

***Bragdon v. Abbott*: Current and Future Ramifications for Federal Employment Discrimination Law**

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Introduction

In *Bragdon v. Abbott*,¹ the Supreme Court, for the first time, held that human reproduction is a “major life activity” for purposes of the Americans with Disabilities Act (ADA).² This article analyzes *Bragdon*’s effect on administrative level, federal sector employment discrimination law³ through the Rehabilitation Act of 1973 (Rehabilitation Act).⁴ Specifically, this article will assist an installation level labor counselor, who represents the Army in administrative, not judicial, proceedings.⁵ This article focuses on when an “individualized assessment” of a complaining party’s alleged disability is required in a federal sector administrative level case.

This article first provides the basic foundation of the ADA and the Rehabilitation Act and explains why *Bragdon* is significant for federal sector employment discrimination law. Next, this article analyzes the *Bragdon* decision after examining the Plaintiff-Appellee’s position on appeal, which is critical to understanding the Court’s opinion. The following section examines Equal Employment Opportunity Commission (EEOC) federal sector decisions that cite *Bragdon* and draws conclusions about the EEOC’s interpretations of *Bragdon*. Finally, this article explains *Bragdon*’s effect on federal sector, administrative level employment discrimination law, in light of two subsequent Supreme Court employment discrimination decisions.

Two legal conclusions can be drawn from EEOC *Bragdon* related precedent. First, with one exception, *Bragdon*, as interpreted by the EEOC, stands for the proposition that decisions regarding disability-based discrimination claims require an individualized assessment of the complaining party’s alleged disability. Second, no individualized assessment is necessary for complainants infected with the human immunodeficiency virus (HIV).⁶ The EEOC conclusively presumes that all HIV infected persons have a physical impairment that substantially limits at least one major life activity.

In terms of practical advice, labor counselors should vigorously litigate how the allegedly disabling condition personally affects the complainant. Two complainants may share the same condition, yet differ greatly in how the condition affects their daily lives. Labor Counselors should not, however, vigorously pursue how an HIV infection personally affects a complainant, since HIV is presumed to substantially limit at least one major life activity. In these cases, a labor counselor should ensure the complainant is required to prove the HIV infection exists, but if the complainant satisfies this threshold showing, the labor counselor should then focus on other aspects of the case and not devote resources to litigating how the HIV infection currently affects the complainant’s life.

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¹ 524 U.S. 624 (1998).

² 42 U.S.C. §§ 12101 - 213 (2000).

³ “Administrative level federal sector employment law” translates to Equal Employment Opportunity Commission (EEOC) adversarial administrative cases involving federal government agencies and their employees. Federal civil servants, and occasionally applicants for federal civil service jobs, bring these cases against the agencies that employ the civil servants, or do not hire the civil service applicants. *See* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1614.105 (2004). An EEOC case is the end of the administrative process. *See id.* § 1614.402(a). It may be the final adjudication of the matter, or it may be the final administrative step preceding a civil servant’s filing suit in federal court. *See id.* § 1614.407(a).

⁴ 29 U.S.C. §§ 701 - 796l (2000).

⁵ *See* U.S. DEP’T OF ARMY, REG. 27-40, LEGAL SERVICES: LITIGATION para. 1-5a (19 Sept. 1994) [hereinafter AR 27-40].

⁶ For a brief discussion of HIV, see *infra* note 44.

Rehabilitation Act and ADA Basics

The Macro View: The Purpose and Scope of the Rehabilitation Act and the ADA

Congress enacted the Rehabilitation Act of 1973 to increase employment opportunities for individuals with disabilities.⁷ The Rehabilitation Act defines and prohibits unlawful, disability-based employment discrimination in the federal workplace, by federal contractors, and by other federally funded entities.⁸ The Rehabilitation Act, however, was not intended to regulate employment practices in the non-federally funded workplace.⁹

Congress enacted the ADA in 1990 to protect persons with physical or mental disabilities from discrimination.¹⁰ The ADA is to the non-federal workplace what the Rehabilitation Act is to the federal workplace.¹¹ The ADA also extends far beyond private sector employment discrimination. Pursuant to Congress's power under the Fourteenth Amendment and the Commerce Clause,¹² the ADA decrees: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation."¹³ The ADA broadly defines "public accommodation";¹⁴ it includes, for example, "the professional office of a health care provider."¹⁵

Although the ADA was enacted to eliminate private sector discrimination, it is also important to public sector employment discrimination law. In 1992, the Rehabilitation Act was amended to apply the ADA's standards to disability based discrimination claims filed by federal civil servants or applicants for federal civil service.¹⁶ Thus, despite *Bragdon* arising from an ADA discrimination claim, not a Rehabilitation Act claim, and despite *Bragdon* involving a complaint filed by a patient against a dentist, not an employee or applicant for employment against an employer, the case's holdings apply to federal employment discrimination.

The Micro View: Disability Definitions and Standards

Understanding *Bragdon* requires familiarity with some basic definitions from the ADA. An important definition to start with is "disability," which the ADA defines as: "A physical or mental impairment that substantially limits one or more of the major life activities of such individual."¹⁷ There are two additional ways an individual may be defined as having a disability, irrespective of the individual's physical or mental condition. An individual also meets the ADA's disability definition if he has a "record of" or is "regarded as having" a physical or mental impairment that substantially limits one or more major life activities, even if the individual does not actually have such an impairment.¹⁸

⁷ See 29 U.S.C. § 701(a)(4).

⁸ See *id.* § 791; see also *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 301 (5th Cir. 1981).

⁹ See 29 U.S.C. § 791.

¹⁰ See, e.g., 42 U.S.C. § 12101; 134 CONG. REC. S5972 (May 16, 1988) (statement of Sen. Riegle).

¹¹ 42 U.S.C. §§ 12111 - 213 (2000).

¹² U.S. CONST. amend. XIV, § 2; *id.* art. I, § 8, cl. 3; 42 U.S.C. § 12101(b)(4) (2000). Supreme Court decisions enforcing civil rights in the pre-civil rights era often were premised on the Commerce Clause, rather than the Fourteenth Amendment. See, e.g., *Morgan v. Virginia*, 328 U.S. 373, 385-386 (1946) (reversing conviction for violation of a state segregation statute regarding bus transportation based on the Commerce Clause).

¹³ 42 U.S.C. § 12182(a).

¹⁴ *Id.* § 12181(7).

¹⁵ *Id.* § 12181(7)(F).

¹⁶ Pub. L. No. 102-569 § 503(b), 106 Stat. 4344, 4424 (1992) (codified as amended at 29 U.S.C. § 791(g) (2000)).

¹⁷ 29 C.F.R. § 1630.2(g)(1) (2004).

¹⁸ *Id.* Persons who meet either of these two additional criteria are defined as having a disability, irrespective of their physical or mental condition. This expansive definition is intended to ensure persons within these two additional categories receive ADA protection, since negative consequences, based on prejudices and stereotypes, may not be based on facts. See, e.g., *Harrison v. Ashcroft*, No. 01A03948, 2003 EEO PUB LEXIS 4333, *13 and *17 (EEOC July 30, 2003) (finding the complainant had not shown that his diabetes limited a major life activity, but nonetheless finding him disabled because "the agency regarded complainant as being substantially limited in the major life activity of eating." Explaining, the EEOC noted, "We find that the reviewing physicians, . . . both engaged in generalized assumptions about complainant's condition, and preconceived notions about how the condition will impact his health currently and what the future consequences could be.").

As might be expected, the words that compose the definition of “disability” have particular meanings, and to fully understand the definition of “disability” it is necessary to understand three key components of “disability.” The first component is the phrase “physical or mental impairment,” which means:

Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.¹⁹

Some examples of particular disorders or conditions listed in the definition of “physical or mental impairment” include: Multiple Sclerosis, which affects the neurological system;²⁰ back injuries, which affects the musculoskeletal system;²¹ asthma, which affects the respiratory system;²² infertility, which affects the reproductive system;²³ and diabetes, which affects the digestive and hemic systems.²⁴ Post traumatic stress disorder is an example of an emotional or mental illness that constitutes a mental or psychological disorder.²⁵

The second component of the definition of disability is the phrase “substantially limits.” It is, however, helpful to understand the third component of the definition of disability—“major life activity”—before discussing “substantially limits.” “Major life activity” is defined as: “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”²⁶ Generalizing, the EEOC or a court is more likely to recognize an activity as being a “major life activity” if the activity is particularly important to life (breathing, for example) or if the activity encompasses a wide range of activities. For example, an impairment that prevents an individual from performing a particular job or a narrow class of jobs does not affect a major life activity,²⁷ but an impairment that prevents an individual from performing a wide range of jobs may affect a major life activity.²⁸

Returning to the second component of the definition of disability, “substantially limits,” this phrase is defined as:

Unable to perform a major life activity that the average person in the general population can perform; or [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.²⁹

It is also important to know that there are three factors that assist in determining whether a given major life activity is substantially limited. These three factors are: “The nature and severity of the impairment; [t]he duration or expected duration of the impairment; and [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.”³⁰

¹⁹ 29 C.F.R. § 1630.2(h).

²⁰ See *Masteller v. Potter*, No. 01994458, 2004 EEOPUB LEXIS 577 (EEOC Feb. 12, 2004).

²¹ See *Cookman v. Potter*, No. 01996505, 2002 EEOPUB LEXIS 8007 (EEOC Dec. 19, 2002).

²² See *Smith v. Potter*, No. 01A00660, 2003 EEOPUB LEXIS 2222 (EEOC Apr. 17, 2003).

²³ See *Cummings v. James*, No. 01A22203, 2004 EEOPUB LEXIS 2648 (EEOC May 13, 2004).

²⁴ See *Lewis v. Rumsfeld*, No. 01A24894, 2004 EEOPUB LEXIS 4349 (EEOC Aug. 10, 2004).

²⁵ See *Capil v. Potter*, No. 01983461, 2001 EEOPUB LEXIS 5337 (EEOC July 13, 2001); *Arnold v. Summers*, No. 03A00091, 2000 EEOPUB LEXIS 6077 (EEOC Sept. 18, 2000).

²⁶ 29 C.F.R. § 1630.2(i) (2004).

²⁷ *Id.* § 1630.2(j)(3)(i).

²⁸ See *Sutton v. United Airlines*, 527 U.S. 471, 491 (1999). The Supreme Court expressed some doubt whether “working” is a major life activity. *Id.* at 492. However, if “working” is a major life activity, then it “requires at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs.” *Id.* at 491.

²⁹ 29 C.F.R. § 1630.2(j).

³⁰ *Id.* § 1630.2(j)(2).

Regarding the nature and severity of the impairment, the standard “restricted . . . as compared to . . . the average person in the general population”³¹ is potentially amorphous. For common activities, however, the EEOC has created relatively precise standards. For example, the EEOC has held that lifting is a major life activity, and a permanent twenty pound lifting restriction may be sufficient to establish a substantial limitation.³² On the other hand, a person who has the ability to lift twenty-five pounds, even occasionally, is not substantially limited in the major life activity of lifting.³³

Orthopedic injuries provide a good illustration of how the duration of an injury may determine whether the injury is substantially limiting. The EEOC held that an ankle fusion that healed without medical complications, allowing the individual to return to light duty work within six weeks and to full duty work within seven months, was of such a short duration that it is was not substantially limiting.³⁴ On the other hand, the EEOC has held that a thirty month medical restriction for a condition that was not improving was sufficient to constitute a long term impairment.³⁵

There are three other definitions in the ADA that are necessary to understand *Bragdon*. These three important definitions are: “qualified individual with a disability,” “essential functions,” and “reasonable accommodation.”

“Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.”³⁶ For example, the EEOC found that a tractor-trailer driver who was diagnosed with Multiple Sclerosis was a qualified individual with a disability.³⁷ The complainant was qualified because he had successfully and safely driven a tractor-trailer for five years, and the only reason he was removed from driving was because his employer voluntarily began following regulations that precluded persons such as complainant from driving, absent a waiver.³⁸ The EEOC found that complainant was an individual with a disability because the regulations “significantly restricted him from working as a driver of commercial motor vehicles”³⁹

Turning to the next definition, “Essential functions . . . [i]n general . . . means the fundamental job duties of the employment position the individual with a disability holds or desires. The term ‘essential functions’ does not include the marginal functions of the position.”⁴⁰ For example, consider a postal automation clerk whose job primarily involved activities other than lifting, but who periodically had to lift mail trays weighing fifteen pounds.⁴¹ If lifting the trays were sufficiently infrequent, the lifting activity might be a marginal function, rather than an essential function. Thus, if the postal clerk were disabled—if she possessed a physical impairment that substantially limited her in the major life activity of lifting—because she was unable to lift over ten pounds, her employer would be required to provide a “reasonable accommodation” that allowed her to perform her job despite her inability to lift the fifteen pound mail trays.⁴²

The definition of “reasonable accommodation” has three parts. The second part is the most important for the issues *Bragdon* raises. “Reasonable accommodation” includes: “Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified

³¹ *Id.* § 1630.2(j).

³² *See* *Peebles v. Potter*, No. 01984745, 2002 EEOPUB LEXIS 1454, at *10-*11 (EEOC Mar. 7, 2002).

³³ *See* *Cookman v. Potter*, No. 01996505, 2002 EEOPUB LEXIS 8007, at *4 and *8 (EEOC Dec. 19, 2002).

³⁴ *See* *McIntyre v. Principi*, No. 01A31380, 2004 EEOPUB LEXIS 2980 (EEOC May 26, 2004).

³⁵ *See* *Chau-Pham v. Potter*, No. 01985730, 2001 EEOPUB LEXIS 5327, at *8-*10 (EEOC July 13, 2001).

³⁶ 29 C.F.R. § 1630.2(m).

³⁷ *Masteller v. Potter*, No. 01994458, 2004 EEOPUB LEXIS 577 (EEOC Feb. 12, 2004).

³⁸ *Id.* at *11. Complainant’s employer, the U.S. Postal Service, was not bound by the Department of Transportation regulations, which by their terms did not apply to transportation performed by the federal government. *Id.* at *3-*4.

³⁹ *Id.* at *10. Significantly, the EEOC found that the Postal Service failed to meet its burden of proving that complainant’s driving a tractor-trailer would present a “direct threat,” that is “‘a significant risk of substantial harm’ which cannot be eliminated or reduced by reasonable accommodation.” *Id.* at *11 (citing 29 C.F.R. 1630.2(r)). Complainant would not have been qualified if the EEOC had been satisfied with the agency’s direct threat evidence.

⁴⁰ 29 C.F.R. § 1630.2(n).

⁴¹ *See* *Chau-Pham v. Potter*, No. 01985730, 2001 EEOPUB LEXIS 5327 (EEOC July 13, 2001).

⁴² *Id.* at *3 and *12.

individual with a disability to perform the essential functions of that position”⁴³ Returning to the example of the postal automation clerk who could lift only ten pounds, and for whom lifting fifteen pound mail trays was a marginal function, a reasonable accommodation might have been to have had a nearby coworker lift the mail trays as needed.

As might be expected, there are additional exceptions, explanations, and factors practitioners should consider regarding the definitions of “qualified individual with a disability,” “essential functions,” and “reasonable accommodation,” as well as a considerable volume of case law regarding all the definitions in this section. The information contained in this section, however, provides an adequate foundation to explore and understand *Bragdon* and related subsequent Supreme Court precedent.

The Supreme Court’s *Bragdon* Decision

Bragdon arose from limitations that a dentist placed on treating a patient who was infected with the human immunodeficiency virus (HIV).⁴⁴ Ms. Abbott, the patient, was infected with HIV in 1986.⁴⁵ In 1994, before Ms. Abbott manifested serious symptoms from the HIV infection, she sought treatment from Dr. Bragdon.⁴⁶ Ms. Abbott disclosed on a patient registration form that she was HIV positive.⁴⁷ Dr. Bragdon then examined Ms. Abbott’s teeth and found a cavity.⁴⁸ Dr. Bragdon told Ms. Abbott that he did not fill cavities for HIV positive patients at his office, but he offered to fill the cavity at a local hospital.⁴⁹ Dr. Bragdon told Ms. Abbott the charge for his services would be the same at either location, but Ms. Abbott would have to pay the hospital’s charge for using its facility.⁵⁰

Ms. Abbott declined Dr. Bragdon’s offer to fill her cavity at the local hospital and filed suit in federal district court, alleging that Dr. Bragdon’s refusal to fill her cavity at his office violated the ADA.⁵¹ The district court granted summary judgment in favor of Ms. Abbott, and the circuit court of appeals affirmed.⁵² The Supreme Court granted certiorari to determine whether an HIV infection in the asymptomatic stage is a disability under the ADA.⁵³ The Supreme Court’s decision also resolved a circuit split regarding the answer to this question.⁵⁴

For Dr. Bragdon to have violated the ADA, Ms. Abbott had to be within the group of individuals the ADA protects. Thus, the Supreme Court began its analysis by determining whether Ms. Abbott was disabled under the ADA—whether her HIV infection constituted “a physical or mental impairment that substantially limits one or more of the major life activities”⁵⁵ The Court held that HIV infection is an “impairment,” as that term is defined in the ADA.⁵⁶ Significantly, the Court held HIV is “an impairment from the moment of infection” because of “the immediacy with which the virus begins to damage the infected person’s white blood cells and the severity of the disease”⁵⁷

⁴³ 29 C.F.R. § 1630.2(o)(ii).

⁴⁴ Human immunodeficiency virus, commonly referred to as “HIV,” invades and inactivates cells central to the immune system. The HIV causes acquired immune deficiency syndrome, commonly referred to as “AIDS.” As HIV progresses to AIDS, the body becomes increasingly susceptible to opportunistic infections, cancers, and neurological disorders. RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 42, 908 (Sol Steinmetz ed., 2d ed. 1998).

⁴⁵ *Bragdon v. Abbott*, 524 U.S. 624, 629 (1998).

⁴⁶ *Id.* at 629-630.

⁴⁷ *Id.*

⁴⁸ *Id.* at 630.

⁴⁹ *Id.*

⁵⁰ *Id.* at 629.

⁵¹ *Bragdon v. Abbott*, 912 F. Supp. 580, 583-84 (D. Me 1995), *affirmed*, 107 F.3d 934 (1st Cir. 1997), *vacated and remanded*, 524 U.S. 624 (1998).

⁵² *Bragdon*, 524 U.S. at 629.

⁵³ *Id.*

⁵⁴ The First Circuit Court of Appeals concluded that an asymptomatic HIV infection is a disability under the ADA. *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997). The Fourth Circuit Court of Appeals concluded that asymptomatic HIV infection is not a disability under the ADA. *Runnebaum v. NationsBank of Maryland, N.A.*, 123 F.3d 156 (4th Cir. 1997).

⁵⁵ *Bragdon*, 524 U.S. at 631 (quoting 42 U.S.C. § 12102(2) (2000)).

⁵⁶ *Id.* at 638.

⁵⁷ *Id.*

Next, the Supreme Court turned to the question of whether HIV impairs a major life activity. The Court limited its inquiry to determining whether reproduction constitutes a major life activity and whether an HIV infection substantially limits reproduction.⁵⁸ The Court noted that its narrow focus on HIV's effect on reproduction alone "may seem legalistic," but was appropriate in light of Ms. Abbott's having argued to the court of appeals that this was the major life activity at issue.⁵⁹ The Supreme Court concluded that reproduction is a major life activity because it "could not be regarded as any less important than working or learning," and according to implementing regulations for the Rehabilitation Act, which apply to the ADA, working and learning constitute major life activities.⁶⁰

Finally, the Supreme Court analyzed whether HIV infection substantially limits the major life activity of reproduction. The Court found that HIV infection substantially limits reproduction in two ways.⁶¹ First, the Court asserted that an HIV positive female's attempt to conceive imposes a significant risk of transmitting HIV to her male partner.⁶² The Court ignored the possibility of artificial insemination, either with or without medical assistance.⁶³ Second, the Court noted a significant risk of infecting the child during gestation and birth, finding that this, too, constituted a substantial limitation to an HIV positive female's ability to reproduce.⁶⁴ The Court asserted that medical information it considered showed an untreated risk of HIV transmission from mother to baby of about twenty-five to thirty percent with this risk falling to about eight percent if the mother received antiretroviral therapy.⁶⁵ The Court found an eight percent risk of HIV transmission from mother to child to constitute a substantial limitation on reproduction.⁶⁶

The Supreme Court's decision also contains an interesting statement regarding what *Bragdon's* holding does not encompass. Specifically, the Supreme Court stated that *Bragdon* does "not address . . . whether HIV infection is a *per se* disability under the ADA."⁶⁷

Equal Employment Opportunity Commission Decisions Applying *Bragdon*

The *Bragdon* General Rule

The EEOC has cited *Bragdon* forty-three times in its published, public sector decisions.⁶⁸ The EEOC has cited *Bragdon* a majority of the time, a total of twenty-six times, for the proposition that determining whether a complainant

⁵⁸ *Id.* at 638-39.

⁵⁹ *Id.*

⁶⁰ *Id.* at 639-40.

⁶¹ *Id.* at 640-41.

⁶² *Id.* at 640.

⁶³ Even if the Court had considered artificial insemination as an alternative means of conception, it appears that the Court might have rejected this alternative based on the Court's discussion of the second impediment where the Court noted that the ADA requires only "substantial limitations on major life activities, not utter inabilities." *Id.* at 642. In its discussion of the second impediment to conception for an HIV positive female, the Court suggested that "economic and legal consequences" might be sufficient to constitute a substantial limitation to reproduction. *Id.* Consequently, the cost of medically assisted artificial insemination might itself qualify as a substantial limitation to reproduction, and more facts would be needed about unassisted artificial insemination to know whether such a procedure is reliable enough not to pose a substantial limitation.

⁶⁴ *Id.* at 641.

⁶⁵ *Id.*

⁶⁶ *Id.* at 642. Interestingly, the Court's exact statement is: "It cannot be said as a matter of law that an 8% risk of transmitting a dread and fatal disease to one's child does not represent a substantial limitation on reproduction." *Id.* This statement appears to be backwards; that is, because the Supreme Court decision holds that Ms. Abbott's HIV infection constituted a substantial limitation on her reproducing, due to the risk that she could transmit the infection during gestation or birth, the Court needed to find that an eight percent HIV transmission rate represented a substantial limitation on reproduction as a matter of law, not the converse.

⁶⁷ *Id.* at 642-43 (italics in original). The Supreme Court ultimately remanded the case for a reassessment of whether Dr. Bragdon established a genuine issue of fact. Specifically, the Court directed the court of appeals to reconsider whether Dr. Bragdon was justified in offering to fill Ms. Abbott's cavity only at a hospital, because providing this treatment in his office, "posed 'a significant risk of communicating an infectious disease to others,'" quoting *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987).

⁶⁸ LEXIS search, Mar. 16, 2005, for "Bragdon w/3 Abbott" in the EEOC public sector data base. This search actually produces forty-four decisions, but two are the same decision in the same case, with different LEXIS numbers. See *Long v. Potter*, No. 01A02616, 2002 EEOPUB LEXIS 6665 (EEOC Sept. 26, 2002) and *Long v. Potter*, No. 01A02616, 2002 EEOPUB LEXIS 6718 (EEOC Sept. 26, 2002).

has an impairment that substantially limits a major life activity requires an individualized inquiry, based upon the particular circumstances in each case.⁶⁹

To emphasize the importance of making an individualized inquiry, the EEOC occasionally follows its admonition for an individualized inquiry with the statement that a complainant is not, per se, an individual with a disability because he has been diagnosed with a particular condition.⁷⁰ The requirement for an individualized inquiry is critical when there are significant disparities among individuals who have a particular physical or mental condition.⁷¹ Diabetes, muscular conditions, and skeletal conditions present the most common instances when two individuals may suffer from the same condition, yet differ greatly in terms of their limitations related to major life activities, and thus, differ in terms of whether they are disabled under the Rehabilitation Act or ADA.⁷²

With two notable exceptions, discussed in detail in the following two sub-sections, the remainder of the EEOC's other public sector citations to *Bragdon* are insignificant. In nine of the EEOC's citations to *Bragdon*, the reference is simply the last case in a string cite, and each of these string cites simply serves notice that the EEOC considered the complainant's claim "in light of" various recent Supreme Court decisions, including *Bragdon*.⁷³ Similarly, two cases cite to *Bragdon* at the end of a "see also" string cite regarding the elements for a disability discrimination case.⁷⁴ One

⁶⁹ These twenty-six cases can be grouped by type. Five of these cases involve individuals whose claimed disability was diabetes. See *Lewis v. Rumsfeld*, No. 01A24894, 2004 EEOPUB LEXIS 4349, at *9 (EEOC Aug. 10, 2004); *Gamelin v. Potter*, No. 01A22307, 2004 EEOPUB LEXIS 116, at *5 (EEOC Jan. 5, 2004); *Harrison v. Ashcroft*, No. 01A03948, 2003 EEOPUB LEXIS 4333, at *9 (EEOC July 30, 2003); *Walker v. Potter*, No. 01A12366, 2002 EEOPUB LEXIS 4414, at *7 (EEOC July 3, 2002); *Surprenant v. Potter*, No. 01996186 2001 EEOPUB LEXIS 5680, at *10 (EEOC July 26, 2001). Six of these cases involve individuals whose claimed disability derived from back or neck conditions. See, *Williams v. Potter*, No. 01A01379, 2003 EEOPUB LEXIS 1227, at *10-*11 (EEOC Mar. 6, 2003); *Cookman v. Potter*, No. 01996505, 2002 EEOPUB LEXIS 8007, at *7 (EEOC Dec. 19, 2002); *Stevens v. Veneman*, No. 01997032, 2002 EEOPUB LEXIS 3404, at *5 (EEOC June 3, 2002); *Cadle v. Veneman*, No. 01997044, 2002 EEOPUB LEXIS 3402, at *5 (EEOC June 3, 2002); *Collins v. McCullough*, No. 01992977, 2002 EEOPUB LEXIS 815, at *5 (EEOC Feb. 15, 2002); *Chau-Pham v. Potter*, No. 01985730, 2001 EEOPUB LEXIS 5327, at *7 (EEOC July 13, 2001). Seven of these cases involve individuals whose claimed disability was based on non-spinal muscular or skeletal conditions. See *McIntyre v. Principi*, No. 01A31380, 2004 EEOPUB LEXIS 2980, at *5-*6 (EEOC May 26, 2004); *Perez v. Potter*, No. 07A20117, 2003 EEOPUB LEXIS 4176, at *12 (EEOC July 23, 2003); *Long v. Potter*, No. 01A02616, 2002 EEOPUB LEXIS 6665 and 2002 EEOPUB LEXIS 6718, at *11 (EEOC Sept. 26, 2002); *Brown v. Potter*, No. 01996312, 2002 EEOPUB LEXIS 1221, at *6 (EEOC Mar. 1, 2002); *Brown v. Potter*, No. 01990686, 2002 EEOPUB LEXIS 812, at *5 (Feb. 15, 2002); *Boyle v. Potter*, No. 01980819, 2001 EEOPUB LEXIS 6174, at *5 (EEOC Aug. 16, 2001). Four of these cases involve individuals whose claimed disability was based on mental rather than physical conditions. See *Kice v. England*, No. 03A20013, 2002 EEOPUB LEXIS 2458, at *5 (EEOC Apr. 18, 2002) (depression); *Capil v. Potter*, No. 01983461, 2001 EEOPUB LEXIS 5337, at *4 (EEOC July 13, 2001) (post traumatic stress disorder); *Olivares v. Henderson*, No. 01980712, 2001 EEOPUB LEXIS 794, at *4 (EEOC Feb. 8, 2001) (disturbed thinking); *Arnold v. Summers*, No. 03A00091, 2000 EEOPUB LEXIS 6077, at *6 (EEOC Sept. 18, 2000) (adjustment disorder, depressed mood, and post traumatic stress disorder). Seven of these cases involve individuals whose claimed disabilities are unique or defy categorization. See *Masteller v. Potter*, No. 01994458, 2004 EEOPUB LEXIS 577, at *8 (EEOC Feb. 12, 2004) (multiple sclerosis); *Smith v. Potter*, No. 01A00660, 2003 EEOPUB LEXIS 2222, at *5 (EEOC Apr. 17, 2003) (asthma, carpal tunnel, and foot inflammation and tenderness); *Simms v. England*, No. 01992195, 2002 EEOPUB LEXIS 3074, at *6 (EEOC May 16, 2002) (sinusitis and a daughter who had cerebral palsy, which constituted a "disability by association" under 29 C.F.R. § 1630.8); *Strutynski v. Norton*, No. 01980837, 2001 EEOPUB LEXIS 6788, at *4 (EEOC Sept. 26, 2001) (heart pain and wrist fusion); *Palmer v. Potter*, No. 01980753, 2001 EEOPUB LEXIS 5343, at *10 (EEOC July 13, 2001) (anxiety and wrist injury); *Hudson v. Henderson*, No. 03A00115, 2000 EEOPUB LEXIS 7424, at *5 (EEOC Dec. 19, 2000) (back condition and stress); *Yacher v. Shalala*, No. 03A00077, 2000 EEOPUB LEXIS 6187, at *8 (EEOC Sept. 25, 2000) (multiple chemical sensitivities).

⁷⁰ See, e.g., *Lewis*, No. 01A24984, 2004 EEOPUB LEXIS 4349 at *9; *Long*, No. 01A02616, 2002 EEOPUB LEXIS 6665, at *10.

⁷¹ *Toyota Motor Mfg., of Ky., Inc. v. Williams*, 534 U.S. 184, 198-99 (2002).

⁷² Regarding diabetes, see, e.g., *Harrison*, No. 01A03948, 2003 EEOPUB LEXIS 4333, at *11 ("Commission precedent has found that some individuals with diabetes mellitus are individuals with disabilities within the meaning of the Rehabilitation Act, while others are not."); regarding carpal tunnel syndrome, a muscular condition affecting the hands and forearms, see, e.g., *Toyota*, 534 U.S. at 199 (noting that carpal tunnel syndrome is a condition "whose symptoms vary widely from person to person").

⁷³ See *Ledesma v. Henderson*, No. 01985925, 2000 EEOPUB LEXIS 6672, at *8-*9 n.5 (EEOC Sept. 13, 2000); *Turner v. Gober*, No. 01976372, 2000 EEOPUB LEXIS 6042, at *7, n.4 (EEOC Sept. 13, 2000); *Gatie v. Danzig*, No. 01970689, 2000 EEOPUB LEXIS 6040, at *12 n.6 (EEOC Sept. 13, 2000); *Klimek v. Henderson*, No. 01973926, 2000 EEOPUB LEXIS 1492, at *8 (EEOC March 16, 2000); *Hill v. Henderson*, No. 01985754, 2000 EEOPUB LEXIS 1488, at *6-*7 n.3 (EEOC Mar. 16, 2000); *Chouteau v. Henderson*, No. 01973853, 2000 EEOPUB LEXIS 1332, at *8-*9 (EEOC Mar. 10, 2000); *Garcia v. Henderson*, No. 01976370, 2000 EEOPUB LEXIS 1331, at *9-*10 (EEOC Mar. 10, 2000); *Ayers v. Henderson*, No. 01975550, 2000 EEOPUB LEXIS 1146, at *10 n.3 (EEOC Feb. 25, 2000); *Lewis v. Reno*, No. 03990043, 2000 EEOPUB LEXIS 665, at *16 n.4 (EEOC Feb. 17, 2000). The phrasing is nearly identical in all nine cases. Six of the nine cases state: "In reaching the above determination, we have examined complainant's disability claim in light of the Supreme Court's recent decisions in . . . *Bragdon* . . ." (citations omitted). See *Gatie*, 2000 EEOPUB LEXIS 6040, at *12 n.6; *Klimek*, 2000 EEOPUB LEXIS 1492, at *8; *Hill*, 2000 EEOPUB LEXIS 1488, at *6-*7 n.3; *Chouteau*, 2000 EEOPUB LEXIS 1332, at *8-*9; *Garcia*, 2000 EEOPUB LEXIS 1331, at *9-*10; *Ayers*, 2000 EEOPUB LEXIS 1146, at *10 n.3. One case describes the disability issue instead of using the words, "In reaching this decision . . ." See *Lewis*, 2000 EEOPUB LEXIS 665, at *16 n.4. Two cases substitute the words "also considered" for "examined." See, *Ledesma*, 2000 EEOPUB LEXIS 6672, at *8-*9 n.5; *Turner*, 2000 EEOPUB LEXIS 6042, at *7, n.4.

⁷⁴ See *Adkins v. Caldera*, No. 01975602, 2000 EEOPUB LEXIS 5378 at *10-*11 (EEOC Aug. 3, 2000); *Smith v. Caldera*, No. 03980066, 2000 EEOPUB LEXIS 2307 (EEOC Apr. 19, 2000).

case's citation to *Bragdon* is actually a description of the basis for the administrative judge's decision, rather than the EEOC citing to *Bragdon*.⁷⁵

The Exception to *Bragdon's* General Rule: The HIV Positive Disability Cases

In contrast to the EEOC's often repeated rule that a complainant is not, per se, an individual with a disability merely because he has been diagnosed with a particular condition, the EEOC has published two public sector decisions since *Bragdon* that appear to adopt a per se rule regarding at least one physical condition: HIV infection. Both cases appear to hold that any disability-based discrimination claim arising from HIV positive status presumptively demonstrates a physical impairment that substantially limits at least one major life activity, making the complainant an individual with a disability.⁷⁶ Neither case includes an individualized assessment of the complainant's condition, and neither case discusses reproduction.⁷⁷

*Doe v. Rubin*⁷⁸ is the first published public sector EEOC decision involving alleged HIV positive discrimination after *Bragdon*. The following comprises the EEOC's analysis of the particular circumstances of Mr. Doe's case. First, the EEOC states: "Petitioner has alleged disability discrimination. The threshold question is whether petitioner is an individual with a disability within the meaning of the regulations."⁷⁹ Next, the EEOC quotes two definitions: "disability" and "major life activity."⁸⁰ After the two definitions, the EEOC states: "The physician's letter indicated that petitioner was diagnosed as being HIV+. The Commission finds that this evidence is sufficient to establish that petitioner had a physical impairment which substantially limited one or more major life activities and that he therefore was an individual with a disability under the regulations."⁸¹

It is difficult to conceptualize how the EEOC's analysis in *Doe* constitutes an individualized inquiry based upon Mr. Doe's particular circumstances. The only words in this analysis unique to Mr. Doe are "[T]he physician's letter"⁸² Discerning how these three words constitute a person specific analysis, different from the analysis the EEOC would conduct for any other HIV positive complainant who alleged disability discrimination, is a challenge. The EEOC's analysis regarding whether Mr. Doe is a disabled individual is unrelated to his particular physiological state, symptoms, lack of symptoms, desire to have children, ability to procreate if he were not HIV positive, or ability to have a partner with whom to have children.⁸³

The EEOC's analysis in *Smith v. Powell*,⁸⁴ the more recent of the two published public sector decisions involving an HIV positive complainant alleging disability discrimination, demonstrates even less of an individualized inquiry, based on Smith's particular circumstances, than is present in *Doe*. The EEOC analyzed the individual circumstances of Mr. Smith's case in one sentence: "Turning to complainant's claim of disability discrimination, the Commission finds that complainant has a physical impairment which substantially limited one or more major life activities and that he was,

⁷⁵ See Mohamed v. Potter, No. 01A33869, 2004 EEOPUB LEXIS 6975, at *4-*5 (EEOC Dec. 16, 2004) (citing *Bragdon* for the proposition that reasonable accommodation cases are not generally amenable to class certification because the need for an individualized inquiry in each case prevents the commonality and typicality prerequisites).

⁷⁶ *Doe v. Rubin*, No. 03990024, 1999 EEOPUB LEXIS 2692, at *10-*11 (EEOC May 20, 1999); *Smith v. Powell*, No. 01995547, 2002 EEOPUB LEXIS 4036, at *3-*4 (EEOC June 20, 2002).

⁷⁷ *Doe*, 1999 EEOPUB LEXIS 2692, at *10-*11; *Smith*, 2002 EEOPUB LEXIS 4036, at *3-*4. Both complainants were male. The two decisions appear to establish that the EEOC applies *Bragdon* equally to males and females.

⁷⁸ *Doe*, 1999 EEOPUB LEXIS 2692.

⁷⁹ *Id.* at *10. The EEOC refers to Doe as "Petitioner" instead of "Complainant" because his case reached the EEOC after being heard as a "mixed" case by the Merit Systems Protection Board (MSPB). Rather than filing initially with EEOC, Doe filed with the MSPB, alleging that he lost his civil service position for reasons including discrimination. *Id.* at *1-2. After the MSPB decided the case, Doe was able to appeal the portion of the MSPB's decision regarding his discrimination allegations to the EEOC. *Id.*

⁸⁰ *Id.* at *10.

⁸¹ *Id.* at *10-*11 (citing *Bragdon v. Abbott*, 524 U.S. 624 (1998)).

⁸² *Id.*

⁸³ These questions are stated or suggested by Chief Justice Rehnquist's dissent in *Bragdon*. See *Bragdon*, 524 U.S. at 658-59 (Rehnquist, C.J., dissenting).

⁸⁴ No. 01995547, 2002 EEOPUB LEXIS 4036 (EEOC June 20, 2002).

therefore, an individual with a disability under the regulations.”⁸⁵ Consistent with its analysis in *Doe*, the EEOC did not analyze Mr. Smith’s physiological state, his symptoms from his HIV positive condition, his desire to have children, his ability to procreate if he were not HIV positive, or his ability find a partner with whom to have children.⁸⁶

The EEOC’s statements about *Bragdon* contradict the EEOC’s holdings in its two HIV public sector decisions. There is some justification for the contradiction. *Bragdon* can be read to require that finding a complainant has a disability necessitates an individualized inquiry based on particular circumstances.⁸⁷ Similarly, *Bragdon* can be read in a way that justifies the EEOC in employing a rule that any HIV positive complainant is per se an individual with a disability, based upon a substantial limitation to the person’s ability to reproduce, which is a major life activity. After all, *Bragdon* conducted no individualized assessment regarding Ms. Abbott’s physiological state, ruling that HIV was a physical impairment from the moment of infection.⁸⁸ Moreover, *Bragdon* never addressed the question of whether Ms. Abbott desired to have children or if she was able to procreate if she were not HIV positive. Nor did the case address questions such as whether Ms. Abbott had a male partner, a sperm donor, or a willingness to procreate via a sperm bank or stranger.⁸⁹

Insurance Coverage for Fertility Therapy

*Cummings v. James*⁹⁰ presented the EEOC with its first public sector case asserting reproductive rights discrimination under *Bragdon*. Ms. Cummings, a Department of Defense, Defense Finance and Accounting Service attorney, filed a complaint against the Office of Personnel Management (OPM) asserting that she was discriminated against on the basis of disability, infertility, when OPM provided Ms. Cummings with "incomplete" insurance coverage for her infertility.⁹¹ Specifically, Ms. Cummings alleged that OPM, which administers the Federal Employee Health Benefits (FEHB) Act, discriminated against her by not requiring health plans in the FEHB program to cover what she termed "artificial reproductive technology."⁹² Included in OPM’s duties as the FEBH administrator is negotiating and approving the terms of all insurance plans offered under the program.⁹³

Initially, OPM dismissed Ms. Cummings’s complaint for failing to state a claim.⁹⁴ The initial dismissal seems surprising given that Ms. Cummings filed her complaint over a year after the Supreme Court decided *Bragdon*⁹⁵ and the ADA places an “agent, or entity that administers benefit plans, or similar organizations” in the same category as a health insurer that offers a plan.⁹⁶ Not surprisingly, the EEOC reversed OPM’s initial decision that Ms. Cummings’s complaint failed to state a claim.⁹⁷ Thereafter, OPM investigated Ms. Cummings’s complaint, and well after OPM completed the investigation, Ms. Cummings moved for class certification of her complaint.⁹⁸

⁸⁵ *Id.* at *3-*4 (citing *Bragdon*, 524 U.S. 624 (1998)); *Doe*, 1999 EEOPUB LEXIS 2692. The EEOC also added, parenthetically, after the *Bragdon* citation: “HIV infection, even during so-called asymptomatic phase, is a physical impairment that substantially limits the major life activity of reproduction.” *Smith*, 2002 EEOPUB LEXIS 4036, at *4 (quoting *Bragdon*, 524 U.S. 624 (1998)).

⁸⁶ *Smith*, 2002 EEOPUB LEXIS 4036, at *3-*4. These questions are stated or suggested by Chief Justice Rehnquist’s dissent in *Bragdon*. See *Bragdon*, 524 U.S. at 658-59 (Rehnquist, C.J., dissenting).

⁸⁷ *Bragdon*, 524 U.S. at 633, 638 (asserting, “The first step in the inquiry under subsection (A) requires us to determine whether respondent’s condition constituted a physical impairment,” and thereafter focusing exclusively on reproduction as a major life activity, because Ms. Abbott asserted this was the condition at issue for her.).

⁸⁸ *Id.* at 638. See also the critique that *Bragdon* failed to conduct an individualized assessment of whether, before she was infected with HIV, Ms. Bragdon’s major life activities included reproduction. *Bragdon*, 524 U.S. at 658-59 (Rehnquist, C.J., dissenting).

⁸⁹ *Id.* at 658-59 (Rehnquist, C.J., dissenting).

⁹⁰ No. 01A22203, 2004 EEOPUB LEXIS 2648 (EEOC May 13, 2004).

⁹¹ *Id.* at *2.

⁹² *Id.* at *2-*4.

⁹³ *Id.* at *2.

⁹⁴ *Id.* at *3.

⁹⁵ Ms. Cummings filed her formal complaint on 4 Nov. 1999. *Id.* at *2. The Supreme Court decided *Bragdon* on 25 June 1998. *Bragdon v. Abbott*, 524 U.S. 624 (1998).

⁹⁶ 42 U.S.C. § 12201(c)(1) (2000).

⁹⁷ *Cummings*, 2004 EEOPUB LEXIS 2648, at *3.

⁹⁸ *Id.* at *3-*5.

In its final decision, OPM first concluded that Ms. Cummings filed her complaint late, and her motion for class certification was also untimely.⁹⁹ Second, OPM decided that even if Ms. Cummings's complaint and motion were timely, Ms. Cummings provided no evidence to support her claim that OPM discriminated against her when her fertility drugs and treatments were covered at less than full cost or that OPM discriminated against her by not requiring health plans in the FEHB program to cover artificial reproductive technology.¹⁰⁰ In its analysis, OPM asserted that "the fact that a [health] plan did not cover the full range of services sought by an enrollee is not evidence of discrimination."¹⁰¹

The EEOC reversed OPM's decision on the first issue, finding that Ms. Cummings had timely asserted an individual discrimination claim. The EEOC agreed with Ms. Cummings's argument that she timely appealed a present harm because when she filed her complaint, she was still limited in coverage for artificial reproductive therapy coverage under the FEHB plan and, thus, asserted a "present violation."¹⁰² The EEOC, however, agreed with OPM that Ms. Cummings filed her motion for class certification unreasonably late since she knew early in the process that a majority of federal employees have health insurance through the FEHB program and were subject to the same limitations.¹⁰³

Turning to the substantive merits of Ms. Cummings's complaint, the EEOC determined that it could not properly review OPM's decision because the record lacked sufficient information to determine whether the FEHB program violated the ADA.¹⁰⁴ As the EEOC analyzed the issue, the first question to be answered was whether the FEHB's limitation on coverage for artificial reproductive technology was a "disability-based distinction."¹⁰⁵

In defining what constitutes a disability-based distinction, the EEOC referred to a 1993 EEOC notice that explained the application of the ADA to health insurance.¹⁰⁶ A disability based distinction is one which "singles out a particular disability (e.g. deafness, AIDS, schizophrenia), a discrete group of disabilities (e.g. cancers, muscular dystrophies, kidney disease), or disability in general (e.g. non-coverage of all conditions that substantially limit a major life activity)."¹⁰⁷

The EEOC noted that "insurance distinctions that are not based upon a disability and are applied equally to all insured employees are not discriminatory."¹⁰⁸ Broad, equally applied distinctions that do not "single out a particular disability, a discrete group of disabilities, or disability in general" are not disability-based.¹⁰⁹ The EEOC noted that a blanket exclusion from coverage for pre-existing conditions would not violate the ADA.¹¹⁰ Similarly, "coverage limits that are not exclusively, or nearly exclusively, utilized for the treatment of a particular disability [or] distinctions based upon a disability" are not discriminatory.¹¹¹

The record contained insufficient information for the EEOC to answer key questions necessary to determine whether the FEHB's limitations on artificial reproductive technology were disability-based distinctions. The EEOC could not determine from the record whether:

⁹⁹ *Id.* at *3.

¹⁰⁰ *Id.* at *3-*4.

¹⁰¹ *Id.* at *4.

¹⁰² *Id.* at *5; *see also* National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 112-13 (2002). If Ms. Cummings ultimately won her case, presumably she would not recover the costs of past, uncovered fertility treatments, but would recover for treatments that occurred within forty-five days before filing her case and all uncovered treatments thereafter. *See* 29 C.F.R. § 1614.105(a) (2004).

¹⁰³ *Cummings*, 2004 EEOPUB LEXIS 2648, at *5-*6.

¹⁰⁴ *Id.* at *6.

¹⁰⁵ *Id.* at *7.

¹⁰⁶ *Id.* at *4 (referring to EEOC Interim Enforcement Guidance on Application of Americans with Disabilities Act to Health Insurance (Guidance), EEOC Notice No. 915.002 (June 9, 1993)) [hereinafter EEOC Health Insurance Guidance]. The EEOC Health Insurance Guidance is available at <http://www.eeoc.gov/policy/docs/health.html>. The document posted at the EEOC website, however, is actually dated 8 June 1993. Although the EEOC labeled the EEOC Health Insurance Guidance "interim" at the time of publication in 1993, paragraph 4 provides that "this Notice will remain in effect until rescinded or superseded." *Id.* at 1.

¹⁰⁷ *Cummings*, 2004 EEOPUB LEXIS 2648, at *8 (quoting EEOC Health Insurance Guidance, *supra* note 106, at 3 & n.1).

¹⁰⁸ *Cummings*, 2004 EEOPUB LEXIS 2648, at *8.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at *8-*9.

¹¹¹ *Id.* at *9.

the excluded fertility treatments are used only to treat those who are infertile due to a substantially limiting impairment or if they are also used to treat women who do not have an impairment but are nonetheless unable to have children. If the procedures are used to assist both individuals with disabilities (i.e., women who are unable to bear children due to an impairment) and individuals without disabilities (i.e. women who are unable to bear children for some other reason, such as age) then the exclusion of such procedures is not a disability-based distinction.¹¹²

Under the EEOC's analysis, if the FEHB program's lack of coverage for artificial reproductive technology was not a disability-based distinction, the program would not violate the ADA.¹¹³ Even if the FEHB program's lack of coverage for artificial reproductive technology were disability-based, however, this would not necessarily mean that the program violated the ADA since the ADA permits disability-based distinctions if they are within listed exceptions.¹¹⁴

Disability-based distinctions in the FEHB program are permissible if "(1) the health insurance plan is a bona fide plan which is not inconsistent with state law; and (2) that disability-based distinction is not being used as a subterfuge."¹¹⁵ The EEOC defines "bona fide" as requiring that "the plan exists, it pays benefits, and its terms have been accurately communicated to employees."¹¹⁶ Consistency with state law requires determining which state's law applies and then determining which laws of the given state are relevant to the determination.¹¹⁷ "Subterfuge" is determined on a case by case basis, under the totality of the circumstances, considering whether the given disability based disparate treatment is justified by the risks of or costs associated with the disability.¹¹⁸

The EEOC concluded that the record in Ms. Cummings's case lacked sufficient evidence to determine whether the FEHB plan was within the ADA's statutory exceptions if its limitations on artificial reproductive technology were disability-based.¹¹⁹ Remanding the case for additional investigation, the EEOC directed OPM to supplement the record with information regarding whether the FEHB's limitations on artificial reproductive technology were disability-based and whether the limitations were within the ADA's exceptions.¹²⁰

Interestingly, the EEOC offered Ms. Cummings an opportunity to provide additional information regarding her medical condition that, she alleged, substantially limited her ability to reproduce.¹²¹ The EEOC found that Ms. Cummings was clearly a "qualified individual" since there was no dispute about her ability to perform her duties as an attorney, but "because . . . we are remanding the case for a supplemental investigation, we decline to determine herein whether complainant established that she is a qualified individual with a disability."¹²²

The EEOC's refusal to accept that Ms. Cummings was disabled, as defined by the Rehabilitation Act and ADA, is inconsistent with the EEOC's holdings in the *Doe* and *Smith* HIV positive cases. Nothing in *Cummings* suggested that OPM disputed Ms. Cummings's assertion that she was infertile. However, where *Doe* and *Smith* needed only to show that they were HIV positive to be conclusively presumed disabled under the Rehabilitation Act and ADA, the EEOC was not satisfied that Ms. Cummings met the disability definition based on "a brief statement which suggests that [Ms. Cummings's] infertility is caused by the inability of eggs to reach the uterus"¹²³

¹¹² *Id.* at *9-*10.

¹¹³ *Id.* at *7-*8.

¹¹⁴ 42 U.S.C. § 12201(c) (2000).

¹¹⁵ *Cummings*, 2004 EEOPUB LEXIS 2648, at *11 (citing 29 C.F.R. § 1614.16(f) (2004)).

¹¹⁶ *Cummings*, 2004 EEOPUB LEXIS 2648, at *11.

¹¹⁷ EEOC Health Ins. Guidance, *supra* note 106, at 11 n.13.

¹¹⁸ *Id.* at 6.

¹¹⁹ *Cummings*, 2004 EEOPUB LEXIS 2648, at *12.

¹²⁰ *Id.*

¹²¹ *Id.* at *12-*13.

¹²² *Id.* at *7.

¹²³ *Id.* at *12-*13.

Conclusion: *Bragdon's* Meaning, Today and in the Future

The conclusion to be drawn from *Doe, Smith, and Cummings* is that the EEOC reads *Bragdon* as announcing a bright line disability rule for individuals infected with HIV. The EEOC does not read *Bragdon* as being a case about reproduction. The EEOC sees *Bragdon* as a case about an individual who was infected with and disabled by HIV, and who was discriminated against because of her HIV positive condition. The EEOC reads portions of *Bragdon* regarding physical disability related to reproduction as mere dicta.

The clear conclusion from an analysis of the EEOC's published, public sector decisions is that an individualized assessment of a complainant's condition is essential for analyzing all disability discrimination claims, except for claims based on HIV positive status. Despite *Bragdon's* stated focus on reproduction, not HIV infection status, the EEOC reads *Bragdon* to require an individualized assessment of claimants who allege that they are substantially limited in the major life activity of reproduction. No such individualized assessment is required for an individual infected with HIV.

The EEOC's interpretation of *Bragdon* is unlikely to change, absent an equally unlikely radical change in future Supreme Court disability discrimination jurisprudence.¹²⁴ Post *Bragdon* Supreme Court decisions have reinvented *Bragdon*, making it into the "individualized inquiry" talisman that it has become for the EEOC. Although *Bragdon* was decided 25 June 1998,¹²⁵ the first EEOC public sector decision citing *Bragdon* for the proposition that it required an individualized inquiry was on September 18, 2000. The EEOC has cited *Bragdon* only twice since 18 September 2000 in its public sector decisions without invoking the individualized inquiry requirement: once on 9 November 2000, noting, "we have also considered the complainant's claim in light of the Supreme Court's recent decisions in . . . *Bragdon* . . ."¹²⁶ and once in the *Smith* HIV positive case in 2002.¹²⁷

The over two-year delay between *Bragdon's* publication and the EEOC's first citing *Bragdon* as requiring an individualized inquiry is not happenstance. In 1999, the Supreme Court decided *Sutton v. United Airlines*.¹²⁸ *Sutton*, a seven-to-two decision, addressed whether mitigating measures¹²⁹ can prevent a disability. *Sutton* cites *Bragdon* for the proposition that "whether a person has a disability under the ADA is an individualized inquiry."¹³⁰ *Bragdon* does not contain the words "individualized inquiry," and as noted above, the *Bragdon* dissent focused on the majority's failure to address whether HIV infection changed Ms. Abbott's reproductive desires.¹³¹ *Sutton* also holds that a disability cannot be potential or hypothetical,¹³² whereas, Ms. Abbott's asymptomatic condition was a part of *Bragdon's* holding.¹³³ Yet *Sutton* never criticizes *Bragdon*, instead redefining *Bragdon* by a greater margin than that which decided *Bragdon*.¹³⁴

Toyota Motor Manufacturing v. Williams,¹³⁵ a unanimous 2002 Supreme Court decision, approves and continues *Sutton's* reinvention of *Bragdon*. *Toyota* states that the *Bragdon* dissent's principle complaint did not exist.¹³⁶ Where *Bragdon's* dissent focuses on the lack of an individualized inquiry, based on Ms. Abbott's failure to present any evidence that HIV infection changed her reproduction plans,¹³⁷ *Toyota* asserts, contrary to *Bragdon's* facts, that *Bragdon* was

¹²⁴ A radical change in Supreme Court precedent appears unlikely, based upon the holdings in *Sutton v. United Airlines*, 527 U.S. 471 (1999) and *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) as discussed in the remainder of this section.

¹²⁵ *Bragdon v. Abbott*, 524 U.S. 624 (1998).

¹²⁶ *Ledesma v. Henderson*, No. 01985925, 2000 EEOPUB LEXIS 6672, at *8-*9 n.5 (EEOC Sept. 13, 2000).

¹²⁷ *Smith v. Powell*, No. 01995547, 2002 EEOPUB LEXIS 4036, at *4-*5 (EEOC June 20, 2002).

¹²⁸ 527 U.S. 471 (1999).

¹²⁹ A "mitigating measure" is a means of lessening a disability. The mitigating measure could be a medicine or a simple device such as eye glasses or contact lenses to correct a vision impairment. See *id.* at 475 & 482-83.

¹³⁰ *Id.* at 483.

¹³¹ See *Bragdon v. Abbott*, 524 U.S. 624, 658-59 (1998) (Rehnquist, C.J., dissenting) and *supra* notes 83, 86, 88-89, and accompanying text.

¹³² *Sutton*, 527 U.S. at 482.

¹³³ *Bragdon*, 524 U.S. at 637 (holding HIV "is an impairment from the moment of infection.").

¹³⁴ *Bragdon* was a five to four decision. *Id.* at 624.

¹³⁵ 534 U.S. 184 (2002).

¹³⁶ *Id.* at 198.

¹³⁷ See *Bragdon*, 524 U.S. at 658.

decided based on its “relying on unchallenged testimony that respondent’s HIV infection controlled her decision not to have a child”¹³⁸

Thus, *Bragdon* remains an uncriticized¹³⁹ precedent and has progressed from a five to four decision to a decision embraced by every member of the Court. Similarly, *Bragdon*’s holding has morphed into the general rule for which the EEOC cites it. Moreover, no Supreme Court precedent has reversed *Bragdon*’s holding that HIV infection “is an impairment from the moment of infection,”¹⁴⁰ or that conception imposes “a significant risk of becoming infected” on the infected individual’s sexual partner.¹⁴¹ Unless and until the Supreme Court specifically overrules these aspects of *Bragdon*, which appears increasingly unlikely in light of *Sutton* and *Toyota*, there is no basis to expect the EEOC will change its published understanding of *Bragdon*.

Any EEOC case that reaches a judicial forum is tried de novo.¹⁴² Thus, there is no post-EEOC harm from a labor counselor failing to litigate whether an HIV infection substantially impairs a complainant and failing to litigate which major life activity allegedly is impaired. If an Army HIV positive discrimination case continues beyond the EEOC, the Justice Department and Army Litigation Division take over the case;¹⁴³ if the Justice Department and Army Litigation Division desire to litigate the individualized inquiry issue, the labor counselor’s failure to litigate this issue at the administrative level will not limit a subsequent judicial inquiry.¹⁴⁴ The installation labor counselor should not expend limited resources on a long, uphill battle to reverse EEOC precedent that almost certainly will fail.

[T]here is not a shred of record evidence indicating that, prior to becoming infected with HIV, respondent’s major life activities included reproduction. . . . Indeed, when asked during her deposition whether her HIV infection had in any way impaired her ability to carry out any of *her* life functions, respondent answered “No.”

Id. (Rehnquist, C.J., dissenting).

¹³⁸ *Toyota*, 534 U.S. at 198.

¹³⁹ That is, uncriticized by subsequent Supreme Court decisions.

¹⁴⁰ *Bragdon*, 524 U.S. at 637.

¹⁴¹ *Id.* at 639.

¹⁴² See 42 U.S.C. § 2000e-16(c) (2000); *Farrell v. Principi*, 366 F.3d 1066 (9th Cir. 2004); 29 C.F.R. 1614.407(a) (2004).

¹⁴³ AR 27-40, *supra* note 5, para. 1-4a – 1-4d.

¹⁴⁴ See 42 U.S.C. § 2000e-16(c); *Farrell v. Principi*, 366 F.3d 1066 (9th Cir. 2004); 29 C.F.R. 1614.407(a).