

ADA Restoration

Keeping the Promise to End Unfair Employment Discrimination

Congress passed the ADA sixteen years ago with overwhelming support from both parties and President George H.W. Bush. Congress's intent was clear: make this great nation's promise of equality and freedom a reality for Americans with disabilities.

Standing together, leaders from both parties described the law as "historic," "landmark," an "emancipation proclamation for people with disabilities."¹ These were not timid or hollow words. Congress's mandate was ambitious: prohibit unfair discrimination and require changes in workplaces, public transportation systems, businesses, and other programs or services.

Through this broad mandate, Congress intended to protect anyone who is treated less favorably because of a current, past, or perceived disability. As with other civil rights laws, Congress wanted to focus on whether an individual could prove that he or she had been treated less favorably because of a personal characteristic that is prohibited from being considered in employment decisions (e.g., race or sex for Title VII and disability for the ADA). Congress never intended for the courts to seize on the definition of "disability" as a means of excluding individuals with serious health conditions like epilepsy, diabetes, cancer, HIV, muscular dystrophy, and multiple sclerosis.

Yet this is exactly what has happened. Through a series of decisions interpreting the definition of "disability" narrowly, the Supreme Court has inappropriately shifted the focus away from an employer's alleged misconduct and onto whether an individual can first meet a "demanding standard for qualifying as disabled."²

THE COURTS HAVE NOT INTERPRETED THE ADA AS CONGRESS INTENDED

The courts have misinterpreted the definition of "disability," which Congress borrowed from Section 504 of the Rehabilitation Act of 1973 because the courts already had interpreted Section 504 generously. Section 504 and the ADA prohibit discrimination against individuals with disabilities and define "disability" to mean –

- (A) a physical or mental impairment that substantially limits one or more major life activities;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.³

Instead of following Congressional expectations that this definition would continue to be interpreted broadly, however, the Supreme Court decided that the terms "*substantially limits*" and "*major life activities*" "*need to be interpreted strictly to create a demanding standard for qualifying as disabled.*" (*Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002)).

In a trio of earlier cases, all decided on June 22, 1999, the Supreme Court already had 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. (*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)).

This has created an absurd and unintended Catch-22: people with serious health conditions like epilepsy or diabetes who are fortunate to find treatment that makes them more capable and independent – and more able to work – may find they are not protected by the ADA at all because limitations from their impairments are not considered substantial enough. Either, the courts say the person is impaired but not impaired *enough to substantially* limit a major life activity (like walking or working), *or* they say the impairment substantially limits something—like liver function—that does not qualify as a “major life activity.” Courts even deny ADA protection when the employer freely admits that it terminated the individuals because of their disabilities. This is not what Congress intended.

**THE COURTS HAVE EXCLUDED INDIVIDUALS
THAT CONGRESS INTENDED TO PROTECT**

Congress never intended to exclude people like Mary Ann Pimental, Carey McClure, Stephen Orr, or James Todd. Their stories are among those collected in a companion document (“The Effect of the Supreme Court’s Decisions on People with Disabilities”), which demonstrate the problem created by the courts’ misinterpretation of the definition of disability. These stories make it clear that this problem is not limited to a single judge, employer, or geographic area. Indeed, studies show that plaintiffs lose more than 90% of ADA claims, mostly on the ground that they do not meet the definition of “disability” and are therefore not protected by the ADA.⁴ This is a nationwide problem that requires an appropriate Congressional fix.

CONGRESSIONAL ACTION IS NEEDED

Millions of Americans who experience disability-based discrimination have been or will be denied protection of the ADA and barred from challenging discriminatory conduct. It’s time to correct problems with the definition of “disability” created by the courts.

Congress should take action to restore its original intent by:

- ✓ amending the definition of “disability” so that individuals who Congress originally intended to protect from discrimination are covered under the ADA;

- ✓ preventing the courts from considering “mitigating measures” when deciding whether an individual qualifies for protection under the law;
- ✓ keeping the focus in employment cases on the reason for the adverse action. The appropriate question is whether someone can show that he or she was treated less favorably “on the basis of disability” and not whether an individual has revealed enough private, highly personal and potentially embarrassing facts to demonstrate how he or she is limited by an impairment; and
- ✓ reminding the courts that – as with any other civil rights law – the ADA must be interpreted fairly and as Congress intended.

THESE CHANGES WILL RESTORE – NOT EXPAND – THE ADA
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In passing the ADA, Congress protected anyone who actually has a limiting impairment or a “record of such an impairment” *and* anyone who has been perceived as (“regarded as”) having an impairment. Congress expected that, as with other civil rights laws, the courts would focus on whether a person who has been discriminated against has proven that the discrimination was based on a personal characteristic such as race, sex, religion, or disability, *not* on whether he or she has proven that the characteristic actually exists..

Congress did not intend for employers to waste time and money reviewing detailed medical records, or for employees or applicants to waste time and money hiring medical experts to show that their disability is sufficiently limiting. Yet individuals with disabilities are often forced to go through all of this – sometimes even before an employer will agree to consider a requested accommodation.

The courts have gotten it wrong. And it’s time for Congress to respond.

Our ADA Restoration proposal would ensure that the focus remains on whether an individual can show that he or she was treated less favorably “on the basis of disability.” It is modeled on recommendations for fixing the problems with the definition of “disability” from the National Council on Disability, a federal agency charged with making recommendations to the President and Congress. In a series of policy reports, NCD has documented and explained the problems created by the courts’ failure to interpret the law as Congress intended. In its 2004 *Righting the ADA* report, NCD called for a legislative fix from Congress.⁵

**THE RESTORATION ACT IS AN APPROPRIATE RESPONSE TO THE
COURTS' MISINTERPRETATION OF THE LAW**

ADA Restoration will not cause an explosion in disability litigation. Like other civil rights laws, plaintiffs will still be required to prove that the alleged discrimination occurred on the basis of their disability. Additionally, an employer may defend against a discrimination claim by proving that an individual is not otherwise qualified to do the job.

¹ For example, President George H.W. Bush described the ADA as a “landmark” law, an “historic new civil rights Act . . . the world’s first comprehensive declaration of equality for people with disabilities.” See Remarks of President George Bush at the Signing of the Americans with Disabilities Act, available at <http://www.eeoc.gov/ada/bushspeech.html>. 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/rightingthead.htm>.

² *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002)

³ See 42 U.S.C. § 12102(2) (ADA); 29 U.S.C. § 705(20)(B) (Sec. 504).

⁴ See Amy L. Allbright, 2004 *Employment Decisions Under the ADA Title I – Survey Update*, 29 Mental & Physical Disability L. Rep. 513, 513 (July/August 2005) (stating that in 2004, “[o]f the 200 [employment discrimination] decisions that resolved the claim (and have not yet been changed on appeal), 97 percent resulted in employer wins and 3 percent in employee wins”).

⁵ See, National Council on Disability, *Righting the ADA* (Dec. 1, 2004), available at http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm.