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The Americans with Disabilities Act

and the ADA Amendments Act of 2008

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Mr. Chairman and Members of the Committee, I am pleased to testify before you today on the Americans with Disabilities Act (ADA). My name is Chai Feldblum, and I am a Professor of Law and Director of the Federal Legislation Clinic at Georgetown University Law Center.

The lawyers and students at the Federal Legislation Clinic have provided *pro bono* legislative lawyering services to the Epilepsy Foundation over the past two years in support of its efforts to advance the ADA Restoration Act. Today, however, I am testifying on my own behalf as an expert on the ADA.

From 1988 to 1990, while working for the American Civil Liberties Union, I served as one of the lead legal advisors to the disability and civil rights communities in the drafting and negotiating of the ADA. From January 2008 until now, I have been actively involved in discussions between representatives of the disability and business communities on S. 1881 and H.R. 3195, the ADA Restoration Acts as introduced, to consider changes that would enable members of the business community to support those bills.

In this submitted testimony, I provide a brief overview of the bipartisan support that propelled passage of the ADA in 1990, describe how Congress discussed the definition of disability in the ADA in its committee reports, and explain how the Supreme Court narrowed that definition of disability. I then describe the ADA Amendments Act as passed by the House of Representatives in June 2008; the obligations of employers under the House-passed bill as compared to current law; and whether the standard for determining whether an individual is "disabled" should be more clearly defined than it is in the House-passed bill. While other witnesses will address the implications of the House-passed bill for schools and universities in their written testimony, I am happy to answer any questions on those issues.

I. The Bi-Partisan Enactment of the ADA

A first version of the ADA was introduced in April 1988 by Senators Lowell Weicker and Tom Harkin and twelve other cosponsors in the Senate, and by

Congressman Tony Coelho and 45 cosponsors in the House of Representatives.[1] In May 1989, a second version of the ADA was introduced by Senators Tom Harkin, Edward Kennedy, Robert Dole, Orrin Hatch and 30 cosponsors in the Senate, and by Congressman Steny Hoyer and 45 cosponsors in the House of Representatives.[2] This version of the bill was the result of extensive discussions with a wide range of interested parties, including members of the disability community, the business community, and the first Bush Administration.[3]

Negotiations on the ADA continued within each committee that reviewed the bill and, in each case, the negotiations resulted in broad, bipartisan support of the legislation. The Senate Committee on Labor and Human Resources favorably reported the bill by a vote of 16-0;[4] the House Committee on Education and Labor favorably reported the bill by a vote of 35-0;[5] the House Committee on Energy and Commerce favorably reported the bill by a vote of 40-3;[6] the House Committee on Public Works and Transportation favorably reported the bill by a vote of 45-5;[7] and the House Committee on the Judiciary favorably reported the bill by a vote of 32-3.[8]

After being reported out of the various committees, the ADA passed the Senate by a vote of 76-8 in September 1989 and the House of Representatives by a vote of 403-20 in May 1990.[9] Both Houses of Congress subsequently passed the conference report by large margins as well: 91-6 in the Senate and 377-28 in the House of Representatives.[10]

On July 26, 1990, President George H.W. Bush signed the ADA into law, stating:

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[1] H.R. 4498, 100th Cong., 2d Sess., 134 CONG. REC. H2757 (daily ed. Apr. 29, 1988) (introduction of H.R. 4498); S. 2345, 100th Cong., 2d Sess., 134 CONG. REC. S5089 (daily ed. Apr. 28, 1988) (introduction of S. 2345).
[2] H.R. 2273, 101st Cong., 1st Sess., 135 CONG. REC. H1791 (daily ed. May 9, 1989); S. 933, 101st Cong., 1st Sess., 135 CONG. REC. S4984-98 (daily ed. May 9, 1989).
[3] *See* Chai R. Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside*, 64 TEMPLE LAW REVIEW 521, 521-532 (1991) (providing a brief overview of passage of the ADA, including a brief description of the various stages of negotiation on the bill).
[4] S. REP. NO. 101-116 at 1 (1989).
[5] H.R. REP. NO. 101-485, pt. 2, at 50 (1990).
[6] H.R. REP. NO. 101-485, pt. 4, at 29 (1990).
[7] H.R. REP. NO. 101-485, pt. 1, at 52 (1990).
[8] H.R. REP. NO. 101-485, pt. 3, at 25 (1990).
[9] 135 CONG. REC. S10803 (daily ed. Sept. 7, 1989); 136 CONG. REC. H2638 (daily ed. May 22, 1990).
[10] 136 CONG. REC. S9695 (daily ed. July 13, 1990); 136 CONG. REC. H4629 (daily ed. July 12, 1990).

> "[N]ow I sign legislation which takes a sledgehammer to [a] . . . wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but could not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America."[11]

Standing together, leaders from both parties described the ADA as "historic," "landmark," and an "emancipation proclamation for people with disabilities."[12]

The purpose of the original legislation was to "provide a clear and comprehensive national mandate for the elimination of discrimination" on the basis of disability, and "to provide clear, strong, consistent, enforceable standards" for addressing such discrimination.[13] It was Congress' hope and intention that people with disabilities would be protected from discrimination in the same manner as those who had experienced discrimination on the basis of race, color, sex, national origin, religion, or age.[14]

But that did not happen. In recent years, the Supreme Court has restricted the reach of the ADA's protections by narrowly construing the definition of disability contrary to Congressional intent. As a result, people with a wide range of impairments whom Congress intended to protect, including people with cancer, epilepsy, diabetes, hearing loss, multiple sclerosis, HIV infection, intellectual disabilities, post-traumatic stress disorder (PTSD), and many other impairments, are routinely found not to be "disabled" and therefore not covered by the ADA.

As demonstrated by the legislative history of the ADA, Congress never intended the law's definition to be interpreted in such a restrictive fashion.

II. Congressional Intent Behind the ADA's Definition of Disability

When writing the ADA that was introduced in 1989, Congress borrowed the definition of "disability" from Sections 501, 503 and 504 of the Rehabilitation Act of

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[11] Remarks of President George H.W. Bush at the Signing of the Americans with Disabilities Act of 1990 (July 26, 1990), *available at* http://www.eeoc.gov/ada/bushspeech.html.

[12] According to President George H.W. Bush, the ADA was a "landmark" law, an "historic new civil rights Act . . . the world's first comprehensive declaration of equality for people with disabilities." *See id*. Senator Orrin G. Hatch declared that the ADA was "historic legislation" demonstrating that "in this great country of freedom, . . . we will go to the farthest lengths to make sure that everyone has equality and that everyone has a chance in this society." Senator Edward M. Kennedy called the ADA a "bill of rights" and "emancipation proclamation" for people with disabilities. *See* National Council on Disability, *The Americans with Disabilities Act Policy Brief Series: Righting the ADA, No. 1: Introductory Paper* (October 16, 2002), available at http://www.ncd.gov/newsroom/publications/2002/rightingtheada.htm.

[13] *See* Americans with Disabilities Act § 2(b), 42 U.S.C. § 12101(b) (2007).

[14] 42 U.S.C. § 12101 (a), (b).

1973, a predecessor civil rights statute for people with disabilities that covered the federal government, federal contractors, and recipients of federal financial assistance. For purposes of Title V of the Rehabilitation Act, "handicap" was defined as: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.[15]

For fifteen years, the courts had interpreted this definition to cover a wide range of physical and mental impairments, including epilepsy, diabetes, intellectual and developmental disabilities, multiple sclerosis, PTSD, and HIV infection.[16] Indeed, in *School Board of Nassau County v. Arline*, the Supreme Court explicitly acknowledged that Section 504's "definition of handicap is broad," and that by extending the definition to cover those "regarded as" handicapped, Congress intended to cover those who are not limited by an actual impairment but are instead limited by "society's accumulated myths and fears about disability and disease."[17]

When the ADA was enacted, Congress consistently referred to court interpretations of "handicap" under Section 504 as its model for the scope of "disability" under the ADA. For example, the Senate Committee on Labor and Human Resources noted that: "the analysis of the term 'individual with handicaps' by the Department of Health, Education and Welfare in the regulations implementing section 504 . . . apply to the definition of the term "disability" included in this legislation."[18]

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[15] 29 U.S.C. § 705(20)(B) (2007); *see* Americans with Disabilities Act, 42 U.S.C. § 12101(2) (2007). At the time the ADA was being drafted, Section 504 used the term "handicap" rather than "disability." Section 504 has since been amended to use the term "disability." The definition of "handicap" under Section 504 and of "disability" under the ADA is identical.

[16] *See, e.g.,* Local 1812, Am. Fed'n. of Gov't Employees v. U.S., 662 F. Supp. 50, 54 (D.D.C. 1987) (person with HIV disabled); Reynolds v. Brock, 815 F.2d 571, 573 (9th Cir. 1987) (person with epilepsy disabled); Flowers v. Webb, 575 F. Supp. 1450, 1456 (E.D.N.Y. 1983) (person with intellectual and developmental disabilities disabled); Schmidt v. Bell, No. 82-1758, 1983 WL 631, at *10 (E.D. Pa. Sept. 9, 1983) (person with PTSD disabled); Bentivegna v. U.S. Dep't of Labor, 694 F.2d 619, 621 (9th Cir. 1982) (person with diabetes disabled); Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1376 (10th Cir. 1981) (person with multiple sclerosis disabled). *See generally* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 128 (2000) (hereinafter "Definition of Disability") ("[A]lthough there had been . . . a few adverse judicial opinions under Section 504 that had rejected coverage for plaintiffs with some impairments, those opinions were the exception, rather than the rule, in litigation under the Rehabilitation Act.")

[17] *See* School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987).

[18] S. REP. NO. 101-116 at 21 (1989).

Second, the committee reports explicitly stated that mitigating measures should **not** be taken into account in determining whether a person has a "disability" for purposes of the ADA. As the Senate Committee on Labor and Human Resources put it:

> A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. . . . [W]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.[19]

Finally, the Committee reports specifically referenced the breadth of the interpretation offered by the Supreme Court in the *Arline* decision with regard to the third prong of the definition of disability, the "regarded as" prong. As the Senate Committee on Labor and Human Resources Report summarized the coverage under the third prong: "A person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity's negative attitudes toward disability is being treated as having a disability which affects a major life activity. For example, if a public accommodation, such as a restaurant, refused entry to a person with cerebral palsy because of that person's physical appearance, that person would be covered under the third prong of the definition. Similarly, if an employer refuses to hire someone because of a fear of the 'negative reactions' of others to the individual, or because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong."[20]

As evident from the ADA's legislative history, Congress' decision to adopt Section 504's definition of disability was a deliberate decision to cover the same wide group of individuals who had been covered under that existing law. Congress expected that the definition of "disability" would be interpreted as broadly under the ADA as it had been interpreted under the previous disability rights law for over fifteen years.

III. Judicial Narrowing of Coverage Under the ADA

The expectations of Congress with regard to the ADA have not been met. Over the past several years, the Supreme Court and lower courts have narrowed coverage by

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[19] S. REP. NO. 101-116 at 121 (1989).
[20] S. REP. NO. 101-116 at 24 (1989); *see also* H.R. REP. NO. 101-485, pt. 2, at 53 (1990) (discussing *Arline*)

interpreting each and every component of the ADA's definition of disability in a strict and constrained fashion. This has resulted in the exclusion of many persons that Congress intended to protect.[21]

The Supreme Court first narrowed coverage in a trio of cases decided in June 1999, ruling that mitigating measures such as medication, prosthetics, hearing aids, other auxiliary devices, diet and exercise, or any other treatment must be considered in determining whether an individual's impairment substantially limits a major life activity.[22] Despite the fact that the committee reports from the Senate Labor and Human Resources Committee, the House Judiciary Committee, and the House Education and Labor Committee had all stated that mitigating measures were **not** to be taken into account; that both the EEOC and DOJ had issued guidance that mitigating measures were **not** to be taken into account; and that eight Circuit Courts of Appeal had **followed** that agency guidance, the Supreme Court concluded that evaluating individuals "in their hypothetical uncorrected state" would be "an impermissible interpretation of the ADA" based on the plain language of the statute.[23]

The Supreme Court's requirement that courts consider mitigating measures has created an unintended paradox: people with serious health conditions, like epilepsy and diabetes, who are fortunate enough to find treatment that make them more capable and independent and thus more able to work, are often not protected by the ADA because the limitations arising from their impairments are not considered substantial enough. Ironically, the better a person manages his or her medical condition, the less likely that person is to be protected from discrimination, even if an employer admits that he or she has dismissed the person *because of* that person's (mitigated) condition.

The Supreme Court also narrowed coverage, in 1999, by changing the standard under the third prong of the definition of disability – the "regarded as" prong that was intended to cover individuals with impairments of any level of severity (or with no

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[21] *See* testimony and appendices submitted by Chai R. Feldblum to the Senate Health, Education, Labor and Pension Committee, *Hearing on Restoring Congressional Intent and Protections under the ADA*, Nov. 15, 2007. Appendix A to that testimony notes the coverage of people under Section 504 as compared to the ADA and Appendix B sets out case stories of people denied coverage under the ADA.

[22] Sutton v. United Airlines, Inc., 527 U.S. 471 (1999); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).

[23] Sutton, 527 U.S. at 482. See Feldblum Testimony, *supra* n. 21, at 10-15 for further description of the trio of Supreme Court cases and the Court's reasoning.

impairments at all) based on how such individuals were *treated* by an entity covered under the law. Again ignoring both committee reports and EEOC guidance, the Supreme Court formulated a new and almost impossible standard to meet for any individual seeking coverage under the third prong. The Court's approach essentially required individuals to divine and prove an employer's subjective state of mind. Not only did the individual have to demonstrate that the employer believed that the individual had an impairment that prevented him or her from working for that employer in that job, the individual also had to show that the employer thought that the impairment would prevent the individual from performing a broad class of jobs for other employers. As it is safe to assume that most employers do not regularly consider the panoply of other jobs that prospective or current employees could or could not perform – and certainly do not often create direct evidence of such considerations – the individual's burden became essentially insurmountable except in rare cases.

Finally, the Court made the situation worse three years later in another decision regarding the definition of disability. In 2002, the Supreme Court ruled in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* that the words "substantially limits" and "major life activities" were to be interpreted strictly to create a "demanding standard for qualifying as disabled."[24] The Court also stated that "'[m]ajor' in the phrase 'major life activities' means important," and so "major life activities" refers to "those activities that are of central importance to daily life," including "household chores, bathing, and brushing one's teeth."[25] As a result of this ruling, lower courts now consistently require people alleging discrimination under the ADA to show that their impairments *prevent or severely restrict them* from doing activities that are of *central importance* to most people's daily lives.

In earlier testimony delivered to this Committee, I described sixteen cases in which individuals who believed they had been discriminated against because of their physical or mental impairments were never given the chance to prove their cases because the courts had ruled they were not "disabled enough" to be covered under the ADA. These results occurred because the mitigating measures used by the individual

[24] 534 U.S. 184, 197 (2002).
[25] *Id.* at 197, 201-02.

meant that he or she was no longer substantially limited in a major life activity; or because the individual could not meet the new standard under the "regarded as" prong; or because the courts deemed the individual's impairment not to be sufficiently severe.[26] These cases all dealt with individuals who should have been given an opportunity to make the case that their impairments had been the basis for a covered entity's discriminatory acts and that they were otherwise qualified for the job.

IV. The ADA Amendments Act of 2008, as passed by the House

In fall 2007, a number of major business associations opposed S. 1881 and H.R. 3195, bills that had been introduced to rectify the situation caused by the Supreme Court's interpretation of the ADA's definition of disability. These groups felt that the bills as introduced went beyond the original intent of the ADA by including too many people with impairments as people with disabilities. They were particularly concerned about the number of employees with impairments who might be eligible for reasonable accommodations by employers under the proposed amendments to the ADA.[27]

For example, in testimony before this Committee on November 15, 2007, Camille Olson, from the law firm of Seyfarth Shaw, articulated a number of concerns that were being voiced by various business associations at the time. These concerns fell into the following broad categories:

- The language of S. 1881 would cover any impairment, no matter how minor or trivial, as a disability.[28]
- The fact that minor and trivial impairments would be eligible for reasonable accommodations could cause considerable difficulty for employers.[29]

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[26] See Feldblum Testimony, *supra* n. 21, pages 22-29.
[27] See, e.g., testimony of Camille A. Olson to the Senate Health, Education, Labor and Pension Committee, *Hearing on Restoring Congressional Intent and Protections under the ADA*, Nov. 15, 2007.
[28] See Olson Testimony, *supra* n. 27 at pages 1-2 ("There can be no question that sponsors of S. 1881 have proposed changes to the ADA with the intent of benefiting individuals with disabilities. S. 1881's proposed changes, however would unquestionably expand ADA coverage to encompass almost any physical or mental impairment – no matter how minor or short-lived. In essence, S. 1881 changes the focus of the ADA from whether an individual has a functional "disability" to whether the individual has an "impairment," without regard to whether the impairment or ailment in any way limits the individual's daily life.")
[29] *Id* at 6. ("Moving the ADA's focus away from individuals with disabilities to individuals with impairments, as S. 1881 would do, will give virtually every employee the right to claim reasonable accommodation for

- Congress had deliberately and carefully decided, in 1990, that an impairment should "substantially limit" a "major life activity" in order to be a disability.[30]
- S. 1881 would make radical shifts with regard to the burden of proof on qualifications under the ADA.[31]

At the November 15, 2007 hearing, there was an exchange between this witness, Camille Olson, and Senator Tom Harkin as to whether S. 1881 was the appropriate response to the Supreme Court cases and both this witness and Olson indicated a willingness to continue talking about how to best respond to such cases.[32]

Overtures for such a conversation were made in January 2008 and official discussions between representatives of the disability community and the business community began in February 2008. The disability community was represented (in alphabetical order) by the American Association of People with Disabilities; Bazelon Center for Mental Health Law; Epilepsy Foundation; the National Council on Independent Living; and National Disability Rights Network. The business community was represented (in alphabetical order) by the HR Policy Association; National Association of Manufacturers; Society for Human Resource Management; and the U.S. Chamber of Commerce. Various other groups joined from time to time. In May 2008, the disability and business communities communicated to several Members of the House of Representatives and the Senate some of the agreements they had reached internally.

The ADA Amendments Act of 2008, passed by the House in June 2007 by a vote of 402-17, reflected some of these agreements. This bill makes the following changes

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some impairment, no matter how minor, unless the employer can prove that doing so would be an undue hardship.")

[30] *Id*. at 10-11 ("The ADA's inclusion of "substantially limits one or more of the major life activities of such individual" was the result of deliberate and careful consideration by Congress. In adopting the substantial limitation on a major life activity requirement, Congress (not the federal judiciary) made clear that covered disabilities do not include "minor, trivial impairments, such as a simple infected finger.")(Citation omitted.)

[31] *Id*. at 24-25 ("Third, in a clear departure from the current statutory scheme, S. 1881 shifts the burden of proof to the employer to demonstrate that an individual alleging discrimination "is not a qualified individual with a disability." . . . The calculated balancing of the rights and obligations between disabled employees and employers is clear from the ADA's legislative history. . . . S. 1881's attempted reversal of Congress's allocation of the burden of proof contravenes the fundamental tenet of law disfavoring proof of a negative proposition.")(Citations omitted.)

[32] See http://help.senate.gov/Hearings/2007_11_15_b/2007_11_15_b.html for video of hearing.

to current law in order to respond to the adverse Supreme Court decisions of 1999 and 2002:

- The statutory language overturns the mitigating measures analysis of *Sutton* and explicitly states that mitigating measures are not to be taken into account in determining whether an individual has a disability.
- The findings in the bill disapprove of the *Sutton* trilogy and disapprove of several statements in *Toyota v. Williams*.
- The statutory language clarifies that an individual is not excluded from coverage because of an ability to do many things, as long as the individual is substantially limited in one major life activity.
- The statutory language clarifies that the fact that an otherwise substantially limiting impairment is in remission or episodic does not remove the individual from coverage.
- To respond to the directive in *Williams* that the definition of disability was intended by Congress to be narrowly construed, the statutory language indicates that the definition is to be given a broad construction. (This construction, obviously, cannot go beyond the terms of the Act itself.)
- The "regarded as" prong focuses on how an individual is treated, rather than on the difficult to prove perception of a covered entity.

There are also several changes in the ADA Amendments Act that respond to concerns raised by the business community:

- The most major change in the ADA Amendments Act of 2008 is that it reinstates the current language of the ADA that requires an impairment to "substantially limit" a "major life activity" in order to be considered a disability that requires a reasonable accommodation or modification.
- The term "substantially limits" is defined as "materially restricts" which is intended, on a severity spectrum, to refer to something that is less than "severely restricts," and less than "significantly restricts," but more serious than a moderate impairment which is in the middle of the spectrum.
- The statutory language explicitly provides that ordinary eyeglasses and contact lenses are to be taken into account as mitigating measures.

- The statutory language makes clear that reasonable accommodations need not be provided to an individual who is covered solely under the ”regarded as” prong of the definition of disability.
- The statutory language clarifies that there are no changes to the burdens of proof with regard to proving qualifications for a job.
- Although there is no general severity test required under the “regarded as” prong, transitory and minor impairments are not covered under that prong.

The Committee has specifically inquired whether the obligations of employers under the House-passed bill would be different than current law. The only difference for employers from the ADA (as enacted in 1990, not as subsequently interpreted by the Supreme Court) is that the statute now clearly establishes that reasonable accommodations need not be provided to an individual who has a disability solely under the “regarded as” prong of the definition.

This aspect of the language clarifies the current state of the law on whether reasonable accommodations are available to those covered under the “regarded as” prong of the definition of disability. Four circuit courts of appeal (the First, Third, Tenth and Eleventh Circuit Courts of Appeal) have held that plaintiffs who are not covered under the first prong of the definition may nonetheless seek reasonable accommodations under the “regarded as” prong.[33]

It is perhaps no surprise that some courts – when faced with claims that appear to have merit but in which the case law (in light of *Sutton* and *Williams*) precludes coverage of the plaintiff under the first prong of the definition of disability – have concluded that the plain language of the ADA requires employers to provide reasonable

[33] The following circuit courts have held that the ADA requires that reasonable accommodations be provided to individuals who are able to establish coverage under the ADA only under the “regarded as” prong of the definition of disability: *Kelly v. Metallics West, Inc.*, 410 F.3d 670 (10th Cir. 2005) (plaintiff needed oxygen device to breathe); *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220 (11th Cir. 2005) (plaintiff had vertigo resulting in spinning and vomiting); *Williams v. Philadelphia Housing Auth. Police Dept*, 380 F.3d 751 (3d Cir. 2004) (plaintiff had major depressive disorder); and *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 33 (1st Cir. 1996) (plaintiff had heart attack). In addition, the following district courts have similarly held that reasonable accommodations may be available under the third prong: *Lorinz v. Turner Const. Co.*, 2004 WL 1196699, * 8 n.7 (E.D.N.Y. May 25, 2004) (plaintiff had depressive disorder and anxiety); *Miller v. Heritage Prod., Inc.*, 2004 WL 1087370, * 10 (S.D. Ind. Apr. 21, 2004) (plaintiff had back injury and could not lift more than 20 pounds, bend or twist); *Jacques v. DiMarzio, Inc.*, 200 F. Supp.2d 151 (E.D.N.Y. 2002) (plaintiff had bipolar disorder); and *Jewell v. Reid’s Confectionary Co.*, 172 F. Supp.2d 212 (D. Me. 2001) (plaintiff had heart attack).

accommodations to individuals who fall under the third prong of the definition. It is also probably not a surprise that other courts have concluded that reasonable accommodations are *not* required under the third prong.[34]

However, when one reviews the facts of the cases in which reasonable accommodations have been found to be required under the third prong, it seems clear that the plaintiffs in those cases should have been covered under the *first* prong of the definition of disability. Hopefully, that will be the case now under the ADA as amended by the ADA Amendments Act of 2008. For example, three of the impairments in those cases – heart attacks, bipolar disorder, and major depressive disorder – should be covered as material restrictions on major bodily functions – the first on the circulatory system and the second two on brain functioning. The particular facts in the cases regarding the severity of the other four impairments – a respiratory impairment requiring use of an oxygen device, vertigo, back injury, and depression & anxiety – could be examples of impairments that materially restrict the major life activities of breathing; standing; bending & twisting; and concentrating, sleeping and thinking (respectively) when mitigating measures are not taken into account and when episodic impairments are considered in their active state.

The Committee has also inquired whether the standard for determining whether an individual is "disabled" should be more clearly defined than it is in the House-passed bill. Those of us engaged in the discussions on this bill believe that there is sufficient guidance for the courts to determine when an impairment "materially restricts" a major life activity. In particular, we believe the combination of the findings in the bill, and the direction for a broad construction of the definition of disability (within the limits of the terms of the statute) should provide additional and adequate guidance for the courts

Thank you for your attention and I look forward to answering any questions.

[34] There is a circuit split on this issue. The Ninth, Eight, Sixth, and Fifth Circuits have held that reasonable accommodations need not be provided to an employee who is merely regarded or perceived as disabled. *See Kaplan v. City of N. Las Vegas,* 323 F.3d 1226, 1231-33 (9th Cir. 2003); *Weber v. Strippit, Inc.,* 186 F.3d 907, 916-17 (8th Cir.1999); *Workman v. Frito-Lay, Inc.,* 165 F.3d 460, 467 (6th Cir.1999); *Newberry v. E. Texas State Univ.,* 161 F.3d 276, 280 (5th Cir.1998)