Statement of the U.S. Chamber of Commerce

ON: **HEARING ON H.R. 3195—THE ADA RESTORATION ACT OF 2007**

TO: **THE HOUSE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES OF THE COMMITTEE ON THE JUDICIARY**

BY: **LAWRENCE Z. LORBER**
PROSKAUER ROSE LLP

DATE: **OCTOBER 4, 2007**

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance – is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 105 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Testimony of

Lawrence Z. Lorber*

Before the United States House of Representatives

Committee on the Judiciary

Subcommittee on Constitution, Civil Rights and Civil Liberties

Hearing on H.R. 3195—The ADA Restoration Act of 2007

October 4, 2007

Chairman Nadler, Ranking Member Franks, and members of the Subcommittee, I am pleased to be able to present this testimony on behalf of the United States Chamber of Commerce addressing H.R. 3195, the ADA Restoration Act of 2007.

The United States Chamber of Commerce (the "Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every industry, sector, and geographical region of the country. I serve as the Chair of the Chamber's policy advisory committee on equal employment opportunity matters.

The Chamber strongly supports equal opportunity in employment, in particular greater inclusion of people with disabilities in the workplace. While the Chamber believes H.R. 3195 is offered with the best of intentions to rectify perceived shortcomings in the Americans with Disabilities Act (the "ADA"), we respectfully disagree with respect to the impact that the bill's provisions would have and, for the reasons that will be discussed more fully in this testimony, the Chamber opposes H.R. 3195 as drafted.

Perhaps my own background may lend some authority to this testimony. I am a practicing employment lawyer and a partner in the Labor and Employment department of Proskauer Rose LLP in Washington, D.C. I have had a long involvement in the issues impacting the inclusion of the disabled in to the workplace. In 1975, I was privileged to be appointed as the Director of the Office of Federal Contract Compliance Programs ("OFCCP") and Deputy Assistant Secretary of the Department of Labor. In that capacity, I was responsible for reviewing the 1974 Amendments to the Rehabilitation Act of 1973. Subsequently, I was responsible for issuing the first regulations promulgated under § 503 of the Rehabilitation Act. These regulations require affirmative action and non-discrimination with respect to the handicapped by federal contractors. My agency also administered the Vietnam Era Veterans' Readjustment Assistance Act of 1974, which required affirmative action and non-discrimination for Vietnam-

* I would also like to acknowledge Meredith C. Bailey, an associate at Proskauer Rose, for her invaluable assistance in the preparation of this testimony.

era veterans and disabled veterans of any era, and the first regulations under that statute were issued under my supervision. In addition, the OFCCP enforced Executive Order 11246, as amended requiring non-discrimination and affirmative action by federal contractors on the basis of race, gender and ethnicity.

In particular, my experience in enforcing § 503 and in supervising the final adoption of the post-1974 amendment regulations provide a valuable insight to the current legislation. Working on a blank slate, we understood certain principles. First, not every individual with an impairment would benefit from the program. To afford appropriate, targeted relief, we adopted as guidance the American Medical Association's Guides to the Evaluation of Permanent Impairment. Second, we understood that to enforce a new requirement, we must make employers aware of their responsibilities and covered individuals aware of their rights. So we instituted an enforcement program including back pay relief as well as vigorous outreach. I have appended to this testimony perhaps my most cherished memento from that time in my career: a memorandum from my executive staff, all career employees, enumerating what was achieved and what precedent was set at that time. While they had kind sentiments for me, they do set forth what became the framework for the treatment of employees under § 503, and which had some influence, we believe, on the subsequent issuance of the § 504 regulations—the basis for the ADA.

On July 26, 1990, the Americans with Disabilities Act of 1990 ("ADA") was signed into law.[1] President George H.W. Bush described the ADA as an "historic new civil rights Act . . . the world's first comprehensive declaration of equality for people with disabilities."[2] The goals of the ADA's passage were two-fold: (1) to provide a clear mandate for the elimination of discrimination against individuals with disabilities; (2) to address accommodation of disabled individuals in both society and the workplace.

For seventeen years, the ADA has fulfilled its promise to the individuals it was meant to protect—a protected class of individuals with "disabilities." The proposed legislation, which seeks to drastically alter the statutory scheme under the ADA, effectively dilutes the protections for those whom the ADA was originally enacted to protect. H.R. 3195 will relegate the ADA to a statement of principle lacking the structure and content needed to sustain changes for the inclusion of the disabled.

The ADA Restoration Act of 2007

H.R. 3195 represents a radical departure from the ADA. As written, the proposed legislation would drastically alter the statutory scheme in that it would:

- remove the current ADA requirement that a disability "substantially limit a major life activity;"

[1] Pub. L. No. 101-336, 104 Stat. 327 (1990).

[2] President George Bush, *Remarks by the President During Ceremony for the Signing of the Americans with Disabilities Act of 1990*, *available at* http://www.presidency.ucsb.edu/ws/?pid=18712 (John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database)).

- effectively substitute the status of "impairment" for that of a "disability" to determine coverage under the ADA;

- prevent courts and employers from considering mitigating measures an individual may be using (such as medication or devices) when determining whether he or she is disabled; and

- shift the burden of proof from plaintiffs to employers regarding whether an individual is "qualified" to perform a job.

Nothing justifies such a drastic overhaul of the ADA.

The ADA was enacted in 1990 in response to a growing public awareness and concern about discrimination against people with disabilities and the effects of such discrimination on the economic and employment opportunities available to these individuals.[3] In his prepared statement before Congress, United States Attorney General Richard Thornburgh described the need to integrate disabled persons, otherwise ostracized, into the American economic and social fabric: "[M]any persons with disabilities in this Nation still lead their lives in an intolerable state of isolation and dependence. . . . [P]ersons with disabilities are still too often shut out of the economic and social mainstream of American life."[4] The House Committee on Education and Labor's favorable report on the ADA concluded that "to the extent that the changes in practices and attitudes brought about by the implementation of the Act ultimately assist people with disabilities in becoming more productive and independent members of society, both they and our entire society benefit."[5] There was a clear understanding by the Administration supporting the ADA and the relevant committees that the Act would be directed to those unfairly and wastefully denied opportunities to be productive participants in the economy.

Congress recognized that the unique aspects of discrimination against individuals with disabilities required legislation that would be distinct from other civil rights statutes that preceded it. Civil rights statutes generally protect all individuals from discrimination on the grounds prohibited, whether it be age, sex, religion, or national origin.[6] The ADA, like the Age Discrimination in Employment Act, defined a distinct class to be afforded benefits and protection under the statute. Congress recognized it was imperative to define "disability," as it had defined "age," for purposes of extending civil rights protection to those truly in need of it. In doing so, it patterned the definition of disability after the Rehabilitation Act of 1973,[7] which requires that an "individual with a handicap" be "substantially limited in one or more major life activities."[8] The

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[3] Lauren J. McGarity, *Disabling Corrections and Correctable Disabilities: Why Side Effects Might Be the Saving Grace of Sutton*, 109 Yale L.J. 1161, 1164-5 (2000).

[4] *Americans with Disabilities Act of 1989: Hearing Before the Comm. of the Judiciary*, 101st Cong. (1989) (prepared statement of Richard Thornburgh, Attorney General of the United States of America), *as reprinted in* H. Comm. on Educ. and Lab., 101st Cong., Americans with Disabilities Act 2021; 2034-5 (Comm. Print 1990).

[5] H.R. Rep. No. 101-485, pt. 2, at 45-46, reprinted in 1990 U.S.C.C.A.N. at 327-28.

[6] Robert L. Burgdorf Jr., *The American with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C.R.-C.L. Rev. 413, 441 (1991).

[7] 29 U.S.C. § 794(a).

[8] H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 27; H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 3 (199) at 50.

ADA Committee reports expressly endorse this definition.[9] In adopting the major life activity requirement, the Committee reports describe the need to clarify that "disability" does not include "minor, trivial impairments, such as a simple infected finger."[10]

H.R. 3195 removes the current ADA requirement that a disability "substantially limit a major life activity," such that it effectively substitutes the term "impairment" for "disability." This definition of disability mirrors an early version of a definition rejected by the ADA drafters.[11] Congress refused to adopt this overreaching definition because it conflicted with the then-fifteen year history of § 504 of the Rehabilitation Act of 1973, created an unworkable standard as a matter of policy, and effectively created a universal federal employment statute, rather than a statute directed at dealing with disabilities.

The definition of "disability" in H.R. 3195 undermines the original intent of the ADA in that it entitles anyone with a "physical or mental impairment" to the protection of the ADA.[12] Individuals with temporary or minor physical or mental "impairments" have not been the subject of such discrimination, nor have they been subject to prejudicial myths and stereotypes about their employability.[13] Changing the definition to provide ADA protection to individuals with commonplace impairments would cast the ADA's net too wide and diffuse protections afforded to the truly disabled.[14]

As a practical matter, the definition of "impairment" is so broad that any physical or mental health condition—no matter how minor—will satisfy the impairment requirement. Indeed, as the EEOC has noted, "the determination of whether an individual has a 'disability' in not necessarily based on the name of the diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."[15] Because the definition of "physical or mental impairment" is so expansive, there has been minimal litigation regarding what conditions constitute "impairments." The few courts which have addressed the issue have recognized that relatively minor conditions meet the definition of impairment, but not an ADA disability. Examples include:

- back and knee strains,[16]
- erectile dysfunction,[17]

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[9] S. Rep. No. 116, 101st Cong. 1st Sess. 22 (1989); H. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, 52 (1990); H. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, 28 (1990).

[10] S. Rep. No. 116, 101st Cong. 1st Sess. 23 (1990); H. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, 52 (1990).

[11] The ADA drafters rejected an early version of the ADA that prohibited discrimination "because of a physical or mental impairment, perceived impairment or record of impairment," favoring instead the framework of the ADA's statutory precursor, the Rehabilitation Act of 1973. *See* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And what Can We Do About It?*, 21 Berkley J. Emp. & Lab. L. 91 (2000).

[12] *See* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 Berkley J. Emp. & Lab. L. 91, 101 (2000) (stating that an "argument can be made that not every person with a physical or mental impairment experiences discrimination.").

[13] Mark A. Rothenstein, et. al., *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 Wash. U. L.Q. 243, 251 (2002).

[14] Katherine Jsu Hagmann-Borenstein, *Much Ado About Nothing: Has the U.S. Supreme Court's Sutton Decision Thwarted a Flood of Frivolous Litigation*, 37 Conn. L. Rev. 1121, 1134 (2005).

[15] 29 C.F.R. pt. 1630, App. § 1630.2(j).

[16] *Benoit v. Tech. Mfg. Corp.*, 331 F.3d 166 (1st Cir. 2003).

- headaches,[18]
- "tennis elbow."[19]

It is, therefore, critical that the scope of the ADA definition of "disability" be sufficiently defined to ensure that truly disabled, but genuinely capable, individuals will receive protection and opportunities under the statute. The ADA's noble purpose—the elimination of discrimination in employment based on stereotypes about the insurmountability of disability—would be debased if the statutory protections available to those who are truly disabled could be claimed by *anyone* whose disability was minor and whose relative severity of impairment was widely shared.

The United States Supreme Court decisions[20] that have been such a magnet for controversy are wholly consistent with the ADA's language and intent. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court held that the phrase "substantially limits one or more major life activities" distinguishes a mere impairment from an actionable disability under the ADA.[21] Similarly, in *Sutton*, and its companion cases, the Supreme Court ruled in a seven to two decision that if a person takes steps "to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity."[22]

The problems cited by proponents of this legislation are derived, in part, from the lack of a simplistic "one size fits all" approach to the ADA. Determinations about who qualifies for protection under the law and what is required once protection is afforded are not easily solved in the context of disability law. This has required courts to craft a jurisprudence that addresses the unique facts and circumstances of each job situation.[23] The Supreme Court opinions, which are oft-criticized as having "unduly narrowed the broad scope of protection afforded in the ADA,"[24] have instead preserved the protections of the ADA by carefully crafting opinions that recognize the devastating effect that an expansive interpretation of "disability" could have on the ADA's intended beneficiaries.

The three cases in the "*Sutton*-trilogy" represent the Supreme Court's careful approach. In *Sutton*, for example, plaintiffs with myopic vision attempted to use the ADA to circumvent the defendant airline's minimum vision requirement to become commercial pilots. The facts in *Sutton* may have influenced the outcome: the Court might not have wanted to tell commercial

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[17] *Arrieta-Colon v. Wal-Mart P.R., Inc.*, 434 F.3d 75 (1st Cir. 2006).
[18] *Sinclair Williams v. Stark County Bd. of Comm'rs*, No. 99-4081, 2001 U.S. App. LEXIS 5367 (6th Cir. 2001).
[19] *Cella v. Villanova Univ.*, No. 03-1749, 2004 U.S. App. LEXIS 21740 (3d Cir. 2004).
[20] *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999); *Albertson's Inc. v. Kirkingburg,* 527 U.S. 555 (1999); *Toyota Motor Mfg, Ky, Inc. v. Williams*, 534 U.S. 184 (2002).
[21] *Toyota*, 534 U.S. at 197. It is important to note that the decision did not eliminate all people with carpal tunnel syndrome from the ADA's protections. The case merely requires the individualized analysis to include an examination of manual tasks essential to daily living. *See* Commissioner Paul Steven Miller, *Reclaiming the Vision: The ADA and Definition of Disability*, 41 Brandeis L.J. 769, 773 (2003).

[22] *Sutton*, 527 U.S. at 482.
[23] Commissioner Paul Steven Miller, *Reclaiming the Vision: The ADA and Definition of Disability*, 41 Brandeis L.J. 769, 771 (2003).
[24] ADA Restoration Act of 2007, H.R. 3195, 110th Cong. § 2 (2007).

airlines that they could not establish rigorous vision standards for their pilots.[25] On the same day it decided *Sutton*, the Supreme Court also issued its opinion in *Albertson's, Inc. v. Kirkingburg*. The plaintiff in that case had a similar, monocular vision impairment. Justice Souter held that the determination of disability under the ADA is not a *per se* categorical test based on an impairment's name or characteristics. [26] The Court simply held that "the [ADA] requires monocular individuals, like others claiming the [ADA's] protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, is substantial."[27]

Finally, in *Murphy*, the plaintiff, a mechanic, was fired because he did not satisfy Department of Transportation ("DOT") health standards for commercial drivers because of his high blood pressure. In holding that the plaintiff was not substantially limited in working, the court noted that there were many other jobs the plaintiff could perform, including a number of mechanic jobs *not* requiring DOT certification. The court pointed out that the plaintiff in fact "secured another job as a mechanic shortly after leaving UPS."[28]

Proponents of this legislation claim that the *Sutton*-trilogy has narrowed the protected class under the ADA by effectively excluding individuals who attempt to mitigate or control a disability. Such concerns are largely unfounded. In an explicit attempt to clarify the specific nature of its holding, the Supreme Court majority in *Sutton* was careful to identify groups of individuals that would still be entitled to the law's protections.[29] For example, the majority in *Sutton* responded to the dissent's argument that viewing individuals in their corrected state created an overly exclusive definition of disability by pointing out that individuals with prosthetic limbs, for example, "may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run."[30] The majority clarified that "the use or nonuse of a corrective device does not determine whether the individual with an impairment is disabled; that determination depends on whether the limitations an individual with an impairment actually faces are substantially limiting."[31]

The fact that other courts have maintained the contours of the ADA legislation reinforces the conclusion that Supreme Court disabilities cases are undeserving of the criticism leveled by advocacy groups. For instance, in *Nawrot v. CPC International*,[32] the plaintiff sufficiently demonstrated that his diabetes substantially limited "his ability to think and care for himself, which are both major life activities."[33] Likewise, a prosthesis may be the cause of a substantial limitation. In *Belk v. Southwestern Bell Telephone Co.*,[34] the court noted that, in addition to

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[25] Mark A. Rothenstein, *et. al.*, *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 Wash. U. L.Q. 243, 265 (2002).
[26] *Albertson's*, 527 U.S. at 566.
[27] *Id.* at 567.
[28] *Murphy*, 527 U.S. at 524.
[29] Lauren J. McGarity, *Disabling Corrections and Correctable Disabilities: Why Side Effects Might Be the Saving Grace of Sutton*, 109 Yale L.J. 1161, 1162 (2000).
[30] *Sutton*, 527 U.S. at 488.
[31] *Id.*
[32] 277 F.3d 896 (7th Cir. 2002).
[33] *Id.* at 905.
[34] 194 F.3d 946 (8th Cir. 1999)

having a "pronounced limp" because of residual effects from polio, the plaintiff's "full range of motion in his leg is limited by the brace" he wore for his condition.[35]

Even assuming that the courts have not struck the appropriate balance under the ADA, the proposed bill does not provide the "modest, reasonable legislative fix" called for by Senator Tom Harkin (D-IA) in response to the Supreme Court decisions.[36] H.R. 3195 drastically re-writes the ADA, without providing any degree of clarity to employers, employees, or the courts in resolving the basic issues of who is covered under the ADA, except, perhaps, indicating that everyone is to be covered.[37] The purpose of the ADA is to establish a clear and comprehensive prohibition of discrimination on the basis of disability and vigorous and effective remedies, and, in so doing, create a strong impetus for self-correction.[38]

H.R. 3195, as proposed, does not achieve this goal. Indeed, it moves the entire process into a mode predominated by litigation. The proponents of H.R. 3195 argue that the low success rate of charging parties at the EEOC and in court compels the sweeping changes contemplated by the bill. This argument lacks logic. It presumes that "success" is measured by lawsuits or that it is inconceivable that after seventeen years of experience under the ADA, employers might not understand their requirements and proactively move to meet them. Rather than acknowledging that the wisdom of President George H.W. Bush and Attorney General Thornburgh has been realized, the proponents of H.R. 3195 offer, instead, interminable individual litigation instead of cooperative problem resolution.

Because the definition of disability delineates the class of individuals protected by the ADA,[39] expanding the definition of disabled to include all individuals with a "physical or mental impairment" would change the scope of the ADA, and effectively negate the underlying legislative scheme intended to prevent, and, if necessary, remedy, disability discrimination. Currently, the ADA prohibits employers from discriminating "against a qualified individual with a disability because of the disability in regard to job application procedures, the hiring, advancement, or discharge of employees . . . ."[40] In addition, "discrimination" under the ADA includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee."[41]

The duty to provide reasonable accommodation is a fundamental component of the ADA given that the nature of discrimination faced by individuals is a result of a unique disability.

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[35] *Id.* at 950.

[36] Michael Sandler, *Bill Seeks to Broaden Definition of 'Disability'*, CQ.com, *available at* http://www.aapd-dc.org/News/adainthe/070727cq.htm.

[37] Mark A. Rothenstein, et. al., *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 Wash. U. L.Q. 243, 269-270.

[38] *See* 42 U.S.C. § 12101(b).

[39] Mark A. Rothenstein, et. al., *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 Wash. U. L.Q. 243, 296 (2002).

[40] 42 U.S.C. § 12112(a).

[41] *Id.* at § 12112(b)(5)(A).

Thus, the reasonable accommodation process requires the employer to engage in the interactive process and render an individualized assessment[42] to the disabled employee. The individualized assessment generally entails identifying the nature and extent of the impairment, the resulting limitations, the essential functions of the occupation, and the nexus between the worker's limitations and the essential functions. From there, employers and their employees collaborate to identify possible options, evaluate their efficacy, and determine the most reasonable solution.

If H.R. 3195 becomes law, every employee with an impairment will be entitled to reasonable accommodation from an employer for any limitation resulting from that "disability," except if the employer can show undue hardship. When one remembers the broad nature of accommodation, the results will be overwhelming to employers. Employers can expect significant increases in requests for leave, modified schedules, teleworking, exceptions to workplace policies, and removal of marginal functions. Every employee who wants leave (full day, half day, intermittent) for a cold, a headache, seasonal allergy, or a bad back could be entitled to such leave. There is no twelve-week cap on leave as there if for FMLA; for many employers it will be impossible to show undue hardship even when intermittent leave for such conditions is over twelve weeks.

Furthermore, this expanded right to reasonable accommodation for persons with minor impairments will force those with true disabilities to compete for certain limited accommodations. For example, there are likely to be occasions when two employees will compete for a reassignment, but there will be only one vacant job. That reassignment could well go to someone with a minor impairment rather than the person now covered under the ADA. Similarly, there are only so many parking spaces next to a door. A person with a sprained ankle could well make a request before the person who is a paraplegic, or missing a leg, or someone with severe emphysema. Nothing in the bill or ADA would require or even allow an employer to give preference to the person with the more serious condition; under the bill there would be no legal difference between the sprained ankle and paraplegia. While this problem does exist to some extent under current law, expanding the definition to include all impairments will exacerbate it.

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[42] Ten years after the passage of the ADA, Chai Feldblum described the great import of individualized assessments with respect to disability law:

> [I]ndividualized assessments lie at the very core of disability anti-discrimination law. Because one of the causes of discrimination faced by people with disabilities is stereotypes regarding what people with disabilities are capable of doing, it is critical that each person with a disability be assessed to determine his or her capacity to do a job. Moreover, because an employer is obliged to make those reasonable accommodations that will allow an employee to be qualified for a particular job, disability law presumes the need for intensive individualized assessments whenever reasonable accommodation is at issue.

Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 Berkley J. Emp. & Lab. L. 91, 151-2 (2000).

Furthermore, the bill will make it far easier to have class action lawsuits on a wide array of disability-related issues since there no longer will be any individualized assessment of "disability."

The underlying premise of the reasonable accommodation scheme is that the individual is first "qualified" under the ADA standards. Section 5 of H.R. 3195 strikes the requirement that an individual be "qualified" (*i.e.* able to perform the job with or without accommodation) before determining whether an employer must accommodate under the ADA. Instead, the legislation would place the burden on employers to prove that a disability discrimination plaintiff is "not qualified."[43]

By shifting the burden, which was fundamental to the consideration of the ADA, H.R. 3195 makes a nullity of the basis for joint examination of the job and the accommodation. By removing the requirement that an individual first be "qualified," H.R. 3195 provides no logical basis to retain the current statutory structures of the ADA, including the interactive process and individualized assessment, that have proven so valuable in advancing the rights of disabled individuals. It is these special features of the ADA not found in other non-discrimination laws which makes the ADA particularly directed to the needs of the disabled. The proposed legislation would eviscerate the special protections by an unreasonable stroke of a pen.

The "ADA Restoration Act of 2007" would radically expand the ADA's coverage by redefining the term "disabled" By changing the definition of "disability" the proposed legislation, in turn, alters the scope of the ADA so as to make it almost unrecognizable. The interests of the employment community and the disabled individuals that the ADA is meant to protect are not mutually exclusive. The Chamber of Commerce recognizes that any statutory scheme deserves reexamination after seventeen years of experience. However, it rejects the notion that the long experience under the Rehabilitation Act of 1973 and the ADA be tossed aside and replaced by a litigation regime not focused on the universally lauded goal of full inclusion of qualified individuals with disabilities into the mainstream of American life.

[43] ADA Restoration Act of 2007, H.R. 3195, 110th Cong. § 5 (2007).

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Federal Contract Compliance Programs
WASHINGTON, D.C. 20210

January 27, 1977

AN EXPRESSION OF APPRECIATION
to
OUR FIRST DIRECTOR, OFCCP

The Veterans and Handicapped Operations Division is indeed grateful to you,

LAWRENCE Z. LORBER
Director, OFCCP
Deputy Assistant Secretary, ESA

For your strong leadership and guidance in developing a totally new program of Affirmative Action for the Handicapped, Vietnam Era and Disabled Veterans, we especially appreciate:

The overall thrust in developing program policies that will impact on the future of an effective Affirmative Action Program for Veterans and the Handicapped, in putting necessary procedures in motion;

Your persistence in the development and issuance of the Handicapped and Veteran Regulations in a timely manner for a new program and still incorporating suggestions from both contractors and constituency groups;

The establishment of the principle of job related medical requirements in the regulations which set the stage for elimination of "systemic discrimination;"

Your vigorous pursuit of the legal principle of law and justice in pursuing "back pay" as an action to remedy discrimination against Veterans and the Handicapped;

Your invaluable legal experience and the application of legal principles in the preparation of cases for sanctions;

Your recognition of the uniqueness of the program by reliance on the Veteran and Handicapped Staff's expertise in accepting many of our independent decisions that have far reaching implications;

and we are particularly appreciative for your

Personal interest in the daily problems faced by the staff and for your frequent informal visits and close inter-relationship with staff at all levels.

United States House of Representatives
Committee on the Judiciary
John Conyers, Jr., Chairman

"Truth in Testimony" Disclosure Form

Clause 2(g)(4) of Rule XI of the Rules of the House of Representatives require the disclosure of the following information by witnesses appearing in a nongovernmental capacity.

Hearing: ADA Restoration Act of 2007

Date: October 4, 2007

1. Name:
Lawrence Z. Lorber

2. Entity(ies) you are representing:
United States Chamber of Commerce

3. Business Address and Telephone Number:
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4. Have you received any Federal grants or contracts (including any subgrants and subcontracts) during the current fiscal year or either of the two preceding fiscal years that are relevant to the subject matter on which you have been invited to testify?

☐ YES ☒ NO

5. Have any of the entities that you are representing received any Federal grants or contracts (including any subgrants or subcontracts) during the current fiscal year or either of the two preceding fiscal years that are relevant to the subject matter on which you have been invited to testify?

☐ YES ☒ NO

6. If you answered "yes" to either item 4 or 5, please list the source (by agency and program) and amount of each grant, subgrant, contract, or subcontract, and indicate whether the recipient of such grant was you or the entity(ies) you are representing. *(Please use additional sheets if necessary)*

7. Signature: Lawrence Z. Lorber Date: Oct 3, 2007