



NATIONAL COUNCIL ON DISABILITY

An independent federal agency working with the President and the Congress to increase the inclusion, independence, and empowerment of all Americans with disabilities.

National Council on Disability Response to Arguments Opposing ADA Restoration

The National Council on Disability (NCD) recommended,¹ and remains in strong support of, the restoration of the definition of disability in the Americans with Disabilities Act (ADA). The Congressional intent of this landmark civil rights legislation was to prevent discrimination against individuals with disabilities in all aspects of society, including employment. Instead, because of a number of Supreme Court decisions, many people with disabilities have experienced discrimination and have been denied ADA protections. Much of society has lost sight of the ADA's overall purpose to establish a clear and comprehensive prohibition of discrimination on the basis of disability. NCD prepared this fact sheet in response to many recent misinterpretations and false claims about the ADA Restoration Act. In response to such claims, NCD offers the following:

1. Opponents Argue:

The Americans with Disabilities Restoration Act definition of disability would make it easier for many individuals -- including those with actual disabilities as well as those regarded as having a disability -- to invoke ADA protections, and it would do so by dramatically expanding the class of persons who could claim ADA coverage. Because most individuals who brought a claim would be covered, it is likely that the majority of cases would turn on whether the alleged discrimination occurred.

NCD Response:

ADA cases *should* turn on whether discrimination occurred. The ADA was concerned with addressing discrimination, not with differentiating one group of people as having disabilities and others as not having disabilities. It was intended to focus more on the attitudes and actions of those accused of discrimination than on the precise physical or mental characteristics of the persons allegedly discriminated against. ADA protection is a civil right -- not special benefits that must be reserved for a select few.

The ADA Restoration Act would protect anyone discriminated against on the basis of disability. This parallels Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 that protect all Americans from discrimination on the basis of race, color, sex, religion, and national origin.

2. Opponents Argue:

By deleting references to "substantial limitations," and "major life activities," the ADA Restoration Act would protect "individuals with virtually any kind of impairment, no matter how minor or temporary, such as the common flu, a cut finger, or a sprained ankle."

NCD Response:

The ADA Restoration Act would only protect individuals who experience discrimination on the basis of disability. A review of the ADA case law reveals that individuals are not attempting to claim disability discrimination against them for having the flu or a cut finger. Rather, the case law *is* full of cases of discrimination against individuals with epilepsy, diabetes, cancer, hearing loss, depression, multiple sclerosis, etc, who are being denied ADA protection for reasons unrelated to whether they were discriminated against.

The Restoration Act includes definitions of “physical impairment” and “mental impairment” derived from Section 504 of the Rehabilitation Act, ADA regulations and ADA committee reports. They declare that “[t]he term ‘physical impairment’ means 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;” and “[t]he term ‘mental impairment’ means any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities.” The standards for “physical or mental impairment” are clear, substantial, and long-accepted.

Once a condition has met the definition of “impairment,” a person seeking to invoke the protection of the ADA must still show either that she or he was discriminated against because of it, or that it interferes with performance of essential job tasks or receipt of job benefits so that a reasonable accommodation is needed. Accordingly, the far-fetched hypothetical statements about minor imperfections that purportedly would give rise to ADA protection, are unsubstantiated, even supposing that such a condition was construed to be an “impairment.” In the rare, if ever, circumstance, that an employer fires someone because of a minor condition that meets the definition of “impairment,” then the ADA should and, properly interpreted, would since its enactment have applied and required the employer to try, if it can, to justify the termination as justified under the Act.

Similarly, seldom would a minor impairment give rise to the need for a reasonable accommodation to enable the worker to perform an essential function of the job. If a minor impairment did necessitate a reasonable accommodation, the employer is free to choose between alternative effective accommodations (after consulting with the employee and engaging in the “interactive process” for determining accommodations) that will enable the worker to do the job. For example, if an employee’s cold or flu is truly preventing him or her from doing the job, employers may, and usually do, advise the employee to go home and get well. Portraying such unlikely hypothetical situations involving minor impairments as giving rise to a violation of the ADA is no answer to the hundreds of people with epilepsy, diabetes, cancer, or hearing loss, who have been told they cannot pursue an ADA claim of discrimination because they are not disabled enough.

Minor imperfections usually will not qualify as “impairments” under the ADA Restoration Act definition; employers will rarely if ever impose negative employment consequences on the basis of a minor impairment; and minor impairments are highly unlikely to prevent performance of essential job tasks so as to necessitate a reasonable accommodation; if a minor impairment was to require accommodation, a minor accommodation would almost always be sufficient to resolve the matter.

3. Opponents Argue:

The ADA Restoration Act would entitle individuals with minor or temporary impairments to reasonable accommodations.

NCD Response:

The ADA already includes language that serves to restrict the scope of the accommodation mandate; the Act defines discrimination as including “not making reasonable accommodations to the *known physical or mental limitations* of an otherwise qualified individual.” (42 U.S.C. § 12112(b)(5)(A)) (emphasis added). A reasonable accommodation is only required for individuals who have an actual need for the accommodation. As explained in #2 above, a minor imperfection will likely not qualify as an impairment under the ADA Restoration Act. Furthermore, a minor impairment is not likely to give rise to a need for a reasonable accommodation.

4. Opponents Argue:

The Americans with Disabilities Restoration Act specifies that the determination of whether an individual has a physical or mental impairment shall be made without regard to whether the individual uses a mitigating measure. This would broaden the class of covered individuals even further.

NCD Response:

The class of protected individuals would be broadened as compared to the class as defined by the Supreme Court in *Sutton*. It would not broaden the class as compared to that intended by Congress. The purpose of the ADA Restoration Act is to restore the coverage intended by Congress when it passed the ADA, not to codify the class as defined by the Supreme Court.

5. Opponents Argue:

The Americans with Disabilities Restoration Act removes a fundamental requirement of the ADA that a plaintiff has the burden of showing that he or she is “qualified for the position at issue.”

NCD Response:

In order to make it clear that, instead of defining a class of people to be protected against disability-based discrimination and that the alleged discrimination itself should be the focus of any judicial inquiry, the “qualified individual” language was taken out of the beginning of the broad prohibition of discrimination (Sec. 102) in the ADA. The

"qualified individual" language was added to the "Defenses" section of the ADA (Section 103(a) by the House and Senate bills in order to show that employers can still insist that workers be qualified. Additionally, the ADA Restoration Act would retain the language in the definition of discrimination that includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual." (42 U.S.C. § 12112(b)(5)(A)) (emphasis added). Thus, the requirement to make a reasonable accommodation still applies only to an individual who is otherwise qualified.

6. Opponents Argue:

The ADA Restoration Act would "dramatically increase unnecessary litigation, create uncertainty in the workplace, and (will) upset the balance struck by Congress in adopting the ADA."

NCD Response:

The purpose of the ADA was to provide a clear and comprehensive prohibition of disability-based discrimination. This purpose has been thwarted by Supreme Court decisions that divide people with disabilities into two classes -- those who may be discriminated against and those who may not. By focusing on the severity of disability instead of on the conduct of discrimination, the Supreme Court has permitted disability-based discrimination, even when the entity involved admits taking an adverse action against an individual because of that individual's disability. People who Congress expressly intended to be protected from disability discrimination are no longer protected.

The ADA Restoration Act is urgently needed to restore the civil rights of people with disabilities. With plaintiffs losing 97 percent of disability claims of employment discrimination in the workplace,² it is no wonder that organizations representing employers are opposed to ADA restoration. Congress need only compare the number of actual cases of discrimination that have been presented by the disability community to the number of actual cases presented by ADA Restoration Act opponents to understand the urgency and imperative of ADA restoration.

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

² ABA Special Feature, 2003 Employment Decisions Under the ADA Title I-Survey Update, 28 Mental & Physical Disability L. Rep. 319 (2004).