

May 25, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: AIDS and the ADA

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Under the ADA persons with AIDS will be covered. This as you know, will be a highly controversial component of the bill with the very conservative groups. Recent court cases and the President's Committee on AIDS support the incorporation of individuals with AIDS in the definition of disability under Section 504 of the Rehabilitation Act -- in addition to assured anti discrimination statutes to these individuals.

I have prepared the following facts pertaining to AIDS and its relation to the Americans with Disabilities Act.

AIDS is not explicitly mentioned in the bill. Persons are protected under the bill if they are subjected to discrimination because of a physical or mental impairment, perceived impairment, or record of impairment.

In defining these terms, the bill relies upon definitions currently in effect in regulations issued under Section 504 of the Rehabilitation Act of 1973.

The definition of "physical or mental impairment" under the Rehabilitation Act does not delineate AIDS specifically, but recent interpretations and court decisions have concluded that, in particular circumstances, AIDS, AIDS Related Complex, and seropositivity may constitute an impairment.

Coverage of people infected by the AIDS virus does not mean that such individuals can never be excluded under any circumstance.

The inclusion of someone having a condition that meets the definition of a physical or mental impairment is not the end of the inquiry under the ADA.

Inquiries regarding unequal treatment of persons with disabilities, including AIDS, can be viewed as a two step test.

First, is the individual being treated unequally because of a physical or mental impairment, perceived impairment or record of impairment? This determination is based upon the definition of physical or mental impairment drawn upon from Section 504 regulations and upon the facts of the case.

Second, is the unequal treatment permitted under the Act? This will depend upon whether there are legitimate standards or criteria justifying the unequal treatment, whether such standards are necessary and can be shown to be sufficiently connected to the essential components of the job or activity, and whether such criteria or standards have been properly applied to the particular individual with a disability.

With regard to AIDS specifically, if an employer or service provider could show, in particular circumstances, that a person with AIDS poses a substantial risk to the health or safety of co-workers or other participants, it would be permissible to establish qualification standards or selection criteria that screen out such individuals.

However, the employer or service provider would have to have adequate evidence to establish that such standards or criteria were necessary and that they were substantially related to the essential components of the job or activity.

They would also have to demonstrate that the individual in question failed to meet the standards or criteria, e.g., that the individual really did endanger the health and safety of others.

Mere irrational prejudice or unfounded fears could not justify such an exclusion or unequal treatment.

The Justice Department Office of Legal Counsel issued a ruling that Section 504 covers not only those who have AIDS -- but also those who test positive for the HIV virus.

Although the Supreme Court ruling in Arline said 504 covers people with contagious diseases, they left open the question of whether those who are simply infected are also covered. All lower courts considering the issue have held that it does.

The opinion gives strength to guidelines instituted by OPM last year that Federal agencies should not discriminate individuals with AIDS or those who test positive.

While not legally binding, the Justice Department opinion does give plaintiffs a new tool in private discrimination suits.

The President's Committee on AIDS in their findings recommended a strong anti discrimination statute to protect persons with AIDS.