

Testimony
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I would like to thank the Committee for this opportunity to provide testimony on behalf of the National Council on Disability (NCD) in support of the Americans with Disabilities Act (ADA) Restoration Act. Our Chairman, John Vaughn, was unable to join us today but asked me to share some information the National Council on Disability (NCD) has learned about the impact on people with disabilities resulting from a series of Supreme Court interpretations of the definition of "disability" under the ADA. Hopefully my comments will emphasize the many reasons why the members of our Council voted unanimously to support the passage of the ADA Restoration Act.

Introduction

NCD is an independent federal agency, composed of 15 members appointed by the President and confirmed by the Senate. NCD's purpose is to promote policies and practices that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability, and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and integration into all aspects of society.

NCD's duties under its authorizing statute include gathering information about the implementation, effectiveness, and impact of the ADA.¹ In keeping with this requirement, one of NCD's monitoring activities has been to analyze the Supreme Court cases interpreting the ADA. From 2002 to 2004, NCD produced a series of 19 policy briefs analyzing the Supreme Court's ADA cases² and their ramifications on subsequent federal court cases. This work culminated in a comprehensive report, *Righting the ADA*³, in which NCD proposed language for an ADA Restoration Act.

The Supreme Court has issued several decisions relating to the definition of "disability" under the ADA. These decisions have narrowed the definition of "disability," restricting substantially the number of individuals entitled to protection under the law. NCD has reviewed the history and evolution of the definition of "disability," analyzed the Congressional intent with respect to coverage, reviewed the effect of EEOC regulations and guidance on the definition, and examined the Supreme Court decisions involving the definition of "disability."⁴ NCD concludes that the Supreme Court's interpretation of the definition of "disability" under the ADA has so altered the ADA that the majority of people with disabilities now would have no federal legal recourse in the event of discrimination, particularly in instances of employment discrimination. Passage of the ADA Restoration Act is urgently needed to restore the ADA's protections against disability-based discrimination for all Americans.

NCD's Role in the Passage of the ADA

NCD played a key role in the inception of the ADA.⁵ NCD first proposed the concept for the ADA, federal legislation to address the discrimination experienced by people with disabilities, in its 1986 publication, *Toward Independence: An Assessment of Programs and Laws Affecting Persons with Disabilities—With Legislative Recommendations*.⁶ The first published draft of the law was included in NCD's report, *On the Threshold of Independence*⁷ in early 1988. The ADA was then introduced in the House and the Senate in April of that year.

While the bill was introduced too late in the congressional session to be voted on by both chambers, NCD continued to play a pivotal role in the

passage of the bill. NCD members continued to meet with various members of the disability community. NCD released another report, *Implications for Federal Policy of the 1986 Harris Survey of Americans with Disabilities*, which evaluated poll results and made recommendations based on the findings.

On Capitol Hill, Congressman Major Owens created the Congressional Task Force on the Rights and Empowerment of Americans with Disabilities, which researched the extent of discrimination. The Task Force was chaired by former NCD Vice Chairperson Justin Dart, and its coordinator was former NCD Executive Director Lex Frieden. Revisions were made to the initial draft, with the assistance of national disability consumer organizations. Strong bipartisan support for the ADA had developed by the time Congress returned for the next session. Both the House and Senate passed similar bills and, in mid-July, both chambers passed the final version of the ADA, which was signed into law by President George H. W. Bush on July 26, 1990.

Definition of "Disability" in the ADA

Congress modeled the definition of disability in the ADA on Section 504 of the Rehabilitation Act, which had been construed to encompass both actual and perceived limitations, and limitations imposed by society. The definition adopted by Congress and the legislative history of the ADA demonstrate the intention to create comprehensive coverage under the statute. This definition of "disability" was conceived as a broad element that would extend statutory protection to anyone who had been excluded or disadvantaged by a covered entity on the basis of a physical or mental impairment, whether real or perceived.

The Supreme Court's decision in *School Board of Nassau County v. Arline*⁸ was the leading legal precedent on the definition of disability when Congress was considering the ADA. Several Committee reports regarding the ADA expressly relied on the *Arline* ruling in discussing the definition of disability. In *Arline*, the Court took an expansive and nontechnical view of the definition of "disability." The Court found that Ms. Arline's history of hospitalization for infectious tuberculosis was "more than sufficient" to establish that she had "a record of" a disability under Section 504 of the Rehabilitation Act.⁹ The Court made this ruling even though her discharge

from her job was not because of her hospitalization.

The Court displayed a lenient interpretation of what a plaintiff needed to show to invoke the protection of the statute. It noted that, in establishing the new definition of disability in 1974, Congress had expanded the definition "so as to preclude discrimination against '[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all.'"¹⁰

To ensure that the definition of disability and other provisions of the ADA would not receive restrictive interpretations, Congress included a requirement that "nothing" in the ADA was to "be construed to apply a lesser standard" than is applied under the relevant sections of the Rehabilitation Act, including Section 504.¹¹ At the time of the ADA's enactment, it was not contemplated that disability discrimination cases would come to be more about determining the extent of someone's disability, rather than about whether discrimination, in fact, occurred.¹²

For several years after the ADA was signed into law, the pattern of broad and inclusive interpretation of the definition of disability, established under Section 504, continued under the ADA. In 1996, a federal district court declared that "it is the rare case when the matter of whether an individual has a disability is even disputed."¹³ As some lower courts, however, began to take restrictive views of the concept of disability, defendants took note, and disability began to be contested in more and more cases.

The Supreme Court Changes the ADA Definition of Disability

Beginning with its decision in *Sutton v. United Airlines* in 1999, the U.S. Supreme Court started to turn its back on the broad interpretation of disability endorsed by the Court in the *Arline* decision.¹⁴ By the time of the *Toyota v. Williams* decision in 2002, the Court was espousing the view that the definition should be "interpreted strictly to create a demanding standard for qualifying as disabled."¹⁵ This position is directly contrary to what the Congress and the President intended when they enacted the ADA.

A narrow interpretation of the term "disability" in the ADA excludes many

people whom Congress intended to protect. Recognizing that discrimination on the basis of disability takes place in various ways against people with various types of disabilities, Congress had adopted a time-tested and inclusive, three-prong definition of "disability" in the ADA. Congress was entitled to expect that this definition would be interpreted expansively because the courts and regulations had interpreted the identical definition in the Rehabilitation Act broadly. NCD views as "draconian" and "erroneous" the "stereotypical view of disability" that would extend ADA protection only to those who "are so severely restricted that they are unable to meet the essential demands of daily life."¹⁶

In June of 1999, the Supreme Court decided *Sutton v. United Airlines*,¹⁷ a case involving pilots needing corrective lenses, and *Murphy v. United Parcel Service*,¹⁸ a case involving a man with high blood pressure. In both cases, the Court held that, in determining whether an individual is substantially limited in a major life activity, courts may consider only the limitations of an individual that persist after taking into account mitigating measures, e.g., medication or auxiliary aids and services and any negative side effects the mitigating measures may cause.

On the same day in 1999, the Supreme Court decided *Albertson's v. Kirkingburg*,¹⁹ a case involving a man blind in one eye. The Court held in *Kirkingburg* that a "mere difference" in how a person performs a major life activity does not make the limitation substantial; how an individual has learned to compensate for the impairment, including "measures undertaken, whether consciously or not, with the body's own systems," also must be taken into account.²⁰ These three cases, *Sutton*, *Murphy* and *Kirkingburg* are often referred to as the "Sutton trilogy."

The result of these decisions is that people who Congress clearly intended to be covered by the ADA,²¹ such as people with epilepsy,²² diabetes,²³ depression,²⁴ and hearing loss,²⁵ are now being denied employment and refused reasonable accommodations because of their disability or the mitigating measures they use, and courts refuse to hear their cases, regardless of how egregious their employers' actions.

These decisions have resulted in courts now making elaborate inquiries into all aspects of the personal lives of certain plaintiffs in order to

determine whether, and to what extent, mitigating measures actually alleviate the effects of the disability – none of which is relevant to the question of whether discrimination occurred. Such inquiries about the extent of people’s disabilities is also inconsistent with other provisions of the ADA that sharply restrict the use of inquiries about the nature and extent of disabling conditions and of medical information about an individual’s limitations.²⁶

When elaborate inquiries are called for by the ADA, they should be about the individual’s abilities – not his or her disabilities.²⁷ Not only are elaborate inquiries into the extent of a person's disability demeaning and extremely costly in terms of litigation resources, they miss the point. It does not matter if medication stabilizes a person's blood sugar if the employer harbors an irrational fear that it will not do so, and terminates the employee. It does not matter how effective someone's hearing aids are if an employer refuses to hire him because the employer believes his insurance rates will increase if he hires a person with a hearing impairment. It does not matter if working the day shift would eliminate someone's risk of seizures if the employer refuses the employee's request to switch from the night shift to the day shift.

By focusing on how well mitigating measures alleviate the effects of a disability, the Supreme Court has denied discrimination protection to people who are likely to be capable of doing the job. It is a rare plaintiff who is able to successfully challenge even the most egregious and outrageous discrimination involving a condition that can be mitigated.

The Supreme Court has also changed the meaning of "substantial limitation of a major life activity" in ways that screen out even more people with disabilities that Congress intended to protect. Closely tracking the Rehabilitation Act, the first prong of the ADA definition of disability provides that a condition constitutes a disability if it "substantially limits one or more of the major life activities of such individual."²⁸ In *Toyota v. Williams*, the Court changed substantially limits to mean "prevents or severely restricts."²⁹

In the *Williams* case, the Court also decided that to be substantially limited in a major life activity, a person must be substantially limited in an activity "of central importance to most people's daily lives," and held

that "substantially limited in a major life activity" must be "interpreted strictly to create a demanding standard for qualifying as disabled."³⁰ The phrase "of central importance to most people's daily lives" has led to extensive questioning about an individual's ability to brush his or her teeth, bathe, dress, stand, sit, lift, eat, sleep, and interact with others.³¹ It has led to contradictory rulings by federal courts about whether activities such as communicating, driving, gardening, crawling, jumping, learning, shopping in the mall, performing house work, and even working and living are "major life activities."³² In hundreds of cases of alleged disability-based discrimination, people with disabilities have had to spend their resources litigating such issues, often with the question of whether disability-discrimination occurred never being addressed.

The cases discussed here represent only a portion of the problematic issues raised by a string of decisions by the Supreme Court which have significantly diminished the civil rights of people with disabilities. The ADA Restoration Act is needed to return the focus to examination of the relevant facts of the case when disability discrimination is alleged. Can the person with a disability perform the essential functions of the job, with reasonable accommodations, if necessary? Would the reasonable accommodation pose an undue hardship on the employer? Would the person's mental or physical impairment pose a safety risk to others that could not be eliminated by a reasonable accommodation? Did the employer discriminate against the employee on the basis of a real or perceived disability?

As NCD declared in its *Righting the ADA* report:

The Court's position that the definition of disability is to be construed narrowly represents a sharp break from traditional law and expectations. It ignores and contradicts clear indications in the statute and its legislative history that the ADA was to provide a comprehensive prohibition of discrimination based on disability, and legislative, judicial, and administrative commentary regarding the breadth of the definition of disability. It also flies in the face of an established legal tradition of construing civil rights legislation broadly. Congress knowingly chose a definition of disability that to that time had been interpreted broadly in regulations and the courts; it was entitled to expect the definition would continue to receive a generous reading.

In crafting the ADA, Congress did not treat nondiscrimination as something special that can be spread too thin by granting it to too many people. Unlike disability benefits programs, such as Social Security Income (SSI) and Social Security Disability Insurance (SSDI), which are predicated on identifying a limited group of eligible persons to receive special benefits or services that other citizens are not entitled to obtain, and for which the courts have sought to guard access jealously, the ADA is premised on fairness and equality, which should be generally available and expected in American society. The Court's harsh and restrictive approach to defining disability places difficult, technical, and sometimes insurmountable evidentiary burdens on people who have experienced discrimination.³⁴

Given the extensive congressional record regarding findings of discrimination against many types of disabilities and the broad coverage of the ensuing ADA regulations, the general understanding following enactment of the ADA was that anyone experiencing disability-related discrimination had a remedy in court. People with disabilities of all types presume they are covered by the ADA when many of them now are not.

Restoration, Not Expansion

The ADA was intended to apply to every person who experiences discrimination on the basis of disability; protection from discrimination is not a special service reserved for a select few. The law was crafted to extend protection even to people who are not actually limited by their conditions but who experience adverse treatment based on fear, stereotyping, and stigmatization.

The ADA Restoration Act supports the purpose of the ADA, to prohibit discrimination, by removing the obstacle of forcing a person to prove that he or she has a sufficiently severe impairment to justify protection under the law. The language in the ADA Restoration Act still requires a plaintiff to show that discrimination occurred based on his or her real or perceived physical or mental impairment to successfully bring a claim under the ADA. The ADA still protects only those who can prove discrimination based on that impairment, and, in addition, in the employment context, individuals who can demonstrate that they are qualified to perform the

job.

Congress balanced the interests at stake when it passed the ADA 17 years ago. Congress included, for instance, elements intended to protect the interests of small businesses, and these elements remain in place under the ADA Restoration Act, including: the exemption for small employers, the undue hardship limitation, the readily achievable limit on barrier removal in existing public accommodations, the undue burden limitation regarding auxiliary aids and services, and the elevator exception for small buildings, among others.³⁵ The bill currently before Congress restores the original intent of a carefully crafted law.

Veterans with Disabilities

NCD is particularly concerned about the impact of the developments in the ADA case law on veterans with disabilities. Service members returning from the current conflict in Iraq and Afghanistan are experiencing a very high incidence of disabilities, including post-traumatic stress disorder and traumatic brain injury.³⁶ Many of our veterans with disabilities will require the use of mitigating measures such as medication, orthotics, and assistive technology. It is imperative that Congress restore the ADA so that these men and women will not be subjected to discrimination as a result of disabilities they incurred while serving our country.

NCD hosted a veterans' program at its quarterly meeting held in San Diego, California on January 29 - 31, 2007. The purpose of the program was for Council members to learn from veterans with disabilities, particularly service members returning from the current conflicts, about the programs available to assist them as they transition to life with a disability, and whether those programs are meeting their needs. NCD learned that veterans with disabilities returning from the current conflicts differ from those in prior wars in that many are electing to remain in the military or enter the civilian workforce after rehabilitation. This phenomenon is due, in part, to advances in assistive technology that make it possible for people with disabilities to perform a wide range of jobs and, in part, to progressing attitudes, as many more people have experienced first-hand the skills and potential of people with disabilities.

We must ensure that our society welcomes home our veterans with disabilities, and that those who can perform essential job functions are not prevented from doing so solely on the basis of their disability or the mitigating measures they use. The rights of veterans with disabilities to be free from discrimination cannot be ensured without restoration of the ADA.

Conclusion

The Americans with Disabilities Act was designed to prohibit disability-based discrimination against all Americans, whether or not they actually have a disability. The Supreme Court has issued many decisions interpreting the ADA since its enactment, limiting the scope of the ADA and transforming it into a "special" protection for a select few. The result is that disability discrimination now occurs with impunity, particularly in the workplace. Unless and until Congress takes action to correct the course of the ADA, most Americans are no longer protected from disability-based discrimination. NCD urges Congress to act quickly to reinstate the scope of protection Congress initially provided in the ADA.

Respectfully submitted,

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