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**June 16, 2008**

## **DREDF on the May 23, 2008 ADA Restoration Act (ADARA) Language**

DREDF supports the need for a law that reverses the Supreme Court and lower court decisions that have stripped coverage from people who do not fit into the medical model of disability, either because the person functions well with mitigating measures or because the person's impairment is not severe enough. The courts' mistaken, wrongheaded views arise from the ADA's definition of disability as an impairment that "substantially limits a major life activity." Unfortunately, this severity test evokes eligibility criteria for benefits programs, an area of law that the courts encounter more frequently, rather than supporting a civil rights interpretation. In restoring the original purpose of the ADA, we believe that it is necessary to send a clear message to the courts to look at disability in a civil rights context by making clear that severity of disability is irrelevant to whether the plaintiff's impairment resulted in discrimination. The ADARA, as originally proposed on July 26, 2007, [HR 3195](#) in the House and S 1881 in the Senate, accomplished these objectives by removing a medical severity test, allowing any person with an actual or perceived impairment the opportunity to show that he or she was subjected to an adverse action on the basis of that impairment.

Over the past few months, at the request of Congressman Hoyer and other Members of the House of Representatives, the disability community and the business community have worked with Congressional leaders to craft language that could be supported by both communities and on both sides of the aisle. Through the efforts of a dedicated negotiation team, [legislative language was negotiated on May 23, 2008](#). DREDF has been struggling since then to reconcile the goal of ADA restoration with the May 23 deal language. Our yardstick has been not whether the status quo is improved, but whether the serious interpretative problems caused by the courts are remedied.

We do not second-guess the judgment of the many organizations that have endorsed the negotiated language, based on their conclusions that it is the best the disability community can do now, or that the pressing need to change the status quo requires immediate action in the form of this compromise. However, after intensive internal consideration, DREDF cannot reconcile the current deal structure with the broader policy advocacy positions to which we are committed in both our U.S. and international work. To be true to both DREDF's mission and policy advocacy and our respect for our fellow disability organizations, we have decided to stay neutral on the deal language and to provide technical assistance to whoever asks for it. In that vein, in answer to the inquiries that we have received, following are the substantive and political pros and cons of the deal language as we currently understand them.

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## **I. SUBSTANTIVE PROS AND CONS**

### PROS

#### MITIGATING MEASURES

The deal language overturns the Sutton v. United Airlines, Inc. mitigating measures ruling. Substantial limitation will be determined without considering mitigating measures such as medication or assistive technology.

#### FINDINGS

The findings disapprove of the Supreme Court's findings in Sutton v. United Airlines, Inc. and Toyota v. Williams.

#### ONE MAJOR LIFE ACTIVITY

The deal language clarifies that an individual shall not be excluded from coverage because of the ability to do many things so long as one major life activity is substantially limited.

#### EPISODIC/ REMISSIONS

The deal language clarifies that the fact that an otherwise substantially limiting impairment is in remission or episodic does not remove the individual from coverage.

#### BROAD INTERPRETATION

The courts are instructed to give a broad (as opposed to narrow) interpretation to the definition of disability.

#### REGARDED AS PRONG (SEE ALSO CON BELOW)

The regarded as prong now focuses on an employer's treatment of a person with a disability rather than the difficult to prove "perception" of the employer. A person who can "establish" that he is discriminated against can bring suit. (The circularity of the deal language's current wording should, however, be further explained in legislative history.)

### CONS

#### SUBSTANTIALLY LIMITS

The deal language maintains a severity test for coverage if the complainant/plaintiff needs accommodation to secure or retain a job, or to access public or private services. In order to get coverage under the 1<sup>st</sup> prong of the definition of disability, a plaintiff must demonstrate a substantial limitation of a major life activity or a major bodily system. While the changes in the proposal: the definition of substantial limitation (i.e., "substantially limits" means "materially restricts"); the findings to reject the strict interpretation standard in Toyota v. Williams; and the

direction to broadly construe “disability;” should allow coverage of more people than the current status quo, the current proposed language still runs a high risk that many will continue to be excluded by the substantially restricted requirement in the first prong of the definition, the only avenue to receive reasonable accommodation (see below).

## NO REASONABLE ACCOMMODATION FOR REGARDED AS CLAIMS

While the regarded as prong now covers anyone who can establish discrimination, it will not allow that person to get an accommodation. Since substantial limitation is retained in the 1<sup>st</sup> prong, all those with less than material restrictions will be forced into the 3<sup>rd</sup> prong. From a review of the cases this includes many if not most of the currently excluded individuals that are injured on the job or acquire an illness that requires some modification to current duties in order to retain employment. Individuals with impairments that limit but do not substantially limit will not be entitled to a reasonable accommodation, no matter how minor the needed change.

## II. POLITICAL PROS AND CONS

### DELAY

Without the current deal framework, a bill to restore the ADA will not pass this term. The timeframe is unknown for establishing a new framework that is more in keeping with the original intent of the Restoration Act to send a clear message to the courts that the severity of a person’s impairment is irrelevant to whether she should be entitled to civil rights coverage.

### POLITICAL MOMENTUM

Congressman Hoyer is strongly committed to getting a bill out of the House and will work toward Senate passage and White House signature this term. House passage could create momentum in the Senate.

### OPPORTUNITY COST

Passage of the current deal will improve the status quo for many, but it will also mean that the opportunity to correct the paradigm to remove severity as a factor of coverage and include many more who are currently unable to use the ADA because they are not considered “disabled enough” be lost or indefinitely delayed as the new provisions are interpreted up the judicial ladder.

(In response to a longer version of this DREDF memo dated May 30, 2008, the negotiating team wrote [this response](#).)