The Supreme Court Changes the Way Courts Are to View One's Disability

A Ripple on the Pond or a Tidal Wave?

by Ernest Calderón

There is a ripple on the pond which, sooner or later, may bounce the deck in your workplace and your clients' workplaces, and may intrude into areas that one would not normally contemplate. The ripple is the after-effect of the United States Supreme Court ruling in ***Bragdon v. Abbott.***[1] In June of this past year, a sharply divided Supreme Court held that an HIV-positive person who displays ***any*** physical or mental manifestation of his or her disease is protected by the Americans with Disabilities Act (ADA). The Court's decision goes to the heart of determining who is disabled under the ADA. It changes the previously subjective standard for determining the existence of a disability to an objective one. This significant transformation of the law may create a "tidal wave" of litigation.

We now know that individuals' illnesses, which in some cases may be more temporary than permanent in nature, do not automatically fall below the level of a qualified disability. At the time of passage of the ADA, some commentators were of the opinion that the ADA would provide a very complicated regulatory scheme. The *Bragdon* case in a sense has guaranteed the complexity of determining when a person has a qualified disability.

Before *Bragdon*: A Subjective Case-by-Case Analysis

In order to best understand the implications of *Bragdon*, we must examine how courts determine when a public, reasonable accommodation must be given. The questions we ask are: Who is disabled? What is a major life activity? How is it substantially limited? The Americans with Disabilities Act defines a disability, in part, as:

> "[a] physical or mental impairment that substantially limits one or more of the major life activities of such individual;"

The federal government has determined that a major life activity is substantially limited if it is "restricted as to the conditions, manner or duration under which it can be performed in comparison to most people."[2] The Equal Employment Opportunity Commission (EEOC) has defined the phrase "physical or mental impairment" to include "such contagious and non-contagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy...HIV disease (where symptomatic or asymptomatic)..."[3]

Many American courts, with the Fourth Circuit "leading the way,"[4] previously followed a subjective "case-by-case" analysis in determining whether an individual's asymptomatic illness satisfied the statutory

definition of disability. In *Runnebaum v. Nations Bank*, the Fourth Circuit determined that a bank employee's asymptomatic HIV infection did not limit one of his major life activities. In response to the claim that HIV infection substantially limits a major life activity by its effect on sexual relations and procreation, the *Runnebaum* Court focused on the infected person's physical ability to engage in sexual relations and engender children. It stated that "...asymptomatic HIV-infected individuals are able to, and indeed do, procreate and engage in sexual intimacies."[5] The fact that a person may perform the acts necessary to procreate led the court to conclude that the significant life activity of reproduction is not limited regardless of the fact that there may be an 8-percent chance that HIV infections could be passed on to children.[6] The risk of passing on the infection may lead to a behavioral decision to refrain from procreative activity, but it created no physical limitation and therefore no impairment, according to the court. Moreover, the court noted, there was no evidence that the plaintiff avoided sexual relations or procreation out of fear of spreading infection.

This approach is consistent with Arizona law. Arizona courts have held that the Arizona Civil Rights Act (ACRA)[7] protects the rights of the disabled. In *Bogue v. Better-Built Aluminum*,[8] the court held that each case must be decided "on its particular set of facts."[9] The court stated that "...an individual is not handicapped under the ACRA if his impairment only interferes with his ability to perform a particular job for a particular employer, but does not significantly decrease that individual's general ability to obtain satisfactory employment elsewhere."[10] Therefore, under the *Bogue* decision, in Arizona each individual situation must be evaluated on a case-by-case basis and one claimant's failure to qualify for a particular disability does not necessarily mean that a second person's claim for disability due to the same condition is automatically negated. Nevertheless, generally speaking, the trend is to liberalize the application of broad protections to individuals who may be disabled. *Madden-Tyler v. Maricopa County*.[11]

Bragdon Adopts an Objective Standard

A majority of the U.S. Supreme Court broadened the scope of the disability inquiry by focusing on the general characteristics of the disease divorced from the actual effect those characteristics had on the particular plaintiff's life. In a case analyzing the ADA's public accommodation provisions, the plaintiff, Sidney Abbott, had been HIV infected since 1986. She sought dental care from Randon Bragdon, notifying him that she was HIV positive. The dentist determined that he would not charge her anything extra for providing her with dental treatment, but that she would be required to have the dental treatment performed in a hospital setting and she would be responsible for those additional costs. The purpose of the hospital setting was to ensure that the risk of infecting others would be minimized. Ms. Abbott disagreed with the dentist and filed a lawsuit claiming that he had violated the public accommodation provision of the ADA.

Ms. Abbott asserted that the major life activity affected by her condition was her reproductive ability. Although, she noted that she had not yet elected to have children, to have children raised the possibility of infecting her partner with HIV as well as passing the virus on to her child during childbirth.

Dr. Bragdon argued that reproduction had nothing to do with the dental treatment that she sought from his office, reasoning that the alleged disability should have some connection to the accommodations for dental service Ms. Abbott sought from him. He also argued that a major life activity was something that was essential to day-to-day life activities. The first part of his argument was consistent with most courts' application of the ADA. His latter argument conflicted with previous EEOC pronouncements.

Justice Kennedy, in his majority opinion, relied on general medical and scientific information on the HIV virus. The Court stated, "The disease follows a predictable and, as of today, an unalterable course...The virus eventually kills the infected host cell...The initial stage of HIV infection is known as acute or primary HIV infection...The assault on the immune system is immediate..."[12] The Court went on to state that "After the symptoms associated with the initial stage subside, the disease enters what is referred to as its asymptomatic phase. *The term is a misnomer*, in some respects the critical features persist throughout, including lymphadenopathy, dermatological disorders, oral lesions and bacteria infections."[13] Relying on this scientific information, the Court found that when one becomes HIV positive, the condition becomes "an impairment from the moment of infection."[14] The Court then ruled that HIV infection satisfied the ADA definition "during every stage of the disease" and must be considered a "physiological disorder."[15]

However, in order to apply the ADA to regular day-to-day activities, plaintiff Abbott had to prove that the HIV infection placed a substantial limitation on a major life activity. The Court noted that "reproduction falls well within the phrase 'major life activity.' Reproduction and the sexual dynamics surrounding it are central

to the life process itself."[16] The Court stressed that a woman infected with HIV who tries to conceive a child imposes on her male partner a one in five chance of being infected with the HIV virus. Further, a woman infected with the HIV virus risks infecting her child during gestation and childbirth (i.e., perinatal transmission). Therefore, the Court ruled that this type of risk in Ms. Abbott's reproductive life affected a major life activity.[17]

Chief Justice William Rehnquist, in his dissent joined by three other justices, disagreed with the majority's conclusion that being HIV positive affects a major life activity. The Supreme Court relied on the trial court's review of Ms. Abbott's particular case and stated that "the individualized nature of the inquiry is particularly important..."[18] Justice Rehnquist argued that the plaintiff failed to show that reproduction was "a life activity." The dissenting opinion stated "No one can deny that reproductive decisions are important in a person's life. But, so are decisions as to who to marry, where to live and how to earn one's living."[19] The dissent stated that "The common thread [to a major life activity] is rather that the activities are repetitively performed and *essential* in the day-to-day existence of a normally functioning individual."[20] The dissent disagreed that HIV infection "substantially limits reproductive activity because people who are HIV infected are still able to engage in sexual intercourse, are still able to give birth and are still able to perform the manual tasks necessary in rearing a child."[21]

The majority opinion increases the number of possible ADA plaintiffs in several ways. It broadens the range of conduct that could be considered major life activities. It also appears to eliminate the need for a plaintiff to show an actual, as opposed to general theoretical, impairment in the denominated major life activity. Finally, it accepts a tenuous nexus between the impairment and the reasonable accommodation demanded.

Thus far, *Bragdon* has had mixed effect on the lower courts. Recently in the Ninth Circuit Court of Appeals, in the case of *Mustafa v. Clark County School District*,[22] the appellate court reversed the finding of summary judgment against the Plaintiff under the Rehabilitation Act.[23] The plaintiff, a mathematics and computer teacher, was reassigned for "open and gross lewdness" that occurred in an after-school meeting. He claimed a violation of the Rehabilitation Act because he was required to work in a classroom or perform other duties inconsistent with his doctors' imposed limitations. His alleged disability was severe depression, panic disorder, and post-traumatic stress disorder due to work-related difficulties. The trial court determined that his disability was temporary in nature and, therefore, not truly a disability. It therefore precluded him from any protection under the Rehabilitation Act. The court relied on a federal regulation stating that "temporary, non-chronic impairments of short duration, with little or no long-term or permanent impact, are usually not disabilities."[24] The Ninth Circuit, relying on *Bragdon*, reversed. The court ruled that an issue of fact existed as to whether the plaintiff was truly disabled because he suffered from depression, post-traumatic stress disorder and panic attacks, which would substantially limit his major life activity of working.[25]

At the same time, the Ninth Circuit affirmed a U.S. District Court for the District of Arizona ruling indicating that an individual's sensitivity to ammonium lauryl sulfate did not constitute a physical impairment affecting major life activity. In that case, *Healey v. The Dial Corp.*,[26] although the plaintiff proved a sensitivity to ammonium lauryl sulfate and it was alleged that there could be breathing, speaking and work-related problems resulting from the sensitivity, the U.S. District Court ruled that the plaintiff failed to provide any evidence establishing that "this significantly restricted [her] 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."[27] In short, the court determined that the inability to perform a single particular job did not rise to the level of a substantial limitation.

Consistent with the Ninth Circuit in the *Healey* case, *supra*, the Fourth Circuit, in *Wylind v. Boddie-Noell Enterprises*,[28] determined that an employee's use of prescription drugs, which could have a negative impact on a person's ability to drive, was not a qualified disability under the ADA. However, the court relied on Bragdon's definition of "significantly impaired" while determining that the individual, who wanted to be a "driver" for the company, could perform other non-driving tasks. Driving itself was not a "major life activity." Other courts have relied on *Bragdon* to determine that other diseases are disabilities for the purposes of the ADA. For example, the Sixth Circuit in *Cehrs v. North East Ohio Alzheimer's Research Center*,[29] determined that psoriasis is a disability for the purposes of the statute.

The ripple on the pond created by *Bragdon* has spread into other non-traditional types of litigation. For example, in *Broadman v. Commission on Judicial Performance*,[30] the California Supreme Court determined that a judge's comments made on the bench, regarding the high cost of prison medical care for HIV-positive

inmates, were inappropriate due to the ADA protection of individuals who are HIV infected but asymptomatic. Judge Broadman was censured because he noted that he had heard over the radio that it cost $100,000 a year to provide medical treatment for an HIV-positive inmate. In the particular case he was reviewing, the probation department's report recommended a sentence of 40 years. He noted that "what I have thought of is a potential order that once the conviction is final, the government doctor shall not be required to provide prophylactic medicine or medicine to treat the incurable disease, but rather shall be required to provide him with food, hydration and pain medication."[31] The comment rose to the level of judicial misconduct and, therefore, merited a public censure.[32]

A Tidal Wave of Potential Confusion

Bragdon's broad and attenuated prescription creates the possibility of complex requests for accommodation. For example, in a public accommodation setting, what if an individual suffers from narcolepsy? Narcolepsy, which causes individuals to suddenly fall asleep, has been determined to be a disability. Does that mean that the person with narcolepsy gets to use his or her disability to force an airline to allow that person to "pre-board" ahead of other passengers? As in *Bragdon*, the impairment has little to do with the reasonable accommodation sought. As in *Bragdon*, the hypothetical major life activity (flying) is voluntary. What if an individual suffers from hemophilia? Does that individual have a right under the ADA's public accommodation provision to require his employer to provide him with flexible employment hours or to allow him to "telecommute" to the job? In this case, the major life activity is something that can affect almost all functions (it is easy for a person to bleed to death in the normal course of living). Therefore, this provides a much more colorful claim even under pre-*Bragdon*. However, the accommodation is something that is not normally considered to be an accommodation for someone suffering from hemophilia.

In either of the hypotheticals above, the nexus between the impairment and accommodation is thin at best. *Bragdon* opens the door to a potential tidal wave of claims that employers and those providing public services may have to grapple with in this era of interaction through litigation. What may have been thought to have caused a ripple in the pond very well may result in a tidal wave of uncertainty.

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ENDNOTES:
1. 118 S.Ct. 2196, 1998 U.S. LEXIS 4212 (1998).
2. 28 C.F.R. § 36.104, Appendix B.
3. 28 C.F.R. § 35.104.
4. *See Runnebaum v. Nations Bank of Maryland*, 123 F.3d 156 (4th Cir. 1997).
5. 123 F.2d at 172.
6. *Id.*
7. A.R.S. § 41-1401 *et seq.*
8. 179 Ariz. 22, 875 P.2d 1327 (App. 1994).
9. *Id.* at 28, 875 P.2d at 1333.
10. *Id.*
11. 189 Ariz. 462, 943 P.2d 822 (App. 1997).
12. 118 S.Ct. at 2203.
13. 118 S.Ct. at 2204.
14. *Id.*
15. *Id.*
16. 118 S.Ct. at 2205.
17. *Id.*
18. 118 S.Ct. at 2214.
19. 118 S.Ct. at 2215.
20. *Id.*
21. 118 S.Ct. at 2216.
22. 157 F.3d 1169 (1998).
23. 29 U.S.C. § 794.
24. 29 C.F.R. § 1630(j).
25. 157 F.3d at 1175.
26. 1998 U.S.App. LEXIS 29607 (9th Cir. Nov. 18, 1998).
27. 29 C.F.R. § 1630.2(j)(3)(i).
28. 1998 U.S. App. LEXIS 29355 (4th Cir. Nov. 1998).
29. 1998 W.L. 548837 (6th Cir. 1998).

30. 77 Cal. Rptr. 2d 408, 959 P.2d 715 (Cal. 1998).
31. 77 Cal. Rptr. 2d at 416, 959 P.2d at 723.
32. *Id.* at 427, 959 P.2d at 734.