Handicaps Which Threaten Others and the Prohibition of Discrimination Under the Rehabilitation Act

Stephen L. Mikochik
HANDICAPS WHICH THREATEN OTHERS AND THE PROHIBITION OF DISCRIMINATION UNDER THE REHABILITATION ACT*

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I. INTRODUCTION

This paper will explore whether persons whose handicaps constitute a potential threat to others are in any measure protected by federal law from discrimination in employment. After reviewing the evolution of section 504 of the Rehabilitation Act of 1973, the principal federal safeguard for handicapped workers, this paper will specifically examine whether alcoholics, drug addicts, and carriers of contagious diseases, like Acquired Immune Deficiency Syndrome (hereinafter “AIDS”), are included within the statute’s coverage. In that regard, this paper will review the Supreme Court’s 1987 decision in School Board of Nassau County v. Arline which required federally funded employers to explore ways of safely accommodating workers handicapped with infectious diseases before discharging them. This paper will close by examining the Civil Rights Restoration Act of 1987 in which Congress effectively codified the Arline decision.4

II. BACKGROUND

Title V of the Rehabilitation Act of 1973 (hereinafter the “Act”) was the first federal legislation to recognize the employment

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4. See infra text accompanying notes 60-78 (discussing the Arline decision).
rights of disabled persons. Section 501(b) of the Act requires the federal government to take affirmative action in the hiring and advancement of handicapped individuals. Section 503(a) places a similar duty on employers in carrying out contracts with the federal government in excess of $2500. Section 504, the broadest and undoubtedly the most litigated of the three provisions, protects qualified handicapped individuals from discrimination solely on the basis


Each department, agency and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after . . . [September 26, 1973], submit to the Civil Service Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals.

7. See id.


Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 7(6) [of this title]. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after . . . [September 26, 1973].

9. See id.


No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.
Title V grew out of an attempt by Representative Vanik and Senators Humphrey and Percy to amend Title VI of the Civil Rights Act of 1964 in order to prohibit discrimination on the basis of handicap. The legislative history surrounding the enactment of Title V is quite sparse, due to the confusion caused by President Nixon vetoing the Rehabilitation Act twice for reasons dealing with the breadth of certain grant provisions. Nevertheless, in sponsoring the predecessor bill, Senator Humphrey indicated that his legislation would address not only formal exclusion but also practices that were exclusionary in effect.

A year after enactment, Congress returned to the Rehabilitation Act to make several technical changes. The original definition of "handicapped individual," applicable to all of the Act's provisions including Title V, was limited to persons with substantial handicaps in regard to employment, who could likely benefit from vocational rehabilitation services. Given that Title V also covered handicapped persons already capable of employment and that section...
504 specifically covered more than just federal fund recipients’ employment practices, a new and much broader definition of “handicapped individual” was added for purposes of Title V. Congress also recognized that it had not formally authorized implementing regulations for section 504. Nevertheless, Congress called upon federal funding agencies, especially the Department of Health, Education and Welfare (hereinafter “HEW”) to develop regulations promptly. Unfortunately, none were issued for several years due in part to the complexity of developing appropriate rules for accommodating the widely varied needs of disabled persons. In 1976, after a lawsuit was filed to force promulgation of regulations, President Ford issued Executive Order 11,914, requiring all federal

19. S. Rep. No. 1297, 93rd Cong., 2d Sess. 38 (1974). Section 504 was enacted to prevent discrimination against all individuals regardless of their need for, or ability to benefit from, vocational rehabilitation services in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally aided programs. Id.


any person who (A) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (B) has a record of such impairment, or (C) is regarded as having such an impairment.

21. See S. Rep. No. 1297, 93rd Cong., 2d Sess. 39-40 (1974). “[Section 504] does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended.” Id.

22. Id. at 40. “The Secretary of the Department of Health, Education, and Welfare, because of that Department’s experience in dealing with handicapped persons and with the elimination of discrimination in other areas, should assume responsibility for coordinating the section 504 enforcement effort . . . .” Id.

23. See Brief of the United States as Amicus Curiae before the Supreme Court, University of Texas v. Comenisch, at 20, n.10 (Oct. Term 1980) (No. 80-317), stating that:

It is our understanding that the issuance of the section 504 regulations was delayed, not because HEW did not believe such regulations should be issued, but because development of the regulations was a difficult and time consuming process. See 39 Fed. Reg. 18582 (1974); 41 Fed. Reg. 20296 (1976); and 41 Fed. Reg. 29548 (1976) . . . .


SECTION 1. The Secretary of Health, Education, and Welfare shall coordinate the implementation of section 504 of the Rehabilitation Act of 1973, as amended, hereinafter referred to as section 504, by all Federal departments and agencies empowered to extend Federal financial assistance to any program or activity. The Secretary shall establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504. The Secretary shall assist Federal departments and agencies to coordinate their programs and activities and shall consult with such departments and agencies, as necessary, so that consistent policies, practices, and procedures are adopted with respect to the enforcement of section 504.
funding agencies to develop section 504 implementing regulations. HEW was designated as the lead agency for coordinating federal implementation and was authorized to issue guidelines on what would constitute discrimination and who would be considered handicapped persons under section 504.26

HEW finally issued implementing regulations in 1977 governing its own grantees.27 These regulations prohibit recipients from discriminating in the terms, conditions, or privileges of their employment against qualified handicapped persons.28 Recipients are also required to make reasonable accommodations to the known handicaps of employees unless they can demonstrate that the accommodations would impose an undue hardship.29 In 1978, HEW issued substantially similar guidelines for federal funding agencies to follow when developing their own regulations.30

That same year, Congress passed several amendments relating to the enforcement of section 504.31 The definition of “handicapped individual” was amended to address whether alcoholics and drug addicts were protected from employment discrimination under the Act.32 The application by HEW of the administrative enforcement procedures under Title VI to section 504 claims was statutorily codified33 and attorney’s fees were authorized for prevailing parties.

SECTION 2. In order to implement the provisions of section 504, each Federal department and agency empowered to provide Federal financial assistance shall issue rules, regulations, and directives, consistent with the standards and procedures established by the Secretary of Health, Education, and Welfare.

Id.

26. See id.
28. Id. at § 84.11.
29. Id. at § 84.12.
32. The Rehabilitation Comprehensive Services, and Developmental Disabilities Amendment of 1978, Pub. L. No. 95-602, § 122(a)(6), (8), 92 Stat. 2955, 2984-85 (amending Pub. L. No. 43-112, §7, 87 Stat. 355, 359), provides that, for purposes of 503 and 504 as they relate to employment the term “handicapped individual” does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of
other than the United States, in Title V actions. In addition, Congress amended section 504 to insure that its nondiscrimination requirements applied to the federal government itself. With HEW's dissolution in 1980, the responsibility for the coordination of section 504 was generally transferred to the U.S. Attorney General. Coordination of employment discrimination coverage under the Act, however, had vested in the Equal Employment Opportunity Commission (hereinafter "EEOC") two years earlier as a result of Executive Order 12,067.

Finally, with the Civil Rights Restoration Act of 1987, passed in reaction to the Supreme Court's decision in Grove City College v. Bell, Congress expanded the extent to which programs receiving federal financial assistance were covered under section 504 and other civil rights statutes. Additionally, the definition of "handicapped

1964 [42 U.S.C. 2000(d) et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

Id.

35. See Rehabilitation Comprehensive Services, and Developmental Disabilities Amendments of 1978, 29 U.S.C. § 794a(b), Pub. L. No. 95-602, § 120, 92 Stat. 2955, 2982 (amending Pub. L. No. 93-112) These amendments established a new section 505(b), which provides that "in any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Id.


For the purposes of this section [504], the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 2891(12) of Title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care,
individual" was again amended, this time to address whether persons with contagious diseases were protected from employment discrimination under section 504.

III. HANDICAPPED INDIVIDUAL

As previously noted, the definition of "handicapped individual," applicable to section 504 when enacted, was geared to eligibility for rehabilitation services. Recognizing the inadequacy of this definition for section 504, which was intended to protect more than just those in need of vocational training, Congress added a new definition in the 1974 Rehabilitation Act Amendments, applicable to all of
the provisions of Title V:

"handicapped individual" means . . . 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 an impairment, or
(iii) is regarded as having such an impairment.45

The breadth of this definition presented HEW with difficult
problems in devising implementing regulations. Although denying
coverage to the aged, homosexuals, or those disadvantaged
by socio-economic status,46 HEW ultimately concluded that alcoholism and
drug addiction were handicapping conditions under the Act.47

A. Alcoholism and Drug Addiction

HEW initially requested a ruling from the Attorney General on
whether alcoholics and drug addicts must be included within its section 504 regulations. In a 1977 opinion,48 Attorney General Bell re-
sponded to this request, stating that Congress had intended coverage
of these groups under the definition of "handicapped individual" in
the 1973 Rehabilitation Act and that no indication to the contrary
was evidenced in the expansive 1974 amendments.49 Furthermore,
alcoholism and drug addiction were squarely within the plain language of the statute since both conditions were generally considered diseases that could substantially impair life activities. The Attorney General, nevertheless, cautioned that, in his opinion, recognition of alcoholics and drug addicts as handicapped persons did not necessarily entitle them to coverage since section 504 protected only "qualified" handicapped persons:

[Our conclusion that alcoholics and drug addicts are "handicapped individuals" for purposes of section 504 does not mean that such a person must be hired . . . if the manifestations of his condition prevent him from effectively performing the job in question. . . . A person's behavioral manifestations of a disability may also be such that his employment . . . would be unduly disruptive to others, and section 504 presumably would not require unrealistic accommodations in such a situation.]

The Attorney General concluded by observing that:

In sum, the statute does not require the impossible. It does not unrealistically require that recipients of Federal . . . grants ignore all the behavioral or other problems that may accompany a person's alcoholism or drug addiction if they interfere with the performance of his job. . . . At the same time, the statute requires that . . . grantees covered by the act not automatically deny employment . . . to persons solely because they might find their status as alcoholics or drug addicts personally offensive, any more than . . . grantees could discriminate against an individual who had some other condition or disease—such as cancer, multiple sclerosis, amputation, or blindness—unless its manifestations or his conduct rendered him ineligible. Between these two basic principles, there is considerable latitude for formulating appropriate rules applicable to specific cases.

In light of the Attorney General's opinion, the Secretary of HEW concluded that "he [was] without authority to exclude . . . [Alcoholics and drug addicts] from the definition [of 'handicapped individual']" but, as did the Attorney General, he qualified their coverage under section 504:

[W]hile an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condi-
tation, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question.54

The reaction in Congress to the resulting regulations was stormy. Several amendments were introduced to exclude alcoholics and drug addicts from section 504 coverage. The version that was adopted by the House, for example, would have excluded any alcoholic or drug addict "in need of rehabilitation."55 Literally applied, this proposed amendment would have permitted federally funded programs, including those providing social services, to exclude even those recovered alcoholics and drug addicts who required periodic therapy to maintain their resolve. When the furor subsided, however, the formula that Congress finally adopted was the Senate’s version56 which, as its supporters intended,57 virtually codified the Attorney General’s 1977 opinion.58

B. Contagious Diseases and the Arline Decision

HEW observed, in its 1977 regulations implementing section

54. Id. The Secretary of the HEW provided further guidance to federally-funded employers:

[I]n making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider—for all applicants including drug addicts and alcoholics—past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce rules prohibiting the possession or use of alcohol or drugs in the work-place, provided that such rules are enforced against all employees.

Id.


56. Id.


58. The 1978 amendment as enacted provided that:

For purposes of sections . . . [503 and 504] . . . as such sections relate to employment, [the] term ["handicapped individual"] does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

504, that there was "no flexibility within the statutory definition [of 'handicapped individual'] to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps." The Justice Department, however, recently argued in *School Board of Nassau County v. Arline* that carriers of contagious diseases, like AIDS, who were yet asymptomatic were yet handicapped for purposes of section 504. In essence, the government argued that, to be handicapped, individuals must be perceived as having an impairment that substantially limits their life activities. Contagiousness may affect others; it does not directly affect the carrier. Any restrictions on a carrier's employability or other life activities, thus, results not from the carrier's infectious condition but from the reaction of others to the carrier's status. Therefore, contagiousness is not an "impairment" for purposes of the Act.

The Supreme Court in *Arline* did not address this specific question since the plaintiff, who had been discharged from her teaching position at an elementary school due to a recurrence of tuberculosis, had previously been hospitalized for that condition. Thus, along with being actively contagious, she had "a record" of substantially impairing symptoms and, therefore, was already a "handicapped individual" for purposes of the Act. The School Board argued that the plaintiff's contagiousness and her history of symptoms were separate and that, by discharging her only for the former, it had not discriminated on the basis of a handicapping condition. The Court rejected this contention, relying on reasoning which could ultimately be applied to suits brought by AIDS carriers.

The Court observed that, in prohibiting discrimination under section 504, Congress recognized that prejudice against handicapped persons could be as disabling as a handicapping condition itself. This concern was reflected in the 1974 amended definition of "handicapped individual" which included persons merely perceived as having an impairing condition:

By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those

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63. *Id.* at 274.
64. *Id.* at 279.
65. *Id.*
66. *Id.* at 282 n.7.
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. 67

The Court further recognized that, historically, a most debilitating form of prejudice against handicapped persons was the unfounded fear of contagion:

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 . . . 68

Although the definition of "handicapped individual" was sufficiently broad to include carriers of contagious diseases, the Court nevertheless observed, as had the Attorney General in 1977 when he addressed the inclusion of alcoholism and drug addiction, 69 that "only those individuals who are both handicapped and otherwise qualified are eligible for relief." 70 The HEW regulations had defined "[q]ualified handicapped [individual] . . . [w]ith respect to employment, [to include] a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question." 71 The first step that the Court identified in deciding whether persons like Arline were qualified was to determine whether their present condition posed an actual risk of contagion. 72 Therefore, in order to protect handicapped persons "from deprivations based on . . . unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health risks," 73 the Supreme Court instructed lower courts to make specific findings of fact:

based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is

67. Id. at 283-84 (footnote omitted).
68. Id. at 284-85 (footnotes omitted).
71. 45 C.F.R. § 84.3(k)(1) (1986).
72. Arline, 480 U.S. at 281.
73. Id. at 287.
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.74

In addressing these factors, lower courts were required to defer to the reasonable medical judgments of public health officials.75 If an actual risk was found, the next step identified by the Supreme Court was to decide whether carriers could be accommodated without subjecting employers to undue hardship.76 Arline was remanded with directions to the district court to make additional findings on whether the plaintiff was “otherwise qualified,”77 including “whether the School Board could have reasonably accommodated her” handicapping condition.78 To understand the Supreme Court’s directions, we must first examine what accommodations section 504 requires.

IV. REASONABLE ACCOMMODATIONS

Section 504 prohibits intentional discrimination. If section 504 went no further, its utility would be greatly diminished since most of the obstacles which handicapped persons face, like architectural or communication barriers, are products of inadvertence rather than animus. In sponsoring the antecedent to section 504, Senator Humphrey indicated that his legislation would address not only formal exclusion, but also practices that were exclusionary in effect.79 Moreover, the Supreme Court recognized that Congress ratified the inclusion of practices that were exclusionary in effect when it adopted section 504.80

The more difficult question, concerns the breadth of the adverse effects which section 504 was meant to prohibit. If recipients were compelled to rid their programs of all obstacles to a handicapped person’s full participation, the resulting cost and disruption would be considerable. Congress, however, endeavored to find a middle ground between prohibiting only purposeful harm and overcoming all the effects of inadvertent harm.

At minimum, the statute requires federal fund recipients to af-
ford handicapped persons “meaningful access” to their programs. 81 Specifically, recipients have the affirmative duty to provide handicapped persons with effective methods for participating in the benefits of their programs. 82 This does not mean that recipients must make fundamental changes or take excessively burdensome steps to accommodate a handicapped individual. 83 Such requirements would constitute what the Supreme Court has considered to be “affirmative action” beyond the duty to avoid discrimination that is imposed by section 504. 84 The Court, nevertheless, has observed “that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons [will not] always . . . be clear.” 85 Moreover, it has acknowledged that “[i]dentification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination . . . continues to be an important responsibility of HEW.” 86

In its implementing regulations, HEW construed “meaningful access” 87 to require that recipients “make reasonable accommodations to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.” 88 The regulations illustrate the types of accommodations required, including removal of architectural barriers and “job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.” 89 The regulations further set forth factors to be considered in determining

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81. See Alexander, 469 U.S. at 300-01, (citing Southeastern Community College v Davis, 442 U.S. 397 (1979)).

82. See Arline, 480 U.S. at 288 n.17.

83. See Southeastern Community College v. Davis, 442 U.S. 397, 410-13 (1979). See also Arline, 480 U.S. at 288 n.11; Alexander, 469 U.S. at 299-301.

84. Davis, 442 U.S. at 411 n.11; see also Alexander, 469 U.S. at 300 n.20.

85. Davis, 442 U.S. at 412.

86. Id. at 413.

87. See supra note 22.

88. 45 C.F.R. § 84.12(a) (1986).

89. Id. § 84.12(b)(2).
whether the provision of any accommodation would impose an undue hardship on a recipient:

(1) the overall size of the recipient’s program with respect to number of employees, number and type of facilities, and size of budget;
(2) the type of the recipient’s operation, including the composition and structure of the recipient’s workforce; and
(3) the nature and cost of the accommodation needed.\(^9\)

Although transferring a disabled worker to another position was not a required accommodation, the Court in *Arline*, nevertheless observed that “alternative employment opportunities reasonably available under the employer’s existing policies” could not be denied on the basis of handicap.\(^9\) Before assessing the impact of *Arline* on legal protections for those with contagious conditions like AIDS, it must first be determined to what extent Congress has subsequently limited that decision’s force.

V. THE CONGRESSIONAL RESPONSE TO ARLINE

Congress responded to *Arline* in 1988 by amending the term “handicapped individual,” to clarify\(^9\) that:

For the purpose of sections [503] . . . and [504] . . . as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.\(^9\)

Senators Humphrey and Harkin sponsored this provision as a floor amendment to Senate Bill 557\(^9\) which ultimately became the Civil Rights Restoration Act.\(^9\) Although the legislative history surround-
ing enactment of this amendment is sparse, consisting primarily of a brief colloquy between the sponsors,96 two points are clear: first, the sponsors disagreed on the effect which their legislation would have, (Senator Humphrey assumed that the amendment would restrict section 504 coverage of contagious conditions97 while Senator Harkin believed it would serve merely to clarify existing law as announced in Arline98), and second, both sponsors expressly intended to model their legislation on the 1978 alcoholism and drug addiction amendment.99 Thus, a proper understanding of that amendment is critical to the analysis.

As previously noted,100 the 1978 amendment was meant to codify existing law as set forth in the Attorney General’s 1977 opinion101 which made clear that, although alcoholic or drug addicted employees were handicapped for purposes of section 504, they could be outside the Act’s protection if not otherwise qualified for employment because their conditions rendered them disruptive or ineffective.102 Nonetheless the Attorney General concluded that alcoholics and drug addicts were entitled to the same protection as persons with more traditional handicaps. Thus, alcoholics and drug addicts, like those with “cancer, multiple sclerosis, amputation, or blindness” could not be automatically denied employment based on their handicapped status “unless its manifestations . . . rendered” them unqualified.103 In determining whether employees were “otherwise
qualified," employers were required to take reasonable steps to accommodate their more traditional handicapping conditions; a similar requirement was evidently expected when the handicaps were alcoholism or drug addiction.

It was precisely this requirement that the Supreme Court applied to contagious conditions in Arline. Affirming that "only those individuals who are both handicapped and otherwise qualified are eligible for relief," the Court further observed:

In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. . . . 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.

Thus, by modeling the treatment of contagious conditions after that afforded alcoholism and drug addiction as evidenced, for example, by...
VI. CONCLUSION

Handicaps do not divest persons of dignity and self-worth. By adopting section 504, Congress recognized that even severely handicapped persons were entitled to take part in programs that their government financially supported and, moreover, that recipients of federal funds must reasonably seek to facilitate the participation of such persons. By affirming that alcoholics and drug addicts were generally covered under section 504, Congress further indicated that recipi-

111. It may be argued that consideration of accommodations is precluded by the 1988 amendment. If contagious conditions render persons ineffective or a direct threat to others, they are not handicapped. Thus, the question whether they are qualified even with accommodations never arises. This apparently is what Senator Humphrey intended when he observed: [A]s we stated in 1978 with respect to alcohol and drug abusers, . . . the two-step process in section 504 applies in the situation under which it was first determined that a person was handicapped and then it is determined that a person is otherwise qualified.

The history of the 1978 amendment, however, makes no reference to any "two-step process in section 504." See Rehabilitation Comprehensive Services, and Developmental Disabilities Amendment of 1978, Pub. L. No. 95-602, §§ 119, 122(d)(2), 92 Stat. 2955, 2982, 2987 (current version as amended at 29 U.S.C. § 794 (Supp. 1988)). As discussed earlier, the amendment was meant merely to insure that only "qualified" alcoholic or drug addicted employees were protected, H.R. Conf. Rep. No. 1780, 95th Cong., 2d Sess. 102 (1978); and nothing in its history would preclude consideration of accommodations in that regard. See supra text accompanying notes 92-110 (discussing this). This was the approach which Senator Harkin evidently intended when he agree that the 1988 amendment "does nothing to change the current laws regarding reasonable accommodation as it applies to individuals with handicaps." 134 CONG. REC. S256 (daily ed. Jan. 28, 1988) (statement of Sen. Humphrey); see also 134 CONG. REC. S1738 (daily ed. Mar. 2, 1988) (statements of Senators Harkin, Kennedy, and Weicker); 134 CONG. REC. S723 (daily ed. Feb. 4, 1988) (statement of Sen. Cranston).

112. The U.S. Department of Justice has also reached the same conclusion, contending that "the Harkin-Humphrey amendment merely collapses the 'otherwise qualified' inquiry applicable outside the employment context into the definition of 'individual with handicaps' in the employment context." Justice Department: Memo on AIDS, Fair Employment Practices Manual, 401: (BNA) 2021 at 2032 (1988). The department's Office of Legal Counsel concluded in a September 27, 1988 opinion letter to White House Counsel Arthur B. Culvahouse that "the amendment's legislative history convinces us that Congress intended that consideration of 'reasonable accommodation' should be factored into an employer's determination of whether an infected employee poses a direct threat or can perform the job." Id. at 2033.

113. See Rehabilitation Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 122(a)(6),8, 92 Stat. 2955, 2984-85 (amended version at 29 U.S.C. § 706(7)(B) (1982)). For purposes of §§ 503 and 504 as they relate to employment, the term "handicapped individual": does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse,
ents could not bar persons from federally funded programs simply because of social reproach towards what were essentially handicapping conditions. These concerns prompted the Arline Court not to exclude contagious persons from section 504 coverage and to measure their level of participation in funded programs against a medical standard. 114

Nothing in the statute, however, requires recipients to ignore illegal or disruptive conduct related to a handicapping condition. For example, the Attorney General observed that section 504 would not prevent application to alcoholics and drug addicts of "reasonable, generally applicable rules of conduct . . . such as proscriptions against the possession or use of drugs or alcohol" at the workplace, 115 and the statute has been consistently construed to leave prohibitions of homosexuality as it finds them. 116

It is equally clear that section 504 does not require recipients to expose others to any appreciable risk of harm in order to accommodate handicapped persons. Observing that "where reasonable accommodation does not overcome the effects of a person's handicap, . . . failure to hire . . . the handicapped person will not be considered discrimination. . . ." 117 the Arline Court concluded that "[t]he Act would not require a school board to place a teacher with active, contagious tuberculosis in a classroom with elementary school children." 118 Hopefully, agency regulations drafted with sensitivity to the concerns of carriers and those with whom they interact can strike an appropriate balance between the need to shield program participants from exposure to more than a de minimis risk of contagion while protecting carriers from warrantless discrimination.

would constitute a direct threat to property or the safety of others.

Id.

117. Arline, 480 U.S. at 288 n.17 (citing 45 C.F.R. Part 84, app. A at 315 (1985)).
118. Id. at n.16.