

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a darker shade of blue. The hourglass is centered on the page.

WikiLeaks Document Release

<http://wikileaks.org/wiki/CRS-98-599>

February 2, 2009

Congressional Research Service

Report 98-599

*THE AMERICANS WITH DISABILITIES ACT: HIV
INFECTION IS COVERED UNDER THE ACT*

Nancy Lee Jones, American Law Division

Updated July 10, 1998

Abstract. 5 pages. July 10, 1998. In *Bragdon v. Abbott*, No. 97-156 (June 25, 1998), the Supreme Court held that the respondent's asymptomatic HIV infection was a physical impairment impacting on the major life activity of reproduction thus rendering the HIV infection a disability under the Americans with Disabilities Act. The decision has been heralded as a significant decision advancing the rights of individuals who have asymptomatic HIV infection. It also has broader implications on the Americans with Disabilities Act coverage of reproductive disabilities.

WikiLeaks

CRS Report for Congress

Received through the CRS Web

The Americans with Disabilities Act: HIV Infection is Covered Under the Act

Nancy Lee Jones
Legislative Attorney
American Law Division

Summary

In *Bragdon v. Abbott*, No. 97-156 (June 25, 1998), the Supreme Court held that the respondent's asymptomatic HIV infection was a physical impairment impacting on the major life activity of reproduction thus rendering the HIV infection a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §§12101 *et seq.* The Court also examined the ADA's exception regarding a direct threat to the health or safety of others and found that courts should assess the objective reasonableness of the views of health care professionals by looking to the views of public health authorities but that these views could be rebutted by citing a credible scientific basis for deviating from the accepted norm. *Bragdon* was remanded for further proceedings regarding the question of risk.

Bragdon v. Abbott has been heralded as a significant decision advancing the rights of individuals who have asymptomatic HIV infection. It also has broader implications on the ADA coverage of reproductive disabilities. This report will not be updated.

Background

In 1994 Dr. Bragdon performed a dental examination on Ms. Abbott and discovered a cavity. Ms. Abbott had indicated on her registration form that she was HIV positive. At that time, she was asymptomatic. Dr. Bragdon told her that he would not fill her cavity in his office but would treat her only in a hospital setting. This would have resulted in higher costs for Ms. Abbott since, although Dr. Bragdon would have charged his regular fee, she would have had to have paid the hospital costs. Ms. Abbott did not find this acceptable and filed a complaint under the ADA, a broad civil rights statute that prohibits discrimination against individuals with disabilities. She prevailed at the district court and court of appeals levels and at the Supreme Court on the issue of whether she was an individual with a disability but the case was remanded for further consideration regarding the issue of direct threat.

The Americans with Disabilities Act

The Americans with Disabilities Act provides broad nondiscrimination protection for individuals with disabilities in employment, public services, public accommodation and services operated by private entities, transportation and telecommunication.¹ The ADA states that "the term 'disability' means, with respect to an individual--(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individuals; (B) a record of such an impairment; or (C) being regarded as having such an impairment."² Although discrimination against such individuals is prohibited in places of public accommodations such as doctor's offices,³ there are some limitations on the reach of this nondiscrimination requirement. The most significant of these limitations with regard to the issues presented by *Bragdon* is the exception for situations that pose a direct threat to the health or safety of others. The term "direct threat" is defined in the statute as "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."⁴ It was created in an attempt to differentiate legitimate public health concerns from prejudicial stereotypes.

Supreme Court's Decision

The Supreme Court held that Ms. Abbott's asymptomatic HIV infection was a physical impairment impacting on the major life activity of reproduction thus rendering the HIV infection a disability under the ADA. In addition, the Court held that when interpreting the ADA, courts should assess the objective reasonableness of the views of health care professionals by looking to the views of public health authorities but that these views could be rebutted by citing a credible scientific basis for deviating from the accepted norm and remanded *Bragdon* for further consideration on this issue. These holdings were reached in a 5 to 4 decision, with Justice Kennedy writing for the majority. Justices Stevens and Breyer joined in a concurring opinion and Justice Ginsberg filed a separate concurring opinion. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, filed an opinion concurring in part and dissenting in part. Justice O'Connor filed a separate opinion concurring in part and dissenting in part.

Definition of Individual with a Disability. Writing for the majority, Justice Kennedy began by examining the issue of whether asymptomatic HIV infection constitutes a disability under the ADA, parsing the statutory language and finding that Ms. Abbott was covered under subsection (A) — having a physical or mental impairment that substantially limits one or more major life activities. In reaching this holding, Justice Kennedy used the following analytic framework: first, determining whether Ms. Abbott's HIV infection was a physical impairment; second, determining the life activity affected and whether it constituted a major life activity; and, third, determining whether the

¹ For a more detailed discussion of the ADA see Jones, "The Americans with Disabilities Act (ADA): An Overview of Major Provisions and Issues," CRS Rep. No. 97-242A(Feb. 12, 1997).

² 42 U.S.C. §12102(2).

³ 42 U.S.C. §12181.

⁴ *Id.*

impairment substantially limited the major life activity. He then noted that the ADA's definition was "drawn almost verbatim from the definition of 'handicapped individual' included in the Rehabilitation Act" and that the ADA specifically states that the ADA shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act and its regulations.⁵

The first question Justice Kennedy examined was whether Ms. Abbott's asymptomatic HIV infection constituted a physical impairment. After a detailed clinical discussion of HIV infection, Justice Kennedy concluded that "in light of the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease, we hold it is an impairment from the moment of infection." Next, Justice Kennedy turned to the issue of whether the physical impairment affected a major life activity. Ms. Abbott had argued that her HIV infection placed a substantial limitation on her ability to reproduce and to bear children and Justice Kennedy had "little difficulty" concluding that reproduction was a major life activity since "reproduction and the sexual dynamics surrounding it are central to the life process itself." The ADA was found not to be limited to the aspects of a person's life which have a public, economic or daily character. The breadth of the term "major" "confounds the attempt to limit its construction in this manner."

The final issue regarding the definition of individual with a disability was whether Ms. Abbott's physical impairment was a substantial limitation on the major life activity of reproduction. After an evaluation of the medical evidence, Justice Kennedy concluded that Ms. Abbott's ability to reproduce was substantially limited in two ways: (1) an attempt to conceive would impose a significant risk on Ms. Abbott's partner, and (2) an HIV infected woman risks infecting her child during gestation and childbirth.

Justice Kennedy found that the reasoning used above to find that asymptomatic HIV infection was a physical impairment that placed a substantial limitation on a major life activity was confirmed by consistent agency and judicial interpretation. He noted that "every agency to consider the issue under the Rehabilitation Act found statutory coverage for persons with asymptomatic HIV." The legislative history of the ADA, which cited the section 504 interpretations, was also seen as buttressing the Court's conclusion. In addition, the administrative guidance issued for the ADA was found to indicate that asymptomatic HIV infection should be covered.

Direct Threat Exception. The other major issue addressed by the Court in *Bragdon* involved the interpretation of the ADA's direct threat exception. Even with the finding that Ms. Abbott was an individual with a disability, Dr. Bragdon could have refused to treat her or insisted on treating her in a different setting if her condition "pose[d] a direct threat to the health or safety of others."⁶ Direct threat is defined in the ADA as "a significant risk to the health or safety of others that cannot be eliminated by

⁵ Section 504 of the Rehabilitation, 29 U.S.C. §794, prohibits discrimination against otherwise qualified individuals with disabilities in any program or activity receiving federal financial assistance, the executive agencies or the U.S. Postal Service. Section 504 and its regulations served as a model for the ADA which expanded these protections to entities that did not receive federal funds.

⁶ 42 U.S.C. §1212(b)(3).

a modification of policies, practices, or procedures or by the provision of auxiliary aids or services."⁷ After examining the Court's decision in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), Justice Kennedy determined that "the existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence." Dr. Bragdon had the duty to assess the risk of infection "based on the objective, scientific information available to him and others in his profession. His belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability." Thus, there was no special deference accorded to Dr. Bragdon because of his professional status.

The question remained as to how to determine if Dr. Bragdon's actions were reasonable. Justice Kennedy observed that "in assessing the reasonableness of petitioner's actions, the views of public health authorities, such as the U.S. Public Health Service, CDC, and the National Institutes of Health, are of special weight and authority." However, Justice Kennedy found that the views of these entities were not necessarily determinative and could be refuted by citing a credible scientific basis for differing from the accepted norm. The Court of Appeals' determination of this issue was examined and found to have placed mistaken reliance on the CDC Dentistry Guidelines and the 1991 American Dental Association Policy on HIV.⁸ The Supreme Court remanded the case for further consideration on this issue. "We conclude that the proper course is to give the Court of Appeals the opportunity to determine whether our analysis of some of the studies cited by the parties would change its conclusion that petitioner presented neither objective evidence nor a triable issue of fact on the question of risk."

Concurring Opinions. Two concurring opinions were filed: one by Justice Stevens who was joined by Justice Breyer and one by Justice Ginsburg. Justice Stevens wrote that he would have preferred an outright affirmance of the Court of Appeals decision but joined with Justice Kennedy to provide a majority opinion. Justice Ginsburg agreed with the majority and stated that "No rational legislator, it seems to me apparent, would require nondiscrimination once symptoms become visible but permit discrimination when the disease, though present is not yet visible."

Dissenting Opinions. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented in part and concurred in part. He dissented from the majority, finding that Ms. Abbott had failed to demonstrate that any of her major life activities were substantially limited by her HIV infection. First, it was noted that the issue of whether reproduction is a major life activity should be answered with regard to the individual in question and he further observed that there was no evidence, that absent the HIV infection, Ms. Abbott would have had or considered having children. Second, the Chief Justice found that reproduction was not a major life activity since reproduction is not essential in the day-to-day existence of a normally functioning individual. And, even if

⁷ *Id.*

⁸ The CDC Guidelines recommend certain universal precautions but do not assess the level of risk. The American Dental Association Policy on HIV is not that of a public health authority and Justice Kennedy observed that it was not clear the extent to which the policy was based on an assessment of ethical and professional duties and the extent to which the policy was based on a scientific assessment of the risk.

reproduction was a major life activity, the dissent found that asymptomatic HIV infection does not substantially limit that activity. The Chief Justice concurred in the remand on the direct threat issue but disagreed with the majority with regard to its conclusion that the views of public health officials are entitled to special weight. He observed that "the credentials of the scientists employed by the public health authority, and the soundness of their studies, must stand on their own."

Justice O'Connor wrote a separate opinion, dissenting in part and concurring in part. She agreed with the dissenting opinion of the Chief Justice that Ms. Abbott's claim of disability should be evaluated on an individualized basis and that Ms. Abbott did not prove that her asymptomatic HIV infection substantially limited one or more of her major life activities. Justice O'Connor also agreed with the decision to remand on the direct threat issue.

Implications

Bragdon has implications for other legal issues beyond its basic holding that Ms. Abbott's asymptomatic HIV infection is a disability under the ADA. Prior to the Court's decision, the courts of appeal had been split on the issue of whether reproduction is a major life activity.⁹ In arriving at its holding, the Court specifically found that reproduction was a major life activity thus resolving this issue. In addition, the Court's holding that asymptomatic HIV infection is covered under the ADA, would appear to indicate that other asymptomatic conditions may also be covered. For example, in *Ryan v. Grae & Rybicki P.C.*, 135 F.3d 867 (2d Cir. 1998), the second circuit held that a woman with ulcerative colitis was not an individual with a disability since she was asymptomatic most of the time. However, the majority's language regarding "the immediacy with which the virus begins to damage the infected person's white blood cells" may create a standard which might not be met by all asymptomatic conditions.

The Court also provided a framework for future analysis of issues involving the first prong of the definition of disability. First, a court is to determine whether a condition is a physical impairment; second, the life activity affected and whether this is a major life activity are to be determined and; third, a determination shall be made concerning whether the impairment substantially limits the major life activity.

The Supreme Court remanded the case to the first circuit for further consideration of the issue of what constitutes a direct threat under the ADA. Although the majority found that there was no special deference accorded to Dr. Bragdon because of his professional status, the question of how to determine if his actions were reasonable was less clear. The decision of the first circuit on remand, will be significant in determining this issue.

⁹ See e.g., *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 694 (8th Cir. 1996)(Finding that the ability to reproduce is not a major life activity).