

WHO ARE AMERICANS WITH DISABILITIES UNDER FEDERAL CIVIL RIGHTS LAW?

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On July 26, 1991, the U.S. Department of Justice (DOJ) issued its final rule (effective January 26, 1992) regarding "Nondiscrimination on the Basis of Disability in State and local Government Services" (28 CFR Part 35). These federal regulations implement the Americans with Disabilities Act of 1990, P.L. 91-336, ("ADA"). As noted in the rule, the ADA (signed into law on July 26, 1990) provides "comprehensive civil rights protections to individuals with disabilities in the areas of employment, public accommodations, State and local government services, and telecommunications." In particular, Subtitle A of title II of the ADA, prohibits discrimination on the basis of disability by public entities.

Title II of the ADA extends this prohibition of discrimination to include all services, programs, and activities provided or made available by State and local governments or any of their instrumentalities or agencies, regardless of the receipt of Federal financial assistance... All governmental activities of public entities are covered, even if they are carried out by contractors. For example, a State is obligated by title II to ensure that the services, programs, and activities of a State park inn operated under contract by a private entity are in compliance with title II's requirements...

According to DOJ, "two major categories of programs or activities covered by this regulation: those involving general public contact as part of involving operations of the entity and those directly administered by the entities for program beneficiaries and participants."

Activities in the first category include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the entity facilities. Activities in the second category include programs that provide State or local government services or benefits.

Further, DOJ noted that "[m]ost programs and activities of State and local governments are recipients of Federal financial assistance from one or more Federal funding agencies and, therefore, are already covered by section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) ("section 504"), which prohibits discrimination on the basis of handicap in federally assisted programs and activities." As a result, title II of the ADA essentially extends the nondiscrimination mandate of section 504 to those State and local governments that do not receive Federal financial assistance.

Accordingly, the DOJ final rule adopts "the general prohibitions of discrimination established under section 504, as well as the requirements for making programs accessible to individuals with disabilities and for providing equally effective communications." However, unlike section 504, DOJ acknowledged that the ADA and these regulations "use of the term 'disability' instead of 'handicap' and the term 'individual with a disability' instead of 'individual with handicaps' represent[ing] an effort by Congress to make use of up-to-date, currently accepted terminology."

In addition to actual conditions considered disabilities under the ADA, DOJ found that this law and regulations would apply "if a public entity refused to serve the person because it perceived that the

person had an impairment that limited his or her enjoyment of the goods or services being offered."

For example, persons with severe burns often encounter discrimination in community activities, resulting in substantial limitation of major life activities. These persons would be covered under this test based on the attitudes of others towards the impairment, even if they did not view themselves as "impaired."...

If a person is refused admittance on the basis of an actual or perceived physical or mental condition, and the public entity can articulate no legitimate reason for the refusal (such as failure to meet eligibility criteria), a perceived concern about admitting persons with disabilities could be inferred and the individual would qualify for coverage under the "regarded as" test. A person who is covered because of being regarded as having an impairment is not required to show that the public entity's perception is inaccurate (e.g., that he will be accepted by others) in order to receive benefits from the public entity.

Within the context of this ADA regulation, "Qualified individual with a disability" for state and local government services is defined as "a handicapped person who meets the essential eligibility requirements for the receipt of such services".

Because of the variety of situations in which an individual's qualifications will be at issue, it is not possible to include more specific criteria in the definition. The "essential eligibility requirements" for participation in some activities covered under this part may be minimal. For example, most public entities provide information about their operations as a public service to anyone who requests it. In such situations, the only "eligibility requirement" for receipt of such information would be the request for it.

Under such circumstances, public entities must make its services available to such qualified individuals with a disability, unless it would result in a "direct threat," i.e., "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services."

As noted by DOJ, the Supreme Court in *School Board of Nassau County v. Airline*, 480 U.S. 273 (1987) articulated "the need to balance the interests of people with disabilities against legitimate concerns for public safety" within the Rehabilitation Act of 1973 and by implication the ADA. Accordingly, this opinion described in the following paragraphs provides some insight into the applicability of the ADA to individuals and governmental services.

#### TB or Not TB?

In the case of *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273; 107 S.Ct. 1123; 94 L.Ed.2d 307 (1987), the Supreme Court of the United States addressed the issue of whether a person afflicted with tuberculosis, a contagious disease, may be considered a "handicapped individual" within the meaning of Section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U.S.C. § 794 (Act). As noted by the court, this federal statute prohibits a federally funded programs from discriminating against a handicapped individual solely by reason of his or her handicap. The facts of the case were as follows:

From 1966 until 1979, Gene Arline taught elementary school in Nassau County, Florida. She was discharged in 1979 after suffering a third relapse of tuberculosis within two years... Arline was hospitalized for tuberculosis in 1957. For the next 20 years, Arline's disease was in remission. Then, in 1977, a culture revealed that tuberculosis was again active in her system; cultures taken in March 1978 and in November 1978 were also positive...The superintendent of schools for Nassau County, Craig Marsh, then testified as to the school board's response to Arline's medical reports. After both her second relapse, in the spring of 1978, and her third relapse in November 1978, the school board suspended Arline with pay for the remainder of the school year. At the end of the 1978-1979 school year, the school board held a hearing, after which it discharged Arline, "not because she had done anything wrong," but because of the "continued reoccurrence of tuberculosis."

Arline brought suit against the school board alleging that she qualified as a "handicapped person." and that she was dismissed "solely as a result of her handicap in violation of Section 504." Despite finding "no question that she suffers a handicap," the federal trial court concluded that Arline was nevertheless not "a handicapped person under the terms of that statute." Specifically, federal trial court found it "difficult to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person."

The appeals court, however, reversed this determination holding that "persons with contagious diseases are within the coverage of section 504." In this particular instance, the appeals court found that Arline's condition "falls neatly within the statutory and regulatory framework" of the Act." Accordingly, the appeals court ordered that this case be returned to the trial court "for further findings as to whether the risks of infection precluded Mrs. Arline from being 'otherwise qualified' for her job and, if so, whether it was possible to make some reasonable accommodation for her in that teaching position or in some other position." The Supreme Court subsequently granted the school board's request to review this determination.

As described by the Supreme Court, the purpose of the Act was to ensure that "all programs receiving federal funds... share with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted." Accordingly, Congress had addressed the broader problem of discrimination against the handicapped by including Section 504 of the Rehabilitation Act, an antidiscrimination provision patterned after Title VI of the Civil Rights Act of 1964, which reads in pertinent part as follows:

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.

Within this context, a "handicapped individual" is defined as a "person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B). As noted by the Court, Congress had adopted an expanded definition of "handicapped individual" to reflect

its concern with "protecting the handicapped against discrimination stemming not only from simple prejudice, but also from archaic attitudes and laws and from the fact that the American people are simply unfamiliar with and insensitive to the difficulties confronting individuals with handicaps."

In determining "whether a particular individual is handicapped as defined by the Act," the Court found that "the regulations promulgated by the Department of Health and Human Services are of significant assistance." The regulations are particularly significant here because they define two critical terms used in the statutory definition of handicapped individual. "Physical impairment" is defined as follows:

[Any] 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, genitourinary; hemic and lymphatic; skin; and endocrine." 45 CFR § 84.3(j)(2)(i) (1985).

In addition, 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." § 84.3(j)(2)(ii).

Further, the Court found that these regulations "reinforced what a careful reading of the statute makes plain, that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities."

The Court then applied this statutory and regulatory framework to the facts of the case to determine "whether Arline can be considered a handicapped individual." In the opinion of the Court, "Arline's hospitalization for tuberculosis in 1957 suffices to establish that she has a 'record of... impairment' within the meaning of 29 U.S.C. § 706(7)(B)(ii), and is therefore a handicapped individual."

While conceding that Arline's condition might constitute a "handicapping condition," the school board maintained that it had "dismissed Arline not because of her diminished physical capabilities, but because of the threat that her relapses of tuberculosis posed to the health of others."

The Court, however, rejected the school board's contention that, "in defining a handicapped individual under § 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant in a case such as this."

Nothing in the legislative history of § 504 suggests that Congress intended such a result. That history demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual. Congress extended coverage, in 29 U. S. C. § 706(7)(B)(iii), to those individuals who are simply "regarded as having" a physical or mental impairment. The Senate Report provides as an example of a person who would be covered under this subsection "a person with some kind of visible physical impairment which in fact does not substantially limit that person's functioning." Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.

Accordingly, the court concluded that "[a]llowing 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 those who are 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. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious.

The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of "handicapped individual" is broad, but only those individuals who are both handicapped and otherwise qualified are eligible for relief. 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 light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology -- precisely the type of injury Congress sought to prevent.

The Court, therefore, held that "the fact that a person with a record of a physical impairment is also contagious does not suffice to remove that person from coverage under § 504."

Further, the Court found that this broader definition of the Act to include contagious diseases would not "extend the Act beyond manageable bounds." On the contrary, the Court found that "[c]onstruing § 504 not to exclude those with contagious diseases will complement rather than complicate state efforts to enforce public health laws."

As we state, courts may reasonably be expected normally to defer to the judgments of public health officials in determining whether an individual is otherwise qualified unless those judgments are medically unsupportable. Conforming employment decisions with medically reasonable judgments can hardly be thought to threaten the States' regulation of communicable diseases. Indeed, because the Act requires employers to respond rationally to those handicapped by a contagious disease, the Act will assist local health officials by helping remove an important obstacle to preventing the spread of infectious diseases: the individual's reluctance to report his or her condition.

Having found Arline qualified as a "handicapped individual" within the meaning of the Act, the Court

concluded that the trial court would have to determine "whether Arline is otherwise qualified for the job of elementary schoolteacher."

To answer this question in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.

The basic factors to be considered in conducting this inquiry are well established. In the context of the employment of a person handicapped with a contagious disease,... this inquiry should 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.

In making these findings, courts normally should defer to the reasonable medical judgments of public health officials. The next step in the "otherwise-qualified" inquiry is for the court to evaluate, in light of these medical findings, whether the employer could reasonably accommodate the employee under the established standards for that inquiry.

As noted by the Court, "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." Accordingly, the Court acknowledged that "the Act would not require a school board to place a teacher with active, contagious tuberculosis in a classroom with elementary school children."

"An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. 45 CFR § 84.3(k) (1985). When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions. Accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on a grantee, or requires "a fundamental alteration in the nature of the program."

Where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination".

Given the "paucity of factual findings by the District Court", the Court found itself "unable at this stage of the proceedings to resolve whether Arline is 'otherwise qualified' for her job."

Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies.

The Court, therefore, remanded (i.e., sent back) the case to the District Court "to determine whether Arline is otherwise qualified for her position."