



National Council on Disability

Policy Brief Series: Righting the ADA

No. 15

The Supreme Court's Decisions Discussing the "Regarded As"
Prong of the ADA Definition of Disability

May 21, 2003

In addition to persons who have a physical or mental impairment that substantially limits a major life activity and persons who have a record of a substantially limiting condition, the Americans with Disabilities Act (ADA) also provides protection from discrimination to individuals who are "regarded as having such an impairment" (42 U.S.C. § 12102(2)(C)). The "regarded as" prong of the definition of disability represents a broad approach that would extend statutory protection to anyone who has been excluded or disadvantaged by a covered entity on the basis of a physical or mental impairment, whether real or perceived. The Supreme Court has taken a restrictive approach to the "regarded as" prong, narrowing its applicability in significant ways. This policy brief examines the origin, purpose, and meaning of the "regarded as" component of the definition of disability, and the implications of the Court's interpretation and application of it.

THE ORIGINS OF THE "REGARDED AS" PRONG

Congress first formulated the three-prong definition of disability in the Rehabilitation Act Amendments of 1974. It included: "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."¹ The Rehabilitation Act of 1973 had been enacted the previous year with a traditional vocational rehabilitation perspective as to what constituted a "handicap," focusing on whether an individual was employable and on whether he or she could benefit from vocational rehabilitation services.² The legislative history indicates that Congress found the prior definition "far too narrow and constricting" for the broader problems addressed in the innovative Title V of the 1973 Act,³ including Section 504's prohibition of discrimination in all programs and activities receiving federal financial assistance.⁴ The Senate Committee Report accompanying the 1974 Amendments declared that the prior definition had proven to be "troublesome" in its application to the affirmative action requirement of Section 503 and the nondiscrimination requirement of Section 504, particularly due to its focus on employability and vocational rehabilitation services.⁵ The Senate Committee explained that it had devised a new definition "which would provide sufficient latitude (but still not be totally open ended), particularly for the nondiscrimination programs carried out under sections 501, 503, and 504...."⁶

In developing the revised definition, Congress did not simply expand the focus of the definition from employment and rehabilitation to include other types of programs and activities; it made two other important additions. It established a definition for an actual disability that required a substantial limitation on a major life activity, and it added the "record of" and "regarded as" components to the definition.⁷ By adding the additional two prongs to the definition Congress was, as the Supreme Court would later acknowledge, including within the definition persons who "may at present have no actual incapacity at all."⁸ The first prong, which is patterned after the prior Vocational Rehabilitation eligibility definition, is worded in restrictive terms, while the second and third prongs are expansive in scope. This difference derives from the dual purposes that Congress framed this definition to serve. The three-prong definition applies to affirmative

action efforts required under Sections 501 and 503, to barrier removal efforts under Section 502, and to nondiscrimination requirements imposed under Sections 501, 503, and 504. Congress wanted a very broad definition for nondiscrimination purposes — to protect people from being discriminated against on the basis of "handicap" whether they had any actual impairment or not. On the other hand, the objective of affirmative action programs would surely be undermined if covered employers could claim success based upon workers whom the employer merely "regards" as being a person with a disability. It would be inappropriate to permit an employer to claim compliance with affirmative action requirements under Section 501 or Section 503 by asserting that it regards employees as impaired. Nor does it make any sense to remove architectural and transportation barriers with reference to people with a record of disability or only regarded as having a disability.

The legislative history explicitly describes the purposes of the third prong as linked to the nondiscrimination mandates; the Senate Committee explained:

Clause [iii] in the new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as Title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority. This subsection includes within the protections of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause [i] of the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being handicapped.⁹

The Committee went on to clarify that the definition had other applications focused on the more restrictive first prong; it contrasted the broad nondiscrimination purpose with the affirmative action obligations created in the 1973 Act:

The new definition applies to section 503, as well as to section 504, in order to avoid limiting the affirmative action obligation of a federal contractor to only that class of persons who are eligible for vocational rehabilitation services. It should be noted, however, that the affirmative action obligation cannot be fulfilled by the expediency of hiring or limiting services to persons marginally or previously handicapped or persons "regarded as" handicapped.¹⁰

To whatever extent the original phrasing of the definition in the Rehabilitation Act of 1973 would have restricted Section 504's protection to a select group of people, the second and third prongs of the revised definition clearly moved beyond such narrow constraints. The second prong includes not only those who once had a disability but no longer do, but also those who never really had such a condition but were mistakenly listed or described in someone's records as

having had a disability. And the third prong of the revised definition clearly can be invoked by anyone who claims that she or he has been "regarded as" having a disability.

Since 1974, the three-pronged definition has formed the basis of Section 504 analysis, and in 1990 the Americans with Disabilities Act adopted it as well.¹¹

REGULATORY INTERPRETATION

The first regulations implementing Section 504 of the Rehabilitation Act were those of the Department of Health, Education, and Welfare (HEW) issued in 1977. Noting that "these regulations were drafted with the oversight and approval of Congress,"¹² the Supreme Court has recognized the preeminent influence of the original HEW regulations as "an important source of guidance on the meaning of § 504."¹³ Subsequently, the Court has declared that "the ADA must be construed to be consistent with regulations issued to implement the Rehabilitation Act," and that a specific provision of the ADA "requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act."¹⁴

In its Section 504 regulations, HEW defined the third prong as follows:

"Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated . . . as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined [in the actual impairment paragraph] but is treated . . . as having such an impairment.¹⁵

The three elements of this formulation focus on how individuals are treated rather than upon technical distinctions about how much impairment makes a person disabled, *i.e.*, it focuses on the existence of discrimination, not upon the characteristics of the person upon whom discrimination is visited.

The HEW three-part definition of the "is regarded as" prong was incorporated in Department of Justice regulations coordinating Section 504 regulations¹⁶ and subsequently in regulations of other federal agencies.¹⁷ The Senate and House committee reports accompanying the Americans with Disabilities Act direct that analysis of the term "individual with handicaps" in the Department of Health, Education and Welfare (HEW) Section 504 regulations should be applied to the term "disability" in the ADA.¹⁸ In 1992, Section 504 was amended to substitute the term "disability" for "handicap."¹⁹

The HEW definition of "is regarded as" was adopted in the ADA Title I regulations of the Equal Employment Opportunity Commission (EEOC),²⁰ in the ADA Title II and Title III regulations of

the Department of Justice,²¹ and in the Department of Transportation's ADA regulations.²² In its interpretive guidance, the EEOC emphasized a "myths, fears and stereotypes" approach to showing that a person was regarded as having a disability. The Interpretive Guidance declares: "An individual rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities would be covered under this part of the definition of disability"²³ The EEOC considers exclusions based on "common attitudinal barriers" toward individuals with disabilities—including "concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers" — to constitute discrimination based on perceptions of disability.²⁴ And, if an individual with a physical or mental impairment can show that he or she was terminated from or not hired for a particular job, and the employer took the exclusionary action because of one of the listed concerns, such a showing may be sufficient to establish that the individual was "regarded as" having a substantially limiting impairment.²⁵

THE *ARLINE* DECISION

At the time the ADA was enacted, the leading judicial decision applying the second and third prongs of the statutory definition of disability was the ruling of the U.S. Supreme Court in *School Board of Nassau County v. Arline*.²⁶ The plaintiff in that case was discharged from her job as an elementary public school teacher because she had infectious tuberculosis. When she brought a lawsuit alleging that she had been discriminated against in violation of Section 504 of the Rehabilitation Act of 1973, the school board defended by arguing that she was not a "handicapped person" within the statutory definition.²⁷

The Supreme Court quoted the words of Senator Hubert Humphrey regarding the overriding goal of the 1973 Act: "to share with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted."²⁸ After setting out the three-pronged statutory definition, the Court described its understanding of the purposes of this definition:

The amended definition reflected Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but from "archaic attitudes and laws" and from "the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps." To combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of "handicapped individual" so as to preclude discrimination against "[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all."²⁹

The Court determined that Arline did have an actual physical impairment — tuberculosis — that affected one of the principal body systems — her respiratory system — and that "[t]his

impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment.”³⁰ The Court thus concluded that Arline’s hospitalization for tuberculosis sufficed to establish that she had “a record of . . . impairment” under the second prong of the statutory definition.

To the school district’s argument that this record of impairment was not relevant in the circumstances of the case because Arline was dismissed not because of diminished physical capabilities or her history of hospitalization, but because of the threat raised by the contagiousness of her condition, the Court replied that such a distinction was inconsistent with the legislative history of the definition, since “[t]hat history demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual.”³¹ In support of this conclusion, the Court particularly examined the third prong of the statutory definition:

Congress extended coverage . . . to those individuals who are simply “regarded as having” a physical or mental impairment. The Senate Report provides as an example of a person who would be covered under this subsection “a person with some kind of visible physical impairment which in fact does not substantially limit that person’s functioning.” Such an impairment might not diminish a person’s physical or mental capabilities, but could nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment.³²

The Court emphasized that the “basic purpose of Section 504” was “to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others” and declared that, by enacting the third branch of the definition,

Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. . . . The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments . . .³³

Pursuant to the *Arline* decision, it is clear that individuals can be included under the third prong of the statutory definition of disability solely because of the negative reactions, prejudiced attitudes, ignorance, misapprehensions, irrational fears, mythology, or reflexive reactions of others, regardless of whether an individual has or does not have a mental or physical impairment that satisfies the other prongs of the definition.

ADA LEGISLATIVE HISTORY

In the process of considering and enacting the ADA, Congress gave some insights into its understanding of the purpose and effect of the "regarded as" prong. The Senate Committee Report declared:

A person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity's negative attitudes towards disability is being treated as having a disability which affects a major life activity. For example, if a public accommodation, such as a restaurant, refused entry to a person with cerebral palsy because of that person's physical appearance, that person would be covered under the third prong of the definition. Similarly, if an employer refuses to hire someone because of a fear of the "negative reactions" of others to the individual, or because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong.³⁴

The Senate Committee discussed several other types of situations in which the third prong would apply. It declared that "[t]he third prong is particularly important for individuals with stigmatic conditions that are viewed as physical impairments but do not in fact result in a substantial limitation of a major life activity. For example, severe burn victims often face discrimination."³⁵ The third prong was also intended to serve to "ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation".³⁶ Other examples cited by the Committee included people "rejected for a particular job for which they apply because of a back abnormality on an x-ray, notwithstanding the absence of any symptoms," and people "rejected for a particular job because they wear hearing aids, even though such people may compensate for their hearing impairments by using their aids, speechreading, and a variety of other strategies."³⁷

The ADA report of the House Committee on Education and Labor discussed fewer examples than the Senate Committee, although it did reiterate the example of a person with severe burns, but it expressed largely the same overall views of the third prong: "A person who is excluded from any basic life activity, or is otherwise discriminated against, because of a covered entity's negative attitudes toward that person's impairment is treated as having a disability."³⁸ The House Committee on the Judiciary was quite explicit regarding its understanding of the "regarded as" standard. It declared:

This test is intended to cover persons who are treated by a covered entity as having a physical or mental impairment that substantially limits a major life activity. It applies whether or not a person has an impairment that substantially limits a major life activity, if that person was treated as if he or she had an impairment that substantially limits a major life activity.³⁹

The Committee reiterated the examples of persons with severe burns and people rejected from jobs because a back x-ray reveals some anomaly, even though the person has no symptoms of a back impairment.⁴⁰ It also stressed that:

a person who is rejected from a job because of the myths, fears, and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.⁴¹

The Committee added that:

[i]n the employment context, if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the "regarded as" test.⁴²

The chief sponsor of the ADA in the House — Representative Steny Hoyer — expressed similar views in his floor statement during debates on the bill when he declared that the third prong of the definition focuses on discriminatory treatment of an individual "whether or not the person had an impairment that actually limited participation."⁴³ These various expressions of congressional intent articulate a consistent congressional intention that the focus of the third prong was to center on how an individual is treated, and, if a person is excluded or otherwise treated discriminatorily because of a real or perceived impairment, the person should be protected by the ADA under the "regarded as" prong of the definition.

THE SUPREME COURT'S ADA DECISIONS AND THE "REGARDED AS" PRONG

As discussed in a previous section of this policy brief, the Supreme Court had discussed the third prong of the definition of disability quite extensively and in expansive terms in its decision in the *Arline* case under the Rehabilitation Act of 1973. However, it was not until 1999 that the Court considered the application of the third prong under the ADA. In *Sutton v. United Airlines*, 527 U.S. 471, 489 (1999), the Court recognized that under the third prong of the definition of disability "individuals who are 'regarded as' having a disability are disabled within the meaning of the ADA." Having recognized the "regarded as" prong of the statutory definition, the Court ruled, however, that the plaintiffs in the *Sutton* case were not "regarded as" having a substantial limitation on the major life activity of working. En route to this decision, the Court made three principal rulings affecting the interpretation of the "regarded as" prong of the definition of disability. First, the Court ruled that a person whose impairment is addressed satisfactorily by mitigating measures, but is nonetheless excluded from an activity covered by the ADA because

of the person's underlying impairment, has neither an actual disability nor has been regarded as having a disability. The Court's problematic rulings regarding "mitigating measures" are discussed in some detail in another policy brief in the National Council on Disability's (NCD) *Righting the ADA* series; see <http://www.ncd.gov/newsroom/publications/mitigatingmeasures.html>.

Second, the Court ruled in *Sutton* that a person has not been regarded as being substantially limited in the major life activity of working unless the person can demonstrate that the employer considered her or him as being unable to perform either a class of jobs or a broad range of jobs in various classes.⁴⁴ The Court's restrictive rulings regarding proving a substantial limitation in working are discussed in another policy brief in NCD's *Righting the ADA* series; see <http://www.ncd.gov/newsroom/publications/limitation.html>.

Third, the Court characterized the third prong in terms that are more narrow than it had traditionally been defined. In *Sutton*, the Supreme Court declared:

There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.⁴⁵

This statement should be contrasted with the definition of the third prong in the ADA regulations and Section 504 regulations:

"Is regarded as having an impairment" means (1) has a physical or mental impairment that does not substantially limit major life activities but that is treated . . . as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (3) has none of the impairments defined [in the actual impairment paragraph] but is treated . . . as having such an impairment.⁴⁶

The three elements of the latter formulation all focus on how individuals are treated by covered entities. The description of the third prong in *Sutton*, on the other hand, focuses on a mistaken belief or "misperceptions" by a covered entity. The difference between these two formulations, while perhaps appearing to be a subtle one, actually is quite dramatic. The *Sutton* description calls for a showing of something in the mental state of a covered entity — a belief or perception. In addition, it is necessary to show that the belief or perception is wrong. Proving what an employer, state or local government agency, or the operator of a private business believes,

thinks, or perceives is a difficult proposition. Unless the covered entity makes the mistake of articulating the depths of its prejudices or the exact nature of its motivation, it will be difficult to produce evidence of its state of mind.

If, for example, a private company or a state or local government agency that offers tours of wilderness areas has a policy that excludes from its tours anyone who has diabetes or uses hearing aids, people whose diabetes is controlled by medication or for whom hearing aids successfully mitigate hearing loss would be hard pressed to challenge their exclusion under the ADA if the *Sutton* framework is applied. Such persons would not have an actual disability because their conditions do not substantially limit their major life activities in their mitigated state. Trying to prove that the covered entity had a mistaken belief or a misperception about their condition would be quite troublesome unless the covered entity explained the rationale behind its policy. Absent such a disclosure, the excluded person would be left to speculate about the belief or perception behind the policy. Does the tour service think that hearing aids might fall out and cause a safety risk at some precarious point in the tour? Does the service have a perception that the altitude, temperature conditions, or strenuousness of the tour might cause elevations or depression of blood sugar levels for individuals with diabetes, thus thwarting the controlling effects of medication? Are the tour operators concerned that other customers will be uncomfortable around people with such conditions? Is the tour service under a prejudiced misconception that people who have diabetes or use hearing aids have reduced intelligence? Do they consider that such people are genetically inferior and should not be allowed to participate in normal social endeavors? Do they have the misperception that participation by such people will increase insurance costs? Are they acting under the ridiculous impression that these conditions are contagious? These somewhat extreme examples of potential rationales serve to demonstrate that if a covered entity remains silent about its motivation, proving what it believed or perceived about a condition will often be nearly impossible.

If an ADA claimant seeks to demonstrate that an employer regarded her or him as substantially limited in regard to the activity of working, the task becomes even more difficult, because, in addition to demonstrating what the employer was thinking, the claimant must be able to show that the employer's belief about the worker's inability to perform jobs extended to a class or broad range of jobs. So as long as the employer maintains that it merely regarded the worker as unable to perform only the particular job at issue, the worker will have great difficulty meeting the necessary burden of proof. Indeed, this approach virtually eliminates the chance to assert most "failure-to-hire" claims; rejected applicants' claims that they were unfairly excluded by medical screening or other discriminatory mechanisms despite their actual ability to perform the job will fail, so long as employers are able to convince courts that they only regarded the applicant as unable to perform a single job.

The situation under the regulatory language, which focuses on whether one was "treated as" having a substantially limiting condition, is considerably different. By interpreting "regarded as" as equivalent to being "treated as," the formulation in the regulations removes the extremely

subjective element of what was in the mind of the covered entity and instead looks at how the individual was treated by the covered entity. What does it mean to be "treated as having" a substantially limited impairment? The answer is that a covered entity treats a person as being substantially limited when it excludes or disadvantages the person because of an actual or purported condition. The Senate Committee that approved the ADA summarized the effect of the third prong very aptly, when it declared "[a] person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity's negative attitudes towards disability is being treated as having a disability which affects a major life activity."⁴⁷ Under this interpretation, whenever a covered entity excludes or takes action to treat a person worse than it otherwise would because of some physical or mental condition the person has or is believed to have, then the covered entity has treated the person as having a substantially limiting impairment. In such circumstances the person has been "regarded as" having a disability, and it should not matter whether the person actually has the condition, or whether the condition does or does not otherwise actually result in a substantial limitation of a major life activity. If a covered entity treats the person as having a substantially limiting condition, that should be sufficient to establish disability under the third prong.

The Supreme Court offered no support or justification for deviating from the language of the regulations and the clearly expressed intent of Congress, to arrive at its narrow reading of the basic thrust of the third prong in the *Sutton* decision. It may be that the Court did not intend the two circumstances it discussed — both involving mistaken beliefs by a covered entity — to describe the full scope of the third prong. After all, the Court prefaced this discussion by saying that "[t]here are two apparent ways in which individuals may fall within this statutory definition"⁴⁸ Perhaps it was leaving open the possibility that there are other, less apparent ways of proving that one is regarded as having a disability. Such speculation, however, does not refute the fact that the Court's discussion can easily be read more definitively and, coupled with the Court's other restrictive interpretations of the third prong in *Sutton*, poses a significant threat to the breadth of the third prong. The lower courts had generally not accorded the third prong of the definition the broad scope the regulatory language calls for;⁴⁹ the *Sutton* ruling accelerated this tendency. Subsequent to the issue of the decision in *Sutton*, both the EEOC and the Department of Justice reported that they were less likely to pursue certain cases involving claims that a person had been regarded as having a disability.⁵⁰ The EEOC reported that while it had always been reserved in its use of the third prong, after *Sutton*, "we tend to rely on the theory even less, in part because of the proof element that the employer must regard the individual as being substantially limited in a major life activity, and evidence of this perception is difficult to obtain."⁵¹ It certainly is easier to marshal evidence of how one was treated by a covered entity than to demonstrate that the covered entity had a particular "mistaken belief" or "misperception" that fueled its actions.

CONCLUSION

The "regarded as" prong of the definition of disability was established in 1974. It was conceived as an extremely broad element of the definition that would extend statutory protection to anyone who had been excluded or disadvantaged by a covered entity on the basis of a physical or mental impairment, whether real or perceived. Such a broad interpretation was embraced in Section 504 regulations and validated by the Supreme Court in its decision in *School Board of Nassau County v. Arline*. Subsequently, ADA Committee reports endorsed the broad interpretation of being regarded as having a disability and this approach was codified in ADA regulations. In its decision in *Sutton v. United Airlines*, however, the Supreme Court disregarded the expansive view of the third prong and took a restrictive approach to its interpretation. Specifically, the Court has narrowed the scope of the "regarded as" prong by (1) the Court's rulings on mitigating measures, (2) its requirement that proving one was regarded as substantially limited in working must involve a showing that the employer considered the person as unable to perform either a class of jobs or a broad range of jobs in various classes, and (3) by redirecting the focus from whether the covered entity treated the person as having a substantially limiting condition to whether the covered entity was motivated by certain kinds of mistaken beliefs or misperceptions — a notoriously hard thing to prove. The result is that the Supreme Court has greatly restricted the applicability of the "regarded as" prong and has significantly impeded the ability of many plaintiffs to challenge the discrimination they have encountered.

This policy brief was written for the National Council on Disability by Professor Robert L. Burgdorf Jr. of the University of the District of Columbia, David A. Clarke School of Law.

ENDNOTES

1. Pub. L. No. 93-516, § 111(a)(6), 89 Stat. 2-5 (1974) (codified at 29 U.S.C. § 706(8)(B)).
2. In the 1973 Act, the term "handicapped individual" was defined as:
any individual who (i) has a physical or mental disability

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which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter.

Pub. L. No. 93-112, §7(6), 87 Stat. 361 (1973).

Even after the 1974 amendments, this definition was retained as the criterion for eligibility for vocational rehabilitation services. 29 U.S.C. § 706(8)(A).

3. S. REP. NO. 93-1297 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6413.

4. 29 U.S.C. § 794.

5. S. REP. NO. 93-1297 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6388.

6. S. REP. NO. 93-1297 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6413.

7. Pub.L.No. 93-516, § 111(a), 88 Stat. 1619 (1974).

8. *Southeastern Community College v. Davis*, 442 U.S. 397, 405-06 n. 6 (1979).

9. S. REP. NO. 93-1297, (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6389-90. *See also* 120 Cong. Rec. 30531 (1974) (statement of Sen Cranston).

10. *Id.* at 6390.

11. 42 U.S.C. § 12102(2) provides:

The term "disability" means, with respect to an individual—
(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

12. *See School Bd. of Nassau County v. Arline*, 480 U.S. 273, 279 (1987) (citing *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634-35, & nn. 14-16 (1984)).

13. *Alexander v. Choate*, 469 U.S. 287, 304 n. 24 (1985); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 279 (1987).

14. *Bragdon v. Abbott*, 524 U.S. 624, 638, 632-33 (1998) (citing 42 U.S.C. § 12201(a)).

15. 45 C.F.R. § 84.3(j)(2)(iv) (quoted verbatim in H.R. REP. NO. 485, 101st Cong., 2d Sess. pt. 3, at 29 (1990) (House Committee on the Judiciary)).

16. 28 C.F.R. § 41.31(b)(4).

17. See, e.g., 29 C.F.R. § 32.3 (Dep't of Labor); 15 C.F.R. § 8b.3(g)(3)(iv) (Dep't of Commerce). In 1976, during the period when the HEW regulations were still in proposed form, the Department of Labor issued its Section 503 regulations, making these the first final regulations that were promulgated under the three-pronged definition of disability. Appended to the Section 503 regulations are "Guidelines on the Application of the Definition "Handicapped Individual" which provide that the "is regarded as having such an impairment" prong includes individuals who, "because of attitudes or any other reason," are "perceived" as having a disability, "whether an impairment exists or not." 41 C.F.R. pt. 60-741 app. A (1995).

18. S. REP. NO. 101-116, 21 (1989); H.R. REP. NO. 101-485, pt. 2, at 50 (1990) (Committee on Education and Labor); H.R. REP. NO. 101-485, pt. 3, at 27 (1990) (Committee on the Judiciary).

19. Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, §§ 102 (f)(1)(A), (f)(2)(B), (f)(3), (P), 106 Stat. 4344, 4348, 4349, 4356-58 (1992).

20. 29 C.F.R. §1630.2(1).

21. 28 C.F.R. § 35.104(4); 28 C.F.R. § 36.104(4).

22. 49 C.F.R. § 37.3(4).

23. 29 C.F.R. pt. 1630, app. (commentary on §1630.2(1)).

24. *Id.*

25. *Id.* (unless employer can articulate nondiscriminatory reason for the employment action in such a situation, "an inference that the employer is acting on the basis of 'myth, fear or stereotype' can be drawn").

26. 480 U.S. 273, *reh'g denied*, 481 U.S. 1024 (1987), *on remand*, 692 F. Supp. 1286 (M.D.Fla. 1988).

27. 480 U.S. at 277.

28. *Id.*

29. *Id.* at 279 (brackets in original) (quoting S. REP. NO. 93-1297, 50 (1974), reprinted in 1974 U.S.C.C.A.N. 6400, and *Southeastern Community College v. Davis*, 442 U.S. 397, 405-06 (1979)).
30. 480 U.S. at 281.
31. *Id.* at 282.
32. *Id.* at 282-83 (quoting S. REP. NO. 93-1297, 64 (1974)).
33. *Id.* at 284-85.
34. S. REP. NO. 101-116, 24 (1989), citing *Thornhill v. Marsh*, 866 F.2d 1182 (9th Cir. 1989) and *Doe v. Centinela Hospital*, No. CV87-2514 PAR, 57 U.S.L.W. 2034, 1988 WL 81776 (C.D. Cal. June 30, 1988).
35. S. REP. NO. 101-116, 24 (1989).
36. *Id.*
37. *Id.*
38. H.R. REP. NO. 101-485, pt. 2, at 53 (1990) (Committee on Education and Labor).
39. H.R. REP. NO. 101-485, pt. 3, at 29 (1990) (Committee on the Judiciary).
40. *Id.* at 30-31.
41. *Id.* at 30.
42. *Id.* at 30-31.
43. 136 CONG. REC. E1914 (daily ed. June 13, 1990) (statement of Rep. Hoyer of May 22, 1990).
44. 527 U.S. at 493-94.
45. 527 U.S. at 489.
46. 29 C.F.R. § 1630.2(1) (ADA Title I regulations of EEOC); 28 C.F.R. § 35.104(4) (DOJ ADA Title II regulations); 28 C.F.R. § 36.104(4) (DOJ ADA Title III regulations); 49 C.F.R. § 37.3(4) (Department of Transportation's ADA regulations); 45 C.F.R. § 84.3(j)(2)(iv) (HHS (originally HEW) Section 504 regulations); 28 C.F.R. § 41.31(b)(4) (DOJ Section 504 coordination regulations).

See also, e.g., 29 C.F.R. § 32.3 (Dep't of Labor Section 504 regulations); 15 C.F.R. § 8b.3(g)(3)(iv) (Dep't of Commerce Section 504 regulations); H.R. REP. NO. 101-485, pt. 3, at 29 (1990) (House Committee on the Judiciary ADA report) (quoting HHS definition verbatim).

47. S. REP. NO. 101-116, 24 (1989). See also H.R. REP. NO. 101-485, pt. 2, at 53 (1990) (Committee on Education and Labor) ("A person who is excluded from any basic life activity, or is otherwise discriminated against, because of a covered entity's negative attitudes toward that person's impairment is treated as having a disability.").

48. 527 U.S. at 489.

49. In *Lessard v. Osram Sylvania, Inc.*, 175 F.3d 193, 199 (1st Cir. 1999), for example, the Court of Appeals for the First Circuit ruled that the scope of protection afforded under the third prong of the ADA definition of disability could not extend to conditions not covered under the first prong, even if the discriminatory actions at issue were fueled by "stereotyping," "myth," or "unwarranted assumptions" about the person's impairment.

50. See Sharon Perley Masling, *The Impact of the Supreme Court's ADA Decisions on the Rights of Persons With Disabilities* (<http://www.ncd.gov/newsroom/publications/decisionsimpact.html>) text accompanying nn. 67-69 (February 25, 2003), quoting Correspondence from The Equal Employment Opportunity Commission to Sharon Masling, December 6, 2002 (on file with the author); and E-mail correspondence from the U.S. Department of Justice to Sharon Masling, December 5, 2002 (on file with the author). See also, <http://www.eeoc.gov/stats/ada-charges.html>; <http://www.eeoc.gov/press/2-6-03.html>.

51. See Sharon Perley Masling, *The Impact of the Supreme Court's ADA Decisions on the Rights of Persons With Disabilities* (<http://www.ncd.gov/newsroom/publications/decisionsimpact.html>) text accompanying n. 69 (February 25, 2003), quoting Correspondence from The Equal Employment Opportunity Commission to Sharon Masling, December 6, 2002 (on file with the author). See also, <http://www.eeoc.gov/stats/ada-charges.html>; <http://www.eeoc.gov/press/2-6-03.html>.