Are There No Per Se Disabilities Under the Americans with Disabilities Act? the Fate of Asymptomatic HIV Disease

Michael D. Carlis
Scott A. McCabe

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Comment

ARE THERE NO PER SE DISABILITIES UNDER THE AMERICANS WITH DISABILITIES ACT? THE FATE OF ASYMPTOMATIC HIV DISEASE

MICHAEL D. CARLIS*
SCOTT A. MCCABE**

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Over the last three years, a disturbing development has occurred in disability-discrimination law regarding HIV-infected individuals. The United States Court of Appeals for the Fourth Circuit has indicated that individuals with asymptomatic HIV disease\(^1\) are not disabled under the principal definition of “disability” in the

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\(^1\) An individual who is HIV positive is considered asymptomatic during the period of time that she does not experience any manifest symptoms of HIV disease. Asymptomatic HIV disease is characterized as follows:

With few exceptions, there is a progressive diminution of CD4+ T cell counts during this asymptomatic period which ultimately leads to a state of immunosup-
Americans with Disabilities Act of 1990 (the Act or the ADA). The Fourth Circuit is the first federal jurisdiction to interpret the Act's protective scope so narrowly. As this Comment shows, the court's view ignores congressional intent, contravenes regulations promulgated by federal agencies authorized to enforce the ADA, and curiously stands alone among federal courts that have ruled on this same issue.

The Fourth Circuit's conclusion allows employers lawfully to discharge asymptomatic HIV-positive employees based on their HIV status alone, and allows business owners to refuse service in places of public accommodation based solely on an individual's HIV-positive status. It is unlikely that the framers of the ADA intended to permit such discrimination.

Part I of this Comment will explore the ADA—its origins and development—in the emerging civil rights jurisprudence of the 1960s, 1970s, and 1980s. The Act authorizes various federal agencies to promulgate regulations enforcing its provisions. As these regulations expressly include asymptomatic HIV infection as a disability, they are consistent with Congress's intent in the late 1980s to protect asymptomatic HIV-positive individuals under the ADA. The regulations, therefore, are entitled to substantial deference by the courts.

Part II will review five federal cases from the 1990s that examine the issue of whether asymptomatic HIV infection constitutes a disability under the ADA. The court in each of these cases concluded that asymptomatic HIV infection is indeed a disability. Significantly,

pressions that is severe enough (CD4+ T cell count <200 per microliter) to place the patient at high risk for opportunistic, and hence clinically apparent, disease. HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1588 (Kurt J. Isselbacher et al. eds., 13th ed. 1994); accord STEDMAN'S MEDICAL DICTIONARY 160 (26th ed. 1995) (defining "asymptomatic" as "[w]ithout symptoms, or producing no symptoms"); infra note 237 (discussing asymptomatic HIV disease).

2. 42 U.S.C. §§ 12101-12213 (1994). The Fourth Circuit stated that individuals with asymptomatic HIV disease are not disabled under the principal statutory definition of disability—that is, not disabled with respect to having "a physical or mental impairment that substantially limits one or more of the major life activities of such individual . . . ." Id. § 12102(2)(A); accord Runnebaum v. NationsBank of Md., N.A., 123 F.3d 156, 172 (4th Cir. 1997) (en banc) (Runnebaum II) (ruling that the language in the ADA requires a nexus between the physical effect of impairment and a major life activity and that asymptomatic HIV is not a disability under the statutory definition); Ennis v. National Ass'n of Bus. & Educ. Radio, 53 F.3d 55, 60 (4th Cir. 1995) (stating in dicta that, absent exceptional evidence to the contrary, an individual with asymptomatic HIV disease is not disabled because he has neither a physical impairment nor any impairment that substantially limits any of his major life activities).


4. See infra note 14 and accompanying text.
the First Circuit has recently decided in Abbott v. Bragdon,\(^5\) in contrast to the Fourth Circuit's rulings, that asymptomatic HIV infection constitutes a disability under the ADA.\(^6\) Abbott is now before the United States Supreme Court, and a decision on whether asymptomatic HIV disease is a disability under the ADA is expected by this summer.

Part III analyzes two Fourth Circuit decisions, Ennis v. National Ass'n of Business & Educational Radio\(^7\) and Runnebaum v. NationsBank of Maryland, N.A.,\(^8\) both of which rejected asymptomatic HIV infection as a federally protected disability under the ADA’s principal definition of disability.\(^9\) When one compares the court’s reasoning in these decisions to another recent Fourth Circuit decision, in which the court emphasized the virus’s virulence,\(^10\) the Fourth Circuit’s attitude toward individuals with HIV disease seems to reflect the very stereotypes that the Act seeks to eliminate. Based on the Fourth Circuit’s approach to HIV-related discrimination cases (i.e., its wholesale rejection of congressional intent, administrative regulations, and case law from other circuits), the authors conclude that the Fourth Circuit’s position in Ennis and Runnebaum\(^11\) is not grounded in reasoned analysis, but instead upon an unfortunate disregard for the court’s proper role to effectuate the clear intent of the Act.

I. THE ORIGINS AND DEVELOPMENT OF THE AMERICANS WITH DISABILITIES ACT

President Bush signed the ADA into law in July 1990.\(^12\) The Act charged the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ) with the responsibility of

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5. 107 F.3d 934, 943 (1st Cir.), cert. granted in part, 118 S. Ct. 554 (1997).
6. See id.
7. 53 F.3d 55 (4th Cir. 1995).
8. 123 F.3d 156 (4th Cir. 1997) (Runnebaum II).
9. Ennis, 53 F.3d at 60; Runnebaum II, 123 F.3d at 168.
10. See Doe v. University of Md. Med. Sys. Corp., 50 F.3d 1261, 1267 (4th Cir. 1995) (holding that the plaintiff, an asymptomatic HIV-positive neurosurgical resident, posed a significant risk to patients—a risk that could not be eliminated by reasonable accommodation and therefore was not an "otherwise qualified" individual with a disability).
11. The Ennis and Runnebaum courts indicated that individuals with asymptomatic HIV disease are neither impaired nor substantially limited in a major life activity. See Runnebaum II, 123 F.3d at 172; Ennis, 53 F.3d at 60.
promulgating regulations to carry out certain provisions of the ADA. These EEOC and DOJ regulations indicate, inter alia, that asymptomatic HIV infection is covered as a disability under the language of the Act.

When interpreting statutory language, federal courts must give substantial deference to administrative regulations that effectuate the intent of Congress. As the legislative history shows, there is no doubt that Congress intended to cover asymptomatic HIV infection as a "disability" under the ADA. Courts, therefore, should restrain any impulse to impose their own agenda on a piece of remedial civil rights legislation that was intended to protect from discrimination individuals with asymptomatic HIV infection.

A. The ADA

Federal legislation protecting the civil rights of individuals with disabilities has evolved from post-World War II prohibitions against disability employment-discrimination within the United States Civil Service to equal-rights guarantees for disabled individuals within the federal government or institutions receiving federal financing under Title V of the Rehabilitation Act of 1973. In the 1970s and 1980s, federal disability legislation evolved even further, eventually leading toward a recommendation for a broad-scoped prohibition of discrimination against disabled individuals.
Two years after its introduction in Congress, the ADA was signed into law in 1990.21 This new federal antidiscrimination statute was "designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities."22 The ADA was also designed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"23 and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."24

Title I of the ADA prohibits discrimination in employment against an otherwise qualified individual with a disability.25 Title I goes further than any prior civil rights law by obligating an employer to accommodate an individual's disability so that equal employment opportunity for the disabled is guaranteed.26 Reasonable accommodations are, for example, changes to an employee's work schedule or adjustments in the way a job is ordinarily performed that enable a disabled employee to compete in the marketplace alongside others who are not disabled;27 such accommodations cannot, however, place an undue hardship on the employer.28
In establishing a prima facie case of discrimination under Title I, a plaintiff must first establish that he is an individual with a disability. "Disability" means having "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," having "a record of such an impairment," or "being regarded as having such an impairment." The ADA does not explicitly delegate to any agency the authority to promulgate regulations interpreting the Act's definition of "disability." The statute, however, does delegate authority to the EEOC to promulgate regulations to enforce Title I, and delegates authority to the DOJ to promulgate regulations to enforce Titles II and III. In so doing, the statute implicitly authorizes these agencies to interpret the statutory definition of "disability" in their determination of who qualifies for federal protection.

B. Administrative Regulations

1. EEOC Regulations.—Unlike most administrative regulations that list certain conditions that are considered impairments under the ADA, the EEOC regulations do not contain such a list. The EEOC regulations define the phrases "physical or mental impairment," "disability," and "record of such an impairment." These case-by-case approaches are essential if qualified individuals of varying abilities are to receive equal opportunities to compete for an infinitely diverse range of jobs. For this reason, neither the ADA nor this part can supply the "correct" answer in advance for each employment decision concerning an individual with a disability. Instead, the ADA simply establishes parameters to guide employers in how to consider, and take into account, the disabling condition involved.

Id. pt. 1630 app., at 348.
30. Id. § 12102(2)(B).
31. Id. § 12102(2).
32. See supra note 13.
33. Several federal administrative agencies have promulgated regulations governing complaints of discrimination on the basis of a handicap. These regulations state that asymptomatic HIV infection is a "physical impairment." See, e.g., 5 C.F.R. § 1636.103(1)(ii) (1997) (Federal Retirement Thrift Investment Board—defining "physical or mental impairment" to include asymptomatic HIV disease); 7 C.F.R. § 15e.103(1)(ii) (Department of Agriculture—same); 22 C.F.R. § 1701.103(1)(ii) (Institute of Peace—same); 24 C.F.R. § 100.201 (Department of Housing and Urban Development—same); 34 C.F.R. § 1200.103(1)(ii) (National Council on Disability—same); 45 C.F.R. § 2301.103(1)(ii) (Arctic Research Commission—same).
34. "Physical or mental impairment" refers to the following:
   (1) 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; or
"major life activities," and "substantially limits," and discuss what conditions are covered as "disabilities."

The EEOC Interpretive Guidance emphasizes that in determining whether an individual's condition constitutes a disability, there must be a causal relationship between the physical or mental impairment and the substantial limitation on a major life activity of the individual:

The ADA and [the EEOC Interpretive Guidance], like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

It would seem, therefore, that every plaintiff's condition must be individually analyzed to determine her "disability" status. Indeed, for most conditions, the regulations set forth various factors that must be

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(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h).

35. "Major life activities" refers to "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

36. "Substantially limits" refers to the following:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). With regard to working, the term "substantially limits" refers to the following:

significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630(j)(3)(i).

37. See EEOC Interpretive Guidance, supra note 14, § 1630.2(g), at 349.

38. Id. § 1630.2(j), at 350.
weighed in determining whether a given impairment is substantially limiting.39

Interestingly, the regulations qualify this case-by-case analysis with regard to certain conditions that are per se disabling: "Other impairments, however, such as HIV infection, are inherently substantially limiting."40 An impairment that is "inherently substantially limiting" satisfies the ADA's disability requirement. The EEOC recognizes that HIV infection will always constitute a disability under the ADA; thus, according to the EEOC, HIV infection operates, in effect, as a per se disability.

2. Department of Justice Regulations.—The DOJ is responsible for enforcing Titles II and III of the Act, which, respectively, prohibit discrimination in public services and in public accommodations.41 The DOJ regulations for Title II define physical or mental disability precisely the same as the EEOC Title I regulations, noted above, except that the DOJ regulations list certain conditions that are expressly included as impairments:

   The 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.42

The appendix to the DOJ regulations notes:

   It is not possible to include a list of all the specific conditions, contagious and noncontagious diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that other conditions or disorders may be identified in the future.43

Nevertheless, the appendix observes that "the list of examples ... includes: ... HIV disease (symptomatic or asymptomatic)."44

39. See, e.g., id. § 1630.2(j), at 351 (listing factors to be used in determining if a condition is "substantially limiting").
40. Id.
41. See 42 U.S.C. §§ 12134(a) (1994) (Title II); id. § 12186(a)(1) (Title III); see also supra note 13.
42. 28 C.F.R. § 35.104(4)(1)(ii) (Title II regulations) (second emphasis added).
44. Id.
The regulations explain that while the list of specific conditions included as impairments is practically identical to those listed in the Rehabilitation Act regulations,\(^\text{45}\) it was important to include asymptomatic HIV disease specifically within the regulations to ensure protection:

The phrase "symptomatic or asymptomatic" was inserted in the final rule after "HIV disease" in response to commentators who suggested the clarification was necessary.

... Following the Arline decision, this Department's Office of Legal Counsel issued a legal opinion that concluded that symptomatic HIV disease is an impairment that substantially limits a major life activity; therefore it has been included in the definition of disability under this part. The opinion also concluded that asymptomatic HIV disease is an impairment that substantially limits a major life activity, either because of its actual effect on the individual with HIV disease or because the reactions of other people to individuals with HIV disease cause such individuals to be treated as though they are disabled.\(^\text{46}\)

These regulations and interpretive guidelines are mirrored in the DOJ regulations for Title III.\(^\text{47}\) The effective result of the DOJ's conclusion that "asymptomatic HIV disease is an impairment that substantially limits a major life activity"\(^\text{48}\) is the same as the EEOC's position that asymptomatic HIV disease operates as a per se disability because it is inherently a physical impairment that substantially limits one or more of the major life activities of the infected individual.\(^\text{49}\)

C. Judicial Deference to Administrative Regulations

Administrative regulations are entitled to substantial judicial deference so long as such regulations are "not contrary to [the] statute or specific statutory intent and ... [are] reasonable."\(^\text{50}\) In Chevron U.S.A.

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\(^{45}\) See 45 C.F.R. § 84.3(j)(2)(i).

\(^{46}\) 28 C.F.R. pt. 35 app. A, at 469; accord School Bd. v. Arline, 480 U.S. 273, 289 (1987) (holding that a school teacher who was fired from her job solely because of her susceptibility to the contagious disease of tuberculosis was a "handicapped individual" within the meaning of the Rehabilitation Act of 1973).

\(^{47}\) 28 C.F.R. § 36.104(1)(iii) (including asymptomatic HIV disease in the definition of "physical or mental impairment"); 28 C.F.R. pt. 36 app. B, § 36.104, at 610 (listing asymptomatic HIV disease as an example of a physical or mental impairment).


\(^{49}\) See 29 C.F.R. pt. 1630 app., § 1630.2(j), at 350.

Inc. v. Natural Resources Defense Council, Inc., the Supreme Court explained this principle in the context of judicial review of administrative agency action.\textsuperscript{51}

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.\textsuperscript{52}

Chevron sets forth a two-step analysis to determine the amount of deference courts should give to administrative regulations. In step one, if the intent of Congress is clear on the precise question at issue, administrative agencies and courts must give effect to the "unambiguously expressed intent of Congress."\textsuperscript{53} However, if Congress has not directly spoken to a precise issue when enacting a statute, a court must further inquire, at step two, whether the administrative agency's interpretation of the issue "is based on a permissible construction of the statute."\textsuperscript{54}

Chevron carefully outlined the relationship between the delegation of authority to an administrative agency by Congress and judicial review of administrative action that gives meaning to ambiguous statutory language:

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary,

\textsuperscript{52} Id. at 842-43 (footnotes omitted).
\textsuperscript{53} Id. at 843.
\textsuperscript{54} Id.
capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.\(^5\)

While Congress did not expressly delegate to any administrative agency the authority to interpret the three statutory definitions of disability, Congress nevertheless implicitly delegated authority to the EEOC and the DOJ to “fill in the gap” and interpret these definitions by regulation.\(^6\) The question for the court, therefore, is whether the EEOC’s and the DOJ’s interpretations of the definition of disability are reasonable.\(^7\)

As the following subpart will demonstrate, not only are the agencies’ regulations reasonable, and therefore entitled to substantial deference by the courts, but the regulations are consistent with Congress’s clear and undisputed intent that HIV disease—symptomatic or asymptomatic—should be protected as a disability under the ADA.

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56. The Fourth Circuit questions the EEOC’s regulatory authority to interpret a term outside of Title I—namely, the definition of “disability” in 42 U.S.C. § 12102(2) (1994). See Ennis v. National Ass’n of Bus. & Educ. Radio, 53 F.3d 55, 59 n.4 (4th Cir. 1995) (stating that the court is uncertain of the EEOC’s authority to define “physical or mental impairment”). Furthermore, the court states that the EEOC’s regulatory definition of “disability,” whether promulgated with legislative authority or not, must comply with the statutory requirement “that the physical or mental impairment substantially limit a major life activity of the particular individual.” Id. at 60 n.4.

Congress has charged the EEOC with issuing regulations to carry out the provisions of Title I of the Act. See 42 U.S.C. § 12116. Thus, the EEOC is responsible for implementing regulations interpreting the phrase “qualified individual with a disability.” Id. § 12111(8). Because the EEOC must interpret the terms “physical impairment” and “major life activities” in order to interpret “disability,” Congress has implicitly delegated to the EEOC regulatory authority on this particular issue.

This implicit delegation of authority is buttressed by the Supreme Court’s decision in School Board v. Arline, 480 U.S. 273 (1987), where the Court deferred to the Department of Health and Human Services’s (HHS) regulations interpreting, with similar implicit legislative authority, the terms “physical impairment” and “major life activities” under section 504 of the Rehabilitation Act. See id. at 279-80. These HHS regulations are identical to the EEOC regulations on this precise issue. Compare 45 C.F.R. § 84.3(j) (2) (i), (ii) (HHS regulations interpreting “physical impairment” and “major life activities”) with 29 C.F.R. § 1630.2(h), (i) (EEOC regulations interpreting “physical impairment” and “major life activities”).

57. See Chevron, 467 U.S. at 844.
D. Legislative History of the ADA

It was clear at the birth of the ADA that any new federal law prohibiting discrimination on the basis of a disability would include asymptomatic HIV infection as a disability. In 1988, the Presidential Commission on the Human Immunodeficiency Virus Epidemic released its comprehensive report on HIV infection in the United States.\(^58\) The Commission analyzed, inter alia, the pervasiveness of discrimination against HIV-positive individuals.\(^59\) It further noted the marked absence of any national mandate against HIV discrimination: "There is not a societal standard or national policy statement clearly and unequivocally stating that discrimination against persons with HIV infection is wrong. There is no comprehensive, national legislation clearly prohibiting discrimination against persons with HIV infection as a handicapping condition."\(^60\) The Presidential Commission supported the position that "[s]ection 504 coverage applies to persons who are HIV positive yet asymptomatic"\(^61\) and recommended that "[a]ll persons with symptomatic or asymptomatic HIV infection should be clearly included as persons with disabilities who are covered by the anti-discrimination protections of this legislation."\(^62\)

Soon after the release of the Presidential Commission Report, the issue of whether individuals with asymptomatic HIV infection should be protected against discrimination reached the Senate floor during initial debates on the ADA. Republican Senator Lowell P. Weicker, Jr., of Connecticut, one of the principal architects of the ADA, stated in mid-1988 that "[t]he job before the President and the Congress is to remove this obstacle and expand the protections against discrimination for all those with disabilities, including HIV infection, ARC [AIDS-related complex], and AIDS."\(^63\)


59. *Id.* at 119 ("Throughout our investigation of the spread of HIV in the United States, the Commission has been confronted with the problem of discrimination against individuals with HIV seropositivity and all stages of HIV infection, including AIDS.").

60. *Id.* at 120.

61. *Id.* at 123.

62. *Id.*


The Chairman's recommendations call for the application of existing Federal handicapped antidiscrimination laws to the private sector to include protection for all individuals with disabilities, including people with HIV infection, from losing their jobs, educational opportunities, and homes. This recommendation comes as no surprise to those of us who are Members of the Senate Labor and Human Resources Committee and have repeatedly heard the horror stories of
In July 1988, Dr. C. Everett Koop, the United States Surgeon General, wrote to Douglas Kmiec, the Acting Assistant Attorney General in the Department of Justice's Office of Legal Counsel, regarding the disabled status of HIV-infected individuals. Dr. Koop observed that discrimination against all HIV-positive individuals must be prohibited, and that the HIV virus impairs infected individuals at every stage of infection:

As I sought to emphasize during our meeting, much has been learned about HIV infection that makes it inappropriate to think of it as composed of discrete conditions such as ARC or "full blown" AIDS. HIV infection is the starting point of a single disease which progresses through a variable range of stages. In addition to an acute flu-like illness, early stages of the disease may involve subclinical manifestations[,] i.e., impairments and no visible signs of illness. The overwhelming majority of infected persons exhibit detectable abnormalities of the immune system. Almost all, [sic] HIV infected persons will go on to develop more serious manifestations of the disease and our present knowledge suggests that all will die of HIV infection barring premature death from other causes.

Dr. Koop concluded that "from a purely scientific perspective, persons with HIV infection are clearly impaired. . . . Like a person in the early stages of cancer, they may appear outwardly healthy but are in fact seriously ill." The following month, the Counsel to President Reagan asked the Department of Justice for an opinion concerning whether section 504 of the Rehabilitation Act of 1973 covered HIV-infected individuals. Acting Assistant Attorney General Kmiec responded in September 1988, concluding that both symptomatic and asymptomatic HIV-infected individuals were protected against discrimination under this

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65. Id. at S7211-12.

66. Id. at 368.
federal act so long as they were otherwise qualified. Kmiec specifically concluded that asymptomatic HIV-infected individuals were physically impaired under the first prong of the statutory definition, and that such physical impairment substantially limited asymptomatic HIV-infected individuals' major life activities.

Kmiec further observed that asymptomatic HIV infection causes "'subclinical manifestations'" of impairment, which, while exhibiting "'no visible signs of illness,'" result in "'detectable abnormalities of the immune system'" that physically impair the infected individual. In addition, the virus's physiological effects on the brain and central nervous systems resulting in "some form of mental deficiency or brain dysfunction . . . 'before they have any other manifestation such as ARC or classic AIDS'" also render asymptomatic individuals physically impaired. Kmiec concluded that asymptomatic HIV infection is physically impairing to the infected individual "because it is a 'physiological disorder or condition' affecting the 'hemic and lymphatic' systems."

With regard to whether asymptomatic HIV-infected individuals are substantially limited in their major life activities, the Acting Assistant Attorney General concluded that the major life activities of procreation and intimate personal relations are among the most important major life activities affected by asymptomatic HIV infection:

Based on the medical knowledge available to us, we believe that it is reasonable to conclude that the life activity of procreation—the fulfillment of the desire to conceive and bear healthy children—is substantially limited for an asymptomatic HIV-infected individual. In light of the significant risk that the AIDS virus may be transmitted to a baby during pregnancy, HIV-infected individuals cannot, whether they are male or female, engage in the act of procreation with the normal expectation of bringing forth a healthy child. Because of the infection in their system, they will be unable to fulfill this basic human desire. There is little doubt that procreation is a major life activity and that the physical ability to engage in normal procreation—procreation free from the fear of what the infection will do to one's child—is substan-

67. Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988) [hereinafter Legal Counsel Memorandum], reprinted in 2 REAMS, JR. ET AL., supra note 64, doc. 14, at 338-66.
68. Id. at 343-50.
69. Id. at 345 (quoting Surgeon General Letter, supra note 64, at 367-68).
70. Id. at 345 & n.9 (quoting UNITED STATES DEP’T OF HEALTH & HUMAN SERVS., SURGEON GENERAL’S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 32 (1986)).
71. Id. at 345.
tially limited once an individual is infected with the AIDS virus.

This limitation—the physical inability to bear healthy children—is separate and apart from the fact that asymptomatic HIV-infected individuals will choose not to attempt procreation. The secondary decision to forego having children is just one of many major life decisions that we assume infected individuals will make differently as a result of their awareness of their infection.\(^7\)

Related to the limitation on procreation, Kmiec noted, is the substantial limitation on intimate personal relations caused by the HIV infection:

Similarly, some courts can be expected to find a limitation of a major life activity in the fact that an asymptomatic HIV-infected individual’s intimate relations are also likely to be affected by HIV infection. The life activity of engaging in sexual relations is threatened and probably substantially limited by the contagiousness of the virus.\(^7\)

Kmiec also discussed the Supreme Court’s reasoning with regard to how those with contagious diseases are treated by others.\(^7\) Basing his reasoning on the 1987 Supreme Court decision in *School Board v. Arline*,\(^7\) Kmiec argued that under the “regarded as” prong of the statutory definition, an individual infected with a contagious disease is handicapped based solely on the substantial limitation upon “that person’s ability to work as a result of the negative reactions of others to the impairment,” even if the infected person is not handicapped himself.\(^7\) Therefore, where an HIV-infected individual has been discriminated against on the basis of the “fear of contagion” from that individual, such person is considered to be within the protected class under the federal statute.\(^7\)

The findings of the Surgeon General and the Department of Justice, as expressed in the Acting Assistant Attorney General’s September 1988 memorandum, are the cornerstone upon which Congress

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\(^7\) Id. at 347-48 (footnote omitted).

\(^7\) Id. at 348. The letter noted that forbearance of procreation or intimate personal relations is dependent upon the “conscience and good sense of the person infected,” as an unconscionable person might engage in dangerous behavior by deciding not to forbear these major life activities. Id.

\(^7\) See id. at 349-50.

\(^7\) 480 U.S. 273 (1987).

\(^7\) Legal Counsel Memorandum, *supra* note 67, at 349 (quoting *Arline*, 480 U.S. at 283). The letter argues that this is significant when the infected individual has decided not to forbear procreation or intimate personal relations. Id. at 348.

\(^7\) Id. at 350.
based its intention to include asymptomatic HIV disease as a disability under the ADA.\textsuperscript{78}

Congressional opposition to federal protection against HIV-related discrimination appeared only during the June 1988 floor debates on the Fair Housing Amendments Act of 1988 (FHAA), which prohibited unlawful housing discrimination on the basis of a handicap.\textsuperscript{79} It was widely understood by members of Congress that HIV infection, including asymptomatic HIV infection, qualified as a handicap under the FHAA, which mirrored the language of the Rehabilitation Act.\textsuperscript{80} On the night that the House of Representatives passed the FHAA, Republican Representative Dan Burton of Indiana proposed an amendment that would have excluded from the term "handicap" "any current infection with the etiological agent for acquired immune deficiency syndrome."\textsuperscript{81}

Democratic Representative Henry A. Waxman of California rose in opposition to this amendment, stating that the bill includes HIV infection, including asymptomatic HIV infection, as a handicap:

Under the provisions of this bill, we will assure that HIV-infected persons are protected from medically unjustified discrimination in housing in the same way that they are in the employment programs covered by the Civil Rights Restoration Act. That is, no discrimination will be permitted

\textsuperscript{78} See infra note 98 and accompanying text.

\textsuperscript{79} 42 U.S.C. §§ 3601-3631 (1994). The definition of handicap under the FHAA is the same as the definition of disability under the ADA. Compare 42 U.S.C. § 3602(h)(1) ("'Handicap' means, with respect to a person . . . a physical or mental impairment which substantially limits one or more of such person's major life activities . . . .") with id. § 12102(2) ("The term 'disability' means, with respect to an individual . . . a physical or mental impairment that substantially limits one or more of the major life activities of such individual . . . ."). Congress for the first time in debates regarding the protective scope of the FHAA considered whether asymptomatic HIV disease was covered as a handicap. These debates settled the issue of whether asymptomatic HIV disease was a disability. By the time Congress debated the ADA, it had resolved that asymptomatic HIV disease was a unitary entity accorded disability status. See text following infra note 86.

\textsuperscript{80} See, e.g., 134 CONG. REC. H4612 (daily ed. June 22, 1988) (statement of Rep. Schroeder) ("This bill would ensure that [people with AIDS and people infected with HIV] have recourse to the courts in fighting such acts of discrimination."); id. at H4613 (daily ed. June 22, 1988) (statement of Rep. Coelho) ("Most recently our country has witnessed the horrors of discrimination directed against people with . . . infectious diseases such as AIDS and HIV infection. As a society, we cannot tolerate these acts of discrimination. This bill will provide protection for these individuals and their families in housing."); id. at H4689 (daily ed. June 23, 1988) (statement of Rep. Pelosi) ("All people with disabilities, including people with . . . AIDS or people infected with the human immunodeficiency virus—HIV, the AIDS virus—would be covered under the three-part definition of handicap adopted in this bill.").

against persons who pose no direct threat to the health or safety of others because they pose no significant risk of transmitting the AIDS virus in the kind of normal social interactions which form the context for housing decisions.\textsuperscript{82}

With specific regard to asymptomatic HIV infection, Representative Waxman stated that "[t]he need to protect asymptomatic HIV-infected persons from housing discrimination is acute."\textsuperscript{83} He explained that "[a]n asymptomatic HIV-infected person would be covered by at least two parts of [the Rehabilitation Act's definition of handicap], and thus would be protected from medically unjustified housing discrimination by this bill."\textsuperscript{84} He further explained:

First, such a person, although asymptomatic, meets the criteria for the first category, that is, having a physical impairment which substantially limits a major life activity.

. . . The AIDS virus does far more than "affect" the hemic system. It destroys essential white blood cells (T-lymphocytes or T-helper cells), which are the primary agents for repelling infection. . . . Thus, there is from HIV infection alone, a clear "physical impairment" to at least one major bodily system.

Moreover, this impairment does substantially limit what is indisputably a major life activity—procreation and childbirth. For both men and women, HIV information [sic] means that one should not engage in sexual intercourse without use of a condom. Thus, in order to protect one's partner from a risk of infection, the man or woman who is infected with the AIDS virus—even if entirely asymptomatic—must essentially forego procreation. For women who are infected with the AIDS virus and already pregnant, the risk of transmitting the virus to their newborn child may well mean that many women will decide to obtain abortions.

. . . .

It is important that Congress take this step of extending protection against housing discrimination to all HIV-infected persons, and I am pleased that this bill will have that effect. This bill represents a historic step forward and I urge my colleagues to pass it without any weakening amendments.\textsuperscript{85}

\textsuperscript{82} Id. at H4921 (daily ed. June 29, 1988) (statement of Rep. Waxman).
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id. at H4921-22; accord id. at H4922-23 (daily ed. June 29, 1988) (statement of Rep. Owens) ("It is important to underscore that this definition clearly intends to include persons with AIDS and all who are infected with the HIV virus, whether or not they show symptoms of the disease.").
Shortly thereafter, Representative Burton's amendment was defeated eighty-four to ten. No other opposition to the inclusion of asymptomatic HIV disease as a handicap was made during the debates on the FHAA. When Congress later discussed the scope of the ADA's protection, no opposition to the inclusion of asymptomatic HIV disease was made.

The same day that Acting Assistant Attorney General Kmiec released his memorandum in September 1988, Congress held the first hearing on the ADA. In a joint hearing before the Senate Subcommittee on the Handicapped of the Committee on Labor and Human Resources and the House Committee on Education and Labor, Democratic Senator Edward M. Kennedy of Massachusetts, a co-sponsor of the ADA, hailed the Presidential Commission's Report and announced that the passage of the ADA will "halt discrimination against individuals suffering from AIDS or who are infected with the AIDS virus." Senator Kennedy observed that "discrimination against victims of AIDS is seriously impairing our ability to halt the spread of the AIDS epidemic, and action by Congress is overdue." Also testifying in this joint hearing was Admiral James Watkins, chairperson of the Presidential Commission. Admiral Watkins underscored his recommendation that individuals with asymptomatic HIV infection be protected against discrimination under the ADA: "All persons with symptomatic or asymptomatic HIV infection should be clearly included as persons with disabilities who are covered by the anti-discrimination protections of this legislation."

Over the next two years, strong support in favor of covering asymptomatic HIV infection as a disability emerged. California Democratic Senator Alan Cranston's September 1989 floor statement on this issue embodied the position of many senators:

The ADA builds on strong legislative, judicial, and administrative history with regard to coverage of people with AIDS...
and those who are infected with the HIV virus under antidiscrimination statutes. Consistent with that history, S. 933 would provide . . . that people with AIDS and those who are infected with the virus are covered under the first prong of the definition of disability as people with impairments that substantially limit major life activities.91

Similarly, the May 1990 comments of Democratic Representative Jim McDermott of Washington illustrated the general attitude of the House on the issue of asymptomatic HIV protection under the Act:

I am particularly pleased that this act will finally also extend necessary protection to people with HIV disease. These are individuals who have any condition along the full spectrum of HIV infection—asymptomatic HIV infection, symptomatic HIV infection or full-blown AIDS. These individuals are covered under the first prong of the definition of disability in the ADA, as individuals who have a physical impairment that substantially limits a major life activity. As a physician, I know that although the major life activity that is affected at any point along the spectrum by the HIV infection may be different, an effect on some major life activity exists from the time of HIV infection.92

Even opponents of the ADA understood Congress's intent to cover asymptomatic HIV infection. Republican Senator Jesse Helms of North Carolina, an outspoken critic of the legislation, was deeply troubled with the Act's coverage of HIV-infected individuals, not for reasons related to the Act's definition of disability but because of his

91. 135 CONG. REC. S10722 (daily ed. Sept. 7, 1989) (statement of Sen. Cranston); accord id. at S4993 (daily ed. May, 9, 1989) (statement of Sen. Kennedy) ("Beyond the fundamental issues of fairness and justice for individuals, protections against discrimination for people with HIV disease are essential to protect the public health.""); id. at S10768 (daily ed. Sept, 7, 1989) (statement of Sen. Harkin) (responding to Sen. Helms, and stating, "[HIV infected individuals] are covered on the basis of their HIV infection but not on the basis of being current drug users"); id. (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy) (emphasizing the need to protect HIV-infected individuals from discrimination to help curb the spread of the disease); 136 CONG. REC. S9696 (daily ed. July 13, 1990) (statement of Sen. Kennedy) ("People with HIV disease are individuals who have any condition along the full spectrum of HIV infection—[including] asymptomatic HIV infection . . . . These individuals who have a physical impairment that substantially limits a major life activity.").

92. 136 CONG. REC. H2626 (daily ed. May 22, 1990) (statement of Rep. McDermott); accord id. at H2442 (daily ed. May 17, 1990) (statement of Rep. Weiss) ("It is of exceptional significance that this bill will offer protection to the thousands of Americans with HIV disease—from those who are asymptomatic to those with fully developed AIDS. Persons living with HIV disease suffer from all the forms of discrimination found in our society."); id. at H2481 (daily ed. May 17, 1990) (statement of Rep. Dymally) (favoring ADA coverage for individuals with HIV and AIDS).
stereotypical view of associating HIV-infected individuals with homosexuals and drug users: "I do not understand why, for example, you went down the road of including in your definitions people who are HIV positive, because 85 percent or more of the HIV positive people in this country are known to be drug users or homosexual or both."93

Opponents in the House voiced even louder opposition to the Act's coverage of HIV-infected people. Republican Representative Dan Burton of Indiana somewhat hysterically warned:

Homosexual lobbyists, AIDS activists, and their Congressional allies in Washington, D.C., realize that a Federal law which directly prohibits discrimination based on "sexual orientation" or "HIV infection" would be unpalatable to the majority of Americans and unlikely to pass. Instead, they have devised a masterpiece of legislative subterfuge which would effectively achieve their goals without using terms which raise a red flag in the minds of the public.

Under the cloak of the benign, [a]ffecting title, "The Americans with Disabilities Act" (ADA), homosexual attorneys have helped to draft a bill which would impose massive fines and other coercive legal measures on all private employers, churches, and private schools who decline to hire an individual with a "physical or mental impairment, a record of such impairment, or who is being regarded as having such an impairment."

The ADA is the last ditch attempt of the remorseless sodomy lobby to achieve its national agenda before the impending decimation of AIDS destroys its political clout.94

Though they opposed the Act on other grounds, the opposition of these legislators was premised upon the assumption that the Act was clearly intended to include asymptomatic HIV infection among the protected disabilities. Thus, from the beginning, proponents and opponents of the ADA recognized that the Act was intended to cover individuals who were infected with HIV and not simply those suffering from AIDS.

More authoritative indicators of congressional intent are the Senate and House Reports on the ADA, both of which endorse coverage of asymptomatic HIV infection as a disability under the Act's primary

statutory definition. The Senate Report, issued by the Committee on Labor and Human Resources, fully endorsed the Presidential Commission’s recommendation that “‘[a]ll persons with symptomatic or asymptomatic HIV infection should be clearly included as persons with disabilities who are covered by the anti-discrimination protections of this legislation.’” 95

With regard to the “physical or mental impairment” prong of the disability definition, the Senate Report stated:

It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that new disorders may develop in the future. The term includes, however, such conditions, diseases and infections as: . . . infection with the Human Immunodeficiency Virus . . . . 96

In addition, both the House Committee on Education and Labor and the House Committee on the Judiciary used substantially the same language in the second and third parts of the House Report to include HIV infection as a physical or mental impairment. 97

With regard to the “major life activities” prong of the definition, the Senate Report echoed the language of Assistant Attorney General Kmieć’s September 27, 1988 memo in stating that “a person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term ‘disability.’” 98 The second part of the House Report elaborated on this conclusion, stating that HIV-infected individuals are considered to be substantially limited in one or more of their major life activities “because of a substantial limitation to procreation and intimate sexual relationships.” 99

While the use of legislative history to aid statutory construction is controversial, 100 some materials reliably indicate congressional intent.

96. Id. at 22.
100. See generally Muriel Morisey Spence, The Sleeping Giant: Textualism as Power Struggle, 67 S. CAL. L. REV. 585 (1994) (examining the textualism controversy regarding the use of legislative history and concluding that textualist opposition to the judiciary’s use of legislative history usurps Congress’s power to determine the authoritative sources of statutory interpretation and denigrates Congress as an institution).
Though the floor statements noted above are suggestive, the statements from sponsors of the ADA, such as Senators Weicker and Kennedy, are clearer indicators. More significant are the committee reports, which are generally considered to be "the most widely accepted indicators of Congress' intent."101

Finally, most significant is the uncontroverted consensus of both supporters and opponents of the ADA that asymptomatic HIV infection was covered as a "disability" under the primary statutory definition. From the earliest HIV recommendations in Senator Weicker's 1988 National AIDS Policy Recommendations, to the days just prior to the Act's enactment in July 1990, there was no congressional objection to the many statements indicating that the ADA's passage meant protection against discrimination for individuals with asymptomatic HIV disease. Before signing the ADA into law, President Bush, a strong supporter of federal protection for the disabled, stated:

"Today, I call on the House of Representatives to get on with the job of passing a law—as embodied in the American [sic] with Disabilities Act—that prohibits discrimination against those with HIV and AIDS. We're in a fight against

As discussed in Bernard W. Bell's recent article, textualist opposition to the use of legislative history as a tool of statutory construction argues that its use has harmed the legislative process in several respects. See Bernard W. Bell, Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post Chevron Era?, 13 J.L. & Pol. 105, 110 (1997). It allows legislative minorities to manipulate cleverly the legislative process in their favor, as well as permits congressional staff members to insert policy in documents that legislators may not review. Id. at 110-11. It allegedly damages the relationship between the Congress and the President by giving voice to legislative policies without bicameralism and presentment. See id. at 111. Textualists also argue that using legislative history discourages Congress from enacting unambiguous statutes. Id. Textualists, therefore, disavow any judicial reliance on legislative history when interpreting statutes. Id. at 112.

As illustrated in the text above, the problems cited by textualists are not relevant to the legislative development of the ADA on the issue of whether asymptomatic HIV disease was intended to be covered as a disability under the primary statutory definition. Instead of isolated references to this issue, the ADA's legislative history, from its introduction in 1988, through the House and Senate committee reports, and culminating with the statement of President Bush just prior to presentment in 1990, see infra text accompanying note 102, consistently elucidates Congress's recognition and support for covering asymptomatic HIV disease under the primary statutory definition of disability.

Additionally, Congress's articulated rationale for not expressly including a list of qualifying impairments in the statutory text—so as not to limit unintentionally the broad scope of the Act's coverage—does not indicate sloppy congressional drafting, but instead demonstrates wise legislative judgment in crafting the remedial civil rights statute.

During the years immediately preceding the enactment of the ADA, every indicator of congressional intent unequivocally pointed toward the conclusion that individuals with asymptomatic HIV disease were covered as individuals with a "disability." As federal courts construe the ADA, the clear and consistent voice of Congress resonating from the birth of this federal antidiscrimination statute should not be blithely discounted.

II. CASE LAW RULING ASYMPTOMATIC HIV DISEASE A DISABILITY

In the last decade, many federal courts have considered whether asymptomatic HIV disease is a disability (or handicap) under either the Rehabilitation Act of 1973, as amended, or the ADA. These


103. In Harris v. Thigpen, 941 F.2d 1495 (11th Cir. 1991), the Eleventh Circuit observed that while the issue of whether asymptomatic HIV infection itself constitutes a "handicap" under the Rehabilitation Act "is not entirely settled" in the Eleventh Circuit, id. at 1522, there "appears to be an emerging consensus on this issue." Id. at 1525 n.46; accord Gonzales v. Garner Food Servs., Inc., 89 F.3d 1523, 1526 & n.8 (11th Cir. 1996) (citing DOJ regulations defining disability as including HIV disease), cert. denied, 117 S. Ct. 1822 (1997); Dorsey v. United States Dept’ of Labor, 41 F.3d 1551, 1553-54 (D.C. Cir. 1994) (recognizing that the district court had found that the plaintiff’s “HIV-positive status rendered him handicapped within the [Rehabilitation] Act’s meaning” and assuming, arguendo, that to be true (citing various federal cases)); Leckelt v. Board of Comm’rs of Hosp. Dist. No. 1, 909 F.2d 820, 825 (5th Cir. 1990) (assuming, for the purposes of appeal, that “seropositivity to HIV antibodies is an impairment protected under section 504” of the Rehabilitation Act of 1973); Doe v. Montgomery Hosp., No. CIV. A. 95-3168, 1996 WL 745524, *5 (E.D. Pa. Dec. 23, 1996) (stating that a reasonable jury could find that asymptomatic HIV infection substantially limits the major life activity of procreation, and therefore the HIV-positive plaintiff is within the meaning of the ADA); Bullock v. Gomez, 929 F. Supp. 1299, 1303 (C.D. Cal. 1996) (stating that an HIV-infected individual is an individual with a disability under the Rehabilitation Act); Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1320 (C.D. Cal. 1996) (“A person who is HIV positive or has AIDS is considered disabled under the ADA.” (citing DOJ regulations)); Sharrow v. Bailey, 910 F. Supp. 187, 191 (M.D. Pa. 1995) (“Individuals diagnosed as HIV-positive are considered disabled for purposes of the [ADA], whether they are symptomatic or asymptomatic.” (citing DOJ regulations)); Hoepfl v. Barlow, 906 F. Supp. 317, 319 n.7 (E.D. Va. 1995) (“It is now settled law that HIV-positive individuals are ‘disabled’ within the meaning of the ADA.” (citing various federal cases)); United States v. Morvant, 898 F. Supp. 1157, 1161 (E.D. La. 1995) (stating that because “AIDS/HIV-positive are both disabilities under the Department of Justice regulations promulgated pursuant to the ADA . . . . [i]t is beyond cavil” that the plaintiff is disabled under the ADA); D.B. v. Bloom, 896 F. Supp. 166, 170 (D.N.J. 1995) (finding that the plaintiff “is, by virtue of his HIV status, a person with a disability” under the ADA (citing DOJ regulations)); Austin v. Pennsylvania Dep’t of Corrections, 876 F. Supp. 1437, 1465 (E.D. Pa. 1995) (noting that asymptomatic HIV disease constitutes a “handicap” because “the HIV virus impairs multiple body systems, including the hemic, lymphatic and reproductive systems, and by its biological effects and the fear it
courts, with the exception of the Fourth Circuit, have unanimously recognized that asymptomatic HIV disease is covered as a disability.

Despite this general consensus among federal courts, the reasoning contained in most of the case law is limited. No case provides a thorough analysis of whether asymptomatic HIV disease is a disability under the Act. The practical effect of each court's reasoning, however, is that asymptomatic HIV disease is always a disability.104

104. Part of the problem has been a misreading of School Board v. Arline, 480 U.S. 273 (1987), in which the Court held that a person suffering from tuberculosis, a contagious disease, may be considered a "handicapped person" within the meaning of section 504 of the Rehabilitation Act. Id. at 289. The Court rejected the argument that the contagious nature of tuberculosis could be isolated from the disease itself and provide a lawful basis upon which to discriminate: "It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment." Id. at 282. The Court stressed that tuberculosis gave rise to a physical impairment and to contagiousness, and the Court thus found it unnecessary to address the question whether contagiousness alone, without an underlying physical impairment, may constitute a handicap. Id. at 282 n.7.

The following year in Chalk v. United States District Court, 840 F.2d 701 (9th Cir. 1988), the Ninth Circuit reversed the denial of a preliminary injunction to reinstate a teacher diagnosed with AIDS to classroom duties. Id. at 712. In assessing whether the schoolteacher was handicapped under section 504, the Ninth Circuit interpreted Arline to hold that section 504 "is fully applicable to individuals who suffer from contagious diseases." Id. Because AIDS is a contagious disease, the schoolteacher was found to be handicapped. Id. The Ninth Circuit made no finding of any underlying physical impairment caused by AIDS.

The Ninth Circuit's interpretation of Arline in Chalk was reiteratad in Gates v. Rowland, 39 F.3d 1439 (9th Cir. 1994), in which the court held that prisoners living with asymptomatic HIV disease were disabled under section 504:

In this case, as in Chalk, the physical impairment to the individual is not the issue, but rather the issue is the contagious effect of the HIV virus. Thus, there is no distinction to be drawn, for purposes of the Act, between those persons in whom the HIV virus has developed into AIDS and those persons who have remained
What follows is a review of the reasoning from five cases that offer the most complete, albeit still limited, analysis of this issue. Each case stands for the proposition that the Act protects individuals with asymptomatic HIV disease from discrimination in employment. The cases generally conclude that HIV always impairs individuals’ hemic systems and always limits their sexual intimacy and reproduction.

A. Pre-ADA Cases

In *Thomas v. Atascadero Unified School District*, a federal district court in California found an HIV-positive child handicapped under the Rehabilitation Act, and ordered a school district to allow the child to attend regular kindergarten classes. The court observed:

A range of symptoms may result from infection with the AIDS virus which have been classified by the Centers for Disease Control ("CDC") into four groups of symptoms: (I) early acute, though transient, signs of the disease; (II) asymptomatic infection; (III) persistent swollen lymph-nodes; and (IV) presence of opportunistic disease and/or rare types of cancer . . . .

. . . Individuals in all four of the CDC classifications suffer from impairments to their physical systems. Persons infected with the AIDS virus suffer significant impairments of their major life activities. People infected with the AIDS virus may have difficulty caring for themselves, performing manual tasks, . . . learning and working, among other life functions. Even those who are asymptomatic have abnormalities in their hemic and reproductive systems making procreation and childbirth dangerous to themselves and others.

Thus, the court ruled that asymptomatic HIV-positive individuals are handicapped under the language of the Rehabilitation Act, rendering asymptomatic HIV infection, in effect, a per se disability.
In *Cain v. Hyatt*, a federal district court in Pennsylvania ruled in favor of a plaintiff with AIDS who brought an action under the Pennsylvania Human Relations Act, which employs a disability standard identical to the Rehabilitation Act. After initially noting the “consensus of opinion” among numerous federal courts and two-thirds of states that qualify AIDS as a handicap under federal and state antidiscrimination laws, the court recognized that AIDS cannot be isolated as an independent phase of HIV disease: “HIV-seropositivity, AIDS-related complex (ARC), and AIDS form a spectrum of related conditions.” In all of the disease’s stages, the court found that the virus damages white blood cells, including lymphocytes, thereby causing a physiological disorder of the hemic and lymphatic systems. The court went on to say that this limits reproduction, because HIV is transmitted through sexual intercourse. The court concluded that “this significant injury to the reproductive system impedes a major life activity.” The court’s reasoning supports the argument that any

112. *Id.* at 678.
113. *Id.* at 679.
115. *Id.*
116. *Id.* The court also discussed at length the impact that social prejudice has upon the major life activities of an infected individual:

[S]ince first identified in the early 1980s as a distinct medical condition, AIDS has engendered such prejudice and apprehension that its diagnosis typically signifies a social death as concrete as the physical one which follows. . . .

. . . The pervasive anxiety that AIDS is easily transmitted converges with and often ostensibly justifies the disapprobation of AIDS victims. Societies long have entertained bizarre conceptions about the etiology of illness and interpreted the contraction of disease, including cancer, as punishment for moral turpitude. The particular associations AIDS shares with sexual fault, drug use, social disorder, and with racial minorities, the poor, and other historically disenfranchised groups accentuates the tendency to visit condemnation upon its victims.

AIDS mythology has fomented not only private judgments about carriers of the virus. It has spawned calls for punitive, oppressive official action against them “in every public forum and institution in this society, in virtually every context imaginable.” Vast segments of the American populace favor the forced quarantine of persons with AIDS, tattooing HIV-positive persons for ready identification, and banishing HIV carriers from the workplace and school. Thus, to conclude that persons with AIDS are stigmatized is an understatement; they are widely stereotyped as indelibly miasmic, untouchable, physically and morally polluted.

These and related prejudices substantially curtail the major life activities of AIDS victims. They are shunned socially and often excluded from public life. As the Supreme Court has observed [in *School Board v. Arline*, 480 U.S. 273, 284 (1987)], “[S]ociety’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”
HIV-infected individual qualifies as disabled, because such an individual suffers a physical impairment that substantially limits one or more major life activities.

B. Post-ADA Cases

The issue reappeared in a Pennsylvania federal district court in *Doe v. Kohn Nast & Graf, P.C.* 117 In discussing the debilitating effects of HIV infection on the body, the court noted that the virus's physiological impact might not be readily observable to the lay eye. 118 Nevertheless, the court stressed that while lay observers would not regard such individuals as "disabled," the court's role "is not to construe the statute so that it might conform with a lay perception." 119 Rather, the court "must read with care the definitions of disability that Congress and the EEOC . . . gave [it], and decide whether this plaintiff's disease and its symptoms fall within one or more of those express statutory and regulatory definitions, as anomalous as the statutory result might seem to some." 120

The court found that the plaintiff's HIV infection constituted a physical impairment because "HIV itself 'creates a physiological disorder of the hemic (blood) and lymphatic systems,'" which constitutes an impairment under the EEOC regulations. 121 The court further found that an HIV-infected individual is substantially limited in her ability to procreate, which, as this court determined, is a major life activity under the ADA. 122 Because Congress determined that the major life activity that may be substantially limited need not be one that is relevant only to the workplace, "the language of the statute does not preclude procreating as a major life activity, but may well include it." 123 Therefore, this court's reasoning again indicates that any HIV-infected individual qualifies because the virus limits procreation.

The most thorough analyses of this issue are found in two 1996 opinions, which, although differing with regard to whether asymptomatic HIV is a per se disability, found that asymptomatic HIV infection

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118. Id. at 1319-20.
119. Id. at 1319.
120. Id. at 1319-20. The court gave substantial deference to the EEOC regulations implementing Title I of the ADA, especially with regard to the "physical impairment" and "substantially limits a major life activity" components. Id. at 1319-21.
121. Id. at 1320 (quoting Cain v. Hyatt, 734 F. Supp. 671, 679 (E.D. Pa. 1990)).
122. Id.
123. Id. The court noted that the legislative history supports including procreation as a major life activity substantially limited by HIV infection. Id. at 1320 n.7.
always constitutes a physical impairment that substantially limits a major life activity of the infected individual. In *Anderson v. Gus Mayer Boston Store*, a federal district court in Texas declared asymptomatic HIV infection to be a per se disability under the ADA. "Conditions such as AIDS, HIV, blindness, and deafness, *inter alia*, have been determined by the courts to be *per se* disabilities. In other words, it has been established both that these conditions impact a major life activity and that this impact is substantially impairing of a given activity." The court stated that HIV infection substantially limited an individual’s major life activities of procreation, engagement in intimate sexual relationships, and the ability to “travel freely.”

The court posited a three-level evaluation to determine whether a given condition constitutes a disability under the ADA:

> [S]ome conditions have been established through regulations and case law to be *per se* disabilities. If a condition has not been established to be a *per se* disability, an individual attempting to classify a condition is not lost in the wilderness. Rather, regulations and case law have consistently maintained that the concepts of “disability” and “major life activities” are to use precedent established under the Rehabilitation Act as a guide.

... If neither the EEOC regulations nor the case law has found a condition to be a *per se* disability, then the court is left to the three-part test for disability found in § 12102(2).

The *Anderson* court concluded that HIV-seropositivity constituted a per se disability, a conclusion it noted was supported by the Act’s legislative history, the EEOC and DOJ regulations, numerous federal court decisions, and several academic articles.

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126. 924 F. Supp. at 777.
127. *Id.* at 774-75 (footnotes omitted).
128. *Id.* at 774 & n.24.
129. *Id.* at 774 n.24.
130. *Id.* at 777 n.37. The court explained the bearing on the ability to travel freely: “[A]symptomatic HIV-positive individual[s] can not travel freely [because they] must be always mindful of exposure to bacterial infection and fungi or even places requiring vaccinations.” *Id.*
131. *Id.* at 775. The court in *Anderson* "greatly relied upon" the EEOC regulations for guidance on the issue of which conditions establish a per se disability. See *id.* at 774 nn.20, 22 (citing *Bolton v. Scriver, Inc.*, 36 F.3d 939, 942 (10th Cir. 1994)).
132. See *id.* at 777.
133. See *id.* at 774 nn.24-25, 777 nn.36 & 38.
In *Abbott v. Bragdon*,134 the First Circuit affirmed summary judgment in favor of an individual with asymptomatic HIV who complained about a dentist's refusal to provide her treatment in the dentist's office.135 The court ruled that asymptomatic HIV infection constituted a disability under the ADA because HIV is an impairment that substantially limits reproduction.136

At trial, the district court examined "the vast weight of authority" on this issue and stated that it was "persuaded that asymptomatic HIV constitutes a physical impairment for the purposes of the ADA."137 The district court further concluded that the plaintiff's condition substantially limited her major life activities of reproduction: "Reproduction, one of the most fundamental of human activities, must constitute a major life activity. . . . [T]he interests in conceiving and raising one's own children have been recognized as essential and basic civil liberties."138 The court explained: "Reducing reproduction to the specific act of conception ignores the processes that occur continually in both male and female reproductive systems in order to achieve conception. Limitation of reproduction to conception also ignores the process of raising and caring for offspring upon which successful reproduction depends."139

The district court stressed that "[c]hild birth poses a risk of physical harm to an asymptomatic HIV mother," and that "an HIV positive mother runs the risk of infecting her child, during pregnancy,  

134. 107 F.3d 934 (1st Cir.), cert. granted in part, 118 S. Ct. 554 (1997).
135. Id. at 937. The dentist agreed to treat her only in a hospital setting. Id.
136. Id. at 949.
138. Id. at 586 (citations omitted).
139. Id. (citation omitted). The court discussed at some length the ongoing controversy regarding whether procreation or reproduction constitutes a major life activity under the ADA. Id. Compare Pacourek v. Inland Steel Co., 916 F. Supp. 797, 804 (N.D. Ill. 1996) ("Since time immemorial, people have procreated, not as a lifestyle choice, but as an integral part of life. In fact, to call working a major life activity, but to deny the same status to reproduction, seems ludicrous."), Erickson v. Board of Governors of State Colleges and Univs., 911 F. Supp. 316, 323 (N.D. Ill. 1995) (finding that reproduction is a major life activity) and Cain v. Hyatt, 734 F. Supp. 671, 679 (E.D. Pa. 1990) ("There is no gainsaying that [HIV's] significant injury to the reproductive system impedes a major life activity.") with Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 677 (8th Cir. 1996) (holding that reproduction is not a major life activity) and Zatarain v. WDSU-Television, Inc., 881 F. Supp. 240, 243 (E.D. La. 1995) ("Reproduction is not an activity engaged in with the same degree of frequency as the listed activities of walking, seeing, speaking, breathing, learning, and working. A person is required to walk, see, learn, speak, breath[e] and work throughout the day, day in and day out. However, a person is not called upon to reproduce throughout the day, every day." (citation omitted)), aff'd mem., 79 F.3d 1143 (5th Cir. 1996).
through child birth or, if she chooses to do so, through breast feeding.” The court reasoned that the major life activity of procreation is also not only a single, isolated act; in actuality, “reproduction extends beyond the act of conception and the period of gestation, to the process of caring for and raising a child.”

On appeal, the First Circuit spent little time disposing of the question whether asymptomatic HIV was an impairment under the Act. The court simply stated that EEOC regulations, judicial authority, and the dentist’s apparent acquiescence supported its conclusion that asymptomatic HIV was an impairment.

The court resolved the issue whether asymptomatic HIV substantially limits major life activities in general, indicating that this issue “is not free from doubt.” In resolving the issue, the court noted that an individual’s “ability to engage in intimate sexual activity, gestation, giving birth, childrearing, and nurturing familial relations” is recognized as fundamentally important in our culture, a recognition that is reflected in American jurisprudence.

The court looked to the statute itself, along with regulations implementing the Act, and located further support for its finding that HIV substantially limits reproduction. Primarily, noting that the Act itself does not define “major life activities,” the court recognized its obligation to interpret the Act to be consistent with the legislature’s will and turned to the “natural” meaning of “major life activities.” The court noted that the dictionary definition of the word “major” denotes “comparative importance.” The court concluded that “reproduction, which is both the source of all life and one of life’s most important activities, easily qualifies.” The court buttressed this conclusion by stating “[i]t would be wholly inconsistent with [the legisla-

140. Abbott, 912 F. Supp. at 587 (citation omitted).
141. Id. It is interesting that the court stated that in finding reproduction or procreation to be a major life activity substantially impaired by HIV infection, the plaintiff does not have to show that her reproductive impairment has rendered her infertile: “The statutory language . . . does not require such a stringent inquiry. By requiring an individual’s physical or mental impairment to substantially limit a major life activity, the statute does not contemplate a complete inability of that individual to engage in a particular major life activity.” Id. at 587.
143. Id.
144. Id.
145. Id.
146. Id.
147. Id.
148. Id. at 940.
ture's transplanting of the phrase 'major life activities' from the Rehabilitation Act into the ADA] to hold that Congress did not envision reproduction as a major life activity."149

Finally, the court looked to the regulations implementing the Act. Although the list of major life activities contained in the EEOC's regulations do not include reproduction, the court emphasized that the regulations expressly state that the enumerated life activities are not exclusive.150 The court concluded that not only does reproduction "fit[ ] comfortably within [the] sweep" of the listed life activities, the inclusion of physiological disorders affecting reproduction within that portion of the regulations defining impairments indicated that Congress intended reproduction to be a major life activity.151

The First Circuit also addressed the issue whether the impairment that substantially limits a major life activity must be shown specifically to limit the plaintiff's major life activity of reproduction.152 The dentist had argued that the facts of this case raised a genuine issue whether the plaintiff's ability to procreate was substantially limited, because deposition evidence indicated that the plaintiff had denied that her HIV disease limited any of her life activities.153

In addressing this argument, the court noted that no evidence exists that "Congress intended either frequency or universality to operate as a restriction on the definition of 'major life activities.'"154 By way of example, the court stated that not everyone engages in learning and working—both of which are major life activities enumerated in the EEOC's relevant regulations155—and that most acts performed by individuals have elements of volition (e.g., although all monks can speak, some monks take vows of silence).156

The court conceded that the ADA's definition of disability as an impairment that substantially limits a major life activity requires "an individualized inquiry into whether the plaintiff is disabled."157 However, unlike the Fourth Circuit, the First Circuit indicated that such a "case-by-case analysis of disability does not necessarily require a corresponding case-by-case inquiry into the connection between the plain-

149. Id.
150. Id.
151. Id.
152. Id. at 941.
153. Id.
154. Id.
155. Id.
156. Id.
157. Id. (citing, among other cases, Ennis v. National Ass'n of Bus. & Educ. Radio, 53 F.3d 55 (4th Cir. 1995)).
ASYMPTOMATIC HIV DISEASE  

The court, however, deferred answering this question, because it concluded that the record revealed no genuine dispute about whether the plaintiff's HIV-seropositive status substantially limited her desire to procreate. The Fourth Circuit stands alone in its refusal to apply the Act's protection to individuals with asymptomatic HIV disease. Both the Ninth Circuit and the First Circuit have stated that asymptomatic HIV disease is a disability. Each federal district court outside the Fourth Circuit discussing the issue has similarly regarded asymptomatic HIV disease to be a disability or handicap. Courts outside the Fourth Circuit have reached uniform conclusions by employing unsophisticated analyses, but analytical sophistication is unnecessary once courts acknowledge the virus's inescapable effect on an individual's hemic or lymphatic systems and recognize that sexual activity is accepted as one of life's most important activities.

III. THE FOURTH CIRCUIT'S TREATMENT OF HIV DISEASE

As discussed above, Congress intended asymptomatic HIV infection to be protected as a disability under the ADA. However, the Fourth Circuit disagrees. The Fourth Circuit's disagreement is rooted in its opinion that under the ADA, there are no per se disabilities. According to the Fourth Circuit, each individual condition must undergo an independent, case-by-case analysis of whether the condi-

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158. Id.
159. Id. at 941-42. The plaintiff clearly stated in her deposition that she decided not to procreate because of her HIV-positive status, and the defendant had no "substantial rebuttal." Id. at 942. Nonetheless, the court stated that it might be enough to find that HIV asymptomatic disease is a disability by showing only that the impairment substantially limits the plaintiff's ability to procreate without showing that the plaintiff herself considered procreation important. Id. at 942.
161. In Hoefly v. Bartou, 906 F. Supp. 317 (E.D. Va. 1995), after stating that the ADA prohibits discrimination against disabled persons in the enjoyment of public accommodations, id. at 319, District Judge Thomas Selby Ellis, III, stated that "it is now settled law that HIV-positive individuals are 'disabled' within the meaning of the ADA." Id. at 319 n.7 (citing various federal courts outside the Fourth Circuit).
162. See Runnebaum v. NationsBank of Md., N.A., 123 F.3d 156, 161 (4th Cir. 1997) (en banc) (Runnebaum II) (holding that Runnebaum failed to provide sufficient evidence to show that he was disabled under the ADA); Ennis v. National Ass'n of Bus. & Educ. Radio, 53 F.3d 55, 62 (4th Cir. 1995) (holding that Ennis failed to establish a prima facie case of discrimination under the ADA).
The question of who is a handicapped person under the Act is best suited to a "case-by-case determination," as courts assess the effects of various impairments upon varied individuals. The definitional task cannot be accomplished merely through abstract lists and categories of impairments. The inquiry is, of necessity, an individualized one—whether the particular impairment constitutes for the particular person a significant barrier to employment.

Forrisi's individualized-inquiry rule relies upon E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980), for support. In E.E. Black, the court rejected an administrative law judge's interpretation that the Rehabilitation Act covered an individual whose impairment was "likely to affect his employability generally." Id. at 1099. The court believed that requiring an impairment to affect an individual's overall employability "drastically reduce[d]" coverage of the Act and undercut the Act's remedial purpose. Id. The court declared that the Rehabilitation Act's definitions were "personal" and must be evaluated with regard to the individual, so that the scope of the individual's employability is focused upon his chosen field, not his employability generally. Id.

The Forrisi court applied E.E. Black's individualized-inquiry rule to an employee who was discharged from a single job because of a single requirement of employment. Forrisi, 794 F.2d at 935. In the Forrisi court's view, an "isolated mismatch of employer and employee" should not result in that employee being regarded as handicapped; the inability to perform a single, particular job does not constitute a substantial limitation of the individual's ability to work. Id.

Subsequent decisions by other federal courts have followed Forrisi's "isolated mismatch" analysis, and have declined to find a plaintiff handicapped because of his inability to perform a single, particular job. See, e.g., Heilweil v. Mount Sinai Hosp., 32 F.3d 718, 723-24 (2d Cir. 1994) ("[A] person found unsuitable for a particular position has not thereby demonstrated an impairment substantially limiting such person's major life activity of working . . . ." (citing, among other cases, Forrisi, 794 F.2d at 935)); Byrne v. Board of Educ., 979 F.2d 560, 565 (7th Cir. 1992) ("It is well established that an inability to perform a particular job for a particular employer is not sufficient to establish a handicap; the impairment must substantially limit employment generally," (citations omitted)). These courts instead weigh various factors to determine "whether the particular impairment constitutes for the particular person a significant barrier to employment." Forrisi, 794 F.2d at 933. The relevant factors are (1) "the number and types of jobs from which the impaired individual is disqualified," (2) "to what geographical area the [individual] has reasonable access," and (3) the individual's "own job expectations and training." E.E. Black, 497 F. Supp. at 1100-01. Federal courts have also interpreted Forrisi's rule to protect conditions that are not commonly recognized as disabilities, but which still constitute a physical impairment that substantially limits a major life activity of the individual. See, e.g., Perez v. Philadelphia Hous. Auth., 677 F. Supp. 357, 360-61 (E.D. Pa. 1987) (finding a plaintiff with a severe lumbosacral sacroiliac sprain with radiculopathy to be handicapped within the meaning of the Rehabilitation Act, despite the employer's argument that the condition was not a recognized handicap), aff'd mem., 841 F.2d 1120 (3d Cir. 1988).
The Fourth Circuit first articulated its position on asymptomatic HIV disease in *Ennis v. National Ass'n of Business & Educational Radio.* In April 1990, the National Association of Business and Educational Radio (NABER) hired the plaintiff, Joan Ennis, as a bookkeeping clerk. Three years later, Ennis's supervisor reviewed Ennis's personnel file and found that it "demonstrated an unacceptable level of performance" and terminated her employment.

Ennis filed suit under Title I of the ADA, alleging that NABER terminated her employment because of her known association with her asymptomatic HIV-positive adopted son, A.J. Specifically, Ennis alleged that NABER terminated her employment to avoid the possibility of a "catastrophic impact" that A.J.'s illness might have upon NABER's insurance rates. NABER moved for summary judgment, arguing that "Ennis' discharge was in no way related to her son's condition or its insurance coverage, but solely the consequence of her poor work performance." The United States District Court for the

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164. 53 F.3d 55 (4th Cir. 1995).
165. *Id.* at 56. NABER provides a service called "frequency coordination." Upon receipt of frequency coordination applications, the mailroom separates the checks and payment information from the applications and sorts them into "batches" of 10 to 20, and then sends them to bookkeeping for entry. Bookkeeping's function is critical to NABER's operations, because applications cannot be processed until the payment information is entered. In the fall of 1992, Ennis's immediate supervisor instructed her to enter each day at least two batches of payment information for each of NABER's five divisions. In January 1993, Ennis was suspended after unprocessed payment information left idle other NABER departments depending on Ennis to enter the data. Ennis's personnel file, already replete with reports of "inaccuracies in data entry, excessive socializing, excessive personal phone calls, and tardiness," contained a memorandum warning that Ennis's employment may be terminated without notice should Ennis violate her job duties once more. *Id.*
166. *Id.* at 57.
167. *Id.* at 56-57. A.J. was born HIV-positive and addicted to "crack" cocaine in 1988. Appellant's Opening Brief at 3, *Ennis* (No. 94-1585). The ADA prohibits employers from taking adverse employment action "because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(4) (1994). The EEOC implementation guidelines state in pertinent part: "It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association." 29 C.F.R. § 1630.8 (1997). The EEOC regulations explain that, for example, "this provision would prohibit an employer from discharging an employee because the employee does volunteer work with people who have AIDS, and the employer fears that the employee may contract the disease." 29 C.F.R. pt. 1630 app., § 1630.8, at 360.
168. *Ennis*, 53 F.3d at 57.
169. *Id.*
Eastern District of Virginia granted NABER’s motion for summary judgment, and the plaintiff appealed.170

The Fourth Circuit affirmed, holding that the plaintiff failed to establish a prima facie case of discrimination under the ADA, because the plaintiff failed to show that she was adequately performing her job and that she was terminated as a result of discrimination.171 The court ruled that in order to establish a prima facie case of discrimination under the ADA, Ennis had to establish by a preponderance of the evidence (1) that she was a member of a protected class, (2) that she was discharged, (3) that she was adequately performing her job at the time of discharge, and (4) that her discharge “occurred under circumstances that raise a reasonable inference of unlawful discrimination.”172 With regard to the first requirement, Ennis sought to qualify as a member of a protected class not because of any disability she may have had, but because of her known association with a disabled individual—specifically, her son A.J.173

Ennis argued that because A.J. was HIV positive, he was “disabled” under the ADA: “A.J. Ennis is HIV-positive. He is, accordingly, a person with a ‘disability’ under the ADA, whether or not his HIV infection has progressed to AIDS or AIDS-related complex.”174 A.J.,

170. Id. The district court found that the McDonnell Douglas Title VII burden-shifting framework applied to Ennis’s ADA claim. The court stated, however, that although Ennis had established a prima facie case of discrimination, she failed to present sufficient evidence that NABER’s explanation for why it terminated Ennis’s employment was a pretext for employment discrimination. Id.

171. Id. at 62.

172. Id. at 58.

173. Id. at 59.

174. Appellant’s Opening Brief at 22-23, Ennis (No. 94-1585) (footnote omitted). For support, Ennis cited T.E.P. v. Leavitt, 840 F. Supp. 110 (D. Utah 1993), which granted injunctive relief under the ADA in favor of those with “AIDS, and those with the HIV disease,” id. at 111, intimating that HIV-positive individuals who have not developed AIDS but remain asymptomatic were within the protected class—that is, disabled under the ADA. Appellant’s Opening Brief at 23, Ennis (No. 94-1585). Ennis buttressed this sole ADA decision with strong support from the ADA’s legislative history, which emphasized that HIV-infected individuals suffer from “an impairment that substantially limits a major life activity, and thus are considered disabled under this first test of the [ADA] definition.” Id. at 23-24 (citing H.R. Rep. No. 101-485 pt. 3, at 28 n.18 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 451); accord supra notes 98-99 and accompanying text. Additionally, Ennis cited numerous decisions holding that asymptomatic HIV-positive individuals were “disabled” under the Rehabilitation Act of 1973, including a District of Columbia federal court decision that recounted the physical impact HIV has upon an infected, albeit asymptomatic, individual. Appellant’s Opening Brief at 24-26, Ennis (No. 94-1585) (citing Leckelt v. Board of Comm’rs of Hosp. Dist. No. 1, 714 F. Supp. 1377 (E.D. La. 1989), aff’d, 909 F.2d 820 (5th Cir. 1990); Ray v. School Dist., 666 F. Supp. 1524 (M.D. Fla. 1987); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1986); Local 1812, American Fed’n of Gov’t Employees v. United States Dep’t of State, 662 F. Supp. 50 (D.D.C. 1987)).
Ennis argued, "has without question experienced interference with normal social relationships and other normal life activities" and "suffers from notable impairment in the performance of many of his life functions, including limitations on playing and recreation, solely due to his asymptomatic HIV status."\(^{175}\)

In response, NABER argued that neither the ADA nor any court recognized per se disabilities.\(^ {176}\) NABER insisted that the ADA required an individual assessment of whether an individual's condition constituted a "substantial impairment."\(^ {177}\) Such an individualized assessment, NABER argued, would be in accord with the fundamental premise of the ADA "that such matters are to be determined on a[n] individual basis, rather than through generalized conjecture, supposition, or stereotyping."\(^ {178}\)

According to NABER, "[t]here [was] no fact in this record which show[ed] that A.J. Ennis [was] impaired, to any degree, or . . . suffer[ed] a limitation on any major life activity."\(^ {179}\) NABER noted that A.J. had been hospitalized once and that Ennis admitted that he suffered no "ailments."\(^ {180}\) Therefore, NABER concluded, "[b]ut for a latent blood condition, A.J. Ennis . . . live[d] a normal child's life," and although A.J. probably would develop AIDS in the future, "there [was] simply no evidence in the record that he [was] disabled [at the time of his mother's discharge]."\(^ {181}\)

The Fourth Circuit agreed that the ADA required an individualized assessment of whether an individual's condition constituted a disability within the meaning of the Act:

"We believe that the plain language of the provision requires that a finding of disability be made on an individually-individual basis. The term "disability" is specifically defined, for each of subparts (A), (B), and (C), "with respect to [the] individual" and the individualized focus is reinforced by the

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\(^{175}\) Appellant's Opening Brief at 26 & n.29, Ennis (No. 94-1585). Ennis commented that A.J. was hospitalized when he had chicken pox (an otherwise mild childhood disease), that on several occasions A.J. could not breathe on his own, and that Virginia considers A.J. to be a "special needs" child. \(\text{id.}\) at 26 n.29.

\(^{176}\) Brief of Appellee at 19, Ennis (No. 94-1585).

\(^{177}\) Id.

\(^{178}\) Id. (citing \textit{EQUAL EMPLOYMENT OPPORTUNITY COMM'N}, \textit{A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT II-10} (1992) (listing three circumstances in which an individual would be considered to have a substantial impairment)); \textit{see also supra} note 38 and accompanying text.

\(^{179}\) Brief of Appellee at 19, Ennis (No. 94-1585).

\(^{180}\) \textit{Id.} at 20.

\(^{181}\) \textit{Id.} NABER also argued that there was no evidence that A.J. was regarded as disabled under the second prong of the ADA disability test. \textit{Id.}
requirement that the underlying impairment substantially limit a major life activity of the individual. 182

The court found that there was no evidence in the record that A.J., as an asymptomatic HIV-positive child, "was impaired, to any degree, or that he . . . endured any limitation, much less a substantial limitation, on any major life activity." 183

The Fourth Circuit concluded that in light of the lack of evidence in the record, if it were to hold that A.J. was disabled, they "would have to conclude that HIV-positive status is per se a disability." 184 However, continued the court, "[t]he plain language of the [ADA], which contemplates case-by-case determinations of whether a given impairment substantially limits a major life activity . . . simply would not permit this[ ] conclusion." 185

Ennis's rejection of asymptomatic HIV disease as a per se disability under the ADA and its finding that the plaintiff's asymptomatic son was neither physically impaired nor substantially limited in a major life activity were dicta, and, therefore not controlling authority. Nevertheless, in Runnebaum v. NationsBank of Maryland, N.A. (Runnebaum I), 186 the Fourth Circuit cited Ennis as controlling authority for holding that asymptomatic HIV disease is not a per se disability. 187 The court also relied on Ennis for its proposition that a finding of disability must be made on an individualized basis; that is, under the first statutory definition, the plaintiff's asymptomatic HIV disease must (1) physically impair the individual, and (2) substantially limit one of his major life activities. 188

In June 1991, NationsBank hired William Runnebaum, a man living with asymptomatic HIV disease, to work in its private banking de-

182. Ennis v. National Ass'n of Bus. & Educ. Radio, 53 F.3d 55, 59 (4th Cir. 1995). The court relied upon Forrissi v. Bowen, 794 F.2d 931, 933 (4th Cir. 1986), which required individualized inquiry under the Rehabilitation Act, and various cases citing Forrissi for authority. See Ennis, 53 F.3d at 60 (citing Chandler v. City of Dallas, 2 F.3d 1385, 1396 (5th Cir. 1993) (citing Forrissi's individualized inquiry requirement under the Rehabilitation Act); Byrne v. Board of Educ., 979 F.2d 560, 564-65 (7th Cir. 1992) (same); Welsh v. City of Tulsa, 977 F.2d 1415, 1417 (10th Cir. 1992) (same); United States v. Southern Management Corp., 955 F.2d 914, 918 (4th Cir. 1992) (citing Forrissi's individualized inquiry requirement under the Fair Housing Act)).

183. Ennis, 53 F.3d at 60.

184. Id.

185. Id. The Fourth Circuit nonetheless assumed that A.J.'s condition satisfied the ADA disability requirement because the summary judgment record as to any limitations, actual or perceived, on his major life functions may not have been fully developed. Id.

186. 95 F.3d 1285 (4th Cir. 1996) (Runnebaum I), rev'd en banc, 123 F.3d 156 (4th Cir. 1997) (Runnebaum II).

187. Id. at 1290.

188. Id.
partment; one year later, NationsBank promoted him into its trust department. In the fall of 1992, Runnebaum was responsible for planning an important client reception.

In September 1992, Runnebaum confidentially informed the trust department manager that he was HIV positive, because he was concerned that the bank’s employee health plan might not cover the cost of his HIV-related medication. The manager “panicked” when he heard this news. In November, Runnebaum began receiving shipments of AZT at work, some of which were inadvertently opened by bank employees. In December, Runnebaum invited his gay partner to the bank’s holiday reception and introduced his partner to his supervisor as his “boyfriend.”

By the end of 1992, Runnebaum had brought in nearly $5 million in assets to NationsBank, generating $21,900 in fees. Runnebaum’s fees, however, fell below his $40,000 sales target. Less than a month later, he was fired. Meanwhile, another employee who was hired contemporaneously with Runnebaum and given the same sales target also failed to meet his goal, generating only $2750 in fees. Nevertheless, this employee retained his position at NationsBank.

Runnebaum filed suit against NationsBank in the United States District Court for the District of Maryland, alleging discriminatory treatment under the ADA. The district court granted summary judgment in favor of NationsBank on the basis that Runnebaum had failed to establish a prima facie case of discrimination under the ADA or, in the alternative, that Runnebaum had failed to establish that NationsBank’s purported reasons for firing him were pretextual. Runnebaum appealed to the Fourth Circuit.

A three-judge panel of the Fourth Circuit reversed, holding, inter alia, that there existed a genuine dispute of material fact on the ques-

189. Id. at 1287-88.
190. Id. at 1288.
191. Id.
192. Id.
193. Id.
194. Id. at 1289.
195. Id.
196. Id.
197. Id.
198. Id.
199. Id.
200. Id.
201. Id.
202. Id.
tion whether Runnebaum was disabled under the ADA. The court stated that although "[s]everal courts have held that asymptomatic HIV infection is a disability per se," and although "[s]everal federal agencies have reached the same conclusion," [w]e rejected this approach [in Ennis], where we concluded that § 12102(2) "requires that a finding of disability be made on an [individualized] basis." The court reiterated that a finding of disability under the ADA "contemplates case-by-case determinations."

The court stated that Runnebaum, "though asymptomatic," proffered sufficient evidence that he was regarded as having a disability under the third statutory definition of disability. This finding implies that if Runnebaum had not proffered evidence that he was perceived as having a disability, his asymptomatic condition would not itself be sufficient to establish that he was disabled.

In his dissent, Judge Williams supported this implication, arguing that Runnebaum failed to establish a prima facie case that he was regarded as being disabled. In criticizing the majority's decision, Judge Williams rejected any argument that asymptomatic HIV disease could itself constitute a disability under the ADA:

According to Runnebaum, he is disabled for purposes of the ADA because of his HIV-positive status. The majority accepts this assertion, concluding that Runnebaum satisfied this element because he was regarded as being disabled, even though he was asymptomatic, and more importantly, affirmatively represented to NationsBank that he was not handicapped.

Judge Williams's conclusion underscored his statement implying that asymptomatic HIV disease is not disabling: "[H]ere, there is no proof that the 'panicky,' 'uncontrolled' feeling meant that [Runnebaum's manager] regarded Runnebaum as 'disabled,' much less disabled as a result of his seropositivity."

203. Id. at 1290.
204. Id. at 1289.
205. Id. at 1290.
206. Id. (citing Ennis v. National Ass'n of Bus. & Educ. Radio, 53 F.3d 55, 59 (4th Cir. 1995)).
207. Id.
208. Id.; accord 42 U.S.C. § 12102(2)(C) (1994). The court cited evidence that bank employees were aware that Runnebaum was HIV positive, that he was taking AZT, and that the trust department manager felt "panicky" and "uncontrolled" in response to the news that Runnebaum had HIV disease. Runnebaum I, 95 F.3d at 1290.
209. Runnebaum I, 95 F.3d at 1302-03 (Williams, J., dissenting).
210. Id. at 1302 (emphasis added).
211. Id. at 1303 (emphasis added).
In a telling footnote, Judge Williams explained his point that asymptomatic HIV disease is not a disability:

Runnebaum does not appear to assert that he satisfies the first element of the prima facie case by virtue of suffering an actual physical or mental impairment as a result of his seropositivity, nor could he credibly do so. The parties do not dispute that Runnebaum has been asymptomatic since 1988 and suffers no affliction arising from his seropositivity. In fact, Runnebaum’s own physician . . . testified that Runnebaum “had no ill effects from the disease or the medications.” Comporting with [Runnebaum’s physician’s] testimony, Runnebaum has consistently maintained that he endures no impairment that substantially limits a major life activity, thereby proving that he is not disabled under the first prong of the ADA’s definition of a disability.212

The position of the majority and the dissent in Runnebaum I is troubling indeed. The judges dismissed outright any argument that asymptomatic HIV disease constitutes a per se disability and suggested that an individual living with asymptomatic HIV disease could not “credibly” argue that he was disabled under the Ennis-Runnebaum individualized-inquiry rule.

In December 1996, the Fourth Circuit vacated Runnebaum I and granted an en banc rehearing.213 In an amicus brief to the Fourth Circuit, the Legal Services Department of the Whitman-Walker Clinic wrote in support of Runnebaum on the disability issue.214 Whitman-Walker argued that individuals with asymptomatic HIV disease are disabled under the first statutory definition of disability, because “from the outset [HIV] infects the blood and the lymphatic system and progressively destroys the immune system.”215 This impairment substantially limits a broad range of an infected individual’s major life activities, including reproduction, intimate sexual relations, child

212. Id. at 1303 n.5 (citation omitted).
214. See Brief of Amicus Curiae, Whitman-Walker Clinic Legal Services Department, Runnebaum v. NationsBank of Md., N.A., 123 F.3d 156 (4th Cir. 1997) (en banc) (Runnebaum II) (No. 94-2200). Whitman-Walker is the largest provider of comprehensive primary medical and social services to persons living with HIV and AIDS in the Washington, D.C. metropolitan area. Id. at 1. The legal department offers pro bono legal assistance to persons with HIV disease in various legal matters, including HIV-related employment discrimination. Id.
215. Id. at 3.
rearing, future planning, career and educational goals, obtaining health, life, and disability insurance, and the ability to travel.\textsuperscript{216}

The amicus brief criticized the now-vacated \textit{Runnebaum I} opinion for relying on "mistaken" dicta in \textit{Ennis} in declaring that HIV infection is not a per se disability,\textsuperscript{217} and argued, as this Comment does, that "the plain language" of the ADA does not preclude HIV disease from being a per se disability.\textsuperscript{218} The ADA's definition of disability, Whitman-Walker asserted, "is not inconsistent with the existence of impairments which substantially limit major life activities of every afflicted individual."\textsuperscript{219} The brief further explained:

For instance, blindness and deafness are impairments that inherently are substantially limiting. As discussed below, HIV disease is another such impairment. The statute's reference to "an individual" (§ 12102(2)) and "such individual" (§ 12102(2)(A)) was intended to provide the flexibility to protect an individual with an impairment which may not always be disabling but in fact is disabling in that person's situation—e.g., a heart condition, depression, or carpel [sic] tunnel syndrome.\textsuperscript{220}

Whitman-Walker's reading of the plain language of the ADA is consistent with the individualized-inquiry rule as originally set forth in \textit{Forrysi}.\textsuperscript{221}

Whitman-Walker astutely observed that should the Fourth Circuit determine that HIV status is not a per se disability, then unless an asymptomatic HIV plaintiff "makes a particularized showing of limitations,"\textsuperscript{222} she would be required to shoulder a more onerous burden in demonstrating that she is disabled than would be required of a plaintiff with debilitating HIV disease or AIDS:

If an asymptomatic plaintiff can qualify as "regarded as" disabled under [section 12102(2)(C)] only if the defendant has directly expressed prejudice, fear or animus, then the ADA would provide less protection from intentional HIV discrimination for asymptomatic individuals with HIV than for per-

\textsuperscript{216} Id. at 19-23. Whitman-Walker stated that these findings are clearly supported by the legislative history of the ADA. \textit{Id.}
\textsuperscript{217} Id. at 15-16.
\textsuperscript{218} Id. at 16-17.
\textsuperscript{219} Id. at 17.
\textsuperscript{220} Id.
\textsuperscript{221} See supra note 163 and accompanying text.
\textsuperscript{222} Whitman-Walker Amicus Curiae Brief at 14, \textit{Runnebaum II} (No. 94-2200).
sons with AIDS... Such a result would eviscerate Congress' intent.223

Whitman-Walker urged the Fourth Circuit to reconsider its position in light of a careful reading of the ADA and its legislative history, while being mindful of the "critical" and "national importance" of this issue.224

The Fourth Circuit reheard the case en banc in March 1997.225 In August of that year, the Fourth Circuit affirmed the district court's grant of summary judgment in favor of NationsBank in a seven-to-five decision, holding that Runnebaum failed to establish a prima facie case of discrimination based on disability.226 Judge Williams, writing for the majority in Runnebaum II, explained that Runnebaum had failed to establish sufficient evidence that, inter alia, he was a member of a protected class—i.e., "disabled" under the Act.227

The most troubling facet of this court's conclusion is its treatment of the statute's primary definition of disability, which requires that the plaintiff establish that he has a physical or mental impairment and that the impairment substantially limits one or more of his major life activities.228 With regard to the impairment prong, the court began its inquiry by announcing that "[w]hether asymptomatic HIV i-
fection is an impairment under the ADA is first and foremost a question of statutory interpretation," which begins "'with an examination of the language used in the statute.'"229 The court stated that where the statutory language is plain and has only one meaning, the court's function is not to interpret the statute but to enforce it according to its terms.230 Furthermore, terms not defined in the statute are to be construed in their "'ordinary and natural meaning.'"231

Therefore, believing that the term "impairment" lacked definitional clarity, the court turned to Webster's Dictionary, which defined "impair" as to "'make worse by or as if by diminishing in some material respect,'" and "impairment" as a "'decrease in strength, value, amount, or quality.'"232 From these definitions, the court summarily concluded that "'[u]nder these definitions, asymptomatic HIV infection is simply not an impairment: without symptoms, there are no diminishing effects on the individual.'"233

Interestingly, the court did not pause to define the term "asymptomatic," but strongly implied that "asymptomatic" means to be without an impairment.234 This implication contrasts with the definition of "impairment" as worded in Stedman's Medical Dictionary: "A physical or mental defect at the level of a body system or organ. The official [World Health Organization] definition is: any loss or abnormality of psychological, physiological or anatomical structure or function."235 "Asymptomatic" is defined as "'without symptoms, or producing no symptoms.'"236 It is inaccurate to equate "asymptomatic" with "non-impairment."237

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229. Id. at 167 (quoting Faircloth v. Lundy Packing Co., 91 F.3d 648, 653 (4th Cir. 1996), cert. denied, 117 S. Ct. 738 (1997)).
230. Id. (citing United States v. Murphy, 35 F.3d 143, 145 (4th Cir. 1994)).
231. Id. (quoting Smith v. United States, 508 U.S. 223, 228 (1993)).
232. Id. at 168 (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 603 (1986) ("impair") and WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 612 (1988) ("impairment"); accord id. ("'To weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner.'" (quoting BLACK'S LAW DICTIONARY 677 (5th ed. 1981) ("impair"); id. ("deterioration" or "lessening" (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1131 (1986) ("impairment"). Note that the court did not turn to a medical dictionary or any other source for authority on this point.
233. Id.
234. See id.
235. STEDMAN'S MEDICAL DICTIONARY, supra note 1, at 857.
236. Id. at 160.
237. As explained in detail by Harrison's Principles of Internal Medicine, the asymptomatic stage of HIV disease does indeed impair the human body:

IMMUNOPATHOGENIC EVENTS DURING CLINICAL LATENCY It has been the consistent observation of clinicians caring for AIDS patients that, with few exceptions, there is a gradual and progressive diminution over time of the level of CD4+ T cells. The slope of the decline is highly predicive of the pattern
The court concluded that "[e]xtending the coverage of the ADA to asymptomatic conditions like Runnebaum's, where no diminishing effects are exhibited, would run counter to Congress's intention as expressed in the plain statutory language."238

Admittedly unconvinced that "'diminishing effects' can be analyzed at so low a level of generality,"239 the court dismissed popular and scientific literature stating that the HIV and the infected body engage in "mortal combat." The court compared the finding of disability based on such evidence analogous to the finding of disability in individuals with genetic predispositions to various diseases, such as cancer and Alzheimer's disease.240

Also dismissed were the House and Senate Reports on the ADA that expressly stated that the term "mental or physical impairment" included HIV infection. The court viewed "isolated references" to HIV as not differentiating between the symptomatic and asymptom-

of the clinical course and the development of advanced disease. Most patients are entirely asymptomatic during this progressive decline of CD4+ T cells, which has led to the term clinical latency. Culturable viremia and p24 antigenemia are uncommon during this period, and there are very few cells (usually 1:1000 to 1:10,000) which contain HIV provirus and at least 1 log less cells which are actively expressing HIV mRNA during this period. In most patients, it is extremely difficult to detect active virus replication in the peripheral blood mononuclear cells during this period. However, the progressive decline of CD4+ T cells belies true viral latency since both cytopathic effects and qualitative dysfunction of T cells that cannot be explained by mere lymphocyte depletion occur. It has been demonstrated that even during this prolonged clinically latent period, there is copious virus contained in the lymph nodes and active virus replication in the lymph nodes. Therefore, it is essential to distinguish between clinical latency and true microbiological latency.

THE ASYMPTOMATIC STAGE—CLINICAL LATENCY . . . As emphasized above, HIV disease with active virus replication progresses during this asymptomatic period. Certain patients will remain entirely asymptomatic despite the fact that their CD4+ T cell counts fall to extremely low levels. Initial symptoms may be associated with the first manifestations of an opportunistic disease. Other patients experience varying degrees of intermittent symptoms such as malaise, lethargy, weakness, and anorexia which are not persistent enough to be categorized as constitutional disease. Certain patients, otherwise asymptomatic, develop persistent generalized lymphadenopathy. With few exceptions, there is a progressive diminution of CD4+ T cell counts during this asymptomatic period which ultimately leads to a state of immunosuppression that is severe enough (CD4+ T cell count <200 per microliter) to place the patient at high risk for opportunistic, and hence clinically apparent, disease.

HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, supra note 1, at 1577, 1587-88 (citations omitted).

238. Runnebaum II, 123 F.3d at 168.
239. Id. at 168 n.6 (citations omitted).
240. See id.
atic stages of HIV infection, which "by their own terms, do not answer whether asymptomatic HIV infection is an impairment under the statute." The court rejected the use of legislative history and instead chose to deduce congressional intent through lay definitions of scientific terms.

The court concluded that "[t]he plain meaning of 'impairment' suggests that asymptomatic HIV infection will never qualify as an impairment: by definition, asymptomatic HIV infection exhibits no diminishing effects on the individual." The court stated that it would not go so far as to say that asymptomatic HIV infection is not per se an impairment, but simply reaffirmed Ennis's requirement that it must determine, on a case-by-case basis, whether asymptomatic HIV infection constitutes a "disability" under the statute. Nevertheless, the court, in effect, declared asymptomatic HIV infection not to be an "impairment" per se:

Runnebaum produced no evidence showing that he was impaired, to any degree, during the relevant time period. Runnebaum does not assert that he suffers an actual physical or mental impairment because of his HIV infection, nor could he credibly do so. . . .

. . . In light of the plain statutory language and the facts of this case, we hold that Runnebaum's HIV infection, be-

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241. See id. at 169.
242. Id. at 168-69 & n.7. The court supported its rejection of the legislative history as an aid in statutory interpretation by citing to two Supreme Court opinions authored by Justice Scalia: 
Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 501 (1988), which stated that "unenacted approvals, beliefs, and desires are not laws," and 
Pittston Coal Group v. Sebben, 488 U.S. 105, 115 (1988), which rejected the argument that the legislative history at issue limited general statutory language.

The court also relied upon Justice Stevens's majority opinion in INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), which adhered to "'the strong presumption that Congress expresses its intent through the language it chooses.'" Runnebaum II, 123 F.3d at 169 n.7 (quoting Cardoza-Fonseca, 480 U.S. at 432 n.12). When this quote is examined in its entirety, a different meaning emerges. The full passage reads:

As we have explained, the plain language of this statute appears to settle the question before us. Therefore, we look to the legislative history to determine only whether there is "clearly expressed legislative intention" contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses.

Cardoza-Fonseca, 480 U.S. at 432 n.12. This statement does not lend credence to the court's averment that "[w]e doubt] that the collective intent of a 535-member body is ascertainable by reference to legislative history." Runnebaum II, 123 F.3d at 169 n.7.

243. Runnebaum II, 123 F.3d at 169.
244. Id.
cause it is asymptomatic, is not a "physical or mental impairment" under § 12102(2)(A) of the ADA.\textsuperscript{245}

This language certainly evinces a conclusion that asymptomatic HIV infection will never constitute an impairment, much less an impairment per se under the language of the Act.

As discussed, the second prong of the first statutory definition requires there to be a "substantial limitation on . . . major life activities." Because the Act does not expressly define the term "major life activity," the Fourth Circuit construed the term in accordance with its ordinary and natural meaning.\textsuperscript{246} The court, turning to Webster's Dictionary once again, defined "major" to mean "'[d]emanding great attention or concern'' and "'greater in dignity, rank, importance, or interest.'"\textsuperscript{247}

From these definitions, the court criticized the argument that procreation and intimate sexual relations were major life activities substantially limited by Runnebaum's asymptomatic HIV infection.\textsuperscript{248} While agreeing that "procreation is a fundamental human activity," the court stated that it was not certain that procreation constituted a major life activity within the meaning of the Act\textsuperscript{249} and rejected the proposition that engaging in intimate sexual relations is encompassed by the Act.\textsuperscript{250} The court entertained the idea, for the purposes of argument, that even if these endeavors were accepted as major life activities under the Act, there would be no causal nexus between a substantial limitation of these activities and the physical effect of asymptomatic HIV infection.\textsuperscript{251} The court explained: "[W]e recognize that as a behavioral matter, asymptomatic HIV-infected individuals may refrain from having children or engaging in sexual relations because of concerns that the offspring or partner will be infected with the virus[,] . . . as a physical matter, nothing inherent in the virus substantially limits these activities."\textsuperscript{252} Under this line of reasoning, it is irrelevant that the infected individual's reaction to his

\begin{itemize}
\item \textsuperscript{245} Id. at 169-70.
\item \textsuperscript{246} Id. at 170.
\item \textsuperscript{247} Id. at 170 (quoting \textit{Webster's II New Riverside University Dictionary}, supra note 232, at 718, and \textit{Webster's Third New International Dictionary}, supra note 232, at 1363).
\item \textsuperscript{248} Id. at 170-71.
\item \textsuperscript{249} Id. at 170 (referencing the debate among the federal circuits on this issue); see also \textit{supra} note 139.
\item \textsuperscript{250} \textit{Runnebaum II}, 123 F.3d at 170-71.
\item \textsuperscript{251} Id. at 171-72 (emphasis added).
\item \textsuperscript{252} Id. at 172.
\end{itemize}
condition causes substantial limitation, because the only concern is whether the condition is inherently limiting.\(^{253}\)

The court concluded that even if such activities qualified as major life activities, there was no evidence in the record that Runnebaum refrained from procreating or engaging in intimate sexual relations.\(^{254}\) In language alluding to Runnebaum's homosexuality, the court observed: "Indeed, nothing in the record so much as suggests that Runnebaum was at all interested in fathering a child. Moreover, the record makes clear that Runnebaum's ability to engage in intimate sexual relations was not substantially limited by his HIV infection; the record shows that he concealed his HIV infection from his lover."\(^{255}\) NationsBank terminated Runnebaum while he was in the asymptomatic stage of HIV infection, which operates, according to the court, as per se not a "disability."\(^{256}\) Accordingly, Runnebaum suffered no physical impairment, nor were any of his major life activities substantially limited by his physical non-impairment; therefore, he fell outside the scope of federal protection against discrimination proscribed by the ADA.

In a powerfully worded dissent, Judge Michael, joined by Judges Hall, Murnaghan, Ervin, and Motz, voiced his opposition to the majority's reasoning.\(^{257}\) Judge Michael began by stressing that the court granted summary judgment on the basis of Runnebaum's job performance rather than his disease and that, as a result, the issue of whether his asymptomatic HIV infection constituted a "disability" was not contested:

\(^{253}\) Id.

\(^{254}\) Id.

\(^{255}\) Id.

\(^{256}\) The majority explicitly departed from Ennis's case-by-case inquiry rule, not only in the effect of its ruling regarding asymptomatic HIV disease, but also in acknowledging that certain conditions, such as blindness and deafness, are indeed per se disabilities requiring no individualized assessment:

Although a finding of disability under the statute must be made on a case-by-case basis, we recognize that some conditions will always constitute impairments that substantially limit the major life activities of the afflicted individual. For instance, blindness and deafness are physical conditions that always substantially limit the major life activities of blind and deaf individuals. In such cases, an individualized determination of whether the condition is an impairment that substantially limits one or more of the major life activities is unnecessary.

\(^{257}\) Runnebaum II, 123 F.3d at 176 (Michael, J., dissenting).
Now, however, the majority concludes that Runnebaum’s HIV infection is not a disability. It bases this holding on its textual reading of the ADA and its own conclusions about the state of the record. There is much that the majority must ignore, however, to affirm on the ground that Runnebaum is not disabled. First, it must ignore that NationsBank conceded Runnebaum’s disability before the district court. Second, it must ignore the physical effects of HIV upon the body even when the disease is in its asymptomatic stage. Third, it must ignore a wealth of legislative history and administrative interpretation contradictory to its reading.258

The dissent recognized that the majority was creating a rule, despite the dissent’s objections, that asymptomatic HIV infection is not a disability per se.259 Such a conclusion, without allowing Runnebaum the opportunity to supplement the incomplete trial record on this issue, amounted to a “rejection, in substance if not in form, of the case-by-case inquiry suggested by . . . [Ennis, and] move[d] this circuit even further from the mainstream of ADA interpretation.”260 “More importantly,” Judge Michael declared, “it moves us completely away from the interpretation that Congress clearly intended.”261

Judge Michael focused upon why the majority chose to decide an issue—whether Runnebaum was “disabled”—that was not addressed in the court below.262 Michael found hypocritical the majority’s assertion that the disability determination was a question of law—especially when other circuits had found that asymptomatic HIV infection was a per se disability—while it simultaneously trumpeted Ennis’s case-by-case inquiry rule.263

Judge Michael further pointed out that the facts pertaining to the issue of disability were in no way sufficiently developed in the trial record to be considered decisive on whether Runnebaum had established a prima facie case that he was disabled.264 Judge Michael continued: “Nevertheless, the majority proceeds to examine the merits of this issue on the current record and concludes, not surprisingly, that

258. Id.
259. Id.
260. Id.
261. Id.
262. Id. at 177.
263. Id. at 177-78.
264. Id. at 178.
there is insufficient evidence to support a finding that Runnebaum is disabled."265

Even considering the insufficiency of the trial record on appeal, the dissent concluded that Runnebaum's claim of disability was sufficient to withstand summary judgment under the primary statutory definition of "disability."266 With regard to the first prong of the definition, Judge Michael accepted the definitions of "impair" and "impairment" adopted by the majority, and argued that under any of the adopted definitions, HIV constitutes an "impairment."267 In a critical distinction, Judge Michael exposed the majority's error in viewing the terms "impairment" and "symptoms" as synonymous. In fact, it was this very error that led the majority to conclude that asymptomatic HIV disease can never constitute an impairment. But Judge Michael countered:

Nowhere does the text of the statute . . . require a "physical impairment" to be outwardly visible or manifest. The effects of the HIV virus may not be noticeable to the outside world until the later stages of the disease, but the body is impaired as soon as the disease enters it.268

Judge Michael opined that "HIV infection comfortably fits within the plain and unambiguous meaning of impairment."269 Nevertheless, he admitted that such a broad reading of the term might render it somewhat ambiguous.270

He suggested, therefore, that the court turn to the legislative history for interpretive guidance: "One look at the legislative history, however, reveals why the majority clings to its textual analysis."271 Judge Michael examined the legislative history regarding HIV infection in greater detail than did the majority, concluding that the Sen-

265. Id. Judge Michael lashed out at the majority's failure to appreciate the "realities of litigation," especially as the trial record available to the appellate court was limited to those papers regarding the issues raised on summary judgment, and that, with notice, the plaintiff could have secured additional discovery that could have yielded sufficient evidence to meet his burden. Id. at 178 n.2.

266. Id. at 179.

267. Id. at 180.

268. Id. at 181.

269. Id.

270. Id.

271. Id. (citing Green v. Bock Laundry Mach. Co., 490 U.S. 504, 508-09 (1989) ("Concluding that the text is ambiguous . . . we then seek guidance from legislative history . . . "); United States v. Irvin, 2 F.3d 72, 76-77 (4th Cir. 1993) ("[B]ecause the relevant statutory language is susceptible to interpretations other than the one suggested by the Government and is therefore ambiguous, we turn to the legislative history for assistance in ascertaining the intent of Congress.").)
ate and House Committee Reports "could not be clearer: infection with HIV constitutes an 'impairment' under the ADA." Judge Michael further surveyed the less authoritative floor statements to emphasize the "breadth of the congressional presumption that individuals with HIV would be covered." The dissent concluded: "The legislative history plainly demonstrates that Congress intended for HIV to be considered a disability. Indeed, it is difficult to imagine a case in which the legislative history could be more explicit."

Judge Michael buttressed his evaluation of Congress's intent as evidenced in the legislative history of the ADA with the many administrative regulations interpreting the term "impairment." He concluded that "the majority's interpretation cannot withstand the stark realities of asymptomatic HIV, the direct and unambiguous legislative history, and the administrative regulations, all of which confirm that Runnebaum was impaired." Judge Michael added: "In the end . . . the grim and disabling nature of asymptomatic HIV is undeniable."

With regard to the second prong of the disability definition—concerning whether Runnebaum's asymptomatic HIV infection substantially limits one or more of his major life activities—Judge Michael questioned the majority's rejection of procreation and engaging in intimate sexual relations as constituting "major life activities":

The question of whether procreation and intimate sexual relations are "major life activities" under the ADA is admittedly "not free from doubt." The words of the statute, however, are certainly broad enough to include these activities. Procreation is perhaps the most important life activity, since we would cease to exist as a species if we no longer reproduced. And intimate sexual relations, while less important in na-

272. Id. at 182.
273. Id.
274. Id.
275. Id. at 182-83. Judge Michael argued that although the definition of disability is not specific to any subchapter under the Act, the definition applies to the Act as a whole. Therefore, it is reasonable to assume that Congress intended for each agency delegated rulemaking authority for a specific subchapter to have the authority to define the term "impairment" and that that agency's definition must be given "controlling weight" if the statute is otherwise ambiguous. See id. at 182 & n.7 (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)). Moreover, "[e]ven if Congress did not grant the EEOC direct statutory authority to define impairment, however, we still must defer to the EEOC's regulations if they are a 'reasonable interpretation' of the statute." Id. at 182 n.7 (citing Chevron, 467 U.S. at 844 (requiring deference to a reasonable agency interpretation if the legislative delegation to an agency is "implicit rather than explicit")).
276. Id. at 183.
277. Id. at 183 n.10.
ture's scheme, have consumed enough of humanity's energy and interest to count among such activities.\textsuperscript{278}

Again, where there may be ambiguity, the dissent wrote, the court should defer to the legislative history and the implementing regulations, both of which indicate that procreation and engaging in intimate sexual relations constitute "major life activities" under the language of the Act.\textsuperscript{279}

The dissent gave short shrift to the majority's distinction between impairments that are substantially limiting as a "physical matter" and those that are substantially limiting as a "behavioral matter":

While it has some intuitive plausibility, this distinction is nowhere within the text, legislative history, or regulatory interpretation of the ADA. . . . There is no requirement that the impairment physically limit the life activity, nor is there any specification about how the impairment must substantially limit that activity. Once again, the majority has no authority to bolster its interpretation. . . .

Moreover, the majority's distinction goes against common sense. . . . It is HIV's physical effects, however, upon procreation and intimate sexual relations that make it substantially limiting. An individual with HIV stands a significant chance of infecting others if he engages in these activities, and this prospect of spreading the disease is a substantial limitation. . . . As the court said in Abbott, "[n]o reasonable juror could conclude that an 8% risk of passing an incurable, debilitating, and inevitably fatal disease to one's child is not a substantial restriction on reproductive activity."\textsuperscript{280}

Furthermore, the dissent criticized the claim that Runnebaum did not establish sufficient evidence in the trial record that his asymptomatic HIV infection substantially limited one of his major life activities, especially the bold assertion that it was apparent that Runnebaum did not forego engaging in intimate sexual relations because he concealed his infection from his lover. "That is too much of a leap for me. I would not presume to know the status of Runnebaum's 'intimate sexual relations' merely because he has a boyfriend."\textsuperscript{281}

\textsuperscript{278} Id. at 184 (citing Abbott v. Bragdon, 107 F.3d 934, 939-40 (1st Cir.), cert. granted in part, 118 S. Ct. 554 (1997)).

\textsuperscript{279} Id.

\textsuperscript{280} Id. at 184-85 (footnote omitted) (citing Abbott, 107 F.3d at 942).

\textsuperscript{281} Id. at 185.
The dissent concluded that, with regard to the primary statutory definition of disability under the Act, the majority had effectively excluded individuals with asymptomatic HIV disease:

The majority's opinion must be taken for what it is: a per se rule that excludes those with asymptomatic HIV from the protections of the ADA. This result runs counter to the statutory text, medical research, legislative history, administrative regulations, and even our decision in Ennis. This result is plainly wrong. 282

Ennis and Runnebaum clearly indicate that the Fourth Circuit rejects asymptomatic HIV disease as a per se disability under the ADA. It therefore directly follows that if an asymptomatic HIV-positive employee cannot show that his employer regarded him as disabled, he has no protection under the Act against discriminatory employment practices. What makes these cases remarkable is the Fourth Circuit's belief that so long as HIV threatens only the carrier, there is nothing physically impairing about the virus's effect that substantially limits a major life activity of the infected individual; however, if there is merely a theoretical chance of transmission to non-infected individuals, the virus suddenly poses a significant risk to the health and safety of others.

Just one day before Ennis was argued, the Fourth Circuit heard arguments on another HIV discrimination case arising under the ADA. The court's decision in that case, announced five weeks before Ennis, characterized HIV disease as a significant danger, and not as a non-disabling, latent blood infection. In Doe v. University of Maryland Medical System Corp., 283 an asymptomatic HIV-positive surgical resident was fired after refusing alternative non-surgical residencies offered by the hospital, which had discovered his HIV status. 284 The resident sued the hospital under section 504 of the Rehabilitation Act and Title II of the ADA. 285 In discussing whether the resident's asymptomatic HIV infection constituted a disability under the federal laws, the Fourth Circuit stated that the issue was not in dispute and that the court would instead focus upon whether the resident was "otherwise qualified":

The parties do not dispute that infection with HIV is a disability; that were Dr. Doe not HIV-positive, he would be quali-

282. Id. at 186.
283. 50 F.3d 1261 (4th Cir. 1995).
284. Id. at 1262-63.
285. Id. at 1264.
fied to continue his employment as a neurosurgical resident at [the hospital]; and that Dr. Doe's residency was terminated because he is HIV-positive. However, [the hospital] maintains that its decision to terminate Dr. Doe was not discriminatory because he poses a significant risk to the health or safety of its patients that cannot be eliminated by reasonable accommodation and therefore is not an otherwise qualified individual with a disability.286

The Fourth Circuit focused on whether the facts established the existence of a significant risk—the risk of HIV transmission—that could not be eliminated by reasonable accommodation, and decided that Dr. Doe did pose a "significant risk to the health or safety of [the hospital's] patients."287 The ADA and the Rehabilitation Act require a disabled employee to be otherwise qualified to claim protection under those Acts.288 Therefore, an employee who poses a direct threat or a "significant risk to the health or safety" of others cannot claim federal protection against unlawful employment practices.

In reconciling the Fourth Circuit's reasoning in University of Maryland Medical System with Ennis and Runnebaum, the court's approach to asymptomatic HIV infection suggests that so long as the virus remains within the body of an infected individual, it is insignificant, i.e., there exists no physical impairment that substantially limits a major life activity of that individual. However, once the virus threatens to be transmitted from an infected individual to a non-infected individual, it poses a significant risk to that other person's health and safety. Whether the Fourth Circuit considers HIV significant to an individual's health seems to depend illogically on whether one is infected or merely at risk of infection. Does the virus somehow become inert after infecting an individual, or does something change in the court's perception of that infected individual?

The Fourth Circuit's position on asymptomatic HIV infection has already impacted employment discrimination cases within the circuit.

286. Id. at 1265.

287. Id. at 1265-66. It is telling that the court observed that there was no dispute about the fact that there have been no confirmed cases of doctor to patient transmission; the risk, according to the court, was admittedly theoretical. Id. at 1266. The U.S. Centers for Disease Control and Prevention reported one confirmed case of doctor-to-patient HIV transmission in the United States. This case involved a Florida dentist in 1991. Telephone Interview with Kitty Warren, HIV Specialist, Communications Office, National Center of HIV, STD, and TB Prevention, U.S. Centers for Disease Control and Prevention (Mar. 16, 1998).

For example, in *Cortes v. McDonald's Corp.*, a federal court in North Carolina granted summary judgment in favor of an employer on an employment discrimination claim filed by an asymptomatic HIV-positive former employee. The district court held that the plaintiff failed to establish a prima facie case of discrimination on the basis of an alleged handicap, because he failed to establish that he was disabled.

The court noted that the plaintiff had the burden of proving that he was disabled within the meaning of the Act, and that in light of *Ennis*, asymptomatic HIV disease was not a per se disability:

> Based on its analysis, the Fourth Circuit has declined to follow a number of jurisdictions which have found that to be HIV-positive is to have a disability per se. In fact, the *Ennis* decision expressly rejected that assertion by requiring that any determination as to disability should be made on a case-by-case basis.

The plaintiff, therefore, must prove (1) that he has a physical or mental impairment, and (2) that the impairment substantially limits one or more of the plaintiff's major life activities. With regard to the first prong, the court summarily stated that the plaintiff had a physical impairment by testing positive for HIV infection. Nevertheless, the court ruled that the Fourth Circuit required "that it also be determined that this impairment substantially limit one or more of plaintiff's major life activities."

The plaintiff's argument that his major life activity of procreation was substantially limited by his HIV disease was rejected by the court. The court stated that, while other courts had recognized procreation as a major life activity within the meaning of the ADA, "this court interprets the Fourth Circuit's requirement in *Ennis* that

290. Id. at 547.
291. Id.
292. Id. at 545.
293. Id.
294. Id. "Having tested positive for HIV, plaintiff certainly meets the first requirement, that he have a physical impairment." Id. Note that this finding does not follow the *Ennis* dicta, which implied that without affirmative evidence to the contrary, HIV infection alone is not a physical impairment. See *Ennis* v. National Ass'n of Bus. & Educ. Radio, 53 F.3d 55, 60 (4th Cir. 1995).
296. See id.
the disability classification be performed on a case-by-case basis and its failure to mention reproduction in its Runnebaum opinion to preclude expansion of the major life functions to include reproduction."298 Therefore, because the plaintiff did not proffer any other evidence of a major life activity substantially limited by his HIV infection, the court concluded:

Whether or not this court believes that even asymptomatic HIV should be considered a disability is immaterial in that this court is bound by what it finds Fourth Circuit precedent to require. The Fourth Circuit held in Ennis that HIV is not a disability per se, but each individual must show he has been substantially limited in a major life function.299

In EEOC v. Newport News Shipbuilding & Drydock Co.,300 a federal district court in Virginia granted summary judgment in favor of an employer on an ADA claim filed by the EEOC on behalf of an employee.301 The employee alleged that his employer failed to reasonably accommodate his need for a mold-free work environment, which was needed because exposure to mold and fungi weakened the HIV-positive employee's suppressed immune system.302

The court found that there was no material fact in dispute upon which a jury could reasonably find that the employer failed to reasonably accommodate the employee, and therefore it refrained from determining whether the employee was disabled within the meaning of the Act.303 The court did, however, comment on how it would have decided if that issue were before the court:

While it was not necessary for the Court to determine whether [the plaintiff] is disabled within the meaning of the ADA, had such a determination been required, it is far from certain that the EEOC would have prevailed on the issue. The Fourth Circuit has decided [in Ennis] that HIV-positive status is not per se a "disability" within the meaning of the ADA. The court explained that the plain language of the statute requires a case-by-case determination of whether a

298. Cortes, 955 F. Supp. at 546. If the Fourth Circuit does not recognize procreation or reproduction as a major life activity, the court would be in conflict with the other circuits on this issue. See, e.g., Abbott v. Bragdon, 107 F.3d 934, 940 (1st Cir.), cert. granted in part, 118 S. Ct. 554 (1997) (stating that "reproduction, which is both the source of all life and one of life's most important activities, easily qualifies" as a major life activity).


301. Id. at 404.

302. Id. at 405-06.

303. Id. at 407.
given impairment substantially limits a major life activity of the particular individual in question. [The employer's expert witness's] expert report states that "[the employee] has had no opportunistic infections" associated with HIV. [The employee's] chief symptoms, sinusitis, watery eyes, and headaches associated with reactions to airborne allergens, are common to the climate of Tidewater, Virginia, albeit [the employee's] reactions are alleged to be more severe.304

These two recent decisions signal the recognition by district courts within the Fourth Circuit of the impact of Ennis and Runnebaum II, especially as these decisions gain wider acceptance as controlling summary-judgment precedents.

The court's "individualized-inquiry" rule—which was articulated in Forrissi, applied in Ennis, and reasserted in Runnebaum II—ignores other, more time-honored principles of law. Effectuating the clear intent of Congress and giving proper deference to administrative regulations cannot take a back seat to a haphazard court-created rule of statutory analysis. To do so, as the Fourth Circuit does, leads the judiciary to impose upon the prerogatives of the legislature.

IV. Conclusion

The Fourth Circuit has gone a long way toward stripping the protection of the ADA from individuals with HIV disease. In doing so, the court has reasoned that the virus creates a significant risk of harm to others, but imposes an insignificant limitation upon its carrier. Thus, in University of Maryland Medical System, the virus's deadliness caused a physician with asymptomatic HIV disease, who performed invasive medical procedures, to lose the Act's protection. In Ennis and Runnebaum II, the virus's deadliness was ignored, and the Act's protections were stripped away from similarly situated individuals. As a result, the Fourth Circuit has rendered the ADA's remedial purpose illusory to HIV-infected individuals who have been discriminated against in employment. The only possible exception applies to those individuals with debilitating HIV disease, who, most often, are too sick to work anyway.

If an employer discharges an employee solely because she has asymptomatic HIV disease, what motivates the employer if not an irrational fear or moral revulsion? It is precisely such damaging stereotypes that Congress intended the ADA to eliminate. Whether HIV impairs an individual's hemic or lymphatic system, thereby substan-

304. Id. at 407 n.5 (citations omitted).
tially limiting reproduction, or whether an irrational perception motivates the discharge, the ADA's purpose is to open doors to employment and its benefits. The purpose of the ADA is not to maintain the barriers HIV-infected individuals must overcome when seeking employment. Congress surely did not intend individuals with HIV disease, symptomatic or asymptomatic, to fall outside the Act's protection.

The Fourth Circuit was wrong to exclude individuals with asymptomatic HIV disease from the Act's protection. Congress, recognizing the necessity for courts to constrain reasonably the elastic scope of the ADA's protection, defined "disability" to guide courts in their enforcement obligations. Should the Supreme Court in its review of Abbott v. Bragdon decide that employers can discriminate against individuals with asymptomatic HIV disease with impunity, it will be left to Congress to use its power to correct the Court's reinterpretation of the ADA's clear purpose.