

# The CHECKOFF

## Expanding the scope of ADA-covered disabilities: The Supreme Court's decision in *Bragdon v. Abbott*

by Robert J. Sniffen



The U.S. Supreme Court has, for the first time, issued an opinion construing the term "disability" as used in the Americans with Disabilities Act of 1990 ("ADA"). In

*Bragdon v. Abbott*<sup>1</sup>, the Court applied the traditional three step analysis for determining whether a given condition constitutes a "disability" under the ADA, holding that asymptomatic HIV infection is, in fact, within the scope of the definition.<sup>2</sup>

The Court's holding, however, does more than simply bring HIV infection within the purview of ADA coverage. This Article will discuss the body of the Court's opinion and the implications of the Court's decision, as well as raise several unanswered questions that will require further interpretation by District Courts and Circuit Courts of Appeal.

### Factual background

The facts of record as presented

in the opinion are fairly straightforward. In 1994, Plaintiff Abbott went to the office of her dentist, Randon Bragdon, for an appointment. During the appointment, Abbott disclosed that she had been infected with HIV for at least 8 years. Dr. Bragdon advised Plaintiff of his policy against filling cavities of HIV-infected patients, but offered to fill Ms. Abbott's cavity at a local hospital. Bragdon advised that he would not charge an additional fee for performing such services at the hospital, although Ms. Abbott was told that she would be responsible for any additional costs associated with using the hospital's facilities.

Ms. Abbott rejected the proposal. She brought suit under Title III of the ADA.<sup>3</sup>

### Procedural history

The District Court granted Plaintiff Abbott's Motion for Summary Judgment on the issue of whether HIV infection constitutes a "disability" under Title III of the ADA. The District Court also found that Defendant Bragdon failed to raise a genuine issue of material fact as to whether the affliction would have posed a "direct threat"

to his health or safety during the scope of the required treatment. In granting summary judgment in favor of Abbott, the District Court cited affidavits submitted by a doctor employed by the Center for Disease Control and Prevention, who testified that HIV infection poses no risk to dentists if standard precautions issued by the CDC in its dentistry guidelines are followed.<sup>4</sup>

The First Circuit Court of Appeals affirmed the District Court's Order, holding that HIV infection is a disability under the ADA, even where, as in Ms. Abbott's case, the infection is asymptomatic.<sup>5</sup> The Court of Appeals further agreed

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# Chair's Message



As we approach the midway point of this Bar year our section has a number of significant items to report. First, The Florida Bar Board of Governors has approved certification for labor and employment law practitioners. The next step is to petition the Florida Supreme Court for approval. If the Court approves, President Coker will appoint a certification committee to work with the Board of Legal Specialization and Education (the "BLSE") to develop the certification test. We expect the first test to be offered in the Spring of 2000, with the first certified labor and employment lawyers to be announced shortly thereafter.

Not surprisingly, certification has been controversial. Many have asked previous chairs, and me why certification was even being pursued. In short, our section pursued certification for two reasons. First, our section membership overwhelmingly supported it. In a poll taken of all section members last

year, 78% of those responding stated they supported certification. Among those voicing approval for certification, the difference in opinion most often expressed related to the type of test that would be administered. The certification standards as approved by the Board of Governors calls for an alternative menu which requires practitioners to be tested in a broad range of labor and employment law topics, but still allows the opportunity to focus on particular areas with which the practitioner is more experienced.

Second, many of our section members devote all or nearly all of their practice to labor and employment law. Certification recognizes the experience and knowledge of those practitioners who have devoted their practice to labor and employment law. However, certification is not meant to be exclusionary. The overall practice requirements approved by The Florida Bar, 50% still allow lawyers who spend some, but not all of their time in labor and employment matters, to become certified. Indeed, we expect a large number of individuals seeking certification to have experience in other areas of the law. For instance, certified civil trial lawyers

who have begun to take on a significant load of employment discrimination cases may decide to seek labor and employment law certification.

The certification process is not complete, but we are well on our way. I want to especially thank Stuart Rosenfeldt for his countless hours in working with our section, the BLSE and the Board of Governors on this issue. Please call Stuart or me if you would like more specific details of the certification process or standards that have been adopted.

Finally, in the next few months we will have some activities to better acquaint labor and employment law practitioners with section activities. A series of seminars on internet usage in the practice of labor and employment law will be held. Also, we intend to host a series of receptions around the state to allow labor and employment practitioners the opportunity to meet locally with each other and members of the judiciary to discuss issues of common concern.

Please call me if you have any questions about the activities of the section or would like to become further involved.

— Kevin E. Hyde, Chair

## SUPREME COURT

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with the District Court's assessment of the "direct threat" defense, but declined to rely on the affidavits of the CDC doctor. Rather, the Court of Appeals looked to the 1993 CDC Dentistry Guidelines, as well as guidelines promulgated by the American Dental Association in finding that the procedure could have been carried out without threatening the health or safety of Dr. Bragdon.<sup>6</sup>

The decisions of both the District Court and Court of Appeals sent

tremors through the Disability Law landscape, leaving a host of lower courts divided over the questions presented in the case. The Fourth Circuit Court of Appeals took a contrary view, holding that asymptomatic HIV infection is, as a matter of law, not an "impairment."<sup>7</sup> There had also been disagreement on the issue of whether "reproduction" constitutes a "major life activity."<sup>8</sup>

Thus, the Supreme Court was asked to review:

1. Whether one suffering from HIV infection in its asymptomatic stage is "disabled" for purposes of the ADA.

2. Whether "reproduction" and the ability to bear children are "major life activities" under the ADA.

3. Whether the professional judgment of healthcare providers should be deferred to in determining whether a given procedure is a "direct threat" to the health or safety of the provider or others working with the provider.

## The Supreme Court's opinion

The Court seemed to have little difficulty answering the first question in the affirmative. Citing the importation of the definition of "handicap" set forth in the Reha-

bilitation Act of 1973,<sup>9</sup> and the Fair Housing Amendments Act of 1988,<sup>10</sup> the Court found that HIV infection, though asymptomatic, is a covered disability under the ADA.<sup>11</sup> The traditional three step analysis for determining whether a given affliction is a disability was utilized.

First, the Court analyzed whether the condition of HIV infection constitutes a "physical impairment." The Court cited as persuasive regulations originally promulgated by the Department of Health, Education and Welfare in 1977 following the passage of the Rehabilitation Act. Though not specifically mentioned in the HEW regulations in question (AIDS was not widely known to be a disorder in 1977), the Court noted that despite the fact that specific conditions were enumerated in the regulations, the HEW purposely decided against including an exhaustive list of disorders for fear of excluding certain disorders that might otherwise qualify as covered disabilities.

The Court then engaged in a fairly detailed discussion about the effects of the HIV virus on an infected individual.<sup>12</sup>

The asymptomatic nature of HIV infection was also discussed in this part of the opinion. Here, the Court said that though symptoms associated with the initial stage of HIV infection usually subside, "clinical features persist throughout," which render an individual no less disabled than one suffering from the virus in its active stage.<sup>13</sup> Writing for the majority, Justice Kennedy opined:

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.<sup>14</sup>

The second step in the ADA disability analysis was considered in rather summary fashion. Here, the Court was called upon to decide whether the "major life activities" identified by Abbott in her lawsuit

(reproduction and the ability to bear children) pass muster as covered activities. The Court had little trouble finding that reproduction and the ability to bear children are "major life activities," noting that "Reproduction and the sexual dynamics surrounding it are central to the life process itself."<sup>15</sup>

Interestingly, though the Court had "little difficulty concluding" that activities surrounding reproduction are major life activities, it hinted that HIV infection affects additional life activities not specifically at issue in the case but which are nevertheless impacted by the disease.<sup>16</sup> It is submitted that the Court went out of its way to cite the impact on other major life activities as a way of curtailing the adoption of a narrow construction by lower courts on this point. Indeed, a narrow construction may have led a court in disagreement with the *Bragdon* holding to limit the opinion to "reproduction" issues and, in so doing find that HIV infection does not impact other major life activities cited by different plaintiffs in different cases.

Finally, the Court considered, and found, that HIV infection is an impairment having a "substantial limitation" on the major life activity of reproduction.<sup>17</sup> The Court cited two examples bearing on this issue: first, that a woman infected with HIV (like Abbott) who tries to conceive a child imposes a risk on her male partner of becoming infected with HIV; second, that there is a risk of perinatal transmission during gestation and childbirth. Such was found to be sufficient to meet the "substantial limitation" prong of the ADA disability analysis.<sup>18</sup> In so finding, the Court rejected *Bragdon's* argument that certain procedures, if utilized, can reduce the risk of perinatal transmission. Rather, it noted that consideration of whether one is disabled under the three part test is to be made without regard to mitigating measures that can be taken by a covered individual.<sup>19</sup>

To bolster its opinion on these issues, the Court cited legislative history indicating that asymptomatic HIV infection is a covered disability, as well as regulatory authorities that have issued rulings under both the Rehabilitation Act and Title III itself which advocate a construction of the term "disability" which includes asymptomatic HIV. Importantly, the often maligned EEOC regulations were found to be persuasive authority.<sup>20</sup>

On the final issue regarding the direct threat defense, the Court refused to grant "special deference" to healthcare providers to determine whether a significant risk is presented by a particular affliction.<sup>21</sup> Here, the Court cited *School Board of Nassau County v. Arline*,<sup>22</sup> and seems to have patched a hole left open by the *Arline* Court regarding medical judgments of private physicians as to whether a direct threat exists. The Court found that its previous interpretation in *Arline* "[a]t most, ...reserved the possibility that employers could consult with individual physicians as objective third-party experts."<sup>23</sup>

On this point, the Court seemed concerned that a medical professional could skirt ADA liability by simply making a wholly subjective determination (whether in good faith or not) that the impairment would pose a direct threat, without any scientific data to back up such a belief. An objective standard was opted for, whereby a medical professional's actions will be analyzed in light of "available medical evidence." One who nevertheless refuses to treat a person in the face of such evidence is given the option of "citing a credible scientific basis for deviating from the accepted norm."<sup>24</sup> In the end, then, the Court struck a compromise by allowing medical professionals to make decisions as to whether some risk may be involved in treating a person with a particular disability, but also requires that such decisions be well-grounded in objective scientific data.

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However, the Court held that evidence relied upon by the First Circuit—the 1993 CDC Dentistry Guidelines and the American Dental Association Guidelines—was insufficient on the “direct threat issue, and remanded the case to the Court of Appeals to determine whether objective evidence was presented by Dr. Bragdon as to whether a triable issue of fact exists on that question.<sup>25</sup>

### Implications of the Court's decision

The *Bragdon* Court answered the question of whether HIV infection is a covered “disability” under the ADA, doing so with little fanfare and confirming what each court considering the question under the Rehabilitation Act had already found. Although the Justices did not conclusively hold HIV to be a *per se* disability, the decision nevertheless creates wider boundaries when considering whether a given

condition is disabling for purposes of the ADA and, by necessary implication, the Rehabilitation Act.

More difficult questions linger in the wake of *Bragdon*. First, does the Court's decision that reproduction is a “major life activity” open the door for claims of disability discrimination and requests for reasonable accommodation by those suffering from reproductive disorders? With the advent of new pharmacological treatments for impotence (e.g., Viagra) does the holding in *Bragdon* require insurance companies to cover such treatments under Title III? What will the implications be for cases involving other diseases which reach asymptomatic stages? Will accommodation be required for individuals needing infertility treatment? What impact, if any, does the decision have on invocation of the “direct threat” defense by employers in Title I and II cases? Will the seemingly broader scope of the

definition of disability have an impact on requests for reasonable accommodation made by employees and/or requests made for FMLA leave for “serious health conditions?”

A fair reading of the opinion in *Bragdon* suggests a broader construction of the ADA not only in Title III cases but also in Title I and Title II employment cases.<sup>26</sup> The apparent narrowing of the ADA by District Courts and Circuit Courts of Appeal over the past few years now seems to be at odds with the broad construction apparently preferred by the Court.<sup>27</sup>

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### Endnotes:

<sup>1</sup>1998 U.S. LEXIS 4212 (June 25, 1998).

<sup>2</sup>*Id.* at 4215.

<sup>3</sup>42 U.S.C. §§12181, et seq. Title III outlaws disability discrimination in places of public accommodation.

<sup>4</sup>*Abbott v. Bragdon*, 912 F.Supp. 580, 589 (Me. 1995).

<sup>5</sup>*Bragdon v. Abbott*, 107 F.3d 934,939-943.

<sup>6</sup>*Id.* at 945-946.

<sup>7</sup>*Runnebaum v. Nations Bank of Maryland*, 10 NDLR ¶246 (4th Cir. 1997).

<sup>8</sup>*Id. see also, Krauel v. Iowa Methodist Medical Center*, 8 NDLR ¶317 (8th Cir. 1996)

(procreation not a “major life activity” under the ADA).

<sup>9</sup>29 U.S.C. §§701, et seq.

<sup>10</sup>42 U.S.C. §§3601, et seq.

<sup>11</sup>*Bragdon*, at 4215.

<sup>12</sup>*Id.* at 4216-17.

<sup>13</sup>*Id.* at 4217.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* at 4218.

<sup>16</sup>*Id.*

<sup>17</sup>*Id.* at 4218-19.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at 4219. For the seminal case from the Eleventh Circuit on this issue see *Harris v. H&W Contracting Co.*, 102 F.3d 516 (11th Cir. 1996).

<sup>20</sup>*Id.* at 4219-22.

<sup>21</sup>*Id.* at 4222.

<sup>22</sup>480 U.S. 273, 107 S.Ct. 1123(1987).

<sup>23</sup>*Bragdon*, at 4222.

<sup>24</sup>*Id.* at 4223.

<sup>25</sup>*Id.*

<sup>26</sup>Indeed, the definitions of “disability” and “direct threat” construed by the Court are the same for Titles I, II and III of the ADA.

<sup>27</sup>This has become even more clear when the broad language of the *Bragdon* opinion is read in conjunction with the Court's recent pronouncement that the ADA covers prison inmates. *Pennsylvania Department of Corrections v. Yeskey*, 66 U.S.L.W. 4481(1998).



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