

# RECENT DEVELOPMENTS

## EXPANDING THE PROTECTION OF AIDS VICTIMS UNDER THE FEDERAL REHABILITATION ACT: UNIFYING THE VIEWS OF COURTS AND THE DEPARTMENT OF JUSTICE

The Department of Justice recently issued a memorandum<sup>1</sup> urging protection of both symptomatic and asymptomatic carriers of the AIDS virus<sup>2</sup> from discrimination in any federally funded programs, activities, or employment covered by the Rehabilitation Act of 1973 (the Act).<sup>3</sup> The Memorandum reversed the Justice Department's previous position that the Act protected only symptomatic carriers of the AIDS virus<sup>4</sup>—

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1. *Justice Department Memorandum on Application of Rehabilitation Act's § 504 to HIV-Infected Persons*, released Sept. 27, 1988, reprinted in *Daily Lab. Rep.* (BNA) 195 at D-1 (Oct. 7, 1988) [hereinafter *1988 Memorandum*].

2. AIDS, Acquired Immune Deficiency Syndrome, is typified by a breakdown in the human immune system leaving the individual incapable of resisting opportunistic diseases. AIDS is thought to be caused by the Human Immunodeficiency Virus, or HIV. The Centers for Disease Control estimate that AIDS has been present in the United States since 1979. 30 *Centers for Disease Control: Morbidity and Mortality Weekly Rep.* 250, 251 (June 5, 1981). The virus is detectable by a blood test. Comment, *Prohibiting the Use of Human Immunodeficiency Virus Antibody Test by Employers and Insurers*, 25 *HARV. J. ON LEGIS.* 275, 283 (1988). AIDS develops in three stages: 1) asymptomatic but seropositive AIDS; 2) AIDS Related Complex (ARC) in which the symptoms are less severe; and 3) full blown AIDS. In the first stage, the individual has not yet suffered symptoms but is capable of transmitting the disease. This stage will almost certainly develop AIDS or ARC. Letter from Surgeon General C. Everett Koop, M.D. to Douglas Kmiec (July 19, 1988) reprinted in *1988 Memorandum, supra* note 1 [hereinafter *Koop Letter*].

AIDS affects the immune system enabling its victims to contract numerous diseases including pneumocystis carinii pneumonia (PCP), a rare and fatal form of pneumonia, and kaposi sarcoma (KS), a rare cancer. These diseases, not the AIDS virus, ultimately kill the victim. 30 *Centers for Disease Control: Morbidity and Mortality Weekly Surveillance Rep.* 250 (March 31, 1986). As of this date, no known cure for AIDS exists. *Koop Letter, supra*.

ARC is less severe than AIDS. ARC appears most frequently in hemophiliacs who received tainted blood products. The symptoms of ARC may include persistent lymph node enlargement, fatigue, persistent fever, weight loss, diarrhea, and dementia. Local 1812, *American Fed'n of Gov't Employees v. United States Dep't of State*, 662 F. Supp. 50, 52 n.2, (D.D.C. 1987).

3. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 795(a-i) (1985)). See *infra* Part I. The Rehabilitation Act prohibits employers and programs receiving federal financial assistance, as well as government contractors, from discriminating against handicapped individuals by reason of their handicap. *1988 Memorandum, supra* note 1, § I.

4. In *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376, 381 (C.D. Cal 1987), the court held that AIDS patients were handicapped within the meaning of the Act because the disease precluded them from engaging in major life activities. The patient in *Atascadero* was a five year old

those persons who display its symptoms and are capable of transmitting the disease—from discrimination in federally funded programs and activities. This reversal in policy unifies the federal government's interpretation of the Act with that of the courts which, despite the Justice Department's earlier position, consistently interpreted the Act as proscribing discrimination against all persons carrying the virus.<sup>5</sup>

The Justice Department's opinion provides courts with alternative rationales for determining that all AIDS victims are handicapped within the Act's meaning. The rationales further aid the courts in reconciling previously unexplained or conflicting reasons for the Act's protections. However, the Department failed to seize this opportunity to address matters of interpretation within the Act that would have provided courts with yet more guidance when such questions arise in the future.<sup>6</sup>

### I. THE REHABILITATION ACT

The Rehabilitation Act of 1973<sup>7</sup> assures otherwise qualified<sup>8</sup> handicapped individuals access to employment and education on a nondiscriminatory basis.<sup>9</sup>

As of 1982, section 706(A) of the Act defined handicapped individuals as 1) persons whose physical or mental impairments limit major life activities,<sup>10</sup> 2) persons with a record of such impairment,<sup>11</sup> and 3) persons

hemophiliac suffering frequent pulmonary and middle ear problems as well as chronic lymphadenopathy as a result of the AIDS virus. This condition precluded the child's full participation in the major life activities surrounding school and recreation. *Id.* at 379.

5. Recently, the courts extended handicapped protection to asymptomatic HIV-seropositive individuals as well. Although asymptomatic, seropositive AIDS carriers can transmit the disease in its most severe form as well as the less severe seropositive and ARC forms. AIDS is not transmitted by casual contact. The virus exists in blood and semen. Intimate sexual contact, intravenous drug needle sharing, tainted blood product transfusions, and fetal intrauterine infection by an infected mother are the means of transfer. Note, *AIDS and Employment Discrimination: Should AIDS be Considered a Handicap?*, 33 WAYNE L. REV. 1095, 1098 (1987).

6. See *infra* notes 76-82 and accompanying text.

7. 29 U.S.C. §§ 701-796 (1985) (as amended).

8. In addition to qualifying as handicapped as defined in § 706(7)(A)-(B), the Act further requires that the individual be "otherwise qualified." 29 U.S.C. § 794 (1985). See *infra* note 62 and accompanying text. The Supreme Court has determined that even if a contagious individual poses a significant risk to others in the workplace, he may be "otherwise qualified" if "reasonable accommodations" eliminate the risk of communicating the disease. *School Bd. of Nassau County, Florida v. Arline*, 480 U.S. 273, 287 n.16 (1987). See *infra* notes 24-33 and accompanying text.

9. 29 U.S.C. § 794 (1985). See also S. Report No. 1297, 93d Cong., 2d Sess. 37-38, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6388-89.

10. 28 C.F.R. § 41.32 (1988).

11. 29 U.S.C. § 706(7)(B)(i) (1985). According to the Department of Health and Human Serv-

who are regarded by others or themselves as having such an impairment.<sup>12</sup> In 1987, however, Congress amended this definition in the employment context.<sup>13</sup> This amendment embodied in the Harkin-Humphrey amendment to the Civil Rights Restoration Act, excludes from the Act's protection contagious individuals who, because of their disease or contagion, either "constitute a direct threat to the health or safety of other individuals," or are unable to perform their employment duties.<sup>14</sup> Under the Act and regulations issued pursuant to it, an employer cannot discriminate against an individual because of his handicap if reasonable accommodation is both possible and effective to eliminate danger of transmission in the workplace.<sup>15</sup>

## II. HISTORY OF COVERAGE UNDER THE REHABILITATION ACT

Prior to the issuance of the 1988 Memorandum, the Justice Department, federal agencies and courts held divergent views on the level of protection the Act gives to asymptomatic AIDS victims.

Initially, the Justice Department, in a 1986 Memorandum, denied individuals infected with the HIV virus (widely believed to be the cause of

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ices, major life activities include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 28 C.F.R. § 41.31(b)(2) (1988). This definition includes employment and education. *See, e.g., Kohl v. Woodhaven Learning Center*, 672 F. Supp. 1226, 1236 (W.D. Mo. 1987) (hepatitis B carrier admitted to federally funded life-skills and vocational facilities).

12. 29 U.S.C. § 706(7)(B)(ii) (1985). Persons with a record of impairment include those who have previously had impairment symptoms but who are no longer symptomatic. *School Bd. of Nassau County, Florida v. Arline*, 480 U.S. 273, 277 (1987) (hospitalization established record of impairment). Asymptomatic HIV-seropositive individuals, having never had symptoms of the disease, do not fall within this category. This distinguishes AIDS from other seropositive diseases such as tuberculosis and hepatitis B, whose asymptomatic victims have a previous record of impairment. PRESIDENTIAL COMM'N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, REPORT (June 24, 1988).

13. 29 U.S.C. § 706(7)(B)(iii) (1985). The Department of Health and Human Services (HHS) considers persons "regarded as having an impairment" to include 1) victims who have impairments that do not limit major life activities but who are treated by the HHS as being impaired, 2) persons who are impaired solely as a result of the attitudes of others, and 3) those persons who have no impairments but are treated by the HHS as impaired. 28 C.F.R. § 41.31(4) (1988). Courts, viewing asymptomatic HIV-seropositive individuals as having neither an impairment record nor a present impairment, justified coverage under the Act if others perceived HIV-infected individuals as handicapped. *See, e.g., Doe v. Centinela Hospital*, No. CV 87-2514 (C.D. Cal. 1988) (WESTLAW 81776), discussed *infra* note 33.

14. Pub. L. No. 100-259, § 9, 102 Stat. 28, 31 (1988) (amending 29 U.S.C. § 706(7) (1982)) [hereinafter Harkin-Humphrey amendment].

15. *Id.*

AIDS)<sup>16</sup> handicapped status if fear of contagion explained the alleged discrimination.<sup>17</sup> Further, neither the Department of Labor (DOL) nor the Department of Health and Human Services (HHS), the agencies authorized to draft regulations enforcing the Act, explicitly referred to the HIV-seropositive condition in their regulations.<sup>18</sup> Both Departments evaded the question of whether programs covered by the Act could legally discriminate against asymptomatic HIV-seropositive individuals, but implied victims with symptomatic AIDS—those persons displaying symptoms of AIDS<sup>19</sup>—might be handicapped because they exhibit disorders.<sup>20</sup>

Even recently, a June 1988 Presidential Commission report<sup>21</sup> did not definitively state whether asymptomatic HIV-seropositive individuals were protected under the Act. The Commission concluded that because neither the Justice Department nor the HIV-seropositive individuals themselves considered the condition a handicap the Act might not be the most appropriate vehicle to address discrimination based on this condition.<sup>22</sup>

Despite the views expressed by the Justice Department and agencies, effectively resulting in no protection under the Act for asymptomatic carriers of the HIV virus, courts have uniformly provided carriers and vic-

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16. Selwyn, *What is Now Known, II Epidemiology*, HOSP. PRAC., June 15, 1986, at 127.

17. *Memorandum of the U.S. Department of Justice, Office of the Legal Counsel for Ronald E. Robertson, General Counsel, Department of Health and Human Services*, 12 Daily Lab. Rep. (BNA) 122 (June 25, 1986) [hereinafter *1986 Memorandum*]. The Justice Department concluded that although the Rehabilitation Act prohibited discrimination against a victim displaying disabling effects of AIDS, it did not prohibit one from discriminating because of a victim's ability to transmit the disease.

Following the Justice Department's release of its *1986 Memorandum*, The American Medical Association immediately criticized the Justice Department for being influenced by hysteria and for not using sound medical judgment. The American Medical Association declared "reasonable medical judgment" should be basis for employment decisions concerning AIDS victims as well as other handicapped individuals, not the irrational fears encouraged by the Justice Department opinion. *DOJ Policy on AIDS is Wrong, AMA Says*, 24 Govt. Empl. Rel. Rep. (BNA) 1023 (1986).

18. Health and Human Service regulations are codified at 45 C.F.R. § 84; the Labor Department regulations are codified at 29 C.F.R. § 32. Congress authorized these two departments to draft regulations implementing enforcement of the Act.

19. Victims of AIDS and ARC manifest symptoms that impair their major life activities. 28 C.F.R. § 41.3 (1988).

20. *1988 Memorandum, supra* note 1, § II(B) n.8 (citing U.S. DEPARTMENT OF HEALTH SERVICES, SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 32 (1986)).

21. PRESIDENTIAL COMM'N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, REPORT (June 24, 1988).

22. *Id.*

tims of this disease or AIDS Related Complex (ARC) protection under the Act. While the Supreme Court has not yet addressed this precise issue, it did consider coverage of seropositive tuberculosis victims in *School Board of Nassau County, Florida v. Arline*.<sup>23</sup> In *Arline*, an employer discriminated against a teacher who previously suffered from tuberculosis, was still capable of transmitting the disease, but was at the time of the discrimination asymptomatic.<sup>24</sup> The Court opined that the relevant analysis for determining whether an individual is protected under the Act includes two separate inquiries. First, the individual must have, or be regarded by others as having, a physical or mental impairment<sup>25</sup> limiting a major life activity.<sup>26</sup> If satisfied, this first inquiry results in a finding that the individual is handicapped under section 706(7). Secondly, the individual must be otherwise qualified for the program.<sup>27</sup> More specifically, the individual must be "able to meet all of a program's requirements in spite of his handicap."<sup>28</sup> In making this second inquiry, the Court stated that initially four specific factual determinations must be made: first, how the disease is transmitted; second, how long the individual is infectious; third, the severity of the risk of transmittal; and finally, the provableness of transmittal.<sup>29</sup> After making these factual determinations, concluded the Court, a finding must be made as to whether the employer can reasonably accommodate the employee.<sup>30</sup>

Using this framework the Court determined that the plaintiff was handicapped and held that the Rehabilitation Act prohibited the employer from discharging her unless the employer could prove on demand that *Arline* was not otherwise qualified under the second inquiry above.<sup>31</sup> The *Arline* holding unquestionably applies by analogy to AIDS or ARC

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23. 480 U.S. 273 (1987).

24. *Id.* at 280-81.

25. 29 U.S.C. § 706(7) (1985). The Department of HHS defines "physical impairment" at 28 C.F.R. § 41.31(b)(7) (1988). On the facts of *Arline* the Court found that past hospitalization because of the handicap constituted a record of impairment. 480 U.S. at 281.

26. 29 U.S.C. § 706(7) (1985). Major life activities include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. § 41.31(b)(2) (1988).

27. 29 U.S.C. § 794 (1985).

28. 480 U.S. at 287 n.17 (citing *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)).

29. 480 U.S. at 287 .

30. *Id.* This requirement comes from regulations issued by the Department of HHS, codified at 28 C.F.R. § 41.32 (1988).

31. 480 U.S. at 285.

victims because they, too, have a record of impairment.<sup>32</sup> Indeed, within one year of that decision a federal district court in California, relying on *Arline*, held that symptomatic, seropositive carriers of the HIV virus were handicapped within the meaning of the Act.<sup>33</sup> The Court, however, explicitly rejected an automatic extension of its rationale to asymptomatic AIDS-infected individuals who do not have a record of impairment.<sup>34</sup>

In the absence of any definitive response from the Supreme Court in *Arline*, two lower courts have assumed asymptomatic AIDS is a handicap. In *Local 1812, American Federation of Government Employees v. United States Department of State*<sup>35</sup> a union sought a preliminary injunction to prevent the Department of State from requiring its employees to be tested for the HIV virus. Although the district court rejected plaintiff's allegation that the testing program violated section 794 of the Act by discriminating against handicapped individuals with the virus<sup>36</sup> the court did hold that "there is no doubt that a known carrier of the [HIV] virus . . . is perceived to be handicapped."<sup>37</sup> Further, the court upheld the Department of State's position that even those infected individuals who do not yet display symptoms—asymptomatic carriers—are handicapped within the meaning of the Act.<sup>38</sup> The court did not enunciate a rationale for its conclusion but instead turned its attention to whether the handicapped individual was otherwise qualified to perform his job.<sup>39</sup> If other legitimate reasons unrelated to his HIV infection disqualified the

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32. See, e.g., 1988 Memorandum, *supra* note 1, II(A).

33. In *John Doe v. Centinela Hosp.*, No. CV 87-2514 (C.D. Cal. 1988) (WESTLAW 81776), the plaintiff was denied access to a residential drug rehabilitation program because he tested positive for seropositive AIDS. The California district court stated that to prevail under § 794 of the Act a plaintiff must establish under HHS regulations that "1) he is an 'individual with handicaps' under the Act; 2) he is 'otherwise qualified' for the program of benefits from which he has been excluded; 3) he has been excluded 'solely' because of his handicap. . . ." 28 C.F.R. § 41, subpart C (1988).

The court determined that the defendant hospital perceived the plaintiff as having an impairment affecting a major life activity: learning. This perception rendered the plaintiff handicapped under the Act. See 28 C.F.R. § 41.31(b)(4) (1988). Moreover, this perceived impairment—inability to participate in a learning situation—was substantial because he was excluded entirely from the program due to his handicap. 29 C.F.R. § 32.4 (1988). The court denied the plaintiff's motion for summary judgment on the second and third elements outlined above, but reserved resolution of those issues for trial.

34. 480 U.S. at 282 n.7.

35. 662 F. Supp. 50 (D.D.C. 1987).

36. *Id.* at 54-55.

37. *Id.* at 54.

38. *Id.*

39. *Id.*

applicant, stated the court, the Act did not protect him.<sup>40</sup>

In *Ray v. School District of DeSoto County*<sup>41</sup> a United States district court sitting in Florida also left unexplained its implicit finding that asymptomatic HIV-seropositive individuals were handicapped and, thus, protected by the Act.<sup>42</sup> In *Ray*, children carrying the HIV virus were removed from school classrooms in both Florida and Alabama. A Florida district court granted the parents' motion for a preliminary injunction to prevent the Florida school from denying the children admission to the school.<sup>43</sup> The court based its decision on a determination that the parents were likely to succeed on the merits of their discrimination suit which alleged that the Florida school discriminated against handicapped individuals in violation of the Act.<sup>44</sup> Without discussion, the court cited *Arline* in support of its implicit conclusion that asymptomatic carriers of the AIDS virus are handicapped within the meaning of the Act.<sup>45</sup>

The district court decisions in *Local 1812* and *Ray* effectively expanded the Supreme Court's interpretation of the Rehabilitation Act to provide both symptomatic and asymptomatic carriers of the AIDS virus with protection. However, these courts did this without providing any reasoning or support for their conclusion other than the *Arline* decision. Hence, as of 1988, the Justice Department, regulatory agencies, and the courts collectively failed to provide asymptomatic carriers of the HIV virus with any reliable protection from discrimination under the Act.

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40. *Id.* (finding individual not otherwise qualified for Foreign Service duty).

41. 666 F. Supp. 1524 (M.D. Fla. 1987).

42. *Id.* at 1530-31.

43. *Id.* at 1538. The court held, "Unless and until it can be established that these boys pose a real and valid threat to the school population of DeSoto County, they shall be admitted to the normal and regular classroom settings, to which they are respectively educationally entitled." *Id.* at 1535 (emphasis in original). The court relied on testimony of local health officials and an amicus curiae brief filed by the American Medical Association in determining the children posed virtually no risk of infecting the other children or teachers by nonsexual contact. *Id.* at 1530. The court did, however, require that the *Ray* children avoid contact sports in school, stringently comply with guidelines of the Centers for Disease Control, and commit to frequent medical examinations after which they were required to submit a report to the court. *Id.* at 1537-38.

44. *Id.* at 1536.

45. The court reached this conclusion by acknowledging that the children were not symptomatic carriers of the HIV virus. *Id.* at 1533 (finding no. 39). The court then concluded without any analysis that under the framework provided by the *Arline* court the plaintiffs were likely to succeed in proving that their children were unlawfully discriminated against as handicapped individuals under the Act. *Id.* at 1536.

### III. THE 1988 DEPARTMENT OF JUSTICE MEMORANDUM

In September 1988 the Department of Justice, at the request of President Reagan,<sup>46</sup> issued a second opinion embracing its views on the Act's coverage of AIDS-infected individuals.<sup>47</sup> In the Memorandum containing its revised opinion the Justice Department effectively reversed its prior position and endorsed the expansion of the Act's protection to asymptomatic and symptomatic carriers of the AIDS virus because they were likely to be handicapped. Perhaps most notably, the Justice Department provided courts with alternative rationales on which they could both base future opinions and harmonize the previous decisions of *Local 1812* and *Ray*.

According to the Department of Justice, *Arline* established that symptomatic victims of AIDS and ARC—a less severe form of AIDS—were handicapped under the Act because both the manifested symptoms and the necessary hospitalization substantially impaired major life activities.<sup>48</sup> From this premise, the Department split its analysis of the Act's applicability to asymptomatic carriers between nonemployment and employment related contexts.

#### A. Nonemployment Context

Using the two part inquiry set forth in *Arline*,<sup>49</sup> the Department first found that asymptomatic carriers are handicapped because they are physically impaired. The Department reached this conclusion by focusing on subclinical manifestations of the infection<sup>50</sup> and the Surgeon General's determination that although HIV-seropositive individuals outwardly may appear healthy, they nonetheless exhibit detectable abnormalities that impair their immune systems.<sup>51</sup> Furthermore, this physical impairment substantially limits major life activities of asymptomatic

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46. Memorandum for the Attorney General from President Ronald Reagan, 24 WEEKLY COMP. PRES. DOC. 1007 (Aug. 5, 1988).

47. 1988 Memorandum, *supra* note 1.

48. *Id.* § II(A).

49. *See supra* notes 24-33 and accompanying text.

50. 1988 Memorandum, *supra* note 1, § II(B)(1). HIV infection results in alteration of the genetic makeup of 14 cells. Although the infection may remain latent for a period of time, the infected cells will most likely be activated in the future, and progress into symptomatic AIDS. Fauci, *The Human Immunodeficiency Virus: Infectivity and Mechanisms of Pathogenesis*, 239 SCIENCE 617, 618-19 (Feb. 5, 1988).

51. 1988 Memorandum, *supra* note 1, § II(B).



carriers. The Department offered two alternative rationales for this conclusion.

First, the individual may be substantially limited because he cannot engage in procreation and intimate personal relations to the same extent as noninfected persons. The Department of Justice interpreted the list of major life activities enumerated by HHS<sup>52</sup> to be merely suggestive, not exclusive, of limiting activities.<sup>53</sup> Therefore, based upon present medical knowledge, the Department opined that the major life activity of, for example, bearing healthy children would be substantially limited for AIDS-infected individuals because of the risk of intrauterine HIV virus transmission. Moreover, if an HIV-infected individual should choose to forego procreation or intimate relations because of his knowledge of the possible effects of his seropositive condition, the scope of this major life activity would also be substantially limited.<sup>54</sup>

The second possible rationale offered by the Department in support of its conclusion focused on how others react to knowledge that the individual is infected. For example, even though the disease may not affect the individual's ability to work, a coworker could nevertheless effectively limit the individual's ability to work because of a negative reaction.<sup>55</sup> Thus, according to the Justice Department, if another person's knowledge of the HIV-infection effectively escalates an insubstantial impairment to one of substantial proportions, the Rehabilitation Act protects the HIV-seropositive individual.<sup>56</sup>

After concluding that under either of the above rationales both symptomatic and asymptomatic carriers of the HIV virus are handicapped within the meaning of section 706(7) of the Act, the Justice Department

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52. 28 C.F.R. § 41.31(b)(2) (1988).

53. 1988 Memorandum, *supra* note 1, § II(A)(2).

54. The Justice Department recognized that not all HIV-infected individuals will react responsibly and that some may not change their sexual behavior. If a court determined that the infected individual failed to show such regard for his offspring or sexual partners, this rationale for handicapped inclusion would not apply. 1988 Memorandum, *supra* note 1, § II(B)(2)(a).

55. *Id.* at § II(B)(2)(b). The Justice Department referred to *Arline*, in which the Supreme Court determined that an impairment "could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 1988 Memorandum, *supra* note 1, § II(B)(2)(b) (citing *School Bd. of Nassau County, Florida v. Arline*, 480 U.S. 273, 283 (1987)). See *supra* notes 22-33 and accompanying text.

56. 1988 Memorandum, *supra* note 1, § II(B)(2)(b). The Justice Department referred to *Centinela*, in which the court held that a hospital's exclusion of an asymptomatic HIV-infected individual from participation in its drug abuse program substantially limited the individual's major life activity of learning. See *supra* note 33.

turned to the second prong of the *Arline* analysis: the requirement that the individual must be "otherwise qualified."<sup>57</sup> The Department endorsed the *Arline* Court's holding that before a court can determine if a handicapped individual is otherwise qualified, four factual findings must be made with respect to the nature of the disease and the risk of transmittal.<sup>58</sup> For example, if an individual poses a real risk of infecting others as a result of his inclusion in the program or activity, he might not be otherwise qualified.<sup>59</sup> The ability to discriminate against an infectious person, however, is tempered by the requirement that the program or activity administrator be unable to make reasonable accommodation<sup>60</sup> to eliminate the risk of transmission.<sup>61</sup> Consequently, as AIDS progresses, an HIV-infected individual might suffer substantial limitations in physical or mental capacities that could not be accommodated reasonably,<sup>62</sup> resulting in a finding that the individual is not otherwise qualified.<sup>63</sup>

### B. Employment Context

In its evaluation of whether asymptomatic and symptomatic carriers of the AIDS virus are both protected from discrimination in the employment context by the Act, the Justice Department first recognized that

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57. 1988 Memorandum, *supra* note 1, § II(C).

58. See *supra* note 29 and accompanying text for the *Arline* Court's enunciation of these four considerations.

59. For a discussion of the means of AIDS infection, see *supra* note 5.

60. See *supra* note 15 and accompanying text. *Arline* offered two guidelines for determining when an employer's refusal to accommodate a handicapped individual was reasonable: 1) reasonable accommodation does not require undue financial or administrative burdens on the employer, and 2) the employer is not required to make fundamental alterations in the nature of the program. 480 U.S. at 287 n.17.

61. The Justice Department encouraged reviewing courts to conduct individualized inquiries to determine the nature and severity of the risk, the probability that the disease would be transmitted and cause harm, and the degree of potential harm. After thus defining the risk, courts should evaluate whether the employer could reasonably accommodate the employee. 1988 Memorandum, *supra* note 1, § II(C).

62. The Justice Department recognized the "otherwise qualified" requirement may depend upon how far the HIV infection has progressed. The DOJ predicted that although safety would not generally be a concern during the earliest stages of AIDS, some instances may exist in which even at the onset of HIV infection courts find a significant health hazard not subject to reasonable accommodation. *Id.*

63. The Justice Department suggests that certain infected health care workers may pose a significant threat to the health of others in the advanced stages of their infections. Likewise, persons having responsibility for the safety of others, such as air traffic controllers, might endanger the safety of others because of the disabling dementia of AIDS. *Id.*

It is worth noting that the transmission probability in the normal employment context is slight. 1988 Memorandum, *supra* note 1, § II(C).

“handicapped” individuals are defined differently in the employment context than for other purposes. As a consequence of the recently enacted Harkin-Humphrey Amendment, persons constituting “a direct threat to the health and safety of other[s]” or who cannot perform their job responsibilities because of a contagious disease or infection are not handicapped within the meaning of section 706(7).<sup>64</sup> The Justice Department regarded this exception as setting specific requirements for determining who is “otherwise qualified” under the Act in the employment context.<sup>65</sup> This interpretation led the Department to conclude that both symptomatic and asymptomatic individuals are handicapped under the Act with the only difference being that in the employment context symptomatic (contagious) individuals cannot pose a direct threat to others and must be able to perform their job duties.

Further, the Department stated that employers must make reasonable accommodations<sup>66</sup> to include both symptomatic and asymptomatic individuals in the work setting;<sup>67</sup> before an employer may exclude these individuals, he must determine whether accommodation is possible and whether such accommodation would eliminate the danger in employing the HIV-infected individual.<sup>68</sup>

In sum, the Justice Department concluded that both symptomatic and asymptomatic carriers of the HIV virus are handicapped within the meaning of the Act in the context of both nonemployment and employment settings. This conclusion was only qualified by the exception that in the employment context an individual with a contagious disease or infection must not pose a risk to coworkers and must not prevent him from performing his job responsibilities.

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64. Harkin-Humphrey amendment, *supra* note 14.

65. 1988 Memorandum, *supra* note 1, § II(B), quoting Senator Harkin and Representatives Owens and Weiss.

66. See *supra* note 14 and accompanying text.

67. 1988 Memorandum, *supra* note 1, § II(C). The Justice Department supported its conclusion by looking at the legislative history of the Harkin-Humphrey Amendment and noting both Congress' awareness of the reasonable accommodation requirement developed by the HHS and courts and its incorporation of that requirement into the Amendment.

68. The DOJ referred again to the *Arline* guidelines concerning reasonable accommodation. If the HIV-infected employee is otherwise qualified and the job's existing personnel policies offers reasonable alternative employment with the same employer, the employer should provide that alternative employment. For example, a teaching hospital would be required to offer an HIV-infected surgeon a teaching position in place of his surgery position, eliminating the risk the surgeon might infect a patient. Limited job assignment flexibility or continued strong risk might preclude reasonable accommodation. *Id.*

#### IV. COMPARISON WITH CASE LAW

The Justice Department's reversal in position restates what courts and medical authorities had already determined: no legal or medical reasons exist for discriminating against AIDS victims.<sup>69</sup> The Supreme Court in *Arline* provided the precedent for coverage of symptomatic HIV-infected individuals under the Rehabilitation Act. Lower courts had specifically extended Rehabilitation Act coverage to asymptomatic HIV-infected individuals.<sup>70</sup> The Justice Department reiterated and reinforced the protection previously afforded by these courts and simultaneously provided them with rationales to support these prior decisions. Additionally, the Department outlined the relationship between the Harkin-Humphrey Amendment and the Act. Yet despite these clarifications, the Memorandum failed to address other intricacies in the Act.

The 1988 Memorandum outlined the Justice Department's recommended analysis for treatment of AIDS-infected individuals under the Rehabilitation Act. The courts in *Ray*<sup>71</sup> and *Local 1812*<sup>72</sup> based their decisions on an assumption that individuals with asymptomatic seropositive AIDS are handicapped.<sup>73</sup> The 1988 Memorandum provides two alternative theories by which one may reach the conclusion that asymptomatic, like symptomatic, victims have substantial limitations on major life activities resulting in handicaps: 1) the theory that interference with an individual's ability or decision to procreate or have intimate relations is a substantial limitation of major life activity, and 2) the theory that by excluding an HIV-infected individual from normal life activities effectively imposes substantial limitations on the individual.<sup>74</sup> Courts had not previously relied upon the first reasoning in any context and had only relied on the second as it related to asymptomatic carriers with a prior history of impairment.<sup>75</sup>

Despite the foregoing beneficial results of the 1988 Memorandum, the

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69. *Justice Department Reverses Itself on Status of AIDS Victims Under Rehabilitation Act*, 195 Daily Lab. Rep. (BNA) (Oct. 7, 1988).

70. See *Ray*, 666 F. Supp. 1524 (N.D. Fla. 1987); *Local 1812*, 662 F. Supp. 50 (D.D.C. 1987).

71. 666 F. Supp. 1524 (N.D. Fla. 1987).

72. 662 F. Supp. 50 (D.D.C. 1987). See *supra* notes 29-32 and accompanying text.

73. See *supra* notes 37, 45 and accompanying text.

74. 1988 Memorandum, *supra* note 1, § II (B)(1)-(2).

75. See, e.g., *John Doe v. Centinela Hosp.*, No. CV 87-2514 (C.D. Cal. 1988) (WESTLAW 81776) (perception of federal program administrator that asymptomatic AIDS victim with prior history of impairment was unable to participate in learning situation resulted in finding that victim was handicapped). See also *supra* note 33 for further discussion of *Centinela*.

Justice Department failed to take this opportunity to address another previously unresolved question: When does a limitation on major life activities become substantial?<sup>76</sup> If one person entirely excludes an HIV-infected individual from participation in a major life activity, that exclusion transforms nondiscrimination into discrimination against a handicapped individual.<sup>77</sup> If the limitation results in only partial exclusion from a major life activity, for example, separated work settings, courts must determine whether the limitation substantially impairs a major life activity. Thus, courts must identify the elusive point at which a limitation becomes substantial.

Further, the Justice Department's discussion of an individual's reaction to the knowledge that he is HIV-seropositive is also problematic. According to the Justice Department, substantial impairment exists if an HIV-infected individual reacted to his infection by abstaining from procreation or intimate relations.<sup>78</sup>

This distinction classifies some HIV-infected individuals as handicapped while excluding others who, because they lacked normative judgment, did not refrain from engaging in major life activities. Although the disregard for the health and safety of one's sexual partner is contemptible, poor judgment, ignorance, or lack of conscience are not exceptions to coverage under the Act.<sup>79</sup>

The Justice Department instructed courts to make individualized investigations in light of current medical knowledge to determine whether an individual is handicapped. Yet, the Department itself ignored the available medical opinion of the Surgeon General who concluded that "persons with HIV infection are clearly impaired" because they "exhibit detectable abnormalities of the immune system."<sup>80</sup> Had the Justice Department incorporated the Surgeon General's opinion, proof of that fact alone would classify HIV-infected persons as handicapped. Consequently, the Justice Department lost an opportunity to classify the ability to live free of the infection as a major life activity.

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76. The court in *Centinela*, No. CV 87-2514 (C.D. Cal. 1988) (WESTLAW 81776), among others, left open this question.

77. 1988 Memorandum, *supra* note 1, § II(B)(2)(b).

78. *Id.* § II(B)(2)(a).

79. Furthermore, the Department of Health and Human Resources considers mental and psychological disorders handicaps. An individual who knowingly transmits the AIDS virus arguably displays evidence of mental disorder that in itself renders him handicapped. 28 C.F.R. § 41.31(b)(2) (1988).

80. *Koop Letter*, *supra* note 2.

Finally, although the 1988 Memorandum does not alter the rule that a handicapped individual who can be reasonably accommodated is "otherwise qualified,"<sup>81</sup> the Justice Department did not clarify what constitutes reasonable accommodation.<sup>82</sup> Courts in the future will have the Herculean task of determining what is an undue financial hardship and what constitutes a fundamental change in the employment program.

## V. CONCLUSION

Although the Justice Department issued its Memorandum only after courts had struggled with the issue of the Act's coverage, the Department is to be commended for remedying the absurdity of its 1986 position. Previously, the Justice Department considered only symptomatic HIV-infected individuals to be handicapped under the Act. In 1986 the Justice Department viewed asymptomatic carriers to be less threatening<sup>83</sup> to employers in terms of added hardship or expense<sup>84</sup> than victims of symptomatic AIDS.<sup>85</sup> The 1986 Memorandum allowed discrimination against asymptomatic HIV-infected individuals although, according to medical knowledge at the time, the probability of an asymptomatic HIV infection developing into AIDS or ARC was considered slight.

In the 1988 Memorandum, on the other hand, the Justice Department finally joined the courts, recognizing that discrimination against HIV-seropositive individuals is acceptable *only* if employers have a realistic fear of contagion that reasonable accommodation cannot eliminate.

The 1988 Memorandum does not altogether eliminate discrimination against HIV-infected individuals. Discrimination may continue if the individual is not "substantially limited" in major life activity unless courts find, after further consideration, HIV-infection manifestations them-

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81. 1988 Memorandum, *supra* note 1, § III(C).

82. See *School Bd. of Nassau County, Florida v. Arline*, 480 U.S. 273, 287 n.17 (1987).

83. When the Justice Department issued its 1986 Memorandum, the U.S. Public Health Service estimated that between 20% and 30% of asymptomatic individuals testing HIV-seropositive might develop AIDS by the year 1991. Now, the Surgeon General suggests that virtually all infected individuals will eventually develop the disease. *Ray v. School Dist. of DeSoto County*, 666 F. Supp. 1524, 1529-30 (1987).

84. An employer can anticipate increased insurance costs, lost hours, and forfeited training time when employees develop symptomatic AIDS.

85. The report of the President's Commission stressed that added health care costs, customer preference, and adverse employment action will be insufficient reasons for discrimination against the handicapped. These added costs and problems do not become evident until an individual shows symptoms of AIDS. PRESIDENTIAL COMM'N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, REPORT (June 24, 1988) at 11.

selves represent a substantial impairment. Nonetheless, the Justice Department has taken a significant step toward accepting the medical profession's view that persons infected with the AIDS virus, including individuals who are not yet symptomatic, are indeed handicapped.

*Gail Bass*

