HIV Positive Employees as Handicapped Persons under State and Federal Law: West Virginia Follows the Trend to Cast Aside Irrational Fear and Prejudice in Favor of Competent Medical Evidence and Sound Public Policy

Frank W. Volk
West Virginia University College of Law

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HIV POSITIVE EMPLOYEES AS "HANDICAPPED" PERSONS UNDER STATE AND FEDERAL LAW: WEST VIRGINIA FOLLOWS THE TREND TO CAST ASIDE IRRATIONAL FEAR AND PREJUDICE IN FAVOR OF COMPETENT MEDICAL EVIDENCE AND SOUND PUBLIC POLICY

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I. INTRODUCTION

AIDS is perhaps one of the most recognizable acronyms across international boundaries. It stands for the deadly disease known as Acquired Immune Deficiency Syndrome. The disease is the result of an individual being infected with the Human Immunodeficiency Virus (hereinafter HIV). After the HIV enters an individual’s bloodstream, it inhibits the stimulation of cellular defenses. This weakens the body’s immune system and makes one vulnerable to a host of “opportunistic diseases.” The virus is primarily transmitted during sexual contact or through the sharing of intravenous drug needles. While the HIV has been shown to be capable of surviving outside of the human body, there is currently no credible medical evidence that it may be transmitted through casual contact. Since there is currently not a cure for AIDS, the outlook for an individual after being infected with the HIV, and developing the disease, is undeniably grim.

As of July 1, 1990, there have been 139,765 cases of AIDS reported to the Centers For Disease Control (hereinafter the CDC) from across the United States. Additionally, the CDC estimates that

2. Id. at 26.
3. Id.
4. Id.
5. Id. at 9.
6. Resnick, Veren, Salahuddin, Tondreau & Markham, Stability and Inactivation of HTLV-III/LAV Under Clinical and Laboratory Environments, 255 J. A.M.A. 1887, 1890-91 (1986). The majority opinion in Benjamin R. v. Orkin Exterminating Co., Inc., 390 S.E.2d 814 (W. Va. 1990), is technically incorrect when it states that, “[t]he virus cannot survive outside of white blood cells; if exposed to the air it will die.” Id. at 814.
8. Id. at 10.
9. Telephone interview with anonymous official, National AIDS Hotline (July 30, 1990). The National AIDS Hotline is funded by the Centers for Disease Control. The Hotline receives information directly from the CDC, which often takes months to be reproduced in print.

The distinction between having AIDS and merely being infected with the HIV is significant from a public health, as well as a legal standpoint. The CDC maintains four groupings for individuals infected with HIV. Group I consists of individuals who have acute infection. Centers for Disease Control, Classification System for Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infections, 51 MORTALITY/MORBIDITY WEEKLY REP. 334 (1986). In this stage the patient
between 1 and 1.5 million individuals are infected with the virus.\footnote{10} As of July 1, 1990, the number of AIDS victims in West Virginia stood at 150, while those individuals testing positive for the HIV numbered over 183.\footnote{11}

Since the disease is always fatal, there is an abundance of fear associated with contracting the HIV simply through casual contact with an infected individual. These irrational fears often translate into discriminatory practices in the areas of schooling, housing and employment. The issue of AIDS-based employment discrimination recently came before the West Virginia Supreme Court of Appeals in \textit{Benjamin R. v. Orkin Exterminating Co.}\footnote{12} The court decided that an individual testing positive for the HIV is a "handicapped" person for the purpose of establishing a claim of employment discrimination experiences transitory mononucleosis like symptoms. \textit{Id.}

Group II is composed of individuals with asymptomatic infection. \textit{Id.} This means literally without symptoms, as no outwardly observable signs of infection are readily apparent. \textit{The American Medical Association, Home Medical Encyclopedia} 139 (1989).

Group III consists of individuals with persistent generalized lymphadenopathy. \textit{Centers for Disease Control, Classification System for Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infections, 35 Mortality/Morbidity Weekly Rep. 334} (1986). This stage is characterized by swollen glands at two or more sites on the body for more than three months. \textit{The American Medical Association, Home Medical Encyclopedia} 654 (1989); \textit{Centers for Disease Control, Classification System for Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infections, 35 Mortality/Morbidity Weekly Rep. 334} (1986).

Group IV consists of individuals with manifestations from several subgroupings of illnesses including pneumocystitis carinii (microorganism causing fever, dry cough and shortness of breath), dementia (an attack by the HIV on the brain which often comes in the very late stages of the disease) and Kaposi’s sarcoma (appearance of blue-red malignant skin tumors starting at the lower extremities). \textit{The American Medical Association, Home Medical Encyclopedia} 803, 541, 614 (1989); \textit{Centers for Disease Control, Classification System for Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infections, 35 Mortality/Morbidity Weekly Rep. 334} (1986). Individuals in Group IV are the only ones recognized by the CDC as having AIDS. The distinctions are important, as some courts may classify only AIDS as a "handicap," while others may include mere infection with the HIV under the definition.


11. Telephone interview with Sarah Bass, Public Information Coordinator for The Epidemiology and Disease Control Branch of the West Virginia AIDS Program (July 30, 1990). The West Virginia AIDS Program is a federally funded organization. The number of individuals testing positive for the virus is underreported to the Program as it only includes individuals tested at one of the Program's fourteen state testing centers and not those tested at hospitals and other clinics throughout the state. Of 6,702 individuals tested by the Program thus far, 183, or 2.7 per cent, have tested positive for the HIV. \textit{Id.}

under the 1981 version of West Virginia Human Rights Act.\textsuperscript{13}

This Note will first offer a brief discussion of the relevant provisions of the West Virginia Human Rights Act (hereinafter the Act). Second, it will provide a comprehensive review of the court’s decision in \textit{Benjamin R. v. Orkin Exterminating Co.} Third, it will provide a brief analysis of how other state jurisdictions across the country have treated this question. Fourth, it will examine what effect the amended version of the Act will have upon future decisions of the court in this area. Finally, it will examine whether a HIV positive individual is a “qualified handicapped person” entitled to statutory protection in West Virginia, and the effect that the recent Congressional passage of the Americans With Disabilities Act will have on this area of the law in West Virginia.\textsuperscript{14}

\section*{II. Relevant Provisions of the West Virginia Human Rights Act}

This section is designed to give a brief overview of the purposes of the Act, the conduct it prohibits, and a skeletal outline for procedurally invoking its protection against discrimination.

Through its passage of the West Virginia Human Rights Act, the Legislature recognized the importance of extending equal opportunity to those individuals in society that often fall prey to discrimination.\textsuperscript{15} The Act’s Declaration of Policy states that equal opportunity in employment is a “human right or civil right of all persons without regard to... handicap.”\textsuperscript{16} The Act specifically states that discrimination\textsuperscript{17} by an employer\textsuperscript{18} “with respect to compensa-
tion, hire, tenure, terms, conditions or privileges of employment" is prohibited even if the individual in question is "handicapped." Exceptions to this general prohibition are permitted when an employer's decision regarding compensation, hiring, tenure, etc., is based upon a "bona fide occupational qualification" required to be performed by the "handicapped" individual, applicable security regulations of the United States or the State of West Virginia or where the individual is not "able and competent" to perform the services required of her.

The process by which an aggrieved individual would invoke the remedial measures contained in the Act must begin with the filing of a complaint with the Human Rights Commission. Next the Commission, based upon a reasonable belief that an unlawful discriminatory act has occurred, will investigate the allegations of the complainant. If the Commission finds, as a result of its investigation, that probable cause exists, and that the situation cannot be remedied through informal means, it may then dispose of the complaint in one of two ways. The Commission will either hold a hearing on the complaint or, under certain circumstances, issue to the complainant a notice of her right to sue in the appropriate circuit court.

19. Id. § 5-11-9(a)(1).
20. Id. § 5-11-9(a). The Legislative Rules of the West Virginia Human Rights Commission state that for an employer to be entitled to the "bona fide occupational qualification" exception under the statute, the employer must show that "[a]ll or virtually all persons with that articul [sic] handicap would be unable to perform the essential functions of the job involved." 6 W. VA. C.S.R. 77-4.10 (1990).
22. Id. § 5-11-9(a)(1). The West Virginia Supreme Court of Appeals recently provided guidelines to determine whether an individual is "able and competent." If an employee is "capable of performing the work" and "can do the work without posing a serious threat of injury to the health and safety of either the individual, other employees or the public," then the individual is likely to be adjudicated "able and competent" for the position sought. Ranger Fuel Corp. v. West Virginia Human Rights Comm'n, 376 S.E.2d 154, 160 (W. Va. 1988). See also 6 W. VA. C.S.R. 77-4.3 (1990).
24. Id.
25. Id.
26. Id.
27. Id. § 5-11-13(b) (1990).
III. BENJAMIN R. v. ORKIN EXTERMINATING CO.\textsuperscript{28}

\textbf{A. Background}

The plaintiff, Benjamin R.,\textsuperscript{29} began working as a pest control inspector for the defendant, Orkin Exterminating Company, in May, 1986.\textsuperscript{30} Benjamin was found to be infected with the HIV in January, 1987.\textsuperscript{31} In July of the same year, Benjamin notified his supervisor that he had been infected with the HIV.\textsuperscript{32} As a result of telling his employer of his condition, Benjamin claimed he was terminated in August, 1987.\textsuperscript{33} Orkin Exterminating claimed that Benjamin voluntarily resigned his position so that he could stay with his relatives living in South Carolina.\textsuperscript{34}

Benjamin filed a complaint with the West Virginia Human Rights Commission alleging employment discrimination on the basis of a handicap. In response to this complaint, the Commission issued Benjamin a letter giving him notice of his right to sue.\textsuperscript{35} Benjamin brought the instant action against Orkin Exterminating in the Circuit Court of Ohio County, West Virginia, and Orkin had the action removed to the United States District Court for the Northern District of West Virginia.\textsuperscript{36} Orkin moved for summary judgment on the grounds that Benjamin was not "handicapped" as a matter of West Virginia law.\textsuperscript{37} Being unable to find any West Virginia precedent on this matter, the federal court certified the question to the West Virginia Supreme Court of Appeals.\textsuperscript{38} The full text of the certified question inquires as to, "[w]hether, as a matter of West Virginia law, a person who tests positive for the human immunodeficiency virus (HIV positive)
is handicapped within the meaning of W. Va. Code 5-11-3(t)?”

B. The Majority Opinion

Justice McHugh's opinion for the majority of the court is broken up into three different stages. First, he examines the definition of a "handicap," and its accompanying elements, in the pre-amended version of the Act and applies them to the asymptomatic HIV positive individual. Second, Justice McHugh distinguishes the authority from another jurisdiction presented to the court which conflicts with the proposition that the HIV infection is a "handicap." Third, he approaches the problem from a pragmatic, public health perspective and concludes with the broad holding that a person at any level of the HIV infection is "handicapped" under W. Va. Code 5-11-3(t) (1981). Each of these stages will be discussed in turn.

1. The Pre-amendment Definitions and Their Application

The definition of a handicap cited by Justice McHugh and contained in the pre-amended version of the Act, states that "The term 'handicap' means any physical or mental impairment which substantially limits one or more of an individual's major life activities."40

Justice McHugh proceeds to parce this definition into two requirements. In order to fall within the definition, an individual must have (1) a physical or mental impairment which (2) substantially limits one or more major life activities.41 The pre-amended Act did not contain definitions for either of these elements, but the Interpretive Rules of the West Virginia Human Rights Commission (hereinafter the Rules) did contain such definitions.42 Justice McHugh

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39. Id.
40. Id. at 816 (citing W. Va. Code § 5-11-3(t) (1981)).
41. Id.
42. 6 W. Va. C.S.R. § 77 (1987). This section of the Code of State Rules was repealed and replaced on February 26, 1990, by the Legislative Rules of the West Virginia Human Rights Commission. The Rules remain in substantially the same form as they were prior to the replacement; however, they now more faithfully reflect the recent amendments and court decisions that have impacted the Act. Copies of the new Legislative Rules may be obtained from the Administrative Law Division of the Secretary of State's office.
cited the definition contained in the Rules of a "physical impairment" and a "physical or mental impairment" in the opinion. A "physical impairment," according to the Rules "means any physiological disorder or condition or cosmetic disfigurement or anatomical loss or abnormality affecting one or more of the following body systems: . . . hemic [blood] and lymphatic." A "physical or mental impairment" is defined as "including . . . such diseases and conditions as" what is stated thereafter.

Justice McHugh quickly reaches the conclusion that the HIV infection, even during the asymptomatic phase, falls within the definition of a "physical impairment." First, he quotes former Surgeon General C. Everett Koop who stated that, "[t]he overwhelming majority of infected persons [who are asymptomatic] exhibit detectable abnormalities of the immune system. . . . Accordingly . . . persons with HIV infection are clearly impaired . . . . [Asymptomatic individuals] may appear outwardly healthy but are in fact seriously ill." Second, he cites a string of cases from various jurisdictions across the country with statutory or regulatory definitions of an actual "physical impairment," identical or similar to the West Virginia definition, which have concluded that asymptomatic HIV positive individuals are "physically impaired."

The second part of the "handicapped" definition requires that the impairment substantially limit one or more major life activities of an individual. The Rules define major life activities as "including . . . communication, ambulation, self-care, socialization, learning, vocational training, employment, transportation and adapting to housing." The court was presented with arguments by

44. Benjamin R., 390 S.E.2d at 816 (emphasis added) (citing 6 W. Va. C.S.R. 77-1-2.4 (1982)). The Rules state that this definition is merely designed to make clear that certain conditions are included within the scope of the Rules. 6 W. Va. C.S.R. § 77-1-3, n.5 (1987).
45. Benjamin R., 390 S.E.2d at 817.
46. Id. (citing letter from Surgeon General Koop to the United States Department of Justice (July 29, 1988)).
47. Id. at 817-18 (citing supporting authority from numerous different legal sources).
48. Id. at 816.
49. Id. (citing 6 W. Va. C.S.R. § 77-1-2.5 (1982)).
the plaintiff, and *amici curiae* briefs from interested parties,\textsuperscript{50} arguing for the recognition of "major life activities" not enumerated in the Rules, but Justice McHugh chose to build the majority's reasoning solely around the "socialization" element. Justice McHugh notes that the medical community has commonly found that HIV infected individuals are, "severely withdrawn and depressed . . . [and] suicidal . . . [due to] the fatal nature of the . . . disease."\textsuperscript{51} As a result, Justice McHugh found that HIV positive individuals are substantially limited in the "major life activity" of "socialization."\textsuperscript{52}

The court next proceeds to distinguish the conflicting authority in this area.

2. Dismissal of Burgess v. Your House of Raleigh, Inc.\textsuperscript{53}

The Supreme Court of North Carolina found in *Burgess v. Your House of Raleigh, Inc.* that asymptomatic infection with the HIV was not a "handicap" under the North Carolina Handicapped Persons Protection Act.\textsuperscript{54} However, as noted by Justice McHugh, the North Carolina Act\textsuperscript{55} differs from the pre-amended West Virginia Act in several material respects.

First, the court in *Burgess* compared the North Carolina statutory definition of a "major life activity" to that of its counterpart in the regulations interpreting the Federal Rehabilitation Act of 1973.\textsuperscript{56} A major claim of the plaintiff in *Burgess* was that working was a major life activity. The North Carolina definition of a "major life activity" and that of the federal regulations were nearly identical in every respect, except for the fact that the North Carolina Legislature deleted the word "working" from its definition.\textsuperscript{57} This omission persuaded the *Burgess* court that the Legislature did not find

\textsuperscript{50} Id. at 818 n.10.
\textsuperscript{51} Id. at 818.
\textsuperscript{52} Id.
\textsuperscript{54} Id. at 214, 388 S.E.2d at 139-40.
\textsuperscript{55} N.C. GEN. STAT. § 168A (1987).
\textsuperscript{56} Benjamin R., 390 S.E.2d at 818.
\textsuperscript{57} Id.
"working" to be a "major life activity." The court in Burgess also dismissed the plaintiff's claims that his inability to bear a healthy child, and to engage in sexual relationships, due to fear of transmitting the virus were "major life activities." The court stated that "major life activities" are, "essential tasks one must perform on a regular basis in order to carry on a normal existence."

Justice McHugh distinguished Burgess by pointing out further that the North Carolina Act contained a specific exception for communicable diseases and that the North Carolina Legislature had just recently enacted legislation designed specifically to protect AIDS victims from employment discrimination.

In short, Justice McHugh finds that the inclusion of "socialization" as a "major life activity" in the West Virginia definition, and the lack of a communicable disease exception in the pre-amended Act, were significant enough to distinguish Burgess.

3. The Public Health Argument and Conclusion

Justice McHugh cites the fact that currently ninety percent of HIV positive individuals are asymptomatic. This alarming figure led him to conclude that there is an urgent need to encourage individuals to be tested to prevent the further spread of the disease. If an individual faces termination because of a positive test result, then it is likely that she will not seek to be tested. For this reason, Justice McHugh states that "[f]rom a public health standpoint, it is crucial for people at all stages of HIV infection to be assured of legal protection from unlawful discrimination."

Based on this public policy finding, and the medical nature of the virus, Justice McHugh concludes that even though individuals

59. Id. at 214, 388 S.E.2d at 139.
60. Id., 388 S.E.2d at 139.
64. Id. at 819 (citations omitted).
exhibit no detectable symptoms, from the day that they test HIV positive, they will qualify for protection as a "handicapped" individual under the pre-amended version of the West Virginia Human Rights Act. 65

C. Justice Neely's Concurrence

[T]he purpose of this concurrence is to recognize and discuss the entirely rational fears of the general public in an effort to justify today's decision in terms that satisfy those who are legitimately fearful that the legal conclusions we reach are not justified by science. 66

Justice Neely's dissatisfaction with the majority opinion focuses on two general areas. First, he cites a lack of guidance to the Human Rights Commission on the subject of "reasonable accommodation", and when, if ever, HIV positive individuals are "otherwise qualified." 67 Secondly, he criticizes the majority for failing to thoroughly examine the medical literature on the issue of contagiousness. 68

Justice Neely begins by recognizing the anxieties and concerns of the general public about HIV positive individuals. He states that the average American wants to be compassionate in situations such as this, but that "lifeboat ethics" dictate caution when her own health is at risk. 69 He further offers his conclusion that, based on the applicable medical literature, the danger of contracting AIDS through casual contact 70 in the work place is on the order of between

65. Id.
66. Id. at 821.
68. Benjamin R., 390 S.E.2d at 819.
69. Id. at 820.
70. Justice Neely defines "casual contact" as including contact with saliva in the form of spit and droplets that might be emitted during ordinary speech, contact with tears and contact with urine. Id. at 824.
one in one hundred thousand and one in a million. He states that this conclusion will have little effect on the average American though, for two reasons:

1. A fear among the general public that since AIDS is a political issue, the government's information may be slanted and inaccurate.\textsuperscript{71}

2. The nature of the medical studies concerning transmission of the HIV (small samples over short periods) do not rule out the probability of contracting the disease through casual contact to a high enough degree.\textsuperscript{72}

Justice Neely also comments that the vague language in some of the medical literature makes average Americans unwilling to bet their life on the conclusions of experts and concerned that there is something about the transmission of the HIV "of which we are utterly ignorant."\textsuperscript{73}

The concurrence then turns to reassuring the public that its fears are unfounded. Justice Neely states that the aggregate of the smaller studies provides a "mega-study" upon which we can "confidently rely."\textsuperscript{74} He further cites studies finding that there are likely sixteen HIV infected individuals for every diagnosed case of AIDS.\textsuperscript{75} As a result, he concludes that we are already in close contact with millions of individuals who do not know that they are HIV positive.\textsuperscript{76} And, thus:

[W]e have all had our food cooked by HIV positive subjects, had our hair cut and permed by them, been served by them in restaurants, had them in our houses as repairmen, and been coughed and spat upon by them in buses, trains, airplanes, hospital waiting rooms, and the line at the Department of Motor Vehicles. Yet unless we are: (1) practicing homosexuals; (2) IV drug users; (3) indulgers in unprotected casual sex; (4) prostitutes or their customers; (5) hemophiliacs or other recipients of bad blood; or (6) children of HIV positive mothers, we are not HIV positive ourselves.\textsuperscript{77}

Justice Neely also agrees with the majority that we must not ostracize known HIV positive individuals. He finds this essential to
assure those who suspect that they are infected with HIV that, if they submit to testing, they will gain a corresponding protection from discrimination.\textsuperscript{78}

In his discussion of the medical literature which follows, Justice Neely presents a comprehensive and cogent argument that the HIV cannot be transmitted by saliva, urine, tears or mosquitoes.\textsuperscript{79} He further states that these conclusions, "should instruct our understanding of the dimensions of 'reasonable accommodation' in the work place . . . ."\textsuperscript{80}

However, the concurrence then takes a seemingly inconsistent turn when Justice Neely states that "[i]t is one thing to conclude that . . . it is nearly impossible to contract HIV by casual contact, and quite another to determine the legal dimensions of . . . 'reasonable accommodation' in the face of widespread fears."\textsuperscript{81} In his attempt to instruct the Human Rights Commission about what "reasonable accommodation" should mean, Justice Neely clouds the issue further. He states that, "[i]t is one thing to require the telephone company to hire HIV positive telephone operators . . . and quite another to require a Holiday Inn . . . to hire HIV positive food-handlers."\textsuperscript{82}

The undesirable effects of Justice Neely's conclusion are three-fold. First, it ignores the overwhelming evidence from the medical community about the risks of transmitting the HIV through casual contact. This dismissal of the overwhelming weight of medical research on the subject serves to reinforce the general public's irrational fears about AIDS. This approach sharply conflicts with the conclusion of the Supreme Court of the United States about the weight to be given to medical judgments when deciding whether a person with a contagious disease can continue working. In School Bd. of Nassau County v. Arline,\textsuperscript{83} the Court stated that in deciding

\textsuperscript{78} Id.
\textsuperscript{79} Id. at 824-25.
\textsuperscript{80} Id. at 824.
\textsuperscript{81} Id. at 825.
\textsuperscript{82} Id.
\textsuperscript{83} School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987).
whether an individual is “otherwise qualified” for employment, the courts “should defer to the reasonable medical judgments of public health officials.”

Secondly, Justice Neely’s conclusion, in reality, provides little guidance to the West Virginia Human Rights Commission on the questions of when a worker is “otherwise qualified” or requires a “reasonable accommodation” by the employer. His suggestion that a telephone operator is “otherwise qualified” while a foodhandler is likely not only takes into account those employees at the extreme ends of the spectrum. A telephone operator has very little close contact with the general public, while a foodhandler, at least indirectly, has a great deal of such contact. One is left wondering about the checker at the local grocery store, the neighborhood pharmacist and the county busdriver who fall into the grey areas.

Finally, Justice Neely’s vague conclusion will serve as a deterrent against voluntary submission to HIV testing by those individuals who fear that a positive test result will mean their dismissal from employment. This is unfortunate for our society on public health grounds, but it also contradicts the express statement in Justice Neely’s concurrence that “[t]here is an urgent public health need to have as many persons as possible tested for the HIV virus so that HIV-positive subjects can protect others.”

The Supreme Court in Arline suggested a more rational approach to making decisions about the questions of “otherwise qualified” and “reasonable accommodation.” The Supreme Court stated that the inquiry on the first question should include:

[fndings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the

84. Id. at 288. See also Chalk v. United States Dist. Court for the Cent. Dist. of Cal., 840 F.2d 701 (9th Cir. 1988) (reversing denial of preliminary injunction for reinstatement to teacher with AIDS).

85. Benjamin R., 390 S.E.2d at 825. It is interesting here to remember Justice Neely's statement that, unless other recognized risk factors are present, one cannot become HIV positive by eating food prepared by an HIV positive subject. Id. at 823.

86. Id. at 823.
probabilities that the disease will be transmitted and will cause varying degrees of harm.\textsuperscript{87}

The inquiry on the "reasonable accommodation" question should evaluate, in light of the above medical conclusions, "whether the employer could reasonably accommodate the employee under the established standards for that inquiry."\textsuperscript{88} The Arline Court then cites instances where "reasonable accommodation" would be unnecessary, such as when it would impose a great financial and administrative burden on the employer.\textsuperscript{89} This approach provides employers, employees and the tribunal deciding the question with a measure of predictability on which to proceed. The approach also accords the medical community's judgments the weight that they rightfully deserve.

Perhaps the main reason that Justice Neely finds fault with the "reasonable accommodation" of foodhandlers is illustrated by his statement that "[a]s irrational as it might be scientifically, widespread rumor[s] that a restaurant hires cooks with AIDS would have disastrous consequences for business..."\textsuperscript{90} This "customer preference" defense has been roundly criticized by other courts, and is even prohibited by the new Legislative Rules promulgated by the West Virginia Human Rights Commission.\textsuperscript{91} Even the West Virginia Supreme Court of Appeals has echoed its misgivings against explicitly recognizing such a defense.

In \textit{Chico Dairy Co. v. West Virginia Human Rights Comm'n},\textsuperscript{92} an assistant manager alleged that she was passed over for a promotion due to her area supervisor's perception that she was "handicapped."\textsuperscript{93} The plaintiff was blind in one eye, but believed she was

\begin{thebibliography}{99}
\bibitem{87} \textit{Arlene}, 480 U.S. at 288 (citing Amicus Curiae brief number 19 submitted by the American Medical Association).
\bibitem{88} \textit{id.} at 288. The West Virginia Supreme Court of Appeals has provided a general discussion of the parameters of "reasonable accommodation" in West Virginia. \textit{Coffman v. West Virginia Bd. of Regents}, 386 S.E.2d 1 (W. Va. 1988).
\bibitem{89} \textit{Arlene}, 480 U.S. at 287 n.17 (citing Southeastern Community College \textit{v. Davis}, 442 U.S. 397, 406 (1979)).
\bibitem{90} \textit{Benjamin R.}, 390 S.E.2d at 825.
\bibitem{93} \textit{id.} at 78.
\end{thebibliography}
discriminated against because the socket around the eye was sunken, resulting in what her supervisor termed a "facial deformity." The court found that the statutory definition of "handicap" did not allow for an action against an employer where the employee was discriminated against solely because her physical appearance was unacceptable. The court explicitly stated the following in a footnote to the opinion, however:

Where the discrimination was alleged and shown to be solely upon the employer's perception that the complainant's physical appearance was "unacceptable," the employer's conduct is not actionable under the West Virginia Human Rights Act because of the statutory definition of "handicap," not because of the employer's so-called "customer preference" defense. By this opinion we do not approve of such a defense to actionable conduct.

Further, Justice Workman, who felt that the majority opinion opened the door to a "customer preference" defense, stated that the defense was attempted during the early days of the civil rights cases and has been "uniformly rejected ... as a defense to human rights actions."

At least one court has dealt with the "customer preference" defense in the context of AIDS-based discrimination. In Barton v. New York City Comm'n on Human Rights, the petitioner claimed that he would lose patients if his colleague were allowed to continue treating AIDS patients. The court stated very succinctly that "[C]ustomer preference can never be the basis for discrimination."

In sum, Justice Neely presents a convincing and rational argument from a public health point of view that members of the general public cannot be infected with the HIV from casual contact. Un-

94. Id. at 77-78.
95. Id. at 85.
96. Id. at 78 n.1 (emphasis added).
97. Id. at 87 (citing Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1181 (7th Cir. 1982); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981); Diaz v. Pan Am World Airways, Inc., 442 F.2d 385, 389 (5th Cir.), cert. denied, 404 U.S. 950 (1971)).
99. Id. at 563, 531 N.Y.S.2d at 985.
100. Id. at 563, 531 N.Y.S.2d at 985.
fortunately, he ignores his own argument, and, in the process, fuels the fire of irrational fear about AIDS and discourages those who are at risk for the virus from being tested.

IV. OTHER JURISDICTIONS

Currently the clear consensus of opinion among the available federal and state interpretations is that AIDS, AIDS Related Complex (hereinafter ARC), asymptomatic infection with the HIV, and even the incorrect perceptions surrounding these conditions constitute protected handicaps. The principal legislation protecting handicapped individuals in the federal sphere is the Rehabilitation Act of 1973.101 While the language of handicap discrimination provisions, and the classes that they protect, vary slightly from state to state, every state jurisdiction provides statutory protection of some type to “handicapped” individuals.102

A. The States’ Approach

In the Massachusetts Superior Court case of Cronan v. New England Telephone Co.103 the plaintiff’s supervisor disclosed to other employees that the plaintiff was suffering from ARC.104 After receiving threats from his fellow workers, the plaintiff chose not to return to work, and filed a claim alleging discrimination on the basis of a physical disability.105 The court, after citing several authorities supporting the proposition that AIDS and ARC were handicaps under definitions comparable to the Massachusetts definition, denied the defendant’s motion to dismiss.106

In the California case of Raytheon Co. v. Fair Employment & Housing Comm’n,107 an employee of the defendant claimed that he

101. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (1988). Section 504 is the section that is most often used by victims of AIDS-based discrimination to obtain redress. Section 504 only applies to programs or activities receiving federal financial assistance.
104. Id. at 1274.
105. Id.
106. Id. at 1275-77.
was discriminated against on the basis of a physical handicap after being diagnosed with AIDS.\footnote{108} Surprisingly, the defendant acknowledged that this was the reason for the plaintiff’s dismissal.\footnote{109} The court briefly examined the nature of AIDS from a medical standpoint, including the risks associated with transmission of the virus by casual contact,\footnote{110} and concluded that “AIDS is clearly a physical handicap within the meaning of Government Code section 12926.”\footnote{111}

The Superior Court of New Jersey in \textit{Poff v. Caro}\footnote{112} dealt with a situation of three homosexual men who claimed that a landlord refused to rent to them, due to his fears that the men might acquire AIDS.\footnote{113} The court, in ruling on a preliminary injunction by the New Jersey Division of Civil Rights, stated that by a reasonable interpretation, “AIDS and persons who are discriminated against because they are perceived to have AIDS or be potential victims of AIDS” are handicapped within the New Jersey Law Against Discrimination.\footnote{114}

In \textit{Barton v. New York City Comm’n on Human Rights},\footnote{115} a dentist who leased office space from one of his colleagues charged, among other things, that the colleague terminated his lease in violation of the New York City Administrative Code because of his practice of treating AIDS victims.\footnote{116} The court first cited prior cases which determined that AIDS was a handicap under the New York City Administrative Code, the New York Human Rights Law and the Federal Rehabilitation Act.\footnote{117} The court then held that “[i]t was proper to conclude that AIDS is a physical handicap as contemplated by the [New York City] Administrative Code.”\footnote{118}
In *Cain v. Hyatt*, a Pennsylvania district court interpreted the Pennsylvania Human Relations Act as it related to an aggrieved individual who was a regional partner with the defendant, Hyatt Legal Services. The plaintiff alleged that he was wrongfully terminated by the defendant after contracting AIDS. The court found that AIDS was a "handicap" for two reasons: it is an actual handicap because the virus and its accompanying symptoms were physical impairments substantially limiting one's major life activities; and, the perceptions and prejudices that are endemic to AIDS are significant impairments.

While those seeking protection from AIDS-based discrimination have suffered some minor setbacks, it appears that only one state court of last resort has expressly held that AIDS-based discrimination is not a protected handicap. As discussed and analyzed earlier in this Note, North Carolina decided in *Burgess v. Your House of Raleigh, Inc.* that an individual who tested HIV positive was not protected by that state's handicap discrimination laws.

Although there are not an abundance of state court decisions on the subject of AIDS-based discrimination, a recent report examining the position of every state agency charged with the enforcement of their state's handicap discrimination laws lends some guidance on how the agencies will handle administrative complaints in this area. The report indicates that "The total number of jurisdictions prohibiting discrimination against people with AIDS is 40 (78% of total); ARC, 35 (69%); asymptomatic HIV infection, 33 (65%); and per-

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120. Id. at 672.
121. Id.
123. See Brunner v. Al Attar, 786 S.W.2d 784 (Tex. Ct. App. 1990) (defendant who fired the plaintiff because of her volunteer work at the AIDS Foundation granted summary judgement because the plaintiff failed to allege that she was handicapped); Sanchez v. Lagoudakis, 184 Mich. App. 355, 457 N.W.2d 373 (1990) (plaintiff who tested HIV negative, and who was not actually handicapped, could not recover on the basis of a perceived handicap).
ceived high risk status, 28 (55%).” Further, virtually every state that did not declare AIDS-based discrimination illegal under their respective handicap protection statutes stated that they were merely undecided on the issue. Tennessee was the only state to declare that discrimination in relation to AIDS, ARC and asymptomatic infection is permissible.

B. The Federal Approach

The approach of the federal courts on AIDS-based discrimination is very nearly a settled proposition of law. The 1987 decision by the Supreme Court in School Bd. of Nassau County v. Arline held that the handicap protection of the Rehabilitation Act extended to individuals with contagious diseases. This holding has added support to a growing list of federal decisions extending protection to those who are victims of AIDS-based discrimination. Aside from setbacks in a few fact specific cases, the overwhelming majority of federal courts have extended broad coverage to prevent arbitrary actions against individuals on the basis of AIDS. The trend in

126. Id. at 3.
127. Id.
128. Id.
130. Id. at 285-86.
131. See Doe v. Garrett, 903 F.2d 1455 (11th Cir. 1990) (stating that an HIV positive member of the Naval Reserve has no remedy under the Rehabilitation Act); Harris v. Thigpen, 727 F. Supp. 1564 (M.D. Ala. 1990) (stating that HIV positive prisoners who were administratively segregated were not “otherwise qualified” to receive protection from the Rehabilitation Act); Doe v. Coughlin, 71 N.Y.2d 523, 518 N.E.2d 536, 523 N.Y.S.2d 782 (1987) (stating that a prisoner with AIDS is not “otherwise qualified” to participate in a Family Reunion Program with his wife), cert. denied, 488 U.S. 879 (1988).
132. Doe, 903 F.2d at 1455 (stating that it is well established that infection with AIDS constitutes a handicap); Chalk v. United States Dist. Court for the Cent. Dist. of Cal., 840 F.2d 701 (9th Cir. 1988) (reversing denial of preliminary injunction for reinstatement to teacher with AIDS); Martinez v. School Bd. of Hillsborough County, 861 F.2d 1502 (11th Cir. 1988) (stating that a mentally retarded child with AIDS suffers from two handicaps under the Rehabilitation Act); Association of Relatives & Friends of AIDS Patients v. Regulations and Permits Admin., 740 F. Supp. 95 (D.P.R. 1990) (stating that persons terminally ill with AIDS are handicapped within the meaning of the Fair Housing Act); Doe v. Attorney Gen. of the United States, 723 F. Supp. 452 (N.D. Cal. 1989) (stating that it is settled in the Eleventh Circuit that AIDS is a handicap under the Rehabilitation Act); Baxter v. City of Belleville, Ill., 720 F. Supp. 720 (S.D. Ill. 1989) (stating that HIV positive individuals are handicapped within the meaning of the Fair Housing Act); Robertson v. Granite City Community Unit School Dist. No. 9, 684 F. Supp. 1002 (E.D. Ill. 1988) (granting preliminary injunction to allow
this area of federal law is clearly in an expanding mode, and with the recent passage of the Americans With Disabilities Act,\textsuperscript{133} AIDS-based discrimination is likely to be prohibited by federal law in the private, as well as the public sector.

V. THE AMENDED DEFINITION OF A "HANDICAP" UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT AND ITS PROBABLE EFFECT ON AIDS BASED DISCRIMINATION CLAIMS SUBSEQUENT TO BENJAMIN R. V. ORKIN EXTERMINATING CO.

As alluded to earlier in this Note, the definition of a "handicap" under the West Virginia Human Rights Act was amended in 1989. The 1981 definition used in Benjamin R. provides that "[t]he term 'handicap' means any physical or mental impairment which substantially limits one or more of an individual's major life activities."\textsuperscript{134} In 1989 the West Virginia State Legislature modified the definition to read as follows:

The term "handicap" means a person who:

(1) Has a mental or physical impairment which substantially limits one or more of such person's major life activities; the term "major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working;

(2) Has a record of such impairment; or

(3) Is regarded as having such an impairment.\textsuperscript{135}


\textsuperscript{135} W. VA. CODE § 5-11-3(3) (1990).
The West Virginia definition of a "handicap" following the 1989 amendment, is now nearly identical to that of its federal counterpart found in the Federal Rehabilitation Act of 1973. Thus, the amended definition now protects not only those with actual handicaps, but also those with past or perceived handicaps. For this reason, the West Virginia Supreme Court of Appeals, has stated that rather than providing less protection to the handicapped, the federal definition, which West Virginia has now adopted, offers handicapped individuals greater protection.

The one significant difference between the federal definition of a "handicap" and that of the amended version of the West Virginia definition is that the latter also includes a definition of "major life activities." This addition to the West Virginia definition merits discussion because it does not include as a "major life activity" the element of "socialization" that the West Virginia Supreme Court of Appeals relied on so heavily in Benjamin R. in finding that a person at any stage of infection with the HIV is "handicapped" under West Virginia law. The argument may be made in the future that if the Legislature intended socialization to be a "major life activity" they would have included it within the statutory definition. This argument, and others which may try to vitiate the decision in Benjamin R., should fail for several reasons.

First, and perhaps most important, is that the Legislature phrased the "major life activities" in a noninclusive manner. The definition states that, "[T]he term ‘major life activities' includes functions such as . . . ." The Legislature could have used a more restrictive term

136. Benjamin R. v. Orkin Exterminating Co., 390 S.E.2d 814, 816 n.5 (W. Va. 1990). See also Chico Dairy v. West Virginia Human Rights Comm'n, 382 S.E.2d 75, 85 n.10. (W. Va. 1989) (the Federal Rehabilitation Act of 1973 defines an "individual with handicaps" as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(B) (1988)).
137. Chico Dairy, 382 S.E.2d at 84.
140. Benjamin R., 390 S.E.2d at 818.
in introducing the word "functions" but they chose not to. This is very significant when one examines the United States Department of Health and Human Services regulatory definition of a "major life activity." The regulations, which interpret the Federal Rehabilitation Act of 1973, and which were drafted with the oversight and approval of Congress state that "[m]ajor life activities' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." As was noted above, the West Virginia Legislature followed the federal approach very closely in amending this section. Their conspicuous departure in using a noninclusive definition, as opposed to the more restrictive federal definition, suggests that they sought to allow for a broader interpretation of "major life activities."

Secondly, "working" is enumerated in the West Virginia definition of "major life activities." Also, as stated above, the West Virginia definition now protects those individuals who are "regarded as having" an impairment substantially limiting their "major life activities." While little West Virginia legislative history is available for the two additions to the West Virginia definition of a "handicap" mentioned above, the new Legislative Rules of the West Virginia Human Rights Commission provide guidance in this area.

The Legislative Rules, in one sense, define "regarded as having" an impairment to mean an individual who "has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment."

142. School Board of Nassau County v. Arline, 480 U.S. 273, 279 (1987). See also Chico Dairy, 382 S.E.2d at 82.
146. 6 W. VA. C.S.R. § 77-1 (1990).
147. Id. § 77-1-2.8.2. See also 45 C.F.R. 84.3(j)(2)(iv)(B) (1989).
Applying this definition in concert with the "major life activity" of "working" produces a favorable result for those suffering from AIDS-based discrimination. For instance, the HIV infection at any stage was determined to be an impairment by the court in Benjamin R.148 Today, an employer terminates an HIV positive employee based on the employer's fears that she, her customers or her other employees might possibly become infected with the HIV. The "attitudes" of the employer toward the employee's impairment (the HIV infection) results in the termination of the employee and, thus, "substantially limits" the employee's statutorily protected "major life activity" of "working." Any doubt as to whether the termination "substantially limits" the employee's "major life activities" is resolved in favor of the "handicapped" individual by a United States Department of Labor regulation which interprets the Federal Rehabilitation Act of 1973. These regulations interpreting the federal counterpart of the West Virginia Human Rights Act state that "[a] handicapped individual who is likely to experience difficulty in securing or retaining benefits or in securing, or retaining, or advancing in employment would be considered substantially limited."149

Finally, the West Virginia Supreme Court of Appeals might find in the future that AIDS and the HIV infection substantially limit other "major life activities" not enumerated in the statutory definition. The court was presented with other "major life activities" in Benjamin R. in an amicus curiae brief filed by the Charleston AIDS Network, but chose instead to base its decision upon the element of "socialization" from the Interpretive Rules of the West Virginia Human Rights Commission.150 However, several federal courts, despite the inclusive definition of "major life activities" under the federal regulations interpreting the Rehabilitation Act, have

148. Benjamin R., 390 S.E.2d at 819.
149. Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance, 29 C.F.R. 32.3(b)(2) (1989). See also 6 W. VA. C.S.R. § 77-1-2.5 (1990) (stating that "Substantially Limits' means interferes with or affects over a substantial period of time"). Following the same line of reasoning as was illustrated above, an employee's "major life activity" of "working" for a particular employer at a particular job is substantially limited when she is fired because it "interferes or affects" her ability to work at that particular job in the future.
150. Benjamin R., 390 S.E.2d at 818.
found unenumerated practices to be within the regulatory definition of "major life activities."\textsuperscript{151}

For the above reasons, the decision in \textit{Benjamin R.} remains on solid footing, despite the amendment to the definition of a "handicapped" under the West Virginia Human Rights Act.

\section*{VI. The Future}

The decision in \textit{Benjamin R.} is significant in the area of AIDS-based discrimination, but there are two other developments in this area of the law that will strengthen the forces opposing AIDS-based discrimination in the State of West Virginia. One of these developments is likely to occur at some time in the future. Namely, a decision as to whether an HIV positive individual is a "qualified handicapped person"\textsuperscript{152} entitled to protection against discrimination by the West Virginia Human Rights Act. The second development is the recent enactment of the Americans With Disabilities Act of 1990,\textsuperscript{153} which will provide broad protections to handicapped individuals across the United States. Each of these two developments will be discussed in turn.

\subsection*{A. Are HIV Positive Individuals "Qualified Handicapped Persons" Entitled To Protection From Employment Discrimination Under the West Virginia Human Rights Act}

The court in \textit{Benjamin R.} found that HIV positive individuals are handicapped, but it did not decide the additional, and more


\textsuperscript{152} 6 W. Va. C.S.R. § 77-1-4.2 (1990).

important, question of whether HIV positive individuals meet the further requirements necessary to receive protection under the employment section of the West Virginia Human Rights Act. The aggregate of these additional statutory requirements have been codified by the West Virginia Human Rights Commission in their new Legislative Rules defining a "qualified handicapped person." The definition states that a "qualified handicapped person" is an "individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job in question." 154

The West Virginia Supreme Court of Appeals laid down guidelines to determine if an individual is "able and competent" in *Ranger Fuel Corp. v. West Virginia Human Rights Comm'n* by stating:

In order to determine if an individual is 'able and competent,' the employer must consider if, with or without reasonable accommodations, (1) the individual is currently capable of performing the work and (2) the individual can do the work without posing a serious threat of injury to the health and safety of either the individual, other employees or the public. 155

The court, in commenting on the second prong of the test, stated that if an individual's "handicap creates a reasonable probability of a materially enhanced risk of substantial harm." to the individual or others, an employer may reject the applicant. 156 In determining whether the employee does create such a probability of harm, the court stated that decisions, "should not be based on general assumptions or stereotypes about persons with that particular handicap." 157 Further, it has been suggested that the employer must rely on competent, objective medical evidence in making such a determination. 158 Though the determination required by the above test will be performed on a case by case basis, 159 it is still possible to

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154. 6 W. Va. C.S.R. § 77-1-4.2 (1990) (though not expressly stated by the Rules, it is implicit in the definition that one can also be a "qualified handicapped person" if one is "able and competent" even though reasonable accommodation is unnecessary).
156. Ranger, 376 S.E.2d at 160. See also 6 W. Va. C.S.R. § 77-1-4.7 (1990).
make some general observations about the status of HIV positive individuals when the test is applied to them.

In applying the first prong of the test to AIDS-based discrimination, it is obvious that individuals in the final stages of AIDS may not be "currently capable of performing" the work required of them. However, this represents a very small portion of all HIV positive individuals, the majority of which show no outward manifestation of illness. These individuals, some asymptomatic and some symptomatic, would be capable of working. At the very most, a minority of them may require time off from work for treatment or recovery, but the Legislative Rules of the West Virginia Human Rights Commission state, in a noninclusive manner, that job restructuring and modified work schedules are considered to be "reasonable accommodations." Thus, the majority of HIV positive individuals would qualify, with or without "reasonable accommodation," as individuals "currently capable" of performing their work.

The second prong of the test will focus on whether an HIV positive individual presents a "reasonable probability of a materially enhanced risk of substantial harm." to the individual or others. Based upon the overwhelming objective, competent medical evidence that the HIV cannot be transmitted by casual contact, HIV positive individuals clearly do not present such a probability of harm in the overwhelming majority of employment positions. Thus, HIV positive individuals do not present a "reasonable probability of a materially enhanced risk of substantial harm" to themselves or others, and they meet the second prong of the test by being able to do their work without posing a serious threat of injury to the health or safety of themselves or others.

From the above analysis, it is likely that when presented with the question of whether an HIV positive individual is a "qualified handicapped person," the West Virginia Supreme Court of Appeals will answer the question in the affirmative.

B. The Americans With Disabilities Act of 1990

I call on the Congress to get on with the job of passing a law — as embodied in the Americans With Disabilities Act — that prohibits discrimination against
those with HIV and AIDS. We’re in a fight against a disease — not a fight against people. And we won’t tolerate discrimination.161

The Americans With Disabilities Act of 1990 (hereinafter the ADA), was signed by President Bush in late July. The ADA represents a comprehensive, bipartisan effort to halt the discrimination against over 43,000,000 disabled Americans.162

The ADA generally outlaws discrimination against the disabled in the areas of employment, public services, public accommodations and telecommunications.163 These protections are clearly meant to complement existing laws protecting the handicapped as illustrated by the following ADA provision:

Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act.164

The ADA also specifically provides that complaints filed under the ADA and the Federal Rehabilitation Act of 1973 should be dealt with so as to avoid duplication of efforts or the imposition of conflicting and inconsistent standards of conduct.165

It is clear that Congress intended to protect HIV positive individuals, and those perceived as such, under the provisions of the ADA. First, the definition of a “disability” under the ADA is identical, aside from stylistic differences, to the definition of an “individual with handicaps” under the Federal Rehabilitation Act of 1973. This is significant due to the near unanimity of the federal courts in stating that various AIDS-based discrimination claims fall within the “individual with handicaps” definition of the Rehabilitation Act.166

161: 136 CONG. REC. S9545 (daily ed. July 11, 1990) (remarks by President George Bush to the Business Leadership on March 29, 1990 which was included in the Record by Senator Kennedy).
163. Id. at 1-2.
164. Id. at 46.
165. Id. at 11.
166. See infra note 132.
Secondly, the comments of members of Congress during the debates of the ADA recognize that AIDS-based discrimination is included within the "disability" definition. Representative William Dannemeyer, an outspoken critic of the homosexual community, and proponent of an effort to restrict HIV positive individuals in food-handling positions, went on the record to state that "[t]he American people have no idea that with the adoption of this act we are instantaneously going to bring within the definition of disabled person across this land every HIV carrier in America, every person with AIDS. Now that is not what my definition of disability should be including."  

Finally, the failed attempt to allow employers to fire or reassign HIV positive foodhandlers provides further evidence of Congressional intent on this subject. Following the deletion of a restrictive food handling provision by Senate and House conferees, 168 both Senator Helms in the Senate, 169 and Representative Dannemeyer in the House of Representatives, 170 introduced motions to recommit the conference report to include the restrictive language. Both of these attempts failed. 171 However, compromise language introduced by Senator Hatch, which is now codified in the ADA, 172 does allow for the reassignment of foodhandlers with infectious or communicable diseases. However, this reassignment is only permitted if the disease in question appears on a list which is to be prepared by the Secretary of Health and Human Services within six months following the enactment of the ADA. 173 The list is only to include those diseases that are transmitted through foodhandling. 174 It is unlikely that the

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170. 136 CONG. REC. H4629 (daily ed. July 12, 1990) (Motion to Recommit offered by Representative Dannemeyer).
173. Id.
174. Id.
HIV or AIDS will appear on this list, as the current Secretary of Health and Human Services, Dr. Louis W. Sullivan, has stated that such restrictions on HIV positive individuals are unnecessary.\textsuperscript{175}

It is apparent from the above discussion that when the employment provisions of the ADA take effect two years from now, HIV positive individuals can look forward to federal protection in both the private and public sphere.

VII. Conclusion

The termination of HIV positive individuals, and AIDS-based discrimination in general, is simply another example of the pernicious and unfounded biases that the physically challenged in our society have had to contend with since the birth of our nation.

The decision in \textit{Benjamin R.}, the 1989 amendment to the definition of a "handicap" under the West Virginia Human Rights Act and recent statutory enactments\textsuperscript{176} illustrate that West Virginia is following an emerging trend at both the federal and state level. This trend is the condemnation of irrational prejudices against people infected, or perceived to be infected, with the HIV specifically, and the physically challenged in general.

The question of whether an HIV positive individual is a "qualified handicap person" entitled to statutory protection against employment discrimination in West Virginia remains to be answered. The West Virginia Supreme Court of Appeals should maintain its progressive approach in this area of the law and answer the question in the affirmative. However, even if the court decides not to extend this protection, the die has already been cast by Congress and the President. The Americans With Disabilities Act of 1990, though its employment provisions do not become immediately effective, signals that discrimination against people infected, or perceived to be infected, with the HIV will no longer be tolerated. By law in this society the door to equal treatment of the physically challenged will


\textsuperscript{176}  W. \textit{Va. Code} § 16-3C-6 (1985) (prohibiting AIDS-based discrimination in healthcare and education).
swing wide open in the coming years. As members of this society we should follow suit and leave our irrational and sanctimonious preoccupations behind us.

VIII. Epilogue

There is a tendency among students of the law to look past the case names that we encounter in researching a legal issue and forget that there is often an aggrieved individual with a serious problem at stake. I was fortunate enough to reach Benjamin, the plaintiff in this case, through his attorney several weeks ago.

Benjamin is married with three children and has engaged in a monogamous relationship with his wife for the past five years. He did engage in one of the activities which the CDC identifies as being “high risk” in nature over ten years ago. He stated that he is interested in working, but his HIV positive status has been a roadblock to employment because of the irrational fears associated with the disease. Benjamin’s case is currently at a standstill in federal court, and he only receives a small disability check from Social Security which falls far short of his medical and family expenses.

Benjamin and his family have suffered far more than financial consequences, though. His fourteen year old son is teased in school by his classmates. His wife is the subject of rumors as to whether she was infected, and as a result infected her husband. Indeed, the entire family is rumored to carry the virus, when, in fact, only Benjamin carries the HIV. One positive reaction that Benjamin received was the initial support and offer of two of his co-workers to help with his case. Unfortunately, one of these co-workers later reconsidered because of the stigma that he might have to endure for his kindness.

When I asked Benjamin what he would change about the public’s current perception of the disease, he simply stated that our society is too judgmental. Upon hearing that someone is infected with the HIV, people will immediately assume that the person was a homosexual and, as a result, “deserved what they got.” He stated that this rationalization does not hold up when one considers the children and hemophiliacs who are also infected.
Benjamin also stated that the public’s ignorance about AIDS may hit close to home one day. Indeed it is certainly not beyond the realm of possibility that a child of a close-minded parent may one day become sexually involved with an HIV positive individual who might have sought testing, but was unwilling to do so because of the discriminatory consequences.

If Benjamin’s story does no more than force one person to reconsider their irrational fears about AIDS, it has effectively served its purpose.\textsuperscript{177}

\textit{Frank W. Volk}

\footnotesize{\textsuperscript{177} The information contained in this epilogue is taken from a telephone interview with Benjamin R., plaintiff in Benjamin R. v. Orkin Exterminating Co. (Aug. 10, 1990).}