

# Righting the ADA



National Council on Disability

December 1, 2004

National Council on Disability  
1331 F Street, NW, Suite 850  
Washington, DC 20004

### **Righting the ADA**

This report is also available in alternative formats and on the awarding-winning National Council on Disability (NCD) Web site ([www.ncd.gov](http://www.ncd.gov)).

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## NATIONAL COUNCIL ON DISABILITY

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*An independent federal agency working with the President and Congress to increase the inclusion, independence, and empowerment of all Americans with disabilities.*

December 1, 2004

The President  
The White House  
Washington, DC 20500

Dear Mr. President:

The National Council on Disability (NCD) is charged with gathering information about the implementation, effectiveness, and impact of the Americans with Disabilities Act (ADA). In keeping with this requirement, I submit this new report, entitled *Righting the ADA*.

Over the past two years, NCD conducted an in-depth analysis of the Supreme Court's interpretations of the ADA. NCD has determined that, while some of the Court's decisions have clearly liberated people with disabilities, e.g., *Tennessee v. Lane*, *Martin v. PGA Tours*, and *Olmstead v. L.C.*, several of the Court's rulings involving the ADA depart from the core principles and objectives of the ADA. In the enclosed report, NCD provides an analysis of the problematic rulings, describes the resulting impact on people with disabilities, and offers legislative proposals designed to restore the ADA to its original intent.

The purpose of the ADA was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." The provisions of the ADA addressing architectural, transportation, and communication accessibility have changed the face of American society in numerous concrete ways, enhancing the independence, full participation, inclusion, and equality of opportunity for Americans with disabilities. However, the provisions of the ADA that have been narrowed by Court rulings currently do not provide the same scope of opportunities and protections expressed by those involved in the creation and passage of the ADA. Legislation is urgently needed to restore the ADA to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for Americans with disabilities.

NCD asks the Administration and Congress to support legislation that will "right" the course of the ADA and protect the civil rights of people with disabilities. NCD stands ready to work with the Administration, Congress, and the public to shape our laws and public policy in a manner that achieves the promise of the ADA for all Americans—the elimination of disability-based discrimination in all aspects of society.

Sincerely,

A handwritten signature in cursive script that reads "Lex Frieden".

Lex Frieden  
Chairperson

(The same letter of transmittal was sent to the President Pro Tempore of the U.S. Senate and the Speaker of the U.S. House of Representatives.)

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## **Acknowledgment**

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## Executive Summary

Many Americans with disabilities feel that a series of negative court decisions is reducing their status to that of “second-class citizens,” a status that the Americans with Disabilities Act (ADA) was supposed to remedy forever. In this report, the National Council on Disability (NCD), which first proposed the enactment of an ADA and developed the initial legislation, offers legislative proposals designed to get the ADA back on track. Like a boat that has been blown off course or tipped over on its side, the ADA needs to be “righted” so that it can accomplish the lofty and laudable objectives that led Congress to enact it.

Since President George H.W. Bush signed the ADA into law in 1990, the Act has had a substantial impact. The Act has addressed and prohibited many forms of discrimination on the basis of disability, although implementation has been far from universal and much still remains to be done. In its role in interpreting the ADA, the judiciary has produced mixed results. Led by the U.S. Supreme Court, the courts have made some admirable rulings, giving effect to various provisions of the Act. Unfortunately, however, many ADA court decisions have not been so positive. This report addresses a series of Supreme Court decisions in which the Court has been out of step with the congressional, executive, and public consensus in support of ADA objectives, and has taken restrictive and antagonistic approaches toward the ADA, resulting in the diminished civil rights of people with disabilities. In response to the Court’s damaging decisions, this report seeks to document and explain the problems they create and advance legislative proposals to reverse their impact. NCD has developed more extensive and detailed analyses of these issues in a series of papers published under the title *Policy Brief Series: Righting the ADA Papers*. The papers can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

In an effort to return the ADA to its original course, this report offers a series of legislative proposals designed to do the following: (1) reinstate the scope of protection the Act affords, (2) restore certain previously available remedies to successful ADA claimants, and (3) repudiate or curtail certain inappropriate and harmful defenses that have been grafted onto the carefully crafted standards of the ADA.

As this report was going to press, the Supreme Court issued its decision in the case of *Tennessee v. Lane*, in which the Court upheld provisions of Title II of the ADA, as applied, to create a right of access to the courts for individuals with disabilities. The *Lane* ruling certainly merits additional study, and NCD expects to issue future analyses of the decision and the questions it leaves open. This report does not attempt to address such issues.

The body of the report at times discusses alternative legislative approaches to some of the problems it addresses. NCD has chosen, however, to consolidate its preferred solutions to the various problems into a single draft bill. The following represent the specific legislative proposals made by NCD at this time for “righting the ADA,” first described in a Section-by-Section Summary and then presented as a proposed “ADA Restoration Act of 2004.”

## **The ADA Restoration Act of 2004: Section-by-Section Summary**

### ***Section 1—Short Title***

This section provides that the law may be cited as The ADA Restoration Act of 2004 and conveys the essence of the proposal’s thrust, which is not to proffer some new, different rendition of the ADA but, rather, to return the Act to the track that Congress understood it would follow when it enacted the statute in 1990. The title echoes that of the Civil Rights Restoration Act of 1987, which was passed to respond to and undo the implications of a series of decisions by the Supreme Court, culminating in *Grove City College v. Bell*, which had taken a restrictive view of the phrase “program or activity” in defining the coverage of various civil rights laws applicable to recipients of federal financial assistance. As with that law, The ADA Restoration Act would “restore” the law to its original congressionally intended course.

### ***Section 2—Findings and Purposes***

*Subsection (a)* presents congressional findings explaining the reasons that an ADA Restoration Act is needed. It describes how certain decisions of the Supreme Court have weakened the ADA by narrowing the broad scope of protection afforded in the Act, eliminating or narrowing remedies available under the Act, and recognizing some unnecessary defenses that are inconsistent with the Act’s objectives.

*Subsection (b)* provides a statement of the overall purposes of the ADA Restoration Act, centering on reinstating original congressional intent by restoring the broad scope of protection and the remedies available under the ADA, and negating certain inappropriate defenses that Court decisions have recognized.

### ***Section 3—Amendments to the ADA of 1990***

This section, and its various subsections, includes the substantive body of the ADA Restoration Act, which amends specific provisions of the ADA.

*Subsection (a)* revises references in the ADA to discrimination “against an individual with a disability” to refer instead to discrimination “on the basis of disability.” This change recognizes the social conception of disability and rejects the notion of a rigidly restrictive protected class.

*Subsection (b)* revises certain of the congressional findings in the ADA. Paragraph (1) revises the finding in the ADA that provided a rough estimate of the number of people having actual disabilities, a figure that a majority of the Supreme Court misinterpreted as evidence that Congress intended the coverage of the Act to be narrowly circumscribed. The revised finding stresses that normal human variation occurs across a broad spectrum of human abilities and limitations, and makes it clear that all Americans are potentially susceptible to discrimination on the basis of disability, whether they actually have physical or mental impairments and regardless of the degree of any such impairment. Paragraph (2) revises the wording of the ADA finding regarding the history of purposeful unequal treatment suffered by people with certain types or categories of disabilities. Paragraphs (3) and (4) add a new finding that incorporates a social concept of disability and discrimination on the basis of disability.

*Subsection (c)* revises some of the definitions used in the ADA. Paragraph (1) amends the definition of the term “disability” to clarify that it shall not be construed narrowly and legalistically by drawing fine technical distinctions based on relative differences in degrees of impairment, instead of focusing on how the person is perceived and treated. This approach rejects the medical model of disability that categorizes people because of their supposedly

intrinsic limitations, without reference to social context and socially imposed barriers, and to individual factors such as compensatory techniques and personal strengths, goals, and motivation. The second part, headed “Construction,” invalidates the Supreme Court’s rulings in *Sutton v. United Airlines*, *Murphy v. United Parcel Service*, and *Albertson’s, Inc. v. Kirkingburg* by clarifying that mitigating measures, such as medications, assistive devices, and compensatory mechanisms shall not be considered in determining whether an individual has a disability.

Paragraphs (2) and (3) add definitions of the terms “physical or mental impairment,” “perceived physical or mental impairment,” and “record of physical or mental impairment” to the statutory language. These definitions are derived from current ADA regulations, and were recommended for inclusion in NCD’s original 1988 version of the ADA.

*Subsection (d)* clarifies that the ADA’s “direct-threat” defense applies to customers, clients, passersby, and other people who may be put at risk by workplace activities, but, contrary to the Court’s ruling in *Chevron U.S.A. Inc. v. Echazabal*, not to the worker with a disability. The latter clarification returns the scope of the direct-threat defense to the precise dimensions in which it was established in the express language of the ADA as enacted.

*Subsection (e)* restores the carefully crafted standard of undue hardship as the sole criterion for determining the reasonableness of an otherwise effective accommodation.

*Subsection (f)* clarifies that ADA employment rights of individuals with disabilities, including the opportunity to be reassigned to a vacant position as a reasonable accommodation, are not to take a backseat to rights of other employees under a seniority system or collective bargaining agreement. In addition, covered entities are directed to incorporate recognition of ADA rights in future collective bargaining agreements.

*Subsection (g)* adds new subsections to the Remedies provision of Title II of the ADA. The first restores the possibility of recovering punitive damages available to ADA plaintiffs who prove they have been subjected to intentional discrimination, an opportunity that was foreclosed by the Supreme Court in *Barnes v. Gorman*. The second added subsection underscores the fact that



other remedies, but not punitive damages, are available to ADA plaintiffs who prove that they have been subjected to “disparate impact” discrimination. The third new subsection establishes that intentionally refusing to comply with certain requirements of Title II of the ADA and the Rehabilitation Act, including accessibility requirements, auxiliary aids requirements, communication access requirements, and the prohibition on blanket exclusions in eligibility criteria and qualification standards, constitutes engaging in unlawful intentional discrimination.

*Subsection (h)* provides that the provisions of the Act are to be liberally construed to advance its remedial purposes. To counter the Court’s ruling that eligibility for ADA protection should be “interpreted strictly to create a demanding standard for qualifying” (*Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*), another provision declares that the elements of the definition of “disability” are to be interpreted broadly. In addition, the subsection provides that “discrimination” is to be construed broadly to include the various forms in which discrimination on the basis of disability occurs. The subsection adds provisions that direct the attorney general, the Equal Employment Opportunity Commission, and the Secretary of Transportation to issue regulations implementing the “ADA Restoration Act,” and establish that properly issued ADA regulations are entitled to deference in administrative and judicial proceedings.

*Subsection (i)* corrects the ruling of the Supreme Court in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, which rejected the catalyst theory in determining eligibility of ADA plaintiffs to attorney’s fees, by reinstating the catalyst theory.

#### ***Section 4—Effective Date***

This section provides that the Act and the amendments it makes shall take effect upon enactment, and shall apply to cases that are pending when it is enacted or that are filed thereafter.

### **The ADA Restoration Act of 2004: A Draft Bill**

To amend the Americans with Disabilities Act (ADA) of 1990 to restore the broad scope of protection and the remedies available under the Act, and to clarify the inconsistency with the Act of certain defenses.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

***Section 1.—Short Title.***

This Act may be cited as the “ADA Restoration Act of 2004.”

***Section 2.—Findings and Purposes.***

(a) FINDINGS.—The Congress finds that —

(1) in enacting the ADA of 1990, Congress intended that the Act “establish a clear and comprehensive prohibition of discrimination on the basis of disability,” and provide broad coverage and vigorous and effective remedies without unnecessary and obstructive defenses;

(2) some decisions and opinions of the Supreme Court have unduly narrowed the broad scope of protection afforded in the ADA, have eliminated or narrowed remedies meant to be available under the Act, and have recognized certain defenses that run counter to the purposes of the Act;

(3) in enacting the ADA, Congress recognized that physical and mental impairments are natural and normal parts of the human experience that in no way diminish a person’s right to fully participate in all aspects of society, but Congress also recognized that people with physical or mental impairments having the talent, skills, abilities, and desire to participate in society are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

(4) Congress modeled the ADA definition of disability on that of Section 504 of the Rehabilitation Act of 1973, which had to the time of the ADA’s enactment been construed broadly to encompass both actual and perceived limitations, and limitations imposed by society; the broad conception of the definition had been underscored by the Supreme Court’s statement in its decision in *School Board of*

*Nassau County v. Arline*, 480 U.S. 273, 284 (1987), that the Section 504 definition “acknowledged that society’s myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment”;

(5) in adopting the Section 504 concept of disability in the ADA, Congress understood that adverse action based on a person’s physical or mental impairment might have nothing to do with any limitations caused by the impairment itself;

(6) instead of following congressional expectations that disability would be interpreted broadly in the ADA, the Supreme Court has ruled, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002), that the elements of the definition “need to be interpreted strictly to create a demanding standard for qualifying as disabled,” and, consistent with that view, has narrowed the application of the definition in various ways;

(7) contrary to explicit congressional intent expressed in the ADA committee reports, the Supreme Court has eliminated from the Act’s coverage individuals who have mitigated the effects of their impairments through the use of such measures as medication and assistive devices;

(8) contrary to the expectations of Congress in enacting the ADA, the Supreme Court has rejected the “catalyst theory” in the awarding of attorney’s fees and litigation costs under the Act, and has ruled that punitive damages may not be awarded in private suits under Section 202 of the Act;

(9) contrary to congressional intent and the express language of the ADA, the Supreme Court has recognized the defense that a worker with a disability could pose a direct threat to her or his own health or safety;

(10) contrary to carefully crafted language in the ADA, the Supreme Court has recognized a reasonableness standard for reasonable accommodation distinct from the undue hardship standard that Congress had imposed;

(11) contrary to congressional intent, the Supreme Court has made the reasonable accommodation rights of workers with disabilities under the ADA subordinate to seniority rights of other employees; and

(12) legislation is necessary to return the ADA to the breadth of coverage, the array of remedies, and the finely calibrated balance of standards and defenses Congress intended when it enacted the Act.

(b) PURPOSES.—The purposes of this Act are —

(1) to effect the ADA’s objectives of providing “a clear and comprehensive national mandate for eliminating discrimination” and “clear, strong, and enforceable standards addressing discrimination” by restoring the broad scope of protection and the remedies available under the ADA, and clarifying the inconsistency with the Act of certain defenses;

(2) to respond to certain decisions of the Supreme Court that have narrowed the class of people who can invoke the protection from discrimination the ADA provides, reduced the remedies available to successful ADA claimants, and recognized or permitted defenses that run counter to ADA objectives;

(3) to reinstate original congressional intent regarding the definition of disability by clarifying that ADA protection is available for all individuals who are subjected to adverse treatment based on actual or perceived impairment, or are adversely affected by prejudiced attitudes, such as myths, fears, ignorance, or stereotypes concerning disability or particular disabilities, or by the failure to remove societal and institutional barriers;

(4) to restore the full array of remedies available under the ADA;

(5) to ensure that the rights afforded by the ADA are not subordinated by paternalistic and misguided attitudes and false assumptions about what a person

with a physical or mental impairment can do without endangering the individual's own personal health or safety;

(6) to ensure that the rights afforded by the ADA are not subordinated to seniority rights of other employees in regard to an otherwise vacant job position to which the individual requires transfer as a reasonable accommodation; and

(7) to ensure that the carefully crafted standard of undue hardship as a limitation on reasonable accommodation rights afforded by the ADA shall not be undermined by recognition of a separate and divergent reasonableness standard.

***Section 3.—Amendments to the ADA of 1990.***

(a) DISCRIMINATION.—References in the ADA to discrimination “against an individual with a disability” or “against individuals with disabilities” shall be replaced by references to discrimination “on the basis of disability” at each and every place that such references occur.

(b) FINDINGS.—Section 2(a) of the ADA of 1990 (42 U.S.C. 12101(a)) is amended—

(1) by striking the current subsection (1) and replacing it with the following:

“(1) though variation in people’s abilities and disabilities across a broad spectrum is a normal part of the human condition, some individuals have been singled out and subjected to discrimination because they have conditions considered disabilities by others; other individuals have been excluded or disadvantaged because their physical or mental impairments have been ignored in the planning and construction of facilities, vehicles, and services; and all Americans run the risk of being discriminated against because they are misperceived as having conditions they may not actually have or because of misperceptions about the limitations resulting from conditions they do have”;

(2) by striking the current subsection (7) and replacing it with the following:

“(7) some groups or categories of individuals with disabilities have been subjected to a history of purposeful unequal treatment, have had restrictions and limitations imposed upon them because of their impairments, and have been relegated to positions 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; classifications and selection criteria that are based on prejudice, ignorance, myths, irrational fears, or stereotypes about disability should be strongly disfavored, subjected to skeptical and meticulous examination, and permitted only for highly compelling reasons”;

(3) by striking the period (“.”) at the end of the current subsection (9) and replacing it with “; and”; and

(4) by adding after the current subsection (9) the following new subsection:

“(10) discrimination on the basis of disability is the result of the interaction between an individual’s actual or perceived impairment and attitudinal, societal, and institutional barriers; individuals with a range of actual or perceived physical or mental impairments often experience denial or limitation of opportunities resulting from attitudinal barriers, including negative stereotypes, fear, ignorance, and prejudice, in addition to institutional and societal barriers, including architectural, transportation, and communication barriers, and the refusal to make reasonable modifications to policies, practices, or procedures, or to provide reasonable accommodations or auxiliary aids and services.”

(c) DEFINITIONS.—Section 3 of the ADA of 1990 (42 U.S.C. 12102) is amended—

(1) by striking the current subsection (2) and replacing it with the following:

“(2) DISABILITY.

“(A) IN GENERAL.—The term “disability” means, with respect to an individual—

- (i) a physical or mental impairment;
- (ii) a record of a physical or mental impairment; or
- (iii) a perceived physical or mental impairment.

“(B) CONSTRUCTION.—

- (i) The existence of a physical or mental impairment, or a record or perception of a physical or mental impairment, shall be determined without regard to mitigating measures;
- (ii) The term “mitigating measure” means any treatment, medication, device, or other measure used to eliminate, mitigate, or compensate for the effect of an impairment, and includes prescription and other medications, personal aids and devices (including assistive technology devices and services), reasonable accommodations, or auxiliary aids and services; and
- (iii) actions taken by a covered entity because of a person’s use of a mitigating measure or because of a side effect or other consequence of the use of such a measure shall be considered ‘on the basis of disability.’”

(2) by redesignating the current subsection (3) as subsection

(6); and

(3) by adding after the current subsection (2) the following new subsections:

“(3) PHYSICAL OR MENTAL IMPAIRMENT.—The term “physical or mental impairment” means—

“(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

“(4) RECORD OF PHYSICAL OR MENTAL IMPAIRMENT.—The terms “record of a physical or mental impairment” or “record of impairment” means having a history of, or having been misclassified as having, a physical or mental impairment.

“(5) PERCEIVED PHYSICAL OR MENTAL IMPAIRMENT.—The terms “perceived physical or mental impairment” or “perceived impairment” mean being regarded as having or treated as having a physical or mental impairment.”

(d) DIRECT THREAT.—Subsection 101(3) of the ADA of 1990 (42 U.S.C. 12111(3)) is amended—

- (1) by redesignating the current definition as part (A)—IN GENERAL; and
- (2) by adding after the redesignated part (A) a new part (B) as follows:

“(B) CONSTRUCTION.—The term “direct threat” includes a significant risk of substantial harm to a customer, client, passerby, or other person that cannot be eliminated by reasonable accommodation. Such term does not include risk to the particular applicant or employee who is or is perceived to be the source of the risk.”

(e) REASONABLE ACCOMMODATION.—Subsection 101(9) of the ADA of 1990 (42 U.S.C. 12111(9)) is amended—



(1) by redesignating the current definition as part (A)—EXAMPLES OF TYPES OF ACCOMMODATIONS.; and

(2) by adding after the redesignated part (A) a new part (B) as follows:

“(B) REASONABLENESS.—A reasonable accommodation is a modification or adjustment that enables a covered entity’s employee or applicant with a disability to enjoy equal benefits and privileges of employment or of a job application, selection, or training process, provided that—

(i) the individual being accommodated is known by the covered entity to have a mental or physical limitation resulting from a disability, is known by the covered entity to have a record of a mental or physical limitation resulting from a disability, or is perceived by the covered entity as having a mental or physical limitation resulting from a disability;

(ii) without the accommodation, such limitation will prevent the individual from enjoying such equal benefits and privileges; and

(iii) the covered entity may establish, as a defense, that a particular accommodation is unreasonable by demonstrating that the accommodation would impose an undue hardship on the operation of the business of such covered entity.”

(f) NONSUBORDINATION.—Section 102 of the ADA of 1990 (42 U.S.C. 12112) is amended by adding after the current subsection (c) a new subsection as follows:

“(d) NONSUBORDINATION.—A covered entity’s obligation to comply with this Title is not affected by any inconsistent term of any collective bargaining agreement or seniority system. The rights of an employee with a disability under this Title shall not be subordinated to seniority rights of other employees in regard to an otherwise vacant job position to which the individual with a disability requires transfer as a reasonable accommodation. Covered entities under this Title shall include recognition of ADA rights in future collective bargaining agreements.”

(g) REMEDIES.—Section 203 of the ADA of 1990 (42 U.S.C. 12133) is amended—

(1) by redesignating the current textual provision as subsection (a)—IN GENERAL., and adding at the beginning of the text of subsection (a) the phrase “Subject to subsections (b), (c), and (d),”; and

(2) by adding, after the redesignated subsection (a), new subsections as follows:

“(b) CLAIMS BASED ON PROOF OF INTENTIONAL DISCRIMINATION.—In an action brought by a person aggrieved by discrimination on the basis of disability (referred to in this section as an ‘aggrieved person’) under Section 202 of this Act, or under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), against an entity covered by those provisions who has engaged in unlawful intentional discrimination (not a practice that is unlawful because of its disparate impact) prohibited under those sections (including their implementing regulations), an aggrieved person may recover equitable and legal relief (including compensatory and punitive damages) and attorney’s fees (including expert fees) and costs.

“(c) CLAIMS BASED ON DISPARATE IMPACT.—In an action brought by an ‘aggrieved person’ under Section 202 of this Act, or under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), against an entity covered by those provisions who has engaged in unlawful disparate impact discrimination prohibited under those sections (including their implementing regulations), an aggrieved person may recover equitable relief and attorney’s fees (including expert fees) and costs.

“(d) CONSTRUCTION.—In addition to other actions that constitute unlawful intentional discrimination under subsection (b), a covered entity engages in such discrimination when it intentionally refuses to comply with requirements of Section 202 of this Act, or of Section 504 of the

Rehabilitation Act of 1973 (29 U.S.C. 794), or of their implementing regulations, by willfully, unlawfully, materially, and substantially—

- (1) failing to meet applicable program and facility accessibility requirements for existing facilities, new construction and alterations;
- (2) failing to furnish appropriate auxiliary aids and services;
- (3) failing to ensure effective communication access; or
- (4) imposing discriminatory eligibility criteria or employment qualification standards that engender a blanket exclusion of individuals with a particular disability or category of disability.”

(h) CONSTRUCTION.—Section 501 of the ADA of 1990 (42 U.S.C. 12201) is amended by adding after the current subsection (d) the following new subsections:

“(e) SUPPORTIVE CONSTRUCTION.—In order to ensure that this Act achieves its objective of providing a comprehensive prohibition of discrimination on the basis of disability, discrimination that is pervasive in America, the provisions of the Act shall be flexibly construed to advance its remedial purposes. The elements of the definition of “disability” shall be interpreted broadly to encompass within the Act’s protection all persons who are subjected to discrimination on the basis of disability. The term “discrimination” shall be interpreted broadly to encompass the various forms in which discrimination on the basis of disability occurs, including blanket exclusionary policies based on physical, mental, or medical standards that do not constitute legitimate eligibility requirements under the Act; the failure to make a reasonable accommodation, to modify policies and practices, and to provide auxiliary aids and services, as required under the Act; adverse actions taken against individuals based on actual or perceived limitations; disparate, adverse treatment of individuals based on disability; and other forms of discrimination prohibited in the Act.

“(f) REGULATIONS IMPLEMENTING THE ADA RESTORATION ACT.—Not later than 180 days after the date of enactment of The ADA Restoration Act of 2004, the attorney general, the Equal Employment Opportunity Commission, and the Secretary of Transportation shall promulgate regulations in an accessible format that implement the provisions of the ADA Restoration Act.

“(g) DEFERENCE TO REGULATIONS.—Duly issued federal regulations for the implementation of the ADA, including provisions implementing and interpreting the definition of disability, shall be entitled to deference by administrative bodies or officers and courts hearing any action brought under the Act.”

(i) ATTORNEY’S FEES.—Section 505 of the ADA of 1990 (42 U.S.C. 12205) is amended by redesignating the current textual provision as subsection (a)—IN GENERAL, and adding additional subsections as follows:

“(b) DEFINITION OF PREVAILING PARTY—The term ‘prevailing party’ includes, in addition to a party who substantially prevails through a judicial or administrative judgment or order, or an enforceable written agreement, a party whose pursuit of a nonfrivolous claim or defense was a catalyst for a voluntary or unilateral change in position by the opposing party that provides any significant part of the relief sought.

“(c) RELATIONSHIP TO OTHER LAWS—

(1) SPECIAL CRITERIA FOR PREVAILING DEFENDANTS—If any other Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, or of any judicial or administrative rule, which addresses the recovery of attorney’s fees, requires a defendant, but not a plaintiff, to satisfy certain different or additional criteria to qualify for the recovery of attorney’s fees, subsection (b) shall not affect the requirement that such defendant satisfy such criteria.

“(2) SPECIAL CRITERIA UNRELATED TO PREVAILING—If an Act, ruling, regulation, interpretation, or rule described in paragraph (1) requires a party to satisfy certain criteria, unrelated to whether or not such party has prevailed, to qualify for the recovery of attorney’s fees, subsection (b) shall not affect the requirement that such party satisfy such criteria.”

***Section 4.—Effective Date.***

This Act and the amendments made by this Act shall take effect upon enactment and shall apply to any case pending or filed on or after the date of enactment of this Act.



# **I. Background and Overview**

The will of Americans, reflected in congressional and presidential actions, is being frustrated by the courts in regard to the Americans with Disabilities Act (ADA). “We the people of the United States,” acting through our democratically elected senators, representatives, and President, enacted the ADA in 1990, with broad bipartisan support. Polls show that “we the people” still remain overwhelmingly supportive of it. Since its enactment, the ADA has had a substantial positive effect. But, as Justice Oliver Wendell Holmes suggested in 1881, ultimately the law is what judges say it is. It is critical, therefore, that courts follow the spirit and letter of laws they are interpreting so that appointed judges’ viewpoints about what the law should be will not replace the actual content of laws enacted by the joint action of the two democratically elected branches. As the Supreme Court observed in a 1989 case, “Our task ... is not to fashion the rule we deem desirable but to identify the rule that Congress fashioned.”<sup>1</sup>

Unfortunately, courts all too often have been out of step with the congressional, presidential, and public consensus in favor of ADA objectives, and have taken antagonistic and restrictive approaches to the ADA. In particular, a string of decisions by the Supreme Court has significantly diminished the civil rights of people with disabilities. Such rulings of the Court and the attendant harmful media portrayals of the ADA have had a detrimental impact on the lives of many Americans with disabilities, threatening a return to second-class citizenship. The National Council on Disability (NCD) has undertaken a major initiative—titled *Righting the ADA*—to respond to the Court’s damaging decisions. The project has two principal objectives: (1) to document and explain the problems created by the Supreme Court’s ADA decisions; and (2) to develop legislative proposals for addressing those problems that appear appropriate for legislative correction. The results are summarized in this report. More detailed descriptions of the specific issues and problems are presented in a series of policy briefs published on NCD’s Web site at [www.ncd.gov/newsroom/publications/2003/policybrief.htm](http://www.ncd.gov/newsroom/publications/2003/policybrief.htm).

A cornerstone of the American system of government is the division of federal governing power into three separate branches—executive, legislative, and judicial—a division that is referred to as the “separation of powers.” Effective functioning of American government demands, however,

that each of the branches of government must stay within the boundaries of its authority and respect the role of the other branches. For this reason, the executive, legislative, and judicial branches are referred to as “coequal”—a term that indicates that none of them is superior to the others and that they must work in a coordinated fashion, with each doing its job and not encroaching on the responsibilities of the others. A grave danger to American democracy is presented by situations in which one of the three branches invades the area of authority that the Constitution of the United States assigns to the other branches. The respect accorded to the coequal branches of government is the reason courts are supposed to give properly enacted federal laws a presumption of validity, and are not to strike down such laws except as a last resort.

In 1991, concern that eight recent decisions of the Supreme Court had impeded the implementation of Title VII of the Civil Rights Act of 1964 and other civil rights laws led Congress to enact, and President George H.W. Bush to sign into law, the Civil Rights Act of 1991, which reversed the impact of those troublesome decisions.<sup>2</sup> The public will, reflected in congressional, presidential, and popular support, is again being thwarted by the Court’s rulings—this time in regard to the ADA. Thus, it appears again necessary for legislative action to orient the course of the statute back to the path that Congress and the President originally intended.

### **A. Broad Bipartisan Support**

President George H.W. Bush called July 26, 1990, “an incredible day...an immensely important day,” for on that date he signed into law the Americans with Disabilities Act (ADA). In his remarks at the signing ceremony, the President described the Act as an “historic new civil rights Act, ... the world’s first comprehensive declaration of equality for people with disabilities.” He added that “[w]ith today’s signing of the landmark Americans with Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence and freedom.” He also noted that “my administration and the Congress have carefully crafted this Act.”



A rarity about the ADA was that it was an important piece of legislation that almost everyone supported. The votes in Congress to pass the ADA were overwhelmingly in favor of passage. The Senate passed its version of the ADA bill by a vote of 76 to 8; the House of Representatives passed its bill 403 to 20. After differences were ironed out in conference, the House approved the final version of the bill by a vote of 377 to 28, and the Senate followed suit, adopting the final ADA bill by the lopsided margin of 91 to 6. Congressional committees that considered the ADA were equally united in their backing of the legislation. Two of the five committees—the Senate Labor and Human Resources Committee and the House Committee on Education and Labor—adopted ADA bills unanimously. None of the formal up-or-down committee votes on reporting out the ADA, nor any of the floor votes on passage of the legislation, had less than a 90 percent majority in favor of the ADA bills.

Such overwhelming approval of a measure—with at least 9 out of 10 voting for it—obviously can occur only if it has both Republican and Democratic support. The ADA originated, as Senator Robert Dole, the Senate minority leader emphasized, “with an initiative of the National Council on Disability, an independent federal body composed of 15 members appointed by President Reagan and charged with reviewing all laws, programs, and policies of the Federal Government affecting individuals with disabilities.” Proposed by Reagan appointees, initially sponsored by a Republican in the Senate (Senator Lowell Weicker) and a Democrat in the House of Representatives (Representative Tony Coelho), passed by a Democrat-controlled Senate and House of Representatives, and supported and signed by President George H.W. Bush, the ADA was a model of bipartisanship.

Before the ADA was reintroduced in the 101st Congress, ADA advocates in Congress determined that, to pass an effective and enforceable law, they needed the support of the administration and members of Congress from both major political parties. As Congressman Coelho would later report, “If it had become a Democratic bill, [the ADA] would have lost.... It had to be bipartisan.” As the ADA passed the Senate, Senator Dole called it “a good example of bipartisanship in action.” Likewise, President George H.W. Bush credited the success of the ADA to the fact that members of Congress, “on both sides of the political aisle” agreed to “put

politics aside” to “do something decent, something right.” He credited the ADA’s passage to “a coalition in the finest spirit. A joining of Democrats and Republicans. Of the Legislative and the Executive Branches. Of federal and state agencies. Of public officials and private citizens. Of people with disabilities and without.”

Members of both political parties participated in cooperative meetings to craft compromise provisions and revise problematic language in the bills. Republican Representative Steve Bartlett described meetings with the leading House advocate for the ADA, Democrat Steny Hoyer, as “the most productive and satisfying legislative negotiations that I had ever been involved with.”

In addition to congressional dialogue and bargaining, a key factor in obtaining bipartisan backing and ultimately passing the ADA was the unwavering support for the legislation by President George H.W. Bush and his administration. While he was Vice President, Mr. Bush had pledged that he would promote a civil rights act for people with disabilities. Two days before his inauguration as President, Mr. Bush declared, “I said during the campaign that disabled people have been excluded for far too long from the mainstream of American life. ... One step that I have discussed will be action on the Americans with Disabilities Act in order, in simple fairness, to provide the disabled with the same rights afforded others, afforded other minorities.” Early in the Senate hearings on the ADA, Senator Tom Harkin, a Democrat, made a remarkable statement crediting President George H.W. Bush’s public remarks in favor of rights for people with disabilities:

[W]e have had strong, strong statements made by President Bush—no President of the United States, Republican or Democrat, has ever said the things about disabled Americans that George Bush has said. No President, including the President who was in a wheelchair, Franklin Roosevelt.

Senator Harkin concluded that “this bodes well” and meant that “we can work together with the administration, [on] both sides of the aisle...” on the ADA.

Attorney General Dick Thornburgh formally announced the Bush administration’s support for the ADA during Senate hearings on the legislation. He declared, “[w]e at the Justice Department

wholeheartedly share [the ADA's] goals and commit ourselves, along with the President and the rest of his administration to a bipartisan effort to enact comprehensive legislation attacking discrimination in employment, public services, transportation, public accommodations, and telecommunications." He added, in regard to the ADA bill, that "[o]ne of its most impressive strengths is its comprehensive character" that was consistent with President George H.W. Bush's commitment to ensuring people with disabilities' "full participation in and access to all aspects of society." After administration and Senate advocates ironed out differences on specific provisions, the Administration's express endorsement of the legislation led to a unanimous Senate Committee vote to report the bill out of committee, and to more than 60 Senators signing on as cosponsors. It also set the stage for favorable House action and final passage of the ADA.

As the ADA passed the Senate, Senator Dole praised President George H.W. Bush for his leadership on the legislation, and declared that "[w]e would not be here today without the support of the President." The senator credited a list of administration officials, including Chief of Staff John Sununu and Attorney General Dick Thornburgh, whose efforts contributed to the passage of the ADA. He also appended to his remarks a *New York Times* opinion-editorial piece about the ADA written by James S. Brady, who had been President Reagan's Press Secretary. Mr. Brady wrote:

As a Republican and a fiscal conservative, I am proud that this bill was developed by 15 Republicans appointed to the National Council on Disability by President Reagan. Many years ago, a Republican President, Dwight D. Eisenhower, urged that people with disabilities become taxpayers and consumers instead of being dependent upon costly federal benefits. The [ADA] grows out of that conservative philosophy.

NCD previously observed:

More than any other single player, the role of President Bush cannot be overestimated. The ADA would have made little headway were it not for the early and consistent support from the nation's highest office. ...The president's support brought people to the table to work out a bipartisan compromise bill that could obtain the support of the business community as well as that of the disability community.<sup>3</sup>

Acclaim for the ADA came from many other sources. Senator Dole called the ADA “landmark legislation” that would “bring quality to the lives of millions of Americans who have not had quality in the past.” Senator Hatch declared the ADA was “historic legislation” whose passage was “a major achievement” demonstrating that “in this great country of freedom, ... we will go to the farthest lengths to make sure that everyone has equality and that everyone has a chance in this society.” The executive director of the Leadership Conference on Civil Rights described the ADA as “the most comprehensive civil rights measure in the past two-and-a-half decades.” Senator Edward M. Kennedy termed the legislation a “bill of rights” and “an emancipation proclamation” for people with disabilities. The late Justin Dart, who occupied disability policy positions in the Reagan, Bush, and Clinton administrations, called the ADA “a landmark commandment of fundamental human morality.”

## **B. Backing by Subsequent Presidents**

In 2000, President Bill Clinton proclaimed July as “The Spirit of the ADA Month” and declared,

The enactment of the Americans with Disabilities Act 10 years ago this month signaled a transformation in our Nation’s public policies toward people with disabilities. America is now a dramatically different—and better—country because of the ADA.

In addition to citing past accomplishments and pending initiatives his administration was pursuing to further the implementation of the ADA, President Clinton added, “Vice President Gore and I are proud to join in the celebration and to renew our own pledge to help advance the cause of disability rights.” For his part, Vice President Al Gore observed, “We know we can’t just pass a few laws and change attitudes overnight. But day by day, person by person, we can make a difference. Together, let’s not just complete the work of the ADA—let’s say to the whole world: this is one country that knows we don’t have a person to waste, and we’re moving into the next century—together.”<sup>4</sup>

Bipartisan support and presidential commitment to the ADA have continued. President George W. Bush endorsed the Act and, in February 2001, issued his “New Freedom Initiative,” committing his administration to ensuring the rights and inclusion of people with disabilities in

all aspects of American life. On June 18, 2001, President Bush issued Executive Order No. 13217, declaring the commitment of the United States to community-based alternatives for individuals with disabilities. On the twelfth anniversary of the signing of the ADA, July 26, 2002, the President proclaimed the ADA to be “one of the most compassionate and successful civil rights laws in American history.”<sup>5</sup> The White House also declared that “[t]he administration is committed to the full enforcement of the Americans with Disabilities Act.” President Bush asserted a clear continuity between his commitment to the ADA and that of his father:

[W]hen my father signed the ADA into law in 1990, he said, “We must not and will not rest until every man and woman with a dream has the means to achieve it.” Today we renew that commitment, and we continue to work for an America where individuals are celebrated for their abilities, not judged by their disabilities.

### **C. Will of the People**

In enacting the ADA and in seeking its vigorous enforcement, the elected branches of the Federal Government—the Congress and the President—have carried out the will of the American people. A large majority of the public reports that it favors the ADA. A 2002 Harris Poll found that, of the 77 percent of Americans who said they were aware of the ADA, an overwhelming percentage (93 percent) reported that they “approve of and support it.” The ADA is supported by most of the business sector. A Harris Poll of business executives in 1995, for example, showed that 90 percent of the executives surveyed said that they supported the ADA.

In the face of negative media reports on the ADA (often misleading and sometimes flatly inaccurate), most Americans are still highly favorably disposed to the Act. They have had experience with the realities of the ADA in their communities and workplaces, and have seen how people have benefited from it. They have noticed people with visible disabilities at stores, malls, theaters, stadiums, and museums. They have seen the ramps, accessible bathrooms, disabled parking spaces, and other accessibility features that the ADA has engendered. They encounter people who use wheelchairs now able to go to department stores, fast food places, and government offices. They know that the son of their neighbors is now living comfortably in an apartment in the neighborhood with appropriate support services instead of in an

institutional setting. They are aware that sign language interpreters now are routinely present at their county council meetings. In these and countless other ways, they have seen the ADA in action, and they approve.

## **D. Impact of the ADA**

In a variety of ways, the ADA has lived up to the high hopes that accompanied its passage. The provisions of the ADA that address architectural, transportation, and communication accessibility have changed the face of American society in numerous concrete ways. A vast number of buildings and other structures have been affected by provisions of the ADA that make it illegal to design or construct any new place of public accommodation or other commercial facility without making it readily accessible to and usable by people with disabilities, or to alter such a facility without incorporating accessibility features. The ADA's mass transit provisions ended decades of disagreements and controversy regarding many of the issues that determined exactly what is required of public transportation systems to avoid discriminating on the basis of disability. The ADA contains detailed provisions describing requirements for operators of bus, rail, and other public transportation systems, and intercity and commuter rail systems. Although implementation has been far from perfect and ADA provisions do not answer all the questions, much progress in transportation accessibility has been made. The ADA's employment provisions have dramatically affected hiring practices by barring invasive preemployment questionnaires and disability inquiries and the misuse of preemployment physical information. These provisions also have made job accommodations for workers with disabilities more common than they were before the ADA was enacted. The ADA's telecommunications provisions have resulted in the establishment of a nationwide system of relay services, which permit the use of telephone services by those with hearing or speech impairments, and a closed captioning requirement for the verbal content of all federally funded television public service announcements.

Other provisions of Title II of the ADA (covering state and local governments) and Title III (covering public accommodations) have eliminated many discriminatory practices by private businesses and government agencies. The ADA has had a particularly strong impact in promoting the development of community residential, treatment, and care services in lieu of unnecessarily

segregated large state institutions and nursing homes. The Act provided the impetus for President George W. Bush's "New Freedom Initiative," issued in February 2001, committing his administration to assuring the rights and inclusion of people with disabilities in all aspects of American life; and for Executive Order No. 13217, issued on June 18, 2001, declaring the commitment of the United States to community-based alternatives for people with disabilities.

At the ADA signing ceremony, the first President Bush declared that other countries, including Sweden, Japan, the Soviet Union, and each of the 12 member nations of the European Economic Community, had announced their desire to enact similar legislation. In the years since its enactment, numerous other countries have been inspired by the ADA to seek legislation in their own jurisdictions to prohibit discrimination on the basis of disability. These countries have looked to the ADA, if not as a model, at least as a touchstone in crafting their own legislative proposals.

In 1988, while the original ADA bills were pending before Congress, the Presidential Commission on the Human Immunodeficiency Virus (HIV) Epidemic endorsed the legislation and recommended that the ADA should serve as a vehicle for protecting from discrimination people with HIV infection. The ADA has proved to be the principal civil rights law protecting people with HIV from the sometimes egregious discriminatory actions directed at them.

In a broader sense, the ADA has, as the Council has observed in a previous report, "begun to transform the social fabric of our nation":

It has brought the principle of disability civil rights into the mainstream of public policy. The law, coupled with the disability rights movement that produced a climate where such legislation could be enacted, has impacted fundamentally the way Americans perceive disability. The placement of disability discrimination on a par with race or gender discrimination exposed the common experiences of prejudice and segregation and provided clear rationale for the elimination of disability discrimination in this country. The ADA has become a symbol, internationally, of the promise of human and civil rights, and a blueprint for policy development in other countries. It has changed permanently the architectural and telecommunications landscape of the United States. It has created increased recognition and understanding of the manner in which the physical and social

environment can pose discriminatory barriers to people with disabilities. It is a vehicle through which people with disabilities have made their political influence felt, and it continues to be a unifying focus for the disability rights movement.<sup>6</sup>

This is not to ignore the fact that there are huge gaps in enforcement of the ADA's requirements or that some covered entities have taken an I-won't-do-anything-until-I'm-sued attitude toward the obligations imposed by the law. Indeed, the *Promises to Keep* report, from which the preceding quotations were taken, described a variety of problems and weaknesses in federal enforcement of the ADA and presented recommendations for remedying such deficiencies.

Numerous people with disabilities, however, have told NCD that the ADA has played an important role in improving their lives. In 1995, NCD issued a report titled *Voices of Freedom: America Speaks Out on the ADA*, in which it presented a large number of statements by individuals with disabilities talking about the impact of the ADA. The following is a tiny sampling of the thousands of statements NCD received:

The ADA is fantastic. I can go out and participate. The ADA makes me feel like I'm one of the gang. (Sandra Brent, Arkansas)

Even though we had the Rehab Act of 1973, it took the ADA to make real change. The ADA has given me hope, independence, and dignity. (Yadi Mark, Louisiana)

Because of the ADA, I have more of the opportunities that other people have. Now I feel like a participant in life, not a spectator. (Brenda Henry, Kansas)

A successful person with a disability was once thought of as unusual. Now successful people with disabilities are the rule. It's the ADA that has opened the door. (Donna Smith-Whitty, Mississippi)<sup>7</sup>

The report presented statements by people with disabilities about their experiences with the ADA in various aspects of their lives, including access to the physical environment, access to employment opportunities, communication mobility, and self image. The report concluded that,

...the actual research data and the experiences of people with disabilities, of their family members, of businesses, and of public servants, [demonstrates] that this relatively new law has begun to move us rapidly toward a society in which all



Americans can live, attend school, obtain employment, be a part of a family, and be a part of a community in spite of the presence of a disability. What is needed now is a renewed commitment to the goals of the Act (which were crafted under unprecedented bipartisan efforts), sufficient resources to support further education and training concerning the ADA, and effective enforcement.<sup>8</sup>

In a similar vein, President George W. Bush declared the following in 2002:

In the 12 years since President George H.W. Bush signed the ADA into law, more people with disabilities are participating fully in our society than ever before. As we mark this important anniversary, we celebrate the positive effect this landmark legislation has had upon our Nation, and we recognize the important influence it has had in improving employment opportunities, government services, public accommodations, transportation, and telecommunications for those with disabilities.

Today, Americans with disabilities enjoy greatly improved access to countless facets of life; but more needs to be done. We must continue to build on the important foundations established by the ADA. Too many Americans with disabilities remain isolated, dependent, and deprived of the tools they need to enjoy all that our Nation has to offer.<sup>9</sup>

## **E. Judicial Resistance**

In light of the overwhelming endorsement of the ADA by Congress in enacting it, by the Presidents in office at and since its enactment, and by the majority of the general public, it is surprising and disappointing that the judiciary all too often has given the Act the cold shoulder. Problematic judicial interpretations have blunted the Act's impact in significant ways. NCD has become increasingly concerned about certain interpretations and limitations placed on the ADA in decisions of the U.S. Supreme Court. This is not to suggest that all the rulings of the high court on the ADA have been negative. Among favorable decisions, the U.S. Supreme Court has (1) upheld the ADA's integration requirement and applied it to prohibit unnecessary segregation of people receiving residential services from the states; (2) held the ADA applicable to protect prisoners in state penal systems; (3) held that the ADA prohibits discrimination by a dentist against a person with HIV infection; and (4) ruled that the ADA required the PGA to allow a golfer with a mobility impairment to use a golf cart in tournament play as a "reasonable modification." But while not all of the Court's ADA decisions are objectionable, those that are have had a serious negative impact.

They have placed severe restrictions on the class of persons protected by the ADA, have narrowed the remedies available to complainants who successfully prove violations of the Act, have expanded the defenses available to employers, and have even called into question the very legality of some parts of the Act. NCD's policy paper, *The Impact of the Supreme Court's ADA Decisions on the Rights of Persons with Disabilities*, explores the effect such decisions have had on individuals with disabilities. Paper No. 7 of NCD's *Policy Brief Series: Righting the ADA Papers* can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

Media coverage of the Court's ADA decisions has made matters worse. While such coverage has not been uniformly negative, a significant portion of it has been misleading, presenting the Act in a highly unfavorable light and placing a negative "spin" on the ADA, the court decisions interpreting it, and its impact on American society. NCD's extensive and detailed policy paper, *Negative Media Portrayals of the ADA*, discusses prevalent media-fed myths about the ADA. Paper No. 5 of NCD's *Policy Brief Series: Righting the ADA Papers* can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

Inhibitive court decisions combined with harmful media perspectives have caused the ADA to be the object of frequent misunderstanding, confusion, and even derision. The detrimental pronouncements of the courts and negative impressions of the ADA fostered by media mischaracterizations have fed on one another and have generated increasing misunderstandings of the Act's underlying purposes and vision, frustrated some of its central aims, and narrowed the scope and degree of its influence.

## **II. Problematic Interpretations of the ADA**

### **A. Surprising Problems with the Definition of Disability**

When Congress passed the ADA and President George H.W. Bush signed it into law, hardly anyone expected trouble in the courts with the definition of disability. Congress played it safe by adopting in the ADA a definition of disability that was the same as the definition of “handicap” under the Rehabilitation Act. That definition was enacted in 1974 and clarified in regulations issued under Section 504 of the Rehabilitation Act. Because the definition was a broad and relatively uncontroversial one, defendants seldom challenged plaintiffs’ claims of having a disability.<sup>10</sup> In 1984, a federal district court noted that, after 10 years’ experience with the Rehabilitation Act definition, only one court found a Section 504 plaintiff not to have a “handicap.”<sup>11</sup>

In 1987, the U.S. Supreme Court made it abundantly clear that the definition of “handicap” under Section 504 was very broad. In *School Board of Nassau County v. Arline*, the Court took an expansive and nontechnical view of the definition. The Court found that Ms. Arline’s history of hospitalization for infectious tuberculosis was “more than sufficient” to establish that she had “a record of” a disability under Section 504 of the Rehabilitation Act. The Court made this ruling even though her discharge from her job was not because of her hospitalization. The Court displayed a lenient interpretation of what a plaintiff needed to show to invoke the protection of the statute. It noted that, in establishing the new definition of disability in 1974, Congress had expanded the definition “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.’”

The Court declared that the “basic purpose of Section 504” was to ensure that individuals “are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others” or “reflexive reactions to actual or perceived [disabilities]” and that the legislative history of the definition of disability “demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual.” The Court elaborated as follows:

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.

When Congress was considering the ADA, the Supreme Court’s decision in *School Board of Nassau County v. Arline* was the leading legal precedent on the definition of disability. The *Arline* ruling was expressly relied on in several ADA committee reports discussing the definition of disability.

This was the legal background when Congress adopted the essentially identical definition of disability in the ADA. To further ensure that the definition of disability and other provisions of the ADA would not receive restrictive interpretations, Congress included in the ADA a provision requiring that “nothing” in the ADA was to “be construed to apply a lesser standard” than is applied under the relevant sections of the Rehabilitation Act, including Section 504, and the regulations promulgating them. In his remarks at the ADA signing ceremony, President George H.W. Bush pointed with pride to the ADA’s “piggybacking” on Rehabilitation Act language:

The administration worked closely with the Congress to ensure that, wherever possible, existing language and standards from the Rehabilitation Act were incorporated into the ADA. The Rehabilitation Act standards are already familiar to large segments of the private sector that are either federal contractors or recipients of federal funds. Because the Rehabilitation Act was enacted 17 years ago, there is already an extensive body of law interpreting the requirements of that Act.

Accordingly, at the time of the ADA’s enactment, it seemed clear that most ADA plaintiffs would not find it particularly difficult to establish that they had a disability. NCD issued two policy papers that discuss the care with which the ADA definition of disability was selected and the breadth of that definition. *A Carefully Constructed Law* and *Broad or Narrow Construction of the ADA*, papers No. 2 and No. 4, respectively, of NCD’s *Policy Brief Series: Righting the ADA Papers*, can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

For some time after the ADA was signed into law, the pattern of broad and inclusive interpretation of the definition of disability, established under Section 504, continued under the ADA. In 1996, a federal district court declared that “it is the rare case when the matter of whether an individual has a disability is even disputed.”<sup>12</sup> As some lower courts, however, began to take restrictive views of the concept of disability, defendants took note, and disability began to be contested in more and more cases.

Beginning with its decision in *Sutton v. United Airlines* in 1999, the U.S. Supreme Court started to turn its back on the broad, relaxed interpretation of disability endorsed by the Court in the *Arline* decision. By the time of the *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* decision in 2002, the Court was espousing the view that the definition should be “interpreted strictly to create a demanding standard for qualifying as disabled.” This stance is directly contrary to what the Congress and the President intended when they enacted the ADA law.

The result of the Court’s harsh and restrictive approach to defining disability places difficult, technical, and sometimes insurmountable evidentiary burdens on people who have experienced discrimination. The focus of many time-consuming and expensive legal battles is on the characteristics of the person subjected to discrimination rather than on the alleged discriminatory treatment meted out by the accused party. The ADA was intended to regulate the conduct of employers and other covered entities, and to induce them to end discrimination. To the extent that these parties can divert the focus to a microscopic dissection of the complaining party, central objectives of the law are being frustrated.

Other governments and judicial forums have rejected the Supreme Court’s restrictive interpretation of disability. Thus, courts in the individual states<sup>13</sup> and in other countries<sup>14</sup> have embraced more inclusive interpretations of who has a disability under nondiscrimination laws. And legislatures in the states<sup>15</sup> and in other countries<sup>16</sup> deliberately have rejected the narrow approach under U.S. law as enunciated in the Supreme Court’s decisions.

## **B. Specific Problems Created by the Supreme Court's Decisions Regarding the Definition of Disability**

### **Issue: *Consideration of Mitigating Measures in Determining Disability***

#### *What the Supreme Court Did*

In a sharp break from the legislative history of the ADA, the position of the executive agencies responsible for enforcing the ADA, and the prior rulings of eight of the nine federal courts of appeal that had addressed the issue, the Supreme Court decided, in its rulings in the *Sutton v. United Airlines, Inc.*, *Murphy v. United Parcel Service*, and *Albertson's, Inc. v. Kirkingburg* cases, that mitigating measures should be considered in determining whether an individual has a disability under the ADA. The Supreme Court's position on mitigating measures ignores the rationale that led courts, regulatory agencies, and Congress to take a contrary position—that unless you disregard mitigating measures in determining eligibility for ADA protection, you shield much discrimination on the basis of disability from effective challenge.

#### *Significance of the Court's Action*

The result of the Court's rulings on mitigating measures turns the ADA's definition of disability into an instrument for screening out large groups of individuals with disabilities from the coverage of the Act, and thereby insulating from challenge many instances of the pervasive unfair and unnecessary discrimination that the law sought to prohibit. To the extent that mitigating measures are successful in managing an individual's condition, the Supreme Court's stance on mitigating measures deprives the individual of the right to maintain an ADA action to challenge acts of disability discrimination she or he has experienced, because such a person is not eligible for the ADA's protection. This means an employer or other covered entity may discriminate with impunity against such individuals in various flagrant and covert ways. NCD issued a policy paper examining the function and types of mitigating measures, discussing the near consensus in the law prior to the Supreme Court's taking a contrary position, and describing the repercussions of the Court's position. *The Role of Mitigating Measures in the Narrowing of the ADA's Coverage*, paper No. 11 of NCD's *Policy Brief Series: Righting the ADA Papers*, can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

### *Examples of Impact*

Taking the condition of epilepsy to illustrate, before the Supreme Court's rulings in *Sutton*, *Murphy*, and *Kirkingburg*, "a person [with] epilepsy would receive nearly automatic ADA protection,"<sup>17</sup> consistent with statements in the ADA legislative history and regulatory guidance. The ADA regulatory commentary of the Equal Employment Opportunity Commission (EEOC) and Department of Justice (DOJ) specifically declared that an individual with epilepsy would remain within the coverage of the ADA even if the effects of the condition were controlled by medication.

The situation changed dramatically with the Supreme Court's mitigating measures decisions. To the extent that a covered entity can successfully demonstrate (after extensive, intrusive discovery into the details of the person's condition) that an individual's epilepsy is effectively controlled by medication, the individual cannot challenge the discriminatory actions of the covered entity. This is true even if the employer or other covered entity has an express policy against the hiring of people with epilepsy; puts up signs that say, "epileptics not welcome here"; inaccurately assumes that all persons with epilepsy are inherently unsafe; or has the irrational belief that epilepsy is contagious. The unfairness or irrationality of the covered entity's actions and motivations, including stereotypes, fears, assumptions, and other forms of prejudice, cannot be challenged by a person whose condition is mitigated. The end result is that it is a rare plaintiff who is in a position to challenge even the most egregious and outrageous discrimination involving a condition that can be mitigated.

Epilepsy is an illustrative example, but the same principles apply to diabetes, various psychiatric disabilities, hypertension, arthritis, and numerous other conditions that, for some individuals, can be controlled by medication. Moreover, the same problems arise with conditions for which techniques and devices other than medication provide an avenue for mitigation. Thus, a company that discriminates against people who use hearing aids will be insulated from challenge by people for whom the hearing aids are effective in offsetting, to some degree, diminution of functional ability to hear.

## **Issue: *Substantial Limitation of a Major Life Activity***

### *What the Supreme Court Did*

The Supreme Court replaced the ADA language of “major life activities of such individual” with the Court’s formulation in *Williams*, “activities that are of central importance in most people’s daily lives.” It also transformed the definition of substantial limitation, from the EEOC regulations’ phrasing “either total inability to perform an activity or significant restrictions as to the condition, manner, or deviation under which an individual can perform,” to the Court’s language in *Williams*, “prevents or severely restricts” an individual from performing an activity.

### *Significance of the Court’s Action*

The Supreme Court’s rulings on substantial limitation of a major life activity have increasingly constricted the meaning of this concept, which had already been narrowed by certain interpretations of the EEOC and some lower courts. On the whole, the Court’s decisions have made it much harder for plaintiffs seeking to invoke ADA protection to challenge alleged discriminatory actions. NCD issued a policy paper examining the meaning and significance of the concepts of substantial limitation and major life activities, what the Supreme Court has said about them, the implications of the Court’s declarations, and how the lower courts have handled questions about substantial limitation of major life activities. *The Supreme Court’s ADA Decisions Regarding Substantial Limitation of Major Life Activities*, paper No. 13 of NCD’s *Policy Brief Series: Righting the ADA Papers*, can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>. Ultimately, the Court has gone a long way toward achieving its announced goal that the phrase “substantially limited in a major life activity” be “interpreted strictly to create a demanding standard for qualifying as disabled.”

### *Examples of Impact*

Some lower courts have commented on the impact of the Supreme Court’s rulings on these issues. In the case of *Mahon v. Crowell*, for example, the Sixth Circuit referred to “[r]ecent Supreme Court decisions sharply limiting the reach of the ADA,” including requiring that the term “substantially limits” be read “strictly to create a demanding standard....” In *Stedman v.*



*Bizmart*, the federal district court held that the plaintiff, a liver transplant recipient with diabetes, was not protected by the ADA because his diabetes did not substantially limit him in performing any major life activity outside of the workplace. The court explained:

Prior to January 2002, case law made satisfaction of a prima facie case under the ADA, particularly meeting the “disability” prong, relatively simple. On January 8, 2002, however, the Supreme Court significantly altered the definition of “substantially limits a major life activity.” ... Curtailing previous case law defining “major life activities,” [the Court in *Toyota v. Williams*] held that “to be substantially limited in performing manual tasks, 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.” ... As a result, this decision creates additional obstacles for many plaintiffs in disability cases.... Under *Toyota*, it appears that courts now have greater discretion in determining what is a major life activity and what interference with that activity is substantial enough to constitute a disability.

By placing “additional obstacles” in the way of potential ADA plaintiffs and by giving judges greater discretion to dismiss ADA cases on the basis of technicalities and miserly standards, the Supreme Court has strayed a long way from pursuing the ADA’s express goal of establishing a clear and comprehensive prohibition of discrimination on the basis of disability.

### **Issue: *Employment as a Major Life Activity***

#### *What the Supreme Court Did*

Although previously the matter had been considered settled law, in its decision in *Sutton v. United Airlines*, the Supreme Court indicated that it had doubts about whether working should be considered a major life activity under the ADA, stating that “there may be some conceptual difficulty in defining ‘major life activities’ to include work....” For the purposes of the *Sutton* case, the Court said that, because the issue was not raised by the parties, it was “assuming without deciding that working is a major life activity.” It again “assumed without deciding” the issue in its decision in the *Murphy* case, and, in its opinion in the *Williams* case, the Court, while again not resolving the issue, was even more explicit about its misgivings:

Because of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been hesitant to hold as much, and we need not decide this difficult question today.

NCD included a discussion of “The Issue of Working as a Major Life Activity” as a section of its paper on *The Supreme Court’s ADA Decisions Regarding Substantial Limitation of Major Life Activities*. Paper No. 13 of NCD’s *Policy Brief Series: Righting the ADA Papers* can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

### *Significance of the Court’s Action*

In 1986, at oral arguments in the *School Board of Nassau County v. Arline* case under Section 504 of the Rehabilitation Act, the Solicitor General threw in a flawed, far-fetched argument that including work as a major life activity would be “a totally circular argument which lifts itself by its bootstraps.” In its decision in *Arline*, the Court replied sharply that “[t]he argument is not circular, however, but direct. Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one’s ability to work.” Remarkably, in its decision in *Sutton* in 1999, the Supreme Court dredged up the Solicitor General’s failed argument and used it as authority for the Court to assert the existence of “some conceptual difficulty” in including work as a major life activity. The Court made this statement despite the fact that ADA and Section 504 regulations and the Senate and House ADA committee reports all expressly list work as a major life activity, and that the majority of the Court had accepted work as a major life activity in its decision in a previous case—*Bragdon v. Abbott*. The result of the misgivings the Court articulated in *Sutton*, *Murphy*, and *Williams* creates doubt where before there was none.

### *Examples of Impact*

The Supreme Court’s reservations have left lower courts in something of a legal limbo on the issue of work as a major life activity. Many courts have, in effect, ignored the high court’s misgivings, and simply have continued to treat work as a major life activity as if it were a settled proposition. Other courts have taken note of the Supreme Court’s qualms, but have treated work as a major life activity for the purpose of deciding the cases before them, without actually ruling

on the issue. Other courts have been more outspoken about their doubts as to whether work is still a major life activity. The Sixth Circuit declared that, after *Sutton* and *Williams*, “[a]s a major life activity, ... ‘working’ is problematic,” and, while it would “assume without deciding” that the regulatory provision declaring it to be so was valid, “[b]ecause of the problems surrounding ‘working,’” it would treat it “as a residual category resorted to only when a complainant cannot show she or he is substantially impaired in any other, more concrete major life activity.”<sup>18</sup> Accordingly, the status of work as a major life activity has gone from being clearly established in the regulations and legislative history to being a proposition that, at least for some courts, is considered “problematic,” doubtful, and something of a last resort.

### **Issue: *The “Class or Broad Range of Jobs” Standard***

#### *What the Supreme Court Did*

For some years, the EEOC has advanced a restrictive interpretation of the standard that must be met to prove that one is substantially limited in working. The EEOC has taken the position that a complainant must demonstrate more than an actual or perceived inability to perform a specific job; it has required ADA plaintiffs to show that they are “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes...” While it technically has not endorsed the EEOC’s position on this issue, the Supreme Court has referred to, quoted, and applied the EEOC standard in the circumstances of several ADA cases.

#### *Significance of the Court’s Action*

The notion that proof that a worker is not able to perform the essential functions of a particular job (or is perceived by an employer as being unable to do so) is insufficient to establish a substantial limitation of working grew out of a few court decisions under the Rehabilitation Act of 1973. Based on such dubious, inadequate, and misinterpreted precedents, and ignoring a body of contrary decisions and statements in the ADA legislative history calling for a less demanding standard, the EEOC devised in its ADA regulations a requirement that proving substantial limitation of work as a major life activity requires an ADA claimant to demonstrate significant restriction “in the ability to perform either a class of jobs or a broad range of jobs in various

classes as compared to the average person having comparable training, skills, and abilities.” The EEOC never definitively clarified whether this standard should be applied under the third prong (“regarded as”) of the definition of disability or only under the first prong (actual disability).

NCD has been critical of the EEOC’s formulation of the “single job” exception. NCD has contended that “[t]he illogic of permitting employers to terminate a person from a job because of a physical or mental condition and then to argue that the condition is not serious enough to constitute a disability is starkly apparent.”<sup>19</sup> NCD also has issued a policy paper examining the origin and consequences of the EEOC’s approach, the Court’s statements about this approach, and the implications of the Court’s indecisive but suggestive position. *The Supreme Court’s ADA Decisions Regarding the Not-Just-One-Job Standard*, paper No. 14 of NCD’s *Policy Brief Series: Righting the ADA Papers*, can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

In a technical sense, the Supreme Court has yet to rule on whether proof that one cannot perform the essential functions of a particular job (or is perceived by an employer as being unable to do so) is sufficient to establish a substantial limitation in working. In its decisions in *Sutton*, *Murphy*, and *Williams*, however, the Court assumed without deciding that the EEOC’s interpretations of the term “substantially limits” were reasonable and valid, and then applied the EEOC’s “class of jobs or a broad range of jobs” standard under both the first and third prongs of the ADA’s definition of disability. These decisions create the impression that the Court has endorsed the EEOC approach and found it applicable to situations in which a plaintiff claims that an employer regarded the plaintiff as being substantially limited in working.

### *Examples of Impact*

The combination of the EEOC’s requirement of proof that a person is restricted in a class or broad range of jobs, the EEOC’s ambiguous stance as to whether that requirement also applies when plaintiffs seek to establish that their employers regarded them as substantially limited in working, and the Court’s application of the EEOC standard to claims under both the first and third prongs has precipitated a torrent of lower court rulings that make it difficult for plaintiffs to prove that they are, or are regarded as being, substantially limited in the activity of work. Whether they seek to

establish that they are actually substantially limited in working or that their employer so regards them, ADA plaintiffs face demanding and at times antagonistic evidentiary burdens.

There are extensive examples of situations in the case law in which plaintiffs have been fired, refused employment, or otherwise disadvantaged in the workplace because of their actual or perceived impairments but have been unable to bring ADA actions because they could not meet what one federal court of appeals called the “weighty showing” of demonstrating that they would be precluded from a class or broad range of jobs. Following are but a few examples of the all-too-numerous cases in which the extremely demanding standards applied by the courts for establishing substantial limitation of the activity of work have proved to be a daunting and at times insurmountable obstacle for ADA plaintiffs:

- An office worker with asthma and migraine headaches who experienced bronchitis, pneumonia, lung infections, and cluster-migraines when she was forced to work in a “smoke-infested” office.
- A pipefitter rigger with a seizure disorder that was not controlled by medication who was fired for refusing to work in elevated locations where there was no place to tie his safety belt to provide a lifeline in case he had a seizure.
- A customer service representative who was fired because his employer decided his HIV status precluded him from customer service work.
- A flight nurse with multiple sclerosis who was involuntarily dismissed from her position and reassigned to a less desirable job.

**Issue: “Regarded As” Having a Disability**

*What the Supreme Court Did*

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) its rulings on mitigating measures, (2) its requirement that proving one was regarded as substantially limited in working must show 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) its redirection of 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.

NCD issued a policy paper examining 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 Supreme Court’s Decisions Discussing the “Regarded As” Prong of the ADA Definition of Disability*, paper No. 15 of NCD’s *Policy Brief Series: Righting the ADA Papers*, can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

#### *Significance of the Court’s Action*

In addition to people who have a physical or mental impairment that substantially limits a major life activity and people who have a record of a substantially limiting condition, the ADA also provides protection from discrimination to individuals who are “regarded as having such an impairment.” The “regarded as” prong of the definition of disability represents an extremely 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 had discussed the third prong of the definition of disability extensively and in expansive terms in its decision in the *Arline* case under the Rehabilitation Act of 1973.

In *Sutton v. United Airlines*, the Court considered the application of the third prong under the ADA. The Court made three significant rulings concerning 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, does not have an actual disability and has not been regarded as having a disability. Second, the Court ruled that a person has not been regarded as being substantially limited in the major life activity of work 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. Third, the Court characterized the third prong in terms that are more narrow than it had traditionally been defined. In *Sutton*, the Supreme Court's description of the third prong focused on a mistaken belief or "misperception" by a covered entity. The Court said:

[I]t 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....

The definition of the third prong in ADA regulations and Section 504 regulations, in contrast, focuses on how individuals are treated by covered entities. The Supreme Court offered no support or justification for deviating from the language of the regulations and the expressed intent of Congress, to arrive at its narrow reading of the basic thrust of the third prong in the *Sutton* decision. The difference between the Court's standard and that of the regulations is significant. 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.

### *Examples of Impact*

The effect of the Supreme Court's rulings greatly restricts the applicability of the "regarded as" prong and impedes significantly the ability of many plaintiffs to challenge the discrimination they have encountered. 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 ameliorate the effects would be hard-pressed to challenge their exclusion under the ADA if the *Sutton* framework is applied. Such people 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 conditions would be 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 the elevation 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 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 work, 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. 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 being “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. A covered entity treats a person as having a “substantially limited impairment” 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.” Under this interpretation, whenever a covered entity excludes a person or treats a person worse than it otherwise would because of a physical or mental condition the person has or is believed to have, 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 actually results 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 lower courts generally had not accorded the third prong of the definition the broad scope the regulatory language calls for; the *Sutton* ruling has accelerated this tendency. Subsequent to the issuance of the decision in *Sutton*, both the EEOC and DOJ reported that they were less likely to pursue certain cases involving claims that a person had been regarded as having a disability. The EEOC reported that, while it always had 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.” It certainly is easier to marshal evidence of how one was

treated by a covered entity than to demonstrate that the actions of the covered entity were fueled by a particular “mistaken belief” or “misperception.”

***Issue: Validity of and Deference to Be Accorded Federal Regulations Interpreting the ADA’s Definition of Disability***

*What the Supreme Court Did*

The Supreme Court’s treatment of ADA regulatory provisions that interpret the definitions found at the beginning of the Act has been dramatically different from its treatment of provisions that address substantive requirements of the Act. In regard to non-definition-of-disability regulations, the Court has generally been willing to grant the high level of judicial deference termed “*Chevron* deference” for such ADA regulations. Likewise, the Court has, for the most part, accepted and been guided by such regulations.

In regard to provisions of the ADA regulations that interpret elements of the definition of disability, the Supreme Court initially indicated (in its decision in *Bragdon v. Abbott*) that such regulations were entitled to *Chevron* deference. In later decisions (*Sutton*, *Murphy*, *Kirklingburg*, and *Williams*), however, the Court went out of its way to declare that it had doubts whether the ADA authorized any of the Federal agencies to issue regulations to implement the Act’s provisions regarding the meaning of “disability.” Accordingly, the Court said it would only assume, without deciding, that the regulatory provisions interpreting the definition of disability were valid, and it was not deciding what level of deference, if any, they should be accorded.

Similarly, regarding its inclination to accept and follow the agencies’ positions on the interpretation of the components of the definition of disability, the Court has retreated from its initial broad view (in *Bragdon*) of the definition of disability. Consequently, the Court has tended not to follow the administrative agencies on issues in which they have taken an expansive view of elements of the definition. The Court has rejected the regulatory agencies’ positions on mitigating measures, questioned their stance on work as a major life activity, and adopted a more restrictive definition in lieu of the EEOC’s definition of “substantial limitation.” The Court has accepted the EEOC’s position in creating a one-job-is-not-enough standard that serves to make

it harder for potential ADA plaintiffs to establish they have a disability that entitles them to ADA protection. Thus, the Court's decisions have been particularly hostile toward provisions and regulatory commentary that take a broad or inclusive view of what constitutes a disability.

NCD issued a policy paper examining the status the Court has conferred on the various sets of ADA regulations, and how solicitous or dismissive it has been in following the standards established in the regulations. *The Supreme Court's Decisions Regarding Validity and Influence of ADA Regulations*, paper No. 16 of NCD's *Policy Brief Series: Righting the ADA Papers*, can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

### *Significance of the Court's Action*

The Court has undermined the status of regulations that interpret the ADA's definition of disability by (1) questioning the deference due to regulations implementing the ADA's definition of disability; (2) suggesting that perhaps no agency has the authority to issue regulations interpreting the definitions section of the ADA; and (3) rejecting, questioning, and restricting particular elements of the regulatory interpretations. By inciting doubts about the legality and validity of the ADA regulations, the Court's decisions have provided a rationale for noncompliance with such regulatory provisions and encouragement for defendants to challenge such provisions in ADA lawsuits.

### *Examples of Impact*

The Supreme Court's rulings have placed the regulations, which interpret the elements of the definition of disability, in something of a legal limbo in the lower courts. In light of the doubts expressed by the high court, most lower courts have hesitated to treat these regulatory provisions as valid, legally binding, and entitled to strong deference; at the same time, they have shied away from disregarding the regulations or ruling them invalid. Thus, these courts have found some middle ground between upholding the provisions and ruling them void, while echoing some of the reservations articulated by the Supreme Court. For example, the Fifth Circuit has taken the position that the EEOC's ADA regulations that address the definition of disability "provide significant guidance," but added,

[W]e have never given the regulations *Chevron* deference, and recent decisions of the Supreme Court strongly suggest that the regulations are not entitled to such deference, because Congress delegated the authority to implement Title I of the ADA, which regulates employment, to the EEOC, 42 U.S.C. 12116, but Title I does not include 12102<sup>20</sup> [which includes the definition of disability].

Some lower courts have avoided the dilemma of whether the definitions provisions of the regulations are valid by focusing on the parties' failure to challenge the regulations. The Sixth Circuit declared in one case:

The Supreme Court explained in *Sutton v. United Air Lines, Inc.*, that “[n]o agency ... has been given authority to issue regulations implementing the generally applicable provisions of the ADA.... Most notably, no agency has been delegated authority to interpret the term ‘disability.’” The *Sutton* Court, however, stated that “[b]ecause both parties accept these regulations as valid, and determining their validity is not necessary to decide this case, we have no occasion to consider what deference they are due, if any.” Similarly, in this case, both [the plaintiff and the defendant] accept the regulations as valid and determining their validity is not necessary to decide the case; therefore, we assume the validity of the regulations for the purpose of deciding this case.<sup>21</sup>

Other courts have followed the same approach of following the definitional provisions of the regulations where the parties had not mounted a challenge to them.<sup>22</sup>

In the Second Circuit, the provisions of ADA regulations have been ruled to command “great deference,” in spite of the Supreme Court’s hesitancy.<sup>23</sup> A federal district court in Maryland has suggested that in the face of the uncertainty engendered by the Supreme Court’s skeptical pronouncements about the definitional regulations, “[n]evertheless, ‘courts normally defer to the EEOC’s regulations and guidelines ... except where they are viewed to be contrary to law.’”<sup>24</sup> A federal district court in Missouri found a novel, if illogical, way around doubts about any agency having authority to write regulations that implement the definitional provisions of the ADA. In a case involving job and service rights of an inmate in a state prison, the court relied on definitional provisions of the DOJ’s ADA Title III regulations (not applicable to state agency programs), which would appear susceptible to the same problem, because the DOJ was not expressly delegated authority over the definition of disability.<sup>25</sup> Other courts have recognized

something of a mixed message in the Court's questioning of the validity of regulatory provisions while still quoting and relying on them.<sup>26</sup>

A federal district court in California discussed at some length the task facing lower courts as a result of the Supreme Court's inconclusive reservations about the definitional provisions of ADA regulations:

The Supreme Court has noted that although Congress gave the EEOC authority to promulgate Title I regulations, and the Department of Justice Title II regulations, no agency was given the authority to issue regulations implementing the generally applicable provisions of the ADA falling outside Titles I–V. Accordingly, the high court concluded that “no agency has been delegated authority to interpret the term disability.” Given the absence of congressional authority, the regulations and interpretive guidelines addressing the ADA's definition of disability are not binding on this court. Because the *Sutton* Court did not address whether such regulations and guidelines, while not binding, are nevertheless entitled to deference, I must now address that issue.

When, as here, Congress has not delegated specific legislative authority to an agency, the federal courts are free to reject the agency judgment and proceed without its guidance. This is the inevitable consequence of Article III reposing the judicial power of the United States in its courts. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). It has been said that a court should consider adopting the position taken in regulations and interpretive guidelines if the agency positions are “wise and correct.” Davis, 1 *Administrative Law Treatise*, 239 (1994). The weight to be accorded an agency's nonbinding interpretation depends upon the “thoroughness evident in its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Prior to *Sutton*, the Supreme Court had noted the bifurcated responsibility for administering the ADA. It observed, however, that “the well-reasoned views of the agencies implementing ... [the ADA] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Bragdon v. Abbott*, 524 U.S. 624 (1998). Thus as a general matter, deference to the EEOC's guidelines appears appropriate.... [T]he relevant regulations present what appears to be a question as to whether they are “well reasoned” and thus “wise and correct.”<sup>27</sup>

The district court judge concluded that “[f]rom all the above, it appears relatively clear that this court should be cautious in adopting the EEOC’s ... construction of disability, but, in light of all the circumstances surrounding the issue before it, ‘I conclude that until directed otherwise it is appropriate for district courts to continue to give deference to the EEOC regulation.’”<sup>28</sup>

The overall situation is that lower courts are grappling in various ways to determine how much weight to give to the provisions of ADA regulations that address the elements of the definition of disability as a result of the Supreme Court’s inconclusive second-guessing of the validity and persuasiveness of such provisions. And this situation provides at least a semblance of a rationale for covered entities to resist following the provisions, ultimately weakening the impetus for vigorous implementation of the ADA.

### **Issue: *Duration Limitation on What Constitutes a Disability***

#### *What the Supreme Court Did*

In its decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court recited a requirement established in the EEOC’s ADA regulation that an “impairment’s impact must also be permanent or long term” to constitute a disability. In doing so, although the Court had expressed reservations about what persuasive authority should be afforded the EEOC regulations’ definitions provisions, the Court’s reference and citation to the duration limitation appeared to offer some measure of support or approval for the EEOC position.

#### *Significance of the Court’s Action*

In defining the term “substantially limits” in its Title I regulation, the EEOC provided that the following factors are to be considered, in addition to the “nature and severity of the impairment,” in determining whether an individual’s major life activity is substantially limited:

- (i) The duration or expected duration of the impairment; and
- (ii) The permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment. *Id.*, 1630.2(j)(2).

In its Interpretive Guidance, the EEOC elaborated that “temporary, non-chronic impairments of short duration, with little or no long-term or permanent impact, are usually not disabilities.”

The ADA contains a legal requirement that nothing in the Act is to be construed to apply a lesser standard than standards applied under the nondiscrimination provisions of the Rehabilitation Act of 1973, and Section 504 regulations do not contain any restrictions regarding the duration a condition must have to constitute a disability. The regulatory guidance accompanying the original Health, Education, and Welfare regulations (and the current regulations of the Department of Health and Human Services and the Department of Education), which the Supreme Court has said ADA interpretation must be consistent with, indicate in regard to the definition of “individual with a disability” that the respective agency “has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps.”

The language of the ADA as proposed and as enacted never contained any limitation or exclusion for “temporary” conditions or any other language imposing or suggesting a duration-of-impairment restriction on conditions that might constitute disabilities under the legislation. Nor did the legislative history of the ADA offer any support for such a limitation. In creating a duration standard and excluding temporary conditions, the EEOC departed from the position of its sister agencies; neither the Department of Justice nor the Department of Transportation ADA regulations include a duration standard. In its Title II and Title III Technical Assistance Manuals, the DOJ explicitly rejected such a standard by including the following language in the manuals: “Are ‘temporary’ mental or physical impairments covered by [Title II/Title III]? Yes, if the impairment substantially limits a major life activity.” The Department of Transportation explained that it did not need to include the words “temporary or permanent” in its regulation, because in its view, “the terms are unnecessary because any condition that meets the criteria of the definition, regardless of its duration, is a disability.”

The EEOC’s duration limit can result in a denial of statutory protection from discrimination for an employee when recovery is more rapid and the impact on the employer’s operations are

reduced. In the case of a broken leg, for example, the EEOC has indicated that its approach would permit an employer to fire an employee whose broken leg took eight weeks to heal but would provide protection from discrimination if it took, for example, four months or more to heal. It is dubious reasoning that denies statutory protection from discrimination for an employee when recovery is more rapid and the impact on the employer's operations are reduced, but affords it if the disruption takes longer and thus the burden on the employer is greater. It is difficult to understand why an employer is permitted to fire a person if a temporary disability will cause the worker to miss some work, but disallow the employer to fire the person if a condition will force the worker to be out of work for a longer time, protecting him or her under the ADA, and then the employer is not permitted to fire the person.

NCD has criticized the EEOC for creating such a duration limitation when there is no basis for it in the statutory language or legislative history of the ADA, nor in other Federal agencies' ADA regulations. See, for example, NCD's *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act 221-222 (2000)*. NCD has challenged both the rationale and purported basis in case law of the EEOC's approach, and recommended that EEOC should issue a supplement to its Title I regulation to remove the duration limitation. Before the *Williams* decision, several courts had rejected the notion that a temporary disability is not a disability under the ADA and Sections 501, 503, and 504.<sup>29</sup> Such efforts to reject or redirect the EEOC's stance have been undercut by the Supreme Court's gratuitous mention of the EEOC's duration provision without expressing any reservations. The Court's reference to the duration limitation appears to offer some measure of support or approval for the EEOC position, and, although it was nonbinding dicta in the *Williams* case, it sends a bad message to the EEOC, the lower courts, and employers that the Supreme Court has no problem with the EEOC invention of a duration-of-impairment requirement for ADA plaintiffs to meet and for defendant employers to contest.

### *Examples of Impact*

Lower courts' applications of a duration limitation on what constitutes a disability have led to a variety of conditions, many quite serious, being ruled not to be disabilities, including epilepsy;<sup>30</sup> breast cancer, lumpectomy and radiation treatment;<sup>31</sup> cancer on shoulder, bone marrow tests, and



chemotherapy treatments;<sup>32</sup> psychological reaction to having bladder cancer;<sup>33</sup> “dysthymia, a chronic depressive disorder characterized by intermittent bouts of depression”;<sup>34</sup> arthritis hampering ability to walk;<sup>35</sup> severe abdominal pain necessitating stomach surgery;<sup>36</sup> painful back injury (“trapped nerve”);<sup>37</sup> and kidney obstruction, surgical treatment, periodic bladder infections, sharp pain, and fever.<sup>38</sup> These seem a far cry from the “transitory illnesses” mentioned in *Stevens v. Stubbs*<sup>39</sup>—the case precedent relied on by the EEOC to justify its temporary impairment exclusion<sup>40</sup>—and from the “simple infected finger” mentioned in ADA congressional reports.<sup>41</sup>

Other examples may help to illustrate the harsh and inequitable rulings that result from the notion that conditions characterized as “temporary,” or that have not been proven to be long term or permanent, are not disabilities. In *Sutton v. New Mexico Department of Children, Youth and Families*,<sup>42</sup> the plaintiff had degenerative arthritis in her hip, which had deteriorated to the point that she could walk only by using a walker.<sup>43</sup> She had surgery to address the condition and, while recuperating, was allegedly terminated by her employer because of her disability.<sup>44</sup> The court granted the employer’s motion to dismiss the plaintiff’s ADA action on the grounds that the plaintiff had not made sufficient allegations that her condition was substantially limiting. In her complaint, the plaintiff had described her “condition, her use of medication, her use of a walker, the occurrence of surgery, her physical inability to work for four weeks, and her ability to work only four hours per day for some unspecified period thereafter.” The court declared, however, that “[n]o inference of permanence or long-term impact, and thus of substantial limitation, can be drawn from these allegations.”<sup>45</sup>

In explaining this severe outcome, the court proclaimed that “the paramount interest of Congress in enacting the ADA was to protect the truly disabled.”<sup>46</sup> It would surely come as a big surprise to all of the members of the 101st Congress, which enacted the ADA, to find that a person in Ms. Sutton’s circumstances was not protected by the statute.

In *Soileau v. Guilford of Maine, Inc.*,<sup>47</sup> the plaintiff had “dysthymia, a chronic depressive disorder characterized by intermittent bouts of depression.” During a bout of depression caused by the condition, Soileau was allegedly terminated from his job because of his disability,

immediately after he requested an accommodation.<sup>48</sup> The defendant employer successfully moved for summary judgment on the plaintiff's ADA claim.<sup>49</sup> The First Circuit affirmed, ruling that while Soileau's doctor had concluded that his "underlying disorder (dysthymia) will be a life-long condition, Soileau has failed to adduce any evidence that his impairment—the acute, episodic depression—will be long term."<sup>50</sup> The court noted that the plaintiff's last previous bout of depression "required only a five-week work absence."<sup>51</sup>

Another example of the problematic and pernicious results of the exclusion of temporary conditions from the definition is provided by *Rakestraw v. Carpenter Co.*,<sup>52</sup> a case involving a truck driver who incurred a back injury while performing job duties.<sup>53</sup> The court noted that "it is evident from the record that Rakestraw's injury was painful and required frequent medical attention."<sup>54</sup> This situation continued for nearly 1 year and 10 months until Rakestraw was discharged, allegedly because the company considered it inconvenient to accommodate his condition by adjusting driver assignments to avoid his having to make deliveries involving heavy lifting.<sup>55</sup>

Although even the EEOC has indicated that a broken leg that requires 11 months to heal is a disability,<sup>56</sup> the *Rakestraw* court found a duration of twice that much for Rakestraw's condition insufficient. Sometime *after* he had been terminated, Rakestraw's doctors conducted additional tests, including a third MRI, and discovered a "trapped nerve."<sup>57</sup> This diagnosis resulted in back surgery that corrected the problem and led to Rakestraw's full recovery.<sup>58</sup> The fact that the plaintiff had recovered completely by the time the court considered the case convinced it that "the relatively short duration" of the plaintiff's injury rendered its limitations "insubstantial."<sup>59</sup> The court declared, "The evidence in this case demonstrates that surgery has corrected Rakestraw's back injury, and the impairment no longer exists. Thus, a finding that the injury constitutes a disability would be contrary to the weight of relevant precedent."<sup>60</sup> It added that the plaintiff's condition "was not a significant barrier to employment because the injury was not long lasting."<sup>61</sup>

The *Rakestraw* court noted that it was "sympathetic to the fact that Mr. Rakestraw lost his job" and acknowledged that the employer's actions "may demonstrate a lack of sensitivity and

compassion,”<sup>62</sup> but believed that such sentiments “must be tempered with the legal reality that not every decision to terminate an employee gives rise to a federal cause of action.” Ultimately, the court ruled that an injury lasting 1 year and 10 months was not of sufficient duration to constitute a disability.<sup>63</sup>

The fact that the cause of Rakestraw’s incapacity was only discovered after he had been terminated underscores a serious flaw in the temporary disability exclusion rationale. Suppose that doctors had not conducted a third MRI until 10 years after his termination, or that the underlying cause of the severe back pain had never been discovered. Presumably, his condition could not have been deemed “temporary” in those circumstances. And yet the conduct of the employer, and what the employer and the employee knew about the condition at the time of the discharge would have been exactly the same. How can the legality of someone’s conduct at point A in time depend on what occurs at some later point B in time? Does the outcome depend on getting a court to decide the case before improvement in the condition occurs? If a court decides a nondiscrimination case in favor of the plaintiff, would the court have to reopen the proceedings if it turned out that the plaintiff’s condition improved or was cured at some later time? Obviously such questions are absurd and the only relevant question is whether the plaintiff was discriminated against on the basis of disability at the time the alleged discrimination occurred. Once a person has been subjected to discriminatory treatment because of disability, it appears irrelevant how long thereafter the plaintiff’s condition persists.

Similar problems confront plaintiffs who have a condition of indefinite duration, are discharged because of the condition, and try to prove, under the third prong of the definition of disability, that the employer regarded them as having a substantial impairment. They must try to prove, by medical evidence and other experts, that (1) their conditions are long term, when in fact they and their doctors may not know how long the conditions will continue and they may hope that they will soon improve, or (2) their employers regarded their conditions as permanent. The latter requires a terminated employee to prove something within the mind of the employer, and “reward[s] employers for doing one thing and saying another.”<sup>64</sup>

A bizarre twist was put on the temporary disability issue by a federal district court, which ruled that a trucking company employee who incurred a serious back injury was not eligible for accommodation in a modified work program provided for injured employees because the program was limited to employees whose disabilities were temporary and the employer regarded this employee's condition as permanent.<sup>65</sup> Such a ruling, coupled with the exclusion of temporary conditions from the definition of disability, would mean that an employee with a disabling condition would not be entitled to a reasonable accommodation if the condition is temporary because such conditions are not protected. If the condition is permanent, however, the employee is not eligible anyway because the accommodation is only available to those having a temporary condition.

A similar choice between the frying pan and the fire was imposed by the court in *Johnson v. Foulds, Inc.*,<sup>66</sup> where the plaintiff sought medical leave as a reasonable accommodation; the court declared:

[T]he implication of the plaintiff's request for medical leave as a result of her mental depression is that once she has recovered, she will be able to return to work. If that is so, then her impairment must be considered to be a temporary condition that does not meet the requirements of a disability under the ADA. On the other hand, if the impairment is not of short duration, then her request for medical leave appears to be a concession that she cannot work.<sup>67</sup>

### **Issue: Per Se Disabilities**

#### *What the Supreme Court Did*

The Court has accepted the concept of *per se* disabilities, but has yet to name one. In its decision in *Bragdon v. Abbott*, the Court came very close to granting *per se* status to HIV infection. In *Kirkingburg*, the Court recognized that "some impairments may invariably cause a substantial limitation of a major life activity," thus endorsing the idea of *per se* disabilities. In *Kirkingburg* and *Williams*, the Court ruled that the conditions at issue in those cases did not merit *per se* disability status, but it did not reject the possibility of other conditions deserving to be considered *per se* disabilities. The Court has also reduced the pool of potential *per se* disabilities by its

rulings on mitigating measures, eliminating such conditions as epilepsy, diabetes, and manic depressive syndrome that might otherwise appear to merit such status.

### *Significance of the Court's Action*

Designation of a condition as a *per se* disability amounts to a recognition that, by its nature, the condition always substantially limits at least one major life activity and therefore is a disability under the ADA. Alternatively, if prejudice toward and stigmatization of the condition is so widespread that an individual proof of personal limitation is unnecessary, then it may also be designated as a *per se* disability. Such a designation would be of considerable practical value for ADA claimants having the condition. The Supreme Court's endorsement of the concept without granting such status to any specific impairments has left the law on this issue in flux. In the absence of the Supreme Court having named any conditions as meriting such designation, the lower courts have been reluctant to rule conditions to be *per se* disabilities. Trial courts have little motivation to go out on a limb and risk being second-guessed on appeal by declaring a condition a *per se* disability, when they can simply insist on an individualized showing of substantial limitation of a major life activity of the particular plaintiff. Because of this reticence in the trial courts, appellate courts are rarely asked to review findings of *per se* disability. One clear legal signpost the Supreme Court has given is that conditions responsive to mitigating measures are not eligible to be named *per se* disabilities. Overall, the Court's decisions have had an inhibiting effect on any inclination of lower courts to find conditions to meet the criteria for *per se* disability status. In this situation, it will be difficult for conditions to achieve *per se* disability status without some action by the Court, enforcement agencies, or the Congress.

NCD issued a policy paper examining the meaning and significance of the *per se* disabilities concept, what the Supreme Court has said about it, and the implications of the Court's declarations. *The Supreme Court's ADA Decisions and Per Se Disabilities*, paper No. 12 of NCD's *Policy Brief Series: Righting the ADA Papers*, can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

### *Examples of Impact*

The lower courts' reluctance to take the lead in recognizing particular conditions as *per se* disabilities, when the Supreme Court has yet to do so, has played out in numerous lower court decisions. Thus, various courts at the trial and circuit court of appeals levels have not granted *per se* disability status to conditions such as alcoholism,<sup>68</sup> drug addiction,<sup>69</sup> heart disease,<sup>70</sup> seizures,<sup>71</sup> diabetes,<sup>72</sup> cancer,<sup>73</sup> hemophilia,<sup>74</sup> Tourette's Syndrome,<sup>75</sup> asthma,<sup>76</sup> Meniere's disease,<sup>77</sup> Hepatitis C,<sup>78</sup> and Attention Deficit-Hyperactive Disorder (ADHD).<sup>79</sup> One federal district court judge even went so far as to declare that there are no conditions that constitute *per se* disabilities,<sup>80</sup> a position sharply inconsistent with the Supreme Court's statements on this issue as discussed above.

Two federal district courts have taken the step that the Supreme Court approached but did not quite take in *Bragdon v. Abbott*—the designation of HIV infection as a *per se* disability,<sup>81</sup> but other courts have declined to reach such a conclusion.<sup>82</sup> Although decided before the Supreme Court issued its ruling in *Bragdon v. Abbott*, the ruling in one such case, *U.S. v. Happy Time Day Care Center*,<sup>83</sup> illustrates some of the difficulties that arise in the absence of *per se* status. The court noted that “there is considerable support for the notion that HIV infection is a *per se* disability under the ADA and the Rehabilitation Act,” but nonetheless opted to scrutinize the affected person's condition of HIV infection on an individualized basis. Having chosen to do so, the court was then forced to grapple with such thorny questions as the significance of procreation and sexual activities in the life of a three-year-old child; whether such activities as caring for one's self, growing, socializing, and living do or do not constitute major life activities; and to what extent such activities are limited by HIV infection in a young child. Such troublesome complexities could have been avoided if HIV infection had been treated as a *per se* disability, either because it substantially limits major life activities either inherently or because prejudice and stigmatization regarding HIV is prevalent throughout our society.

In the absence of recognition that HIV infection is always a disability, however, at least one court has ruled that a plaintiff's HIV infection and AIDS did not qualify as a disability under the ADA. In the case of *Gutwaks v. American Airlines*,<sup>84</sup> a federal district court ruled that an airline

employee with full-blown AIDS was not substantially limited in any major life activity. This appears to be an extreme and dubious example of the application of the ADA's definition of disability, but it illustrates the risks that a litigant incurs in trying to establish the existence of a disability when the terms of the ADA definition are interpreted strictly. This ruling that a person with AIDS did not have a disability was particularly startling in light of the Supreme Court's earlier ruling in *Bragdon v. Abbott* that the plaintiff's asymptomatic HIV infection constituted a disability under the ADA. Given that the plaintiff in *Gutwaks* had a more advanced form of the condition than Ms. Abbott, it seems illogical that she had a disability under the ADA, but he did not. In *Bragdon*, the Supreme Court premised its decision on the effect of Ms. Abbott's condition on her major life activity of reproduction, while in *Gutwaks* the court was heavily influenced by the fact that Mr. Gutwaks indicated that he had no interest in fathering children.

In addition to HIV, the ADA committee reports and enforcement guidance have suggested a number of other conditions as likely candidates for *per se* disability status. Among these are the following:

- paraplegia<sup>85</sup>
- deafness<sup>86</sup>
- hard of hearing/hearing loss<sup>87</sup>
- lung disease<sup>88</sup>
- blindness<sup>89</sup>
- mental retardation<sup>90</sup>
- alcoholism<sup>91</sup>

A strong argument can be made that all of the physical or mental impairments in this list, by definition, "invariably cause a substantial limitation of a major life activity" (*Kirkingburg*). Thus, paraplegia automatically entails a substantial limitation on major life activities of walking and performing manual tasks. Deafness and other hearing impairments involve a substantial limitation on the major life activity of hearing. Lung diseases substantially limit the major life activity of breathing. Blindness engenders a substantial limitation on the major life activity of seeing. The condition of mental retardation denotes a substantial limitation on learning and thinking. Chronic inability to refrain from drinking to intoxication is the essence of the condition of alcoholism, and such intoxication causes substantial limitations on various major life activities

such as thinking (and remembering), walking, performing manual tasks, and others. If this is true, such conditions (along with various others that might also qualify) could be accorded *per se* disability status. Yet the courts have not yet so ruled.

Three other conditions—epilepsy,<sup>92</sup> diabetes,<sup>93</sup> and manic depressive syndrome<sup>94</sup>—were also deemed worthy of *per se* disability status in ADA committee reports and the *EEOC Compliance Manual*, but for many individuals these conditions can be mitigated through medication, dietary restrictions, and other means. In light of the Supreme Court’s decisions requiring the assessment of disability to take mitigating measures into account, currently it is unlikely that any court would find these conditions to qualify automatically as disabilities under the ADA. Indeed, dicta in the Court’s opinion in *Sutton* indicate that “find[ing] all diabetics to be disabled” would be “contrary to both the letter and the spirit of the ADA.”<sup>95</sup> Subsequent to the Supreme Court’s rulings on mitigating measures, at least two federal courts found that plaintiffs whose diabetes was controlled (at least to some degree) by blood sugar tests, insulin injections, and controlled diet had failed to establish that they had a disability under the ADA.<sup>96</sup> Similarly, at least three lower courts have ruled that, in light of mitigation through medication, particular plaintiffs’ conditions of epilepsy did not qualify as a disability under the ADA definition.<sup>97</sup> One of those courts conceded that before the Supreme Court’s ruling in *Sutton* “a person [with] epilepsy would receive nearly automatic ADA protection.”<sup>98</sup> Thus, some likely potential contenders for *per se* status, based upon ADA committee reports and regulatory commentary, in effect, have been removed from the pool of potential *per se* disability candidates as a result of the Court’s rulings on mitigating measures.

### ***Issue: Restrictive Interpretation of the Definition of Disability to Create a Demanding Standard***

#### *What the Supreme Court Did*

In its decisions in the cases of *Sutton*, *Murphy*, and *Kirkingburg*, the U.S. Supreme Court made rulings that narrowed the interpretation of the concept of “disability” as used in the ADA. In *Williams*, the Court expressly declared what those prior decisions had strongly suggested—that



the Court was embracing a view that the elements of the definition of “disability” in the ADA “need to be interpreted strictly to create a demanding standard for qualifying as disabled ....”<sup>99</sup>

NCD issued a policy paper examining the language and legislative history of the ADA, and the legal principles in place at the time it was enacted, bearing on how narrowly or broadly Congress intended the definition of disability to be construed, and comparing the expressed congressional intent with the Court’s narrow construction of the definition. *Broad or Narrow Construction of the ADA*, paper No. 4 of NCD’s *Policy Brief Series: Righting the ADA Papers*, can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

### *Significance of the Court’s Action*

In many ways, the most important, far-reaching, and damaging of the Court’s rulings on the definition of disability is its announcement that the ADA’s definition of disability should be interpreted narrowly to create a demanding standard for eligibility for the Act’s protection. It explains and provides the underlying rationale for the problematic rulings on the meaning of disability discussed in previous subsections of this report. It also creates an ominous atmosphere for resolving future questions regarding the definition of disability. The Court’s position that the definition of disability is to be construed narrowly represents a sharp break from traditional law and expectations. It ignores and contradicts clear indications in the statute and its legislative history that the ADA was to provide a “comprehensive” prohibition of discrimination based on disability, and legislative, judicial, and administrative commentary regarding the breadth of the definition of disability. It also flies in the face of an established legal tradition of construing civil rights legislation broadly. Congress knowingly chose a definition of disability that to that time had been interpreted broadly in regulations and the courts; it was entitled to expect the definition to continue to receive a generous reading. In crafting the ADA, Congress did not treat nondiscrimination as something “special” that can be spread too thin by granting it to too many people. Unlike disability benefits programs, such as Social Security Income (SSI) and Social Security Disability Insurance (SSDI), which are predicated on identifying a limited group of eligible persons to receive special benefits or services that other citizens are not entitled to obtain, and for which the courts have sought to guard access jealously, the ADA is premised on

fairness and equality, which should be generally available and expected in American society. The Court's harsh and restrictive approach to defining disability places difficult, technical, and sometimes insurmountable evidentiary burdens on people who have experienced discrimination.

The Court put forth a very weak rationale for its "strict" and "demanding" approach to the definition of disability. Primarily, it pointed to an ADA finding that 43 million people have disabilities. The Court's use of the 43 million figure, including its ill-founded assumptions that Congress intended the figure to have a degree of mathematical exactitude and only that number of people were to be protected by the ADA, are addressed in a policy brief in the *Righting the ADA* series. *Significance of the ADA Finding That Some 43 Million Americans Have Disabilities*, paper No. 3 of NCD's *Policy Brief Series: Righting the ADA Papers*, can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

### *Examples of Impact*

In the decisions it has made on the definition of disability, the Court has fully lived up to its declared intention to interpret strictly the elements of the definition to turn it into "a demanding standard for qualifying as disabled." The Court has made good on its objective of restricting ADA protection in its (1) position on mitigating measures, (2) interpretation of "substantial limitation" and "major life activities," (3) expression of misgivings over whether working is a major life activity, (4) application of the EEOC's "class or broad range of jobs" standard regarding the activity of working, (5) questioning whether any Federal agency has authority to issue regulations regarding the definitions section of the ADA, (6) unnecessary reference to a duration limitation on disability, and (7) failure to designate any conditions as *per se* disabilities and elimination of some conditions from such a prospect. In each of these instances, the Court has chosen a narrow, restrictive reading of the scope of the definition of disability instead of a broader, more benevolent reading. In his dissenting opinion in the *Sutton* case, Justice Stevens contended that "in order to be faithful to the remedial purpose of the Act, we should give it a generous, rather than a miserly construction." In the *Williams* decision, the Court openly opted for the "miserly" approach.

***Principles and Assumptions Regarding the Definition of Disability When the ADA Was Enacted That Have Been Disregarded or Contradicted by the Supreme Court***

The impact of the problematic decisions of the Supreme Court regarding the definition of disability can be summed up by identifying the important ways in which the Court has deviated from expectations that were in place when the ADA was negotiated, debated, and enacted. Such expectations were based on the law and regulations in effect at the time and on clearly stated positions in the ADA's legislative history. The following represent significant tenets and assumptions of the ADA's drafters, Congress, and the President who signed the Act into law, which the Supreme Court has not respected:

1. To ensure that the ADA achieves its objective of prohibiting pervasive discrimination comprehensively, the elements of the definition of disability would be interpreted liberally to encompass, within the ADA's protection, the full gamut of people who encounter discrimination on the basis of disability.
2. Determinations of the existence of impairment and whether an impairment substantially limits a major life activity would be made without regard to mitigating measures such as medicines or assistive or prosthetic devices and techniques that an individual does or might make use of.
3. The phrase "major life activities of such individual" refers to activities that are important in the life of the individual claiming ADA protection, or that are important to most people in the general population and would be important in the individual's life if a physical or mental impairment did not preclude the individual from performing the activity. For all individuals, it would include all significant endeavors of ordinary daily and occupational life. Under this approach, there would be little question that major life activities would include such activities as caring for one's self, including personal-care tasks; lifting, reaching, grabbing, holding, and performing manual tasks, including housework and household chores, and manual job tasks; walking and running; seeing; hearing; speaking; breathing; thinking, learning, and concentrating; working; dating and engaging in sexual relations; procreation; sleeping; interacting and communicating with other people; reading and writing; driving a motor vehicle; and engaging in physical exercise.
4. Working is a major life activity.
5. The term "substantially limits" refers either to significant restriction, in comparison with the average member of the general population, as to the condition, manner, or duration under which the individual can perform an activity, or to total inability to perform the activity.

6. Showing that an individual is precluded, because of a physical or mental impairment of the individual or the employer's perception of a physical or mental impairment of the individual, from performing essential tasks of a particular job position the individual occupies or applies for is sufficient to demonstrate that the individual is substantially limited in regard to the major life activity of working.
7. The "regarded as" prong of the definition of disability would be interpreted broadly to extend statutory protection of the ADA 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.
8. Each of the Federal agencies charged with issuing regulations implementing the various Titles of the ADA or provisions of a Title would be authorized to include provisions that apply the definition of disability to activities subject to the regulations, including regulatory clarifications or interpretive guidance arising from the differing contexts and purposes of the particular subject of the regulations. Properly issued regulations promulgated by the Federal agencies pursuant to their ADA implementation authority, including provisions relating to the definition of disability, would be entitled to *Chevron* deference.
9. If a covered entity excludes or disadvantages an individual because of an actual or perceived physical or mental impairment, the fact that the impairment is temporary should not matter; duration of an impairment is not a relevant consideration if an impairment otherwise substantially limits a major life activity.
10. Impairments that invariably cause a substantial limitation of a major life activity, either inherently or because of general prejudice and stigmatization, would be designated *per se* disabilities, but no negative presumption would arise to reduce the chances that other conditions would be designated *per se* disabilities or found to be disabilities in the circumstances of particular cases.
11. The ADA finding that 43 million Americans have disabilities would serve to indicate that the ADA was addressing a problem of sizable dimensions and to give a rough idea, an order-of-magnitude estimate, of the constituency that, because they encounter discrimination in their daily lives because of particularly severe and obvious impairments, would readily support and laud the enactment of such a law. The figure was not intended to be subjected to mathematical partition for deductions about what types of conditions the ADA protects. The 43 million figure does not represent the total number of people who would be protected by the ADA. The "record of" and "regarded as" prongs of the definition of disability provide protection to all Americans who are discriminated against whether they have any actual impairment or not. The ADA's focus is on eliminating discrimination and doing so comprehensively, not on making technical distinctions about how disabled the plaintiff is, causing more classifying and labeling of individuals, as a precondition to being protected by the Act and thus entitled to being treated equally.

## **C. Limitations on ADA Remedies Under Decisions of the Supreme Court**

### **Issue: *Rejection of the “Catalyst Theory” in the Awarding of Attorney’s Fees and Litigation Costs***

#### *What the Supreme Court Did*

In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, the Supreme Court rejected the “catalyst theory” that most lower courts had applied in determining the availability of attorney’s fees and litigation costs to plaintiffs in cases under the ADA and other civil rights statutes, and under other federal laws that authorize such payments to the “prevailing party.”

#### *Significance of the Court’s Action*

The ADA contains a provision expressly authorizing fees and costs of litigation to be paid to the prevailing party in any action or administrative proceeding brought under the Act. Various other federal laws, the Civil Rights Act of 1964, the Fair Housing Amendments Act of 1988, the Voting Rights Act Amendments of 1975, the Civil Rights Attorney’s Fees Awards Act of 1976, and quite a few others, also authorize the awarding of attorney’s fees to the “prevailing party.” Until the Supreme Court made its ruling in the *Buckhannon* case, a plaintiff whose lawsuit motivated a defendant to change its conduct and to cease performing actions that the plaintiff claimed were violations of the ADA or one of these other laws could recover attorney’s fees and certain litigation expenses from the defendant under the “catalyst theory.” Under the “catalyst” approach, the courts considered “prevailing party” as meaning something broader than simply a party that wins a final judicial ruling in its favor. A plaintiff was considered a “prevailing party” eligible to be awarded attorney’s fees if the lawsuit achieved its desired result because it brought about a voluntary change in the defendant’s conduct. The idea was that in circumstances where the filing of a lawsuit caused a defendant to change its ways and cease some action whose legality had been challenged, the plaintiff had achieved the goal of the lawsuit, and was the “prevailing party.” If filing a lawsuit proved to be a catalyst for the defendant’s compliance, the plaintiff had prevailed even if the legal proceedings never reached the formal decision stage.

The lower courts imposed conditions for a party to qualify as a prevailing party under the catalyst theory: (1) a plaintiff had to show that the defendant provided some of the benefit sought by the lawsuit; (2) a plaintiff had to demonstrate that the suit stated a genuine claim—one that was at least “colorable,” not frivolous, unreasonable, or groundless; and (3) the plaintiff had to establish that the suit was a “substantial” or “significant” cause of the defendant’s action providing relief.

In *Buckhannon*, the Supreme Court, by a 5-to-4 vote, scrapped the “catalyst theory.” The Court decided that the critical factor in attorney’s fees cases was whether there was a “judicially sanctioned change in the legal relationship of the parties.” It held that a defendant’s voluntary change in conduct, even if it accomplishes what the plaintiff sought to achieve by the lawsuit, lacks the necessary “judicial imprimatur” on the change.

The result of the *Buckhannon* decision undercuts incentives for public interest lawyers and the private bar to undertake many ADA cases. In her dissenting opinion in *Buckhannon*, Justice Ginsburg predicted that “the Court’s constricted definition of ‘prevailing party,’ and consequent rejection of the ‘catalyst theory,’ [will] impede access to court by the less well-heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general.” Her prediction has proved all too accurate. As a consequence of the *Buckhannon* ruling, defendants have a significant motivation to settle promising ADA cases informally rather than by consent decree or to make the cases moot by voluntary compliance, so that they can avoid paying attorney’s fees. This possibility makes many ADA cases less desirable to private attorneys and more demanding of scarce resources of public interest advocacy agencies. Attorneys are aware that there is a good chance that promising ADA cases will be settled informally or mooted out and attorney’s fees precluded, so, unless significant monetary damages are at issue or the plaintiff is well-to-do and can afford to pay fees, there is little chance the attorney will make any money on such cases. The risk to attorneys of not being able to get attorney’s fees is greater in cases in which potential compensatory damages are small or where the plaintiff is primarily seeking an injunction ordering the defendant to stop its discriminatory actions. A compliant defendant may be able to avoid almost any potential financial consequences of its previous noncompliance with

ADA requirements. Accordingly, an attorney bringing such a case may have little chance to receive compensation for her or his work.

Reduced availability of attorney's fees means fewer resources for ADA advocates, who, as a result, can litigate fewer cases. Ultimately, this makes it much more difficult for people with disabilities, including those who have suffered egregious discrimination on the basis of disability prohibited by the ADA, to obtain legal representation. In addition, defendants have more incentive to engage in unlawful discriminatory acts unless and until they are sued, because even if they lose in court they will not be liable for a fee award.

NCD issued a policy paper examining the meaning and effect of the "catalyst theory," and the implications for the enforcement of the ADA caused by the Court's rejection of the theory. *The Supreme Court's Rejection of the "Catalyst Theory" in the Awarding of Attorney's Fees and Litigation Costs*, No. 17 of NCD's *Policy Brief Series: Righting the ADA Papers*, can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

### *Examples of Impact*

The *Buckhannon* decision has spawned lower court decisions in which attorneys who would have been likely recipients of attorney's fees before the decision are no longer being compensated for cases challenging discrimination on the basis of disability. In one case,<sup>100</sup> the Tenth Circuit ruled that an ADA plaintiff was not entitled to attorney's fees even though after the lawsuit was filed the employer discontinued the practice, challenged in the suit, of asking questions regarding medical history on job applications. In another case,<sup>101</sup> the defendant in a Title III action reacted to the lawsuit by voluntarily reducing challenged barriers to access in his restaurant in various ways, including removing planters obstructing wheelchair-accessible parking spaces, installing new wheelchair access signs in the parking lots and bathrooms, and altering the bathroom stall doors. The parties went to trial regarding a single remaining issue of whether the defendant was required to lower the urinal in the men's bathroom, and the plaintiff prevailed. The court ruled that the plaintiff was the "prevailing party," and thus entitled to an award of attorney's fees, but only as to the issue regarding the urinal. Notwithstanding the defendant's removal of numerous

architectural barriers, prompted by the plaintiff's lawsuit, "the only material change in the legal relationship between the parties occurred when the defendant was ordered to lower a urinal in the men's bathroom."<sup>102</sup> As a result, plaintiff's attorney was awarded less than 10 percent of his total fees and costs related to filing and trying the lawsuit.

In a third case,<sup>103</sup> the plaintiffs sued the Law School Admissions Council for failing to provide accommodations to students with disabilities taking the Law School Admissions Test (LSAT). As a result of the lawsuit, the Council provided all the accommodations sought by one of the named plaintiffs, and the parties entered into a stipulation dismissing her case. The district court found that the plaintiff was not entitled to attorney's fees, however, because she "failed to achieve a judicially sanctioned change in the parties' legal relationship."<sup>104</sup> The *Buckhannon* ruling has had a similar impact on attorney's fees in cases brought under Section 504 and the Individuals with Disabilities Education Act.<sup>105</sup>

The negative implications of *Buckhannon* are also illustrated by less formal reports either of fees not received or of cases not filed because of the rejection of the catalyst theory. One publicly funded advocacy agency, for example, complained that it had spent hundreds of thousands of dollars litigating a case involving alleged inhumane conditions at a state residential center for people with mental retardation, but lost its chance to recover attorney's fees and litigation expenses when the state decided to close the facility.<sup>106</sup> Even though the federal district court indicated it was inclined to believe that the state's action was the result of the lawsuit, the court was foreclosed from awarding attorney's fees and litigation costs under the *Buckhannon* ruling. The loss of such fees and costs severely hampered the level of service the agency would otherwise have been able to provide to other clients. Another advocacy organization that provides attorney representation at no cost to families in special education proceedings reported that, after *Buckhannon*, it was unable to negotiate any fees in any of the special education cases that were resolved through settlement.<sup>107</sup> Since 90 percent of its cases were typically settled, the result was that it no longer recovered fees for most of its work, with negative effects on both the quality of the work it undertook (by reducing resources for retaining experts, obtaining evaluations, and similar expenses) and the number of families for which it could provide representation. Another



agency reported that as a result of *Buckhannon*, “we are obtaining fewer fees, which impacts on our ability to hire additional staff, and pay current staff sufficiently, both of which decrease our ability to serve more people with disabilities.”<sup>108</sup>

The *Buckhannon* decision has also inhibited the interest of private attorneys and law firms to take on such cases on a pro bono basis. A representative of one publicly funded disability advocacy agency observed:

*Buckhannon* ... has had a dampening effect on our work in recruiting pro bono attorneys. ... In the past, we have been able to recruit private pro bono attorneys with the promise of recouping their time through attorney fees statutes. Unfortunately, the current reality is that if the attorney makes a persuasive case, the defendant can then change [its] policy or practice and moot out the case, thereby defeating the plaintiff’s claim for attorney’s fees.<sup>109</sup>

### **Issue: *Disallowance of Punitive Damages in Private Lawsuits Under Section 202 of the ADA***

#### *What the Supreme Court Did*

In *Barnes v. Gorman*, the Supreme Court ruled that punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, under Section 202 of the ADA, or under Section 504 of the Rehabilitation Act.

#### *Significance of the Court’s Action*

“Punitive damages” are amounts awarded to a plaintiff in addition to actual monetary damages when the defendant acted with malice, recklessness, or deception. Punitive damages are designed to punish the lawbreaker, and to deter future unlawful conduct by the defendant and by others who might be tempted to engage in similar conduct. The Supreme Court had provided indirect support for the availability of punitive damages under Title II by its decision in *Franklin v. Gwinnett County Public Schools*,<sup>110</sup> in which the Court stated that it would “presume the availability of all appropriate remedies, unless Congress has expressly indicated otherwise.” While *Franklin* was a Title IX case, the framework of analysis it applied led some lower courts to award punitive damages under Section 504.<sup>111</sup> At the time that the Supreme Court took up the *Barnes* case, the court of appeals for the Sixth Circuit had ruled that punitive damages could

not be obtained under Section 504,<sup>112</sup> while the Eighth Circuit had ruled that punitive damages were available under both Section 504 and Title II of the ADA.<sup>113</sup>

In *Barnes*, the Court noted that the “remedies, procedures, and rights” for violations of Section 202 of the ADA (Title II) and Section 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964. The Court also indicated that the availability of remedies under Title VI, and consequently of Title II of the ADA, should be determined with reference to a “contract law analogy,” which asks whether the recipient of federal funds implicitly consented to the remedy by accepting the funds. The Court considered it unlikely that funding recipients would subject themselves to punitive damages liability and concluded that compensatory damages were adequate to right the wrong in violation of Spending Clause legislation. Having concluded that punitive damages may not be awarded in private causes of action brought under Title VI, the Court reasoned that such damages, therefore, were unavailable for violations of Section 202 of the ADA or of Section 504 of the Rehabilitation Act of 1973.

NCD issued a policy paper examining the nature and purpose of punitive damages, their availability under the ADA, and the substance and ramifications of the Court’s ruling in *Barnes*. *The Supreme Court’s Refusal to Permit Punitive Damages in Private Lawsuits under Section 202 of the ADA*, paper No. 18 of NCD’s *Policy Brief Series: Righting the ADA Papers*, can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

### *Examples of Impact*

Lower court decisions have begun to reflect the impact of the *Barnes* decision. In one case, a federal district court ruled that a fire paramedic, who was denied disability benefits because he was no longer “disabled” but denied reemployment because of an abnormal gait from a back injury, could not seek punitive damages against his city employer.<sup>114</sup> Another district court similarly held that university students with disabilities could not seek punitive damages against the state university for its ongoing failure to provide the students access to campus programs, services, activities, and facilities.<sup>115</sup>

The inability to recover punitive damages acts as a disincentive for individuals considering pursuing their claims in court, and also eliminates the deterrent value of such damages to egregiously discriminatory conduct. In some cases, the possibility of an award of punitive damages also serves to make defendants less intractable in settlement negotiations. Without such a remedy, individuals are dramatically impaired in their ability to enforce civil rights protections and hold their governments accountable for the most extreme acts of intentional discrimination.<sup>116</sup>

## **D. Safety Limitations Under ADA Decisions of the Supreme Court**

### ***Issue: Acceptance of the EEOC Provision Allowing Employers to Exclude from a Job a Person with a Disability Who Would Pose a Direct Threat to His or Her Health***

#### *What the Supreme Court Did*

In *Chevron U.S.A. Inc. v. Echazabal*, the Supreme Court upheld as permissible under the ADA the EEOC regulatory provision that allows employers to refuse to hire applicants because their performance on the job would endanger their health because of a disability, despite the fact that, in the language of the ADA, Congress recognized a “direct-threat” defense only for dangers posed to other workers.

#### *Significance of the Court’s Action*

In the section of Title I that lists defenses available to employers, the ADA contains a provision stating that “[t]he term ‘qualification standards’ may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.”<sup>117</sup>

The ADA defines “direct threat” as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”<sup>118</sup> Although these provisions refer to the health or safety of “others” or “other individuals,” the EEOC expanded the defense in its regulations implementing Title I, making it applicable to “the health or safety of the individual or others.”<sup>119</sup> NCD opposes the EEOC’s addition of a danger-to-self provision, because it invites paternalistic conjecturing by employers and their physicians about perceived dangers to individuals with disabilities, often based on ignorance and misconceptions about particular conditions, and

fosters perceptions that individuals with disabilities are commonly irrationally self-destructive.<sup>120</sup> The Court's acceptance of the EEOC provision raises the distressing possibility of the more prevalent use of such overprotective health standards in the future.

It is important to note, however, that in its decision in *Echazabal* the Court also accepted several significant conditions the EEOC recognized as part of the "direct-threat" defense. The Court noted that the EEOC regulation requires that the direct-threat defense must be "based on a reasonable medical judgment" supported by "the most current medical knowledge and/or the best available objective evidence," and must involve an "individualized assessment of the individual's present ability to safely perform the essential functions of the job," which considers how imminent the risk is and how severe the harm would be.<sup>121</sup> The EEOC provision also recognizes that the direct-threat defense applies only where there is "a significant risk of substantial harm" that "cannot be eliminated or reduced by reasonable accommodation."<sup>122</sup> In *Echazabal*, the Court observed that safety-related qualification standards that would reject potential workers because of "indirect" threats of "insignificant" harm would implicitly be precluded by the Act's specification of a direct-threat defense.<sup>123</sup>

The Court also suggested in *Echazabal*, without deciding, that all safety-related qualification standards imposed by employers should be required to satisfy the ADA's direct-threat standard—a question that was expressly not decided in the Court's earlier decision in *Kirkingburg*. The Court in *Echazabal* did accept that safety-related qualification standards are subject to the same requirement as other types of qualification standards that screen out individuals with disabilities—that they must be "job related" and "consistent with business necessity."<sup>124</sup> EEOC's interpretive guidance for its Title I regulations specifies that, for any safety requirement that screens out individuals with disabilities, the employer must demonstrate that such requirement, as applied to the individual with a disability, satisfies the direct-threat standard to show that the requirement is job related and consistent with business necessity.<sup>125</sup> Requiring employers' safety criteria for hiring and retaining employees to be "job related," "consistent with business necessity," and able to satisfy the ADA's "direct-threat" standard, as that defense is defined in

the ADA and interpreted in the EEOC regulation, is critical to keeping such safety criteria within reasonable bounds, and preventing them from being used to undercut major ADA objectives.

These requirements should ameliorate the damaging effects of the risk-to-self defense to some degree, and provide litigants with disabilities and their attorneys grounds for contesting the assertion of such a defense. Critically, because “direct threat” is a defense, employers attempting to assert health and safety concerns as a justification for their allegedly discriminatory actions must bear the burden of proof on the issues involved in demonstrating the existence of a direct threat.<sup>126</sup> Such safeguards, however, may be rendered ineffective to the extent that such judgments and assessments are made by physicians who are employed by employers and may be more sensitive to protecting the employer than to the equal opportunity rights of potential employees with disabilities under the ADA. A job applicant with a disability may not have the knowledge or resources, and basis in current medical knowledge, to challenge the reasonableness of judgments made by company doctors that the employment would endanger his or her health or safety. Thus, despite the hope that it can be confined within appropriate limits, NCD views the establishment and recognition of a risk-to-self defense as a disturbing, unfortunate development.

NCD issued a policy paper examining the *Echazabal* decision in detail, and discussing its implications and inconsistency with the statutory language and legislative history of the ADA *Chevron v. Echazabal: The ADA’s “Direct Threat to Self” Defense*, paper No. 9 of NCD’s *Policy Brief Series: Righting the ADA Papers*, can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

### *Examples of Impact*

The *Echazabal* decision has permitted employers to make greater use of safety criteria in relation to workers and applicants with disabilities. The effects have begun to show up in reported ADA cases. In one case, a pharmacist with diabetes who worked at a Wal-Mart store asked his employer to permit him, as a reasonable accommodation, to have a half-hour off for lunch, so that he could take his medications and eat lunch.<sup>127</sup> The store managers refused and fired the pharmacist. The court of appeals for the Eighth Circuit held that, in light of mitigating

measures—primarily injections of insulin—the man did not have a disability under the ADA. The court added, however, that even if the pharmacist had established that he had a disability, Wal-Mart might have successfully raised the “risk-to-self” defense.<sup>128</sup> Citing *Echazabal*, the Eighth Circuit ignored the plaintiff’s requested reasonable accommodation and instead suggested that Wal-Mart was justified in not continuing his employment, because working in a single-pharmacist pharmacy that did not provide for uninterrupted meal breaks posed a direct threat to the plaintiff’s health.<sup>129</sup>

In another case, the Merit Systems Protection Board found that the plaintiff employee failed to demonstrate that she could safely perform the essential functions of her position.<sup>130</sup> The employee, an Internal Revenue Service program analyst, had a diagnosis of “multiple chemical sensitivity syndrome” and “respiratory reactive airway disease” and sought accommodations from her employer that would have allowed her to perform her job without getting ill. The Board found that the plaintiff failed to demonstrate that the requested accommodations would provide sufficient protection to allow her to safely perform the duties of her position, although, after her removal from Federal Government employment, she had successfully worked in an office environment for several private companies that made the accommodations she requested.<sup>131</sup> The Board noted that plaintiff’s doctors agreed that there was no guarantee that the plaintiff could successfully avoid a debilitating chemical exposure at her workplace, and concluded, relying on the *Echazabal* decision, that “although the [plaintiff’s] willingness to work is admirable, we find that the consequences resulting from an accidental exposure could prove irreversibly catastrophic to her health.”<sup>132</sup>

A federal district court ruled that a nurse with latex allergies could not challenge a hospital’s requirement that its employees could not suffer from such allergies.<sup>133</sup> Because other hospitals in the area did not have such a policy, the court ruled that the plaintiff was not disabled in regard to working, so she was not protected by the ADA. The court added, however, that under *Echazabal*, “a requirement that [the hospital’s] employees not suffer from latex sensitivities is a valid job requirement.”<sup>134</sup> Accordingly, the court never addressed whether reasonable accommodations would have permitted the plaintiff to perform the essential tasks of the job.

## **E. Limitations on Reasonable Accommodations Under Decisions of the Supreme Court**

### **Issue: *Standard for Reasonableness of Reasonable Accommodations***

#### *What the Supreme Court Did*

In *U.S. Airways, Inc. v. Barnett*, the Supreme Court recognized a reasonableness standard for reasonable accommodations separate from undue hardship analysis.

#### *Significance of the Court's Action*

Before the *Barnett* decision, the EEOC and most courts and commentators believed that, to claim the right to a reasonable accommodation, a person with a disability merely had to show that a requested accommodation worked, in the sense that it would enable the worker with a disability to perform the essential functions of the job. The limits on its “reasonableness” were established by the ADA definition of “undue hardship,” which provided that an employer did not have to make an accommodation that required “significant difficulty or expense” determined in light of resources available to the employer, the nature and cost of the accommodation, and other factors.<sup>135</sup> An “unreasonable accommodation,” then, was one that resulted in undue hardship. The majority opinion in *Barnett*, however, recognized an assessment of reasonableness of accommodation apart from undue hardship.

The Court reasoned that the ADA does not “demand action beyond the realm of the reasonable.”<sup>136</sup> It rejected Mr. Barnett’s argument that the word “reasonable” in “reasonable accommodation” only means “effective,” and held that it is the word “accommodation,” not the word “reasonable,” that conveys the need for effectiveness. The Court declared that “an accommodation could be unreasonable in its impact even though it might be effective in facilitating performance of essential job functions.”<sup>137</sup> In permitting employers and courts to conduct an assessment of the “reasonableness” of accommodations, apart from their financial and administrative hardship on the employer’s operation, the *Barnett* opinion opened up a troublesome can of worms. It invites employers to interject their own possibly eccentric and prejudiced views about what is reasonable, and allows courts to second-guess otherwise workable and not unduly burdensome accommodations. Accordingly, the Court’s position

undercuts a sensitive compromise—reflected in the “undue hardship” standard—between requiring employers to do nothing or very little to accommodate the needs of individual workers with disabilities and requiring them to take extreme actions to accommodate particular workers that would unduly harm the employers’ businesses.

In its regulations and regulatory guidance, the EEOC has delineated a process for determining an appropriate accommodation, which involves (1) initial discussions between the employer and the employee or applicant, (2) analysis of the particular job involved to determine its purpose and essential functions, (3) consultation with the individual with a disability to identify job-related limitations and how those limitations could be overcome with a reasonable accommodation, (4) identification of potential accommodations and assessment of the effectiveness each would have, and (5) selection and implementation of the accommodation that is most appropriate for both the employee and the employer considering the preference of the individual to be accommodated.<sup>138</sup> The courts have recognized this requirement and commonly refer to it as the “interactive process” for determining reasonable accommodation.<sup>139</sup> This process did not contemplate that, although such-and-such accommodation would be effective and is not unduly costly or difficult, the employer could still reject it because it did not view the accommodation as reasonable. Nor did it contemplate that courts could interpose their own opinions about whether an effective, not unduly burdensome accommodation is somehow nonetheless unreasonable.

In its origins in regulations implementing the Rehabilitation Act, in its usage in the ADA, and in regulatory interpretations of the EEOC, the focus of the “reasonable accommodation” concept has always been on meeting the accommodation needs of the worker. Under the EEOC’s regulations implementing the ADA, “reasonable accommodation” is defined to mean various kinds of “modifications or adjustments” to the application and work environment that (1) “enable a qualified applicant with a disability to be considered for the position such qualified applicant desires,” (2) “enable a qualified individual with a disability to perform the essential functions of [the] position [held or desired],” or (3) “enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated



employees without disabilities.”<sup>140</sup> The definition is concerned exclusively with enabling the employee or applicant to participate on an equal footing.

Conversely, the phrase “undue hardship” has been viewed, since its origins in Rehabilitation Act regulations, as the limit on an employer’s obligation to provide accommodations. The ADA defines the term “undue hardship” to mean “an action requiring significant difficulty or expense, when considered in light of” factors noted in the next subparagraph of the definition, including (1) the type and cost of an accommodation; (2) the financial resources of the employer; (3) the financial resources of the particular facility involved; (4) the number of persons employed by the employer overall and at the particular facility; (5) the type of business involved; and (6) the impact of an accommodation on expenses, resources, and operations of the particular facility and of the employer’s business overall.<sup>141</sup> The ADA thus states in considerable detail the kinds of financial, administrative, and structural factors that courts should consider when deciding whether an accommodation will place an undue hardship on employers.

During congressional consideration of the ADA, discussions and debates about how an employer could defend itself against a claim for a requested accommodation centered on the “undue hardship” definition.<sup>142</sup> The word “reasonable” was not viewed by Congress or the drafters of the legislation as an independent modifier that would exclude particular accommodations that employers were otherwise legally obligated to provide under the ADA. The Court’s opinion in *Barnett* makes a dramatic break with the ADA’s legislative history and implementing regulations in suggesting that the statute imposes an independent standard of reasonableness of accommodation.

On a positive note, the majority opinion in *Barnett* recognized the ADA’s “basic equal opportunity goal,”<sup>143</sup> and that achievement of the Act’s objectives “will sometimes require affirmative conduct to promote entry of disabled people into the workforce.”<sup>144</sup> The Court ruled that the reasonable accommodation obligation can require an employer to make exceptions to disability-neutral practices and rules, even if such exceptions might be considered a “preference” in a sense.<sup>145</sup> The Court elaborated as follows:

Were that not so, the “reasonable accommodation” provision could not accomplish its intended objective. Neutral office assignment rules would automatically prevent the accommodation of an employee whose disability-imposed limitations require him to work on the ground floor. Neutral “break-from-work” rules would automatically prevent the accommodation of an individual who needs additional breaks from work, perhaps to permit medical visits. Neutral furniture budget rules would automatically prevent the accommodation of an individual who needs a different kind of chair or desk. Many employers will have neutral rules governing the kinds of actions most needed to reasonably accommodate a worker with a disability.<sup>146</sup>

Significantly, this ruling makes it clear that the duty of making reasonable accommodations is not restricted simply to modifying rules and practices that directly disadvantage workers with disabilities, and can necessitate exceptions even to practices and policies that are disability-neutral and applied uniformly to all workers.

The majority opinion in *Barnett* also clarified the evidentiary framework for reasonable accommodation cases by ruling that, to overcome an employer’s summary judgment motion, a plaintiff employee needs only show that an accommodation seems reasonable on its face, “ordinarily or in the run of cases.”<sup>147</sup> Once the plaintiff meets this burden, the employer has to establish the existence of “undue hardship” in the particular circumstances.

The recognition of the underlying purpose, necessity, and reach of the reasonable accommodation requirement, and clarification of the evidentiary framework, however, do not lessen the potential harmful effects of the Court’s formulation of an independent standard for determining the reasonableness of accommodations.

NCD issued a policy paper examining the *Barnett* decision in detail, and discussing its implications as well as the larger economic and social issues it raises. *Reasonable Accommodation After Barnett*, paper No. 10 of NCD’s *Policy Brief Series: Righting the ADA Papers*, can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

### *Examples of Impact*

One hope for minimizing the negative impact of the independent evaluation of reasonableness of accommodation as sanctioned in the *Barnett* decision would be to confine this analysis to the reassignment/seniority factual context at issue in the *Barnett* case. Seniority rights have traditionally occupied a special place in employee-management relations, and have been accorded favorable status in the courts, in recognition of their significant impact on the expectations and rights of workers.<sup>148</sup>

Some courts have chosen to read *Barnett* narrowly, and have refused to extend the Supreme Court's reasoning beyond the ambit of established seniority rights. The court of appeals for the Third Circuit, for example, declined to grant summary judgment to an employer who claimed that an employee seeking a transfer as a reasonable accommodation had failed to follow its regular procedures for seeking a transfer.<sup>149</sup> The court said that the plaintiff must still be given the opportunity to show that the accommodation he or she requests is reasonable on its face, and the fact that the Supreme Court found one type of requested accommodation—"violation of seniority system rules"—prima facie unreasonable did not mean that violations of other types of rules would be found equally unreasonable. The Third Circuit noted that, in light of the Supreme Court's caveat in *Barnett* that a plaintiff "remains free to show that special circumstances warrant a finding,"<sup>150</sup> even a seniority system violation can be found reasonable on the facts of a particular case.<sup>151</sup> The court did not accept that the Supreme Court's creation of one presumptive exception to a reasonable accommodation request worked to reshape either the interactive accommodation procedure or the evidentiary defense burden, which employers ordinarily must meet when they deny an accommodation that on its face is reasonable.

Not all lower court decisions, however, have been so discriminating in their application of the *Barnett* ruling. A decision of the Seventh Circuit perhaps best illustrates the extent to which the *Barnett* analysis could be extended outside of the seniority system context. In *Mays v. Principi*,<sup>152</sup> the Seventh Circuit affirmed the district court's grant of summary judgment against a staff nurse employed by Veterans Affairs (VA) who had sought a reasonable accommodation to enable her to continue to perform nursing duties in a different nursing position. Although the action was

brought under Section 501 of the Rehabilitation Act of 1973, the court relied on its interpretation of the Supreme Court's *Barnett* decision. The Seventh Circuit found support in the following:

...a recent decision of the Supreme Court [*Barnett*] which holds that an employer is not required to give a disabled employee superseniority to enable him to retain his job when a more senior employee invokes an entitlement to it conferred by the employer's seniority system. If for "more senior" we read "better qualified," for "seniority system" we read "the employer's normal method of filling vacancies," and for "superseniority" we read "a break..."<sup>153</sup>

By simply equating "normal method of filling vacancies" with a "seniority system," the decision bypassed any analysis of the employer's "normal method" and whether it could be adjusted as a reasonable accommodation. The Seventh Circuit ultimately ruled against Mays' request for accommodation because, even "assuming that she was qualified for such a job, if nevertheless there were better-qualified applicants 'and the evidence is uncontradicted that there were' the VA did not violate its duty of reasonable accommodation by giving the job to them instead of to her."<sup>154</sup> The court ruled for the VA merely because it claimed to have better-qualified applicants, not existing employees with a legal right or expectation to the positions in question. The court reasoned that it would not be "reasonable" for the VA to transfer Mays to a vacant position as an accommodation if she was "not as well-qualified as competing applicants."<sup>155</sup>

The result is that Mays' right to reassignment as a reasonable accommodation was reduced to a mere right to apply for a position when no applicants with better qualifications exist (in the employer's opinion)—a right she would have had even if there were no "reasonable accommodation" requirement. Thus, the *Mays v. Principi* decision demonstrates the serious threat to reasonable accommodation that a broad interpretation of the *Barnett* decision can cause.<sup>156</sup>

The Seventh Circuit had, in fact, been inclined to impose a separate reasonableness standard well before its *Mays v. Principi* ruling and, indeed, well before the *Barnett* decision. In a strange and erratic decision in a 1995 ADA case,<sup>157</sup> the Seventh Circuit advanced a broad prerogative to second-guess the reasonableness of accommodations sought by an individual with a disability. The case involved an employee whose paralysis made her prone to developing pressure ulcers and sometimes required her to stay at home for periods of up to several weeks. The plaintiff

sought the following as reasonable accommodations: (1) lowering a kitchen sink used by employees on the floor where her office was (at a cost of approximately \$150); (2) providing her a desktop computer for home use; and (3) permitting her to work at her home during periods when her condition prevented her from coming to the office. The Seventh Circuit affirmed an award of summary judgment for the employer on the grounds that the employee's requested accommodations were not "reasonable" as a matter of law, even though the employer had not demonstrated that they would cause undue hardship. The court rejected the contention that the phrase "reasonable accommodation" means only an apt or efficacious modification required by the employee with a disability. Instead the court advanced the idea that "'reasonable' may be intended to qualify (in the sense of weaken) 'accommodation' ...."<sup>158</sup> The court reasoned that even if an accommodation would not be an "undue hardship" on the employer it could still be unreasonable. The court compared costs to the relative benefit to the employee, a consideration that is not a factor in the undue hardship analysis.<sup>159</sup> The Seventh Circuit even decided that costs could be a limit on the duty to accommodate even apart from the undue hardship standard imposed in the statute:

...costs enter at two points in the analysis of claims to an accommodation. The employee must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs. Even if this prima facie showing is made, the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health.<sup>160</sup>

Apart from its undercutting the statutorily designated process and standard for consideration of costs of accommodations, the arbitrariness of the reasonableness standard imposed by the court was demonstrated by its bald assertion that the plaintiff's request to work at home periodically as an accommodation to flare-ups in her condition was not reasonable. The court simply stated, without any evidentiary basis, that "[m]ost jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance.... An employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced."<sup>161</sup> This pronouncement

came during a decade of rapidly expanding telework options that allowed many different kinds of employees the option of performing their work functions outside of a centralized workplace. Even without a desktop computer, the plaintiff managed to work all but 16.5 hours from her home in an eight-week period using a laptop computer. It is difficult to understand how the court could then draw the conclusion that it manifestly is not reasonable to allow employees to work at home for a period of time.<sup>162</sup>

Such injections of personal misconceptions and assumptions are one of the grave dangers of an untethered reasonableness assessment by employers and judges, in lieu of the more definite, statutorily specified undue hardship standard. Obviously, the Supreme Court's decision in *Barnett* greatly ratchets up the risk of such misguided, if often sincere, interference to prevent the implementation of workable accommodations to permit employees with disabilities to perform essential job tasks.

#### **Issue: *Impact of Seniority Systems on Potential Accommodations***

##### *What the Supreme Court Did*

In *U.S. Airways, Inc. v. Barnett*, 122 S.Ct. 1516 (2002), the Supreme Court ruled that the ADA ordinarily does not require the assignment of an employee with a disability, as a reasonable accommodation, to a particular position to which another employee is entitled under an employer's established seniority system, but that it might in special circumstances. The Court declared that "to show that a requested accommodation conflicts with the rules of a seniority system is ordinarily to show that the accommodation is not 'reasonable.'"<sup>163</sup>

##### *Significance of the Court's Action*

In a sense, the Court's ruling regarding situations in which the rights of a worker with a disability seeking assignment to a particular position as a reasonable accommodation under the ADA come into conflict with other workers' rights to bid for the position under the employer's seniority system can be viewed as having improved the legal situation slightly. Although neither the language of the ADA nor anything in its legislative history suggests that modification of seniority policies inherently is unreasonable, before the *Barnett* decision, most courts held

that an accommodation that violated a collective bargaining agreement was automatically unreasonable.<sup>164</sup> NCD has taken the position that ADA rights should not be subject to limitation by the terms of collective bargaining agreements,<sup>165</sup> particularly because Section 504 regulations have long provided that employer obligations under that Act are not affected by the terms of any collective bargaining agreement,<sup>166</sup> and the ADA specifies that “nothing” in the law is to “be construed to apply a lesser standard” than under such regulations. Under *Barnett*, accommodations conflicting with collectively bargained seniority systems would ordinarily, but not automatically, be deemed unreasonable.

The particular accommodation at issue in the *Barnett* case was allowing Mr. Barnett to remain in a position to which he had transferred despite the fact that the position was subject to seniority-based bidding by other employees. The Court ruled that the ADA ordinarily does not require the assignment of an employee with a disability to a particular position to which another employee is entitled under an employer’s established seniority system, but that it might in special circumstances. The Court indicated that transfer to a position to which another employee would be entitled under a seniority system would not be reasonable “ordinarily or in the run of cases.”<sup>167</sup> But the Court stated that the employee could demonstrate “special circumstances” that would render a requested accommodation reasonable in particular circumstances. As an example of such circumstances, the Court mentioned situations in which other exceptions to a seniority system are made relatively frequently, so permitting another exception to accommodate a worker with a disability would not significantly impact the company or workers’ expectations.<sup>168</sup> The upshot of the ruling is that plaintiffs seeking accommodations that conflict with seniority rights of other employees will face an uphill battle but can prevail if they can demonstrate special circumstances that make an exception to the seniority system reasonable.

The Court removed one obstacle that some courts created for plaintiffs seeking reassignment as a reasonable accommodation. Such courts held that a position that was open for bidding under a seniority system was not “vacant” and, therefore, not available as a possible accommodation. The majority opinion in *Barnett* clarified that for purposes of accommodations in the form of

“reassignment to a vacant position” as authorized under the ADA,<sup>169</sup> a vacant position can be one that is open for bidding under a seniority system.<sup>170</sup>

Justice O’Connor wrote a concurring opinion in which she indicated that she would have held that a seniority system would only render a job reassignment as an accommodation under the ADA unreasonable if the seniority system were legally enforceable (U.S. Airways’ was not). Justice Stevens also filed a concurring opinion, in which he identified issues that, in his view, would need to be resolved by the lower courts to determine whether the accommodation requested by Mr. Barnett was reasonable. The slim 5-to-4 margin of the decision coupled with the sentiments expressed in the concurrences are sufficient to afford Mr. Barnett and future litigants some leeway to still argue, given the particular circumstances at issue, that transfer to a position as a reasonable accommodation should prevail over seniority rights of other employees.

### *Examples of Impact*

The Supreme Court’s recognition in *Barnett* of a rebuttable exception to the ADA’s reasonable accommodation mandate for seniority systems offers a line of defense for employers, but it does not require lower courts to let employers off the evidentiary hook. The circuit decisions on this issue that have been decided after *Barnett* generally have focused more on the evidentiary framework established in the decision than on the question of what will be considered “reasonable” in the abstract. For the most part, the circuit courts have refused to grant summary judgment for defendants. In one decision of the Tenth Circuit,<sup>171</sup> for example, the court considered a truck driver’s request for reassignment to a route that accommodated his back disability by not requiring lifting above 60 pounds. The employer argued that *Barnett* applied and the employee’s request was prima facie unreasonable since it “would have required [the employer] to violate the terms of its collective bargaining agreement with the union representing its warehouse employees.”<sup>172</sup> Stating that “it is the *direct* violation of a seniority system that has been held unreasonable under the governing case law,”<sup>173</sup> the Tenth Circuit found that there was only a slim chance that the plaintiff—who ranked 5 out of 42 drivers in seniority—might be reassigned to a position that was later requested by a more senior driver. The plaintiff’s present request for accommodation was not rendered unreasonable merely because it potentially might



violate the seniority system if a more senior employee requested the plaintiff's position and the employer refused to bump the plaintiff until another route or position was available.

In another decision, the same circuit court of appeals considered the ADA case of an employee with diabetes who had worked for 20 years for the defendant company but was let go when the employer claimed it was unable to transfer him to an equivalent position that would accommodate scheduling restrictions resulting from his diabetes.<sup>174</sup> When the EEOC, pursuant to a subpoena, requested information about job vacancies in the defendant's three store locations, the employer argued that the existence of a collective bargaining agreement and an established seniority system served to "take off the table" those positions for which the plaintiff sought information, therefore rendering the information irrelevant.<sup>175</sup> The holding in *Barnett*, interpreted broadly, might have offered support to the defendant's position, since *Barnett* did not distinguish between the rights established under collective bargaining agreements and those under unilaterally imposed employer seniority systems. The Tenth Circuit, however, cited the *Barnett* decision only for the proposition that an accommodation cannot be rendered not "reasonable" by the mere fact that it would result in a "preference."<sup>176</sup> The court found that, as a matter of fact, the collective bargaining agreement did not apply to the particular positions for which information was sought, and also rejected the employer's argument that the information was irrelevant because of an entrenched company policy that other employees at any particular store location had a prevailing right to any vacancy occurring at that location. In the court's analysis, "the information requested by the EEOC remains relevant . . . to determine whether there was in fact a position that was either not offered to any incumbents or not accepted by any incumbent." In other words, the defendant's bald assertion of policy did not foreclose the possibility that the employee's requested transfer could have been factually reasonable. The court explicitly distinguished between a collective bargaining agreement's effect on the "vacancy" status of an open position and a unilaterally asserted employment policy, whether entrenched or not. The implication is that an employer's assertion that an entrenched store policy makes a requested accommodation unreasonable remains something that must be asserted and established by defendants at trial.

The court of appeals for the District of Columbia Circuit (D.C. Circuit) considered “reasonable accommodation” in the case of an operating room orderly who had worked for a hospital for 19 years before undergoing bypass surgery, after which he was restricted to work that involved a “light or moderate level of exertion.”<sup>177</sup> The hospital declined to transfer the plaintiff to a job compatible with his medical restrictions and instructed him to apply for vacant jobs as the hospital posted them. The district court had granted summary judgment to the employer on the ground that the hospital’s collective bargaining agreement prevented the hospital from reassigning disabled employees outside of the job-application process provided in the agreement, and that any conflict between the ADA’s reassignment obligations and other employees’ rights under the collective bargaining agreement had to be resolved in favor of the agreement.

On appeal, the D.C. Circuit reversed its decision. The court of appeals ruled that reassignment to a vacant position in the particular case did not necessarily require violation of the collective bargaining agreement in question, and was therefore not *prima facie* unreasonable and grounds for granting summary judgment. In its analysis, the appellate court refused to assign priority to either the collective bargaining agreement or the ADA, stating that there were insufficient facts to determine whether a conflict existed in the case before them. The court recognized no automatic priority of either the ADA or collective bargaining agreements, and required that conflicts between them should be determined and resolved on a case-by-case factual analysis. Accordingly, the D.C. Circuit examined the hospital’s collective bargaining agreement in detail and noted that the agreement contained a provision stating that any employee who became disabled and consequently unable to perform a job “shall be reassigned to another job he is able to perform whenever, in the sole discretion of the Hospital, such reassignment is feasible and will not interfere with patient care or the orderly operation of the Hospital.” The court viewed this provision as giving the employer the discretion and right to reassign employees with disabilities in some circumstances, and added that, whenever possible, collective bargaining agreements should be interpreted so as to be consistent with federal laws. There was no need to consider whether the agreement would allow for reassignment in every case where it is mandated by the ADA.

The court of appeals also refuted the hospital's constricted interpretation of the term "reassign" in the ADA, declaring that it "must mean more than allowing an employee to apply for a job on the same basis as everyone else."<sup>178</sup> Because the ADA prohibits discrimination in job application procedures, such a narrow interpretation of reassignment would render the provision meaningless as a reasonable accommodation. Furthermore, the court denied the argument that the ADA on principle can never be interpreted so as to require employers to give a "preference" to an employee with a disability. The majority acknowledged the legislative history's warning against giving preferences to applicants with disabilities, but distinguished this from "[t]he ADA's reasonable accommodation requirement [which] treats disabled and non-disabled employees differently"; different treatment under the ADA is not prohibited merely because it could be interpreted as a "preference," because such actions "need not always be highly disruptive to an employer's operations or seriously infringe the interests of other employees."<sup>179</sup>

The fact that the initial lower court cases interpreting the Supreme Court's *Barnett* decision, as discussed here, have been relatively favorable to plaintiffs should not obscure the fact that the decision fundamentally gives certain workplace norms—seniority systems and terms of collective bargaining agreements—priority over ADA rights in many situations, as the Court put it, "ordinarily or in the run of cases."<sup>180</sup> As a remedial measure for historic and systemic discrimination against people with disabilities, the ADA requires "reasonable accommodation," which involves individualized assessments of what a job requires and what a given person with a disability can do if the work environment is modified. The Court's recognition of traditional workplace practices and processes, including seniority systems and terms of collective bargaining agreements, as having superiority over the accommodation rights of workers with disabilities flies in the face of central objectives of the ADA, and helps to keep in place the discriminatory, exclusionary workplace environment the ADA sought to reform.

Commentators have suggested that seniority systems tend to work against workers with disabilities because inaccessibility and other aspects of workplace discrimination have made it more likely that they will have shorter work tenure, that is, less seniority.<sup>181</sup> Of course, for those individuals with disabilities who have managed to obtain a job in a company with a properly

administered seniority system, seniority may be advantageous in facilitating promotions in circumstances in which the employer's prejudice and lowered expectation for the worker with a disability might otherwise stifle chances of advancement. The pertinent question, however, is not with the underlying value of seniority systems, but whether a seniority system should give way in the face of reassigning a worker with a disability as a reasonable accommodation in lieu of discharging that employee. In its *Barnett* decision, the Supreme Court stated the following:

...to require the typical employer to show more than the existence of a seniority system might well undermine the employees' expectations of consistent, uniform treatment—expectations upon which the seniority system's benefits depend. That is because such a rule would substitute a complex case-specific “accommodation” decision made by management for the more uniform, impersonal operation of seniority rules.<sup>182</sup>

The Supreme Court thus treats the desire not to undermine employee expectations by deviating from “more uniform, impersonal ... rules” as more important than case-specific accommodations for workers with disabilities. The individualized approach lies at the heart of the ADA's reasonable accommodation requirement. In *Barnett*, the Court made a non-legislatively-based value decision that it is more important to preserve impersonal systemic rules than to evaluate the abilities of individuals with disabilities and the essential requirements of jobs to avoid discriminating on the basis of disability. The full impact of this position on the decisions of lower courts has yet to be felt.

### **III. Getting the ADA Back on Track: Remedial Legislative Approaches**

Incisive and forceful legislative action is needed to address the dramatic narrowing and weakening of the protection provided by the ADA, resulting from the Supreme Court’s decisions, and to restore civil rights protections. Millions of Americans experience discrimination based on ignorance, prejudice, fears, myths, misconceptions, and stereotypes that many in American society continue to associate with certain impairments, diagnoses, or characteristics. To revive the scope and degree of protection that the ADA was supposed to provide—to address “pervasive” discrimination in a “comprehensive” manner, as the Act declares—and to put ADA protections on a more equal footing with other civil rights protections under federal law, it is necessary to remove conceptual and interpretational baggage that has been attached to various elements of the ADA. Any legislative proposal should address, in some way, each of the problems listed in Section II of this report that the Court’s decisions have created. Often there may be alternative approaches for remedying particular problems.

#### **A. The Definition of Disability**

##### ***1. Primary Recommended Approach to Repair the Definition of Disability— Back to Basics***

The most fundamental way to allay much of the trouble with the definition of disability would be to return to the streamlined approach of the original version of the ADA, developed by NCD and introduced in Congress in 1988, with a few terminological changes such as substituting “disability” for “handicap.” In its January 1986 report, *Toward Independence*, NCD called on Congress to “enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap.” The report went on to recommend the following:

[The proposed law] should straightforwardly prohibit “discrimination on the basis of handicap,” without establishing any eligibility classification for the coverage of

the statute. Discrimination on the basis of handicap should be broadly construed to apply the requirements of the statute to all situations in which a person is subjected to unfair or unnecessary exclusion or disadvantage because of some mental or physical impairment, perceived impairment, or history of impairment.

In 1988, NCD issued a follow-up report, *On the Threshold of Independence*, which included NCD's draft version of the ADA. The draft bill was based on the approach outlined in the equal opportunity recommendations in *Toward Independence*, augmented by the comments and advice received from disability advocates and congressional leaders in the intervening 18 months. The draft bill included definitions of "on the basis of handicap" and "physical or mental impairment," as follows:

(1) ON THE BASIS OF HANDICAP.—The term "on the basis of handicap" means because of a physical or mental impairment, perceived impairment, or record of impairment.

(2) PHYSICAL OR MENTAL IMPAIRMENT.—The term "physical or mental impairment" means—

(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems:

- (i) the neurological system;
- (ii) the musculoskeletal system;
- (iii) the special sense organs, and respiratory organs, including speech organs;
- (iv) the cardiovascular system;
- (v) the reproductive system;
- (vi) the digestive and genito-urinary systems;
- (vii) the hemic and lymphatic systems;
- (viii) the skin; and
- (ix) the endocrine system; or

(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(3) PERCEIVED IMPAIRMENT.—The term “perceived impairment” means not having a physical or mental impairment as defined in paragraph (2), but being regarded as having or treated as having a physical or mental impairment.

(4) RECORD OF IMPAIRMENT.—The term “record of impairment” means having a history of, or having been misclassified as having, a mental or physical impairment.

This 1988 draft remained true to NCD’s 1986 admonition that the ADA not establish an onerous eligibility classification for coverage under the statute. NCD’s proposal was followed closely in the version of the ADA introduced in Congress in April 1988.

The revised version of the ADA introduced in the new Congress in 1989 simply substituted language from the Rehabilitation Act regarding the meaning of “handicap” in the nondiscrimination provisions of that Act (including Section 504), and replaced the word “handicap” with “disability.” The language, which remained in the bill that passed in 1990, defined “disability” as follows:

(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.

Given the broad interpretation that the definition of disability under Section 504 had received, including by the Supreme Court in the *Arline* case, Congress did not view the substitution of the Rehabilitation Act version as involving any narrowing of the scope of protection. The ADA committee reports indicated that Congress intended the definition of disability to be comprehensive; they stated that the Act does not include a list of all the specific conditions, diseases, or infections that constitute physical or mental impairments under the first prong of the definition “because of the difficulty of ensuring the comprehensiveness of such a list....” In addition, the reports stressed the breadth of the third prong (“regarded as”) of the definition

that includes anyone who is excluded from activities because of a covered entity's negative reactions to the person's condition. The reports also made it clear that people whose conditions were ameliorated by mitigating measures were intended to be protected by the ADA. Congress could not foresee the series of restrictive, "miserly," technical interpretations that the Supreme Court would affix to the elements of the definition of disability.

A return to the original approach would avoid many of the problematic interpretations of the definition, resulting from the Supreme Court's stingy parsing of the "major life activity" and "substantially limits" elements of the definition. NCD issued a policy paper that discusses some of the advantages of such an approach and presents versions of some of the legislative proposals contained in this subsection. *Defining "Disability" in a Civil Rights Context: The Courts' Focus on Extent of Limitations as Opposed to Fair Treatment and Equal Opportunity*,<sup>183</sup> paper No. 6 of NCD's *Policy Brief Series: Righting the ADA Papers*, can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

Following is legislative language that would refocus the ADA on prohibiting discrimination on the basis of disability rather than drawing sharp, technical distinctions among people based on how inherently debilitating their conditions are or are not, as engendered by the Supreme Court's interpretations of the elements of the current definition of disability. The original NCD version of the definition would also be modified by incorporating a key concept of enlightened modern disability policy referred to as the "social model" of disability, which acknowledges that environment plays a critical role in determining the extent to which a condition is limiting and, therefore, that the significance of a person's impairment is to a large extent socially and environmentally determined.

#### *Proposed Statutory Revisions*

- (1) Various forms of references in the ADA to discrimination "against an individual with a disability" shall be replaced by references to discrimination "on the basis of disability."



- (2) “Disability” shall be defined to mean:
  - (1) a physical or mental impairment;
  - (2) a record of a physical or mental impairment; or
  - (3) a perceived physical or mental impairment.
- (3) The following definitions shall be inserted in the ADA:
  - (A) PHYSICAL OR MENTAL IMPAIRMENT. The term “physical or mental impairment” means:
    - (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or
    - (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
  - (B) RECORD OF PHYSICAL OR MENTAL IMPAIRMENT. The term “record of impairment” means having a history of, or having been misclassified as having, a physical or mental impairment.
  - (C) PERCEIVED PHYSICAL OR MENTAL IMPAIRMENT. The terms “perceived physical or mental impairment” or “perceived impairment” mean being regarded as having or treated as having a physical or mental impairment.

#### *Purpose and Sources of the Proposed Language*

The proposed language would help to address many of the coverage problems created by the series of constricting Supreme Court interpretations of the elements of the definition of disability, by returning to a simpler, more straightforward formulation of statutory coverage—protecting

all persons who are subjected to discrimination on the basis of disability. It seeks to avoid any requirement that a victim of disability discrimination submit evidence of the nature and extent of her or his limitations flowing from an impairment as a precondition to addressing whether the person was treated fairly or discriminatorily. This focus on discrimination based on impairment is derived from the original ADA proposal of NCD, and the 1988 ADA bills sponsored by Senators Weicker and Harkin, and Representative Coelho. In some ways, this proposal can be seen as a descendent of a 1972 bill sponsored by Senator Hubert H. Humphrey, which simply would have added disability to the grounds of discrimination prohibited by the Civil Rights Act of 1964.

The rejection of a rigid and stringent concept of “disability” consisting of an “impairment” that “substantially limits” one or more major life activity is based on these federal sources, as well as the laws of California, Connecticut, New Jersey, and New York. It prevents plaintiffs from having to submit evidence about the potential negative impact of their condition on their ability to function when that impact is irrelevant to their discrimination cases.

The definition of “physical or mental impairment” is the definition currently in place in ADA regulations. It is the same definition that was established in Section 504 regulations, proposed by NCD in its 1988 version of the ADA, and explicitly endorsed in ADA committee reports.

## ***2. Addressing Specific Problematic Aspects of the Court’s Rulings***

In addition to addressing the broad conceptualization and overall structure of the definition of disability that undergird the Supreme Court’s restrictive interpretations, legislative revisions are needed to counter, explicitly, the particular problematic legal conclusions announced in the Supreme Court’s decisions. If left in place, these conclusions would undermine the return to the original broad scope of the definition. Following are issues or aspects of the definition of disability and related provisions in the ADA that should be clarified to undo damage caused by the Court’s rulings:

### *Mitigating Measures*

To ensure that the Supreme Court's rulings that determinations of disability are to be made with mitigating measures taken into account shall not remain the law, a specific provision needs to be added to the ADA to explicitly declare otherwise.

A provision such as the following should be included in the definition of "on the basis of disability":

MITIGATING MEASURES.—The existence of a physical or mental impairment, or a record or perception of a physical or mental impairment, shall be determined without regard to mitigating measures. The term "mitigating measure" means any treatment, medication, device, or other measure used to eliminate, mitigate, or compensate for the effect of an impairment, and includes prescription and other medications, personal aids and devices (including assistive technology devices and services), reasonable accommodations, or auxiliary aids and services. Actions taken by a covered entity because of a person's use of a mitigating measure or because of a side effect or other consequence of the use of such a measure shall be considered "on the basis of disability."

The exclusion of "mitigating measures" is fully supported by the legislative history of the ADA, and tracks recent legislative changes made to state laws in California and Rhode Island, and a recent ruling by the Massachusetts Supreme Court.

### *Supportive Construction of Definition and Entire Act*

To correct the Court's ruling that the definition of disability is to be interpreted strictly to create a demanding standard, the ADA needs to include a provision directing that the Act, in general, and the definition of "on the basis of disability," in particular, are to be construed broadly to achieve the law's objective of eliminating pervasive discrimination in a comprehensive fashion. This could be accomplished by inserting a provision in Title V requiring liberal interpretation of the Act, including the definition, such as the following:

SUPPORTIVE CONSTRUCTION.—In order to ensure that this Act achieves its objective of providing a comprehensive prohibition of discrimination on the basis of disability, discrimination that is pervasive in America, the provisions of the Act shall be flexibly construed to advance its remedial purposes. The elements of the

definition of “disability” shall be interpreted broadly to encompass within the Act’s protection all persons who are subjected to discrimination on the basis of disability. The term “discrimination” shall be interpreted broadly to encompass the various forms in which discrimination on the basis of disability occurs, including blanket exclusionary policies based on physical, mental, or medical standards that do not constitute legitimate eligibility requirements under the Act; the failure to make a reasonable accommodation, modify policies and practices, and provide auxiliary aids and services, as required under the Act; adverse actions taken against individuals based on actual or perceived limitations; disparate, adverse treatment of individuals based on disability; and other forms of discrimination prohibited in the Act.

### *Regulations Interpreting the Definition and Clarifications*

Each of the Federal agencies charged with issuing regulations that implement various Titles of the ADA or provisions of a Title should be expressly authorized to include provisions covering the application of the ADA definitions to activities subject to the regulations. These provisions include regulatory clarifications or interpretive guidance arising from the differing contexts and purposes of the particular subject of the regulations. Accordingly, a new provision should be added to Title V, along the following lines:

Not later than 180 days after the date of enactment of The ADA Restoration Act of 2004, the attorney general, the Equal Employment Opportunity Commission, and the Secretary of Transportation shall promulgate regulations in accessible formats that implement the provisions of the ADA Restoration Act. Duly issued federal regulations for the implementation of the ADA, including provisions implementing and interpreting the definition of disability, shall be entitled to deference by administrative bodies or officers and courts hearing any action brought under the Act.

### *The 43 Million Figure*

Because the Supreme Court, particularly in the *Sutton* and *Williams* decisions, used the ADA congressional finding that 43 million people in the United States have a disability as the justification for its conclusion that Congress wanted a narrow interpretation of disability, the 43 million finding should be addressed directly. The 43 million figure was intended as a loose gross estimate (based on the partial data available) of the number of people with actual disabilities and not the indefinite, indeterminable class of people who may be perceived or

treated as having a condition that may subject them to discrimination. The most complete solution would be to remove the finding from the ADA. Without such a clarification, the Supreme Court might continue to restrict the application of any revised version of the definition on the grounds that Congress intended to limit the ADA's coverage to the 43 million figure.

The current finding should be replaced with something like the following:

Although variations in people's abilities and disabilities across a broad spectrum are a normal part of the human condition, some individuals have been singled out and subjected to discrimination because they have conditions considered disabilities by others; other individuals have been excluded or disadvantaged because their physical or mental impairments have been ignored in the planning and construction of facilities, vehicles, and services; and all Americans run the risk of being discriminated against because they are perceived as having conditions they actually may not have or because of misperceptions about the limitations resulting from conditions they do have.

#### *The "Discrete and Insular Minority" Finding*

Another finding of the ADA declares that individuals with disabilities are

...a discrete and insular minority who 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.

The awkwardly worded finding was cobbled together from language of several different Supreme Court decisions establishing criteria for constitutionally "suspect" classifications for equal protection purposes. It attempted to improve the chances that courts would subject discrimination on the basis of disability to heightened judicial scrutiny under the Equal Protection Clause. This congressional finding was intended to assist plaintiffs with disabilities seeking to invoke heightened equal protection scrutiny in lawsuits filed after the ADA took effect. In the *Sutton* case, Justice Ginsburg filed a concurring opinion in which she stated that this finding provided one of the "strongest clues" to congressional intent on the breadth of the definition of disability. She concluded that the finding was "a telling indication of [Congress'] intent to restrict the

ADA's coverage to a confined, and historically disadvantaged, class." Accordingly, she agreed with the majority that the actual disability prong of the ADA definition of disability "does not reach the legions of people with correctable disabilities."

Because of its potential for suggesting that the ADA protects only a narrow class of people, the finding should be revised. The "discrete and insular minority" language was not intended to be applied to the full scope of persons to whom the ADA provides protection from discrimination. Obviously, people who are merely regarded as having a disability are not such a discrete minority, because a mistaken perception of disability can happen to any American. The finding should be retained in a revised form that clarifies it refers to only some subgroups of the broader class the ADA was intended to protect—subgroups that have, in fact, been subjected to a long and persistent history of unequal treatment, such as the history of purposeful unequal treatment of people with mental retardation cited by Justice Thurgood Marshall in his dissenting opinion in the *Cleburne* case. In addition to mental retardation, people with a variety of other disabilities, including psychiatric disabilities, HIV infection, epilepsy, blindness, deafness, paralysis, and others can point to an extended history of purposeful unequal treatment and drastic discrimination that they have been powerless to rectify. Moreover, the finding should reflect the Court's disfavor, as reflected in *Cleburne* and other decisions, of classifications based on fear, prejudice, and stereotypes about disability.<sup>184</sup>

The current finding should be revised to read:

Some groups or categories of individuals with disabilities have been subjected to a history of purposeful unequal treatment, have had restrictions and limitations imposed upon them because of their impairments, and have been relegated to positions 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's ability to participate in, and contribute to, society; classifications and selection criteria that are based on prejudice, ignorance, myths, irrational fears, or stereotypes about disability should be strongly disfavored, subjected to skeptical and meticulous examination, and permitted only for highly compelling reasons.

### *Incorporation of a Social Model of Discrimination*

The ADA embodies a social concept of discrimination that views many limitations resulting from actual or perceived disabilities as flowing, not from limitations of the individual, but, rather, from the existence of unnecessary barriers to full participation in society and its institutions. This is in contrast to the medical model of disability that centers on assessments of the degree of a person's functional limitation. To provide context and emphasis to guide courts and regulatory agencies, the social model should be made explicit by incorporating it as an additional ADA finding as follows:

Discrimination on the basis of disability is the result of the interaction between an individual's actual or perceived impairment and attitudinal, societal, and institutional barriers; individuals with a range of actual or perceived physical or mental impairments often experience denial or limitation of opportunities resulting from attitudinal barriers, including negative stereotypes, fear, ignorance, and prejudice, in addition to institutional and societal barriers, including architectural, transportation, and communication barriers, and the refusal to make reasonable modifications to policies, practices, or procedures, or to provide reasonable accommodations or auxiliary aids and services.

### *Effect on the Reasonable Accommodation Mandate*

It is important to recognize that a broad interpretation of overall ADA protection does not expand the requirement that employers make reasonable accommodations for applicants and workers with disabilities beyond reasonable bounds, entitling almost everyone to accommodation. The ADA includes language that serves to restrict the scope of the accommodation mandate; the Act defines discrimination as including "not making reasonable accommodations to the *known physical or mental limitations* of an otherwise qualified individual." (42 U.S.C. § 12112(b)(5)(A)) (emphasis added). To make these criteria for reasonable accommodation more visible, NCD believes it would be prudent to include language emphasizing them in the definitional provision that describes what a reasonable accommodation is, to dispel any incorrect perception that expanding the ADA's coverage would produce an unprincipled and open-ended accommodation mandate. This approach will be described in Section III. D., "Legislative Approaches to Limitations on Reasonable Accommodations under Decisions of the Supreme Court."

It is important to recognize that the ADA statutory and regulatory framework requires that individuals seeking accommodation must ordinarily request an accommodation.<sup>185</sup> Unless the physical or mental impairment requiring accommodation is apparent, individuals may be required to demonstrate, at times with medical documentation, that they have physical or mental limitations that cause them to need accommodation. Moreover, while the individual is entitled to an effective accommodation, he or she is not necessarily entitled to the “Cadillac” of alternative accommodations; the employer may choose from among several accommodations if each will be effective in permitting the individual to perform essential job tasks and have equal opportunity in the workplace. Finally, employers always have had, and continue to have, the “undue hardship” defense to accommodation requests that prove to be too expensive or disruptive.

### ***3. Secondary Option for Repairing the Definition of Disability—Restoring the Section 504 Approach***

The approach of refocusing the ADA squarely on “discrimination on the basis of disability” rather than on attempting to determine who meets various technical criteria to qualify as an “individual with a disability” appears to represent the most complete and conceptually sound option for restoring the ADA to its intended broad scope. Logically, and in terms of paralleling other civil rights laws, this proposed approach is the most appealing. It would involve a return to the original form of the ADA as proposed by NCD and in the ADA bills initially introduced in Congress. It would resolve problems with the Supreme Court’s narrowed constructions of the statutory terms “substantially limits” and “major life activities” by making such terms irrelevant. This approach would afford statutory coverage to every person who is subjected to discrimination on the basis of a physical or mental impairment whether real or not, consistent with congressional understanding reflected in ADA committee reports during the process of its enactment.

If, however, the more fundamental correction proves too difficult to accomplish for political or other reasons, amendments clarifying the reach of the current three-prong ADA definition of disability may achieve many, though not all, of the same objectives. If defined and interpreted properly, the “regarded as” prong of the three-prong definition of disability can serve to



ameliorate many of the harmful effects that result from the protected class approach, including the mitigating measures problem, the one-job-is-not-enough approach, and the harsh application of the first prong of the definition. The “regarded as” prong of the definition would become the vehicle for dealing with most complaints of disability discrimination. Whenever a covered entity directs any type of negative action toward a person because of that person’s actual or perceived physical or mental impairment, then the covered entity should be deemed to have regarded the person as having a disability. This would qualify the affected persons as an “individual with a disability,” and the analysis and proceedings would move on to questions of whether the negative actions of the covered entity constitute discrimination prohibited under the Act and what defenses the covered entity may have for its actions. The essence of this approach would be to give the concept “regarded as having a disability” a broad meaning that would make it roughly equivalent to “treating an individual less well than others because of a physical or mental impairment, whether real or perceived.”

#### *Specific Provisions*

The “regarded as” approach could be accomplished by adding language such as the following to the definitions section of the ADA:

REGARDED AS HAVING SUCH AN IMPAIRMENT.—“Being regarded as having such an impairment” under subsection 3(2)(C) of this Act (42 U.S.C. § 12102(2)(C)) includes being subjected to adverse action or treated less well than others because of a physical or mental impairment or perceived impairment; or being perceived, whether accurately or not, as having one or more of the conditions included in subsection 3(2)(A) of the Act (42 U.S.C. § 12102(2)(A)). The term “adverse action” includes but is not limited to limiting, segregating, or classifying an individual in a way that adversely affects the opportunities or status of such individual. Showing that an individual has been subjected by a covered entity to an adverse action relating to employment, on the basis of an actual, past, or perceived physical or mental impairment, shall be sufficient to demonstrate that

the individual is regarded by the covered entity as having, or having had, an impairment that substantially limits the major life activity of working.

(C) MITIGATING MEASURES.—(i) The determination of whether a condition constitutes an impairment shall be made without regard to mitigating measures.

(ii) The determination of whether an impairment limits an individual's major life activities shall be made without regard to mitigating measures.

(iii) The term “mitigating measure” means any treatment, medication, device, or other measure used to eliminate, mitigate, or compensate for the effect of an impairment, and includes prescription and other medications, personal aids and devices (including assistive technology devices and services), reasonable accommodations, or auxiliary aids and services.

(iv) Being subjected to adverse action or treated less well than others because of the use of a mitigating measure or because of a side effect or other consequence of the use of such a measure shall constitute “being regarded as having such an impairment” under subsection 3(2)(C) of this Act (42 U.S.C. § 12102(2)(C)).

The definition of “regarded as” addresses situations in which (1) a person has a physical or mental impairment, which the covered entity regards (perceives or treats) as disqualifying or disadvantaging, or (2) a person does not have any actual impairment, but the covered entity regards the person as having one. The second provision addresses the problem of mitigating measures and expressly declares that they are not to be considered in determining whether a person has a disability and whether an impairment constitutes a disability.

#### *Related Amendments*

Many of the additional amendments suggested in earlier sections, such as authorizing the issuance of regulations for implementing the definitions provisions of the ADA, calling for supportive construction of the definitions and other provisions, revising or eliminating the 43 million figure and the “discrete and insular minority” finding, and adding other explanatory findings, continue to be applicable under the restoring-the-Section-504-definition approach.

To clarify the breadth of the “regarded as” prong, and shore up other elements of the definition, while retaining the current three-prong definition of disability, several revisions will be necessary to address problems raised by the Supreme Court’s rulings on the meaning of disability, including the following:

A provision should be added to the ADA definitions section to restore the breadth of the concept of “major life activities,” along the following lines:

**MAJOR LIFE ACTIVITIES.—(A) IN GENERAL.**—The term “major life activities of such individual” means activities that either are important in the individual’s life or are important for most people in the general population. It includes all significant endeavors of ordinary daily and occupational life, such as living; breathing; caring for one’s self, including personal-care tasks; eating; standing, walking, and running; seeing; hearing; speaking; thinking, learning, and concentrating; lifting, reaching, grabbing, climbing, holding, and performing manual tasks, including housework and household chores, and manual job tasks; working; dating and engaging in sexual activities; procreating; sleeping; interacting and communicating with others; reading and writing; driving; and engaging in physical exercise.

**(B) INDIVIDUALIZED DETERMINATION.**—The determination of whether an activity is important in an individual’s life shall be made on a case-by-case basis taking into consideration the unique circumstances of the individual.

**(C) MAJOR LIFE ACTIVITY OF WORKING.**—(i) An individual need not be substantially limited in the major life activity of working to be considered a person with a disability for purposes of Title I of the Act.

(ii) A substantial limitation in the major life activity of working shall be determined based on the preferences of the individual regarding the type of work and the opportunity available to that individual. Showing that an individual is precluded, because of a physical or mental impairment of the individual or the employer’s perception of a physical or mental impairment of the individual, from performing essential functions of a particular job the individual occupies or applies for shall be sufficient to demonstrate that the individual is substantially limited in regard to the major life activity of working.

A provision should be added to the ADA definitions section to clarify the meaning of the term “substantially limits,” along the following lines:

**SUBSTANTIALLY LIMITS.**—The phrase “substantially limits” means limits an individual’s performance of an activity in more than a minor way compared with the average person in the general population, including by restricting the conditions under which, or the manner or duration in which, the individual can perform the activity.

A provision should be added to the ADA definition of “individual with a disability” to reject the rafting of an inappropriate duration restriction on the definition of disability, along the following lines:

**DURATION OF CONDITION.**—(A) An impairment that otherwise substantially limits a major life activity meets the definition of a disability under subsection 3(2)(A) of the Act (42 U.S.C. § 12102(2)(A)) even if the impairment is temporary or of limited duration.

(B) An individual who is subjected to adverse action or treated less well than others because of a physical or mental impairment or perceived impairment is “being regarded as having such an impairment” under subsection 3(2)(C) of the Act (42 U.S.C. § 12102(2)(C)) even if the impairment or perceived impairment is temporary or of limited duration.

It would be helpful to add a provision to the ADA definition of “individual with a disability” to endorse the concept of *per se* disabilities, along the following lines:

**PER SE DISABILITY.**—(A) Impairments that invariably cause a substantial limitation of a major life activity, either inherently or because of general prejudice and stigmatization, shall be considered disabilities without any necessity of an individualized showing of substantial limitation of a major life activity.

(B) A particular impairment’s not having been designated as a *per se* disability pursuant to paragraph (A) shall not give rise to any negative implication nor increase the burden of demonstrating that the impairment constitutes a disability in the circumstances of a particular case. A particular impairment’s not previously having been recognized as a *per se* disability shall not give rise to any presumption that it shall not be accorded such status at a later time.

## **B. Restoring Remedies Available Under the ADA**

From a legislative drafting standpoint, undoing the harm to ADA remedies caused by the *Buckhannon* and *Barnes* decisions is a fairly straightforward matter. The *Buckhannon* decision

rejected the “catalyst theory” for awarding attorney’s fees and litigation costs, and the *Barnes* Court ruled that punitive damages were not available under the Act. Remedial legislation would decree the opposite—that plaintiffs can recover attorney’s fees and litigation expenses under the circumstances provided in the catalyst theory, and that punitive damages can be obtained under Title II of the Act. Such legislation would presumably maintain the conditions under prior law as to when a plaintiff is a “prevailing party” under the catalyst theory and would not narrow the types of conduct that put a defendant at risk of punitive damage liability.

A critical factor in addressing the *Buckhannon* and *Barnes* rulings is that both decisions were not limited to the ADA, but applied in addition to a variety of other civil rights statutes and other federal laws. Accordingly, it would be advantageous to address the problems created by the decisions as part of a comprehensive initiative addressing all the laws implicated by the decisions. The Leadership Conference on Civil Rights and other civil rights organizations worked with congressional allies to develop such a comprehensive or “omnibus” approach. The result was a multi-issue legislative proposal that would address a broad array of issues raised by court decisions unfavorable to civil rights constituencies, including the problems created by the *Buckhannon* and *Barnes* decisions. Such legislation, popularly known as the “FAIRNESS Act,” was introduced in the 108th Congress and is currently pending.<sup>186</sup> It would address some issues, particularly the “catalyst theory” and punitive damages issues, which affect claims under the ADA, Section 504, and other disability nondiscrimination laws, but would not deal with many of the other issues NCD addresses in this report. NCD supports the unified, cross-categorical remedial approach of the pending bills, but also believes that targeted legislative proposals are necessary to address some of the issues particularly affecting laws that prohibit discrimination on the basis of disability. And, until such a broad repudiation of *Buckhannon* and *Barnett* is enacted, NCD believes it prudent to incorporate the gist of the provisions addressing those issues in its proposals for restoring the ADA.

To restore the availability of punitive damages to private complainants, which often are critical in cases in which defendants are shown to have acted with malice, deception, or recklessness in

violating Section 504 of the Rehabilitation Act and Title II of the ADA, new subsections need to be added to the remedies provision of Title II of the ADA, along the following lines:

- In an action brought by a person aggrieved by discrimination on the basis of disability (referred to in this section as an “aggrieved person”) under Section 202 of this Act, or under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), against an entity covered by those provisions who has engaged in unlawful intentional discrimination (not a practice that is unlawful because of its disparate impact) prohibited under those sections (including their implementing regulations), an aggrieved party may recover equitable and legal relief (including compensatory and punitive damages) and attorney’s fees (including expert fees) and costs.
- In an action brought by an “aggrieved person” under Section 202 of this Act, or under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), against an entity covered by those provisions who has engaged in unlawful disparate impact discrimination prohibited under those sections (including their implementing regulations), an aggrieved party may recover equitable relief and attorney’s fees and costs.
- In addition to other actions that constitute unlawful intentional discrimination under [the first added subsection above], a covered entity engages in such discrimination when it intentionally refuses to comply with requirements of Section 202 of this Act, or of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), or of their implementing regulations, by willfully, unlawfully, materially, and substantially—
  - (1) failing to meet applicable program facility accessibility requirements for existing facilities, new construction, and alterations;
  - (2) failing to furnish appropriate auxiliary aids and services;
  - (3) failing to ensure effective communication access; or
  - (4) imposing discriminatory eligibility criteria or employment qualification standards that engender a blanket exclusion of individuals with a particular disability or category of disability.<sup>187</sup>

### **C. Legislative Approaches to Safety Limitations Under the ADA**

The result of the *Echazabal* decision should be repaired by adding language to the ADA to prohibit a risk-to-self defense. Accordingly, the ADA would permit a “direct-threat” defense only for dangers posed to other persons. A new paragraph should be added at the end of the ADA’s current definition of “direct threat,” along the following lines:

CONSTRUCTION.—The term “direct threat” includes a significant risk of substantial harm to a customer, client, passerby, or other person that cannot be

eliminated by reasonable accommodation. Such term does not include risk to the particular applicant or employee who is or is perceived to be the source of the risk.

In a series of meetings with ADA stakeholders, some participants advised NCD to accept some degree of a direct-threat defense for risks posed to the person with a disability, while clarifying the limited circumstances within which such a defense should be permitted. Given the prevalence of overprotective employer attitudes and misinformation about the implications of physical and mental impairments, NCD believes that the better course is to return the scope of the direct-threat defense to the precise dimensions it had in the statutory language as enacted, and not allow it to be expanded by administrative fiat. At the same time, NCD would underscore that all safety-related qualification standards imposed by employers are required to satisfy the ADA's "direct-threat" standard, as well as ADA requirements that they be "job related" and "consistent with business necessity."<sup>188</sup> The application of the defense also shall incorporate requirements contained in EEOC regulations that the direct-threat defense must be "based on a reasonable medical judgment" supported by "the most current medical knowledge and/or the best available objective evidence," and must involve an "individualized assessment of the individual's present ability to safely perform the essential functions of the job," which considers how imminent the risk is and how severe the harm would be.<sup>189</sup> The direct-threat defense shall apply only where there is "a significant risk of substantial harm" that "cannot be eliminated or reduced by reasonable accommodation."<sup>190</sup> Because the ADA makes "direct threat" a defense, it is clear that employers attempting to assert health and safety concerns as a justification for their allegedly discriminatory actions must bear the burden of proof on each of the issues involved in demonstrating the existence of a direct threat.<sup>191</sup>

#### **D. Legislative Approaches to Limitations on Reasonable Accommodations Under Decisions of the Supreme Court**

Correcting the negative implications of the Supreme Court's decision in *U.S. Airways, Inc. v. Barnett* requires paying attention to the two principal damaging aspects of the decision: (1) the Court's recognition of a reasonableness standard for reasonable accommodations separate from undue hardship analysis and (2) its ruling that conflict with a seniority system

is ordinarily sufficient to make a requested accommodation unreasonable. Remedying the former involves reinstating the “undue hardship” standard as the sole limitation on the reasonableness of otherwise appropriate accommodations. This can be achieved by adding language to the ADA to clarify that an accommodation qualifies as a “reasonable accommodation” if it effectively enables the person with a disability to perform job tasks or to benefit from terms, conditions, or benefits of employment on an equal basis, but that a covered entity may demonstrate, as a defense, that an accommodation is unreasonable if it imposes an undue hardship.

This can be accomplished by adding to the definition of “reasonable accommodation” an additional subsection, such as the following:

A reasonable accommodation is a modification or adjustment that enables a covered entity’s employee or applicant with a disability to enjoy equal benefits and privileges of employment or of a job application, selection, or training process, provided that—

- (1) the individual being accommodated is known by the covered entity to have a mental or physical limitation resulting from a disability, is known by the covered entity to have a record of a mental or physical limitation resulting from a disability, or is perceived by the covered entity as having a mental or physical limitation resulting from a disability;
- (2) without the accommodation, such limitation will prevent the individual from enjoying such equal benefits and privileges; and
- (3) the covered entity may establish, as a defense, that a particular accommodation is unreasonable by demonstrating that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

This language restates the standard for reasonable accommodation as it existed before the *Barnett* decision. The provision, including its “modification or adjustment” and “equal benefits and privileges of employment” language, is derived directly from the EEOC regulations’ definition of “reasonable accommodation.”<sup>192</sup> The first proviso reemphasizes the current ADA requirement that reasonable accommodations are required for “the *known physical or mental limitations* of an otherwise qualified individual.” (42 U.S.C. 12112(b)(5)(A)) (emphasis added). Presently, this language is in the section of the ADA that establishes what types of acts constitute forms of



employment discrimination prohibited under the Act. The second proviso requires that the physical or mental limitation must be such that, without accommodation, it will prevent the individual from enjoying equal benefits and privileges of employment (or of job application, selection, or training processes). This links entitlement to accommodation to the need for it to prevent the denial of equal opportunity.

These criteria will make the current standards for reasonable accommodation more explicit and would clearly invalidate frivolous claims for accommodation; a person with a hangnail or a minor cough would not need to have a medical appointment during work hours, but a person who requires kidney dialysis might have a legitimate need to do so. A person with a minor headache would not need an accommodation to perform job tasks and benefit from job opportunities and benefits, but a person with severe migraines might, if the person could show such interference with the job.

A covered entity's obligation to make a reasonable accommodation can arise in two different ways. One situation occurs when the individual with a disability initiates a request for an accommodation. In such a case, the person requesting the accommodation is obliged to describe why he or she needs an accommodation, including apprising the covered entity of the existence and nature of the physical or mental limitation that causes the individual to need accommodation. In other circumstances, however, a covered entity may initiate a disadvantageous action toward an individual (for example, termination, pay reduction, or assignment to an undesirable position) that the covered entity premises on an actual, past, or perceived impairment. Where this occurs, the ADA requires the covered entity to consider whether a reasonable accommodation would eliminate the need for the disadvantageous action, because the covered entity already "knows" (whether accurately or not) about the impairment that it believes is interfering with job performance.

Thus, if a manager says to an employee, "I am going to have to terminate you, or move you to a lesser-paying position, because you have condition X and that keeps you from being able to adequately perform a certain assigned task," there are a variety of possible circumstances in

which the worker may find herself or himself. The worker may not have the impairment the employer thinks that he or she has, or may not have any impairment at all (“You’ve got the wrong employee Jones.”). It may be that the employee has the impairment named but does not believe it prevents performance of the task. It may be that the employee has the impairment and it interferes with performance, but the task is a nonessential one or an essential one that the employee can perform with a reasonable accommodation. Because the employer has initiated an adverse action premised on the impairment’s effect on performance, the employer should be obligated to make a reasonable accommodation if it will enable performance, without the affected individual having to make an additional showing about the details of his or her impairment, if any. Where a covered entity has both regarded the individual as having a disability and regarded the disability as preventing satisfactory job performance, the covered entity is required to demonstrate, as a precondition to any adverse employment action, that reasonable accommodation will not resolve the problem.

The Supreme Court’s ruling with regard to the impact of seniority systems on the right to reasonable accommodation under the ADA could be addressed, with greater or lesser efficacy, in various ways. At the very least, only seniority systems that are collectively bargained and legally enforceable should be permitted to be considered as possibly affecting reasonable accommodation rights; a seniority program like that involved in *Barnett*—one that was imposed unilaterally by an employer, was subject to alteration at the discretion of the employer, and was not legally enforceable—should not be able to interfere with the right of an employee with a disability to a reasonable accommodation. A statutory provision might be drafted to effectuate the approach advocated in the ADA committee reports (and cited by Justice Souter in his dissenting opinion in *Barnett*)—that seniority protections contained in a collective bargaining agreement should constitute only a factor, and not be determinative, in determining whether an accommodation at odds with seniority rules is “reasonable.”<sup>193</sup> Otherwise, a presumption, rebuttable by an employer in particular circumstances, might be created that a worker’s reasonable accommodation rights take precedence over collectively bargained seniority rights. A somewhat similar approach would be to codify in the ADA the EEOC regulatory guidance that “[t]he terms of a collective bargaining agreement may be relevant to” the determination

whether “the provision of a particular accommodation would be unduly disruptive to [an employer’s] other employees or to the functioning of its business.”<sup>194</sup>

In developing any such remedial provision, it is important to recognize the important rights of workers and labor organizations in protecting the integrity of the collective bargaining process and the labor agreements they produce.<sup>195</sup> Congressional recognition of the importance of such concerns is reflected in provisions explicitly protecting seniority interests in both Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967.<sup>196</sup> Accordingly, labor representatives might be very helpful in crafting provisions of collective bargaining agreements that protect reasonable accommodation rights while preserving critical labor bargaining interests. In this vein, in *amicus curiae* participation in one ADA case,<sup>197</sup> the EEOC took the position that the labor union should be directed to negotiate a variance to protect workers’ ADA rights.

Consistent with NCD’s position that ADA rights should not be subject to limitation by the terms of collective bargaining agreements,<sup>198</sup> that Section 504 regulations contain a provision stating that employer obligations under that Act are not affected by the terms of any collective bargaining agreement,<sup>199</sup> and that “nothing” in ADA specifications is to “be construed to apply a lesser standard” than under such regulations,<sup>200</sup> NCD believes that clear and strong legislative guidance is needed. Accordingly, provisions should clarify that ADA employment rights of individuals with disabilities, including the opportunity to be reassigned to a vacant position as a reasonable accommodation, are not to take a backseat to the rights of other employees under a seniority system or collective bargaining agreement. In addition, covered entities should be directed to incorporate recognition of ADA rights in future collective bargaining agreements.

Accordingly, a new provision should be added to the “Discrimination” provisions of Title I of the ADA, along the following lines:

A covered entity’s obligation to comply with this Title is not affected by any inconsistent term of any collective bargaining agreement or seniority system. The rights of an employee with a disability under this Title shall not be subordinated to seniority rights of other employees in regard to an otherwise

vacant job position to which the individual with a disability requires transfer as a reasonable accommodation in lieu of being discharged by the employer. Covered entities under this Title shall include recognition of ADA rights in future collective bargaining agreements.

## **IV. Consolidating the Proposals— The ADA Restoration Act**

Section III presented an array of proposals (sometimes including alternative approaches) designed to address various significant problems created by decisions of the Supreme Court. In lieu of cluttering the draft bill with a menu of alternative versions of provisions to deal with various issues, the ADA Restoration Act consolidates these piecemeal proposals into a single draft bill representing NCD’s best thinking, in light of the problems it addresses and the advice it has received from ADA stakeholders and other interested individuals and organizations, for returning the ADA to its original course. In the aggregate, the amendments to the ADA are designed to reinstate the scope of protection the Act affords, to restore previously available remedies to successful ADA claimants, and to repudiate or curtail inappropriate and harmful defenses that have been grafted onto the carefully crafted standards of the ADA.

The text of NCD’s draft bill, preceded by a Section-by-Section Summary of the proposed law outlining the highlights and major elements of the proposal, is presented in full at the end of the Executive Summary. To avoid unnecessary duplication, those materials are not repeated here, and the reader is referred to the Section-by-Section Summary to review specific content.

The short title of the proposed law—the ADA Restoration Act—conveys the essence of the proposal’s thrust, which is not to proffer some new, different rendition of the ADA but, rather, to return the Act to the track that Congress understood it would follow when it enacted the statute in 1990. The title echoes that of the Civil Rights Restoration Act of 1987, which was passed to respond to and undo the implications of a series of decisions by the Supreme Court, culminating in *Grove City College v. Bell*, that had taken a restrictive view of the phrase “program or activity” in defining the coverage of various civil rights laws applicable to recipients of federal financial assistance. As with that statute, the ADA Restoration Act would “restore” the law to its original congressionally intended course.



## V. Matters Not Addressed in This Report

In this report, NCD addresses many of the most significant problems that have arisen from the ADA decisions of the Supreme Court. The report, however, is not exhaustive. Some issues that the Court's decisions may engender have not yet emerged as sufficiently serious to warrant correction at this time. As this report was going to press, the Supreme Court issued its decision in the case of *Tennessee v. Lane*, in which the Court upheld provisions of Title II of the ADA as applied to create a right of access to the courts for individuals with disabilities. The *Lane* case had raised questions regarding the authority of Congress to place certain obligations on states and state entities under Title II and to authorize monetary damages when they fail to comply with these obligations. These issues were partially exposed in the Court's prior decision in *Board of Trustees of the University of Alabama v. Garrett*, in which the Court stripped state workers of the right to sue their employers for monetary damages for violations of Title I of the ADA. NCD issued a policy paper examining the *Garrett* decision and its implications in detail, and discussing its implications as well as the larger economic and social issues it raises. *The Implications of the Supreme Court's Decision in Board of Trustees of the University of Alabama v. Garrett*, paper No. 8 of NCD's *Policy Brief Series: Righting the ADA Papers*, can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

NCD also filed a brief *Amicus Curiae* in the *Garrett* case, in which it described NCD's belief that Congress had ample justification for concluding that discrimination by state and local governments was a serious problem that justified such agencies to coverage by Titles I and II of the ADA and the authorization of monetary damages in suits by private persons subjected to such discrimination. The brief can be found at [http://www.ncd.gov/newsroom/publications/2002/chevron\\_amicus.htm](http://www.ncd.gov/newsroom/publications/2002/chevron_amicus.htm).

NCD has not addressed the *Garrett* decision in this report, primarily because most state workers still retain rights to sue for money damages under Title II of the ADA and under Section 504 of the Rehabilitation Act. Before the Supreme Court issued its decision in *Tennessee v. Lane*, NCD had issued a separate policy paper examining the *Lane* proceedings and the issues raised by the Supreme Court's consideration of the case. *Tennessee v. Lane*:

*The Legal Issues and the Implications for People with Disabilities* can be found at <http://www.ncd.gov/newsroom/publications/2003/legalissues.htm>.

The *Lane* ruling certainly merits additional study, and NCD expects to issue future analyses of the decision and the questions it leaves open. The report, however, does not attempt to address such issues.

In addition, this report does not attempt to address the many and varied issues on which some lower courts have made unfortunate, damaging ADA rulings. One issue on which the Supreme Court offered some amelioration of restrictive lower court decisions—the question of whether individuals who apply for or receive Social Security disability benefits should be precluded, as unqualified to work, from pursuing ADA cases—has continued to surface in the lower courts, often with results unfavorable to litigants with disabilities. In *Cleveland v. Policy Management Systems Corporation*, the Court held that ADA plaintiffs should be allowed to “proffer a sufficient explanation” as to why their disability benefit status or representations were not inconsistent with their ability to pursue an ADA claim, and that disability benefit claimants or recipients should not be required to rebut a presumption that they are stopped from bringing ADA cases. Despite this ruling, many lower courts have continued to make it almost impossible for such individuals to maintain ADA suits. If such a trend continues, NCD may need to consider possible legislative remedies. NCD has chosen to address only those issues that currently present a substantial problem to ADA implementation as a result of an unfavorable decision of the nation’s highest court.



## VI. Conclusion

Many Americans with disabilities feel that a series of negative court decisions is reducing their status to “second-class citizens,” a status that the ADA was supposed to remedy forever.<sup>201</sup> In this report, NCD, which first proposed the enactment of an ADA and developed the initial version of the legislation, offers legislative proposals designed to get the ADA back on track. The title of this report, *Righting the ADA*, borrows a metaphor from nautical terminology. When a ship or boat has gotten off course as a result of a storm, other environmental conditions, or other causes, it is necessary to “right” its course. When a vessel is listing (tilting) excessively or has tipped over, it is necessary to “right” it by keeping it on an even keel so that the vessel can return to its upright position. Similarly, the ADA needs to be “righted” so that it can accomplish the lofty and laudable objectives that led Congress to enact it.

Since President George H.W. Bush signed the ADA into law in 1990, the Act has had a substantial impact. The Act has addressed and prohibited many forms of discrimination on the basis of disability, although implementation has been far from universal and much still remains to be done, as NCD has contended in many of its other reports. In its role in interpreting the ADA, the judiciary has produced mixed results. Led by the U.S. Supreme Court, the courts have made some admirable rulings, giving effect to various provisions of the Act. Unfortunately, however, many ADA court decisions have not been so positive. This report addresses a series of Supreme Court decisions in which the Court has been out of step with the congressional, executive, and public consensus in support of ADA objectives, and has taken restrictive and antagonistic approaches to the ADA, resulting in the diminished civil rights of people with disabilities. In response to the Court’s damaging decisions, the report attempts, particularly in Section II, to document and explain the problems they create and, in Sections III and IV, to advance legislative proposals to reverse their impact. For more extensive and detailed analyses of the issues raised by the Supreme Court’s unfavorable decisions, refer to the series of papers NCD has published on its Web site under the title *Policy Brief Series: Righting the ADA Papers*. They can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

NCD is highly aware that the legislative proposals presented in this report are hardly the last word on these issues. In presenting its original version of the ADA in 1988, NCD observed the following:

The drafting of legislation is a developmental process that reflects negotiation, compromise, and continuous revision; the Council recognizes that the draft proposal presented on the succeeding pages is not the final version. The Council believes, however, that the draft presented herein represents a significant step toward the introduction and eventual passage of such a statute. The Council is confident that the “Americans with Disabilities Act” is representative of the need for expanded nondiscrimination protection it has heard repeatedly voiced by [people] with disabilities, and is convinced that the enactment of such a statute is one key to increased independence and quality of life for [people] with disabilities.

*(On the Threshold of Independence, p. 23.)*

Likewise, NCD offers its ADA Restoration Act proposal with the full expectation that, before it is enacted, it will be tweaked, tinkered with, and hopefully improved on. NCD is confident, however, that the development of a concrete and multifaceted ADA Restoration Act proposal is a significant step in the much-needed process of *Righting the ADA*.

# Appendix

## Mission of the National Council on Disability

### *Overview and Purpose*

The National Council on Disability (NCD) is an independent Federal agency with 15 members appointed by the President of the United States and confirmed by the U.S. Senate. The overall purpose of NCD is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all individuals with disabilities regardless of the nature or significance of the disability and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.

### *Specific Duties*

The current statutory mandate of NCD includes the following:

- Reviewing and evaluating, on a continuing basis, policies, programs, practices, and procedures concerning individuals with disabilities conducted or assisted by federal departments and agencies, including programs established or assisted under the Rehabilitation Act of 1973, as amended, or under the Developmental Disabilities Assistance and Bill of Rights Act, as well as all statutes and regulations pertaining to federal programs that assist such individuals with disabilities, to assess the effectiveness of such policies, programs, practices, procedures, statutes, and regulations in meeting the needs of individuals with disabilities.
- Reviewing and evaluating, on a continuing basis, new and emerging disability policy issues affecting individuals with disabilities at the Federal, state, and local government levels and in the private sector, including the need for and coordination of adult services, access to personal assistance services, school reform efforts and the impact of such efforts on individuals with disabilities, access to health care, and policies that act as disincentives for individuals to seek and retain employment.
- Making recommendations to the President, Congress, the Secretary of Education, the director of the National Institute on Disability and Rehabilitation Research, and other officials of Federal agencies about ways to better promote equal opportunity, economic self-sufficiency, independent living, and inclusion and integration into all aspects of society for Americans with disabilities.
- Providing Congress, on a continuing basis, with advice, recommendations, legislative proposals, and any additional information that NCD or Congress deems appropriate.
- Gathering information about the implementation, effectiveness, and impact of the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.).

- Advising the President, Congress, the commissioner of the Rehabilitation Services Administration, the assistant secretary for Special Education and Rehabilitative Services within the Department of Education, and the director of the National Institute on Disability and Rehabilitation Research on the development of the programs to be carried out under the Rehabilitation Act of 1973, as amended.
- Providing advice to the commissioner of the Rehabilitation Services Administration with respect to the policies and conduct of the administration.
- Making recommendations to the director of the National Institute on Disability and Rehabilitation Research on ways to improve research, service, administration, and the collection, dissemination, and implementation of research findings affecting people with disabilities.
- Providing advice regarding priorities for the activities of the Interagency Disability Coordinating Council and reviewing the recommendations of this council for legislative and administrative changes to ensure that such recommendations are consistent with NCD's purpose of promoting the full integration, independence, and productivity of individuals with disabilities.
- Preparing and submitting to the President and Congress an annual report titled *National Disability Policy: A Progress Report*.

### ***International***

In 1995, NCD was designated by the Department of State to be the U.S. government's official contact point for disability issues. Specifically, NCD interacts with the special rapporteur of the United Nations Commission for Social Development on disability matters.

### ***Consumers Served and Current Activities***

Although many government agencies deal with issues and programs affecting people with disabilities, NCD is the only Federal agency charged with addressing, analyzing, and making recommendations on issues of public policy that affect people with disabilities regardless of age, disability type, perceived employment potential, economic need, specific functional ability, veteran status, or other individual circumstance. NCD recognizes its unique opportunity to facilitate independent living, community integration, and employment opportunities for people with disabilities by ensuring an informed and coordinated approach to addressing the concerns of people with disabilities and eliminating barriers to their active participation in community and family life.

NCD plays a major role in developing disability policy in America. In fact, NCD originally proposed what eventually became the ADA. NCD's present list of key issues includes improving personal assistance services, promoting health care reform, including students with disabilities in high-quality programs in typical neighborhood schools, promoting equal employment and community housing opportunities, monitoring the implementation of the ADA, improving assistive technology, and ensuring that people with disabilities who are members of diverse cultures fully participate in society.

### ***Statutory History***

NCD was established in 1978 as an advisory board within the Department of Education (P.L. 95-602). The Rehabilitation Act Amendments of 1984 (P.L. 98-221) transformed NCD into an independent agency.



## Endnotes

<sup>1</sup> *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989).

<sup>2</sup> Section 3(4) of the Civil Rights Act of 1991 declared that one of the Act's purposes was "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes to provide adequate protection to victims of discrimination." The Act reversed or altered, in whole or in part, the implications of the following cases: *Wards Cove v. Atonio*, 490 U.S. 642 (1989); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *EEOC v. Arabian American Oil Company*, 490 U.S. 244 (1991); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991); *Library of Congress v. Shaw*, 478 U.S. 310 (1986).

<sup>3</sup> *National Council on Disability, Equality of Opportunity: The Making of the Americans with Disabilities Act* at 184 (1997).

<sup>4</sup> Statement by Vice President Al Gore, December 14, 1998, quoted in the Presidential Task Force on Employment of Adults with Disabilities, *Working on Behalf of Americans with Disabilities: President Clinton and Vice President Gore: Goals and Accomplishments* at 17.

<sup>5</sup> George W. Bush, *Presidential Proclamation on the Anniversary of the Americans with Disabilities Act, 2002* (July 26, 2002).

<sup>6</sup> NCD, *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act* at 1 (2000).

<sup>7</sup> NCD, *Voices of Freedom: America Speaks Out on the ADA* at 26 (1995).

<sup>8</sup> *Id.* at 27.

<sup>9</sup> George W. Bush, *Presidential Proclamation on the Anniversary of the Americans with Disabilities Act, 2002* (July 26, 2002).

<sup>10</sup> See Mary Crossley, "The Disability Kaleidoscope," 74 *Notre Dame Law Review* 621, 622 (1999).

<sup>11</sup> *Tudyman v. United Airlines*, 608 F. Supp. 739 (C.D.Cal. 1984).

<sup>12</sup> *Morrow v. City of Jacksonville*, 941 F. Supp. 816, 823 n. 3 (E.D.Ark. 1996).

<sup>13</sup> See, e.g., *Stone v. St. Joseph's Hospital of Parkersburg*, 538 S.E.2d 389, 400-402, 404 (W.Va. 2000), in which the Supreme Court of West Virginia, after acknowledging that the state law had been amended in 1989 to adopt the federal three-prong definition of disability, chose to reject the

“restrictive approach” of federal interpretation of the definition, endorsing an “independent approach ... not mechanically tied to federal disability discrimination jurisprudence.” The court also cited a number of cases from other states that had interpreted the definition of disability more expansively than under federal nondiscrimination laws. *Id.* at 405 and n. 23. Likewise, in *Dahill v. Police Department of Boston*, 434 Mass. 233, 748 N.E.2d 956 (2001), the Massachusetts Supreme Judicial Court embraced virtually every argument advanced by disability rights advocates that the United States Supreme Court had rejected in *Sutton v. United Airlines*, and ruled that mitigating measures should not be considered in determining whether an individual has a “handicap” under Massachusetts antidiscrimination law. According to the *Dahill* Court, the public policy underlying the antidiscrimination statute supported its interpretation that mitigating measures should be excluded, while embracing the *Sutton* standard would “exclude[ ] from the statute’s protection numerous persons who may mitigate serious physical or mental impairments to some degree, but who may nevertheless need reasonable accommodations to fulfill the essential functions of a job.” *Id.* at 240 and n. 10.

<sup>14</sup> See, e.g., *Granovsky v. Canada*, [2000] 1 S.C.R. 703, in which the Supreme Court of Canada expressly rejected the restrictive approach of the U.S. Supreme Court in *Sutton v. United Airlines*, noted the “ameliorative purpose” and “remedial component” of the disability nondiscrimination provision of the Canadian Charter of Rights and Freedoms, and adopted an approach in which the focus is “not on the impairment as such, nor even any associated functional limitations, but is on the problematic response of the [defendant] state to either or both of these circumstances.” The Court added that it was the alleged discriminatory action “that stigmatizes the impairment, or which attributes false or exaggerated importance to the functional limitations (if any) ...” Similarly, in *Quebec v. Canada*, [2000] 1 S.C.R. 665, the Supreme Court of Canada noted that “[h]uman rights legislation is [to be] given a liberal and purposive interpretation,” and ruled, “The objectives of the Charter, namely the right to equality and protection against discrimination, cannot be achieved unless we recognize that discriminatory acts may be based as much on perception and myths and stereotypes as on the existence of actual functional limitations. Since the very nature of discrimination is often subjective, assigning the burden of proving the objective existence of functional limitations to a victim of discrimination would be to give that person a virtually impossible task. Functional limitations often exist only in the mind of other people, in this case that of the employer.” The Court ruled that “a ‘handicap,’ therefore, includes ailments which do not in fact give rise to any limitation or functional disability.”

<sup>15</sup> Some states, such as California and Rhode Island, have amended their disability nondiscrimination statutes to reject federal case law narrowing the scope of individuals protected. Others, such as Connecticut, New Jersey, and New York have never adopted the rigid and stringent concept of “disability” consisting of an “impairment” which “substantially limits” one or more major life activities. For a discussion of state laws that have deviated from the restrictive federal model, see NCD’s paper titled *Defining “Disability” in a Civil Rights Context: The Courts’ Focus on the Extent of Limitations as Opposed to Fair Treatment and Equal Opportunity*. Paper No. 6 of NCD’s *Policy Brief Series: Righting the ADA Papers* can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.



<sup>16</sup> For example, the definition of disability provisions of Australia’s Disability Discrimination Act of 1992 (4.(1)) and of Ireland’s Employment Equality Act (1998) (2), both of which were adopted after the ADA was enacted, are framed in very broad terms that encompass not only a wide variety of currently existing conditions, but also include any condition that previously existed but no longer does, that “may exist in the future,” or that “is imputed to a person.”

<sup>17</sup> *Todd v. Academy Corporation*, 57 F. Supp. 2d 448, 453-54 (S.D. Tex. 1999).

<sup>18</sup> *Mahon v. Crowell*, 295 F.3d 585, 590 (6th Cir. 2002).

<sup>19</sup> *Id.* at 215.

<sup>20</sup> *Waldrip v. General Elec. Co.*, 325 F.3d 652, 655 (5th Cir. 2003), citing *Williams*, 534 U.S. at 194; *Albertson’s*, 527 U.S. at 563 n. 10; and *Sutton*, 527 U.S. at 478-80.

<sup>21</sup> *Black v. Roadway Express, Inc.*, 297 F.3d 445, 449 n. 4 (6th Cir. 2002) (citations omitted).

<sup>22</sup> See, e.g., *Sheehan v. City of Gloucester*, 2002 WL 389297, p. \*3 (D.Mass. 2002) (“The Court has deemed the EEOC regulations to be of more questionable authority—because no agency has been authorized to issue regulations further interpreting the term ‘disability’ in the ADA—but has cited these regulations as well in cases where both parties have accepted them as reasonable.”); *EEOC v. AMR Eagle, Inc.*, 2001 WL 257905, p. \*14 n. 17 (N.D.Tex. 2001) (“The Supreme Court in *Sutton v. United Air Lines, Inc.* questioned the validity of the EEOC’s regulations, noting that no agency had been given authority to interpret the term ‘disability.’ The Court nevertheless passed on the issue of what deference, if any, they were due since both parties accepted the validity of the regulations and determining their validity was unnecessary to decide the case. The same applies here, so this Court will not discuss the validity of or the deference to be accorded the EEOC’s regulations.”) (citations omitted); *EEOC v. Exxon Corporation*, 124 F. Supp.2d 987, 994 (N.D.Tex. 2000) (“The Supreme Court in *Sutton v. United Air Lines, Inc.* questioned the validity of the EEOC’s regulations, noting that no agency had been given authority to interpret the term ‘disability.’ The Court, however, passed on the issue of what deference, if any, they were due since both parties accepted the validity of the regulations and determining their validity was unnecessary to decide the case. The same applies here, so this Court will not discuss the validity of or the deference to be accorded the EEOC’s regulations.”) (citations omitted).

<sup>23</sup> See, e.g., *Muller v. Costello*, 187 F.3d 298, 312 (2d Cir.1999) (deference to the EEOC’s interpretations “remains the law of this Circuit”); *Karmel v. Liz Claiborne, Inc.*, 2002 WL 1285253, p. \*6 n. 3 (S.D.N.Y. 2002) (“The Court is mindful that the Supreme Court has recently called into question the degree of deference which should be accorded the EEOC’s regulations interpreting the ADA. See *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 479-480 (1999). However, in this circuit, the EEOC’s regulations continue to command great deference. See *Muller v. Costello*, 187 F.3d 298, 312 (2d Cir.1999).”); *Beason v. United Technologies Corporation*, 213 F. Supp.2d 103, 108-109 (D.Conn. 2002) (“29 C.F.R. 1630.2(h)(1); see

*Francis v. City of Meriden*, 129 F.3d 281, 283 n. 1 (2d Cir.1997) (stating in regard to EEOC regulations defining ‘disability’ under the ADA, ‘[w]e accord great deference to the EEOC’s interpretation of the ADA’); see also *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 563 n. 10, 119 S.Ct. 2162, 144 L.Ed.2d 518 (1999) (‘[W]e assume, without deciding, that [the regulations and interpretive guidance promulgated by the EEOC relating to the ADA’s definitional section] are valid.’); but see *Sutton*, 527 U.S. at 479-80, 119 S.Ct. 2139 (assuming without deciding that EEOC regulations defining disability under ADA are valid, but noting that the EEOC has not been given authority to issue regulations defining disability under ADA.”); *D’Amato v. Long Island R.R. Co.*, 2001 WL 563569, p. \*4 (S.D.N.Y. 2001) (“As the agency with principal responsibility for enforcing the ADA, the EEOC’s regulations are entitled to deference. See, e.g., *Muller v. Costello*, 187 F.3d 298, 312 (2d Cir.1999) (deference to the EEOC’s interpretations ‘remains the law of this Circuit’). But see *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 479-80 (1999) (questioning the authority of the EEOC to issue regulations interpreting the ADA).”).

<sup>24</sup> *EEOC v. Browning-Ferris, Inc.*, 262 F. Supp.2d 577, 583 n. 7 (D.Md. 2002), quoting Barbara Lindemann and Paul Grossman, *Employment Discrimination Law* 1208 (3d ed. 1996 and Supp. 2000).

<sup>25</sup> See *Arlt v. Missouri Department of Corrections*, 229 F. Supp.2d 938, 944 (E.D.Mo. 2002) (“The Act does not define the terms ‘physical or mental impairment,’ ‘substantially limits,’ or ‘major life activities,’ and no agency has been given authority to issue regulations implementing the generally applicable provisions of the ADA. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479 (1999). However, the Department of Justice (DOJ), which Congress assigned to write the regulations for Subchapter III of the ADA, defines ‘physical or mental impairment’ as including ‘specific learning disabilities.’ See 28 C.F.R. 36.104 (2000). The DOJ’s regulations further define ‘major life activities’ as including ‘learning.’ *Id.*”).

<sup>26</sup> See, e.g., *Duncan v. Washington Metropolitan Area Transit Authority*, 240 F.3d 1110, 1115 n. 2 (D.C.Cir. 2001) (“The *Sutton* Court declined to resolve whether deference is owed to the EEOC’s ADA regulations, 527 U.S. at 480, but quoted this regulation’s factors approvingly, *Id.* at 491-92.”); *Kasten v. Port Authority of New York and New Jersey*, 2002 WL 31102689, p. \*3 (E.D.N.Y. 2002) (“*Cf. Sutton*, 527 U.S. at 479-80 (noting, in contrast, that ‘no agency ... has been given authority to issue regulations implementing the generally applicable provisions of the ADA, see “ 12101-12102, [which include the definition of ‘disability’ and] which fall outside Titles I-V,’ and declining to address amount of deference due to EEOC regulations that nonetheless discuss the latter provisions).”).

<sup>27</sup> *Capizzi v. County of Placer*, 135 F. Supp.2d 1105, 1110 (E.D.Cal. 2001) (additional citations omitted).

<sup>28</sup> *Id.* at 1111. The specific issue the court was considering was whether working is a major life activity. The court noted that the EEOC had included working in the list of major life activities, but had treated it “as a last resort.” *Id.* (citing 29 C.F.R. Pt. 1630, App., 1630.2(j)(1998)) (“If an individual is substantially limited in any other major life activity, no determination should be

made as to whether the individual is substantially limited in working.”). The court noted that in *Sutton* the Supreme Court had expressed reservations about the validity of the definitional provisions generally, but specifically regarding whether working is a major life activity (see *The Supreme Court’s ADA Decisions Regarding Substantial Limitation of Major Life Activities*, paper No. 13 of NCD’s *Policy Brief Series: Righting the ADA Papers*, found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>). The court noted, on the other hand, “that the Ninth Circuit, while recognizing the *Sutton* dicta, has considered working a major life activity without discussion, but also without hesitancy. See *Broussard v. University of California*, 192 F.3d 1252, 1255-6 (9th Cir.1999). Moreover, no published Ninth Circuit opinion has rejected working as a major life activity.” *Id.* Accordingly, the court decided to accept working as a major life activity.

<sup>29</sup> See, e.g., *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991, 998 (D.Or. 1994) (“employer cannot terminate the employee because he is temporarily unqualified if that condition can be alleviated through reasonable accommodation”); *Wood v. County of Alameda*, 5 AD Cases 173, 181 (N.D.Cal. 1995) (defendant’s motion for summary judgment denied and preliminary injunction granted to plaintiff; factor of “permanent or long-term impact of the individual’s impairment” in EEOC ADA Title I regulation not meant to be dispositive); *Patterson v. Downtown Medical and Diagnostic Center, Inc.*, 866 F. Supp. 1379, 1381 (M.D.Fla. 1994) (defendant’s motion to dismiss denied; “the definition of ‘disability’ does not require permanency”).

<sup>30</sup> *Matczak v. Frankford Candy and Chocolate Co.*, 96-CV-3083, 6 AD Cases 390, 392-93 (January 14, 1997).

<sup>31</sup> *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996).

<sup>32</sup> *Gordon v. E.L. Hamm and Associates, Inc.*, 100 F.3d 907 (11th Cir. 1996).

<sup>33</sup> *Sanders v. Arneson Products, Inc.*, 91 F.3d 1351 (9th Cir. 1996).

<sup>34</sup> *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12 (1st Cir. 1997).

<sup>35</sup> *Hamm v. Runyon*, 51 F.3d 721 (7th Cir. 1995); *Sutton v. New Mexico Department of Children, Youth and Families* 922 F. Supp. 516, 517 (D.N.M. 1996).

<sup>36</sup> *McDonald v. Commonwealth of Pennsylvania*, 62 F.3d 92 (3d Cir. 1995).

<sup>37</sup> *Rakestraw v. Carpenter Company*, 898 F.Supp. 386 (N.D.Miss. 1995).

<sup>38</sup> *Roush v. Weastec, Inc.*, 96 F.3d 840 (6th Cir. 1996).

<sup>39</sup> *Stevens v. Stubbs*, 576 F. Supp. 1409, 1414 (N.D. Ga. 1983).

<sup>40</sup> Memorandum on the Definition of Disability, *EEOC Compliance Manual* 902.4(d) (March 15, 1995).

<sup>41</sup> S. Rep. No. 116, 101st Cong., 1st Sess., 22 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. pt. 2, 52 (1990).

<sup>42</sup> 922 F. Supp. 516 (D.N.M. 1996).

<sup>43</sup> *Id.* at 517.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 518-19.

<sup>46</sup> *Id.* at 519, quoting D. Todd Arney, Note, “Survey of the Americans with Disabilities Act, Title I: With the Regulations In, Are the Criticisms Out?,” 31 *Washburn L.J.* 522, 524 (1994).

<sup>47</sup> 105 F.3d 12 (1st Cir. 1997).

<sup>48</sup> *Id.* at 13-14.

<sup>49</sup> *Id.* at 13.

<sup>50</sup> *Id.* at 16.

<sup>51</sup> *Id.*

<sup>52</sup> 898 F. Supp. 386 (N.D.Miss. 1995).

<sup>53</sup> *Id.* at 388.

<sup>54</sup> *Id.* at 390.

<sup>55</sup> *Id.* at 389. The defendant alleged that Rakestraw was fired for lateness, a charge that Rakestraw argued was “mere pretext.” *Id.*

<sup>56</sup> Memorandum on the Definition of Disability, *EEOC Compliance Manual* 902.4(d) (March 15, 1995).

<sup>57</sup> 898 F. Supp. at 389.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 390.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 389.

<sup>64</sup> Richard A. Bales, *Once Is Enough: Evaluating When a Person Is Substantially Limited in Her Ability to Work*, 11 *Hofstra Lab. L. J.* 203, 239 (1993).

<sup>65</sup> *Collins v. Yellow Freight System, Inc.*, 942 F. Supp. 449, 453 (W.D.Mo. 1996).

<sup>66</sup> 95 C 5062, 5 AD Cases 1635 (N.D.Ill. Jan. 30, 1996).

<sup>67</sup> *Id.* at 5 AD Cases 1639.

<sup>68</sup> See, e.g., *Bailey v. Georgia-Pacific Corporation*, 306 F.3d 1162, 1167-68 (1st Cir. 2002.); *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 46-47 (2d Cir.2002); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 316-17 (5th Cir. 1997); *Wilson v. International Brotherhood of Teamsters, Chauffeurs and Warehousemen*, 47 F. Supp.2d 1347, 1359 (S.D.Fla. 1999); *Goldsmith v. Jackson Memorial Hospital Public Health Trust*, 33 F. Supp.2d 1336, 1341-42 (S.D.Fla. 1998).

<sup>69</sup> See, e.g., *Zenor v. El Paso Healthcare System, Ltd.*, 176 F.3d 847, 860 (5th Cir. 1999).

<sup>70</sup> See, e.g., *Weber v. Strippit, Inc.*, 186 F.3d 907, 913 (8th Cir. 1999).

<sup>71</sup> See, e.g., *Deas v. River West, L.P.*, 152 F.3d 471, 476-79 (5th Cir. 1998).

<sup>72</sup> See, e.g., *Kapche v. City of San Antonio*, 304 F.3d 493, 497-98 (5th Cir. 2002); *Beaulieu v. Northrop Grumman Corporation*, 161 F. Supp.2d 1135, 1142 (D.Hawaii 2000). See, also, *Sutton v. United Airlines*, 527 U.S. 471, 483-84 (1999) (dicta) (to “find all diabetics to be disabled” would be “contrary to both the letter and the spirit of the ADA”).

<sup>73</sup> See, e.g., *Godron v. Hillsborough County*, 2000 WL 1459054, \*2 n.3 (D.N.H., 2000); *Hirsch v. National Mall and Services, Inc.*, 989 F. Supp. 977, 981-82 (N.D.Ill. 1997); *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp.2d 177, 182 (D.N.H., 2002); *Schwertfager v. City of Boynton Beach*, 42 F. Supp.2d 1347, 1359 (S.D.Fla. 1999).

<sup>74</sup> See, e.g., *Bridges v. City of Bossier*, 92 F.3d 329, 336 n. 11 (5th Cir. 1996).

<sup>75</sup> See, e.g., *Lanci v. Andersen*, 2000 WL 329226, \*3 (S.D.N.Y. 2000); *Purcell v. Pennsylvania Department of Corrections*, 1998 WL 10236, \*8 (E.D.Pa. 1998).

<sup>76</sup> See, e.g., *White v. Honda of America Manufacturing, Inc.*, 2003 WL 203111, \*3-\*4 (S.D.Ohio 2003); *Ventura v. City of Independence*, 108 F.3d 1378, 1997 WL 94688, at \*1-\*2 (6th Cir. 1997) (unpublished opinion) (individualized inquiry of effects of plaintiff’s asthma); *Minnix v. City of Chillicothe*, 205 F.3d 1341, 2000 WL 191828, at \*2 (6th Cir. 2000); *Heilweil v. Mount Sinai Hospital*, 32 F.3d 718, 724 (2d Cir. 1994); *Boone v. Reno*, 121 F. Supp.2d 109, 111 (D.D.C. 2000); *Castro v. Local 1199, National Health and Human Services Employees Union*,

964 F. Supp. 719, 725 (S.D.N.Y. 1997); *Gaddy v. Four B Corporation*, 953 F.Supp. 331, 337 (D.Kan. 1997); *Emery v. Caravan of Dreams, Inc.*, 879 F. Supp. 640, 642-43 (N.D.Tex. 1995).

<sup>77</sup> See, e.g., *Perkins v. St. Louis County Water Co.*, 160 F.3d 446, 448 (8th Cir. 1998).

<sup>78</sup> See, e.g., *Quick v. Tripp, Scott, Conklin and Smith, P.A.*, 43 F. Supp.2d 1357, 1366-67 (S.D.Fla. 1999); *Ellis v. Mohenis Services, Inc.*, 1998 WL 564478, \*3 (E.D.Pa. 1998); *Reese v. American Food Service*, 2000 WL 1470212, \*5 (E.D.Pa. 2000).

<sup>79</sup> See, e.g., *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 155 (1st Cir. 1998); *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 505-06 (7th Cir. 1998); *Demar v. Car-Freshner Corporation*, 49 F. Supp.2d 84, 89-90 (N.D.N.Y. 1999); *Bingham v. Oregon School Activities Association*, 37 F. Supp.2d 1189, 1195 (D.Or. 1999).

<sup>80</sup> *White v. Honda of America Manufacturing, Inc.*, 2003 WL 203111, \*3 (S.D.Ohio 2003) (“No impairment constitutes a disability *per se*”).

<sup>81</sup> *Jones v. Rehabilitation Hospital of Indiana*, 2000 WL 1911884, \*3-\*4 (S.D.Ind. 2000); *Ihekwe v. City of Durham, N.C.*, 129 F. Supp.2d 870, 879 (M.D.N.C. 2000).

<sup>82</sup> See, e.g., *Thomas v. New Commodore Cruise Lines Ltd.*, 202 F. Supp.2d 1356, 1360-61 (S.D.Fla. 2002); *Cruz Carrillo v. AMR Eagle, Inc.*, 148 F.Supp.2d 142, 145 (D.Puerto Rico 2001); *Solorio v. American Airlines, Inc.*, 2002 WL 485284, \*4 (S.D.Fla. 2002); *U.S. v. Happy Time Day Care Center*, 6 F. Supp.2d 1073, 1078-79 (W.D.Wis. 1998).

<sup>83</sup> 6 F. Supp.2d 1073, 1078-79 (W.D.Wis. 1998).

<sup>84</sup> 1999 WL 1611328 (N.D.Tex. 1999).

<sup>85</sup> See S. Rep. No. 101-116, at 22 (1989); H.R. Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor); H.R. Rep. No. 101-485, pt. 3 at 28-29 (1990) (Committee on the Judiciary).

<sup>86</sup> See S. Rep. No. 101-116, at 22 (1989); H.R. Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor); *EEOC Compliance Manual* (Number 915.002, March 14, 1995) at p. 902-21.

<sup>87</sup> See H.R. Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor) (“hard of hearing”); H.R. Rep. No. 101-485, pt. 3 at 28-29 (1990) (Committee on the Judiciary) (“hearing loss”).

<sup>88</sup> See S. Rep. No. 101-116, at 22 (1989); H.R. Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor); H.R. Rep. No. 101-485, pt. 3 at 28-29 (1990) (Committee on the Judiciary).

<sup>89</sup> See *EEOC Compliance Manual* (Number 915.002, March 14, 1995) at p. 902-21.

<sup>90</sup> See H.R. Rep. No. 101-485, pt. 3 at 28-29 (1990) (Committee on the Judiciary).

<sup>91</sup> See *EEOC Compliance Manual* (Number 915.002, March 14, 1995) at p. 902-21.

<sup>92</sup> See S. Rep. No. 101-116, at 22 (1989); H.R. Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor); H.R. Rep. No. 101-485, pt. 3 at 28-29 (1990) (Committee on the Judiciary).

<sup>93</sup> See S. Rep. No. 101-116, at 22 (1989); H.R. Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor); *EEOC Compliance Manual* (Number 915.002, March 14, 1995) at p. 902-21.

<sup>94</sup> See *EEOC Compliance Manual* (Number 915.002, March 14, 1995) at p. 902-21.

<sup>95</sup> 527 U.S. 471, 483-84 (1999).

<sup>96</sup> See, e.g., *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002); *Nordwall v. Sears, Roebuck and Co.*, 46 Fed App. 364, 2002 WL 31027956 (7th Cir. 2002) (unpublished).

<sup>97</sup> *Chenoweth v. Hillsborough Co.*, 250 F.3d 1328 (11th Cir. 2001), cert denied, 534 U.S. 1131 (2002); *EEOC v. Sara Lee*, 237 F.3d 349 (4th Cir. 2001); *Todd v. Academy Corporation*, 57 F. Supp.2d 448 (S.D.Tex. 1999).

<sup>98</sup> *Todd v. Academy Corporation*, 57 F. Supp.2d 448, 453-54 (S.D. Tex. 1999).

<sup>99</sup> 534 U.S. 184, 197 (2002).

<sup>100</sup> *Griffin v. Steeltek, Inc.*, 261 F.3d 1026 (10th Cir. 2001).

<sup>101</sup> *Iverson v. Sports Depot*, 2002 WL 745824 (D.Mass. 2002).

<sup>102</sup> *Id.* at \*2.

<sup>103</sup> *Dorfsman v. Law School Admissions Council, Inc.*, 2001 WL 1754726 (E.D.Pa. 2001).

<sup>104</sup> *Id.* at \*5.

<sup>105</sup> See, e.g., *J.C. v. Regional School District 10, Board of Education*, 278 F.3d 119 (2d Cir. 2002) (student who obtained all requested relief—including finding of eligibility for special education services and termination of expulsion hearing—not entitled to attorneys’ fees under either the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act because relief was not “judicially sanctioned”).

<sup>106</sup> Correspondence from Lauren Young, legal director, Maryland Disability Law Center, to Sharon Masling, November 11, 2002, quoted in text accompanying endnote 110 in *The Impact of the Supreme Court's ADA Decisions on the Rights of Persons with Disabilities*. Paper No. 7 of NCD's *Policy Brief Series: Righting the ADA Papers* can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

<sup>107</sup> E-mail correspondence from Tim Sindelar, senior attorney, Disability Law Center, to Sharon Masling, October 29, 2002, quoted in text accompanying endnote 111 in *The Impact of the Supreme Court's ADA Decisions on the Rights of Persons with Disabilities*. Paper No. 7 of NCD's *Policy Brief Series: Righting the ADA Papers* can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

<sup>108</sup> E-mail correspondence from Jeff Spitzer-Resnick, managing attorney, Wisconsin Coalition for Advocacy, to Sharon Masling, October 4, 2002, quoted in text accompanying endnote 112 in *The Impact of the Supreme Court's ADA Decisions on the Rights of Persons with Disabilities*. Paper No. 7 of NCD's *Policy Brief Series: Righting the ADA Papers* can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

<sup>109</sup> Correspondence from Lauren Young, legal director, Maryland Disability Law Center, to Sharon Masling, November 11, 2002, quoted in text accompanying endnote 110 in *The Impact of the Supreme Court's ADA Decisions on the Rights of Persons with Disabilities*. Paper No. 7 of NCD's *Policy Brief Series: Righting the ADA Papers* can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

<sup>110</sup> 503 U.S. 60, 70-71 (1992).

<sup>111</sup> See, e.g., *DeLeo v. City of Stamford*, No. 592 CV80, 4 A.D. Cases 427, 430 (D.Conn. Mar. 14, 1995).

<sup>112</sup> *Moreno v. Consolidated Rail Corporation*, 99 F.3d 782 (6th Cir. 1996).

<sup>113</sup> *Gorman v. Easley*, 257 F.3d 738, 745 (8th Cir. 2001).

<sup>114</sup> *King v. City of Chicago*, 2002 WL 31101273 (N.D. Ill. 2002).

<sup>115</sup> *Denmeade v. King*, 2002 WL 31018148 (W.D.N.Y. 2002).

<sup>116</sup> One attorney provided the following description of the impact of the *Barnes* decision on a class action the attorney had filed against a city housing authority:

Liability is not the real issue, as the case is clear. [The defendant agency] has acted for years to deny non-elderly people with disabilities housing opportunities to which they were legally entitled. [The defendant agency] has also failed miserably to comply with accessibility requirements of Section 504 [and] the ADA . . . [However], since the *Gorman* decision has stripped us of our claim for punitive damages, the remedial claims become quite difficult. . . . As our clients generally receive SSI and aren't able to work,



their lack of shelter cannot be said to interfere with their ability to receive normal wages. Many of our clients have not paid rent, as they live from person to person, in the street or in shelters. . . . Their harm has been extreme, yet their claims for compensatory damages are complex and uncertain. . . . When we still had a claim for punitive damages, we were convinced that the illegal action of the Authority could be punished and that the victims could expect some genuine relief. As significantly, the Authority would know in the future that they may not violate the law with impunity. Now, without the relief of punitive damages, government action can go for long periods of time and there is no true accountability for its wrongdoings.

Correspondence from Lauren Young, legal director, Maryland Disability Law Center, to Sharon Masling, November 11, 2002, quoted in *The Impact of the Supreme Court's ADA Decisions on the Rights of Persons with Disabilities*. Paper No. 7 of NCD's *Policy Brief Series: Righting the ADA Papers*, can be found at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>.

<sup>117</sup> 42 U.S.C. 12113(b).

<sup>118</sup> 42 U.S.C. 12111(3).

<sup>119</sup> 29 C.F.R. 1630.2(r), 1630.15(b)(2).

<sup>120</sup> See NCD's *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act* at 221-222 (2000); NCD's *Brief as Amicus Curiae in Support of Respondent in Chevron U.S.A. Inc. v. Echazabal* (2002).

<sup>121</sup> 29 C.F.R. 1630.2(r).

<sup>122</sup> *Id.* Because of the procedural manner in which the case came to the Supreme Court, the *Echazabal* Court also did not have occasion to determine whether Chevron could have made a reasonable accommodation that would have permitted Mr. Echazabal to keep his job in spite of the risk-to-self standard, 122 S.Ct. at 2048 n. 2.

<sup>123</sup> 122 S.Ct. at 2050 n. 3.

<sup>124</sup> *Id.* at 2053 and n. 6; 42 U.S.C. 12112(b)(6).

<sup>125</sup> See 29 C.F.R. pt. 1630. app. (commentary on 1630.15(b) and (c)) ("With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the 'direct-threat' standard in section 1630.2(r) in order to show that the requirement is job related and consistent with business necessity") (emphasis added), quoted in *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 764 (5th Cir. 1996).

<sup>126</sup> See, e.g., *Hutton v. Elf Atochem North America, Inc.*, 273 F.3d 884, 893 (9th Cir. 2001) ("Because it is an affirmative defense, the employer bears the burden of proving that an employee constitutes a direct threat."); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999)

(“Because this is an affirmative defense Wal-Mart bears the burden of proving that Nunes is a direct threat.”); *Rizzo v. Children’s World Learning Centers, Inc.*, 84 F.3d 758, 764 (5th Cir. 1996) (“As with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat.”).

<sup>127</sup> *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002).

<sup>128</sup> 297 F.3d at 725, n. 5.

<sup>129</sup> *Id.*

<sup>130</sup> *Nanette v. Department of the Treasury*, 92 M.S.P.R. 127, M.S.P.B. (August 7, 2002).

<sup>131</sup> *Id.* at 138.

<sup>132</sup> *Id.* at 140-41.

<sup>133</sup> *Watson v. Hughston Sports Medicine Hospital*, 231 F. Supp.2d 1344 (M.D.Ga. 2002).

<sup>134</sup> *Id.* at 1352-53.

<sup>135</sup> 42 U.S.C. 12111(10).

<sup>136</sup> 122 S.Ct. at 1523.

<sup>137</sup> *Id.* at 1522.

<sup>138</sup> 29 C.F.R. pt. 1630 app. (commentary on 1630.9).

<sup>139</sup> See, e.g., *Shapiro v. Township of Lakewood*, 292 F.3d 356, 359 (3d Cir. 2002); *Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir. 1997); *Templeton v. Neodata Services, Inc.*, 162 F.3d 617, 619 (10th Cir. 1998); *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996); *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 951-54 (8th Cir. 1999); *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002); *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1171-72 (10th Cir. 1999) (*en banc*).

<sup>140</sup> 29 C.F.R. 1630.2(o).

<sup>141</sup> 42 U.S.C. 12111(10).

<sup>142</sup> “Undue hardship” was the topic of considerable debate. See, e.g., 135 *Cong. Rec.* S10735, S10736 (daily ed. September 7, 1989) (Statements of Senators Hatch and Harkin); 135 *Cong. Rec.* S10773 (daily ed. September 7, 1989) (Statement of Senators Helms and Harkin); 136 *Cong. Rec.* H2429 (daily ed. May 17, 1990) (Statement of Representative Bartlett); and 136

*Cong. Rec.* H2471-H2475 (daily ed. May 17, 1990) (debate on Representative Olin amendment to put a cap on undue hardship).

<sup>143</sup> 122 S.Ct. at 1521.

<sup>144</sup> *Id.* at 1522-23.

<sup>145</sup> 122 S.Ct. at 1521. The Court explained that it was using the term “preference” narrowly in referring to some reasonable accommodations, “in the sense that they would permit the worker with a disability to violate a rule that others must obey.” *Id.*

<sup>146</sup> *Id.* at 1521.

<sup>147</sup> *Id.* at 1523.

<sup>148</sup> In *Barnett*, the majority decision emphasized “the importance of seniority to employee-management relations” and the benefits of “creating, and fulfilling, employee expectations of fair, uniform treatment.” 122 S.Ct. at 1524.

<sup>149</sup> *Shapiro v. Township of Lakewood*, 292 F.3d 356 (3d Cir. 2002).

<sup>150</sup> *Barnett*, 122 S.Ct. at 1525.

<sup>151</sup> 292 F.3d 360-61.

<sup>152</sup> 301 F.3d 866 (7th Cir. 2002).

<sup>153</sup> *Id.* at 872.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> In *Oconomowoc Residential Programs, Inc., v. City of Milwaukee*, 2002 WL 1811325, at 7 (7th Cir. 2002), a case brought under ADA Title II and the Fair Housing Amendments Act, the Seventh Circuit showed itself even willing to apply the *Barnett* analysis totally outside of the employment context. It cited the *Barnett* decision to support the application of a reasonableness standard—separate from the undue burden/undue hardship limitations—to “reasonable modifications” and “reasonable accommodations” requirements under Title II and the Fair Housing Amendments Act, in a case involving a challenge to a zoning decision.

<sup>157</sup> *Vande Zande v. State of Wisconsin Department of Administration*, 44 F.3d 538 (7th Cir. 1995).

<sup>158</sup> *Id.* at 542.

<sup>159</sup> *Id.* at 542-43.

<sup>160</sup> *Id.* at 546.

<sup>161</sup> *Id.* at 544-45.

<sup>162</sup> In March 1999, the EEOC issued *Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, which recognized working at home as an appropriate accommodation in the right circumstances.

<sup>163</sup> 122 S.Ct. at 1519.

<sup>164</sup> See, e.g., *Davis v. Florida Power and Light Co.*, 205 F.3d 1301, 1307 (11th Cir. 2000); *Feliciano v. Rhode Island*, 160 F.3d 780, 787 (1st Cir. 1998); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir. 1998); *Kralik v. Durbin*, 130 F.3d 76, 81-83 (3d Cir. 1997); *Foreman v. Babcock and Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997); *Eckles v. Consolidated Rail Corporation*, 94 F.3d 1041, 1051 (7th Cir. 1996); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1114 (8th Cir. 1995); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1125 (10th Cir. 1995).

<sup>165</sup> NCD, *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act* 226-27 (2000).

<sup>166</sup> 45 C.F.R. 84.11(c) (“a recipient’s obligation to comply with this subpart [employment] is not affected by any inconsistent term of any collective bargaining agreement”).

<sup>167</sup> 122 S.Ct. at 1523-24.

<sup>168</sup> *Id.* at 1525.

<sup>169</sup> 42 U.S.C. 12111(9)(B).

<sup>170</sup> 122 S.Ct. at 1521.

<sup>171</sup> *Dilley v. SuperValu, Inc.*, 296 F.3d 958 (10th Cir. 2002).

<sup>172</sup> *Id.* at 963.

<sup>173</sup> *Id.*

<sup>174</sup> *EEOC v. Dillon Companies, Inc.*, 2002 WL 31516342 (10th Cir. 2002).

<sup>175</sup> *Id.* at \*5.

<sup>176</sup> *Id.*

<sup>177</sup> *Aka v. Washington Hospital Center*, 156 F.3d 1284 (D.C. Cir. 1998) (*en banc*).

<sup>178</sup> *Id.* at 1304.

<sup>179</sup> *Id.* at 1305 (n. 29).

<sup>180</sup> 122 S.Ct. at 1523-24.

<sup>181</sup> See, e.g., Vikram David Amar and Alan Brownstein, *Reasonable Accommodations Under the ADA*, 5 *Greenbag* 2d 361 (2002). Discussing *Barnett*, the authors make the following observation:

Don't seniority rules "bear more heavily" on disabled workers because such workers have shorter work histories with particular employers, in part due to an historical (and economically rational) pre-ADA unwillingness by employers to modify workplace rules to accommodate the physical needs of the disabled? Don't disabilities alter a person's vocational path and make longevity at any one employer less likely? Robert Barnett may be the exception—he became disabled after he was employed and remained (or rather tried to remain) with his existing employer. But don't seniority rules more generally hurt disabled persons more than others and thereby pose "distinctive" problems for the disabled?

*Id.* at 366.

<sup>182</sup> 122 S.Ct. at 1524.

<sup>183</sup> The paper was developed for NCD by Claudia Center and Andrew J. Imparato, who published a later version of the paper in the *Stanford Law and Policy Review*. See Claudia Center and Andrew J. Imparato, *Redefining "Disability" Discrimination: A Proposal to Restore Civil Rights Protections for All Workers*, 14 *Stanford Law and Policy Review* 321 (2003) (Symposium: Developments in Disability Rights).

<sup>184</sup> *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448, 450 (1985) ("negative attitudes," "fear," and "irrational prejudice"); *School Board of Nassau County v. Arline*, 480 U.S. 273, 283-284 (1987) (disability nondiscrimination legislation motivated by congressional desire to condemn effects of "negative reactions," "prejudiced attitudes," "ignorance," "myths and fears," "public fear and misapprehension," and "irrational fear").

<sup>185</sup> The individual must request an accommodation unless the covered entity already knows about the disability and knows that a limitation resulting from the disability is preventing or limiting the individual from equal enjoyment of employment opportunities or benefits. Most emphatically, an employer is required to consider a reasonable accommodation before subjecting an employee with a disability to an adverse employment action that is premised on a limitation arising from the employee's disability.

<sup>186</sup> Bills titled the "Settlement Encouragement and Fairness Act" were introduced in the 107th Congress (S. 3161) in November 2002, and in the current 108th Congress (S. 1117) in May 2003.

These bills focused solely on undoing the *Buckhannon* Court’s rejection of the “catalyst theory.” Subsequently, in February 2004, the substantive provisions of the Settlement Encouragement and Fairness Act bills were incorporated into a comprehensive civil rights bill addressing a variety of issues under federal civil rights laws. These bills, S. 2088 in the Senate and H.R. 3809 in the House of Representatives, are titled the “Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004,” and the proposed law is known popularly as the “FAIRNESS Act.” The provision addressing the *Buckhannon* ruling (Section 502 of the FAIRNESS Act) would add a new section to Chapter 1 of Title 1 of the United States Code—governing basic legal remedies—to provide as follows:

#### **Sec. 9. Definition of “prevailing party”**

- (a) In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, or of any judicial or administrative rule, which provides for the recovery of attorney’s fees, the term “prevailing party” includes, in addition to a party who substantially prevails through a judicial or administrative judgment or order, or an enforceable written agreement, a party whose pursuit of a nonfrivolous claim or defense was a catalyst for a voluntary or unilateral change in position by the opposing party that provides any significant part of the relief sought.
- (b)(1) If an Act, ruling, regulation, interpretation, or rule described in subsection (a) requires a defendant, but not a plaintiff, to satisfy certain different or additional criteria to qualify for the recovery of attorney’s fees, subsection (a) shall not affect the requirement that such defendant satisfy such criteria.
- (2) If an Act, ruling, regulation, interpretation, or rule described in subsection (a) requires a party to satisfy certain criteria, unrelated to whether or not such party has prevailed, to qualify for the recovery of attorney’s fees, subsection (a) shall not affect the requirement that such party satisfy such criteria.

The FAIRNESS Act also addresses the outcome of the *Barnes* decision by restoring, to some extent, the availability to private complainants of punitive damages under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act of 1973. The FAIRNESS Act does not directly address remedies under the ADA, but presumably would restore them indirectly, because Section 203 of the ADA makes Section 504 remedies available under Title II of the ADA.

Section 104(d) of the FAIRNESS Act would add a new subsection at the end of Section 504 to provide as follows:

(e)(1) In an action brought by a person aggrieved by discrimination on the basis of disability (referred to in this section as an ‘aggrieved person’) under this section against an entity subject to this section who has engaged in unlawful intentional discrimination (not a practice that is unlawful because of its disparate impact) prohibited under this section (including its implementing regulations), the aggrieved person may recover equitable and legal relief (including compensatory and punitive damages), attorney’s fees (including expert fees), and costs, except that punitive damages are not available against a government, government agency, or political subdivision.

(2) In an action brought by an ‘aggrieved person’ under this section against a covered entity who has engaged in unlawful discrimination based on disparate impact prohibited under this section (including its implementing regulations), the aggrieved party may recover equitable relief, attorney’s fees (including expert fees), and costs.

The subsection (e)(1) exception providing that punitive damages are not available against a government, government agency, or political subdivision makes applicable to Section 504 (and, through other provisions of the FAIRNESS Act proposal, to Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Age Discrimination Act of 1975) a limitation on punitive damages that Congress expressly had made applicable only to Title VII of the Civil Rights Act and Title I of the ADA in the Civil Rights Act of 1991. Before the *Barnes* decision, this limitation was not applicable to either Title II of the ADA nor to Section 504, and NCD does not endorse the expansion of this limitation to those provisions. Indeed, recognizing this exception would, in effect, codify rather than remedy the *Barnes* ruling, because a jury had awarded Mr. Gorman punitive damages in his suit against the Kansas City Board of Police Commissioners, the chief of police, and a particular police officer, and this award ultimately was invalidated by the Supreme Court. Moreover, recognition of this exception appears inconsistent with a later provision of the FAIRNESS Act (Section 105), which provides that “Nothing in this subtitle, including any amendment made by this subtitle, shall be construed to limit the scope of, or the relief available under, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), the ADA of 1990 (42 U.S.C. 12101 et seq.), or any other provision of law.” Accordingly, NCD has decided not to include the exception in its legislative proposal.

A further refinement of the FAIRNESS Act approach in its application to discrimination on the basis of disability would be to make it clear that substantial ongoing failure by an entity subject to Section 504 or of the ADA to comply with certain nondiscrimination requirements should be treated as constituting intentional discrimination for purposes of availability of punitive damages. This would address situations in which a covered entity willfully, unlawfully, materially, and substantially does any of the following: (1) fails to meet program accessibility requirements for existing facilities, and facility accessibility requirements, including the ADA Accessibility Guidelines standards, for new construction and alterations; (2) fails to furnish appropriate auxiliary aids and services; (3) fails to ensure effective communication access; or (4) imposes discriminatory eligibility criteria or employment qualification standards that engender a blanket exclusion of individuals with a particular disability or category of disability.

<sup>187</sup> One of the findings (no. 14) of the FAIRNESS Act bill recites the fact that, unlike some other federal civil rights laws, Section 504 statutorily prohibits practices that involve disparate impact discrimination. It observes that in *Alexander v. Choate*, 469 U.S. 287 (1985), the Supreme Court “proceeded on the assumption that the statute itself prohibited some actions that had a disparate impact on handicapped individuals—an assumption borne out by congressional statements made during passage of the Act.” The finding goes on to add,

In *Sandoval*, the Court appeared to accept this principle of *Alexander*. Moreover, the Supreme Court explicitly recognized congressional approval of the regulations promulgated to implement Section 504 of the Rehabilitation Act of 1973 in *Consolidated Rail Corporation v. Darrone*, 465 U.S. 624, 634 (1984). Relying on the validity of the regulations, Congress incorporated the regulations into the statutory requirements of Section 204 of the ADA of 1990 (42 U.S.C. 12134). Thus, it does not appear at this time that there is a risk that the private right of action to challenge disparate impact discrimination under section 504 of the Rehabilitation Act of 1973 will become unavailable.

Accordingly, the FAIRNESS Act does not seek to restore such a private right of action for Section 504 or for the ADA.

In *Alexander v. Choate*, the Supreme Court also observed that members of Congress made numerous statements during the consideration and passage of Section 504 regarding the importance of eliminating architectural barriers and providing access to transportation. The Court then stated, “These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design.” 469 U.S. at 297. Substantial ongoing noncompliance with accessibility requirements definitely and foreseeably will exclude individuals with disabilities and should be treated as a form of deliberate discrimination justifying the award of punitive damages provided the other prerequisites for such damages are met. The same rationale supports availability of punitive damages in situations in which a covered entity willfully fails to furnish appropriate auxiliary aids and services or to ensure effective communication access; or persists in applying eligibility or qualification criteria that involve a blanket exclusion of individuals with a particular disability or type of disability.

<sup>188</sup> *Echazabal*, 122 S.Ct. at 2053 and n. 6.; 42 U.S.C. 12112(b)(6); 29 C.F.R. pt. 1630. app. (commentary on 1630.15(b) and (c)) (“With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the ‘direct-threat’ standard in section 1630.2(r) to show that the requirement is job related and consistent with business necessity.”) (emphasis added).

<sup>189</sup> 29 C.F.R. 1630.2(r).



<sup>190</sup> *Id.* Because of the procedural manner in which the case came to the Supreme Court, the *Echazabal* Court also did not have occasion to determine whether Chevron could have made a reasonable accommodation that would have permitted Mr. Echazabal to keep his job in spite of the risk-to-self standard, 122 S.Ct. at 2048 n. 2.

<sup>191</sup> See, e.g., *Hutton v. Elf Atochem North America, Inc.*, 273 F.3d 884, 893 (9th Cir. 2001) (“Because it is an affirmative defense, the employer bears the burden of proving that an employee constitutes a direct threat.”); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999) (“Because this is an affirmative defense Wal-Mart bears the burden of proving that Nunes is a direct threat.”); *Rizzo v. Children’s World Learning Centers, Inc.*, 84 F.3d 758, 764 (5th Cir. 1996) (“As with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat.”).

<sup>192</sup> 29 C.F.R. 1630.2(o)(1).

<sup>193</sup> See H.R. Rep. No. 101-485, pt. 2, p. 63 (1990), 1990 U.S.C. *Cong. & Admin. News* 303, 345 (existence of collectively bargained protections for seniority “would not be determinative” on the issue whether an accommodation was reasonable); S. Rep. No. 101-116, p. 32 (1989) (a collective bargaining agreement assigning jobs based on seniority “may be considered as a factor in determining” whether an accommodation is reasonable).

<sup>194</sup> 29 C.F.R. pt. 1630, app. (commentary on 1630.15(d)).

<sup>195</sup> Regarding the important role of organized labor in implementing the ADA, see, e.g., Guy Stubblefield, “Organized Labor’s Role in Implementing the ADA,” in *Implementing the Americans with Disabilities Act: Rights and Responsibilities of All Americans* 81B85 (Lawrence O. Gostin and Henry A. Beyer eds., 1993); Mary Dryvoyage, “Compliance and Litigation Resources for Implementing the Americans with Disabilities Act of 1990,” 14 *Berkeley J. Empl. & Lab. L.* 318, 326B27 (1993); Loren K. Allison and Eric H.J. Stahlhut, “A Reasoned Approach to Harmonizing the ADA and the NLRA,” *Lab. L. J.* 292B97 (May 1994).

<sup>196</sup> See 42 U.S.C. 2000e-2(h) (1994 ed.) (“Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to [provide different benefits to employees] pursuant to a bona fide seniority ... system ....”); 29 U.S.C. 623(f) (1994 ed.) (“It shall not be unlawful for an employer ... to take any action otherwise prohibited [under previous sections] ... to observe the terms of a bona fide seniority system [except for involuntary retirement] ...”).

<sup>197</sup> *Eckles v. Consolidated Rail Corporation*, 94 F.3d 1041 (7th Cir. 1996).

<sup>198</sup> NCD, *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act* 226-27 (2000).

<sup>199</sup> 45 C.F.R. 84.11(c) (“a recipient’s obligation to comply with this subpart [employment] is not affected by any inconsistent term of any collective bargaining agreement”).

<sup>200</sup> 42 U.S.C. 12201(a).

<sup>201</sup> See, e.g., 136 *Cong. Rec.* S9684 (daily ed. July 13, 1990) (remarks of Senator McCain) (“The ADA is a final proclamation that the disabled will never again be excluded, never again treated by law as second-class citizens.”); 136 *Cong. Rec.* H2622 (daily ed. May 22, 1990) (remarks of Representative Hoyer) (“Let us not say ... that the disability community remains in a second-class status in America. That is not what this bill is all about.”); 135 *Cong. Rec.* S10717 (daily ed. September 7, 1989) (remarks of Senator Kennedy) (“For years, ... we have tolerated a status of second-class citizenship for our disabled fellow citizens.”); S. Rep. No. 101-116, at 16 (1989) (quoting testimony of Judith Heumann) (“This forced acceptance of second-class citizenship has stripped us as disabled people of pride and dignity.”); H.R. Rep. No. 101-485, pt. 2 at 42 (1990) (Committee on Education and Labor) (same).



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