

Legislative and Regulatory History -- Foundation for the National Council on Disability's (NCD) Proposed ADA Restoration Act*

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* This document examines only those portions of NCD's proposed ADA Restoration Act pertaining to problems with the definition of disability. NCD's proposed ADA Restoration Act is set forth in its entirety in NCD's "Righting the ADA" Report (2004), available on the Consortium for Citizens with Disabilities' website, at www.c-c-d.org/ADA.

FINDINGS

DRAFT LANGUAGE	LEGISLATIVE HISTORY (1990)	REGULATORY HISTORY	COMMENTS
<p><u>Section 2 of the ADA Restoration Act:</u> (a) Findings.—The Congress finds that —</p> <p>(1) in enacting the ADA of 1990, Congress intended that the Act “establish a clear and comprehensive prohibition of discrimination on the basis of disability,” and provide broad coverage and vigorous and effective remedies without unnecessary and obstructive defenses;</p>	<p>House Committee on Education and Labor, Report 101-485 <u>Page 28</u>: “[T]here exists a need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability...”</p> <p>Senate Committee on Labor and Human Resources, Report 101-116 <u>Page 20</u>: “There is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life.”</p>		
<p>(2) some decisions and opinions of the Supreme Court have unduly narrowed the broad scope of protection afforded in the ADA, have eliminated or narrowed remedies meant to be available under the Act, and have recognized certain defenses that run counter to the purposes of the Act;</p>			<p><i>See, CRS Report for Congress, March 9, 2006</i></p> <ul style="list-style-type: none"> • <i>Sutton v. United Air Lines</i>, 527 U.S. 471 (1999) • <i>Albertsons, Inc. v. Kirkingburg</i>, 527 U.S. 555 (1999); • <i>Murphy v. United Postal Service, Inc.</i>, 527 U.S. 516 (1999); and • <i>Toyota Motor Manufacturing v. Williams</i>, 534 U.S. 184 (2002).

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(3) in enacting the ADA, Congress recognized that physical and mental impairments are natural and normal parts of the human experience that in no way diminish a person's right to fully participate in all aspects of society, but Congress also recognized that people with physical or mental impairments having the talent, skills, abilities, and desire to participate in society are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;	<p>House Committee on the Judiciary, Report 101-485, Page 25: "Gradually, public policy affecting persons with disabilities recognized that many of the problems faced by disabled people are not inevitable, but instead are the result of discriminatory policies based on unfounded, outmoded stereotypes and perceptions, and deeply imbedded prejudices toward people with disabilities."</p> <p>Senate Committee on Labor and Human Resources, Report 101-116, Page 8: "A major obstacle to achieving the societal goals of equal opportunity and full participation of individuals with disabilities is the problem of discrimination....The severity and pervasiveness of discrimination against people with disabilities is well documented." (Quoting NCD)</p> <p><i>See Also:</i> House Committee on Education and Labor, Report 101-485, page 29-30</p> <p>Senate Committee on Labor and Human Resources, Report 101-116, page 7</p>	HISTORY	<p><i>See related acts:</i> I.D.E.A. § 601(c), 20 U.S.C. §1400(c) Rehabilitation Act of 1973 § 2(a)(3), 29 U.S.C. § 701(a)(3).</p>
(4) Congress modeled the ADA definition of disability on that of Section 504 of the Rehabilitation Act of 1973, which had to the time of the ADA's enactment been construed	<p>House Committee on the Judiciary, Report 101-485 Page 27: "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 [and] it would not be possible to guarantee</p>		

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<p>broadly to encompass both actual and perceived limitations, and limitations imposed by society; the broad conception of the definition had been underscored by the Supreme Court's statement in its decision in <i>School Board of Nassau County v. Arline</i>, 480 U.S. 273, 284 (1987), that the Section 504 definition "acknowledged that society's myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment";</p>	<p>comprehensiveness by providing a list of specific disabilities."</p> <p>Senate Committee on Labor and Human Resources, Report 101-116 <u>Page 21</u>: "The definition of the term 'disability' is comparable to the definition of 'individuals with handicaps' in section 7(8)(B) of the Rehabilitation Act of 1973 and section 802(h) of the Fair Housing Act. "It is the Committee's intent that the analysis of the term 'individuals with handicaps' by the Department of Health, Education, and Welfare of the regulations implementing section 504 and the analysis by the Department of Housing and Urban Development of the regulations implementing the Fair Housing Act of 1988 apply to the definition of the term 'disability' included in this legislation."</p> <p><i>See Also: House Committee on Education and Labor, Report 101-485, page 50</i></p> <p>Discussion of <i>Arline</i>, pages 12, 14</p> <p>Senate Committee on Labor and Human Resources, Report 101-116 <u>Page 22</u>: "For example, a person who is paraplegic will have a substantial difficulty in the major life activity of walking; a deaf person will have substantial difficulty in hearing aural communications; and a person with lung disease will have a substantial limitation</p>	<p>HISTORY</p> <p>HEW Analysis § 504 Regulations 1977 <u>Page 84.3</u>: "Comments suggested narrowing the definition [of 'handicapped person'] in several ways....The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps."</p> <p>HUD Regulations: Fair Housing and Equal Opportunity Jan. 23, 1989 <u>Page 3245</u>: "[C]ommenters are concerned that these paragraphs broaden the definition of handicap 'far beyond' the intent of Congress as expressed in the plain language of the statute. Congress intended that the definition of 'handicap' be fully as broad as that provided by the Rehabilitation Act."</p> <p>EEOC Compliance Manual (No. 915.002) March 14, 1995 <u>Page 902-21</u>: "[Under Section 504,] courts accepted without</p>	

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	<p>in the major life activity of breathing.” House Committee on the Judiciary, Report 101-485 Page 28-29: “[A] paraplegic is substantially limited in the major life activity of walking, a person who is blind is substantially limited in the major life activity of seeing, and a person who is mentally retarded is substantially limited in the major life activity of learning. Persons infected with the Human Immunodeficiency Virus are considered to have an impairment that substantially limits a major life activity and thus are considered disabled under this first test of the definition....[A] person with epilepsy has an impairment which substantially limits a major life activity.”</p>	<p>discussion of that a person was an individual with a disability when the impairment was insulin-dependent diabetes, legal blindness, deafness, manic depression syndrome, and alcoholism. Further, according to the legislative history, an individual who has HIV Infection (including asymptomatic HIV Infection) is an individual with a disability.” (citations omitted)</p>	
<p>(5) in adopting the Section 504 concept of disability in the ADA, Congress understood that adverse action based on a person’s physical or mental impairment might have nothing to do with any limitations caused by the impairment itself;</p>	<p>See discussion of Prong 3 below, pages 12-15.</p>		
<p>(6) instead of following congressional expectations that disability would be interpreted broadly in the ADA, the Supreme Court has ruled, in <i>Toyota Motor Manufacturing, Kentucky, Inc. v. Williams</i>, 534 U.S.</p>			<p>CRS Report for Congress March 9, 2006 Page CRS-6: “Finding that these terms are to be ‘interpreted strictly, the Court held that ‘to be substantially limited in performing manual tasks, an individual must have an</p>

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184, 197 (2002), that the elements of the definition “need to be interpreted strictly to create a demanding standard for qualifying as disabled,” and, consistent with that view, has narrowed the application of the definition in various ways;			impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.’ Significantly, th Court also stated that ‘[t]he impairment’s impact must be permanent or long term.’”
(7) contrary to explicit congressional intent expressed in the ADA committee reports, the Supreme Court has eliminated from the Act’s coverage individuals who have mitigated the effects of their impairments through the use of such measures as medication and assistive devices;	<i>See</i> , Discussion on pages 16-17 <i>See Also: House Committee on Education and Labor, Report 101-485, page 52</i> <i>House Committee on the Judiciary, Report 101-485, page 28</i> <i>Senate Committee of Labor and Human Resources, Report 101-116, page 23</i>		CRS Report for Congress, March 9, 2006 <u>Page CRS-2</u>: “The Court, in the landmark decision of <i>Sutton v. United Airlines</i> and in <i>Murphy v. United Parcel Service, Inc.</i> , held the ‘determination of whether an individual is disabled should be made with reference to measures that might mitigate the individual’s impairment...’ The <i>Sutton</i> court stated: ‘a disability exists only where an impairment ‘substantially limits’ a major life activity, not where it ‘might,’ ‘could,’ or ‘would’ be substantially limiting if mitigating measures were not taken.’

DRAFT LANGUAGE	DEFINITION LEGISLATIVE HISTORY (1990)	REGULATORY HISTORY	COMMENTS
<p><u>Section 3 of the ADA (as amended):</u></p> <p>(a) Discrimination.—References in the ADA to discrimination “against an individual with a disability” or “against individuals with disabilities” shall be replaced by references to discrimination “on the basis of disability” at each and every place that such references occur.</p> <p><u>Example:</u> § 102 of ADA:</p> <p>(a) GENERAL RULE.—No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.</p>	<p>See the discussion of the legislative history contained in this document which illustrates, contrary to recent Supreme Court holdings, Congress’ intent to focus on the discrimination against an individual on the basis of disability. In other words, the ADA was designed to protect individuals who are discriminated against because of the negative attitudes of others toward them, whether or not they have an actual physical or mental impairment.</p>		

PRONG 1

DRAFT LANGUAGE	LEGISLATIVE HISTORY (1990)	REGULATORY HISTORY	COMMENTS
<p><u>Section 3 of ADA (as amended):</u> (2) Disability.— (A) In General.— The term “disability means, with respect to an individual (i) a physical or mental impairment;</p> <p>(3) Physical or mental impairment.—The term “physical or mental impairment” means— “(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic</p>	<p>Senate Committee on Labor and Human Resources, Report 101-116 <u>Page 22</u>: “A physical or mental impairment means – (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” House Committee on the Judiciary, Report 101-485 <u>Page 28</u>: This means any physiological disorder or condition, cosmetic disfigurement, or anatomic loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including</p>	<p>28 CFR 35.104(1)(i): The phrase physical or mental impairment means -- (A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; (B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities; (C) The phrase physical or</p>	

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<p>brain syndrome, emotional or mental illness, and specific learning disabilities.</p>	<p style="text-align: center;">HISTORY (1990)</p> <p>speech organs; cardiovascular; reproductive, digestive; genitor-urinary; hemic and lymphatic; skin; and endocrine. It also means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. <i>See also: House Committee on Education and Labor, Report 101-485, page 50</i></p>	<p style="text-align: center;">HISTORY</p> <p>mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism</p>	

PRONG 2

DRAFT LANGUAGE	LEGISLATIVE HISTORY (1990)	REGULATORY HISTORY	COMMENTS
<p>(2)(A)(ii) a record of a physical or mental impairment; or</p> <p>(4) Record of physical or mental impairment.—The terms “record of a physical or mental impairment” or “record of impairment” means having a history of, or having been misclassified as having, a physical or mental impairment.</p>	<p>House Committee on Education and Labor Report 101-485 Page 52: This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment. Discrimination on the basis of such a past impairment would be prohibited under this legislation. Frequently occurring examples are persons with histories of mental or emotional illness, heart disease, or cancer; examples of the second group are persons who have been misclassified as mentally retarded.</p> <p><i>See also:</i> House Committee on the Judiciary, Report 101-485 page 29 Senate Committee on Labor and Human Resources Report 101-116 page 22</p>	<p>EEOC Compliance Manual (No. 915.002) March 14, 1995 Page 902-43: The term “disability” covers persons who are not, and may have never actually been, impaired but nonetheless have been misclassified as having a disability. Thus, school or other institutional documents labeling or classifying an individual as having a substantially limiting impairment would establish a “record” of disability.</p> <p>Preamble to Final Rule (28 CFR Part 35) Implementing Title II of the ADA, 56 FR 35699 (July 26, 1991) This test is intended to cover those who have a record of an impairment. As explained in paragraph (3) of the rule's definition of disability, this includes a person who has a history of an impairment... such as someone who has recovered from an impairment. It also includes persons who have been misclassified as having an impairment.</p>	

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This provision is included in the definition in part to protect individuals who have **recovered** from a physical or mental impairment that previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment is prohibited. Frequently occurring examples of the first group (those who have a history of an impairment) are persons with histories of mental or emotional illness, heart disease, or cancer; examples of the second group (those who have been misclassified as having an impairment) are persons who have been misclassified as having mental retardation or mental illness.”

PRONG 3

DRAFT LANGUAGE	LEGISLATIVE	REGULATORY	COMMENTS
<p>(2)(A)(iii) a perceived physical or mental impairment.</p> <p>(5) Perceived physical or mental impairment.—The terms “perceived physical or mental impairment” or “perceived impairment” mean being regarded as having or treated as having a physical or mental impairment.”</p>	<p>HISTORY (1990) Senate Committee on Labor and Human Resources Report 101-116 <u>Page 23</u>: “The third prong of the definition includes an individual who is regarded as having a covered impairment. This third prong includes an individual who has a physical or mental impairment, but that is treated by a covered entity as constituting such a limitation. “The rationale for this third prong was clearly articulated by the U.S. Supreme Court in <i>School Board of Nassau County v. Arline</i>. The court noted that Congress included this third prong because it was as concerned about the effect of an impairment on others as it was about its effect on the individual. As the Court noted, the third prong of the definition is designed to protect individuals who have impairments that do not in fact substantially limit their functioning.” <u>Page 24</u>: “This third prong is particularly important for individuals with stigmatic conditions.... “Another important goal of the third prong of the definition is to ensure that persons with medical conditions that are under control and that therefore do not currently limit major life activities are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they</p>	<p>HISTORY EEOC Compliance Manual (No. 915.002) March 14, 1995 <u>Page 902-43</u>: “The inclusion of persons regarded as having a substantially limiting impairment reflects Congressional intent to protect all persons who are subjected to discrimination based on disability, even if they do not in fact have a disability. It also reflects a recognition by Congress that the reactions of others to an impairment or a perceived impairment can be just as disabling as the limitations cause by an actual impairment. As noted in the legislative history of the ADA, the United States Supreme Court effectively explained the rationale for this aspect of the definition of the term ‘disability’ in <i>School Bd. Of Nassau County v. Arline</i>. The court stated, ‘By amending the definition of ‘handicapped individual’ to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a</p>	

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are qualified. Such denials are the result of negative attitudes and misinformation.
“Other examples of individuals who fall within the ‘regarded as’ prong of the definition include people who are rejected for a particular job for which they apply because of findings of a back abnormality on an x-ray, notwithstanding the absence of any symptoms, or people who are rejected for a particular job solely because they wear hearing aids, even though such people may compensate substantially for their hearing impairments by using their aids, speech reading, and a variety of other strategies.
“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 towards 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.”

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major life activity, Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.’ In contrast to the first two parts of the statutory definition of the term “disability,” this part of the definition is directed at the employer rather than at the individual alleging discrimination.
“The issue is whether the employer treats the individual as having an impairment that substantially limits major life activities. The individual is covered by this part of the definition if (s)he can show that the employer made an employment decision because of a **perception** of disability based on ‘myth, fear or stereotype’ If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of ‘myth, fear or stereotype’ can be drawn.

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House Judiciary Committee Report 101-485 Page 30: “This test applies whether or not a person has an impairment, if the person was **treated** as if he or she had an impairment that substantially limits a major life activity.
“The rationale for this third test, as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in *School Board of Nassau County v. Arline*. ‘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.’
“The Court concluded that, by including this test, ‘Congress acknowledged that society’s accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from the actual impairment.’
“It is not necessary for the covered entity to articulate one of these concerns. In the employment context, if a person is disqualified on the basis of an actual or **perceived** physical or mental condition, and the employer can articulate no legitimate reason for the rejection, a **perceived** concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the ‘regarded as test.’”
House Committee on Education and Labor Report 101-485 Page 53:

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“The legislative history to the Act makes clear that the individual does not have to demonstrate that the employer’s perception is wrong. As the legislative history notes, “A person who is covered because of being regarded as having an impairment is not required to show that the employer’s **perception** is inaccurate.”
Preamble to the Final Rule (28 CFR Part 35)
Implementing Title II of the ADA 56 FR 35700 (July 26, 1991) “A person would be covered under this test if a public entity refused to serve the person because it perceived that the person had an impairment that limited his or her enjoyment of the goods or services being offered.
“For example, persons with severe burns often encounter discrimination in community activities, resulting in substantial limitation of major life activities. These persons would be covered under this test based on the attitudes of others towards the impairment, even if they did not view themselves as ‘impaired.’”

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“The third prong of the definition includes an individual who is **regarded** as having a covered impairment....
This third prong is particularly important for individuals with stigmatic conditions that are viewed as physical impairments but do not in fact result in a substantial limitation of a major life activity.”

DRAFT LANGUAGE	MITIGATING MEASURES LEGISLATIVE	REGULATORY	COMMENTS
<p>(2)(B) Construction —</p> <p>(i) The existence of a physical or mental impairment, or a record or perception of a physical or mental impairment, shall be determined without regard to mitigating measures;</p> <p>(ii) The term “mitigating measure” means any treatment, medication, device, or other measure used to eliminate, mitigate, or compensate for the effect of an impairment, and includes prescription and other medications, personal aids and devices (including assistive technology devices and services), reasonable accommodations, or auxiliary aids and services; and</p> <p>(iii) actions taken by a covered entity because of a person’s use of a mitigating measure or because of a side effect or other consequence of</p>	<p>HISTORY (1990) House Committee on Education and Labor, Report 101-485 <u>Page 52</u>: “Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonably 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 under the first prong of the definition, even if the effects of the impairment are controlled by medication.”</p> <p>House Committee on the Judiciary, Report 101-485 <u>Page 28</u>: “The impairment should be assessed without considering whether the mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation. For example, a person with epilepsy, an impairment which substantially limits a major life activity, is covered under this test, even if the effects of the impairment which substantially limits a major life activity, is also covered, even if the hearing loss is corrected by the use of a hearing aid.”</p> <p>Senate Committee of Labor and Human Resources, Report 101-116 <u>Page 23</u>: “Moreover, whether a person has a disability should be assessed without</p>	<p>HISTORY EEOC Amicus Brief for Murphy v. UPS, Inc., 1998 <u>Page 5</u>: “The fact that petitioner takes medication to relieve his condition may be relevant to a number of inquiries under the ADA....But the fact that he takes mitigating measures is of no relevance in the threshold inquiry as to whether he his disabled.”</p> <p>EEOC Compliance Guide <u>Page 902-35</u>: “The determination of whether a condition constitutes an impairment must be made without regard to mitigating measures. The availability of reasonable accommodation or auxiliary aids such as hearing aids to alleviate the effects of a condition has no bearing on whether the condition is an impairment....Similarly, individuals with impairments (such as epilepsy or diabetes) that substantially limit major life activities are individuals with disabilities, even if medication controls the effects of the impairment.”</p>	

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the use of such a measure shall be considered “on the basis of disability.”	regard to the availability of mitigating measures , such as reasonable accommodations or auxiliary aids.”		