Skin Deep

Some AIDS disabilities are only in the eye of the beholder

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Plenty of people with HIV are fired by employers, and convincing courts this is disability-based discrimination can be a hard tow to hoe. To earn your day in court, you must first prove that having the virus is a disability covered by law. Federal agencies have made it clear that HIV infection--*with or without symptoms*--is protected under 1990's Americans with Disabilities Act (ADA), which defines a disability as an impairment that "substantially limits a major life activity," such as walking, seeing or reproducing. Typically, a person with HIV is fired as in the film *Philadelphia:* An employer spots an HIV-related symptom (a KS lesion, say) and concludes the employee has AIDS or gets information to that effect; although the Tom Hanks character is perfectly able to do his job, the firm is phobic about having a PWA in its ranks. With the ADA, Congress recognized the need to defend against fears and stereotypes about disability, including an employer's worries about safety and the reactions of coworkers and customers.

The bill also protects people who have *no* impairment but are treated as if they do (an HIV negative food handler, say, who is fired because his or her lover has AIDS). In this way, an ADA-defined disability can exist entirely in the eye of the employer. Advocates have won several discrimination cases on behalf of asymptomatic people with HIV who lost their jobs, allegedly due to poor performance, but who really were the victims of HIV-related bias. To establish that the apparently healthy plaintiffs were protected by the ADA, attorneys opted to argue that they had a major life-function impairment as a result of the limitation HIV places on the capacity to reproduce. The ability to bear children had nothing to do with the plaintiffs' job or their employers' perception that they had HIV; it merely legitimated their claim as people with an ADA-covered disability.

This strategy may now be failing. Several recent decisions have rejected reproduction as a "major life function." Courts increasingly require fired workers to document that an impairment has a real--rather than a theoretical--effect on *job function.* In turn, advocates have started to emphasize the irrational *perception* of disability, relying on the section of the ADA that protects people who are healthy but "regarded as" disabled.

Last September, advocates were encouraged when a federal court of appeals ruled that an asymptomatic HIV positive plaintiff was perceived as disabled and so was protected by the ADA. The case involved a bank representative who had a good sales record and shining reviews but was fired for poor performance soon after his managers learned he had HIV. The court focused on

evidence of a supervisor’s “panicky” reaction upon learning the rep had the virus, and concluded that according to the ADA, the attitudes of others determine whether you have a disability. But the bank appealed, and at presstime this important case was set to be re-argued in March.

An ominous footnote: in a decision last November, a court ruled that a condition controlled by medication--high blood pressure--isn’t covered by the ADA. This, and several similar rulings, have wary advocates fretting, “Could health-giving, symptom-eliminating protease inhibitors mark the end of legal protections for people with HIV?” Because these drugs have taxing side effects and difficult dosing, and because the risk of opportunistic infections diminishes but doesn’t vanish, a compelling argument can be made that in the age of protease, AIDS remains a disability. But since Reagan- and Bush-appointed judges show a steely ability to ignore legislative history and legal logic in ruling that qualified plaintiffs are outside the ADA’s reach, the argument is hardly an automatic winner. Stay tuned.

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