Putting the Dis in Disability

A U.S. Court of Appeals rules that asymptomatic people with HIV are not disabled

August 1, 1995 By Catherine Hanssens

In Scott Doe v Kohn, Nast & Graf, last year's widely covered *Philadelphia*-like lawsuit brought by a promising gay Philadelphia lawyer whose was fired for having HIV, the defense attorneys from the high-powered law firm seemed wiling to try anything to derail Scott Doe's case. They even argued that Doe had no case under the Americans With Disabilities Act (ADA) because a person with asymptomatic HIV is not "disabled."

The legislative history of the ADA expressly identifies asymptomatic HIV infection as a protected disability under the Act. The federal regulations adopted to implement the law were equally clear. Courts which had considered the issue under the Rehabilitation Act of 1973 (Rehab Act) also concluded that an individual with HIV infection was protected under that law. So when the Scott Doe court concluded that Scott was a person with a disability under ADA, few observers were surprised.

But a surprise would come.

On May 15, 1995, a federal appeals court for the first time concluded asymptomatic HIV is not automatically covered under the law.

The case, *Ennis v. National Association of Business and Educational Radio, Inc.*, was brought by a bookkeeping clerk in Virginia who claimed that she was fired because her employer wanted to avoid paying for the medical bills of her HIV positive son. A month prior to her suspension, her employer had sent a memo around the office warning employees that their health benefit rates would rise f they had a couple of "very expensive cases."

The appeals court concluded that the clerk had failed to establish a sufficient connection between her termination and her employer's knowledge of her son's HIV status. The court also questioned whether her son's asymptomatic HIV status even qualified as a disability under the ADA. According to the court's novel analysis, the ADA requires for each case a specific demonstration of an individual's substantially-limiting impairment before concluding that the individual is "disabled."

What is wrong about the Appeals Court decision in *Ennis*? One important flaw in the court's reasoning is the failure to recognize the nature of HIV and the discrimination it generates, even

against family members or friends of those with HIV.

The ADA defines a person with a disability as someone who: 1) has a physical or mental impairment that substantially limits a major life activity; 2) has a record of such impairment; or 3) is regarded as having such an impairment.

Indeed, several federal appeals courts have recognized that it is the infectious nature of HIV, rather than the physical impairment, that qualifies HIV as a disability. Under the law, an infectious or contagious disease such as HIV or tuberculosis is a covered disability because of the potential for transmission through activity of contact with other persons, even if the affected person is symptom-free. For this reason most courts have not distinguished between those person with AIDS and those who have remained asymptomatic. While these decisions were made under the Rehab Act, the ADA was crafted to create virtually identical definitions of disability.

Under the third prong of the ADA's definition, it also is possible to be protected as a "disabled" person under the ADA even if one is not strictly impaired. The focus under this prong is not on the person's actual physical or mental impairment, but on the reactions of others to a perceived disability.

This third prong recognizes that the reactions of others to an impairment, real or imagined, can be as disabling as the physical limitations caused by an actual impairment. Here, the perception of the employer, not the plaintiff's health, is the key element of the test. This aspect of the ADA, is applicable to the type of discrimination raised by the *Ennis* case, where the physical limitations of the clerk's HIV positive son were not a factor in the employer's discrimination. The fear of increased insurance cost, according to the EEOC, is a "reaction" which is illegal under the ADA.

A couple of months before the *Ennis* decision was handed down, the Equal Employment Opportunity Commission (EEOC) issued a detailed memo trying to resolve any confusion over the meaning of "disability" under the ADA. According to the memo, certain "impairments" are of such a nature that it is an undisputed disability; HIV infection was deemed such an impairment.

Prior to the *Ennis* case, nearly 20 reported federal cases recognized (or at least suggested) that HIV infection is a covered disability under federal anti-discrimination laws. One appeals court in 1991 observed the "emerging consensus" on the issue. In fact, in a case decided just weeks prior to the *Ennis* decision, a panel of judges from the same court observed the lack of disagreement over HIV as a disability under the ADA.

Given the well-developed consensus that asymptomatic HIV is an undisputed disability under federal law, it seems unlikely that other jurisdictions will follow the Ennis court's direction. Employees who are fired for having HIV can rely on the cumulative weight of legislative history, case law and federal agency regulations and guidance to make their case.

But the *Ennis* case provides an important reminder: The efforts to ensure that people with HIV are protected from discrimination did not end when the ADA passed, or with other hard-fought

victories. We must be prepared to re-fight those battles in the future.

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