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The Americans with Disabilities Act (ADA) Coverage of Contagious Diseases

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Summary

The Americans with Disabilities Act, ADA, 42 U.S.C. §§12101 *et seq.*, provides broad nondiscrimination protection for individuals with disabilities in employment, public services, public accommodations and services operated by private entities, transportation, and telecommunications. As stated in the act, its purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Due to recent concern about the spread of highly contagious diseases such as epidemic influenza[1] questions have been raised about the application of the ADA in such situations. This report briefly discusses the Americans with Disabilities Acts' statutory provisions relating to contagious diseases and relevant judicial interpretations. It will be updated as necessary.

Statutory Language and Legislative History

The Americans with Disabilities Act has often been described as the most sweeping nondiscrimination legislation since the Civil Rights Act of 1964 and provides protections against discrimination for individuals with disabilities.[2] The threshold issue when discussing the applicability of the ADA is whether the individual in question is a person with a disability. Generally, individuals with serious contagious diseases would most

[1] See e.g., Michael T. Osterholm, "Preparing for the Next Pandemic,"*Foreign Affairs* [http://www.foreignaffairs.org/20050701faessay84402/michael-t-osterholm/preparing-for-the-next-pandemic.html] (July/August 2005). For a discussion of other legal issues relating to epidemics see CRS Report RL31333, *Federal and State Isolation and Quarantine Authority*, by Angie A. Welborn and CRS Report RS21414, *Mandatory Vaccinations: Precedent and Current Laws* by Angie A. Welborn.

[2] For a more detailed discussion of the ADA see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues* by Nancy Lee Jones.

likely be considered individuals with disabilities.[3] However, this does not mean that an individual with a serious contagious disease would have to be hired or given access to a place of public accommodation if such an action would place other individuals at a significant risk.

Title I of the ADA, which prohibits employment discrimination against otherwise qualified individuals with disabilities, specifically states that "the term 'qualifications standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[4] In addition, the Secretary of Health and Human Services (HHS) is required to publish, and update, a list of infectious and communicable diseases which may be transmitted through handling the food supply.[5] Similarly, title III, which prohibits discrimination in public accommodations and services operated by private entities, states: "Nothing in this title shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services."[6] Although title II, which prohibits discrimination by state and local government services, does not contain such specific language, it does require an individual to be "qualified" and this is defined in part as meeting "the essential eligibility requirements of the receipt of services or the participation in programs or activities...."[7] This language has been found by the Department of Justice to require the same interpretation of direct threat as in title III.[8]

Contagious diseases were discussed in the ADA's legislative history. The Senate report noted that the qualification standards permitted with regard to employment under title I may include a requirement that an individual with a currently contagious disease or infection shall not pose a direct threat to the health or safety of other individuals in the workplace and cited to *School Board of Nassau County v. Arline*, 480 U.S. 273, 287, note 16 (1987), a Supreme Court decision concerning contagious diseases and section 504 of the Rehabilitation Act of 1973.[9] Similarly, the House report of the Committee on

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[3] See *Bragdon v. Abbott*, 524 U.S. 624 (1998). The issues involving the definition of disability have been among the most controversial under the ADA. For a more detailed discussion of this complicated issue see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues* by Nancy Lee Jones.

[4] 42 U.S.C. §12113(b).

[5] 42 U.S.C. §12113(d). This provision was added in an amendment by Senator Hatch after a long debate over the Chapman Amendment which was not enacted. The Chapman Amendment would have allowed employers in businesses involved in food handling to exclude individuals with specific contagious diseases such as HIV infection. See 136 Cong. Rec. 10911 (1990)

[6] 42 U.S.C. §12182(3).

[7] 42 U.S.C. §12131(2).

[8] 28 C.F.R. Part 35, Appx A.

[9] S. Rep. No. 101-116, 101st Cong., 1st Sess. reprinted in Vol. I, Committee Print Serial No. 102-A *Legislative History of Public Law 101-336 The Americans with Disabilities Act*, prepared for (continued...)

Education and Labor reiterated the reference to *Arline* and added "[t]hus the term 'direct threat' is meant to connote the full standard set forth in the *Arline* decision."[10]

Supreme Court Decisions

School Board of Nassau County v. Arline. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, in part prohibits discrimination against an otherwise qualified individual with a disability in any program or activity that receives federal financial assistance. Many of the concepts used in the ADA originated in section 504, its regulations, and judicial interpretations. The legislative history of the ADA, as discussed above, specifically cited to the Supreme Court's interpretation of section 504 in *Arline* which held that a person with active tuberculosis was an individual with a disability but may not be otherwise qualified to teach elementary school. Footnote 16, which was referenced in the ADA's legislative history, states in relevant part that "a person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk."[11]

The Court in *Arline* examined the standards to be used to determine if an individual with a contagious disease is otherwise qualified. In most cases, the Court observed, an individualized inquiry is necessary in order to protect individuals with disabilities from "deprivation based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks."[12] The Court adopted the test enunciated by the American Medical Association (AMA) amicus brief and held that the factors which must be considered include "findings of facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm."[13] The Court also emphasized that courts "normally should defer to the reasonable medical judgments of public health officials" and that courts must consider whether the employer could reasonably accommodate the employee.[14] *Arline* was remanded for consideration of the facts using this standard and the district court held that since the teacher had had negative

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[9] (...continued)
the House Committee on Education and Labor at 139 (Dec. 1990).

[10] H.Rep. No. 101-485, 101st Cong., 2d Sess., reprinted in Vol. I, Committee Print Serial No. 102-A *Legislative History of Public Law 101-336 The Americans with Disabilities Act*, prepared for the House Committee on Education and Labor at 349 (Dec. 1990). See also 136 Cong. Rec. 10858 (1990).

[11] 480 U.S. 273, 287, ftnote 16 (1987).

[12] *Id.* at 287.

[13] *Id.* at 288

[14] *Id.*

cultures and the possibility of infection was "extremely rare," the school board must reinstate her or pay her salary until retirement eligibility.[15]

Bragdon v. Abbott. The Supreme Court in *Bragdon v. Abbott*,[16] addressed the ADA definition of individual with a disability and held that the respondent's asymptomatic HIV infection was a physical impairment impacting on the major life activity of reproduction thus rendering the HIV infection a disability under the ADA. The Court also addressed the question of what is a direct threat, finding that the ADA's direct threat language codified the Court's decision in *Arline.* In *Bragdon* the plaintiff, an individual with asymptomatic HIV infection, sought dental treatment from the defendant and was told that she would be treated only in a hospital, not in the office. The plaintiff, Ms. Abbott, filed an ADA complaint and prevailed at the district court, court of appeals and the Supreme Court on the issue of whether she was an individual with a disability but the case was remanded for further consideration regarding the issue of direct threat.

The Supreme Court provided some guidance regarding the direct threat issue in *Bragdon* stating that "the existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence." Dr. Bragdon had the duty to assess the risk of infection "based on the objective, scientific information available to him and others in his profession. His belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability." On remand for consideration of the direct threat issue, the first circuit court of appeals held that summary judgment was warranted, finding that Dr. Bragdon's evidence was too speculative or too tangential to create a genuine issue of fact.[17]

Chevron U.S.A. inc., v. Echazabal. Both *Arline* and *Bragdon* dealt with the issue of whether an individual was a direct threat to others. In *Chevron U.S.A. Inc., v. Echazabal*,[18] the Supreme Court dealt with the issue of whether an individual was a threat to himself and held unanimously that the ADA does not require an employer to hire an individual with a disability if the job in question would endanger that individual's health. The ADA's statutory language provides for a defense to an allegation of discrimination that a qualification standard is "job related and consistent with business necessity."[19] The act also allows an employer to impose as a qualification standard that the individual shall not pose a direct threat to the health or safety of other individuals in the workplace[20] but does not discuss a threat to the individual's health or safety. The ninth circuit in *Echazabal* had determined that an employer violated the ADA by refusing to hire an applicant with a serious liver condition whose illness would be aggravated through

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[15] *Arline v. School Bd. of Nassau County,* 692 F.Supp. 1286 (M.D. Fla. 1988).

[16] 524 U.S. 624 (1998).

[17] *Abbott v. Bragdon,* 163 F.3d 87 (1st Cir. 1998), *cert. den.,* 526 U.S. 1131(1999).

[18] 536 U.S. 73 (2002).

[19] 42 U.S.C. §12113(a).

[20] 42 U.S.C. §12113(b).

exposure to the chemicals in the workplace.[21] The Supreme Court rejected the ninth circuit decision and upheld a regulation by the EEOC that allows an employer to assert a direct threat defense to an allegation of employment discrimination where the threat is posed only to the health or safety of the individual making the allegation.[22] Justice Souter found that the EEOC regulations were not the kind of workplace paternalism that the ADA seeks to outlaw. "The EEOC was certainly acting within the reasonable zone when it saw a difference between rejecting workplace paternalism and ignoring specific and documented risks to the employee himself, even if the employee would take his chances for the sake of getting a job." The Court emphasized that a direct threat defense must be based on medical judgment that uses the most current medical knowledge.

Lower Court Decisions

The lower courts have dealt with a number of direct threat cases under the ADA. Although a comprehensive survey of these cases is beyond the scope of this report, they have involved a number of types of disabilities as well as varying occupations and accommodations. The disabilities at issue have often involved AIDS or HIV infection[23] or mental illness[24] but have also included hepatitis,[25] and other conditions. The various occupations have included public health care workers, public safety officers, transportation operators, food handlers and industrial workers.[26]

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[21] 226 F.3d 1063 (9th Cir. 2000).

[22] 29 C.F.R. §1630.15(b)(2).

[23] See e.g., *Montalvo v. Radcliffe*, 167 F.3d 873 (4th Cir. 1999), *cert. denied*, 528 U.S. 813 (1999), where the fourth circuit held that excluding a child who has HIV from karate classes did not violate the ADA because the child posed a significant risk to the health and safety of others which could not be eliminated by reasonable modification.

[24] See e.g., *Lassiter v. Reno*, 885 F.Supp. 869 (E.D.Va. 1995), *aff'd* 86 F.3d 1151 (4th Cir. 1996), *cert. denied*, 519 U.S. 1091 (1997), where the court found that a deputy U.S. Marshal diagnosed as suffering from delusional paranoid personality disorder presented a reasonable probability of substantial harm if permitted to carry a firearm.

[25] See e.g., *Doe v. Woodford County Board of Education*, 213 F.3d 921 (6th Cir. 2000), where the court upheld the school's decision to place a student who was a hemophiliac and a carrier of the hepatitis B virus on hold status for the varsity basketball team pending a medical clearance.

[26] For a discussion of several of these cases see Jeffrey A. Van Detta, "'Typhoid Mary' Meets the ADA: A Case Study of the 'Direct Threat' Standard under the Americans with Disabilities Act," 22 Harv. J. of Law and Public Policy 849, 868-923 (1999); and Brian S. Prestes, "Disciplining the Americans with Disabilities Act Direct Threat Defense," 22 Berkeley J. Emp. & Labor Law 409, 422-434 (2001).