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QUESTIONS AND ANSWERS ABOUT THE SUPREME COURT'S DECISION IN BRAGDON V. ABBOTT

UNDERSTANDING HOW THE AMERICANS WITH DISABILITIES ACT COVERS PEOPLE WITH HIV

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➢*What is This Case About and What Issues Did the United State Supreme Court Address*

Since the beginning of the HIV epidemic in the early 1980's, there have been irrational beliefs and myths about how HIV can be transmitted. This case provides a vivid example.

In September, 1994, Sidney Abbott arrived at the office of Bangor, Maine dentist Randon Bragdon for a previously-scheduled appointment. In response to questions on Dr. Bragdon's medical history form, Ms. Abbott answered that she had tested positive for HIV. Dr. Bragdon determined that Ms. Abbott had a cavity which required a filling, but told her that he was not willing to fill her cavity because she had HIV. Dr. Bragdon, in fact, had a written policy of refusing routine dental care to patients solely because they had tested positive for HIV.

Dr. Bragdon claims that his fear of HIV transmission from an HIV-positive patient justifies his discriminatory conduct. Scientific evidence demonstrates otherwise.

In contrast to initial popular perception, which has been slow to change, HIV is difficult to transmit. Although over one billion dental procedures have been performed by over 250,000 dental health care workers since the beginning of the HIV epidemic, and 1,000,000 individuals in the United States are estimated to be infected with HIV, there has never been a documented case of HIV transmission from an infected patient to a dental health care worker, nor from infected patient to non-infected patient. It is the position of the American Dental Association,[1] and the United States Centers for Disease Control and Prevention (CDC), which testified in this case, that people with HIV can be safely treated in private dental offices using standard infection control procedures known as "universal precautions."

Ms. Abbott sued Dr. Bragdon in federal court in Bangor, Maine under the Americans with Disabilities Act (ADA). The ADA, a landmark federal civil rights law passed in 1990,

prohibits discrimination on the basis of "disability" in employment, public services, and places of public accommodation (including medical and dental offices). Dr. Bragdon claimed that Ms. Abbott did not have a disability and that, even is she did, providing routine dental treatment to a patient with HIV was a "direct threat to the health or safety of others," a defense to discrimination under the ADA. In December, 1995, the federal trial court ruled in Ms. Abbott's favor, and the United States of Appeals for the First Circuit affirmed that decision in March, 1997. Both of these courts concluded that the ADA protects people who are HIV-positive even if they do not have an AIDS diagnosis or outward signs of illness. In addition, both courts ruled that Dr. Bragdon's fear of potential HIV transmission was nothing more than "speculation" and "conjecture," and was therefore not a basis for exemption from the ADA's anti-discrimination provisions.

In its first opportunity to consider discrimination against people living with HIV, the United States Supreme Court addresses two critical issues:

First, whether all people living with HIV, including those who do not have an AIDS diagnosis or outward signs of illness, are protected from discrimination under the ADA.

Second, whether trial courts should give deference to the positions of public health authorities, such as the CDC, when determining whether a claimed fear of potential transmission of a contagious disease, such as HIV, can be justification for blatant discrimination under the ADA.

➢*How Can Individuals Who Do Not Have Outward Signs of Illness be Considered to Have a "Disability" Under the ADA? Isn't it Harmful to Portray All People with HIV as Disabled?*

The use of the term "disability" has been the subject of much confusion among judges, the media, and the general public. The ADA does not use the term "disability" in the popular or colloquial sense. The notion that the ADA prohibits discrimination only against individuals who are significantly debilitated or who appear outwardly ill reflects a fundamental misunderstanding of the statute. In the ADA, Congress created a broad definition of "disability" to eradicate discrimination against individuals with a wide range of serious health conditions – such a cancer, epilepsy, HIV, diabetes, blindness, or deafness. Congress did not want individuals who were capable of working and participating in community life to be prevented from doing so because of stereotypes and ignorance against a serious health condition. Indeed, Congress states in the ADA that "some 43,000,000 Americans [one of every six Americans] have one or more physical or mental disabilities."

The ADA's definition of "disability" is therefore much broader than the definition of disability in the Social Security Act, which provides cash benefits to people who are unable to work due to their health condition. In other words, being an individual with a "disability" under the ADA confers no benefits and is of no relevance unless one is discriminated against. The only right that an individual has under the ADA is the simple right not to be discriminated against in employment and access to public accommodations.

Congress, however, did not specify any disease or condition as a "disability" in the text of the statute. Rather, Congress used broad, general language (a health condition which "substantially limits one or more major life activities") to fulfill the goal of prohibiting discrimination against people with a wider range of serious health conditions, while excluding coverage of trivial or short-lived conditions such as a broken ankle or the flu.

GLAD argued on behalf of Ms. Abbott in the Supreme Court, that the phrase "substantial limitation of a major life activity" simply refers to a health condition which has the effect of making an important life activity more difficult. Based on this expansive language, every person with HIV should be protected from discrimination under the ADA. HIV infection, at every stage of the disease, has a profound impact on many aspects of a person's life, including procreation, parenting, and sexual activity, as well as maintaining one's health due to the need for lifelong medical care and burdensome treatment regimens. Even planning for the future and making decisions about such matters as family, working, education and finances are made more difficult when a person is diagnosed with an incurable and terminal disease.

➢*What Is the Basis for the Supreme Court's Conclusion that Sidney Abbott is Protected Under the ADA? Since the Court Focused on the Major Life Activity of Procreation, Will the ADA's Anti-Discrimination Protections Be Available to Gay Men?*

As an initial matter, the Supreme Court agreed with GLAD that visible symptoms or illness are not a prerequisite to meeting the ADA's definitions of disability. In addition, the Court gave an expansive interpretation to the phrase "major life activity" and found that reproduction falls well within the statutory language because, among other reasons, "reproduction and the sexual dynamic surrounding it are central to the life process itself." The court also ruled that the phrase "substantially limits" only requires that significant limitations result from the health condition, and does not require that an individual be unable to engage in the major activity at issue. Although GLAD argued that HIV affects many life activities, the Court focused on procreation, ruling that Ms. Abbott was substantially limited in that major life activity because of the risk of infecting both her partner and her child.

Importantly, the language and reasoning of the Court's decision go far beyond the specific facts of Ms. Abbott's case to ensure that all people living with HIV will be covered under the ADA. In lengthy analysis, the Court endorsed long-standing interpretations of the ADA by the U.S. Department of Justice and the Equal Employment Opportunity Commission, which have found that the ADA protects all people from HIV discrimination, regardless of the presence of symptoms, in part due to the limitation on both procreation and sexual activity. The Court directed the nation's lower courts to defer to these comprehensive and unanimous agency interpretations.

➢*Aren't People with HIV Protected From Discrimination Because They are "Regarded As" Being Disabled?*

Yes. However, because the Supreme Court ruled that Ms. Abbott was limited in major life activity, it did not have to reach the "regarded as" section of the ADA's definition of disability. According to the ADA regulations, the ADA protected individuals who have no actual physical limitations, but who are denied a job or access to a place of public accommodations simply because of the prejudice or negative attitudes of others toward their health condition. This provision of the ADA is particularly important to individuals with stigmatic conditions, such as persons with HIV or persons with a cosmetic disfigurement. Congress recognized the importance of covering all people with HIV in order to combat stigma attached to the disease, particularly fear of contagion.

➢*Is Discrimination Against People with HIV Still a Significant Problem?*

Many people believe that the problem of HIV-related discrimination has been solved. Nothing could be further from the truth. In a recent editorial, the New England Journal of Medicine observed that the "prejudices, fears and legacy of discrimination associated with the [HIV] infection have deep roots in society."[2] Numerous studies demonstrate the continued stigma and discrimination associated with HIV.[3] It is particularly disturbing that well-documented discrimination against people with HIV occurs in access to routine health care.[4] These refusals to treat patients with HIV, according to former United States Surgeon General C. Everett Koop, "threaten the very fabric of health care."[5]

➢*Why is the Eradication of Discrimination Against People With HIV Critical to This Nation's Fight Against the HIV Epidemic?*

The problem of pervasive discrimination against people with HIV was a keen interest of Congress when it passed the ADA. Congress was concerned not only that discrimination harmed individuals, but also that coverage of all people with HIV under the ADA was critical to public health efforts to combat the spread of the epidemic. As the President's Commission on the HIV Epidemic stated in a report whose conclusions were adopted by Congress:

> [A]s long as discrimination occurs, and no strong national policy with rapid and effective remedies against discrimination is established, individuals who are infected with HIV will be reluctant to come forward for testing, counseling and care. This fear of potential discrimination ... will undermine our efforts to contain the HIV epidemic and will leave HIV-infected individuals isolated and alone. [6]

With no cure or vaccine available or on the horizon, efforts to control the HIV epidemic have focused on identifying individuals who are infected with HIV and counseling them about how to

prevent transmitting HIV to others. Discrimination deters people from being tested for HIV and from accessing services where they will receive such counseling.

Early detection is also critical for the medical treatment of HIV. The most effective current treatments for HIV entail the use of multi-drug antiviral therapy, including protease inhibitors, as early as possible in the process of HIV disease progression.

Moreover, fears of discrimination in setting such as the workplace or an elementary school can harm the fight against the disease in frightening ways. This is because once starting multi-drug antiviral therapy, which can involve more than thirty pills each day, an individual must adhere to a strict dosing schedule. An employee who ceased taking HIV medications at work due to fear of discrimination could develop drug-resistant virus. The drug-resistant virus could spread to others and endanger the public health.[7]

➢*Why is it Important That Courts Defer to Public Health Authorities, Such as the CDC, When Determining the Rick of Transmission of a Contagious Disease? What Legal Principle did the Court Establish on the Issue?*

In a 1987 case, School Board of Nassau County v. Arline, the United States Supreme Court established an important principle to make sure that discrimination against individuals with contagious disease could not be justified by irrational beliefs and myths. In that case, the Supreme Court directed trial courts to defer to the reasonable medical judgments of public health officials in such matters.

This principle makes perfect sense. The Supreme Court observed in the Arline case that there are "complex and often pernicious mythologies about ... the transmission of illness." and that "[f]ew aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness." In fact, at one time, many people believed that cancer was contagious. Public health officials, such as the CDC, have expertise in epidemiology and infectious disease transmission. They are in the best position to provide courts with objective scientific evidence. Deference to public health authorities is necessary to end discrimination based on unfounded fears and myths about contagious diseases, and also to ensure that people are not exposed to truly significant health or safety risks.

The Court agreed in Bragdon with GLAD's position that in evaluating the risk of transmission of a contagious disease, the views of public health authorities should be given special weight. The court stated that such decisions must be based on objective medical and scientific evidence and squarely rejected Dr. Bragdon's position that his personal beliefs about HIV transmission, even if maintained in good faith, should be given special deference.

➢*Why Did the Supreme Court Send the Case Back to the Court of Appeals for Further Proceedings? What did the Court of Appeals Rule?*

In the Bragdon case, the Supreme Court endorsed all of GLAD's legal positions on the standard for "direct threat." The Supreme Court, however, had not agreed to review the sufficiency of the factual findings below relating to the risk of HIV transmission in dentistry. Given the importance of the issues, the Supreme Court determined that is would be prudent to direct the Court of Appeals to take a second look at Dr. Bragdon's claims. The Supreme Court noted that there are "reasons to doubt whether [Dr. Bragdon] advanced evidence sufficient to raise a triable issue of fact on the significance of the risk." In fact, in its March 1997 Opinion, the Court of Appeals scrutinized all of Dr. Bragdon's evidence and ruled that it was only "speculation" or "conjecture," an insufficient basis to justify denial of care to a patient.

On December 19, 1998, the Court of Appeals reaffirmed it's prior ruling that the use of the standard infection control procedures (known as "universal precautions") renders the risk of HIV in dentistry "insignificant." The Court of Appeals again ruled that Dr. Bragdon had violated the ADA by refusing to treat an HIV-positive patient.

➢*Is it Safer to Provide Dental Care to Patients with HIV in a Hospital Setting?*

Dr Bragdon has sometime claimed that all patients with HIV should receive routine dental care only in a hospital setting. This position has no scientific basis. The CDC testified in this case that a hospital setting is not a safer environment in which to treat patients with HIV, and that no infection control procedures beyond the standard "universal precautions" are necessary to provide care to HIV-positive patients. Dr. Bragdon's own expert in this case stated that the only way in which a hospital setting reduced the risk of HIV transmission is that Dr. Bragdon would have more "time to deal with the patient" in a hospital setting.

In addition, Dr. Bragdon has never had privileges to treat a patient in any hospital. Two months after Ms. Abbott filed a complaint against him, Dr. Bragdon for the first time applied for privileges at a hospital which is a two-hour drive from his office in Bangor. He insisted that Ms. Abbott would have to pay the additional cost of a hospital surgical operatory. Dr. Bragdon's application for privileges has never been granted.

➢*What Organizations Filed "Friend of the Court" Briefs in Support of Sidney Abbott?*

A wide range of governmental, medical, public health, and civic and civil rights organizations filed or signed onto briefs in the Supreme Court in support of Ms. Abbott's position. These organizations include the: American Medical Association, Solicitor General of the United States of America, Pediatric AIDS Foundation, Infections Disease Society of America, American Nurses Association, Council of State and Territorial Epidemiologists, National Association of Public Hospitals and Health Systems, American Association of Dental

Schools, AIDS Action Council, American Association of Retired Persons, Bazelon Center for Mental Health Law, Evangelical Lutheran Church in America, National Association of Social Workers, National Council of Churches of Christ, National Hemophilia Foundation, National Multiple Sclerosis Society, Union of American Hebrew Congregations, Blind Veterans Association and many others. In addition, Senators Tom Harkin, Edward Kennedy, and James M. Jeffords, and Representatives Steny Hoyer, Henry Waxman, and Major Owens, Congressional sponsors of the Americans with Disabilities Act of 1990, filed a brief in support of Ms. Abbott. If you would like copies of Ms. Abbott's briefs or the "friend of the court" briefs filed in this case, contact GLAD at (617) 426-1350 or check our website at www.glad.org.

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[1] See American Dental Association, Policy Statement on AIDS and HIV Infection and the Practice of Dentistry (1988:457; 1991: 591)

[2] See Roger Steinbrook, M.D., Battling HIV on Many Fronts, 337 New England Journal of Medicine 11, 779-780 (1997)

[3] See National AIDS Funds Survey Finds HIV-Positive Employees May Face Continuing Discrimination, PR Newswire (October 28, 1997)(two-thirds of employees felt their co-workers would be uncomfortable around people infected with HIV and 21% would favor firing or restricting such an employee).

[4] See Elizabeth Bennett, Ph.D. et al., A National Survey: Dentists' Attitudes Toward the Treatment of HIV-Positive Patients, 126 Journal of American Dental Association 509 (April, 1995)(one-third of dentists responded that they would not treat a patient with HIV who needs are within their scope of training); C. Lewis, M.D. et al., Primary Care Physicians' Refusal to Care for Patients Infected with Human Immunodeficiency Virus, 156 Western Journal of Medicine 36 (1992)(48% of primary care physicians surveyed indicated that they had elected not to care for, or said they would not care for, patients with HIV infection).

[5] See Buffey, Doctors Who Shun AIDS Patients Are Assailed By Surgeon General, New York Times, September 10, 1987 at A-1.

[6] See Report of the Senate Committee on Labor and Human Resources on the Americans with Disabilities Act, No. 116, 101st Congress, 1st Session (1989), at p. 8.

[7] See Joyce Cohen et al., School-Related Issues Among HIV-Infected Children, 100 Pediatrics e8 (July, 1997)(reporting case of a child who hid in a school bathroom to take his medications in order to hide his HIV status

from the school nurse); Steven G. Deeks, et al., HIV-1 Protease Inhibitors: A Review for Clinicians, 227 J. Am. Med. Assn' 145 (1997)(indicating that failure to maintain a strict drug regimen can lead to drug-resistant strains of HIV).