

future generations of Americans, ANC is considering alternative actions that could be taken. Repair of the Monument is a viable alternative, as verified by experts in the field of stone conservation. Replacement is another alternative under consideration, due to the uncertainty of obtaining suitable marble in the future. Only marble with specific qualities can be used for replacement, so the current and future existence and availability of such marble is of concern. Suitable marble is available today, but may not be in the future, and there will never be a greater quantity of suitable marble in the future than there is now. It is primarily for this reason that ANC is considering replacement of the Monument as one potential long-term solution.

There is more information in this report on the potential replacement option than there is for other options, because the replacement option is much more complex than the other options under consideration. Also, the potential replacement option has undergone the most scrutiny through the Section 106 review process. The preponderance of information on replacement should not be construed as favoring this option over the other options under consideration.

In response to ANC's request to provide a Tomb Monument replacement, the Department of Veterans Affairs (VA) entered into a Memorandum of Understanding (MOU) with the Department of the Army in 2004 that outlines respective responsibilities. VA will be responsible for the procurement, transportation, and sculpting of a replacement for the base, main die block, and cap of the Tomb Monument when and if Army decides replacement is necessary. Both agencies have compliance requirements under Section 106 of the National Historic Preservation Act and the National Environmental Policy Act (NEPA). No decision on a final course of action will be made until both agencies fulfill their respective responsibilities under both of these laws.

Furthermore, subsection 2873(b) of the Act states that "The Secretary of the Army and the Secretary of Veterans Affairs may not take any action to replace the monument at the Tomb of the Unknowns at Arlington National Cemetery, Virginia, until 180 days after the date of receipt by Congress of the report required by subsection (a)." According to subsection 2873(c), the limitation in subsection 2873(b) does not prevent the repair of the current Monument or the acquisition of blocks of marble. Accordingly, while long-term options such as continued repair, procurement of replacement marble, and immediate replacement continue to be explored, ANC is working with experts in the field of marble maintenance and conservation to develop and implement a maintenance and repair plan to ensure that the existing marble is appropriately protected. ANC will take no action to acquire replacement blocks of marble until after Section 106 and NEPA requirements are complete.

#### STATEMENT OF MANAGERS—S. 3406

Mr. HARKIN. Mr. President, I ask unanimous consent that this Statement of Managers to S. 3406 be reprinted in the RECORD with its endnotes.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

STATEMENT OF THE MANAGERS TO ACCOMPANY  
S. 3406, THE AMERICANS WITH DISABILITIES  
ACT AMENDMENTS ACT OF 2008

Contents:

- I. Purpose and Summary of the Legislation
- II. Background and Need for Legislation
- III. Legislative History and Committee Action
- IV. Explanation of the Bill and Committee Views
- V. Application of the Law to the Legislative Branch
- VI. Regulatory Impact Statement
- VII. Section-by-Section Analysis

#### I. PURPOSE AND SUMMARY OF THE LEGISLATION

The purpose of S. 3406, the "ADA Amendments Act of 2008" is to clarify the intention and enhance the protections of the Americans with Disabilities Act of 1990, landmark civil rights legislation that provided "a clear and comprehensive national mandate for the elimination of discrimination on the basis of disability."<sup>1</sup> In particular, the ADA Amendments Act amends the definition of disability by providing clarification and instruction about the terminology used in the definition, by expanding the definition, and by rejecting several opinions of the United States Supreme Court that have had the effect of restricting the meaning and application of the definition of disability.

S. 3406 is the product of an extensive bipartisan effort that included many hours of meetings and negotiation by legislative staff as well as by stakeholders including the disability, business, and education communities. In addition, two hearings were held in the Senate Health, Education, Labor, and Pensions Committee to explore the issues addressed in this legislation. The goal has been to achieve the ADA's legislative objectives in a way that maximizes bipartisan consensus and minimizes unintended consequences.

This legislation amends the Americans with Disabilities Act of 1990 by making the changes identified below.

Aligning the construction of the Americans with Disabilities Act with Title VII of the Civil Rights Act of 1964, The bill amends Title I of the ADA to provide that no covered entity shall discriminate against a qualified individual "on the basis of disability."

The bill maintains the ADA's inherently functional definition of disability as a physical or mental impairment that substantially limits one or more life activities; a record of such impairment; or being regarded as having such an impairment. It clarifies and expands the definition's meaning and application in the following ways.

First, the bill deletes two findings in the ADA which led the Supreme Court to unduly restrict the meaning and application of the definition of disability. These findings are that there are "some 43,000,000 Americans have one or more physical or mental disabilities" and that "individuals with disabilities are a discrete and insular minority." The Court treated these findings as limitations on how it construed other provisions of the ADA. This conclusion had the effect of interfering with previous judicial precedents holding that, like other civil rights statutes, the ADA must be construed broadly to effectuate its remedial purpose. Deleting these findings removes this barrier to construing and applying the definition of disability more generously.

Second, the bill affirmatively provides that the definition of disability "shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."<sup>2</sup> It retains the term "substantially limits" from the original ADA definition but makes it clear that this is intended to be a less demanding standard than that enunciated by the U.S. Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.<sup>3</sup>

With this rule of construction and relevant purpose language, the bill rejects the Supreme Court's holding in *Toyota v. Williams* that the terms "substantially" and "major" in the definition of disability must be "interpreted strictly to create a demanding standard for qualifying as disabled,"<sup>4</sup> as well as the Court's interpretation that "substantially limits" means "prevents or severely restricts."<sup>5</sup>

Third, the bill prohibits consideration of mitigating measures such as medication, assistive technology, accommodations, or modifications when determining whether an impairment constitutes a disability. This provision and relevant purpose language rejects the Supreme Court's holdings in *Sutton v. United Air Lines*<sup>6</sup> and its companion cases<sup>7</sup> that mitigating measures must be considered.<sup>8</sup> The bill also provides that impairments that are episodic or in remission are to be assessed in an active state.

Fourth, the bill provides new instruction on what may constitute "major life activities." It provides a non-exhaustive list of major life activities within the meaning of the ADA. In addition, the bill expands the category of major life activities to include the operation of major bodily functions.

Fifth, the bill removes from the third "regarded as" prong of the disability definition the requirement that an individual demonstrate that he or she has, or is perceived to have, an impairment that substantially limits a major life activity. Under the bill, therefore, an individual can establish coverage under the law by showing that he or she has been subjected to an action prohibited under the Act because of an actual or perceived physical or mental impairment. Because the bill thus broadens application of this third prong of the disability definition, entities covered by the ADA will not be required to provide accommodations or to modify policies and procedures for individuals who fall solely under the third prong. Such entities will, however, still be subject to discrimination claims.

Finally, the bill clarifies that the agencies that currently issue regulations under the ADA have regulatory authority related to the definitions contained in Section 3. Conforming amendments to Section 7 of the Rehabilitation Act of 1973 are intended to ensure harmony between federal civil rights laws.

#### II. BACKGROUND AND NEED FOR LEGISLATION

When Congress passed the ADA in 1990, it adopted the functional definition of disability from the Section 504 of the Rehabilitation Act of 1973,<sup>9</sup> in part, because after 17 years of development through case law the requirements of the definition were well understood. Within this framework, with its generous and inclusive definition of disability, courts treated the determination of disability as a threshold issue but focused primarily on whether unlawful discrimination had occurred.

More recent Supreme Court decisions imposing a stricter standard for determining disability had the effect of upsetting this balance. After the Court's decisions in *Sutton* that impairments must be considered in their mitigated state and in *Toyota* that there must be a demanding standard for qualifying as disabled, lower courts more often found that an individual's impairment did not constitute a disability. As a result, in too many cases, courts would never reach the question whether discrimination had occurred.

Thus, some 18 years later we are faced with a situation in which physical or mental impairments that would previously have been

found to constitute disabilities are not considered disabilities under the Supreme Court's narrower standard. These can include individuals with impairments such as amputation, intellectual disabilities, epilepsy, multiple sclerosis, diabetes, muscular dystrophy, and cancer. The resulting court decisions contribute to a legal environment in which individuals must demonstrate an inappropriately high degree of functional limitation in order to be protected from discrimination under the ADA.

The ADA Amendments Act rejects the high burden required in these cases and reiterates that Congress intends that the scope of the Americans with Disabilities Act be broad and inclusive. It is the intent of the legislation to establish a degree of functional limitation required for an impairment to constitute a disability that is consistent with what Congress originally intended, a degree that is lower than what the courts have construed it to be. In addition, the bill provides for application of this standard to a wider range of cases by expanding the category of major life activities. These steps, resulting from extensive bipartisan negotiation and discussion among legislators and stakeholders, are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is more predictable, consistent, and workable for all entities subject to responsibilities under the ADA.

### III. EXPLANATION OF THE BILL AND MANAGER'S VIEW OVERVIEW

The Americans with Disabilities Act of 1990 ("the ADA") is a landmark statute that has fundamentally changed the lives of many millions of Americans with disabilities. The managers of this legislation were proud to be leaders in that effort that was accomplished in a deliberative careful manner that allowed for the development of a strong bipartisan coalition in both Houses of Congress and the Administration of President George H. W. Bush and led to Senate passage with a definitive vote of 91-6.

However, as discussed in more detail below, a series of Court decisions have restricted the coverage and diminished the civil rights protections of the ADA, especially in the workplace, by narrowing its definition of disability. As a result, lower court cases have too often turned solely on the question of whether the plaintiff is an individual with a disability rather than the merits of discrimination claims, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied inappropriately, or qualification standards were unlawfully discriminatory.

The managers have introduced the ADA Amendments Act of 2008 to restore the proper balance and application of the ADA by clarifying and broadening the definition of disability, and to increase eligibility for the protections of the ADA. It is our expectation that because this bill makes the definition of disability more generous, some people who were not covered before will now be covered. The strong bipartisan support for this legislation once again demonstrates the continuing bipartisan commitment to protecting the civil rights of individuals with disabilities among members of the Senate Committee on Health Education Labor and Pensions and the Senate as a whole.

The ADA Amendments Act renews our commitment to ensuring that all Americans with disabilities, including a new generation of disabled veterans who are just beginning to grapple with the challenge of living to their full potential despite the limitations imposed by their disabilities, are able to par-

ticipate to the fullest possible extent in all facets of society, including the workplace. We acknowledge and applaud the substantial improvements in medical science and the courageous efforts of individuals with disabilities to overcome the impact of those disabilities, but in no way wish to exclude them thereby from protection under the ADA.

By retaining the essential elements of the definition of disability including the key term "substantially limits" we reaffirm that not every individual with a physical or mental impairment is covered by the first prong of the definition of disability in the ADA. An impairment that does not substantially limit a major life activity is not a disability under this prong. That will not change after enactment of the ADA Amendments Act, nor will the necessity of making this determination on an individual basis. What will change is the standard required for making this determination. This bill lowers the standard for determining whether an impairment constitute a disability and reaffirms the intent of Congress that the definition of disability in the ADA is to be interpreted broadly and inclusively.<sup>10</sup>

#### FINDINGS AND PURPOSES

Given the importance the Court has placed upon findings and purposes particularly in civil rights statutes like the ADA, the ADA Amendments Act contains a detailed Findings and Purposes section that the managers believe gives clear guidance to the courts and that they intend to be applied appropriately and consistently. As described above, the legislation deletes two findings in the ADA that have been interpreted by the Supreme Court to require a narrow definition of disability. We continue to believe that individuals with disabilities "have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."<sup>11</sup>

In addition to deleting the findings forming the basis of the Sutton and Toyota decisions, the bill states explicitly its purpose to reject the holdings in those cases (and their progeny), and to ensure broad coverage under the ADA. To be clear, the purposes section conveys our intent to clarify not only that "substantially limits" should be measured by a lower standard than that used in Toyota,<sup>12</sup> but also that the definition of disability should not be unduly used as a tool for excluding individuals from the ADA's protections.

The bill expresses the clear intent of Congress that the EEOC will revise its regulations that similarly improperly define the term "substantially limits" as "significantly restricted"; again, this sets too high a standard.

The bill's purposes also reject the Supreme Court's holding that mitigating measures must be considered when determining whether an impairment constitutes a disability. With the exception of ordinary eyeglasses and contact lenses, impairments must be examined in their unmitigated state.

These purposes are specifically incorporated into the statute by the rule of construction providing that the term "substantially limits" shall be construed consistently with the findings and purposes of the ADA Amendments Act of 2008. This rule of construction, together with the rule of construction providing that the definition of disability shall be construed in favor of broad

coverage of individuals sends a clear signal of our intent that the courts must interpret the definition of disability broadly rather than stringently.

#### DEFINITION OF DISABILITY

In the ADA of 1990, Congress sought to protect anyone who experiences discrimination because of a current, past, or perceived disability. Under the ADA, there are three prongs of the definition of disability, with respect to an individual:

- (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (2) a record of such an impairment; or
- (3) being regarded as having such an impairment.

This definition is of critical importance because as a threshold issue it determines whether an individual is covered by the ADA. The ADA Amendments Act retains the definition of disability but further defines and clarifies three critical terms within the existing definition ("substantially limits," "major life activities," "regarded as having such impairment") and, under the rules of construction for the definition, adds several standards that must be applied when considering the definition of disability.

#### *Physical or mental impairment*

The bill does not provide a definition for the terms "physical impairment" or "mental impairment." The managers expect that the current regulatory definition of these terms, as promulgated by agencies such as the U.S. Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ) and the Department of Education Office of Civil Rights (DOE OCR) will not change.<sup>13</sup>

#### *Substantially limits*

We do not believe that the courts have correctly instituted the level of coverage we intended to establish with the term "substantially limits" in the ADA. In particular, we believe that the level of limitation, and the intensity of focus, applied by the Supreme Court in Toyota goes beyond what we believe is the appropriate standard to create coverage under this law.

We have extensively deliberated with regard to whether a new term, other than the term "substantially limits" should be used in this Act. For example, in its ADA Amendments Act, H.R.3195, the House of Representatives attempted to accomplish this goal by stating that the key phrase "substantially limits" means "materially restricts" in order to convey that Congress intended to depart from the strict and demanding standard applied by the Supreme Court in Sutton and Toyota.<sup>14</sup>

We have concluded that adopting a new, undefined term that is subject to widely disparate meanings is not the best way to achieve the goal of ensuring consistent and appropriately broad coverage under this Act. The resulting need for further judicial scrutiny and construction will not help move the focus from the threshold issue of disability to the primary issue of discrimination.

We believe that a better way is to express our disapproval of Sutton and Toyota (along with the current EEOC regulation) is to retain the words "substantially limits," but clarify that it is not meant to be a demanding standard. In addition, we believe eliminating the source of the Supreme Court's decisions narrowing the definition and providing more appropriate findings and purposes for properly construing that definition will accomplish our goal without introducing novel statutory terms.

We believe that the manner in which we understood the intended scope of "substantially limits" in 1990 continues to capture our sense of the appropriate level of coverage

under this law for purposes of placing on employers and other covered entities the obligation of providing reasonable accommodations and modifications to individuals with impairments. As we described this in our committee report to the original ADA in 1989:

"A person is considered an individual with a disability for purposes of the first prong of the definition when [one or more of] 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. 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." S. Rep. No. 101-116, at 23 (1989).

We particularly believe that this test, which articulated an analysis that considered whether a person's activities are limited in condition, duration and manner, is a useful one. We reiterate that using the correct standard—one that is lower than the strict or demanding standard created by the Supreme Court in *Toyota*—will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking accommodations or modifications. At the same time, plaintiffs should not be constrained from offering evidence needed to establish that their impairment is substantially limiting.<sup>15</sup>

Thus, we believe that the term "substantially limits" as construed consistently with the findings and purposes of this legislation establishes an appropriate functionality test for determining whether an individual has a disability.

#### *Major life activities*

The bill provides significant new guidance and clarification on the subject of major life activities. First, a rule of construction clarifies that an impairment need only substantially limit one major life activity to be considered a disability under the ADA. This responds to and corrects those courts that have required individuals to show that an impairment substantially limits more than one life activity. It is additionally intended to clarify that the ability to perform one or more particular tasks within a broad category of activities does not preclude coverage under the ADA.<sup>16</sup>

For purposes of clarity, the bill provides an illustrative list of "major life activities" including activities such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. In addition, for the first time, the category of "major life activities" is defined to include the operation of major bodily functions, thus better addressing chronic impairments that can be substantially limiting. Major bodily functions include functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.<sup>17</sup>

Both the list of major life activities and major bodily functions are illustrative and non-exhaustive, and the absence of a particular life activity or bodily function from the list does not create a negative implication as to whether such activity or function constitutes a "major life activity" under the statute.

Finally, we also want to illuminate one area which may be easily misunderstood, with respect to individuals with specific learning disabilities. When considering the

condition, manner, or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking.

#### *Rules of construction on the definition of disability*

The bill further clarifies the definition of disability with a series of rules of construction. As discussed elsewhere, the rules of construction specifically require that the definition of disability be interpreted broadly and that the term "substantially limits" be interpreted consistent with this legislation. This construction is also intended to reinforce the general rule that civil rights statutes must be broadly construed to achieve their remedial purpose. In addition, the rules of construction provide that impairments that are episodic or in remission be assessed in their active state for purposes of determining coverage under the ADA.

#### *Mitigating measures*

The bill also prohibits consideration of the ameliorative effects of mitigating measures when determining whether an individual's impairment substantially limits major life activities, overturning the Supreme Court's decision in *Sutton* and its companion cases. This provision is intended to eliminate the situation created under current law in which impairments that are mitigated do not constitute disabilities but are the basis for discrimination. We expect that when such mitigating measures are ignored, some individuals previously found not disabled will now be able to claim the ADA's protection against discrimination.

The legislation provides an illustrative but non-comprehensive list of the types of mitigating measures that are not to be considered. This list also includes low vision devices, which are devices that magnify, enhance, or otherwise augment a visual image, such as magnifiers, closed circuit television, larger-print items, and instruments that provide voice instructions. The absence of any particular mitigating measure from this list should not convey a negative implication as to whether the measure is a mitigating measure under the ADA.

We also believe that an individual with an impairment that substantially limits a major life activity should not be penalized when seeking protection under the ADA simply because he or she managed their own adaptive strategies or received accommodations (including informal or undocumented ones) that have the effect of lessening the deleterious impacts of their disability.

The bill provides one exception to the rule on mitigating measures, specifying that ordinary eyeglasses and contact lenses are to be considered in determining whether a person has a disability. The rationale behind this exception is that the use of ordinary eyeglasses or contact lenses, without more, is not significant enough to warrant protection under the ADA. Nevertheless, if an applicant or employee is faced with a qualification standard that requires uncorrected vision (as the sisters in the *Sutton* case were), an employer will be required to demonstrate that the qualification standard is job-related and consistent with business necessity.

#### *Regarded as*

Under this bill, the third prong of the disability definition will apply to impairments, not only to disabilities. As such, it does not require a functional test to determine whether an impairment substantially limits a major life activity.

This section of the definition of disability was meant to express our understanding that

unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are often just as disabling as actual impairments, and our corresponding desire to prohibit discrimination founded on such perceptions. In 1990 we relied extensively on the reasoning of *School Board of Nassau County v. Arline*<sup>18</sup> that the negative reactions of others are just as disabling as the actual impact of an impairment. This legislation restates our reliance on the broad views enunciated in that decision and we believe that courts should continue to rely on this standard.

We intend and believe that the fact that an individual was discriminated against because of a perceived or actual impairment is sufficient. Thus, the bill clarifies that contrary to *Sutton*, an individual who is "regarded as having such an impairment" is not subject to a functional test. If an individual establishes that he or she was subjected to an action prohibited by the ADA because of an actual or perceived impairment—whether the person actually has the impairment or whether the impairment constitutes a disability—then the individual will qualify for protection under the Act.

This provision is subject to two important limitations. First, individuals with impairments that are transitory and minor are excluded from eligibility for the protections of the ADA under this prong of the definition, and second, the bill relieves entities covered under the ADA from the obligation and responsibility to provide reasonable accommodations and reasonable modifications to an individual who qualifies for coverage under the ADA solely by being "regarded as" disabled.

#### *Transitory and minor*

The bill contains an exception that clarifies that coverage for individuals under the "regarded as" prong is not available where an individual's impairment is both transitory (six months or less) and minor. Providing this exception responds to concerns raised by employer organizations and is reasonable under the "regarded as" prong of the definition because individuals seeking coverage under this prong need not meet the functional limitation requirement contained in the first two prongs of the definition. A similar exception for the first two prongs of the definition is unnecessary as the functional limitation requirement already excludes claims by individuals with ailments that are minor and short term.

#### *Accommodations*

The bill establishes that entities covered under the ADA do not need to provide reasonable accommodations under Title I or modify policies, practices, or procedures under Titles II or III when an individual qualifies for coverage under the ADA solely by being "regarded as" having a disability under the third prong of the definition of disability.

Under current law, a number of courts have required employers to provide reasonable accommodations for individuals who are covered solely under the "regarded as" prong.<sup>19</sup> In each of those cases, the plaintiffs were found not to be covered under the first prong of the definition of disability because of the overly stringent manner in which the courts had been interpreting that prong. Because of our strong belief that accommodating individuals with disabilities is a key goal of the ADA, some members continue to have reservations about this provision. However, we believe it is an acceptable compromise given our strong expectation that such individuals would now be covered under the first prong of the definition, properly applied.

## DISCRIMINATION ON THE BASIS OF DISABILITY

The bill amends Section 102 of the ADA to mirror the structure of nondiscrimination protection provision in Title VII of the Civil Rights Act of 1964. It changes the language from prohibiting discrimination against a qualified individual “with a disability because of the disability of such individual” to prohibiting discrimination against a qualified individual “on the basis of disability.” This ensures that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a “person with a disability.”

## RULES OF CONSTRUCTION

*Benefits under state worker's compensation laws*

The bill provides that nothing in the Act alters the standards for determining eligibility for benefits under State worker's compensation laws or other Federal or State disability benefit programs.

*Fundamental alteration*

The bill reiterates that no changes are being made to the underlying ADA provision that no accommodations or modifications in policies are required when a covered entity can demonstrate that making such modifications would fundamentally alter the nature of the service being provided. This provision was included at the request of the higher education community and specifically includes “academic requirements in postsecondary education” among the types of policies, practices, and procedures that may be shown to be fundamentally altered by the requested modification or accommodation to reaffirm current law. It is included solely to provide assurances that the bill does not alter current law with regard to the obligations of academic institutions under the ADA, which we believe is already demonstrated in case law on this topic. Specifically, the reference to academic standards in postsecondary education is unrelated to the purpose of this legislation and should be given no meaning in interpreting the definition of disability.

*Claims of no disability*

The bill prohibits reverse discrimination claims by disallowing claims based on the lack of disability, (e.g., a claim by someone without a disability that someone with a disability was treated more favorably by, for example, being granted a reasonable accommodation or modification to services or programs). Our intent is to clarify that a person without a disability does not have the right under the Act to bring an action against an entity on the grounds that he or she was discriminated against “on the basis of disability” (i.e., on the basis of not having a disability).

## REGULATORY AUTHORITY

In *Sutton*, the Supreme Court stated that “[n]o agency . . . has been given authority to issue regulations implementing the generally applicable provisions of the ADA which fall outside Titles I-V.”<sup>20</sup> The bill clarifies that the authority to issue regulations is granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation and specifically includes the authority to issue regulations implementing the definition of disability as amended and clarified by this legislation.

We anticipate that the agencies charged with regulatory authority under the ADA will make any necessary modifications to their regulations to reflect the changes and

clarifications embodied in the ADA Amendments Act, including the addition of major bodily functions as major life activities and the broadening of the “regarded as” prong. We also expect that the Equal Employment Opportunity Commission (EEOC) will revise the portion of its ADA regulations that defines “substantially limits” as “unable to perform a major life activity. . . . or significantly restricted as to . . . particular major life activity. . . .” given the clear inconsistency of that portion of the regulation with the intent of this legislation.

## CONFORMING AMENDMENT

The bill ensures that the definition of disability in Section 7 of the Rehabilitation Act of 1973, which shares the same definition, is consistent with the ADA. The Rehabilitation Act of 1973 preceded the ADA in providing civil rights protections to individuals with disabilities, and in drafting the definition of disability in the ADA, the authors relied on the statute and implementing regulations of the Rehabilitation Act. Maintaining uniform definitions in the two federal statutes is important so that such entities will generally operate under one consistent standard, and the civil rights of individuals with disabilities will be protected in all settings. The ADA, under Title II and Title III, and Section 504 of the Rehabilitation Act provide overlapping coverage for many entities, including public schools, institutions of higher education, childcare facilities, and other entities receiving federal funds.

We expect that the Secretary of Education will promulgate new regulations related to the definition of disability to be consistent with those issued by the Attorney General under this Act. We believe that other current regulations issued by the Department of Education Office of Civil Rights under Section 504 of the Rehabilitation Act are currently harmonious with Congressional intent under both the ADA and the Rehabilitation Act.

## CONCLUSION

We intend that that the sum of these changes will make the threshold definition of disability in the ADA—under which individuals qualify for protection from discrimination—more generous, and will result in the coverage of some individuals who were previously excluded from those protections.

We note that with the changes made by the ADA Amendments Act, courts will have to address whether an impairment constitutes a disability under the first and second, but not the third, prong of the definition of disability. The functional limitation imposed by an impairment is irrelevant to the third “regarded as” prong.

In general, individuals may find it easier to establish disability under this bill's more generous standard than under the Supreme Court's demanding standard. To repeat, we intend this bill to return the legal analysis to the balance that existed before the Supreme Court's *Sutton* and *Toyota* decisions. The determination of disability is a necessary threshold issue in many cases, but an appropriately generous standard on that issue will allow courts to focus primarily on whether discrimination has occurred or accommodations improperly refused.<sup>21</sup>

## IV. LEGISLATIVE HISTORY AND COMMITTEE ACTION

Prior to introduction of the ADA Amendments Act of 2008 on July 31, 2008 with 55 original cosponsors the following actions occurred in the 110th Congress.

On July 26, 2007, Senator Tom Harkin introduced S. 1881, the ADA Restoration Act of 2007 together with Senator Arlen Specter. Senator Edward Kennedy, the Chairman of the Senate Health, Education, Labor, and

Pensions Committee cosponsored the legislation along with Senator Ted Stevens. The bill was referred to the Senate Health, Education, Labor, and Pensions Committee.

Similarly, on July 26, 2007, Representatives Steny H. Hoyer (D-MD) and F. James Sensenbrenner (R-WI) introduced H.R. 3195, the ADA Restoration Act of 2007, with 144 original cosponsors. The bill was referred to the House Committees on Education and Labor, Judiciary, Transportation and Infrastructure, and Energy and Commerce.

On October 4, 2007, the House Judiciary Committee held a hearing on H.R. 3195. Six witnesses appeared before the committee: Honorable Steny Hoyer (D-MD), House Majority Leader; Cheryl Sensenbrenner, Chair of the Board, American Association of People with Disabilities; Stephen Orr, Pharmacist (Plaintiff in *Orr v. Wal-Mart*); Michael Collins, Executive Director, National Council on Disability; Lawrence Lorber, Attorney, on behalf of the U.S. Chamber of Commerce; Chai Feldblum, Director, Federal Legislation Clinic and Professor of Law, Georgetown Law Center.

On November 15, 2007, the Senate HELP Committee held a hearing chaired by Senator Tom Harkin, “Restoring Congressional Intent and Protections under the Americans with Disabilities Act.” Five witnesses appeared before the committee: John D. Kemp, President, United States International Council on Disabilities; Dick Thornburgh, Former United States Attorney General and Counsel, Kirkpatrick & Lockhart; Stephen Orr, Pharmacist (Plaintiff in *Orr v. Wal-Mart*), Camille Olson, Labor and Employment Attorney, Seyfarth & Shaw; Chai Feldblum, Director, Federal Legislation Clinic and Professor of Law, Georgetown Law Center.

On January 29, 2008, the House Committee on Education and Labor held a hearing on H.R. 3195. Five witnesses appeared before the committee: Honorable Steny Hoyer (D-MD), House Majority Leader; Andrew Imparato, President and CEO, American Association of People with Disabilities; Carey McClure, Electrician (Plaintiff in *McClure v. General Motors*); Robert L. Burgdorf, Professor of Law, University of the District of Columbia; David K. Fram, Director, ADA & EEO Services, National Employment Law Institute.

On June 18, 2008, the House Committee on Education and Labor held a markup to consider H.R. 3195. An amendment was offered as a substitute to the original bill, and it was reported out of the Committee by a vote of 43 to 1.

On June 18, 2008, the Committee on the Judiciary held a markup to consider H.R. 3195. An amendment was offered as a substitute to the original bill, and it was reported out of the Committee by a vote of 27 to 0.

On June 25, 2008 the United States House of Representatives held a vote on H.R. 3195 and passed the legislation by a vote of 402-17.

On July 15, 2008, the Senate HELP Committee held a Roundtable: “H.R. 3195 and Determining the Proper Scope of Coverage for the Americans with Disabilities Act.” Eight individuals gave testimony before the committee: Samuel R. Bagenstos, Professor of Law, Washington University School of Law; Carey McClure, Electrician (Plaintiff in *McClure v. General Motors*); JoAnne Simon, Disability Rights Attorney; Sue Gamm, Elementary and Secondary Education Consultant; Terry Hartle, Senior Vice President, American Council on Education; Chai Feldblum, Professor, Federal Legislation Clinic, Georgetown University Law Center, Washington, DC; Michael Eastman, Executive Director of Labor Policy, U.S. Chamber of Commerce; Andrew Grossman, Senior Legal Policy Analyst, Heritage Foundation.

On July 31, 2008 Senators Tom Harkin and Orrin Hatch introduced S. 3406, The ADA

Amendments Act of 2008. The bill was placed on the Senate calendar (under general orders/pursuant to Rule XVI).

#### V. APPLICATION OF THE LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104-1, the Congressional Accountability Act (CAA), requires a description of the application of this bill to the legislative branch. S. 3604 does not amend any act that applies to the legislative branch.

#### VI. REGULATORY IMPACT STATEMENT

The managers have determined that the bill may result in some additional paperwork, time, and costs to the Equal Employment Opportunity Commission, which would be entrusted with implementation and enforcement of the act. It is difficult to estimate the volume of additional paperwork necessity by the bill, but the committee does not believe it will be significant. Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the committee has determined that the bill will not have a significant regulatory impact.

#### VII. SECTION-BY-SECTION ANALYSIS

Sec. 1. Short Title. This Act may be cited as the "ADA Amendments Act of 2008."

Sec. 2. Findings and Purposes. Acknowledges Congressional intent of the Americans with Disabilities Act of 1990 (ADA) to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and to provide broad coverage, and that the U.S. Supreme Court subsequently erroneously narrowed the definition of disability in a series of cases. The purposes of the Act are to reinstate a broad scope of protection to be available under the ADA, to reject several Supreme Court decisions, and to re-establish original Congressional intent related to the definition of disability.

Sec. 3. Codified Findings. Amends one finding in the ADA to acknowledge that many people with physical or mental impairments have been subjected to discrimination, and strikes one finding related to describing the population of individuals with disabilities as "a discrete and insular minority."

Sec. 4. Disability Defined and Rules of Construction. Amends the definition of "disability" and provides rules of construction for applying the definition. The term "disability" is defined to mean, with respect to an individual, a physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such an impairment.; provides an illustrative list of "major life activities" including major bodily functions; and defines "regarded as having such an impairment" as protecting individuals who have been subject to an action prohibited under the ADA because of an actual or perceived impairment, whether or not the impairment is perceived to limit a major life activity. Requires the definition of disability to be construed broadly and consistent with the findings and purposes. Provides rules of construction regarding the definition of disability, requiring that impairments need only limit one major life activity; clarifying an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and prohibiting the consideration of the ameliorative effects of mitigating measures such as medication, learned behavioral modifications, or auxiliary aids or services, in determining whether an impairment is substantially limiting, while excluding ordinary eyeglasses and contact lenses.

Sec. 5. Discrimination on the Basis of Disability. Prohibits discrimination under Title

I of the ADA "on the basis of disability" rather than "against a qualified individual with a disability because of the disability of such individual." Clarifies that covered entities that use qualification standards based on uncorrected vision must show that such a requirement is job-related and consistent with business necessity.

Sec. 6. Rules of Construction. Provides that nothing in this Act alters the standards for determining eligibility for benefits under State worker's compensation laws or other disability benefit programs. Prohibits reverse discrimination claims by disallowing claims based on the lack of disability. Provides that nothing in this Act alters the provision in Title III that a modification of policies or practices is not required if it fundamentally alters the nature of the service being provided. Establishes that entities covered under all three titles of the ADA are not required to provide reasonable accommodations or modifications to an individual who meets the definition of disability only as a person "regarded as having such an impairment." Authorizes the EEOC, Attorney General, and the Secretary of Transportation to promulgate regulations implementing the definition of disability and rules of construction related to the definition.

Sec. 7. Conforming Amendments. Amends Section 7 of the Rehabilitation Act of 1973 to cross-reference the definition of disability under the ADA.

Sec. 8. Effective date. Amendments made by the Act take effect January 1, 2009.

September 11, 2008.

TOM HARKIN,  
U.S. Senator.  
ORRIN HATCH,  
U.S. Senator.

#### ENDNOTES

- 42 U.S.C. §12101.
- This rule of construction is consistent with earlier judicial precedents and parallels the rule of construction in the Religious Land Use and Institutionalized Persons Act, which Congress unanimously passed in 2002.
- Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).
- Id. at 197.
- Id. at 198. See also, 29 CFR 1630.2.
- Sutton v. United Airlines*, 527 U.S. 471 (1999).
- Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).
- Ordinary eyeglasses and contact lenses are excluded from this prohibition.
- 29 U.S.C. §794. Sections 501 and 503 of the Rehabilitation Act also use the same definition of disability and prohibit disability discrimination by federal employees and federal contractors, respectively. 29 U.S.C. §§791, 793. Note that the definition of disability is found in Section 705(20)(B).
- This bill does not change any current statutory requirement that an individual must be qualified to perform the essential functions of the job.
- 42 U.S.C. 12101.
- The bill's purposes include rejecting the holding in *Toyota* that in order for an impairment to be substantially limiting, the impairment must "prevent or severely restrict the individual from doing activities that are of central importance to most people's lives."
- 28 CFR §36.104; 29 CFR §1630.2(h) (1)-(2); 34 CFR §104.3(j)(2)(i).
- We have chosen not to adopt the House's term "materially restricts" or the House Committees' use of a range or spectrum of severity to define "materially restricts" because we are concerned both by the lack of clarity in the terms "material" "moderate" and "severe" and because we believe that such terms encourage the courts to engage in an inappropriate level of scrutiny as to the severity of an impairment when determining whether an individual has a disability.
- Under the first prong, of course, a plaintiff must still provide evidence that his or her impairment is substantially limiting.
- See *Holt v. Grand Lake Mental Health Center, Inc.*, 443 F. 3d 762 (10th Cir. 2006) holding an individual with cerebral palsy who could not independently perform certain specified manual tasks was not substantially limited in her ability to perform a "broad range" of manual tasks.
- We expect that this illustrative list of major life activities (including major bodily functions), in combination with the rejection of both the "demanding standard" in *Toyota* and the consideration of mitigating measure in the *Sutton* trilogy will make it easier for individuals to show that they are eligible for the ADA's protections under the first prong of the definition of disability. While it is impossible to predict the type of cases that will be brought following passage of this bill, we would expect that the bill will make it easier for individuals in cases like the following to qualify for the protections of the ADA—*Littleton v. Wal-Mart Stores, Inc.*, 231 Fed. Appx. 874 (11th Cir. 2007) (individual with intellectual disability); *Furnish v. SVI Syst., Inc.*, 270 F. 3d 445, 450 (7th Cir. 2001) (person with cirrhosis of the liver caused by Hepatitis B); and *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177 (D.N.H. 2002) (individual with advanced breast cancer).
- 480 U.S. 273(1987).
- The following courts have held that the ADA requires that reasonable accommodations be provided to individuals who are able to establish coverage under the ADA under the "regarded as" prong of the definition of disability: *Kelly v. Metallics West, Inc.*, 410 F.3d 670 (10th Cir. 2005) (plaintiff needed oxygen device to breathe); *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220 (11th Cir. 2005) (plaintiff had vertigo resulting in spinning and vomiting); *Williams v. Philadelphia Housing Auth. Police Dept.*, 380 F.3d 751 (3d Cir. 2004) (plaintiff had major depressive disorder); *Lorinz v. Turner Const. Co.*, 2004 WL 1196699, \* 8 n.7 (E.D.N.Y. May 25, 2004) (plaintiff had depressive disorder and anxiety); *Miller v. Heritage Prod., Inc.*, 2004 WL 1087370, \* 10 (S.D. Ind. Apr. 21, 2004) (plaintiff had back injury and could not lift more than 20 pounds, bend or twist); *Jacques v. DiMarzio, Inc.*, 200 F. Supp.2d 151 (E.D.N.Y. 2002) (plaintiff had bipolar disorder); *Jewell v. Reid's Confectionary Co.*, 172 F. Supp.2d 212 (D. Me. 2001) (plaintiff had heart attack); *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 33 (1st Cir. 1996) (plaintiff had heart attack). Some courts have held that reasonable accommodations need not be provided to an employee who is merely regarded or perceived as disabled. See *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1231-33 (9th Cir. 2003); *Weber v. Strippit, Inc.*, 186 F.3d 907, 916-17 (8th Cir. 1999); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Newberry v. E. Texas State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998). Cf. *Brady v. Wal-Mart Stores Inc. et al*, No. 06-5486-cv (2nd Cir. July 2, 2008) (accommodations available under either first or third prong).
- 527 U.S. at 479 (1999).
- For example, an individual with diabetes might demonstrate coverage by showing either that he was substantially limited in endocrine functioning or that his diabetes substantially limited a major life activity, such as eating or sleeping.

#### IDAHOANS SPEAK OUT ON HIGH ENERGY PRICES

Mr. CRAPO. Mr. President, in mid-June, I asked Idahoans to share with