

REPRODUCTION AS A MAJOR LIFE ACTIVITY UNDER THE ADA: A SURVEY OF THE LAW BEGINNING WITH THE EIGHTH CIRCUIT

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I. INTRODUCTION

The American With Disabilities Act ("ADA")¹ provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."² A disability is defined under the ADA as a "physical or mental impairment that substantially limits one or more of the major life activities of such individual."³

An ADA plaintiff, therefore, must satisfy two requirements: (1) the plaintiff must have a mental or physical impairment; and (2) that impairment must substantially interfere with a major life activity.⁴ This article focuses on the latter requirement and specifically, whether generally reproduction or procreation is a major life activity within the meaning of the ADA. The cases deciding the issue of whether reproduction is a major life activity typically involve one of two scenarios; those in which the impairment is infertility and those in which the impairment is the AIDS virus.⁵ With regard to these

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1. 42 U.S.C. §§ 1201 to 12213 (1994).

2. 42 U.S.C. § 12112(a) (1994).

3. *Id.* at § 12102(2). The term "disability" with respect to an individual can also mean having a record of such an impairment or being regarded as having such an impairment. *Id.*

4. The first prong of this analysis is made on a subjective case-by-case basis; the second prong is not. *Runnebaum v. Nationsbank of Maryland, N.A.*, 123 F.3d 156, 164-65 (4th Cir. 1997) (*en banc*). In other words, a plaintiff must always show that he or she is impaired as a result of the disability; however, a plaintiff may not be required to show necessarily that the affected major life activity was of significance to him or her. *Runnebaum*, 123 F.3d at 164-65.

5. Most federal courts deciding the issue have concluded that both infertility and AIDS are impairments under the ADA. *E.g.*, *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 801 (N.D. Ill. 1996) [*Pacourek II*] (holding that "infertility, whether explained or not, is an impairment under the ADA."); *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997), *cert. granted in part*, 118 S.Ct. 554 (1997) (holding that HIV-positive status, whether symptomatic or asymptomatic, is impairment under the ADA). *Contra Runnebaum*, 123 F.3d at 169 (holding that asymptomatic HIV-positive status is not disabled

impairments, the analysis of whether reproduction is a major life activity should remain largely the same. Therefore, the survey below discusses both categories of cases.

II. THE SURVEY: CIRCUIT-BY-CIRCUIT

A. THE EIGHTH CIRCUIT

In *Krauel v. Iowa Methodist Medical Center*,⁶ the United States Court of Appeals for the Eighth Circuit held that reproduction is not a major life activity under the ADA.⁷ In *Krauel*, Mary Jo Krauel ("Krauel") brought an action in federal district court against her employer Iowa Methodist Medical Center ("IMMC") for, *inter alia*, discrimination under the ADA.⁸ Employed as a respiratory therapist with IMMC, Krauel participated in a self-funded employee medical benefits plan.⁹ That plan excluded medical coverage for treatment of female and male infertility.¹⁰

During the time in which Krauel worked for IMMC and presumably in response to her inability to become pregnant, she sought medical treatment and was diagnosed with endometriosis, a condition that can lead to sterility.¹¹ Thereafter, Krauel had laparoscopy surgery to treat the endometriosis and underwent extensive fertility treatment.¹² Sometime during or after that fertility treatment, Krauel became pregnant and gave birth to a baby girl.¹³ Based upon the exclusion under the medical plan, however, IMMC denied coverage for Krauel's fertility treatments.¹⁴ Thereafter, Krauel brought suit against IMMC claiming that IMMC's denial of coverage for her fertility treatment violated the ADA.¹⁵

under the ADA). The split is over whether reproduction is a major life activity substantially limited by infertility or AIDS within the meaning of that term under the ADA. Compare *Abbott v. Bragdon*, 107 F.3d 934, 939-40 (1st Cir. 1997) (holding that reproduction is a major life activity), *cert. granted in part*, 118 S.Ct. 554 (1997); with *Krauel v. Iowa Methodist Medical Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996) (holding that reproduction is not a major life activity).

6. 95 F.3d 674 (8th Cir. 1996).

7. *Krauel v. Iowa Methodist Medical Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996).

8. *Krauel*, 95 F.3d at 676. Krauel also asserted claims against IMMC under the Pregnancy Discrimination Act and under Title VII of the Civil Rights Act. *Id.*

9. *Krauel*, 95 F.3d at 675.

10. *Id.*

11. *Id.* & n.2. (citing RICHARD SLOANE, THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 252 (1987).

12. *Id.* at 676.

13. *Id.*

14. *Id.* Pursuant to the terms of the plan, IMMC provided coverage for the laparoscopy surgery, pregnancy, and delivery expenses. *Id.*

15. *Krauel*, 95 F.3d at 676.

The district court granted summary judgment in favor of IMMC concluding on Krauel's claim under the ADA, *inter alia*, that Krauel was not an individual with a disability under the ADA because reproduction is not a major life activity.¹⁶ Reviewing the district court decision *de novo*, the United States Court of Appeals for the Eighth Circuit affirmed the district court, likewise holding that procreation is not a major life activity within the meaning of the ADA.¹⁷ Acknowledging that Congress did not define the term "major life activity" within the ADA itself, the Eighth Circuit turned to the Equal Employment Opportunity Commission ("EEOC") regulations for guidance regarding the intended definition of that term.¹⁸ Specifically, the court referred to 29 C.F.R. section 1630.2(i) wherein the term major life activity is defined as "functions *such as* caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."¹⁹

Despite recognizing that the EEOC's list of major life activities was not intended to be exhaustive, the Eighth Circuit stated:

Although Krauel is unable to conceive without medical intervention, she has the ability to care for herself, perform manual tasks, walk, see, hear, speak, breathe, learn, and work. It is undisputed that her infertility in no way prevented her from performing her job duties as a respiratory therapist. We conclude, then, that to treat reproduction and caring for others as major life activities under the ADA would be inconsistent with the illustrative list of activities in the regulations, and a considerable stretch of federal law.²⁰

Based upon this interpretation of the EEOC regulation, the Eighth Circuit Court of Appeals held that the district court properly concluded that reproduction is not a cognizable major life activity within the meaning of the ADA.²¹

16. *Id.*

17. *Id.* at 676-77, 681.

18. *Id.* at 677. The federal courts deciding this issue first look to the EEOC regulation for guidance in interpreting "major life activity" under the ADA. *Id.* The split in decisions turns on the attitude of the court in reading the EEOC regulation expansively or narrowly. *Id.*

19. *Krauel*, 95 F.3d at 677 (quoting 29 C.F.R. § 1630.2(i) (1996)) (emphasis added).

20. *Id.* Krauel also argued that caring for children of her own was a major life activity in which she was unable to engage as a result of her infertility. *Id.* at 676. The district court had found that reproduction differed from activities identified in the EEOC's non-exhaustive list in two important ways: (1) reproduction is a lifestyle choice; and (2) reproduction is not engaged in with the same degree of frequency. *Krauel v. Iowa Methodist Medical Ctr.*, 915 F. Supp. 102, 106 (S.D. Iowa 1995), *aff'd*, 95 F.3d 674 (8th Cir. 1996).

21. *Krauel*, 95 F.3d at 677.

B. THE OTHER CIRCUIT AND DISTRICT COURTS

As more courts confront the issue of whether reproduction constitutes a major life activity under the ADA, the minority position of the Eighth Circuit Court of Appeals on this issue becomes more apparent. Granted, not all of the federal circuit courts of appeal have decided the issue. Those that have, however, coupled with the district court decisions on this issue, tend to resolve the issue in favor of the ADA plaintiff. The following discussion explores those decisions both in favor of and against the proposition that reproduction constitutes a major life activity under the ADA.

The First Circuit

In the recent decision *Abbott v. Bragdon*, the United States Court of Appeals for the First Circuit held in a case of first impression that reproduction is a major life activity under the ADA.²² In so holding, the First Circuit stated: "Reproduction (and the bundle of activities that it encompasses) constitutes a major life activity because of its singular importance to those who engage in it, both in terms of its significance in their lives and in terms of its relation to their day-to-day existence."²³

Plaintiff Sidney Abbott ("Abbott"), an asymptomatic HIV-positive woman, visited her dentist's office for a routine check-up.²⁴ Abbott disclosed her HIV status on the patient registration form that she completed at the time of her visit.²⁵ During the check-up, Dr. Bragdon discovered a cavity.²⁶ In proposing treatment, Dr. Bragdon advised plaintiff that due to her HIV status, he would fill the cavity only in a hospital.²⁷ He further advised her that in addition to his regular charge for the filling, Abbott would have to bear the cost that the hospital charged for use of its facilities.²⁸ Abbott refused the treatment options Dr. Bragdon offered to her and subsequently filed a lawsuit in federal district court against him under the ADA based on Dr. Bragdon's refusal to provide treatment in his office.²⁹

22. *Abbott v. Bragdon*, 107 F.3d 934, 937, 941 (1st Cir.), cert. granted in part, 118 S.Ct. 554 (1997).

23. *Abbott*, 107 F.3d at 941.

24. *Id.* at 937.

25. *Id.*

26. *Id.*

27. *Id.* See generally John Gibeaut, *Filling a Need*, 83 A.B.A. J. 48 (1997) (discussing pervasive discrimination against HIV-positive patients in dental profession).

28. *Abbott*, 107 F.3d at 937.

29. *Id.* at 937-38.

At the conclusion of discovery, the parties filed cross-motions for summary judgment.³⁰ The district court found in favor of Abbott holding as a matter of law that her HIV-positive status substantially limited the major life activity of reproduction.³¹ An appeal from this ruling followed.³²

Affirming the district court and holding "unhesitatingly that HIV-positive status, simpliciter, comprises a physical impairment under the ADA[.]" the First Circuit spent the majority of its opinion construing the ADA's statutory language "major life activity" in determining whether reproduction falls within the meaning of that term as it is used in the ADA.³³ The court looked at this issue from two perspectives: (1) whether reproduction is a major life activity for the average person; and (2) whether reproduction was a major life activity for Abbott.³⁴

Construing the undefined term major life activity in accordance with its ordinary meaning, the First Circuit pointed out the plain meaning of the word "major" as denoting "comparative importance" or "significance."³⁵ Recognizing reproduction as "both the source of all life and one of life's most important activities," the court concluded that reproduction is certainly a significant life activity.³⁶

The court drew further support for this conclusion from the Rehabilitation Act of 1973,³⁷ the statute from which the ADA language "major life activity" originated.³⁸ Because that term was accorded a broad definition under the Rehabilitation Act extending beyond "so-

30. *Id.* at 938.

31. *Abbott v. Bragdon*, 912 F. Supp. 580, 587 (D. Me. 1995), *affd.*, 107 F.3d 934, 937, 941 (1st Cir.), *cert. granted in part*, 118 S.Ct. 554 (1997).

32. *Abbott*, 107 F.3d at 938. The federal government and the Maine Human Rights Commission intervened as plaintiffs. *Id.* at 937 & n.1. In addition, several interest groups joined in brief amicus curiae, including the American Dental Association, R.I. Dept. of Pub. Health, Bureau of Health of the Me. Dept. of Human Servs., American Pub. Health Ass'n, Ass'n of State and Territorial Dental Dirs., and Ass'n of State and Territorial Health Officials. *Id.* at 937.

33. *Abbott*, 107 F.3d at 939, 949. As mentioned earlier, most federal courts deciding whether infertility or HIV-positive status qualify as a disability under the ADA struggle little, if any, in concluding that the condition (*i.e.*, infertility and HIV-positive status) is a physical impairment under the ADA. *See Supra* note 5.

34. *Abbott*, 107 F.3d at 939. While acknowledging that an individualized inquiry is necessary in determining whether a plaintiff has a physical or mental impairment, the First Circuit Court of Appeals questioned whether it was necessary to conduct an individualized inquiry of the connection between the plaintiff and the major life activity. *Id.* at 941.

35. *Abbott*, 107 F.3d at 939 (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1084 (3d ed. 1992), WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 718 (1989)).

36. *Abbott*, 107 F.3d at 940.

37. 29 U.S.C. §§ 701 to 797 (1994 & Supp. 1996).

38. *Abbott*, 107 F.3d at 940.

called "traditional handicaps," and because Congress "specifically directed the retention of the original meaning" of that term under the ADA, the First Circuit believed that had Congress intended a narrow construction excluding activities such as reproduction, it would have written the statute differently.³⁹

Finally, in *Abbott*, the First Circuit looked to the EEOC regulations defining major life activities to "mean functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."⁴⁰ Further persuaded by the fact that the EEOC regulations define physical impairment to include physiological disorders affecting the reproductive system, the court found that reproduction "fits comfortably within [the] sweep" of that definition.⁴¹ The court concluded that "otherwise, including reproductive disorders among the regulation's roster of physical impairments would not have made much sense."⁴²

The First Circuit specifically rejected the "formulations" used by the Eighth Circuit in *Krauel* and a Louisiana district court in *Zatarain v. WDSU-Television, Inc.*⁴³ in their conclusions that reproduction is unlike the activities identified in the EEOC's regulation and therefore not a major life activity.⁴⁴ The First Circuit could find no support for these courts' holdings that "an activity must be performed either frequently or universally before it can be classified as a major life activity."⁴⁵ Finding no legislative support for such a restriction on the term major life activity, the court stated the following:

39. *Id.* As the district court said, "Congress chose to use the broad term 'major life activities' rather than a more limited term such as 'major work activities.'" *Abbott*, 912 F. Supp. at 586 (citing *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1320 (E.D. Pa. 1994)). The Court of Appeals later pointed out that the Department of Justice interpreted the Rehabilitation Act to protect persons infected with HIV from discrimination: "[I]n enacting the ADA, Congress endorsed the DOJ's view, noting that '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.'" *Abbott*, 107 F.3d at 943 (citing H.R. REP. No. 101-485(II), at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334 and S. REP. No. 101-116, at 22 (1989)). This legislative history bolstered the Court of Appeals conclusion that *Abbott* was disabled within the contemplated meaning of the ADA. *Abbott*, 107 F.3d at 943.

40. *Abbott*, 107 F.3d at 940 (citing 28 C.F.R. § 36.104 (1996)).

41. *Abbott*, 107 F.3d at 940.

42. *Id.* (citing *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 801-02 (N.D. Ill. 1996)). The First Circuit noted "evidence in the legislative archives that Congress deemed HIV-infected individuals to be disabled under the ADA." *Id.* at 942-43 (citing H.R. REP. No. 101-485(III), at 28 n.18 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 451 n.18 (stating "Persons infected with the Human Immunodeficiency Virus are considered to have an impairment that substantially limits a major life activity, and thus are considered disabled under th[e] first test of the definition.")).

43. 881 F. Supp. 240 (E.D. La. 1995), *aff'd*, 79 F.3d 1143 (5th Cir. 1996).

44. *Abbott*, 107 F.3d at 940-41.

45. *Id.* at 941.

Indeed, the activities explicitly enumerated in the regulation are not wholly characterized by frequency and universality; learning - even in a broad sense - is for many adults not a part of daily life, and work is certainly not universal (as the lives of some of the very rich and very poor demonstrate). The view from the other end of the spectrum bolsters this conclusion; neither lack of frequency nor lack of universality diminishes the fundamental importance of conceiving, childbearing, and raising a family.⁴⁶

Likewise, the First Circuit rejected Dr. Bragdon's argument that reproduction is a "lifestyle choice" and hence, cannot be viewed as a major life activity.⁴⁷ On this point, the court stated, "[m]ost acts that human beings perform - or refrain from performing - have elements of volition. Speaking is undoubtedly a major life activity, but there are those (say, monks who have taken vows of silence) who choose to eschew it."⁴⁸

Holding that reproduction is a major life activity for the public at large, the court went on to similarly find that reproduction was a major life activity for Abbott in particular and that Abbott's HIV-positive status substantially limited her in that major life activity.⁴⁹

The Second Circuit

To date, the United States Court of Appeals for the Second Circuit has not decided the issue of whether reproduction constitutes a major life activity. A recent district court decision, however, suggests that the courts in that jurisdiction will find that reproduction is a major life activity.

In *Rivera v. Heyman*⁵⁰, an HIV-positive employee of the Smithsonian Institution filed suit in New York federal district court against his employer and two supervisors claiming that the defendants failed to accommodate his disability and that defendants discriminated against him as result of his disability.⁵¹ Among other claims, the plaintiff asserted a claim under the Rehabilitation Act of 1973.⁵² In response to the plaintiff's complaint, the defendants filed a motion for

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 942-43.

50. No. 96 Civ. 4489 (PKL), 1997 WL 620837 (S.D.N.Y., Oct. 7, 1997).

51. *Rivera v. Heyman*, No. 96 Civ. 4489 (PKL), 1997 WL 620837, at *1 (S.D.N.Y., Oct. 7, 1997).

52. *Rivera*, 1997 WL 620837, at *1. The ADA, which does not provide a cause of action to a federal employee such as the plaintiff in *Rivera*, is based upon the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 to 797 (1994 & Supp. 1996); many courts look to decisions interpreting that act for purposes of deciding cases under the ADA. *Abbott*, 107 F.3d at 940.

judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.⁵³

As with the ADA, the threshold issue in determining whether the plaintiff in *Rivera* stated a claim was whether plaintiff had a disability. Under the Rehabilitation Act, one definition of a disabled individual is someone with a physical or mental impairment which substantially limits one or more of that person's major life activities.⁵⁴ The district court concluded easily that "due to the way HIV manifests in the individual's blood, the infection is a 'physical impairment.'"⁵⁵ With only slight hesitation, the district court further found that, construing the statute broadly, "procreation and sexual contact are major life activities and that the nature of the HIV substantially limits an infected individual from engaging in those activities."⁵⁶ Based on these findings, the court held that the plaintiff in *Rivera* was "a disabled individual under the Rehabilitation Act."⁵⁷

The Third Circuit

The Court of Appeals for the Third Circuit has not decided the issue of whether reproduction constitutes a major life activity. At least two federal district courts within the Third Circuit, however, have held that reproduction is a major life activity under the terms of the ADA.⁵⁸

In *Doe v. Montgomery Hospital*,⁵⁹ an asymptomatic, HIV-positive male filed suit in the district court of Pennsylvania against a hospital and some of its employees who treated him for a wrist injury.⁶⁰ The plaintiff alleged that the defendants (including the hospital as a place of public accommodation within the meaning of the ADA) discriminated against him in their treatment because of his HIV status and

53. *Rivera*, 1997 WL 620837, at *1.

54. *Id.* at *3 (citations omitted).

55. *Id.*

56. *Id.*

57. *Id.* Notwithstanding this holding, the district court granted judgment in favor of the defendants in *Rivera* finding that the exclusive remedy provided to the plaintiff under the Rehabilitation Act did not extend to a claim against the Smithsonian Institution because that institute is not part of the executive branch of the federal government. *Id.* at *7.

58. *Doe v. Montgomery Hospital*, No. CIV.A.95-3168, 1996 WL 745524 (E.D. Pa. Dec. 23, 1996); *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310 (E.D. Pa. 1994).

59. No. CIV.A.95-3168, 1996 WL 745524 (E.D. Pa. Dec. 23, 1996).

60. *Montgomery Hospital*, 1996 WL 745524, at *1.

that such discriminatory treatment violated the ADA.⁶¹ The defendants filed a motion for summary judgment on the ADA claim.⁶²

The district court first found that "a reasonable jury could find that Plaintiff's HIV infection has impaired a major life function" and, therefore, that the plaintiff was disabled within the meaning of the ADA.⁶³ Because the plaintiff could produce no evidence that the defendant hospital denied him treatment or treated him disparately from others as a result of his HIV-positive status, however, the district court granted summary judgment in favor of the hospital on the ADA claim.⁶⁴

In *Doe v. Kohn Nast & Graf, P.C.*,⁶⁵ an attorney with HIV filed a lawsuit against his former employer under the ADA claiming that he was fired due to his infection.⁶⁶ In support of its motion for summary judgment, the defendant contended that the plaintiff was not within the class of individuals protected by the ADA.⁶⁷ One of the issues in the case then was whether plaintiff had a disability within the meaning of the ADA and specifically, whether reproduction is a major life activity.

Plaintiff began working for the law firm Kohn Nast & Graf in mid-1991.⁶⁸ The first year of the plaintiff's employment went well, with the plaintiff receiving an unexpectedly generous bonus after six months on the job and significant job responsibility.⁶⁹ According to the plaintiff, things began to change for the worse in the fall of 1992 when he learned that he had HIV.⁷⁰ During that fall, the plaintiff

61. *Id.* Specifically, the plaintiff claimed that the defendants denied him the opportunity to participate in the services and facilities of the hospital, provided him with different and separate services and treatment than provided to others, and took unnecessarily protective measures in their treatment of him. *Id.* at *4. The district court granted summary judgment in favor of the *individual* defendants under the public accommodation provision of the ADA finding that those individuals did not have the requisite control over the services provided. *Id.* at *5-6.

62. *Montgomery Hospital*, 1996 WL 745524, at *5-6. The plaintiff in *Montgomery Hospital* also asserted federal claims under the Consolidated Omnibus Budget Reconciliation Act, 42 U.S.C. § 1395dd and the Rehabilitation Act of 1973, 29 U.S.C. § 701 to 797 (1994 & Supp. 1996). as well as unidentified state law claims. *Montgomery Hospital*, 1996 WL 745524, at *5-6.

63. *Montgomery Hospital*, 1996 WL 745524, at 6 (citing with approval *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990). See *infra* note 80.

64. *Montgomery Hospital*, 1996 WL 745524, at 7.

65. 862 F. Supp. 1310 (E.D. Pa. 1994).

66. *Kohn Nast & Graf*, 862 F. Supp. at 1313. The plaintiff also asserted claims under the Employee Retirement Income Security Act of 1974, the Pennsylvania Human Relations Act, and the Pennsylvania Wage Payment and Collection Law. *Id.* at 1313-14. In addition to suing the law firm, the plaintiff sued a principal of the law firm for his personal participation in the alleged wrongdoing. *Id.* at 1314 & n.1.

67. *Kohn Nast & Graf*, 862 F. Supp. at 1318.

68. *Id.* at 1314.

69. *Id.*

70. *Id.*

received a letter at his office from a physician wherein the words "Infectious Diseases" and "AIDS Services" were referenced.⁷¹ Shortly after he received that letter, the plaintiff's immediate supervisor began to avoid him and within a couple of months, fired him.⁷²

In response to the defendant's argument that the plaintiff was not a member of the protected class under the ADA, the district court first looked at the definition of "disability" under the ADA.⁷³ After reaching the conclusion that the plaintiff's HIV-positive status constituted a physical impairment within the meaning of the ADA, the court turned to the issue of whether reproduction is a major life activity under the ADA.⁷⁴

The district court started with the EEOC's list of major life activities.⁷⁵ The EEOC regulations define major life activities as: "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."⁷⁶ Paying particular attention to the words "such as," the district court concluded that Congress did not intend the list to be exhaustive.⁷⁷ In addition, the court deemed significant the fact that Congress chose the broad term "life" in the term or phrase "major life activities."⁷⁸ If, as the defendant contended, the disability must be occupationally-related (*i.e.*, affect the plaintiff's ability to work) to fall within the ADA, then Congress might have chosen a term such as "work-life" or "major work activities."⁷⁹ Based on this interpretation, the district court held that procreation is a major life activity and denied the defendant's motion for summary judgment.⁸⁰

The Fourth Circuit

Very recently, the United States Court of Appeals for the Fourth Circuit considered, without deciding, the issue of whether reproduction constitutes a major life activity under the ADA in *Runnebaum v.*

71. *Id.*

72. *Id.* at 1314-15.

73. *Id.* at 1319.

74. *Id.* at 1320.

75. *Id.*

76. *Id.* (citing 29 C.F.R. § 1630.2(i) (1994)).

77. *Id.* at 1320.

78. *Id.*

79. *Id.*

80. *Id.* at 1321. *See also* *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990) (involving an HIV-positive plaintiff and interpreting "major life activity" under the Pennsylvania Human Relations Act, an act similar to the ADA.) The *Cain* court stated: "There is no gainsaying that this significant injury to the reproduction system impedes a major life activity. The interests in conceiving and raising one's own children 'have been deemed 'essential,' 'basic civil liberties of man,' and '[r]ights far more precious . . . than property rights.'" *Cain*, 734 F. Supp. at 679.

*Nationsbank of Maryland, N.A.*⁸¹ In *Runnebaum*, a former bank employee sued Nationsbank claiming, *inter alia*, that the Bank fired him in violation of the ADA because he was HIV-positive.⁸² After the Maryland district court granted summary judgment in favor of the Bank, the plaintiff appealed.⁸³

Analyzing the plaintiff's claim under the ADA, the Fourth Circuit held that an employee who is HIV-positive, but who is asymptomatic, is not an "individual with a disability" under the ADA.⁸⁴ Following the traditional analysis under the ADA, the court stated that in order to qualify as having a disability under the ADA, the plaintiff must prove two things: (1) that asymptomatic HIV is a physical or mental impairment; and (2) that asymptomatic HIV substantially limits a major life activity.⁸⁵ The court held that the plaintiff failed to make either showing.⁸⁶

Despite the plaintiff's failure to show that he suffered a physical or mental impairment as a result of the HIV virus, the Fourth Circuit analyzed the issue of whether asymptomatic HIV substantially limits one or more major life activities.⁸⁷ The court agreed that "procreation is a fundamental human activity," but was "not certain that it is one of the major life activities contemplated by the ADA."⁸⁸ Notwithstanding its uncertainty, the court assumed for purposes of its analysis that

81. 123 F.3d 156, 164-65 (4th Cir. 1997) (*en banc*).

82. *Runnebaum*, 123 F.3d at 161.

83. *Id.* at 163. After a divided panel reversed the district court's summary judgment award, the Fourth Circuit Court of Appeal granted *en banc* review of the summary judgment ruling. *Id.*

84. *Runnebaum*, 123 F.3d at 168-69. Six of the twelve judges on the panel agreed with this holding, one judge concurred, and five judges dissented entirely. *Id.*

85. *Runnebaum*, 123 F.3d at 166.

86. *Id.* at 166, 169. Finding the ADA term "impairment" plain and unambiguous, the court completely ignored the legislative history to the contrary, and found that plaintiff was not "impaired" under the ADA in that "[h]e has been asymptomatic since being diagnosed in 1988 and, during the relevant time, suffered no diminishing effects from his HIV infection." *Id.* at 168-69. Recognizing the requirement under the ADA that a disability be analyzed on a case-by-case basis, however, the court resisted the temptation to make a blanket holding that asymptomatic HIV infection could never be an impairment under the ADA. *Id.* at 168. Because plaintiff failed to offer any evidence that the HIV infection had impaired him physically, his claim fell short of meeting the statutory requirements. *Id.* at 169.

The *Runnebaum* dissent strongly disagreed with the holding that a person with the HIV infection is not impaired within the meaning of the ADA in that based on the scientific research, the HIV virus attacks the immune system immediately despite the absence of outward signs of illness associated with the virus. *Id.* at 180 (Michael, J., dissenting). In support of its position, the dissent stated: "Nowhere does the text of the statute, . . . , require a 'physical impairment' to be outwardly visible or manifest. The effects of the HIV virus may not be noticeable to the outside world until the later stages of the disease, but the body is impaired as soon as the disease enters it." *Id.* at 181 (Michael, J., dissenting).

87. *Runnebaum*, 123 F.3d at 166-67.

88. *Id.* at 167.

reproduction is a major life activity protected by the ADA.⁸⁹ The Fourth Circuit avoided a decision on this issue, however, because it held that "asymptomatic HIV does not substantially limit procreation . . . for purposes of the ADA."⁹⁰ In short, the court found that asymptomatic HIV individuals are able, as a physical matter, to procreate.⁹¹

The Fifth Circuit

To date, the United States Court of Appeals for the Fifth Circuit has not published a decision regarding the issue of whether reproduction constitutes a major life activity. However, in an unpublished decision, the Fifth Circuit Court of Appeals affirmed a district court decision in *Zatarain v. WDSU-Television, Inc.*,⁹² in which the district court held that reproduction is *not* a major life activity under the ADA.⁹³ Notwithstanding, a little over a month later, a federal district court in Texas held in *Anderson v. Gus Mayer Boston Store of Delaware*⁹⁴ that reproduction is a major life activity under the ADA.⁹⁵

In *Zatarain*, Lynn Zatarain ("Zatarain") worked for television station WDSU as a reporter and anchor person.⁹⁶ During the period of time in which she was under contract with WDSU, Zatarain began fertility treatment to become pregnant.⁹⁷ When Zatarain first began receiving fertility treatments, WDSU adjusted her work schedule to accommodate her.⁹⁸ Just prior to the expiration of her contract, Zatarain asked WDSU for additional accommodations related to her efforts to become pregnant and asked that these accommodations be a

89. *Id.* at 167. Not surprisingly, the *Runnebaum* dissent also disagreed with the notion that the impairment must physically limit a major life activity. *Runnebaum*, 123 F.3d at 178 (Michael, J., dissenting). Finding no support for such an interpretation in the statute, regulations, or legislative history, the dissent astutely pointed out that "[i]t is HIV's physical effects, . . . upon procreation . . . that make it substantially limiting. An individual with HIV stands a significant chance of infecting others if he engages in [this activity], and this prospect of spreading the disease is a substantial limitation." *Id.* at 185 (Michael, J., dissenting).

90. *Id. Contra Cortes v. McDonald's Corp.*, 955 F. Supp. 541, 546 (E.D.N.C. 1996) (stating "the Fourth Circuit has also apparently declined to consider reproduction as a major life function.").

91. *Runnebaum*, 123 F.3d at 172.

92. 881 F. Supp. 240, 243 (E.D. La. 1995).

93. *Zatarain v. W.D.S.U.-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995), *aff'd*, 79 F.3d 1143 (5th Cir. 1996).

94. 924 F. Supp. 763 (E.D. Tex. 1996).

95. *Anderson v. Gus Mayer Boston Store of Delaware*, 924 F. Supp. 763, 774 (E.D. Tex. 1996). *See also* Equal Employment Opportunity Comm'n v. Chemtech Int'l Corp., No. Civ.A.H-94-2848, 1995 WL 608335 (S.D. Tex. July 21, 1995) (holding that a plaintiff with AIDS falls within the protection of the ADA).

96. *Zatarain*, 881 F. Supp. at 241.

97. *Id.*

98. *Id.* at 242.

term of her new employment contract.⁹⁹ After engaging in contract negotiations with Zatarain, WDSU decided not to renew her contract.¹⁰⁰ Zatarain subsequently sued the television station in federal district court claiming that she was discharged from employment by WDSU in violation of the ADA.¹⁰¹

Defendant WDSU moved for summary judgment on Zatarain's ADA claim arguing (1) that infertility is not a disability; and (2) that Zatarain's condition did not substantially limit her from engaging in a major life activity.¹⁰² The district court was unwilling to hold, as a matter of law, that Zatarain did not have a physical impairment within the meaning of the ADA.¹⁰³ The court granted summary judgment in favor of WDSU, notwithstanding, finding that Zatarain was not substantially limited in one or more major life activities as a result of her infertility.¹⁰⁴

Rejecting Zatarain's argument that reproduction is a major life activity, the court stated:

[T]he structure of the ADA and its regulations indicate that the major life activity that is allegedly limited is separate and distinct from the impairment that limits it. Plaintiff's construction is faulty because it would allow her to bootstrap a finding of substantial limitation of a major life activity on to a finding of an impairment. To articulate plaintiff's analysis, she claims to have a reproductive disorder that interferes with the major life activity of reproduction, which is substantially limited because of her disorder. This analysis is circular and unpersuasive.¹⁰⁵

In addition, the district court found reproduction to be inconsistent with the other major life activities identified in EEOC regulations in that reproduction is not engaged in with the same degree of frequency as the listed activities of walking, seeing, speaking, breathing, learning, and working as identified in the regulations.¹⁰⁶ On this point, the district court stated: "[a] person is required to walk, see, learn, speak, breath [sic], and work throughout the day, day in and day out. However, a person is not called upon to reproduce throughout the day, every day." Based on this analysis, the court refused to expand the definition of major life activity to include reproduction.¹⁰⁷

99. *Id.*

100. *Id.*

101. *Id.* Plaintiff also asserted claims under Title VII. *Id.*

102. *Zatarain*, 881 F. Supp. at 242.

103. *Id.* at 242-43.

104. *Id.* at 243-44.

105. *Id.* at 243.

106. *Id.* (citing 29 C.F.R. § 1630.2(i) (1995)).

107. *Id.*

In *Anderson v. Gus Mayer Boston Store of Delaware*,¹⁰⁸ David Anderson ("Anderson"), an HIV-infected employee of Gus Mayer, sued his employer under the ADA after the employer's new group insurer denied Anderson health insurance coverage.¹⁰⁹ Among others, one issue in the case was whether Anderson had a disability within the meaning of the ADA.¹¹⁰

Unlike the district court in *Zatarain*, the district court in *Anderson* found not only that AIDS is a "per se" disability under the ADA, but also that reproduction is a major life activity under the ADA.¹¹¹ In reaching this latter conclusion, the district court relied upon the EEOC's illustrative list of major life activities and upon a variety of cases decided under the Rehabilitation Act wherein the courts have found that AIDS is an impairment substantially limiting the major life activity of procreation.¹¹²

The Seventh Circuit

While the United States Court of Appeals for the Seventh Circuit itself has not decided the issue, there are several district court decisions holding that reproduction is a major life activity covered by the ADA. Those court decisions are discussed below.

In *Pacourek v. Inland Steel Co. ("Pacourek I")*,¹¹³ plaintiff Charline Pacourek ("Pacourek") began working for Inland Steel in 1975.¹¹⁴ In 1986, Pacourek began fertility treatments to become pregnant.¹¹⁵ During the course of treatment, Pacourek told her employer about the fertility treatments she was receiving.¹¹⁶ Ultimately, Inland Steel fired Pacourek; she then filed a lawsuit in the district court of Illinois claiming, among other things, that she was terminated in violation of the ADA.¹¹⁷ Defendants, in turn, filed a motion to dismiss on the ground that plaintiff's condition was not a disability covered by the ADA.¹¹⁸

The district court identified three components to the analysis of whether Pacourek's condition (esophical reflux) fell within the ADA's

108. 924 F. Supp. 763 (E.D. Tex. 1996).

109. *Anderson*, 924 F. Supp. at 770.

110. *Id.* at 771.

111. *Id.* at 774-75.

112. *Id.* at 774 & n.24, 775 (citations omitted).

113. 858 F. Supp. 1393 (N.D. Ill. 1994) [*Pacourek I*].

114. *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1396 (N.D. Ill. 1994) [*Pacourek I*].

115. *Id.* Pacourek had a medical condition known as esophical reflux, a condition that prevented her from becoming pregnant naturally. *Id.*

116. *Pacourek I*, 858 F. Supp. at 1396.

117. *Id.* at 1397.

118. *Id.*

definition of a disability: (1) whether plaintiff's condition is a physical or mental impairment; (2) whether that impairment affects a major life activity; and (3) whether the major life activity is substantially limited by the impairment.¹¹⁹

Although undisputed by the parties, the district court in *Pacourek I* first found that plaintiff's medical condition was a physical impairment under the ADA affecting the reproductive system.¹²⁰ The court then went on to hold that reproduction is a major life activity under the ADA.¹²¹ In support of this latter holding, the court stated:

[W]hile the EEOC regulation cited above only instructs that the reproductive system can be the subject of an *impairment*, it logically follows from that instruction that reproduction is a covered major life activity. Otherwise, it would have made no sense to include the reproductive system among the systems that can have an ADA physical impairment.¹²²

With regard to the last requirement, the court stated "[o]nce reproduction is categorized as a major life activity, the conclusion that infertility substantially limits the major life activity is a matter of common sense."¹²³ Based upon all of these findings, the court found in favor of Pacourek on defendants' motion to dismiss the ADA claim.¹²⁴

A little over a year after *Pacourek I*, a district court in Illinois again held that reproduction is a major life activity within the meaning of the ADA in *Erikson v. Board of Governors of State Colleges*.¹²⁵ In *Erikson*, the plaintiff worked at Northeastern Illinois University for approximately five years before she was terminated.¹²⁶ During the last two years of her employment, the plaintiff began using accrued sick leave and vacation time to undergo fertility treatment.¹²⁷ De-

119. *Id.* at 1404.

120. *Id.*

121. *Id.*

122. *Id.* The district court also relied upon the decision in *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992). In *McWright*, the United States Court of Appeals for the Seventh Circuit found that the protected class of handicapped persons under the Rehabilitation Act included any person with a physiological condition affecting the reproductive system. *Id.* at 226-27. As the district court in *Pacourek I* pointed out, "The Rehabilitation Act regulations' definition of 'handicapped' and the ADA and ADA regulations' definition of 'disability' are substantially identical, making *McWright* applicable to this ADA case." *Pacourek I*, 858 F. Supp. at 1405.

123. *Id.* at 1405.

124. *Id.*

125. 911 F. Supp. 316 (N.D. Ill. 1995); *See also* *Erikson v. Board of Governors of State Colleges*, No. 95 C 2541, 1997 WL 548030, at *4 (N.D. Ill., Sept. 2, 1997) (holding that reproduction as major life activity under ADA is law of the case).

126. *Erikson v. Board of Governors of State Colleges*, 911 F. Supp. 316, 317 (N.D. Ill. 1995).

127. *Erikson*, 911 F. Supp at 318.

spite the plaintiff's use of accrued leave to which she was entitled, her supervisor (who authorized the leave in advance) expressed disapproval of the plaintiff's leave and reprimanded plaintiff for tardiness.¹²⁸ After her termination, the plaintiff filed a lawsuit against the University claiming, among other things, ADA violations.¹²⁹ The University filed a motion to dismiss for failure to state a claim arguing that the plaintiff was not a disabled person under the ADA because reproduction is not a major life activity.¹³⁰

Agreeing with the holding in *Pacourek I*, the district court held that reproduction is a major life activity under the ADA.¹³¹ The court found support for its holding in *McWright v. Alexander*,¹³² a Seventh Circuit decision involving alleged violations of the Rehabilitation Act, the precursor to the ADA.¹³³ In particular, the district court in *Erikson* found compelling the statement in *McWright* that "[t]he Rehabilitation Act calls for reasonable accommodations that permit handicapped individuals to lead normal lives."¹³⁴ The district court noted that "[c]ertainly, the [Seventh Circuit's] reference to child rearing as part of a "normal life," contemplates the "major life activity" prong of the handicapped person inquiry."¹³⁵

In an attempt to distinguish the examples of major life activities set forth in the EEOC regulations, the University argued that those activities involve only one person whereas reproduction necessarily involves two persons.¹³⁶ Rejecting this distinction, the court in *Erikson* pointed to the EEOC's inclusion of "interacting with others" as a major life activity and that such activity involves more than one person.¹³⁷ The court similarly rejected defendant's argument that reproduction, unlike the simple activities on the EEOC list, is a very complex pro-

128. *Id.*

129. *Id.* at 317-18.

130. *Id.* at 321.

131. *Id.* The court also found persuasive *Kohn Nast & Graf*, 862 F. Supp. at 1319-20 (holding that reproduction is a major life activity under the ADA for purposes of a person infected with HIV) and *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 377 (C.D. Cal. 1986) (holding that person infected with HIV is protected under the Rehabilitation Act).

132. 982 F.2d 222 (7th Cir. 1992).

133. *Erikson*, 911 F. Supp. at 322 (citing *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992)). As the appendix to the ADA instructs, the ADA's term "disability" is equivalent to the term "handicapped" as used in the Rehabilitation Act. *Erikson*, 911 F. Supp. at 322 (citations omitted). Apparently, the word "disability" was chosen over the word "handicapped" for purposes of the ADA to reflect the current terminology being used. *Id.*

134. *Erikson*, 911 F. Supp. at 322 (citing *McWright*, 982 F.2d at 227).

135. *Id.*

136. *Id.* at 321-22.

137. *Id.* at 322.

cess.¹³⁸ Refusing to acknowledge this distinction, the court stated that the "simplicity or complexity of the [major life activity] is insignificant."¹³⁹

Lastly, the court disagreed with the reasoning in *Zatarain* that the frequency of the activity is relevant to the inquiry of what constitutes a major life activity under the ADA.¹⁴⁰ The court stated that in any event, viewing reproduction as an infrequent activity limited to conception only ignores "the processes that occur continually in both male and female reproductive systems in order to achieve conception."¹⁴¹

In *Pacourek v. Inland Steel Co. ("Pacourek II")*,¹⁴² Inland Steel moved for partial summary judgment on the plaintiff's ADA claim.¹⁴³ As in its earlier motion to dismiss, Inland Steel argued that the plaintiff had no ADA claim because (1) unexplained infertility is not an impairment under the ADA; and (2) procreation is not a major life activity within the meaning of the ADA.¹⁴⁴

The court first concluded that infertility, explained or unexplained, is the "ultimate impairment" affecting the reproduction system and therefore, is a physical impairment under the ADA.¹⁴⁵ The court then turned its attention to Inland Steel's assertion that reproduction is not a major life activity and ultimately, held that reproduction is a major life activity under the ADA.¹⁴⁶

The court in *Pacourek II* began its analysis by restating its findings in *Pacourek I* that the ADA regulations provide that the reproductive system is a bodily system that can be impaired under the ADA and, therefore, necessarily, reproduction is a major life activity under the ADA.¹⁴⁷ "Otherwise, it would make no sense to include the reproductive system among the systems that can have an ADA physical impairment."¹⁴⁸

Despite defendant's urging, the district court was unmoved by the criticism of its reasoning in *Pacourek I* by the courts in *Zatarain* and *Krauel*.¹⁴⁹ Rather, the district court accused those courts of over sim-

138. *Id.*

139. *Id.*

140. *Id.* (citing *Zatarain*, 881 F. Supp. 240 (E.D. La. 1995)).

141. *Erikson*, 911 F. Supp. at 322.

142. 916 F. Supp. 797, 799 (N.D. Ill. 1996)[*Pacourek II*].

143. *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 799 (N.D. Ill. 1996)[*Pacourek II*]. In *Pacourek I*, the defendant had filed a motion to dismiss. *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1396 (N.D. Ill. 1994)[*Pacourek I*].

144. *Pacourek II*, 916 F. Supp. at 800.

145. *Id.* at 801.

146. *Id.* at 804.

147. *Id.*

148. *Id.* at 801 (citing *Pacourek I*, 858 F. Supp. at 1404).

149. *Id.*

plifying and misunderstanding *Pacourek I*.¹⁵⁰ In that regard, the district court in *Pacourek II* stated the following:

This court does not hold merely that "reproduction [is] a major life activity because the reproductive system was included among the systems that can have an ADA impairment."¹⁵¹ Rather, the court believes that because the EEOC rulemakers included the reproductive system among body systems that can suffer from an impairment under the ADA, they anticipated that a physiological disorder of the reproductive system may be covered by the ADA. Otherwise, including the reproductive system in the body systems that can be impaired would be superfluous. Since reproduction obviously is one of the activities, and probably the major activity, substantially limited by a physiological disorder of the reproductive system, a reasonable inference is that the EEOC rulemakers contemplated that reproduction may be considered a major life activity.¹⁵²

In addition to the guidance offered by the EEOC, the district court in *Pacourek II* relied upon dictum in the Seventh Circuit's decision in *McWright*.¹⁵³ Specifically, the court referred to the statement in *McWright* that regulations under the Rehabilitation Act "defined the protected class of handicapped individuals to include any person with a physiological disorder affecting the reproduction system."¹⁵⁴ Taking it one step further, the court found that "[b]ecause the Seventh Circuit has implicitly recognized that a woman unable to bear children is handicapped under the Rehabilitation Act, the same should hold true under the ADA."¹⁵⁵

150. *Id.* Indeed, the court found that *Zatarain* and *Krauel* interpret "major life activities" too narrowly by defining the term "in terms of quantity, rather than quality" despite the complete lack of statutory guidance suggesting such an interpretation. *Id.* at 804. In doing so, those decisions trivialize reproduction and overlook the fact that no human being would exist but for reproduction. *Id.* The court simply refused to limit major life activities to those "that occur with frequency or are a necessary part of daily existence." *Id.*

151. *Krauel*, 915 F. Supp. at 107.

152. *Pacourek II*, 916 F. Supp. at 801-02.

153. *Id.* at 802 (citing *McWright*, 982 F.2d at 227).

154. *Id.* at 802 (quoting *McWright*, 982 F.2d at 226-27).

155. *Id.* The court found it appropriate to rely on *McWright* in that the definitions of "handicapped person," "physical or mental impairment," and "major life activities" under the Rehabilitation Act regulations and the definitions of "disability," "physical or mental impairment," and "major life activities" under the ADA are substantially identical. *Id.* Further, EEOC regulations expressly recognize that Congress adopted the ADA's definition of "disability" from the Rehabilitation Act's definition of term "individual with handicaps." *Id.* Based on these observations, the *Pacourek II* court stated that "since the relevant definitions under the Rehabilitation Act and ADA are identical, and the case law regarding "handicapped individual" under the Rehabilitation Act also is applicable to the term "disability" under the ADA, the Seventh Circuit's statements in *McWright* have equal force in the present case. *Id.* at 802.

The district court also relied upon Judge Nordberg's observation in *Erikson* of a congressional report explaining that a "person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term 'disability' because of a substantial limitation to procreation and intimate sexual relationships."¹⁵⁶ In agreement with Judge Nordberg, the district court in *Pacourek II* found that this report lends support to the holding that reproduction is a major life activity under the ADA.¹⁵⁷

Lastly, the court found its view of reproduction as a major life activity consistent with the canon that civil rights statutes are to be liberally construed to effectuate their remedial purpose.¹⁵⁸

The Eleventh Circuit

The United States Court of Appeals for the Eleventh Circuit has not decided the issue of whether reproduction is a major life activity under the ADA. It may be only a matter of time, however, inasmuch as a federal district court in Florida very recently held that reproduction is indeed a major life activity for purposes of the ADA.¹⁵⁹

In *Hernandez v. Prudential Life Insurance Company of America*,¹⁶⁰ an HIV-infected employee sued Prudential for violations of the ADA.¹⁶¹ Prudential filed a motion for summary judgment on several grounds including its contention that the plaintiff was not disabled under the ADA.¹⁶² While conceding that asymptomatic HIV is a physical impairment under the statute, Prudential denied that asymptomatic HIV is a *per se* disability under the ADA or that it substantially limits a major life activity as required by the statute.¹⁶³

Declining the opportunity to decide whether HIV-positive status constitutes a *per se* disability under the ADA, the district court held instead that "[a]n individual infected with the HIV virus can easily satisfy the 'substantial impairment of major life activities' prong" of the test for a disability.¹⁶⁴ Specifically, the district court followed the

156. *Pacourek II*, 916 F. Supp. at 803 (citing *Erikson*, 911 F. Supp. at 323 (quoting H.R. REP. No. 101-485 (Part II), at 52 (1990), reprinted in 1990 U.S.C.A.N. 267, 344)).

157. *Id.* at 803.

158. *Id.*

159. *Hernandez v. Prudential Ins. Co. of Am.*, 977 F. Supp. 1160, 1164 (M.D. Fla. 1997); *See also Harris v. Thigpen*, 941 F.2d 1495, 1524 (11th Cir. 1991).

160. 977 F. Supp. 1160 (M.D. Fla. 1997).

161. *Hernandez*, 977 F. Supp. at 1163. The plaintiff also asserted a claim under the Florida Civil Human Rights Act. Fla. Stat. Ch. 760.22 (1997). *Id.*

162. *Hernandez*, 977 F. Supp. at 1161-63.

163. *Id.* at 1163.

164. *Id.* at 1164.

majority of courts and held that reproduction is a major life activity.¹⁶⁵

The Sixth, Ninth, and Tenth Circuits

As of the writing of this article, neither the Sixth, Ninth, or Tenth Circuits nor any district court within those circuits has decided the issue of whether reproduction constitutes a major life activity under the ADA in a published decision.

III. CONCLUSION

Based on the reasoning of the courts holding that reproduction is a major life activity under the ADA, the appropriate resolution of this issue is in favor of coverage under the ADA. Frankly, it is difficult to imagine a more fundamental major life activity than reproduction, particularly when one considers the national debate over abortion rights in this country. After all, in the absence of reproduction, all other life activities, major or otherwise, cease to exist. Further, while the analysis revolves around statutory interpretation, the broad remedial purpose behind statutes such as the ADA militates in favor of reproduction as a major life activity under the ADA. If Congress intended to limit the reach of the ADA in the fashion suggested by courts such as the Eighth Circuit in *Krauel*, it could have, and should have done so.

In light of the fair amount of litigation over the issue and the diverging court opinions resulting therefrom, it seems likely that ultimately the Supreme Court will decide the issue of whether reproduction constitutes a major life activity under the ADA. Hopefully, that decision will reflect the broad remedial purpose behind the ADA and hold, consistent with the majority of distinguished courts on this issue, that reproduction is a major life activity within the meaning of the ADA.

165. *Id.* at 1163-64 (citations omitted). The district court also held that the plaintiff's HIV-positive status substantially limited him in caring for himself, an activity the EEOC expressly recognizes as a major life activity. *Id.* at 1165.