

HIV AS A "DISABILITY" UNDER ADA/REHABILITATION ACT

How NOT to convince a court that you are an individual with a "disability"

"The term "disability" means, with respect to an individual[,] (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (emphasis added).

- Plaintiff "admit[ted] he does not currently, nor has he ever, desired to father children." Plaintiff also testified that "his HIV status does not limit his ability to walk, hear, care for himself, perform manual tasks, speak, breathe, learn and work."

Gutwaks v. Am. Airlines, Inc., 1999 WL 1611328, at *4 (N.D. Tex. Sept. 2, 1999): Court granted employer's motion for summary judgment, finding, *inter alia*, that plaintiff with HIV was not "disabled."

- Plaintiff testified that, long before the alleged discrimination occurred, he and his wife "decided not to have any more children and his wife underwent a procedure to prevent her from having any more children."

Blanks v. S.W. Bell Communications, Inc., 310 F.3d 398, 401 (5th Cir. 2002): Appellate court affirmed grant of summary judgment to employer, finding plaintiff with HIV not "disabled" largely because he testified that he did not want to have any more children.

- "[Plaintiff] failed to introduce into evidence any medical evidence from which a reasonable jury could find that HIV substantially limits a man's ability to reproduce: there is no study, medical testimony, or statistical evidence in the record of a significant risk of infection of female partners by men with HIV; there is no evidence of whether an infected man's sperm may carry and transmit the virus to his child at conception; there is no evidence in the record of any treatment available to lower the risk of infection."

Cruz Carrillo v. AMR Eagle, Inc., 148 F. Supp. 2d 142, 145 (D.P.R. 2001): Court granted employer's motion for judgment as matter of law after plaintiff presented his case in chief, finding, *inter alia*, that male plaintiff failed to establish that he was substantially limited in the major life activity of reproduction.

- Plaintiff's deposition testimony:
Q: Has your HIV affected your ability to have children, to your knowledge?
A: Yes, it has.
Q: How has it?
A: I have to .. I have to have protected--protect myself and others.
Q: Have you taken any steps to learn whether nor not you could be a father, even that you have

an HIV-positive condition? Whether it's physical-whether you're physically able to become a father?

A: Yes.

Q: And what have you done to investigate that to determine if you still could be a father?

A: To adopt

Q: Have you talked to any doctors or any other health care professionals to find out if you could be father and donate sperm in order to be a natural father?

A: No.

Q: Are you thinking now or have you been thinking of possibly adopting?

A: No.

Fusco v. American Airlines, 2003 WL 25730512, *11 (N.D. Cal. April 10, 2003) (not for citation): Court granted employer's motion for summary judgment and denied plaintiff's motion for partial summary judgment, finding, *inter alia*, that plaintiff did not provide sufficient evidence that his HIV substantially limited a major life activity.

- *Plaintiff stated that HIV affects his life activity "moderately, if I am able to maintain a healthy physical regimen, and am not subjected to a lot of unnecessary stress."*

Harmon v. Dep't of Veterans Affairs, 2008 WL 495876, at *4 (E.D. Ark. Feb. 20, 2008): Court granted employer's motion to dismiss or for summary judgment on plaintiff's Rehabilitation Act claim without deciding whether plaintiff had a disability.

And some cases brought by plaintiffs with Hepatitis C:

- *Plaintiff "testified that he and his wife have not altered their sexual practices since he was diagnosed and that he does not use a condom regularly during sex."*

Reese v. American Food Serv., 2000 WL 1470212, *6 (E.D. Pa. 2000): Court concluded, *inter alia*, that plaintiff's major life activities of reproduction and sexual activity have not been substantially limited by his Hepatitis C.

- *"Plaintiff testified that when he was first married he had sexual relations with his wife 'at least once every two days, on average.' Plaintiff asserted that sexual activity with his wife started to decline when he 'knew things were getting serious' when his 'levels began to rise rapidly' in '2002, 2001.' Plaintiff, however, testified that he did not know if the decrease in sexual activity was as a result of a 'physical or mental effect.' While Plaintiff speculates that his hepatitis is the cause of his decreased sexual activity, he has not pointed to any medical opinion to support his belief."*

Barber v. Verizon New England, Inc., 2006 WL 3524465, *4-*5 (D.R.I. Dec. 6, 2006): Court granted employer's motion for summary judgment, concluding, *inter alia*, that plaintiff had not established that he was disabled by his Hepatitis C.