St. Mary's Law Journal

Volume 19 | Number 1 Article 7

1-1-1987

Civil Rights - Rehabilitation Act of 1973 - Individual Affected with Contagious Disease Held Handicapped and Entitled to Protection of Section 504 Recent Development.

Michael E. Hilton

Follow this and additional works at: https://commons.stmarytx.edu/thestmaryslawjournal

Part of the Environmental Law Commons, Health Law and Policy Commons, Immigration Law Commons, Jurisprudence Commons, Law and Society Commons, Legal Ethics and Professional Responsibility Commons, Military, War, and Peace Commons, Oil, Gas, and Mineral Law Commons, and the State and Local Government Law Commons

Recommended Citation

Michael E. Hilton, *Civil Rights - Rehabilitation Act of 1973 - Individual Affected with Contagious Disease Held Handicapped and Entitled to Protection of Section 504 Recent Development.*, 19 ST. MARY'S L.J. (1987).

Available at: https://commons.stmarytx.edu/thestmaryslawjournal/vol19/iss1/7

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

RECENT DEVELOPMENTS

CIVIL RIGHTS—REHABILITATION ACT OF 1973—INDIVIDUAL AFFECTED WITH CONTAGIOUS DISEASE HELD "HANDICAPPED" AND ENTITLED TO PROTECTION OF SECTION 504 (29 U.S.C. § 794). *School Board of Nassau County v. Arline*, __ U.S. __, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987).

Gene Arline was an elementary school teacher who contracted tuberculosis as a teenager. After a twenty-year remission, Arline suffered three relapses within a two-year period. Subsequent medical tests revealed that the disease was again in a contagious state. Due to the school board's fear that Arline would transmit the disease to her students, she was dismissed. After being denied administrative relief, she filed suit in federal district court alleging that her dismissal violated section 504 of the Rehabilitation Act of 1973 ("Act"), which proscribes a federally funded state program from discriminating against a handicapped person solely by reason of his or her handicap. The district court held that a contagious disease was not a handicap within the meaning of the Act. The Court of Appeals for the Eleventh Circuit reversed, holding that Arline was an "individual with handicaps" under both the "record of" impairment and "regarded as" having an impairment provisions of the Act. The court of appeals then remanded for a determination of whether a person such as Arline, having a contagious disease, was "otherwise qualified" for her teaching position, and directed the district court to consider whether the school board could reduce the risk of infecting others to an acceptable level by making "reasonable accommodations." The United States Supreme Court affirmed the court of appeals, holding that Arline, by reason of her contagious disease, was a handicapped person under the "record of" impairment clause.

A determination of whether an individual is protected by the Act depends upon the interpretation of several key statutory terms, *see Arline v. School Board of Nassau County*, 772 F.2d 759, 760 (11th Cir. 1985), *aff'd*, __ U.S. __, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987), in particular the language of section 504, the anti-discrimination provision of the Act. 29 U.S.C. § 794

Published by Digital Commons at St. Mary's University, 1987

St. Mary's Law Journal, Vol. 19 [1987], No. 1, Art. 7

(Supp. III 1979)(codification of § 504 of Rehabilitation Act of 1973). This provision, which Congress designed to counter negative attitudes and practices toward the disabled, was patterned after Title VI of the Civil Rights Act of 1964. *See School Board of Nassau County v. Arline*, — U.S. —, — & n.2, 107 S. Ct. 1123, 1126 & n.2, 94 L. Ed. 2d 307, 315 & n.2 (1987)(similarity of statutory language evidences similar congressional intent); *Alexander v. Choate*, 469 U.S. 287, 293 n.7 (1985)(§ 504 patterned after Title VI). Section 504 provides in pertinent part:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of his handicap, be excluded from the 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 (Supp. III 1979).

The terms of section 504 have been developed by the United States Supreme Court into a multi-part test to determine the Act's applicability. *See, e.g., Arline*, 772 F.2d at 760; *Joyner v. Dumpson*, 712 F.2d 770, 774 (2d Cir. 1983); *Doe v. New York University*, 666 F.2d 761, 774-75 (2d Cir. 1981). In determining the statute's applicability, a court inquires as to whether the program receives "federal financial assistance." *See Arline*, 772 F.2d at 762-63 ("federal financial assistance" is jurisdictional requirement for applicability of Act; finding such assistance). Next, the court must determine whether the claimant is an "individual with handicaps." *See id.* at 763-64 (applying statutory and regulatory authority to determine handicapped status). Lastly, the court must consider whether the handicapped claimant is "otherwise qualified." *See id.* at 764-65 (remanding for determination). If all these questions are answered affirmatively, then section 504 precludes the program from denying an opportunity based solely on the claimant's handicap. *See* 29 U.S.C. § 794 (Supp. III 1979).

The first inquiry, whether the program is receiving "federal financial assistance," is generally not a substantial barrier to claimants. This is partially due to the fact that the Supreme Court has interpreted "financial assistance" as merely requiring a receipt of federal funds, with no necessity for a nexus between the funds and a program's employment activities. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 631-34 & n.12 (1984) (funds need not be furnished explicitly for purposes of providing employment). The next hurdle, whether the claimant is an "individual with handicaps," is more burdensome. Under the Act such a claimant is defined as:

> Any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. § 706(8)(B) (Supp. III 1979). This definition contains three categories under which a person may be classified as an "individual with handicaps." The first two categories are relatively self-explanatory. *See Arline*, __ U.S. at __, 107 S. Ct. at 1127, 94 L. Ed. 2d at 316-17 (hospitalization sufficient for second "record of" impairment category); *see also Southeastern Community College v. Davis*, 442 U.S. 397, 405 & n.6 (1979)(current disability satisfies first category). Although the exact parameters of the third, "regarded as," category are unclear, legislative history reveals that Congress intended to include visible physical deformities which substantially limit one's ability to work due to adverse reaction by others. *See, e.g.*, S. Rep. No. 1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 6373, 6388-91.

The last obstacle in the claimant's path is the inquiry into whether the claimant is an "otherwise qualified" individual. *See Davis*, 442 U.S. at 412-13 (1979)(plaintiff not "otherwise qualified"). In order to be "otherwise qualified," the claimant must be able, in his handicapped condition, to perform all the essential functions of his or her job. 45 C.F.R. § 84.3(k) (1986) (defining "otherwise qualified" for § 504); *see also Arline*, __ U.S. at __ n.17, 107 S. Ct. at 1131 n.17, 94 L. Ed. 2d at 321 n.17. This determination, however, must take into account any "reasonable accommodations" which the federally assisted program could make. *See Davis*, 442 U.S. at 408-12. If "reasonable accommodations" could enable the claimant to perform these essential functions then he is "otherwise qualified" to receive the program's benefits. *See id.* at 412-13.

Although Supreme Court caselaw interpreting the language of section 504 is relatively limited, it reveals a tendency of the Court to interpret the statute expansively. *See, e.g.*, *Choate*, 469 U.S. at 295-96 (discrimination need not be purposeful to invoke § 504's protection); *Darrone*, 465 U.S. at 631-32 (1984)(interpreting § 504 as not requiring federal financial assistance be designated for primary purpose of providing employment); *Davis*, 442 U.S. at 407 (requiring individualized inquiry of whether employer could make reasonable accommodations resulting in an "otherwise qualified" individual). The Court, in its most recent decision prior to *Arline*, however, did not adopt the expansive interpretation urged by the Department of Health and Human Services regarding health care for handicapped infants. *See Bowen v. American Medical Association*, __ U.S. __, __, 106 S. Ct. 2101, 2114, 90 L. Ed. 2d 584, 599-600 (1986)(handicapped infants not "otherwise qualified" for medical treatment absent parental consent).

In *Arline*, the United States Supreme Court returned to its expansive interpretation of section 504 when it affirmed the court of appeals' decision and held that an individual who is afflicted with a contagious disease may be protected by the Act. *See Arline*, __ U.S. at __, 107 S. Ct. at 1129, 94 L. Ed. 2d at 318. The dissent, however, argued that this interpretation is too ex-

St. Mary's Law Journal, Vol. 19 [1987], No. 1, Art. 7

pansive to give federally assisted programs the unambiguous notice required in these cases. *See id.* at ___, 107 S. Ct. at 1132, 94 L. Ed. 2d at 322 (Rehnquist, C.J., dissenting)(conditions on federal funds must be particularly clear because control of contagious diseases traditionally state function); *see also Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (conditional receipt of federal funds must be unambiguous). Perhaps swayed by the dissent, the Court based its holding that Arline was an "individual with handicaps" solely on the second "record of impairment" category. *See Arline*, ___ U.S. at ___, 107 S. Ct. at 1127, 94 L. Ed. 2d at 317 (prior tuberculosis-associated hospitalization sufficient). The Court held that Arline, having required tuberculosis-associated hospitalization, fell squarely within the "record of" impairment category. *See id.* Thus, the Court found no need to review the court of appeals' determination that Arline was handicapped under the "regarded as" category. *See id.* at ___ & n.7, 107 S. Ct. at 1127-28 & n.7, 94 L. Ed. 2d at 317 & n.7; *see also Arline*, 772 F.2d. at 764 (Arline handicapped under both "regarded as" and "record of" clauses). Moreover, the Court expressly avoided ruling on whether a claimant could be handicapped under the "regarded as" category due solely to the fact that he was a carrier of a contagious disease. *See Arline*, ___ U.S. at ___ n.7, 107 S. Ct. at 1128 n.7, 94 L. Ed. 2d at 317 n.7.

A careful reading of the Supreme Court's opinion in *Arline*, however, leads to the conclusion that the current Court feels that a contagious disease, *in itself*, is enough to bring a claimant within the protection of the Act. *See generally Arline*, ___ U.S. at ___, 107 S. Ct. at 1123, 94 L. Ed. 2d at 307. The only indication to the contrary is the Court's failure to decide the issue. *See id.* This failure could be the result of disagreement among the majority as to this issue. *See id.* at ___, 107 S. Ct. at 1127, 94 L. Ed. 2d at 317. The more likely explanation, however, is that the Court declined to rule upon an issue not necessary to determine the outcome of the case. This latter explanation is buttressed by the Court's almost exclusive reliance on the statutory "regarded as" language and its legislative history to hold that contagiousness did not take Arline out of protected status. *See id.* at ___, 107 S. Ct. at 1126-27, 94 L. Ed. 2d at 315-16. The legislative history of the "regarded as" category relied on by the Court reveals that this language was included to protect those persons with visible physical deformities that cause adverse reactions by others which substantially limit a handicapped person's ability to work. *See, e.g.*, S. Rep. No. 1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 6373, 6388-91. The Court found that Congress was as equally concerned about the effects of a handicap on others as they were about the effects on the claimant and that these different effects were, therefore, indistinguishable. *See Arline*, ___ U.S. at ___, 107 S. Ct. at 1129, 94 L. Ed. 2d at 318. The Court used this analysis to hold that a contagious claimant is not removed from the protection of the Act due to his effects on others. *See id.*

The logical extension from the Court's analysis in *Arline* is that contagiousness alone is sufficient to confer handicapped status. *See Arline*, 772 F.2d at 764. In fact, this extension is dictated by one of the Court's footnotes which states that "[t]he effects of one's impairment on others is as relevant to a *determination of whether one is handicapped* as is the physical effect of one's handicap on oneself." *Arline*, ___ U.S. at ___ n.10, 107 S. Ct. at 1129 n.10, 94 L. Ed. 2d at 318 n.10 (emphasis added). In other words, an impairment affecting others occupies the same status as a physical defect when determining whether a claimant is handicapped. *See id.* Because a physical defect alone is sufficient to make a claimant handicapped, contagiousness alone must also be sufficient. *See, e.g., Strathie v. Department of Transportation*, 716 F.2d 227, 229-30 (3d Cir. 1983)(hearing defect alone a handicap); *Fitzgerald v. Green Valley Area Education Agency*, 589 F. Supp. 1130, 1135-36 (S.D. Iowa 1984)(left-side hemiplegia is handicap). Although the Court expressly avoided the issue, the majority opinion mandates the conclusion that a person who is a carrier of acquired immune deficiency syndrome (AIDS) and has not yet suffered any physical impairment would enjoy handicapped status. *See Arline*, ___ U.S. at ___ n.7, 107 S. Ct. at 1128 n.7, 90 L. Ed. 2d at 317 n.7.

The *Arline* Court enumerated several factors to guide courts in determining whether an individual afflicted with a contagious disease is "otherwise qualified." *See id.* at ___, 107 S. Ct. at 1131, 94 L. Ed. 2d at 321. The Court intended these factors to ensure that a determination that a person is not "otherwise qualified" be based upon reasoned and sound medical judgments and not unfounded myths and fears. *See id.* at ___, 107 S. Ct. at 1129, 94 L. Ed. 2d at 319. These factors include:

> "[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 ___, 107 S. Ct. at 1131, 94 L. Ed. 2d at 321 (quoting Brief for Amicus Curiae American Medical Association)(brackets original). These factors are to be considered in conjunction with whether "reasonable accommodations" could be made to reduce or eliminate the risk of infecting others. *Id.* at ___ & n.17, 107 S. Ct. at 1131 & n.17, 94 L. Ed. 2d at 321 & n.17.

In *Arline* the Court held that an individual with a record of impairment stemming from a contagious affliction is entitled to the protection afforded by the Rehabilitation Act of 1973. The Court expressly avoided deciding whether an individual, such as an AIDS carrier, who has not yet suffered any actual impairment could be considered handicapped within the meaning of the Act. The *Arline* opinion, however, compels the conclusion that the