

Joint Statement of Representatives Hoyer and Sensenbrenner

Origins of the ADA Restoration Act of 2008, H.R. 3195

On September 29, 2006, we introduced H.R. 6258, entitled the Americans with Disabilities Act Restoration Act of 2006. This bill was a response to decisions of the Supreme Court and lower courts narrowing the group of people whom Congress had intended to protect under the Americans with Disabilities Act (ADA). The Supreme Court had interpreted the ADA to impose a “demanding” standard for coverage.¹ It had also held that the ameliorative effects of “mitigating measures” that people use to control the effects of their disabilities must be considered in determining whether a person has an impairment that substantially limits a major life activity and is protected by the ADA.² This holding was contrary to Congress’ stated intent in several committee reports.

We introduced H.R. 6258, which was designed to reverse these holdings, at the end of the 2006 legislative session. We intended this bill to serve as a marker of our intent to introduce future legislation to address this issue. On July 26, 2007, we introduced similar legislation, H.R. 3195, the ADA Restoration Act of 2007, which ultimately garnered over 240 cosponsors. A nearly identical bill, S. 1881, was introduced in the Senate on the same day by Senators Harkin and Specter.

H.R. 3195 as introduced would have amended the ADA to provide protection for any individual who had a physical or mental impairment or a record

¹ *Toyota Motor Mfg. of Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002).

² *Sutton v. United Airlines*, 527 U.S. 471 (1999), and its companion cases.

of such an impairment, or who was treated as having such an impairment. The purpose of this legislation was to restore the intent of Congress to cover a broad group of individuals with disabilities under the ADA and to eliminate the problem of courts focusing too heavily on whether individuals were covered by the law rather than on whether discrimination occurred. The bill as introduced, however, was seen by many as extending the protections of the ADA beyond those that Congress originally intended to provide.

In order to craft a more balanced bill with broad support, we urged that representatives of the disability and business communities enter into negotiations to try to reach an acceptable compromise. We maintained contact with these communities over the course of their negotiations and supported them in their efforts to understand the needs and concerns of each community. After several months of intensive discussions, negotiators for the two communities reached consensus on a set of protections for people with disabilities that garnered broad support from both communities. These protections would significantly expand the group of individuals protected by the ADA beyond what the courts have held, while at the same time ensuring that the expansion does not extend beyond the original intent of the ADA.

This compromise formed the basis of the amendment in the nature of a substitute for H.R. 3195 that was voted out of the House Education and Labor and Judiciary Committees with overwhelming support on June 18, 2008. The substitute bill was reported out of the Education and Labor Committee by a vote of 43-1, and out of the Judiciary Committee by a vote of 27-0.

The Provisions of the Committee Substitute to H.R. 3195

The primary purpose of H.R. 3195, as amended by the committee substitute, is to make it easier for people with disabilities to qualify for protection under the ADA. The bill does this in several ways. First, it establishes that the definition of disability must be interpreted broadly to achieve the remedial purposes of the ADA. The bill rejects the Supreme Court's holdings that the ADA's definition of disability must be read "strictly to create a demanding standard for qualifying as disabled," and that 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" in order to qualify for protection.³ The bill also provides a new definition of "substantially limits" to make clear Congress' intent to depart from the standard applied by the Supreme Court in *Toyota Motor Mfg. of Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002), and to apply a lower standard.

Second, the bill provides that the ameliorative effects of mitigating measures are not to be considered in determining whether a person has a disability. This provision is intended to eliminate the catch-22 that exists under current law, where individuals who are subjected to discrimination on the basis of their disabilities are frequently unable to invoke the ADA's protections because they are not considered people with disabilities when the effects of their medication, medical supplies, behavioral adaptations, or other interventions are considered. The one exception to the rule about mitigating measures is that ordinary eyeglasses and contact lenses *are* to be considered in determining

³ *Toyota*, 534 U.S. at 685.

whether a person has a disability. The rationale behind this exclusion is that the use of ordinary eyeglasses or contact lenses, without more, is not significant enough to warrant protection under the ADA.

Third, the bill provides that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. This provision is intended to reject the reasoning of court decisions concluding that certain individuals with certain conditions -- such as epilepsy or post traumatic stress disorder -- were not protected by the ADA because their conditions were episodic or intermittent.

Fourth, the bill provides for broad coverage under the “regarded as” prong of the definition of disability. It clarifies that an individual can establish coverage under the “regarded as” prong by establishing that he or she was subjected to an action prohibited by the ADA because of an actual or perceived impairment, whether or not the impairment limits or is perceived to limit a major life activity. This provision does not apply to impairments that are both transitory (lasting six months or less) and minor.

The purpose of the broad “regarded as” provision is to reject court decisions that had required an individual to establish that a covered entity perceived him or her to have an impairment that substantially limited a major life activity. This provision is designed to restore Congress’ intent to allow individuals to establish coverage under the “regarded as” prong by showing that they were treated adversely because of an impairment, without having to establish the covered entity’s beliefs concerning the severity of the impairment.

Impairments that are transitory and minor are excluded from coverage in order to provide some limit on the reach of the “regarded as” prong. The intent of this exception is to prevent litigation over minor illnesses and injuries, such as the common cold, that were never meant to be covered by the ADA.

A similar exception is not necessary for the first two prongs of the definition of disability as the functional limitation requirement adequately prevents claims by individuals with ailments that do not materially restrict a major life activity. In other words, there is no need for the transitory and minor exception under the first two prongs because it is clear from the statute and the legislative history that a person can only bring a claim if the impairment substantially limits one or more major life activities or the individual has a record of an impairment that substantially limits one or more major life activities.

The bill also provides that a covered entity has no obligation to provide reasonable accommodations, or reasonable modifications to policies, practices or procedures, for an individual who qualifies as a person with a disability solely under the “regarded as” prong. 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.

Fifth, the bill modifies the ADA to conform to the structure of Title VII and other civil rights laws by requiring an individual to demonstrate discrimination “on the basis of disability” rather than discrimination “against an individual with a disability” because of the individual’s disability. We hope this will be an important signal to both lawyers and courts to spend less time and energy on the minutia of

an individual's impairment, and more time and energy on the merits of the case – including whether discrimination occurred because of the disability, whether an individual was qualified for a job or eligible for a service, and whether a reasonable accommodation or modification was called for under the law.

In exchange for the enhanced coverage afforded by these provisions, the bill contains important limitations that will make the bill workable from the perspective of businesses that are governed by the law. We have already noted some of these limitations: there is an exception in the mitigating measures provision for ordinary eyeglasses and contact lenses, and the “regarded as” provision includes two important limitations, as described above.

Of key importance, the bill retains the requirement that a person's impairment must substantially limit a major life activity in order to be considered a disability. “Substantially limits” has been defined as “materially restricts” in order to communicate to the courts that we believe that their interpretation of “significantly limits” was stricter than we had intended. On the severity spectrum, “materially restricts” is meant to be less than “severely restricts,” and less than “significantly restricts,” but more serious than a moderate impairment which would be in the middle of the spectrum.

The key point in establishing this standard is that we expect this prong of the definition to be used only by people who are affirmatively seeking reasonable accommodations or modifications. Any individual who has been discriminated against because of an impairment – short of being granted a reasonable accommodation or modification – should be bringing a claim under the third

prong of the definition which will require no showing with regard to the severity of his or her impairment. However, for an individual who is asking an employer or a business to make a reasonable accommodation or modification, the bill appropriately requires that the individual demonstrate a level of seriousness of the impairment – that is, that it materially restricts a major life activity.

The bill also retains the requirement in Title I of the ADA that an individual must be “qualified” for the position in question. The original version of H.R. 3195 contained language which could have been interpreted to alter the burden-shifting analysis concerning whether an individual is “qualified” under the ADA. The substitute bill makes clear that there was no intent to place a greater burden on the employer and that the burdens remain the same as under current law.

Additional Legal Issues

We would like to clarify the intent of the bill with respect to particular legal issues. First, some higher education trade associations have raised questions about whether the bill will eviscerate academic standards. This bill will have absolutely **no effect** on the ability of higher education institutions to set academic standards. It addresses only the standards for determining who qualifies as an individual with disability, and not the standards for determining whether an accommodation or modification is required in a particular setting or context. It has always been, and it remains the law today under this bill, that an academic institution need not make modifications that would fundamentally alter the essential requirements of a program of study. The particular concerns of educational institutions in ensuring that students meet appropriate academic

standards are, of course, relevant in determining whether a requested modification is reasonable in an educational setting.

There have been particular concerns with the way that specific learning disabilities have been treated in the academic context, and that individuals are not receiving appropriate accommodations. The Education and Labor Committee Report's discussion of specific learning disabilities is specifically targeted toward the academic setting and not the employment sector.

Second, a concern has been raised about whether the bill changes current law with respect to the duration that is required for an impairment to substantially limit a major life activity. The bill makes no change to current law with respect to this issue. The duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity. Impairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe.

Third, some have raised questions about whether the bill's provisions relating to mitigating measures would require employers to provide certain mitigating measures as accommodations. This bill's provisions are intended to clarify the definition of disability, not to alter current rules on provision of reasonable accommodations.

Fourth, the bill's language requiring that qualification standards, employment tests, or other selection criteria based on uncorrected vision must be job related for the position in question and consistent with business necessity is not intended to change current interpretations of whether a qualification standard

based on a government requirement or regulation is job related for the position in question and consistent with business necessity.

Passage of the ADA Amendments Act is a great moment in this country's history. We would like to thank all the individuals who worked so hard on these negotiations, and to thank the thousands of individuals and businesses who care about making this country a fair and equitable place for people with disabilities.