Supreme Sacrifice

High court limits disability protections, hanging HIVers out to dry. Arthur S. Leonard is on the case.

November 1, 1999 By Arthur S. Leonard

The Supreme Court opens its 1999–2000 term on October 4 with the usual anticipatory buzz about which cases the nine justices will decide to hear. Although AIDS has only occasionally made that list, it's clear from three controversial rulings last term that the court does not have HIVers' best interests at heart. It will be even more important for AIDS advocates to closely monitor the court's decisions this term to see if the anti-HIV trend continues. Because the court selects at most 200 cases from thousands of eligible ones, however, it's difficult to know at press time if any HIV-related ones will make the docket.

In the three worrisome decisions from last term—all handed down June 22—the court sharply limited protections under the Americans With Disabilities Act (ADA), the statute that lawyers for HIVers rely upon most in employment and public services discrimination. It's time for advocates and others concerned about the lack of rights for people with HIV to work to ensure that Congress strengthen the ADA to make it as powerful an antidiscrimination tool as originally envisioned. AIDS advocates were prominent in the coalition that worked to pass the ADA in 1990, making sure that the committee reports in the House and the Senate specified that HIVers were entitled to protection. Under the statute, an "individual with a disability" is a person who has—or has a record of having, or is regarded as having—a physical or mental impairment that substantially limits "a major life activity."

Yet the three rulings—*Sutton v. United Air Lines*, *Murphy v. United Parcel Service* and *Albertsons v. Kirkingburg*—suggest that HIVers for whom reproduction is not "a major life activity" may be out of luck. (Reproduction in this context was upheld by the court in 1998 in *Bragdon v. Abbott*.)

In the June cases, the court considered whether people with physical impairments that can be overcome through medication or assistive devices (hearing aids, glasses or prosthetics, for example) have ADA-defined "disabilities." Contrary to the view of most lower courts, the Supreme Court said no, by a vote of 7 to 2, in all three decisions. Although the congressional committee reports specified that people should be evaluated without regard to medication or assistive devices in deciding coverage questions, the Court found that the present-tense wording of the statute requires evaluating what a person actually can or cannot do, rather than speculating about which activities would be limited without medication or other assistance.

This meant, in Sutton for instance, that two women with weak eyesight were not covered *because* their vision with corrective lenses is 20/20, even though the employer used their uncorrected vision as the basis for its refusal to hire them as pilots. That ruling seems plausible enough on the surface: Who wants to be on a plane flown by someone with imperfect vision? But in reality such a decision undermines the whole purpose of the ADA, which is to ensure that people with physical or mental impairments who are able to work are not excluded from the workplace by an employer's unjustified requirements—at the end of the day, what's the difference between a pilot with 20/20 natural vision and 20/20 corrected vision? But the court decided there was no need to pay attention to what Congress explained it was doing in passing this law. It seems unlikely that a court that in *Murphy* turned down a man with medically controllable hypertension will agree that the ADA covers an asymptomatic person with HIV who is doing well on a protease regimen.

The most effective way to strengthen the ADA now would be to do an end run around the court and convince Congress to amend the statute to include the specific language from the original House and Senate committee reports. Courts at all levels would then be unable to waffle on whether Congress meant the ADA to cover people with HIV and other conditions that substantially limit a major life activity, even if their disabilities are "correctable."

Therefore, it's crucial that HIVers and their advocates get out and vote in the 2000 election—a Democratic-controlled Congress and presidency are far more likely to amend the ADA in HIVers' favor. There's another potential bonus to this approach: A Democratic president would probably choose more liberal Supreme Court justices to replace those expected to retire in the next few years.

In the end, the squabbling over the ADA would be avoided if the United States took a page from South Africa's sweeping federal civil rights law, which specifically prevents discrimination against people with HIV in all forms of public accommodation and employ-ment. But knowing how difficult it is to add such a clause to any civil rights statute here, even at the lowest local level, it may be many years before we reach that enlightened place.

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