

**Testimony of Chai R. Feldblum**  
**Professor of Law**  
**Director, Federal Legislation Clinic**  
**Georgetown University Law Center**

**Hearing On:**  
**The ADA Restoration Act of 2007 –**  
**“A Bill to Restore the Intent and Protections of**  
**the Americans with Disabilities Act of 1990”**

**Before the**  
**Subcommittee on the Constitution, Civil Rights, and Civil Liberties**  
**of the**  
**Committee on the Judiciary**  
**United States House of Representatives**  
**Washington, D.C.**

**October 4, 2007**

Mr. Chairman and Members of the Subcommittee, I am pleased to testify before you today. 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 provide *pro bono* legislative lawyering services to the Epilepsy Foundation 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 subject matter of this hearing. During passage of the original Americans with Disabilities Act of 1990 (ADA), I served as one of the lead legal advisors to the disability and civil rights communities in the drafting and negotiating of that legislation.

In this testimony, I provide a brief overview of the bipartisan support that propelled passage of the ADA in 1990 and I describe how Congress intended the ADA's definition of disability to be consistent with the definition of "handicap" that had been applied by the courts for fifteen years under a prior disability anti-discrimination law. I then explain how the courts subsequently narrowed the definition of disability under the ADA in a manner that was inconsistent with Congressional intent and offer some observations on why courts may have acted in such a manner. Finally, I describe the specific ways in which H.R. 3195, the ADA Restoration Act, restores original Congressional intent.

## **I. The Bi-Partisan Enactment of the ADA**

A first version of the ADA was introduced in April 1988 by Congressman Tony Coelho and 45 cosponsors in the House of Representatives and by Senators Lowell Weicker and Tom Harkin and twelve other cosponsors in the Senate.<sup>1</sup> This version of the ADA was based on a draft from the National Council on Disability (NCD), an independent federal agency composed of 15 members appointed by President George H.W. Bush which was established by Congress to advise the President and Congress on issues concerning people with disabilities.<sup>2</sup>

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<sup>1</sup> 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).

<sup>2</sup> NATIONAL COUNCIL ON DISABILITIES, ON THE THRESHOLD OF INDEPENDENCE (1988), *available at* <http://www.ncd.gov/newsroom/publications/1988/threshold.htm>. Lowell Weicker, at that time, the Republican Senator from Connecticut and the ranking minority member of the Subcommittee on the

In May 1989, a second version of the ADA was introduced by Congressman Steny Hoyer and 45 cosponsors in the House of Representatives and by Senators Tom Harkin, Edward Kennedy, Robert Dole and 31 other cosponsors in the Senate.<sup>3</sup> 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.<sup>4</sup>

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;<sup>5</sup> the House Committee on Education and Labor favorably reported the bill by a vote of 35-0;<sup>6</sup> the House Committee on Energy and Commerce favorably reported the bill by a vote of 40-3;<sup>7</sup> the House Committee on Public Works and Transportation favorably reported the bill by a vote of 45-5;<sup>8</sup> and the House Committee on the Judiciary favorably reported the bill by a vote of 32-3.<sup>9</sup>

After being reported out of the various committees, the ADA passed by wide margins in the House of Representatives, by a vote of 403-20, and in the Senate, by a vote of 76-8.<sup>10</sup> 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.<sup>11</sup>

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

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Handicapped, was approached by the National Council on Disability to take the lead on the ADA because of his longstanding interest in the area of disability rights. Senator Tom Harkin, a Democratic Senator from Iowa and Chairman of the Subcommittee on the Handicapped, worked closely with Senator Weicker in this endeavor. In the House of Representatives, Congressman Tony Coelho, a Democrat from California and third-ranking Member in the House Democratic Leadership, was the key leader in the development of the ADA.

<sup>3</sup> 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).

<sup>4</sup> 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 brief overview of passage of the ADA).

<sup>5</sup> S. REP. NO. 101-116 at 1 (1989).

<sup>6</sup> H.R. REP. NO. 101-485, pt. 2, at 50 (1990).

<sup>7</sup> H.R. REP. NO. 101-485, pt. 4, at 29 (1990).

<sup>8</sup> H.R. REP. NO. 101-485, pt. 1, at 52 (1990).

<sup>9</sup> H.R. REP. NO. 101-485, pt. 3, at 25 (1990).

<sup>10</sup> 136 CONG. REC. H2638 (daily ed. May 22, 1990); 135 CONG. REC. S10803 (daily ed. Sept. 7, 1989).

<sup>11</sup> 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.”<sup>12</sup>

Standing together, leaders from both parties described the ADA as “historic,” “landmark,” and an “emancipation proclamation for people with disabilities.”<sup>13</sup>

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.<sup>14</sup> Thus, it was the hope of Congress that people with disabilities would be protected from discrimination in the same manner as those who experienced discrimination on the basis of race, color, sex, national origin, religion, or age.<sup>15</sup>

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, PTSD, and many other impairments, are routinely found not to be “disabled” and therefore not covered by the ADA.

The difficulty with this scope of coverage under the ADA is *significant* – studies show that plaintiffs lose 97% of ADA employment discrimination claims, mostly on the grounds that they do not meet the definition of “disability.”<sup>16</sup> The National Council on

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<sup>12</sup> 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>.

<sup>13</sup> 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>.

<sup>14</sup> See Americans with Disabilities Act § 2(b), 42 U.S.C. § 12101(b) (2007).

<sup>15</sup> 42 U.S.C. § 12101 (a), (b).

<sup>16</sup> Amy L. Allbright, *2006 Employment Decisions Under the ADA Title I – Survey Update*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 328, 328 (July/August 2007) (stating that in 2006, “[o]f the 218 [employment discrimination] decisions that resolved the claim (and have not yet changed on appeal), 97.2 percent

Disability has stated that Supreme Court decisions narrowing the definition of disability “ha[ve] significantly diminished the civil rights of people with disabilities,” “blunt[ing] the Act’s impact in significant ways,” and “dramatic[ally] narrowing and weakening . . . the protection provided by the ADA.”<sup>17</sup>

As demonstrated by the legislative history, Congress never intended the ADA’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 Section 504 of the Rehabilitation Act of 1973, a predecessor civil rights statute for people with disabilities that covers recipients of federal financial assistance. Section 504 defines disability 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.<sup>18</sup>

For fifteen years, the courts had interpreted this definition to cover a wide range of physical and mental impairments, including epilepsy, diabetes, intellectual and

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resulted in employer wins and 2.8 percent in employee wins”); see also Amy L. Allbright, *2003 Employment Decisions Under the ADA Title I – Survey Update*, 28 MENTAL & PHYSICAL DISABILITY L. REP. 319, 319-20 (May/June 2003) (“One such obstacle [for plaintiffs to overcome] is satisfying the requirements that the plaintiff meet the ADA’s restrictive definition of disability – a physical or mental impairment that substantially limits a major life activity, a record of such an impairment, or being regarded as having such an impairment – and still be qualified to perform essential job functions with or without reasonable accommodation. A clear majority of the employer wins in this survey were due to employees’ failure to show that they had a protected disability.”) (emphasis added); see also Ruth Colker, *Winning and Losing Under the ADA*, 62 OHIO ST. L.J. 239, 246 (2001) (“[A]ppellate litigation outcomes under the ADA are more pro-defendant than under other civil rights statutes.”); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100-01 (“[C]ontrary to popular media accounts, defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level. Of those cases that are appealed, defendants prevail in eighty-four percent of reported cases. These results are worse than results found in comparable areas of the law; only prisoner rights cases fare as poorly.”).

<sup>17</sup> NATIONAL COUNCIL ON DISABILITIES, *RIGHTING THE ADA*, pt. I (2004), available at [http://www.ncd.gov/newsroom/publications/2004/righting\\_ada.htm](http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm).

<sup>18</sup> 29 U.S.C. § 705(2)(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 language of “handicap” under Section 504 and “disability” under the ADA is identical.

developmental disabilities, multiple sclerosis, PTSD, and HIV infection.<sup>19</sup> 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."<sup>20</sup>

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 House Committee on the Judiciary observed that: "The ADA uses the same basic definition of 'disability' first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988. . . . [I]t has worked well since it was adopted in 1973."<sup>21</sup> The House Committee on Education and Labor and the Senate Committee on Labor and Human Resources made similar observations, and specifically referenced the breadth of the interpretation offered by the Supreme Court in the *Arline* decision.<sup>22</sup>

The committee reports also 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 House Committee on Education and Labor put it:

Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity, are covered

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<sup>19</sup> "[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." 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"); 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).

<sup>20</sup> See *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987).

<sup>21</sup> H.R. REP. NO. 101-485, pt. 3, at 27 (1990).

<sup>22</sup> H.R. REP. NO. 101-485, pt. 2, at 53 (1990) (discussing *Arline*); S. REP. NO. 101-116 at 21, 23-24 (1989) (discussing Section 504 and *Arline*).

under the first prong of the definition, even if the effects of the impairment are controlled by medication.<sup>23</sup>

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

Disability rights advocates like myself – blissfully unaware of what the future would hold for the definition of disability – fully supported Congress' incorporation of the Section 504 definition into the ADA. We agreed with Congress' legal judgment that the fifteen-year-old definition would cover people with a wide range of physical and mental impairments, based on the record in the case law under Section 504. In addition, we were particularly reassured by the reasoning of the Supreme Court just two years earlier in the *Arline* case – the case so consistently referred to in the various committee reports. In that case, the Supreme Court had reasoned that an employer who fired an individual from one job *because of* an impairment (in that case, a teacher who had recovered from tuberculosis) must have *regarded that* individual as limited in the life activity of *working*.<sup>24</sup> Under such an interpretation, the third prong of the definition was clearly sufficiently broad to capture any individual who had been explicitly discriminated against because of an impairment.<sup>25</sup>

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<sup>23</sup> H.R. REP. NO. 101-485, pt. 2, at 52 (1990); see also H.R. REP. NO. 101-485, pt. 3, at 28-29 (1990); S. REP. NO. 101-116 at 23 (1989).

<sup>24</sup> During oral argument in *Arline*, the Solicitor General had sought to reject such an interpretation of the "regarded as" prong of the definition of handicap, noting that such an approach would allow plaintiffs to make "a totally circular argument which lifts itself by its bootstraps." *Arline*, 480 U.S. at 283 n.10 (1987). But the Court had responded that "[t]he argument is not circular, however, but direct." *Id.* As the Court explained: "Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work." *Id.* And, as the Court explained: "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." *Id.* at 283; see Feldblum, *Definition of Disability*, *supra* note 19, 116-118 for a full analysis of the *Arline* opinion.

<sup>25</sup> 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

We were soon to be rudely surprised by new interpretations of the definition of disability by various courts, including the Supreme Court.

### **III. Judicial Narrowing of Coverage Under the ADA**

Over the past several years, the Supreme Court and lower courts have narrowed coverage under the ADA by 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, based on a reading of the legislative history of the ADA, Congress intended to protect.

The Supreme Court has narrowed coverage under the ADA in three primary ways:

(A) by requiring people alleging disability-based discrimination to meet a demanding standard for qualifying as “disabled”;

(B) by requiring courts to consider mitigating measures in determining whether a person is “disabled”; and

(C) by requiring people alleging that they were “regarded as” disabled to show that employers believed them incapable of performing not just one job, but a *broad range of jobs*.

#### **A. Demanding Standard: Substantially Limits a Major Life Activity**

The Supreme Court, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, ruled that the words “substantially limits” and “major life activities” in the definition of disability “need to be interpreted strictly to create a demanding standard for qualifying as disabled.”<sup>26</sup> This was contrary to the various statements in the legislative history indicating an assumption that the definition of disability would be interpreted broadly.

As a result of this ruling, people alleging discrimination must now show that their impairments *prevent* or *severely restrict* them from doing activities that are of *central importance* to *most* people's daily lives. So, according to some recent court decisions:

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employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong.” S. REP. NO. 101-116 at 24 (1989).

<sup>26</sup> *Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002).

- ▶ If you have muscular dystrophy and you cannot lift your arms above your head, but you are able to brush your teeth and wash your hair by supporting one arm with the other – you are not prevented/severely restricted from doing these life activities and therefore you are not “disabled” under the ADA.<sup>27</sup>
- ▶ If you have seizures in your sleep and you wake up with bruises all down your arms and legs and you only get a few hours of restful sleep – you are not prevented/severely restricted from sleeping and therefore you are not “disabled” under the ADA.<sup>28</sup>
- ▶ If you are a right-hand dominant person whose right arm was amputated below the elbow, but you are not “prevented or severely restricted from doing activities that are of central importance to most people’s daily’s lives . . . [like] household chores, bathing oneself, and brushing one’s teeth,” you have only a “physical impairment, nothing more,” and, therefore, you are not “disabled” under the ADA.<sup>29</sup>
- ▶ If you experience a traumatic brain injury (causing a four-month coma, weeks of rehabilitation and an inability to work for fourteen years) and then continue to have blurred vision, dizziness, spasms in your arms and hands, slowed learning, headaches, poor coordination, and slowed speech – but you fail to demonstrate precisely how these limitations “substantially” impact your functioning – you are not “disabled” under the ADA.<sup>30</sup>
- ▶ If you experience an injury that permanently limits your use of one hand, that does not mean that you are “so far disabled as to fall within the restrictive meaning the ADA assigns to the term.”<sup>31</sup>
- ▶ If you undergo a mastectomy, chemotherapy, and radiation therapy for breast cancer, and, as a result, you are unable to lift your arm above your head and you experience fatigue and concentration and memory problems, you are not “disabled” under the ADA because these side effects “[a]re (relatively

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<sup>27</sup> McClure v. General Motors Corp., 75 Fed. Appx. 983, 2003 WL 21766539 (5th Cir. 2003).

<sup>28</sup> Equal Employment Opportunity Comm'n v. Sara Lee Corp., 237 F.3d 349 (4th Cir. 2001).

<sup>29</sup> Williams v. Cars Collision Center, LLC, No. 06 C 2105 (N.D. Ill. July 9, 2007).

<sup>30</sup> Phillips v. Wal-Mart Stores, Inc., 78 F. Supp. 2d 1274 (S.D. Ala. 1999).

<sup>31</sup> Tockes v. Air-Land Transport Services, Inc., 343 F.3d 895, 896 (7th Cir. 2003).

speaking) short-lived” and therefore “they d[o] not have a substantial and lasting effect on the major activities of [your] daily life.”<sup>32</sup>

► If you permanently injure your arm and are fired because of limitations resulting from that injury, but you are able to perform activities of daily living, “such as shaving and brushing [your] teeth, with [your] left hand,” you are not “disabled” under the ADA because you have not “met [your] burden of showing that the extent of [your] limitations due to [the] impairment [is] ‘substantial.’”<sup>33</sup>

► If you have intellectual and developmental disabilities (what some courts term “mental retardation”) that limit your ability to think, communicate, and interact, you may not be “disabled” because “[i]t is unclear whether thinking, communicating, and social interaction are ‘major life activities’ under the ADA.”<sup>34</sup> And even if thinking, communicating, and interacting *are* sufficiently “major” life activities, you are still not “substantially” limited in these activities – and therefore not “disabled” under the ADA – if you are able to drive a car and to communicate with words.<sup>35</sup>

As demonstrated by these decisions, the Supreme Court’s “demanding standard for qualifying as disabled” has resulted in the exclusion from coverage under the ADA of a range of individuals that Congress intended to protect and indeed – that any ordinary American hearing these stories would imagine would be protected under the Americans with Disabilities Act.

The Supreme Court’s narrow reading is in marked contrast to the cases that had been decided under Section 504 of the Rehabilitation Act, which Congress had before it as precedent when it enacted the ADA. In these cases, the courts had tended to decide questions of coverage easily and without extensive analysis.<sup>36</sup> This narrow reading is likewise inconsistent with other civil rights statutes, such as the Civil Rights Act of 1964

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<sup>32</sup> Pimental v. Dartmouth-Hitchcock Clinic, 236 F. Supp. 2d 177, 183 (D.N.H. 2002).

<sup>33</sup> Didier v. Schwan Food Co., 387 F. Supp. 2d 987, 991 (W.D. Ark. 2005).

<sup>34</sup> Littleton v. Wal-Mart Stores, Inc., 231 Fed. Appx. 874, 877-78 (11<sup>th</sup> Cir. 2007).

<sup>35</sup> *Id.*

<sup>36</sup> Feldblum, *Definition of Disability*, *supra* note 19, at 128; see also Consortium for Citizens with Disabilities, *People Covered Under Section 504 of the Rehabilitation Act/People Not Covered Under the ADA*, available at [http://www.c-c-d.org/task\\_forces/rights/Rehab%20Act%20v%20%20ADA.pdf](http://www.c-c-d.org/task_forces/rights/Rehab%20Act%20v%20%20ADA.pdf).

(CRA), upon which the ADA was modeled<sup>37</sup> and which courts have also interpreted broadly.<sup>38</sup> Indeed, under the Rehabilitation Act and Title VII of the CRA, courts rarely tarried long on the question of whether the plaintiff in a case was “really a handicapped individual,” or “really a woman,” or “really black.” Instead, these cases tended to focus on the essential causation requirement: i.e., had the individual proven that the alleged discriminatory action had been taken *because of* his or her handicap, race, or gender?<sup>39</sup>

## **B. Mitigating Measures**

The Supreme Court, in a trio of cases decided in June 1999, ruled that mitigating measures – 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.<sup>40</sup> This was contrary to the various statements in the legislative history indicating that mitigating measures should not be taken into account.

According to the Supreme Court, a person’s impairment must substantially limit the individual *in the present moment*. If medication or a device takes away that limitation in the present moment, that person has been considered by the courts as no longer “disabled” under the ADA. So, according to some recent court decisions:

- ▶ If you are fired from your job because you need a half-hour lunch break to take insulin for your diabetes, but that insulin helps you effectively manage your diabetes, you may not challenge the discrimination because you are not considered “disabled” within the meaning of the ADA.<sup>41</sup>
- ▶ If you are fired from your job a few months after experiencing a seizure at work, but your epilepsy is otherwise well-managed with anti-seizure medication,

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<sup>37</sup> 42 U.S.C. § 12101 (2007) (“[U]nlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination.”).

<sup>38</sup> See, e.g., *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 381 (1977) (Marshall and Brennan, JJ., concurring in part and dissenting in part) (“Title VII is a remedial statute designed to eradicate certain invidious employment practices . . . [and], under longstanding principles of statutory construction, the Act should be given a liberal interpretation.” (internal quotation marks and citation omitted)).

<sup>39</sup> Feldblum, *Definition of Disability*, *supra* note 19, at 106.

<sup>40</sup> *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).

<sup>41</sup> *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002).

you may not challenge the discrimination because you are not considered “disabled” within the meaning of the ADA.<sup>42</sup>

▶ If you are hospitalized because of heart disease and are subsequently fired from your job, but your heart disease is well-managed with medication, you may not challenge the discrimination because you are not considered “disabled” within the meaning of the ADA.<sup>43</sup>

▶ If you are fired by your employer because of a hearing impairment, but you wear a hearing aid that helps correct that impairment, you may not challenge the discrimination because you are not considered “disabled” within the meaning of the ADA.<sup>44</sup>

▶ If you have major depression and PTSD that are well-managed through medication, you may not challenge a termination that you believe was related to those grounds because you are not considered “disabled” under the ADA.<sup>45</sup>

▶ If you are fired because an examining physician determines that your clinical depression disqualifies you from a job, but you have successfully managed your condition with medication for over fifteen years, you may not challenge the discrimination because you are not considered “disabled” under the ADA.<sup>46</sup>

As demonstrated by these decisions, 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 makes them more capable and independent, and thus more able to work, may find they are not protected by the ADA at all because 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 dismissed the person *because of that person’s (mitigated) condition*.

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<sup>42</sup> Todd v. Academy Corp., 57 F. Supp. 2d 448 (S.D. Tex. 1999).

<sup>43</sup> Epstein v. Kalvin-Miller International, Inc., 100 F. Supp. 2d 222, 223 (S.D.N.Y. 2000).

<sup>44</sup> Eckhaus v. Consolidated Rail Corp., No. Civ. 00-5748(WGB), 2003 WL 23205042 (D.N.J. Dec. 24, 2003).

<sup>45</sup> Schriener v. Sysco Food Serv., No. Civ. 1CV032122, 2005 WL 1498497 (M.D.Pa. June 23, 2005).

<sup>46</sup> McMullin v. Ashcroft, 337 F. Supp. 2d 1281 (D. Wyo. 2004).

### **C. Broad Range of Jobs Under “Regarded as” Prong**

Despite Congress’ citation to *Arline* as an example of the broad coverage that Congress expected to see under the “regarded as” prong of the definition of disability, the Supreme Court in *Sutton v. United Airlines* ruled that an employer’s decision to deny an individual a given job based on a perceived impairment was not sufficient to establish that the employer *regarded* the individual as substantially limited in the major life activity of *working*. Rather, in order to be covered under the third prong, the individual was now required to prove that the employer thought that the individual was incapable of performing *a class or a broad range of jobs*.<sup>47</sup> This was contrary to statements in the committee reports indicating that coverage under the third prong of the definition did not depend on how employers might act or think.<sup>48</sup>

The new formulation created by the Supreme Court erects an almost impossible threshold for any individual seeking coverage under this prong. The approach requires that an individual essentially both divine and prove an employer's subjective state of mind. Not only must an individual demonstrate that the employer believed the individual had an impairment that prevented him or her from working for that employer in that job, the individual must also 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 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 becomes essentially insurmountable.

So, according to some recent court decisions:

- ▶ If you have twenty years’ experience as an offshore crane operator and you are not hired solely because your employer believes that you are incapable of performing the job based on your two prior back surgeries, the ADA does not

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<sup>47</sup> *Sutton*, 527 U.S. at 493.

<sup>48</sup> As the House Committee on the Judiciary Report put it: “[A] person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field, and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.” H.R. REP. NO. 101-485, pt. 3, at 30 (1990).

protect you unless you can show that your employer believed that you were incapable of performing a *broad range of jobs* – not just the job for which you were applying.<sup>49</sup>

► If you are not hired solely because your employer believes that you are incapable of performing the job based on your use of certain prescription drugs, the ADA does not protect you unless you can show that your employer believed that you were incapable of performing a *broad range of jobs* – not just the job for which you were applying.<sup>50</sup>

As the various examples under these three different categories of legal analysis demonstrate, the Supreme Court and the lower courts have dramatically changed the meaning of “disability” under the ADA over the past number of years so as to make it almost unrecognizable. Many of the very people whom Congress intended to protect are finding that they are not “disabled” under the ADA; they are never even given the opportunity to show they can do the job and were treated unfairly because of their medical condition.

But how did this happen? How did a statutory definition that Members of Congress and disability rights advocates felt would ensure protection for a broad range of individuals end up becoming the principal means of restricting coverage under the ADA?

There is a range of academic literature on this question, including some to which I have contributed. But let me point out here simply one observation. From my reading of the cases, it seems to me that the instinctive understanding by many courts of the term “disability” is that it is synonymous with an “inability to work or function,” and concomitantly, that people with disabilities are thus necessarily viewed as significantly different from “the rest of us.”

This view of disability may have been influenced by the fact that most disability cases heard by courts prior to the ADA regarded claims for disability payments under Social Security. In those cases, an individual was required to demonstrate that he or she had a “medically determinable physical or mental impairment” that made him or her

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<sup>49</sup> E.E.O.C. v. HBH Inc., No. Civ.A. 98-2632, 1999 WL 1138533 (E.D.La. Dec. 9, 1999).

<sup>50</sup> E.E.O.C. v. J.B. Hunt Transport, Inc., 321 F.3d 69 (2d Cir. 2003).

unable “to engage in any substantial gainful activity” – i.e., that he or she was unable to work.<sup>51</sup> Hence, it may have been difficult for courts to grasp that the Congressional intent under the ADA was to capture a much broader range of individuals with physical and mental impairments than those intended to be covered under Social Security disability law.<sup>52</sup>

This may help to explain the mitigating measures analysis. Under Social Security disability law – when a court is determining whether someone should get *disability payments* because the person’s impairment makes him or her *unable to work* – it can matter a great deal whether the impact of the person’s impairment has been mitigated through medication or devices, and whether the impairment, as treated, still impacts a person’s ability to work.

But a civil rights law is very different. The goal of the ADA is to prohibit *discrimination* against a person because of his or her disability. A person does not have to be unable to work in order to face discrimination based on his or her impairment. On the contrary, people who are perfectly able to perform their jobs – sometimes thanks to the very medications or devices they use – are precisely the ones who may face discrimination because of myths, fears, ignorance, or stereotypes about their medical conditions.

Similarly, in a civil rights context, requiring a person to meet an extremely high standard for qualifying as “disabled” is counter-intuitive if an employer has taken an adverse action based on an individual’s physical or mental impairment. Requiring the person to reveal private, highly personal, and potentially embarrassing facts to employers and judges about the various ways the individual’s impairment impacts daily living, simply and only to demonstrate the severity of the impairment, is completely unnecessary to deciding whether unjust discrimination has occurred.<sup>53</sup>

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<sup>51</sup> 42 U.S.C. § 423(d)(1)(A) (2007) (SSDI); 42 U.S.C. § 1382c(a)(3)(A) (2007) (SSI).

<sup>52</sup> See Feldblum, *Definition of Disability*, *supra* n. 17, at 97, 140.

<sup>53</sup> As I also note in my academic article, there are other elements that are in play here. For example, “EEOC regulations that emphasize individualized assessments of the impact of impairments on particular individuals, a sophisticated management bar trained in seminars to carefully parse the statutory text of the definition, and finally, the terms of the definition itself, have all resulted in a reading of the ADA that has radically reduced the number of people who can claim coverage under the law.” Feldblum, *Definition of Disability*, *supra* n. 19, at 140; *see also id.* at 152 (“[W]hile individualized assessments are . . . critical in determining whether an individual with a disability is qualified for a job (including whether a reasonable accommodation is due to an individual in a particular case), the idea that an individualized assessment

Finally, it is inconsistent with a civil rights law to excuse an employer's behavior simply because other employers may not also act in a similar discriminatory fashion. As the court made clear in *Arline*, if an employer fires an individual expressly because of an impairment, that is sufficient to establish coverage for the individual under the "regarded as" prong of the definition of disability. Of course, an action of this nature would not suffice to qualify an individual for *disability payments*. But it certainly is sufficient to raise a viable claim of discrimination based on that impairment, regardless of whether other employers would have discriminated against the individual as well.

#### **IV. How the ADA Restoration Act Restores Congressional Intent**

As the Honorable Steny Hoyer stated when he and the Honorable Jim Sensenbrenner introduced the ADA Restoration Act of 2007 on July 26, 2007, "the point of the ADA is not disability; it is the prevention of wrongful and unlawful discrimination."<sup>54</sup> Courts and lawyers have spent an exorbitant amount of time and resources parsing the question of whether a person is really "disabled," when the real question should be whether a person has been treated unfairly on the basis of an irrelevant personal characteristic (disability).

The ADA Restoration Act fixes this problem by focusing a court's attention on the *reason* for the adverse action, rather than on a person's physical or mental condition, and reminding courts that – as with any other civil rights law – the ADA must be interpreted fairly and as Congress intended. The bill does this in two primary ways:

First, the bill removes the phrase from the definition of "disability" – "substantially limits a major life activity" – that courts have latched onto as the basis for a restrictive reading of coverage under the ADA. In its place, the bill defines the terms "physical impairment" and "mental impairment" along the lines traditionally used by the regulatory agencies. As a further precautionary measure, the bill adds a rule of construction

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would be used to determine whether one person with epilepsy would be covered under the law, while another person with epilepsy would not, was completely foreign both to Section 504 jurisprudence and to the spirit of the ADA as envisioned by its advocates. The words of the ADA, however, can lend themselves to such an interpretation, and the fact that the EEOC's guidance expressly endorsed such an interpretation has cemented that approach in the courts.").

<sup>54</sup> Press Release, Congressman Steny Hoyer, Hoyer Introduces Americans With Disabilities Restoration Act of 2007 (July 26, 2007), available at <http://hoyer.house.gov/Newsroom/index.asp?ID=955&DocumentType=Press+Release>.

prohibiting courts from considering whether a person uses mitigating measures or considering whether the manifestations of an impairment are “episodic, in remission, or latent” when determining if a person has an impairment.

This change to the definition of “disability” – while different in terms of *words* from the language in the original ADA – will actually restore the original *intent* of Congress in terms of coverage under the law. The new definition ensures that individuals with a wide range of physical or mental impairments are covered under the law – and are provided legal redress *if they have been subjected to discrimination because of a physical or mental impairment*. This last point is key. As with any other civil rights law, any individual claiming discrimination must *bear the burden of proof* that the discriminatory action was taken *because of* the impairment. This legal requirement ensures that the individuals Congress wanted to protect under the original ADA will be the ones protected under the ADA Restoration Act.

Second, the bill modifies the general section prohibiting discrimination to frame the section as prohibiting discrimination “on the basis of disability,” rather than the existing formulation that prohibits discrimination “against a qualified individual with a disability” in that section. This change brings the ADA into conformity with the Civil Rights Act of 1964, which similarly prohibits discrimination “on the basis of” race, sex, religion, and other characteristics. This formulation ensures that courts begin their analysis by focusing on whether a person has proven that a challenged discriminatory action was taken *because of* a personal characteristic – in this case, disability – and not on whether the person has proven the existence of various complicated elements of the characteristic.

Despite some stated concerns, this change does *not* change the right of an employer to defend a claimed discriminatory action on the grounds that a particular applicant or employee does not have the requisite qualifications for the job. The ADA Restoration Act does not change the existing definitions provision of the ADA – 42 U.S.C. § 12111 – which provides that a “qualified individual with a disability” means an individual with a disability who, with or without reasonable accommodation, *can perform the essential functions of the employment position that such individual holds or desires.*”

## **V. Conclusion**

Mr. Chairman, it is unfortunate that the words adopted by Congress in the ADA to define “disability” so easily lent themselves to the restrictive approach adopted by the lower courts. Congress’ intent was crystal clear when it passed the ADA. Unfortunately its words were not. Too many people whom Congress intended to protect have had their ADA claims dismissed because they have been found by the courts not to be sufficiently “disabled” under the courts’ misguided interpretation of the definition of disability under the ADA. The ADA Restoration Act of 2007 fixes this problem by restoring the intent and protections of the original ADA.