FREQUENTLY ASKED QUESTIONS
ABOUT THE ADA RESTORATION ACT OF 2007

1. What is the problem with the coverage of people with disabilities under the current Americans with Disabilities Act (ADA) that needs to be fixed?

The Supreme Court and the lower courts have dramatically changed the meaning of "disability" under the ADA over the past eight years – since the *Sutton v. United Airlines* decision – so as to make it almost *unrecognizable*.

Courts have ruled that people with epilepsy, diabetes, intellectual and developmental disabilities, muscular dystrophy, and cancer (among many others) are **not "disabled"** for purposes of the ADA. **This is not what Congress intended when it passed the ADA in 1990.**

- ► Studies show that plaintiffs lose 97% of ADA employment discrimination claims,[*] *mostly on the grounds that they do not meet the definition of "disability."* These individuals are not even given the opportunity to show they can do the job and were treated unfairly because of their medical condition.

2. If this was not the intent of Congress in passing the ADA, how did this problem in coverage come about?

The Supreme Court cases shrinking coverage under the ADA are used in law schools across the country as textbook examples of how language passed by Congress to mean one thing can be interpreted by judges to mean an entirely different thing.

The definition of disability that Congress used in the ADA is the *same definition* that had already existed in Section 504 of the Rehabilitation Act of 1973 for over fifteen years: "a physical or mental impairment that substantially limits one or more major life activities." That definition had been interpreted broadly by the courts to include people with physical and mental impairments such as epilepsy, diabetes, intellectual and developmental disabilities, muscular dystrophy, and HIV infection.

Congress expected **that this definition would continue to be read broadly under the ADA.** In particular, Congress pointed out in legislative history that the use of medication should not be taken into account when determining whether an individual has a disability. Congress also emphasized in the legislative history that courts had ruled that even people who are not *actually* limited by their conditions but who experience adverse treatment because of fear, stigma, and misunderstanding are covered under the ADA. **Congress did not expect its legislative history, and prior case precedent, to be ignored.**

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[*] *See* 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 resulted in employer wins and 2.8 percent in employee wins").

But it was. **The Supreme Court *ignored* all of the legislative history and past case precedent, and came up with a new interpretation for the language of the ADA.** For example, in the key decision that has limited coverage for people with disabilities, *Sutton v. United Airlines*, the Supreme Court ruled that if medicines or devices help individuals function despite their physical or mental impairments, such individuals will likely *not be covered under the ADA* because these "mitigating measures" remove them from the category of people with "disabilities."

- ► So, for example, if you're fired or not hired because you have epilepsy or diabetes, but you're doing everything you can to effectively manage your condition with medication, you very well may not be able to challenge the discrimination because you may not be considered "disabled" within the meaning of the ADA. Ironically, the better you manage your medical condition – and thus the more employable you become – the less likely you are to be protected from discrimination, even if your employer admits that he or she didn't hire you *because of* your medical condition.

A few years after the *Sutton* case, the Supreme Court decided another case in which it concluded 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." (*Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*) As a result of that case, individuals 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:

- ► If you have muscular dystrophy and you can't lift your arms above your head, but you're able to brush your teeth and wash your hair by supporting one arm with the other – you're not *prevented/severely restricted* from doing these life activities and therefore you're not "disabled" under the ADA.

- ► 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're not *prevented/severely restricted* from sleeping and therefore you're not "disabled."

- ► If you've got cirrhosis of the liver caused by Hepatitis B, you are not "disabled" because liver function isn't a "major" life activity like eating or sleeping.

3. Isn't the ADA Restoration Act of 2007 an expansion – not a restoration – of Congressional intent?

No. As Congressman Steny Hoyer stated when he 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." The courts have spent an exorbitant amount of time parsing the question of whether a person is really "disabled," when the real question is whether the person was treated *unfairly* on the *basis of* an irrelevant personal characteristic (disability). Courts do not require people alleging race or sex

discrimination under other civil rights laws to first prove their race or gender – instead, they look at whether race or gender was the basis for the adverse action. Under the ADA, however, before a court will hear a person's discrimination claim, the person is currently required to first prove in excruciating detail how "disabled" he or she is. This is *not* what Congress intended in the *original* ADA.

Instead, as Congressman Jim Sensenbrenner said when he joined Mr. Hoyer in the introduction of the ADA Restoration Act of 2007, this bill helps ensure that the ADA takes its rightful place among other civil rights laws, and "will force courts to focus on whether a person has experienced discrimination 'on the basis of disability,' rather than require individuals to demonstrate that they fall within the scope of the law's protection" at all. That was what Congress originally intended – to focus a spotlight on unfair discrimination against people with a broad range of disabilities.

When Congress passed the ADA, when President George H. W. Bush signed the law, and when Attorney General Dick Thornburgh promulgated regulations to implement the law, the intent of the ADA was crystal clear – the law was intended to apply to *everyone* who experienced discrimination on the basis of disability, not just those with severe disabilities. By extending protection to individuals who were not *actually* disabled but who were instead "regarded as" disabled by their employers, Congress tried to make clear that the ADA protected everyone who experienced disability-based discrimination, even those who may not have considered themselves to have a disability or who may not have actually *had* any disability. Thus, even individuals with relatively minor impairments were intended to be covered under the ADA *if* they were discriminated against for no other reason than *because of* such an impairment.

But Congress was not clear enough. The Supreme Court and the lower courts have destroyed this initial broad intent of the law by telling people with a range of physical or mental impairments that they are not "disabled enough" to be protected from discrimination. The ADA Restoration Act *restores Congressional intent* by shifting the focus to whether an individual can prove that he or she *was discriminated against <u>because of</u> an impairment*, and not on the particular severity of the impairment.

4. Why is it so wrong for courts to take mitigating measures into account, or to be strict about the interpretation of "substantially limits a major life activity," when determining whether a person has a disability? Isn't the standard of what is a disability supposed to be high?

It depends on the *purpose* of the law. Under Social Security disability law – where 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.

In the civil rights context, taking into account the medications, devices, or other interventions a person uses in order to determine whether he or she can challenge discrimination is completely inconsistent with the purpose of the law. In addition, requiring a person to meet an extremely high standard for qualifying as "disabled" means that people are being forced to reveal private, highly personal, and potentially embarrassing facts to employers and judges about the various ways the individual's impairment impacts daily living, in order to demonstrate the severity of disability. Even so, many individuals with a broad range of impairments are being told they are not "disabled enough" to be protected by the law. Congress did not intend this result.

5. Why isn't the third prong of the current definition of the ADA – which covers anyone who is "<u>regarded as</u>" having "such a physical or mental impairment" – sufficient to cover anyone who is fired <u>because of</u> a particular impairment?

That was certainly the intent of Congress in 1990 when it included the "regarded as" prong of the definition of disability in the law. Indeed, in 1987, the Supreme Court ruled that a person who was fired from one job because of her physical condition was "regarded" by the employer as being unable to work and was, therefore, covered under Section 504. (*School Board of Nassau County v. Arline*) Both the House and Senate committee reports to the ADA cited the *Arline* case as an example of the broad coverage Congress expected to see under the "regarded as" prong of the definition of disability.

But in the *Sutton* case, the Court essentially overruled this aspect of the *Arline* case. In *Sutton*, the Court 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 life activity of working. Rather, in order to be covered under the third prong, the individual was required to prove that the employer thought that the individual was incapable of performing *a broad range of jobs*.

- ► So if your employer fires you on account of your diabetes because he or she thinks it will prevent you from doing your job, the ADA doesn't protect you unless you can show that your employer *also* believed that you were incapable of performing a *broad range of jobs* – not just the job from which you were fired.

6. How does the ADA Restoration Act of 2007 fix this problem created by the courts?

The ADA Restoration Act of 2007 eliminates the language from the definition of disability – "substantially limits a major life activity" – that has been the justification relied on by the courts to exclude individuals with a range of impairments from coverage under the ADA. The bill also explicitly prevents the courts from considering "mitigating measures" when deciding whether an individual has a physical or mental impairment.

The definition of disability in the ADA Restoration Act mirrors language proposed by the National Council on Disability (NCD), an independent federal agency composed of 15 members appointed by Republican administrations. NCD is charged with making recommendations to the President and Congress on disability policy issues.

As an overall matter, the bill focuses a court's attention on the *reason* for the adverse action ("on the basis of disability") rather than on the person's physical or mental condition, and reminds courts that – as with any other civil rights law – the ADA must be interpreted fairly and as Congress intended.

7. Won't this new definition of disability mean the courts will become overloaded with cases alleging disability-based discrimination?

No. In order to make out a claim under the ADA, a person must still show that he or she has a physical or mental impairment *and* was discriminated against *because of* that impairment. The ADA Restoration Act does not change this – the burden remains on the **plaintiff** to prove that the discrimination occurred for a reason that is illegal under the ADA. One can reasonably expect that most lawyers will bring cases under the new definition only if they believe they can prove that the discrimination actually *occurred because of* their client's physical or mental impairment.

Experience with state laws supports this conclusion. For example, New Jersey state law has a broad definition of disability that does not require any limitation – substantial or otherwise – of a major life activity in its definition. N.J. STAT. ANN. § 10:5-5(q). As with all state civil rights laws, however, the burden remains on the plaintiff to prove that the discrimination occurred *because of* the disability, as broadly defined in the law. For nearly 35 years, New Jersey has applied this broad definition of disability without any proposed legislative amendment to narrow the definition because of a crushing overload of cases.[**]

8. What is the relationship between the Genetic Information Nondiscrimination Act (GINA) and the ADA Restoration Act of 2007?

GINA provides protection from discrimination to those who have a genetic marker for a disease but who have not yet developed the disease – i.e., those who are asymptomatic. Once a person develops the disease, however, he or she would not be protected under GINA. That person *would* be protected under the ADA if the person could demonstrate that he or she was "substantially limited in a major life activity" – an almost impossible threshold to meet given the current case law under the ADA. Thus, if GINA became law, we would be in the ironic situation of protecting people with a *genetic marker* for a disease such as epilepsy or diabetes from discrimination (via GINA), but exposing them to discrimination if they actually *got* the disease (given the shrinkage of coverage under the current ADA).

[**] In fact, modifications to New Jersey's disability anti-discrimination provisions over the years have universally enhanced – not restricted – protections for people with disabilities, for example, by prohibiting discrimination based on genetic information and extending protection to those with "seizure dogs." *See* 2003 N.J. Sess. Law Serv. 293; 1996 N.J. Sess. Law Serv. 126.

9. How critical is it to pass the ADA Restoration Act?

Extremely critical. Too many people have had their ADA claims dismissed because they were found by the courts not to be sufficiently disabled under the courts' misguided interpretation of the definition of disability under the ADA. A sampling of these case stories are captured in a companion document ("The Effect of the Supreme Court's Decisions on People with Disabilities"), available on the Consortium for Citizens with Disabilities' website, at www.c-c-d.org/ADA.

Most employers and businesses try to do the right thing with regard to people with disabilities. But for those who don't, the courts must be available to ensure that people with disabilities have the same opportunities to work and be a part of everyday society as Congress intended. People who have been discriminated against because of their physical or mental impairments deserve their day in court.