HR POLICY ASSOCIATION
The Association of Senior Human Resource Executives

Memorandum 07-114 September 28, 2007

TO: HR Policy Prime Representatives
Associate Representatives
Washington Representatives

FR: Jeffrey C. McGuiness
President

RE: **Misnamed "ADA Restoration Act" Goes Far Beyond Reversal of Targeted Court Decisions**

H.R. 3195/S. 1881 Would Make Virtually Every "Impairment" Such as the Flu, Scars, or "Anything Less Than Perfect Health" a Protected Disability

Bipartisan legislation has been introduced in the House and Senate that would radically expand the Americans with Disabilities Act (ADA) to cover individuals with minor impairments rather than serious disabilities. The so-called "ADA Restoration Act of 2007" (H.R. 3195 / S. 1881) sponsored by Reps. Hoyer (D-MD) and Sensenbrenner (R-WI) and Sens. Harkin (D-IA) and Specter (R-PA) would:

- remove the current ADA requirement that a disability "substantially limit a major life activity;"
- prevent courts and employers from considering mitigating measures an individual may be using (such as medication or devices) when determining whether he or she is disabled; and
- shift the burden of proof from plaintiffs to employers regarding whether an individual is "qualified" to perform the job.

Even though the bill would rewrite the ADA and eliminate an entire body of case law, the bill is being presented as a moderate measure that merely reinstates original congressional intent. Based on this premise, the legislation has gained some momentum, with 197 cosponsors in the House, including 40 Republicans.

The following memorandum provides an overview of how the ADA has been interpreted since its enactment in 1990 and explains how those interpretations would change if the ADA Restoration Act became law.

IN BRIEF

The bill would make minor impairments protected disabilities under the ADA

Employers and courts would be prevented from considering mitigating measures when determining whether individual is disabled.

On HRPolicy.org

View the ADA Restoration Act at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3195ih.txt.pdf

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I. Background: ADA Law and Policy

The concept of prohibiting discrimination against persons with a "disability" has immense moral, emotional, and political appeal. Disabilities are not limited to any race, gender, religion, nationality or region of the country. In fact, Sen. Harkin, the bill's sponsor in the Senate noted that there are currently "50 million Americans with Disabilities."[1] Individuals with disabilities can be found in every social and economic class and political party.

Indeed, many *current* lawmakers have personal experiences with family members who have disabilities. For example, Senator Harkin (D-IA) has a brother who is deaf.[2] Senator Kennedy (D-MA), the chairman of the Senate's Health, Education, Labor and Pension Committee, has a son who lost his leg to cancer and a sister who had a developmental disability.[3] Senator Hatch (R-UT), a ranking Republican, has a brother who lost the use of his legs because of a case of childhood polio,[4] and Senator Elizabeth Dole's (R-NC) husband, former senator and Republican presidential candidate Bob Dole, suffers from paralysis of his arm as the result of a war injury. The wide appeal of protection of persons with a disability plays an important role in the broad bipartisan support the ADA received when originally enacted. The legacy of this bipartisanship has played a role in gaining the 197 cosponsors H.R. 3195 has garnered so far in the House.

The ADA Prohibits Discrimination Against Individuals With a "Disability"

The ADA was signed into law by President George H.W. Bush on July 26, 1990, after being passed by substantial majorities in the House (377 to 28) and Senate (91 to 6). It prohibits employers from discriminating "against a qualified individual with a disability because of the 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."[5] In addition, "discrimination" under the ADA, includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee."[6]

The law creates a protected class of individuals with a "disability" that is quite different from protected classes covered by other antidiscrimination statutes. Under the other federal antidiscrimination statutes, it is typically easier to determine whether a person falls within the class intended to be protected. For example, Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex, and national origin. To show that an individual is protected under Title VII, an individual needs to show that they are either male or female, or of a particular national origin or religion. Similarly, every person has a "color" and a "race" and the law also protects persons who are considered "biracial." Similarly, the Age Discrimination in Employment Act (ADEA) forbids discrimination against persons who are at least 40 years of age.

By contrast, the "protected class" under the ADA is much more fluid. For example, individuals can be born with disabilities or disabilities may develop throughout one's life. Similarly, a person can be disabled for periods of time and then no longer suffer from the disability. Moreover, a health condition amounting to a "disability" may be mitigated or

corrected by medicine, chemicals or assistive devices. Because of the fluid nature of disabilities, Congress devised a carefully defined standard for the concept of disability under the ADA.

Disabled Individual Must Be Substantially Limited in a Major Life Activity

Congress defined "disability" as "a physical or mental impairment that substantially limits one or more major life activities," "a record of such an impairment" or being "regarded as having such an impairment."[7] Indeed, the ADA's legislative history explains that the term "disability" as defined under the ADA is identical to the definitions under the Rehabilitation Act of 1973[8] and the Fair Housing Act,[9] both of which require that an "individual with a handicap" be "substantially limited in one or more major life activities."[10] The ADA uses the term "disability" instead of "handicap" but Congress explicitly noted that no change in the definition was intended.[11]

The courts have generally recognized that the term "disability" is not meant to cover all individuals "with health conditions"[12] nor is it "a general protection of medically afflicted persons."[13] Similarly, the law is not meant to be "a medical leave act nor a requirement of accommodation for common conditions that are short-term or can be promptly remedied."[14] Indeed, as the U.S. Supreme Court has asserted, "merely having an impairment does not make one disabled for the purposes of the ADA."[15] Instead, the law only protects "disabled" individuals who are substantially limited in one or more major life activities.

An employee's "threshold burden" is to establish that he or she has a condition that constitutes a "disability" under the ADA.[16] Because physical or mental conditions can vary substantially, determinations of "disability" are made on an individualized basis.[17] As one court aptly noted, "some impairments may be disabling for particular individuals but not for others, depending upon the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors."[18] Indeed, a host of factors can be considered in measuring whether an individual is disabled.

Tracking the statutory definition, the U.S. Supreme Court has established a basic three-part test to measure whether a person has a "disability," which asks: (1) whether the condition alleged constitutes a physical or mental impairment, (2) whether that impairment affects a major life activity, and (3) whether the impairment operates as a substantial limit on the major life activity asserted.[19] For an individual to be within the statute's "protected class," his or her condition must satisfy all three elements.[20]

Test One: The Expansive Definition of a "Physical or Mental Impairment"

Establishing that an individual's condition is a "physical or mental impairment" is the first and easiest step in ascertaining whether the individual has a "disability" because of the broad definition of "physical or mental impairment." While the statute itself does not define "physical or mental impairment," the courts have accepted the broad definitions of those terms[21] promulgated by the Equal Employment Opportunity Commission (EEOC), which administers the statute. The regulations define a "physical impairment" as "any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting…neurological, musculoskeletal, special sense organs, (respiratory including

speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin and endocrine)."[22] A "mental impairment" includes "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[23]

The regulation's definitions are so broad that almost any mental or physical health condition is almost certainly an impairment. Moreover, the regulation's definitions of "impairments" is not comprehensive. Indeed, any attempt to identify every physical or mental impairment would be futile. As one commentator aptly noted, "[b]ased on the sheer number of variations in human circumstance, any attempt to draft an exhaustive list covering all the possible types of diseases and conditions that might constitute a protected physical or mental impairment certainly would be impossible."[24] Similarly, the EEOC acknowledged the futility in attempting to identify all impairments by noting comprehensive publications such as the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* does not even include all conditions that may qualify as mental impairments.[25]

Because the definition of "physical or mental impairment" is so expansive, there has been minimal litigation regarding what conditions constitute "impairments." Instead, employers and courts often will simply assume, agree or concede that a plaintiff's condition is an impairment.[26] The few courts which have addressed the issue have recognized that relatively minor conditions meet the definition of impairment. Examples include:

- back and knee strains,[27]
- knee contusions and back strain,[28]
- a knee injury,[29]
- high cholesterol,[30]
- erectile dysfunction,[31]
- headaches,[32]
- "tennis elbow,"[33]
- the occasional inability to localize sound,[34] and
- a six inch scar along an individual's chin line.[35]

Moreover, it is irrelevant whether an individual developed an impairment through some volitional act on the part of the individual.[36] As one court noted, "the source of an impairment is irrelevant to a determination of whether the impairment constitutes a disability."[37]

Yet, the EEOC and courts have recognized a few narrow exclusions from the regulation's sweeping definition of "impairments." For instance, general physical characteristics (such as eye color, hair color or left-handedness), common personality traits (such as being irresponsible or showing poor judgment),[38] cultural, environmental, or economic disadvantages, homosexuality, bisexuality, pregnancy,[39] and normal deviations in height,[40] weight,[41] or strength are not impairments.[42] Similarly, "characteristic predispositions to illness or disease" due to social, economic or environmental conditions are not impairments under the ADA.[43]

As a practical matter, the definition of "impairment" is so broad that almost any physical or mental health condition —no matter how minor— will satisfy the impairment requirement. Thus, it is critical that additional criteria be required. Indeed, as the EEOC has noted, "the determination of whether an individual has a 'disability' is not necessarily based on the name of diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."[44] Thus, in almost every situation the disability determination is made in step two and three —*i.e.*, whether the impairment substantially limits a major life activity— or as one court recently noted, "the dispute is not over whether the Plaintiff has a condition, but whether that condition is severe enough to qualify as a disability pursuant to the ADA."[45]

Test Two: An Impairment Must Affect a Major Life Activity

The determination of whether an impairment affects a major life activity is guided by the U.S. Supreme Court's unanimous decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.[46] In that case, the Court held that the phrase "substantially limits one or more major life activities" distinguishes a mere impairment from an actionable disability under the ADA. In *Toyota*, the Supreme Court found that the term "major" in the phrase "major life activities" means "important."[47] Moreover, the Court ruled that the concept of "major life activity" refers to "those activities that are of central importance to daily life."[48] Lower federal courts and the EEOC have articulated similar meanings to the phrase "a major life activity," asking in their analyses whether the activity is "a basic function of life,"[49] "basic to any person's daily regimen,"[50] "a daily activity that the average person can accomplish with little effort," "is of life-sustaining importance," or are rudimentary activities "that the average person in the general population can perform with little or no difficulty."[51]

"Major life activities" has been broadly defined to include, among many others, functions such as:

- caring for oneself;
- performing manual tasks;
- walking;
- seeing;
- hearing;
- speaking;
- breathing;
- learning;
- working;[52]
- sitting;
- standing;
- lifting;
- reaching;[53]
- thinking;
- concentrating;
- interacting with others;[54]
- reading;[55]
- eating;[56]
- digesting;[57]
- reproduction;[58]
- childbearing;[59]
- engaging in sexual relations;[60]
- sleeping;[61]
- bathing;[62]
- controlling one's bowels;[63]
- and running;[64]

By contrast, activities such as driving,[65] physical exertion,[66] lawn mowing,[67] weight lifting, sport activities,[68] bowling, camping, restoring cars,[69] climbing,[70] sweeping, dancing,[71] skiing, golfing, painting, plastering, shoveling snow and shopping in a mall[72] were not considered of sufficient importance to the daily life of the average person to be "major life activities."

Moreover, to establish an ADA disability, it is not necessary that an impairment be a "workplace-related limitation."[73] Instead, the measure for determining "disability" is whether any major life activity is affected.[74] In *Janssen v. COBE Laboratories, Inc.*,[75] the court confirmed this by noting that "applicable law…does not require that the disability affect a claimant's work, only that if affect a major life activity." That said, an impairment must bear some relationship to a requested workplace accommodation. For example, in *Wood v. Crown Redi-Mix, Inc.*,[76] the court determined that the plaintiff could not establish a discriminatory failure to accommodate claim even though he was impotent and limited in the major life activity of procreation, because his requested accommodation of driving a "non ready mix truck" had absolutely nothing to do with his impotence or inability to procreate.[77]

Test Three: The Impairment Must Substantially Limit a Major Life Activity.

Once one or more major life activities have been identified, the final step in determining whether an individual has a "disability" is ascertaining whether the condition "substantially limits" them. In the U.S. Supreme Court's unanimous *Toyota*[78] decision discussed above, the Court also ruled that an impairment is "substantially limiting" if it prevents or severely restricts an individual from doing activities that are central to most people's daily lives. In *Toyota*,[79] the Supreme Court noted that the word "substantially" in the phrase "substantially limits" suggests "considerable" or "to a large degree."[80] Thus, the term "substantial" "clearly precludes impairments that interfere … in only a minor way."[81] Hence, a limitation resulting from an impairment will only be considered disabling if it is significant.[82]

To determine whether an impairment is "substantially limiting," courts compare the degree to which the impairment limits the individual's life activities to those of the average person. According to the EEOC, to be "substantially limiting," the impairment must make the individual "unable to perform a major life activity that the average person in the general population can perform" or "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."[83]

Consequently, individuals must establish the nature and severity of the condition for an impairment to be substantially limiting. For example, in *Clemente v. Executive Airlines, Inc.*,[84] a plaintiff failed to establish that her impairment of "temporary diminution in her right-ear hearing" substantially limited the major life activity of hearing. The plaintiff failed to identify "the overall functional degree of loss suffered" and failed to show that "compared to the average person in the general population, she was significantly restricted in her hearing." Thus, she was not covered by the ADA.

Similarly, an individual's impairment must be long-term or permanent.[85] A short-term or temporary impairment will generally not constitute a disability under the ADA,

depending, of course, upon the severity of the condition.[86] The EEOC and courts have maintained that if an impairment lasts "at least several months" it is not short term.[87] In *Guzman-Rosario v. United Parcel Service*,[88] the First Circuit suggested that an impairment must have a minimum duration between 6 and 24 months. But other courts have found that periods as short as two to three months may be long enough.[89] Likewise, occasional or intermittent impairments (depending upon severity) will generally not be considered a "disability." For instance, in *Dillon v. Roadway Express*,[90] the plaintiff was not substantially limited in the major life activity of hearing where "the only symptom he complains of is an *occasional* inability to localize a sound" but did not suffer "any actual hearing loss."[91] Therefore, while he suffered from an impairment, he was not disabled under the ADA.

Mitigating Measures Are Considered in Determining Whether an Individual Has a "Disability"

In ascertaining whether an individual has a "disability," his or her use of mitigating measures is taken into account to determine whether the impairment is "substantially limiting." In *Sutton v. United Airlines, Inc.*,[92] and its companion cases,[93] the U.S. Supreme Court in a seven to two decision ruled that if a person takes steps "to correct for, or mitigate, a physical or mental impairment, the effects of those measures —both positive and negative— must be taken into account when judging whether that person is 'substantially limited' in a major life activity."[94] In other words, a disability exists only where an impairment actually and currently substantially limits a major life activity, "not where it might, could, or would be substantially limiting if mitigating measures were not taken." The Court noted that, "to be sure, a person whose physical or mental impairment is corrected by mitigating measures *still has an impairment, but if the impairment is corrected it does not 'substantially limit' a major life activity*."[95]

In interpreting the clear language of the statute, the Court rejected legislative history and EEOC guidelines indicating that "individuals should be examined in their uncorrected state,"[96] and ruled that three provisions of the ADA "read in concert" mandated that a person's mitigating measures must be taken into account when determining whether the ADA applied. First, the Court found that "substantially limits" is a verb requiring that "a person be presently —not potentially or hypothetically— substantially limited in order to demonstrate a disability."[97] Second, the statute requires "an individualized inquiry" regarding whether a person has a disability and the "directive that persons be judged in their uncorrected or unmitigated state runs directly counter to the individualized inquiry mandated by the ADA."[98] The Court found that the EEOC's approach would "create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals," which "is contrary to both the letter and the spirit of the ADA."[99]

Finally, the Supreme Court concluded that the congressional finding that "some 43,000,000 Americans have one or more physical or mental disabilities…reflects an understanding that those whose impairments are largely corrected by medication or other devices are not 'disabled' within the meaning of the ADA."[100] According to the Court, if Congress intended to include "persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings. That it did not is evidence that the ADA's coverage is restricted

to only those whose impairments are not mitigated by corrective measures."[101] Indeed, Justice Ginsburg concurred, pointing out that the congressional findings that 43 million Americans were disabled and that such persons "are a discrete and insular minority" and such persons have been "subject to a history of purposeful unequal treatment, and relegated to a position of political powerlessness" is simply inconsistent with "the enormously embracing definition of disability" urged by the plaintiff.[102]

The Court noted that the congressional finding that 43 million Americans were disabled indicated that Congress adopted a "functional" instead of a "nonfunctional" approach to the concept of "disability."[103] For example, the Court noted that the "nonfunctional" "health conditions approach, which looks at all conditions that impair the health or normal functional abilities of an individual," would yield 160 million disable Americans.[104] The "functional disability" approach, instead, looks at whether individuals have difficult performing one or more basic physical activities," such as "seeing, hearing, speaking, walking, using stairs, lifting, or carrying, getting into or out of bed."[105] By contrast, the number used —43 million— showed that Congress did not intend to cover the more than 100 million Americans with vision impairments, 28 million people with impaired hearing or the approximately 50 million people with high blood pressure.[106]

Only "Qualified Individuals" Can Prevail in an ADA Discrimination Claim

Reasonable accommodation and disability-based discrimination claims under the ADA, consistent with other federal antidiscrimination laws, require that a person demonstrate that he or she is a qualified individual with a disability.[107] A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[108] To be qualified, according to the EEOC, a person must (1) have the requisite skills, experience, education, licenses, etc. and (2) be able to perform the essential functions of the job with or without a reasonable accommodation.[109]

Similar to other federal antidiscrimination statutes such as Title VII, Section 1981, the ADEA or the Rehabilitation Act, ADA plaintiffs bear the burden of proof of proving that they are qualified.[110] Indeed, in a typical disability discrimination case, a plaintiff must show that he or she (1) has a disability (2) is a qualified individual and (3) suffered an adverse employment action because of the disability.[111] In other words, disability discrimination plaintiffs must establish that they have the necessary knowledge, skills, abilities or licenses *and* are capable of performing the job.[112]

While ADA plaintiffs ultimately bear the burden of proof to establish that they are qualified, employers bear the burden of proving that an aspect of a job is an "essential function" *if* a plaintiff raises the issue.[113] The term "essential functions" means the "fundamental job duties of the employment position" but does not include "marginal functions of the position."[114] Several factors are considered in determining whether a function is "essential" or merely "marginal" including the employer's judgment as to which functions are essential, written job descriptions prepared before advertising or interviewing applicants for the job, the amount of time spent on the job performing the function, and the work experience of both past and current employees in the job.[115] The

most important factor, however, is whether employees actually perform the specific function.[116]

Employers Must Provide "Reasonable Accommodations" to Disabled Employees

Under the ADA, an employer unlawfully discriminates against a "qualified individual with a disability" when it fails to make "reasonable accommodations to the known physical or mental limitations" of the disabled employee.[117] To establish a claim for failure to accommodate, a plaintiff must show that: (1) she is a qualified individual with a disability; (2) the employer was aware of her disability; and (3) the employer failed to reasonably accommodate the disability.[118] This standard requires the "employer and employee engage in an interactive process to determine a reasonable accommodation."[119]

Employers are not required to provide the particular accommodation that an employee requests.[120] At the very least, the employer is obliged to provide an accommodation that effectively accommodates the disabled employee's limitations.[121] If a disabled employee shows that his or her disability was not reasonably accommodated, the employer will be liable only if it is responsible for the breakdown of the interactive process.[122]

As with determining whether a person is disabled as defined by the ADA, assessing whether an employee requires a reasonable accommodation and the type and nature of that accommodation is made on an individualized basis. Reasonable accommodations may include but are not limited to "making existing facilities used by employees readily accessible to and usable by individuals with disabilities,"[123] providing unpaid leave[124] (the amount of leave is highly fact specific based on the individual and workplace),[125] restructuring an employee's job,[126] providing an assistant or job coach,[127] a modified work schedule,[128] reassignment,[129] or even monitoring an employee's medications.[130]

In sum, the ADA has been carefully crafted to protect disabled individuals who are most in need of protection. Given the breadth of the term, Congress chose not to cover all "impairments," but rather only those that substantially limit a major life activity for an individual otherwise qualified to perform the job. This narrowly crafted approach based on individual circumstances has served its purposes well—*i.e.*, to enable individuals with disabilities to participate in the workplace with reasonable accommodations arrived at through an interactive process. By contrast, as discussed below, the ADA Restoration Act would expand the class of individuals covered so fundamentally as to make the concept of a protected disability essentially meaningless.

II. The ADA Restoration Act Would Fundamentally Rewrite the ADA

The stated purposes of the ADA Restoration Act (H.R. 3195 /S. 1881) are to:

- "restore the broad scope of protection available under the ADA;"[131]
- overturn several U.S. Supreme Court decisions that proponents allege have narrowed the intended protected class;[132] and
- "reinstate original congressional intent regarding the definition of disability."[133]

In truth, however, the bills would radically *expand* —not restore— the ADA. Specifically, the bills would fundamentally broaden the coverage of the ADA to include

individuals Congress never intended to fall within the purview of the ADA by completely rewriting the definition of "disability."

Under the bill, the new definition of "disability" would expand coverage of the ADA from individuals with disabilities to include all individuals with an impairment regardless of how minor. The bills would also prohibit the consideration of mitigating measures (such as medication or assistive devices) an individual may be using when determining whether he or she is disabled. Moreover, the legislation would flip the burden of proof from plaintiffs onto employers regarding whether an individual is "qualified."

The proponents claim that the proposed legislation is nothing more than "a modest, reasonable, legislative fix."[134] The bills, however, would "wield a broad ax in lieu of a scalpel."[135] They would introduce sweeping and expansive changes to regulations governing the workplace. Furthermore, the new definition would render much of the legal precedent under disability discrimination useless because the ADA cases have focused on the current functional definition of "disability."

The ADA Restoration Act Would Substantially Expand ADA Coverage to Include All Impairments

H.R. 3195/S. 1881 would revise the definition of "disability" and drastically expand the number persons covered by the ADA. As explained above, under the ADA, a "disability" is "a physical or mental impairment that *substantially limits one or more major life activities*." The bills, however, would redefine "disability" to simply mean "a physical or mental impairment" and abolish the requirement that an impairment substantially limit one or more major life activities. In other words, under the bills, any physical or mental impairment constitutes a protected disability. Indeed, the terms "impairment" and "disability" are used interchangeably in the proposed legislation.[136]

The proponents of the legislation argue that it simply "amends the definition of 'disability' so that people who Congress originally intended to be protected from discrimination are covered by the ADA."[137] Such statements, however, fail to reveal the significance of the dramatic revisions to the ADA. Moreover, they misconstrue Congress's original intent regarding the definition of "disability" under the ADA. The ADA was never meant to cover mere impairments, but has always required a person's impairment to substantially limit a life activity.

Furthermore, unlike current law, the bills would codify the sweeping definition of "physical or mental impairments" in the EEOC regulations without any limitation. As previously discussed, these definitions are so inclusive that almost any mental or physical health condition, regardless of how minor, would be an impairment. A small scar or even a tattoo could be a cosmetic disfigurement affecting skin. A sprained ankle could be a physiological condition affecting the musculoskeletal system, and a simple case of the flu could qualify under several criteria as an impairment.

Indeed, the proposed legislation would adopt the physician's concept of "disability" in *Partlow v. Runyon*[138] considered erroneous under current law. In *Partlow*, the doctor determined that the plaintiff's relatively minor back problem was a "disability" because the doctor considered "*anything less than perfect health to be a [disability]*."[139] The court, however, noted that the doctor's definition of disability as "anything less than

perfect health *does not even approximate the statutory definition.*"[140] If the ADA Restoration Act became law, virtually anyone in less than perfect health could bring suit because there would be no limit on impairments protected under the bill.

Contrary to Proponents' Claims, Congress Clearly Intended the ADA to Apply to Impairments That Substantially Limit a Major Life Activity

Contrary to the proponents' claims, in originally enacting the ADA, Congress clearly intended that an impairment must substantially limit one or more major life activities. The relevant Committee Reports clearly state that "[a] physical or mental impairment does not constitute a disability under the first prong of the definition for the purposes of the ADA *unless* its *severity* is such that it results in a 'substantial limitation of one or more major life activities.'"[141] Congress provided examples of impairments that substantially limit a major life activity. The report noted, for example, "a person who is a paraplegic will have a substantial difficulty in the major activity of walking; a deaf person will have a substantial difficulty in hearing aural communications; and a person with lung disease will have a substantial limitation in the major life activity of breathing."[142]

In measuring the severity of an individual's condition on a major life activity, Congress intended that he or she be compared to "most people" or the "average person." The Committee Reports directed that "a person is considered an individual with a disability…when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people."[143] The reports noted, for example "a person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort."[144] More importantly, the reports further noted that "[p]ersons with *minor, trivial impairments* such as a simple infected finger are not impaired in a major life activity."[145] Not only did Congress clearly intend that to be covered by the ADA an impairment must substantially limit a major life activity, but also the reports unequivocally establish that the statute did not cover impairments that do not substantially limit a major life activity.

Requirement That a Disability "Substantially Limit a Major Life Activity" Has Ensured Statutory Protections Are Properly Focused

Since the ADA was enacted, the EEOC and courts have followed Congress's directive and used the phrase "substantially limits a major life activity" to set reasonable boundaries between mere impairments and disabilities. Eliminating this requirement will also remove the line between a minor impairment and a serious disability, such as a vision impairment of 20/60 eyesight requiring corrective lens as compared with a serious disability such as complete blindness. Under current law, only the individual with complete blindness would be considered disabled and thus protected by the ADA. Under the bills, both conditions would be "disabilities" and thus equally protected under the ADA. Indeed, under the proposed legislation, all impairments would be covered regardless of how temporary, intermittent, occasional, mild, or minor and would exponentially increase the number of persons who can bring a disability discrimination claim.

In making this change, the bills would also overturn the U.S. Supreme Court's unanimous decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[146] which recognized that the phrase "substantially limits" distinguishes a mere impairment from an actionable disability by ruling that an impairment is "substantially limiting" if it prevents or severely restricts an individual from doing activities that are central to most people's daily lives. Eliminating the reasonable limitations which distinguish between mere impairments and real disabilities would exponentially increase the number of persons who can bring a disability discrimination claim.

As noted above, the ADA was intended to prohibit discrimination against individuals with real "disabilities" not mere impairments. In *Christian v. St. Anthony Medical Center, Inc.*,[147] the Seventh Circuit highlighted the fact that the ADA protected disabled individuals not employees with a common illness or a minor health condition. The court noted:

> She [the plaintiff] believes, in other words, that the American with Disabilities Act protects an employee from being fired because of illness. *It does not. This is a subtle but important point and we wish to be as emphatic about it as we can. The Act is not a general protection of medically afflicted persons. It protects people who are discriminated against by their employer…either because they are in fact disabled or because their employer mistakenly believes they are disabled.*[148]

Proponents of the bills claim that "[s]imply put, the point of the ADA is not disability, it is the prevention of wrongful discrimination."[149] Such hyperbolic statements highlight the central problem with the bills, which is that the concept of "disability" will be expanded so dramatically that it will technically cover almost everyone at one time or another and the definition of "disability" would be trivialized. As one court aptly noted, "the purpose of the ADA would be undermined if protection could be claimed by those whose relative severity of impairment was widely shared."[150]

Proponents have argued that under other federal antidiscrimination laws, plaintiffs do not need to make a showing that they are "a member of a protected class" before relief can be granted.[151] To the contrary, it is axiomatic that the threshold showing in any type of discrimination case —whether it be based on race, color, religion, sex, national origin, or age— is that an individual is a member of the protected class. Moreover, unlike these other antidiscrimination statutes, ADA plaintiffs need not show that they were treated differently than a person outside the protected class.

Indeed, the legislation would make the concept of a "protected class" on the basis of "disability" almost meaningless because virtually everyone would be protected by it. For example, a person with a bunion would be considered just as disabled as a diabetic foot amputee. An individual with occasional headaches would be protected like a person who suffered from substantial brain damage resulting from a head injury. Similarly, a person with a cut on their finger requiring seven stitches would be considered just as disabled as a veteran returning home from battle having lost his or her arm in combat. An individual with a kidney stone would be on par with a person suffering from kidney failure requiring dialysis a couple of times a week.

The Class of Persons Covered under the ADA has Not Been Narrowed

As discussed, one of the purposes of the proposed legislation is to "respond to" or overturn several U.S. Supreme Court decisions, which have allegedly "narrowed the class of people who can invoke the protection from discrimination the ADA provides."[152] One of these cases is *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.[153] Critics of the case and proponents of the legislation claim that the *Toyota* case narrowed the definition of "disability" —narrowing the protected class— by using the word "severely" in its analysis of how much an impairment must substantially limit a major life activity. But the Supreme Court's decision in *Toyota*,[154] did not "narrow" or change the class of persons protected by the ADA. Moreover, the decision was limited in its scope to the major life activity of performing manual tasks.

In *Toyota*, the Court held that to be substantially limited in a major life activity, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[155] Using the word "severely," however, did not change the definition of "disability" nor the applicable standard. Indeed, the relevant congressional Committee Reports on the ADA expressly used the word "severity" noting that an impairment does not qualify as a disability unless its "*severity* is such that it results in a 'substantial limitation of one or more major life activities.'"[156] Moreover, the EEOC maintains that the Court's use of the term "severely" did not change the pre-*Toyota* standard of "substantially limits."[157] Federal courts of appeals have agreed, as demonstrated by the Seventh Circuit's decision in *Keane v. Sears, Roebuck & Co.*.[158]

In *Keane*, the EEOC filed suit against an employer for failing to reasonably accommodate an employee's disability. The federal district court granted summary judgment in favor of the employer, concluding that the plaintiff did not have a "disability" under the ADA. The decision was appealed and the Seventh Circuit reversed and remanded the case to the district court ("*Keane I*").[159] On remand, the district court determined that the Supreme Court's intervening decision in *Toyota* changed the definition of "substantially limits." Thus, the district court concluded that courts may no longer rely upon the EEOC's regulations because they define a disability as an impairment that "significantly restricts" one or more major life activities and that the Supreme Court set a higher threshold by using the phrase "severely restricts."[160] Once again, the district court found that Keane was not disabled under this new standard.

The Seventh Circuit, however, rejected the district court's opinion. The appeals court, instead, determined that *Toyota* did not alter the statutory standard that, to be disabled, one's impairment must "substantially limit" a major life activity.[161] According to the court, *Toyota* "did not change the way in which courts are to go about making this determination—asking whether the limitation is substantial or considerable in light of what most people do in their daily lives, and whether the impairment's effect is permanent or long term."[162] Consequently, the Seventh Circuit sent the case back to the district court to make the same findings it had ordered before the *Toyota* decision.

Moreover, the Seventh Circuit determined that Toyota was limited in its scope to the major life activity of "performing manual tasks."[163] Specifically, analyzing an individual's ability to perform several types of tasks is different from considering the

major life activity of walking. For example, "the ability of a person who is wheelchair-bound to wash his face or pick up around the house does not indicate that he is not disabled under the ADA, and it would not relieve his employer of the obligation to install a ramp or reasonably accommodate his limitations in other ways."[164] The requirement that a plaintiff be unable to perform a "variety of tasks" like the ones discussed in *Toyota* would not apply where the major life activity at issue is something other than the performance of manual tasks.[165]

Similarly, in *Albert v. Smith's Food & Drug Ctrs., Inc.*,[166] the Tenth Circuit agreed that *Toyota* was largely limited to the major life activity of "performing manual tasks." The court found that "*Toyota* did not set down the rule that all people claiming a disability must show an inability to perform the variety of tasks required to be performed in most people's daily lives."[167] Instead, the appeals court held that the "Supreme Court's analysis regarding the impact of the disability relevant in that case on the ability to perform basic tasks does not apply to what is required to show a substantial limitation in the major life activity of breathing."[168]

Mitigating Measures No Longer Considered

In addition to covering all impairments, under the proposed legislation, mitigating efforts such as medicines, eye glasses, or prosthetic devices would be ignored in determining whether a person is disabled. The Supreme Court cases of *Sutton v. United Airlines*,[169] and its two companion cases[170] would be overturned by the proposed bills. *Sutton*, and its counterparts, held that if a person takes steps "to correct for, or mitigate, a physical or mental impairment, the effects of those measures —both positive and negative— must be taken into account when judging whether that person is 'substantially limited' in a major life activity." In other words, a disability exists only where an impairment actually substantially limits a major life activity, "not where it might, could, or would be substantially limiting if mitigating measures were not taken." Thus, mitigating measures, under the bills, could no longer be considered in analyzing a disability. Not only would the expanded definition of "disability" dispense with the boundaries between mere impairments and disabilities, but also the EEOC and courts could not even consider the mitigating measures used to correct a simple impairment.

Proponents of the legislation and critics of *Sutton* claim that the case has narrowed the protected class under the ADA by effectively excluding individuals who attempt to mitigate or control a disability. Such concerns are largely unfounded. For instance, in *Nawrot v. CPC Int'l*,[171] the plaintiff sufficiently demonstrated that his diabetes substantially limited "his ability to think and care for himself, which are both major life activities."[172] The plaintiff injected himself with insulin approximately three times a day and tested his blood sugar level at least ten times a day. Even taking these mitigating measures, which the court noted was "itself a substantial burden," did not remedy the adverse effects of the plaintiff's diabetes.[173] He could not "completely control his blood sugar level" and he suffered from "unpredictable hypoglycemic episodes, of such extreme consequence that death [was] a very real and significant risk." When suffering from such episodes "his ability to think coherently [was] significantly impaired" inhibiting his ability to express coherent thoughts and occasionally "causing him to make completely nonsensical statements." Moreover, aside from full-blown diabetic episodes, he had "close calls," where he felt the onset of an episode but was able to avert a serious,

debilitating attack.[174] The plaintiff also suffered early stages of kidney damage and nerve damage in his feet (affecting his ability to sense feeling) as a consequence of his diabetes and "depression and mood changes accompany his swings in blood sugar level."[175] In sum, the claim that *Sutton* narrowed the individuals protected by the ADA has not played out in practice.

Burden of Proof Shifts From Plaintiffs to Employers

Unlike other federal anti-discrimination laws, the proposed bills would eliminate the requirement that a plaintiff establish that he or she is a "qualified individual," (*i.e.*, able to perform the job with or without accommodation). Instead, the legislation would place the burden on employers to prove that a disability discrimination plaintiff is "not qualified." Even though Congress intended for an ADA plaintiff to bear the burden of proof that he or she is "qualified individual with a disability."[176]

Under the ADA, a person is "qualified" if they can perform the essential functions of the job, with or without reasonable accommodation.[177] Currently, in a typical disability discrimination case, a plaintiff must show the following elements: (1) the plaintiff has a disability as defined by the ADA; (2) the plaintiff is a *qualified* individual; and (3) the plaintiff suffered an adverse employment action under circumstances which gave rise to an inference of unlawful discrimination. Flipping the burden of proof from plaintiffs to employers would substantially increase litigation costs.

With this unprecedented measure, employers would bear a tremendous burden. Take, for example, a disability applicant case in which an individual with a disability interviewed for a position was not selected. If sued, the employer would be required to show that the plaintiff was qualified for the position. As has been recognized by every other discrimination law, the plaintiff is in a much better position to show that he or she is qualified.

Flipping the burden would require employers to interview and question former employers, if any, regarding the qualifications of the plaintiff (assuming such employers would cooperate with a potential defamation suit hanging over their head if their statements differed from the plaintiff's perception). Moreover, it would necessitate that employers fish through the plaintiff's background looking at and confirming education, test results, medical records, interviewing former coworkers, friends, neighbors or anyone that could assist the employer in meeting the evidentiary burden that the plaintiff was "not qualified." Plaintiffs are much better positioned to bear this burden of proof. They will know where the evidence is and will have the *ability and authority* to acquire the information whereas the employer often would not.

Employer Requirement to Provide Reasonable Accommodations Expanded

The expansion of the term "disabled" would also expand an employer's accommodation obligations. The ADA requires employers to provide reasonable accommodations so disabled individuals may perform the essential functions of the job. To do this, an employee generally requests an accommodation from his or her employer and then the two engage in an interactive communicative process regarding possible accommodations. Under the proposed bills, any employee with any impairment (*i.e.*, disability) may request an accommodation. This would require the employer to engage in

the interactive accommodation process even for minor impairments, which the employer could only ignore at its own peril. Thus, employers could be engaging in the interactive process discussing a reasonable accommodation for the common cold, an ingrown toenail, or even mild seasonal allergies.

Conclusion

The so-called "ADA Restoration Act of 2007" (H.R. 3195 / S. 1881) would radically expand the ADA's coverage by redefining the term "disabled." By changing the definition of "disabled" it will increase litigation brought by individuals who only have impairments but are not disabled and also render much of the ADA legal precedent meaningless. The Act would also shift the burden of proof from a plaintiff to an employer as to whether the plaintiff is "qualified."

Endnotes

[1] 153 Cong. Rec. S10,151 (daily ed. July 26, 2007) (statement of Sen. Harkin).
[2] NATIONAL COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT, 96 (1997).
[3] *Id*. at 97.
[4] *Id*. at 102.
[5] 42 U.S.C. § 12112(a).
[6] *Id*. at § 12112(b)(5)(A).
[7] *Id*. at § 12102(2).
[8] 29 U.S.C. § 794(a).
[9] S. Rep. No. 116, 101st Cong. 1st Sess. (1989), at 21.
[10] H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 27; H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 3 (1990) at 50.
[11] H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 26.
[12] *Narwot v. CPC Int'l*, 277 F.3d 896, 903 (7th Cir. 2002) (citations omitted).
[13] *Christian v. St. Anthony Medical Center, Inc.*, 117 F.3d 1051, 1053 (7th Cir. 1997). *See also Skorup v. Modern Door Corp.*, 153 F.3d 512 (7th Cir. 1998) (holding that if an individual's medical condition does not rise to the level of a disability then he or she is not protected under the ADA).
[14] *Guzman-Rosario v. United Parcel Service*, 397 F.3d 6, 10 (1st Cir. 2005); *see also Flemmings v. Howard University*, 198 F.3d 857, 861 (D.C. Cir. 1999) ("The ADA does not cover every individual with an impairment who suffers an adverse employment action.").
[15] *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 195 (2002). *See also Dalton v. Subaru-Isuzu Auto*, 141 F.3d 667, 675 (7th Cir. 1998) ("Not all impairments are substantial enough to be deemed a protected disability under the ADA.").
[16] *Moore v. J.B. Hunt Transport, Inc.*, 221 F.3d 944, 950 (7th Cir. 2000).
[17] *Toyota*, 534 U.S. at 199 ("An individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person.").
[18] *Moore*, 221 F.3d at 950 (citing *Homeyer v. Stanley Tulchin Assocs., Inc.*, 91 F.3d 959, 962 (7th Cir. 1996)).
[19] *Bragdon v. Abbott*, 524 U.S. 624, 632-42 (1998).
[20] The *treatment* of a condition that is not itself a "disability" can count as a disability under the ADA. *Christian v. St. Anthony Medical Center, Inc.*, 117 F.3d 1051, 1052 (7th Cir. 1997) ("Obviously, having high cholesterol is not in itself disabling; it does not prevent a person from engaging in any of the activities of living and working; it is wholly unlike blindness or paraplegia or the other conventional disabilities that trigger the protection of the ADA. But it is lifethreatening, albeit only in the long term, and if a medical condition that is not itself disabling nevertheless requires, in the prudent judgment of the medical profession, treatment that is disabling, then the individual has a disability within the meaning of the Act, even though the disability is, as it were, at one remove from the condition."). *See also Gordon v. E.L. Hamm & Associates, Inc.*, 100 F.3d 907 (11th Cir. 1996) (assuming that the effects of chemotherapy treatment for a cancer could be disabling, even though the cancer itself did not substantially limit a major life activity. Although, the cancer did not trigger the protections of the statute because it did not render the individual disabled, the treatment did.)
[21] The EEOC adopted the definitions of physical or mental impairment from the Senate and House committee reports. *See* H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 28 and 51; S. Rep. No. 116, 101st Cong. 1st Sess. (1989), at 21-22.
[22] 29 C.F.R. § 1630.2(h)(1).
[23] 29 C.F.R. § 1630.2(h)(2).
[24] PETER A. SUSSER, DISABILITY DISCRIMINATION & THE WORKPLACE, 17 (2005).
[25] EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, No. 915.002 (March 25, 1997).
[26] *See, e.g., Keane v. Sears, Roebuck & Co.*, 417 F. 3d 789, 797 (7th Cir. 2005); *Wood v. Crown Redi-Mix, Inc.*, 339 F.3d 682, 684 (8th Cir. 2003); *Nawrot*, 277 F.3d at 904 n. 4; *Moore*, 221 F.3d at 950; *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 506 (7th Cir. 1998).
[27] *Benoit v. Technical Manufacturing Corp.*, 331 F.3d 166 (1st Cir. 2003).
[28] *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 938 (6th Cir. 2000).

[29] *DiCarlo v. Potter*, 358 F.3d 408 (6th Cir. 2004).
[30] *Christian*, 117 F.3d at 1052.
[31] *Arrieta-Colon v. Wal-Mart, Inc.*, 2006 U.S. App. LEXIS 826 (1st Cir. 2006).
[32] *Sinclair Williams v. Stark*, 2001 U.S. App. LEXIS 5367 (6th Cir. 2001).
[33] *Cella v. Villanova University*, 2004 U.S. App. LEXIS 21740 (3d. Cir. 2004).
[34] *Dillon v. Roadway Express*, 2005 U.S. App. LEXIS 7490 at *8 (5th Cir. 2005).
[35] *Van Sickle v. Automatic Data Processing*, 952 F. Supp. 1213, 1218 (E.D. Mich. 1995).
[36] EEOC Compliance Manual § 902.2(e) at 14.
[37] *Navarro v. Pfizer*, 261 F.3d 90 (1st Cir. 2001).
[38] *Dewitt v. Carsten*, 941 F. Supp. 1232 (N.D. Ga. 1996), *aff'd*, 122 F.3d 1079 (11th Cir. 1997).
[39] *Villarreal v. J.E. Merit Constructors, Inc.*, 895 F. Supp. 149, 152 (S.D. Tex. 1995) (dismissing the complaint because pregnancy is not a disability under the ADA because it is not a disorder and the temporary nature of the condition weighs against considering it an impairment).
[40] *Mehr v. Starwood Hotels & Resorts*, 2003 U.S. App. LEXIS 14815 (6th Cir. 2003).
[41] *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006) (holding that obesity was not an impairment because it was not caused by a physiological condition).
[42] 29 C.F.R. pt. 1630, App. § 1630.2(h).
[43] EEOC Compliance Manual § 902.2(c)(2).
[44] 29 C.F.R. pt. 1630, App. § 1630.2(j).
[45] *Lehman v. U.S. Steel Corp*., No. 2:05-cv-01479-NBF at *7 (W.D. Pa. Sept. 19, 2007).
[46] 534 U.S. 184 (2002).
[47] *Id.* at 197.
[48] *Id*.
[49] *Davidson*, 133 F.3d at 505.
[50] *Heiko v. Colombo Savings Bank, F.S.B.*, 434 F.3d 249 (6th Cir. 2004).
[51] 29 C.F.R. pt. 1630, App. § 1630.2(i).
[52] 29 C.F.R. § 1630.2(h).
[53] 29 C.F.R. pt. 1630, App. § 1630.2(i).
[54] EEOC Compliance Manual § 902.3(b) at 15.
[55] *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053 (9th Cir. 2005); *Bartlett v. New York State Board of Law Examiners*, 226 F.3d 69 (2d Cir. 2000).
[56] *Waldrip v. General Electric Co.*, 325 F.3d 652 (5th Cir. 2003); *Fraser v. U.S. Bancorp*, 342 F.3d 1032 (9th Cir. 2003).
[57] *Doe v. County of Centre*, 242 F.3d 437 (3d Cir. 2001).
[58] *Bragdon*, 524 U.S. at 634.
[59] *Chenoweth v. Hillsborough County*, 250 F.3d 1328 (11th Cir. 2001).
[60] *Miller v. Ameritech Corp*., 2007 U.S. App. LEXIS 1039 (7th Cir. 2007); *Swart v. Premier Parks Corp.*, 2004 U.S. App. LEXIS 2964 (10th Cir. 2004).
[61] *Greathouse v. Westfall*, 2006 U.S. App. LEXIS 27882 (6th Cir. 2006).
[62] *Toyota*, 534 U.S. 184.
[63] *Workman v. Frito-Lay, Inc*., 165 F.3d 460 (6th Cir. 1999).
[64] *Sutton*, 527 U.S. at 471.
[65] *Robinson v. Lockheed Martin Corp*., 2007 U.S. App. LEXIS 331 (3d Cir. 2007); Collado v. United *Parcel Service, Co*., 419 F.3d 1143 (11th Cir. 2005).
[66] *MacKenzie v. Denver*, 414 F.3d 1266 (10th Cir. 2005).
[67] *Nuzum v. Ozark Automotive Distributors, Inc.*, 2005 U.S. App. LEXIS 28736 (8th Cir. 2005).
[68] *Rossbach v. City of Miami*, 371 F.3d 1354 (11th Cir. 2004).
[69] *Moore*, 221 F.3d at 950.
[70] *Robinson v. Global Marine Drilling Co*., 101 F.3d 35 (5th Cir. 1996).
[71] *Toyota*, 534 U.S. at 196.
[72] *Colwell v. Suffolk County Police Dept*., 158 F.3d 635 (2d Cir. 1998).
[73] *Davidson*, 133 F.3d at 508 ("The statute requires proof of a limitation on one or more major life activities, and among the major life activities cited by the regulations is 'working'; but nowhere do we find a requirement that limitations on the other life activities –walking, for example—be shown to manifest specifically in the workplace before the plaintiff may be accorded disabled status under the statute.").

[74] *Sizemore v. Consolidated Rail Corp*., 2003 U.S. App. LEXIS 952 (3d Cir. 2003) (holding that employee could bring an ADA claim because he was regarded as substantially limited in hearing even though he was not regarded as substantially limited in working); *Davidson*, 133 F.3d at 499.
[75] 1999 U.S. App. LEXIS 30586 (10th Cir. 1999).
[76] 339 F.3d 682 (8th Cir. 2003).
[77] *Id*. at 686.
[78] 534 U.S. 184 (2002).
[79] *Id*.
[80] *Id.* at 196 (citations omitted).
[81] *Id.* at 197.
[82] *Davidson*, 133 F.3d at 506.
[83] 29 CFR § 1630.2(j)(1); *see also Sutton*, 527 U.S. at 480.
[84] 213 F.3d 25, 31-32 (1st Cir. 2000).
[85] *Toyota*, 534 U.S. at 198 (citing 29 C.F.R. §§ 1630.2(j)(2)(ii)-(iii)).
[86] *See Rinehimer v. Cemcolift, Inc*., 292 F.3d 375 (noting that a temporary impairment is not protected by the ADA).
[87] *See* EEOC Compliance Manual § 902.4(d) at 30; *Sinclair Williams v. Stark*, 2001 U.S. App. LEXIS 5367 (6th Cir. 2001) (noting that 3 months may be long enough).
[88] 397 F.3d 6, 10 (1st Cir. 2005).
[89] *Reg. Economic Comm. Action Program v. City of Middleton*, 281 F.3d 333 (2d Cir. 2002) (noting that somewhere between three and nine months is "long-term"); *Sinclair Williams v. Stark*, 2001 U.S. App. LEXIS 5367 (6th Cir. 2001) (noting that hypertension lasting three months could be considered "substantially limiting").
[90] 2005 U.S. App. LEXIS 7490 (5th Cir. 2005).
[91] *Id*. at *8 (emphasis added).
[92] 527 U.S. 471 (1999).
[93] *Murphy v. United Parcel Service*, 527 U.S. 516 (1999) (7-2 decision); *Albertson's, Inc. v. Kirkinburg*, 527 U.S. 555 (1999) (unanimous decision).
[94] *Sutton*, 527 U.S. at 482.
[95] *Id.* at 483.
[96] *Id.* at 482.
[97] *Id.* at 483.
[98] *Id.* at 483.
[99] *Id.* at 483-84.
[100] *Id.* at 484-85.
[101] *Id.* at 487.
[102] *Id.* at 494 (Ginsburg J., concurring).
[103] *Id.* at 486-87.
[104] *Id.* at 485, 487.
[105] *Id.* at 485 (citing National Council on Disability, On the Threshold of Independence 19 (1988)).
[106] *Id*. at 487.
[107] 42 U.S.C. § 12112.
[108] 42 U.S.C. § 12111(8).
[109] 29 C.F.R. § 1630.2(m).
[110] *Fenney v. Dakota, Minnesota & Railroad Co*., 327 F.3d 707, 712 (8th Cir. 2003); *Flemmings v. Howard University*, 198 F.3d 857, 861 (D.C. Cir. 1999).
[111] *Fenney v. Dakota, Minnesota & Railroad Co*., 327 F.3d 707, 711-12 (8th Cir. 2003); *Moore*, 221 F.3d at 950; *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 51-52 (5th Cir. 1997) (per curiam).
[112] *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852 (7th Cir. 2005) (holding that the plaintiff has the burden of demonstrating the he was capable of performing the essential functions of the job); *Frazier v. Simmons*, 254 F.3d 1247 (10th Cir. 2001) (same).
[113] *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 568 (8th Cir. 2007); *Hamlin v. Township of Flint*, 165 F.3d 426, 430 (6th Cir. 1999). *But see Laurin v. The Providence Hospital*, 150 F.3d 52, 59 (1st Cir. 1998) ("an ADA plaintiff ultimately must shoulder the burden of establishing that she was able to perform all 'essential functions'").

[114] 29 C.F.R. § 1630.2(n)(1). S*ee also Kapche v. City of San Antonio*, 176 F.3d 840, 843 (5th Cir. 1999).
[115] *EEOC v. E.I. Du Pont de Neumours & Co.*, 480 F.3d 724, 730 (5th Cir. 2007) (citing 29 C.F.R. § 1630.2(n)(3)(i)-(vii)).
[116] *See, e.g., Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894 (8th Cir. 2006) (holding that "driving" was not an "essential function" where the employee had "consistently arranged for his own transportation between customer locations"); *Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3d Cir. 2001) (questioning whether "climbing" was an "essential function" when the employee had worked for over 3 years "without ever having to perform overhead work").
[117] 42 U.S.C. §§ 12112(a), and (b)(5)(A).
[118] *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 572 (7th Cir. 2001); *Jones v. United Parcel Serv.*, 214 F.3d 402, 408 (3d Cir. 2000).
[119] *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 633 (7th Cir. 1998).
[120] *Jay v. Internet Wagner, Inc*., 233 F.3d 1014, 1017 (7th Cir. 2000).
[121] *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002) ("An *ineffective* 'modification' or 'adjustment' will not *accommodate* a disabled individual's limitations.").
[122] *Keane v. Sears, Roebuck & Co.*, 417 F. 3d 789, 797 (7th Cir. 2005).
[123] 42 U.S.C. § 12111(9).
[124] 29 C.F.R. pt. 1630, App. § 1630.2(o); *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1335-36 (10th Cir. 1998) (holding that providing leave for four months to be treated for post traumatic stress disorder was a reasonable accommodation).
[125] The analysis of the length of leave is fact specific depending on whether the leave would impose an undue hardship on the employer. *See, e.g., Garcia-Alaya v. Lederle Parenterals, Inc.*, 212 F.3d 638, (1st Cir. 2000) (noting that it may not have been an undue hardship for the employer to hold the employee's secretarial job open for an extended period of time given that the company was able to fill her position with temporary help).
[126] 42 U.S.C. 12111(9)(B); *see also Benson v. Northwest Airlines*, 62 F.3d 1108, 1113 (8th Cir. 1995) (noting that reallocating marginal functions of the job is a reasonable accommodation).
[127] 29 C.F.R. § 1630.2(o)(2)(ii).
[128] 42 U.S.C. § 12111(9).
[129] 42 U.S.C. § 12111(9)(B). *But see Denszak v. Ford Motor Co*., 2007 U.S. App. LEXIS 2435 (6th Cir. 2007) (holding that employer was not required to displace existing employees to create an opening for reassignment).
[130] EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, No. 915.002 (March 25, 1997) at 27-28.
[131] See H.R. 3195 § 2(b)(1) 110th Cong., 1st Sess. (July 26, 2007).
[132] See H.R. 3195 § 2(b)(2) 110th Cong., 1st Sess. (July 26, 2007).
[133] See H.R. 3195 § 2(b)(3) 110th Cong., 1st Sess. (July 26, 2007).
[134] 153 Cong. Rec. S10,152 (daily ed. July 26, 2007) (statement of Sen. Harkin).
[135] *Rodriguez v. Con Agra Grocery Products Co*., 436 F.3d 468 (5th Cir. 2006).
[136] *See, e.g.*, H.R. 3195 § 2(b)(3) 110th Cong., 1st Sess. (July 26, 2007) (stating that the purpose of the legislation is to reinstate original congressional intention "regarding the definition of *disability* by clarifying that ADA protection is available for all individuals who are subjected to adverse treatment based on actual or perceived *impairment*, or record of *impairment* or are adversely affected by prejudiced attitudes, such as myths, fears, ignorance, or stereotypes concerning *disability*…") (emphasis added).
[137] 153 Cong. Rec. S10,152 (daily ed. July 26, 2007) (statement of Sen. Harkin).
[138] 826 F.Supp. 40, 45 (D.N.H. 1993).
[139] *Id*. at 45. The *Partlow* case arose under the § 504 Rehabilitation Act and analyzed the definition of "handicap" instead of "disability." For consistency, and because both terms —"handicap" under the Rehabilitation Act and "disability" by the ADA— are defined the same, the term "disability" has been substituted in place of "handicap" in this case.
[140] *Id*. (emphasis added).
[141] S. Rep. No. 116, 101st Cong. 1st Sess. (1989) at 22 (emphasis added); H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 52 (emphasis added).
[142] S. Rep. No. 116, 101st Cong. 1st Sess. (1989) at 22 (emphasis added); H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 52 (emphasis added).

[143] S. Rep. No. 116, 101st Cong. 1st Sess. pt. 1 (1989) at 23; H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 52.
[144] S. Rep. No. 116, 101st Cong. 1st Sess. pt. 1 (1989) at 23; H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 52.
[145] S. Rep. No. 116, 101st Cong. 1st Sess. pt. 1 (1989) at 23 (emphasis added); H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 52 (emphasis added).
[146] 534 U.S. 184 (2002).
[147] 117 F.3d 1051 (7th Cir. 1997)
[148] *Christian*, 117 F.3d at 1053 (emphasis added).
[149] Hoyer Introduces Americans With Disabilities Restoration Act of 2007 (July 26, 2007) available at http://www.tilrc.org/docs/0707hoyer.htm.
[150] *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 185-86 (3d Cir. 1999).
[151] SUSAN STEFAN, HOLLOW PROMISES, 73 (2002).
[152] H.R. 3195 § 2(b)(2) 110th Cong., 1st Sess. (July 26, 2007).
[153] 534 U.S. 184 (2002).
[154] *Id.*
[155] *Id.* at 198 (citing 29 C.F.R. §§ 1630.2(j)(2)(ii)-(iii)).
[156] S. Rep. No. 116, 101st Cong. 1st Sess. (1989) at 22 (emphasis added); H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 52 (emphasis added).
[157] EEOC's Reply Br. in *EEOC v. Sears, Roebuck & Co.*, No. 04-2493 (Brief filed in Seventh Circuit, Feb. 25, 2005); EEOC's Br. in EEOC v. UPS, No. 01-15410 (Brief filed in Ninth Circuit, Nov. 1, 2001) at n. 6.
[158] 417 F. 3d 789 (7th Cir. 2005).
[159] *See EEOC & Keane v. Sears Roebuck & Co. ("Keane I")*, 233 F.3d 432 (7th Cir. 2000).
[160] *EEOC & Keane v. Sears Roebuck & Co. ("Keane")*, 417 F. 3d 789, 798 (7th Cir. 2005).
[161] *Keane* , 417 F. 3d at 801.
[162] *Id.*
[163] *Id.* (noting that in *Toyota* the Supreme Court "expressly limited its grant of certiorari, its analysis, and its holding, to the "major life activity of performing manual tasks.").
[164] *Id.*
[165] *See Toyota*, 534 U.S. at 200-202.
[166] 356 F.3d 1242, 1250 n.5 (10th Cir. 2004).
[167] *Id.* (citing *Toyota*, 534 U.S. at 198).
[168] *Id.*
[169] 527 U.S. 471 (1999).
[170] *Murphy v. United Parcel Service*, 527 U.S. 516 (1999) (7-2 decision); *Albertson's, Inc. v. Kirkinburg*, 527 U.S. 555 (1999) (unanimous decision).
[171] 277 F.3d 896 (7th Cir. 2002).
[172] *Nawrot*, 277 F.3d at 905.
[173] *Id.* at 904.
[174] *Id.* at 905.
[175] *Id.*
[176] *See* H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 3 (1990) at 31-34 ("This additional language adopted by the Committee is not meant to change the current burden of proof. This language simply assures that the employer's determination of essential functions is considered. A plaintiff may challenge the employer's determination of what is an essential function.").
[177] 42 U.S.C. § 12111(8).