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The Inclusion of Contagious Diseases Under Section 504 of the Rehabilitation Act: School Board v. Arline

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THE INCLUSION OF CONTAGIOUS DISEASES UNDER SECTION 504 OF THE REHABILITATION ACT

SCHOOL BOARD OF NASSAU COUNTY, FLA. v. ARLINE

Discrimination against the handicapped has long plagued the United States.[1] Early attempts of the federal government to address problems facing the handicapped focused on assisting American War veterans.[2] The federal government responded to employment discrimination against the handicapped by passing section 504 of the Rehabilitation Act of 1973[3] (the Act).[4] The Act imposes liability for discrimination on employers receiving federal funding.[5] Litigation first centered on

1. Citing Department of Health, Education and Welfare (HEW) regulations implementing § 504, Senator Hubert Humphrey (D. Minn.) stated: "Certain kinds of discrimination have become so ingrained in our society they almost enjoy respectability." 123 CONG. REC. 13,515 (daily ed. May 4, 1977) (statement of Sen. Humphrey).

2. In 1920, Congress enacted the Smith-Fess Act, ch. 219, 41 Stat. 735 (1920) (repealed in 1973) to "assist veterans returning from World War I in the areas of training, placement, counseling and rehabilitation services." Cohen, *The State of Section 504 of the Rehabilitation Act of 1973*, 65 IOWA L. REV. 446, 448 (1980) [hereinafter cited as Cohen].

3. The Rehabilitation Act of 1973, § 504, 87 Stat. 394 (1973) (codified as amended at 29 U.S.C. §§ 701-796 (1982)).

4. One commentator referred to the 1973 Rehabilitation Act as:
> a program of comprehensive services and genuine priorities on behalf of the handicapped . . . emphasiz[ing] research in special problem areas, innovation in federal programs, and extension of services to a broader class of disabled persons . . . . [T]he most far-reaching portion of the Act . . . contains a group of provisions designed to combat prejudice-inspired treatment of the handicapped in employment and federally funded programs.

Cohen, supra note 2, at 449.

5. Section 504 of the Rehabilitation Act reads in pertinent part:
> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794 (1982).

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determining whether the Act provides a private cause of action[6] and subsequently focused on defining the Act's terminology.[7] In *School Board of Nassau County, Fla. v. Arline*,[8] the United States Supreme Court defined the term "handicap"[9] and held that an individual suffering from a contagious disease[10] may be considered handicapped under the terms of the Rehabilitation Act.[11]

In *Arline*, elementary school teacher Gene Arline sought protection as a handicapped individual under section 504 of the Rehabilitation Act.[12] In 1978 Arline suffered a relapse of tuberculosis,[13] and the School Board discharged her, fearing the risk of contagion.[14] At trial,

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6. *See, e.g.*, Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984); U.S. v. Cabrini Medical Center, 479 F. Supp. 95 (S.D.N.Y. 1980); Carmi v. Metropolitan St. Louis Sewer Dist., 471 F. Supp. 119 (E.D. Mo. 1979); Trageser v. Libbie Rehabilitation Center, Inc., 462 F. Supp. 424 (E.D. Va. 1977).

7. *See, e.g.*, School Board of Nassau County, Fla. v. Arline, 107 S. Ct. 1123 (1987); Vickers v. Veteran's Administration, 549 F. Supp. 85 (W.D. Wash. 1982).

8. 107 S. Ct. 1123 (1987).

9. The Court also examined Arline's status as "otherwise qualified." *Arline*, 107 S. Ct. at 1125. *See supra* note 5 and *infra* note 28.

10. According to medical records examined by the district court, Arline's first stay in the hospital for tuberculosis occurred in 1957. Her 1977 and 1978 cultures revealed that the disease was again active. *Arline*, 107 S. Ct. at 1125. Webster's Dictionary defines tuberculosis as "a highly variable communicable disease of man . . . characterized by toxic symptoms . . . which in man primarily affect the lungs." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1269 (9th ed. 1986).

11. The school system received funding under both Title I of the Elementary and Secondary Education Act, 20 U.S.C. §§ 2701-2854 and in the form of "impact aid" under 20 U.S.C. § 237. *Arline*, 107 S. Ct. at 1125. Because the school received federal funding, it is bound by the provisions of the Rehabilitation Act.

12. The 1973 definition of handicapped appears in § 504 of the Act and in the amended 1978 version as § 794. When referring to the main purpose of the Act, some courts refer to § 504 and some to § 794. Section 794 is the codified version of the Act.

The 1978 amendment to the 1973 Rehabilitation Act defines a handicapped individual as:

> [A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such a 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(7)(B) (1978).

13. Arline first contracted the disease in 1957. For approximately twenty years the disease remained in remission. *Arline*, 107 S. Ct. at 1125.

14. The Nassau County School Board held a hearing at the end of the 1978-79 school year and dismissed elementary school teacher Arline " 'not because she has done anything wrong,' but because of the 'continued reoccurence [sic] of tuberculosis.' " *Id.* at 1125.

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Arline argued that because she suffered from tuberculosis,[15] she was a handicapped person under the terms of the Act.[16] The District Court for the Middle District of Florida held that the Rehabilitation Act does not include contagious diseases[17] in its definition of handicapped.[18] In addition, even if handicapped, Arline was not "otherwise qualified"[19] to teach elementary school.[20]

The Court of Appeals for the Eleventh Circuit reversed,[21] accepting Arline's contention that she was handicapped[22] under section 504. To determine whether the infectious nature of her disease precluded her from being "otherwise qualified"[23] and whether the School Board might have avoided Arline's dismissal through reasonable accommodation,[24] the court remanded the case to the district court.[25] The Supreme Court granted certiorari and affirmed the circuit court,[26] holding that Arline was handicapped under section 504.[27] The Court

15. *See supra* note 10.

16. *See supra* note 12.

17. Stedman's Medical Dictionary defines contagious as "communicable, transmissible by contact with the sick . . . ." STEDMAN'S MEDICAL DICTIONARY 315 (5th Lawyers' ed. 1982).

18. The Court of Appeals, citing the District Court, stated that "[i]t is difficult for this court to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person." Arline v. School Board of Nassau County, 772 F.2d 759, 763 (11th Cir. 1985).

19. The terms of the Rehabilitation Act prohibit discrimination against any "otherwise qualified" handicapped individual on the basis of his or her disability alone. *See supra* note 5. For the definition of "otherwise qualified," *see infra* note 59.

20. *Arline*, 772 F.2d at 761.

21. 772 F.2d 759 (11th Cir. 1985).

22. Appeals Court Justice Vance wrote:

> The language of these provisions [the Rehabilitation Act] in every respect supports a conclusion that persons with contagious diseases are within the coverage of section 504. . . . A person with tuberculosis is, when afflicted with the disease, one who has a physical or mental impairment which substantially limits . . . major life activities.

Arline, 772 F.2d at 764.

23. *Id.* at 765.

24. Employers have an affirmative obligation to make reasonable accommodations for a handicapped employee. "A recipient [of federal funding] shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee . . . ." 45 C.F.R. § 84.12(a) (1986).

25. *Arline*, 772 F.2d at 765.

26. *Arline*, 107 S. Ct. at 1126.

27. *Id.* at 1132.

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remanded the case to the district court to determine the actual risks posed by Arline's disease and whether Arline was "otherwise qualified" for her position.[28]

Through the Rehabilitation Act, Congress intended to create a comprehensive program aimed at the effective assimilation of the handicapped into mainstream society.[29] To further that end, Congress passed the Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978.[30] The legislative history reveals Congress' intent to provide the same remedies for the handicapped[31] that protect employees from discrimination based on race, sex, and national origin in the Civil Rights Act of 1964.[32]

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28. The Supreme Court held:

> Because of the paucity of factual findings by the District Court, we, like the Court of Appeals, are unable at this stage of the proceedings to resolve whether Arline is otherwise qualified for her job. The District Court made no findings as to the duration and severity of Arline's condition, nor as to the probability that she would transmit the disease. Nor did the court determine whether Arline was contagious at the time she was discharged. . . .

Id. at 1131.

29. Consolidated Rail Corp. v. Darrone, 465 U.S. at 626.

30. Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602 § 120(a), 92 Stat. 2982 (1978) (codified at 29 U.S.C. § 794(a) (1978)).

31. Jacobs, *Employment Discrimination and the Handicapped: Some New Teeth for a "Paper Tiger"—The Rehabilitation Act of 1978*, 23 How. L.J. 481, 486 (1980).

32. Section 505(a)(1) of the Rehabilitation Act provides that the remedies available in the Civil Rights Act, 42 U.S.C. § 2000e-5(f)-(k) (1982), are available to any complaint brought under the Rehabilitation Act.

Remedies permitted under section 2000e-5(f)-(k) include:

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders . . . .

(i) Proceedings by Commission to compel compliance with judicial orders.

(j) Appeals.

(k) Attorney's fee; liability of Commission and United States for costs.

1964 Civil Rights Act, Title VI, 42 U.S.C. § 2000e-5(f)-(k) (1982).

The purpose of Title VI of the 1964 Civil Rights Act was to eliminate from programs and activities receiving federal funding discrimination on the basis of race, color, religion, or national origin. Pub. L. No. 88-352, 88th Cong. 2d Sess., reprinted in 1964 U.S. Code Cong. & Admin. News 287.

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Although the Rehabilitation Act presents a multitude of issues,[33] those most pertinent to the *Arline* decision are the meanings of "handicapped" and "otherwise qualified,"[34] and whether the Act includes contagious diseases within its protection.[35]

The Act's 1973 definition of handicapped focused on the extent to which the presence of a mental or physical disability substantially hampered employability.[36] The 1978 amendments expanded the definition of "handicapped"[37] to include disabilities resulting from physical or mental impairments, either actual or perceived.[38] Through this expanded definition, Congress sought to combat employers' fear of and unfamiliarity with the handicapped.[39] To determine whether an individual is handicapped, the *Arline* Court examined the Department of Health, Education and Welfare (HEW) statutory guidelines defining the terms "physical impairment" and "major life activities."[40] These

33. *See supra* note 6 and accompanying text.

34. Southeastern Community College v. Davis, 442 U.S. 397 (1979); Strathie v. Department of Transp., 716 F.2d 227 (3d Cir. 1983); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980).

35. *See infra* notes 73-82 and accompanying text.

36. The 1973 Act defines a handicapped individual as "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services . . . ." Rehabilitation Act of 1973, Pub. L. No. 93-112 § 7, 87 Stat. 355 (1973).

37. The change in the definition of "handicapped" reflected Congress' intention to broaden the Act's application: "It was clearly the intent . . . of Congress in adopting . . . Section 504 (nondiscrimination) that the term 'handicapped individual' in [this] [s]ection . . . [is] not to be narrowly limited to employment . . . ." Note, *Judicial Limitations on Section 504 of the Rehabilitation Act of 1973*, 26 ST. LOUIS U. L.J. 989, 994 (1982) [hereinafter cited as *Judicial Limitations*]. The 1978 version excluded any reference to employment and did not limit the applicability of the Act to those employers receiving federal funding primarily to promote employment. *Id.* at 990.

38. *See supra* note 12.

39. The legislative history of the 1978 version of the Act reflected Congress' recognition of public attitudes toward the handicapped:

> Individuals with handicaps are all too often excluded from schools and educational programs, barred from employment or are underemployed because of archaic attitudes and laws. . . . Not the least of the problems is the fact that the American people are simply unfamiliar with and insensitive to difficulties confronted [by] individuals with handicaps. The failure to involve individuals with handicaps in the development of programs which affect their lives certainly fosters this problem.

Pub. L. No. 93-516, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CONG. & ADMIN. NEWS 1862.

40. Nondiscrimination on the Basis of Handicap in Programs Receiving or Benefiting from Federal Financial Assistance, 45 C.F.R. § 84.4 (1987).

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regulations guide courts interpreting section 504.[41]

In *E.E. Black, Ltd. v. Marshall*[42] the United States District Court for the District of Hawaii focused on the meaning of "handicapped" under the Rehabilitation Act.[43] Prior litigation of *Black*[44] relied on interpretations of "handicapped" that were either too broad[45] or too narrow,[46] diluting the effectiveness of the Act.[47] Both the congressional intent to develop a comprehensive statute[48] and the desire to effectuate the Act's purposes compelled a broad reading of "handicapped."[49] The court defined a handicapped individual as "one who has a physical or mental disability which for such individual consti-

41. Alexander v. Choate, 469 U.S. 287 (1985).

42. 497 F. Supp. 1088 (D. Haw. 1980). Construction contractor Black denied employment to Crosby, a union employee, after a series of physical examinations revealed he suffered from a congenital back ailment. The court stated, "The Rehabilitation Act require[d] the employer to take affirmative action to employ and advance in employment, notwithstanding that the employee suffered from a condition that weakened, diminished, restricted, or otherwise damaged health and physical and mental activities . . . ." *Id.* at 1089.

43. The court adopted the Rehabilitation Act's § 706(7)(B) definition of handicapped. *See supra* note 12.

44. The Administrative Law Judge (ALJ) who heard Crosby's complaint concluded that Congress meant to cover only persons with the most disabling diseases, thus narrowly construing the term "handicapped." O.F.C.C.P. v. E.E. Black, Ltd., 19 Fair Empl. Prac. Cas. (BNA) 1624, 1632 (1979). The ALJ based his conclusion on guidelines from the Social Security Administration, which defined handicap as "the inability to perform 'substantial gainful activity.'" 20 C.F.R. § 416.905 (1981). The Assistant Secretary of Labor for Employment Standards, who next heard the case, O.F.C.C.P. v. E.E. Black, Ltd., 19 Fair Empl. Prac. Cas. (BNA) 1624, 1626 (1979), defined handicap as a "physical or mental impairment which substantially limits one or more of such person's major life activities" (citing statutory language of 29 U.S.C. § 706(7)(b)(i) (1976 and Supp. III 1979)). *See* Bogaard, *The Rehabilitation Act of 1973: Who Is Handicapped Under Federal Law?*, 16 U.S.F.L. REV. 653, 667 (1982).

45. *Black*, 497 F. Supp. at 1099.

46. *Id.* at 1098.

47. *Id.*

48. *See supra* note 4.

49. The Court said: "[G]iven the legislative history of the Act, persons of common intelligence should have had fair warning that the term impairment means 'any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity.'" *Black*, 497 F. Supp. at 1098. The *Black* court stated: "Words are not precise symbols and statutory definitions are often unable to precisely define and cover all possible situations. . . . Congress was not required to spell out in detail every possible condition or abnormality that could constitute an impairment. . . . It is clear that Congress was trying to protect a large number of people in a broad range of situations." *Id.*

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tutes or results in a substantial handicap to employment. . . ."[50] The court stressed the need for a case by case application of its definition to individuals involved in litigation under the Act.[51]

The *Black* court's broad reading[52] recognizes Congress' intent to include individuals with obvious impairments as well as those who are merely perceived as impaired.[53] This definition does not, however, render the term improper or unconstitutionally vague.[54] *Black*[55] thus articulated the intent of Congress to include within the Act's protections[56] employees thought to be impaired.[57]

In *Southeastern Community College v. Davis*,[58] a case of first impression before the Supreme Court, Justice Powell's majority opinion focused on the meaning of "otherwise qualified."[59] The Court refused to allow the college to assume arbitrarily that a handicap renders an individual unable to function and therefore preclude that individual from participation in a federally funded program or activity.[60] Davis alleged that Southeastern Community College denied her admission to its nursing program because of her hearing impairment.[61] She claimed that section 504 of the Act compelled the school to restructure its pro-

50. *Id.* at 1099.

51. *Id.* at 1100.

52. *See supra* note 49.

53. *See supra* note 12.

54. *See supra* note 49.

55. E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980).

56. 29 U.S.C. § 706(7) (1982).

57. *See* Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11 (1985-86).

58. 442 U.S. 397 (1979).

59. Consistent with § 504 of the Rehabilitation Act, Justice Powell wrote: "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Davis*, 442 U.S. at 406.

60. According to Justice Powell, "[Section 504] requires only that an 'otherwise qualified handicapped individual' not be excluded from participation in a federally funded program 'solely by reason of his handicap,' indicating . . . mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." *Id.* at 405.

61. Davis suffered from a bilateral, sensory-neural hearing loss which prevented her from discriminating among sounds sufficiently to understand normal spoken speech." *Id.* at 401. The Supreme Court, citing the district court, 424 F. Supp. 1341 (E.D.N.C. 1976), found:

> Even with a hearing aid respondent [Davis] cannot understand speech directed to her except through lipreading. . . . [Respondent's] handicap actually prevents her from safely performing in both her training program and her proposed profes-

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gram to accommodate her by dispensing with its requirement of effective oral communication.[62] The Court found that both the language and the history of the Act failed to require an employer or educational institution to substantially change a program's requirements[63] to allow a handicapped individual to participate.[64] As a result, employers must reasonably accommodate "otherwise qualified" handicapped individuals, but need not dispense with qualifications crucial to job performance.

In *Strathie v. Department of Transportation*[65] the United States Court of Appeals for the Third Circuit held that a handicapped individual unable to fulfill all of a program's requirements may still be "otherwise qualified" for the program.[66] The court based its holding on the premise that refusal to modify program qualifications may be

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sion. . . . Of particular concern to the court . . . is the potential of danger to future patients in such situations.

Davis, 442 U.S. at 403.

62. *Id.* at 407.

63. Davis claimed that HEW regulations required Southeastern to modify their program requirements to accommodate the handicapped. *Id.* at 408. These proposed modifications include sign language interpreters, individual faculty supervision, and dispensing with certain required courses. The Court claimed that such a fundamental alteration went beyond the type of modification that HEW required. In support of its position, the Court cited the HEW regulations:

(a) *Academic requirements.* A recipient [of federal funds] to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped application or student.

Davis, 442 U.S. at 408-09, *citing* 45 C.F.R. § 84.44 (1978).

64. In finding that Southeastern did not discriminate against Davis, the Court stated:

Nothing in the language or history of § 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualification for admission . . . . Nor has there been any showing . . . that any action short of a substantial change in Southeastern's program would render unreasonable the qualifications it imposed.

Davis, 442 U.S. at 414.

65. 716 F.2d 227 (3d Cir. 1983). The Pennsylvania Department of Transportation (DOT) denied employment to Strathie, a hearing-impaired bus driver. The denial, based on DOT regulations, mandated that drivers must have "[n]o hearing loss greater than 25 decibels at frequencies of 500-1,000 and 2,000 in the better ear without a hearing aid." The court found that with his hearing aid, Strathie's audio capacity was within the statutory requirements. 716 F.2d at 228.

66. *Strathie*, 716 F.2d at 230, *citing* Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981) (in reversing the district court's grant of injunctive relief to a student who sought to be re-admitted to medical school, the court held that the student, who misrepresented

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unreasonable and thus discriminatory.[67] The court used two factors to assess the reasonableness of an employer's refusal to accommodate a handicapped individual:[68] the extent to which an employer would have to modify the essential nature of the program and the extent of the financial burden resulting from the modification.[69] As a result of *Strathie*, job requirements used to evaluate whether an individual is "otherwise qualified" must be essential to the performance of the job. In some cases, failure to modify those requirements may be discriminatory.

School Board of Nassau County, Fla. v. Arline[70] is the Supreme Court's first attempt to define "handicapped" under the Rehabilitation Act.[71] Acknowledging that discrimination against the handicapped occurs because of both real and imagined disabilities,[72] Justice Brennan found that the Act's 1978 definition[73] of "handicapped" protects indi-

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her health to the medical admissions board, was handicapped but not otherwise qualified within the meaning of the Rehabilitation Act).

67. *Strathie*, 716 F.2d at 230.

68. *Id.*

69.[1] We believe the following standard effectively reconciles these competing considerations: A handicapped individual who cannot meet all of a program's requirements is not otherwise qualified if there is a factual basis *in the record* reasonably demonstrating that accommodating that individual would require either a modification of the essential nature of the program, or impose an undue burden on the recipient of federal funds.

Id. at 231.

70. 107 S. Ct. 1123 (1987).

71. Although other courts have defined handicap, this is a case of first impression for the Supreme Court. *Id.* at 1132. Other courts have dealt with the issue of who is handicapped in various ways. *See generally* Tudyman v. United Airlines, 608 F. Supp. 739, 745 (D.C. Cal. 1984) (refusing to designate as handicapped an airline attendant who lost his job because of voluntary bodybuilding that caused him to exceed the airline's weight requirements; failure to secure one job fails to impair a major life activity); Duran v. City of Tampa, 430 F. Supp. 75, 78 (M.D. Fla. 1977) (complainant within the Act's provisions when the City of Tampa failed to hire him because of his past history of epilepsy, even though he suffered no greater chance of having a seizure than any other member of the general population); Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978) (past drug addiction within the Act's definition of handicapped since it substantially limits major life activities, and past addiction falls within the definition of "having a record of such impairment").

72. The 1978 Amendments to the Rehabilitation Act "preclude discrimination against [a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all." *Id.* at 1126-27; Stewart, *Good News for AIDS Victims, Refugees*, May 1 A.B.A.J. 50 (1987) [hereinafter cited as Stewart].

73. *See supra* note 12.

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viduals afflicted with contagious diseases,[74] such as Arline.[75] The majority also considered whether the risks from a contagious disease preclude an individual from being "otherwise qualified."[76] The Court believed Arline's record established that her illness fit into both the HEW regulations[77] and Congress' statutory framework.[78]

Next, the Court considered the School Board's contention that the contagious nature of a disease is distinguishable[79] from its physical effect on the handicapped individual. Such a distinction would allow an employer to refuse to hire someone who could spread the disease without personally suffering any physical impairment. The Court noted that the Act's legislative history[80] failed to justify such a distinction.[81]

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74. The Supreme Court in *Arline* wrote:

> The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in the light of medical evidence and a determination made as to whether they were "otherwise qualified."

Arline, 107 S. Ct. at 1130.

75. In determining whether an individual is handicapped, the Court relied upon regulations promulgated by HEW defining physical impairment as "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin and endocrine." 45 C.F.R. § 84.3(j)(2)(1) (1987).

The regulations define major life activities as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. § 84.3(j)(2)(ii) (1987).

76. *Arline*, 107 S. Ct. at 1130.

77. According to the medical testimony at trial, Arline suffered from tuberculosis "in an acute form in such a degree that it affected her respiratory system." *Id.* at 1127. This fits into the HEW definition of major life activity (breathing), 45 C.F.R. § 84.3(j)(2)(ii) (1987), and establishes that Arline had a physiological condition and a physical impairment, as defined by HEW. *Arline*, 107 S. Ct. at 1126.

78. The Court found that the serious nature of Arline's illness satisfied the statutory requirements of proving "handicap":

> (i) her impairment, serious enough to warrant hospitalization, established that a major life activity was substantially limited;
>
> (ii) Arline's 1957 hospitalization for tuberculosis established a "record of impairment";
>
> (iii) the fact that Arline was dismissed established that the school board regarded her as having an impairment ". . . not because of her diminished physical capabilities, but because of the threat that her relapses . . . posed to others."

Id. at 1127-28.

79. *Id.* at 1128.

80. Under 29 U.S.C. § 706(7)(B)(iii) (1976), individuals "regarded as having such

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The Court believed that allowing contagion to remove an individual from the Act's protections would defeat the purpose of ensuring that discrimination against the handicapped does not result from fear and ignorance.[82]

To determine whether Arline was "otherwise qualified"[83] to teach elementary school, the Court examined what reasonable accommodations[84] the School Board could have made to avoid her dismissal.[85] Since the district court suffered from a dearth of information[86] regarding the actual risks[87] to Arline's students, the Supreme Court concluded that the lower court should have undertaken extensive fact-finding.[88] Due to this lack of information, the Court was unable to

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[physical or mental] impairment" are protected against discrimination. Justice Brennan believed this provision established Congress' concern about the effect a disease has *on others* as well as on the handicapped individual. *Arline*, 107 S. Ct. at 1128.

81. The Court held: "[I]t would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease and use that distinction to justify discrimination." *Id.*

82. *See infra* note 104.

83. *See supra* note 5.

84. Justice Brennan, citing *Davis* stated: "When a handicapped person is not able to perform the essential functions of the job, the Court must consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions. . . ." *Arline*, 107 S. Ct. at 1131 n.17. Accommodation is unreasonable if it imposes "undue financial or administrative burdens" on a grantee. Southeastern Community College v. Davis, 442 U.S. 397, 412 (1979).

85. *Arline*, 107 S. Ct. at 1131.

86. The district court's oral opinion made no findings regarding:
1) duration and severity of Arline's condition;
2) probability of transmitting the disease;
3) existence of active disease at the time the school board discharged Arline;
4) whether the school board could have reasonably accommodated her.
Id.

87. Citing the transcript of respondent's oral argument, the Court acknowledged that an individual who poses a "significant" risk to others because of the contagious nature of her disease is not "otherwise qualified" if reasonable accommodation would not eliminate the risks to others. *Id.* at 1131 n.16.

88. Citing the American Medical Association Amicus Curiae 19, the Court outlined the factors the district court should consider in a fact finding inquiry of the actual risk of contagion:

> [findings 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 probabilities the disease will be transmitted and will cause varying degrees of harm.

Id. at 1131.

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conclude whether Arline was an "otherwise qualified" individual and remanded the case to the district court.[89]

Justice Rehnquist's dissent focused on the lack of express language in the Act regarding conditions attached to the receipt of federal funds and the status of contagious diseases.[90] He opined that the absence of specific statutory language and the existence of state public health statutes[91] to protect the public from communicable diseases required a narrow reading of the Act.[92] The dissent stated that instead of founding its inclusion of contagious diseases on the Act's statutory language,[93] the majority relied on its own sense of right and wrong[94] in the treatment of those dismissed from employment because of their handicap.

The implications of *Arline*[95] extend beyond protecting individuals dismissed from their jobs because they are merely regarded by others as handicapped.[96] The majority's holding broadened the scope of the Act.[97] *Arline* prohibits government-funded employers from discriminating against qualified individuals because of actual or perceived handicaps.[98]

The Court's extension of the definition of "handicapped" to include contagious diseases is especially relevant today, since the mere mention of the contagious disease Acquired Immune Deficiency Syndrome (AIDS) creates panic. The Court reserved[99] discussion of the AIDS issue by refusing to classify as handicapped those individuals who carry

89. *Id.* Justice Brennan wrote: "Because of the paucity of factual findings . . . we . . . are unable at this stage to resolve whether Arline is 'otherwise qualified' for her job." *Id.*

90. *Id.* at 1132.

91. *Id.* at 1132 n.2.

92. Regarding state statutory regulation of public health, Justice Rehnquist wrote: "When faced with such extensive regulation, this Court has declined to read the Rehabilitation Act expansively." *Arline*, 107 S. Ct. 1132, 1133.

93. Justice Rehnquist cited Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 17 (1981), and wrote that "[w]here Congress intends to impose a condition on the grant of federal funds, it must do so unambiguously." *Arline*, 107 S. Ct. at 1132.

94. "[T]he Court today . . . rest[ed] its holding on its own sense of fairness and implied support from the Act." *Id.* at 1132.

95. *Id.* at 1123.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1128 n.7.

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the AIDS virus but lack physical impairment.[100] By reserving judgment[101] on the inclusion of AIDS under the Rehabilitation Act, the Court left open the possibility that, if risks to others can be reduced by reasonable accommodation,[102] an employee with the disease may still be an "otherwise qualified" handicapped individual protected by the Act.[103] Such a finding relies on a broad reading of the Act and its purposes.[104]

Justice Rehnquist's dissent would preclude this broad interpretation. His argument for a narrow reading of the Act,[105] however, ignores its purpose.[106] Further, the *Arline* dissent contains the very attitudes that Congress sought to remedy through the Rehabilitation Act.[107]

The *Arline* decision preserves the intent behind the Rehabilitation Act of 1973 and its 1978 Amendments.[108] In some cases, disabilities are readily apparent and therefore efforts to eradicate prejudicial reactions are easier to develop. On the other hand, it is often difficult to eliminate discrimination based on impairments that are not visible, such as AIDS. The difficulties inherent in identifying certain disabilities and correcting prejudices formed by real or imagined handicaps bolster support for a broad reading of the Rehabilitation Act.

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100. *Id.*

101. *Id.* at 1123 n.7.

102. *Id.* at 1131 n.16.

103. Designation as "otherwise qualified" presumes the handicapped individual is "qualified in spite of his handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).

104. Focusing on the purpose behind the Rehabilitation Act, the Court wrote:

> Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also regarded as impaired and who, as a result are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

Arline, 107 S. Ct. at 1129.

105. *See supra* notes 92-94 and accompanying text.

106. *See supra* note 4.

107. *See supra* note 39.

108. *See supra* note 104.

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