IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff, v. HAPPY TIME DAY CARE CENTER, Defendant. KIDDIE RANCH, Defendant. ABC NURSERY, INC., Defendant.	)	Case No. 97-C-439-C Case No. 97-C-440-C Case No. 97-C-441-C

PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff, by Peggy A. Lautenschlager, United States Attorney for the Western District of Wisconsin, and by David E. Jones, Assistant United States Attorney for that District, submits this opposition to defendants' motion for summary judgment.[1] Defendants essentially argue that the Americans with Disabilities Act ("ADA") did not prohibit discrimination against a child named L.W., who is infected with Human Immunodeficiency Virus ("HIV"). As set forth below, the ADA protects L.W. from discrimination because his HIV infection is an impairment that substantially limits the

1/ Counsel for the United States gratefully acknowledges the assistance of

major life activities of procreation, living a normal life span, growing and thriving, socializing, and caring for himself by fighting-off infectious and opportunistic diseases.[2] Moreover, the record evidence indicates that L.W. was "regarded as" being disabled by defendants and others, thereby making summary judgment inappropriate (particularly if defendants dispute this evidence). Accordingly, plaintiff asks this Court to deny defendants' motion for summary judgment and to allow this matter to proceed to trial.

STATEMENT OF FACTS

I. The Characteristics of L.W.'s HIV Infection

L.W. is an African-American male born on December 27, 1992. Compl. ¶ 5. He is cared for by his maternal aunt and guardian, Rosetta McNuckle. Deposition of Rosetta McNuckle p. 5, l. 21-25; p. 6, l. 7-20 (Jun. 19, 1997).

L.W. has been diagnosed since at least 1994 as being infected with HIV, and according to L.W.'s treating physician at the University of Wisconsin Hospital and Clinics, Dr. James Gern, L.W. is still infected with HIV. Affidavit of James Gern, M.D. ¶¶ 2, 6 (Feb. 19, 1998). Since January 1995, Dr. Gern has attempted to treat L.W.'s HIV infection by prescribing the drugs AZT and TMP-SMX, which is a prophylactic medication to prevent a type of pneumonia that is a common opportunistic infection in HIV-positive patients. Id.

According to the affidavit of Dr. Catherine Wilfert, Professor Emerita of Pediatric

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Paralegal Alice Green and Intern Amy Dixon in preparing this brief.

2/ Plaintiff advises the Court that the issue of whether procreation is a major life activity is before the United States Supreme Court. Bragdon v. Abbott, No. 97-156.

Infectious Diseases at Duke University Medical Center, L.W.'s HIV infection is contagious through contact between L.W.'s blood and the blood of another person. Affidavit of Catherine Wilfert, M.D. ¶ 7 (Feb. 17, 1998). Should he reach puberty, L.W.'s HIV infection will also be contagious through sexual contact. Id. ¶ 8.

HIV infection manifests itself by, among other things, impairing the nervous system and by attacking and destroying CD4+ T cells, which are lymphocytes (white blood cells produced by bone marrow and maturing in thymus and lymphoid tissue). Wilfert Aff. ¶ 8. CD4 lymphocytes are responsible for responding to infectious agents, and as L.W.'s HIV causes his T-cell count to diminish, he will become ever more vulnerable to infections and diseases caused by these organisms. Id. ¶ 9. Thus, HIV causes physiological disorders of the hemic (blood) and lymphatic systems. Id. ¶ 6.

L.W. is enduring the debilitating effects of HIV: in November 1995, L.W. contracted chicken pox and had to be hospitalized for four days due to concerns about his HIV infection. Gern Aff. ¶ 3. During his hospitalization, L.W. was treated intravenously with the antiviral drug acyclovir, and he was also diagnosed with thrush, which was treated with nystatin. Id. In Dr. Gern's experience, children without HIV do not ordinarily have to be hospitalized when they contract chicken pox, nor do they undergo treatment with acyclovir. Id. At the time of L.W.'s discharge from the hospital, his CD4+ T cell count had fallen to 330. Id. A CD4+ T cell count for a child between the ages of one and five is generally not considered normal until it registers at or above 1,000. Id.; see also Wilfert Aff. ¶ 19.

This led Dr. Gern to begin a new treatment regime for L.W., consisting of AZT,

TMP-SMX, and DDI. Gern Aff. ¶ 4. In April 1997, Dr. Gern substituted 3TC for DDI and tried to have L.W. take a protease inhibitor, but the child could not tolerate the taste so this medication was stopped. Id. The dosage and frequency of L.W.'s medications have varied, but since March 1996 he has taken AZT three times a day. He also takes 3TC twice a day and TMP-SMX twice a day three days a week. He took DDI twice a day and the protease inhibitor three times a day. Id. Dr. Gern believes that L.W.'s treatment regime of taking AZT in combination with DDI or 3TC has temporarily stabilized L.W.'s CD4+ T cell count. Id. ¶ 6. These drugs appear to slow the onset of AIDS in persons infected with HIV, and they may act to reduce the speed by which L.W.'s T cells are being destroyed. Wilfert Aff. ¶ 10. Without AZT, DDI, and 3TC, it is likely that L.W.'s T-cell count would be lower than it is today, with a consequent increase in his vulnerability to opportunistic infections. Id. ¶ 12.

These drugs, however, can cause gastrointestinal and nutritional problems through such side effects as loss of appetite, nausea, anemia, and pancreatitis. Wilfert Aff. ¶ 11. Moreover, L.W. will need to continue enduring medications, blood tests, and frequent visits to health care facilities as a result of his HIV infection. Id. ¶ 13. And because HIV has an ability to mutate and become resistant to drugs, rendering them ineffective, it is likely that L.W. will have to change to other medications that can also have adverse side effects just as AZT, 3TC, and DDI do. Id. ¶ 14.

But there is no cure for HIV infection -- it is, to date, inevitably fatal. Wilfert Aff. ¶ 15. Consequently, it is statistically certain that L.W.'s HIV infection will progress to Acquired Immunodeficiency Syndrome (AIDS), which will cause profound

immunosuppression and will give rise to L.W. suffering from fatal opportunistic infections and complications of HIV infection such as pneumonia, intractable diarrhea, and decline in central nervous system function. Id. ¶ 16. The prognosis for L.W. is that he will die as a direct consequence of his HIV infection, and it is only 50% likely that he will reach his ninth or tenth birthday. Id. ¶ 17.

Indeed, the term "asymptomatic HIV infection" is a misnomer that does not accurately reflect the effects that HIV infection has on L.W. Wilfert Aff. ¶ 18. In his deposition, Dr. Gern refused to categorize L.W. as being asymptomatic. Deposition of James Gern p. 43, l. 13-16 (Nov. 26, 1997). As set forth in Ex. A to Dr. Gern's affidavit, the Centers for Disease Control and Prevention have established a diagnostic chart that allows physicians to categorize a person with HIV depending on how the infection is manifesting itself in an individual. Gern Aff. ¶ 7. Dr. Gern has concluded that L.W.'s HIV classification has ranged between B-2 (moderately symptomatic and moderately immunosuppressed) and C-2 (severely symptomatic and moderately immunosuppressed). Id. According to the CDC chart, a child L.W.'s age in category B-2 has a mean or average life span of 99 months and a median life span of 81 months, and in C-2 has an average life span of 34 months and a median life span of 23 months. Gern Aff. ¶ 7 & Ex. A. The normal life expectancy of an African-American male is approximately 64 years. U.S. Bureau of the Census, Statistical Abstract of the United States 89 (116th ed. Oct. 1996).

Dr. Gern's classification of L.W.'s HIV infection is based in part on L.W.'s CD4+ T cell count, which from December 1995 through July 1996, ranged from 580 to 520.

Gern Aff. ¶ 8. A child with CD4+ T cell levels in the range exhibited by L.W. has a diminished ability to fight off diseases compared to children with normal CD4+ T cell ranges. Wilfert Aff. ¶ 20.

Another physiological effect of L.W.'s HIV is that it has caused his growth consistently to fall well below the 5th percentile for height and weight. Gern Aff. ¶¶ 8-9; Wilfert Aff. ¶ 22. For example, in November 1997, L.W. was 37 inches tall. At that time he was 4 years and 10 months of age, but he was as tall as an average child at age 2 years and 9 months. Gern Aff. ¶ 8. "AIDS in children is frequently associated with failure to thrive (FTT), defined as a subnormal rate of growth and weight gain for age." Louisa Laue & Gordon B. Cutler Jr., Abnormalities in Growth and Development, in Pediatric AIDS 575 (P.A. Pizzo & C.M. Wilfert eds. 1994). According to Dr. Gern, L.W. was diagnosed with FTT in December 1994, and his FTT was one of the reasons his CDC classification has ranged between B-2 and C-2. Gern Aff. ¶ 8. Dr. Gern has reviewed standardized growth charts for healthy children whose parents are the estimated height of L.W.'s mother and father and has concluded that L.W. is much smaller than he should be given the size of his parents. Gern Aff. ¶ 9. L.W. has no medical conditions other than HIV infection that could account for his growth delay, and it is Dr. Gern's medical opinion that the most likely cause of L.W.'s growth delay is HIV infection. Id. Based on her clinical experience, Dr. Wilfert believes that L.W. will likely not recover from his FTT and that this condition will continue to affect him until his early death. Wilfert Aff. ¶ 22.

L.W.'s current Head Start teacher, Joelle Henkins, testified in her deposition that

L.W. and one other child are the smallest in his fifteen-student class (Henkins Dep. p. 24, l. 20-25) and that there is a “noticeable difference” in size between L.W. and the other students. Id. p. 25, l. 1-4. As a result of L.W.'s small size, the other children in his class “have a tendency to mother him.” Id. p. 25, l. 8.

Children with HIV infection, such as L.W., have a near-negligible opportunity to reproduce as do others without HIV. Wilfert Aff. ¶ 24. First, L.W. will likely have a delayed onset of puberty, the period in which persons without HIV develop the physiological capability to reproduce, and given his life expectancy, L.W. will likely die before reaching puberty. Wilfert Aff. ¶ 23. Second, even if he were to survive long enough to reach puberty, L.W. could not reproduce without imposing a serious risk of spreading his fatal disease to his partner or to his infant. Id. ¶ 25.

Due to all these effects, Dr. Wilfert's expert medical opinion is that L.W.'s HIV infection has substantially limited his ability to live a normal life span, to grow and thrive at a normal rate, to fight off diseases, and to procreate. Wilfert. Aff. ¶ 26.

In Rock County, where L.W. resides, persons with HIV may not receive public assistance unless they have a sufficiently low T-cell count or other physiological characteristics, and L.W. has received disability assistance from Rock County Human Services due to his HIV status since January 1995. Deposition of Pam Casiday p. 9, l. 23-25; p. 10, l. 1-7; p. 12, l. 17-21 (May 15, 1997).

II. L.W.'s Attempts to Obtain Child Care from Defendants

Rosetta McNuckle is L.W.'s aunt and has been his guardian since 1993. McNuckle Dep. p. 5, l. 21-23; p. 6, l. 14-16. Shortly after becoming L.W.'s guardian, she learned that L.W. was infected with HIV. Id. p. 3, l. 12-15. In addition to L.W., Ms. McNuckle has four children of her own, ranging in age from 8 to 19. Id. p. 4, l. 18.

Ms. McNuckle works at a food processing facility in Beloit, Wisconsin. McNuckle Dep. p. 8, l. 7-18. She works the third shift, meaning that her work day begins at 10:00 p.m. and ends at 6:00 a.m. Id. p. 8, l. 19-25. Since she works the third shift, Ms. McNuckle tries to sleep in the morning, from about 8:00 a.m. until noon or 1:00 p.m. Id. p. 11, l. 18-25; p. 12, l. 1-3. To do this, she seeks child care for L.W. during the morning period. Id. p. 12, l. 12-14. She obtains assistance for L.W. from Rock County Human Services, and L.W.'s caseworker since January 1995 has been Pamela Casiday. Casiday Dep. p. 9, l. 1-13.

A. Defendant Kiddie Ranch

In February 1996, when L.W. was three years old, Ms. McNuckle obtained from Ms. Casiday a list of child care centers from Ms. Casiday that had been previously used by Human Services clients. Casiday Dep. p. 37, l. 22-25; p. 38, l. 3-4. Ms. McNuckle contacted defendant Kiddie Ranch and initiated the process to get L.W. admitted. McNuckle Dep. p. 61, l. 17-25; p. 62, l. 1-11. Ms. Casiday called Kiddie Ranch on February 23, 1996, to advise them that Human Services would pay L.W.'s tuition at the child care center. Casiday Dep. p. 119, l. 13-17. Ms. McNuckle met with staff from Kiddie Ranch in late February and understood that L.W. could start at Kiddie Ranch on

March 4, 1996. McNuckle Dep. p. 64, l. 1-3. During this meeting, Ms. McNuckle told Kiddie Ranch that L.W. was HIV positive. Id. p. 68, l. 1-4. She returned to Kiddie Ranch on the afternoon of Friday, March 1, 1996, to leave a medical form required for L.W.'s admission. Id. p. 69, l. 11-18.

Later that evening, after she returned home, Ms. McNuckle received a call from someone at Kiddie Ranch, who said that L.W.'s spot had been "mistakenly" filled and that there was no longer a vacancy for him. Id. p. 70, l. 11-24; p. 71, l. 13-15; p. 73, l. 9-13. Ms. McNuckle testified that on March 1, Kiddie Ranch did not inform her that she needed to pay a $20 registration fee, that she needed to complete a Registration for Enrollment form, that she needed to submit a Home Transportation agreement or that she needed to bring in a Rock County Human Services Day Care Authorization form. Id. p. 92, l. 4-23; p. 93, l. 1-2.

On the morning of Monday, March 4, 1996, Ms. McNuckle left a message with Pam Casiday to say that L.W.'s place had been filled by someone else. McNuckle Dep. p. 102, l. 4-10; p. 103, l. 3-8. After receiving this message, Ms. Casiday called Kiddie Ranch on March 4, 1996, to inquire whether there were any openings for children L.W.'s age. Casiday Dep. p. 43, l. 1-4; p. 45, l. 11-13; p. 46 l. 24-25; p. 47, l. 1. According to a contemporaneous note she kept, Kiddie Ranch told Ms. Casiday that it had an opening for a three-year old. Id. p. 43, l. 1-4; p. 48, l. 7-22.

The owner of Kiddie Ranch, Laura Jo Pearson, stated in response to an interrogatory that she called Ms. McNuckle on Friday, March 1, 1996, but only to inform her that she needed to provide certain forms to Kiddie Ranch. Kiddie Ranch Resp. to

Inter. No. 11. In an affidavit filed in support of defendants' summary judgment motion, Ms. Pearson states that she never gave consideration to L.W.'s physical health. Affidavit of Laura Jo Pearson ¶ 5 (Jan. 23, 1998). Day Care Licensing Specialist Anne Carmody testified in her deposition, however, that she received a call from Ms. Pearson in which she expressed concern "because what if one of her families found out that this child was HIV positive and would other families pull their children based on that." Deposition of Anne Carmody p. 20, l. 24; p. 21, l. 2-7 (Jun. 23, 1997).

B. Defendant ABC Nursery

Ms. McNuckle then applied to defendant ABC Nursery in March 1996, and she was told that there were openings for L.W. and that L.W. could start on or about March 18, 1996. McNuckle Dep. p. 20, l. 1-5; p. 75, l. 3-6; p. 76, l. 5-12. Ms. McNuckle then visited ABC on or about March 13, 1996, to pick up some registration forms, and at that time she advised an employee of ABC Nursery that L.W. was infected with HIV. Id. p. 78, l. 4-6; p. 79, l. 4-18. When she returned home to fill out the forms, Ms. McNuckle received a phone call from ABC Nursery informing her that there was not an opening for L.W. Id. p. 80, l. 14-18.

According to the deposition testimony of former ABC Nursery employee Dora Goldsworthy, an ABC Nursery employee named Bonnie Schill, who was in charge of enrollment, said that "she [Schill] had enrolled a child who was HIV positive, and she got to get out of it. *** She said, 'what I'll have to do, Dora, is I won't be able to enroll kids for two or three weeks so that they don't catch on or charge me with discrimination." Deposition of Dora Goldsworthy p. 42, l. 11-19; p. 43, l. 2-6 (Oct. 2, 1997).

Ms.Goldsworthy further testified that Ms. Schill stated that she was “not going to have any HIV-positive kid working here with me.” Id. p. 44, l. 13-21.

C. Defendant Happy Time Day Care Center

Finally, Ms. McNuckle testified that she called Happy Time Day Care Center in August 1996 to see if they had openings for L.W., and Eula Buchanan said that Happy Time did have an opening. McNuckle Dep. p. 31, l. 5-11. In Happy Time's discovery responses, Ms. Buchanan attested that she spoke with Ms. McNuckle on August 19, 1996, and that she met with Ms. McNuckle on or about August 20, 1996. Happy Time Resp. to Inter. No. 10. At this meeting, Ms. McNuckle testified that she asked Ms. Buchanan to enroll L.W. for full days, and then to take him in the mornings so that he could attend Head Start in the afternoon during the fall. McNuckle Dep. p. 33, l. 19-24; see also id. p. 34, l. 5-14 (“I specifically told her mornings.”). In the Happy Time discovery responses, defendant denied that Ms. McNuckle ever requested a full day or a morning slot. Happy Time Resp. to Req. for Admis. Nos. 1 & 2.

Ms. McNuckle further testified that during her visit she told Ms. Buchanan that L.W. was HIV positive. Id. p. 39, l. 14-18. Ms. Casiday testified that she had a telephone conversation with Ms. Buchanan on or about August 20, 1996, and that Ms. Buchanan seemed "very concerned" about taking a child infected with HIV. Casiday Dep. p. 79, l. 16-25; p. 82, l. 9-12. Ms. Casiday also related that as of August 20, L.W. was scheduled to begin attending Happy Time on August 27. Id. p. 79, l. 25.

On August 21, 1996, Ms. Buchanan called Rock County Health Services to express her concern about accepting a child infected with HIV. Affidavit of Maureen

Churchill ¶ 2 (Feb. 18, 1998). Ms. Churchill visited Ms. Buchanan the same day, and Ms. Buchanan stated that she was having second thoughts about admitting L.W. Id. ¶ 3. Ms. Buchanan also said that staff had threatened to quit if she took the child and that she was worried that parents might take their children out of the child care center. Id. Ms. Churchill advised Ms. Buchanan about the risks of transmission and about the importance of using universal precautions. Id. ¶ 4. At the end of Ms. Churchill's visit, Ms. Buchanan indicated that she was still confused about whether she should admit L.W. Id. ¶ 5. In her affidavit in support of defendants' motion for summary judgment, however, Ms. Buchanan states that she did not "formulate any impressions or even think about L.W.'s physical, mental, or emotional health." Affidavit of Eula Buchanan ¶ 5 (Jan. 27, 1998).

On or about August 22, 1996, Ms. Buchanan called Ms. McNuckle to say that two of her staff members were going to quit if she accepted L.W. and that she would be unable to accept him in that case due to under staffing. McNuckle Dep. p. 43, l. 8-15; p. 44, l. 2-5, l. 13-18. Ms. Casiday's testimony echoed this account, as an August 22, 1996, entry in her notes indicates that Ms. McNuckle called her to explain that Happy Time "was probably canceling because staff will quit because of L.W.'s health condition." Casiday Dep. p. 84, l. 8-19. Sometime after the August 22nd call, Ms. Buchanan called Ms. McNuckle again to retract the previous arrangement and to offer L.W. only an afternoon vacancy, despite Ms. McNuckle's specific request for a morning slot so that L.W. could attend Head Start in the afternoon. McNuckle Dep. p. 33, l. 19-24; p. 45, l. 10-18. This was unacceptable to Ms. McNuckle. Id. p. 46, l. 15.

STANDARD OF REVIEW

When reviewing a motion for summary judgment, courts "review the record, and all reasonable inferences which can be drawn from it, in the light most favorable to [plaintiff], the non-moving party." DeLuca v. Winer Indus. Inc., 53 F.3d 793, 796 (7th Cir. 1995). Courts have recognized that the summary judgment standards are applied with added rigor in suits alleging discrimination, "where intent and credibility are crucial issues." Robinson v. PPG Indus., Inc., 23 F.3d 1159, 1162 (7th Cir. 1994); see also Huff v. Uarc, Inc., 122 F.3d 374, 388-89 (7th Cir. 1997) (explaining in employment discrimination case under the ADA that "[e]mployers who engage in discriminatory conduct rarely expressly reveal their discriminatory intent, and these cases are especially difficult to prove."). This is so because courts "will not resolve factual disputes or weigh conflicting evidence." Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 562 (7th Cir. 1996). Only when the record demonstrates that no issue of material fact exists will summary judgment be deemed appropriate. DeLuca, 53 F.3d at 796-97.

ARGUMENT

In 1990, Congress enacted the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The Act contains three subchapters, or titles, which prohibit discrimination in employment (Title I, 42 U.S.C. §§ 12111-12117), public services (Title II, 42 U.S.C. §§ 12131-12165), and public accommodations (Title III, 42 U.S.C. §§ 12181-12189). This action has been brought by the United States under Title III against three child care

centers, which are undisputedly public accommodations, as part of the ADA mandate "to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities." 42 U.S.C. § 12101(b)(3); see also id. § 12188 (providing that the Attorney General of the United States is empowered to enforce Title III of the ADA when she has "reasonable cause to believe" that an individual has been discriminated against).

The ADA extends its protection to individuals with a "disability," which is defined in the statute to mean (1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"; or (2) "a record of such an impairment [that substantially limits one or more of the major life activities]"; or (3) "being regarded as having such an impairment." 42 U.S.C. § 12102(2). Defendants' summary judgment motion is limited to the issue of whether a young child with HIV has a "disability." Since defendants have not sought summary judgment on the merits of plaintiff's claims or otherwise contested whether plaintiff can satisfy the prima facie case, the ramifications of defendants' motion are narrow but significant. If the motion is granted, then a precedent will be established making it very difficult for numerous HIV-positive individuals, especially children, to obtain protection under the ADA, whereas a finding for the United States simply allows this matter to proceed to trial where the ultimate issue of liability will be determined by a jury.

At the outset, defendants' brief appears predicated on their mistaken belief that L.W. has asymptomatic HIV, but L.W. is not asymptomatic -- L.W.'s treating physician and an outside expert have both concluded that L.W.'s HIV infection is symptomatic.

Gern Aff. ¶ 7; Wilfert Aff. ¶ 18. As a consequence of this mistake, defendants have erroneously characterized the issue before the Court as whether asymptomatic HIV infection is a per se disability under the ADA. Given the facts of this case, however, the issue before the Court is whether L.W. falls within the protection of the ADA due to his HIV infection. Below, the United States explains that L.W. satisfies the first two prongs of the disability definition because the record evidence shows that his HIV infection is an impairment that substantially limits at least one major life activity. It will also become clear that infection with HIV, like blindness or paraplegia, causes a set of limitations on major life activities that will inevitably qualify someone like L.W. for protection under the ADA. Finally, plaintiff shows that L.W. satisfies the third prong of the definition because defendants and others regarded him as having a contagious impairment that substantially limits major life activities.

I. Congress Understood the Term Disability as Covering Individuals with Asymptomatic or Symptomatic HIV

When enacting the ADA in 1990, Congress borrowed the definition of the term "handicapped persons" found in Section 504 of the Rehabilitation Act Amendments of 1974 to define the ADA term "disability."[3] As explained in the ADA Committee Reports,

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3/ See Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111, 88 Stat. 1617, 1619 (1974), codified at 29 U.S.C. § 706(8)(B). As amended in 1974, the Rehabilitation Act protects "handicapped individuals" from discrimination by entities receiving Federal financial assistance. 29 U.S.C. § 794. In 1992, the Rehabilitation Act was amended to change the term "handicapped individuals" to "individuals with a disability," thereby creating symmetry with the ADA.

"[n]o change in definition or substance is intended nor should be attributed to the change in phraseology [from the term 'handicap' to 'disability']." H.R. Rep. No. 101-485, pt. 2, at 51, reprinted in 1990 U.S.C.C.A.N. 332. To ensure that the ADA would be interpreted as providing the same scope of protection as the Rehabilitation Act, Congress included within the ADA a provision requiring that "[n]othing in the ADA shall be construed to provide a lesser standard than the standard applied under Title V of the Rehabilitation Act." 42 U.S.C. § 12201(a). This Court too has confirmed that "[i]n drafting the ADA, Congress drew upon and incorporated standards developed under the Rehabilitation Act. Therefore, the ADA is to be interpreted consistently with the Rehabilitation Act." Vande Zande v. Wisconsin Dep't of Administration, 851 F. Supp. 353, 359 (W.D. Wis. 1994), aff'd, 44 F.3d 538 (7th Cir. 1995); see also Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 484 (7th Cir. 1997) ("Congress did not attempt, by altering the language that it was borrowing from the old statute as the template for the new one, to prevent the new one from being interpreted the same way the old one had been interpreted, nor did it amend the Rehabilitation Act to extinguish the old interpretation.").

Judicial interpretations of the term "handicapped" will therefore provide an unerring guide to understanding the scope of the term "disability" under the ADA. Providing a general interpretative rule, the Supreme Court held in 1987 that the term "handicapped" under the Rehabilitation Act must be given a "broad" definition. School Board of Nassau v. Arline, 480 U.S. 273, 285 (1987). The case involved a school teacher with the contagious disease tuberculosis and her school board's attempt to remove her from classroom duties. The Court found that the contagiousness of the

teacher's disease rendered her handicapped, and that Congress intended to prohibit discrimination against people who may not have any reduced physical capability, but who are nonetheless substantially limited in their life activities due to the negative attitudes of others toward their impairment. Id. at 282-84.[4]

Before enactment of the ADA, courts unanimously used a broad definition of "handicapped" to hold that individuals with HIV were protected by the Rehabilitation Act. See Chalk v. United States District Court, 840 F.2d 701, 705-06 (9th Cir. 1988) (holding that a teacher with HIV was protected by the Rehabilitation Act and noting that "[i]ndividuals who become infected with HIV may remain without symptoms for an extended period of time"). And in a series of pre-ADA decisions, courts held that school children with HIV were covered by the Rehabilitation Act and could not be excluded from educational programs on the basis of their disease alone. See, e.g., Doe v. Dolton Elementary School Dist. No. 1, 694 F. Supp. 440, 444-45 (N.D. Ill. 1988) (holding that an elementary school student with HIV was likely handicapped under the Rehabilitation Act because he was substantially limited in the major activity of reproduction due to impairments to his "hemic, lymphatic and reproductive systems"); Thomas v. Atascadero Unified School Dist., 662 F. Supp. 376, 379 (C.D. Cal. 1987) (concluding that a kindergarten student was likely handicapped under the Rehabilitation Act after finding that "[e]ven those who are asymptomatic have abnormalities in their hemic and reproductive systems making procreation and childbirth dangerous to

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4/ The Arline Court expressly declined to consider whether persons infected

themselves and others"); Ray v. School Dist. of DeSoto County, 666 F. Supp. 1524, 1533, 1536 (M.D. Fla. 1987) (holding that three asymptomatic HIV-positive school children were entitled to an injunction under the Rehabilitation Act to prohibit discrimination at school). In fact, plaintiff is unaware of any case prior to the enactment of the ADA holding that persons infected with HIV did not fall within the definition of handicapped under the Rehabilitation Act.

Of course, it is well-established that when Congress enacts a new law incorporating sections of a prior law, Congress is presumed to be aware of prior judicial interpretations and to adopt them in the re-enacted statutory language. Lorillard v. Pons, 434 U.S. 575, 580-81 (1978); see also Keene Corp. v. United States, 508 U.S. 200, 212-13 (1993) (observing that Congressional re-enactment of a statute that had been given a consistent judicial interpretation generally includes that interpretation). The idea that the definition of disability should receive a broad reading has certainly been carried forward from the Rehabilitation Act to the ADA. Vande Zande v. Wisconsin Dep't of Administration, 44 F.3d 538, 541 (7th Cir. 1995) ("'Disability' is broadly defined."). Accordingly, defendants must concede that Congress understood that HIV infection, even when asymptomatic (which it is not with L.W.) and even when infecting children, would be included as a disability under the ADA because of its debilitating effects on the hemic, lymphatic, and reproductive systems.

The United States does not, however, rely solely on clearly established judicial interpretations and canons of statutory construction to determine Congressional will, for

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with HIV would fall within the Rehabilitation Act. 480 U.S. at 282 n.7.

compelling legislative history also leads to the conclusion that the ADA was intended to protect individuals with HIV infection, whether asymptomatic or symptomatic.[5] First, a memorandum prepared in 1988 by the Office of Legal Counsel of the United States Justice Department concluded that the Rehabilitation Act protects individuals with both symptomatic and asymptomatic HIV. See Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, to Arthur B. Culvahouse, Jr., Counsel to the President 9-11 (Sept. 27, 1988), reprinted in Americans with Disabilities Act of 1989: Hearings Before the Senate Comm. on Labor and Human Resources, 101st Cong., 1st Sess., 346-348 (1989) (hereafter "Kmiec Memo"). Congress specifically endorsed this conclusion in a section of the House Report entitled "Explanation of the Legislation -- Definition of the Term Disability," which states that "[a]s noted by the U.S. Department of Justice, *** a person infected with [HIV] is covered under the first prong of the definition of the term 'disability' because of a substantial limitation to procreation and intimate sexual relations." H.R. Rep. No. 101-485, pt. 2, at 52, reprinted in 1990 U.S.C.C.A.N. 334 (citing Kmiec Memo); see also H.R. Rep. No. 101-485, pt. 3, at 28 n.18, reprinted in 1990 U.S.C.C.A.N. 451 (citing Kmiec Memorandum with approval). The official Senate Report also embraced the conclusions of the Kmiec Memo. S. Rep. No. 101-116, at 22.

5/ Justice Stephen Breyer has acknowledged the utility of legislative history to explain "specialized meanings of terms or phrases in a statute which were previously understood by the community of specialists (or others) particularly interested in a statute's enactment." Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 853 (1992).

Second, Congress endorsed the recommendation of a Presidential Commission which concluded that persons with HIV needed protection under federal anti-discrimination laws. "All persons with symptomatic or asymptomatic HIV infections should be clearly included as persons with disabilities who are covered by the anti-discrimination protections of this [the ADA] legislation." H.R. Rep. No. 101-485, pt. 2, at 31, 48, reprinted in 1990 U.S.C.C.A.N. 313, 330 (citing Report of the Presidential Comm. on the Human Immunodeficiency Epidemic 123 (Jun. 1988)).

Finally, floor statements of those favoring passage of the ADA and of those opposed to passage all demonstrate that Congress was of one mind that individuals with HIV, whether symptomatic or asymptomatic, would be protected under the ADA: "People with HIV disease are individuals who have any condition along the full spectrum of HIV infection -- asymptomatic HIV infection, symptomatic HIV infection or full-blown AIDS. These individuals are covered under the first prong of the definition of disability in the ADA ***." 136 Cong. Rec. S9696 (daily ed. July 13, 1990) (statement of Senator Kennedy).[6] "I do not understand why, for example, you went down the road of including in your definitions people who are HIV positive, because 85 percent or more of the HIV positive people in this country are known to be drug users or homosexual or both." 135 Cong. Rec. S10768 (daily ed. Sept. 7, 1989) (statement of Senator Helms).[7]

6/ Accord 136 Cong. Rec. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens); id. H4624 (statement of Rep. Edwards); id. H4626 (statement of Rep. Waxman).

7/ Senator Harkin responded to this query by explaining to Senator Helms that "[t]hey are covered on the basis of their HIV infection but not on the basis of being

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Plaintiff relates this legislative history not in an effort to confuse what defendants contend is a plain meaning of the ADA, but to give historical context to the specific language used by Congress. Defendants would certainly agree that legislation cannot be interpreted in a vacuum. Defs.' Br. 13 ("The Court has '[o]ver and over *** stressed that in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." (quoting United States Nat'l Bank v. Independent Ins. Agents of N. America, 508 U.S. 439, 455 (1993)). This common sense notion is particularly apt when the statutory language at issue had an established judicial meaning at the time Congress enacted it: Congress was not using a dictionary when it defined disability, it was carrying forward a preestablished definition with a preestablished meaning. Accordingly, the policy of the ADA unambiguously favors including persons infected with HIV as disabled because HIV, like blindness, has irreparable effects on major life activities. Defendants can really divine no countervailing policy, and their effort to create a tension in the legislative history where one does not exist simply underscores their failure.[8]

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current drug users." 135 Cong. Rec. S10768 (daily ed. Sept. 7, 1989).

8/ Defendants contend that the implementing regulations for the Fair Housing Act include asymptomatic or symptomatic HIV in the illustrative list of physical impairments, but do not expressly define HIV as a handicap. Since the Senate Report endorses the analysis of the term handicap in the Fair Housing Act regulations, defendants reason that the Senate must have believed that HIV infection was an impairment, but not always a disability. Defs.' Br. 9-10. This claim is unfounded. The

II. L.W.'s HIV Infection Is An Impairment That Substantially Limits Major Life Activities

Under the first prong of the statutory definition of a disability, plaintiff must show that L.W. has (1) a physical or mental impairment that (2) substantially limits one or more major life activities. 42 U.S.C. § 12102(2)(A). Significantly, the terms used by Congress in this prong are broad. Impair means "to decrease in strength, value, amount or quality." Webster's Third New International Dictionary of the English Language (1994). Similarly, the "plain meaning of the word 'major' denotes comparative importance" or "significance" and that the term "life" is "notable for its breadth." Abbott v. Bragdon, 107 F.3d 934, 939-40 (1st Cir. 1997), cert. granted, 118 S. Ct. 554 (1997); see also Doe v. Kohn, Nast & Graf, 862 F. Supp. 1310,1320 (E.D. Pa. 1994) (holding that "the term 'major life activities' *** encompasses a lot [and includes] the various major activities embraced within the full scope of one's life").

In the regulations implementing Title III of the ADA, the phrase "major life activities" is given an open-ended definition with a list of illustrative, but not exclusive, examples. 28 C.F.R. § 36.104 ("major life activities means functions such as caring for

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regulations under the Fair Housing Act, the Rehabilitation Act, and the ADA all include illustrative examples of physical impairments, but not one of these regulations identifies any specific disabilities. Therefore, the inference that defendants draw from the regulatory silence does not follow. Indeed, the preamble to the Fair Housing Act regulations explains that HIV was included in the list of physical impairments because "the legislative history of the Act contains numerous statement that HIV infected individuals are covered by the Act." 54 Fed. Reg. 3232, 3245 (Jan. 23, 1989) (emphasis added). The preamble to the ADA regulations promulgated by the Justice Department is in accord. See 28 C.F.R. Pt. 36, App. B, at 610 (1997) (citing Kmiec Memorandum for the proposition that symptomatic and asymptomatic HIV infection would be covered by the ADA).

one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."). The Preamble to this regulation explains that a substantial limitation occurs "when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." 28 C.F.R. Pt. 36, App. B, 600-601 (1997). This is consistent with the hallmark of the terms used by Congress, which is their flexibility to adapt to different understandings about what conditions might constitute a disability, while at the same time excluding trivial conditions by requiring a plaintiff to show a substantial limitation (though not preclusion) of a comparatively important life function.

A. L.W.'s HIV Infection Is a Physical Impairment

Defendants agree that L.W. is infected with HIV (Defs.' Proposed Finding of Fact No. 3), and they appear to concede that L.W.'s HIV infection constitutes a physical or mental impairment. Defs.' Proposed Finding of Fact No. 40. They do not, at least, argue to the contrary.

To the extent this issue remains open, the record evidence related above in the Statement of Facts shows that L.W.'s HIV infection has been evaluated by Dr. Catherine Wilfert, who is the Scientific Director of the Pediatric AIDS Foundation and is a Professor Emerita of Pediatrics and the former Chief of the Division of Infectious Diseases at Duke University Medical Center in Durham, North Carolina. Dr. Wilfert explains that HIV infection "causes a physiological disorder of the hemic (blood) and lymphoid systems." Wilfert Aff. ¶ 6. HIV infection manifests itself by "impairing the nervous system and by attacking and destroying CD4+ T cells, which are lymphocytes (white blood cells

produced by bone marrow and maturing in the thymus or lymphoid tissue). CD4 lymphocytes are responsible for responding to infectious diseases, and as L.W.'s HIV infection causes his T-cell count to diminish, he will become ever more vulnerable to opportunistic infections and the diseases caused by the organism." Id. ¶¶ 11-12.

From December 1995 through July 1996 (the period when L.W. was denied admission by defendants), L.W.'s CD4+ T cell count ranged from 580 to 520. Gern Aff. ¶ 8. Dr. Wilfert testified that L.W.'s CD4+ T cell count has caused him to suffer moderate immunodepression, and that a child without HIV will have a T cell count of at least greater than 1,000. As a result of his immunodepression, Dr. Wilfert notes that L.W.'s bout with Chicken Pox required special medication and hospitalization due to his HIV infection. Wilfert Aff. ¶ 12. Moreover, L.W. has been diagnosed with Failure to Thrive ("FTT"), which means that L.W.'s HIV infection has caused a physiological impairment of his ability to grow in height and weight in a manner consonant with other children his age. Gern Aff. ¶ 8. L.W.'s height and weight have consistently been well below the 5th percentile for his age group. Id.; Wilfert Aff. ¶ 22. Both Dr. Gern and Dr. Wilfert have concluded that L.W.'s HIV infection is symptomatic. Gern Aff. ¶¶ 7, 9; Wilfert Aff. ¶¶ 18, 20.

The regulations implementing Title III of the ADA provide that a physical or mental impairment means "[a]ny physiological disorder or condition *** affecting one or more of the following body systems: *** hemic and lymphatic." 28 C.F.R. § 36.104. The regulations also specifically include "HIV (whether symptomatic or asymptomatic)" within the definition of impairment. Id. The case law agrees that the effect of HIV infection on

the hemic and lymphatic systems results in a physical impairment, see Cain v. Hyatt, 734 F. Supp. 671, 679 (E.D. Pa. 1990) (citing Doe v. Dolton Elementary School Dist. No. 1, 694 F. Supp. 440, 444 (N.D. Ill. 1988)), and defendants are not alone in conceding this portion of the test. Hernandez v. The Prudential Insur. Co., 977 F. Supp. 1160, 1163 & n.1 (M.D. Fla. 1997) (noting that defendant had conceded that an HIV-positive person had a physical impairment).[9] Thus, L.W.'s HIV infection has resulted in a physical or mental impairment.[10]

B. L.W.'s Physical Impairment Substantially Limits Major Life Activities

Defendants argue that the only possible major life activity affected by L.W.'s HIV infection is his ability to reproduce, and they further contend that reproduction is not a major life activity, especially for a three-year old boy. Defs.' Br. 12-20. As a threshold matter, defendants' analysis suffers from misplaced focus, for they insist that an activity such as reproduction cannot be one of life's major activities because Congress was not concerned about discrimination against people with reproductive problems. Defs.' Br.

9/ The only court of which plaintiff is aware suggesting that even asymptomatic HIV is not a physical impairment is Runnebaum v. NationsBank of Maryland, N.A., 123 F.3d 166, 167-69 (4th Cir. 1997) (en banc). There, without benefit of record development, the Fourth Circuit concluded that because asymptomatic HIV has no symptoms, it perforce must exert no impairment. Id. at 168. The Fourth Circuit did nothing more than rely on a dictionary to rebut the phalanx of judicial and regulatory pronouncements contradicting its reasoning. Regardless, plaintiff asserts that the factual record in this case, which shows that L.W.'s HIV infection is symptomatic, does not allow the Fourth Circuit's reasoning to find purchase here.

10/ The physical effects of L.W.'s HIV infection discussed above also constitute a “record of impairment,” which would satisfy the second prong of the disability definition. 42 U.S.C. § 12102(2)(B). The effects of this record of impairment on L.W.'s major life activities are addressed below in Section II.B.

16. This argument is nonsensical. Nothing in the ADA suggests that the phrase "major life activities" encompasses only those activities that, when lost, could lead to discrimination, and nothing in the policy animating the statute would lead to such a result.

To the contrary, the ADA was enacted with a keen recognition of the Supreme Court's holding in Arline, which specifically rejected the argument that "the contagious effects of a disease can be meaningfully distinguished from the diseases's physical effects on a claimant. *** [Respondent's] contagiousness and her physical impairment each resulted from the same underlying condition." 480 U.S. at 282; see H.R. Rep. No. 101-485, pt. 2, at 53 (citing Arline with approval), reprinted in 1990 U.S.C.C.A.N. at 336; S. Rep. No. 101-116, at 24 (same). Relying on this passage from Arline, the Ninth Circuit in Gates v. Rowland, 39 F.3d 1439, 1446 (9th Cir. 1994), maintained that "there is no distinction to be drawn, for purposes of the Act, between those persons in whom the HIV virus has developed into AIDS and those persons who have remained asymptomatic." Id. The court concluded that "[i]t is the possible transmission of the virus to others that is the basis of the individual's disability under the provision of the Act." Id. In the same way, it is the fear in others that they might "catch" HIV, with its host of incurable consequences, through contact with L.W. that brings him squarely within the policy and purpose of the ADA as a person with a disability.

1. L.W.'s HIV Infection Has Substantially Limited the Major Life Activity of Procreation

It is undisputed that L.W.'s HIV infection has substantially limited, and likely precluded, his ability to procreate. Dr. Wilfert's affidavit sets forth the facts that L.W.'s HIV infection will likely result in delayed puberty, that he will likely not live long enough to reach puberty, and that even if he does, he risks infecting his infant and his infant's mother if he engages in procreative sexual intercourse. Wilfert Aff. ¶¶ 23-25.

Defendants suggest that a three-year old boy cannot have a substantial limitation of his procreative activities because he cannot yet procreate. This subjective approach has no case law or statutory support. Even the Fourth Circuit's Runnebaum decision recognizes that "courts need only consider whether the impairment at issue substantially limits the plaintiff's ability to perform one of the major life activities contemplated by the ADA, not whether the particular activity that is substantially limited is important to him." 123 F.3d at 170 (citing with approval Abbott, 107 F.3d at 941, for the proposition that "whether a particular activity is one of the major life activities under the statute is not a subjective inquiry").

Moreover, prior to enactment of the ADA, courts concurred that HIV infection in children constituted a handicap under the Rehabilitation Act because of the infection's effect on procreation. See Dolton, 694 F. Supp. at 444-45 (holding that an elementary school student with HIV was likely handicapped because his infection caused an impairment to his reproductive system); Thomas, 662 F. Supp. at 379 (C.D. Cal. 1987) (concluding that a kindergarten student was likely handicapped because of HIV's effect

on the reproductive system). This only makes sense, for otherwise, a person with a physical impairment having fluctuating effects (such as HIV or epilepsy) would only qualify as being disable intermittently depending on their daily symptomatic condition. Therefore, the proper question is whether procreation is a major life activity for individuals generally, not whether L.W. has a present desire to be a father.[11]

Procreation, the life activity that creates life itself, is plainly a major life activity. See Abbott, 107 F.3d at 939 ("[R]eproduction, which is both the source of all life and one of life's most important activities, easily qualifies [as a major life activity.]"); see also McWright v. Alexander, 982 F.2d 222, 226-27 (7th Cir. 1992) (assuming that reproduction is a major life activity under the Rehabilitation Act). Indeed, two district courts from this Circuit have agreed that procreation is a major life activity, expressly rejecting a contrary holding issued by a federal district court in Louisiana. See Pacourek v. Inland Steel Co., 916 F. Supp. 797, 801-02 (N.D. Ill. 1996) (finding unpersuasive the reasoning used in Zatarain v. WDSU-Television, Inc., 881 F. Supp. 240 (E.D. La. 1995)); and Erickson v. Northeastern Illinois Univ., 911 F. Supp. 316, 322 (N.D. Ill. 1995) (same).[12]

11/ Defendants' subjective test would create an evidentiary nightmare for children that they likely did not consider. Applying their subjective test, children would need to provide deposition or affidavit testimony saying that they would like to become fathers or mothers someday. The emotional trauma inflicted by such a requirement would only get worse if children were also required to testify that they hoped to live long enough to go to high school and learn, or grow and thrive like other children, or have a normal immune system that would allow them to care for themselves by fighting off diseases.

12/ According to the court in Hernandez v. The Prudential Insur. Co., 977 F.

The understanding that procreation is one of the most important and cherished activities in which people engage has long been a foundation of American jurisprudence. See, e.g., Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 849 (1992) (recognizing that the ability to make decisions about family and parenthood is a fundamental liberty); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (recognizing that procreation is "fundamental to the very existence and survival of the race."). Naturally, a life activity does not need to claim constitutionally-protected status before it can be considered "major," but the traditional importance attaching to procreation compels the conclusion that it falls within the category of major life activities. This conclusion is buttressed by the House Report to the ADA, which listed procreation and sexual relations as among the category of "major life activities." H.R. Rep. No. 101-485, pt. 2, at 52.[13]

There is no basis in statutory language, policy or history to support defendants' claim that reproduction is not a major life activity. Standing off by themselves, some courts have advanced defendants' argument, primarily the plurality opinion in Runnebaum v. NationsBank of Maryland, 123 F.3d 156 (4th Cir. 1997) (en banc). There,

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Supp. 1160 (M.D. Fla. 1997), the majority of courts have concluded that HIV substantially limits the major life activity of procreation. Id. at 1164 (collecting cases).

13/ The ADA Title III regulations further support the conclusion that procreation is a major life activity. The regulations define the term "physical impairment" to include physiological disorders affecting the reproductive system. 28 C.F.R. § 36.104. This indicates that the ADA's "drafters considered reproduction to be a major life activity -- otherwise, including reproductive disorders among the regulation's roster of physical impairments would not have made much sense." Abbott, 107 F.3d at 940.

the court mused that while "procreation is a fundamental activity, [we] are not certain that it is one of the major life activities contemplated by the ADA." Id. at 170.[14] The court did not explain why there should be a distinction between concededly "fundamental activities" and "major life activities contemplated by the ADA." If anything, the language and history of the Act conflict with the view that there is a finite set of "major life activities" recognized by the ADA that is distinct from a common understanding of the term. Abbott, 107 F.3d at 939 ("Because the term "major life activities" is not defined in the enactment, we are obliged to construe it in accordance with its natural (that is, ordinary) meaning."). Ultimately, the Fourth Circuit quickly moved on to assume for purposes of the opinion that procreation was a major life activity, so its doubts are dicta. Id. at 171.

Perhaps the best insight into this issue can be gained by a brief moment of introspection, setting aside judicial opinions and committee reports and concentrating on what individuals believe to be among their core life activities. One conclusion will emerge: procreation is in the highest tier of life's major activities. In the end, there is no basis in logic, in law or in life-experience for excluding procreation from the group of major life activities encompassed by the ADA.

14/ As support for its doubts, the Fourth Circuit relied on Krauel v. Iowa Methodist Med. Center, 95 F.3d 674 (8th Cir. 1996), which inexplicably construed the illustrative list of major life activities found in the regulation as exclusive, leading it to find that procreation's absence from the list disqualified it as a major life activity. The Eighth Circuit's approach was flatly rejected in Abbott, 107 F.3d at 940.

2. L.W.'s HIV Infection Has Substantially Limited the Major Life Activities of Living, Growing, Socializing, and Caring for Himself

In addition to its effect on L.W.'s ability to procreate, L.W.'s HIV infection has resulted in a substantial reduction in his life span. An African-American male in the United States can be expected to live for approximately 64 years. Due to his incurable HIV and based on his symptomatic condition, L.W.'s median life span is at most 99 months and his median life span is at most 81 months. Gern Aff. Ex. ¶ 7 & Ex. A. After reviewing his medical history, Dr. Wilfert concluded that it is only 50% likely that L.W. will see his ninth or tenth birthday. Wilfert Aff. ¶ 17. It is nearly certain, therefore, that L.W. will die at a very young age as a direct consequence of his HIV infection. Id. That early death will completely deprive him of all the major life activities that one might expect to enjoy after the age of 10, such as learning and working. Since learning and working are unquestionably major life activities (28 C.F.R. § 36.104), then a 70% reduction in the life span during which these activities might have been enjoyed must constitute a substantial limitation.

In addition, L.W.'s HIV infection has likely resulted in a severe stunting of his normal growth in height and weight. Dr. Wilfert points out that this condition, known as Failure to Thrive ("FTT") is a common characteristic of childhood HIV, and one that L.W. is not likely to recover from before his death. Wilfert. Aff ¶¶ 21-22. L.W. has consistently fallen well below the 5th percentile of his age group in height and weight. Id. ¶ 22; Gern Aff. ¶ 8. For example, in November 1997, L.W. was 4 years and 10 months old, but he was only as tall as an average 2 year and 9 month old child. Gern Aff. ¶ 8. Dr. Gern has

concluded that the most likely cause of L.W.'s growth delay is HIV infection. Gern Aff. ¶ 9.

The inability to grow not only delays the onset of certain biological milestones, such as puberty, but it also deprives L.W. of certain "normal" socialization experiences. Henkins Dep. p. 25, l. 8-10 (observing that the other students in L.W.'s class have a tendency to "mother him" due to his small size); Gern Dep. p. 28, l. 11-16; p. 30, l. 1-6 (noting that L.W. will be at a physical disadvantage in normal playground activities due to his diminished size and strength). It also appears axiomatic that, like living a normal life span, thriving and growing normally are major life activities that have been substantially limited by L.W.'s HIV infection.

Finally, L.W.'s HIV infection has substantially limited his ability to care for himself by reducing his capacity for overcoming infections and opportunistic diseases.[15] Dr. Wilfert explains that a "child with CD4+ T cell levels in the range exhibited by L.W. has a diminished ability to fight off diseases compared to children with normal CD4+ T cell ranges." Wilfert Aff. ¶ 20; see also Gern Aff. ¶ 7 (explaining that L.W.'s CDC classification has ranged between B-2 and C-2). To combat these effects on his immune system, L.W. must take a variety of drugs, such as AZT, DDI, or 3TC. Wilfert Aff. ¶ 10. This drug therapy comes at a price, for it can cause gastrointestinal and nutrition problems through such side effects as nausea, loss of appetite, and pancreatitis. Id. ¶ 11. L.W. must also endure invasive blood tests and frequent visits to health care

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15/ The ADA regulations specifically include "caring for one's self" as a major

facilities as a result of his HIV infection that children without HIV do not ordinarily have to undergo. Id. ¶ 13. Without his drug therapy, "it is likely that L.W.'s T-cell count would be lower than it is today, with a consequent increase in his vulnerability to opportunistic infections. Id. ¶ 12.[16]

All this leads to the conclusion that L.W.'s ability to care for himself by fighting off diseases has been substantially limited by his HIV infection. In this regard, this Court's discussion of the Seventh Circuit's decision in Vande Zande v. Wisconsin Dep't of Administration, 44 F.3d 538 (7th Cir. 1995) is instructive:

> The court focused on the fact that many diseases, such as the AIDS virus, may create intermittent problems that might not be considered a disability under the act if view in isolation, but would show a substantial limitation of a major life activity if viewed over an extended period of time. Put another way, the court concluded that when an impairment creates smaller intermittent impairments, the disability focus should be on the effects of the overall impairment. Such a focus allows the court to expand the scope of the disability inquiry, which is appropriate in a situation in which the overall disability creates sporadic impairments that may create a substantial limitation when viewed cumulatively.

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life activity. 28 C.F.R. § 36.104.

16/ Plaintiff understands that this Court has previously rejected the argument that a person's disability should be considered without regard to mitigating measures they are taking. Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1445 (W.D. Wis. 1996). Nevertheless, plaintiff notes for the record its assertion that L.W.'s HIV condition should be considered without regard to the mitigating effects of his drug therapy. See Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997) ("[O]ur analysis of whether [a person] is disabled does not include consideration of mitigating measures."); Hendler v. Intelecom USA, Inc., 963 F. Supp. 200, 206 (E.D.N.Y. 1997) ("[T]he impact of the impairment without considering mitigating measures is but one of several factors in determining whether it is substantially limiting."); but see Sutton v United Air Lines, Inc., 130 F.3d 893, 901 & nn. 7, 8 (10th Cir. 1997) (holding that mitigating measures should be considered when assessing whether a disability exists and collecting cases on both sides of the issue).

Schluter, 928 F. Supp. at 1446. Under an appropriately expanded view, therefore, the intermittent, long-term cumulative effects of L.W.'s HIV infection on his ability to care for himself assuredly results in a substantial limitation.

III. Defendants and Others Regard L.W.'s HIV Infection as an Impairment that Substantially Limits His Major Life Activities

Even If this Court concludes that L.W. cannot satisfy the first two prongs of the definition of disability, then L.W. is still protected by the ADA because his HIV infection causes him to be "regarded as" having a disability. See 42 U.S.C. § 12102(2)(C). This third prong of the disability definition is satisfied where, as here, a person has an impairment that substantially limits major life activities only "as a result of the attitudes of others toward such impairment." 28 C.F.R. § 36.104 subpart (4)(ii). Additionally, the third prong may be satisfied when a person has a physical impairment "that does not substantially limit major life activities but that is treated by a private entity as constituting such a limitation." Id. § 36.104 subpart (4)(i). Under these tests, it is immaterial whether the impairment in fact limits an infected person's major life activities. See Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996) (affirming dismissal of claim based on failure to satisfy first prong of disability definition but reversing dismissal of "regarded as" claim because evidence would support finding that employer believed plaintiff to have a disabling impairment).

As Congress explained, the "rationale for [the "regarded as" test] was clearly articulated" by the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987), where the Court addressed the similar provision of the Rehabilitation Act in

the context of a contagious disease. S. Rep. No. 101- 116, at 23. The Court stated that under the "regarded as" test, "an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283. The Court explained that

> [b]y amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from the impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious.

Id. at 284 (footnote omitted). The Court therefore concluded that "[a]llowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of [the Rehabilitation Act], which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." Id.

The Court in Arline left open whether a carrier of a contagious disease could be considered a handicapped person under the Act solely on the basis of contagiousness, 480 U.S. at 282 n.7,[17] but with HIV the answer is clearly yes. Fear of contagion, based

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17/ The narrow holding in Arline on this point was that "the fact that a person with a record of a physical impairment is also contagious does not suffice to remove

upon the invariably fatal nature of AIDS, has resulted in widespread discrimination and fear toward those infected with HIV. Cain v. Hyatt, 734 F. Supp. 671, 678 (E.D. Pa. 1990) (“HIV-positive individuals are unjustifiably and 'widely stereotyped as indelibly miasmic, untouchable, physically and morally polluted.”). Such fears have been especially acute concerning HIV-infected children in school settings. Dolton, 694 F. Supp. at 444-45 (rejecting school district's effort to discriminate against HIV-infected elementary school student and observing that “[s]urely no physical problem has created greater public fear and misapprehension than AIDS.”); Ray, 666 F. Supp. at 1533, 1536 (same); see also Debra Jensen De Hart, Suit Brings AIDS Issue to Beloit, Beloit Daily News, Mar. 8, 1997, at 1 (quoting a mother whose child attended defendant Kiddie Ranch as saying that “I'm very fearful of it [HIV infection], I hear the chances would be minimal, but I don't know. *** It is a scary thing.”) Centers for Disease Control, Education and Foster Care of Children Infected with HIV, 34 Morbidity & Mortality Wkly. Rep. 517, 517 (Aug. 30, 1985) (“The diagnosis of AIDS or associated illnesses evokes much fear from others in contact with the patient ***. Parents of [HIV]-infected children should be aware of the potential for social isolation should the child's condition become known to others in the care or educational setting.”)

It is the contagious nature of HIV, therefore, that has the effect of substantially limiting an infected person's major life activities "as a result of the attitudes of others toward [the] impairment." 28 C.F.R. 36.104 (subpart (4)(ii)). As noted above, Congress

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that person from coverage under Section 504 [of the Rehabilitation Act]." 480 U.S. at 286.

found that "discrimination against individuals with HIV infection is widespread and has serious repercussions for both the individual who experiences it and for this nation's efforts to control the epidemic." H.R. Rep. No. 101-485, pt. 2, at 31. More specifically, committee hearings and floor debates were replete with references to children with HIV such as Ryan White, who was barred from school due to fears about his HIV infection.[18] Thus, the "regarded as" doctrine appropriately recognizes that where individuals with a particular condition, such as HIV infection, face such persistent discrimination and exclusion, that fact itself warrants legal protection. See generally Gates v. Rowland, 39 F.3d 1439, 1446 (9th Cir. 1994) ("It is the possible transmission of the [HIV] virus to others that is the basis of the individual's disability under the provisions of the [Rehabilitation] Act."); Harris v. Thigpen, 941 F.2d 1495, 1522-1524 (11th Cir. 1991) (holding that HIV-infected inmates were "handicapped individuals" under the Rehabilitation Act because the correctional system treated them as being unable to engage in major life activities relative to the rest of the inmate population).

The conclusion that HIV is a disability as a result of the attitudes of others toward the impairment is reflected in Department of Justice regulations. Citing Arline, the regulations state that "a person who is not allowed into a public accommodation because of the myths, fears, and stereotypes associated with their disabilities would be

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18/ See, e.g., Hearings Before the Comm. on Labor and Human Resources on S. 933, 101st Cong., 1st Sess., 102 (1989); Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary on H.R. 2273, 101st Cong., 1st Sess., 171 (1989); 136 Cong. Rec. H2479-81 (daily ed. May 17, 1990) (statements of Reps. McCloskey, McDermott & Jontz); Id. S7438 (daily ed. Jun. 6,

covered under this *** test," even if the person's physical condition would not otherwise be considered a disability under the Act. Id. With HIV, it is precisely the reactions of others toward the impairment that substantially limits a broad array of the infected person's major life activities. See U.S. Dep't of Justice, The Americans with Disabilities Act Title III Technical Assistance Manual 12 (Nov. 1993) (providing as an illustration of a "regarded as" disability a "three-year old child born with a prominent facial disfigurement [who] has been refused admittance to a private day care program on the grounds that her presence in the program might upset the other children"). Moreover, the Preamble to the Title III regulations counsels that "[a] person would be covered under [the regarded as] test if a restaurant refused to serve that person because of a fear of 'negative reactions' of others to that person." 28 C.F.R. Pt. 36, App. B, at 612 (1997).[19]

In this case, the reactions of defendants and others such as parents and teachers demonstrate that they regarded him as having a disability. As to defendant Kiddie Ranch, the record evidence shows that Ms. McNuckle was initially told that L.W. could start on March 4, 1996, but was then told that there was no room for L.W. after Kiddie Ranch learned that he was HIV positive. The pretextual nature of L.W.'s denial was exposed when L.W.'s social worker, Pamela Casiday called Kiddie Ranch the next

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1990) (statement of Sen. Harkin).

19/ The Justice Department regulations as well as the preamble and technical assistance manuals interpreting those regulations "are entitled to controlling weight unless they are plainly erroneous or inconsistent with the regulations." Innovative Health Systems, Inc. v. City of White Plains, 931 F. Supp. 222, 232 n.3, 233 n.4

business day, March 4th, and was told that Kiddie Ranch had room for a child L.W.'s age. The record evidence also shows, through the testimony of Anne Carmody, that Kiddie Ranch's owner was concerned about whether admitting an HIV positive child would result in a loss of business.[20]

As to defendant ABC Nursery, the record evidence shows that L.W. was initially accepted for entry into the child care center, but was then told that there was no room for him after Ms. McNuckle revealed that L.W. was infected with HIV. The inference to be drawn from these facts is that the no-vacancy excuse was pretextual. This inference is solidified by the testimony of Dora Goldsworthy, who was told by ABC Nursery's director of enrollment that she was going to get out of having to take an HIV infected child.[21]

Finally, as to defendant Happy Time Day Care Center, the record evidence shows that facility owner Eula Buchanan said on August 19, 1996, that L.W. could attend Happy Time. After she learned on August 20 that L.W. was infected with HIV,

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(S.D.N.Y. 1996) (quotation omitted).

20/ In the face of this evidence, Ms. Pearson states in her affidavit in support of defendants' summary judgment motion that she never gave consideration to L.W.'s physical condition. Pearson Aff. ¶ 5. In another apparent dispute of facts, Ms. Pearson stated in response to an interrogatory that she called Ms. McNuckle on Friday, March 1, 1996, only to inform her that she to pay a registration fee and that she needed to provide a Registration for Enrollment form, a Home Transportation agreement and a Rock County Human Services Day Care Authorization form to Kiddie Ranch. Kiddie Ranch Resp. to Inter. No. 10. This testimony is directly contradicted by Ms. McNuckle. McNuckle Dep. p. 70, l. 11-24; p. 71, l. 13-15; p. 17, l. 9-13; p. 92, l. 4-23; p. 93, l. 1-2.

21/ In an apparent factual dispute, ABC Nursery denied that it had scheduled L.W. to begin attending the center (ABC Resp. to Req. for Admis. No 2), and it denied that L.W.'s "nonadmission was in any way related to L.W.'s alleged HIV-positive

however, Ms. Buchanan expressed concerns to Ms. McNuckle, to Pam Casiday, and to Maureen Churchill about accepting the child. Ms. Churchill attests that Ms. Buchanan was having second thoughts about accepting L.W. and that she was concerned about losing staff and business. The evidence also shows that Ms. McNuckle specifically asked for a full-time slot and then a half-time slot in the mornings so that L.W. could attend Head Start in the afternoons in the fall. On August 22nd, Ms. Buchanan called Ms. McNuckle to say that two staff members would likely quit if she admitted L.W. and that he would therefore be unable to attend Happy Time due to staff shortages. Sometime later, Ms. Buchanan called again to say there was only an afternoon vacancy available. This offer was effectively a denial, since Ms. McNuckle had specifically requested mornings, not afternoons, so that L.W. could attend Head Start. And the excuse that there was suddenly no longer a vacancy for L.W., coming on the heels of Ms. Buchanan's repeated concerns about admitting a child with HIV, rings of pretext.[22]

Not surprisingly, none of the three defendants admits violating the law. When the inferences are drawn in plaintiff's favor, however, the circumstances surrounding each of their reactions to L.W.'s HIV infection indicate that defendants regarded L.W. as

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condition." ABC Resp. to Req. for Admis. No. 5.

22/ In an apparent factual dispute, the Happy Time discovery responses deny that Ms. McNuckle ever requested a full day or a morning slot. Happy Time Resp. to Req. for Admis. Nos. 1 & 2. Moreover, in her affidavit in support of defendants' motion for summary judgment, Ms. Buchanan states that she did not "formulate any impressions or even think about L.W.'s physical, mental, or emotional health." Affidavit of Eula Buchanan ¶ 5 (Jan. 27, 1998).

disabled. At a minimum, there are numerous disputes of material fact that cannot be resolved through summary judgment, as highlighted above in footnotes 20, 21 & 22. Therefore, this matter should proceed to trial where the critical issues of intent and credibility can be resolved in an open forum.

CONCLUSION

For the reasons stated above, plaintiff asks this Court to deny defendants' motion for summary judgment and to allow this matter to proceed to trial.

Dated this _____ day of February, 1998.

Respectfully submitted,

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