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CHRONOLOGY OF THE ADA RESTORATION ACT
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PURPOSE OF THE ADA

1. All Americans, including people with disabilities, want to live the American dream—we all want the opportunity to enjoy independence and economic self-sufficiency. We expect to be judged based on our abilities, not our disabilities. Discrimination is un-American.
2. On July 26, 1990 President George H. W. Bush signed into law the landmark Americans with Disabilities Act (ADA). He stated:

“I now sign legislation which takes a sledgehammer to a...wall, one which has for too many generations, separated Americans with disabilities from freedom they could glimpse, but not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, and we will not tolerate discrimination in America.”¹

3. The purpose of the ADA is to establish a clear and comprehensive prohibition of discrimination on the basis of disability and provide broad coverage and vigorous and effective remedies.²

HISTORICAL CONTEXT

4. The original version of the ADA was drafted in 1988 by the National Council on Disability (NCD)³, a council established by Congress to advise the President and the Congress on issues impacting persons with disabilities. NCD was composed of 15 members appointed by President George H.W. Bush.
5. The ADA was reintroduced in 1989, and after 17 congressional hearings, 5 committee markups, 63 public forums across the country, 8,000 pages of transcripts, and oral and written testimony from, among others, the Attorney General of the United States, Governors, State Attorney Generals, and legislators, votes were taken:⁴
 - o The Senate Committee on Labor and Human Resources favorably reported the ADA by a vote of 16-0.⁵
 - o The House Committee on Public Works and Transportation favorably reported the ADA by a vote of 45-5.⁶
 - o The House Committee on the Judiciary favorably reported the ADA by a vote of 32-3.⁷
 - o The House Committee on Education and Labor favorably reported the ADA by a vote of 35-0.⁸
 - o The House Committee on Energy and Commerce favorably reported the ADA by a vote of 40-3.⁹
 - o The ADA passed the Senate 76-8.¹⁰
 - o The ADA passed the House 403-20.¹¹
 - o The Senate passed the ADA Conference Report by a vote of 91-6.¹²
 - o The House passed the ADA Conference Report by a vote of 377-28.¹³
6. The ADA adopted the structure and definition of disability set out in Section 504 of the Rehabilitation Act, a predecessor civil rights statute for persons with disabilities covering recipients of federal financial assistance.¹⁴
 - o The ADA (consistent with Section 504) defines disability, with respect to an individual as:

- A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
 - A record of such an impairment; or
 - Being regarded as having such an impairment.¹⁵
 - The ADA (consistent with Section 504) provides in part that “No covered entity shall discriminate against a qualified individual with a disability because of the disability of the individual...”¹⁶
7. When the ADA was enacted, Congress intended that the executive agencies and the courts would continue the broad, flexible interpretation of the definition and scope of coverage under Section 504 previously adopted by executive agencies and courts. This intent was made explicit in the bipartisan committee reports accompanying the ADA.¹⁷ For example:
- As stated by the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987), the Section 504 definition “acknowledged that society’s myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”¹⁸
 - The fact that an individual uses mitigating measures (e.g., takes medication) to address his or her condition is of no relevance (i.e., should not be considered) in the threshold inquiry as to whether he or she is disabled.¹⁹

In other words, Section 504 was designed to protect individuals who are discriminated against because of the negative attitudes of others toward them, whether or not they have an actual physical or mental impairment.²⁰

8. The bipartisan committee reports accompanying the ADA also recognized that the ADA would automatically cover certain impairments, such as epilepsy, hearing impairments, legal blindness, Human Immunodeficiency Virus (including asymptomatic HIV), paraplegia, and intellectual and developmental disabilities, as well as persons perceived or treated as if they had a disability.²¹
9. Consistent with congressional intent, the executive agencies issuing ADA regulations under President George H. W. Bush adopted the broad Section 504 scope of coverage envisioned by Congress. For example:
- The DOJ clearly stated that “the question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modifications or auxiliary aids and services.”²²
 - Later, DOJ stated that “[a] person would be covered under this test if a public entity refused to serve the person because it perceived that the person had an impairment that limited his or her enjoyment of the goods or services being offered.”²³
 - In addition, the EEOC interpreted the following conditions as *automatically* falling under the scope of coverage of the ADA: “such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.”²⁴

SUPREME COURT DECISIONS

10. Beginning in 1999, the Supreme Court issued a series of decisions²⁵ that:

- Ignored congressional intent and rejected the broad interpretation of disability by: requiring that mitigating measures should be considered in determining whether an individual has a disability; requiring that the words “substantially limits” and “major life activities” in the definition of disability must be “interpreted *strictly* to create a *demanding* standard for qualifying as disabled”; and narrowing the scope of the “regarded as” prong of the definition.
- Expanded the “direct threat” defense by covering safety to self as well as to others and limiting the scope of the reasonable accommodation standard, especially with respect to seniority rights.
- Placed limits on the remedies available under the ADA after a finding of discrimination has been made by rejecting the catalyst theory in awarding attorneys fees and litigation costs, and by restricting the circumstances under which punitive damages may be awarded.²⁶

NCD REPORT, INCLUDING DRAFT ADA RESTORATION ACT

11. On December 1, 2004, 15 members of NCD appointed by President George W. Bush issued a report condemning the Supreme Court decisions described above.²⁷ According to NCD, the Court’s rejection of a broad interpretation of disability has had a devastating impact on coverage of people with disabilities, including people with epilepsy:

To the extent that a covered entity successfully demonstrates (after extensive, intrusive discovery into the details of the person’s condition) that an individual’s epilepsy is effectively controlled by medication, the individual cannot challenge the discriminatory actions of the covered entity. This is true even if the employer or other covered entity has an express policy against the hiring of people with epilepsy; puts up signs that say, “epileptics not welcome here”; inaccurately assumes that all persons with epilepsy are inherently unsafe; or has the irrational belief that epilepsy is inherently unsafe; or has the irrational belief that epilepsy is contagious.²⁸

12. NCD also addressed the problems with court decisions regarding mitigating measures, stating:

This leaves only individuals whose conditions are not controlled by mitigating measures to bring such a covered entity to task under the ADA. But if such persons' impairments are seriously debilitating, it is quite likely that they will be found not "qualified" for jobs or other opportunities, and thus denied ADA protection anyway. If, on the other hand, their unmitigated conditions are not severe, there is a good chance that their conditions will be held not to be "substantially limiting." This is a prime example of the unfortunate "Catch-22" that ADA complainants often find themselves frustrated by: either your condition is not serious enough to constitute a disability or it is too serious for you to be qualified. The end result is that it is a rare plaintiff who is in a position to challenge even the most egregious and outrageous discrimination involving a condition that can be mitigated.²⁹

13. NCD has concluded that the Supreme Court’s restrictive interpretation of the definition of disability has unduly narrowed the scope of coverage of the ADA:

The result of the Court’s harsh and restrictive approach to defining disability places difficult, technical, and sometimes insurmountable evidentiary burdens on people who have experienced discrimination. The focus of many time-consuming and expensive legal battles is on the

characteristics of the person subjected to discrimination on the basis of disability rather than on the alleged discriminatory treatment meted out by the accused party.³⁰

14. A representative sample of lower court decisions that illustrate the adverse impact of the Supreme Court's decisions on individuals who simply want to work and earn a living are contained in a companion document ("The Effect of the Supreme Court's Decisions on People with Disabilities"), available on the Consortium for Citizens with Disabilities' (CCD) website, at www.c-c-d.org/ADA.
15. In addition to criticizing the Supreme Court's interpretations of the ADA as limiting the scope of protection intended by Congress and President Bush, NCD's report also included a draft bill ("ADA Restoration Act") designed to restore that original intent. The NCD draft bill addresses the accumulation of misinterpretations – i.e., the narrowing of the definition of disability; the expansion of the "direct threat" defense and limitation of the reasonable accommodation standard; and the limitation of remedies for violation of the ADA.
16. Specifically, the NCD draft bill allays much of the trouble with the definition of disability created by the Supreme Court by returning to the streamlined approach of the original version of the ADA, developed by NCD and introduced into Congress in 1988. This return to the original approach avoids many of the problematic interpretations of the definition, resulting from the Supreme Court's stingy parsing of the "major life activity" and "substantially limits" elements of this definition. The NCD draft bill refocuses the ADA on prohibiting discrimination on the basis of disability rather than drawing sharp, technical distinctions among people based on how inherently debilitating their conditions are or are not.³¹
17. CCD supports the NCD draft bill, which is consistent with statements of policy set out in the bipartisan congressional committee reports as well as interpretations by executive agencies under President George H.W. Bush.³²
18. However, if members of Congress decide that a comprehensive fix addressing all the issues raised in the NCD draft bill is not possible at this time, CCD supports resolution of the definition problem as set forth in H.R. 3195, the ADA Restoration Act of 2007, introduced by House Majority Leader Steny Hoyer (D-MD) and Representative Jim Sensenbrenner (R-WI), and S. 1881, the Americans with Disabilities Act Restoration Act of 2007, introduced by Senator Tom Harkin (D-IA) and Senator Arlen Specter (R-PA). These bills mirror the definition fix in the NCD draft bill by:
 - Prohibiting consideration of mitigating measures;
 - Eliminating the "substantial limitation" on a "major life activity" requirement;
 - Clarifying physical and mental impairments and "regarded as" having a disability; and
 - Prohibiting discrimination "on the basis of disability."

Once a resolution to the definition problems has occurred, CCD strongly recommends that Congress take up the other issues in the NCD draft bill at a later date.

SUMMARY

19. In sum, when the NCD-developed ADA Restoration Act is enacted into law, Americans who have been denied the right to demonstrate that they have been subjected to discrimination will once again be judged on the basis of their *abilities*, not their actual or perceived *disabilities*.

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- ¹ Remarks of President George H.W. Bush during ceremony for the signing of the Americans with Disabilities Act of 1990, July 26, 1990.
- ² See Americans with Disabilities Act § 2(b) [42 U.S.C. § 12101(b)].
- ³ NCD Report “On the Threshold of Independence” (1988); see also NCD Report “Toward Independence” (1986).
- ⁴ 149 CONG. REC. S5411 (daily ed. April 28, 2003) (Remarks of Senator Tom Harkin).
- ⁵ Senate Committee on Labor and Human Resources Report No. 101-116, page 1.
- ⁶ House Committee on Public Works and Transportation Report No. 101-485, page 52.
- ⁷ House Committee on Judiciary Report No. 101-485, page 25.
- ⁸ House Committee on Education and Labor Report No. 101-485, page 50.
- ⁹ House Committee on Energy and Commerce Report No. 101-485, page 29.
- ¹⁰ 135 CONG. REC. S10803 (daily ed. September 7, 1989).
- ¹¹ 136 CONG. REC. H2638 (daily ed. May 22, 1990).
- ¹² 136 CONG. REC. S9695 (daily ed. July 13, 1990).
- ¹³ 136 CONG. REC. H4629 (daily ed. July 12, 1990).
- ¹⁴ House Committee on the Judiciary Report 101-485, page 31, see also “Memorandum Legislative and Regulatory History -- Foundation for the Proposed ADA Restoration Act,” pages 2-3.
- ¹⁵ Americans with Disabilities Act §, 102(3)(2) 42 USC § 12102.
- ¹⁶ Americans with Disabilities Act, § 102(a) 42 USC § 12112(a).
- ¹⁷ House Committee on the Judiciary Report 101-485 page 27; Senate Committee on Labor and Human Resources, Report 101-116 page 21; House Committee on Education and Labor Report 101-485, page 50; see also Memorandum: “Legislative and Regulatory History -- Foundation for the Proposed ADA Restoration Act,” page 3.
- ¹⁸ House Judiciary Committee Report 101-485 page 30; Senate Committee on Labor and Human Resources Report 101-116 page 23; see also Memorandum: “Legislative and Regulatory History -- Foundation for the Proposed ADA Restoration Act,” pages 12,14.
- ¹⁹ Senate Committee of Labor and Human Resources, Report 101-116 page 23; House Committee on the Judiciary, Report 101-485 page 28; House Committee on Education and Labor, Report 101-485 page 52. See also: Memorandum: “Legislative and Regulatory History -- Foundation for the Proposed ADA Restoration Act.” pages 16-17.
- ²⁰ House Committee on the Judiciary Report 101-485 page 27; Senate Committee on Labor and Human Resources, Report 101-116 page 22; House Committee on Education and Labor Report 101-485, page 50, see also Memorandum: “Legislative and Regulatory History -- Foundation for the Proposed ADA Restoration Act,” pages 12-15.
- ²¹ House Judiciary Committee Report 101-485 page 30; Senate Committee on Labor and Human Resources Report 101-116 page 23; see also Memorandum: “Legislative and Regulatory History -- Foundation for the Proposed ADA Restoration Act,” pages 3, 4, 12-14.
- ²² Preamble to the Final Rule (28 CFR Part 35) Implementing Title II of the ADA, 56 FR 35701 (July 26, 1991).
- ²³ Preamble to the Final Rule (28 CFR Part 35) Implementing Title II of the ADA, 56 FR 35700 (July 26, 1991).
- ²⁴ 28 CFR 35.104(1)(ii); EEOC Compliance Manual (No. 915.002) March 14, 1995, page 902-21; see also Memorandum: “Legislative and Regulatory History -- Foundation for the Proposed ADA Restoration Act,” page 4.
- ²⁵ *Sutton v. United Air Lines*, 527 U.S. 471 (1999); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Postal Service, Inc.*, 527 U.S. 516 (1999); and *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002).
- ²⁶ CRS Report for Congress, March 9, 2006.
- ²⁷ “Righting the ADA,” December 4, 2001; see also NCD Papers: “The Supreme Court's *Kirkingburg* Decision and the Impact of Federal Safety Regulations in ADA Cases” October 21, 2003; “The Supreme Court's Refusal to Permit Punitive Damages in Private Lawsuits Under Section 202 of the ADA” October 1, 2003; “The Supreme Court's Rejection of the “Catalyst Theory” in the Awarding of Attorneys' Fees and Litigation Costs” June 16, 2003; “The Supreme Court's Decisions Regarding Validity and Influence of ADA Regulations” June 4, 2003; “The Supreme Court's Decisions Discussing the “Regarded As” Prong of the ADA Definition of Disability” May 21, 2003; “The Supreme Court's ADA Decisions Regarding the Not-Just-One-Job Standard” May 20, 2003; “The Supreme Court's ADA Decisions Regarding Substantial Limitation of Major Life Activities” April 29, 2003; “The Supreme Court's ADA Decisions and Per Se Disabilities” March 19, 2003; “The Role of Mitigating Measures in the Narrowing of the ADA's Coverage” March 17, 2003; “Reasonable Accommodation After *Barnett*” March 5, 2003; “*Chevron v. Echazabal*: The ADA's “Direct Threat to Self” Defense” February 27, 2003; “The Implications of the Supreme Court's Decision in *Board of Trustees of the University of Alabama v. Garrett*” February 26, 2003; “The Impact of the Supreme Court's ADA Decisions on the Rights of Persons With Disabilities” February 25, 2003; “Defining ‘Disability’ in a Civil Rights Context: The Courts' Focus on Extent of Limitations as Opposed to Fair Treatment

and Equal Opportunity” February 24, 2003; “Negative Media Portrayals of the ADA” February 20, 2003; “Broad or Narrow Construction of the ADA” December 16, 2002; “Significance of the ADA Finding That Some 43 Million Americans Have Disabilities” November 15, 2002; “A Carefully Constructed Law” October 30, 2002; “The Americans with Disabilities Act” October 16, 2002.

²⁸ “Righting the ADA,” December 4, 2001, page 43.

²⁹ NCD Report: “The Role of Mitigating Measures in the Narrowing of the ADA's Coverage” March 17, 2003, page 10.

³⁰ “Righting the ADA,” December 4, 2001, page 43.

³¹ “Righting the ADA,” December 4, 2001, page 102.

³² *See generally*, “Righting the ADA,” December 4, 2001.