Hyatt, 734 F. Supp. 671, 682 (E.D. Pa. 1990).

III. THE DECISION

The *Bragdon* case was decided on June 25, 1998.[122] The Court handed down a 5-4 decision holding that Ms. Abbott's HIV infection did constitute a disability under the ADA.[123] All three underlying issues supporting a claim of disability were decided: 1) whether her HIV infection was a "physical impairment," 2) whether reproduction and child bearing constitute a "major life activity," and 3) if the impairment "substantially limits" the "major life activity."[124] However, the Court remanded to the First Circuit the degree of deference given to the health care provider in determining if a "direct threat" exists.[125]

Relative to the first underlying issue, the Court held that HIV is an "impairment from the moment of infection."[126] Specifically, the Court finds the use of the term "asymptomatic" a misnomer[127] when referencing that one is infected but not visibly affected by HIV. The Court illustrated at great length the current scientific knowledge supporting its decision.[128] This decision resolves one of the Circuit splits.

The second underlying issue also involved a jurisdictional split; whether reproduction is to be considered a "major life activity." The Court easily finds that reproduction is a major life activity.[129] Support for the Courts decision is predicated on the definition of the term "major"[130] as well as an interpretation of the list from the Rehabilitation Act as "illustrative, not exhaustive."[131] However, the Court goes even further in stating that "reproduction and the sexual dynamics surrounding it are central

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[122] Bragdon v. Abbott, 118 S. Ct. 2196 (1998).
[123] *Id.* at 2201.
[124] *Id.* at 2202.
[125] *Id.* at 2213.
[126] *Id.* at 2204.
[127] *Id.*
[128] *Id.* at 2203-04.
[129] *Id.* at 2205.
[130] *Id.*
[131] *Id.*

to the life process itself."[132] The case before the Court and other similar cases, did not rely on HIV affecting one's sexual relations as a "major life activity."[133]

The third underlying issue brings the two prior issues together in deciding if the "physical impairment" of HIV infection substantially limits one's ability to reproduce. The Court held that "a consistent course of agency interpretation . . . consider[ing] the issue . . . found statutory coverage for persons with asymptomatic HIV."[134] Again, the Court identifies the risk of infection during sexual activity as part of the "substantial limitation" analysis.[135] The risk of perinatal infection is also identified in the same analysis as a "substantial limitation."[136]

The dissent argues that those infected with HIV are able to engage in sexual relations, get pregnant, carry the pregnancy to term and give birth.[137] This ability does not constitute a "substantial limitation" on life activities, according to the dissent, but a choice which is to be considered a voluntary act.[138] The Court specifically disputes the logic of the dissent in finding that just because an HIV infected woman can become pregnant and carry the fetus to term, does not necessarily mean that her risk of infecting her offspring does not substantially limit this activity.[139] This decision resolved a second jurisdictional split whether reproduction could suffice as a "major life activity" to prove a disability and state a claim under the ADA.

In coming to these conclusions, the Court relied heavily on a variety of agency interpretations related to the issue of HIV and its effects on reproduction.[140] Of particular interest is a statement from the Office of Legal Counsel of the Department of Justice

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[132] *Id.*

[133] *See* Abbott v. Bragdon, 107 F.3d 934, 939 (1st Cir. 1997); Runnebaum v. Nationsbank, 123 F.3d 156, 171 (4th Cir. 1997).

[134] *Bragdon,* 118 S. Ct. at 2207.

[135] *Id.* at 2206.

[136] *Id.*

[137] *Id.* at 2216 (Rehnquist, C.J. dissenting)

[138] *Id.*

[139] *Id.*

[140] *Id.*

that "the life activity of engaging in sexual relations is threatened and probably substantially limited by the contagiousness of the virus."[141]

Having decided that Ms. Abbott was disabled under the ADA, the Court declined to decide if HIV infection was a *per se* disability.[142]

The last major issue before the Court questioned the appropriate degree of deference to be given to the health care provider's professional judgment. Specifically, the Court granted certiorari to determine whether the courts should defer to the health care professional's judgment as long as it is reasonable in light of then current medical knowledge.[143]

The existence of a significant risk is determined from the point of view of the health care professional; however, the view must be based on an assessment of the risk based on "medical or other objective evidence."[144] The intent of this standard is to protect the disabled from prejudice while also protecting health care professionals from significant risk.[145] And thereby, the health care professional is not free to determine for him or herself that a significant risk exists without basing that determination on objective medical evidence. The Court stated that "an individual physician's state of mind could [not] excuse discrimination without regard to the objective reasonableness of his actions."[146]

The "direct threat"[147] language is a codification of the Supreme Court's decision in *School Board v. Arline.*[148] In *Arline,* a

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[141] *Id.* at 2207.

[142] *Id.*

[143] *Id.* at 2209.

[144] *Id.* at 2210.

[145] *Id. See also* School Board of Nassau County v. Arline, 480 U.S. 273, 287 (1987).

[146] *Id.* at 2210.

[147] 42 U.S.C. § 12182(b)(3) (1994). Section 12182(b)(3) provides in pertinent part:

> Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term

school teacher was fired from her job after suffering her third tuberculosis relapse within a two year period.[149] Gene Arline, respondent, sued the School Board alleging that her firing violated § 504[150] of the Rehabilitation Act.[151] The Court agreed with respondent that her condition met the statutory definition of "handicapped individual."[152] However, petitioners conceded that her tuberculosis met the statutory definition due to her "having a record of physical impairment"[153] based on her numerous hospitalizations.[154] Petitioner argued that respondent was fired because of the threat her tuberculosis posed on the health of others.[155]

The Court was clear to ensure that contagious diseases were covered by the Act.[156] In fact, there is considerable discussion by the Court regarding the necessity of providing coverage for those with contagious diseases due to the level of fear associated with these diseases in the general public.[157] It is precisely this type of fear that results in discrimination which the ADA seeks to combat. Therefore, those with contagious diseases are covered by both the Rehabilitation Act and the ADA.

Yet, what both *Arline* and *Bragdon* questioned was the limit of the protection afforded to individuals whose disabilities pose a

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> "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

Id.

[148] *Arline*, 480 U.S. at 273. *See also Bragdon*, 118 S. Ct. at 2210.

[149] *Arline*, 480 U.S. at 276.

[150] 29 U.S.C. § 794 (1994) (amending 87 Stat. 394).

[151] *Arline*, 480 U.S. at 276.

[152] 29 U.S.C. § 705(20)(B) (1994). Section 705(20)(B) provides in pertinent part: "(A)ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such impairment; or (iii) is regarded as having such an impairment." *Id.*

[153] *See id.*

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

[155] *Id.*

[156] *Id.* at 282-86.

[157] *Id.* at 284 n.12.

threat to others. Where *Arline* required the Court determine if Mrs. Arline was "otherwise qualified"[158] for the job of elementary schoolteacher,[159] *Bragdon* required the Court determine if Ms. Abbott posed a "direct threat" to Dr. Bragdon.[160]

The *Arline* Court identified a two-pronged analysis for deciding if the individual is "otherwise qualified."[161] First, is an inquiry into the findings based on reasonable medical judgements given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long the carrier is infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.[162] Second, is an inquiry into whether or not the employer could reasonably accommodate the employee in light of the medical findings.[163] The *Arline* Court remanded for further findings of fact.[164]

On remand to the United States District Court in the Middle District of Florida, the court concluded that Mrs. Arline was "otherwise qualified" to teach in 1978 and was "otherwise qualified" at the time of the decision.[165] The *Bragdon* Court also remanded the "direct threat" issue to the lower court.[166] In remanding the case, the Court identified that the weight previously given by the lower court to certain components of medical evidence did not assess the level of the risk required by the statute.[167] This risk assessment is necessary to determine if

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[158] *Id.* at 287.

[159] *Id.*

[160] *Bragdon,* 118 S. Ct. at 2200.

[161] *Arline,* 480 U.S. at 288.

[162] *Id.*

[163] *Id.*

[164] *Id.* at 289.

[165] Arline v. School Board of Nassau County, 692 F. Supp. 1286 (M.D. Fla. 1988).

[166] Bragdon v. Abbott, 118 S. Ct. 2196, 2213 (1998).

[167] *Id.* at 2211 (expressing concern that the CDC guidelines which recommend universal precautions as a means of combating the risk of HIV, did not assess the level of the risk.)

any risk posed is "significant" and if so, if it could be "eliminated by a modification of policies, practices, or procedures. . . ."[168] Additionally, the Court leaves open the possibility that the health care professional who determines that a significant risk is present can disagree with the prevailing medical consensus on the subject.[169] And, if the health care professional does in fact disagree, the prevailing medical consensus can be "refute(d) by citing a credible scientific basis for deviating from the accepted norm."[170] There are both similarities and differences in these two cases. The similarities are that both plaintiffs suffered from contagious diseases. Also, both suffered discriminatory conduct from others based on their diseases. What is different is that one plaintiff sued for workplace discrimination while the other sued for discriminatory treatment in a place of public accommodation. Also, where Ms. Arline allegedly presented a threat to school children, Ms. Abbott's potential threat was to a health care worker.

IV. CONCLUSION

It is clear that the *Bragdon* Court resolved a number of issues that were previously disputed in the lower courts. Asymptomatic HIV is now defined as a "disability" and protected by the ADA.[171] Additionally, reproduction is to be considered a "major life activity" under the statutory framework of the ADA.[172] Yet, these decisions do not completely resolve the question of who is protected by the ADA; in fact, this decision opens the door to additional questions of who is protected by the legislation.

The Court's language in determining that reproduction is to be considered a "major life activity" brings into play, not just

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[168] *Bragdon,* 118 S. Ct. at 2214.
[169] *Id.* at 2211.
[170] *Id.*
[171] *Id.* at 2204.
[172] *Id.* at 2205.

reproduction, but the "sexual dynamics surrounding it . . . ."[173] This reference to sexual relations was mentioned several times.[174]

The Court initially discussed sexual relations in the "major life activity" analysis.[175] Although the Court mentioned "sexual dynamics surrounding [reproduction] as central to the life process itself," the "sexual dynamics" portion of the quote was not elaborated upon.[176] It is unclear if the Court intended to extend the definition of "major life activity" to sexual relations and thereby include this as a protected category under the ADA. Additionally, since respondent asserted only that she was affected in the "major life activity" of reproduction not sexual relations *per se,* it was additionally unclear if the Court's use of this language was dicta.

A second mention of sexual behavior in the opinion was in the context of the analysis of whether the "physical impairment was a substantial limit on the major life activity."[177] Again, since the respondent in this case only presented the issue of the risk of infecting her child during pregnancy,[178] it is unclear whether the language discussing sexual dynamics is dicta or law.

It remains to be seen whether the Court will find that an HIV positive individual is protected by the ADA when there is no desire to reproduce, but the individuals HIV infection substantially limits sexual activity. Moreover, the *Bragdon* case context for the "sexual dynamic" and infection risk language relates to sexual relations which are engaged in, in order to procreate.[179] What about a couple engaging in sexual relations with no desire to procreate, who in fact utilize condoms for the dual purpose of birth control and reduction of HIV transmission?

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[173] *Id.*

[174] *Id.* (holding that "Reproduction and the sexual dynamics surrounding it are central to the life process itself."). *Id.* at 2206 (holding that "First, a woman infected with HIV who tries to conceive a child imposes on the man a significant risk of becoming infected.").

[175] *Id.*

[176] *Id.*

[177] *Id.* at 2206.

[178] *Id.* at 2204.

[179] *Id.*

Is this couple protected? Taking the analogy further, are homosexual male and female couples protected by the ADA when their sexual relations could never be characterized as an attempt to procreate?

These are a few of the many questions relating to the "disability" definition which were left unanswered in the *Bragdon* decision. Certainly, the lower courts will grapple with the language and effects of *Bragdon* and delineate many of these unanswered questions.

Where the issues decided leave many questions unanswered, the remanded issue opens the door to an incredibly broader array of concerns for those infected with HIV. The Court concluded that the evidence before it was insufficient to determine if Dr. Bragdon supported his contention that a "direct threat" existed.[180] Therefore, the issue was remanded to the lower court for determination of whether the Supreme Courts analysis of some of the studies presented a triable issue of fact on the question of risk.[181] In fact, the remand decision proved to show the greatest level of consistency in the opinion with the support of seven justices and two dissenters.[182] However, as Justice Stevens noted in his concurrence, the reasons underlying the remand decision are not consistent.[183]

The threat of infection with an incurable disease would likely be frightening to most people. Because of this fear, individuals infected with an incurable disease potentially run a high risk of discrimination by healthcare professionals laboring under their own fear of infection. However, because of the existence of the disease state, infected individuals are in need of health care and are thereby likely to come in contact with their healthcare providers fears. Since discrimination is not always obvious and can in fact be insidious; the threat exists that individuals with

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[180] *Id.* at 2213.

[181] *Id.*

[182] Chief Justice Rehnquist and Justices Kennedy, Souter, Ginsburg, Scalia, Thomas and O'Connor supported remand while Justices Stevens and Breyer supported an outright affirmance. *Id.* at 2196.

[183] *Bragdon,* 118 S. Ct. at 2213 (Stevens, J., concurring).

HIV will be discriminated against when their providers fear infection.

A potential threat to the HIV infected patient lies in the language of the majority opinion, "[a] health care professional who disagrees with the prevailing medical consensus may refute it by citing a credible scientific basis for deviating from the accepted norm."[184] Here, the Court identifies the freedom of the health care professional to disagree with an accepted norm if that professional relies on credible science. However, this does open up the possibility of supporting the fear of health care workers to discriminate in ways the law is meant to protect. A health care worker might fear HIV infection and thereby engage in overly broad restrictive practices. These practices could subject the HIV patient to additional costs or encumbrances in receipt of their health care. These practices might not be considered discrimination if that health care worker could cite a "credible" source supporting their use. This would be so despite the prevailing medical view. In this scenario the health care professional would be free to dress up prejudice in clinical or medical terms in order to succeed in breaking the spirit of the law. Although this might seem a bit hyperbolic considering the legal standard implied in the statute;[185] not all cases of discrimination are litigated.

The language in *Arline* recognizes the concerns of fear based decision making.[186] "Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness."[187] Responding to it's own recognition of this,

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[184] *Id.* at 2211 (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 32, p. 187 (5th ed. 1984)).

[185] *See supra* note 9.

[186] School Board of Nassau County v. Arline, 480 U.S. 273, 284 (1987).

[187] *Id. See also Arline,* 480 U.S. at 286 n.12. "The isolation of the chronically ill or contagious appears across cultures and centuries, as does the development of complex and often pernicious mythologies about the nature, cause, and transmission of illness." *Id.* "Senator Humphrey noted the 'irrational fears or prejudice on the part of employers or fellow workers' that make it difficult for former cancer patients to secure employment." *Id.* at 286 n.13.

the Court states "[t]he Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments. . . ."[188] Does the language in *Bragdon* fully realize this possibility when allowing the health care professional to rely on sources outside of the mainstream of accepted medical practice?[189] Under this line of reasoning, could not a health care provider discriminate against those infected with HIV based on that health care workers fear of infection if the fear had some basis in science, even though this basis was not widely accepted? It seems that this is just what Dr. Bragdon was doing in this instance.[190] Dr. Bragdon based a policy of filling cavities in HIV infected patients in hospital settings on the fear that he might be infected if the virus became airborne during the procedure.[191] This fear was seemingly based or supported by a study revealing that "the use of high speed drills and surface cooling water created a risk of airborne HIV transmission."[192] The particular study on which respondent relied was deemed inconclusive by the Court,[193] and would therefore not be likely to provide the necessary scientific basis required.[194] Nevertheless, Dr. Bragdon engaged in the discriminatory practice apparently believing the science he relied upon was "credible".

The Court identifies the health care provider's duty as "assess[ing] the risk of infection based on the *objective,* scientific information available to him and others in his profession."

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[188] *Id.*

[189] This does not preclude this writers understanding that a basis outside of the mainstream of medical evidence must also be "credible" medical evidence. As well as the certainty of this writer that health care providers should have the ability to rely on state of the art medical technology and research that may have yet to make it into the 'mainstream' of medical practice. This is only to recognize the perspective of the patient who could find the health care worker supported in discriminatory practices.

[190] Bragdon v. Abbott, 118 S. Ct. 2196, 2201 (1998).

[191] *Id.* at 2212.

[192] *Id.*

[193] *Id.*

[194] *Id.* at 2210. *See also* School Board or Nassau County v. Arline, 480 U.S. 273, 288 (1987.

(emphasis added)[195] The problem with the language of this duty is that fear is a subjective, emotional response. Although the evidence may be objectively based, it is seen through the eyes of a subjective, potentially highly charged emotional response. Therefore, a health care provider with a heightened fear of HIV infection might evaluate a study and determine a significant risk exists; where another health care professional with little or no fear of infection may determine that only a limited risk exists.

However the final issue is determined in the Court of Appeals,[196] several jurisdictional splits were resolved by this decision. Although HIV infection is not necessarily a *per se* disability, it is clear that asymptomatic HIV infection is a "physical disability." It is also clear that reproduction is considered a "major life activity" which is substantially limited by the existence if the HIV virus in the body. It remains to be seen if the Court will recognize HIV positive individuals who have no desire to procreate as also protected by the ADA because of the substantial effect of the disease on their sexual activities. It also remains to be seen how much protection will be afforded to those individuals with infectious diseases in their pursuit of health care.

*Leah Guidry**

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[195] *Bragdon,* 118 S. Ct. at 2210.

[196] The case on remand was decided on December 29, 1998. Abbott v. Bragdon, No. 96-1643, 1998 WL 887125 (1st Cir.). Upon review, the First Circuit reaffirmed the district court's summary judgement decision. *Id.* at 1.

* I dedicate this first published work to my father who imbued me with an unquenchable thirst for knowledge. Early in my life, he taught me that "knowledge for the sake of knowledge" is a worthy and respectable pursuit.

A special note of thanks to Professor Jack Battaglia whose direct feedback and hours of consultation elevated this work to a different level.

Thank you to the Editors and staff of the Touro Law Review for their training and attention to details.