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Bragdon v. Abbott: Is Asymptomatic HIV a Per Se Disability Under the Americans with Disabilities Act?

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Bragdon v. Abbott: Is Asymptomatic HIV a Per Se Disability Under the Americans with Disabilities Act?

In *Bragdon v. Abbott*,[1] the United States Supreme Court held that asymptomatic HIV is a "disability" under the Americans with Disabilities Act ("ADA")[2] because it is a physical impairment that substantially limits the major life activity of reproduction.[3] It further held that determining whether a plaintiff is entitled to relief requires objective and particularized evidence of the risks to the defendant under the "direct threat" provisions of the ADA.[4] This Casenote focuses exclusively on the "disability" holding.

I. FACTUAL BACKGROUND

On September 16, 1994, Sidney Abbott went to Dr. Randon Bragdon's dental office in Bangor, Maine, for a dental appointment. She reported her HIV-positive status on the patient registration form and Dr. Bragdon examined her.[5] During the exam Dr. Bragdon found a cavity and informed Ms. Abbott of his policy against filling cavities of HIV-infected patients in his office. He offered to fill the cavity at a hospital with no added fee for his services. Ms. Abbott would, however, be charged for using the hospital's facilities. Ms. Abbott declined.[6]

Ms. Abbott sued Dr. Bragdon under state law and ADA Title III's Public Accommodations and Services Operated by Private Citizens

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1. 118 S. Ct. 2196 (1998) (5-4 decision on "disability," 6-3 decision on the "direct threat" provision).

2. *Id.* at 2205, 2206.

3. *Id.* at 2206.

4. *Id.* at 1213. 42 U.S.C §§ 12101-12213 (1994).

5. *Id.* at 2201. Ms. Abbott became infected with HIV in 1986 and, at the time this incident occurred, she was primarily asymptomatic. *Id.* at 2200-01.

6. *Id.* Although Petitioner represented to Ms. Abbott that he would treat her in a hospital setting if she paid the extra charges, he had not applied for privileges at a hospital. After Ms. Abbott filed her complaint against Dr. Bragdon, he applied for, but never received, privileges at a hospital two hours away. *See* Brief for Respondent Sidney Abbott, 1998 WL47514, at *3, Bragdon v. Abbott, 118 S. Ct. 2196 (1998) (No. 97-156).

section.[7] She alleged discrimination based on her disability—HIV infection.[8] The United States and the Maine Human Rights Commission intervened as plaintiffs, and the parties filed cross-motions for summary judgment.[9] The district court granted summary judgment for plaintiffs, holding that Ms. Abbott's asymptomatic HIV satisfied the ADA definition of disability because it substantially limited her major life activity of reproduction.[10] As to the first prong of the ADA definition of a "disability," the district court, relying on the regulatory guidelines and judicial authority, concluded that asymptomatic HIV is a physical impairment.[11]

The court, however, was more troubled by the second and third prongs of the analysis—whether plaintiff's asymptomatic HIV "substantially limits" one or more of her "major life activities."[12] The district court concurred with a majority of courts that "[r]eproduction, one of the most fundamental of human activities, must constitute a major life activity."[13] The court was not persuaded that the regulations' failure to mention reproduction as a major life activity was dispositive on that issue; rather, it reasoned that the regulation is illustrative of major life activities, not an exhaustive list.[14] Finally, the court relied on Ms. Abbott's statements in her deposition that fear of harm to her immune system, the risks of infecting her child, and the possibility of her child being motherless were all factors establishing that her asymptomatic HIV substantially limited her major life activity of reproduction.[15]

The United States Court of Appeals for the First Circuit affirmed the grant of summary judgment.[16] The court's reasoning was very similar to the district court regarding the "physical impairment" prong of the

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7. *Bragdon*, 118 S. Ct. at 2201. 42 U.S.C. § 12182(a) provides: "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."

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

9. *Id.*

10. Abbott v. Bragdon, 912 F. Supp. 580, 587 (D. Me. 1995).

11. *Id.* at 585. The court cited the following cases as supporting the proposition that HIV is a physical impairment within the meaning of the ADA: Gates v. Rowland, 39 F.3d 1439, 1446 (9th Cir. 1994); Doe v. Garrett, 903 F.2d 1455, 1459 (11th Cir. 1990); EEOC v. Chemtech Int'l Corp., No. H-94-2848, 1995 WL 608355, at *1 (S.D. Tex. July 21, 1995).

12. *Abbott*, 912 F. Supp. at 586-87.

13. *Id.* at 586.

14. *Id.* (citing 28 C.F.R. § 36.104 (1998) which states: "The phrase *major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.").

15. *Id.* at 587.

16. Abbott v. Bragdon, 107 F.3d 934, 949 (1st Cir. 1997).

analysis. The court held "unhesitatingly that HIV-positive status, simpliciter, whether symptomatic or asymptomatic, comprises a physical impairment under the ADA."[17] Likewise, the court found that reproduction was a major life activity, citing societal norms, congressional intent, and the plain meaning of the words in the statute.[18] The final hurdle, whether Ms. Abbott's impairment substantially limited that major life activity, was leaped without the individualized inquiry usually followed in ADA claims. Relying on empirical statistics rather than Ms. Abbott's contentions about the particular consequences she experienced, the court held that Ms. Abbott's HIV substantially limits her ability to reproduce.[19] The Supreme Court granted certiorari and affirmed, holding that asymptomatic HIV is a disability that substantially limits the major life activity of reproduction.[20]

II. LEGAL BACKGROUND

Prior to the ADA, the primary legislation prohibiting discrimination against the disabled was the Rehabilitation Act of 1973 ("RHA").[21] The RHA prohibits discrimination against "handicapped" persons participating in federally funded programs.[22] The RHA definition of "handicapped"[23] is mirrored almost verbatim in the RHA's successor, the ADA. The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[24] The similarities are so significant, and the purposes so intertwined, that Congress included a statutory provision directing that

17. *Id.* at 939.

18. *Id.* at 939-40 (citing a dictionary definition of "major" to support the position that the statute plainly means an activity of "greater than others in importance or rank").

19. *Id.* at 942-43. The court noted that an HIV-positive woman faces an approximate twenty-five percent risk of transmitting the virus to her child without AZT and an eight percent risk with AZT. Accordingly, the court held that "[n]o reasonable juror could conclude that an eight percent risk of passing an incurable, debilitating, and inevitably fatal disease to one's child is not a substantial restriction on reproductive activity." *Id.* at 942.

20. *Bragdon*, 118 S. Ct. at 2206.

21. 29 U.S.C. §§ 701-796 (1976).

22. 29 U.S.C. § 701.

23. The RHA defines "handicapped" as an individual who "has a physical or mental impairment which substantially limits one or more of such person's major life activities." 29 U.S.C. § 705(20). A person is also handicapped if he "has a record of such an impairment" or "is regarded as having such an impairment." 29 U.S.C. § 706(6).

24. 42 U.S.C. § 12102(2)(A).

case law and regulations promulgated under the RHA should apply when interpreting the ADA.[25]

The Department of Health, Education, and Welfare ("HEW") issued the first RHA regulations in 1977.[26] These regulations were duplicated, without change, by the Department of Health and Human Services and define "physical or mental impairment" as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal; special sense organs; respitory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin, and endocrine . . . ."[27] This definition has been adopted by the current regulations promulgated for use with the ADA as well.[28]

Courts first considered discrimination against people with HIV under the RHA. Every reported decision from the mid-1980s until the passage of the ADA in 1990 found that AIDS and asymptomatic HIV infection were handicaps within the meaning of the RHA or relevant state statutes.[29] Many of these cases did so without discussing how the individual's condition fell within the act.[30] In 1987 the Supreme Court first addressed whether a contagious disease was a disability under Section 504 of the RHA in *School Board of Nassau County v. Arline*.[31] While the Court specifically declined to decide whether AIDS was a "physical impairment,"[32] it held that tuberculosis was a disability under the RHA.[33] Justice Brennan, writing for the majority, reasoned that tuberculosis is a disability because it affects the respiratory system, a system included in the Health and Human Services regulation's definition.[34]

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25. 42 U.S.C. § 12201(a) states, "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than . . . under Title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et. seq.) or the regulations issued by Federal agencies pursuant to such title."

26. 3 C.F.R. § 117 (1976-1980 Comp.).

27. 45 C.F.R § 84.3(j)(2)(i) (1998). The regulations issued by the Justice Department (the department currently responsible for enforcing Titles II and III of the ADA) adopted the HEW definition of physical impairment. *See* 28 C.F.R. § 36.104(1) (1998).

28. *See* 29 C.F.R. § 1630.2(h)(1) (1998) (Title I EEOC regulations) and 28 C.F.R. § 36.104(1)(i) (1998) (Title II and Title III Department of Justice regulations).

29. *See* Wendy E. Parmet & Daniel J. Jackson, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 AM. J.L. & MED. 7, 16-17 (1997) (listing federal and state cases that found HIV to be a disability under the Rehabilitation Act).

30. *Id.* at 16.

31. 480 U.S. 273, 289 (1987).

32. *Id.* at 282 n.7.

33. *Id.* at 289.

34. *Id.* at 281.

Without a definitive answer by the Supreme Court on whether asymptomatic HIV is a disability under the RHA or the ADA, the circuit courts split. In *Gates v. Rowland,*[35] the Ninth Circuit held that HIV-positive inmates were entitled to protection against discrimination by prison officials.[36] Although the action was brought, in part, under the RHA, the court cited and discussed the term "disability" as it is used in the ADA.[37] The court deferred to the Department of Justice regulation implementing the ADA, which specifically includes "HIV disease (whether symptomatic or asymptomatic)" as a physical impairment.[38] The court's holding was very broad in that it did not require an individualized assessment of each plaintiff to find that asymptomatic HIV was a disability. Rather, it simply held "that a person infected with the HIV virus is an individual with a disability within the meaning of the Act."[39] The lower court opinions in *Bragdon* mirror this categorical approach to the disability question.

In accordance with ADA analysis in areas other than HIV, the Fourth Circuit adopted a much narrower, more individualized standard. In *Ennis v. National Association of Business and Educational Radio, Inc.,*[40] the court held that "the plain language of [the ADA] requires that a finding of disability be made on an individual-by-individual basis."[41] This distinction is significant because ADA decisions typically require plaintiffs to prove how their disability significantly limits a major life activity. In *Ennis* the court declined to find that plaintiff's asymptomatic son had a per se disability,[42] stating that plaintiff must prove how her son's HIV-positive status substantially limited a specified major life activity.[43]

Reaffirming *Ennis,* the en banc Fourth Circuit held in *Runnebaum v. NationsBank of Maryland*[44] "[t]he plain meaning of 'impairment' suggests that asymptomatic HIV infection will never qualify as an

35. 39 F.3d 1439 (9th Cir. 1994).
36. *Id.* at 1446.
37. *Id.*
38. *Id.* (quoting 28 C.F.R. § 35.104(4)(1)(ii) (1998)).
39. *Id.*
40. 53 F.3d 55 (4th Cir. 1995).
41. *Id.* at 59.
42. *Id.* at 60. Plaintiff sued under 42 U.S.C. § 12112(b)(4), which prohibits employers from discriminating against an employee because "of the known disability of a person with whom the qualified individual is known to have a relationship or association." *Id.* at 59. Plaintiff alleged that she was fired because her employer knew of her HIV-positive son and feared increased medical insurance premiums. *Id.* at 57.
43. *Id.* at 60.
44. 123 F.3d 156 (4th Cir. 1997) (en banc), *rev'g* 95 F.3d 1285 (4th Cir. 1996).

impairment: by definition, asymptomatic HIV infection exhibits no diminishing effects on the individual."[45] The court did, however, temper that assertion by observing that a case-by-case, individualized assessment of a party's particular impairment should be made.[46] The court held, unconditionally, that HIV does not substantially limit either procreation or intimate relations.[47]

Thus, the circuits were split on when and whether asymptomatic HIV is an impairment covered under the ADA and, if so covered, whether reproduction qualifies as a substantial life activity that an impairment might substantially limit. *Bragdon v. Abbott* gave positive categorical answers to both questions.

III. RATIONALE OF THE COURT

Justice Kennedy, writing for the majority, subdivided the disability analysis into three basic questions: (1) whether respondent's HIV infection was a physical impairment, (2) whether reproduction or child bearing, upon which respondent relied, constitutes a major life activity, and (3) whether such an impairment substantially limited that major life activity.[48] In construing these questions under the ADA, the Court was "informed" by interpretations of parallel definitions in the RHA and its regulations and agency interpretations.[49]

The Court began by examining the ADA's definition of disability in light of its history under the RHA.[50] The majority asserted that Congress's repetition of the substantive definition of "handicap," contained in the RHA, equates with the ADA term "disability" and carries the implication that "Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."[51] This view is supported by case law[52] and the provision in the ADA[53] that "'nothing . . . shall be construed to apply a lesser standard than the standards

45. 123 F.3d at 169.

46. *Id.*

47. *Id.* at 172. The court reasoned that HIV-infected people are not unable to procreate or engage in sexual intimacies; rather, they may choose not to for fear of infecting their partner or fetus. *Id.* The court was not satisfied that choosing to refrain fits within the statutory language of "substantially limits" because there is nothing physically limiting the activities. *Id.*

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

49. *Id.*

50. *Id.*

51. *Id.*

52. *See* FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 437-38 (1986) (holding that repition of a pre-existing statutory term in a new statute implies Congress intended that term to be interpretted in accordance with the pre-existing term).

53. 42 U.S.C. § 12201(a).

applied under . . . the [RHA].'"[54] Accordingly, the Court concluded that it is required to construe the ADA to provide at least as much protection as the regulations implementing the RHA.[55]

The Court first determined that Ms. Abbott had a physical impairment by turning to the HEW regulations under the RHA.[56] These regulations appear without change in the current regulations issued by the Department of Health and Human Services and by the Department of Justice.[57] The regulations define "physical or mental impairment" as, among many other things, a "physiological disorder . . . affecting . . . [the] hemic and lymphatic" systems.[58] Interestingly, the Court observed that the 1977 regulations did not mention HIV among the specific disorders that constitute a physical impairment.[59] However, the majority failed to mention the modern Department of Justice regulations, which do specifically mention asymptomatic HIV as a physical impairment, until it had already concluded its discussion of the impairment prong of the analysis.[60]

The Court then recited the course the HIV retrovirus takes upon infection of a human host paying special attention to the immediacy with which the infection affects the body.[61] Finally, the Court concluded that HIV infection satisfies both the statute and the regulations from the point of infection, reasoning that "[i]n 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."[62] The Court also found that HIV is an ongoing physical impairment with a physiological impact even in dormancy.[63]

The second prong of the disability analysis requires that the HIV-positive impairment affect a major life activity.[64] Ms. Abbott claimed that her HIV infection substantially limited her ability to reproduce and

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54. *Bragdon*, 118 S. Ct. at 2202 (quoting § 12201(a)).
55. *Id.*
56. *Id.*
57. *See supra* note 25.
58. 3 C.F.R. § 117; 45 C.F.R. § 84.3(j)(2)(i); 28 C.F.R. § 36.104(1).
59. 118 S. Ct. at 2203.
60. *Id.* at 2209.
61. *Id.* at 2203. Once the virus enters the body, the "assault on the immune system is immediate," causing the victim to suffer sudden decline in CD4+ (lymphocytes). Mononucleosis-like symptoms often emerge between six days and six weeks along with several other outward manifestations of the illness. *Id.*
62. *Id.* at 2204.
63. *Id.*
64. *Id.*

bear children.[65] Although Justice Kennedy mentioned in dicta that reproduction is not the only major life activity affected by HIV that would fall within the purview of the ADA, the opinion is limited to reproduction because it was the only activity raised and considered in the circuit court.[66] Tracing the language of the court of appeals, the majority had little difficulty concluding that reproduction is a major life activity.[67] The Court held that reproduction is "major" because it is "central to the life process itself."[68] Dismissing Dr. Bragdon's claim that Congress intended the ADA to cover only those aspects of a person's life that are "public, economic, or daily [in] character," the Court observed there is nothing "in the definition [which] suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant . . . as to fall outside the meaning of the word 'major.'"[69] The Court cited the illustrative, nonexhaustive list of examples in the regulation to support the proposition that the statute is to be read more broadly than suggested by Dr. Bragdon.[70] Thus the Court upheld the court of appeals determination that reproduction is a major life activity.[71]

The final prong of the disability analysis is whether Ms. Abbott's physical impairment substantially limited her participation in the major life activity asserted.[72] At this point the Court found the RHA regulations were inconclusive and of no help in determining whether HIV substantially limits reproduction.[73] The majority held Ms. Abbott's impairment substantially limited her participation in reproduction, based not so much on the individualized evidence as on medical evidence showing that HIV-positive status limits reproduction in two ways.[74] First, the Court held significant the risk that an HIV-impaired person would infect a sexual partner with HIV during the sexual relations required for conception.[75] Second, the Court held that the fetus of an

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65. *Id.* at 2205; *see also* Brief of the American Medical Association as Amicus Curiae in Support of Respondents, 1998 WL 47248, at *20, Bragdon v. Abbott, 118 S. Ct. 2196 (1998) (No. 97-156) (explaining the profound impact HIV has on many major life activities).

66. 118 S. Ct. at 2205.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 2206.

75. *Id.* The Court stated, "The cumulative results of 13 studies collected in a 1994 textbook on AIDS indicates that 20% of male partners of women with HIV became HIV-positive themselves, with a majority of the studies finding a statistically significant risk

infected woman is at risk for infection during gestation and at childbirth.[76] Dr. Bragdon produced countervailing evidence that antiviral therapy reduces the risk of transmission to the fetus to about eight percent.[77] However, the Court refused to find as a matter of law that an eight percent risk of transmitting a "dread and fatal" disease to one's child falls short of a substantial limitation on reproduction.[78] Justice Kennedy denied that the decision of an HIV infected person to reproduce is a personal choice, citing the danger to the public health, economic costs, and the laws of some states that prohibit persons with HIV from having consensual sex.[79] The majority supported this holding with authority in the various agency interpretations[80] and the Department of Justice regulations.[81]

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, filed a dissenting opinion. The dissenters took issue with the majority's categorical approach to defining disability.[82] Chief Justice Rehnquist noted the language of the statute states explicitly that the disability determination is made "'with respect to an individual,'" stating "that whether respondent has a disability covered by the ADA is an individualized inquiry."[83] He asserted that "there is not a shred of record evidence indicating that, prior to becoming infected with HIV, respondent's major life activities included reproduction."[84] In any event, the dissent observed that "the Court is simply wrong in concluding as a

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of infection." *Id.* (citing Osmond & Padian, *Sexual Transmition of HIV, in* AIDS KNOWLEDGE BASE 1.9-8 & tbl.2).

76. *Id.* The Solicitor General questioned the relevance of the seventeen percent reduction in the risk of transmitting HIV to the fetus while being treated with AZT, pointing to regulatory language requiring the substantiality of a limitation to be assessed without regard to mitigating measures. *See* Brief for United States as Amicus Curiae Supporting Respondents, 1998 WL 47255 at *18 n.10, Bragdon v. Abbott, 118 S. Ct. 2196 (1998) (No. 97-156).

77. *Bragdon*, 118 S. Ct. at 2206.

78. *Id.*

79. *Id.*

80. *See id.* at 2207. In support of its position, the Court points to a 1988 opinion written by the Office of Legal Counsel of the Department of Justice claiming that the RHA "'protects symptomatic HIV-infected and asymptomatic individuals against discrimination in any covered program.'" *Id.* (quoting Memorandum to Arthur B. Culvahouse, Jr., Counsel to the President, Justice Department Application of Rehabilitation Act's Section 504 to HIV-Infected Persons, Daily Lab. Rep. (BNA) D-1 (Oct. 7, 1988)).

The Court also cited several administrative hearings under both the RHA and the ADA. *See* 118 S. Ct. at 2207-08.

81. *See* 118 S. Ct. at 2209.

82. *Id.* at 2214-15 (Rehnquist, C.J., dissenting).

83. *Id.* at 2214 (quoting 42 U.S. § 12102(2)).

84. *Id.* at 2214-15 (footnote omitted).

general matter that reproduction is a 'major life activity.'"[85] The decision whether to reproduce, according to Chief Justice Rehnquist, is an important one, but is not the sort of activity covered by the list in the RHA regulations.[86]

IV. IMPLICATIONS

Bragdon is an anomaly among ADA cases with respect to the Court's methodology in determining whether a plaintiff has a "disability." Prior to *Bragdon,* courts emphasized the individualized nature of the "substantially limits a major life activity" portion of the disability analysis. Plaintiffs had the burden of proving how their physical impairments significantly limited their major life activities by a preponderance of the evidence.[87] The Court in *Bragdon* did not follow this approach; rather, relying on empirical evidence and general theories, it concluded that plaintiff's major life activity of reproduction was "substantially limited."[88] This method of analysis appears to be limited to cases involving HIV, however, because the lower court cases following *Bragdon* (not involving asymptomatic HIV) have continued the individualized inquiry tradition on the third prong of the analysis.[89]

The circuit courts, since *Bragdon,* have continued to employ an individualized inquiry in deciding whether a plaintiff is disabled. The Second, Fifth, Sixth, and Seventh Circuits have emphasized the tripartite "disability analysis" set forth in *Bragdon,* but only two acknowledge using *Bragdon*'s approach to the "substantially limits a life activity" prong. Accordingly, these courts appear either to have chosen to interpret *Bragdon* as reaffirming the necessity of an individualized inquiry, or instead to have continued to rely on the language in the EEOC regulations that counsel the same approach.

The Sixth and Seventh Circuits have not relied on *Bragdon* for the "substantially limits" prong of the "disability test." Instead, both courts invoked the language of the EEOC regulations. In *Cehrs v. Northeast Ohio Alzheimer's Research Center*,[90] the Sixth Circuit held that plaintiff's pustular psoriasis was a "physical impairment."[91] It cited *Bragdon* for the proposition that the ongoing nature of a disease and its

85. *Id.* at 2215.

86. *Id.*

87. *See* Colwell v. Suffolk County Police Dep't, 158 F.3d 635 (2nd Cir. 1998); Beart v. Euclid Beverage, Ltd., 149 F.3d 626 (7th Cir. 1998); Cehrs v. Northeast Ohio Alzheimer's Research Ctr., 155 F.3d 775 (6th Cir. 1998); Deas v. River W., 152 F.3d 471 (5th Cir. 1998).

88. *Bragdon*, 118 S. Ct. at 2206.

89. *See supra* note 86.

90. 155 F.3d 775.

91. *Id.* at 780.

physiological impact in dormancy are factors indicating that a person suffers from a "physical impairment."[92] However, in determining whether plaintiff's disease substantially limited the major life activity of work, the Sixth Circuit relied on the factors laid out in the EEOC regulations without mentioning *Bragon*.[93] Similarly, in *Baert v. Euclid Beverage, Ltd.*,[94] the Seventh Circuit found that while a truck driver who lost his job because of insulin-dependent diabetes may be "disabled," diabetes could not be deemed a disability as a matter of law.[95] Rather, the court held that whether an impairment is a disability and whether it substantially limits a major life activity requires a case-by-case inquiry of the kind called for by the EEOC regulations.[96]

Interestingly, the Fifth Circuit has cited *Bragdon* as standing for an individualized inquiry. In *Deas v. River West*[97] it held that plaintiff's seizures were not a per se disability under the ADA and that "awareness" was not a major life activity.[98] The court emphasized "the importance of . . . making disability determinations on an individualized basis."[99] The court further stated that it has "consistently emphasized that an individualized, case-by-case determination of disability best achieves the purposes of the ADA."[100] In a footnote the court stated that the Supreme Court in *Bragdon* declined to rule specifically on whether HIV is a per se disability.[101] The court noted the Supreme Court conducted an individualized inquiry into whether plaintiff's infection substantially limited reproduction.[102] The court did not, however, explain how the Supreme Court conducted an individualized inquiry and did not recite the Court's reasoning.[103] Likewise, the Second Circuit held in *Colwell v. Suffolk County Police Department*[104] that the inquiry into whether plaintiff's impairment substantially limits a major life activity is "individualized and fact specific."[105] Again, the court cited *Bragdon* for this position.[106]

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92. *Id.*
93. *Id.* at 781.
94. 149 F.3d 626.
95. *Id.* at 631.
96. *Id.*
97. 152 F.3d 471.
98. *Id.* at 482.
99. *Id.* at 477.
100. *Id.* at 478.
101. *Id.* at 478 n.15.
102. *Id.*
103. *Id.*
104. 158 F.3d 635.
105. *Id.* at 643.
106. *Id.*

Regardless of the methodology, it is evident from the outcomes of most post-*Bragdon* litigation that very little has changed in ADA jurisprudence. Rather, it seems possible that the Supreme Court afforded HIV the same unique status that it receives in modern culture, that of an unknown, feared disease deserving of special considerations. While there is certainly no explicit mention of the societal view on HIV in the opinion, perhaps the Court is protecting the current view that HIV is an especially debilitating disease deserving of the rarely given title of "per se" disability under the ADA. Regardless of why the court seemingly abandoned the individualized inquiry into the final prong of the disability analysis, the individualized methodology is still alive and well in other contexts in the circuit courts.

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